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Law and Obesity

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1. OBESITY AS A GROWING PUBLIC HEALTH PROBLEM: THE GLOBAL EPIDEMIC AND THE CASES OF EUROPE AND SPAIN

We can say that obesity is an excess of fat or adipose tissue in relation to age, sex, and height\(^1\). The generally accepted system for determining overweight and obesity, with slight variations, is the Body Mass Index (BMI) which is weight in kilograms divided by height in square meters (\(\text{BMI} = \text{kg/m}^2\))\(^2\). Overweight\(^3\) is defined as a BMI of 25 to 29.9 \(\text{kg/m}^2\). Individuals with a BMI \(\geq 30\) are considered obese. Overweight and obesity are not mutually exclusive, since obese persons are also overweight\(^4\). Obesity can be considered a disease\(^5\) in itself as it causes myocardial dysfunction, mechanical overcharge and psychological burden or “the mother” of other ones as it stresses

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\(^3\) Overweight or pre-obesity, see ANDERSEN, R., WEINBERG, J., Obesity, Human Kinetics, 2003, p. 3.


chronically metabolic pathways, distorting hormonal systems and pre-existent pathologies\textsuperscript{6}.

According to the World Health Organization (WHO) obesity and overweight have become a global epidemic which means that it’s a problem that affect all regions of the world\textsuperscript{7}. Approximately one billion adults are overweight and of them, at least three hundred million are obese\textsuperscript{8}. At least 135 million EU citizens are affected and perhaps another 70 million in those countries seeking to join\textsuperscript{9}. As an example, within the Spanish adult population (25-60 years of age) the obesity index is 14.5%, and the overweight index is 38.5%\textsuperscript{10}. So, one of every two adults weighs more than what is considered healthy. Among the population of infants and young people in Spain (2-24 years of age) the obesity index is close to 13.9%, and the overweight index is 26.3%\textsuperscript{11}.

Obesity wouldn’t have public relevance if it weren’t for the fact that it causes a large number of various illnesses and diseases, such as type 2 diabetes, arterial

\textsuperscript{6} MEDEIROS, G., HALPERN, A., BOUCHARD, C., 

\textsuperscript{7} WHO, \textit{Obesity}, op.cit.

\textsuperscript{8} WHO, \textit{Obesity}, op.cit.


hypertension\textsuperscript{12}, malignant tumors\textsuperscript{13}, coronary heart disease and others, as well as psychological problems, problems of social integration, suffering, and an elevated cost to the Public Health System. But obesity is not just a individual problem. It is a social problem and should be tackled as such. The costs to the Public Health System associated with obesity are of such importance that in the United States they are equal to the costs associated with illnesses related to smoking\textsuperscript{14}. It is estimated that in the European Union obesity accounts for up to 7\% of health care costs\textsuperscript{15}. In Spain this represents a cost of 2.5 billion euros per year\textsuperscript{16}.

Some studies have been made about the relationship between obesity and well-being concluding that obesity seriously affects the quality of life, not only because of resulting illnesses\textsuperscript{17} but also because it causes physical limitations, psychological problems, economic and social disadvantages and discrimination\textsuperscript{18}. Some studies on bias and discrimination in obesity show a clear discrimination against overweight people in three areas: education, health care and employment\textsuperscript{19}.

\textsuperscript{12} FERNÁNDEZ-CREHUET, J., GÓMEZ GRACIA, E., y GÓMEZ ARACENA, J., \textit{op.cit.}

\textsuperscript{13} KREBS-SMITH, “Progress in improving diet to reduce cancer risk”, \textit{Cancer}, 83, 198, pp. 1425-1432.


\textsuperscript{15} WHO, \textit{Obesity, op.cit.}

\textsuperscript{16} GABINETE DE ESTUDIOS BERNARD KRIEF, \textit{Estudio prospectivo delphi Costes sociales y económicos de la obesidad y sus patologías asociadas}, Madrid, 1999. This studies says that the Health cost is 6.9\%.


