

THE ABUSIVE ADVERTISING OF FOODS DIRECTED TO CHILDREN: THE CASE OF THE BRAZILIAN SUPERIOR COURT OF JUSTICE.

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ABSTRACT. The object of this paper is to analyze the decision of the Brazilian Superior Court of Justice that prohibited the advertising of food products, directly or indirectly, to children. This decision is precedential because it is the first time this or any other court has adopted a position on the issue. The Brazilian Superior Court of Justice based its decision on the general clause provided by the Consumer Code, which prohibits abusive advertising. In order to understand the impact of the court's decision, a comparative analysis was carried out with other relevant legal systems on the protection of advertising aimed at minors. This article then examines the interpretation provided by the Brazilian doctrine regarding this general clause and attempts to identify the criteria for its standardization. This article also looks at the legality and the interpretation to be conferred to the resolution issued by the National Council for the Rights of Children and Adolescents, which tries to specify the criteria for assessing the abusiveness of advertising aimed at children. Through this framework, the Brazilian court's decision was examined and issues with its interpretation of substantive law were brought forth.



1. Research plan.

The present work's objective is the examination of the precedential decision adopted by the Brazilian Superior Court of Justice. It will be developed in four stages. First, the reasoning of the decision will be analyzed, especially its conclusion: the existence of inherit abusiveness and thus illegal advertising of food products directed at children. Not only the vote of the designated judge-rapporteur will be examined, but also the thought process of other judges during the deliberation.

Second, in order to contextualize the decision taken by the Brazilian court and to understand its impact, it will be compared with the children advertising regulations in other legal systems. These were chosen because of their relevance, as well as the possibility of their study to compose a complete and rich regulation panorama.

In the third stage, in light of the legislative context of other legal systems discussed, the general clause of abusive advertising and the factors for its standardization in the Brazilian legal system will be studied. In this process, the legal texts that concern the subject in Brazil will be examined.

In the fourth and final part of the paper, the Brazilian court's decision will be examined considering the conclusions presented and evaluating the adequacy of the advertising within the Brazilian legal system.

2. The precedential decision of the Brazilian Superior Court of Justice: The ban on food advertising directed at children.

The Superior Court of Justice¹ adopted a decision (REsp. 1.558.086, 2016). in a collective action submitted by the Public Ministry concerning an advertising that allegedly violated the Brazilian Consumer Code (Law 8.078, 1990). The relevance of this case stems from the fact that it was considered abusive in any situation and independently of the advertising techniques used the advertising directed at children.

This case concerns a commercial advertisement aired on television for cookies, produced by a renowned food company, in which it is shown a promotion. With the acquisition of five products and an additional sum of money, a personalized watch with

a character from the children's movie Shrek could be purchased. On the TV ad, some children and the image of the cartoon character Shrek were used to describe the promotion; hence the name of the campaign was "It's Shrek's Time."²

The reasoning used by the Superior Court of Justice was not well developed, despite the importance of the decision and the possibility of the legal reasoning to be extended to other cases of children's advertising. The court considered illegal this advertising of food aimed at children based on two arguments. First, it qualifies as an abusive practice of tying contracts, i.e. when a party refuses to supply a product unless the consumer acquires another one.³ The watch with the movie character would only be available for purchase after the acquisition of five large cookie packages. This reasoning will not be examined in this paper.

The second justification provided by the court was that the advertisement, according to Article 37 of the Consumer Code, would be abusive simply because it is targeted directly or indirectly to children. For the judge-rapporteur's opinion, the advertising should be directed towards the parents, who would be the only ones able to acquire the product. Although not clearly expressed, great weight was given to the argument by the consideration of an existing obesity crises and a product with low nutritional value.

In a complementary vote by Judge Assusette Magalhães, other rationales were provided, for instance, the fact that that children are not grown and that they have a great power of convincing parents to fulfill their wishes. According with this opinion, advertising toward minor would be vetoed by Article 37 of the Brazilian Advertising Standard Practices – without mentioning which part of it would fit the hypothesis.

Although not recorded in the ruling, other elements were considered by the court, as is derived from the oral opinion of Judge Herman Benjamin – a well-known consumer's rights author and one of the authors of the project of the Brazilian Consumer Code.⁴ According to him, besides confirming the majority opinion, the decision should not be considered paternalistic, but rather the recognition of the

² TV 30", promoção Bauducco Gulosos "É hora de Shrek", Youtube (Ago 17, 2007), <https://www.youtube.com/watch?v=pROsWr3avg8>.

³ The Consumer Code prohibits this practice in Article 39, I: ("Article 39. The supplier of products or services is prohibited, among other abusive practices: I – to condition the supply of product or service to the supply of other product or service, and, without just cause, quantitative limits; (...)").

⁴ Oral vote of the Judge Herman Benjamin (2016), <http://www.migalhas.com.br/arquivos/2016/3/art20160310-07.mp3> (last visited Jan 4, 2017).

¹ This is a high court in the Brazilian Court System, with numerous competent jurisdictions, among them examining as court of last resort the conflict of interpretation between lower courts and their divergent interpretation of federal law.



parents' authority to decide on their children's diet – not the food producers. Also, as the children could not complete a valid contract, the advertisement should not be addressed at them; it is continued directed at them only because they could adopt some tactics of convincing their parents. In addition, it was emphasized that the advertising could create some indirect bullying among the children and that the advertising of products with a poor nutritional value would increase even more the existing obesity crisis.

The legal basis for the court's conclusion was the second part of Article 37 of the Brazilian Consumer Code (see, *infra* note 64). It prohibits abusive advertising. This article does not contain a legal conceptualization of abusive advertising; instead, it has a non-exhaustive list of practices considered abusive.

This institute is considered a great novelty compared to other legal systems. Since it is a general clause the legal prohibition requires its interpretation and implementation in order to apply it in cases that are not exemplified. The doctrine states that advertising should be prohibited when it offends society's values and legal principles such as the child protection, the environmental protection, and the consumer safety.⁵ A modality of protection of minors is set forth in the mentioned article. It is considered – as one of its examples – abusive advertising to take advantage of the deficiency of judgment and experience of a child.

For these reasons, a comparative examination of significant legal systems regarding the matter will be conducted, then, once this comparative aspect has been explored, the institute of abusive advertising in Brazilian law will be scrutinized.

3. The regulation of food advertising directed at children: a comparative study.

The definition of abusive advertising and, consequently, the evaluation of the decision of the Brazilian court requires a comparative study of regulations of advertising directed towards children. This is one of the tools used to verify the standard of regulation of advertising imposed by the Brazilian court and to verify the adequacy of its interpretation of the general clause in Article 37 of the Consumer Code.

The childhood obesity in contemporary societies is an undeniable public health concern.⁶ Advertising towards children is considered a relevant factor for this problem; therefore, it is the subject of debate based on its regulation in order to ensure the protection of the health of minors and, consequently, the reduction of obesity.⁷

There isn't a simple answer to this problem. The direct relationship between advertising and public health problems concerning obesity is unclear.⁸ This connection is still being studied by scientists, especially the effects of advertising products that have high concentrations of fat, salt, or sugar (hereinafter, HFSS).

The scientific consensus at the moment is that obesity is a result of numerous factors. Therefore, in addition to the difficulty of establishing the direct relationship between childhood advertising and obesity, other factors responsible for obesity should not be forgotten, especially the role of parents in guiding the health and the well-being of their children. Any policy depends on the actions and the responsibilities of parents and how they exert control of their children's behavior..⁹

Two legal frameworks have been established to combat this issue. The first is named *right-based*, which assumes that it is society's responsibility to protect its citizens, especially the vulnerable. This approach is based on documents such as the United Nations Convention on the Rights of the Child¹⁰ and the right to freedom of obesity,¹¹ which establishes

⁶ See generally World Health Organization, *Childhood overweight and obesity* (last visited Jan 4, 2017), <http://www.who.int/dietphysicalactivity/childhood/en/>.

⁷ The World Health Organization Europe has spoken about the food promotion to children as a great risk factor for child obesity: "The promotion of potentially unhealthy food and beverage products is now widely recognized in Europe as a significant risk factor for child obesity and for the development of diet-related noncommunicable diseases. Reviews conducted for WHO (1–3), for European parliamentarians (4,5) and for national agencies in Europe and the United States of America (6,7) have all concluded that, despite substantial gaps in the evidence, advertising and the promotional marketing of foods and beverages have enough effect on children's diets to merit action" (World Health Organization Europe, *Marketing of foods high in fat, salt and sugar to children: update 2012–2013* (last visited Jan 4, 2017), http://www.euro.who.int/__data/assets/pdf_file/0019/191125/e96859.pdf).

⁸ See *above* note 7 (the quotation expressly refers to the existence of substantial gaps in the evidence that the advertising and the promotional marketing of foods have effect on the children's diet).

⁹ World Health Organization Europe, *supra* note 7, at 9.

¹⁰ Convention on the Rights of the Child, 1989, <http://www2.ohchr.org/english/law/crc.htm>.

¹¹ Joint Working Groups Statement issued by the Working Groups on Nutrition throughout the Life Cycle, and Nutrition, Ethics and Human Rights, *The human right of children and ad-*

⁵ See generally Herman Benjamin, *Comentário ao artigo 37*, in 1 Ada Pellegrini Grinover et al., *CÓDIGO BRASILEIRO DE DEFESA DO CONSUMIDOR: COMENTADO PELOS AUTORES DO ANTEPROJETO* 354 (11th ed. 2011).

the right of adequate food and the fight against the infantile obesity. This framework considers marketing to children as inherently exploitative as they may be incapable of discerning its commercial intent and are highly susceptible to its influence.¹² It has been adopted in some countries such as Norway and Sweden, and in the province of Quebec, Canada.

The other approach is named *risk-based* (or *risk-benefit-based*). With this type of regulation, the authorities balance the multiple factors of a particular rule to minimize the risk of harm and maximize the benefits. It recognizes the conflict of interests and the costs for the different parties, including the need for proportional action to balance the commercial costs¹³ and to favour the consumer's conscious choice. The World Health Organization recommended this strategy in 2010.¹⁴

The task of composing a regulation on this subject is not simple. Many factors must be taken into account to implement a complete and adequate regulation, such as: which products should be regulated; which group is to be protected, specifically their minimum age; what media will be subject to regulation; how advertising will be regulated; what is the profile of viewers; what is the regulation of child persuasion strategies; and how the evaluation of benefits and losses will be reflected in the regulation.¹⁵

Considering these factors, the legislative measures of some countries will be presented to demonstrate the different approaches regarding the

olescents to adequate food and to be free from obesity and related diseases: the responsibilities of food and beverage corporations and related media and marketing industries, 2007, http://www.unscn.org/files/Statements/Joint_statement_lifecycle_nehr_The_human_right_of_children_and_adolescents_to_adequate_food_and_bee_free_from_obesity.pdf, accessed 1 November 2012.

