

# Chile: Front-of-Package Warning Labels and Food Marketing

Marcelo Campbell<sup>1</sup>

<sup>1</sup>: SCHOOL OF LAW AND SOCIAL JUSTICE, UNIVERSITY OF LIVERPOOL, UNITED KINGDOM

**Keywords:** Non-Communicable Diseases, Food Labelling, Food Marketing, Commercial Speech, Industry Litigation

**Abstract:** This Article aims to show how the food industry has instrumentalized the right to freedom of expression to oppose innovative laws in Chile aimed at creating healthier food environments.

According to Chile's National Statistics Institute, the country's three main causes of death are cancers (26%), cardiovascular diseases (25.6%), and respiratory diseases (12.6%).<sup>1</sup> A major contributing factor to such non-communicable diseases (NCDs) are overweight and obesity,<sup>2</sup> which affects 74.2% of Chile's population.<sup>3</sup> Moreover, people in lower socioeconomic groups suffer from higher rates of obesity, and women are more obese and morbidly obese than men.<sup>4</sup> Overweight and obesity are fundamentally caused by an energy imbalance between calories consumed and calories expended, making dietary habits and physical inactivity key risk factors. In this regard, it is not surprising that Chileans suffer from high rates of overweight and obesity and diet-related NCDs: they are large consumers of sugary drinks, averaging 190 calories per person per day,<sup>5</sup> and buy on average 201.9 kg of ultra-processed foods and beverages per person per year.<sup>6</sup> As regards physical activity, 86.7% of Chileans lead sedentary lifestyles, exercising less than three times a week.<sup>7</sup>

It is against this background that the Act on the Nutritional Composition of Food Products and their Advertising (the Food Act) entered into force in 2016.<sup>8</sup> The goal of this ambitious act was to promote healthier diets by introducing a mandatory front-of-package warning label (FOPL) for foods high in fats, sodium, sugar, or calories (HFSS foods), strict marketing and advertising restrictions of HFSS foods to children, and a sales ban of HFSS foods in schools, among other measures. Crucially, the Food Act is at the heart of a comprehensive, multi-sectoral nutrition policy aimed at curbing obesity and diet-related diseases, which includes an 18% excise duty on sugary drinks,<sup>9</sup> the promotion of breastfeeding,<sup>10</sup> and a prohibition to use nutrition and health claims on HFSS foods and food supplements.<sup>11</sup>

From the outset of the parliamentary discussions of Chile's proposed Food Act, national and multinational

---

**Marcelo Campbell** is a Doctoral Researcher at the School of Law and Social Justice, University of Liverpool (United Kingdom).

food companies expressed their discontent, advocating for an approach based on voluntary self-regulation and public-private partnerships instead.<sup>12</sup> In opposing the Food Act and its related regulations, the industry used all available means to try to influence the outcome of the legislative and regulatory processes and the perceived legality of these regulatory actions.

Illustrative are the international economic law concerns raised by corporations and industry associations in stakeholder submissions during public consultations related to Chile's subsequent regulations implementing the Food Act, as well as their extensive coordination with their government representatives to raise similar concerns in diplomatic government-to-government exchanges, particularly at the World Trade Organization's Technical Barriers to Trade Committee.<sup>13</sup> Moreover, the food industry expressed concerns under national law grounds in several parliamentary hearings and stakeholder submissions. These

of commercial expression were not included in subsequent formal legal challenges. Finally, I offer brief concluding remarks.

### Chile's Strengthened Food and Nutrition Policy

The Chilean Food Act became fully operational on 27 June 2016, when its implementing decree entered into force.<sup>14</sup> The Food Act contains *inter alia* provisions regulating food labelling and food information, food sales of foods in schools, and food marketing and advertising. Additionally, regulations concerning health and nutrition claims were adopted separately by Chile's Ministry of Health to bring relevant rules in compliance with the newly adopted Food Act.