If we compare Spain with other European Union countries, we see that Spain occupies a middle position in the ranking of obesity among adults, but the index of obese infants in Spain is one of the highest in Europe, only exceeded by Italy, Malta, and Greece. The statistics show us that obesity is more prevalent in southern Spain, the east coast and the Canary Islands than in other areas of the country, which demonstrates that there is a geographic relationship to the incidence of this disease. In addition, in Spain the probability of suffering overweight is higher in rural areas than in urban areas, and appears more frequently among lower income populations with lower levels of education. This confirms that what Kelly Brownell wrote in his book, *Food Fight*, is true: the environment is structured in ways that make obesity a massive burden to the poor. Actually, social position, income and education are determinants of diet and physical activity. Lower levels of education and poorer access to relevant information reduce the capacity to make right choices. And food choice is determined by both individual preferences and socio-economic factors.

The Spanish Department of Health and Consumer Affairs, as other many Health Organizations, has identified increased consumption of high-calorie foods and sedentary lifestyle as the main causes of obesity and overweight. The same as in other countries,
there are many factors that have produced this situation, including social and economic changes. Spain, as most of the EU countries, has undergone huge changes in recent decades that have had drastic effects on the eating habits of our citizens. These countries have experienced what is traditionally known as a “nutrition transition”\(^{24}\). This is a series of modifications, both quantitative and qualitative, to diet, related with economic, social and demographic changes, and health factors\(^{25}\).

Obesity is a major issue because: vast numbers of people are affected; the prevalence is growing; obesity rates are increasing among children; the medical, psychological, and social effects are severe; the behaviors that cause obesity (poor diet and inactivity) are themselves major contributors to ill health; and treatment is expensive, rarely effective, and impractical to implement on a large scale\(^{26}\). Governments can no ignore this problem as their citizens begin to recognize the health, social, and economic consequences and costs to society.

2. DETERMINING FACTORS OF OBESITY AND PREVENTION STRATEGIES

According to experts, obesity is a complex disease involving many factors. It is a complex, multifactorial chronic disease that develops from an interaction of genotype and environment. It is difficult to determine the implication of each factor in the development of this illness. Obesity appears to be the result of biological, genetic, environmental and lifestyle factors, and the unbalanced relationship between diet and caloric requirements\(^{27}\). Although there are powerful genetic factors affecting individual families who have genetic susceptibility, the overwhelming influence for 99% of the population is environmental (abundance of “energy dense” foods and drinks and sedentary lifestyle)\(^{28}\).

\( ^{24} \) Barry Popkin (University of North Carolina) has coined the term “nutrition transition” to explain global changes in diet (POPKIN, B., “An overview on the nutrition transition and its health implications: the Bellagio meeting”, Public Health Nutrition, núm. 5, 2002.  
\( ^{25} \) AESA, op.cit., p. 13.  
\( ^{26} \) BROWNELL, K., BATTLE, K., op.cit., p.51.  
\( ^{27} \) FERNÁNDEZ-CREHUET, J., GÓMEZ GRACIA, E., y GÓMEZ ARACENA, J., op.cit.  
\( ^{28} \) IOTF, Obesity in Europe, op.cit.
Public Health policies for the control and prevention of obesity must take all of these factors into consideration and not just some of them, as they sometimes do. However, diet and sedentary lifestyle are the two most important factors because both of these factors can be easily changed. For this reason, public health policies to fight against obesity should be based not only in “health education” (improving public knowledge on the relationship between diet and health, energy intake and output, sport, physical activity and health, etc.), but also in other relevant factors such as transportation, urban planning, children advertisement, sports, menus at schools cafeterias, school environments, food labelling, and others.

3. FOOD SAFETY, LAW AND OBESITY

These days obesity is an important public health problem that attracts media attention, but some people would ask, “What does obesity have to do with Law?” Obesity is a health problem that affects humans and as such, the study of it mainly relates to Medicine and life sciences. The World Health Organization defines health as “a state of complete physical, mental and social well-being and not merely the absence of infirmity”. But obesity is also a social problem that impinges on one of our fundamental rights: the right to health protection. This right includes a right to health care and a right to a live under healthy conditions. Taking this approach we can say that there is a relationship between Law and obesity. There are many examples of this relationship: Is it employment discrimination when an obese person is not hired because of his obesity? Can insurance companies raise their rates to obese persons because they are at higher risk for illness and/or death? Can insurance companies cancel the

