

Superintendence of Industry and Commerce.

RESOLUTION NUMBER 51415 OF 2024

(September 3, 2024)

"Deciding a request for reconsideration and granting an appeal."

File No. 21-75875

CONFIDENTIAL VERSION

THE DIRECTOR OF CONSUMER PROTECTION INVESTIGATIONS

In the exercise of her legal powers, especially those conferred by Laws 1437 and 1480 of 2011 and Decree 4886 of 2011, as amended by Decree 092 of 2022, and

CONSIDERING:

FIRST: That the Consumer Protection Investigations Directorate, in the exercise of its duties, became aware of the complaint filed under file No. 21-75875-0 on February 22, 2022, against **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, in which an alleged infringement of consumer rights was reported, relating to the advertising, packaging, and labeling of tobacco *Vype* products and the non-compliance with Article 13 and subsequent articles of Law 1335 of 2009 and Law 1480 of 2011.

SECOND: That subsequently, on March 23, 2021, the complainant filed a petition under consecutive No. 21-253543-0 requesting recognition as an intervening third party, to which the Directorate¹ responded that it would address this petition in the administrative act through which the possible imposition of charges would be resolved.

THIRD: That the Directorate required the sanctioned company through official letter No. 21-75875-3 of September 23, 2021, to provide information, within a maximum of ten (10) business days from the receipt of the communication, about, among other things: i) the tobacco-derived goods marketed by the company through the website www.vuse.com, indicating for each one its nature, characteristics, and reference, the technical specifications, the terms, conditions, and restrictions established for commercialization, and the way in which they were made available for consumer consultation, ii) all advertising or promotional materials issued, along with the frequency and media through which they were advertised, as well as the last issuance date, iii) the authorization issued by the Ministry of Health and Social Protection for the labeling and whether the consumption of the mentioned goods had any warning or contraindication, iv) if there were any restrictions on commercialization, v) a detailed description of the purchase process through the website, vi) the measures to verify the consumer's age, and vii) the security mechanisms adopted to ensure the consumer's personal information and the commercial transaction, among others.

FOURTH: That **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** submitted information under file number 21-75875 consecutively from 6 to 20 on October 8, 2021, and October 11

¹ File number 21-253543-3 dated July 2, 2021.

of the same year, in order to demonstrate compliance with the request made by this Directorate.

FIFTH: That the Directorate² submitted a request to the Ministry of Health and Social Protection to provide information on, among other issues: i) what the public policy of the Ministry of Health and Social Protection entailed regarding the prevention of tobacco consumption and the cessation of tobacco dependence in the Colombian population, including Electronic Nicotine Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems (ENNDS), known as "Electronic Cigarettes," and other devices that simulate the act of smoking, ii) whether, in compliance with the goals proposed in "The Decennial Plan for Cancer Control in Colombia 2012-2021," specifically in terms of regulatory actions, it was aware of the promotion of projects or the issuance of specific regulations aimed at Electronic Nicotine Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems (ENNDS), known as "Electronic Cigarettes," iii) whether, within the scope of its competencies, it had become aware of recent scientific evidence about the potential health consequences of using Electronic Nicotine Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems (ENNDS), known as "Electronic Cigarettes," and their harmfulness; or whether the Ministry had conducted any studies for the same purpose, iv) to report if the Ministry had complied with health measures aimed at countering the potential harmful effects of these products and protecting the population from the consequences of their use, as recommended by the World Health Organization, v) to indicate whether the specific measures regarding promotion and advertising, labeling, and packaging for Electronic Nicotine Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems (ENNDS), known as "Electronic Cigarettes," recommended by the World Health Organization had been implemented in Colombian legislation, among others.

SIXTH: That the Ministry of Health and Social Protection submitted information related to the request made with the filing number 21-75847-25 dated March 22, 2022.

SEVENTH: That the Directorate, on April 18, 2022, conducted an administrative visit to the website www.govype.com, which redirected to <https://www.vuse.com/co/es/>. The web page report is included in the file under filing number 21-75875-27, dated April 18, 2022.

EIGHTH: That the Directorate, through official letter No. 21-75875-28 dated April 29, 2022, requested the sanctioned company to provide advertising pieces or promotional material for the marketed goods, indicating the frequency and the media through which they were advertised, as well as the last date of issuance of each one, which were requested within the information request number 21-75875-4 dated September 23, 2021, due to the inability to access these documents through the provided Drive link. It also requested to report whether there were any restrictions on the commercialization of the goods, such as consumer age, minimum or maximum number of units, through the website <http://www.vuse.com/co/es/>, and if affirmative, to indicate the type of restriction and provide evidence of their response.

NINTH: That **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** submitted, by means of filing number 21-75875-29 dated May 16, 2022, information to prove compliance with the request made by this Directorate.

² File number 21-75875-22 and 23 of February 16, 2022.

TENTH: That in response to the procedures carried out during the preliminary investigation stage, this Directorate, through Resolution No. 57472 dated August 26, 2022, initiated the present administrative investigation by formulating charges against **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, for the alleged non-compliance with the following provisions:

- i. Article 6 of Law 1480 of 2011, for the alleged quality failure of the products offered and failure in the quality of the service related to the establishment of a consumer relationship.
- ii. Paragraph 1.3 of Article 3 and Article 23 of Law 1480 of 2011, for the alleged lack of timely, clear, sufficient, and accurate information regarding the nicotine intensity contained in the pod inserted into the Vuse Epod device, and the alleged provision of minimal information in a language other than Spanish.
- iii. Article 25 of Law 1480 of 2011, because the defendant allegedly did not clearly indicate on the packaging or in the user guides the harmfulness of the marketed products, nor did it clearly state on the packaging and in the user guides the necessary conditions or instructions for proper use, but allegedly left the use of such products to the consumers' discretion.
- iv. Article 31 of Law 1480 of 2011, because it appears that in advertising Vuse products containing nicotine, there was no clear warning to the public about their harmfulness and the need to consult the conditions or instructions for proper use, as well as relevant contraindications.
- v. Article 33 of Law 1480 of 2011, per subsections ii) and iii) of section a) of paragraph 2.1.2.1 of Chapter Two, Title II of the Single Circular of this Superintendency, as the promotion called "haz tu match vuse" ("Make your vuse match") seemingly only stated that terms and conditions applied to redeem the incentive. However, the defendant did not effectively inform the consumer in the advertisement about the terms and conditions, which are essential and thus should have been included in the same ad and not communicated through other means. Furthermore, in the promotion of the "bundle starter kit" product observed during the administrative visit to the website, it did not specify the time conditions, as the duration or validity of the incentive was not disclosed, nor were the exact start and end dates specified, along with any other requirements for accessing it.
- vi. Article 42 and sections 1, 5, and 9 of Article 43 of Law 1480 of 2011, as an analysis of the terms and conditions found on the website "<https://www.vuse.com/co/es/>," owned by the respondent, revealed three provisions that appear to constitute abusive clauses.
- vii. Sections a), b), c), g), and the paragraph of Article 50 of Law 1480 of 2011, consistent with the provisions of sections 1, 7, and 9 of Article 2.2.2.37.8 of Decree 1074 of 2015, since the website allegedly did not provide information before the offer about the respondent's identity, product availability, the right of withdrawal available to consumers, and the procedure for exercising it following Article 47 of Law 1480 of 2011. The website did not have a mechanism for consumers to obtain proof of the date and time of submission of petitions, complaints, or claims, nor did it provide a mechanism for subsequent tracking, or establish a visible, easily identifiable link allowing consumers to access the website of the Colombian consumer protection authority.

In the same administrative act, the **CORPORACION COLOMBIANA DE PADRES Y MADRES, WHICH MAY USE AS ACRONYMS "REDPAPAZ," "PAPAZ," AND "PAPAZ**

RED DE PADRES Y MADRES,” registered under NIT 830.130.422-3, which filed the initial complaint, was recognized as an intervening third party, by Article 38 of Law 1437 of 2011.

ELEVENTH: That, after the stages of defense, evidence presentation, and final arguments were completed, this Directorate issued **Resolution No. 62028 on October 10, 2023**, an administrative act imposing a fine on **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, amounting to **ONE BILLION TWO HUNDRED FORTY-FOUR MILLION SIX HUNDRED EIGHTY THOUSAND PESOS** (COP 1,244,680,000), equivalent to **ONE THOUSAND SEVENTY-THREE (1073)** current legal monthly minimum wages, corresponding to **29,347.35 UVT** (acronym in Spanish for Taxable Value Unit), **date of the appealed resolution**, due to the non-compliance with the provisions related to the charges that were brought against the sanctioned company.

In the same administrative act, the sub-charge corresponding to the alleged non-compliance with the provisions of subsection a) of Article 50 of Law 1480 of 2011, consistent with section 1 of Article 2.2.2.37.8 of Decree 1074 of 2015, which was part of Charge No. 7, was dismissed, as the identification and contact information of the sanctioned company had been provided in the terms and conditions.

TWELFTH: Furthermore, in the aforementioned resolution, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** was ordered to:

1. *PROVIDE information in a clear, timely, sufficient, and accurate manner in Spanish regarding all VUSE products offered, whether through the website or physical or digital advertisements.*
2. *INFORM consumers that the products currently marketed and to be marketed in the future, corresponding to nicotine salts and vaping liquids, are considered harmful products due to their components. For this purpose, the harmful effects, necessary conditions or instructions for proper use, and contraindications should be clearly indicated and perfectly legible, either on labels, packaging, or through an attachment.*
3. *ADJUST future physical or digital advertising to clearly warn the public about the harmfulness of the components of vaping products, specifically nicotine salts and vaping liquids, as well as the need to consult the conditions or instructions for proper use and the contraindications.*
4. *MODIFY the terms and conditions on the website <https://www.vuse.com/co/es/> to ensure that the stipulations analyzed in this investigation do not cause an unjustified imbalance to the detriment of consumers or affect the time, manner, or place where consumers can exercise their rights.*
5. *INFORM at all times, truthfully, reliably, sufficiently, clearly, accessibly, and up-to-date about the availability of the offered products on the website <https://www.vuse.com/co/es/>.*
6. *INFORM on the website <https://www.vuse.com/co/es/>, at all times in a truthful, reliable, sufficient, clear, accessible, and updated manner, and in the terms and conditions, as well as in any document related to the consumer relationship, about the possibility of exercising the right of withdrawal as provided in Article 47 of Law 1480 of 2011.*
7. *IMPLEMENT within the domain <https://www.vuse.com/co/es/> a mechanism allowing consumers to submit petitions, complaints, or claims (PQR, for its acronym in Spanish), through which a receipt is generated, recording the date and time of submission. This system should also allow tracking of the PQR, enabling the follow-up on the actions taken regarding it.*

8. *ESTABLISH on the electronic commerce platform used, <https://www.vuse.com/co/es/>, a visible, easily identifiable link that allows consumers to access the page of the Colombian consumer protection authority.*

THIRTEENTH: BRITISH AMERICAN TOBACCO COLOMBIA S.A.S. was notified of the above resolution on **October 23, 2023**, as certified by the General Secretary Ad-Hoc of this Entity, through record No. **21-75875-68**.

NINTH: That **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, within the established time, filed a motion for reconsideration and, alternatively, an appeal against the administrative sanctioning act, through a document submitted on November 7, 2023, under registration No. 21-75875-69.

1. Preliminary Considerations

As a preliminary matter, this Directorate finds it pertinent to remind that the constitutional jurisprudence has defined the administration's power to impose sanctions as *“a tool of self-protection, as it helps preserve the institutional legal order by assigning powers to the administration, enabling it to enforce compliance, even through punitive means, among both its own officials and private individuals, to uphold a discipline that contributes to fulfilling its aims.”*³

In this regard, administrative acts issued under the administration's sanctioning authority, which aim to protect the legal order regarding the public norms outlined in the Consumer Statute, are presumed to be true and correct.⁴ Therefore, when the appellant attempts to establish errors by this legal operator in evaluating the submitted evidence or in applying the substantive rule that underlies the factual and legal imputations, their task must necessarily demonstrate that the alleged mistake is noticeable and relevant.

In other words, the appellant's argumentative work must be thorough regarding the basis of the imposed sanction, not only limited to asserting opposing opinions or interpretative possibilities regarding the assessment of evidence or application of rules, but primarily focused on convincing the administration that the attributed fault is non-existent or that the breach of duties derived from the Consumer Statute is excused by one of the exoneration grounds addressed in Article 24's paragraph.⁵

In line with the above and to ensure the sanctioned company's right to defense and to contest, this Directorate will study what the appellant has raised and the existing evidence, taking into account the relevant rulings from the Constitutional Court, as follows:

“(...) Pursuant to Article 29 of the Constitution, due process applies to “all judicial and administrative proceedings.” When interpreting this article, the [Constitutional] Court has defined the right to due process “as the set of guarantees provided in the legal system to protect

³Constitutional Court, Ruling C-875 of November 22, 2011, Presiding Judge: Dr. Jorge Ignacio Pretelt Chaljub. Ruling that in turn was mentioned in Ruling C-364 of 2012. Exp. D-8795. M.P. Luis Ernesto Vargas Silva.

⁴In a similar sense: Ruling of April 6, 2011, Second Section, Exp. 11001-03-25-000-2008-00079-00(2431-08). Presiding Judge: Dr. Víctor Hernando Alvarado Ardila. Nullity Action.

⁵Law 1480 of 2011, Article 24, Paragraph: *“The producer or supplier may only be exempted from liability when it proves force majeure, fortuitous event or that the information was adulterated or supplanted without having been able to avoid the adulteration or supplanting.”*

an individual involved in a judicial or administrative proceeding, ensuring their rights are respected, and justice is correctly applied throughout the process.”

(...)

As we have seen, the fundamental right to due process in administrative proceedings includes the guarantees to exercise both the right to defense and the right to contest.

(...)

The right to defense in the context of administrative procedures is closely linked to the principle of publicity and the rights of access and audience, enabling the individual to oppose, raise objections, request, submit, and contest evidence, participate in its presentation, make arguments, be regularly notified, and challenge the administration’s decisions. Although the Court has recognized that the right to defense in administrative proceedings has “a high level of indeterminacy,” certain minimum standards must always be protected. These minimum standards mean that under no circumstances may administrative authorities “completely deprive individuals” of the following guarantees: 1) access and participation in the procedure, 2) commenting on evidence, 3) requesting and submitting evidence, and 4) challenging decisions made in the process. In the context of sanctioning processes, there is also the guarantee “to not participate, to remain silent, or to wait for the State to prove liability.”⁶

Consequently, considering that in both the investigation phase and the administrative action related to appeals, the aim is to establish the truth of the facts, not merely a formal or legal truth, the evidence available in the process is crucial and must be assessed collectively based on the rules of sound judgment, as these are the basis for the adjudicator’s final decision.

2. Directorate's Considerations

2.1. Considerations Regarding Charge No. 1, for Non-Compliance with Article 6 of Law 1480 of 2011

2.1.1. Motivation of the Existence of a Quality Failure in Service Provision

The appellant questioned that the Directorate failed to substantiate the existence of the alleged quality failure, limiting its evidentiary activity to pointing out that there was a “*large*” number of petitions, complaints, and claims (PQRs) without any investigative activity. After citing jurisprudential excerpts from the Supreme Court of Justice and the Council of State on this point, they argued that the case law has consistently held that mere assertions by an individual have no evidentiary value in a legal proceeding. They argued that while these considerations have been issued within judicial procedures, they are fully applicable to the administrative investigations conducted by the Directorate, especially since the Constitutional Court has determined that the evidentiary activities of the Superintendency of Industry and Commerce should be conducted following the provisions of the CGP (acronym in Spanish for General Procedural Code) and CPACA (acronym in Spanish for Code of Administrative Procedure and Administrative Disputes), which underpin these considerations from the high courts.

From this, they concluded that the Directorate did not analyze the petitions, complaints, and claims (PQRs) that supported the imputation, limiting itself to verifying the existence of a

⁶ Constitutional Court. Ruling C-162 of May 27, 2021. Case file: D-1397. Presiding Judge: JORGE ENRIQUE IBÁÑEZ NAJAR.

certain number of them, which, in its view, implied a violation of consumer protection rules without analyzing their content.

In line with this argument, they claimed that, if granted, not all the petitions, complaints, and claims (PQRs) demonstrated the factual scenario of charge number 1 of the sanctioning act. Consequently, according to the sanctioned company, the Directorate made a factual error in its positive dimension by not considering all the evidentiary material in the record. If it had thoroughly reviewed this material, it would not have concluded that all the PQRs supported the imputation.

To illustrate their arguments, the sanctioned company referenced specific petitions, complaints, and claims (PQRs). For example, regarding petition ID 18204, they explained it originated from the buyer's improper use of the product, although the company replaced it as a customer courtesy. Petition ID 30965 involved a consumer who only contacted the sanctioned company for information. Petition ID 13425 was a case in which a consumer mistakenly purchased the wrong product. Petition ID 13426 was a query about buying through the phone line. Petition ID 13438 was about a consumer requesting information on physical sales points in Bogotá. Petition ID 13445 involved a consumer trying to purchase using a credit card. Petition ID 13462 involved a consumer who received a discount code through Rappi but did not know how to apply it. Petition ID 13470 dealt with a case where a consumer asked if the desired device came with capsules. Petition ID 13479 involved a consumer who experienced issues with their credit card but resolved them. Petition ID 13488 was an information request about sales points in Cartagena.

Contrary to the appellant's assertions, this Directorate did analyze the content of the petitions, complaints, and claims (PQRs), and, based on these, found the infraction of Article 6 of Law 1480 of 2011 grounded. It is important to note that it was not solely the large volume of complaints that led to the conclusion that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** incurred administrative liability for non-compliance with Article 6 of Law 1480 of 2011 regarding the quality of offered goods.

In this regard, this Directorate deems it necessary to recall the definition of quality found in Law 1480 of 2011 as *“the condition in which a product meets the inherent and attributed characteristics provided by the information about it”* and, per Article 6 of the Consumer Statute, producers are obliged to ensure the quality of the goods and services they offer or place on the market.

Given the above, this Directorate reviewed the content of the petitions, complaints, and claims (PQRs). It examined the one with filing number 21-75875, sequences 6 to 20, from October 8 and 11, 2021, and another with filing number 21-75875-9 from October 8, 2021. The latter corresponds to a database showing multiple complaints classified under various criteria, notably those listed in the “SUBCLASSIFICATION” and “DETAIL” fields, where complaints related to *“battery, warranty cases, how to use vype, leakage, refund, (...) no vapor, (...) paint peeling/rubbing, product arrived damaged, product does not match what was purchased (...)”*, clearly indicating quality issues in the products sold. To illustrate this, some of the complaints listed in the document are referenced here, though many more were recorded.

Table No. 1 “Prepared by the Directorate.”

Case ID	Findings from the Investigation
21680	"We contacted the user to check the status of the Vype ePod device after providing usage recommendations. The user indicates that the device remains the same; they report that the Vype continuously flashes a green LED light, does not charge properly, and does not allow vaping."
21787	"User sends evidence of capsules that have no color or flavor; it was validated with Alejandra, who indicated that a warranty should be issued."
22164	"We contacted the user to check the device's status as usage recommendations were sent. The user indicates it continues not working and charges but does not turn on."
22227	"We contacted the user to check the device's status as usage recommendations were sent. The user indicates it does not work and does not turn on."
22284	"We contacted the user because they reported that the ePod device was not working. They bought the ePod yesterday, 01-11-2020, and initially, it worked perfectly, but then it stopped generating vapor. They mention that they charged it for approximately 30 minutes until the green LED light turned on. They followed the usage recommendations (for example, charging the device on a computer, 80-minute charging time, etc.). They report that the device continued with the same issue, not generating vapor."
22339	"The user contacts us and indicates a pending warranty case. We could not establish contact when we tried to communicate with the user. This capsule has leakage issues; when asked to provide evidence of the leakage, the user sent it two days later, showing that the capsule was empty. This was validated with the responsible department, which authorized the process for the user."
22612	"We contacted the user to check the device's status as usage recommendations were sent. They reported that it does not generate vapor. The user states that despite following the recommendations (proper charging method, inserting/replacing the capsule, etc.), the device charges but does not generate vapor."
22638	"We contacted the user to proceed with the warranty of the Vype ePod device capsule as they communicated via email, attaching a photo that shows evidence of leakage, and additionally, the capsule has a very light liquid color."

