

Restricting Unhealthy Food and Beverage Advertising in Brazil: Challenges and Opportunities

Isabel Barbosa¹, Fábio Leite^{2,3}, and Carla Britto³

1: GEORGETOWN UNIVERSITY, WASHINGTON, DC, USA, 2: PONTIFÍCIA UNIVERSIDADE CATÓLICA DO RIO DE JANEIRO, RIO DE JANEIRO, BRAZIL, 3: PLEB – PESQUISA SOBRE LIBERDADE DE EXPRESSÃO NO BRASIL, RIO DE JANEIRO, BRAZIL

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Abstract: In Brazil, the normative landscape around advertising is complex, not the least because of limitations inherent to dispute resolution mechanisms. Focusing on unhealthy food and beverages, this case study identifies some challenges and opportunities around advertising restrictions, including in relation to freedom of speech.

Over the years, the advertising of unhealthy food and beverages has become the object of legal debate in Brazil. On the one hand, civil society has developed tools to identify ads deemed to be misleading or abusive, including the Observatory of Food Advertisement, a platform that allows for such ads to be reported by the public and analyzed by legal teams, eventually leading to proceedings filed before administrative or judicial bodies.¹ Their premise is that the food and beverage industry frequently engages in advertising that infringes on existing laws and regulations, and — most importantly — that it must be held accountable by third parties. On the other hand, the food and beverage industry has participated in campaigns of responsible advertising, such as *Take responsible advertising seriously*,² a series of posts in social media aimed at corporations launched in partnership with, among others, advertisers and trademark associations.³ They rely on the premise that companies are capable of holding themselves to high standards.

These opposing narratives are best exemplified by the issue of advertising to children, including but not limited to food and beverages. Civil society has repeatedly stated that advertising to children is necessarily abusive and therefore illegal, pointing to decisions issued by judges of the Superior Tribunal of Justice (hereinafter STJ) — the highest court for federal law interpretation in Brazil.⁴ By contrast, the Advertisers Association has openly questioned this position, recently issuing guidelines on *Responsible Marketing: Safeguards and Limits of Advertising to Chil-*

Isabel Barbosa, LL.M., LL.B., is an Adjunct Professor at Georgetown University and a Senior Associate at the O'Neill Institute for National and Global Health Law. **Fábio Leite, Ph.D., M.A., LL.B.,** is a Professor of Constitutional Law at the Pontifícia Universidade Católica do Rio de Janeiro and the Coordinator of PLEB – Pesquisa sobre Liberdade de Expressão no Brasil. **Carla Britto Pereira, LL.M., M.A., LL.B.,** is a Researcher at PLEB – Pesquisa sobre Liberdade de Expressão no Brasil.

dren, where they argue that advertising to children is not necessarily abusive and that the specific situations in which children get taken advantage of should be assessed on a case-by-case basis.⁵ Setting aside this normative discussion, advertisement to children, including of unhealthy food and beverages, is still common in Brazil.⁶

From the legal standpoint, the dynamics of unhealthy food and beverage advertising in Brazil is both a product of, and results in, structural challenges

Constitution and the Consumer Protection Code. We then analyze existing dispute resolution mechanisms, exploring specifically the shortcomings of self-regulation by the National Council of Advertisement Self-Regulation (hereinafter CONAR) and landmark court decisions. Finally, we discuss one recent state law, with potential to increase the protection of public health in primary schools, which was recently questioned in court on the grounds of free commercial speech.