30 When consumers don’t have this type of information, they make intuitive decisions that are not based on objective data, but on mere impressions, which are frequently far from reality.
34 In the United States, for example, in most employment-discrimination cases involving obese plaintiffs, courts have ruled that obesity is not a disability except in cases of morbid obesity. In Cook v. Rhode Island (1993) a federal appeals court ruled for the first time that obesity can be covered under the Americans with Disabilities Act.
policies of people who become obese? Is it possible for an obese person to apply for and collect Disability Insurance without ever working again? Can the government refuse public health assistance to obese people under the justification that the responsibility for the illness is theirs? Is it justified to take away the custody of children from parents using the argument that their diet and lifestyle are provoking the children’s obesity which proves lack of attention on the part of the parents and grave risk for the children? Is it necessary to regulate the menus of school cafeterias? Should restaurant menus list the ingredients and caloric values of their meals? Is the food industry responsible for widespread obesity? Must we levy taxes on certain foods to discourage their consumption and to pay back the costs spent by the Public Health System on obesity and other related disorders?

These are some of the many questions that show the relationship between Law and obesity. They reflect a complex political debate which calls attention to such issues as constitutional rights, individual freedoms, the role of the State, and scientific uncertainty about some relevant aspects related to food such as, are there good and bad foods?, are some foods addictive?, what is the most healthy diet?, etc.

In Spain, for example, some cases related to obesity have gone to Court. Some people seeking employment were denied positions because of their obesity. The justification was that these people were not in sufficient physical health to perform the duties required by the job. Some of these individuals sued the Companies invoking their right to equal treatment under the law, but the Courts said that these were not cases of discrimination according to Article 14 of the Spanish Constitution. Some people have lost their jobs because they became obese and were unable to perform the duties required by the job as stated in their contracts.

35 Usually, insurance companies raise rates based on height and weight tables. An obese person may be denied coverage and the final rate can depend, amoung other factors, on a moving scale for increasing premiums.
36 NESTLE, M., *Food Politics*, University of California Press, 2003, p. 364
38 STSJ Madrid núm. 800/2004, de 28 de mayo de 2004 (JUR 2004/268864); Article 14 of the Spanish Constitution (1978): “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”.
39 STSJ Castilla y León, Burgos, núm. 973/1997, de 17 de noviembre de 1997 (AS 1997/4192)
Obesity, as an endocrine illness\textsuperscript{40}, must be taken into consideration by health and life insurance companies before issuing policies or establishing premiums as obesity is a risk factor. Because some people don’t realize that obesity is an illness they neglect to inform the insurance company when filling out the insurance application. Others, who know that obesity should be declared, intentionally lie about their height and weight. According to Spanish insurance Law the insured has, at least, two important obligations: 1. All information declared on the insurance application form must be relevant and completely accurate. 2. The applicant is required to give full information with no omissions. If these obligations are not complied with the Company is free to cancel the policy\textsuperscript{41}. If the Company accepts the contract in full knowledge of the applicant’s actual physical condition, the policy therefore, cannot be cancelled. \textsuperscript{42}

A different example is when obesity, which is not a work-related illness, disables a worker. That worker under Spanish labor law is entitled to lifelong compensation, paid by the State\textsuperscript{43}.

Some American food chains have recently hung signs listing the ingredients and caloric values of their meals. They have done so voluntarily, as it is not compulsory under Spanish law. However, this confuses the issue. While it appears that they are voluntarily informing consumers, and it is a good step, what they are actually doing is preventing the possibility of losing future cases in Court\textsuperscript{44}.

In some cases obesity in children could be a determining factor that influences a judge’s decision, specifically, in cases related to custody. Obesity in children could indicate neglect on the part of the parents in regards to food preparation and eating\textsuperscript{45}.

