

Commercial Speech and the Prohibition of Tobacco Advertising: The Colombian Constitutional Court Approach

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Abstract: This article argues that the decision by the Colombian high court to totally ban the advertising and promotion of tobacco products is sound and could indeed be applied to other types of harmful products.

In 2010, the Constitutional Court of Colombia (“the Constitutional Court”) issued the decision C-830/2010 declaring that the total ban of advertising and promotion of tobacco products enacted by Law 1335 of 2009 (Law 1335) was constitutional.¹ In line with the World Health Organization Framework Convention for Tobacco Control (FCTC), Law 1335 establishes provisions aimed at discouraging the use of tobacco, such as the ban on its advertising and promotion or the prohibition of its consumption in closed spaces, as well as measures aimed at protecting children and the non-smoker population from tobacco's harmful effects.

The decision was issued after a Colombian citizen, Pablo Cáceres Corrales (the plaintiff) filed a petition to the Constitutional Court asking to declare articles 14, 15, 16, and 17 of Law 1335 as unconstitutional. The Colombian legal system allows any citizen to file actions before the Constitutional Court in order to obtain an abstract judicial review on the constitutionality of any statute or provision of any statute enacted by Congress.² Both, procedural and substantive arguments can be presented to support the petition. To challenge statutes under procedural grounds, the petition must be presented within a year after their official publication. If it is declared unconstitutional on procedural grounds, the content of the statute can be enacted again. On the contrary, substantive challenges to statutes can be raised at anytime, subject to the limitation of *res judicata*.³ Decisions declaring a

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statute or some provisions of a statute as unconstitutional have general effects and prohibit Congress from enacting the same statute or provision in the future.

As the plaintiff's arguments were related to substantive matters, decision C-830/2010 declaring the constitutionality of the total ban of promotion and advertising on tobacco products is of major importance. Because it confirms that such prohibition is compatible with the constitutional framework, this declaration has general effects and limits the nature and scope of potential future challenges related to these issues.

Importantly, in this piece we argue the relevance of this decision is not limited to the specific context of

reasoning to other bans or restrictions on advertising of other unhealthy commodities.

1. The Double Function of Advertising and the Constitutionality of its Total Ban Regarding Tobacco Products

The plaintiff's main argument claimed that the prohibition of promotion and advertising of tobacco products was unconstitutional because it violated the free private initiative and freedom of enterprise, both protected under the Colombian Constitution. According to the plaintiff, if producing and selling tobacco products is legal, the promotion of such products should also be legal.

In this piece we argue the relevance of this decision is not limited to the specific context of tobacco. Several reasons call for an expanded analysis of decision C - 830/2010. One is that the Constitutional Court framed the case in the broader context of the role of the State in the regulation of the economy and the margin for interventions when public, general and social interests are at stake. Furthermore, although the Constitutional Court takes into consideration the international obligations imposed by the FCTC to strengthen its analysis, the main contents of the reasoning are not necessarily tied to the existence of such instrument.

tobacco. Several reasons call for an expanded analysis of decision C - 830/2010. One is that the Constitutional Court framed the case in the broader context of the role of the State in the regulation of the economy and the margin for interventions when public, general and social interests are at stake. Furthermore, although the Constitutional Court takes into consideration the international obligations imposed by the FCTC to strengthen its analysis, the main contents of the reasoning are not necessarily tied to the existence of such instrument. In fact, the Constitutional Court based its analysis on previous cases dealing with a wide variety of State interventions in the field of economics where the type of reasoning and the specific test used by the Constitutional Court is applicable, in general, to interventions beyond the context of tobacco as well as to other types of marketing bans and restrictions. Based on this premise, in Section 1 we summarize the reasoning of the Constitutional Court and in Section 2 we propose an analytical framework to explore the applicability of such

However, the Constitutional Court seized the opportunity to develop a more comprehensive analysis of the potential tensions between the impugned prohibition and the Constitution, examining them from the lens of free private initiative and freedom of enterprise and from the consumers rights perspective and freedom of expression. The double function of commercial advertising was crucial in the Constitutional Court's determination of the nature and scope of the three levels of tensions with constitutional rights and values. This approach was fundamental to the Court's findings on the intensity of the judicial scrutiny of the prohibition on advertising of these products.