This case study seeks to identify and analyze some challenges and opportunities relevant to the debate around advertising restrictions in Brazil, focusing specifically on the advertising of unhealthy food and beverages. We start with a brief overview of the legal framework on free speech and advertisement, with an emphasis on legislation, as opposed to all normative acts, exploring only select provisions of the Brazilian Constitution and the Consumer Protection Code. We then analyze existing dispute resolution mechanisms, exploring specifically the shortcomings of self-regulation by the National Council of Advertisement Self-Regulation (hereinafter CONAR) and landmark court decisions. Finally, we discuss one recent state law, with potential to increase the protection of public health in primary schools, which was recently questioned in court on the grounds of free commercial speech.

worth noting. First, identifying, reporting and eventually litigating unlawful ads is a lengthy and cumbersome process that demands considerable resources. By the time this process concludes, even if corporations are ordered to take down the ad in question and/or to pay a fine, airing it may still have been profitable. Second, the cases that make it to court can lead to relevant — even landmark — decisions, but these do not always carry the same weight as precedents would in common law countries.⁷ In this sense, every ad identified, reported and challenged before a court of law does not necessarily prevent other potentially unlawful ads, which might then need to undergo the same process, leading to a whack-a-mole situation that can prove extremely costly for society.

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Brief Overview of the Normative Landscape

The adoption of the Constitution of 1988, which re-established democracy following the military dictatorship in Brazil, and the enactment of the Consumer Protection Code in 1990, set important limits to advertising.

The Constitution establishes freedom of expression as a fundamental right, protecting the free expression of thoughts (article 5, IV) and of intellectual, artistic, scientific and communications activities regardless of censorship or licensing (article 5, IX). Regarding advertisement, the Constitution lays the foundation for its restriction by establishing that “it is within the competence of federal law to: (...) establish legal means which afford persons and families the possibility of defending themselves against (...) the advertising of products, practices, and services which may be harmful to health or to the environment” (article 220, § 3, II). More specifically, it states that “the advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies shall be subject to legal restrictions (...) and shall contain, whenever necessary, a warning con-

cerning the damages which may be caused by their use” (article 220, §4).⁸

Law No. 9.294 in 1996 fleshed out the constitutional provision on advertising. In particular, it defined the time period when the advertisement of alcoholic beverages and tobacco could be aired in radio and television, as well as set rules on the creation of an advertising piece, including, for example, restrictions on associating cigarettes and alcoholic beverages with sports and suggesting that tobacco products have calming or stimulating properties.⁹ In 2011, this law underwent an important reform that prohibited “the commercial advertising of cigarettes, cigarillos, cigars, pipes or any other smoking product, derived from tobacco or not.”¹⁰ To date, however, no specific federal law has yet implemented article 220, §3, II of the Constitution, and thereby given “persons and families the possibility of defending themselves against (...) the advertising of products, practices and services which may be harmful to health or to the environment.”

The Consumer Protection Code also contains important provisions related to advertising, especially the prohibition of “all misleading or abusive advertisement” (article 37).¹¹ In order for advertisement to be considered misleading, the information conveyed needs to be fully or partially false or withhold essential information, inducing consumers to make a mistake.¹² In turn, abusive advertising is essentially anti-ethical advertising that preys upon consumers’ vulnerability and goes against basic social values, harming society as a whole.¹³ The general ban on misleading and abusive advertising has been particularly relevant in the context of unhealthy food and beverages due to the fact that, unlike tobacco and alcohol, there is no specific federal law restricting their advertising.¹⁴ However, as institutional communications by the STJ itself show, the limits of advertising in relation to consumer protection are not always clear, leading to constant disputes that need to be resolved.¹⁵

Confronting Limitations in Dispute Resolution

The prevailing model of dispute resolution has long centered on CONAR,¹⁶ charged with applying the Brazilian Self-Regulation Advertising Code.¹⁷ This model was adopted in the mid-1970s in a context of mistrust of government agencies — particularly in relation to limitations to free speech — during the military dictatorship (1964–1985).¹⁸

To this day, the self-regulatory model is in force and provides that complaints against misleading or abusive advertising must be assessed by CONAR’s Council of Ethics. The Council of Ethics conducts this assess-

ment when prompted, necessarily after the circulation of the advertising piece in question. If the advertising piece is considered not to have violated the rules of the Brazilian Self-Regulation Advertising Code, the Council of Ethics can dismiss the complaint. If the advertising piece is instead considered to have violated those rules, the Council of Ethics can recommend the suspension or modification of the advertising piece, or issue a mere warning to the advertisers behind it. Notably, it cannot issue fines to the advertisers, although in any case fines could fall short of disincentivizing companies from airing ads that are expected to be highly profitable.¹⁹

