



ADVERTISING JURY

OPINION

Complainant	National Association of Soft Drinks (ANFABRA)
Claimed	Komvida Kombucha, SL
Subject Name	Santa Claus is dead. Internet
Case No.	05/R/ JANUARY 2025
Phase of the process	First Instance
Organ	Section Two
Date	January 24, 2025

SUMMARY

Opinion of January 24, 2025, of the Second Section of the AUTOCONTROL Jury, expressing the opinion of the Section on the deontological correctness of an advertisement for which Komvida Kombucha, SL is responsible

The post consisted of an advertisement distributed through Instagram, which, under the guise of an obituary, included the text: *"Santa Claus has passed away in Lapland on December 11, 2024 at the age of seventy-two. RIP Santa Claus, known for his inexhaustible energy and contagious laugh, saw his health affected over the years due to excessive consumption of sugary drinks on his endless journey around the world. His overloaded intestinal microbiota stopped supporting him. His fatty liver had had enough. His heart could no longer take it. This case reminds us that excessive consumption of sugary drinks not only affects daily well-being, but can have serious and irreversible consequences for our long-term health. At Komvida, we believe that everyone's well-being is the most important thing. Let's take care of what we consume; our lives will thank us."*

The Section considered that the advertising conveys to the consumer public that sugary drinks are harmful to health with serious and irreversible consequences, and may even cause death, and was therefore derogatory and contrary to rule 21 (denigration) of the AUTOCONTROL Advertising Code of Conduct.

On the other hand, it considered that, if in the context of an adversarial procedure that could not take place, the advertiser provided sufficient evidence to fully prove the truth and accuracy of the message conveyed in the advertising, which is that the drinks sold by Komvida do not contain sugar, this would be compatible with rule 14 (principle of truthfulness) of the AUTOCONTROL Advertising Code of Conduct. Otherwise, the advertising should be considered misleading and incompatible with the aforementioned rule.

And finally, it assessed that the communication contained several elements that clearly revealed to the average consumer that it was intended to promote the drinks that the defendant company promotes, and therefore did not find any violation of rule 13 (covert advertising) of the AUTOCONTROL Advertising Code of Conduct.

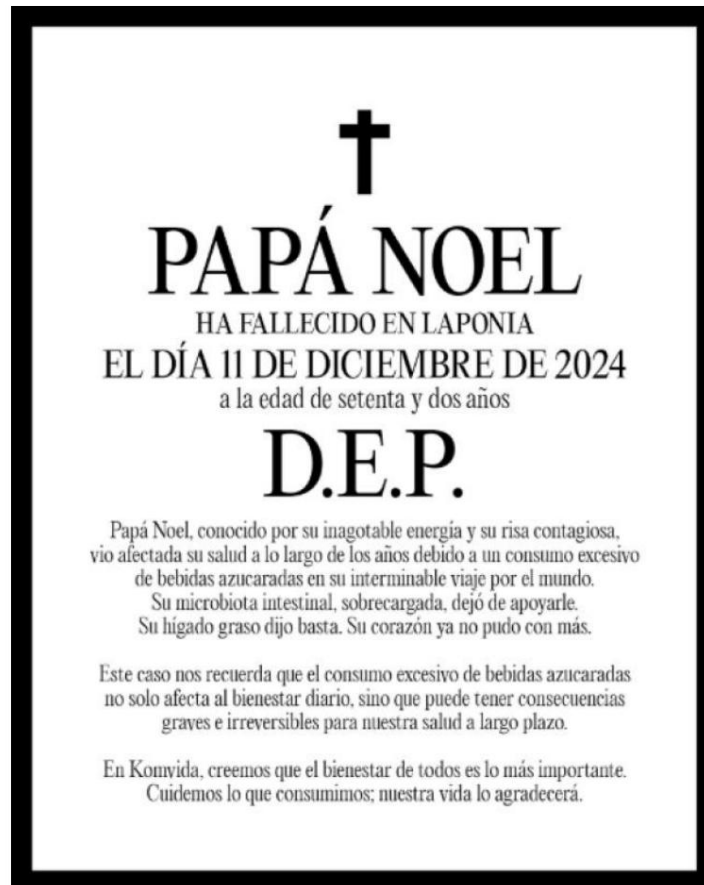
FULL TEXT

In Madrid, on January 24, 2024, the Second Section of the Jury of AUTOCONTROL, Association for the Self-Regulation of Commercial Communication, chaired by Ms. María Teresa De Gispert Pastor, held a meeting, issues, by majority of its members, the following