¹² World Health Organization Europe, *supra* note 7, at 9.

¹³ "Broadcasters argue that the revenue generated in the EU every year by TV ads for children's products - between 670 million euros and 1 billion euros - is essential for the creation of quality children's programming. European governments have been pushing television stations to produce more of their own shows, to reduce the amount of American-made content that fills up TV schedules, but for-profit station owners say that without sufficient ad revenue, only fee-supported broadcasters will be able to even try to do so" (Sweden Pushes Its Ban on Children's Ads, WALL STREET JOURNAL, May 29, 2001, available at <http://www.commondreams.org/headlines01/0529-05.htm> (last visited Jan 4, 2017).

¹⁴ Marketing of foods and non-alcoholic beverages to children: set of recommendations, World Health Organization, 2010, <http://www.who.int/dietphysicalactivity/marketing-food-to-children/en/> (last visited Jan 4, 2017). See also World Health Organization Europe, *supra* note 7, at 9.

¹⁵ See generally World Health Organization Europe, *supra* note 7, at 9.

issue. In some of them advertising is virtually prohibited to children, whereas in others it is given broader freedom.

3.1. Regulation of advertising to children in the province of Quebec, in Norway and in Sweden.

Few countries have adopted regulations that are considered rights-based, with a broad ban on advertising towards children, concerning items beyond just food products. The best-known examples are Sweden, Norway, and the province of Quebec, Canada. These are regions with some similarities.¹⁶ It is reported that China, after discussing the issue at length, decided to adopt only the self-regulation and not a right-based approach.¹⁷

In Sweden, television advertising towards children under 12 years was prohibited under the 1996 Sweden's Radio and Television Act.¹⁸ This decision was made after research showed that children can't fully distinguish between advertising and programming until about age 10.¹⁹ Under a new law, the Radio and Television Act of 2010, this ban was maintained (Chapter 8, Sections 3, 7 and 8).²⁰ This country has had a prominent role in campaigning to ban advertising geared towards children in the rest

¹⁶ Conselho Nacional de Autorregulamentação Publicitária, *As normas éticas e a ação do Conar na publicidade de produtos e serviços destinados a crianças e adolescentes* 9 (2015), <http://www.conar.org.br/pdf/conar-criancas.pdf> (last visited Jan 4, 2017).

¹⁷ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16.

¹⁸ Hammad Aqil & Asim Iqbal, *The dilemma of children's advertisement on television in Sweden* 5 (2011), <http://umu.diva-portal.org/smash/get/diva2:441820/FULLTEXT02.pdf>.

¹⁹ Sweden Pushes Its Ban on Children's Ads, *supra* note 13. See also Igor Rodrigues Britto, *Controle da publicidade em direito comparado*, 157 *Ciência Jurídica* 317-318 (2011).

²⁰ Sweden Radio and Television Act (2010):

"Chapter 8. Commercial advertising and other advertising, etc. Advertising time for television broadcasts

Section 3. TV broadcasts that contain religious services or programmes primarily aimed at children below 12 years of age may not be interrupted by advertising. In on-demand TV, programmes primarily aimed at children below the age of 12 may not be interrupted by advertising. (...)

Commercial advertising and children

Section 7. Commercial advertising in television broadcasts, Teletext and on-demand TV may not be designed to attract the attention of children less than 12 years of age. Commercial advertising in television broadcasts and on-demand TV may not appear immediately before or after a programme or part of a programme that is primarily directed to children below 12 years of age. Section 8. Individuals or characters who play a prominent role in programmes that are primarily aimed at children below the age of 12 years may not appear In commercial advertising on television broadcasts, Teletext and on-demand TV".



of Europe.²¹ In spite of the fact that Sweden's Radio and Television Act forbids the advertising on television towards children under 12, they still have access and are exposed to different advertisements due to the advent of satellite channels from other European countries where the law is not as restrictive.²² Another limitation of the Swedish legislation is that the ban only covers the television advertising and not marketing in other medias.

Norway has also banned advertising aimed at children in association with children's programming.²³ This legislation presents limitations similar to those faced in Sweden. For this reason, there's a new proposal that intends to ban any marketing of unhealthy food and drink to children and young people under 18.²⁴ The proposal with a broader ban is facing criticism of the industry of children related products.²⁵

The province of Quebec established in 1978 a rule prohibiting all advertising towards children under 13 years of age. This rule is in section 248 of the Consumer Protection Act, which provides that no one can advertise food and games directly to anyone under this age.²⁶ The Act also defines the elements to assess if an advertising is direct toward

children.²⁷ This ban goes beyond those set forth in Norway and in Sweden, because it is not limited to television advertising, but it is imposed in any media. This prohibition is intended for commercial advertising.²⁸

The World Health Organization has not issued any directive proposing to prohibit food advertising or any restrictions.²⁹ It has preferred instead to put forth general recommendations to be adopted by the member states.³⁰ Influenced by the lack of significant results from the Quebec experience, authorities in Europe and in the United States have reaffirmed their intentions to avoid restrictive legislation on advertising by choosing to strengthen instances of education and family authority. This is also the position of the European Parliament, which formally rejected the advertising ban for children in October 2011 and again in April 2012.

According to the Brazilian Advertising Self-Regulation, the results observed in Quebec demonstrate that banning advertising is not a solution. In 2004, almost 25 years after the advertising ban was adopted, infant obesity rates were almost identical to those in other Canadian provinces. The indicators of being overweight and obese registered in Quebec children are higher than those observed in the province of neighboring Alberta, where advertising is not restricted.³¹

²¹ Sweden Pushes Its Ban on Children's Ads, WALL STREET JOURNAL, May 29, 2001, available at <http://www.commondreams.org/headlines01/0529-05.htm> (last visited Jan 4, 2017). See also Igor Rodrigues Britto, *supra* note 19.

²² Aqil & Iqbal, *supra* note 18. The European Court of Justice in the case "De Agostini" (Konsumentombudsmannen v. De Agostini F. Joined cases C-34/95, C-35/95 and C-36/95. (1997) ECR I-3843) stated TV broadcasts that can be received in Sweden are not subjected to the Swedish law but to the origin state's law.

²³ Norwegian Broadcasting Law (1992).

§ 3-1. Duration, content

(...) Advertising may not be broadcast in association with children's programming or directed specifically to children. (...)

§ 3-2. Special rules on advertisements on television

Advertisementson television shall be broadcast primarily in blocks between programs and shall be clearly distinguished from ordinary programming by a distinct auditory and visual signal. (...)

²⁴ Wendy Zeldin, *Norway: Thitening of Restrictions on Unhealthy Food Ads Aimed at Youth*, LIBRARY OF CONGRESS, Aug 29, 2013.

²⁵ *Advertising of Unhealthy Foods to Children is Banned*, THE NORDIC PACE: NORWAY, Jun 4, 2013, available at <http://www.tnp.no/norway/panorama/3766-advertising-of-unhealthy-foods-to-children-is-banned-in-norway> (last visited Jan 4, 2017); Julie Ryland, *Bans Unhealthy Food Ads Directed at Children*, NORWAY POST, Dec 4, 2016, available at <http://www.norwaypost.no/news-politics/28602-bans-unhealthy-food-ads-directed-at-children-> (last visited Jan 4, 2017).

²⁶ Section 248 of the Quebec Consumer Protection Act (1978): "no person may make use of commercial advertising directed at persons under thirteen years of age".

²⁷ Section 249 of the Quebec Consumer Protection Act (1978): "To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of

(a) the nature and intended purpose of the goods advertised;

(b) the manner of presenting such advertisement;

(c) the time and place it is shown.

The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age".

²⁸ This ban was challenged and the Canadian Supreme Court examined its constitutionality, finding that the it was an acceptable incursion on commercial freedom of expression (Attorney General of Quebec v. Irwin Toy, Ltd., [1989] 1 S.C.R. 927, 988 (Can.)).

²⁹ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16.

³⁰ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16.

³¹ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16. It is added that an in-depth study of the Quebec experience, promoted by the Journal of Marketing Research, showed that banning advertising would have inhibited daily consumption of less than four calories per child - the equivalent of thirty seconds of walking - in comparison with other regions of the country (Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16).



3.2. Regulation of advertising aimed at children in the United Kingdom.

42 The regulation on the issue in the United Kingdom is an example of an accurate assessment of the interests at stake. It was conducted in order to analyze concrete data on the problem of obesity and the impact of advertising on this health issue, as well as the effects of eventual regulation on the parties involved. Based on that analysis, it was possible to establish a detailed regulation of scheduling of television advertisements.

To avoid sudden and unpredictable consequences, the regulation has been implemented in three stages. At the end of each one of them the results were examined. After the last stage, it was verified that the goals established at the beginning of the process were achieved. There was also a coordinated change in the code of British Advertising Standard Practices. For all of this, the regulation in the United Kingdom is not only an example of its nuances, but also of its salutary process of implementation, which allows wide discussion in society and the preparation of the actors involved with the measures taken. It is an effective way of achieving the balance between maximum benefits and minimum losses as it limited the restrictions to those considered more efficient to reduce the impact of the advertising among children and verified the cost of these measures regarding the television broadcasters.

The Office of Communication (Ofcom), which is the regulatory and the competition authority in the United Kingdom and has the responsibility for the broadcasting, telecommunications, and the postal industry, was responsible for the implementation of the regulation. With researchers indicating that obesity increased the risk to the health of children and teenagers, the United Kingdom's Government was prompted to ask Ofcom in December 2003 to consider the increasing the rigidity of rules on advertising of foods to minors.³²

After conducting a detailed study, Ofcom suggested that television has a relatively modest impact on children's food preferences, and it is only one among a number of factors affecting these preferences.³³ The other factors include social, environmental, and cultural elements, which interact in complex ways and still are not yet well understood.

³⁴ In these circumstances, Ofcom believed that a total ban on food advertising would be neither proportionate nor, in isolation, effective. So Ofcom and its partner to co-regulation, the Advertising Standards Association, put in place rules both on programming and on the content of HFSS advertising, which are among the strictest in the world.³⁵ In the end of 2005, the Food Standards Agency (FSA) completed a food profile to help distinguish which aliments and soft drinks are less healthy and that could be subjected to advertising restrictions. Ofcom concluded that the nutritional profile proposed was appropriate.