With regards to the double function of advertising, the Constitutional Court noted: one function is to incentivize the consumption of the advertised products, and the other function is to provide information to consumers. In other words, commercial advertising can aim both to persuade and inform. Based on this distinction, the Constitutional Court established that the persuasive component could only be in tension with

economic freedoms. At the same time, the informative component also related to consumers' rights could be in tension with the right to freedom of expression and information. However, the Constitutional Court was explicit in framing the latter tension as "exceptional and restrictive" compared with the protection of other types of speech.

The Analysis of the Advertisement Prohibition under Economic Freedoms

Regarding the persuasive function of advertising, the Constitutional Court established that restrictions on economic liberties are constitutional if they are established by law, do not affect the essential core of freedom of enterprise, are grounded in adequate and sufficient reasons, are compatible with the principle of solidarity and are proportionate and reasonable. The level of proportionality and reasonableness scrutiny in this context is "weak," a standard similar to a rational basis test. Therefore, for a restriction to pass such scrutiny it is required that the purpose of the measure is not prohibited under the Constitution, and the measure is both potentially adequate for achieving its intended objective and is not patently unnecessary or disproportionate.

In its analysis, the Constitutional Court first stated that the essential core of freedom of enterprise is to produce goods and services and the possibility to commercialize them in the market. The Constitutional Court considered that the prohibition on advertising has no impact nor creates barriers on either core component.

The Constitutional Court noted that it had identified the objective of discouraging the consumption of tobacco products as legitimate and stemming from the right to the enjoyment of the highest attainable level of health in previous decisions. Furthermore, the Constitutional Court considered the global consensus that tobacco use and exposure to tobacco smoke cause mortality, morbidity, and disabilities, as well as the evidence showing that tobacco products were carefully designed to create dependence.

Regarding the proportionality and reasonableness of the measure, and considering the documented link between advertising, promotion, and sponsorship of tobacco products and its increased consumption, the Constitutional Court found the measure suitable to achieve its purpose. The Constitutional Court also recalled that under the weak level of scrutiny applicable to this matter, the aim-means causal relation only needs to be reasonable and no demonstration of the actual achievement of the aim is required.

Moreover, the Constitutional Court expressed that the total ban on advertising of tobacco products was directly proportional to its negative impact on constitutional values. Bearing in mind the devastating effects of tobacco consumption, an intense intervention such as a complete prohibition of advertising and promotion was determined to be admissible. The Constitutional Court reinforced this determination by referring to international law, particularly focusing on the FCTC and its interpretive guidance. Specifically, it emphasized that a full ban on advertising has been recognized by these instruments as the most effective way to discourage tobacco consumption.

Furthermore, the Constitutional Court concluded that the measure was compatible with the principle of solidarity, as the protection of public health and the environment are objectives of great importance. The Colombian constitutional framework allows for the production and commercialization of tobacco products, that are intrinsically hazardous to physical integrity and to the environment, but strongly restricts the direct and indirect promotion of their consumption, aiming at discouraging it rather than prohibiting it. It is possible, under the constitutional framework, that a licit commercial activity be disincentivized by the State based on general interests such as public health and others.⁴ This approach was framed by the Constitutional Court as the creation of a passive market scheme in which these activities were tolerated but not encouraged by the State. Moreover, they can be discouraged with restrictions and even more intense interventions such as total prohibitions.

The Analysis of the Advertisement Prohibition Under Consumer Rights and Freedom of Expression and Information

The previous analysis dealt with the persuasive component of advertising. Regarding the informative component, the Constitutional Court established that the total ban on advertising did not affect such component of commercial speech. To reach this conclusion, the Constitutional Court distinguished tobacco from other goods and services, emphasizing that it is "intrinsic[ally] harmful" to health and the environment. Specifically, the Constitutional Court ruled that the informative component of commercial speech that is constitutionally protected under "consumer rights" is the provision of information to the consumer related to the harms or risks of harm of the product. This aspect was not affected by the prohibition. Moreover, the Constitutional Court stated that the legislator had already established mechanisms to guarantee consumers' right to access information about tobacco

products and the harmful consequences of use, supporting the conclusion that a total ban on advertising did not affect such right.

