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The CNMC's report calls for a review of various aspects of the Draft Royal Decree that will ban the advertising of certain foods and drinks to children

On 14 October 2022, the National Commission on Markets and Competition (in Spanish, the "CNMC") published the report IPN/CNMC/028/22¹ (the "Report"). The Report examines the Draft Royal Decree which prohibits commercial communications for certain foods and beverages² when these communications target children. The Draft Royal Decree also prohibits the appearance of influencers in such commercial communications and regulates commercial communications in audiovisual media services (the "Draft Royal Decree" or the "Royal Decree").

1. Context of the Draft Royal Decree

The Draft Royal Decree analysed in the Report flows from the special protection granted to minors in the Spanish legal system, enshrined in Article 20(4) of the Constitution. The scope of protection that has been subsequently implemented through legislative initiatives also covers habit-based health issues. Accordingly, the content of the Royal Decree seeks to regulate the advertising of foods and beverages that may substantially affect the preferences and eating habits of children. To this end, among other things, the Royal Decree provides for: (i) the prohibition of the broadcasting of commercial communications for certain foods and beverages targeting children, as well as the prohibition of public figures in commercial communications, the regulation of promotional activities targeting children and the conditions for commercial communications in audiovisual media services; (ii) the minimum content of co-regulation agreements and codes of conduct; (iii) the relevant food safety authority's obligation to publish the co-regulation agreements and codes of conduct that are established; and (iv) the CNMC's jurisdiction regarding the sanctioning regime for audiovisual service providers.

2. Observations made by the CNMC in its Report on the Draft Royal Decree

The CNMC stresses that any activity of the public administration that restricts economic activity must be justified, always taking into account the public interest and the principles of good regulation, necessity, proportionality and non-discrimination. Accordingly, the Report makes the following observations:

- The European Union is currently drafting legislation on a sustainable food system. This legislation is due to come into force in 2023³ and will address elements such as labelling that affect commercial communications. Therefore, the legislature should take this into account, to avoid publishing it in advance and being forced to immediately amend the content of the Royal Decree as a consequence of the European Union's regulatory proposal.
- The attribution to the CNMC of powers regarding complaints would significantly impact the budget, as it would require the recruitment of professionals with knowledge and experience in the area of audiovisual communication services and food safety, which it does not currently have.

¹ <https://www.cnmc.es/expedientes/ipncnmco2822> (last accessed 25/10/2022)

² In the case of Europe, commercial communications for chocolate and sugar confectionery, energy bars and sweet toppings and desserts would be prohibited. Cakes, sweet biscuits and similar baked goods, juices, energy drinks and ice cream shall be prohibited for all other food groups when they contain certain amounts of sugars, added sugars, saturated fats, total fat, sweeteners, and industrially produced trans-fatty acids per 100 grams.

³ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sistema-alimentario-sostenible-de-la-UE-nueva-iniciativa_es (last accessed 25/10/2022)

- The definition of the concept of "children's advertising" is not sufficiently clear and may lead to legal uncertainty as it does not sufficiently define those elements that may attract children. It also fails to explain the difference between attracting the attention of children and targeting children. Furthermore, by requiring content classification of audiovisual media services, a competitive difference or discrimination may be created between the different operators that broadcast commercial communications. The CNMC urges specificity and clarity in this regard.
- There is no mention of the regional audiovisual regulatory authorities, although the General Law on Audiovisual Communication takes their role into account. The Draft Royal Decree only mentions the CNMC, which in the Report urges the legislature to adapt the text to take into account the powers that have been granted to the regional audiovisual regulatory authorities in the General Law on Audiovisual Communication.
- Advertising of certain nutrient profiles is prohibited, as required by the World Health Organisation ("**WHO**")⁴. However, the WHO states that countries may modify these profiles according to national habits. Although childhood obesity is influenced by a variety of factors, much emphasis is placed on advertising as a key determinant. Thus, the CNMC has identified a number of consequences that intervention in the advertising sector could have on the market:
 - (i) Reduction of the consumption of products affected by the ban because they have a certain nutritional profile.
 - (ii) Reduction of the price of advertising in children's time slots, favouring the entry of operators of healthier products.
 - (iii) A barrier to entry for operators wishing to enter the market with products affected by the ban.

A ban on all advertising may curb the reformulation of certain foods, precisely when reformulation is initiated by the European Union. There are also cases of different product-specific treatments depending on the application of a given substance. The CNMC urges a review of the ingredients that are subject to a ban and the products in which they are used, in order to ensure competitive neutrality and a proper justification for a ban.

- The CNMC notes that it does not have the power to impose penalties for infringements committed by audiovisual providers. Therefore, the text should mention the CNMC's option to require the cessation of commercial communications, but not to sanction such infringing behaviour. Similarly, the CNMC calls for exclusive reference to social networks that allow video sharing, and not social networks in general, as only the former are subject to the General Law on Audiovisual Communication.
- Finally, the CNMC highlights the latest amendment to the General Law on Audiovisual Communication, as the Draft Royal Decree is adapted to the previous text. Accordingly, references to the current text, Law 13/2022 of 7 July, General Audiovisual Communication⁵, should be updated.

⁴ <http://fedn.es/docs/Nutrient-Profile.pdf> (last accessed 25/10/2022)

⁵ https://www.boe.es/diario_boe/txt.php?id=BOE-A-2022-11311 (last accessed 25/10/2022)

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