OPINION

I. Factual background.

1. On January 9, 2025, the National Association of Soft Drinks (hereinafter, "ANFABRA") filed a complaint against an advertisement for which the company Komvida Kombucha, SL (hereinafter, "Komvida") is responsible.
2. The complaint is directed against an advertisement distributed via Instagram, which is inserted below, in which, under the guise of an obituary, the following message is included: "Santa Claus has passed away in Lapland on December 11, 2024 at the age of seventy-two. RIP Santa Claus, known for his inexhaustible energy and contagious laugh, saw his health affected over the years due to excessive consumption of sugary drinks on his endless journey around the world. His overloaded intestinal microbiota stopped supporting him. His fatty liver had had enough. His heart could no longer take it. This case reminds us that excessive consumption of sugary drinks not only affects daily well-being, but can have serious and irreversible consequences for our long-term health. At Komvida, we believe that everyone's well-being is the most important thing. Let's take care of what we consume; our lives will thank us for it."



From now on, we will refer to this advertising as the “Advertising subject of this Opinion”.

3. As set out in its complaint, ANFABRA considers that the Advertising that is the subject of this Opinion would be unlawful for the following reasons:

- (i) Both through the channel used for its dissemination (Instagram) and through the reference to the character of Santa Claus, the advertising subject to this Opinion is aimed at children and adolescents and exploits their natural naivety and credulity.
- (ii) It denigrates sugary drinks to the extent that the Advertising subject of this Opinion alludes to the fact that excessive consumption of this type of drink damages the intestinal microbiota, the liver and the heart of people to the point of causing death, which, in the opinion of the claimant, is neither accurate nor true.
- (iii) It violates the right to honour and image of sugary drinks, which are, according to the complainant, unjustly accused of causing serious and irreversible damage to health.
- (iv) It misleads the target public by presenting itself as a different and contrasting drink to sugary drinks, when the truth is that, according to the complainant, the drinks marketed by the respondent contain sugar among their ingredients.
- (v) It is not identified as a commercial communication, hiding its true commercial purpose, which is none other than, in the opinion of ANFABRA, to implicitly promote the sale of the Komvida beverage.

4. The claim was forwarded to the advertising company, but it has not submitted a written statement reply.

II. Deontological foundations.

1. Before analyzing the merits of the case, it should be noted that, to the extent that the document that gave rise to this procedure is directed against a company that is not a partner of AUTOCONTROL nor is it linked to the Jury for other reasons, this opinion is not binding on it.

In this regard, it should be noted that, as in the rest of the advertising self-regulation bodies existing in all the countries of the EU environment, and with the aim of creating systems open to society, the AUTOCONTROL Jury is entrusted with the resolution of those controversies that are presented to it by any natural or legal person with a legitimate interest, against advertising pieces of both associated companies and third parties. However, the resolutions that settle such controversies are only binding on the associates, who have voluntarily expressed their adherence to the AUTOCONTROL Advertising Code of Conduct (hereinafter, "AUTOCONTROL Code"), which governs the pronouncements of the Jury. On the contrary, in the face of an entity such as the advertiser, not adhering to the self-discipline system, this opinion constitutes a mere, non-binding opinion on the ethical and deontological correctness of the advertising campaign in question, issued by experts in the field.

