

General Council of the Judiciary

Case-law

Roj: **SJM M 1157/2019** - ECLI: **ES:JMM:2019:1157Id**

Cendoj: **28079470032019100008**

Court: **Mercantile Judge**

Location: **Madrid**

Section: **3**

Date: **30/09/2019**

Appeal No.: **205/2018**

No. of Resolution: **334/2019**

Procedure: **Ordinary procedure**

Rapporteur: **JORGE MONTULL URQUIJO**

Type of decision: **Judgment**

COMMERCIAL COURT Nº 03 OF MADRID

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NIG: 28.079.00.2-2018/0011613

Procedure: Ordinary Proceeding 205/2018

Subject matter: Unfair competition

Type of distribution: SUITS BASED ON ADVERTISING LAW A

Plaintiff:: ALTADIS

Attorney D./Mrs. MARIA TERESA GOÑI TOLEDO

Defendant:: PHILIP MORRIS SPAIN SL

Attorney: Mr./Ms. VICTORIO VENTURINI MEDINA

JUDGMENT 334/2019

MAGISTRATE-JUDGE:D. JORGE MONTULL URQUIJO

Place: Madrid

Date: September thirtieth, two thousand nineteen

I, JORGE MONTULL URQUIJO, Judge of this Court, having heard the present proceedings of ordinary trial on unfair competition and advertising, filed by ALTADIS, S.A., represented by Attorney María Teresa Goñi Toledo, and assisted by Mr. Ignacio Millán Latasa de Aranibar, against the defendant PHILIP MORRIS SPAIN, S.L., represented by Attorney Mr. Victorio Venturini Medina, and assisted by Counsel Mr. Alejandro Ferreres Comella and Mr. Cristian Gual, hereby render this judgment as follows:

FACTUAL BACKGROUND

FIRST.- LAWSUIT. A lawsuit was filed on January 23, 2018, which was circulated to this Court, with the following pleading:

"Issue a judgment that, upholding the claim, contains the following pronouncements:

1.- That the entity Philip Morris Spain, S.L., has committed acts of unfair competition consisting of advertising tobacco products and/or the use of tobacco, through the IQOS brand tobacco consumption device and the HEETS tobacco brand in the media, advertising that must be considered unlawful under the provisions of Article 18 of the Unfair Competition Law, in relation to Article 3. d) of the General Advertising Law, in relation to article 9.1 and 2.a), b) and d) of Law 28/2005 on health measures against smoking and regulating the sale, supply, consumption, and advertising of tobacco products.

2.- That the company Philip Morris Spain, S.L., has committed acts of unfair competition consisting in the concealed advertising of the IQOS tobacco consumption device and of the HEETS tobacco brand in the media, pursuant to the provisions of articles 5, 7, and 26 of the Unfair Competition Law.

3.- That the company Philip Morris Spain, S.L. has committed acts of unfair competition consisting of misleading information in the media, by presenting the consumption of tobacco through IQOS as a practice of "reduced risk" or of "less harmfulness", pursuant to article 5 of the Law of Unfair Competition.

4.- That the company Philip Morris Spain, S.L., has committed acts of unfair competition by violating the rules regulating the competitive activity set forth in Article 15.2 and, in addition, by unlawful advertising of these products according to Article 18, both of the Law of Unfair Competition in relation to Articles 9 and 2 of Law 28/2005 on health measures against smoking and regulating the sale, supply, consumption, and advertising of tobacco products of the HEETS tobacco brand in the media.

And, consequently, to order the defendant, Philips Morris Spain to:

1.- The CESSATION in the communication campaign of the IQOS brand and the HEETS brand in all media and formats, including those of information society services, and to PROHIBIT in the future any type of communication or commercial action that may have as a direct or indirect effect the promotion of a tobacco product or the use of tobacco through these devices.

2.- The RECTIFICATION of the information that could have misled the consumer regarding the reduced harmfulness of the product, in the same media and agencies in which they have been published and with the same diffusion and intensity. This rectification should be limited to stating that the mentions about IQOS as a "reduced risk", "less harmful", "less noxious", "less detrimental" product, are all misleading statements because they are not truthful, as there is no sufficiently verified information about the real effects of this product, This should be published at least once in all national and provincial media, as well as press agencies where these statements have been disseminated, which are those that correspond to the press dossier that has been provided as a document. 3.

Unofficial translation

And to the publication of the full judgment of this Judgment in a national newspaper and in the tobacco sector magazines "Mundo Estanco" and "Boutique del fumador" at the defendant's expense."

By Resolution, the aforementioned lawsuit was admitted for processing, and the defendant was notified for 20 days to appear and answer.

SECOND - DEFENSE. A response was filed on May 16, 2018, requesting the full dismissal of the claim, together with the imposition of costs.

THIRD.- PRELIMINARY HEARING AND TRIAL. The preliminary hearing was held on November 22, 2018. In this hearing, after verifying the lack of agreement between the parties, the defendant alleged new facts consisting of a series of new scientific documents and a document of the plaintiff's matrix, the parties stated their position with respect to the documents provided by the opposing party, established the disputed facts and proposed evidence, after which the date of the trial was set.

The trial was held on March 4, 2019, at the beginning of which the plaintiff, in accordance with the document filed by both parties dated March 5, 2019, waived the unfair competition action (point 3 of the pleading and point 2 of the obligations to do), requesting the non-imposition of costs as a result of that action, and the defendant did not oppose. After the provision of new documentation by the plaintiff under article 270 of the Civil Procedure Law, the testimonies proposed by the plaintiff namely Mr. Ruperto and Ms. Candelaria, and the one proposed by the defendant namely Ms. Carina, were heard. After the foregoing, the managing attorneys of the parties formulated oral conclusions, and the case was set for judgment.

Upon request for the submission of documentation after the hearing by the *defendant*, the request was resolved, giving rise to a series of additional requests for clarification and appeals, respectively, which ended with a resolution issued on September 27, 2019, thus it was not possible to issue this judgment prior to that date.

FOURTH: In the present case, the legal procedures have been followed, except for the compliance with the deadlines that affect the court, due to the overload of work that falls on it, which exceeds twice the number of incoming cases envisaged for a commercial court by the General Council of the Judiciary.

