Judgment C-830/10

Reference: Docket D-8096

Action for unconstitutionality against Articles 14, 15, 16 and 17 of Law 1335 of 2009 *"provisions by which harm to the health of minors and the non-smoking population is prevented and public policies stipulated for the prevention of tobacco use and smoker"s cessation of dependence on tobacco and its derivatives among the Colombian people"*.

Plaintiff: Pablo J. Cáceres Corrales

Justice Rapporteur:
LUIS ERNESTO VARGAS SILVA

Bogotá D.C., October twenty (20), two thousand ten (2010).

The Constitutional Chamber sitting en banc, in exercise of its constitutional faculties and in compliance with the requirements and formalities established in Decree 2067 of 1991, has proffered the following Judgment.

I. BACKGROUND INFORMATION

In exercise of the public action set out in Article 241.4 of the Constitution, Mr. Pablo J. Cáceres Corrales has requested that the Court find for the unenforceability of Articles 14, 15, 16 and 17 of Law 1335 of 2009 *"provisions by which harm to the health of minors and the non-smoking population is prevented and public policies stipulated for the prevention of tobacco use and smoker"s cessation of dependence on tobacco and its derivatives among the Colombian people"*

Having complied with the formalities established in Article 242 of the Constitution and Decree Law 2067 of 1991, the Court hereby resolves upon the referenced action.

II. NORM SUBJECT TO ACTION

Following are the norms subject to this action, which the plaintiff challenges in their entirety:

LEY 1335 DE 2009
(julio 21)
Diario Oficial No. 47.417 de 21 de julio de 2009

CONGRESO DE LA REPÚBLICA

Disposiciones por medio de las cuales se previenen daños a la salud de los menores de edad, la población no fumadora y se estipulan políticas públicas para la prevención del consumo del tabaco y el abandono de la dependencia del tabaco del fumador y sus derivados en la población colombiana.

EL CONGRESO DE COLOMBIA

DECRETA:
(...)

Artículo 14. Contenido en los medios de comunicación dirigidos al público en general*. Ninguna persona natural o jurídica, de hecho o de derecho podrá promocionar productos de tabaco en radio, televisión, cine, medios escritos como boletines, periódicos, revistas o cualquier documento de difusión masiva, producciones teatrales u otras funciones en vivo, funciones musicales en vivo o grabadas, video o filmes comerciales, discos compactos, discos de video digital o medios similares.*

Parágrafo*. Los operadores de cable, los operadores satelitales y los operadores de televisión comunitaria que estén debidamente autorizados por la Comisión Nacional de Televisión, a través de licencia, no permitirán la emisión en Colombia de comerciales o publicidad de tabaco producida en el exterior.*

Las sanciones serán las mismas previstas en la presente ley.

Artículo 15. Publicidad en vallas y similares*. Se prohíbe a toda persona natural o jurídica la fijación de vallas, pancartas, murales, afiches, carteles o similares móviles o fijos relacionados con la promoción del tabaco y sus derivados.*

CAPITULO IV.
DISPOSICIONES PARA PROHIBIR LAS ACCIONES DE PROMOCIÓN Y PATROCINIO DE TABACO Y SUS DERIVADOS.

Artículo 16. Promoción. *Prohíbase toda forma de promoción de productos de tabaco y sus derivados.*

Artículo 17. Prohibición del patrocinio. *Prohíbase el patrocinio de eventos deportivos y culturales por parte de las empresas productoras, importadoras o comercializadoras de productos de tabaco a nombre de sus corporaciones, fundaciones o cualquiera de sus marcas, cuando este patrocinio implique la promoción, directa o indirecta del consumo de productos de tabaco y sus derivados.*

III. THE ACTION

Mr. Cáceres Corrales considers that the challenged norms, which univocally provide for the prohibition of advertising, broadcasting and promotion of tobacco products and their derivatives, clash with Articles 333 and 334 of the Constitution, which provide for free private initiative and the freedom of enterprise. To support that statement, he establishes the following arguments:

3.1. Law 1335/09, considering the objectives established in its Article 1, consists of a series of legal instruments, directed to avoiding the damaging effects that tobacco consumption implies for the health of Colombians. Along these lines, such regulations conform to various international law provisions, especially those proffered under the framework of the World Health Organization – WHO, which coincide in considering that the consumption of tobacco and its derivatives poses a serious threat to public health. The plaintiff nonetheless considers that such international commitments must be applied in the internal law in a manner that is compatible with constitutional freedoms, especially free private initiative and the freedom of enterprise. Therefore, as the production and commercialization of tobacco and its derivatives is a lawful activity, permitted under the Colombian framework and that it even receives economic incentives and tax imposts, an absolute prohibition of the advertising of such goods to the public through the media represents a violation of such liberties.

3.2. In the opinion of the plaintiff, the establishment of the freedom of enterprise as a limit to the State powers of intervention in the economy is one of the aspects defining the social and democratic state of laws, respectful of the fundamental guaranties. Therefore, there is an express constitutional mandate imposing upon the State the duty to eliminate all barriers preventing the proper exercise of free private initiative, as they are contrary to certain essential aspects of liberal constitutionalism, circumscribing the exercise of political and economic power by Law.[1] Based on the references to the constitutional case law on the matter, the plaintiff has identified three plains expressing the content and scope of free private initiative and freedom of enterprise. *"The first aspect that we find there is the establishment of such economic rights, holding a place in the constitutional order. The second is the one considering that such rights and freedoms are relative and not absolute, as the lawmaker can establish limits based on the common good and social interest in all expressions considered under the framework and, in addition to such restriction, introduce in the exercise of the rights and freedoms the criteria that are adopted under the framework of the economic and tax*

[1] To support this statement, the action provides an extensive quote from decision C-524/95 (Justice Rapporteur: Carlos Gaviria Díaz).

policies, in accordance with the relevant constitutional rules. The third provides that the limitations cannot be "of such scope as to render the right or freedom nugatory."" According to such last provision, the plaintiff stresses that the State has the authority to prohibit a particular activity, assuming the consequences of doing so, or allowing it, in which case it may subject it to different degrees of intervention, provided the exercise of economic freedom is permitted.

3.3. Based on the considerations provided by the Court in its Judgment C-524/95 (Justice Rapporteur: Carlos Gaviria Díaz), the plaintiff states that case law has established that the facets protected by economic freedom include the possibility that entrepreneurs use advertising in media as an instrument par excellence for the promotion of their products, clearly subject to certain conditions. This is in the understanding that if such faculty were prohibited it would close off the proper and sufficient channels for the consumers to know of the conditions and qualities of the goods offered, especially as regards merchandise the marketing of which is permitted by the State. Along these lines, the plaintiff insists that *"the existence of enterprises is the consequence of the system of rights and freedoms* (…). *If the business objective is legal, so shall be the activity of making available to the market (users, buyers, etc.) the goods and services that are sought to be traded. To do so, they shall be made known through the dissemination technically provided through the media they freely choose. It is quite clear that, without that activity, the seller would be unable to offer the product and the buyer would be unable to reap the benefits or advantages that such goods could offer. In fact, they would not acquire them. || It is clear that if a company has a legal objective, it is also the owner of the right to promote its products. Such right may be limited by law, but never prohibited."*

Sufficient exercise of the authority to rely on advertising, in the opinion of Mr. Cáceres Corrales, is even more important in the case of products such as tobacco and alcoholic beverages, inasmuch as there are express legal provisions ordering that consumers be informed of their potential effects on health. It would therefore be contradictory that, in spite of such requirements and the lawfulness of the manufacture of tobacco, the lawmaker would prohibit the use of advertising for the products in question. Along these lines, the plaintiff stresses that *"competitors at the market have no further option than to legally gain the will of the consumers, presenting their product with all elements as are useful for such clients to form an opinion. If they cannot make use of advertising, they cannot participate at the free competition market."*

3.4. In the opinion of the plaintiff, the fact that there are several norms of a tax nature, both national and local in scope, assessed upon the manufacture and commercialization of products derived from tobacco, is reliable evidence that the activity is lawful and, therefore, is encompassed by the freedom of enterprise. Along these lines, the challenged provisions overstep the objective of Law 1335/09, inasmuch as such regulations are intended to protect public

health, but the challenged rules ultimately prohibit a particular commercial activity, based on the absolute restriction of its promotional channels. Furthermore, it cannot be forgotten that the production and sale of the referred goods has been accepted with a high degree of freedom, to the extent that they are subject to requirements such as the obtaining of a sanitary registration from Invima. Consequently, there is a clear contradiction between the broad recognition of the lawfulness of the commercialization of tobacco and its derivatives and the prohibition of its advertising, which is a characteristic of economic freedom.

IV. INTERVENCIONES

4.1. Intervención del Ministerio de las Tecnologías de la Información y las Comunicaciones

El Ministerio de las Tecnologías de la Información y las Comunicaciones, mediante apoderada judicial, intervino en el presente proceso con el fin de solicitar a la Corte la declaratoria de exequibilidad de los artículos demandados. Sostiene que las limitaciones impuestas a la publicidad de productos de tabaco son adecuadas, toda vez que constituyen *"una política pública en materia de derecho a la vida, salud, ambiente sano y protección de los menores de edad, que obliga a tomar las medidas necesarias y drásticas para la cesación del consumo del tabaco."* En este sentido, afirma que los apartes demandados de la Ley 1335 de 2009 representan un avance en el cumplimiento de las obligaciones adquiridas por el Estado colombiano al ratificar y aprobar el Convenio Marco de la Organización Mundial de la Salud para el Control del Tabaco, mediante la Ley 1109 de 2006.

Agrega que en aplicación de la Ley 1109 de 2006, la prohibición de la publicidad de productos de tabaco está dirigida a evitar su consumo, finalidad que se encuentra acorde con la protección del derecho a la vida, a la salud y a un ambiente sano.

Así, el Ministerio concluye que *"debe primar el derecho a la vida, a la salud y a un ambiente sano, frente a la libertad de empresa que es a la norma que acude el señor demandante. Las libertades económicas son reconocidas por la Constitución pero es la Ley la que delimita el alcance cuando así lo exija el interés general de la comunidad. No hay derechos absolutos, es una libertad que se encuentra atemperada por el interés colectivo."*

4.2. Intervención del Ministerio de la Protección Social

Mediante apoderado judicial, el Ministerio de la Protección Social presentó los siguientes argumentos dirigidos a defender la constitucionalidad de las normas acusadas. En primer lugar, afirma que la prohibición de publicidad de productos de tabaco busca proteger la salud de los habitantes y ajustar el

ordenamiento jurídico interno a los instrumentos internacionales sobre la materia. Al respecto, precisa que de acuerdo con lo dispuesto en el Convenio Marco de la Organización Mundial de la Salud para el Control del Tabaco, los Estados parte están obligados a: *(i)* vigilar el consumo de tabaco y adelantar políticas de prevención; *(ii)* proteger a la población de la exposición al humo de tabaco; *(iii)* ofrecer ayuda a los fumadores para abandonar este hábito; *(iv)* advertir de los peligros que el consumo representa para la salud; *(v)* adoptar medidas relacionadas con prohibir la publicidad, promoción y patrocinio de productos de tabaco; y *(vi)* elevar los impuestos de estos productos.

En segundo lugar, señala que en el Estado social de derecho las autoridades públicas tienen la responsabilidad de garantizar la efectividad del derecho a la salud de los ciudadanos. De ahí que, en su criterio, las limitaciones impuestas al ejercicio del derecho a la libertad de empresa, previstas en los artículos demandados, son un medio para la satisfacción de los fines del Estado en el ámbito de la salud.

En tercer lugar, indica que *"la regulación contenida en la Ley 1335, en general y, en particular en lo relativo a la publicidad, tiene su origen en la abrumadora evidencia científica que demuestra que el humo del tabaco produce enfermedades, discapacidad y muerte en las personas fumadoras."* Así, a su juicio, uno de los elementos que incrementa el consumo del tabaco *"es la publicidad en los diferentes medios de comunicación dirigidos al público en general y sobre los cuales el poder de discriminar el receptor del mensaje es mínimo o limitado."*

En cuarto lugar, el Ministerio aduce que la medida relativa a la prohibición total de la publicidad de productos de tabaco, en contraposición a medidas de prohibición parcial, se justifica en la necesidad de prevenir el consumo en toda la población. En esta medida, señala que de conformidad con la jurisprudencia constitucional, particularmente en la sentencia C-665 de 2007, decisión en la que la Corte analizó la exequibilidad de la Ley 1109 de 2006 "*por medio de la cual se aprueba el „Convenio Marco de la OMS para el control del tabaco",* las restricciones a la publicidad y promoción del tabaco son constitucionalmente admisibles.

Finalmente, afirma que el modelo constitucional colombiano permite la intervención del Estado en la economía para salvaguardar los derechos de los habitantes y el bienestar general. Al respecto, reitera los argumentos expuestos por el Ministerio de las Tecnologías de la Información y las Comunicaciones, en el sentido de señalar que, a diferencia de lo estimado por el demandante, el derecho a la libertad de empresa debe ceder ante los derechos a la vida y a la salud de la población que buscan proteger las normas acusadas. Además, el Ministerio explica que, en todo caso, dichas normas *"*[n]*o vulnera[n] la libertad de empresa, la iniciativa privada ni la libre competitividad",* pues la prohibición a la publicidad de productos de tabaco *"es adecuada, suficiente,*

proporcional y goza de racionalidad conforme al bien jurídico que se protege."

4.3. Intervención del Ministerio de Educación Nacional

A través de escrito dirigido a esta Corporación por intermedio de apoderado judicial, el Ministerio de Educación Nacional solicita la declaratoria de exequibilidad de los artículos demandados. Para el efecto, el Ministerio indica, al igual que el Ministerio de la Protección Social, que en concordancia con la sentencia C-665 de 2007, las restricciones a la publicidad y promoción del tabaco son constitucionalmente admisibles. En este sentido, transcribe *in extenso* varios apartes de la citada sentencia.