#### *Front-of-Package Warning Labels*

The Food Act's mandatory FOPL scheme mandates that food products that exceed certain nutrient thresh-

**Taking these arguments as a starting point, this contribution shows how the industry relied heavily on the right to freedom of commercial expression during parliamentary hearings and stakeholder submissions to oppose Chile's advertising and marketing restrictions, but later on relied primarily on the right to property to build their arguments in formal legal challenges. It is argued that this practice reflects an instrumentalization of legal rights, and is part and parcel of the industry's legal strategies to oppose state regulation more generally.**

legal concerns were primarily based on constitutional rights, including the right to freedom of commercial expression and the right to property.

Taking these national law challenges as a starting point, the goal how the industry relied heavily on the right to freedom of commercial expression during parliamentary hearings and stakeholder submissions to oppose Chile's advertising and marketing restrictions, but later on relied primarily on the right to property to build their arguments in formal legal challenges. It is argued that this practice reflects an instrumentalization of certain legal rights, and is part and parcel of the industry's legal strategies to oppose state regulation more generally.

After briefly describing the most contested measures introduced by the Food Act and its related regulations, I consider more fully specific arguments raised by multinational food companies in challenging some of these measures, and explore possible explanations as to why arguments alleging breaches of freedom

olds for sodium, sugar, fats and calories be marked with black octagonal warning signs (resembling traffic STOP signs) on the front of their packaging.<sup>15</sup> Written on these signs is the warning "High in..." for each nutrient exceeding the legal thresholds (e.g. "High in sugar"). Thus, a product may have to display up to four "High in..." warnings, occupying significant space from the front face of a product's packaging. The nutrient thresholds set by the Ministry of Health are also particularly strict if compared with the voluntary FOPL schemes introduced in other countries, like the United Kingdom or Australia for example.<sup>16</sup> However, they have been applied gradually to allow sufficient time for the industry to adapt. The strictest thresholds entered into force on June 27, 2019 and the FOPL scheme will be mandatory for smaller businesses as of June 27, 2022.

### *Marketing and Advertising Restrictions*

Strict marketing and advertising restrictions were included in the Food Act to protect children from pervasive and ubiquitous exposure to unhealthy food marketing.<sup>17</sup> In particular, HFSS foods can no longer be advertised to children under 14 years of age,<sup>18</sup> and cannot appear on TV or in cinemas between 6 am and 10 pm.<sup>19</sup> Crucially, the advertising ban to children has been interpreted by health authorities as prohibiting also the use of cartoons and other child-attractive figures on the packaging of HFSS foods, affecting brand equity characters such as Tony the Tiger and Cheetos' Chester Cheetah.<sup>20</sup> Finally, marketing restrictions have banned the use of "commercial hooks" unrelated to the product itself (e.g. toys, contests, raffles, stickers, games, etc.), banning products like Ferrero's Kinder Surprise eggs from the Chilean market.<sup>21</sup>

### *Prohibition of Using Nutrition and Health Claims*

The use of voluntary nutrition and health claims such as "sugars-free" on HFSS foods has also been prohibited, primarily on the basis that they could mislead consumers.<sup>22</sup> Moreover, the use of such claims has been banned from certain food products regardless of their nutritional composition because they do not align with the varied and balanced diet that Chile is seeking to promote according to its dietary guidelines and national nutrition policy. Such products include food supplements, sports foods, and infant formulas.<sup>23</sup>

## **Legal Arguments Raised by the Food Industry**

In addition to arguments based on international economic law, the food industry has also raised several objections based on Chilean constitutional law in their attempt to oppose the Food Act and its related regulations, and in particular arguments pertaining to the right to freedom of expression and the right to property.