Such rules would be implemented in three stages. In February, 2007 announcing the advertising restrictions,³⁶ Ofcom said it would carry out a review in time for assessing whether they were having the expected effects in terms of: a) the reduction of the amount of HFSS advertising seen by children; b) the use of advertising techniques considered to appeal to children in HFSS advertising; and c) the impact on transmission revenues.³⁷ The first (in April 2007) consists of a total ban on HFSS advertising in programs directed at children of four to nine years old. At this stage, the channels with content geared towards children would have to reduce advertising to 75% of the level of 2005. In the following phase, in January 2008, Ofcom would try to expand the prohibition even to children of four to fifteen years, and the level of advertising of HFSS products would have to be reduced to 50% of the level of 2005. In the third phase, in January of 2009, it would be prohibited from advertising in children's channel. Most of the intended results were achieved with the restrictive measures adopted and Ofcom was satisfied and considered the limitations presented appropriate to its purposes.³⁸

³⁴ Office of Communication, *supra* note 32, at 8.

³⁵ Office of Communication, *supra* note 32, at 5.

³⁶ Office of Communication, *supra* note 32, at 1.

³⁷ Office of Communication, *supra* note 32, at 2.

³⁸ Office of Communication, *supra* note 32, at 5. See also the report of the results: "These restrictions have: a) reduced children's exposure to HFSS advertising significantly (37% overall), particularly in the case of younger children (52%), who may be more susceptible to the influence of advertising. In the case of older children, the reduction is less marked (22%), and somewhat less than that observed in the interim review (28%). However, this reflects the greater proportion of their viewing in adult airtime, and a shift in their viewing towards channels carrying more HFSS advertising; b) led to a sharp drop in HFSS advertising featuring various advertising techniques considered attractive to children, such as popular cartoon characters. While advertisers continued to make use of celebrities, both in children's and adult airtime, most of these are likely to appeal principally to adults; and c) contributed to a significant shift in the balance of food and drink advertising on television towards non-HFSS products, which accounted for an estimated 33.1% all food and drink advertising spots in 2009 as against 22.5% in

³² Office of Communication, *HFSS advertising restrictions: Final Review* 1 (2010), https://www.ofcom.org.uk/__data/assets/pdf_file/0024/31857/hfss-review-final.pdf (last visited Jan 4, 2017).

³³ Office of Communication, *supra* note 32, at 5.



In limiting the advertising that broadcasters could air, Ofcom has sought to avoid a disproportionate impact on broadcasters' revenues. Ofcom estimated that the restrictions would, however, adversely affect the advertising revenue earned by broadcasters, although some would be able to reduce this damage, to a greater or lesser extent. For the final review, all of the broadcasters that responded indicated that it would not be feasible to disentangle the impact of the restrictions from other factors, but the restrictions were not the most significant factor affecting broadcasters in the period under review.³⁹

In coordination with Ofcom's interventions, the Advertising Standards Authority introduced restrictions on advertising techniques that may be used in promoting food and drink products, including some specific to HFSS products: (A) licensed characters; (B) celebrities; (C) promotions (such as those offering free gifts or tokens); and (D) health claims.⁴⁰ By assessing the data on changes in the use of restricted techniques in food and drink advertising considered to be of particular appeal to children after the Ofcom interventions, it was possible to see that there was a reduction in the use of all the techniques analyzed (with the exception of celebrities) during children's airtime. However, there was an increase in the use of all of these techniques during adult airtime and an increase in the use of these techniques overall (with the exception of licensed characters).

3.3. Regulation of advertising to children in the United States.

Different from the other legal models examined, the regulation of advertising aimed at minors in the United States does not find a state regulation. It can only be found in the advertising self-regulation, specially the rules defined by the Children's Advertising Review Unit (CARU). This framework, however, needs to be explained based on the history of the attempt to regulate the issue and on the development of the constitutional protection of commercial speech promoted by the American Supreme Court.

In the United States, the [Federal Trade Commission](#) (FTC), which has as one of its functions the

promotion of consumer protection,⁴¹ studied the issue of advertising to children in the 1970s but decided against regulation.⁴² This regulation was based on an unfairness theory as it was provided in the 1938 amendment of the FTC Act and later specified by the Cigarette Rule (see item 4.1).⁴³

In 1978, the FTC intended to make a rule restricting the television promotion of highly sugared foods to children.⁴⁴ Later the FTC staff recommended terminating the process of drafting a regulation. The FTC concluded that children age six and younger lack the cognitive ability to understand and evaluate the message of advertising. Nonetheless, the staff also concluded that a workable remedy could not be implemented. An informational remedy would not also be effective for this age group. Likewise, the ban would have various practical problems, as it would have resulted in only a small reduction of young children's total exposure to TV advertising.⁴⁵

In 1980, Congress passed a law prohibiting the FTC from adopting any rule in the children's advertising rulemaking.⁴⁶ There were other consequences to the decision to regulate the advertising toward minors. Only after ten years the Congress was willing to reauthorize the FTC, as the Congress perceived the FTC's attempt to regulate advertising to children "as a grossly overreaching proposal".⁴⁷

In parallel, the Supreme Court defined the parameters to restrictions on advertising in 1980 when it examined regulation banning promotional advertising in the case *Central Hudson Gas & Elec. Corp. v. Public Service Commission*.⁴⁸ The Court recognized the distinction between speech proposing, a commercial transaction and other varieties of speech. It stated that the government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity. However, the Court established a three-prong test to this hypothesis: (i) the state must assert a substantial interest to be achieved by restrictions on commercial speech; (ii) the restriction must directly advance the state interest involved; and (iii) if the governmental interest could be served as well by a more limited restriction on commercial

⁴¹ The Commission's basic authority to regulate advertising and marketing practices derives from Section 5 of the FTC Act, which broadly prohibits unfair or deceptive acts or practices in commerce.

⁴² J. Howard Beales III, *supra* note 42.

⁴³ J. Howard Beales III, *supra* note 43.

⁴⁴ J. Howard Beales III, *supra* note 42.

⁴⁵ J. Howard Beales III, *supra* note 42.

⁴⁶ J. Howard Beales III, *supra* note 42.

⁴⁷ J. Howard Beales III, *supra* note 42.

⁴⁸ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

2005 and 41.1% of all food and drink child impacts in 2009, as against 19.3% in 2005" (Office of Communication, *supra* note 32, at 5).

³⁹ Office of Communication, *supra* note 32, at 5.

⁴⁰ Office of Communication, *supra* note 32, at 1 and Annex 2.



speech, the excessive restrictions cannot survive. As a result this understanding promotes the commercial speech and makes difficult to ban it;⁴⁹ moreover, the Supreme Court also has classified as unconstitutional the prohibitions aimed at protecting children that also keep commercial speech from reaching adults.⁵⁰

Currently the public agencies are also looking for effective ways to address the problem. The solutions proposed, however, go against legal⁵¹ and political issues, as well as implementation problems.⁵²

Considering this history narrated, industry self-regulation acquires great relevance. The Children's Advertising Review Unit (CARU) administered by the Council of Better Business Bureau was established by the National Advertising Review Council (NARC) to promote responsible advertising to children under the age of 12⁵³ in all media.⁵⁴ CARU's self-regulatory program contains some principles and guidelines. CARU monitors, reviews and evaluates advertising for truth, accuracy, appropriateness and sensitivity to children's still developing cognitive abilities. The standards of the rules take into account the special vulnerabilities of children, their inexperience, susceptibility to being misled or unduly influenced, and their lack of cognitive skills

needed to evaluate the credibility of advertising.⁵⁵ Besides these functions, CARU provides a general advisory service for advertisers and agencies as well as has created publications to assisting parents with their kids to understand advertising. There are, however, critic opinions on the degree of effectiveness of the self-regulation, specially CARU's no power to enjoin specific ads from running, and no ability to sanction advertisers that break the rules.⁵⁶

On the other hand, the general guidelines are divided two sections: (A) deception; and (B) unsafe and inappropriate advertising to children. Unlike the discipline in Brazil, there isn't an extend regulation on the unfair advertising. It is limited to rule on safety and appropriateness of the advertising, e.g. the obligation to ensure that only age appropriate videos, films and interactive software are advertised to children, and should not portray or encourage behaviour inappropriate or include material that could unduly frighten or provoke anxiety in children. There are also critics on the CARU's lack of attention to nutritional issues ban food advertisers.⁵⁷

Exception of the self-regulation is the Children's Television Act (CTA), enacted by the Congress in 1990 to increase the amount of educational and informational programming for children available on television. This law requires each broadcast television station to include in the broadcasting programming specifically designed to serve its objectives ("core programming"). The CTA also limits the amount of time can be devoted to advertisements during children's programs, limiting in certain children's television programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays (Section 102, b, a of CTA). The Federal Communications Commission has adopted rules and guidelines to carry out the CTA's educational programming mandate, such as to air at least three hours per week of core programs.⁵⁸ The FCC also requires that, in television programs directed to children ages 12 and under, program material be separated from commercials by intervening and unrelated program material.

3.4. Regulation of advertising to children in the European Union.

⁴⁹ However, there are opinions defending that FTC has the Constitutional e Statutory Authority to regulate advertising toward children. See Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J.L. Med. & Ethics 98 2010; and M. Neil Browne et al., *Advertising to children and the commercial speech doctrine: political and constitutional limitations*, 58 Drake L. Rev. 67 2009-2010.

⁵⁰ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534-36 (2001).

⁵¹ J. Howard Beales III, *supra* note 42.

⁵² J. Howard Beales III, *supra* note 42.

⁵³ The CARU's guidelines list the factors to evaluate if the advertising is primarily directed to children under 12 years of age in any media: (a) whether the content of the media in which the advertisement appears is intended for children under 12, (considering the content's subject matter, format, projected audience demographics, and extent to which other advertising in that content is intended for children under 12); (b) whether the advertisement appears during, or just before or after, a television program aired during what is generally understood to be children's programming, considering the time of day during which the advertisement appears and the media outlet; (c) whether the advertisement appears during, or just before or after, a television program which is counted towards the broadcaster's or cablecaster's Children's Television Act obligations; and (d) whether, based on available information (including the subject matter and format of the advertisement), the advertiser intended to direct the advertisement primarily to children under 12 (Children's Advertising Review Unit, *Self-Regulatory Program for Children's Advertising* (2009), <http://www.caru.org/guidelines/guidelines.pdf> (last visited Jan 4, 2017)).

⁵⁴ Children's Advertising Review Unit, *supra* note 53.

⁵⁵ Children's Advertising Review Unit, *supra* note 53.

⁵⁶ Ellen J. Fried, *Assessing effectiveness of selfregulation: a case study of the Children's Advertising Review Unit*, 39 Loy. L. A. L. Rev. 93 2006.