Food education, addressing diet habits and nutritional properties of food, should be a part of health education in school curriculums because food consumption is directly related to health. If the scientific community has reached a general consensus regarding

\textsuperscript{41} URÍA, R., Derecho Mercantil, Marcial Pons, Madrid, 1998, p. 779
\textsuperscript{42} SAP Burgos núm. 494/2005 (Sección 2ª), de 10 noviembre, (AC 2005\2197).
\textsuperscript{43} STSJ Cantabria núm. 1287/2005 (Sala de lo Social, Sección 1ª), de 14 diciembre, (JUR 2006\18670).
\textsuperscript{44} Art. 2 Real Decreto 930/1992, de 17 de julio, por el que se aprueba la norma de etiquetado sobre propiedades nutritivas de los productos alimenticios.
\textsuperscript{45} SAP Madrid núm. 570/2005 (Sección 22ª), de 18 julio, (JUR 2005\220759).
what constitutes a basically healthy diet, why then have governments been unable to approve regulations concerning something as simple as school menus? Therefore, from the point of view of protecting the health and rights of the consumer it would be sufficiently justified to introduce a legislative measure that obligates restaurants to indicate the ingredients and caloric values of their meals on their menus. With respect to possible liability on the part of the food industry, we must take into account that according to Spanish Law, in order to place responsibility for the damage caused, it is necessary to prove who is responsible. In order to do this it is necessary to prove the relationship between food products and obesity (the cost-effect relationship).

I have stated previously that obesity is a question of food safety. Food safety is not simply a matter of concern to consumers, the food industry and Public Administration. It is not just an interest worth protecting. Food safety is a fundamental right that is clearly derived from other fundamental rights such as the right to life, human dignity, the right to health protection and the right of consumers to protection.

4. PUBLIC ACTIONS TO FIGHT AGAINST OBESITY

4.1 International level.

In 2002 a Joint WHO/FAO Expert Consultation on Diet, Nutrition and the Prevention of Chronic Diseases made recommendations regarding the prevention of chronic diseases and the reduction of their impact. The Consultation recognized that the growing epidemic of chronic disease was related to dietary and lifestyle changes. Because of these changes chronic NDCs, such as obesity and other diseases, are becoming important causes of disability and premature death. The report concluded that in order to achieve the best results in preventing chronic diseases, the strategies and policies that are applied must fully recognize the essential role of diet, nutrition and

46 Art. 3 of the Universal Declaration of Human Rights; Art. 2 of the European Convention on Human Rights; Art. 2 of the International Covenant on Civil and Political Rights;
physical activity. This report called for a shift in the conceptual framework for developing strategies for action, placing nutrition at the forefront of public health policies and programs\textsuperscript{50}.

4.2 European Union.

The European Union has dealt with health issues since many years but with the adoption of the Maastricht Treaty the Community acquired a mandate to develop a coherent public health strategy. The Community has a clear competence in this area, since article 152 of the Treaty requires that a high level of human health protection be ensured in the definition and implementation of all Community policies and activities.

In 1998 the Eurodiet project was initiated (under the first public health framework) to help coordinate EU and Member State programs on nutrition, diet and healthy lifestyles. The Commission was co-founding the European network of health-promoting schools. Under the cancer program the Commission supported the European prospective investigation into cancer and nutrition. A network on nutrition and physical activity was established by the Commission services in 2003 to advice the Commission on the development of Community activities to fight overweight and obesity. In order to establish a common forum for action the European Platform for Action on Diet, Physical Activity and Health was launched in March 2005\textsuperscript{51}. The importance of nutrition, physical activity and obesity is reflected in the Public Health Action Program (2003-2008) and its annual Works Plan\textsuperscript{52}.

In December 2005 the Commission presented the green paper “Promoting health habits and physical activity: an European dimension for the prevention of overweight, obesity and chronic diseases”. The green paper establishes different areas for action: 1) Consumer information, advertising and marketing (proposal for a regulation to


\textsuperscript{51} The purpose of the Platform is to create a launching pad for concrete actions designed to contain or reverse current trends. Apart from the European Commission, the European Food Safety Authority, or the WHO, there are other many private members in the Platform.

\textsuperscript{52} More information at \url{http://europa.eu.int/comm/health/ph_programme/programme_en.htm}.
harmonise the rules on nutrition on health claims, self-regulation\(^{53}\) in advertisement and marketing, and other options in case self-regulation fails to deliver a satisfactory results, etc.; 2) Consumer education (improving public knowledge on the relationship between diet and health, etc.); 3) Children and young people (relevant measures at schools, positive role models, etc.); 4) Food availability, physical activity and health education at the work place (canteens offering healthy choices, etc.); 5) Overweight and obesity prevention and treatment into health services; 6) Environment (urban planning policies, walking, cycling, etc.); 7) Socio-economic inequalities; 8) Promotion of healthy diets and physical activity; 9) Recommendations for nutrients intakes and for the development of food-based dietary guidelines, etc\(^{54}\).