### *The Right to Freedom of Commercial Expression*

Concerns related to the right to freedom of commercial expression were first raised during parliamentary hearings discussing the Food Act bill. In particular, the National Advertisers Association (NAA), whose list of members includes multinational food companies such as Coca-Cola, Unilever, and Nestlé,<sup>24</sup> stressed that the restrictions included in the bill would infringe Article 19(12) of the Chilean Constitution, which protects the "freedom to express opinions and to inform, without previous censorship, in any form and by any means."<sup>25</sup> The interpretation advanced by the NAA also claimed that freedom of commercial expression was as "indis-

pensable" as any other form of expression or communication (e.g. artistic, political and journalistic), and thus protected to the same degree.<sup>26</sup>

It is worth noting that such an interpretation was very expansive considering that commercial speech has traditionally been excluded from discussions concerning freedom of expression in Chile. The concept itself was not mentioned by the Chilean constituents mentioned when discussing the inclusion of freedom of expression in the Chilean Constitution, and is normally not included in leading academic works on the topic.<sup>27</sup> Moreover, the interpretation advanced by the industry did not consider that the advertising restrictions only apply to a subset of products, i.e. HFSS foods, and only when directed at children. Neither did it consider that the right to health is also protected by the Chilean Constitution. These are all important factors to consider, as the Constitutional Court of Chile has explicitly acknowledged that freedom of expression is not an absolute right and can and should be subject to legitimate restrictions in a democratic society to protect other rights and values, including public health.<sup>28</sup> Taking into account the widespread use of a proportionality test to strike a fair balance between competing interests,<sup>29</sup> one would have expected considerations relevant to such test to have been included in the NAA's arguments relating to commercial speech or freedom of commercial expression. As discussed below, a better understanding of the industry's arguments based on commercial speech reflect an instrumentalization of certain legal rights to oppose food marketing and advertising restrictions, rather than genuine concerns based on their understanding of their legal entitlements.

Similarly, concerns related to commercial speech were raised by the Latin American Alliance for Responsible Nutrition (ALANUR) — an association that represents producers of food supplements in Latin America — albeit in relation to proposals to ban the use of nutrition and health claims on food supplements and sports foods. These concerns were raised in stakeholder submissions during public consultations, where the industry claimed that the right of business operators to inform consumers about the science-based health benefits of their food products was also protected under Article 19(12) of the Chilean Constitution.<sup>30</sup> By anchoring their arguments on the scientific accuracy of the nutrition and health claims — rather than on commercial speech more generally — the industry was also able to invoke Articles 29 and 33 of the Chilean Consumer Protection Act, which permits the dissemination of accurate and truthful product information. The Ministry of Health

responded stressing that the industry's right to inform was already guaranteed by the possibility to provide relevant information to consumers in the ingredients list and nutrition declaration of their food products. It further argued that using nutrition and health claims could not be permitted taking into account Chile's nutrition policy, which seeks to promote a varied and balanced diet.

### *The Right to Property*

The right to property has been at the center of formal legal challenges against the Food Act and its related regulations. The food industry has primarily challenged the prohibition to use child-attractive trademarks on the packaging of their food products, claiming that such prohibition constitutes a “regulatory taking” of their intellectual property. Lawsuits were filed by multinational companies including Kellogg's,<sup>31</sup> PepsiCo,<sup>32</sup> and Carozzi.<sup>33</sup> Whilst most cases have been dismissed, one major case is still pending.<sup>34</sup>

In their claims, the industry relied on Article 19(24) of the Chilean Constitution, which protects the right to property and states that “[o]nly the law may establish the form of acquiring, using, enjoying, and disposing of property.” Since the Food Act and its related regulations do not include trademarks in their definition of advertising, the industry claimed that health authorities' prohibition to use child-attractive trademarks on the packaging of HFSS foods was illegal and expropriatory, demanding adequate and effective compensation.<sup>35</sup>