22790	"The user contacts us and indicates they had a pending warranty process, but no contact was made when usage evidence was requested. The user clarifies that they followed the usage test, but the Vype still does not charge. They also report that when they attempt to charge it, the green LED light turns on but does not work when used."
22803	"We contacted the user to check the Vype ePen 3 device status after providing usage recommendations. The user reported that the device is not charging despite plugging it in for two hours. They indicate that they followed the recommendations, but the Vype continues to have the issue of not charging."

In line with the above, contrary to the claims of the company under investigation, it is not only the existence of these complaints that evidences the breach of the duty of quality but also the responses and follow-ups to these complaints that reveal, in numerous cases, that the product delivered to consumers did not meet the advertised or expected characteristics. As seen in this sample from the evidence, the sanctioned company responded to the PQRs and acknowledged defects in the delivered goods by using phrases such as "*we contacted the user to verify device status, to send usage recommendations, user contacted us because they repeatedly tried to charge the device, requested a warranty, warranty proceeded (...)*" among others.

Following the above explanations and the evidence in the record, it was confirmed that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** did not comply with Article 6 of Law 1480 of 2011 by failing to ensure the quality of the goods offered. According to the "SUBCLASSIFICATION" and "DETAIL" fields, nine hundred seventy-two (972) PQRs related to defects like "*battery, leakage, no vapor*" were recorded, along with nine hundred seventy-one (971) PQRs citing issues such as "*device not turning on, liquid leakage, battery not charging, LED not turning off, overheating, no vapor, low vapor, LED not turning on, battery not lasting enough, liquid leakage, red light flashing*" as inherent characteristics of the goods.

Likewise, the above shows that the argument of the company under investigation, according to which the Directorate incurred a factual defect in its positive dimension by not assessing all the evidentiary material, is not grounded since the Directorate never indicated that each and every single one of the PQR's submitted had implied a violation. Instead, within such complaints, there was a multiplicity of cases in which the company under investigation had ignored its duty regarding the quality of the goods, which represented a violation of Article 6 of Law 1480 of 2011 regarding the quality of the goods offered.

Additionally, it is necessary to clarify that the cases used by the sanctioned company to support its arguments were not considered to attribute the alleged responsibility in the statement of charges, nor the sanctioning act, as the appellant tries to suggest, because the factual assumptions mentioned were not the basis for the imputation or the administrative infringement against **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** Rather, it was the multiple complaints and responses, as listed in the previous table, that highlighted the product quality issues and supported the sanction's application.

Based on the above information, this Directorate considers the basis for the sanctioning decision sufficient. This is because the documentation of complaints provided by the sanctioned company was evaluated according to the principles of sound judgment, as stated in Article 176 of the General Procedural Code (CGP, for its acronym in Spanish), demonstrating the quality defects attributed to it through applying empirical principles. For this purpose, it is essential to briefly reference the meaning of this concept, its conditions of application, and the elements that give it evidentiary value in a proceeding of this nature. According to case law,⁷ empirical principles are *"those general hypothetical statements rooted in empirical knowledge, derived from concrete situations, but which, detached from these, acquire validity in new circumstances or, in other words, 'those principles born from observing reality that pertains to human experience and serve as a tool to assess the evidentiary material of any judgment.'"*

In this regard, this Directorate finds that there is an empirical principle that holds that if a group of unorganized individuals independently and repeatedly presents a series of complaints about a product or service, it is reasonable to believe that such dissatisfaction exists—especially when the only incentive for the complainants is the assertion of their rights, i.e., the rectification of the issues.

Thus, as the analyzed file contains descriptions of what the affected consumers conveyed to the company when submitting their claims, and considering the aforementioned empirical principle, these statements can be regarded as truthful because **i)** they comprise numerous complaints, which could hardly result from an orchestrated or manipulated action; **ii)** there are patterns in the types of defects in the products, such as failure to ignite, failure to produce smoke, peeling, failure to charge, and leaks, among others; and **iii)** these complaints required significant time and effort on the part of the consumers, whose main incentive in filing the complaint was to assert their rights.

Furthermore, under Article 241 of the General Procedural Code, the procedural conduct of the company ultimately corroborated the conclusions that followed from an adequate assessment of the document describing the complaints. In this respect, it should be noted that the defendant complied with the requests of users who complained about defects in purchased goods, substantiating that the accusation did, in fact, exist. This is evident from the details of the PQR (petitions, complaints, or claims) table, which shows how different PQRs were handled and whether they solved the complainant's problem.

In conclusion, the appellant's objections have been dismissed as unfounded, and consequently, the decision finding a violation of Article 6 of Law 1480 of 2011 will be upheld.

2.1.2. Inapplicability of After-Sales Service to Goods Sold by BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.

The sanctioned company emphatically asserted that after-sales service did not apply to products sold by the company. In its view, under Title II of the Single Circular of the SIC

⁷ Supreme Court of Justice, Criminal Cassation Chamber, Presiding Judge: Patricia Salazar Cuellar, Process Number: 37175

[Superintendency of Industry and Commerce], the cases in which after-sales service applies are **(i)** Automotive and **(ii)** Home Appliances and Gas Appliances.

Additionally, the appellant referenced the delivery of goods, particularly the considerations made in the sanctioning act, which stated there was a service failure arising from the consumer relationship, resulting in consumers feeling misled due to the delivery of incorrect or defective products. In this regard, the defense argued that these considerations were inconsistent with those in Resolution No. 12996 of March 16, 2023, which stated that delivery was an inherent activity of the company. Consequently, it questioned the delivery classification as intrinsic to the sale in prior cases rather than as a service in itself.

In response to these objections, this Directorate expressly stated in the sanctioning act: *"Regarding the above, this Office must indicate that the defendant's argument is unfounded and cannot cite concepts from other sectors of the economy that are markedly different from the environment in which it operates to excuse its actions."*

Thus, this Authority explained that it referred to after-sales service to indicate that, after entering a consumer relationship, the sanctioned company sent goods in poor condition or different from what consumers had purchased. Consequently, the company conducted sales under the remote sales model, where the goods were delivered separately from the payment.

Therefore, the provisions concerning (i) Automotive and (ii) Home Appliances and Gas Appliances are not applicable in the after-sales service framework, as claimed by the sanctioned company. However, this does not mean that after-sales service is inapplicable altogether.

In this sense, it was clarified in the sanctioning administrative act that the concept of "*quality*" includes the act of delivery since it is inherent to the acquisition of the goods, and the sanctioned company cannot dissociate itself from the commercialization and distribution processes developed to meet consumer needs. This is consistent with the transcription made by the appellant of Resolution No. 12996 of March 16, 2023, stating that the delivery activity is inherent to a consumer relationship.

In this regard, this Superintendency has not changed its stance on previous cases. It maintains that there was a service failure, as **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** sent goods that did not match the original purchase and were in poor condition, preventing consumers from fulfilling their consumption needs.

Therefore, the sanctioned company's arguments cannot succeed.

2.2. Considerations Regarding Allegation No. 2, for Non-Compliance with Article 3, Paragraph 1.3, and Article 23 of Law 1480 of 2011

2.2.1. Information on Nicotine Levels

The sanctioned company argued that in its written defense, it provided a survey conducted by Ipsos, a leader in market research, aimed at determining consumers' understanding of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**'s information on Vuse nicotine levels.

It added that the Directorate did not take into account that, according to the survey, "76% of consumers understand the milligram unit of nicotine measurement, 79% understand comparative differences in nicotine content, 94% understand that the bars on the products denote the nicotine level in the liquid, and 99% feel adequately informed about nicotine levels in a product."

It argued that the sanctioning act failed to consider the rational understanding of the average consumer and underestimated their cognitive, logical, and decision-making abilities.

The sanctioned company asserted that the vast majority of Vuse consumers understood nicotine level intensity through numbers, percentages, and/or graphs.

This claim is based on the rational understanding of an average consumer without underestimating cognitive, logical, learning, and decision-making abilities, as Vuse consumers understood nicotine levels by numbers, percentages, and graphs.

Likewise, it argued that the sanctioning act established that the information provided was insufficient, as it would be impossible for consumers to understand the indications fully, thus violating the principle that "no one is obligated to the impossible."

The sanctioned company argued that this Superintendency should have conducted a study based on the rational consumer concept to determine if the information was sufficient, questioning that no other element was cited as making nicotine levels understandable to consumers.

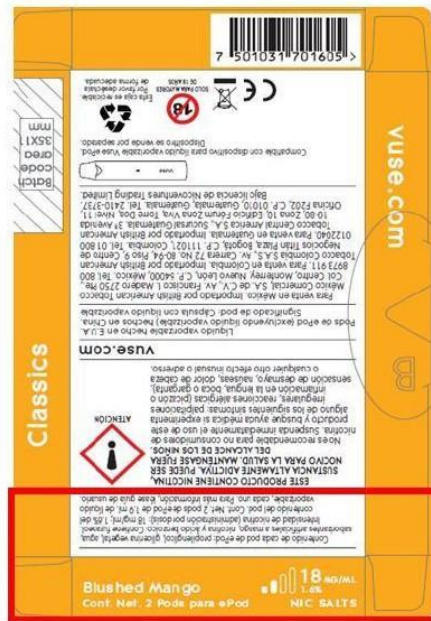
In response to the arguments made by the sanctioned company, this Directorate considers it essential to reproduce the pieces through which BRITISH AMERICAN TOBACCO COLOMBIA S.A.S. informed consumers of the Vuse nicotine levels.⁸

Image No. 1 of Resolution No. 62028 of 2023 - Filing No. 21-75875-18 of October 8, 2021



Image No. 2 of Resolution No. 62028 of 2023 - File No. 21-75875-18 of October 8, 2021

⁸ File number 21-75875 consecutive 6 to 20 of October 8, 2021 and October 11 of the same year. File number 21-75875-18 of October 8, 2021, "annex 7 question 9", with one (1) file in PDF format called "pack capsules with nicotine (1)" corresponding to a package of the product referred to as "blushed mango".



Based on the previous images, it is observed that they correspond to the “*nicotine capsules pack (1)*” of the packaging of the product identified as “*blushed mango*,” where it was marked “*18 mg/ml 1.6%*” “*NIC SALT*” with a graphic of four (4) rising bars.

Similarly, from an administrative visit⁹ to the website “<https://www.vuse.com/co/es/>” of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, the following was observed:

Image No. 3 of Resolution No. 62028 of 2023 - File No. 21-75875-18 of October 8, 2021

⁹ File number 21-75875-27 of April 18, 2022.

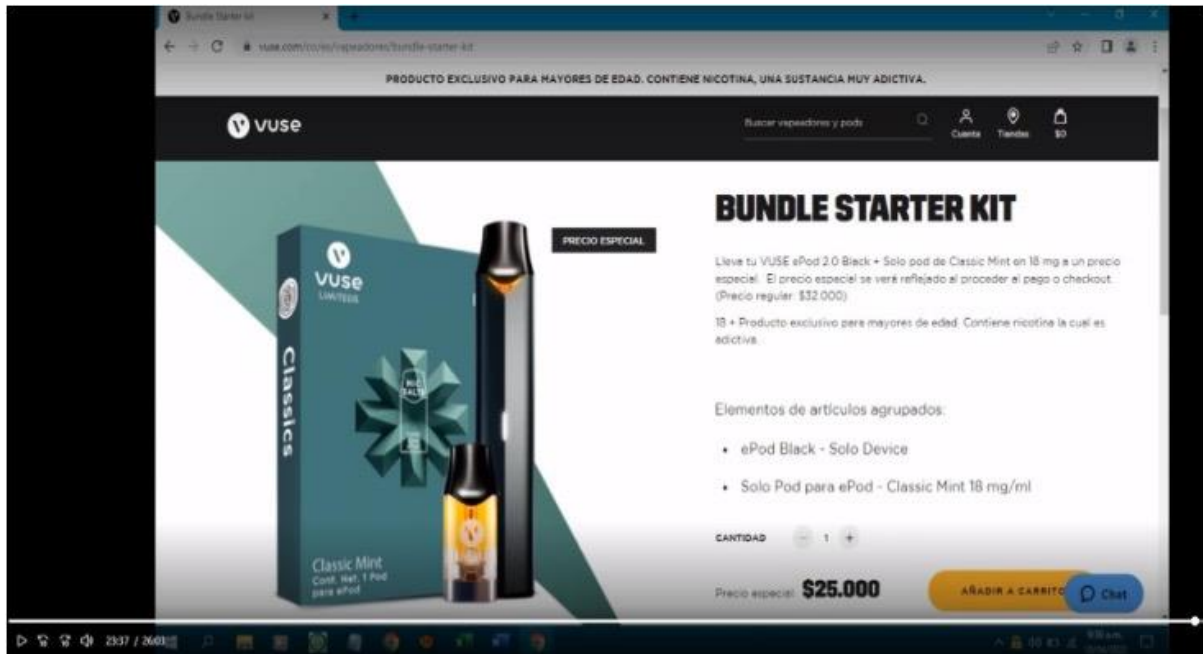
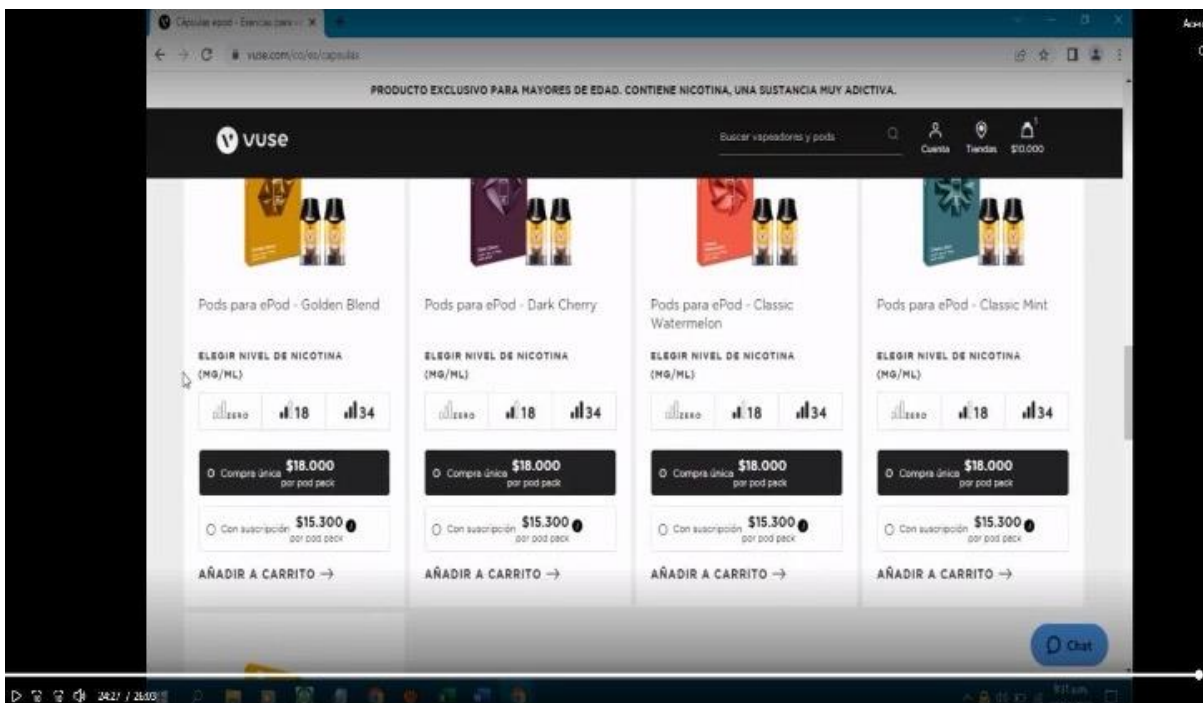


Image No. 4 of Resolution No. 62028 of 2023 - File No. 21-75875-18 of October 8, 2021.



Based on the previous images, it is noted that the sanctioned company disclosed the nicotine intensity on the pod that is inserted into the *Vuse Epod* device, “18 mg/ml”, using ascending bars and the expressions “zero” or the numbers “18” and “34.”

From the transcribed information, this Directorate agrees with the conclusions of the sanctioning administrative act regarding the fact that the information was neither **sufficient, precise, nor clear**. Indeed, from a review of the *Ipsos* survey cited in the document through which the appeal was filed, it is overlooked by the appellant that respondents were asked, “What information do you believe should be included regarding nicotine levels in a vaping product package?”, **fifty-one percent (51%) indicated the nicotine percentage present in the product, twenty-eight percent (28%) indicated nicotine level (comparative), twenty**

percent (20%) nicotine content per milliliter, and one percent (1%) mentioned another unlisted aspect.

Additionally, seventy-six percent (76%) identified that “MG/ML” referred to the unit of measurement for milligrams of nicotine per milliliter of vaping liquid, but seventeen percent (17%) thought it referred to the amount of vaping liquid in a capsule. Six percent (6%) indicated that it was the amount of flavor contained in a Vuse pod. This shows that the term “MG/ML” had varied interpretations for respondents, and when seeing a percentage and numbers, there was no clarity about nicotine levels.

Consequently, the information **was not timely** because consumers did not know the nicotine level of Vuse products at the time of purchase¹⁰, whether on the packaging or the website. Nor was it **sufficient**, as the unit of measurement, numbers, percentages, and graphics were inadequate for consumers to make an informed choice based on nicotine level and thus adopt a reasonable consumption decision. Finally, the information was not **clear**, as it could lead to doubts, and the nicotine intensity was not easy to understand.

This is not an isolated error, as the sanctioned company wrongly claimed in their appeal, but evidence from the Ipsos survey shows a lack of clarity in respondents’ answers.

Concerning the notion of the rational consumer invoked by the defense to analyze the information provided to consumers, the Andean Community Court of Justice¹¹ defined the average consumer. This definition has been used by the Council of State,¹² as follows:

*“Spain’s case law in this area refers to the ‘**average consumer**’ or ‘**average public**’ defined as ‘**a person with normal perceptive faculties**’ or ‘**a person with normal reasoning abilities**,’ who, generally speaking, **is not an expert and is guided by simple, common visual or auditory perceptions**.*

*In contrast to this ‘average’ or ‘common’ consumer, there is the **professional and specialized consumer**, who, **due to their training, is less likely to be confused than the average or ordinary consumer**. (...)*

*The Court addressed the matter of the average consumer in a ruling dated December 3, 1987. The High Community Body stated, ‘...The Court allows itself to specify – following prevailing doctrine – that the **consumer** to be considered (...) is the so-called ‘**average consumer**’, that is, **the ordinary consumer of a particular class of products**, assumed to have **average knowledge and perceptive capacity**. (...)*

***When considering the consumer**, we start from the hypothesis that this is an ‘**average consumer**,’ one who is **neither overly alert nor overly distracted, neither having ample time nor is in too much of a rush, neither well-informed nor ignorant**, and **distinct** from **consumers** with **specialized or technical knowledge** (...).” (Emphasis outside original text).*

Provisions protecting the consumer are based on the premise that the consumer, as the recipient of information, should be considered an “*average or rational consumer*” to verify if the information was clear, truthful, sufficient, timely, verifiable, understandable, precise, and appropriate.