Dado lo anterior, el Ministerio sostiene que *"el Convenio Marco* [de la OMS para el control del tabaco] *y su Ley aprobatoria 1109 de 2006, hacen posible el desarrollo legislativo que se ha concretado en la expedición de la Ley 1335 de 2009, sobre cuyas disposiciones acusadas conceptúo que deben ser mantenidas, o en otras palabras, que no son materia susceptible de inexequibilidad, pues no se está restringiendo con ella la libertad de empresa, como tampoco la libertad de mercados, ya que se mantienen como posibles, legalmente, la siembra y cultivo del tabaco, su recolección y elaboración domésticos o su exportación en rama y/o en productos fabricados, su distribución dentro de ciertas condiciones a los mercados del tabaco y de los productos derivados del mismo."*

Adicionalmente, indica que el propósito buscado mediante las normas demandadas tiene respaldo constitucional, dado que pretenden proteger el derecho a la salud de las personas, particularmente de los menores, a través de la prohibición de la publicidad de los productos derivados del tabaco. En este sentido, afirma que se debe tener en cuenta que de conformidad con los informes realizados por la Organización Mundial de la Salud sobre la materia, *"a fin de sobrevivir, la industria tabacalera necesita sustituir con nuevos consumidores jóvenes a quienes abandonan el tabaco o mueren."*

4.4. Intervención de la Comisión Nacional de Televisión

La Comisión Nacional de Televisión, por intermedio de apoderado judicial, solicita ante la Corte Constitucional declarar la exequibilidad de los artículos demandados. Para sustentar su solicitud, afirma que el fin buscado por las normas acusadas es legítimo y constitucionalmente importante, toda vez que dichas disposiciones buscan proteger el derecho a la salud de las personas y en especial de los niños, mediante el control de los medios de divulgación de los productos derivados del tabaco. Esto, en el entendido que el consumo de esos productos tiene efectos nocivos en el cuerpo humano. Al respecto, la Comisión Nacional de Televisión precisa: *"Es entonces el fin supremo de la protección de la salud de los colombianos y de la salud de los niños en especial y de ampararlos en los riesgos que los productos referidos tienen*

sobre la salud, el que justifica la prohibición como la que se plantea en cuanto a la publicidad de sus productos."

De otro lado, la Comisión advierte que en concordancia con el artículo 333 de la Constitución y la jurisprudencia constitucional (sentencias C-425 de 1992, C-176 de 1996, C-624 de 1998, C-616 de 2001, C-665 de 2007), el derecho a la libertad de empresa no tiene carácter absoluto. Sobre el servicio público de televisión, la Comisión señala que éste está sujeto a la prevalencia del interés público sobre el interés privado, razón por la cual *"los artículos objeto de la presente acción no pueden reñir con el concepto constitucional de* "libertad de empresa", *pues el interés privado que pueda tener el accionante no puede primar sobre el interés público."*

Además, en su criterio, la prohibición total de publicidad de productos de tabaco es adecuada y conduce a la satisfacción del fin constitucional señalado, pues dado que de manera particular las normas demandas prenden proteger a los menores del consumo de esos productos, en este caso no se puede argüir que los menores pueden decidir si compran o no los artículos publicitados. Es por ello que en este contexto, *"la libertad económica puede ser limitada con el fin de alcanzar objetivos de interés general, y más en el servicio público de televisión que es un servicio especial, cuyas características son tan particulares que le ubican en una posición privilegiada frente a los demás medios de comunicación social."*

4.5. Intervención de la Academia Colombiana de Jurisprudencia

En escrito dirigido a esta Corporación, la Academia Colombiana de Jurisprudencia intervino en el presente proceso para defender la exequibilidad de las normas demandadas. Reitera, en primer lugar, que la Ley 1335 de 2009 hace parte del desarrollo legal del Convenio Marco de la OMS para el control del tabaco, incorporado al ordenamiento jurídico interno mediante la Ley 1109 de 2006.

En segundo lugar, acoge los argumentos expuestos por el Ministerio de la Protección Social, en el sentido de afirmar que de acuerdo con lo indicado por la Corte Constitucional en la sentencia C-665 de 2007, las restricciones a la publicidad y promoción del tabaco son constitucionalmente admisibles. Además, afirma que, contrariamente a lo sostenido por el demandante, las disposiciones acusadas no vulneran el derecho a la libertad de empresa, comoquiera que *"se mantienen como posibles, legalmente, la siembra y cultivo del tabaco, su recolección y elaboración domésticos o su exportación en rama y/o en productos fabricados, su distribución dentro de ciertas condiciones a los mercados del tabaco y de los productos derivados del mismo."*

4.6. Intervención de la Universidad de Ibagué

El Decano de la Facultad de Derecho y Ciencias Políticas de la Universidad de Ibagué solicita ante la Corte declarar la exequibilidad de las disposiciones demandadas. Para el efecto, adujo que de conformidad con el artículo 333 de la Constitución, la actividad económica y la iniciativa privada se encuentran limitadas por el bien común. En su criterio, dicha limitación justifica la intervención del Estado en la economía *"máxime cuando está en juego la salud pública que se erige entonces en causa o motivo suficiente para limitar el ejercicio de un derecho individual como lo es la libertad de empresa."*

De otro lado, destaca que en consideración de su artículo 1°, la Ley 1335 de 2009 tiene por objeto *"contribuir a garantizar los derechos a la salud de los habitantes del territorio nacional, especialmente la de los menores de 18 años de edad y la población no fumadora".* En este sentido, a su juicio, las normas acusadas coinciden con el contenido del artículo 44 de la Constitución, pues pretenden amparar los derechos de los menores evitando el consumo de tabaco en ese sector de la población.

Con base en el argumento anterior, el interviniente concluye que *"cuando el legislador dictó la Ley 1335 de 2009 con el objeto de contribuir a garantizar los derechos de la salud del territorio nacional,* "especialmente la de los menores de 18 años de edad" *(niños, niñas y adolescentes) está cumpliendo a cabalidad el mandato constitucional de proteger la salud y la vida de los niños, y es apenas lógico que para cumplir este cometido deba acudirse a imponer reglas prohibitivas como las contenidas en los artículos 14, 15, 16 y 17 acusados en la citada Ley, porque la publicidad es un medio por el que se induce a los menores de edad a consumir el tabaco que científicamente es considerado como altamente adictivo y que puede llevar a deteriorar la salud del ser humano causando incluso la muerte."*

4.7. Intervención de la Universidad Nacional de Colombia

El Decano de la Facultad de Derecho, Ciencias Políticas y Sociales de la Universidad de Nacional de Colombia solicita ante la Corte declarar la exequibilidad de las disposiciones demandadas. Afirma, en primer lugar, que de conformidad con el artículo 13 del Convenio Marco de la OMS para el control del tabaco, incorporado al ordenamiento jurídico interno mediante la Ley 1109 de 2006, el Estado colombiano *(i)* reconoce que *"una prohibición total de la publicidad, la promoción y el patrocinio reduciría el consumo de productos de tabaco."; (ii) "procederá a una prohibición total de dicha forma de publicidad, promoción y patrocinio del tabaco."* En este sentido, reitera que mediante la sentencia C-665 de 2007, la Corte Constitucional declaró la exequibilidad de dicho Convenio, así como de su Ley aprobatoria.

Con base en el argumento expuesto, en segundo lugar, coincide con la Academia Colombiana de Jurisprudencia al indicar que la Ley 1335 de 2009 hace parte del desarrollo legal del Convenio Marco de la OMS para el control

del tabaco. Al respecto, señala: *"las disposiciones demandadas por el actor, a saber los artículos 14, 15, 16 y 17 de la Ley 1335, son precisamente parte de las medidas mediante las cuales el Estado colombiano pretende dar cumplimiento a lo establecido en el artículo 13 del Convenio Marco, por lo que se entiende que no sólo hay un reconocimiento ante la comunidad internacional por parte del Estado colombiano de pertinencia, necesidad y utilidad de tales medidas, sino que además hay un compromiso y una obligación legal y constitucional del Estado de dar aplicación a las mismas."*

En tercer lugar, explica que en concordancia con el artículo 333 Superior y la jurisprudencia constitucional (sentencias C-425 de 1992 y C-524 de 1995), el derecho a la libertad de empresa no es un derecho de carácter absoluto, toda vez que puede ser restringido cuando así lo exijan el interés social, el ambiente y los derechos fundamentales. Es por ello que el legislador se encuentra facultado para imponer restricciones a ese derecho, *"máxime cuando tales limitaciones son imperativas en atención a los compromisos adquiridos por Colombia ante la comunidad internacional y éstos han sido asumidos en el bloque de constitucionalidad dada la aprobación efectuada por el Congreso."*

Finalmente, el Decano de la Facultad de Derecho, Ciencias Políticas y Sociales de la Universidad de Nacional de Colombia presenta, a manera de anexo, un cuadro comparativo sobre las medidas adoptadas por varios países en relación con la incorporación del Convenio Marco de la OMS para el control del tabaco.

4.8. Intervención de la Universidad del Rosario

Edgar Iván León Robayo y Yira López Castro, profesores de la Facultad de Jurisprudencia de la Universidad del Rosario intervinieron en el presente proceso con el fin de defender la exequibilidad de las disposiciones demandadas. Señalan que en virtud del artículo 333 de la Constitución, la libertad de empresa tiene como límites el bien común, el interés social y el patrimonio cultural de la nación. Igualmente, si se trata de una persona jurídica, el derecho a la libertad de empresa se encuentra sujeto a las restricciones relacionadas con *"las formas legales que así lo permiten y seguir los requisitos para su constitución, las exigencias sobre capital mínimo, al igual que las obligaciones contables y tributarias, entre otros aspectos."*

En este orden de ideas, indican que en ejercicio del derecho a la libertad de empresa, *"el empresario puede hacer uso de estrategias publicitarias que promocionen la compra de bienes que produce."* Al respecto, advierten que de conformidad con la jurisprudencia constitucional, el examen de constitucionalidad de las normas que tienen contenido económico debe ser débil, comoquiera que la Constitución protege la libertad de empresa y la iniciativa privada. Así, explican que en virtud de la sentencia C-010 de 2000, *"el examen de las disposiciones referidas a la publicidad comercial se encuentra guiado por un escrutinio débil de constitucionalidad que implica*

que las disposiciones examinadas sólo resultan inconstitucionales en aquellos casos en los que: (i) se persigan fines incompatibles con la Constitución; (ii) se empleen medios abiertamente prohibidos por el texto constitucional o (iii) no exista una relación de adecuación entre las finalidades perseguidas y los medios empleados."

Con base en los argumentos expuestos, la Universidad del Rosario sostiene que, a diferencia de lo estimado por el demandante, las normas acusadas se ajustan a la Constitución, toda vez persiguen un fin constitucionalmente valioso, este es, la protección del derecho a la salud de todas las personas. Así mismo, dado que la publicidad hace parte del conjunto de las denominadas libertades económicas y no del ejercicio de la libertad de expresión, *"está claro que las autoridades no encuentran un límite constitucional para prohibir la publicidad."* Por último, en su criterio, debido a que los mensajes publicitarios tienen incidencia directa sobre las decisiones de los consumidores, *"se trata de una medida razonable el hecho de que el legislador haya decidido prohibir o restringir su publicidad como medio para desincentivar el consumo de tabaco en Colombia."*

4.9. Intervención de la Universidad Externado de Colombia

El profesor Dionisio Manuel de la Cruz Camargo, del Departamento de Derecho Económico de la Facultad de Derecho de la Universidad Externado de Colombia intervino en el presente proceso con el fin de solicitar a la Corte la declaratoria de exequibilidad de los artículos demandados. Reitera que en concordancia con el artículo 333 Superior y la jurisprudencia constitucional, el derecho a la libertad de empresa no es un derecho de carácter absoluto, pues puede ser restringido cuando así lo exijan el interés social, el ambiente y los derechos fundamentales. Empero, afirma que si bien el derecho a la libertad de empresa no tiene un carácter absoluto, el Estado está sujeto a importantes límites en relación con su facultad de intervención en la economía. Al respecto, explica que de conformidad con el criterio de la Corte Constitucional en esta materia, la intervención del Estado en la economía: *"(i) necesariamente debe llevarse a cabo por ministerio de la ley; (ii) no puede afectar el núcleo esencial de la libertad de empresa; (iii) debe obedecer a motivos adecuados y suficientes que justifiquen la limitación de la referida garantía; (iv) debe obedecer al principio de solidaridad; y (v) debe responder a criterios de razonabilidad y proporcionalidad."*

En aplicación de los argumentos indicados, a juicio de la Universidad las normas demandadas deben ser declaradas exequibles por esta Corporación, porque la publicidad no hace parte del núcleo esencial del derecho a la libertad de empresa, pues en el presente caso dicho núcleo consiste en el derecho a la fabricación y comercialización del tabaco. En tercer lugar, dichas disposiciones persiguen un fin constitucionalmente valioso, este es, la protección del derecho a la salud de todas las personas. En cuarto término, en este ámbito, el deber de solidaridad del Estado se expresa en el cumplimiento

de su obligación de proteger la salud y la vida de las personas. Finalmente, la medida de prohibición total de la publicidad de productos de tabaco está en concordancia con los principios de razonabilidad y proporcionalidad, porque *"impedirá que menores adquieran un hábito mortal a través del espejismo que se transmite a través de la publicidad y mediante la promoción que muchas veces consiste en la provisión gratuita de tabaco y sus derivados."*

4.10. Intervención de la Asociación de Operadores de Televisión por Suscripción y Satelital de Colombia

El Presidente de la Asociación de Operadores de Televisión por Suscripción y Satelital de Colombia intervino en el presente proceso con el fin de solicitar a la Corte la declaratoria de inexequibilidad de los artículos demandados. Señala que de acuerdo con el artículo 8 de la Ley 335 de 1996, *"Cada canal de un concesionario de televisión por suscripción, que transmita comerciales distintos de los de origen, deberá someterse a lo que reglamente la Comisión Nacional de Televisión al respecto."* A su juicio, la norma trascrita implica que existen dos tipos de comerciales que son transmitidos por las empresas concesionarias del servicio de televisión por suscripción: *(i)* aquellos que son editados en el país en el que se origina la señal; *(ii)* los que son introducidos por el concesionario en espacios que los programadores dejan libres, previa negociación con el concesionario de cada país, es decir, *"los que la ley califica como comerciales distintos de los de origen."*

En virtud de lo expuesto, el interviniente explica que los únicos comerciales que están sujetos a las regulaciones expedidas por la Comisión Nacional de Televisión son los incorporados por el concesionario, y no los que son editados en el país que origina la señal. Esto es así, *"si tenemos en cuenta que al concesionario no le está permitido modificar el contenido de la señal de origen, so pena de hacerse acreedor a las sanciones que la ley de derechos de autor establece para ese tipo de violaciones."*

En este sentido, señala que el artículo 14 de la Ley 1335 de 2009 debe ser declarado inexequible porque de conformidad con Ley 335 de 1996, jurídicamente no es viable imponer limitaciones a los operadores de televisión por suscripción en relación con la emisión de señales producidas en el exterior. Además, porque como se indicó, los operadores de televisión por suscripción no pueden modificar el contenido de la señal de origen. Por las razones expuestas, *"no puede la ley demandada establecer de tajo la responsabilidad para los concesionarios del servicio de TV por suscripción frente a los contenidos de publicidad que se emitan o transmitan por los programadores internacionales."*

En suma, la Asociación de Operadores de Televisión por Suscripción y Satelital de Colombia manifiesta: *"apoyamos los argumentos de la demanda de inconstitucionalidad de las normas contenidas en la Ley 1335 de 2009, relacionadas con la publicidad producida en el exterior, pues adicional a los*

argumentos que sustentan el desconocimiento a la libertad de empresa y la libre competencia, se desconoce por parte del legislador la imposibilidad que existe para los operadores de esta industria, ejercer una prohibición o impedimento a los programadores internacionales de trasmitir comerciales o publicidad de tabaco."