Thus far, courts have ruled against the food industry, stating that trademarks fall within the scope of the Food Act and its related regulations,<sup>36</sup> which means that resulting use-restrictions do not constitute a deprivation of the companies' intellectual property rights.<sup>37</sup> Courts have also weighed the right to property against the right to health, ruling that public health concerns justify Chile's advertising restrictions.<sup>38</sup> Overall, the advertising restrictions have been found to be lawful under Chilean law, and health authorities have been given a wide margin of discretion to implement the Food Act and its related regulations.<sup>39</sup>

### **Remarks on the Food Industry's Legal Strategies**

It is interesting to note that not all legal arguments raised prior to the adoption of the Chilean Food Act and its related regulations have reached national courts. Although legal arguments raised in formal legal challenges are largely dependent on the factual circumstances of the case — which in Chile have primarily concerned decisions of health authorities pro-

hibiting the use of trademarks — two factors may explain why the food industry has not invoked the right to commercial speech in formal litigation.

Firstly, by contesting primarily the trademark restrictions read into the Chilean Food Act and its related regulations — and linking this to the constitutional protection of the right to property — the food industry has sought to center the courts' attention on questions concerning the scope of application of the Food Act and on the alleged lack of powers of health authorities, thus avoiding questions of proportionality. This strategy is further confirmed by the large amount of evidence submitted to demonstrate that the use of trademarks on the packaging of food products should not be considered to be a form of advertising.<sup>40</sup>

Secondly, by relying on the high level of protection afforded to the right to property by the Chilean Constitution and traditionally by the Chilean judiciary, the industry confidently put forward the interpretation that intellectual property was protected under the Constitution to the same degree as normal property. Such interpretation was likely reinforced by concordant opinions of prominent Chilean constitutional and intellectual property lawyers, some of whom submitted legal expert opinions supporting the industry's case.<sup>41</sup>

Had the industry advanced alternative or complementary arguments based on the right to freedom of commercial expression, it would have had to overcome several legal hurdles, such as convincing the courts that the right to freedom of expression covers commercial speech and also protects it to the same degree as other forms of expression (e.g. artistic, political and journalistic). Moreover, the industry would also have had to make a *prima facie* case that the restrictions on commercial speech were disproportionate in the context of Chile's obesity epidemic. These difficulties could explain why there has been no lawsuits to date challenging other aspects of the strict marketing and advertising restrictions introduced by Chile, as well as the prohibition to use nutrition and health claims to promote certain products, despite their being strongly resisted during parliamentary hearings and public consultation procedures.

### **Conclusion**

Consistent with research demonstrating the relevance of interpretive contests between regulators and corporations over the legality of specific regulatory measures,<sup>42</sup> this contribution has shown that the food industry put forward very expansive interpretations of the right to freedom of expression during parliamentary hearings and public consultation submis-

sions to protect their advertising and marketing practices from State regulations in Chile. However, once adopted, arguments on the right to freedom of expression were not included in formal legal challenges, suggesting that industries' pre-regulatory interpretive practices do not necessarily correspond to their actual understanding of their legal entitlements, but are rather part of their overall legal strategies to do away with or diminish the effect of unwanted State regulations. The fact that no other lawsuits have been filed against unparalleled strict advertising restrictions of food products introduced by Chile, as well as prohibitions to use science-based nutrition and health claims on certain food products, further reinforces this conclusion.

#### Note

The author has no conflicts to disclose.