Moreover, it is worth mentioning that people perform a superficial, **not in-depth**, detailed analysis of the provided information, so it is evaluated according to the meaning the consumer

¹⁰ Definition of timely according to the Royal Spanish Academy.

¹¹ Andean Community Court of Justice, Process No. 09-IP-94 case “DIDA” - SOCIEDAD CONFECCIONES DEPORTIVAS DIDA LTDA., and Process No. 41-IP-99 case PASTEUR SANOFI DIAGNOSTICS.

¹² Council of State, Contentious-Administrative Chamber, First Section, Reporting Counselor: Rafael E. Ostau De Lafont Planeta, Bogotá, D. C., seventeen (17) March two thousand eleven (2011), file number: 11001-03-24-000-2004-00390- 01, Plaintiff: Puma Ag Rudolf Dassler Sport, Defendant: Superintendencia de Industria y Comercio, Reference: action for nullity and reestablishment of rights.

attributes to it, **guided by common sense and the usual meaning of words.**

Consequently, this Superintendency did not need to conduct a technical study under the concept of the rational consumer to determine if the information was sufficient, as the contradictor erroneously tried to argue. Instead, this Authority's analysis should consider the position of an average consumer without requiring an exhaustive study of their understanding.

Thus, this Office reiterates that it endorses the "*rational consumer*" standard because "*advertisements should be judged according to their content and the meaning that the consumer would attribute to them, the **common and usual meaning of words, phrases, and sentences, and what they suggest or state without resorting to convoluted, complex, or forced interpretations,** with the preferred interpretation being the one that most naturally arises in the consumer's view.*"¹³

Therefore, given that the average consumer's analysis is superficial, not in-depth or detailed, and instead guided by the natural sense of words, this Directorate properly analyzed the information about the nicotine level. Based on the information about the product, an average consumer could not fully determine what the percentages or bar graphs referred to. On the contrary, as seen even in the studies submitted by the appellant, a large number of consumers did not identify what the numeric and proportional data on the package referred to.

It is evident then that the average consumer, based on the provided information, did not know the nicotine level of Vuse on time, and thus the unit of measurement, numbers, percentages, and graphics were inadequate and created doubts that hindered an easy understanding of nicotine intensity.

This is not about requiring **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** to do the impossible, as the appellant incorrectly claimed, but about the company's obligation to provide **timely, sufficient, and clear** information about the nicotine level of its Vuse, which, as previously explained, did not occur.

Therefore, the sanctioned company's arguments are not valid.

2.2.2. Information in a language other than Spanish

The appellant asserted that the vast majority of consumers understood the information provided by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, based on the results of the *Ipsos* survey, according to which eighty percent (80%) of respondents understood that the term "*nicotine level*" referred to the nicotine level contained in the vaping device's liquid. Seventy-two percent (72%) of respondents understood that "*nic salts*" referred to nicotine salts in vaping devices.

The defense argued that this Directorate did not provide any technical or statistical basis to conclude that the survey sample was not significant. They added that the Directorate should have explained why it concluded that the survey was not "*significant*," detailing the proper standard for a sample to be considered significant and providing proof that the sanctioned company's survey was invalid. They argued that, in any case, this Superintendency was responsible for the burden of proof regarding the factual accusation.

Contrary to the appellant's assertions, as explained in the sanctioning administrative act, the survey sample was not representative concerning the number of people surveyed compared to the total sales made by the company.

¹³Jaackel Kovacs Jorge, *Publicidad Engañosa: Análisis Comparativo*, Boletín Latinoamericano de Competencia, Volume number 20, June 2005, pages 59 to 61.

Indeed, a representative sample for a statistical analysis is a sample of a relatively appropriate size that has been selected by random procedures, with observed characteristics reflecting those of the population from which it was drawn.¹⁴ The doctrine has explained that representativeness is a function of various factors, which not only depend on randomness and sample size but also the specific sample design, auxiliary key information usage, and an updated sample frame. The term representative is used when the sample accurately represents the variable under study, which has a probabilistic distribution in the population, and the frequency distribution in the sample should closely mirror that of the population.¹⁵

This illustrates the complexity of selecting a representative sample, and thus consideration must be given to the selection method, proposed estimators and their accuracy, determination of sample size that considers the allowed margin of error, confidence level in the estimation, and variability on which *Probabilistic Inference*¹⁶ will be based.

Based on the above, this Directorate was justified in the sanctioning act in stating that the evidence provided by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, corresponding to the Ipsos survey, did not include a representative sample, because to validate the results of research and data collection to obtain information from people on a specific topic,¹⁷ it is essential to use statistical instruments capable of supporting these conclusions, such as sample size. The sample¹⁸ is a set of data that represents the entire statistical population, characterized by its large size, with representativeness being its most important feature, defined as:

*"The ability of a subset to present identical characteristics to the complete set; therefore, sampling is meaningful only if the characteristics to be observed in the population are adequately reflected in the sample. A sample will be representative of the population it was taken from if 'its aggregate characteristics are similar to the total set of characteristics in the population.'"*¹⁹

Considering the previously explained concepts, this Directorate verified that the Ipsos survey was conducted with a base of 138 participants according to its technical sheet²⁰, whereas, based on the information provided by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**²¹ in response to the information requirement issued in Resolution No. 3295 of February 2, 2023,²² the total sales records for all products marketed from September 1, 2020, to September 30, 2021, through the website <https://www.vuse.com/co/es/> and the ratio of sales of all VYPE products marketed from September 1, 2020 to September 30, 2021, corresponded to 45,900 sales through the former and approximately 343,000 through the latter.

Consequently, upon reviewing the survey sample, that is, 138 participants, it is not representative in light of the 343,000 units of VYPE products sold, because the subset cannot

¹⁴ Ras, 1980; Cochran, 1976; Scheaffer, Mendenhall and Ott, 1987; Scheaffer, Mendenhall and Ott, 1987.

¹⁵ Ibidem.

¹⁶ Ibidem.

¹⁷ DANE [acronym in Spanish for the National Administrative Department of Statistics] definition of survey : "The purpose of surveys is to obtain continuous statistical information from a sample of the population, while censuses and population registers are of greater scope and extension. Surveys can be carried out in several ways: by sampling, opinion poll, pilot test", available at <https://www.dane.gov.co/files/Glosario.pdf> date of consultation August 30, 2024.

¹⁸ Definition of *sample* taken from the Enciclopedia Iberoamericana available at <https://enciclopediaiberoamericana.com/muestra-estadistica/> date of consultation August 30, 2024.

¹⁹ Definition of the *representativeness of the sample* taken from the *Guía Práctica para la Construcción de Samples* of the Technical Unit of External Control of the Comptroller General's Office of the Republic of Chile, available at https://www.oas.org/juridico/pdfs/mesicic4_chl_const.pdf date of consultation August 30, 2024.

²⁰ Provided by the sanctioned party through file number 21-75875-40 dated September 21, 2022.

²¹ File number 21-75875-51 of February 17, 2023.

²² Through the administrative act that ordered the opening of the evidentiary period, Resolution No. 3295 of February 2, 2023, the sanctioned company was ordered to "11.1.3. Provide the list of sales of all products marketed from September 1, 2020 to September 30, 2021, through the website <https://www.vuse.com/co/es/>; it must indicate: date of sale, invoice number, brief description of the product, units and total amount paid. This information must be submitted in Excel (.xls) format, via email.

guarantee the same characteristics as the entire group, and its approximation is not valid.

This, in addition to the fact that, according to the charge sheet, the issue corresponded to the concern that the information was made available to the consumer in a language other than Spanish.

Thus, from the review of the charge sheet, Resolution No. 57472 of August 26, 2022,²³ it is established that one of the factual grounds supporting charge two was the apparent failure to provide consumers with the minimum information in the Spanish language. Consequently, the reproach focused on the sanctioned company's use of expressions that are not in Spanish, such as "*nic salts*" and "*nicotine level*", on its website and in materials issued from June 15 to September 30, 2021, at points of sale, *Instagram*, *Facebook*, *YouTube*, among others.

The sanctioned company is reminded that Article 23 of Law 1480 of 2011 emphatically states that **"in all cases, the minimum information must be in Spanish."**

Consequently, by failing to comply with the obligation to provide information in Spanish by using the expressions "*nic salts*" and "*nicotine level*", **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** engaged in the reproached conduct, and accordingly, the arguments of the opposing company have been dismissed.

Now, regarding the burden of proof, this Directorate recognizes that it was the responsibility of this Superintendency to verify the breach of the relevant rules based on evidence duly provided in the file, which did indeed occur, as explained in this administrative act. This is because the violation is one of the basic prerequisites for the administrative sanction imposed in exercising the State's sanctioning authority.

In this regard, it should be noted that this Superintendency fulfilled its evidentiary burden, as it conducted the relevant preliminary investigations and assessed their merit to initiate the corresponding administrative investigation. In exercising its powers of inspection, supervision, and control in consumer protection, it gathered, among other things, several complaints, made the necessary information requests, and conducted an administrative visit to the website of the passive subject. During the preliminary investigation phase, it collected evidence to determine whether to continue with the proceedings.

Additionally, this Authority issued the corresponding charge sheet through Resolution No. 57472 of August 26, 2022, in which it precisely and clearly described the facts with the probative materials supporting each of the legal charges made. Similarly, it ordered the opening of the evidentiary period through Resolution No. 3295 of February 2, 2023, incorporating and granting probative value to the documents collected during the preliminary investigation phase and the documentary evidence submitted with the reply under file number 21-75875-40. It ordered the closure of the evidentiary period through Resolution No. 10093 of October 10, 2023, incorporating and granting probative value to all the evidence collected and submitted in the preliminary investigation phase, as listed in the charge sheet, opening, and closure of the evidentiary period.

Likewise, the sanctioning act assessed all the evidentiary material according to sound judgment rules, thereby demonstrating non-compliance with the provisions of numeral 1.3 of Article 3, Articles 6, 23, 25, 31, 33, 42, and numerals 1, 5, and 9 of Article 43, paragraphs b), c), g), and the paragraph of Article 50 of Law 1480 of 2011, consistent with numerals ii) and iii) of paragraph a) of numeral 2.2.2.1. of Chapter II of Title II of the Single Circular of this Superintendency and what is established in numerals 7 and 9 of Article 2.2.2.37.8 of

²³ Considering 17.2. Imputation No. 2: Alleged non-compliance with the provisions of numeral 1.3 of Article 3° and Article 23 of Law 1480 of 2011 - 17.2.2. Alleged provision of minimum information in a language other than Spanish.

Regulatory Decree 1074 of 2015.

Therefore, in this case, it was the responsibility of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** to disprove what was proven in the proceedings and, consequently, to demonstrate compliance with the guidelines outlined in the relevant rules or that an exculpatory circumstance existed. It is clarified that the presumption of innocence principle must be reconciled with the determination of the burden of proof, meaning the sanctioned company was responsible for providing sufficient evidence to refute the charges and demonstrate that it indeed fulfilled its duties to protect consumer rights, which did not occur in this case under review.

For this reason, in this specific case, this Directorate assumed the burden of proof to demonstrate the sanctioned company's non-compliance without it being necessary for this Directorate to conduct a technical or statistical test, as was mistakenly interpreted by the defense.

Given the above, the defense's objections claiming that the Directorate did not consider the *Ipsos* survey and its results are duly refuted and therefore dismissed. This Superintendency did evaluate that evidence, concluding that the sample was not representative and that expressions in a language other than Spanish were used, demonstrating the imputed rule's violation, which the sanctioned company failed to disprove.

Thus, the sanctioned company's arguments are dismissed and cannot succeed because they are groundless.

2.2.3. Interpretation of the Rules

In the appeal document, the sanctioned company asserted that the Directorate's interpretation of the rules should follow a teleological or purposive approach. It argued that under this approach, the legislator's intention or spirit when enacting a legal text should be identified. It reiterated that, according to the *Ipsos* survey, seventy-six percent (76%) of respondents understood the numbers indicating nicotine level, seventy-nine percent (79%) understood the percentages denoting nicotine content in the products, and ninety-four percent (94%) understood the graphical component indicating nicotine level.

It argued that this Directorate made a formalistic analysis of the imputed rules and that the Constitutional Court warned that rules should be interpreted following the criteria established in the Civil Code.

Similarly, it argued that the company fulfilled the rule's purpose by proving that most consumers understood the information.

In response, this Directorate reminds the sanctioned company that, according to Article 4 of Law 1480 of 2011, the rules of this law should be interpreted in the manner most favorable to the consumer, and in case of doubt, the matter will be resolved in favor of the consumer.

Furthermore, it should be noted that consumer relations occur in an asymmetrical context due to the producer's dominant role in developing the goods or modeling the service, imposing conditions for its functioning and use, as well as the distributor's or supplier's advantage due to their control over marketing channels for goods and services.²⁴ Thus, the consumer protection regime corresponds to the framework designed by the Constituent Assembly and the Legislator to address market asymmetry, where the consumer is disadvantaged.²⁵ For

²⁴ Constitutional Court. Ruling C-524 of 1995. Case D-920. Presiding Judge Dr. Carlos Gaviria Díaz.

²⁵ Constitutional Court. Ruling C-973 of 2002. Case D-4032. Judge Dr. Alvaro Tafur Galvis.

these reasons, the imputed rule, Article 23 of the Consumer Statute, requires that minimum information be in Spanish to protect the Colombian consumer, whose native language is Spanish.

Based on the above, the assertion of the appellant that this Directorate should apply a teleological or purposive interpretation criterion is not accurate, as the imputable provision, Article 23 of Law 1480 of 2011, should be interpreted in the manner most favorable to the consumer. This means that the information on nicotine level must be clear, sufficient, timely, and, as minimum and crucial information due to its adverse effects, must be in Spanish. It is concluded, therefore, that contrary to what the sanctioned company argued, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** did not comply with the rule, as it is proven that it used the expressions “*nic salts*” and “*nicotine level*”, and it is irrelevant that, in its view, the vast majority of consumers understood the content of the information.

In conclusion, the decision that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** violated the provisions of numeral 1.3 of Article 3 of Law 1480 of 2011 is upheld.

2.3. Considerations Regarding Charge No. 3, Due to Non-compliance with Article 25 of Law 1480 of 2011

2.3.1. Information About Usage Conditions and Contraindications of Marketed Goods

The appellant asserted that the sanctioned company informed consumers about the usage conditions and contraindications of the marketed goods.

They argued that External Circular 32 of October 21, 2019, issued by the Ministry of Health, was not an applicable standard to determine the non-compliance by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** with Article 25 of Law 1480 of 2011.

They reiterated that if this Authority reproached what was communicated or a particular contraindication, the Directorate should have conducted an analysis under the concept of the rational consumer to determine if consumers were aware of the proper way to use and the risks associated with the consumption of *Vuse*.

The defense highlighted the use of *optional language*, which, in their opinion, was neither prohibited by Article 25 of the Consumer Statute nor reprehensible, asserting that the sanctioned company provided clear and sufficient information about the possibility of *Vuse* causing adverse effects. In the same sense, they argued that the use of *optional language* was appropriate in this case, considering that the harmful effect that could result from *Vuse*, including nicotine, was a possibility.

Finally, regarding formaldehyde, the sanctioned company explained that they did not announce it as a harmful effect because the amount emitted by *Vuse* was below levels considered safe according to international standards.

In response to this argument, this Directorate reiterates that the norm breached was Article 25 of Law 1480 of 2011, as the sanctioned company did not clearly indicate, in perfectly legible characters, the harmfulness and the necessary conditions or instructions for the correct use of the marketed good, nor the contraindications of the liquid stored in the vaping device's cartridge in the case of nicotine, as well as those produced by the heating of other incorporated substances that generated formaldehyde, which, due to their nature or components, were harmful to health.

To demonstrate the alleged non-compliance, it was necessary to resort to statements from

the Ministry of Health and Social Protection,²⁶ which clearly indicate the harmfulness of the mentioned good.

The Ministry warned of “*the harmful health consequences due to the use of Electronic Nicotine Delivery Systems (ENDS) and Electronic Non-Nicotine Delivery Systems (ENNDS).*” Furthermore, according to External Circular No. 32 of October 21, 2019, issued by the Ministry of Health and Social Protection, nicotine causes, among other things, addiction, affects neural development in adolescents, and causes acute intoxication, especially dangerous for children. Additionally, the circular explained that one of the documented effects of chemicals present in electronic cigarette vapor, such as formaldehyde and acrolein, can cause cellular damage and mutagenesis, supporting the possibility that long-term exposure increases the risk of cancer.²⁷

Accordingly, and contrary to the sanctioned company’s claim, studies and evidence demonstrate that nicotine has harmful effects on consumers’ health,²⁸ without coercing the sanctioned company to provide inaccurate or false information.

Furthermore, considering the presence of substances such as formaldehyde in the analyzed product, as described in section 3.5 of the appealed act, it is evident that the marketed vaping products increase consumers’ exposure to these harmful components, even in minimal proportions, a situation that heightens the potential health impacts, which should be communicated to consumers in compliance with Article 25 of Law 1480 of 2011.

This Directorate deems it important to note that the amounts of formaldehyde present in the Vuse product do not diminish its harmfulness. In fact, upon reviewing Circular 32 of October 21, 2019, the Ministry of Health and Social Protection specified health risks associated with chemical products in electronic cigarette vapor, **like formaldehyde**, which, as stated, can cause cellular damage and mutagenesis, supporting the possibility that long-term exposure increases the risk of cancer, without any differentiation between low and high levels of the substance.

Therefore, this Superintendency emphasizes that there is no evidence proving the degree of formaldehyde’s harmfulness based on whether it is present in lesser or greater amounts, nor that it becomes more or less harmful accordingly. Thus, it is feasible to assert that there is no proof that any formaldehyde concentration does not pose a risk, rendering the appellant’s claims unsupported beyond mere references to international standards without evidence for their statements. In other words, the defense’s argument regarding formaldehyde concentrations lacks evidentiary basis, and as such, these arguments cannot succeed in dismissing the factual allegation.

Thus, the appellant incorrectly interprets this Directorate’s argument regarding External Circular 32 of October 21, 2019, as the administrative infraction was established due to the non-compliance with Article 25 of Law 1480 of 2011, given the harmful nature of the goods as indicated in the mentioned Circular.

Moreover, the sanctioned company claimed to have informed consumers about the

²⁶ External Circular No. 00000032 of October 21, 2019 (Official Gazette No. 51.114 of 2019).