### 4.3 National Level: the case of Spain.

The Spanish Constitution obligates the Government to adopt all necessary measures to protect public health and to promote public health education\(^{55}\). The Spanish Government is obligated by order of the 1978 Constitution to organize a public health system to protect the public’s health using all the necessary features and services, including preventive measures, in short, to do everything possible in order to guarantee the health protection\(^{56}\). In relation to the problem of obesity, Spanish regional and national government activity has been centered around fostering healthy eating habits and promoting physical exercise and sports. However, given the facts these programs have been insufficient. At the moment there is no Law to fight against obesity, but only some general guidelines for elaborating an Integral Plan addressing Obesity, Nutrition and Physical Activity. In 2005, an initiative to pass a law was presented in Congress. This initiative would have elaborated on the National Plan Against Obesity, promoting physical activity and sports, but it didn’t receive the majority support necessary and was

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\(^{55}\) Article 43 of the Spanish Constitution (1978): “1. The right to health protection is recognized. 2. It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect. 3. The public authorities shall foster health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time”.

rejected\textsuperscript{57}. Nevertheless, the Integral Plan addressing Obesity, Nutrition and Physical Activity was approved by the Department of Health and Consumer Affairs in 2004 and has produced good results.

The objectives of the Integral Plan addressing Obesity, Nutrition and Physical Activity were the following: a) Invert the trend of obesity, particularly, children’s obesity; b) Promote the regular practice of physical activity and the acquisition and maintenance of healthy and balanced eating habits related to calories burned per day; c) Prevent the onset of eating disorders; d) Decrease unjustified variations in access to preventive services; e) Give fuller attention to obese patients and to others with eating disorders; f) Improve the quality of information available to patients, family members, professionals, business managers and politicians; h) Strengthen the systems of surveillance and information about obesity and eating disorders; i) Promote basic information to avoid obesity\textsuperscript{58}.

In order to realize this Plan two people were elected to be in charge, also involved were an Executive Committee (composed of members from the State and the Regions), a Drafting Committee, a Scientific Committee, and the Spanish Food Safety Agency. In 2005, the Spanish Department of Health and Consumer Affairs elaborated a new Plan called the Spanish Strategy for Nutrition, Physical Activity and Prevention of Obesity (the NAOS Strategy)\textsuperscript{59}. The NAOS Strategy aims to improve diet and encourage the regular practice of some physical activity by citizens, paying special attention to prevention during childhood. The goal of this strategy is to promote and protect health and guide consumers towards the creation of a favourable environment. The NAOS Strategy policies are aimed at the entire population but priority is given to children\textsuperscript{60}.

The main objectives are: To promote plans of action aimed at improving eating habits and increasing physical activity in the population; Population awareness and information campaigns about the positive impact on health of a balanced diet and

\textsuperscript{57} Proposición no de Ley relativa a la elaboración de un Plan Nacional contra la Obesidad mediante el fomento y la práctica de la actividad física y deportiva (161/001026).
\textsuperscript{58} Orden SCO/66/2004, de 12 de enero, por la que se establecen las directrices para la elaboración del Plan Integral de Obesidad, Nutrición y Actividad Física.
\textsuperscript{59} Some Regional Governments of Spain have passed their own plans to fight obesity. This is the case of Andalucia: Plan para la Promoción de la Actividad Física y la Alimentación Equilibrada (2004-2008).
\textsuperscript{60} AESA, \textit{op.cit.}
regular physical activity; To promote nutritional education at home, at school and in the community; To stimulate the practice of regular physical activity among the population, with special emphasis on schools; To favour a framework of collaboration with food industries to promote the production and distribution of products which contribute to a healthier and more balanced diet; To make professionals in the National Health System more aware of the problems in order to foster the systematic detection of obesity and overweight among the population; To monitor the proposed measures and evaluate the results obtained as a consequence of the Strategy\textsuperscript{61}.

The NAOS Strategy is being implemented within the family and in the community, at school, in business, and within the health system.