#### References

- National Statistics Institute of Chile, *Anuario de Estadísticas Vitales, 2019, 2021*, available at <[https://www.ine.cl/docs/default-source/nacimientos-matrimonios-y-defunciones-publicaciones-y-anuarios/anuarios-de-estad%C3%ADsticas-vitales/anuario-de-estad%C3%ADsticas-vitales-2019.pdf?sfvrsn=97729b7b\\_5](https://www.ine.cl/docs/default-source/nacimientos-matrimonios-y-defunciones-publicaciones-y-anuarios/anuarios-de-estad%C3%ADsticas-vitales/anuario-de-estad%C3%ADsticas-vitales-2019.pdf?sfvrsn=97729b7b_5)> (last visited May 3, 2022).
- WHO, "Obesity and Overweight: Key Facts and Figures," June 9, 2021, available at <<https://www.who.int/news-room/factsheets/detail/obesity-and-overweight>> (last visited May 3, 2022).
- Ministry of Health of Chile, *Encuesta Nacional de Salud 2016-2017: Primeros resultados*, 2017, available at <[https://www.minsal.cl/wp-content/uploads/2017/11/ENS-2016-17\\_PRIM-EROS-RESULTADOS.pdf](https://www.minsal.cl/wp-content/uploads/2017/11/ENS-2016-17_PRIM-EROS-RESULTADOS.pdf)> (last visited May 3, 2022).
- Id.*
- B. M. Popkin and C. Hawkes, "Sweetening of the Global Diet, Particularly Beverages: Patterns, Trends, and Policy Responses," *The Lancet Diabetes and Endocrinology* 4, no. 2 (2015): 174-186.
- PAHO and WHO, *Ultra-Processed Food and Drink Products in Latin America: Trends, Impact on Obesity, Policy Implications* (Washington DC, 2015): at 18.
- See Ministry of Health of Chile, *supra* note 3.
- Ley N° 20.606 – Sobre la Composición Nutricional de los Alimentos y su Publicidad (Act No. 20.606 – On the Nutritional Composition of Food Products and their Advertising), available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC150722/>> (last visited May 4, 2022).
- See Article 2(10) of Act No. 20.780, available at <[www.bcn.cl/leychile/navegar?idNorma=106719](http://www.bcn.cl/leychile/navegar?idNorma=106719)> (last visited May 4, 2022). For a detailed account of how the food and beverage industry opposed tax reforms in Chile see A. Carriedo et al., "The Political Economy of Sugar-Sweetened Beverage Taxation in Latin America: Lessons from Mexico, Chile, and Colombia," *Globalization and Health* 17, no. 5 (2021), available at <<https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-020-00656-2>> (last visited May 3, 2022).
- See Act No. 21.155, available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC186500/>> (last visited May 4, 2022).
- See Resolution No. 860 of the Ministry of Health, available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC208108/>> (last visited May 4, 2022). A complete list of measures adopted by Chile as part of its nutrition policy, available at <<https://dipol.minsal.cl/departamentos-2/nutricion-y-alimentos/nutricion/>> (last visited May 3, 2022).
- Drafting history of the Food Act, available at <[www.bcn.cl/historiadelaync/historia-de-la-ley/4468/](http://www.bcn.cl/historiadelaync/historia-de-la-ley/4468/)> (last visited May 4, 2022).
- T. Dorch and P. Mertenskötter, "Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label," *Law & Society Review* 54, no. 1 (2020): 571-606.
- Decree No. 13 of the Ministry of Health, available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC155737/>> (last visited May 4, 2022).
- See Article 5 of the Food Act, *supra* note 8, and Article 1 of Decree No. 13, *supra* note 14.
- For a comparison, see Decree No. 13, *supra* note 14; Department of Health of the United Kingdom, *Guide to Creating a Front of Pack (FoP) Nutrition Label for Pre-Packed Products Sold through Retail Outlets*, 2016; and Department of Health of Australia, *Health Star Rating System: Calculator and Style Guide*, 2021.
- See the drafting history of the Food Act, *supra* note 12.
- Advertising to children under 14 years of age is defined in Article 1 of Decree No. 13 as advertising that uses celebrities, characters, cartoons, toys, animations, children's music, among other elements. It also includes advertisements in TV shows or websites aimed primarily at children or having an audience of at least 20% of children under 14 years of age.
- See Article 2 of Act No. 20.869, available at <<https://www.fao.org/faolex/results/details/en/c/LEX-FAOC150722/>> (last visited May 3, 2022).
- A. Jacobs, "In Sweeping War on Obesity, Chile Slays Tony the Tiger," February 7, 2019, available at <<https://www.nytimes.com/2018/02/07/health/obesity-chile-sugar-regulations.html>> (last visited May 3, 2022).
- C. Bleiker, "The Evil Egg: Chile bans Kinder Surprise," June 28, 2016, available at <<https://www.dw.com/en/the-evil-egg-chile-bans-kinder-surprise/a-19362518>> (last visited May 3, 2022).
- See Article 1 of Decree No. 13, *supra* note 14.
- See Resolution No. 860 of the Ministry of Health, *supra* note 11.
- More information about the National Advertisers Association and its members can be found at <<https://www.anda.cl/nuestros-socios/socios/>> (last visited May 3, 2022).
- An unofficial translation of the Chilean Constitution can be found at <[https://www.constituteproject.org/constitution/Chile\\_2021?lang=en](https://www.constituteproject.org/constitution/Chile_2021?lang=en)> (last visited May 3, 2022).
- See the drafting history of the Food Act, *supra* note 12.
- See J. Charney and P. Marshall, "Libertad de Expresión," in P. Contreras and C. Salgado, eds., *Curso de Derechos Fundamentales* (Tirant lo Blanch, 2020): at 567-504.
- Constitutional Court of Chile, STC 3933, at paras. 37 y 53. In making this statement, the Court referred to Article 13.2 of the Interamerican Convention on Human Rights and Article 19.3 of the International Covenant on Economic, Social and Cultural Rights.
- Id.*, at paragraph 54. For a comparative study on how freedom of commercial expression has been balanced against public health in Europe and the US see A. Garde, "Freedom of Commercial Expression and Public Health Protection: The Principle of Proportionality as a Tool to Strike the Balance", in N.N. Shuibhne and L.W. Gormley, eds., *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012): at 117-133.
- A complete list of the legal concerns raised by the industry and the responses of the Ministry of Health during the public consultation procedure can be found at <<https://www.minsal.cl/wp-content/uploads/2017/06/Consolidado-Obs-y-Resp-CP-764.pdf>> (last visited May 3, 2022).
- Kellogg Company v Ministry of Health*, case 107376-2016 (*protección*), Santiago Court of Appeal.

