

Decision T-543 of 2017

Presiding Judge: Diana Fajardo-Rivera

**Executive Summary Prepared by
Dejusticia and Educar Consumidores**

The Constitutional Court held that the Superintendency of Industry and Commerce censored the organization Educar Consumidores, and it cautioned the Superintendency that henceforth it could not exercise prior control over informational contents. The Court also decided that consumers have the right to receive information about the risks that sugary drinks pose to our health.

The Facts and Background of the Decision

In August 2016, Educar Consumidores, a non-profit organization that works for the implementation of health policies in Colombia, launched a commercial that was broadcast on television and also several radio stations in the country that showed the sugar quantities of several sugary drinks. Postobón S.A., a Colombian sugary drinks company, filed a proceeding against the commercial for alleged “false advertising.” In a decision dated September 7, 2016, the Superintendency of Industry and Commerce (SIC), a Colombian entity responsible for monitoring consumer

rights, issued Resolution 59.176, ordering Educar to stop broadcasting the commercial in all the media channels where it was circulating, including the internet. Additionally, it ordered Educar to “forward to the Superintendence of Industry and Commerce any advertising piece related to the consumption of sugary drinks [...] before its broadcast so preventive control over the information can be carried out”.

After the decision, Educar Consumidores submitted a new commercial to the SIC for prior review, attaching scientific evidence of the commercial’s claims. Part of the evidence was presented in English and some studies in Spanish. In the review of the new commercial, the SIC considered it could not take into account this information because it was in a language other than Spanish and should be translated. Although Educar Consumidores gave up the evidence presented in English and requested that only the one in Spanish be taken into account, and, due to the insistence of the SIC, Educar subsequently presented official Spanish translations of the most important pieces of evidence, the SIC did not allow the emission of this second commercial either.

In response to Resolution 59.176, two *tutelas* were initiated. The first *tutela*, filed by Educar Consumidores, argued, on the one hand, that its right to freedom of expression was violated when the SIC censored a commercial with informational content about the health effects of the consumption of sugary beverages and, on the other hand, that its fundamental right to due process was violated because the decision was adopted without the proper notice of the proceedings. The second *tutela*, initiated by 23 citizens –who are part of member organizations of the Alliance for Food Health (including Dejusticia)– in their capacity as consumers, argued the violation of their right to receive information about the health risks of the consumption of sugary drinks as a result of the SIC’s resolution ordering that the commercial not be broadcast and the silencing of the information campaign “Take Care Of Your Life - Take It Seriously.”

The first *tutela* was denied by the first and second instance courts. The second one was denied in the first instance and granted in the second instance by a decision of the Supreme Court of Justice. In its ruling, the Supreme Court protected the right to due process of 23 citizens and ordered the SIC to join them to the proceedings. The ruling also protected the right of consumers to access information related to the health effects of sugary drinks and recognizes them as “decision-making citizens.” The Supreme Court left the SIC resolution without grounds, therefore allowing the broadcast of the commercial.

The Constitutional Court selected the two *tutelas* for review and unified them in a single case file. Through decision T-543 of 2017 the Constitutional Court examined the two proceedings and decided on the substance of the petitions.

The Grounds of the Constitutional Court's Decision

- The Constitutional Court referred “to the close relationship existing between democracy and freedom of expression, by establishing that freedom of expression is a fundamental element on which the existence of a democratic society is based.” In addition, it recalled a pronouncement of the Inter-American Court of Human Rights setting forth that “a society that is not well informed is not truly free.”
- With reference to freedom of expression, the Constitutional Court, citing the Inter-American Court, recognized that it includes “not only the right and freedom to express one’s own thoughts but also the right and freedom to seek, receive and impart all types of information and ideas.” Whilst the first refers to its “individual” dimension, the second references its “social” dimension, thereby constituting a right that is a “two-way street.”
- The Constitutional Court held that freedom of expression is not an absolute right; that instead, in accordance with General Comment No. 34 of the Human Rights Committee and the Inter-American Court, it may be subject to restrictions.
- However, the Constitutional Court also held that