⁵⁷ Fried, *supra* note 56.

⁵⁸ Federal Communications Commission, *Children's Educational Television*, <https://www.fcc.gov/consumers/guides/childrens-educational-television> (last visited Jan 4, 2017).



The advertising of food products for children does not have a specific legal act that regulates it in the European Union,⁵⁹ nor the majority of the European countries. There are some scattered predictions, which foresee a minimum protection toward the children. It has to be mentioned the Directive 2010/13/EU (Audiovisual Media Services), which amended the Television Without Frontiers Directive, and the Directive 2005/29/EC (Unfair Commercial Practices). Those directives are criticized as they failed to ensure an adequate protection to the children.⁶⁰

The Directive of Unfair Commercial Practice regulates two subcategories: (1) misleading practices and (2) aggressive practices (articles 6, 7 and 8). Neither of them resembles precisely the abusive advertising provided in the Brazilian Consumer Code. As it will be explained in the item 4.1, a general clause of abusive advertising was excluded in the earlier proposal of Directive 84/450/EEC.

On the other hand, the Directive 2010/13/EU presents advertising regulations regarding those broadcasted that could resemble in some aspects the rule of abusive advertising set forth in Brazilian law. However, this Directive is considered as a missed opportunity to protect children within the European Union.⁶¹ This Directive has some hypothesis prohibiting certain conducts, and some of them are similar to the examples mentioned in the second paragraph of Article 37 of the Brazilian Consumer Code. However, there isn't a general clause capable of producing a broad effect on the control of advertising.

That Directive states that the media service providers must recognize commercial advertising as such; shall not use subliminal techniques, prejudice the respect for human dignity, include or promote any discrimination, encourage harmful behavior to health or safety and encourage behavior grossly prejudicial to the protection of the environment (article 9). Article 9 (g) of the Directive provides a specific mention regarding advertising to minors, such as the prohibition of advertising physical or moral detriment to minors; exhort minors to buy or hire a product or service by exploiting their inexperience or credulity; directly encourage them to per-

suade their parents or others to purchase the goods or services being advertised; exploit the special trust minors in parents, teachers or other persons, and unreasonably show minors in dangerous situations. There are other documents – without binding force – that can assist in the protection of children within the European Union.⁶²

4. Regulation of advertising toward children in Brazil.

The regulation of advertising directed towards children in Brazil is complex. The analysis of this body of laws requires the examination of multiple sources and an interpretative effort to systematize them. The center of this system corresponds to the general clause of abusive advertising, set forth in the Brazilian Consumer Code.⁶³ This central position was reinvigorated by the introduction of a resolution issued by a government executive body to specify the concept of abusive advertising directed at children.

4.1. General clause of abusive advertising in the Consumer Code and the difficulties in its standardization.

There is no specific and detailed ordinary law on the issue of advertising directed at children in the Brazilian legal system, nor is there a regulation of advertising of food products. Therefore, the rule of abusive advertising of the Consumer Code has a central importance regarding the problem discussed.⁶⁴ It sets forth an indeterminate concept

⁵⁹ J. Pegado Liz, *O enquadramento legal da publicidade infanto-juvenil na UE: presente e futuro*, 14 Revista Lusobrasileira de Direito do Consumo 85 (2014).

⁵⁹ J. Pegado Liz, *O enquadramento legal da publicidade infanto-juvenil na UE: presente e futuro*, 14 Revista Lusobrasileira de Direito do Consumo 85 (2014).

⁶⁰ Anandine Garde, *Advertising Regulation and the Protection of Children-Consumers in the European Union: In the Best Interests of... Commercial Operators?*, 19 Int'l J. Child. Rts. 523 2011.

⁶¹ Thomas Walter Haug, *The new Audiovisual Media Services Directive as a missed opportunity in view of the protection of children and young people against harmful influences of advertisement in nowadays' media*, 4 Hanse L. Rev. 35 2008.

⁶² J. Pegado Liz, *supra* note 59.

⁶³ The notion of general clause adopted in this work is that proposed by Mario Libertini, to whom the general clause consists of those rules that identifies situations of conflict of interests equally protected by the legal order and remit to the judge the determination of the criteria to harmonize these interest (Mario Libertini, *Clausole generali, norme di principio, norme a contenuto indeterminato. Una proposta di distinzione*. 3 Revista Crítica de Direito Privado (2011)). Lucia Ancona defends expressly this qualification of Article 37, 2 (Lucia Ancona, *Publicidade e Direito* 164 (2nd ed. 2010)). However, the majority of the doctrine affirms only that the device has an indeterminate concept, which permits a flexible regulation. This position does not invalidate the qualification of the Article 37, 2 as a general clause.

⁶⁴ Article 37 of the Brazilian Consumer Code: "All misleading or abusive advertising is prohibited. (...) Paragraph 2. It is abusive, among others, discriminatory advertising of any nature, that incites violence, exploits fear or superstition, takes advantage of the child's judgment and experience deficiency, disrespects environmental values, or is capable to induce the consumer to behave in a manner harmful or dangerous to his health or safety."



without a legal definition and prohibits some advertising practices, considered examples of abusive advertising. Among the article's examples, it is mentioned the exploitation of children's judgment deficiency and credulity. The characteristics of the rules regarding advertising directed at children make it difficult to interpret, implement and apply.⁶⁵

The innovative character of the general clause is recognized.⁶⁶ However, the legislative process indicates that its historical root was the institute of unfair advertising, as it was conceived in the United States.⁶⁷ The reference is specified in relation to the version of the institute concerning the Cigarette Rule,⁶⁸ elaborated by the Federal Trade Commission and which gained relevance with the Supreme Court's case *FTC v. Sperry & Hutchinson Co.* In this version of the unfair advertising, the court established a three-pronged test to evaluate the prohibition of advertising practice: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).⁶⁹

The conception of this institute was altered in the 1980s. The primary focus of the application of the institute shifted to the unjustified substantial injury to consumers (i.e. prong 3).⁷⁰ This shift occurred after the FTC's attempt to regulate child ad-

vertising on the basis of prong 2.⁷¹ After a period when virtually no such test was used, the Federal Trade Commission re-employed it in cases where misleading advertising would not fit and as long as the practice made substantial injury to consumers by restoring prong 3.⁷²

Although the historical reference is to unfair advertising, general clause and some of the examples listed in the article of the Brazilian Consumer Code seem to be influenced by a proposal of discipline by the European Union. The unfair practices directive, currently disciplined by the Directive 2005/29/EC, concerns currently only the institutes of misleading advertising and aggressive practices. Its initial proposal, however, had some specific hypothesis of unfair advertising, as well as a general clause, like in Brazil.⁷³ The general clause was excluded in the final version of the directive; because it could prohibit some advertising practices.⁷⁴ Despite being excluded from this Directive, some of the examples listed in the Brazilian Consumer Code are found in Audiovisual Media Directive (Directive 2010/13/EU, article 9, 1, g) (see item 3.4, supra).⁷⁵

The characteristics of the regulation have allowed opposing positions to be defended by the Brazilian doctrine concerning the advertising toward children. There are those who claim to be

⁷¹ J. Howard Beales, *supra* note 43.

⁷² J. Howard Beales III, *supra* note 42. The difficulties of this criteria application are reported in David J. Harland, *The legal concept of unfairness and the economic and social environment: fair trade, market law and consumer interest*, in Eric Balate (Ed.), UNFAIRNESS ADVERTISING AND COMPARATIVE ADVERTISING 29 (1988).

⁷³ See the hypothesis of unfair advertising provided in the 1978 draft version of the directive: a) casts discredit on another person by improper reference to his nationality, origin, private life or good name, or b) injures or is likely to injure the commercial reputation of another person by false statements or defamatory comments concerning his firm, goods or services, or c) appeals to sentiments of fear, or promotes social or religious discrimination, or d) clearly infringes the principle of the social, economic and cultural equality of the sexes, or e) exploits the trust, credulity or lack of experience of a consumer, or influences or is likely to influence a consumer or the public in general in any other improper manner". See Eric Balate, *Unfair advertising and comparative advertising: a fighting place for a new consumer policy*, in Eric Balate (Ed.), UNFAIRNESS ADVERTISING AND COMPARATIVE ADVERTISING 9 (1988).

⁷⁴ Harland, *supra* note 72; and Ulf Bernitz, *The legal concept of unfairness and the economic and social environment: fair trade, market law and consumer interest*, in Eric Balate (Ed.), UNFAIRNESS ADVERTISING AND COMPARATIVE ADVERTISING 54 (1988).

⁷⁵ Heloísa Carpena defends that the Directive CEE 89/522, which is a previous version of the Audiovisual Media Services Directive, inspired the institute of abusive advertising. See Carpena, *Prevenção de riscos no controle da publicidade abusiva*, 35 Revista de Direito do Consumidor 123-131 (2000).

⁶⁵ Herman Benjamin defends that still hard to define the concept of abusive advertising and that this task has been inglorious (Benjamin, *supra* note 5).

⁶⁶ Benjamin, *supra* note 5.

⁶⁷ In a comment on the draft of the Consumer Code during the legislative process, Deputy Joaci Goes made a comparison with the institute of unfair advertisement (see Parecer de Joaci Goes, *Dossiê digitalizado do Projeto de Lei 3683/1989* (1990), <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=214992> (last visited Jan 4, 2017)). Herman Benjamin also analysed the attempt of to base the concept of abusive advertising on the unfair theory test adopted by the American Supreme Court (Benjamin, *supra* note 5).

⁶⁸ J. Howard Beales III, *supra* note 42. See also Robert Langer, *The Second Prong of the 'Cigarette Rule' Continues to Serve as Basis for Fiding Unfairness Unver Several 'Little Acts'* (Sept 30, 2011), <http://www.wiggin.com/13331> (last visited Jan 4, 2017).

⁶⁹ These indicia of unfairness were proposed by the FTC in 1964 as Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 FE. RER. 8324, 8355 (1964).

⁷⁰ J. Howard Beales, *supra* note 43.





banned any children advertising;⁷⁶ in an opposite position, others that believe the advertising is allowed being prohibited only as long as it is not abusive nor misleading;⁷⁷ and, supporting expressly the Conanda's resolution, others that believe the use of some techniques employed by advertising aimed at capturing children's attention should be prohibited.⁷⁸

There is also a discord between what the instruments to interpret or to apply the general clause of abusive advertising beyond the hypothesis of the examples listed are.⁷⁹ It is mentioned that the use of

⁷⁶ Isabella Henriques, *O capitalismo, a sociedade de consumo e a importância da restrição da publicidade e da comunicação mercadológica voltadas ao público infantil*, in PUBLICIDADE E PROTEÇÃO DA INFÂNCIA 112-127 (2014); and Cláudia Lima Marques e Káren Rick Danilevicz Bertoncello, *Publicidade e infância: sugestões para a tutela legal das crianças consumidores*, in PUBLICIDADE E PROTEÇÃO DA INFÂNCIA 93-111 (2014). See also *Advertising to children now illegal in Brazil*, Global Voice For Consumers (Apr 10, 2014), <http://www.consumersinternational.org/news-and-media/news/2014/04/advertising-to-children-now-technically-illegal-in-brazil/> (last visited Jan 4, 2017).