4.11. Intervención de la Liga Colombiana contra el Cáncer

La Presidenta Nacional de la Liga Colombiana contra el Cáncer solicita ante la Corte declarar la exequibilidad de las disposiciones demandadas. En primer lugar, advierte que en el presente proceso existe cosa juzgada constitucional, toda vez que mediante la sentencia C-665 de 2007, la Corte Constitucional se pronunció sobre la exequibilidad de las normas de la Ley 1109 de 2006 –aprobatoria del Convenio Marco de la OMS para el control del Tabaco- que prohíben la publicidad de productos de tabaco. Adicionalmente, destaca que en la sentencia C-010 de 2000, esta Corporación sostuvo que la protección del derecho a la salud constituye una justificación válida para limitar el ejercicio del derecho a la libertad de empresa, particularmente en el caso de la prevención del tabaquismo.

En segundo lugar, señala que mediante la incorporación al ordenamiento jurídico interno del Convenio Marco de la OMS para el control del Tabaco, el Estado colombiano reconoció *"los riesgos del tabaco sobre la salud y el carácter epidémico del tabaquismo sobre la población, más particularmente sobre los niños."* En ese sentido, afirma que en la Tercera reunión de la Conferencia de las Partes en el Convenio Marco de la OMS para el control del Tabaco, el Estado colombiano también reconoció que la prohibición de la publicidad de la industria tabacalera constituye una medida eficaz para prevenir el tabaquismo.

En tercer lugar, reitera los argumentos expuestos por la Comisión Nacional de Televisión, en el sentido de afirmar que el fin buscado por las normas acusadas es legítimo y constitucionalmente importante, toda vez que dichas normas buscan proteger el derecho a la salud de las personas y los derechos fundamentales de los niños.

Por último, coincide con el criterio según el cual, de conformidad con lo dispuesto en el artículo 333 de la Constitución y la jurisprudencia de esta Corporación, el derecho a la libertad de empresa no tiene un carácter absoluto, pues está sujeto a la prevalencia del interés general e implica obligaciones relacionadas con la protección del bienestar de la población.

4.12. Intervención del Centro de Estudios de Derecho, Justicia y Sociedad – Dejusticia

El Centro de Estudios de Derecho, Justicia y Sociedad – Dejusticia intervino en el presente proceso para defender la constitucionalidad de los artículos 14 a

17 de la Ley 1335 de 2009. Para sustentar su petición, señala que las normas acusadas constituyen restricciones razonables a la libertad de empresa, en tanto pretenden que el Estado colombiano pueda cumplir sus deberes constitucionales de amparar a las personas de los riesgos derivados del tabaco.

Con base en ese argumento, Dejusticia considera que el punto de partida para analizar la exequibilidad de los artículos acusados implica *"el reconocimiento de que el tabaco ocasiona graves problemas a la salud de las personas y a los sistemas de salud, al menos por cinco factores que interactúan entre sí. Primero, el consumo de tabaco es adictivo, (...). Segundo, el tabaco ocasiona muy graves daños a la salud de los consumidores, (...). Tercero, el humo de tabaco afecta no sólo al usuario sino también a terceros, los llamados "fumadores pasivos", pues quienes se encuentran en un lugar cercano a quien consume tabaco terminan afectados por el humo del fumador. (...). En cuarto lugar, los servicios de salud deben dedicar cuantiosos recursos a atender las enfermedades asociadas al consumo de tabaco; a su vez, dichas enfermedades implican pérdidas de productividad considerables y costos generales importantes a las economías nacionales. Finalmente, sobre todo para las personas de escasos recursos, en los países pobres, la adicción al tabaco consume una parte no despreciable de los ingresos familiares, lo cual reduce el gasto en vivienda, educación o salud."*

Ahora bien, dados los graves efectos del tabaco sobre la salud, a su juicio, el Estado colombiano está obligado a regular de manera estricta la producción, comercialización y consumo del tabaco. En efecto, de conformidad con los instrumentos internacionales ratificados por el Estado colombiano en la materia y la jurisprudencia constitucional, el derecho a la salud es un derecho fundamental que implica para el Estado el deber de garantizar el acceso de todos los habitantes al sistema de salud, así como *"la prevención y el tratamiento de las enfermedades endémicas, profesionales y de otra índole y la educación de la población sobre la prevención y tratamiento de los problemas de la salud."* Así, en su criterio, el Estado colombiano tiene la obligación de prevenir las enfermedades asociadas con el consumo del tabaco, así como los *"factores subyacentes"* que las causan.

Indica que, de hecho, el argumento anterior fue acogido por la Corte en la sentencia C-665 de 2007, sentencia mediante la cual la Corporación analizó la exequibilidad de la Ley 1109 de 2006 "*Por medio de la cual se aprueba el „Convenio Marco de la OMS para el control del tabaco"*. En este sentido, reitera que la Ley 1335 de 2009 hace parte del desarrollo legal del Convenio Marco. Entonces, resultan constitucionalmente admisibles las limitaciones impuestas por la Ley 1335 de 2009 en relación con la publicidad de los productos derivados del tabaco, pues de ello depende *"que se pongan en marcha medidas estrictas para implementar el convenio Marco y para reducir los daños sanitarios asociados al consumo de tabaco y a la exposición del humo de cigarrillo."*

En consecuencia, el derecho constitucional a la libertad de empresa puede ser restringido en aras de salvaguardar los derechos fundamentales, en este caso, los derechos fundamentales a la salud y a la vida. Al respecto, recuerda que de conformidad con la jurisprudencia de esta Corte (sentencias C-425 de 1992 y C-176 de 1996), las actividades económicas que traen consigo un riesgo social deben ser estrictamente reguladas, comoquiera que en virtud del texto constitucional el interés general tiene prevalencia sobre el interés particular. De este modo, *"se desprende también la necesidad de control de estas iniciativas particulares, pues, por un lado, se puede poner en peligro la dignidad humana; y por el otro, el artículo 365 de la Constitución le ordenó a las autoridades públicas mantener la vigilancia sobre este tipo de actividades."*

En este punto, afirma que de acuerdo con la sentencia C-624 de 1998, los órganos de representación política deben tener en cuenta los parámetros definidos por la jurisprudencia de la Corte, con el propósito de garantizar la efectividad de los derechos fundamentales sobre las libertades económicas. La verificación de las limitaciones impuestas por el Legislador o el Ejecutivo en este ámbito, implica evaluar "*(i) si la limitación, - o prohibición-, persiguen una finalidad que no se encuentre prohibida por el ordenamiento constitucional; (ii) si la restricción propuesta es potencialmente adecuada para cumplir el fin propuesto, y (iii) si hay proporcionalidad en esa relación, esto es, que la restricción no sea manifiestamente innecesaria o claramente desproporcionada. Adicionalmente, (iv) debe la Corte examinar si el núcleo esencial del derecho fue desconocido con la restricción legal o su operatividad se mantiene incólume."*

Por tanto, el derecho a la libertad de empresa no es absoluto, pues está sujeto a restricciones y cargas de orden constitucional y legal. Con relación al derecho de propiedad, en la sentencia C-870 de 2003, la Corte precisó que *"Sobre él recaen una serie de cargas que son necesarias para que el dictado de la solidaridad sea real y efectivo. Una de esas cargas consiste en que el ejercicio del derecho de propiedad debe servir para mantener el medio ambiente sano y libre de elementos que puedan perjudicar la salud de los ciudadanos."*

Ahora bien, respecto de las limitaciones impuestas por el Legislador a la industria del tabaco, en la sentencia C-524 de 1995 la Corte ha afirmado que la protección del derecho a la salud constituye una justificación válida para restringir la publicidad de artículos que sean nocivos para el cuerpo humano y el medio ambiente. Igualmente, en la sentencia C-665 de 2007, *"Al revisar las medidas que propone el Convenio para evitar el consumo de tabaco, la Corte encontró que todas se ajustaban a la Constitución, en la medida en que buscan proteger a las personas de los efectos nocivos del tabaco."*

En este orden de ideas, a juicio del interviniente, el contenido esencial del derecho a la libertad de empresa se concreta en el derecho a escoger y realizar

determinadas actividades o fabricar determinados productos, pero no incluye la promoción o publicidad de esas actividades o productos, especialmente cuando éstos representan importantes riesgos sociales. Frente a estos riesgos sociales, como el derivado del consumo de tabaco, estima que el Estado debe adoptar medidas para desincentivar su adquisición o consumo, tal y como lo prevé el Convenio Marco de la OMS para el control del tabaco. Al respecto, explica: *"En esos casos, que son muy comunes frente a vicios, (...) es entonces perfectamente legítimo que el Estado recurra a una forma que algunos autores han denominado „mercado pasivo", esto es, un mercado que el Estado y la sociedad simplemente toleran, pero que desestimulan, por considerar que se trata de vicios o actividades no deseables; entonces el Estado no sólo limita las posibilidades de desarrollo a nivel espacial y temporal de esas actividades (...) sino que prohíbe cualquier forma de publicidad de la misma y le impone altos impuestos, todo con el fin de desestimular el consumo de esos productos o la realización de esas actividades."*

Sobre este argumento, el Centro de Estudios de Derecho, Justicia y Sociedad – Dejusticia indica que en sociedades pluralistas y democráticas como la colombiana, la prohibición absoluta del consumo de tabaco en personas adultas resulta problemática. Sin embargo, la prohibición de publicidad de productos de tabaco se ajusta a la Carta, en tanto tolera y a la vez disuade su consumo. En este sentido, recuerda que en la sentencia C-665 de 2007, la Corte declaró la exequibilidad del artículo 13 del Convenio Marco que establece que los Estados deben buscar *"una prohibición total de toda forma de publicidad, promoción y patrocinio del tabaco."*

4.13. Intervención de Federación Nacional de Comerciantes – Fenalco

La Federación Nacional de Comerciante – Fenalco intervino en el presente proceso para solicitar ante la Corte declarar la inexequibilidad de las disposiciones demandadas, *"o se module la exequibilidad del artículo 16 de la Ley 1335 de 2009."* En este sentido, Fenalco sostiene: *"el artículo 16 de la Ley 1335 de 2009 establece la prohibición de* "toda forma de promoción de productos de tabaco y sus derivados." *Debe anotarse que no existe, ni dentro de la propia Ley 1335 de 2009 ni en otro ordenamiento jurídico, una definición del término "promoción" que pueda utilizarse para entender qué es exactamente lo que el artículo 16 de la Ley 1335 de 2009."* En su criterio, la falta de claridad sobre el término "promoción"*, "conlleva el riesgo de que se interprete que quedan prohibidas actividades que son lícitas y que están protegidas por la Constitución Política."* Así, a su juicio, *"es importante que la exequibilidad del artículo 16 quede condicionada a la existencia de una definición razonable del término* "promoción" *que no viole los derechos contenidos en la Carta Magna."*

Al respecto, señala que así como el derecho a la libertad de empresa no es absoluto, el derecho a la salud tampoco tiene esa condición. Entonces, en el

presente caso corresponde a la Corte ponderar la efectividad de los derechos en comento, sin menoscabar el núcleo esencial de ninguno de ellos. En consecuencia, *"si no se adopta una definición razonable y proporcional para interpretar el artículo 16 de la Ley 1335 de 2009, éste podría resultar violatorio de la Constitución al volver imposible la realización del núcleo de los derechos establecidos en los artículos 20, 61, 333 y 334 de la propia Constitución."*

De otro lado, la Federación afirma que el artículo 16 de la Ley 1335 de 2009 vulnera el derecho a la igualdad de los empresarios de la industria tabacalera, pues los comerciantes y productores de mercancías que también representan un riesgo para la salud no enfrentan restricciones similares a las establecidas en dicho artículo relacionadas con la publicidad de sus productos.

Así, el interviniente concluye: *"sería posible delimitar el contenido del término promoción por otras vías, haciendo referencia a las actividades que técnicamente se entienden tales, como el ofrecimiento de productos de manera gratuita o en condiciones más favorables por períodos limitados de tiempo, o bien el ofrecimiento de producto adicional sin costo, las rifas y concursos y sus consecuentes premios. Esta definición, en armonía con los artículos 14, 15 y 17, también podría permitir alcanzar los objetivos de salud pública sin vulnerar derechos fundamentales."*

4.14. Intervención de la Compañía Colombiana de Tabaco – Coltabaco S.A.

Por intermedio de apoderado judicial, la Compañía Colombiana de Tabaco – Coltabaco S.A. solicita ante la Corte declarar la *"inexequibilidad condicionada del artículo 16 de la Ley 1335 de 2009."* Para fundamentar su solicitud, Coltabaco reitera los argumentos expuestos por la Federación Nacional de Comerciante – Fenalco, en el sentido de sostener que el término "promoción" contenido en el artículo 16 de la Ley 1335 de 2009 resulta ambiguo. En su criterio, la falta de claridad sobre el término "promoción" podría lesionar actividades lícitas amparadas por la Constitución y ley.

Coltabaco explica que aunque la Ley 1335 de 2009 no establece una definición de la expresión "promoción", *"existen varias fuentes en el Derecho Colombiano que indican cuál debe ser la definición apropiada del término en este contexto. Cada una de esas fuentes sugiere que el término "promoción" debe ser usado de manera limitativa y que debe alcanzar sólo un número limitado de técnicas que, en sentido estricto, no constituyen publicidad (tales como la distribución gratuita, la distribución de cupones y productos de manera gratuita)."* A su juicio, tales "técnicas" no constituyen publicidad, pues están dirigidas al público en general *"y no sólo a consumidores adultos cuya condición de fumadores haya sido previamente verificada."*

Para una adecuada definición del término "promoción", en su criterio, se debe tener en cuenta que el proyecto de ley que concluyó en la Ley 1335 de 2009 establecía en su artículo 14 -ahora artículo 16 de dicha Ley-, medidas que limitaban la publicidad de productos derivados del tabaco relacionadas con la distribución gratuita de esos productos, pero no la prohibición total de publicidad prevista en la norma demandada. Así, *"La redacción original del artículo 16, citada anteriormente, demuestra que el Legislativo tenía la intención de cubrir en dicha prohibición sólo ciertos tipos, específicos y limitados de* "promociones", *es decir, aquellos que involucraban la oferta y distribución de muestras gratuitas de productos de tabaco, y no otras formas de comunicación comercial."*

Por último, reitera el argumento según el cual, el artículo 16 de la Ley 1335 de 2009 vulnera el derecho a la igualdad de los empresarios de la industria tabacalera, pues los comerciantes y productores de mercancías que también representan un riesgo para la salud no enfrentan restricciones similares a las establecidas en dicho artículo relacionadas con la publicidad de sus productos.