Self-regulation by CONAR presents considerable problems of both procedural and substantive nature. On the procedural side, CONAR’s governance rules clearly favor advertisers over consumers, consumer associations and consumer protection entities.²⁰ For instance, despite governance rules setting aside space in the Council of Ethics for civil society representatives, the selection of such representatives is done by CONAR’s Superior Council, which is in turn made up by representatives of CONAR’s founding members, who are all connected to the advertising industry.²¹ Finally, the volume of cases considered by CONAR is arguably small in a country of continental proportions with massive investment in advertising:²² according to data found on CONAR’s website, the average is 236 cases per year.²³

On the substantive side, CONAR openly frames its mission in defense of free commercial speech; including the “promot[ion of] free speech in advertising and [the] defen[se of] the constitutional prerogatives of... advertising.”²⁴ This sets the tone of their reasoning in decision-making. For example, in 2011 CONAR dismissed a complaint by Alana, a non-governmental organization, about a McDonald’s ad exhibited during the trailer of animated film “Rio.”²⁵ In the decision, the rapporteur of the case portrayed Alana as a witch who hates children, stating that “[w]hen the witch Alana comes into scene, children live on bread and water... [N]o more cheeseburgers, fries, milkshake or soda.” They went on to frame the complaint as part of a broader strategy of demonizing advertising to ideologically control children.²⁶ In response, Alana said it no longer recognized CONAR as a serious entity to safeguard ethics in advertising due to the open mockery displayed in this decision.²⁷

The judiciary can also exert control over advertising to the extent that it potentially violates relevant laws and regulations, including the Consumer Protection Code. For example, at the state level, the court of appeals of São Paulo ruled that McDonald’s engaged

in abusive and therefore unlawful advertising to children by holding Ronald McDonald concerts — which they framed as educational — in nurseries and primary schools, both public and private. The lawsuit had been filed by the Public Defender's Office in São Paulo, following reports to government entities.²⁸

At the national level, two decisions issued by judges in the STJ are especially relevant. In March 2016, the 2nd Chamber upheld the conviction of a food company for the “Time for Shrek” marketing campaign, which targeted children by using the well-known animated character. Upon the purchase of five cookies of the brand, plus a payment of R\$ 5.00, the consumer could receive a Shrek watch. The judges in the STJ found that the marketing campaign was abusive because it aimed, directly or indirectly, at children, in addition to other arguments.²⁹ In April 2017, the 2nd Chamber of the STJ considered a similar advertising campaign, known as “Sadia Mascots.” Upon the purchase of five products of the same brand, plus a payment of R\$ 3.00, the consumer could receive a collectible stuffed animal, the company mascot. Though the product here — frozen food — was meant for an adult audience, the judges concluded that the kind of prize indicated that the marketing campaign targeted children and was therefore abusive and unlawful.³⁰

These are landmark decisions for consumer protection, but ultimately their legal effects are limited to the concrete cases considered, meaning that despite their persuasive power they may or may not be followed by the other judges adjudicating over similar cases across the country.³¹ The food and beverage industry has already taken advantage of this characteristic of the legal system in Brazil. For example, when the National Agency of Health Surveillance issued Resolution 24 in 2010 — a binding normative act of lower rank than legislation — restricting the advertisement of unhealthy food and beverages, multiple associations from the private sector questioned it in court, filing diffuse actions across different jurisdictions that led to conflicting decisions. The issue is yet to be definitively resolved by high courts.³²

Taking advertising to children as an example again, the fact that the industry continues to push the legal narrative that it is not necessarily abusive³³ — irrespective of these recent rulings by judges in the STJ — signals that they are likely to continue such practices. The situation is ever more complex in the context of unhealthy food and beverages, in the absence of specific federal laws limiting advertising. In the end, the broader the legislation, such as general bans on misleading and abusive advertising, the greater the lee-

way for decision-makers across the judiciary to ascertain their sometimes-conflicting views.