⁷⁷ Nelson Nery Jr., *Limites para a publicidade infantil – Direito fundamental à comunicação e liberdade de expressão da iniciativa privada*, in Nelson Nery Jr., 1 SOLUÇÕES PRÁTICAS 427-452 (2014).

⁷⁸ Guilherme Martins, *A regulamentação da publicidade infantil no Brasil: a proteção do consumidor e da infância*, 24 Revista de Direito do Consumidor n. 102 297-320 (2015); Bruno Miragem, *Proteção da Criança e do Adolescente Consumidores. Possibilidade de Explicitação de Critérios de Interpretação do Conceito Legal de Publicidade Abusiva e Prática Abusiva em Razão de Ofensa a Direitos da Criança e do Adolescente por Resolução do Conselho Nacional da Criança do do Adolescente – Conanda. Parecer*, 95 Revista de Direito do Consumidor 459-495 (2014); and Adalberto Pasqualotto & Mariana Menna Marreto Azambuja, *A Comédia da Publicidade: entre a Sátira e o Politicamente Correto*, 96 Revista de Direito do Consumidor 89-104 (2014).

⁷⁹ One of the solutions suggested by the Brazilian doctrine to implement the general clause of abusive advertising would correspond to the equalization with the abuse of law, which in Brazil represents a general clause provided in the Article 187 of the Civil Code. This device establishes as illegal the exercise of the right that exceeds its social and economic purpose, the good faith and the public policy. This interpretation was adopted in the work of among others Guilherme Fernandes Neto, *Cláusulas, práticas e publicidades abusivas: o abuso do direito no Código civil e no Código de defesa do consumidor* (2012); Carpena, *supra* note 75; and José Tadeu Neves Xavier, *Os limites da atuação publicitária na condução de comportamentos sociais o valor da ética no controle jurídico da publicidade*, 81 Revista do Direito do Consumidor 117-143 (2012). According with these authors, the social values to evaluate the abusive advertising would be similar to the public policy and good faith, the elements to assess the abuse of right in Brazil. However, the advances regarding the standardization of the term public policy are still timid in Brazil, especially in a scenario in which relevant social values are provided in the Constitution, not extracted from the public polity (see Eduardo Nunes de Souza, *Abuso do direito: novas perspectivas entre a licitude e o merecimento de tutela*, 50 Revista Trimestral de Direito Civil (2012)). Therefore, the interpretation of the clause of abusive advertising based on one the public policy as provided in the abuse of

legal principles and social and ethical values to specify the application of the mentioned general clause.⁸⁰⁻⁸¹ It should be noted that the use of social values as elements for its implementation seems to have been partly inspired by the second prong of unfair advertising. It is interesting, however, that the Federal Trade Commission no longer used the application of this criterion at the time of the promulgation of the Consumer Code.

Nevertheless, it is not clear as such legal, social or ethical principles could provide the instruments to establish specific advertising prohibitions.⁸² While they are able to guide decisions regarding abusive advertising, it seems difficult to apply them when is required, for example, to determine the percentage of viewers needed for an advertisement to be considered as aimed at children, or the time of the television transmission, or the modality of advertising that should be prohibit, or even the possibility of a complete prohibition of their practice, as carried out by the Superior Court of Justice.

The vagueness of the elements listed above cannot be the solution for applying a standard for the legal prohibition of the general clause of abusive advertising. Nor can they be understood to exclusively to protect the consumer. One cannot interpret such ethical and moral values as solely directed instruments to protect the consumer.⁸³ It is not possi-

right could not be an adequate parameter for its standardization. Its standards still have to be developed to serve as parameters to the institute of abusive advertising.

⁸⁰ Cláudia Lima Marques, *Comentário ao artigo 37*, in Cláudia Lima Marques et al., *COMENTÁRIOS AO CÓDIGO DE DEFESA DO CONSUMIDOR* (4th ed. 2013); Carpena, *supra* note 75; Diógenes Fera de Carvalho & Thaynara de Souza Oliveira, *A proteção do consumidor-criança frente à publicidade no Brasil*, 94 Revista de Direito do Consumidor 181-211 (2014); and Neves Xavier, *supra* 79. Lucia Ancona suggests, in attempt to specify the general clause, that prohibition should be evaluated through the parameter of common sense of a medium citizen (Ancona, *supra* note 63).

⁸¹ A similar understanding was adopted by Italian doctrine when it defined the principle of professional correctness as an “ethical principle universally followed by the category until it became customary” or “ethical principle of the average consumer.” See generally Adriano Vanzetti & Vincenzo Di Cataldo, *Manuale di Diritto Industriale* 27,28 (2012); and Mario Libertini & Anna Genovese, *Disciplina della concorrenza e dei consorzi: artt. 2595-2601*, in 3 COMMENTARIO DEL CODICE CIVILE DIRETTO DA ENRICO GABRIELLI 581 (2015).

⁸² After analysing the strategies suggested by the Brazilian doctrine to implement the general clause of abusive advertising, some similarity is observed with the argumentative stages of the Italian doctrine regarding the process of definition of the content of the general clause of unfair competition in Article 2598 (3) of the Italian Civil Code.

⁸³ This position corresponds to the decision of the Superior Court of Justice under analysis, which, without much consideration, prohibited the advertising of food for children. This position seems to be adopted by Guilherme Martins, *supra* note

ble to defend the abusiveness of advertising directed at children only on the grounds that it would reach vulnerable public consumers who suffer from an increase in the obesity problem, even if such vulnerability is set forth in the Consumer Code (Article 4, I) and in the Constitution (Article 227). It is necessary to temper such protection. Other principles of the law must be considered, namely freedom of information and expression (Article 220 of the Constitution), which protect the freedom to adopt commercial advertising; and the free choice of the consumer (Article 6, III of the Consumer Code).

4.1.1. Suggestion to implement the general clause of abusive advertising.

As a method of standardization the general clause, it is recommended its interpretation with principals of the legal system, in a so-called self-integration⁸⁴ – not with moral and social values, which are hard to define and to apply.⁸⁵ The legal interests involved in the matter must be harmonized.⁸⁶

However, this strategy is not concrete enough to apply the general clause. After its self-integration with principles of the legal order, a hetero-integration process must be carried out, i.e. the use of technical elements outside of the legal order to define the limits of the advertising prohibition.⁸⁷

78; Henriques, *supra* note 76; Lima Marques & Rick Danilevicz Bertonecello, *supra* note 76.

84 See Libertini, *supra* note 63. In the Brazilian doctrine see Gustavo Tepedino, *Crise de fontes normativas e técnicas legislativas na parte geral do Código Civil de 2002*, in A PARTE GERAL DO NOVO CÓDIGO CIVIL: ESTUDOS NA PERSPECTIVA CIVIL-CONSTITUCIONAL 1-17 (2003). The work of Judith Martins-Costa, *A boa-fé no direito privado* 119-194 (2015) should be noted. It is a mature result of her previous works about the subject of general clauses (Judith Martins-Costa, *As cláusulas gerais no Projeto do Código Civil brasileiro*. 139 *Revista dos Tribunais* (1998); and Judith Martins-Costa, *As Cláusulas Gerais como Fatores de Mobilidade do Sistema Jurídico*, 112 *Revista de informação legislativa* (1991)). However, it is defends the idea that the general clauses should be applied integrated with legal principals and with moral and social values. See also in the Italian doctrine Stefano Rodotà, *Il tempo delle clauseole generali* (1987) and Pietro Perlingieri, *O direito civil na legalidade constitucional* 237-240 (2008). With different legal philosophy approach, see Mario Barcellona, *Clauseole generali e giustizia contrattuale* chapter 1 (2006).

85 Although with some ambiguities, this is one of the solutions adopted by Benjamin, *supra* note 5; and Ancona, *supra* note 63 clearly adopted this position.

86 The necessity to harmonize the consumer protection and the necessity of economic and technology development is provided in Article 4, III of the Consumer Code.

87 This is the concern of Mario Libertini, for whom the adoption of elements of self-integration does not eliminate the possibility of hetero-integration. If it is not possible to use the principles of the legal order to specify the content of an indeterminate juridi-

Faced with technical elements that may involve the standardization of this clause, it is of absolute relevance, which in this author's opinion is not emphasized enough by Brazilian doctrine, to carry out the hetero-integration of the general clause with rules of the Brazilian Advertising Self-Regulation. This code expresses an intimate relationship with professional and commercial ethics, translating into specific precepts these values.⁸⁸ It can serve as an objective parameter for evaluating the abusiveness of advertising activity.⁸⁹ This integration enriches the general clause of abusive advertising, which acquires concrete parameters.⁹⁰

According with this suggestion of hetero-integration, there is only presumptive equivalence between the rules derived from the general clause of abusive advertising and the criteria of the Brazilian Advertising Self-Regulation. There is a possibility of contrast between the rules formed based on the self-integration with principal of the legal order and the ones provided in the self-regulation, because in some situations it could be demanded superior protection than those stipulated in technical norms.⁹¹ In this case, it should be considered the prohibition extracted from legal principles and their values. However, this application requires an argumentative burden.

The need to establish a relationship between the general clause of abusive advertising with elements of the self-regulation is evidenced by the fact that the examples indicated therein find similar predictions in such codes of ethics. Five examples of abusive advertising are indicated in the Consumer Code: (1) discriminatory advertising of any kind; (2) advertising meant to incite violence, exploit fear or superstition; (3) advertising that takes advantage

cal concept, one must use objective criteria, i.e. the use of technical and scientific discipline or recognized cultural currents. See Libertini, *supra* note 63.

88 This idea is present in the Article 8 of the Brazilian Advertising Self-Regulation: "The main objective of this Code is to regulate the ethical standards applicable to advertising, understood as activity designed to stimulate the consumption of goods and services, as well as to promote institutions, concepts or ideas."

89 This position is adopted in Italy regarding the general clause of unfair competition. See Libertini & Genovese, *supra* note 81. However, it must be pointed out that this position does not mean adherence to the understanding witch defends the use alone the business deontological ethics as parameter of the general clause; rather, this usage is an exception.