BASIS OF LAW

FIRST: Statement of claim.-

1. The plaintiff, the company ALTADIS, S.A. (ALTADIS), a company engaged in the manufacture and trade of tobacco, brings a series of actions against the tobacco company PHILIP MORRIS SPAIN, S.L. (PHILIP MORRIS), also a tobacco company, based on the rules of advertising and unfair competition, on the grounds, in essence, that the communication campaign PHILIP

MORRIS has been carrying out for the product IQOS, in connection with the tobacco brand HEETS, is unlawful because it infringes the legal prohibition of tobacco advertising.

2. The referred actions are based on the following factual account, succinctly stated: the group of companies to which the defendant belongs is marketing throughout the world, under the trademark IQOS, an electronic device used to consume tobacco cigarettes; the device consists of a kind of pen that heats the tobacco instead of burning it, so that a special tobacco cigarette, of the HEETS trademark, also marketed by the defendant, is inserted through the mouthpiece; Since it is a real cigarette, it is subject to the same rules that regulate the advertising of traditional tobacco; notwithstanding the foregoing, the defendant, through its representatives, has been conducting interviews and making statements in various media describing the characteristics and advantages of this form of tobacco consumption; the plaintiff requested the cessation of the campaign both to certain media and to the defendant. In this factual account, the facts of the lawsuit referring to the action for misleading or false information, which was waived by the plaintiff, have been omitted.

3. Based on these briefly stated facts, the plaintiff considers that they are contrary to art. 9.1 of Law 28/2005, of December 26, 2005, on health measures against smoking and regulating the sale, supply, consumption, and advertising of tobacco products. According to the plaintiff, the facts represent a case of advertising of a tobacco product prohibited by that provision, and therefore, since art. 23.2 of the aforementioned law refers to the General Advertising Law (GAL) *in matters of advertising actions 23.2 of the aforementioned law refers to the General Advertising Law (LGP), and the latter in turn refers to the Unfair Competition Law (UCL) in this matter, both provisions support the declaratory action and the action for cessation and prohibition of repetition in the future, provided for in art. 32.1.1ª and 2ª, respectively, UCL, as well as the partial publication of the judgment, provided for in paragraph 2 of the same article.*

4. In response to this claim, the defendant argues that the IQOS product is not a tobacco product, while HEETS is, and therefore the former is not subject to the regulations applicable to such products; with respect to HEETS, it is pointed out that it is a tobacco product that can only be consumed with the IQOS device, but it does not have the same design and composition as a combustible cigarette, and they differ substantially; therefore, HEETS is not a cigarette, it does not combust, its use does not produce smoke, and its legal qualification is that of a novel tobacco product, which makes it subject to specific regulations; the information contained in the lawsuit is not advertising, but information from the media on matters of public interest; the defendant responded to the plaintiff's request, but the lawsuit was filed only seven days after the request was made.

SECOND: Proven facts.

5. The following are facts that have been proven in the present case, and which are directly related to the claims made in the lawsuit and to the causes of opposition presented in the answer:

I. The defendant company, a Spanish subsidiary of the PHILIP MORRIS INTERNATIONAL (PMI) group, markets the electronic device IQOS, which heats the tobacco instead of burning it like the combustion cigarettes, and which is used by introducing into it the special tobacco, brand HEETS, also marketed by the defendant company [uncontested fact].

II. In relation to the aforementioned product, between January 2017 and January 2018, a series of information has appeared in the media, among which the following can be highlighted for the purposes of this lawsuit:

1) On January 13, 2017, on pages 10 and 11 in full of the business daily Expansión, under the headline "Tobacco giants face a technological battle" it is reported: "Tobacco companies have spent billions of dollars in recent years to develop a cigarette that causes less harm but looks and tastes just like a real cigarette. With its IQOS *smokeless cigarette*, Philip Morris International believes it has found the answer (...) However, analysts believe that the company is winning the race in the segment of products that heat tobacco but do not burn it and that this technology is vital for the consolidation of the industry". On page 11, in a separate box, under the headline A question of price, the following is reported: -Philip Morris launched its new IQOS device in Spain last December. -The IQOS comes with a pocket charger and is sold at a price of 70 euros. The cigarettes are special for the new device. -They are sold under the Heet brand in packs of 20 at the same price as a pack of regular Marlboro 4.85 euros. -Each cigarette lasts 34 puffs or about six minutes. The battery allows you to charge the IQOS device 20 times without having to connect it to the power supply".

2) On January 20, 2017, the general information newspaper La Razón also published a report on pages 36 and 37, under the title "SMOKING: Is it possible to achieve a less harmful tobacco?" "The article reported on the author's visit to the PMI building in Switzerland where this product, called "the Cube", is being developed, in which the following statements were made: "...for a decade, they have invested 3 billion dollars to come up with a product that combines two key aspects: harm reduction and satisfaction for smokers. "We tried to launch these products in the past but now is the time. We have the technology and the demand," Estela, director of Reduced Risk Products (RRP) at PMI, told this newspaper. She, as an expert in toxicology, is responsible for demonstrating why IQOS, the product they have just launched on the Spanish market, is so revolutionary. The key, according to them, is in the consumption process. IQOS does not burn the cigarette, but heats it up"; on page 37 there is a drawing of the device showing its parts.

3) On February 28, a report about IQOS appeared on pages 6 and 7 of the Diario de Avisos, a general information newspaper of the province of Tenerife, under the title "Cigarette 2.0," in which the following was stated: "The general manager of Philip Morris in Spain, Ruperto , explained during the presentation of the product, a few months ago, that the arrival of IQOS is a "milestone" for the sector because it is about replacing conventional cigarettes with similar technologically advanced products." " In the same way, Altadis Imperial is also investing in the development of products that do not contain tobacco or electronic cigarettes for vaping."

4) On March 16, 2017, the general information online newspaper Larioja.com also reported the visit to the Italian building where the device is produced. On the same date, the same information appeared in El Diario Montañés, La Verdad, el Diario Vasco, Las Provincias, El Comercio, Finanzas.Com, El norte de Castilla, and Hoy.es.