The other potential tension the Constitutional Court identified concerning the informative function of commercial advertising relates to freedom of expression and information. The Constitutional Court considered that commercial advertising was granted restrictive and exceptional protection under such a fundamental right. Two main arguments support this differentiated — and certainly weaker — protection of commercial advertising.

On the one hand, that an equal degree of protection should be granted is not consistent or does not adequately acknowledge the integrality of the relevant constitutional contents that have a bearing on the degree of protection of commercial advertising. Therefore, the standards of analysis applicable to economic freedoms and consumer rights are also determinant and affect the degree of protection. In other words, the constitutionality of the State intervention in commercial advertising must be determined based on the rules applicable to the different constitutional contents affected.

On the other hand, the Constitutional Court highlighted that the informative component of commercial advertising was not related to political participation or democratic deliberation. Consequently, such speech was not protected at the same level of other manifestations of information and ideas. In this sense, the State has the power to impose restrictions that will be valid from a constitutional point of view if the objective pursued is legitimate in relation to the State function as director of the economy and/or its duty to protect consumer rights, and if the measure is proportionate and reasonable.

In the next section, we will examine whether the Court's reasoning concerning the dual dimensions of advertising could apply to other unhealthy products, as well as the challenges that such extrapolation could raise from a constitutional perspective.

2. Bans on Advertising of Unhealthy Products Beyond Tobacco

Like tobacco products, several studies have widely documented the link between the consumption of other unhealthy products, such as alcohol or unhealthy foods and beverages, with the development of adverse health, economic, societal, and environmental outcomes.⁵ Furthermore, public health authorities and human rights bodies have called for the adoption of measures to discourage the consumption of unhealthy products, including restrictions to

advertising.⁶ In this context, it is relevant to examine whether the Constitutional Court's reasoning in the C-830/10 decision, could be applicable — and, if so, to what extent — to similar bans in relation to other unhealthy products.

According to decision C-830/10, advertising plays an essential role in incentivizing the consumption of a given product, which is exclusively protected under the freedom of enterprise. Therefore, in general, the constitutional framework considers admissible strong restrictions and even bans on advertising if the measure does not pursue a prohibited objective and the measure chosen to achieve such end is reasonable and not patently disproportionate.

Following the reasoning of the Constitutional Court, a ban on advertising unhealthy products, is not considered to affect the essential core of freedom of enterprise. A ban on advertising unhealthy products does not amount to a prohibition of manufacturing or selling them on the market. These are the two main components of the essential core of the freedom of enterprise. Consequently, States enjoy a wide permissible margin to intervene in economic freedoms provided such essential core is not affected, including adopting bans and restrictions to advertising. Based on this logic, legal challenges to those interventions based on the impact to the core of freedom of enterprise would have to demonstrate exactly how the intervention prevents production or commercialization.

As to the potential legitimacy of the aim pursued, the reasoning of decision C-830/10 can be easily expanded to other unhealthy products. As previously mentioned, it has been widely documented that consumption of unhealthy foods and drinks, and the harmful use of alcohol, have negative impacts on health and in society. It may be argued that States have a legitimate interest in discouraging consumption of unhealthy foods or use of alcohol to protect constitutional rights and public health and must adopt measures to achieve that purpose. Therefore, a restriction or ban on advertising unhealthy products could be considered as pursuing a constitutionally valid objective.

The next step would be to assess the suitability of the measure, that is, the reasonableness between the means selected and the purpose. Considering advertising operates as an economic instrument to increase the consumption of unhealthy products and expand the markets for these products, a ban on advertising could potentially be suitable and an effective way to discourage the consumption of such products.

However, it could be argued that a total ban is the most radical measure and that the State could have

chosen a less restrictive measure to achieve its goals. In the context of Colombia, where economic freedoms are combined with a relevant power and duty of the State to regulate the economy, the proportionality analysis of the interventions is weak or similar to a mere rational basis analysis that does not include a necessity or less restrictive alternative test. Therefore, the evidence on the relation between consumption of unhealthy products and advertising would suffice for this level of scrutiny. However, the proportionality analysis could differ among diverse types of unhealthy products and consider different types of interventions on advertising, ranging from total bans to other types of restrictions.