At the family and community levels, actions have been taken to make the population aware of the positive impact of a balanced diet and regular physical activity, improving the information available concerning lifestyle habits. These are some of the actions proposed: From the Public Administration, information campaigns will be organised; the book “Your children’s diet” will be distributed; on the Web site of the Department of Health and Consumer Affairs a page will be set up offering news about the different initiatives underway; contact will be made with those responsible in the media to spread positive messages promoting good habits; the participation of professionals, parents, consumer associations, etc., will be sought, to multiply the effect of the information campaign; athletes and celebrities will take part in entertainment programs destined for this audience; the Public Administration will seek agreements with entertainment companies to promote positive images of active lifestyles and healthy diet; well-known chefs will be invited so that, through their cooking programs they emphasize the nutritional benefits of their meals.

One of the objectives of the NAOS Strategy is to offer food guides to consumers in which leading experts have contributed relevant information\textsuperscript{62}.

At the school level, the first action will be the inclusion in the school’s curriculum of a course on diet and nutrition; other actions at schools will be: reinforcement through

\textsuperscript{61} AESA, \textit{op.cit.}  
\textsuperscript{62} AESA, \textit{op.cit.}
workshops or extracurricular activities presenting the world of cooking and gastronomy; teaching materials and guides about diet and nutrition included in teacher training courses; the promotion of other educational activities; the promotion of frequent physical activity and sports at school, extending the hours of operation of school sports facilities on the weekends, and encouraging children to walk or bike to school. A standard will be drawn up with respect to school cafeterias. This standard will cover the requirements of the school’s menus, and parents will be informed of the menus. An agreement will be drawn up between the catering industry and the Public Administration to prohibit the use of saturated fats, salt without iodine, etc.

An agreement has been drawn up with the Spanish National Association of Automatic Distributors in which they undertake the following: Vending machines will not be located in those areas easily accessible to pupils from Infant and Primary Education; Advertising will be removed from the machines in order to avoid encouraging the consumption of certain products. Products which encourage a balanced diet should be included in favor of those with a lower salt, sugar or fat content.

At the business level, an agreement will be signed between the Public Administration and the Spanish Food and Drink Industry Federation to support the NAOS Strategy. The food industry will undertake the inclusion of nutritional information, presented in an accessible way on all food labels. The food industry will distribute a guide to help citizens understand nutritional labeling. As far as is technologically possible the industry will try to ensure that certain ingredients are not used in products destined for consumption by children under the age of twelve, to promote bringing to market a range of products with low salt, fat and sugar content, and gradually to reduce the caloric content of food products. In relation to advertising, the Food Industry has signed a self-regulating code regarding food advertising.

On 9th June 2005 the Spanish Self-Regulating Code for Advertising Aimed at Children (PAOS) was signed between the Ministry of Health and the Food and Drink Industry Federation, and came into force in September 2005. The rules of the Code are

63 There has been a significant reduction in the proportion of children who go to school walking or cycling because the streets are considered unsafe.
64 Meals in most EU schools are not regulated or poorly regulated.
applied to: 1) Product presentation, 2) Sales pressure; 3) Using famous people and programs; 5) Identification of the advertising; 8) Comparative presentations; 9) Safety, and, 9) Promotions, prize draws, competitions, and children’s club. Companies associated to the code that does not comply with the rules can be sanctioned with fines between 6,000 and 180,000 euros.

Product presentation: a) the advertisement must not mislead children suggesting that the promoting food product possesses special characteristics when all similar products possess such characteristics; b) the advertisement of food or drinks should not be mislead children about the benefits derived from the consumption of the product; c) the advertisement cannot mislead about the characteristics of the promoted product; e) in advertisement aimed at children images that could frighten them should be avoided and precaution should be taken not to exploid the imagination of the child.