[...] any limitation on freedom of expression is presumed suspect, so it must be subject to a strict scrutiny constitutionality test, which requires verifying that the restriction that is intended to be imposed: i) is provided by law; ii) pursues the achievement of compelling aims that should be related to respect for the rights of others or the protection of national security, public order, public health or morals; iii) is necessary for the accomplishment of those aims; and iv) does not impose a disproportionate restriction on the exercise of freedom of expression. Additionally, it is necessary to verify that v) the restrictive measure is subsequent and not prior to the expression subject to the limitation, as well as that vi) it does not constitute any type of censorship, which includes the requirement of being neutral with respect to the content of the expression that is being limited.

- The Constitutional Court considered that regarding the potential conflict between the exercise of freedoms and rights, there is a variety of responses. For example, in the event of the abusive exercise of freedom of expression, the “private person or a journalist may be subject to the determination of subsequent liabilities, as is the case when the right to honor and reputation is affected.” However, linked to the



possibility of establishing subsequent liabilities and citing jurisprudence of the Inter-American Court, the Constitutional Court recalled that prior censorship is prohibited and reiterated its jurisprudence according to which “any state regulation or decision of an official of the State that constitutes censorship implies, *ipso jure*, a violation of the right to freedom of expression.”

- The Court specified that “any state regulation in the arena of freedom of expression should be strictly neutral regarding the contents of the communication, for in a democratic, open and pluralist society, there can not be instances charged with determining which contents are ‘correct’ or ‘legitimate’.” It stated that censorship occurs when the state authorities, invoking the performance of their duties, supervise the contents of what is sought to be informed, published, transmitted or expressed through the media, printed publications or any form of communication or expression, in order to submit the disclosure of the content to their permission, authorization, prior examination, or the trimming, adaptation or modification of the content.

The Constitutional Court's Analysis of the Case Under Review

- Regarding the fundamental right to *due process*, the Constitutional Court held that the SIC “violated the right of the petitioners to administrative due process when it initiated an administrative proceeding against the petitioners without communicating it to them, hence preventing the exercise of the guarantees that derive from this right.” The absence of communication prevented Educar from “participating in the proceedings in order to exercise its right to defense and the *audi alteram partem* principle, as well as the right to request, provide and contest evidence.”
- For the Court it is also objectionable that after the resolution ordering the withdrawal of the commercial, the SIC adopted measures without justification. For example, in response to a subsequent petition from Educar requesting the broadcast of a second commercial, the SIC held it was not possible because several of the supporting documents were in English. Although Educar requested that only the information in Spanish be taken into account, the SIC decided to uphold its decision without offering additional considerations.
- The Constitutional Court confirmed the decision of the Supreme Court of Justice that held that the right to administrative due process had also been violated with respect to the intended recipients of the campaign because they were not joined to the administrative proceedings.
- In relation to the fundamental right to *freedom of expression*, and particularly the right of consumers to receive information, the Court determined its essential role:
 - (i) First of all, it guarantees the right of consumers to the relevant information about the food products they consume, which gives meaning to the essential core of their right to information. (ii) Second, it enables consumers to freely choose the food products they wish to consume, according to their own life orientation, thus respecting the essential core of the right to choose, which falls to the consumer and is connected clearly to the expression of the free development of their personality. Third, (iii) *it guarantees protection and prevention regarding health, by admitting the presumed or eventual risks linked to aspects of the development of these products that, as yet, are unknown to society, on the basis of the precautionary principle* [and] (iv) it fulfills an instrumental role, by facilitating the monitoring of these products by the corresponding authorities.

- The Court also took into account that

[...] as put forth by some of the participants and the Civil Cassation Chamber of the Supreme Court of Justice when it issued the second instance decision, one of the guiding principles of Law 1751 of 2015 is the *importance of information for the protection of health*, which was also pointed out by the Committee on Economic, Social and Cultural Rights.