The final step of the Constitutional Court's analysis requires assessing the compatibility of a ban on advertising other unhealthy products with the principle of solidarity. As the objectives to be achieved through the ban are of analogous importance to the ones pursued in the context of tobacco, it could be argued that a ban or other restrictions could be compatible with this principle.

Although, at this point it could be concluded that the considerations of the decision C-830/10 can be extended to bans or restrictions to advertising of other types of unhealthy products, it is necessary to study the compatibility of such an intervention from the point of view of the informative role of advertising. As mentioned before, this other function of advertising can be analyzed for other constitutional contents, specifically, freedoms of expression and information and consumer rights.

The Court's reasoning regarding the informative dimension of advertising is based on the understanding that tobacco is an intrinsically harmful product. A significant challenge to this approach when extended to other unhealthy products is that not every unhealthy product, particularly when it comes to food, can be considered intrinsically harmful to health. Even if tobacco and other unhealthy commodities create adverse individual, social and environmental outcomes, the available information regarding the potential of such products to be harmful is less consistent across products.

Additionally, the intrinsically harmful nature of tobacco allowed the Constitutional Court to conclude that the only information that could be furnished through advertising of this product was on the damages its use produced. Considering that regulations on labelling and packaging already include such information, the Constitutional Court concluded that a total ban on advertising of tobacco products did not impact consumers rights.

In contrast, to make informed decisions, consumers purchasing unhealthy products —that are not necessarily intrinsically harmful — have a legitimate interest in accessing information other than on the harms the product could cause. For example, the geographical origin of a product, the type of production (industrial, artisanal, organic, agroecological), the content (allergens, raw material), among other factors, can be considered as relevant information to consumers.

To assess if a restriction or prohibition on advertising of other unhealthy products is constitutional from the point of view of providing information, other variables, beyond economic liberties, should be considered. An analysis on whether the restrictions or prohibitions impact consumer rights may include a study of the legislative and regulatory framework related to the provision of information beyond the risks associated with consumption. Such an analysis would determine to what extent the ban or restriction impacts the consumers' interest in making informed decisions. Thus, in assessing the proportionality of the measure, the State's behavior in complying with its duty to adopt measures to protect and guarantee the right to information of consumers could have a crucial role.⁷ Whether the regulatory framework promotes consumers' full access to relevant information will vary according to the unhealthy product in question. However, if advertising is the only or a key channel to access information regarding specific types or products, and there is no substitute for access to such information, the elimination of this source of information could have a disproportionate impact on consumers' rights. Still, other restrictions different from total bans can be considered in these cases.

3. Conclusion

Decision C-830/10 opens the door to consider bans or other restrictions on advertising unhealthy products, beyond tobacco, as constitutionally valid. It also reflects the relevant role that the State plays in regulating the economy.

A ban on advertising of these products could be considered constitutionally valid from the persuasive dimension of advertising standpoint. However, when it comes to the informative dimension of advertising, other factual and normative variables need to be considered. This includes an analysis of the scope and level of protection for consumer rights and freedom of speech and information in a specific legal system.

Moreover, extending the Constitutional Court's reasoning to other constitutional frameworks that are less open to State interventions in the economy could benefit from a stronger and more robust emphasis on

these measures not only as admissible interventions in the economy, but as means to comply with human rights obligations in the face of private activities that interfere with the realization and enjoyment of such rights.

Note

The authors have no conflicts of interest to disclose.

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2. Political Constitution of Colombia. Articles 241 and 242.
3. The Constitutional Court has developed a flexible approach to *res judicata*, but in general it constitutes a limitation for the use of this type of action.
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7. The Colombian Constitutional Court’s caselaw considers that the ability to access truthful and complete information is a key element of consumers’ rights. Therefore, any regulation on the matter must be aimed at promoting that consumers have full access to relevant information about the type of goods they buy and consume. See Constitutional Court of Colombia. Decision C- 583/2015, available at <<https://www.corteconstitucional.gov.co/relatoria/2015/c-583-15.htm>> (last visited May 5, 2022).