90 The hetero-integration of the general clause with rules of self-regulation makes it possible to dispel the argument that the mere application of the Brazilian Advertising Self-Regulation would be ineffective (see Martins, *supra* note 78). With the interpretation presented in this paper, the standard practices acquire law enforcement.

91 In relation to the Italian doctrine on general clause of unfair competition, this is the understanding adopted by Libertini & Genovese, *supra* note 81.



of the child's judgment and experience; (4) advertising that disrespects environmental values; and (5) advertising that is capable of inducing the consumer to behave in a manner detrimental or dangerous to his health or safety.⁹² All of these correspond with the discipline of the Advertising Self-Regulation. Example (1) is provided in Article 20 of the Advertising Self-Regulation;⁹³ example (2) in Articles 24, 25 and 26;⁹⁴ example (3), Articles 23⁹⁵ and 37 which specifically govern advertising directed towards children (see item 4.2, *infra*); examples (4) in Article 36;⁹⁶ and example (5), Article 33.⁹⁷

4.2. The interpretation of abusive advertising as it relates to food advertising directed at children.

After applying the legal principals to implement the abusive advertising clause, it is not yet clear when advertising directed at children should be prohibited. It is necessary to apply some rule of the Brazilian Advertising Self-Regulation in a hetero-integration process. Its Article 37 presents a broad rule that is capable of protecting children in diverse

⁹² Some of these examples of abusive advertising can also be extracted directly from constitutional principles and norms (hypotheses (1) and (4)); others are elements of moral and ethical values, translated into deontological discipline (examples (2), (3) and (5)). Herman Benjamin also indicates the relationship between the regulation of the abusive advertising and some self-regulation rules (see Benjamin, *supra* note 5).

⁹³ Article 20. No advertisement shall favor or encourage any kind of racial, social, political, religious or nationality offense or discrimination.

⁹⁴ Article 24. Advertisements should not be based on fear without socially relevant motive or plausible reason; Article 25. Advertisements should not exploit any kind of superstition; and Article 26. Advertisements shall not contain anything that could lead to violence.

⁹⁵ Article 23. Advertisements must be carried out in a way that does not abuse the consumer's confidence, does not exploit his lack of experience or knowledge, and does not benefit from his credulity.

⁹⁶ Article 36 Advertising shall reflect the concerns of all humankind with problems related to the quality of life and protection of the environment; thus, ads that directly or indirectly stimulate will be vigorously combated: a. pollution of air, water, forests and other natural resources; b. pollution of the urban environment; c. depredation of fauna, flora and other natural resources; d. the visual pollution of fields and cities; and. Noise pollution; f. The waste of natural resources.

⁹⁷ Article 33. This Code condemns advertisements that: a. to show disregard for security, especially when they include young people and children or when the message is addressed to them; b. encourage the hazardous use of the product offered; c. special precautions for the prevention of accidents where such care is essential to the use of the product; d. fail to mention the liability of third parties, where such mention is essential; and is. No special care should be specified regarding the use of the product by children, the elderly and sick persons if such care is essential.

ways. In 2006, these specific standards went through a complete review. The National Council for Advertising Self-Regulation (CONAR) states that Brazil has one of the most demanding legal and ethical rules for advertising directed at minors, according to the conclusion of an extensive international survey.⁹⁸ It is emphasized that the discipline of the country knew how to detail restrictions without asphyxiating the natural and desirable creativity of the professionals of the sector and the capacity to renew itself permanently.⁹⁹

In its norms, the child is inserted in a broad context, in which the public must serve as a coadjutant in the formation of responsible citizens and conscious consumers. Therefore, no advertising can urge the child to buy (Article 37).¹⁰⁰

Some bans in the self-regulation code regarding advertising toward children are similar to the examples given as abusive advertising: (A) the advertisements must reflect special safety precautions (Articles 37, I and 37, I, c and example 5 of the abusive advertising clause); (B) positive social values such as the environment must be respected (example 4 of the abusive advertising clause and Article 37, I, of the code); (C) cannot cause any discrimination (Article 37, I, b and example 1 of the advertising clause); (D) use situations of psychological pressure or violence that are capable of infusing fear (Article 37, I, i and example 2 of the abusive advertising clause); and (E) take advantage of the child's judgment deficiency (Article 37, II, c and example 3 of the abusive advertising clause).

The protection provided by the self-regulation code goes further. There is also food-advertising self-regulation (Annex H of the Advertising Self-Regulation), with provisions aimed at the protection of children:

- if it is used characters from the universe of children's movies or television shows or including presenters of programs aimed at this target audience, to do so only in the intervals distinguishing between the advertising message and the editorial or programming content;

⁹⁸ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16.

⁹⁹ Teresa Ancona Lopez praised the Brazilian self-regulation as serious and precise (Teresa Ancona Lopez, A Resolução 24/2010 da Anvisa e a publicidade para o público infantil, in João Grandino Rodas (Ed.), DIREITO ECONÔMICO E SOCIAL: ATUALIDADES E REFLEXES SOBRE DIEITO CONCORRENCIAL, DO CONUMIDOR, DO TRABALHO E TRIBUTARIO 279 (2012)).

¹⁰⁰ See also Tício Sampo Ferraz Junior, *Crianças fora da redoma*, O GLOBO, Out 22, 2015.

- when the product is intended for the child, its advertising must also refrain from any imperative stimulus of purchase or consumption, especially if presented by family, school, medical, sports, cultural or public authority, as well as characters who interpret them, except in educational campaigns;
- to refrain from encouraging excessive consumption or presenting situations that encourage excessive consumption; and
- to refrain from using children well above or far below normal weight.

These examples do not exhaust the limits of child protection on food advertising. If the protection of the self-regulation is not adequate, the burden of demonstrating the need based on legal principles to provide broader protection is imposed. Note that this burden was not exceeded by the decision of the Superior Court of Justice, nor by Resolution no. 163/2014 of the National Council for the Rights of Children and Adolescents, which sought to specify the concept of abusive advertising in relation to advertising for children.

4.3. The resolution no. 163/2014 of the National Council of the Rights of the Child and the Adolescent.

The National Council for the Rights of Children and Adolescents (Conanda), an executive body of the Brazilian Ministry of Justice, attempted to specify in 2014 through a binding resolution the concept of abusive advertising of the Consumer Code in relation to advertising directed at children. The open texture of the general clause, coupled with its difficult interpretation, allowed an existence of a resolution with rules that went beyond the protection of abusive advertising as was set forth at the Consumer Code and that do not meet the criteria for its application.

This regulation generated the critical manifestation of several business associations.¹⁰¹ They argued that it would violate the Constitution as it wouldn't be proportionate and it regulated a matter of commercial advertising reserved to an ordinary law (Article 22, XXIX), as well as reaffirmed that proper

control to characterize abusive practices would be through the self-regulation. This criticism generated a great interest in the discussion, with the presentation of legal opinions and articles addressing the legality of such a resolution¹⁰² and the public demonstration of support by public institutions.¹⁰³

In this author's view, the issue does not regard the proportionality of the measures listed. If ordinary law provided the object of the regulation with a strict position, it should be considered proportional and, therefore, constitutional, as it would pass the proportionality test used in the Brazilian system.¹⁰⁴

The resolution, although claiming to specify criteria for the application of a general clause, should be criticized for regulating matters beyond the limits of this general clause, which removes the legal basis for the validity of the resolution. Thus, a strict interpretation of it must be adopted to avoid its illegality.¹⁰⁵

In this perspective, the attention of the analysis deserves to be focused on the specification of the concept of abusive advertising carried out by the resolution. According to the regulation, advertising would be abusive if two requirements were met: (1) it targets children with the intention of persuading them; and (2) it uses one of the listed advertising techniques. Among such techniques are listed the use of children's language, special effects and excessive color, children's music soundtracks, of child representation, of celebrities or people with children's appeal, of cartoons, of promotion with distri-

¹⁰² The Alana institute, specialized in consumer protection, commissioned relevant Brazilian jurists, Virgílio Afonso da Silva, professor of Constitutional Law at the University of São Paulo, and Bruno Miragem, professor of Consumer's Law at the Federal University of Rio Grande do Sul, to write legal opinions to overcome criticisms made of that resolution.

¹⁰³ Several public agencies, such as the Ministry of Health, the Ministry of Education, the Federal Public Prosecutor's Office, through the Regional Public Prosecutor's Office for Citizens' Rights of the State of São Paulo, have expressed support for the Conanda's resolution.

¹⁰⁴ This is the opinion of Virgílio Afonso da Silva, *Publicidade*, 961 *Revista dos Tribunais* 319-350 (2015) Dalmo Dallari, *Publicidade danosa à criança*, *JORNAL DO BRASIL*, Apr 24, 2014, <http://www.jb.com.br/dalmo-dallari/noticias/2014/04/26/publicidade-danosa-a-crianca/>. In the opposite position, see Nery Jr., *supra* note 77.

¹⁰⁵ Pasqualotto & Azambuja, *supra* note 78 defended the illegality of the resolution as the advertising toward minors would also be prohibited by the Brazilian Advertising Practices, in its Article 37, III ("This Code condemns the action of merchandising or indirect advertising contracted company that employs children, elements of the infant universe or other devices with the deliberate purpose of capturing the attention of this specific public, whatever the vehicle used."). However, this device bans the *indirect* advertising and merchandising action, practices substantially different from the direct advertising, which the Conanda's resolution regulate.

¹⁰¹ Several business associations signed a public note on this matter (see *NOTA PÚBLICA: Publicidade Infantil – Resolução Nº 163/2014* (2014), <http://aner.org.br/nota-publica-publicidade-infantil/> (last visited Jan 4, 2017).





bution of prizes or gifts.¹⁰⁶ However, the concept of abusive advertising in the resolution is not limited to the specific notion presented in the general clause, nor to “exploit the child's judgment and experience” – one of the examples of abusive advertising provided in the Consumer Code.¹⁰⁷

The structuring of the requirements for the configuration of abusive advertising does not properly fit within the category of exploiting child's judgment and experience. The rules of commercial practice and publicity, consolidated and subsequently revised by ICC (International Chamber of Commerce) in 2011, detail the notion of exploiting the inexperience and credulity of children in its Article 18.¹⁰⁸ It is forbidden to exaggerate the qualities of products or to promote the need to buy additional products to produce the described result, and in the case of using fancy features, to make it easily dissociated from reality. It also imposes the duty to clearly distinguish advertising. These are ethical rules drawn from international practices. These examples indicate that the configuration of the exploit of the children's judgment would not fit into the hypothe-

¹⁰⁶ Article 2 of Conanda's Resolution no. 163/2014: “The practice of directing advertising and marketing communication to the child, with the intention of persuading the child to consume any product or service, is considered abusive, using, among others, the following aspects: I - children's language, special effects and excess colors; II - soundtracks of children's songs or sung by children's voices; III - child representation; IV - persons or celebrities with appeal to the child public; V - characters or children presenters; VI - cartoon or animation; VII - dolls or the like; VIII - promotion with distribution of prizes or collectible gifts or with appeals to children; and IX - promotion with competitions or games with appeal to children.”