<https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/DE/DIJ/circular-32-de-2019.pdf>

²⁷ Huang, Xu, & Lau, 2018

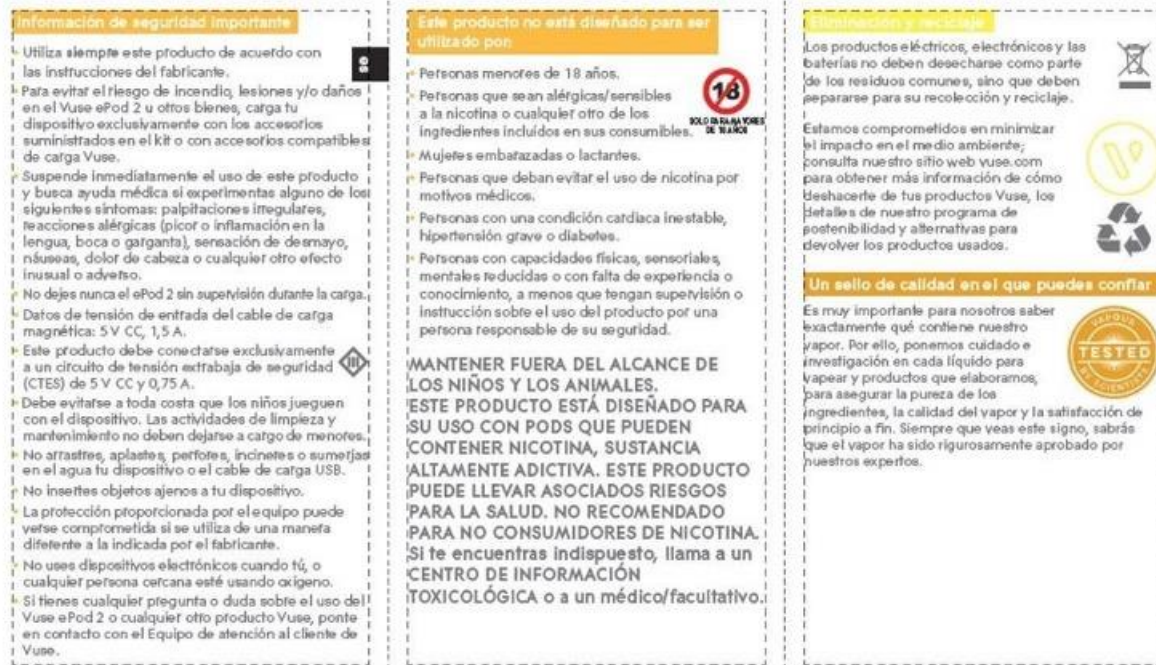
²⁸ Ministry of Health and Social Protection. External Circular No. 00000032 of October 21, 2019 (Official Gazette No. 51.114 of 2019).

<https://www.minsalud.gov.co/sites/rid/Lists/BibliotecaDigital/RIDE/DE/DIJ/circular-32-de-2019.pdf>. The scientific studies that were taken into account by the Ministry of Health and Social Protection, were the following: (Centers for Disease Control, 2019); (U.S. Department of Health and Human Services, 2018); (Cullen KA, 2018); (Jenssen BP, 2019); (American Psychiatric Association, 2013); (Moheimani & Bhetraratana, 2017); (Alzahrani, Pena, & Temesgen, 2018); (Bhatta & Glantz, 2019); (Jenssen & Boykan, 2019); (Unger, Leventhal, McGovern, Stone, & Barrington, 2018); (McConnell, Barrington, Wang, & Urman, 2017); (Itoh, Aoshiba, Herai, Nakamura, & Takemura, 2017); (Huang, Xu, & Lau, 2018); (Weiss, Tomasallo, Meiman, & Creswell, 2016); (Ordonez, Kleinschmidt, & Forrester, 2015); (Layden, Ghinal, Kimbal, & Layer, 2019); (United Nations Office on Drugs and Crime, 2016); (Ministry of Health and Social Protection, 2017); (World Health Organization, 2019); (Ministry of Health and Social Protection, 2018); (Colombian Society of Family Medicine, 2018); (European Respiratory Society, 2019); (Latin American Chest Association, 2019).

appropriate use of the product and its warnings, referring to Image No. 10 of the sanctioning act under filing number 21-75875-18 dated October 8, 2021. They added that optional language was not prohibited by Article 25 of Law 1480 of 2011 and that, in the draft circular proposed by this Superintendency to inform about the harmful effects of the products, the term “may” was used, meaning a sanction was imposed based on language that this Superintendency proposed as discretionary for informing about the harmfulness of certain goods.

To clarify, this Directorate reproduces Image No. 10 of the sanctioning act:

Image No. 10 of Resolution No. 62028 of 2023, file number 21-75875-18 of October 8, 2021



Based on the above image and in response to the opponent's argument that, in this case, it was possible to use optional language since the harmful effect *may* result from *Vuse* goods, along with the potential effects of nicotine itself, this Directorate clarifies that the provision established in Article 25 of Law 1480 of 2011 is an imperative mandate of obligatory compliance, and its observance is neither discretionary nor optional.²⁹

In the same vein, it is pertinent to insist that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** cannot exempt itself from responsibility by stating that formaldehyde emitted by *Vuse* products was not disclosed to consumers because, in their view, its emission levels are considered safe, as explained above. This substance, being a chemical present in electronic cigarette vapor, can cause cellular damage and mutagenesis, supporting the possibility that long-term exposure increases cancer risk, as noted by the National Authority responsible for establishing health-related norms and guidelines in our country, without differentiating between low or high levels of this substance to determine its harmfulness or safety. What is clear is that formaldehyde is inherently harmful, regardless of its concentration.

Therefore, given that nicotine and formaldehyde are harmful and can cause health damage or harm, it was the obligation of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** to clearly indicate, in perfectly legible characters, on labels, packaging, or inserts included with these

²⁹ Article 4°. Character of the rules. The provisions contained in this law are of public order.

products, their harmfulness.

Likewise, the company failed to inform the conditions and instructions for the proper use of *Vuse*, and the contraindications due to omitting other health implications for consumers due to the presence of nicotine.

This Directorate notes that, based on Circular 0000032 of October 2, 2019, issued by the Ministry of Health and Social Protection, which stated that “*e. Chemicals present in electronic cigarette vapor (for example, formaldehyde and acrolein) can cause cellular damage and mutagenesis, supporting the possibility that long-term exposure increases cancer risk*”, and given that formaldehyde was present in the vapor generated by *Vuse* usage, the sanctioned company was required to inform about the presence of formaldehyde but failed to do so, as it is harmful and can increase the likelihood of causing severe health damage.

Concerning the use of *optional language*, as warned in the sanctioning act, the appellant cannot ignore the adverse effects of nicotine and formaldehyde, described in the external circular issued by the Ministry of Health and Social Protection. Consequently, it is imperative that the warnings are communicated accurately, and in no way should compliance with this obligation be optional, given the harmful nature of these substances.

Therefore, this Directorate will dismiss the appellant's objections as inadmissible and uphold the decision regarding **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**'s failure to comply with Article 25 of Law 1480 of 2011.

2.4. Considerations regarding Charge No. 4 for failure to comply with Article 31 of Law 1480 of 2011

2.4.1. Warning about the harmful nature of nicotine

The sanctioned company claimed that it did inform consumers about the harmful nature of nicotine, particularly its addictive properties.

Indeed, they explained that the warnings clearly indicated that nicotine is a highly addictive substance and that *Vuse* could be harmful to health. However, they clarified that no study or evidence showed that nicotine caused harmful health effects; thus, according to the appellant, stating that nicotine would cause harm would be inaccurate and false information. In the defense's view, the communication regarding the harmful nature and presence of nicotine in *Vuse* complied with national and international standards.

On the other hand, they explained that formaldehyde is a chemical substance naturally present in foods such as fruits, vegetables, meat, and fish. It is neither an added substance nor an ingredient directly incorporated into *Vuse*. Consequently, they clarified that the amount of formaldehyde emitted by *Vuse* daily was safe according to international standards compared to levels emitted by common foods.

Given these points, the sanctioned entity argued that it was unreasonable to require warnings about the presence of formaldehyde in the goods it markets since the emission levels are considered safe.

This Directorate disagrees with the appellant's claims. An analysis of the **evidentiary material on file shows that the advertising pieces distributed from June 15 to September 30, 2021**, at points of sale, *Instagram*, *Facebook*, *YouTube*, the website, among others, failed to clearly warn about the harmful nature of *Vuse* products containing nicotine and the need to consult usage conditions or contraindications. The passive subject simply limited itself to indicating, in a circle on the lateral area of the packaging, that “*this product contains nicotine*,

a highly addictive substance,” as shown below:

Image No. 12 of Resolution No. 62028 of 2023 - Record number 21-75875-20 of October 11, 2021.



[VUSE. The freshness of the cucumber as you like it // at the level you want today.]

Image N° 13 Resolution N° 62028 of 2023 - File number 21-75875-20 of October 11, 2021.



[VUSE. The mango sweetness your way // At the level you want today.]

Image N° 14 Resolution N° 62028 of 2023 - File number 21-75875-20 of October 11, 2021.



[The sweet, fresh or classic flavor you like // At the level you like. 0 mg, 18 mg, and 32 mg.
Get to know nine flavors.]

Image N° 15 Resolution N° 62028 of 2023 - File number 21-75875-20 of October 11, 2021.



[The freshness of incredible flavors // At the level you like. 1 pack. \$14.000.]

Based on the preceding images,³⁰ it is fully proven that the sanctioned company included in its advertising the addictive nature of nicotine and the need to consult usage conditions and contraindications. However, even though the analyzed and previously reproduced advertisements stated that nicotine was addictive, they did not specify its harmful nature. Other factors closely related to its harmfulness, such as its effects in increasing the risk of cardiovascular, respiratory, and gastrointestinal diseases, weakening immune response, negatively impacting reproductive health, affecting cell proliferation, oxidative stress, apoptosis, and DNA mutation leading to cancer, among others, were overlooked.³¹

As such, even though one of the harmful effects of nicotine is its addictive nature, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** failed to disclose other harmful effects of the nicotine used in Vuse. Additionally, as indicated in the sanctioning act, the company did not inform that formaldehyde was generated with the use of Vuse due to the heating of other incorporated substances, which could cause harm.

Given the above considerations, this Directorate cannot accept the arguments of the sanctioned company regarding the clarity of warnings on Vuse packaging, because, contrary to the investigated company's assertion, there are indeed studies and evidence demonstrating that nicotine causes harmful effects on health beyond being highly addictive. Consequently, merely mentioning addiction as the sole effect of Vuse, without referring to its other harmful effects, constitutes advertising that does not comply with the requirements of Article 31 of Law 1480 of 2011.

Regarding the argument that formaldehyde is present in fruits, vegetables, meat, and fish, the fact remains that when present in Vuse as a chemical product, it can cause cellular damage and mutagenesis, which supports the possibility that long-term exposure may increase cancer risk,³² rendering it harmful to health.

This was explained in section 2.3.1 of this administrative act, as Circular 32 of October 21, 2019, from the Ministry of Health and Social Protection, explicitly warned of the health risks associated with **formaldehyde** as a chemical present in e-cigarette vapor, which can indeed cause cellular damage and mutagenesis, along with the potential for long-term exposure to increase cancer risk. This leads this Directorate to conclude that formaldehyde is harmful on

³⁰These are brought to mention as an example of the file No. 21-75875-20 of October 11, 2021.

³¹Institute for Health Technology Assessment - Colombia, "Options in Colombia for regulating the use of electronic systems with or without nicotine dispensing: a policy brief," accessed at: https://www.iets.org.co/Archivos/3/Policy_brief_version_completa.pdf.

³²Huang, xu, & Lau, 2018

its own, and **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** should have warned consumers accordingly. Therefore, it is clear that the company failed to comply with the applicable regulations.

Consequently, the appellant's interpretation suggesting that all producers and marketers of fruits, vegetables, dairy products, meat, fish, and seafood should include warnings on their packaging alerting consumers to the presence of formaldehyde in such goods is irrelevant to this case, as this matter specifically concerns the *Vuse Epod* device.

2.5. Considerations regarding Charge No. 5 for failure to comply with Article 33 of Law 1480 of 2011, in conjunction with subpoints ii) and iii) of letter (a) of numeral 2.1.2.1 of Chapter Two of Title II of this Superintendency's Unified Circular

2.5.1. Information on the essential elements of the promotion

The appellant company argued that in the communication piece called "*haz tu match vuse*" ("make your Vuse match"), the sanctioned company provided consumers with all necessary information to understand the advertisement within the same piece, thus making it unnecessary to refer to additional sources.

They added that they fulfilled the obligation to inform about the promotion's validity period, method, location, and other conditions for accessing the promotion. Similarly, they argued that the Entity's requirements in the sanctioning act regarding specifying the requirements and conditions for delivery, accumulation with other incentives, any per-person limit, and the exact start and end dates were not mandated by subpoints ii) and iii) of letter (a) of numeral 2.1.2.1 of Chapter Two of Title II of this Superintendency's Unified Circular. They argued that it was not mandatory to specify in the advertisement whether there was a per-person limit or if it could be combined with other incentives.

Upon reviewing the evidentiary material on file, this Directorate observed the following:

Image N° 16 Resolution N° 62028 of 2023 - File number 21-75875-20 of October 11, 2021.



[VUSE. Make your Vuse match. 1 epod 20.0 + 1 pack of pods + 2 Club Colombia beers. For only \$34,000. Buy here]

The analysis of the previous communication piece shows that "*Terms & Conditions available at (TBC)*" was indicated at the bottom. Still, no further details were provided to the public within the advertisement. Likewise, as mentioned in the sanctioning act, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** confirmed through communication filed 21-75875-51 of

February 17, 2023, that no additional document established terms and conditions. However, they claimed in the communication piece that terms and conditions would apply and be available, yet they did not specify how consumers could access them.

Therefore, this Directorate reiterates that Article 33 of Law 1480 of 2011 clearly states that the conditions of time, method, place, and **any other requirements for accessing promotions and offers must be disclosed to consumers in the advertisement.** From the detailed review of the evidentiary material on file and of numeral 2.2.5 of the defense's brief, the defendant company explicitly indicated: "(...) *The Directorate alleges that BAT supposedly failed to comply with Article 33 of Law 1480 of 2011 because (i) it did not include terms and conditions within an advertising piece (...)*" (...) **However, BAT did refer the consumer to the terms and conditions of the advertising piece in question**", a statement that confirms that not only did the provisions reported in the communication piece apply, but also that other restrictions applied. However, it did not inform which ones or where they could be consulted.

In addition to the above, regarding the application of sections ii) and iii) of the letter a) in section 2.1.2.1 of Chapter Two of Title II of this Superintendent's Unified Circular, the appellant argued that it was not true that it was mandatory to announce in the advertisement if there was a quantity limit per person or if it could be combined with other incentives. Since the communication piece being analyzed did not limit the quantity per person, there was no restriction in that regard, and since it also did not limit the possibility of combining it with other incentives, the consumer could do so.

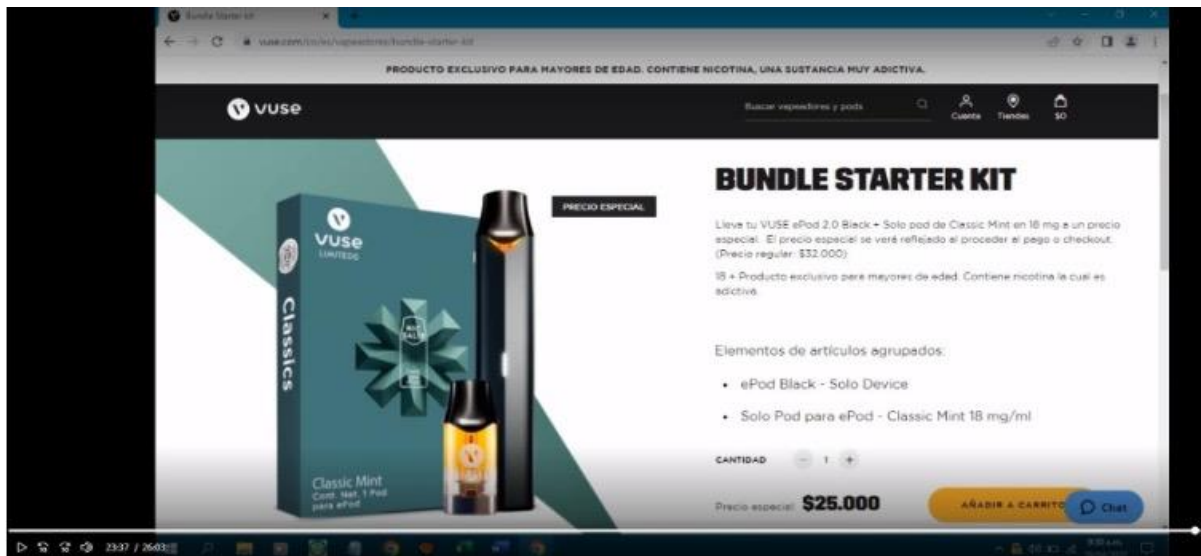
Contrary to the appellant's claims, a careful reading of section 2.1.2.1 of Chapter Two of Title II of this Superintendent's Unified Circular shows that this provision refers to the technical and legal criteria for the proper application of the requirements for truthfulness, sufficiency, and non-misleading information mandated by the legislature, particularly regarding minimum information. Thus, upon reviewing the evidentiary material in the file, it was found that the sanctioned company did not inform the requirements and conditions for delivering "*1 edpod 2.0 + 1 pack of pods + 2 Club Colombia beers for only \$34,000.*" Indeed, it is neither evident, clear, nor precise how consumers could claim the promotion or what they actually had to do to receive 1 edpod 2.0 + 1 pack of pods + 2 Club Colombia beers.

Similarly, it was not indicated whether it could be combined with other incentives or if it was limited to a certain quantity per person. This interpretation of sections ii) and iii) of letter a) in section 2.1.2.1 of Chapter Two of Title II of this Superintendent's Unified Circular made by the appellant does not align with the intent of the regulation, as the use of the expression "*for example*" is meant to guide the interpretation of the rule in some instances concerning the requirements and conditions for delivery, rather than making the minimum information optional.

Based on the above, the defense's arguments regarding the non-compliance with Article 33 of Law 1480 of 2011, in line with section ii) of letter a) in section 2.1.2.1 of Chapter Two of Title II of this Superintendency's Unified Circular, are dismissed. The objections will be dismissed, confirming the decision regarding this part of the charge.

Furthermore, concerning the "Bundle starter kit" communication piece, the sanctioned company explained that it was not a temporary offer but rather the sale of a package consisting of two items: *Vuse epod 2.0 black and Classic Mint Pod of 18 mg.*

Upon reviewing the evidentiary material in the file, this Directorate considers that the statement in the appeal does not correspond with the information in the communication piece, as the term "**SPECIAL PRICE**" was used, as shown below:



The use of the term “*SPECIAL PRICE*” leads to the conclusion that it was a promotion or offer, which, according to section 10 of Article 5 of Law 1480 of 2011, is defined as:

*“10. Promotions and offers: **Temporary offering** of products under **favorable or free special conditions** as an incentive for the consumer. It will also be considered a promotion if offered for free or at a **reduced price**, as well as by a similar system, in money, in kind, or with point accumulation.”*

Likewise, the information in the communication piece indicates, *“The special price will be reflected upon checkout (**regular price: \$32,000**)”*. In contrast, the “special price” was twenty-five thousand pesos (\$25,000), which led this Directorate to reiterate that it was an offering under favorable special conditions for the consumer as a reduced price incentive. In that sense, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** was required to comply with the applicable provisions regarding promotions and offers.

After these considerations, and without finding a substantiated argument from the sanctioned company to refute the findings made by this Directorate, it will be confirmed that the company mentioned above did not specify the time conditions, failing to state the duration or validity of the incentive, without indicating the exact start and end date, nor informing any other requirement to access it, thus confirming non-compliance with Article 33 of Law 1480 of 2011, in line with sections ii) and iii) of letter a) in section 2.1.2.1 of Chapter Two of Title II of this Superintendent's Unified Circular.

2.6. Considerations regarding Charge No. 6 for non-compliance with Article 42 and numerals 1, 5, and 9 of Article 43 of Law 1480 of 2011.