4.15. Intervención del ciudadano Juan Pablo Cardona González

El ciudadano Juan Pablo Cardona González intervino en el presente proceso con el fin de solicitar a la Corte la declaratoria de inexequibilidad de los artículos demandados. Para el efecto, recoge lo señalado por el demandante, en el sentido de afirmar que las normas acusadas violan los artículos 333 y 334 de la Constitución, comoquiera que establecen una prohibición total de la publicidad de productos de tabaco, a pesar de que la fabricación y comercialización de dichos productos constituye una actividad lícita. A su juicio, *"Los empresarios tienen derecho de ofrecer y promocionar sus bienes en el mercado, ello forma parte del núcleo esencial del derecho a la libre empresa."*

Además, señala que la prohibición total en cuestión desborda los principios de proporcionalidad y razonabilidad, pues se coarta de manera absoluta el ejercicio del derecho a la libertad de empresa que incluye el derecho de los empresarios a publicitar sus productos. Al respecto, sostiene: *"So pretexto de amparar, proteger y garantizar los derechos a la salud y conexos no se pueden vulnerar y desconocer abiertamente otros derechos contenidos en la Constitución económica, ambos deben ponderarse con juicio, razonabilidad y proporcionalidad."* Así, *"el legislador en estas materias de promoción, publicidad y patrocinio de manera desproporcionada e irracional pasó del rango razonable de la regulación del mercado, al de la prohibición absoluta, a través de todo medio masivo de comunicación y a través de la prohibición total de promoción."*

V. DEFINITION PROVIDED BY THE PROSECUTOR GENERAL OF

THE NATION

By brief filed before this Court within the due procedural term, the Prosecutor General of the Nation (E) presented the definition set out in Articles 242-2 and 278-5 of the Constitution, requesting that the Court find for the enforceability of the challenged norms.

To support its request, the Public Ministry reiterated, first of all, that Law 1335 of 2009 forms part of the legal development of the WHO Framework Convention on Tobacco Control, incorporated into the internal legal framework by Law 1109 of 2006. The Ministry stresses that the main purpose of the Convention is to *"protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke."*

Along these lines, in second place, the Prosecutor General claims that in Judgment C-665 of 2007, the Court declared the enforceability of Article 13 of the Framework Convention establishing that States must seek *"a comprehensive ban on tobacco advertising, promotion and sponsorship."* The Public Ministry adds that the Court found that the restrictions on tobacco advertising and promotion are constitutionally admissible.

In third place, the Prosecutor states that *"the studies conducted by the World Health Organization show that tobacco addiction reduces the life expectancy of users. Tobacco addiction is a public health problem, leading to a high rate of disabilities and premature deaths, caused by chronic, degenerative and irreversible diseases. In the case of Colombia specifically, in 2000, the available reports show that there were* '17,473 deaths attributable to tobacco consumption. Our country has high consumption rates. Experimental use among children and youths is alarming. In children from 12 to 17 years of age, it increased from 12.7% in 1993 to 18.6% in 1998.[2]"

And fourth, the Prosecutor adds that, in accordance with Judgment C-665 of 2007, for several years, the public authorities have developed a public policy focusing *"on the progressive limiting of advertising for the sale and consumption of cigarettes and tobacco, in the protection of the environment and the rights of non-smoking third parties that could be affected by second-hand smoke and in the prevention of early addiction."*

In the light of the foregoing, the Prosecutor states that: *"It is necessary to clarify, in relation to the challenged provisions, two issues: i) that their unconstitutionality cannot be analyzed in isolation from the remaining provisions forming part of the* corpus juris *of the fight against tobacco in the country, which derive from international commitments acquired by the Colombian State, under the framework of the WHO Convention on Tobacco*

[2] Ministry of Health. ENFRECII. Tobacco Addiction, Volume II, 1998.

Control; and (ii) that the people most vulnerable in this context are minors, nicotine addicts and non smokers."

Along these lines, the Office of the Prosecutor General of the Nation concludes that, contrary to what is held by the plaintiff, the challenged norms are not incompatible with the exercise of the right to the freedom of enterprise, inasmuch as in this regard, as it involves the protection of the fundamental rights of the people to life and health, the State has broad authorities of regulation which may include banning the advertising of products derived from tobacco.

VI. CONSIDERATIONS AND GROUNDS OF THE CONSTITUTIONAL COURT

Jurisdiction of the Court.

The Constitutional Court has competent jurisdiction to hear the referenced matter in accordance with Article 241-4 C.P., as it is an action brought against a law of the Republic.

Legal problem and methodology of the decision

1. Mr. Cáceres Corrales considers that the challenged norms, which impose bans on the advertising and promotion of tobacco products, as well as the sponsoring of sporting or cultural events by the entrepreneurs producing, importing or commercializing them, are in disregard of the freedoms of economy and enterprise. The plaintiff considers that the authority to promote the consumption of tobacco, a product that may be legally commercialized, forms part of the essential core of such authorities, which would imply that prohibiting its advertising would have a disproportionate and unreasonable impact on the production and sale of tobacco, which activities are recognized by the legal framework and are legitimate expressions of the exercise of free private initiative. The plaintiff adds that the advertising of such products is necessary not only to guarantee the exercise of the freedom of enterprise, but also to comply with constitutionally material [*duties*], such as informing consumers of their effects.

A significant group of participants, along with the Prosecutor's Office, oppose the claim by the plaintiff and request that the Court declare the enforceability of the challenged norms, inasmuch as the exercise of the freedom of enterprise is not absolute, but is subject to the restrictions derived from the general direction of the economy by the State. In the case posed, it is constitutionally admissible that intense restrictions be imposed, and even the banning of the advertising and promotion of tobacco, as the consumption of this substance poses a serious public health problem, as has been recognized by international instruments subscribed by Colombia. Facing this situation, it is not only

acceptable but compulsory to impose restrictions directed to discouraging tobacco consumption, including those established by the challenged norms, all encompassed by the State's will to drive production, imports and commercialization to the condition of a *passive market*, i.e., although judicially tolerated, it is not subject to state promotion.

Another minority group of participants back the request of unenforceability, as they consider that in addition to the disregard for the freedom of enterprise, the challenged norms include vague formulas, such as the concept of "promotion", which would imply that any activity destined for making tobacco products available to potential clients would also be encompassed by the legally-prohibited actions, which would imply that in practice the ban would not only be on advertising, but also on the commercialization of the product. The group adds that such prohibitions against advertising, when regarding audiovisual mediums, would clash with legal mandates prohibiting a pay TV operator from altering the signal offered by international mediums, including the advertising of tobacco products.

2. In accordance with the foregoing, the Court must resolve the following legal problem: does the legislative measure banning the advertising and promotion of tobacco disregard the freedom of enterprise and free private initiative? To accomplish such objective, the Chamber shall adopt the following methodology: First, it shall compile the rules established by constitutional case law regarding the content and scope of the referred freedoms, stressing for such purpose the constitutionally-admissible limits, derived from the general direction of the economy by the State. This section shall also be devoted to defining the role of advertising, in its dual dimension of an element belonging to the freedom of enterprise and the rights of the consumer, and as an expression, in any case restricted, of the freedom of speech. There shall later be a presentation regarding the case law position in terms of the implementation of measures to discourage the consumption of tobacco products, which section shall set out the decisions that the Court has adopted in this regard, the content of the international commitments on this same topic and some examples of how the issue has been addressed in comparative law. Finally, based on the rules derived from the foregoing analyses, it shall resolve upon the specific case, assuming for such purpose the methodology of a proportionality trial of the legislative measures subject to this study.

Constitutionally-admissible limitations on the freedom of enterprise and free private initiative

3. A topic that is sufficiently discussed in constitutional case law is that the Political Charter does not offer a neutral perspective in the face of the acceptable economic model, but rather takes a stand for a system of a *social market economy*, which has among its defining characteristics *(i)* the constitutional recognition of the freedom of enterprise and free private

initiative, as these are indispensable guaranties for achieving economic development and general prosperity. To this end, a complex general clause is imposed, preventing the requirement of prior permits or formalities, and the state obligation to promote free competition and economic freedom (Art. 333 C.P.); and *(ii)* the ascribing to the State of the function of general direction of the economy, a task expressed on several levels, such as verifying that free enterprise is exercised within the common good and the power to impose limitations on such freedom when required by social interest, the environment and the cultural patrimony of the Nation (Art. 333 C.P.). On this subject, recent decisions by this Court have provided that *"the Colombian Constitutional State is incompatible with both the classic economic liberalism model, proscribing State intervention, and with centralized planning economic models where the State is the only relevant agent on the market and the production of goods and services is subject to a public monopoly. On the contrary, the Constitution adopts a social market economy model, recognizing the enterprise and private initiative in general as the motor of the economy, but reasonably and proportionately recognizing the freedom of enterprise and free economic competition, for the sole purpose of accomplishing constitutionally-valuable objectives, destined for the protection of the general interest."*[3]

The general direction of the economy, as established, is expressed in the broadest form based on two defined aspects. First, the State is charged with exercising the measures directed to ensuring that enterprises, considering their status as expressions of private property, meet the obligations derived from their social ecological function (Art. 58 C.P.). Secondly, such general direction involves a group of state authorities referring to the intervention, by legal mandate, to regulate the exploitation of natural resources, the use of the land, the production, distribution, and the use and consumption of public and private goods and services, in order to achieve improvement in the living standards of the people, an equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment (Art. 334 C.P.) The constitutional norm further provides that state intervention in the economy must be directed to ensuring the full use of human resources, the effective access to basic goods and services by the people of lesser income, and the promotion of productivity and competitiveness and the harmonious development of the regions.

4. These constitutional principles lead to the conclusion that the conceptual definition of economic freedoms is part of the balance between the recognition of the guarantees necessary for economic trade and the correlative state obligation to participate at market, in order to *(i)* guarantee the supremacy of the common good, represented in the objectives identified by the constitutional framers as intrinsic to such general interest; and *(ii)* correct, in the framework of the protection of equal opportunities, the imperfections of

[3] See Constitutional Court, judgment C-228/10 (Justice Rapporteur: Luis Ernesto Vargas Silva). Legal grounds 6.

such market representing barriers to the access by the goods and services of the people of lower income or in conditions of clear weakness.

Likewise, the aforesaid provisions imply that freedom of enterprise and free economic initiative must be understood as constitutional guarantees which, in themselves, have no connotation as fundamental laws[4] and, in this sense, incorporate in their definition the legitimate restrictions and interventions imposed by the Political Charter, which is why, as is the case with other rights and guarantees, they are not absolute. In any case, they are freedoms rooted in the Constitution that, due to their ties to the social and ecological function of property and the general direction of the economy by the State, are of a self-restricted nature.

Along these lines, case law defines freedom of enterprise as *"that* (…) *recognized to the people to utilize or earmark goods of any sort (mainly capital goods) to perform economic activities for the production or trade in goods and services in accordance with the organizational guidelines or models typical of the contemporary economic world, in hopes of obtaining a benefit or profit. The term enterprise in this context would thus seem to cover two aspects, the initial aspect – the initiative or enterprise as a manifestation of the capacity to enterprise and undertake – and the instrumental aspect – through a typical economic organization -, with the abstraction of the legal form (individual or corporate) and the legal equity and labor statute".*[5] *The Court has also stated that such freedom "is based on the freedom of organization of production factors, which includes contractual freedom, which when exercised by the free economic subject, attends to the purpose that there be a balance of the interests of the various agents on the market".*[6]"[7] This definition shares many of its basic elements with a broader concept, that of economic freedoms, which encompasses the freedom of enterprise and free private initiative. The Court considers that such freedoms are *"an expression of values of reasonability and efficiency in economic management for the production of goods and services and allow benefiting from the creative capacity of the individuals and from private initiative. To that extent, it is a collective value that has been subject to special constitutional protection.* || *Economic freedom also allows channeling private resources, through economic incentives, towards the promotion of specific collective interests and providing public services. Such possibility includes an option, adopted by the*

[4] This condition is not incompatible with the possibility that the right be protected through an action for protection when, in the specific case, it has been proven that the economic freedom and freedom of enterprise are connected with other rights that are themselves fundamental. As stated by case law, *"Although economic freedoms are not in themselves fundamental rights and they may further be broadly limited by the Lawmaker, it is not possible to restrict them arbitrarily, nor it is feasible to prevent their exercise, in equal conditions, by all persons that are in similar factual conditions. It is feasible to advocate the ius fundamentality of these rights when connected with a fundamental right."*. See Constitutional Court, judgment SU-157/99 (Justice Rapporteur: Alejandro Martínez Caballero).

[5] [Quote from text] Judgment C-524 of 1995 Justice Rapporteur: Carlos Gaviria Díaz.

[6] [Quote from text] Judgment C-616 de 2001 Justice Rapporteur: Rodrigo Escobar Gil.

constitutional framer, to make private interests, acting as the motor of economic activity, compatible with the satisfaction of collective needs."[8]

5. As concerns this Judgment, we should focus on the modalities of intervention by the State in the exercise of the economic freedoms and the requirements that such actions must meet to be compatible with the Constitution. In terms of the former, case law has recognized that State intervention in the economy may materialize through several levels and modalities, subject to the condition that such public actions be preceded by a legal norm regulating the form and degree of intervention. The Court considers that "*State intervention in the economy takes place through various public powers and is exercised through various instruments. A key role is clearly invested in the Congress of the Republic, through the issue of laws, whether specifically regarding economic intervention laws (Articles 150.21 and 334), and other laws set out in Article 150 of the Constitution (for instance, the framework laws of subsection 19, or the laws applying to domiciliary public services, set out in subsection 23 of that same provision) or, in general, through the exercise of its powers of configuration in economic matters. But the 1991 Constitution also conferred upon the executive branch of the public power certain important powers in this regard, not only through the exercise of the regulatory power, but also assigning specific duties of inspection, oversight and control with respect to certain activities or certain economic agents. In conclusion, the 1991 Constitution in both its dogmatic and organic parts, established a State with broad powers of intervention in the economy, which are materialized through the joint action of the public powers."*[9]

As regards the constitutional validity of the State activities of economic intervention, the same case law has identified both the requirements that must be met to credit such validity, and the degree of intensity and methodology of judicial scrutiny of the intervention measures. In the light of the former, there is a consolidated precedent, in the sense that the measure of state intervention in the economy would solely be admissible when the following requirements are met: *"i) it must necessarily be conducted by operation of law; ii) it cannot affect the essential core of the freedom of enterprise; iii) it must respond to adequate and sufficient reasons, justifying the limitation of the guarantee in question;*[10] *iv) it must conform to the principle of solidarity*[11]*; and v) it must conform to criteria of reasonability and proportionality*[12]*."*[13]

Requirements two and five of the foregoing list refer to the need for there to be a criteria of reasonability and proportionality between the exercise of the

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[7] See Constitutional Court, judgment C-070/04 (Justice Rapporteur: Clara Inés Vargas Hernández.).
[8] See Constitutional Court, judgment C-616/01 (Justice Rapporteur: Rodrigo Escobar Gil).
[9] See Constitutional Court, judgment C-1041/07, (Justice Rapporteur: Humberto Antonio Sierra Porto).
[10] Constitutional Court. Judgment T-291 of 1994. Justice Rapporteur: Eduardo Cifuentes.
[11] Constitutional Court. Judgment T-240 of 1993. Justice Rapporteur: Eduardo Cifuentes Muñoz.
[12] Constitutional Court Judgment C-398 of 1995. Justice Rapporteur: José Gregorio Hernández Galindo.
[13] There are several decision by the Court that have reiterated such requirements. The transcription is included for C-615/02 (Justice Rapporteur: Marco Gerardo Monroy Cabra).

economic freedoms and the guarantee of the constitutional principles and values defended by the intervention measure. As stated by this decision, economic freedoms are guarantees that are restricted by the powers of market direction of the State. Nonetheless, such self-restricted nature cannot be construed to be a mechanism permitting the extension of the measure of intervention beyond the essential core of the freedom of enterprise and free private initiative such as to render them nugatory and support an economic model of centralized planning. Rather, there is an interest that is constitutionally recognized and protected, in the sense that it is necessary to preserve the minimum guarantees allowing for commercial trade and, more broadly, the participation of market agents, under a framework of conditions such that allows economic development and free competition. Along these lines, the control of the constitutionality of the norm establishing a modality of intervention of the State in the economy must be implemented based on defined parameters, relating to the evaluation in terms of *"(i) whether the limitation or prohibition seek a purpose that is not prohibited under the Constitution; (ii) if the restriction imposed is potentially adequate for the accomplishment of the purpose sought, and (iii) whether there is any proportionality in that relation, i.e., that the restriction not be patently unnecessary or clearly disproportionate. Furthermore (iv) the Court must examine whether the essential core of the right was disavowed with the legal restriction or it remains completely operational"*[14].