In any case, it cannot be ignored that most of the rulings issued by this Jury are complied with voluntarily, even by those companies that are not members of the system. This fact is probably explained by the recognised moral force that such rulings enjoy. This moral force would derive from the accredited and recognised prestige of the members of the Jury, and from the legal backing given to the system of self-discipline or self-control, both at Community level (see Recital 18, and Articles 6 and 8 of Directive 2006/114/EC of the European Parliament and of the Council, of 12 December 2006, on misleading and comparative advertising; Recitals 32, 40, 49 and 51 and Articles 16 and 17 of Directive 2000/31/EC of the European Parliament and of the Council, of 8 June 2000, on electronic commerce) and at State level (see the Explanatory Memorandum of Law 34/1988, of 11 November, General Advertising); regulatory provisions to which has been added the explicit recognition of codes of conduct and the promotion of self-regulation and co-regulation introduced by Law 29/2009, of December 30, in Law 3/1991, of January 10, on Unfair Competition (see Chapter V), and by Law 13/2022, of July 7, General Audiovisual Communication (see its Preamble -section IV- and its articles 6, 7, 12, 14, 15, 89, 91, 94, 97, 98, 99, 105, 108 and 153). In all likelihood, it is this same moral force that also explains the substantial coincidence existing between the opinions and resolutions of the Jury and the decisions of Judges and Courts in those cases in which, consecutively, the same facts have been known by them.

2. Once the above has been clarified, and in view of the factual background set out here, this Jury must analyse the compatibility of the Advertising that is the subject of this Opinion with rules 21, 14 and 13 of the AUTOCONTROL Code.
3. Thus, it is up to this Section to analyze, first of all, whether the Advertising that is the subject of this Opinion is derogatory and, therefore, incompatible with rule 21 of the Code.

of SELF-CONTROL, according to which:

“Commercial communications must not denigrate or disparage, implicitly or explicitly, other companies, activities, products or services. Statements included in the advertising message that are accurate, true and relevant will not be considered denigration. In particular, references to the personal circumstances of the entrepreneur or his company will not be considered relevant.”

Given the tenor of the rule, it must be stated that for there to be a case of derogatory advertising, it is necessary first of all that the advertising analysed, as it is perceived, understood and interpreted by an average consumer, transmits a message that is objectively capable of generating discredit or contempt for the products or services of a third party.

In the case at hand, this Section considers that the Advertising subject of this Opinion is suitable to undermine the credibility of third parties in the market, in particular, of sugary drinks and the companies that market them. The way the advertising message is set up, in the form of an obituary announcing the death of Santa Claus, and including statements such as *“his health was affected over the years due to excessive consumption of sugary drinks”* and *“his intestinal microbiota, overloaded, stopped supporting him. His fatty liver had had enough. His heart could not take it anymore. This case reminds us that excessive consumption of sugary drinks not only affects daily well-being, but can have serious and irreversible consequences for our health in the long term”*, it conveys to the consumer public that sugary drinks are harmful to health with serious and irreversible consequences, and can even cause death.

Therefore, in view of the above considerations, and taking into account the content of the transcribed rule, we must confirm the existence of a violation of rule 21 of the Code of SELF-CONTROL.

4. Secondly, it is necessary to assess whether the Advertising Subject of this Opinion can be classified as a case of misleading advertising contrary, therefore, to the principle of truthfulness contained in rule 14 of the AUTOCONTROL Code in the following terms:

“1. Commercial communications must not be misleading. Misleading advertising is understood to be that which in any way induces or may induce its recipients into error, being likely to alter their economic behaviour, provided that it affects any of the following aspects: (...) b) The main characteristics of the good or service, such as its availability, its benefits, its risks, its execution, its composition, its accessories, the procedure and the date of its manufacture or supply, its delivery, its appropriateness, its use, its quantity, its specifications, its geographical or commercial origin or the results that may be expected from its use, or the results and essential characteristics of the tests or controls carried out on the good or service (...).”

This principle of truthfulness has already been analyzed by the Jury on different occasions. Thus, the reiterated doctrine of this Jury establishes that for a message to exist that can be classified as misleading, it is necessary that it be capable of triggering false expectations in the target audience of the advertising. Therefore, to analyze the compliance or not of this principle of truthfulness, this Jury must carry out an analysis of the

message conveyed by advertising in order to then assess compliance or non-compliance with rule 14 of the AUTOCONTROL Code.

In this regard, ANFABRA considers that the Advertising subject to this Opinion is misleading to the extent that it misleads consumers into believing that the drinks marketed by Komvida do not contain sugar, when, as stated, these drinks do contain sugar.