2.6.1. Abusive Clauses

The sanctioned company explained that its terms and conditions did not include abusive clauses and proceeded to defend each clause as follows:

2.6.1.1. Section 4.10 of the Terms and Conditions

Regarding this section, the appellant argued that this Directorate misinterpreted the clause, as, in their view, it did not assume the consumer's will nor grant the company arbitrary discretion. They explained that its purpose was to ensure compliance with the terms and conditions and that the clause did not establish a scenario where the consumer voluntarily decided not to continue the consumption relationship according to section 5 of Article 43 of

Law 1480 of 2011. They argued that the clause, in addition to not being abusive, has never implied that it would not refund the money for the corresponding orders, as, in their view, all canceled orders due to consumer non-compliance with terms were fully refunded.

From reading section 4.10 of the Terms and Conditions, it states the following:

“Section 4.10. If you fail to comply with these terms before we dispatch the Product, even after we have accepted your order, we will not dispatch the Product to you. We reserve the right to charge you for the Product, but we may, at our discretion, refund all or a portion of the payment you made for the Product in question.”

From the above clause, this Directorate observes that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** established that *“We reserve the right to charge you for the Product, but we may, at our discretion, refund all or a portion of the payment you made for the Product in question.”* Thus, the company kept the right to charge for the product and, at its discretion, refund all or part, which ultimately contradicts section 5 of Article 43 of Law 1480 of 2011. According to this article, clauses stipulating that the producer or provider does not refund what has been paid if the contract's purpose is not fully or partially executed are null and void.

Similarly, it also contradicts section 9 of Article 43 of Law 1480 of 2011 because the aforementioned clause assumes a manifestation of the consumer's will leading to expenses or obligations on their part, considering that clause presumes consumer acceptance that if the product is not dispatched or delivered due to non-compliance with terms and conditions, they would agree that the sanctioned company may, at its discretion, refund all or part of the payment.

Consequently, as previously noted in the decision imposing the sanction, although the first part of the clause concerns a consequence against the consumer for non-compliance with the terms and conditions, the fact remains that the latter part of the clause is overtly null and void, granting **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** arbitrary discretion to refund all or part of what was paid, which is against the imposed regulations.

Additionally, regarding the argument that all canceled orders due to consumer non-compliance with terms resulted in refunds, it is necessary to point out that this does not exempt the company from its responsibility for non-compliance with Article 43 of Law 1480 of 2011, as the cited regulations state that the clause wording, as such, should not violate consumer rights; otherwise, it would amount to a null and void abusive clause.

All the above is in line with Article 42 of Law 1480 of 2011, which outlines that abusive clauses are those that create an unjustified imbalance to the consumer's detriment, amounting to an abuse of the bargaining power held by the producer and/or provider in terms of information and understanding of the scope, contractual content proposed or, in most cases, imposed on the consumer, expanding the advantages or benefits of the party imposing those conditions or reducing its obligations and, consequently, increasing the burdens and responsibilities of the consumer.³³

Finally, regarding the defense's claim that the clause did not establish a scenario in which the consumer voluntarily chose not to proceed with the consumer relationship according to item 5 of Article 43 of Law 1480 of 2011, this Directorate considers that such a factual assumption is not part of the objection. Indeed, the sanctioned company, with the wording used in the analyzed clause, kept the right to refund all or a portion of the payment made, turning the clause abusing by establishing that the producer or provider would not refund what was paid

³³ Rubén S. Stiglitz, Consumer contracts and unfair terms. Page 39.

if the contract's objective was not fulfilled in whole or in part, and presumed an expression of the consumer's will, which results in expenses or obligations charged to the consumer.

Consequently, the defense's arguments have been dismissed, and the resolution regarding Item 4.10 of the Terms and Conditions will be upheld.

2.6.1.2. Numeral 6.4 of the Terms and Conditions

Regarding this numeral, the appellant company argued that the Directorate misinterpreted it, as the company believed the clause indicated that the company should only be compensated in cases where it had to incur a cost due to a failed payment for the product.

From reading the clause, it states:

Numeral 6.4. "In the event of a failed payment for any reason, you agree to fully compensate us for all costs, expenses, and disbursements incurred in attempting to collect the payment made by you."

Contrary to the assertions of the appeal document, this Directorate has correctly interpreted the cited clause, as it explicitly presumes the consumer's expression of will, imposing expenses or obligations on them by using expressions such as "*you agree to compensate us*" and "*all costs, expenses, and disbursements*", which violates numeral 9 of Article 43 of Law 1480 of 2011, rendering the clause invalid ipso facto.

Furthermore, since this stipulation violates Article 42 of the Consumer Statute as an abusive clause by creating an unjustified imbalance against the consumer, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** cannot, in the wording of its terms and conditions, presume the consumer's expression of will in any way to charge for the items incurred due to failed payments, as the appellant mistakenly argued.

Consequently, the sanctioned company cannot claim that the clause assumes a failed payment occurred, as explained in the sanctioning act; payment failures can even be caused by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, and not exclusively by the consumer.

Finally, it is clarified that the objection is not based on the company having avoided its responsibility or concealed the charge of any amount, but rather that it included abusive clauses in its terms and conditions, violating Article 42 of the Consumer Statute and numeral 9 of Article 43 of the same law, without it being necessary for the clause to have been applied or not, as the mere fact of stipulate it is enough to constitute the alleged violation.

Therefore, the arguments of the sanctioned company do not proceed.

2.6.1.3. Numerals 7.3 and 7.5 of the Terms and Conditions

Regarding item 7.3 of the Terms and Conditions, the sanctioned company argued that it did not limit its responsibility in the delivery of goods purchased by consumers and that the delivery times should be understood as estimated and not exact.

It indicated that it had always complied with the maximum delivery time provided in subsection h) of Article 50 of Law 1480 of 2011 and delivered products within a number of days equal to or less than its sales promise.

The aforementioned numeral reads as follows:

Item "7.3. The estimated dispatch times are those indicated on our website. Please note that

the dispatch times listed are only estimates and are not guaranteed; therefore, they should not be relied upon. An email will be sent confirming when your Product has been shipped. We do not guarantee delivery will be on the specified date."

Based on the reproduced clause, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** included in its terms and conditions that *"the times (...) are not guaranteed"* and *"we do not guarantee delivery will be on the specified date,"* effectively limiting the company's responsibility from its corresponding obligations and, therefore, violating numeral 1 of Article 43 of Law 1480 of 2011. This is because the company limits its responsibility regarding delivery by establishing that it does not guarantee it on a specific date, even though it had informed it.

Likewise, the sanctioned company violated Article 42 of the Consumer Statute because the questioned clause created an unjustified imbalance against the consumer by stating the times as estimates and not guaranteeing them, in addition to emphasizing that **it does not guarantee delivery on a specified date**. This situation was left to the unilateral discretion of the drafter, establishing it solely for its own benefit and to the detriment of consumers, compromising the principle of reciprocity of interests and including a waiver by the consumer of their interests without grounds for justification.

Additionally, the significant imbalance stemmed from the abuse of negotiating power held by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** as a professional due to the ability to set the contract's content without the consumer's intervention and to their detriment,³⁴ which expanded the company's advantages by reducing and eliminating its obligations while increasing the consumer's burdens, who could not expect their purchase on a specific date.

In response to the argument that the sanctioned company always complied with the maximum delivery time provided in subsection h) of Article 50 of Law 1480 of 2011 and that it was proven to have delivered the goods sold within a number of days equal to or less than its sales promise, this Directorate clarifies to the appellant that this charge analyzes the wording of the clause included in the terms and conditions, which was found to be abusive, without requiring an analysis of whether or not the goods were actually delivered or within what time frame.

It is reiterated that the issue studied was the imbalance created by establishing a clause that disadvantaged the consumer due to a lack of equivalence between the contracting parties' situations, one of whom is in a disadvantaged position compared to the other. Moreover, the clause was not individually negotiated and caused harm to the consumer due to the imbalance between the parties' rights and obligations.³⁵

Consequently, the company violated numeral 1 of Article 43 of Law 1480 of 2011, and Article 42 of the Consumer Statute, and thus, the defense's objections on this matter have been dismissed.

Regarding numeral 7.5, the appellant argued that the sanctioned company's liability standard related to cases where delivery delays were due to force majeure.

It argued that, in any case, the same clause explicitly states that if the product is not delivered within ten (10) days, it would be resent at no cost to the consumer, so there is and has never been an exemption from liability.

This Directorate finds that clause 7.5 included in the terms and conditions stated:

"7.5. We do not accept any liability for any delay in delivery, including but not limited to delays

³⁴Rubén S. Stiglitz, Consumer contracts and unfair terms. Page 39.

³⁵Ruling of the Supreme Court of Justice, Civil Cassation Chamber of December 14, 2011. M. P. Jaime Alberto Arrubla Paucar. Reference. C-1100131030142001-01489-01.

caused by a force majeure event (see clause 14). However, if you have not received the product within ten business days from the delivery date specified in our acceptance email, please notify us, and we will resend your order at no additional cost. At our discretion, we may require proof of non-delivery, and the costs of this will be your responsibility."

According to the reading of the clause and the review of the sanctioning act, this Directorate clarifies that the objection focused on the expression, "**We do not accept any liability for any delay in delivery, including but not limited to delays caused by a force majeure event** (see clause 14)."

Thus, contrary to the assertions of the appeal document, this is not about cases where deliveries were delayed due to force majeure. Instead, the clause explicitly states that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** does not accept any responsibility for any delivery delay, which is clearly contrary to the provisions in item 1 of Article 43 of Law 1480 of 2011, thereby constituting an abusive clause invalid as a matter of law by limiting the producer's responsibility for obligations legally owed.

It also violated Article 42 of the Consumer Statute. This is because, by including the questioned clause, the company created an unjustified imbalance against the consumer, who reasonably expects to receive what they purchased, making it the responsibility of the sanctioned company to ensure delivery as an inherent obligation of the consumer relationship.

Finally, regarding the sanctioned company's argument that the same clause expressly mentioned that if the good were not delivered within ten (10) days, it would be sent again at no cost to the consumer, this Directorate reiterates that what is analyzed is the wording of the clause as such, finding it abusive because with it the company expressly exempted itself from liability for any delay in delivery, without correcting the aforementioned exemption for the resending.

Having made the previous considerations, the arguments of the defense against the decision made in the sanctioning act have been dismissed, and consequently, it will be confirmed that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** violated the provisions of Article 42 and numerals 1°, 5°, and 9° of Article 43 of Law 1480 of 2011.

2.7. Considerations regarding charge No. 7, for failure to comply with the provisions of literals b), c), g), and the paragraph of Article 50 of Law 1480 of 2011, consistent with the provisions of numerals 1°, 7°, and 9° of Article 2.2.2.37.8 of Decree 1074 of 2015.

2.7.1. Visible link, easily identifiable, allowing the consumer to access the website of the Superintendence of Industry and Commerce.

Regarding allegation number 7, the sanctioned company argued that it rectified some irregularities identified by this Superintendency. In its view, this fact was not recognized when issuing the sanctioning administrative act.

It stated that per the written defense and in the concluding remarks, the company included on the website <https://www.vuse.com/co/es/> a link that redirected consumers directly to the Superintendence of Industry and Commerce website. Therefore, in the company's opinion, the Directorate should recognize that, when presenting the written defense, it acknowledged its deficiency and rectified it.

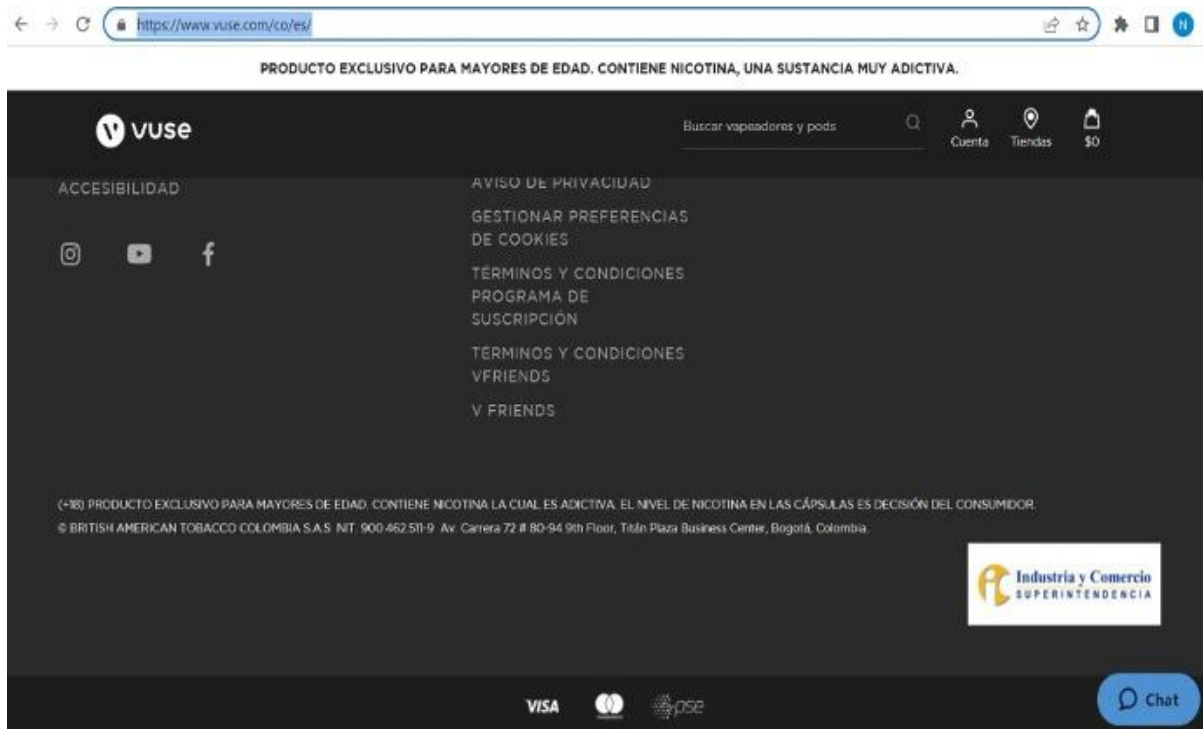
This Directorate finds that, from the written defense,³⁶ **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** demonstrated that it corrected the reproached error of not having included a link that redirected consumers directly to the website of the Superintendence of Industry and

³⁶ File number 21-75875-40.

Commerce on the website <https://www.vuse.com/co/es/>, as can be seen below:

"The website <https://www.vuse.com/co/es/>, as can be confirmed by the Directorate itself, currently has the mentioned link available and visible at <https://www.vuse.com/co/es/>:

Image No. 18 taken from record No. 21-75875-40.



Therefore, this Directorate will proportionally reduce the fine in the resolute part of this administrative act.

Likewise, this Directorate will modify Article 2 of Resolution No. 62028 of 2023's resolute part in the sense of revoking order number 8 consisting of "8. *ESTABLISH a visible, easily identifiable link that allows the consumer to access the page of the consumer protection authority of Colombia on the electronic commerce website <https://www.vuse.com/co/es/>,*" since in the context of this appeal it has been found that following the written defense, the sanctioned company adjusted its website and included the link of this Authority.

2.7.2. Information about the right of withdrawal.

The appellant added that, per the written defense and the concluding remarks, at the time of presenting the written defense, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** had adjusted its Terms and Conditions to comply with the obligation to inform consumers about the right of withdrawal.

Consequently, it requested that this Directorate recognize such a fact and apply the corresponding legal consequences.

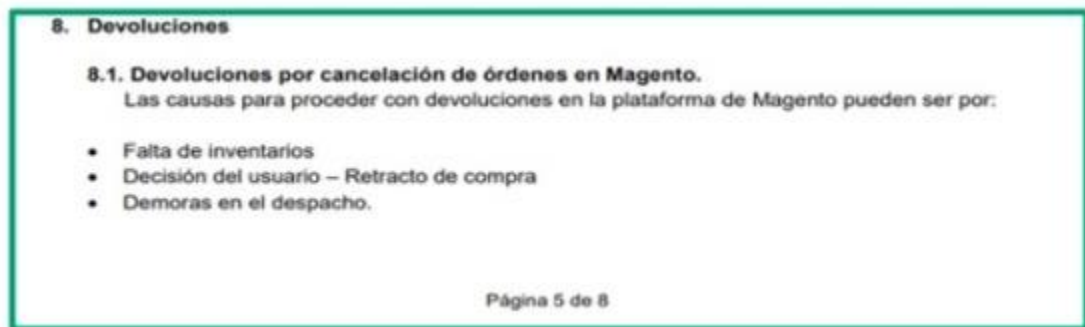
In its written defense,³⁷ the sanctioned company indicated:

"As of the date of this defense, BAT has adjusted its T&Cs to comply with this obligation.

³⁷. Ibidem.

Notwithstanding the above, it is essential to highlight that BAT did apply such a process and does enforce the right. As evidenced in Annex 11, the online payment procedure mentions the right of withdrawal as a cause for the refund of money, as follows:

Image No. 19 taken from record No. 21-75875-40.



[8. Returns. 8.1. Returns due to cancellation of orders in Magento. The reasons for proceeding with refunds on Magenta's platform may be: -a lack of inventory. - Decision of the user –Withdrawal of purchase. - Delays in dispatch.]

Now, Article 50 of Law 1480 of 2011 states:

"Article 50. Without prejudice to the other obligations established in this law, suppliers and vendors in the national territory who offer products through electronic means must: (...)

c). Inform, in the electronic commerce medium used, the means available for making payments, the delivery time of the good or the provision of the service, the right of withdrawal that the consumer has, the procedure for exercising it, and any other relevant information so that the consumer can make a purchase decision freely and without being misled."

In this regard, it should be noted that according to the analysis of the evidentiary record, it was evident that the sanctioned company did not inform about the possibility of exercising the right of withdrawal, nor did it indicate on its website the procedure to do so effectively. This situation constituted a breach of the provisions of literal c) of Article 50 of Law 1480 of 2011, consistent with numeral 9 of Article 2.2.2.37.8 of Regulatory Decree 1074 of 2015.

In this regard, notwithstanding the assertions made by the defense in the written appeal, this Directorate must indicate that they do not exempt from responsibility, as it is evident that it did not comply with its obligation as ordered in the applicable regulation. Furthermore, while the sanctioned company alleged that it made adjustments to demonstrate compliance with the obligation to inform consumers about the right of withdrawal, it is true that within this type of administrative investigation, the concept of supervening fact is not applicable, as explained in detail in the sanctioning act.

Nonetheless, for the sake of discussion, this Directorate did not find evidence that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** had modified its terms and conditions based on legal requirements. Thus, this Directorate reviewed the annexes provided by the sanctioned company in its written defense and analyzed Annex 11. Still, from reading that document, it is unclear whether it corresponds to the *Terms and Conditions* applicable to commercial operations through the company's electronic commerce, nor are they made available to consumers.

Consequently, there is a clear breach of the applicable regulation, and therefore, the arguments of the sanctioned company are not valid.