- 
32. *Evercrisp Snacks Productos de Chile v the State*, case C-10665-2017, Second Civil Court of Santiago.
33. *Empresas Carozzi v. Ministry of Health*, case 46253-2017 and 46273-2017 (*protección*), Santiago Court of Appeal; and *Empresas Carozzi v. the State*, case C-17913-2017, Fifteenth Civil Court of Santiago.
34. Currently pending is *Evercrisp Snacks Productos de Chile v. the State*, case C-10665-2017, Second Civil Court of Santiago.
35. Case C-10665-2017, *supra* note 32, legal complaint, at paragraphs 144–148 and 151–162, and notice of appeal, at paragraphs 45, 53–55 and 98; case C-17913-2017, *supra* note 33, legal complaint, at paragraph 8; case 46253-2017, *supra* note 33, legal complaint, at 10–14; concurrent cases 46253-2017 and 46273-2017, *supra* note 33, notice of appeal, at 11; and case 107376-2016, *supra* note 31, legal complaint, at 29–32 and 35–37.
36. Decision of the Court of First Instance, case C-10665-2017, *supra* note 32, at paragraph 23.
37. Decision of the Court of Appeal, concurrent cases 46253-2017 and 46273-2017, *supra* note 33, at paragraph 7.
38. Decision of the Court of Appeal, case C-17913-2017, *supra* note 33, at paragraphs 20–21.
39. *Id.* See also decision of the Court of First Instance, case C-10665-2017, *supra* note 32, at paragraph 28.
40. *Evercrisp Snacks Productos de Chile v. the State*, *supra* note 32.
41. *Id.*
42. See Dorlach and Mertenskötter, *supra* note 13.
-