¹⁰⁷ Bruno Miragem, author of a relevant legal opinion to defend the legality of the resolution, argues in his consumer law manual that the use of techniques for advertising aimed at children would not be enough to configure the abusiveness advertising: “With regard to the children, to whom advertising is often addressed with fanciful or unreal motives (characters of cartoon, people who fly, among others), it isn't a question of inhibiting the normal use of persuasion, or even make advertising more enjoyable. Only the use of the techniques to take advantage of the lack of discernment of children is forbidden, as it is considered abusive” (Bruno Miragem, *Curso de Direito do Consumidor* 257 (5th ed. 2014). This represents a contradiction with his legal opinion.

¹⁰⁸ Article 18 of Rules of Commercial Practice and Publicity of the International Chamber of Commerce “When demonstrating a product's performance and use, marketing communications should not a. minimize the degree of skill or understate the age level generally required to assemble or operate products; b. exaggerate the true size, value, nature, durability and performance of the product; c. fail to disclose information about the need for additional purchases, such as accessories, or individual items in a collection or series, required to produce the result shown or described. 2. While the use of fantasy is appropriate for younger as well as older children, it should not make it difficult for them to distinguish between reality and fantasy. 3. Marketing communications directed to children should be clearly distinguishable to them as such.”

ses described in the Conanda resolution since they do not necessarily exploit children's credulity, as do the examples provided in the ICC's rules. Thus, the requirement to apply the example provided in the Consumer Code is the use of a technique capable of exploiting children's credulity and lack of experience, not the simple use of advertising strategies geared to minors.

It would also not be possible to frame the discipline of the resolution as a specification of the general clause of abusive advertising. As discussed in the items 4.1 and 4.2, it is not possible to extract a virtually total prohibition of advertising towards minors from the general clause of abusive advertising, as it cannot be derived from principals of the legal order, or from any hetero-integration of advertising practices.

This conclusion is confirmed when observed that the practical effects of the resolution. As a consequence of the modality in which the abusive advertising was put forth in the resolution, which is not very accurate, it is able to prohibit (A) publicity directed at children that uses one of the techniques listed, which would require complete reinvention of the advertising campaigns; (B) child product advertising aimed at parents using one of the listed techniques; and (C) advertising directed exclusively to the adult public using one of the techniques listed and indirectly reaches the children's audience. The consequences of such an understanding is dramatic. Parmalat's advertising campaign,¹⁰⁹ which is still widely remembered in Brazil, could be banned today because it used children's actors dressed in animal costumes singing music related to the universe of children, techniques banned in the resolution.

It is not the intent of the resolution to go beyond what is provided for in the abusive clause of the Consumer Code and to target campaigns not directed at children;¹¹⁰ however its practical effect goes beyond such limits. Simply put: the requirements used in the resolution do not correspond to the possible interpretations to characterize the abusive advertising provided in the Consumer Code.

It is not accurate the resolution requirement (1), advertising directed to children with the intention of persuading them, for considering an advertising abusive. Child advertising is referred to as advertis-

¹⁰⁹ The campaign was called “Mammals”, as it would be possible to exchange some product packaging for cute stuffed animals. In the television ad, some children would sing a song with a childish lyric dressed as mammals.

¹¹⁰ This interpretation is based on the resolution's terms “the practice of directing advertising and marketing communication to the child” and “with the intention of persuading it to consume any product or service” (Article 2 of the Conanda's Resolution no. 163/2004). Bruno Miragem rejects this literal interpretation (Miragem, *supra* note 78).

ing that includes (i) a promotion that is deliberately targeted at children and scheduled to reach them, and (ii) promotion targeting other groups to which children are widely exposed.¹¹¹ It should be added to this requirements other specifications to be considered advertising toward children, not only the intention of persuading them, but the context of its presentation, and in particular of the nature and intended purpose of the goods advertised; and the manner of presenting such advertisement; the time and place it is shown.¹¹²

Also, the techniques listed in the resolution represent practically all the modalities of promoting children's goods and services. If the simple use of those techniques is considered the targeting of children with the intention of persuading them, this advertising modality would be practically prohibited in Brazil, so much so that this country would be considered a legal system compared to the example of Norway, Sweden, and the Province of Quebec with regard to children's advertising, which have a very strict legal framework on the matter (see item 3.1).

It does seem that this extreme interpretation should be extracted from the general clause. Instead, the resolution should be read as an enumeration of techniques that can be used to take advantage of the children's lack of judgment and inexperience as set forth in the Consumer Code. It is necessary, therefore, to add a third requirement for the configuration of the abusive advertising in the resolution: the use of advertising to exploit children's characteristics¹¹³ as it was, for instance, described in the ICC rules.¹¹⁴ This interpretation, alt-

¹¹¹ World Health Organization Europe, *supra* note 7, at 9. This proposal could run into the same problems verified when the FTC tried to regulate children advertising. According to its reports, if it was considered the TV child audience comprised 50%, or even 30%, only one program then would have been affected. Although the television audience is significantly different nowadays, the practical problem still exists, as the audience still mixed, except in the children's channels.

¹¹¹ Convention on the Rights of the Child, 1989, <http://www2.ohchr.org/english/law/crc.htm>.

¹¹² These factors are extracted from the Article 249, Consumer Protection Act of Quebec, Canada.

¹¹³ Igor Britto notes that this requirement – to take advantage of children's inexperience also presupposes the articles regulation the advertising toward minors in the Audiovisual Media Services Directive (*see* item 3.5, *supra*) (Rodrigues Britto, *supra* note 19).

¹¹⁴ The position of Bruno Miragem on this matter is contradictory (Miragem, *supra* note 78; and Miragem, *supra* note 107). As indicated in note 107, he argued in his previous work that is necessary the element of exploitation of children's credulity and inexperience for the characterization of advertising abusiveness. However, contradictorily, this is not this criteria in the resolution, defended by him. Instead, it lists as requirements the use of some persuasion techniques toward children, which are not hypothesis of the any abusive behaviour. Moreover, for

though necessary, removes virtually all the usefulness of the resolution.

The only decision by a court of appeal found interpreting the resolution concluded in the way set forth in this paper.¹¹⁵ In this case, administrative fines imposed on the basis of the terms of the resolution were in question. The São Paulo's court dismissed the fines and considered it permissible to offer a sandwich from McDonald's called Happy Meal, which comes with a toy. The illegality of the resolution was not declared, even though the practice under consideration is expressly forbidden, as it promotes a product having children as target audience. However, it was stated that it could not have a literal interpretation of the resolution and, therefore, the characterization of abusive advertising. The court emphasized that the use of the entertainment and a toy gift would be a normal element of children's advertising. Its prohibition would be considered a paternalistic attitude and it would disregard the duty of the parents in the education of the children.

4.4. Resolution no. 24/2010 National Agency for Sanitary Surveillance and other resolutions on the advertising of food to children.

In another perspective, the resolution no. 24/2010 of the National Sanitary Surveillance Agency regulates the content of the information to be presented on food packaging, characterized by the scientific recognition of their harmful health effects, such as those with high sugar, saturated fat, trans fat, sodium, or drinks with low nutritional content. The technique used is different from that indicated by the Conanda Resolution. It does not ban the advertising through the use of certain techniques. In order to protect health, it is seen as an obligation to inform the consumer about the harmful effects of the food in an appropriate manner and with the content provided therein.¹¹⁶

him, those techniques are not able to inform the consumer but only to attract his attention and promote products. Nonetheless, in this author's personal opinion, a suggestive advertising directed toward children is allowed and do not fit the requirement of take advantage of the children's credulity and inexperience. Anyway, eventual contradiction in Bruno Miragem's opinion would be overcome if it is added the third requirement for this resolution, as suggested in this paper.

¹¹⁵ Ap. 0018234-17.2013.8.26.0053, 5ª Câmara de Direito Público do TJ/SP, em 30.6.2015.

¹¹⁶ A public hearing, resulting in a very detailed regulation, supported the drafting process of the resolution. However, most of the suggestions were not adopted in its final version. About the drafting process, *see* Patricia Henriques et al., *A regulamentação da propaganda de alimentos no Brasil: convergências e*

Advertising is required to be direct and truthful. The information on the food packing needs to follow the resolution's instructions. The packaging, with different content depending on the characteristics of the products contained in the food product, would indicate the high rate of any product considered harmful and some of the risks associated with its consumption. Although not substantially different, the protection of child-directed advertising is specifically addressed in one of the provisions of that resolution.¹¹⁷

The resolution was challenged in court. It was considered unconstitutional by Federal Court in 2013, in a decision that, despite having recognized its relevant content, ruled that the health agency's doesn't have legal competence to regulate advertising. The discussion of competence can still be analyzed by the higher courts.¹¹⁸

In another resolution dealing with the issue of advertising aimed at children of food products, the National Council of Medicine promulgated Resolution no. 408 in 2008, which, although without effective enforcement measures, recommended the adoption of a regulation of advertising directed at children on food. This proposal has not yet been implemented.

4.5. Comparison of the laws governing advertising food directed to children in Brazil with other systems.

The absence of specialized regulations (except resolution no. 163/2014 whose interpretation must be strict, as presented in item 4.3, *supra*) does not exclude the necessity of confrontation of Brazilian law with other legal systems. The general clause of abusive advertising of the Consumer Code requires a high interpretive burden to materialize and define the current regulations set forth in Brazilian law, which include multiple views regarding the system of control of advertising.

conflitos de interesses, 30 Cad. Saúde Pública 1219-1228 (2014).

¹¹⁷ Teresa Ancona Lopez criticized this resolution, as it disregarded many other factors responsible for the children's obesity, not only the consumption of some specific foods and drinks (Ancona Lopez, *supra* note 99).

¹¹⁸ TRF1, Remessa Necessária 0042882-45.2010.4.01.3400, 6ª T., Rel. Des. Jorair Aram Meguerian, julg. 22.2.2013. Agreeing with this decision, see Marcelo de Siqueira Freitas, *Publicidade no âmbito do Direito do Consumidor: Resolução RDC 24/2010 da Anvisa – Publicidade de Alimentos*, in João Grandino Rodas (Ed.), DIREITO ECONÓMICO E SOCIAL: ATUALIDADES E REFLEXES SOBRE DIEITO CONCORRENCIAL, DO CONUMIDOR, DO TRABALHO E TRIBUTARIO 231-243 (2012). See also Rafael Pellon de Lima Sampaio, *A publicidade em tempos gordurosos*, 3 Revista de Direito das Comunicações 183-195 (2001).