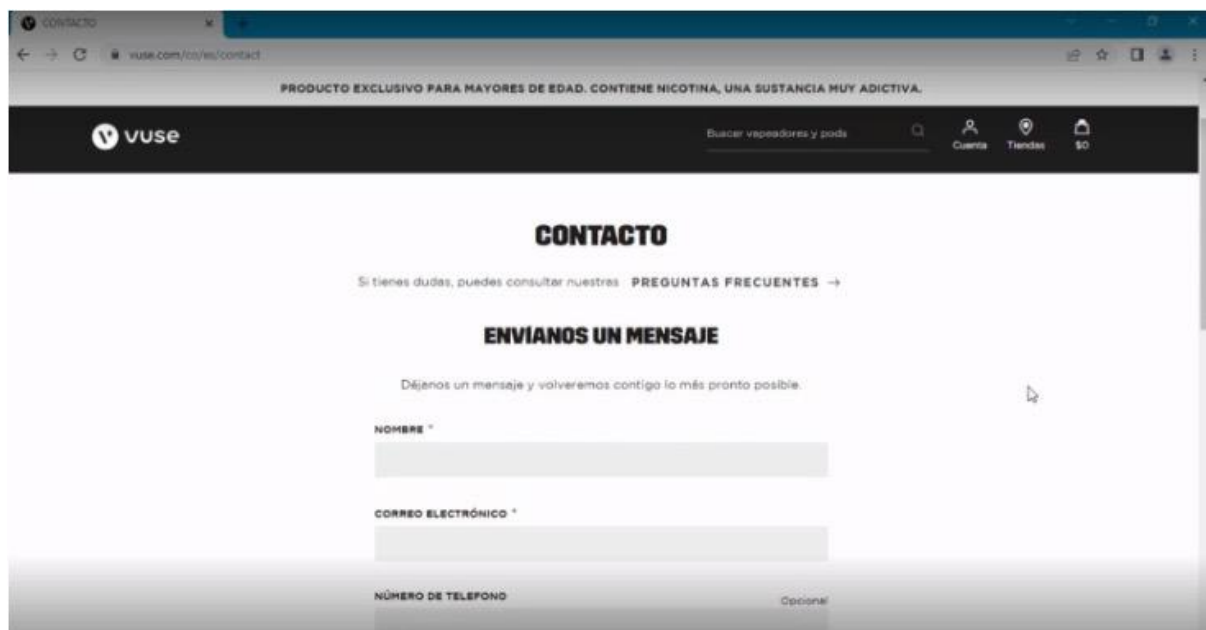
2.7.3. Provision in the same medium in which it conducts electronic commerce of mechanisms for the consumer to file their requests, complaints, or claims in such a way that there is evidence of the date and time of the filing, including a mechanism for subsequent follow-up.

Regarding this matter, the sanctioned company indicated that it indeed had channels for attention and follow-up of requests, complaints, and claims (PQRs) through its telephone line and chat available on the website <https://www.vuse.com/co/es/>. It added that through these mechanisms, a tracking number was assigned with which the consumer could follow up on their case through the customer service line.

Contrary to the explanations of the sanctioned company, and from the review of the evidentiary material in the file, it is observed that even though **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** had an option on its website to "*SEND US A MESSAGE*," it is not clear that this option is for the submission of requests, complaints, and claims (PQRs).

Indeed, the images reproduced below can be seen in the file:

Image No. 20 from Resolution No. 62028 of 2023 - Record No. 21-75875-27 dated April 18, 2022, minute 17:31.

A screenshot of a web browser displaying the contact page of the Vuse website. The browser's address bar shows the URL 'vuse.com/co/es/contact'. The page has a dark header with the Vuse logo on the left and navigation links for 'Buscar vapedores y pods', 'Cuenta', 'Tiendas', and '\$0' on the right. Below the header, the word 'CONTACTO' is centered in large, bold, black letters. Underneath, a line of text reads 'Si tienes dudas, puedes consultar nuestras PREGUNTAS FRECUENTES →'. The main heading 'ENVIANOS UN MENSAJE' is centered in bold. Below this, a sub-heading says 'Déjanos un mensaje y volveremos contigo lo más pronto posible'. There are three input fields: 'NOMBRE *' (with an asterisk indicating it is required), 'CORREO ELECTRÓNICO *' (also required), and 'NÚMERO DE TELÉFONO' (with the word 'Opcional' next to it, indicating it is optional). Each input field is a light gray rectangle.

[CONTACT. If you have any questions, you can consult our FREQUENTLY ASKED QUESTIONS. SEND US A MESSAGE. Leave us a message, and we will get back to you as soon as possible. NAME. EMAIL ADDRESS. TELEPHONE NUMBER]

Image No. 21 from Resolution No. 62028 of 2023 - Record No. 21-75875-27 dated April 18, 2022, minute 17:35.

CONTACTO

vuse.com/co/es/contact

PRODUCTO EXCLUSIVO PARA MAYORES DE EDAD. CONTIENE NICOTINA, UNA SUSTANCIA MUY ADICTIVA.

vuse

Buscar vapesadores y pods

Cuenta Tienda \$0

CORREO ELECTRÓNICO *

NÚMERO DE TELÉFONO Opcional

¿EN QUÉ PODEMOS AYUDARTE? *

ENVIAR MENSAJE

[HOW CAN WE HELP YOU? SEND A MESSAGE.]

From a careful reading of the regulation, letter g) of Article 50 of Law 1480 of 2011 expressly states that it is mandatory to provide, on the same medium through which electronic commerce is conducted, mechanisms for consumers to submit their petitions, complaints, or claims, and furthermore, these mechanisms must allow the consumer to have proof of the date and time of the submission, and include a mechanism for subsequent follow-up.

Therefore, there is no evidence in the record proving that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** had a mechanism by which the consumer could obtain proof of the date and time when they submitted a petition, complaint, or claim, nor a mechanism for subsequent follow-up.

In this regard, given the conditions mentioned above, this Directorate specifies that it is not feasible to accept the mechanisms provided by the sanctioned company for the submission of petitions, complaints, or claims because they do not fulfill the purpose of the regulation, which is to leave proof of the date and time of submission and a mechanism for subsequent follow-up.

As such, the appellant's objections have been discredited, and the infringement of letter g) of Article 50 of Law 1480 of 2011 will be confirmed.

2.8. Authority of the Directorate to Issue Administrative Orders

The sanctioned company argued that its fundamental right to due process and other legal guarantees were violated because, following the preliminary inquiry, even though the Directorate could file charges against it, that entity could not impose a fine during the administrative investigation and simultaneously issue administrative orders. The company argued that, if applicable, the fine and the administrative orders should be issued in a separate administrative act. It also claimed that imposing a fine along with orders represented a new sanction.

It added that the orders should be issued in a specific context, not in parallel with another sanction, such as a fine; otherwise, the principle of proportionality would be violated because the orders should not be of such a magnitude as to constitute a sanction.

For the appellant, by issuing the orders, this Directorate exceeded its functions, and if the intent was to impose precautionary measures, the orders did not resemble such a figure.

The Political Constitution of Colombia establishes in Article 2 that a fundamental purpose of the State is to promote general prosperity and guarantee the effectiveness of consumers' rights:

"Article 2. The essential purposes of the State are: to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties enshrined in the Constitution; to facilitate the participation of everyone in decisions that affect them and in the economic, political, administrative, and cultural life of the Nation; to defend national independence, maintain territorial integrity, and ensure peaceful coexistence and the existence of a just order. The authorities of the Republic are instituted to protect all residents of Colombia in their life, honor, property, beliefs, and other rights and freedoms, and to ensure compliance with the social duties of the State and individuals."

Article 78 of the Political Constitution of 1991 elevates consumers' rights to a higher level by stating:

"Article 78. The law shall regulate the quality control of goods and services offered and provided to the community and the information that must be provided to the public in their commercialization. Those who, in producing and commercializing goods and services, compromise the health, safety, and adequate supply to consumers and users shall be liable following the law. The State shall guarantee the participation of consumer and user organizations in the study of provisions that concern them. To enjoy this right, the organizations must be representative and observe democratic internal procedures."

Regarding administrative orders, it is pertinent that the scholar Jaime Orlando Santofimio Gamboa³⁸ states that the imposition of orders as part of administrative powers aims to enforce constitutional and legal provisions. Therefore, this Superintendency must conduct its actions, including the issuing of orders, within the legal guarantees for the protection of consumers in its intervention in economic activities or rights, as follows:

*"10. Per the provisions of Articles 59 and 62 of Law 1480 of 2011, the Superintendency of Industry and Commerce, like mayors, is granted precise **administrative powers of order** or of what was formerly called administrative policing, that is, **control and supervision intending to enforce the constitutional mandate of consumer protection**. (...)*

*Thus, the administrative **power of the Colombian State**, with the necessary powers and authorities, under the terms of superior imperative norms (principle of legality), is understood to **order private activities in favor of preserving community interests**. In this sense, the exercise of ordering activity by the administration has the particularity of **impacting the social, economic, political, and civil life of individuals, that is, all activities or rights that may affect their life in the community**. (...)*

*Under this conceptual framework and exercise of the **modern regulatory activity of the administration** (or, if preferred, within the classic context of police power [...]), the activity of the Superintendency of Industry and Commerce finds its basis in Colombian law. Concerning this set of limitations and orders on individuals' interests and rights, the **competent authorities must act proactively, maintain the limitation, permit the exercise of the activity or right,***

³⁸Santofimio Gamboa, Jaime Orlando. "Aproximaciones a los procedimientos administrativos en el Ley 1480 de 2011. El Estatuto del Consumidor y sus relaciones con la Ley 1437 de 2011 Código de Procedimiento Administrativo y de lo Contencioso Administrativo" In Perspectivas Del Derecho Del Consumo (Compilation). Universidad Externado de Colombia. Bogotá. 2013. Pp 251-597.

or simply sanction offenders.^{39 40}(Emphasis outside the original text).

In addition to the above, it is important to note that regarding the exercise of inspection, surveillance, and control powers, the authority to issue orders is operational, aimed solely at ensuring compliance with applicable regulations through preventive and repressive mechanisms.⁴¹

The measures adopted aim to effectively and efficiently guarantee the rights of the people, that is, in the case of the Superintendency of Industry and Commerce, all consumers' rights.

After these considerations, it is established that Law 1480 of 2011 and Decree 4886 of 2011⁴² outline that the two powers exercised by this Directorate—imposing a sanction and issuing orders—are different but equally important. Thus, the sanctioning power is provided in paragraph 1 of Article 59 of Law 1480 of 2011, and in paragraphs 17, 30, and 55 of Article 1, and in paragraph 1 of Article 12 of Decree 4886 of 2011. Meanwhile, the power to order necessary measures is found in paragraph 9 of Article 59 of Law 1480 of 2011, as follows:

Law 1480 of 2011 assigns the following powers to this Superintendency:

*“Article 59. **Administrative powers of the Superintendency of Industry and Commerce.** In addition to the provisions in the previous chapter, the Superintendency of Industry and Commerce shall have the following **administrative powers regarding consumer protection**, which it shall exercise as long as they have not been expressly assigned to another authority:*

- 1. **Ensure compliance with the provisions contained in this law and conduct investigations for non-compliance, as well as impose respective sanctions; (...)***
- 2. **Order necessary measures to prevent harm or damage to consumers due to violations of consumer protection regulations. (...)**”.*

Meanwhile, Decree 4886 of 2011 states:

“Article 1. (...) The Superintendency of Industry and Commerce shall perform the following functions:

(...)

- 17. Ensure compliance with consumer protection regulations and process claims or complaints submitted, whose jurisdiction has not been assigned to another authority, to establish administrative responsibilities and order appropriate measures.*

(...)

- 30. Impose, following investigation, according to the applicable procedure, sanctions for violations of consumer protection regulations and the user protection regime for telecommunications services.*

(...)

- 55. Issue instructions on consumer protection, competition protection, industrial property, personal data administration, and other areas of its functions, establish criteria to*

³⁹ RIVERO, JEAN. Administrative Law. Universidad Central de Venezuela. Caracas, Universidad Central, 1984, pp.458 et seq.ff. On the national level, see RODRÍGUEZ, LIBARDO. Derecho Administrativo. General y Colombiano. Temis. Bogotá, 2005, p. 494”.

⁴⁰ Santofimio Gamboa, Jaime Orlando. “Aproximaciones a los procedimientos administrativos en el Ley 1480 de 2011.El Estatuto del Consumidor y sus relaciones con la Ley 1437 de 2011 Código de Procedimiento Administrativo y de lo Contencioso Administrativo” In Perspectivas Del Derecho Del Consumo (Compilation). Universidad Externado de Colombia. Bogotá. 2013. Pp 251-597.

⁴¹ Cfr. Jiménez Jaramillo. C. Un régimen jurídico propio para las actividades de vigilancia y control. Contexto Magazine. December 2006. Universidad Externado de Colombia.

⁴² Modified by Decree 092 of 2022.

facilitate compliance and specify procedures for full application.

56. *Conduct inspection visits, decree, and practice evidence, and gather all relevant information to verify compliance with the legal provisions under its control and adopt corresponding measures following the law."*

Based on the above, this Superintendency concludes that it is authorized to carry out administrative sanctioning procedures for alleged consumer protection violations and to **issue administrative orders**. In this regard, this Directorate can issue orders concurrently with a fine, as these are two parallel and equally essential powers, with no rule prohibiting them from being exercised in the same administrative act.

The principle of proportionality is not violated either, as the orders are simply instructions to correct a behavior, while the fine has a punitive character due to the configuration of the alleged infractions.⁴³

Regarding the respect for and observance of due process for **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, this Directorate, throughout the entire administrative sanctioning process, has guaranteed this right, as the evidence in the file sufficiently demonstrated that the company indeed failed to comply with the provisions of subsection 1.3 of Article 3, Articles 6, 23, 25, 31, 33, 42, and subsections 1, 5, and 9 of Article 43, paragraphs b), c), g), and the paragraph of Article 50 of Law 1480 of 2011, in conjunction with subsections ii) and iii) of paragraph a) of subsection 2.1.2.1 of Chapter Two, Title II of the Single Circular of this Superintendency, and the provisions of subsections 7 and 9 of Article 2.2.2.37.8 of Decree 1074 of 2015.

Constitutional jurisprudence⁴⁴ has consistently indicated that the right to due process includes:

*"(...) Due process that requires, among other things, the establishment of a procedure, even if summary, that guarantees due process and, in particular, the right to defense, which includes the explicit designation of the competent authority to impose the sanction."*⁴⁵ (Underlined outside the original text).

Additionally, the Constitutional Court has defined due administrative process as:

"(i) the complex set of conditions imposed by law on the administration, materialized in the completion of a sequence of acts by the administrative authority, (ii) that are directly or indirectly related to each other, and (iii) whose purpose is constitutionally and legally predetermined."

⁴⁶*This is intended to "(i) ensure the orderly functioning of the administration, (ii) validate its own actions, and (iii) safeguard the right to legal security and defense of the governed."*

⁴⁷(Underlined outside the original text).

Based on the above, the Directorate finds that it respected the fundamental right to due process of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, since after determining with a degree of probability that the company could be in breach of the rules indicated in the charges, it provided the opportunity for the sanctioned company to submit its defenses and

⁴³OSSA ARBELAEZ Jaime, *Derecho Administrativo Sancionador*, Legis 2009, second edition, p. 559.

⁴⁴Constitutional Court Ruling C-616 of 2002. Reference: file D-3860 Presiding Judge: Dr. Manuel José Cepeda Espinosa.

⁴⁵Constitutional Court Ruling C-401 of 2010. Reference: file D-7928. Presiding Judge: Luis Ernesto Vargas Silva.

⁴⁶Constitutional Court Ruling T-796 of 2006. Reference: file T-1330716. Presiding Judge: Dr. CLARA INÉS VARGAS HERNÁNDEZ.

⁴⁷Constitutional Court Ruling T-522 of 1992. REF: EXPEDIENTE No. 2972. Presiding Judge: Alejandro Martínez Caballero.

provide evidence⁴⁸ and later to present its final arguments,⁴⁹ in which the company mentioned above participated on both occasions⁵⁰ without successfully disproving the alleged violations of the rules underlying the charges, contrary to what was sufficiently proven in the file.

In other words, in addition to there being sufficient evidence in the record based on which this Superintendency found the infraction of consumer protection regulations proven, the sanctioned company had the opportunity to challenge, throughout the entire administrative sanctioning procedure that began with the statement of charges, the accusations against it. Therefore, respect for and observance of its fundamental right to due process and defense were verified.

On the other hand, the sanctioned company argued that the decision to issue orders violated the first paragraph of Article 59 of Law 1480 of 2011, as it felt that the Directorate exceeded its authority in imposing sanctions and that the orders could be equated to an administrative precautionary measure. In the appellant's view, this is how this Directorate should have proceeded. Still, in its view, the Directorate did not act this way, as they implied fundamental and permanent changes in the business operations of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**

In response to the claims made in the appeal, it cannot be said that there was a violation of the first paragraph of Article 59 of Law 1480 of 2011; on the contrary, this Directorate fulfilled its duty to ensure compliance with the provisions of Law 1480 of 2011 and to process investigations for its violation, as well as to impose the respective sanctions, as can be seen from a careful reading of Resolution N° 62028 of 2023.

Additionally, regarding the police power,⁵¹ the same Court has noted that it is identified as the **power of administrative policing**, which, in general terms, can be defined as "***the set of coercive measures available to the administration to ensure that individuals adjust their activities to a purpose of public utility and thus achieve the preservation of public order***";⁵² that is, it is an intervention power of the State, exercised through the various public entities endowed with such authority, to verify the conformity of individuals' rights and obligations with the legal order and the administrative acts governing them.

It is also important to note that the powers of inspection, surveillance, and control **are operational in nature**, as their sole purpose is to **ensure compliance with the law, even through repressive mechanisms** if necessary.⁵³ Consequently, the adoption of administrative orders is configured as an effective tool in the exercise of the inspection, surveillance, and control powers assigned to this Authority and as an additional expression of the State's exorbitant powers in the exercise of administrative functions.⁵⁴

Now, as for its purpose, it is worth noting that when reviewing the explanatory statement of Bill No. 089 of 2010 from the House of Representatives and No. 252 of 2011 from the Senate, "*Through which the Consumer Statute is enacted and other provisions are made*," among the motivations put forward by the bill's promoter, it is argued: "*The 1991 Political Constitution*

⁴⁸ Resolution No. 3295 of February 2, 2023.

⁴⁹ Resolution No. 10093 of March 3, 2023.

⁵⁰ File numbers 21-78575-40 of September 22, 2022 for the arguments and 21-75875-59 of March 24, 2023 for the closing arguments.

⁵¹ "It is the power to create police regulations, regulating the freedom and behavior of citizens for the preservation of public order". Constitutional Court. Decision C-110 of February 9, 2000.

⁵² Constitutional Court. Ruling C - 432 of September 12, 1996.

⁵³ Cfr. Jiménez Jaramillo. C. Un régimen jurídico propio para las actividades de vigilancia y control. Contexto Magazine. December 2006. Universidad Externado de Colombia.

⁵⁴ Robledo del Castillo, Pablo Felipe. "Administrative cautions, their characteristics and practice". In XXXV Colombian Congress of Procedural Law. 1st Edition. Bogotá. Universidad Libre. 2014. ISSN 2322-6560.

establishes clear provisions aimed at safeguarding consumers' rights and prerogatives. This is contemplated in Chapter III, 'On Collective Rights and the Environment,' Article 78, first paragraph: 'The Law shall regulate the quality control of goods and services offered and provided to the community, as well as the information that must be supplied to the public in their marketing.' This text was widely debated within the Fifth Committee of the National Constituent Assembly, and for this, **the 1991 constituent considered the inferior position of consumers and users in relation to producers and merchants.** The adopted article expressly enshrines the intervention of public power in favor of consumers and users to **ensure their right to health, safety, information, free choice, adequate supply, and protection against any undue exploitation of their defenseless or subordinate conditions.**⁵⁵ This situation justifies, beyond imposing fines or other punitive measures, the authority to issue administrative orders aimed at the real and effective satisfaction of consumer needs in a preventive context.

In this sense, these orders are an essential tool for achieving the constitutional principle of administrative efficiency, which seeks to ensure the law is enforced "in pursuit of the effectiveness of the material right at the heart of the administrative action," concordant with Article 209 of the Political Constitution⁵⁶ and Article 3 of Law 1437 of 2011.⁵⁷ Thus, it is wrong for the defense to characterize them as unrelated to the charges issued when concluding the preliminary investigation phase.