5) On April 13, 2017, similar information appeared in the Deia newspaper.

6) The monthly magazine La Razón Tu Economía, issue of April 23, 2017, pages 12 and 13 also gave an account of the product and its characteristics, as well as the fact that the electronic device could be purchased in shops at a price of 70 euros, and a box of 20 HEETS costs 4.85 euros, referring for more information on where to find them to the website www.IQOS.es. The article was repeated in the economy pages of Larazón.es on April 24.

7) The general information newspaper La Provincia, from Las Palmas, on May 5, 2017, reported an awards ceremony held in the Canary Islands, in which the general manager of the defendant, sponsor of the event, announced in her speech that "we already have a patented tobacco project on the market, without combustion, its name is IQOS, the new tobacco device without smoke or combustion and it will lead a paradigm shift in the tobacco sector".

8) In the weekly supplement Mercados of the newspaper El Mundo, on May 14, 2017, under the title "Las Tabacaleras quieren romper con los malos humos" [Tobacco companies want to break with harmful smoke], it is stated that Philip Morris, British American Tobacco, and Japan Tobacco International market products that are not smoked but inhaled, under the names of IQOS, Glo and Ploom, with statements made by the director of the defendant, Ruperto, being included below. This news item was also published in the Economy section of the newspaper El Mundo on the same day.

9) In the online news daily, prnoticias.com, on May 16, 2017, a news item was published under the title "Las últimas investigaciones clínicas confirman que IQOS reduce la exposición del fumador" [The latest clinical research confirms that IQOS reduces smoker exposure], in which an image of the device and HEETS packs appeared, and information on studies conducted by PMI's research program is reported.

10) In the publication Expansión Economía Digital, dated May 23, 2017, under the title "Philip Morris y la próxima era tecnológica del tabaco" [Philip Morris and the next technological era of tobacco], there is information on page 6, in which, among other information, the following is stated: "PMI is leading the race to develop alternative products that pose less potential risk to the consumer. The first to be marketed is called IQOS and consists of two parts: an electronic battery and a small cylindrical device, inside which are inserted special cigarettes that PMI sells under the umbrella of the Marlboro brand (specifically they are called HEETS Marlboro), although their flavor is slightly different". After going on to indicate the characteristics of the product, it is pointed out that "IQOS has been available in Spain since last December (...) By the end of this year PMI is expected to launch a second product on the market, which will incorporate the battery inside the *e-cigarette* itself (...).

Internally, IQOS is considered a success. More than two million people have embraced it, either exclusively or as a complement to conventional cigarettes." The information included statements from Ruperto and a photo of him in the center of the page holding the *device and the cigarette*.

11) In the Companies section of the digital newspaper El Español of May 26, 2017, *an article appeared under the headline "Philip Morris (Marlboro, L&M): "Queremos un mundo libre de humos" [We want a world free of smoke]*, which includes an interview with Ruperto, in which he states that "more than 3 billion dollars have been invested in these initiatives. An R&D center has been created with more than 430 scientists and IQOS is the result of those years of work and that investment". Below, the operation of IQOS is shown in italics, "it heats the cigarette to less than 300 degrees; for combustion to take place, it has to be heated to over 650 degrees (...) once it has been heated inside the device - in the photo below - the cigarette lasts either six minutes, that is, 12 or 14 puffs. After that, it goes out. It's hot, but it doesn't burn", and a photograph appears just below this paragraph with the device and a HEETS cigarette with its pack. In other responses, Ruperto says that 70% of smokers in Japan who have tried IQOS have switched to it.

12) On May 27, 2017, an article entitled "Philip Morris y la próxima era tecnológica del tabaco" [Philip Morris and the next technological era of tobacco] appeared in the digital newspaper Expansión.com, in the digital economy section, headed by a photograph of Mr. Ruperto holding the IQOS device and a HEETS cigarette. The article reports that PMI has invested 3 billion dollars in R&D to develop alternative products, the first to be marketed being IQOS, giving an account of its features and operation, along with a photograph of it. The article states, among other things, that "internally IQOS is considered a success. More than two million people have adopted it, either exclusively or as a complement to conventional cigarettes."

13) In the Canary Islands general information newspaper Canarias 7, an article was included on July 21, 2017, on page 27, based on an interview with Mr. Ruperto, headed by a photograph of him holding the IQOS device in his hands, in which he states the characteristics and operation of the device; in a box at the bottom of the page, there is a photograph of the device with a cigarette inserted in it.

14) In the general information newspaper of Tenerife, El Día, of the same date as the above, an article also appeared on page 26, under the title "Philip Morris mira al futuro con su nuevo dispositivo de consumo" [Philip Morris looks to the future with its new consumer device], in which Mr. Ruperto's statements about IQOS are included, with a photograph of it at the bottom, and a larger photograph of the device with a HEETS cigarette at the top.

15) On July 23, 2017, in the Company section of the ABC newspaper, under the title "*La tabaquera Philip Morris apuesta por bajar los humos*" [Philip Morris tobacco company committed to lower smoke], in which, as in the previous ones, Mr. Ruperto's statements are

included *along with a photograph of the latter, and another photograph at the bottom of the IQOS device with a cigarette inside.*

16) On August 12, 2017, in the newspaper Canarias 7, page 34, there was an account of the presentation to the public by Philip Morris in Las Palmas and Santa Cruz de Tenerife of the IQOS Club. Together with the photographs of the social event, reference was made to the device.

17) The same event was the subject of a page in the newspaper La Provincia, in which, together with the photographs of the event, a photograph of the IQOS device was included. This also happened in the newspapers La Opinión de Tenerife and El Día.

18) In the digital newspaper Vozpópuli, on September 16, 2017, an article was published in which PMI launched the IQOS product, under the title "Marlboro will finance with 960 M. the foundation 'World Without Smoke' facing medical skepticism" [Marlboro financiará con 960 M. la fundación 'Mundo Sin Humo' ante el escepticismo médico].