This modality of protection, however, has an undeniable benefit: the possibility of advertising control in different medias, not limited to television. Although restrictive, the ban on advertising for children in Norway and Sweden is reduced to the practice of advertising on television. The flexibility of the general clause also allows it to be adapted according to social changes.¹¹⁹ The interpretation proposed for the implementation of the general clause of abuse, based on the rules of the self-regulation, which can change over time through amendments, allows detailed and updated protection of the advertising aimed at minors.

The rules set forth in that code are considered examples of rigor, with a level of protection above the European Union and the United States.¹²⁰ It is not, therefore, the fact that they are inserted in an ethical code, organized by a certain business sector, that the protection established there should be unmerited. Brazil's laws share some similarities with the United Kingdom regulations. In fact, the comparison with other systems point to a broad protection in Brazil, even if the literal terms of the Conanda Resolution are ignored.

Defending a restrictive interpretation of this resolution does not mean privileging a soft law regulation, or disregarding the vulnerability of children. The country will not be behind in protecting children and its regulation must be within the limits of the legality and extension of the general clause of abusive advertising.

The awareness of the limits of the effective protection allows society to discuss the modality of protection of children regarding advertising. The most protective model configuration, even if it has not shown effective results, can be performed from the enactment of ordinary law. It is for society to discuss how to balance, on one hand, the protection of children in their vulnerability and their health, and on the other, freedom of initiative and freedom of expression and information. Individual choices of the interpreter or of one government body must not to outweigh decisions of the society.

The ban provided in the Conanda's resolutions and corroborated by the Superior Court decision affected the availability of children's programs on the

¹¹⁹ Benjamin, *supra* note 5.

¹²⁰ Conselho Nacional de Autorregulamentação Publicitária, *supra* note 16. In a public hearing in the Chamber of Deputies in 2016, the president of the Brazilian Advertising Self-Regulation presented a table, in which it is not demonstrated that Brazil has the most complete regulation of advertising toward minors – comprised both self-regulation and state provision (see <http://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cctci/audiencias-publicas/2016/ap-2016-05-24-ap-pl-702-de-2011-publicidade-infantil/conar-gilberto-leifert> (last visited Jan 4, 2017)).



main television broadcasters, practically remaining only in the cable channels.¹²¹ In Brazil, differently from the United Kingdom regulation, this court didn't consider the effects of its decision on the revenues of the television broadcasters; so their solution was to reduce significantly the hours of children's programs. The interests of the television broadcasters were not weighted nor the children's to not be more exposed to adult television, in a country where only few have access to cable television and spend hours in front of the television.

5. Analysis of the Superior Court of Justice's decision.

The comparative analysis of advertising aimed at children and the suggestion of an interpretation and an application of the general clause of abusive advertising contribute to the exam of the decision adopted by the Superior Court of Justice. This case examination can thus be carried out by considering a broader legal framework context, as well as the legal rule of advertising aimed at children in Brazil.

The decision of the Superior Court of Justice was based on the existence of abusive advertising in television advertising called "It's Shrek Time." (its description was presented in item 2). The reasoning for this conclusion was very broad: it was considered as abusive advertising since it directly or indirectly targeted at children, and also included the use of elements from the universe of children. The decision is open to criticism for several reasons, as discussed below.

5.1. Criticisms of the decision of the Superior Court of Justice.

There is no clear justification in the court's decision for considering abusive advertising. This in and of itself should be questioned. The use of a general clause imposes an argumentative burden, which was not satisfied by the decision of the Superior Court of Justice.¹²² Such a burden is further accentuated in the application of the general clause when there was

¹²¹ Fernanda Reis, *Programação infantil vive queda na televisão aberta*, FOLHA DE SÃO PAULO, Jun 21, 2015, <http://www1.folha.uol.com.br/ilustrada/2015/06/1645333-programacao-infantil-vive-queda-na-televisao-aberta.shtml>; and Gabriela Sá Pessoa, *Após restrição de publicidade infantil, canais vendem espaço para desenhos*, FOLHA DE SÃO PAULO, Aug 11, 2016, <http://www1.folha.uol.com.br/ilustrada/2016/08/1801269-apos-proibicao-de-publicidade-infantil-canais-vendem-espaco-para-desenhos.shtml>.

¹²² See generally Libertini, *supra* not 63.

no other court precedent concerning this subject and when the decision results in drastic consequences.

The characteristics of the general clause of abusive advertising require the demonstration of how the legal principles of the order point to the prohibition of the advertising. No argument is set forth addressing this direction. On the contrary, the elements used by the decision are solely circumstances and facts that are not applicable to this general clause, such as the reference to the obesity crisis and the impossibility of children not being the target of advertising as they are not able to complete a legal transaction.

The allegation of a child obesity crisis cannot serve as a basis for the general clause. The general clause should not become the means to allow a utilitarian argument. The collective good cannot serve as a basis for overcoming fundamental rights, such as free enterprise and freedom of expression and information. This argument becomes even more subject to criticism since there isn't a scientific consensus about the direct relationship between food advertising and the infantile obesity crisis.

The other argument put forward is rebuffed even by the current legislation. It is true that children cannot complete a legal transaction. However, this impossibility does permit the idea that advertising is or is not aimed at them. Article 37 of the Consumer Code itself sets an example of abusiveness of advertising as the exploitation of a child's deficiency of judgment, presupposing that in other conditions the advertising would be allowed. Thus, the self-regulation has allowed this possibility.

Another criticism corresponds to the fact that it has not exhausted the examination of the available legislation to govern the matter. The Conanda's resolution was not mentioned, even if, in this author's opinion, it should not be applied literally (see item 4.4).

Judge Aussete Magalhães's opinion also deserves criticism. It is argued that Article 37 of the Advertising Self-Regulation code would prevent advertising toward children, but this is not the case. There is no indication that there would be a prohibition in this regard; on the contrary, it is based on the presupposition of such advertising modality should be regulated after the fact instead of prohibited.

5.2. The adequate interpretation of the case analyzed by the Brazilian Court of Justice.

The criticisms examined are sufficient to challenge the decision adopted by the Brazilian Superior Court of Justice. There are insufficient arguments in



the decision to build the ban of abusive advertising. This does not preclude interpreting and applying the general clause of abusive advertising.

The legal principles, which are capable of collecting the existing social and ethical values as well as the technical elements, are able to standardize the clause to evaluate the legality of certain advertising. The principles of the law do not exclude the possibility of admitting the prohibition of advertising. However, it is difficult to interpret the ban of advertising directed to children according to the current standards of Brazilian society. Advertising aimed at children is still socially accepted and legally based in some principals. While there are some who would defend a strict ban of the advertising, there are relevant opinions defending the contrary opinion. Also, the rules of the self-regulation allow the modality of advertising, so the possibility of prohibiting advertising for children, as well as the construction of rules similar to those in the Conanda resolution, are not currently possible.

However, this understanding does not exclude the abusiveness of the advertising evaluated in the “It’s Shrek time” case if the rules of the advertising self-regulation are analyzed. This advertising should be banned, but not because any advertising directed at children is illegal. The argument is different from the one put forward by the court. Section 1, d of Annex H of the Advertising Self-Regulation, which concerns food advertising, prohibits advertising that encourages excessive consumption of the product, especially when dealing with advertising for children (items 1, d and 5, b, Annex H of the Advertising Self-Regulation).¹²³ This was the case of the mentioned advertising and was also the reason for the CONAR to prevent the continued use of such advertising.¹²⁴

It is necessary to point out that this understanding does not corroborate the broad ban on advertising to children. If the advertising violates a rule extracted from the abusive advertising general clause,

it should be prohibit; however, it does not result that other advertisings toward children, even if it was used some persuading techniques, are not allowed.

6. Conclusive Remarks

The analysis of the Brazilian Superior Court of Justice’s decision required two parallel argumentative developments. First, it was necessary to contextualize the Brazilian legal framework regarding the advertising to children with other legal systems. Then, it suggests an appropriated modality of implementation of the central element of the Brazilian advertising system: the general clause of abusive advertising provided in the Consumer Code.

Through these arguments it was possible to identify and expose the real complexity of the Brazilian legal system regarding the advertising toward children. The general clause of abusive advertising can be a useful tool to protect the children, but it is important to clarify how it could be standardized. It was suggested its self-integration with legal principals of the order and successively with norms of self-regulation advertising. This interpretation may exclude the literal application of the Conanda’s resolution. First, there are many factor to evaluate if the advertising is targeted to the children – not only whether it is intended to persuade them; second, one should always evaluate if the advertising exploits the children’s natural credulity and inexperience, not only the use of some advertising techniques.

Considering this interpretation, the rules in Brazil concerning on this matter is very strict, but at the same time without adopting an asphyxiating regulation and permitting it to change over time. This comparative study was deemed obligatory since some researchers still consider that Brazil has an insufficient protection to its children.

After the mentioned conclusions the appropriate exam of the Superior Court of Justice’s decision was possible. There are various criticisms to it. The main one is that, although it adopted a precedential position on the matter, this court did not satisfy the argumentative burden to apply the general clause specially when concluding for the broad ban of advertising toward children of food products.

The effects of this decision and the Conanda’s resolution have been already felt. There was a great decrease of children programming hours broadcasted on television. However, besides the immediate economical consequences to the agencies, companies that produce products and services directed to children, and television broadcasts, one should note that the children are now being exposed to greater number of hours of programming designed to

¹²³ Annex H of the Brazilian Advertising Self-Regulation: “This Annex disciplines the commercial advertising of food, soft drinks, juice, chocolate, non-carbonated beverages and alcohol-free beverages similar to them, classified by public administration bodies, and obviously does not exclude compliance with specific legislation. 1. General Provisions - In addition to complying with the general precepts of this Code, advertisements for products subject to this Annex must: (...) (d) refrain from encouraging or relinquishing excessive consumption or presenting situations that encourage excessive consumption or conflict with this recommendation; (...) 5. In advertising of products subject to this Annex, the most restrictive interpretation shall be adopted where: (...) The product is intended for use by children”.

¹²⁴ Representation no. 205/2007 in the Conselho Nacional de Autorregulação Publicitária, rapporteur Paulo Chueiri (majority opinion).



adults. This is a harmful consequence that might neutralize any eventual positive effects of the ruling.