On this point, the Constitutional Court has stated the following:

"Administrative authorities bear responsibilities related to the performance of their duties to implement and provide solutions to citizens' problems. Such problems represent deficiencies attributable to specific administrative duties, and therefore, those solutions must be certain, effective, and proportional to them."⁵⁸ (Emphasis outside the original text).

Therefore, it is possible to conclude that the issuance of orders, like those outlined in Resolution N° 62028 of October 10, 2023, imposed on the sanctioned company, is closely related to the need to protect and guarantee the rights and freedoms of individuals, the primacy of the general interest, the fulfillment of state purposes, and the observance of the duties of both the State and individuals as stipulated in Article 1 of Law 1437 of 2011.⁵⁹

Finally, the orders in this case cannot be classified as preventive measures in the strict sense. In this regard, the Constitutional Court⁶⁰ has stated:

"For the Court, preventive measures are those instruments through which the legal order provisionally protects the integrity of a right contested in that same process while the process lasts. In this way, the legal order proactively protects the person who turns to judicial authorities to claim a right to ensure that the decision adopted is materially executed. For

⁵⁵ Republic of Colombia. Congressional Gazette, Senate and House of Representatives. Year XIX - N° 626 of September 9, 2010. Edition of 24 pages. Bogotá D.C.

⁵⁶ Article 209 of the Political Constitution, states: "The administrative function is at the service of the general interest and is developed based on the principles of equality, morality, efficiency, economy, speed, impartiality and publicity, through decentralization, delegation and deconcentration of functions. The administrative authorities must coordinate their actions for the proper fulfillment of the purposes of the State. The public administration, at all levels, shall have an internal control that shall be exercised under the terms established by law".

⁵⁷ Article 3 of Law 1437 of 2011, provides: "Principles. All authorities shall interpret and apply the provisions that regulate administrative actions and procedures in light of the principles enshrined in the Political Constitution, in Part One of this Code and in special laws (...) 11. By virtue of the principle of efficiency, the authorities shall seek that the procedures achieve their purpose and, to that effect, shall remove ex officio the purely formal obstacles, shall avoid inhibitory decisions, delays or delays and shall remedy, in accordance with this Code, the procedural irregularities that arise, in order to ensure the effectiveness of the material right that is the object of the administrative action".

⁵⁸ Constitutional Court Ruling T-733 of October 15, 2009, Reference: file T-2303945. Presiding Judge: Dr. Humberto Antonio Sierra Porto.

⁵⁹ Article 1 of Law 1437 of 2011, states: "Purpose of Part One. The purpose of the rules of this Part One is to protect and guarantee the rights and freedoms of individuals, the primacy of general interests, the subjection of the authorities to the Constitution and other precepts of the legal system, the fulfillment of state purposes, the efficient and democratic functioning of the administration, and the observance of the duties of the State and of individuals".

⁶⁰ Constitutional Court Ruling C-379/04. Reference: file D-4974. Presiding Judge: Dr. Alfredo Beltrán Sierra.

this reason, this Court has indicated, in previous cases, that these measures aim to ensure compliance with the decision made, as judgments would be illusory if the law did not establish mechanisms to ensure their outcomes, preventing the destruction or impairment of the contested right."

Based on the above considerations, this case does not involve a provisional measure while the sanctioning process is ongoing; instead, it is an order for **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** to adjust its conduct according to the binding mandates found to have been violated and, therefore the defense's objection cannot succeed.

Based on the arguments and explanations provided, the objections raised by the defense are dismissed, and the decision to issue administrative orders will be upheld, as this Directorate has the authority to do so.

2.9. Nature of the administrative visit to the website

In the appeal, the appellant claimed that the Directorate incorrectly applied the General Code of Procedure, specifically concerning judicial inspections, for not guaranteeing the company's presence during the administrative visit to the sanctioned company's website on April 18, 2022.

Likewise, it stated that this Directorate erred in classifying the inspection visits as documentary evidence and did not follow the General Code of Procedure rules for judicial inspections.

The defense argued that the inspection visits were not evidence established in the General Code of Procedure and, therefore, should have been conducted according to the type of evidence most similar. According to the appellant, those rules concern the judicial inspection. Consequently, it argued that under the applicable and binding regulations for this Authority, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** should have been present or part of the inspection.

As an initial consideration, administrative visits to websites are evidentiary procedures aimed at verifying potential violations of a specific regime; through them, the necessary evidence is gathered to determine compliance with legal obligations. Hence, they do not entail the formality or ritualism typical of a judicial process but simply should ensure contradiction in the procedural opportunities.

The Constitutional Court⁶¹ has indicated that *"administrative inspection visits are evidentiary procedures intended for superintendencies to exercise the administrative powers granted to them by law (...) for the proper fulfillment of their inspection, surveillance, and control functions. For this reason, the Constitutional Court,⁶² the Council of State,⁶³ and Superior District Courts⁶⁴ have stated that inspection visits find constitutional support in the fourth paragraph of Article 15 of the Constitution."*⁶⁵

Regarding this, it is relevant to point out that, per item 56 of article 1 of Decree 4886 of 2011,⁶⁶ this Superintendence must conduct inspection visits, order and carry out evidence collection, and gather all relevant information to verify compliance with legal provisions. Likewise, item 4 of article 59 of Law 1480 of 2011 establishes that one of the administrative powers of this

⁶¹ Constitutional Court Ruling C-165 of 2019. Reference: Case D-12536. Presiding Judge: Alejandro Linares Cantillo.

⁶² Constitutional Court, judgment T-040 of 2018. Reference: Case T-6412404. Judge: Gloria Stella Ortiz Delgado.

⁶³ Council of State Contentious-Administrative Chamber, Fifth Section, Sentence Rad. 2012-00832 of March 1, 2018.M.P., Lucy Jeannete Bermúdez.

⁶⁴ Superior Court of Bogotá, Civil Chamber, Judgment of April 30, 2013, M.P., Ruth Elena Galvis Vergara.

⁶⁵ For judicial tax purposes and for cases of inspection, surveillance and intervention of the State, the presentation of accounting books and other private documents may be required, under the terms established by law.

⁶⁶ Modified by Decree 092 of 2022.

Superintendency is to conduct inspection visits.

Indeed, in exercising these functions granted by Decree 4886 of 2011 and Law 1480 of 2011, this Directorate, within the framework of a preliminary investigation aimed at verifying the occurrence of certain events, identifying possible perpetrators, and determining a possible violation of the norms within the jurisdiction of this Office, conducted an administrative visit on April 18, 2022, to the website <https://www.vuse.com/co/es/>, owned by the sanctioned company.

Thus, the visit constitutes documentary evidence collected to verify facts during the preliminary investigation stage, backed by a magnetic recording, as stated in the sanctioning act.

Subsequently, upon evaluating and analyzing the administrative visit, it was deemed warranted that an administrative investigation be initiated by issuing an administrative act. In other words, the statement of charges formally linked the passive subject to the administrative procedure under the provisions of Article 47 of Law 1437 of 2011.

Moreover, in response to the arguments of the appellant, this Directorate clarifies to the complainant that, in ruling C-165 of 2019, the Constitutional Court stated that inspection visits carried out by the Superintendencies are not proceedings requiring prior judicial authorization or subsequent legal oversight and thus do not violate due process rights by being conducted without prior notification to the investigated parties.

The Court added that the evidence collected during these proceedings could be challenged in ordinary procedural opportunities, so in this case, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**'s right to defense was not affected, as the statement of charges clearly and precisely specified, among other matters, the facts giving rise to it, based on the inspection visit and the provisions allegedly violated.

Furthermore, the Court⁶⁷ clarified that conducting unannounced inspection visits serves a legitimate purpose by allowing the collection of necessary evidence to determine if the investigated entities comply with their legal obligations. This purpose would be hindered if the "*element of surprise*" were not ensured, as prior notice would allow the investigated company to conceal relevant information.

Consequently, the Court⁶⁸ reiterated that this Superintendence is under no constitutional or legal obligation to provide prior notice of inspection visits, as these are not proceedings requiring prior judicial authorization or subsequent legal oversight.

The Constitutional Court further asserted that conducting unannounced visits does not violate administrative due process, as the evidence collected during the proceedings is subject to challenge in ordinary procedural opportunities; therefore, the investigated company's right to defense is not compromised.⁶⁹ Likewise, the Court explained that unannounced inspection visits serve the legitimate purpose of strengthening the administrative powers of the Superintendence. It invoked the Council of State's statement on this matter,⁷⁰ which notes that the purpose of administrative visits is to collect the necessary evidence to ascertain if the

⁶⁷ Constitutional Court Ruling C-165 of 2019 Reference: Case D-12536. Presiding Judge: Alejandro Linares Cantillo

⁶⁸ *Ibidem*.

⁶⁹ Constitutional Court, Ruling C-505 of 1999. Reference: Case D-2278, Judge Rapporteur: Dr. Alejandro Martínez Caballero. In the same sense, see Ruling C-034 of 2014, Article 47 of Law 1437 of 2011 guarantees the exercise of the right of defense, since it establishes the opportunity to establish the legal position regarding the administrative sanctioning action and to controvert the evidence submitted against him/her.

⁷⁰ Council of State Contentious-Administrative Chamber, Fifth Section, Sentence Rad No. 2012-00832 of March 1, 2018. M.P., Lucy Jeannete Bermúdez.

investigated entities are fulfilling their legal obligations.

Thus, even if, hypothetically, these proceedings were akin to judicial inspections, they resemble judicial inspections as extra procedural evidence, given that they take place during the preliminary investigation stage. In this regard, article 189 of the General Code of Procedure states that extra procedural evidence, such as judicial inspections of persons, locations, objects, or documents relevant to a proceeding, may be collected without notifying the future opposing company.

In conclusion, website visits do not resemble judicial inspections. Therefore, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**'s presence was not required during the April 18, 2022 visit, rendering the defense's arguments inadmissible.

2.10. Sanction Dosage

The sanctioned company, in its appeal, argued that this Directorate did not apply the sanctioning criteria correctly. It claimed that the fine was not itemized by charge, thus violating its right to defense by failing to clarify the fine amount per charge and the corresponding amount for each.

Regarding this point, the Council of State⁷¹ has explained that:

"The principle of legality of offenses and sanctions 'refers to the requirement that a rule with the material force of law establishes the description of punishable conduct, as well as the types and amounts of sanctions to be imposed. Consequently, the Constitution mandates the legal predetermination of administrative violations and the corresponding sanctions. This principle is developed in a twofold manner: (i) law reservation, and (ii) typicity.'"

Therefore, the principle of typicity *"is part of the principle of legality and specifically refers to the prior and precise determination of —offenses, penalties, punishments, or sanctions that can be imposed by administrative authorities in the exercise of the state's punitive power."*⁷²

For its part, the Constitutional Court⁷³ stated that:

"The principle of legality requires that in administrative sanctioning procedures, the offense or objectionable conduct must be defined in the rule – lex scripta – before the events under investigation – lex previa. In punitive law, the principle of legality entails a dual guarantee, namely: material, which relates to the predetermined regulation of infractions and sanctions; and formal, which involves the requirement that these must be stipulated in a rule with the force of law, which may reference a regulation provided that the essential elements of the unlawful conduct are specified in the law. This is derived from article 29 of the Political Constitution, which establishes the principle of legality by stipulating that 'no one may be tried except under pre-existing laws pertaining to the alleged act (...)', meaning there is no penalty or sanction without a law defining the legality of such action, either by commission or omission.

Article 29 of the Constitution stipulates that all actions must follow the legally established procedure in the matter at hand. Additionally, it limits state powers, as it is the legislator's duty to establish in advance the offense, the sanctions applicable to those who commit them, and to designate the public or administrative authorities competent to investigate and consequently impose the sanction. Constitutional jurisprudence has repeatedly held that due process comprises a set of guarantees under the legal system aimed at protecting the individual engaged in conduct subject to judicial or administrative sanctions,

⁷¹ Council of State, Chamber of Consultation and Civil Service, Reporting Counselor: Germán Alberto Bula Escobar, Bogotá D.C., five (5) March two thousand nineteen (2019), Radication number: 11001-03-06-000-2018-00217-00(2403), Actor: Ministry Of Transportation.

⁷² Ibidem.

⁷³ Ruling C-412 of 2025.

specifying that due process includes the following elements: a) the right to jurisdiction and access to justice; b) the right to a natural judge; c) the right to defense; d) the right to a public process conducted within a reasonable time; e) the judge's independence; and f) the judge or official's impartiality.

To exercise the administration's punitive power requires: (i) **a prior law determining the grounds for the sanction and defining its subjects – without necessarily detailing all elements of the sanctioning type** – since it is valid to delegate to the executive within the limitations imposed by the law; (ii) **proportionality between the conduct or act and the intended sanction**, ensuring both the administered party and the competent official have a **framework of reference for determining the sanction in the specific case**; and (iii) that the administrative procedure aligns with existing regulations to ensure due process.

Due process, integrated by the principles of legality and legal reservation, in the context of **administrative punitive law**, establishes the **legislator's duty to predetermine the sanction, indicating essential aspects** such as **type, duration, amount, and maximum limit**, to provide the competent official with a specific reference framework for **determining and imposing the sanction**, and to **inform the administered parties of the consequences of their transgressions**."

Based on the judicial ruling cited above, it is feasible to conclude that the exercise of the sanctioning authority entails, to impose a penalty, a **framework that allows for the determination of the penalty in each specific case**. The law sets the penalty, defining its essential components such as **type, term, amount, and maximum limit**, so that this Authority has a **clear framework for determining the penalty**.

Thus, the normative framework in this case is Law 1480 of 2011, specifically Article 61, which states:

"Article 61. Penalties. The Superintendence of Industry and Commerce may impose, following an administrative investigation, the penalties outlined in this article for failure to observe the provisions of this law, technical regulations, legal metrology standards, instructions, and orders issued under the powers granted by this law, or for not fulfilling the obligation to provide information in relation to any price control regime:

1. *Fines of up to two thousand (2,000) current legal monthly minimum wages at the time of the penalty's imposition.*

(...)

Paragraph 1. To determine the fine's amount, the Superintendence of Industry and Commerce shall consider the following criteria:

1. *The harm caused to consumers;*
2. *Persistence in the infringing behavior;*
3. *Repeated violations of consumer protection laws;*
4. *Willingness or lack thereof to seek an appropriate solution for consumers;*
5. *Willingness or lack thereof to cooperate with competent authorities;*
6. *Economic benefit obtained by the infringer or third parties through the violation;*
7. *Use of fraudulent means in the violation, or use of an intermediary to conceal or cover its effects;*
8. *The prudence or diligence exercised in fulfilling duties or applying relevant standards."*

From reading the applicable rule, this Directorate finds that the requirements of legality and specificity are met, because, after conducting an administrative investigation under Article 47 of Law 1437 of 2011, it was duly and sufficiently proven that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** violated paragraph 1.3 of Article 3, Articles 6, 23, 25, 31, 33, 42, and paragraphs 1, 5, and 9 of Article 43, subparagraphs b), c), g) and the paragraph of Article 50

of Law 1480 of 2011, in line with subparagraphs ii) and iii) of paragraph a) of section 2.1.2.1 of Chapter Two of Title II of this Superintendency's Sole Circular, and what is established in paragraphs 7 and 9 of Article 2.2.2.37.8 of Regulatory Decree 1074 of 2015. This allows this Authority to impose a fine of up to two thousand (2,000) current legal monthly minimum wages at the time of the penalty's imposition.

Consequently, the legal provisions governing this matter do not establish an obligation for this Directorate to break down the fine according to each proven charge, as the appellant company mistakenly argued. In this regard, it cannot be said that the sanctioned company's right to defense was violated, as throughout the administrative sanctioning procedure, it was allowed to dispute the findings supporting the charges, without successfully overturning them.

This Office will now address the defense's objections regarding the application of criteria for determining the fine amount.

2.10.1. Harm caused to consumers

The sanctioned company claimed it did not breach the information duties attributed by this Directorate and consequently did not harm consumer rights.

Regarding the criterion of **harm caused to consumers**, it is essential to note that the Constitutional Court, in ruling T-466 of 2003, stated:

"In relation to protecting consumers' rights, neither actual harm nor damage is required, nor is there room for a compensatory award through a class action. What the legislator protects is the right of those who acquire a particular product or service not to be disappointed in the public trust the producer must consistently uphold for all. It is the mere possibility that the offered product may not meet reality in terms of quality, quantity, hygiene conditions, and other specific attributes that warrants State protection. These are the so-called 'diffuse interests' protected by law, enforceable by the courts in each case."

Based on this jurisprudence, it is clarified that demonstrating real and actual harm does not apply in these cases, as a collective right is being protected, specifically consumer rights.

Therefore, this criterion was assessed against the sanctioned company, as the conduct of the appellant in failing to observe rules on the information and advertising of harmful goods, the prohibition of abusive clauses, the right of withdrawal, among others, disregarded consumer rights to, for example: i) receive quality goods and services, ii) receive timely, clear, sufficient, and accurate information regarding the nicotine content in the *Vuse Epod* device insert, iii) be protected from advertising harmful products, iv) receive information on terms and conditions for promotions and offers, v) contractual protection, among others, all of which were comprehensively detailed in the penalty order.

Therefore, in response to the appellant's claim of fulfilling the alleged information duty, it is clear that the sanctioned company had a legal obligation to provide timely, clear, sufficient, and accurate information regarding the nicotine content in the *Vuse Epod* insert, which was not fulfilled because, despite using expressions, numbers, and graphics, the information was not clear, precise, or sufficient.

Moreover, the information was not provided in Spanish as required by Article 23 of Law 1480 of 2011.

Additionally, the sanctioned company did not comply with Article 25 of the Consumer Statute, which mandates clearly and legibly informing, either on labels, containers, packaging, or an included insert, about the harmfulness of the goods being marketed and any conditions or instructions necessary for their correct use and contraindications. This obligation is essential

to allow consumers to make rational consumption decisions.

Therefore, this Directorate reaffirms the considerations for using the criterion of consumer harm to determine the fine amount as provided in the sanctioning administrative act.

2.10.2. Persistence in the infringing conduct

The appellant argued that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** did not breach the provisions of Law 1480 of 2011 in marketing its goods and providing services and therefore requested this criterion be applied in its favor.

Contrary to the appellant's claim, after conducting the administrative sanctioning process against the company, it has been sufficiently proven that it violated paragraph 1.3 of Article 3, Articles 6, 23, 25, 31, 33, 42, and paragraphs 1, 5, and 9 of Article 43, subparagraphs b), c), g) and the paragraph of Article 50 of Law 1480 of 2011, in line with subparagraphs ii) and iii) of paragraph a) of section 2.1.2.1 of Chapter Two of Title II of this Superintendency's Sole Circular and paragraphs 7 and 9 of Article 2.2.2.37.8 of Regulatory Decree 1074 of 2015.

Consequently, and as explained in the penalty order, according to Charge No. 1 for violating Article 6 of Law 1480 of 2011, from November 10, 2020, to November 21, 2021, faults were reported in the marketed goods and services provided from January 5, 2021, to September 27, 2021. Therefore, the criterion in question shall be considered against the sanctioned company.

2.10.3. Recidivism in Consumer Protection Violations

The sanctioned company requested that a favorable criterion be applied, arguing they had not been previously sanctioned for consumer protection violations.

For this Directorate, an analytical reading of the regulation indicates that the criterion mentioned would apply against the sanctioned company, and since the factual conditions were not met, this Office did not consider it relevant to the present case.