19) On October 19, 2017, in Diario de Sevilla, pg. 46, there was an article based on an interview with Mr. Ruperto, under the title "Sevilla, tercera ciudad con más venta del tabaco para calentar de Philip Morris" [Seville, the third city with more sales of Philip Morris heating tobacco] and a photograph of him. The same article with the same photograph was included on the same date in the Diario de Cádiz, the Diario de Jerez, the Día de Córdoba and in Huelva Información.

20) In the weekly magazine Yo Dona, photographs of certain actresses and actors were included in "the presentation of IQOS", in which they posed in a *photocall* in which only the IQOS brand appeared.

21) In the economic information newspaper Cinco Días of December 7, 2017, under the headline "Philip Morris cambia su producción para dejar atrás el cigarrillo tradicional" [Philip Morris changes its production to leave behind the traditional cigarette], it devotes pages 8 and 9 to the IQOS device, showing on the first page a photo of it and of an operator working in the building in Switzerland, and on the second page, below some graphs on the fall in tobacco consumption, it gives an account of similar projects of other companies in the sector.

22) In the general information online newspaper eldiario.es, an article was published on January 7, 2018 under the title "Philip Morris achaca la caída de Marlboro en España a la subida del precio y a IQOS" [Philip Morris blames the fall of Marlboro in Spain on the rise in price and IQOS], headed by a photograph of Mr. Ruperto in front of the slogan "this changes everything", in which reference was made to the marketing of IQOS as current demand activity, with that one indicating that "our fall is also partly due to the fact that we have supported IQOS - it concentrates more than 80% of its budget on communication and we have overlooked our *traditional brands*".

23) The same photograph heads the information published in *Diario de Teruel* on January 8, 2018, under the headline "Ruperto (Philip Morris): *"El futuro del tabaco se encuentra en el ámbito de la tecnología"* [The future of tobacco is in the field of technology], focusing on the launch of Iquos.

24) In the economic newspaper *El Economista* on January 8, 2018, information on the launch of Iquos was reported, also indicating its price, under the headline "Ruperto, de Philip Morris: 'Nuestra meta es un mundo sin humo'" [Ruperto, of Philip Morris: "Our goal is a world without smoke"]].

25) In an article published in the economic newspaper *Expansión* on January 16, 2018, referring to the innovations introduced in several important companies in different sectors, it was stated that Philip Morris had developed the IQOS device, indicating its characteristics.

26) In an article published in the newspaper *El Economista* on January 20, 2018, dedicated to electronic cigarettes, the launch of the IQOS is reported, indicating its characteristics.

[doc. 3 of the lawsuit; dossier in which the above information appears, obtained from the corresponding media in 96 pages].

27) In the same newspaper, on February 27, 2018, on pg. 33 an interview with Ruperto was published, under the headline "Cinco millones de personas fuman ya nuestro cigarrillo sin humo" [Five million people already smoke our smokeless cigarette], with a photograph of him in the center of the page holding the IQOS device [Doc. 18 provided by the plaintiff in the preliminary hearing].

28) An article published by *Vozpópuli.com* includes Ruperto's statements under a photograph of him in front of the IQOS logo [Doc. 19].

29) On March 29, 2018, in *El Correo Gallego*, on page 7, a photograph of "El Cubo" and its 430 workers was published under the headline "La I+D del Cubo 'jubila' al vaquero de Marlboro" [The Cube's R&D 'retires' the Marlboro cowboy], with an article reporting on the launch of IQOS [Doc. 20].

30) Articles similar to the above have been published in *La Opinión de Tenerife* (March 31, 2018), *LaProvincia* (April 1, 2018), *La Vanguardia* (April 1, 2018), *20minutos.es* (April 6, 2018), *ABC* (April 7, 2018), *Diario de Burgos* (April 8, 2018), *Cosmopolitan* (April 10, 2018) [docs. 21 to 27].

31) On April 25, 2018, the headline on page 11 of the newspaper *Expansión* was "*Philip Morris: 100.000 IQOS en España en un año y medio*" [Philip Morris: 100,000 IQOS in Spain in a year and a half], next to a photograph of Ruperto, noting in the subtitle that "the manufacturer of Marlboro reaches a market share of 1.5% in Madrid and 0.6% in Barcelona with its heated tobacco device", with the article including Ruperto's statements on IQOS, including the upcoming launch of new flavors of HEETS [doc. 29].

32) On May 6, 2018, the Diario de Teruel published an article under the headline "Philip Morris descarta darmarcha atrás en su plan de acabar con el cigarrillo" [Philip Morris rules out backtracking on its plan to end cigarettes], in which reference was made to the characteristics of IQOS and a photograph of a researcher of the firm was included [doc. 30].

33) On May 20, 2018, in the monthly supplement La Razón Tu Economía, an interview with Ruperto was published, with a photograph of Ruperto, in which he talks about the implementation of IQOS in Spain [doc. 31].

34) On June 4, 2018 in an article in the newspaper Canarias 7, under the headline "¿Por qué el día Mundial Sin Tabaco debería ser el Día Mundial Sin Fumar?" [Why the World No Tobacco Day should be the World No Smoking Day?], appeared next to it the photograph of a person smoking the IQOS device [doc. 32].

35) In El Día of June 5, 2018, a column referred to the Respondent's investment of 4.5 billion dollars in research [doc. 33].

36) In the newspaper La Provincia, on September 23, 2018, an interview with the general manager of Philip Morris in the Canary Islands was published referring to the launch of IQOS, with a photograph of the device appearing on the second page of the newspaper [doc. 34].

37) In the Correo Gallego of October 24, 2018, in a column titled "el cigarrillo sin humo espera tener 40% de mercado en siete años" [smokeless cigarette expects to have 40% market share in seven years], there appeared a photograph of the device with the cigarette inserted in the device [doc. 35].

38) In the weekly supplement of the newspaper Expansión, Fuera de Serie, of January 27, 2018, on its fifth page, an advertisement of IQOS was published, in which an image of it appears without a cigarette inserted in it, with the warning in its lower part of "product aimed exclusively at adult smokers" [doc.38].

39) The same advertisement featured in the magazine Hola of January 31 and February 28, 2018 [docs. 39 and 43 respectively], as well as in the sports daily Marca of February 21, 2018 [doc. 40] and in the magazine Woman of March 2018 [doc. 45].