In this regard, this Section agrees with ANFABRA that the Advertising that is the subject of this Opinion conveys a message by virtue of which the drinks promoted by Komvida do not contain sugar among their ingredients, in contrast to the other type of drinks referred to in said advertising, that is, "sugary drinks" - as textually cited therein - and, in respect of which, in the opinion of this Section, there is a difference.

Once the message conveyed by the advertisement has been clarified, that is, that the drinks sold by Komvida, in contrast to sugary drinks, do not contain sugar, it should be noted that in Advertising Law there is a principle of reversal of the burden of proof, in accordance with the provisions of rule 23 of the AUTOCONTROL Code, which states that *"the advertiser has the burden of proving the veracity of the statements and allegations included in commercial communications (...)"*. This rule is fully in line with the provisions of the Civil Procedure Law, according to which it is up to the advertiser to prove the veracity of the allegations made in its advertising.

Therefore, in the case at hand, it will be up to Komvida to be able to prove the veracity of the message according to which the drinks promoted by it do not contain sugar; otherwise the Advertising that is the subject of this Opinion would be misleading.

However, the advertiser, as a non-affiliated or affiliated entity, has legitimately chosen not to participate in the present procedure and, consequently, the adversarial debate within which the advertiser should prove the veracity of the message conveyed by its advertising has not taken place within the framework of this procedure.

Thus, this Jury must conclude that, if within the framework of a contradictory procedure that has not been able to take place so far, the advertiser provided sufficient evidence that

If the advertiser fully proved the truth and accuracy of the message conveyed in the advertising (i.e. that the drinks sold do not contain sugar), the advertising would be compatible with rule 14 of the AUTOCONTROL Code. Otherwise (i.e. if, in the context of an adversarial procedure in which the advertiser participated, such evidence was not provided or was insufficient), the advertising should be considered misleading and incompatible with the aforementioned rule.

5. Finally, it is also necessary to examine whether the Advertising that is the subject of this Opinion whether or not it constitutes a case of covert advertising, which would be incompatible with rule 13 of the AUTOCONTROL Code, which states the following:

"Commercial communications will be identifiable as such regardless of their form, format, or medium used. When a commercial communication, including so-called "native advertising," appears in a medium containing news or editorial content, it must be presented in a way that is easily recognizable as an advertisement and, when

necessary, labelled as such. The true purpose of advertising must be transparent. Therefore, a communication that promotes the sale of a good or the contracting of a service must not be passed off as, for example, market research, consumer survey, user-generated content, private blog, private post on social media or independent analysis."

This Section considers it appropriate to recall that this Jury has stated on numerous occasions that the principle of authenticity requires that all advertising messages be easily identifiable as such. The ultimate reason for this principle is that the consumer can grasp the advertising nature of the message so that he can bear it in mind when assessing the origin and value of the information provided to him.

This principle is therefore infringed and a case of covert advertising, incompatible with the aforementioned rule, occurs when the following two conditions are met. First, the message disseminated must have an advertising purpose. Second, this purpose must remain hidden, so that the message is presented to consumers as a message of a different nature, misleading them about the value and nature of the information provided.

In the case at hand, this Section considers that the communication made through Instagram contains several elements that clearly reveal to the average consumer that it is intended to promote the drinks that the defendant company promotes. On the one hand, the fact that the advertisement was disseminated through the company's own Instagram account and, on the other hand, the inclusion of the claim "*At Komvida, we believe that the well-being of everyone is the most important thing*" clearly reveal the origin of the message and, therefore, the advertising purpose of the publication.

This being the case, the Jury must conclude that the advertising subject of this Opinion does not infringe rule 13 of the AUTOCONTROL Code, since an average consumer will be able to unequivocally identify its promotional nature.

This Opinion is issued solely on the basis of the information provided by the applicant, and is not of any binding nature. The Opinion expresses the Jury's opinion on the ethical correctness of the advertising submitted for analysis, which, as usual, is subject to any other better-founded opinion.

Additionally, and pursuant to the provisions of Article 30 of the AUTOCONTROL Jury Regulations, this Jury agrees to communicate this opinion to the competent Public Administration.