Such scrutiny, as seen, is weak in nature, as it is limited to requiring that the purpose sought by the limitation or prohibition be a legitimate constitutional objective and the measure not be patently unnecessary or clearly disproportionate, such as to affect the essential core of economic freedoms. This is explained, as mentioned in this section, by the fact that such freedoms in themselves imply, due to their self-restricted nature, the possibility that the State, considering the general direction of the economy it runs, establish limitations in order to satisfy the common interest prevailing in the market of goods and services.

The preference of constitutional case law for a minor or weak judgment of proportionality, when regarding norms contemplating economic intervention measures may be seen, among others, in Judgment C-810/01 (Rapporteur Justice: Eduardo Montealegre Lynett). In such case, the Court analyzed the constitutionality of Article 21 (partial) of Law 14 of 1991, inasmuch as it established that a certain percentage of the advertising budget of decentralized organizations must be used for ads on public television, which requirement was challenged due to the alleged discrimination it implied with respect to private channels and those under concession. Regarding this matter, the decision provided that *"as the central charge brought in this case is that of equality, it is necessary to consider the justification that may back such*

[14] See Constitutional Court, judgments C-624/98 (Justice Rapporteur: Alejandro Martínez Caballero), C-332/00 (Justice Rapporteur: Fabio Morón Díaz) and C-392/07 (Justice Rapporteur: Humberto Antonio Sierra Porto).

provisions, as this is required by the test to be applied. In fact, in a recent finding (Judgment C-673/01), this Court explained that the intensity of such test of equality shall depend on the matter subject to analysis in each case; in this sense, as a general rule, in economic, tax and international policy matters, a minor test is to be applied, limited to "establishing the legitimacy of the purpose and of the measure, with the latter also being required to be appropriate for achieving the purpose sought"."

Similar considerations were made by the Chamber in Judgment C-031/03 (Rapporteur Justice: Manuel José Cepeda Espinosa), when, in studying the constitutionality of certain precepts of Law 643/01, regarding the operation of games of luck and chance, it recalled that *"the Court has applied the minor test "in certain cases exclusively referring to 1) economic matters, 2) tax matters, or 3) matters of international policies, without this implying that the content of a norm would inevitably lead to a minor test. For instance, in economic matters, a norm discriminating on the basis of race or political opinion shall clearly be suspect and, most likely, a minor test would not be appropriate. The same could be said, for instance, of a norm contained in a treaty affecting fundamental rights. […]. Additionally, the case law of the Court has also applied to three other hypotheses a minor test of the reasonability of legislative measures: 4) when involving a specific power defined by the Constitution, invested in a constitutional body; 5) when regarding the analysis of an abrogated pre-constitutional rule that is still effective at present; and 6) when the regulatory context of the challenged Article does not pose a prima facie threat to the right in question"[15]."* (Emphasis added).[16]

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[15] Judgment C-673 of 2001; Justice Rapporteur: Manuel José Cepeda Espinosa.

[16] The difference between the various levels of intensity of the proportionality test and the application of the minor level for economic intervention measures has been reiterated in the most recent case law of the Court. In this sense, for instance, in finding C-354/09 (Justice Rapporteur: Gabriel Eduardo Mendoza Martelo), under the framework of the study of the constitutionality of one of the rules on insurance agencies set out in the Organic Statute of the Financial System, the Chamber states the following:

"As expressed by the Court in Judgment C-720 of 2007, pursuant to the principle of proportionality, for a restriction of fundamental rights to be considered constitutionally acceptable, it must not breach any specific constitutional guarantee and must pass the proportionality test or trial. Such trial shall be passed when: 1) such restriction pursues a constitutionally-legitimate goal; 2) it represents a suitable means of accomplishing such goal; 3) it is necessary, in the absence of other, less damaging means, and with similar effectiveness, to accomplish the proposed goal; 4) there is a proportionality between the constitutional costs and benefits obtained with the challenged measure.

The Court has stated that the control of constitutionality, in general, and the trial of proportionality in particular, adopt various modalities – minor, intermediate or strict – according to its intensity level.

According to case law, the general rule in the control of constitutionality is the application of a minor test of proportionality in the test of a legislative measure, a criterion based on the democratic principle and the presumption of constitutionality existing with respect to legislative decisions.

The minor test is directed to establishing the legitimacy of the purpose and of the measure, and the latter must also be suitable to achieve the set goal. Consequently, when the test is minor, the Court merely determines whether the goal sought and the means used are not constitutionally banned on the one hand, and, on the other, establishes whether the means chosen is appropriate, i.e., suitable to achieve the purpose sought.

Not as an exhaustive list, and without the content of a provision being the sole criterion relevant to define the intensity of the constitutionality trial, it may be said that the Court has applied a minor proportionality test in cases referring exclusively to 1) economic, 2) tax, or, 3) international policy matters, or, 4) when involving a specific power defined by the Constitution, invested in a constitutional body, 5) when involving the analysis of abrogated pre-constitutional regulation still effective at present; or, 6) when the regulatory context of the challenged article does not pose a prima facie threat to the right in question.

6. In conclusion, freedom of enterprise and free economic initiative are constitutional guarantees that are necessary for the coexistence of the various agents on the market in conditions of equality and free competition. The definition of the content and scope of these economic freedoms must necessarily be analyzed based on the recognition of the state powers of general direction of the economy, the objective of which is the satisfaction of higher principles and values relating to the supremacy of the general interest. This recognition implies, among other aspects, the *prima facie* admissibility of legislative and administrative measures regulating and limiting economic freedoms, provided they conform to criteria of reasonability and proportionality, which test would imply minor scrutiny, in the light of the constitutional formula recognizing the need for State intervention at the market to ensure the purposes set out in the Political Charter.

Role of commercial advertising in the exercise of economic freedoms

7. One aspect expressing economic freedoms is the possibility of advertising products and services to encourage their consumption. Along these lines, constitutional case law has recognized that both advertising and publicity are expressions of such freedoms and that, accordingly, they achieve constitutional recognition as aspects integrating such rights. In this sense, the Court has defined[17] publicity as an activity destined for making the public familiar with a good or service, for the purpose of attracting adepts, buyers, spectators or users, or creating sympathizers, using any means of dissemination. It has in turn defined advertising as the promotion of news or ads of a commercial or professional nature for the purpose explained above.

The key importance of advertising in contemporary society and its key implications in various facets of constitutional law are matters of special importance for this decision. In current times, where commercial trade and the permanent flow of information are prevalent, spurring the acquisition of foods and services, the practice of advertising is of great importance to legal order.

The Court considers that the constitutional limitations imposed upon the lawmaker as regards certain matters in the Constitution itself in certain cases justify the application of a more intensive test.
The Court has used what is known as an intermediate test to analyze the reasonability of a legislative measure, especially 1) when the measure can affect the enjoyment of a non-fundamental constitutional right, or 2) when there is an indication of arbitrariness that is reflected in a serious impact on free competition, or 3) when involving an affirmative action measure.
In the intermediate test, the level of demand of the analysis is greater, inasmuch as it is required that the purpose not only be legitimate, but also that it be constitutionally material, as it promotes public interests valued by the Constitution or by reason of the scope of the problem that the lawmaker seeks to resolve and that the means not only be appropriate, but actually conducive to achieving the purpose sought by the norm subject to judicial control.
Finally, in Judgment C-673 of 2001 the Court listed some cases in which a strict test of reasonability has been applied: 1) when involving a suspicious means of classification, such as those listed in a non-exhaustive manner as prohibitions against discrimination in 13.1 of the Constitution; 2) when the measure mainly affects persons in conditions of patent weakness, outcast or discriminated-upon groups, sectors with no effective access to decision making or insular and discrete minorities; 3) when the measure making the distinction between persons or groups, seriously affects the enjoyment of a fundamental constitutional right, or, 4) when a measure creating a privilege is examined."

[17] See Constitutional Court, judgment C-355/94 (Justice Rapporteur: Antonio Barrera Carbonell).

For the purposes of this Judgment, it is relevant to consider three plains of relations between advertising and constitutional law, namely, *(i)* advertising as an activity protected by economic freedoms; *(ii)* the relation between advertising and consumer rights; and *(iii)* advertising as a recognized form of constitutional speech. The Court shall now address the core aspects of each of these plains.

Advertising and freedom of enterprise

8. In the previous sections of this decision, it has been determined that the activity protected by economic freedoms is the implementation of procedures directed to the production of goods and services, destined for the commercialization and subsequent legitimate obtaining of profits. Clearly, one of the essential stages to guarantee such commercialization is to rely on advertising so that consumers may know of and choose to acquire the relevant product. From an economic perspective, therefore, advertising would have a dual purpose of providing consumers with information and eliciting a change in their consumption tendencies, so that they may choose the advertised product over others available at the market. The consequence of this is that the data offered by the advertising be, above all, a means of persuading the consumer, which based on the relevance of the virtues and advantages of the product, could lead to its acquisition. Advertising may even affect a given social practice, to configure stable consumption options within a given community, to the extent of influencing the State machine to issue public political policies allowing or facilitating the exercise of such consumption option.[18] As may be seen, advertising is not intended to achieve more efficient forms of using the resources, but merely to modify the preferences of the consumer to choose a product within a given market.

The need for advertising for commercialization purposes in the light of constitutional law implies at least two defined consequences. First, if the State recognizes the economic freedoms as guarantees in favor of the people, necessary for the preservation of the social market economy, then advertising is also the subject of protection, as it is an integral part of the productive effort and the subsequent appearance at market of the agent and its products. Second, by advertising being included among the group of activities encompassed by the definition of freedom of enterprise and free economic initiative, the State may impose limitations, restrictions and even prohibitions on its various expressions, subject to the condition that the requirements identified by constitutional case law for validity of acts of economic intervention be met, especially compliance with the conditions of reasonability and proportionality of State activity.

[18] These characteristics are taken from COASE, R.H. "Advertising and Free Speech" *6 Journal of Legal Studies.* 1-34 (1977).

Along these lines, commercial advertising shares the self-restricted nature explained earlier for economic freedoms. Such nature in turn affects the level of intensity and the methodology of the judicial scrutiny of the measures, in this case legislative, imposing limits on such activity. In simple terms, the tools for the judicial analysis of the measures of intervention in the economy are fully applicable in the case of legal provisions imposing limitations, requirements and prohibitions to the intrinsic practices of commercial advertising.

Advertising and the rights of the consumers

9. It has been stated that advertising is, above all, a mechanism for the transmission of persuasive messages, seeking to direct the preferences of the people towards the acquisition of a given good or service. This implies that the advertised message, by definition, shall not meet the conditions of impartiality or full transparency in the presentation of the information on the properties of the product or service, inasmuch as any activity along these lines was focused on stressing the virtues of the good offered. Facing such reality of the economic practice and considering the deep changes involved in changing from a liberal legal conception of the market, of limited State intervention, to the level of inherence intrinsic in the model of social market economy,[19] the Constitution establishes in its Article 78 the legal power to regulate both the quality of the goods and services offered and rendered to the community, and the information that is to be furnished to the public.