40) In Magazine magazine, a weekly supplement of La Vanguardia newspaper, dated *February 25, 2018, the same advertisement was published on pg. 8, and on pg. 9 two photographs of the IQOS device without a built-in cigarette, with an explanatory text of the device* [doc. 41]. *The same pages were featured in the March 2018 Vogue magazine* [doc. 44].

41) During March 2018, in Muy Interesante, Quo, Vanity Fair, Viajar and Condé Nast Traveler magazines, information about the IQOS device appeared taking up a page with the same photograph of the device that appeared in the previous advertisements [docs. 46 to 50].

42) An advertisement similar to the one referred to in point 39 above was published in the magazine of the Spanish confederation of hotel and catering trade, La Revista de Hostelería, issue 43, of 2018 [doc. 51].

43) A report entitled "La esperanza blanca de Philip Morris" [The white hope of Philip Morris] appeared in the magazine Actualidad Económica from September 3 to 9, 2018, with a photograph of the device with a built-in cigarette, reporting the statements of Samuel, corporate director of the firm [doc. 52].

III. The defendant had a contract with the communication agency Román y Asociados since 2015 to develop the communication plan that is set every year [witness statement of Ruperto and doc. 17 provided by the plaintiff in the previous hearing, affidavit of the Internet portal topcomunicación.com]. The plan was prepared by the consultant, being then presented to the client [witness statement of the legal representative of Román y Asociados, Candelaria].

IV. The plaintiff sent letters on May 9 and November 3, 2017, to the newspaper La Razón and Diario de Sevilla respectively, informing them that their actions violated the legal prohibition to disseminate tobacco advertising [docs. 14 and 15 of the lawsuit].

V. On January 15, 2018, Plaintiff sent a letter to Defendant requiring it to publicly acknowledge that its communication campaign violated Law 28/2005 and the Unfair Competition Law, and to commit to cease its conduct [doc. 16 of the Complaint].

6. The aforementioned facts have been established by the documentary evidence indicated therein, which produces the effects granted by art. 326 Civil Procedure Law, as it is full proof of the fact, act or state of affairs that it documents, in the absence of evidence to the contrary. The facts gathered in the Notarial Act, such as the plaintiff's document 17, produce the effects granted to them by art. 319 Civil Procedure Law. The rest have been proven by the witness statements described above, which meet the requirements of sufficient veracity to do so.

THIRD: Regulatory framework.-

7. The General Advertising Law, Law 34/1988 of November 11, 1988 (LGP), in its art. 3 d), *defines as unlawful advertising that which infringes the provisions of the regulations governing the advertising of certain products, goods, activities or services. Considering such conduct as unlawful advertising implies treating it not only as an administrative offense, but also as a civil offense of unfair advertising (art. 18 of the Unfair Competition Law), and therefore being able to exercise against it the civil actions set forth in art. 32 of the Unfair Competition Law (UCL).*

8. Law 28/2005, of December 26, 2005, on health measures against smoking and regulating the sale, supply, consumption and advertising of tobacco products, in article 9. 1 prohibits the sponsorship of tobacco products, as well as all kinds of advertising and promotion of the aforementioned products in all media and formats, including vending machines and

information society services, with three sole exceptions consisting of publications intended exclusively for professionals involved in the tobacco trade; presentations of tobacco products to professionals in the sector within the framework of Law 13/1998, of May 4, 1998, on the regulation of the tobacco market and tax regulations, and promotion in State tobacco and stamp outlets, under the conditions indicated in the provision; and publications published or printed in a non-EU Member State not principally intended for the Community market.

9. Art. 2 a) of Law 28/2005 defines advertising for the purposes of that law as

"any form of communication, recommendation or commercial action, the objective or direct or indirect effect of which is the promotion of a tobacco product or the use of tobacco, including advertising which, without directly mentioning a tobacco product, attempts to circumvent the prohibition of advertising by using names, trademarks, symbols or other distinctive elements of tobacco products." For the purposes of the General Advertising Law, according to Article 2 thereof, advertising is understood as *"any form of communication made by a natural or legal person, public or private, in the exercise of a commercial, industrial, craft or professional activity, for the purpose of directly or indirectly promoting the contracting of movable or immovable goods, services, rights and obligations."* Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 on misleading and comparative advertising defines advertising as *"any form of communication made in the course of a commercial, industrial, craft or professional activity with a view to promoting the supply of goods or services, including immovable property, rights and obligations."* The CJEU of 11 July 2013 (C-657/11) states that, from paragraphs 3, 4 and 8 of the Directive, and from the broad definitions of misleading advertising and comparative advertising, it is clear that the Community legislature intended to establish, through that Directive and 84/450, a comprehensive regime for all forms of advertising, regardless of whether or not they lead to the conclusion of a contract, in order to prevent such advertising from harming both consumers and traders and distorting competition within the internal market (para. 38).

10. Directive 98/43 of 6 July 1998 on the harmonization of the *laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products prohibits in Article 3.1 thereof any kind of tobacco advertising or sponsorship in the Community. The fourth paragraph prohibits free distribution whose aim or direct or indirect effect is the promotion of a tobacco product.*

11. Directive 98/43 defines advertising as adapted in its implementation by Law 28/2005, as any type of commercial communication the direct or indirect aim or effect of which is the promotion of a tobacco product, including advertising which, without directly mentioning a tobacco product, attempts to circumvent the advertising ban by using names, trademarks, symbols, or other distinctive elements of tobacco products. As for sponsorship, both the Directive and Law 28/2005 define sponsorship as any contribution, public or private, to an event or activity whose objective or direct or indirect effect is the promotion of a tobacco product. Tobacco products are defined in both laws as products intended to be smoked, inhaled, sucked or chewed, provided that they consist, even if only in part, of tobacco (art. 2).

Finally, Law 28/2005 defines promotion as any stimulation of the demand for tobacco products, such as announcements, advertisements, and special events, among others, aimed at attracting the attention and arousing the interest of consumers (art. 2.1.d).