- The Court determined that

[...] The messages broadcast by Educar Consumidores -which is a non-profit organization and does not promote any product- are part of a public health campaign that, beyond influencing a consumer decision, sought to warn of the health risks posed by the excessive consumption of sugary beverages, substantiated by this association with the numerous studies that were submitted to the SIC and were never examined by this public entity. In other words, *the message broadcast by Educar Consumidores falls within the “information” and not the “advertising” category.*

- This difference in the type of message allowed the Constitutional Court to conclude that the SIC “cannot adopt any measure that implies prior control over the information –regardless of the medium used to broadcast it– and that it can only adopt subsequent liabilities [...].” That is, for the Court, “the powers exercised by the SIC to issue Resolution 59.176 of 2016 were not prescribed by law”.

- In addition to not having the authority to order the measure, the Court concluded that the Resolution censuring the Educar Consumidores commercial did not fulfill any of the other requirements indicated in the ruling for limiting the right to freedom of expression:

(i) it did not indicate the precise, clear and limited legal basis of the aim, nor how, concretely and specifically, the right of consumers was affected by broadcasting the information (defining and argumentative burden); and (ii) the factual and technical elements that underpinned the SIC’s decision, did not have a solid evidentiary foundation that provided sufficient certainty as to its veracity. Thus, *although the SIC indicated it did not know what were the scientific grounds that supported the truth of the assertions of the broadcasted information, the fact is it also lacked scientific grounds to assert the opposite (ad ignorantiam fallacy);* in addition, Educar Consumidores did not have the opportunity to participate in the administrative proceeding and submit the respective supporting information, which -after being sent to the SIC- was never reviewed (burden of proof).

- The Constitutional Court recalled that prior censorship is prohibited by the Constitution (Article 20) and that the measures established by the SIC Resolution “did not pursue a compelling aim and were not necessary, in addition to constituting prior censorship measures for they established the prior control of the contents that were intended to be broadcast”.
- For all these reasons, the Constitutional Court concluded that the SIC violated the petitioners’ right to inform and receive information “because the measures established therein were not provided for by law, did not pursue a compelling aim and were not necessary, in addition to constituting prior censorship measures because they established previous control on the contents that were intended for broadcast”.

The Specific Orders of the Constitutional Court

1. It confirmed the decision of the Civil Cassation Chamber of the Supreme Court of Justice that protected the rights of 23 consumers to receive information about the products available in the market (*tutela* by Dejusticia and other organizations of the Alliance for Food Health).
2. It granted the *tutela* of Educar Consumidores over their rights to inform (as a component of freedom of expression) and their right to due process.
3. It ordered the Superintendence of Industry and Commerce to communicate, within 5 days of notice, the content of the decision to the entities to which the censoring Resolution had been notified and communicated. That is, to Educar Consumidores, the media outlets where the television commercial was broadcast the District Institute for Recreation and Sports.
4. It ordered the Superintendence of Industry and Commerce to, for a three-month period from the publication of the judgment, publish on the homepage of its website a hyperlink to access the decision and a statement summarizing its content.
5. It cautioned the SIC that, in exercising its administrative powers in reference to consumer protection, it cannot adopt any measures that imply the prior control of the information -irrespective of the medium where it is broadcast- and that it can only adopt subsequent liabilities, in the context of which, the fundamental rights of those involved must be respected, including the right to administrative due process.

The Importance of this Decision for Colombia and the Region

- This is the first time that the Constitutional Court of Colombia rules in favor of the right of consumers to receive information about the effects of sugary drinks on their health.
- The Court advised the SIC that it cannot exercise prior control over public health information in any other case and reiterated the criteria that must be fulfilled in cases where there is an intent to limit freedom of expression.
- The Court recalled that freedom of expression includes not only the right to express one's thoughts but also the right to seek, receive, access and disseminate information. That is to say, it recognizes it is a "two-way street" right.
- The Court distinguishes between the characteristics of a message that corresponds to the definition of information (such as the Educar Consumidores commercial) and those of an advertising message.
- The Constitutional Court established that "the protection of freedom of expression and its corresponding boundaries applies to the internet and social networks in the same manner it applies to other media, therefore, restrictions must be analyzed in the light of the same standards."