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[19] Regarding this transformation, the Court recently issued some considerations that best illustrate the phenomenon. In this sense, judgment C-749/09 (Justice Rapporteur: Luis Ernesto Vargas Silva), stated that *"... the treatment of the rights of the consumers and users had a significant change as of the issue of the Political Constitution of 1991. During the pre-constitutional period, the relation between the agents concurring at the commercial circuit of distribution of goods and services (producers, dealers and consumers) was based on the rules inherent in economic liberalism. Consumers, as acquirers of the products, were at equal levels in the negotiation with their suppliers and, if any imbalances were found in their purchase, either due to noticeable differences in the price or in the quality demanded of the merchandise, they had access to the tools inherent in civil law to repair the damages sustained (redress of material damage, warranty of title and right of possession or for hidden damages, civil contractual liability, etc.). This obviously implied the presumption that the producers, intermediaries and consumers (i) access the market in identical conditions; (ii) have at their disposal the same level and quality of information; (iii) have identical conditions of access to the jurisdictional solution of conflicts arising in such exchange relations. || The aforementioned qualitative change is based on the recognition, by constitutional law, of the deep inequalities inherent in the market and consumption. On the one hand, the advances in science and technology in contemporary society and, especially, the specialization in productive processes causes significant asymmetries in the information among those concurring to the exchange of goods and services. In fact, consumers tend not to have sufficient knowledge and expertise to discern about the technical aspects defining the quality of the products, even those of ordinary consumption. Likewise, the manufacturers and dealers are, in most cases, business conglomerates that have access to infrastructures which, as economies of scale, participate in the economic market and, even, concur before the administrative and judicial authorities with clear advantages, considering the availability of resources, permanent top-quality professional advice and knowledge of the functioning of the juridical conflict resolution instances, derived from the condition as recurring litigants. || 7. Consumers, under such framework of asymmetric information and factual inequalities with traders and producers, adopt their decisions to acquire goods and services essentially based on relations of trust. The prestige obtained by a certain brand, the novelty of the good or, on many occasions, the mediatic success of an advertising campaign, lead the consumer to choose a given product, even in cases in which their use implies a social risk, as is the case with food, freely-sold pharmaceuticals, vehicles, etc."*

This constitutional provision links State intervention of commercial advertising to consumer rights. As stated earlier, one of the functions of such advertising is to transmit information to the members of the market regarding the qualities of the good or service. Along these lines, the amount and quality of the data on the products offered by the merchants through the advertising message, are critical elements for judging the appropriateness of the consumption options. Case law has recognized that the State function in this field is focused on guaranteeing that the consumption decisions be informed, reducing the asymmetries that prevent knowledge before acquiring products and services that are safe and of acceptable quality. In this sense, the Court has recognized that the rights of the consumers are *polyhedral* in nature, as they integrate the duty of the State to guarantee several levels of effectiveness relating to the quality and safety of the products, the proper and sufficient information thereupon, and the assurance of the participation of the organizations of consumers and users. For the precedent in question, *"the rights of the consumer are not limited to their legitimate expectation to obtain from producers and distributors on the market goods and services meeting certain minimum requirements of quality and suitability as to satisfy their needs, which is part of the essential content of the rights of the consumer. Consumer rights, it should be said, are polyhedral in nature. Their purpose, in fact, incorporates claims, interests and situations of a substantial order (quality of goods and services; information); of a procedural order, judicial enforceability of guarantees; indemnification of damages for defective products; class actions, etc.); of a participative order (regarding the public administration and the regulating bodies) || The public powers, in the instances of creation and application of the law, in the permanent search for the consensus that is characteristic of the social State and the mission of its bodies, must materialize as an element of the public interest which must prevail; that of the proper defense of the consumer, requiring the enabling of procedures and mechanisms of participation and challenge so that their interests are duly protected. The opening and deepening of the channels of expression and intervention of the consumers, in the processes of public and community decisions, are part of the essence of the rights of the consumer, inasmuch as without them the diffuse and legitimate interests of the collective cease to be included in public policies and in the administrative actions, with serious damage to the general interest and to the legitimacy of the public function, called upon not only to apply the preexisting law, but to generate the most consensus possible with regard to its determinations."*[20]

10. The recognition of the legal power to regulate the form of expressing commercial information has permitted the Court to opine with regard to the constitutional legitimacy of regulations that have established limits or conditions with respect to certain modalities of commercial advertising. In this sense, in Judgment C-355/94 (Rapporteur Justice: Antonio Barrera

[20] See Constitutional Court, judgment C-1141/00 (Justice Rapporteur: Eduardo Cifuentes Muñoz). This finding advanced the control of constitutionality of certain norms of Decree Law 3466/82, regarding the restriction of liability in favor of dealers in goods and services.

Comercial), for instance, the Court declared the unenforceability of the norms contained in Law 35 of 1989, which established a ban against odontologists advertising instruments to draw in potential users of their services, under penalty of incurring faults against professional ethics. In its finding, the Chamber accepted that, under the provisions of Article 78 Superior, it had competent jurisdiction to determine the compatibility between the advertising message used by those exercising liberal professions, and consumer rights, especially the sufficient and appropriate information regarding the content and qualities of the services offered. In the case analyzed, the Court concluded that such message, in itself, could not be considered to be contrary to ethics, inasmuch as it served the purpose of providing the community with the information necessary to illustrate various consumption options. Therefore, commercial advertising may even be seen as necessary, under the framework of economic transactions on contemporary markets. The Chamber found that *"... although advertising relates, in principle, to commercial activities, it cannot be denied that at the present time, due to the large number of professionals existing in certain areas, it is difficult to identify and locate those capable of providing a given service, and it is therefore necessary for those having an art or profession to be able to put them at the service of society and to make their availability known through advertising*. (…) *In the opinion of the Court, it is admissible for those exercising a liberal profession to make their qualities known, through advertising and publicity, provided these means are not used beyond the limits of ethics or favor unfair professional competition and could thus constitute an abuse of the right, contrary to the precept of Article 95.1 of the C.P., which lists among the duties of all people "the respect for the rights of others and not to abuse one"s own ".*"

Analogous considerations were used by the Court in decision C-116/99 (Rapporteur Justice: María Victoria Sáchica Méndez), which declared the unconstitutionality of the norm of Law 23 of 1981, which established as a restriction intrinsic in medical ethics that academic, honorary and scientific degrees, or reference to positions held, could solely be referenced in scientific publications. In this case, the Chamber reiterated the previous considerations, in the sense that a restriction of such nature would disregard the faculty of the doctors, which is legitimate from a constitutional viewpoint, to advertise their services and thus, inform their users of their content and qualities. Nonetheless, it was also stated that the provisions of Article 78 Superior led to inferring that the practice of advertising was not without limitation, but rather was subject to restrictions to render it compatible with the effectiveness of the rights of the consumers, especially when regarding the promotion of health services, where the standards required of quality of attention, and the probity of the professionals rendering the services, must be substantially higher. There was therefore some tension facing the possibility of doctors engaging in advertising and the protection of the rights of the users, especially the right to receive appropriate and sufficient information, that would enable them to choose safe, quality medical-assistance services. In the case in point, the

Chamber concluded that the restriction contained in the challenged norm was disproportionate inasmuch as *(i)* it greatly prevented such supply of information; and even *(ii)* it could jeopardize good medical practice, by affecting the possibility of advertising unsuitable services. Along these lines, the Court stated the following:

> "As may be inferred when comparing such elements, the purpose sought with the legal provision subject to analysis does not coincide with the scope of the limitation that is thereby assumed by the doctors regarding some of their fundamental freedoms and rights, which are protected constitutionally. This renders it disproportionate. Especially if two additional situations are considered: the first, that medical publications of a scientific nature, in addition to being very scarce in the country, are restricted in their circulation to that specific group of professionals; the second, that through legal controls of the use of advertising in general, with the respective penalties of a disciplinary, civil or criminal nature, it is possible to accomplish the purpose supported by the norm, which is preventing the undue use of advertising to promote medical-professional services, avoiding damage to the legal competition that must be exist among the members of the same profession and the general interests affecting the exercise of such profession.
>
> The foregoing allows concluding that in this case the measure adopted in the regulation contained in the norm in question is not proportionate with the purpose sought thereby and, quite the opposite, it denies the exercise and the safeguarding of rights of a constitutional level, thus affecting its essential core.
> (…)
> To base the defense of constitutionality of the norm *sub examine* on the fact that there could be a misuse of advertising by doctors in the promotion of their services, due to the deceptions that could arise there – as is sustained by some participants – in the light of our constitutional framework is also an unacceptable discrimination of a group of professionals, the disregard for the principle of good faith in the professional practice of medicine, governing all professions and, especially, in medicine, due to the high axiological component that it implies and that, accordingly, accompanies its professionals in the practice of their profession. This means that if there were such an anti-ethical, it would be an exception and not the rule.
>
> Consequently, in the defense of the right that is invested in medical professionals to inform of certain relevant aspects of their professional practice, which are of a social interest, and in the interest of the community to receive such information through the use of legitimate and widespread advertising, in a plain of equality with other professionals, under the relevant legal controls that allow protecting that general interest inherent in the exercise of the medical science, the Court declares the unenforceability of the challenged provision in the decision of this order, finding it in violation of higher mandates, specifically Articles 13, 20 and 25 of the Political Constitution."

11. In conclusion, the mandate of protection of the rights of the consumers, through the regulation of the information furnished to the public for the commercialization of goods and services, has allowed constitutional case law to advance in the scrutiny of legal norms establishing limitations and requirements regarding commercial advertising. In the cases subject to analysis, the Court has concluded that the mere transmission of the advertising

message does not affect the constitutional framework, which would be infringed upon if it were impossible to deliver information illustrating consumption options or when, in general, it were a threat to identifiable constitutional goods and values.

Commercial advertising as speech protected exceptionally by the freedoms of speech and information

12. The third plain in which advertising is present is in its condition as speech. The previous items have indicated that one of the purposes of the advertising message is to transmit information to consumers regarding the quality of the product or service put to market. Along these lines, commercial advertising, provided it contains a message that is sought to be disseminated by the interested party in the sale of the good, is covered by the freedoms of speech and information.

Indeed, in line with the catalog of basic principles of liberal law, Article 20 C.P. establishes the freedom of all people to express and disseminate their thoughts and opinions, the freedom to inform and receive accurate and impartial information, and the freedom to utilize mass media. Similar formulas are found in provisions of international law on human rights, which form part of the constitutional body of laws. Along these lines, Article 19-2 of the International Civil and Political Rights Agreement provides the right to the freedom of speech as the power that every person has to seek, receive and disseminate information and ideas of any nature, regardless of borders, whether orally, in writing or in print or artistic form, or by any procedure of their choice. Article 13-1 of the American Human Rights Convention also establishes a provision of identical content.

Recognition of the right of the freedom of speech and information, as seen, is broad in nature, implying that commercial advertising would be encompassed by such constitutional guarantee. The advertising message is a means of speech of the agents competing at the market, destined for informing consumers of the qualities and conditions of the goods and services. This has been the position assumed by prior decisions of the Court, providing that *"the right to transmit or conduct information to others and, likewise, the correlative right thereof to receive such information, are considered facets of the freedom of speech, which is subject to constitutional protection. (Article 20 C.P.). Therefore, such freedom is present with respect to those exercising liberal professions and is denied when they are deprived of the right to make legitimate use of advertising, as the restrictions of such rights must have a serious, reasonable justification, proportionate with the purpose sought."*[21]

Therefore, both the constitutional mandate and the norms of human rights lead to conclude that any limitations that could be imposed upon commercial speech could not be greater in intensity than those admissible for other

[21] See Constitutional Court, judgment C-355/94, previously cited.

modalities of speech, such as press or opinions. Nonetheless, as provided by case law, this conclusion is based on a partial understanding of the constitutional contents affecting the degree of protection of commercial advertising. As explained earlier, the advertising message is not only an instrument of information, but also is an expression of freedom of enterprise and an element of the guarantee of consumer rights. Along these lines, the level of State participation in the broadcasting of the advertising message shall have to be analyzed based on the rules described above, which permit imposing restrictions by operation of law, provided they meet the purposes inherent in State participation in the economy and/or the protection of consumer rights, and the measure in question responds to criteria of proportionality and reasonability.

13. Regarding the constitutional limitations admissible to commercial advertising, Judgment C-010/00 (Rapporteur Justice: Alejandro Martínez Caballero) is especially relevant. In such decision, the Court studied the constitutionality of several provisions of Law 24 of 1966, which regulates the transmission of programs using broadcasting services. The precepts analyzed included those directed to banning *(i)* commercial advertising on public broadcasting mediums; and *(ii)* advertising messages destined for promoting professionals that do not have the relevant qualifying degree, as well as the advertising of spiritualists, fortune tellers and other similar activities.

The Court began by stressing, as mentioned earlier, the specific nature of commercial advertising and, accordingly, its differentiated constitutional treatment, due to its nature of a modality of practice of economic freedoms. Along these lines, it provided that *"a systematic and teleological interpretation nonetheless leads to another conclusion, namely that commercial advertising does not receive the same constitutional protection as other contents covered by the freedom of speech. Therefore, the law may participate more intensely in publicity, as seen below. || The Constitution expressly establishes that the law must regulate the information that must be supplied to the public for the commercialization of the various goods and services (CP Article 78), which means that the Constitution not only allows but orders a regulation of the matter, but by no means authorizes the law regulating the information that must be provided in political, religious, cultural or other sense. || This specific mandate regarding the regulation of the commercial information, which obviously includes advertising, derives from the narrow relation of these messages with the economic and market activity, to the extent that they represent an incentive for the development of certain commercial transactions. This means that the advertising activity is, in general, more a development of economic freedom than a component of freedom of speech. Therefore, commercial publicity is subject to regulation by the "Economic Constitution""*

Based on this statement, the Chamber found that commercial advertising is a modality of speech that is not invested with the same level of protection as

other manifestations of information or ideas, which are in fact protected by the postulates inherent in the freedom of speech. This is due to the fact that its purpose is not to encourage participation and democratic deliberation, but to merely facilitate economic transactions. Along these lines, it is valid that the lawmaker impose restrictions, even stringent ones, upon commercial advertising, provided they do not imply a direct violation of fundamental rights or a disproportionate or unreasonable treatment of the market agent relying on the advertising message. In this sense, the Court considered in the Judgment in question that *"... the law can regulate the content and scope of the dissemination of such advertising more stringently and, therefore, constitutional control is less strict in these cases. In general terms, and according to the methodological criteria established by this Court in earlier decisions*[22]*, the regulation of commercial advertising is constitutional if it is an appropriate means of achieving a legitimate state objective. Therefore, such a norm may solely be declared unenforceable if it directly infringes upon fundamental rights, or resorts to discriminatory categories, or breaches clear constitutional mandates, or incurs in patently unreasonable or disproportionate regulations. In other words, if the law regulating commercial advertising is not in clear violation of the constitution, and does not establish regulations that are patently unreasonable or discriminatory, it should be deemed constitutional, as there are general clauses authorizing state intervention in the economy and in market information."*

The same case law has established that the limitations to commercial advertising may be particularly strict when the State finds that a certain activity, in spite of being legally exercised, should be discouraged due to the objective damage it causes upon society or the veritable danger of damage to others. In this sense, it is not contrary to the constitutional framework *prima facie* that the lawmaker establish rules seeking to conform a passive market, i.e., the existence of a correlative of the authorization for the production and commercialization of a given good or service, and the establishment of policies destined for discouraging its utilization. In the opinion of the Court, "*it is necessary to bear in mind that there are occupations or economic transactions that a democratic lawmaker may consider socially damaging and, therefore, that they require limitation. Nonetheless, that same lawmaker may conclude that it is wrong to prohibit such activities, for very different reasons. For instance, based on various sociological studies, lawmakers may consider that a comprehensive ban is susceptible of generating a legal black market, which rather than reducing the social damage associated with undesired economic exchanges, tends to make it worse. In such cases, the democratic society may assume the option of creating what some scholars have denominated a "passive market", i.e., the activity is tolerated and is thus legal, but it cannot be advertised, implying that all publicity in its favor is not only prohibited, or strongly restricted, but the authorities may hold advertising campaigns against such activities. This type of strategy has been developed in some countries, for instance, to control the abuse of legal psychoactive*

[22] See, among others, the cited judgments C-265 of 1994 and C-445 of 1995.

substances, such as alcohol or tobacco. || In accordance with the above, it is thus not contradictory, nor in itself a violation of the Constitution, that the law prohibit the commercial advertising of an activity that is legal, inasmuch as it is valid for the authorities to establish various forms of "passive market" for occupations that are tolerated, but that society deems necessary to discourage. Nonetheless, for a measure of such nature not to be discriminatory, or in violation of pluralism (CP Articles 7 and 13), not only must there be very clear reasons explaining such ban or restriction of advertising, but also, the measure must be proportionate with the accomplishment of the established objective."