12. Directive 2001/83 of 6 November 2001, which establishes a human code relating to medicinal products for human use, prohibits any advertising of a medicinal product for which a marketing authorization has not been granted in accordance with Community law. The CJEU of 2 April 2009, *Frede Damgaard* case (C-427/07), interpreting this Directive, points out that although the Directive, when defining the advertising of medicinal products, expressly underlines the purpose of the message, it does not include any indication as to the persons who disseminate this information (para. 20), adding that dissemination by an independent third party does not exclude the advertising nature of the message, even if the independent third party disseminates such message in the context of a commercial or industrial activity (para. 21), since even in such cases the advertising of medicinal products may harm public health, the safeguarding of which is the essential objective of the Directive (para. 22).

13. The aforementioned judgment also states that the status of the communication of the author of information relating to a medicinal product, and in particular his relationship with the company producing or distributing the medicinal product, is a factor which, although it helps to determine whether such information is of an advertising nature, must be assessed in conjunction with other circumstances, such as the nature of the activity carried out and the content of the message (nr. 24). It follows from the foregoing that the dissemination by a third party of information relating to a medicinal product, in particular its curative or preventive properties, may be regarded as advertising within the meaning of Article 86 of Directive 2001/83, even if that third party acts on its own account and entirely independently, in law and in fact, of the manufacturer or seller of that medicinal product; it is for the national court to determine whether such dissemination constitutes a form of offer of information, promotion or inducement intended to encourage the prescription, supply, sale or consumption of medicinal products. The analogy between the prohibition of advertising of *medicinal products under the conditions indicated and that of tobacco advertising, deriving from the fact that both are based on the protection of public health (4th recital of Directive 98/43 with regard to tobacco advertising)*, makes the above considerations of the CJEU applicable to the present case.

14. As regards the concept of communication (as opposed to advertising), Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the internal market, Article 2(f) defines "commercial communication" as "*all forms of communication intended to promote directly or indirectly goods, services or the image of a company, organization or person engaged in commercial, industrial or craft activities or in the regulated professions. Communications relating to the goods, services or image of such company, organization or person, prepared independently of it, in particular when they are made without economic consideration, are not considered as commercial communications in themselves (...).*"

15. The CJEU, in interpreting Regulation 1924/2006 on nutrition and health claims made on foods, which prohibits the latter when they do not comply with the conditions provided for therein, declared in the judgment of 14 July 2016 (C-19/15) that the Regulation is applicable to nutrition and health claims made in a commercial communication relating to food intended to be supplied as such to the final consumer, whenever such communication is not addressed to the final consumer, but exclusively to health professionals.

FOURTH: The purpose of advertising.-

16. In view of the parties' positions, it is not disputed between the parties that the IQOS device is not a tobacco product, but that HEETS cigarettes are, and that the IQOS device cannot be used without HEETS cigarettes, nor can HEETS cigarettes be consumed without using the IQOS device. It is not disputed that the IQOS device is intended solely for smoking HEETS cigarettes, which are produced by the defendant specifically to be smoked with IQOS, and cannot be smoked in any other way. Given the foregoing, the reply of the Tobacco Market Commissioner of the Ministry of Finance to the official letter addressed to it by the Barcelona Social Court No. 20 (provided by the defendant as doc. 1 in a document dated June 12, 2019) is of no evidentiary significance in this lawsuit, since it ratifies what has been stated above, that IQOS is not a tobacco product.

17. Although the prohibition of advertising, by its very essence as an exception to a general rule of free advertising, must be interpreted restrictively, or at least not in a non-extensive manner, the above consideration of smoking being the sole purpose of the IQOS device must be taken into account. Therefore, although in principle the advertising ban would only affect HEETS cigarettes, given that they are a tobacco product and the IQOS device is not, taking into account the public health protection purpose of the ban -as referred to in the previous ground-, *the advertising ban should also cover the IQOS device, since the only possible use of the device is smoking. The advertising of tobacco products is not prohibited for their own sake, but because they are smoked, so advertising a technical device whose only purpose is to be used for smoking would be a kind of fraud of law. Such advertising would be covered by the lack of application of the prohibition of art. 9 of Law 28/2005 to achieve a purpose contrary to that pursued by the rule: the advertising of a product whose sole use is to smoke cigarettes, i.e., the promotion of tobacco.*

18. Notwithstanding the foregoing, such issue is not particularly relevant in this lawsuit, since what is truly relevant is to determine whether the set of information that appeared in the media -at least partially- in the proven facts of this resolution constitutes advertising, in the sense of the prohibition of art. 9 of Law 28/2005, or only constitute acts of communication or information of a matter of public interest by the media, and therefore outside the scope of the prohibition of advertising established by that legal provision.

19. The first thing to be emphasized is that, whether advertising or communication, that set of information constitutes a unit, since - as has been proved - Philip Morris does not deny that it is part of a preconceived plan carried out by the company, in the form of a communication

campaign, through the communication agency Román y Asociados. This set of information has its origin, therefore, in the defendant's desire to communicate the development and launch of a new product, which would replace conventional cigarettes and reduce their harmful effects.

20. Although it was doubtful that the prohibition of advertising affected the IQOS technical device, the defendant avoided the problem and did not communicate this product through an advertising campaign as such (paid advertisements in the media), but through acts of communication (distribution to the media of information on the product, so that they would subsequently, voluntarily and without payment, report on the existence of the same). It is a different matter, which is the subject of the lawsuit, whether or not these acts of communication go beyond their own scope, and if the first case is true whether they are acts of covert or hidden advertising, which would therefore fall within the prohibition of advertising for the reason stated in point 15 above.

FIFTH: The requirements of the concept of advertising.

21. The object of the lawsuit requires determining in the first place, not whether the information contained in the proven facts constitute acts of communication, but whether they comply with the requirements of the legal concept of advertising, and therefore must be considered as such.

22. Therefore, it is necessary to consider the material aspects of the information rather than the formal ones. That is to say, although they may fall within the doctrinal or legal concept (indicated in points 14 and 15 of this resolution) of an act of communication, what is relevant is whether they fall within the legal concept of advertising.

23. Of the different legal concepts of advertising that have been included in the *third ground of law*, we must start from the specific one for the present matter, which is that of art. 2 a) of Law 28/2005, whose first element is "any form of communication, recommendation or commercial action".