Sales pressure: a) The advertisement should not make a direct reference for the children to buy the advertised product exploiting their inexperience or innocence. Neither should it encourage them to ask their parents or other people to purchase this product; b) Price should be expressed clearly and exactly; c) Benefits atributed to the food or drink product must be inherent its use; d) it should not give the impression of immediate results or exclusivity;

Additionaly, advertisements cannot use parents, teachers or other people such as professionals in children’s programs or real or fictitious people from films based on fiction or presenters of children’s programs. Television advertisements of food and drink products will not be aired coinciding with programs aimed at under 12’s. Food and drink advertisements aimed at minor must be clearly separated from the programs and the advertisements must not refere to themselves as “programs”. And, comparative presentations must be done in such a way that children can clearly understand them. An advertisement message that include a promotion must be designed so that as well as transmitting a message regarding the promote incentive, it clearly shows the advertised product. The essential conditions of the promotional offers must be set out in the advertising simply and clearly so that they are easily readable and understandable for

65 MINISTERIO DE SANIDAD Y CONSUMO Y AESA, Codigo PAOS: Código de Autorregulación de la publicidad de alimentos dirigida a menores, 2005.
minors. In order to avoid misleading children, references to children´s clubs can only be made in food and drink advertisements if they fulfill the following requirements: interactivity, continuity, and exclusivity. Advertisements must avoid scenes that encourage dangerous or inadequate use of the advertised product.  

Finally, in the Health System the actions that have been taken are: to encourage doctors to ask patients the necessary questions for early detection of obesity, to carry out regular campaigns, to carry out information campaigns aimed at high risk sectors of the population, and to identify and monitor children potentially at risk.

The Administration proposes the creation of an Obesity Observatory which regularly quantifies and analyses the prevalence of obesity within the Spanish population.

The NAOS Strategy clearly shows us that self-regulation, and not governmental regulation, has been the principal legal technique chosen by the Spanish authorities to combat the problem of obesity.

In fact, the NAOS Strategy only addresses legislative measures for the regulation of school menus, but all other possible actions have been left to self-regulation within the food industry (advertising directed towards children, school vending machines, the ingredients and caloric values of all foods offered). There are examples that clearly show that these last issues can be regulated by law. For example, in 1978 the Province of Quebec (Canada) passed the Consumer Protection Act which stated that “no person may make use of commercial advertising directed at persons under thirteen years of age”. In recent years many European countries have passed legislation that limits advertising directed towards children: Belgium, ban on advertising in children’s programs of less than 30 minutes; Germany, advertisements may not mislead children and young people as to the size, value, type, durability, performance or degree of skill required to use the product; Greece, ban on advertising for toys from 7 a.m. to 10 p.m. and total ban against war toys; Italy, it is prohibited to insert ads in cartoons; Norway, ban on advertising 10 minutes before and after programs for children; Sweden, ban on

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66 MINISTERIO DE SANIDAD Y CONSUMO Y AESA, Código PAOS: Código de Autorregulación de la publicidad de alimentos dirigida a menores, 2005.
67 AESA, op.cit.
68 AESA, op.cit.
advertising addressed towards children under the age of 12; Luxemburg, ban on advertising before, during or after children’s programs, etc. Perhaps the EU’s implementation of a tobacco advertising ban should now be followed by similar EU based restrictions on the targeting of the young, including pre-school children, to consume inappropriate foods and drinks.\textsuperscript{69}

In April 2005, the European Heart Network published a report on the marketing of unhealthy food to children in Europe. It concluded that television advertising of unhealthy food to children should be prohibited. This report has been criticized by the World Federation of Advertisers (WFA) saying that the data is not accurate.\textsuperscript{70} However, what really concerns the WFA is the possible loss of this important part of their business. On June 22nd, 2005, the British Medical Association (BMA) Board of Science published a report on preventing childhood obesity. The report recommends the banning of advertising unhealthy foodstuffs, including inappropriate sponsorship programs targeted towards school children. The Food Advertising Unit (FAU) responded that a total ban, as proposed by the British Medical Association, would be disproportionate.

The results of the NAOS Strategy have still not been evaluated. Clearly, they have realized some interesting actions but this does not justify the transfer of power from State regulation to self-regulation. The self interests of the food industry could call into question the use of self-regulation in this matter: the food industry, like any other industry, must protect their own interests. In the case of advertising directed towards children, or in nutritional labeling of food, or in the use of food ingredients, self-regulation can be a legal technique. However, in some cases, this could simply be clever marketing. Although self-regulation is acceptable from a legal point of view, there are no legal reasons to justify the State’s omission of regulations in such complex and important issues.

\textsuperscript{69} IOTF, *Obesity in Europe, op.cit.*

\textsuperscript{70} http://www.wfanet.org/news/article_detail.asp?Lib_ID=1539