In the case studied by the Court, the conclusion was reached that banning the advertising of services of spiritualists and witchcraft was disproportionate and unreasonable, as there was no objective and veritable social risk derived from such activities that would permit imposing strict restrictions on such advertising message. Therefore, the relevant regulatory section was declared unenforceable.

14. The nexus between commercial advertising and freedom of speech has been well documented in comparative law. The constitutional case law of the United States is illustrative in this regard as it has tended to precisely determine the scope of protection of such law, as regards *commercial speech*. The key aspect of this case law dynamics is the transformation that has been sustained by the degree of protection of commercial speech, which was not granted protection in the initial stage, but progressively achieved specific guarantee levels, although understood as a separate and individual speech, different from that destined for promoting ideas, debate and information.[23] The transformation came about with the finding in *Valentine v. Chrestensen*,[24] where the Supreme Court considered that commercial speech was not the subject of protection under the First Amendment on the freedom of speech, inasmuch as it was merely product promotion. This allowed that in the case in point the United States Supreme Court validate a local ordinance banning the distribution of flyers promoting the rental of a submarine, which on their backsides criticized the city policies that prevented the use of the city docks for such vehicle.

This position, which remained in force for over thirty years, was modified with the findings in *Bigelow v. Virginia*[25] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council*[26]. In the first, the Supreme Court declared the criminalization by the State of Virginia of newspaper advertisements for the availability of abortion procedures in New York to be contrary to the First Amendment. To arrive at that conclusion, the Court considered that the commercial advertising not only had a content that was purely economic, but

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[23] Regarding this process of transformation, *Vid.* US Government Printing Office. *Analysis and Interpretation of the Constitution. Annotations of Cases Decided by the Supreme Court of the United States.* 2002 Edition Pages 1176-1185. Available on the Internet: http://www.gpoaccess.gov/constitution/browse2002.html#supp A detailed explanation of the modifications of the level of protection of commercial speech in United States constitutional law is available at SULLIVAN, Kathleen. GUNTER, Gerald. *Constitutional Law.* Fifteenth Edition. Foundation Press. Pages 1160-1191.

[24] 316 U.S. 52 (1942)

[25] 421 U.S. 809 (1975).

[26] 425 U.S. 748 (1976).

also another that was informative, which was indeed protected by the First Amendment. In the case posed, the information consisted of the availability of the health service in another State, the advertising cannot be censored or eliminated by authority of the State where the press advertisement is published.

Similar arguments were used in the case of the *Virginia State Board of Pharmacy*, where the Supreme Court supported the claims of a group of consumers opposing a State prohibition of the advertising of prescription medicine. The Supreme Court considered that commercial speech not only contained elements of economic promotion, but also information relating to the public interest, especially the data necessary to guide consumer decisions. In this sense, *"the interest of the consumer in receiving factual information on the prices may even be greater in value than public debate, inasmuch as any matter relating to price competition and access to information thereupon is a matter of social interest."*[27]

Following these conceptual modifications, which basically held the opposite of what was originally established in *Valentine*, the Court reached a case law, based on the recognition of *(i)* the dual nature, informative and economic, of commercial advertising; and *(ii)* the admissibility of State restrictions on commercial speech, as an expression of economic activity. This balance was exposed in the Judgment in *Central Hudson Gas & Electric Co. v. Public Service Commission.*[28] In such case, the New York Public Service Commission banned the commercial advertising of a power station that sought to increase the consumption of such fluid. The restriction was implemented as a result of a fuel supply crisis, but continued after it had been overcome. In that case, the Supreme Court established a methodology for the judicial scrutiny of the measures of State intervention in commercial speech, known traditionally as the *Central Hudson Test.* According to such methodology, to determine the constitutionality of a measure that sort, it is necessary to take into consideration that *(i)* the object of the protection under the First Amendment on the freedom of speech is the informative function of commercial speech. Therefore, the remaining aspects of the advertising message may be restricted and even suppressed; *(ii)* if commercial speech, with that precise characterization, is subject to protection, the interest that the State may have in restricting it must be identifiable. In this sense, for the Supreme Court there must be a *substantial interest* on the part of the State, which must be reached by restricting commercial speech; *(iii)* the restriction cannot be supported if the substantial interest is only remotely or ineffectively satisfied. Therefore, the regulation must imply a *significant advance* in accomplishing the State interest; finally *(iv)* if the State interest may be achieved through a measure that is less burdensome on commercial speech, the more burdensome policy would be inadmissible. In this case, the Supreme Court has applied a less strict proportionality test, as it does not require that the State purpose sought be exigent, but merely requires the

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[27] See *Analysis and Interpretation…* (Op cit.). Pages 1177-1178. Free translation by the Court.
[28] 447 U.S. 557 (1980).

existence of a reasonable nexus between means and purposes, so that the restriction is *designed narrowly to accomplish the desired objective.*

15. The usefulness of the *Central Hudson Test* has become evident in subsequent cases.[29] In this sense, for instance, in the decision of *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*[30] the Court backed a law of the Associated State of Puerto Rico which prohibited advertising casinos. The Supreme Court considered that the substantial interest defended by the State to obtain such limitation was the reduction of the demand for casino gambling by the people of the State, in order to satisfy objectives pertaining to the health, security and welfare thereof. The measure also met the criteria of proportionality, as it merely banned advertising, but not the activity of the casinos, which led to the legislative policy being restricted to the purposes listed above, all related to the public interest. These criteria that are broad *prima facie*, in favor of strict intervention in commercial speech, were later adjusted in *Liquormart Inc. v. Rhode Island*,[31] where it was established that commercial speech with regard to the price of alcoholic beverages was encompassed by the information necessary for the consumer, implying that its prohibition did not meet the requirements of the *Central Hudson Test*. Along these lines, as stated by the United States constitutional doctrine, after *Liquormart Inc.,* the level of intensity in the application of the referred test *"depends more on its application than on its verbal formulation: this judgment is based on factors that must be examined, the force required of the state justifications and the rigor with which a Court would examine the legislative measure."*[32] In conclusion, for the United States constitutional case law, it is admissible that the lawmaker impose restrictions on commercial speech, provided they pass a test of proportionality, in which the limitation responds to identifiable state purposes and the policy in question has a tangible effect in the accomplishment of such objectives.

16. The foregoing considerations allow identifying the central ideas of the constitutionality of the limitations and restrictions imposed by the lawmaker to commercial advertising. It has been said that the advertising message is expressed in the plains of economics, consumer information and the speech protected legally by the freedom of speech. This is due to the fact that two types of content may be identified therein, responding to two distinguished constitutional matters. On the one hand, there is the component of commercial advertising directed to informing the consumer to make decisions based on the market, a scope achieving higher levels of protection, due to the need to guarantee the appropriate and sufficient information necessary for the commercialization of goods and services (Article 78 C.P.). On the other hand, there is the content of the advertising message intended to promote the acquisition of a good or service, which may be validly limited, even

[29] The study of the subsequent applications of the *Central Hudson Test* is taken from SULLIVAN and GUNTER, *Op Cit.* Pages 1176-1191.
[30] 478 U.S. 328 (1986).
[31] 517 U.S. 484 (1996).
[32] SULLIVAN and GUNTER. *Op Cit.* page 1186. Free translation by the Court.

stringently through its restriction or prohibition, provided it meets certain criteria of reasonability and proportionality. Along these lines, a legislative policy of this type is compatible with the Political Charter if it meets the conditions for the measures of intervention by the State in the economy. These conditions in turn bear a close similarity with the requirements for the enforceability of the restrictions to commercial speech offered by comparative law.

Constitutional control of provisions establishing limits to commercial advertising of tobacco and its derivatives

17. The Constitutional Court has exercised the judicial control of various norms imposing limits and restrictions upon the commercialization and advertising of tobacco and its derivatives. In such decisions, it has unanimously found for the enforceability of such measures. The first case is set out in C-524/95 (Rapporteur Justice: Carlos Gaviria Díaz), where the Court analyzed the constitutionality of Article 19 of Law 30 of 1986, which norm provided that the broadcasting stations, television programmers and cinematographers may solely transmit publicity of alcoholic beverages, cigarettes and tobacco during the times and with the intensity to be determined by the National Stupefacients Council, upon hearing from its Technical Advisory Committee.

After making certain considerations regarding the admissible limitations to the freedom of enterprise and regarding the State role in the regulation of the information on the quality of the goods and services destined for commercialization, all similar to those set out in the preceding paragraphs of this Judgment, the Plenary took upon itself the study of the constitutionality of the imposing of limitations upon tobacco advertising, such as those posed in the challenged norm.

Based on the evidentiary material gathered during the process, especially the contributions made by universities and scientific bodies, the Court concluded that the regular consumption of tobacco entailed serious and objective health hazards, all physical and none behavioral. Along these lines, the commercial advertising of these products, seeking to influence the purchasing decisions of the consumers, may be subject to limitation by the State, as occurred in the case analyzed, without there being grounds to validly conclude that a regulation of that nature limited the right to information. This is due to the fact that *(i)* the impact on public health from tobacco consumption, and from the consumption of alcoholic beverages, was sufficient reason to justify, from a constitutional perspective and based on the State powers set out in Article 78 C.P., limitations to the advertising of such products; and *(ii)* the challenged norm did not, in any case, impose a full limitation on such advertising, but rather subjected the conditions for its issue to a state authority, which meant that there was no disproportionate impact on the freedom of enterprise. In the words of the Court, *"by the challenged precept establishing that the*

broadcasting stations, television programmers and cinematographers may solely transmit publicity for alcoholic beverages, cigarettes and tobacco during the times and with such intensity as indicated by the National Stupefacients Council, upon hearing from its Technical Advisory Committee, could it be inferred as an affront to the right to information and the ban against censoring the media? The answer is no, inasmuch as the lawmaker is empowered by the very constitutional canon that the plaintiff has claimed to have been violated, i.e., Article 78 of the Constitution has the power to state the information that is to be furnished to the public in the commercialization of goods and services, which must necessarily include advertising or publicity of such products, which translates into protection and guarantees for the consumers of the products or users of the services offered. || It should further be noted that the challenged norm does not prevent the dissemination of publicity through the media therein mentioned, but conditions their broadcast to the times determined by the National Stupefacients Council, for plausible purposes, such as: the general interest, life, health, safety and children"s rights. For these purposes, it is necessary to bear in mind that the respective regulation of the Council in question (Resolution 03/95), solely permits the transmission by radio and television of publicity for alcoholic beverages, cigarette and tobacco between eleven o"dock pm and six o"cbck am the next day, and cinematographers in the screening of movies for adult audiences, and that law 124 of 1994 prohibits the sale of intoxicating beverages to minors."

Finally, in relation to the analysis of the challenged norm in the light of the guarantee of the right to the free development of personality, Judgment C-524/95 stated that the lawfulness of a behavior, in this case the consumption of tobacco, was not incompatible with the consideration of such an activity as socially undesirable. In other words, the Court concluded that the lawfulness of a given consumer behavior does not in itself lead to the advocating of all guarantees for its promotion, inasmuch as we could be dealing with an activity that the State considers to be excluded from incentive, due to its proven hazardous effects in terms of public health. In this sense, *"1) The fact that the consumption of certain toxic substances is not penalized does not mean that it is socially desirable. And if it were to indeed be found hazardous, it is legitimate and in line with the spirit of the Constitution that there be no tolerance for advertising that makes the product attractive, beyond a certain point; and 2) Inasmuch as, if it is possible to state who, when and in what circumstances it is allowed to consume a substance, which in spite of not being banned is individually and socially hazardous, it is all the more valid to state the conditions in which the product may be advertised, and who, specifically, it would seem appropriate to protect from advertising influence. || In other words: if adults, for instance, are less vulnerable to conditioned election than children (and are also in condition to choose freely), it would seem reasonable that advertising by radio and television shall take place in times that are less accessible by the latter.|| The Court finds, for these reasons, that the challenged norm not only is not an affront to any*

fundamental right, but has a reasonable balance between the exercise of certain freedoms and the protection of those who could, at least potentially, be affected thereby."

18. The overall consensus regarding the need to implement measures directed to dissuading the consumption of tobacco, along with the exposure to its smoke, considering its proven damaging effects on health, was achieved through the Framework Convention for Tobacco Control of the World Health Organization, hereafter the FCTC, subscribed in Geneva in 2003. This international treaty, which coincidentally is the first one subscribed under the auspices of the WHO, is based on strict premises,[33] relating, among others, to *(i)* the need to have an international instrument destined for protecting present and future generations from the *devastating* impact on human health and for the environment implied by the consumption and exposure to tobacco smoke, especially in the case of developing countries and economies in transition; *(ii)* such instrument must provide an obligation for the party States to implement appropriate measures to *slow* consumption and exposure to tobacco consumption; *(iii)* that the effects recorded above do not correspond to an unsolved dispute, but rather that *"science has unequivocally proven that tobacco consumption and exposure to tobacco smoke can cause mortality, morbidity and disability."* It has also been proven that prenatal exposure to tobacco smoke creates adverse conditions for the health and development of the child; *(iv)* that cigarettes and other products containing tobacco are designed in a sophisticated manner, so as to cause dependency; *(v)* that there is a serious concern among the international community for the impact of all forms of advertising and sponsorship directed to stimulating the consumption of tobacco products; and *(vi)* that there is a clear link between the discouraging of tobacco consumption and the guarantee of the right to the enjoyment of the highest possible level of health, established in Article 16 of the International Economic, Social and Cultural Rights Agreement.

That based on considerations of this nature, the FCTC relies on a catalog of defined principles, described in its Article 4, and which refer to the duty of the States to inform everyone of the health implications, the addictive nature and the mortal threat of consuming tobacco and of exposure to tobacco smoke, for which it shall be necessary to adopt the legislative, executive, administrative and other measures destined for the protection of all from tobacco smoke. Such measures must take into account specific aspects, such as the need to adopt actions tending to *(i)* protect people from exposure to tobacco smoke; *(ii)* prevent starting, promote and support quitting, and achieve a reduction of the consumption of tobacco products in any of their forms; *(iii)* promote the participation of the indigenous peoples and communities in the creation, implementation and evaluation of tobacco control programs that are socially and culturally appropriate to their needs and views; and *(iv)* when preparing tobacco control strategies it is necessary to take into account the hazards arising specifically by gender.

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[33] See Preliminary Part and Recitals of the FCTC. Document WHA56.1 of the World Health Organization.

Likewise, the general principles include international cooperation on various fronts, directed to the design and application of effective tobacco control programs; the adoption of measures of various sorts, destined for preventing, in accordance with public health policies, the impact of diseases, premature disability and mortality derived from the consumption and exposure to tobacco smoke; assuming that matters pertaining to liability, as determined by each party in their own jurisdiction, are an important aspect of tobacco control; recognizing the importance of the adoption of plans with respect to growers and workers that are affected by the tobacco control measures; and the participation of the civil company to accomplish the objectives of the FCTC.