Considering Emerging Opportunities for the Limitation of Commercial Speech

Attempts to adopt specific federal laws regulating the advertisement of unhealthy food and beverages have not yet been successful in Brazil, despite the introduction of several bills in Congress that moved past the general prohibition of misleading and abusive advertising.³⁴ In general, these initiatives tend to face strong resistance from both the advertising industry and the food and beverage industry, who have argued in the past that such limitation violates freedom of commercial speech among other arguments.³⁵

In March 2021, the Supreme Federal Tribunal (hereinafter STF) — the highest constitutional court in Brazil — upheld State Law No. 13.582 of 2016, as amended by State Law No. 14.045 of 2018, which prohibits commercial communication to children in primary schools in the state of Bahia.³⁶ State Law No. 14.045 significantly altered the content of State Law No. 13.582. Before the reform, Law No. 13.582 prohibited the advertisement of unhealthy food and beverages aimed at children on radio and television at certain times, as well as in schools at all times. Since the reform, Law No. 13.582 prohibits not only the advertisement of unhealthy food and beverages, but all commercial communication to children, though this prohibition is now limited to primary schools.³⁷

The constitutionality of this law was questioned in the STF by the Association of Radio and Television Networks, based in part on the alleged violation of the freedom of commercial speech. In the ruling, the judges indicated that advertising “instrumentalizes free enterprise under commercial speech,”³⁸ and unanimously held that (i) commercial speech is included in freedom of speech; (ii) freedom of speech is not absolute and can therefore be subject to restrictions; and (iii) restrictions must be proportionate. Though the decision did not lay out a detailed roadmap for the assessment of proportionality, it did list some factors that had shaped their analysis, namely the scope of the ban (commercial communication to children, primary schools). However, the judges did not analyze the nature of commercial speech in detail; for example, whether the protection granted to commercial speech rises to the same level of non-commercial speech.³⁹

The STF also touched upon other relevant points. Importantly, it clarified that the advertising restrictions listed in the Constitution under article 220, §4^o are not exhaustive, but rather constitute a list of examples. In other words, by enumerating tobacco,

alcoholic beverages, pesticides, medicines and therapies, the Constitution merely illustrated one possible pathway to the restriction of the freedom of commercial speech, in order to promote or protect other fundamental rights, including health — framed not only as an individual's right, but also as the State's duty, and one of utmost priority. In particular, the STF stressed the role of government in leading the control of unhealthy food and beverage advertising, relying on recommendations issued by the World Health Organization.⁴⁰ This indicates that health considerations can be paramount in the analysis of advertising restrictions.

Overall, this decision paves the way for other states to pass legislation restricting commercial communication in primary schools, given that it weakens probable legal arguments grounded on the freedom of commercial speech, provided that the measures restricting advertising — including that of unhealthy food and beverages — are proportionate. Most importantly, even if at the state level, laws like the one in Bahia are relevant because they move the needle from more general to more specific regulation of advertising, leaving less (though far from non-existent) room for interpretation in a context of potentially widespread litigation, as described above.

Conclusion

In Brazil, the normative landscape around advertising is complex, not so much due to the lack of applicable norms, but rather to the limitations inherent to dispute resolution mechanisms. The Constitution and existing legislation, not least the Consumer Protection Code, already impose restrictions on advertising. In particular, misleading and abusive unhealthy food and beverage advertising is prohibited. However, in the judiciary, there are structural difficulties related to the limited effects of some high-court decisions that interpret these general provisions. In this sense, more specific laws like the one in the state of Bahia can be strategic in moving forward with protecting public health — not least because it confronts the argument of free commercial speech in relation to other fundamental rights in the context of advertising restrictions, possibly setting an example for other states in the country.

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