2.10.4. Willingness to Seek an Adequate Solution for Consumers

The company asserted that it provided a solution to consumers by diligently responding to requests from this Superintendency and the petitions, complaints, and claims (PQRs) from consumers.

For this Directorate, the behaviors cited by the sanctioned company cannot be taken into account to apply the relevant criterion in their favor.

On the one hand, the responses to requests or petitions presented during the administrative sanctioning procedure are part of the effective exercise of due process and the right to defense of the sanctioned company. Moreover, the current process was initiated under this Superintendency's legal powers to oversee, inspect, and control its subjects in compliance with the regulations to protect consumer rights, primarily Law 1480 of 2011. Therefore, the sanctioned company cannot claim that merely responding to requests during this process should be viewed favorably, as it constitutes an exercise of a procedural right allowing the sanctioned company to refute the allegations in the investigation opening resolution, present evidence, or provide relevant explanations. Considering otherwise would mean accepting that, in cases of consumer protection violations, no sanctions could be imposed because the sanctioned company responded to requests during the process.

On the other hand, regarding the sanctioned company's behavior in handling consumer

petitions, complaints, and claims, it is worth noting that the imposed sanction does not exempt the sanctioned company from complying with the Consumer Statute and its related provisions.

Additionally, the defense should be reminded that in the sanctioning administrative act, this Directorate applied the sanction reduction criterion in favor of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, understanding that the company modified some contractual provisions that were deemed abusive. Finally, as stated in Section 2.7.1 of this administrative act, this Directorate will proportionally reduce the amount of the fine, given that the company rectified the infringement of the obligation stipulated in the paragraph of Article 50 of Law 1480 of 2011, specifically the requirement to have a visible, easily identifiable link allowing consumers to access the Superintendency of Industry and Commerce's website through their own site used for electronic commerce transactions.

2.10.5. Willingness to Cooperate with Competent Authorities

The appellant argued that the sanctioned company acknowledged its faults and made modifications to its electronic commerce website in compliance with Article 50 of Law 1480 of 2011.

Regarding this argument, this Directorate considers that such behavior was acknowledged in the previous section to proportionally reduce the fine based on the criterion concerning the willingness to seek an adequate solution for consumers.

2.10.6. Economic Benefit Obtained by the Offender or Third Parties from the Violation

The sanctioned company claimed it received no economic benefit from the alleged violation. In response, this Directorate considers that an analytical reading of the regulation shows that this criterion is only applicable against the offender, not in their favor. Therefore, this Office did not take it into account in the present case.

2.10.7. Use of Fraudulent Means in the Violation or Use of an Intermediary to Conceal or Cover Its Effects

The appellant argued that this Directorate misinterpreted its own considerations, stating that when adjusting the fine, it should have considered this criterion in favor of **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, as no fraudulent means were used in the violation.

Concerning the use of fraudulent means, it is clarified that such a mandate applies to the actions of each member of society. This principle, in Consumer Protection, is not an exception, so there is no mention in the appealed resolution that the imposed fine was due to the sanctioned company acting fraudulently.

Thus, it is concluded that all actions, including consumer protection, must be carried out with transparency, and this does not constitute a mitigating factor or exemption of responsibility, as it is a moral duty, a principle under which all citizens should act. In any case, it is worth noting that this criterion was not analyzed against the sanctioned company in the sanctioning act, as it was not relevant to the case.

2.10.8. Degree of Prudence or Diligence in Fulfilling Duties or Applying Relevant Regulations

The sanctioned company argued that its diligence was demonstrated by responding to requests and modifying its website through which it conducts electronic commerce transactions.

Regarding this argument, this Directorate considers that, as previously explained, responding to this Superintendency's requests during an administrative sanctioning procedure reflects the effective exercise of the right to defense and contradiction, as an expression of due process for **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, and cannot be regarded as a mitigating factor in calculating the fine. Moreover, it has been established that the company violated subsections b), c), g), and the paragraph of Article 50 of Law 1480 of 2011, among others. Consequently, this Directorate does not observe any diligent behavior to fulfill its obligations and comply with applicable regulations.

2.11. Principle of Proportionality of the Sanction and Principle of Equality

The appellant claimed that the imposed fine violated the principles of proportionality and equality.

Regarding the principle of proportionality, they argued that the sanctioned company's efforts to find an adequate solution for consumers, its cooperation with this Directorate to correct certain behaviors, and its prudence and diligence during the sanctioning process were not considered.

In response to the appellant's claims, this Directorate must state that it is not proven in the record that **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** acted with prudence and diligence in complying with the regulations in question.

Concerning the principle of proportionality, the Constitutional Court⁷⁴ stated:

"The punitive authority of the administration is an expression of the state's ius puniendi, consisting of the application of repressive measures by administrative authorities against private individuals (administered persons) and public servants when they engage in actions that affect and/or threaten the legal order.

On the legal nature of this branch of public law, constitutional jurisprudence⁷⁵ has consistently indicated that, although this body of law aims to preserve protected legal interests, it is nonetheless subject to principles that serve as limits, namely:

*'(i) the principle of legality, meaning the existence of a law regulating it; in other words, only the ordinary or extraordinary legislator is responsible for defining it. (ii) The principle of specificity, which, while less strict than in criminal law, still requires the legislator to describe the conduct or behavior leading to the imposition of the sanction and to explicitly determine the sanction.⁷⁶ (iii) Due process, which demands, among other things, the establishment of a procedure, even if summary, that guarantees due process and, particularly, the right to defense, including the express designation of the competent authority to impose the sanction. (iv) **The principle of proportionality, meaning the sanction must be proportional to the fault or administrative infraction being penalized,**⁷⁷ and (v) Independence from criminal penalties; this means that the sanction may be imposed independently of whether the act constituting it may also constitute a violation of criminal law."*

Based on the above, this Directorate finds that the sanction imposed respected the principle of proportionality because the fine amount reflects the seriousness of the conduct committed

⁷⁴ Constitutional Court Ruling C-412 of 2015. Reference: Case D-10485. Supporting Judge: Alberto Rojas Ríos.

⁷⁵ Constitutional Court Ruling C-616 of 2002, Reference: file D-3860. Presiding Judge: Dr. Manuel José Cepeda Espinosa.

⁷⁶ Constitutional Court Ruling SU-1010 of 2008. Reference: Files T-1.410.120, T-1.540.637, T-1.541.417, T-1.541.805, T-1.546.704, T-1.546.830, T-1.548.002, T-1.550.439, T-1.550.854, T-1.553.717, T-1.557.174, T-1.559.660, T-1.570.640, T-1.572.628, T-1.572.853, T-1.573.598, T-1.573.600, T-1.573.681, T-1.573.787, T-1.574.070, T-1.574.078, T-1.574.079, T-1.575.094, T-1.575.659, T-1.579.196, T-1.618.168, T-1.619.105, T-1.619.182, T-1.621.210, T-1.621.497, T-1.621.898, T-1.621.963, T-1.622.627, T-1.622.802, T-1.622.835, T-1.622.894, T-1.623.944, T-1.624.749, T-1.625.827, T-1.631.213, T-1.632.319, T-1.632.544, T-1.635.364, T-1.639.727, T-1.639.736, T-1.828.809, T-1.828.810, T-1.828.811, T-1.836.549. Presiding Judge: Dr. Rodrigo Escobar Gil.

⁷⁷ Constitutional Court Ruling C-401 of 2010. Reference: file D-7928. Presiding Judge Luis Ernesto Vargas Silva.

by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.** in failing to comply with numeral 1.3 of Article 3, Articles 6, 23, 25, 31, 33, 42, and numerals 1, 5, and 9 of Article 43, literals b), c), g) and the paragraph of Article 50 of Law 1480 of 2011, consistent with numerals ii) and iii) of literal a) of numeral 2.1.2.1 of Chapter Two of Title II of this Superintendent's Single Circular and the provisions of numerals 7 and 9 of Article 2.2.2.37.8 of the Sole Regulatory Decree 1074 of 2015, which is significant in relation to the gravity. Thus, the principle of proportionality was realized in that this Authority adhered to the objective circumstances surrounding the commission of the infraction.

Additionally, the Directorate insists that the submission of the statement of defense and the supporting documentation provided by the sanctioned company forms part of their exercise of the right to defense and opposition, and therefore, such actions cannot be considered a factor that affects the proportionality of the sanction.

Regarding the principle of equality, the defense argued that the imposed fine was disproportionate compared to other sanctions, such as those decided in Resolution No. 63724 of 2023, amounting to nineteen million seven hundred twenty thousand pesos (COP 19,720,000) for Grupo DIY S.A.S., and in Resolution No. 61017 of 2023, amounting to two hundred thirty-two million pesos (COP 232,000,000) for LIFETECH S.A.S., based on similar factual allegations.

Article 13 of the Constitution stipulates that in Colombia, all people are equal before the law and therefore must receive the same treatment and guarantees without discrimination based on sex, race, national or family origin, language, religion, political or philosophical opinion.

Furthermore, this provision establishes the constitutional duty to protect individuals who are in a state of manifest vulnerability or who belong to a discriminated group, imposing an obligation on authorities to take all necessary measures to achieve real equality in treatment, conditions, protection, and opportunities for this group.

To clarify the scope of this provision, the Constitutional Court, since its inception, has established⁷⁸ that to make this fundamental right effective for all individuals, the State may employ positive differential treatment. Thus, Judgment T-330 of 1993⁷⁹ specified:

"With positive differential treatment, the essential philosophy of the Social Rule of Law is applied, translating into the State's duty to protect individuals who, due to economic, physical, or mental conditions, are in circumstances of manifest vulnerability, making equality real and effective. The principle of equality and the State's ability to provide positive differentiation is based on the Preamble to the Constitution, which refers to the aim of ensuring equality within a just social framework."

In this way, the Constitutional Court has analyzed and developed the fundamental right to equality established in the aforementioned Constitutional Article 13 on several occasions, clearly and repeatedly stating that the principle of equality entails *"on the one hand, a mandate of equal treatment for all factually or legally comparable situations whenever there are no sufficient grounds to provide different treatment, and on the other hand, a mandate of unequal treatment for differentiable circumstances."*⁸⁰

Constitutional jurisprudence has determined that the right to equality is violated when, **without constitutionally legitimate grounds**, preferential treatment is granted or discrimination is imposed on **people in similar factual and legal situations**, therefore in equal conditions. It

⁷⁸Constitutional Court Ruling T-554 of 1992, Judge Eduardo Cifuentes Muñoz; Constitutional Court Ruling C-040 of 1993, Judge Ciro Angarita Barón; Constitutional Court Ruling T-273 of 1993, Judge Carlos Gaviria Díaz; among others.

⁷⁹M. P. Alejandro Martínez Caballero

⁸⁰Constitutional Court Ruling C- 445 of 2011. Reference: file D-8345. Presiding Judge: Humberto Antonio Sierra Porto

specified:⁸¹

*“This statement aligns with the scope of the principle of equality contained in Article 13 of the Constitution, which stipulates that two or more comparable factual situations should receive the same legal treatment. This does not preclude different treatment for similar factual situations, as **discrimination arises from differentiation lacking objective and reasonable justification**. In this regard, the Court has stated that to determine a violation of equality, the judge must verify not only the objective grounds for the different treatment but also the proportionality between the pursued purpose and the means employed for that treatment.”*
(Bold and underlined out of text)

Accordingly, concerning the alleged violation of the right to equality, this Directorate finds that it was not infringed upon as there is no proof that the factual and actual situations regarding the administrative sanctioning procedures against DIY S.A.S. and LIFETECH S.A.S. were identical or similar to warrant equal treatment.

3. Final consideration

Per Article 313 of Law 2294 of 2023, which enacted the “*National Development Plan 2022-2026*”, authorities responsible for collections, sanctions, fines, fees, and rates, currently based on minimum wages or Tax Value Units (UVT), must calculate these based on their equivalency in terms of the Basic Value Unit (UVB) as stipulated in the aforementioned article.

In compliance with this provision, and given that the administrative sanction act is not yet final, this Directorate, to fulfill the above, will proceed to calculate the imposed fine based on its equivalency in terms of the Basic Value Unit (UVB),⁸² following Resolution No. 62028 of October 10, 2023, issued by the Ministry of Finance and Public Credit.

Based on the foregoing, this Directorate

DECIDES

ARTICLE 1: MODIFY the first article of Resolution No. 62028 of October 10, 2023, which will read as follows:

*“**ARTICLE ONE: IMPOSE** a fine on **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, of **ONE THOUSAND FIFTY (1050)** current legal monthly minimum wages,⁸³ equivalent to **111,222.72 UVB**,⁸⁴ amounting to ONE BILLION TWO HUNDRED EIGHTEEN MILLION PESOS (COP 1,218,000,000) as of the date of this resolution, as stated in the motivating part of this administrative act.*

***PARAGRAPH:** The pecuniary sanction imposed by this resolution must be paid within five (5) business days following the finalization of this resolution. Once this period expires, interest will be charged for each day of delay, calculated at an annual effective rate of 12%.*

To this end, the following payment methods may be used:

1. Via the PSE Payment Button at <https://serviciolinea.sic.gov.co/sic.multas.pagos/payform>; upon completion of the transaction, the receipt may be automatically downloaded. 2. Using the universal collection format by depositing in cash or a cashier's check at Banco de Bogotá into

⁸¹Constitutional Court Ruling T-047 of 2002. Presiding Judge Álvaro Tafur Galvis.

⁸²Pursuant to Internal Circular No. 005 of February 19, 2024 issued by the Head of the Legal Advisory Office of the Superintendency of Industry and Commerce.

⁸³El salario mínimo legal mensual vigente para el año 2023 es de UN MILLÓN CIENTO SESENTA MIL PESOS MCTE (\$1.160.000.).

⁸⁴The value of the Basic Value Unit (UVB) that applied for the year 2024 is TEN THOUSAND NINE HUNDRED AND FIFTY ONE PESOS (\$10,951).

checking account No. 062-87028-2, in the name of the Superintendence of Industry and Commerce NIT: 800.176.089-2 and tax code 03. In this case, proof of payment must be provided by emailing the respective support to contactenos@sic.gov.co, where the receipt applied to the sanctioning resolution will be issued, or by submitting the payment support at the Treasury counter of the Superintendence of Industry and Commerce, located at Avenida Carrera 7 No. 31ª - 36, 3rd floor, Bogotá.”

ARTICLE 2: PARTIALLY AMEND Article 2 of Resolution No. 62028 of October 10, 2023, which shall now read as follows:

“ARTICLE ONE: Order **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, to do the following:

1. **PROVIDE** clear, timely, sufficient, precise information in Spanish for all VUSE products offered, whether on the website or in physical or digital advertising pieces issued by the company.
2. **INFORM** consumers that the products currently marketed and future products containing nicotine salts and vaping liquids, due to their components, constitute harmful products. To this effect, their harmful effects, necessary conditions or instructions for proper use, and contraindications must be clearly indicated and perfectly legible, whether on labels, containers, or packaging, or through an insert.
3. **ADJUST** future physical or digital advertising to clearly warn the public about the harmfulness of components in vaping products, specifically nicotine salts and vaping liquids, and the need to consult the conditions or instructions for correct use and contraindications.
4. **MODIFY** the terms and conditions on the website <https://www.vuse.com/co/es/> according to the stipulations analyzed in this investigation so that they do not produce an unjustified imbalance detrimental to consumers or affect the time, manner, or place in which consumers can exercise their rights.
5. **PROVIDE** certain, reliable, sufficient, clear, accessible, and up-to-date information on the availability of the products offered on the website <https://www.vuse.com/co/es/> at all times.
6. **INFORM** on the website <https://www.vuse.com/co/es/>, in a truthful, reliable, sufficient, clear, accessible, and updated manner at all times, as well as in the terms and conditions and any document regarding the purchase, the possibility of exercising the right of withdrawal as provided in Article 47 of Law 1480 of 2011.
7. **IMPLEMENT** a mechanism within the web domain <https://www.vuse.com/co/es/> to allow consumers to submit inquiries, complaints, and claims (PQR), generating a tracking number and recording the date and time of submission. This system must also enable tracking of PQRs, allowing for evidence of the actions taken.

PARAGRAPH: To prove compliance with the orders given, **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, must submit the necessary supporting documents to this Directorate within four (4) months following notification of this administrative act.

Finally, it is noted that, if non-compliance with the above within the specified terms occurs, an administrative sanction procedure may be initiated against the company for failing to comply with the administrative order. If applicable, sanctions provided for in numeral 6 of Article 61 of Law 1480 of 2011 may be imposed due to being in a state of non-compliance.”

ARTICLE 3: CONFIRM all other parts of Resolution No. 62028 of October 10, 2023, following what is set out in the motivation of this administrative act.

ARTICLE 4: GRANT the appeal filed by **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, against the mentioned resolution, to be resolved by the Delegate Superintendent for Consumer Protection.

ARTICLE 5: FORWARD the referenced file to the Office of the Delegate Superintendent for

Consumer Protection so that the appeal may be decided.

ARTICLE 6: NOTIFY the content of this resolution in person to **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**, identified with NIT 900.462.511-9, through its legal representative, providing a copy and informing that no further appeal may be filed against it.

ARTICLE 7: NOTIFY in person the content of this resolution to **CORPORACION COLOMBIANA DE PADRES Y MADRES, WHICH MAY USE AS ACRONYMS REDPAPAZ PAPAZ AND PAPAZ RED DE PADRES Y MADRES**, identified with NIT 830.130.422-3, through its legal representative or substitute, providing a copy and advising that no further appeal may be filed against this administrative act.

NOTIFY **AND** **COMPLY**
Issued in Bogotá, D.C., on September 3, 2024

THE DIRECTOR OF CONSUMER PROTECTION INVESTIGATIONS,
NEYIRETH BRICEÑO RAMÍREZ

NOTIFICATION

Sanctioned Company: **BRITISH AMERICAN TOBACCO COLOMBIA S.A.S.**
Identification: NIT 900.462.511-9
Legal Representative: ALEXANDRE CAMPOS DE OLIVEIRA
Identification: C.E. No 7501106
Physical Address for Judicial Notification: AK 72 No 80-94, P 9
City: Bogotá D.C.
Email for Judicial Notification: alexandra_bernal@bat.com

Attorney: **JOSÉ MIGUEL DE LA CALLE RESTREPO**
Identification: C.C. No 80.417.606
Professional Card: 66.218 from C.S. of the J.
Email Address:⁸⁵ jose.miguel.delacalle@garrigues.com

Physical Address:⁸⁶ Avenida Calle 92, No. 11-51, Floor 4
City: Bogotá D.C.
Other Email Addresses:⁸⁷ natalia.serrano@garrigues.com

Interested Third Party: **CORPORACION COLOMBIANA DE PADRES Y MADRES,**

⁸⁵ File number 21-75875-69 of November 7, 2023.

⁸⁶ File number 21-75875-69 of November 7, 2023.

⁸⁷ File number 21-75875-52 of February 17, 2023.

WHICH MAY USE AS ACRONYMS REDPAPAZ PAPAZ AND PAPAZ RED DE PADRES Y MADRES

Identification: NIT 830.130.422-3

Legal Representative: CAROLINA PIÑEROS OSPINA

Identification: C.C. No 39.694.233

Email for Judicial Notification: director@redpapaz.org

Physical Address for Judicial Notification: AV. Carrera 16 No 93 A 36, Office 201

Building: Business Center 93, Office 201

City: Bogotá D.C.

Other Emails in the Record: soportelegal@redpapaz.org

Drafted by: MAAG

Reviewed by: DCM

Approved by: NBR