24. The broad nature of "any form of communication" means that the information described in the proven facts must be included, since they constitute a form of communication, even indirect, from the manufacturer of the product to the general public.

25. This concept does not require, unlike the general definition of the General Advertising Law, that the communication be made "in the exercise of a commercial, industrial, artisan or professional activity". In any case, this requirement would also be fulfilled, since the person who commissions the communication campaign and appears in it is the producer and marketer of the product, who therefore acts within its industrial and commercial activity.

26. The predominant element of the definition is the purpose or effect of the communication: "the direct or indirect purpose or effect of which is the promotion of a tobacco product or the use of tobacco". First of all, it must be emphasized that the inclusion of the purpose or effect of

promoting tobacco use makes it clear that also the isolated advertising of a device that is not a tobacco product, but has no other purpose than tobacco use, such as IQOS, is also included in the concept of advertising for the purposes of Law 28/2005.

27. Secondly, it is necessary that the promotion of tobacco use be the goal - the purpose of the communication - or the effect of it, even indirectly, and therefore, even if it is an objective effect, not intended by the author of the information, regardless of whether or not he represents it to himself, a requirement that is not required either.

From the moment it is stated by the defendant that, unlike the electronic cigarette, HEETS is tobacco, and therefore the use of IQOS involves smoking it (albeit in a different way than smoking a conventional cigarette), the promotion of IQOS is the promotion of tobacco use. In this regard, the doctrine points out - in the field of drug advertising, which is regulated in a similar way to tobacco advertising - that unlawful advertising has the nature of unlawful endangerment typical of acts of unfair competition in general; therefore, what is important is not to determine whether the relevant public perceived the message as informative or promotional, but whether there was a reasonable risk that it could have perceived it as promotional.

28. The question is therefore centered on determining whether the information presented in the section of this decision on proven facts amounts to a promotion of IQOS. The answer can only be affirmative; such information, under the appearance of information on a new technological invention, carries an important advertising message, both for its content and its form, as well as for its generalized and indiscriminate nature.

29. In terms of content, the vast majority of the stories are *journalistic information that takes up at least a full page of the newspaper, magazine or digital newspaper (of similar length to the above), signed by a journalist from the media in question, which includes both the investment made by Philip Morris, specifically the figure of 3 billion dollars, to develop products for smoking that prevent or reduce the health problems of tobacco. The information in all cases, together with the reference to the research efforts - in which the existence of the "cube" where these projects are being developed is mentioned - includes the existence of IQOS and its launch by the defendant. In other words, there is always a specific reference to the research product, the IQOS device. This reference means that we are not dealing with mere information on relevant scientific advances, which would clearly constitute a case of non-promotional information, but rather the product presentation.*

30. The reference to IQOS always includes an explanation of its characteristics: unlike conventional tobacco, it does not burn tobacco but only heats it; it is used with the special HEETS brand cigarette, also marketed by the Respondent; the duration of the battery or of the cigarettes; and most importantly, many pieces of information indicate where IQOS can be obtained and at what price, as well as the HEETS cigarettes. References to the characteristics of the product can be the subject of communication and advertising at the same time, but the

reference to how to obtain it, including the price, can only have the purpose of promoting the sale of the product.

31. Some of the articles start from the general situation of the tobacco sector, making reference to the different products developed by the different companies in it. Thus, together with IQOS, other products are mentioned, such as the one developed by the plaintiff's group. However, this does not detract from the advertising nature of the information focused on the Respondent's product.

32. References to the success that the product is having in the market also have an advertising character in terms of content. It is clear that a public reference to this type of success with respect to a given product implies - even if it is not an effect intended by the speaker - the promotion of the purchase of the product. Following the plaintiff's waiver of the action for misleading advertising, it is irrelevant whether the statements in favor of the properties of IQOS in relation to regular tobacco, or even the reality of the sales success, are true. But the latter reference is relevant when it serves to promote the product. The news that Seville is the third Spanish city in sales of PM heating tobacco is a pretext to give favorable information to the product, and to encourage its consumption.

33. The foregoing includes Ruperto's statements that IQOS is a "milestone", or the slogan "this changes everything" (which in some occasions is pronounced by Mr. Ruperto and in others his image appears in the place where the product is presented), since such expression comes to emphasize the preeminence of IQOS over the rest of similar devices existing in the market.

34. In addition to the content of the information, the form adopted by most of the pieces *is particularly relevant when it comes to classifying them as advertising. On the one hand, there are very few reports that do not contain a photograph or any other image of the IQOS device, with or without the built-in Heet cigarette. The presentation of the image has a clear promotional component*; in addition to the interest in the product created by the text, the product is reproduced in such a way that the interested public, after reading the article, has a complete image of the product and its characteristics, in the same way as if they had seen an advertisement for it.

35. Even in the very appearance of the image of Philip Morris' CEO, Ruperto, in many of the news articles, an advertising component can be seen. He was the one who, according to what he declared, was in charge of the launching of the product and who gave the interviews that served as the basis for most of the newspaper articles. In many reports, a photograph of him appears, most of the time holding the product: the image of Mr. Ruperto represents Philip Morris, and the device he is holding is IQOS, the product mentioned in the article. Such a form of presentation is not typical of non-advertising information but of information with the promotional effect referred to above.

36. The very fact that the communication campaign was not limited to disseminating press releases to the media, or even inviting journalists to get to know "the Cube", but rather to

interviews with the person in charge of launching the product is revealing of the promotional intention of the campaign. Since it is an interview -although the article does not include the entire interview but only some of the interviewee's statements-, the message is issued by the interested party, not by the journalist; the phrases used for the title or subtitle of the article are statements made by the interviewee, although chosen by the journalist; and, therefore, there is already a direct connection between the person marketing the product and the public, just as in the advertising message.

37. A promotional nature is also appreciated when the information reported is a social event consisting of the presentation of IQOS, such as those mentioned in points 16 and 20 of proven fact II. These events were attended by people socially known as actors or models outside the tobacco sector, which is what motivated the appearance in the press of such reports, but in which it was expressly stated that it was the presentation of IQOS, the logo appearing -in the news item 20- in the *photocall* itself where the attendees were photographed. The mentioned news have the character of information about a social event, but this event itself has an unquestionable promotional character, and so does its appearance in the media.

38. Finally, as regards the form, the advertisements listed in points 39 to 42 of proven fact II are clearly advertisements, because they are presented in such format. Both these advertisements, as well as the information referred to in the previous point, cannot be considered as isolated facts, since they coincide temporally with the communication campaign that is the matter of this lawsuit, so they fall within the action inferred in the lawsuit together with the rest of the information referred to therein.

39. The third element (insofar as the elements in which the motives for which the information declared proven to be advertising have been *individualized, since they are not impermeable to each other*) is the *generalized and indiscriminate nature of the information published; that is to say, as can be easily observed in the proven facts, the information was published in a wide variety of media of all sectors, starting with general, economic, sports or social information.* This fact alone is revealing of the promotional nature of the information and in any case of its effect, direct or indirect, intended or not, of promoting the use of tobacco. If they were non-advertising communications, the information would be directed to sectors specifically interested in the technological advances in the matter; if they are directed to the general public to make them aware that there is a new product with the characteristics of IQOS, what is being done is to promote the sale of IQOS, and to promote this sale, as has been said, is to promote the use of tobacco.

40. This promotional nature derived from the indiscriminate dissemination of information follows from the exceptions that art. 9.1 of Law 28/2005 establishes to the general prohibition of tobacco products, namely: publications intended exclusively for professionals involved in the tobacco trade; presentations of tobacco products to professionals in the sector within the framework of Law 13/1998; and publications published or printed in a non-EU Member State that are not primarily intended for the Community market.

SIXTH. Conclusion.-

41. In accordance with the two previous grounds, in view of their content, form and generalized nature, the information which is the object of the claim, and which has been declared proven in the proven fact II section of this resolution, is deemed as advertising of tobacco products or the use of tobacco.

42. This conclusion is not affected by the fact that the information was issued on behalf of journalists or media independent of the defendant. As stated in point 12 of this decision, first of all, the doctrine established in the CJEU on 2 April 2009 is applicable to the present case, since both the prohibition of advertising of medicines (under the conditions established by law) and the prohibition of tobacco advertising have the same basis, which is the protection of public health, and according to this doctrine, it does not affect the advertising nature of the information that the message is broadcasted by an independent third party, in view of the purpose of protecting public health.

43. In any case, in the present situation, the information issued by the media has its origin in the communication campaign undertaken by the defendant, so it is this campaign, which has as a consequence the disputed information, which will be affected by the decision of this lawsuit.

44. Declared that the information is of an advertising nature of tobacco or its use, this advertising contravenes the prohibition of art. 9.1 Law 28/2005, without being covered by any of the exceptions that the precept sets forth.

45. As it is, therefore, an advertisement that does not comply with the specific rules that regulate it, we are dealing with an unlawful advertisement, according to art. 3 d) of the General Advertising Law. Pursuant to art. 18 of the Unfair Competition Act, advertising regarded as unlawful by the General Advertising Act shall be deemed unfair, which implies, as has been said, that the actions provided for in art. 32 of the Unfair Competition Act may be brought against it.

46. The lawsuit seeks a declaration that acts of unlawful advertising have been committed, in contravention of art. 3 d) of the General Advertising Law in relation to art. 9.1 of Law 28/2005, as well as disguised advertising pursuant to art. 5 of the Unfair Competition Law, and unlawful advertising pursuant to art. 15.2 of the Unfair Competition Law. Having declared the first of the unlawful acts, it is not appropriate to enter into the following ones, especially since this unlawful act has a specific nature as opposed to the more general nature of the other two.

47. As a consequence of such declaration, the claim seeks the cessation of the communication campaign and the prohibition of its future repetition. The declaration of unlawfulness entailed by the foregoing considerations must entail the acceptance of the action for cease and desist and the prohibition of repetition. The latter is obviously limited to a communication campaign repeating in substance the characteristics of the one at issue in the current case.

48. The lawsuit also seeks the publication of the entire Judgment in a national newspaper and in the tobacco industry magazines "Mundo Estanco" and "La Boutique del fumador" at the defendant's expense. The publication of the judgment is merely a remedy for the infringement committed, and is therefore intended to undo the effects that the infringement has had on the market. It does not have a punitive character in our law. The publication in two magazines of the tobacco sector in which it has not been declared proven that the unlawful information was included has the latter character and not the former, so that this claim cannot be accepted. As for the national daily newspaper, taking into account that the proven facts show that the newspaper Expansión is the national daily newspaper (digital or on paper) in which - in some of its different publications, which means that the readers are the same - the information has appeared most frequently, the publication must take place in this newspaper.

SEVENTH: Costs of the proceedings.

49. Given that the claim is upheld, in accordance with art. 394.1 of the Civil Procedure Law, the procedural costs are imposed on the defendant. By virtue of the foregoing legal reasoning, and in the name of the King, I hereby rule the following

ORDER

That, upholding the claim filed by ALTADIS, S.A., being defendant *PHILIP MORRIS SPAIN, S.L.*, I must make the following pronouncements:

1. I declare that the defendant has carried out acts of unfair competition consisting of *unlawful advertising of the IQOS device and the HEETS tobacco*.
2. I order the defendant to cease carrying out such acts, specifically the communication campaign relating to such products in the terms in which they have been developed, as well as not to repeat them in the future.
3. I order the defendant to publish the Judgment of this sentence in the newspaper Expansión at its own expense.
4. All of the above with the defendant being ordered to pay the costs of the proceedings.

This sentence is notified to the parties, warning them that it is not final, being able to file an appeal against it, which must be presented before this Court within 20 days from the following day of its effective notification, appeal that will be resolved by the Provincial Court of Madrid.

Thus, by this my sentence, which I dictate, command and sign on the day of its date, of which testimony will be left in the case files, taking its original to the corresponding book, and executing it, as the case may be.

Thus, by this sentence, I pronounce, command and sign it.

The Magistrate Judge

Unofficial translation

PUBLICATION: The foregoing resolution is delivered in this Secretariat for its notification, being published in legal form, and a literal certification of the same is issued to be attached to the case file. I attest.