In line with the expressed principles, the FCTC provides a series of obligations for the party States, divided into blocs and relating to *(i)* measures referring to the reduction of the demand for tobacco; *(ii)* measures pertaining to the reduction of the supply of tobacco; *(iii)* protection of the environment; *(iv)* matters relating to liability; *(vii)* technical and scientific cooperation and communication of information; *(viii)* institutional arrangements and financial resources; and *(ix)* dispute settlement.

19. Regarding the decision that is to be adopted in this finding, it is necessary to focus on the provisions contained in Article 13 of the FCTC, incorporating within the measures relating to the reduction of the demand for tobacco, those relating to its advertising, promotion and sponsorship. This precept is based on establishing that the States party to the Agreement recognize that a total prohibition of advertising, promotion and sponsorship shall reduce the consumption of tobacco products. In this regard, it is necessary to stress that Article 1 of the FCTC defines the term "tobacco advertising and promotion" as "*any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly."* If also defines "tobacco sponsorship" as *"any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly."*

Upon stressing this commitment regarding the complete elimination of advertising, promotion and sponsorship of tobacco, Article 13 establishes several duties of the Party States, namely:

19.1. Each State party to the Convention shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory. In this respect, international norms provide that, within the period of five years after entry into force of this Convention for that

Party, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report accordingly in conformity with Article 21 of the Treaty, which provides for the presentation of reports to the Conference of the Parties regarding, among other aspects, the measures of various sorts adopted to apply the FCTC.

19.2. In the cases in which the Party State is not in a position to undertake a comprehensive ban due to its constitutional principles, such Party State shall regardless be required to apply restrictions on all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, restrictions or a comprehensive ban on advertising, promotion and sponsorship originating from its territory with cross-border effects. In this respect, each Party shall undertake appropriate legislative, executive, administrative and/or other measures and report to the Conference of the Parties, in conformity with the mechanism described above.

19.3. The FCTC determines the content of the *minimum* obligations to be implemented by each party State in relation to the matter subject to analysis. In this sense, they must *(i)* prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive in any other way or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions; *(ii)* require that health or other appropriate warnings or messages accompany all tobacco advertising and, as appropriate, promotion and sponsorship; *(iii)* restrict the use of direct or indirect incentives that encourage the purchase of tobacco products by the public; *(iv)* require, if not subject to a comprehensive ban, the disclosure to relevant governmental authorities of expenditures by the tobacco industry on advertising, promotion and sponsorship not yet prohibited. Those authorities may decide to make those figures available, subject to national law, to the public and to the Conference of the Parties; *(v)* undertake a comprehensive ban or, in the case of a Party that is not in a position to undertake a comprehensive ban due to its constitution or constitutional principles, restrict tobacco advertising, promotion and sponsorship on radio, television, print media and, as appropriate, other media, such as the internet, within a period of five years; and *(vi)* prohibit, or in the case of a Party that is not in a position to prohibit due to its constitutional principles, restrict, tobacco sponsorship of international events, activities and/or participants therein.

19.4. Finally, the norm determines that the FCTC encourages the parties to impose measures that are more stringent than the minimum obligations described above. It further stresses the sovereign right of the State prohibiting the advertising, promotion and sponsorship of tobacco to ban the same activities taking place cross borders. To this end, the party States consider drafting a protocol to regulate the measures appropriate to control such phenomenon.

20. The FCTC was approved by the Colombian Congress through Law 1109 of 2006. The content of the international treaty, same as its approving law, was declared enforceable by the Court through its Judgment C-665/07 (Rapporteur Justice: Marco Gerardo Monroy Cabra). Regarding the control of the constitutionality of the Convention, two different aspects were stressed. First of all, the Court considered that the measures established in the international instrument, in general terms, did not conflict with the Political Charter but rather constitute the development of principles and values contained therein, especially the promotion of public health and the rights of children, adolescents and pregnant women. Along these lines, the Judgment stated that *"it is an important international instrument to avoid and counteract the devastating consequences of tobacco consumption, especially for health and the environment. In this sense, it is in line with Articles 9, 226 and 227 of the Constitution, which provisions guide the external policies of the Colombian State.* (…) *The purpose of the Convention, stated in its Article 3, lies in the protection of current and future generations with respect to the health, social, environmental and economic consequences of tobacco consumption and the exposure to smoke and, therefore, develops the principles contained in Articles 49, 78 and 79 of the Constitution. In fact, such norms state the obligation of the State to attend to health and environmental stewardship, in relation to the control of goods and services offered to the community, and the information that must be supplied to the public in their commercialization. It further establishes the liability of the producers of substances that threaten public health. It states the duty of every person to seek complete care for their health and that of their community.* || *The same may be stated of the General Principles and obligations of the States, established in the international instrument in its Articles 4 and 5.* (…) *The principles and obligations generated for the Party States in this Convention protect the right to life of both passive and active smokers, a right which is protected by Article 11 of the Political Charter.* || *Indeed, as established in the preliminary recitals of the bill of Law 1109 of 2006, studies by the World Health Organization have proven that tobacco addiction has brought a reduction in life expectancy. Along these lines, tobacco addiction is a problem of public health, causing a high rate of disability and premature deaths due to chronic, degenerative and irreversible diseases* (…) *Additionally, the Convention seeks to protect children and youths from the addiction caused by tobacco consumption. Articles 44 and 45 of the Constitution are developed along these lines.* (…) *the Convention protects the rights of nonsmokers in terms of their exposure to tobacco, as they are entitled to breathe pure, smoke-free air; protest when tobacco and its derivatives are consumed in places where they are banned; and demand that consumption be ordered to be suspended at such places. These people are also entitled to appear before the competent authority to defend their rights as nonsmokers and request their protection; demand more advertising of the toxic and mortal effects of tobacco and exposure to smoke and inform the competent authority when the norms are infringed, as established by the Convention."*

Additionally, the Court backed the constitutionality of the obligations imposed by the FCTC facing the obligation to impose restrictive measures on the advertising, promotion and sponsorship of tobacco products. In the opinion of the Plenary, these limitations conform to the powers derived from the state intervention in the economy and the authority to regulate the information offered to the consumers about the quality of the goods and services. Furthermore, the measures did not affect the Constitution, as they were compatible with the sovereign decisions of the party State to fully or partially ban the activities in question. Considering the importance of the matter for this decision, the considerations of the Court on the subject matter are transcribed in full.

> **"5.6. Measures relating to the advertising and sponsorship of tobacco**
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> The Convention, in its Articles 10, 11, 12 and 13, encourages the Parties to establish a policy of restriction of the advertising and promotion of tobacco, in accordance with their own constitutional norms.
>
> Regarding the specific matter of the restriction of the advertising of tobacco, case law has established that the market, understood as the development of the processes of production, distribution and consumption of goods and services, is governed by the law of supply and demand. The entrepreneur has full freedom of initiative to choose the instruments it deems suitable and effective to offer or advertise its products, provided they are not an affront to the common good, fundamental rights, the social function of the company, the laws regulating the economic activity, and the information that must be furnished to the public in the commercialization of the products. Such mechanisms include the advertising or publicity of the good or service through the various media.[34]
>
> The Court has nonetheless reiterated that such authority may be limited in pursuit of the protection of "*plausible purposes such as: collective interest, life, health, security and children's rights*". This led the Court to find in favor of the constitutionality of the limitations established against the advertising by radio and television of alcoholic beverages, cigarettes and tobacco, which is solely permitted from eleven o'clock post meridiem until six o'clock ante meridiem the next day, and for cinematographers in the screening of films for adult audiences. In fact, this is in line with the protection of children and youths established in Articles 44 and 45 of the Constitution.
>
> Due to the foregoing, the measures in relation to which the Convention is challenged may be considered constitutionally valid and legitimate, considering also that it recognizes and respects the sovereign decisions of the States in regard to the subject of the full or partial restriction of tobacco advertising."

21. The impact of the international obligations that the FCTC imposes upon the internal legal order is evidenced by recent decisions by the Court, studying principles that, in the development of such treaty, impose conditions on the commercialization of tobacco products. This is the matter addressed in Judgment C-639/10 (Rapporteur Justice: Humberto Antonio Sierra Porto),

[34] See C-560 of 1994, Justice Rapporteur: José Gregorio Hernández Galindo

where this Court found for the constitutionality of Article 3 (partial) of Law 1335 of 2009, which precept establishes the ban against the sale of cigarettes in presentations of less than 10 units, providing for the banning of the sale of individual cigarettes as of two years from the effective date of the law in question.

In this decision, following a detailed presentation on the regulatory powers of the State in the economy, same as the constitutional rights that could be affected by the impact of the consumption of tobacco, in relation to the analysis making express use of the previsions of the FCTC, the Court considered that the prohibition to sale individual cigarettes was a legitimate expression of the powers of the lawmaker to participate at the market, to satisfy purposes relating to the common good. This is especially true when an interest is involved, that is constitutionally plausible and encouraged by the international community, to discourage tobacco consumption due to the effects that it has on the health of the community and for the environment. The Chamber considers that, *"the constitutional possibilities of intervening in the regulation of the market by the State allow taking measures for the sole purpose of discouraging, dissuading or restricting the performance of an activity, when such measures do not extend their effects to the restriction of constitutional rights. The Chamber does not consider it plausible to establish a right consisting of granting privileges to any form of tobacco commercialization, which implies that this aspect may be regulated in such manner as the lawmaker considers fit. And the right that the plaintiff claims is at stake really is not, as it is stressed that the prohibition subject to control does not establish a ban against smoking for anyone of legal age.*[35] || *30.- Whether the prohibition is or not suitable to accomplish the purposes proposed, which according to the preliminary recitals of Law 1335 of 2009 correspond to the desire to prevent and reduce tobacco consumption, as held by the plaintiff, is a matter that has absolutely no constitutional relevance. In other words, if the answer were that the measure is not suitable to the purpose it seeks, this would be a problem of ineffectiveness of the norm and not of unconstitutionality. As there has been no sacrifice of any constitutional rights, as has been explained, than the proportionality trial upon the terms expressed by the plaintiff shall not apply. Additionally, eventual problems of effectiveness of the regulatory provisions are not, in principle, problems with the constitutionality thereof, and much less sufficient grounds for unconstitutionality."*

The Court also opposed the argument sustained by the plaintiff at such time, whereby the establishment of a particular means of commercialization was in reality addressed to establishing a measure of paternalistic profile, incompatible with individual autonomy and the right to the free development of personality. This Court considers that the legislative measure should have been understood in its true sense, i.e., as an instrument imposing conditions

[35] Regarding the prohibition directed to minors, as explained earlier, it derives from another norm, different from the one challenged, and warrants an analysis with regard to the constitutional obligation for special and prevalent protection of minors, which is not the case.

on the commercialization of tobacco, but that did not have the potential of preventing the personal choice of its consumption. In terms of the Judgment, *"the fact that, anti-tobacco policies could respond to paternalistic justifications is not sufficient grounds either, so it is necessary to always consider, with respect to such measures, the possible impact of the right to personal autonomy (Article 16 C.N). This is the case inasmuch as the measure, as repeatedly mentioned, is not directed to the consumption of tobacco, but to a modality of sale thereof. Therefore, the fact that there is a certain moral position with respect to the consumption of tobacco, serving as a basis for justifying the component of measures of the anti-tobacco policies, does not imply that the restrictions directed to events accessory to the behavior subject to the referred moral position are not legitimate. Precisely, as it would be presumed unconstitutional to prohibit a behavior solely because a given sector finds it immoral, then the legitimate right of the State to degrade an activity cannot be exercised through a ban against such activity, but must be accomplished through the legitimate tools it has available, such as the regulation of the economy and the market, among others."*

Comparative law examples of judicial control of legislative measures prohibiting or restricting tobacco advertisements

22. Comparative case law has undertaken the analysis of the constitutionality of legislative measures that, same as those studied at that time, are intended to restricting or even prohibiting commercial advertising directed to tobacco consumption. This is the case of the Judgment proffered on December 12, 2006, in the case of C-380/03, tried by the Justice Court of the European Union. In that case, the Federal Republic of Germany demanded the annulment of Articles 3 and 4 of Directive 2003/33/CE, which establish rules for *(i)* the restriction of tobacco advertising in the press or other print publications to those destined for professionals in the trade in tobacco, banning them for those of other types; and *(ii)* the ban against tobacco advertising on the radio, same as the sponsorship of radio programs by tobacco companies. The main claim made by Germany was that Article 95 CE could not represent sufficient legal grounds for the imposing of such restrictions, inasmuch as a good part of such publications were made and used domestically, which implied that a restriction for the entire European Union would prove disproportionate and beyond regulation of cross-borders trade. The Court did not grant the motion for annulment of the community norm, considering that indeed several of the member States, independently or in compliance with the obligations acquired by subscribing to the FCTC, had limited or completely banned tobacco advertisements. Additionally, as the publications and radio programs did indeed have a cross-borders reach, a norm was needed that would standardize their circulation in the Union, without the national regulations establishing prohibitions to tobacco advertising hindering their dissemination.

To adopt this decision, the Court of Justice considered the validity of the decisions of the member States to limit, or even ban, commercial advertising of tobacco, considering the damaging effects of its consumption and the correlative need to discourage it. To this end, it stated the following:

> *"59. Additionally, it is seen that some member States that have established a ban against advertising tobacco products, have excluded from such ban the items of the foreign press. The fact that such member States have decided to accompany the ban in question with such exception confirms that, at least in its opinion, there are significant exchanges between communities as regards press products.*
> *60. Finally, there was a true risk that new obstacles arise to trade or to the free rendering of services, as a result of the accession by new member States.*
> *61. The same appreciation is necessary with respect to the advertising of tobacco products on radio shows and the services of the information society. Many member States had already adopted legislation in this regard, or were preparing to do so. Considering the increasing awareness of the public in terms of the health hazards of the consumption of tobacco products, it was likely that new obstacles arise to the trade or free rendering of services based on the adoption of new rules which, when reflecting upon such evolution, are intended to discourage, as best possible, the consumption of such products.*
> *62. It is relevant to recall the sixth recital of the Directive, stressing that resorting to the services of the information society as a means of advertising tobacco products is increasingly more frequent, as the consumption and public access to such services increases, and as such services, along with radio casts, which may also be broadcast through the services of the information society, are particularly attractive and of easy access for young consumers.*
> *63. Contrary to what is stated by the plaintiff, tobacco advertising in these two media has a cross-borders aspect that allows companies that make and commercialize tobacco to develop marketing strategies to extend their clientele beyond the member State from which they come.*
> *64. Additionally, it cannot be excluded that, as Article 13 of Directive 89/552 prohibited any form of television advertising of cigarettes and other tobacco products, the disparities existing between the national norms as regards tobacco advertising in the radio programs and in the services of the information society could favor the possible elusion of such prohibition through these two means.*
> *65. The same appreciation may apply to the sponsorship by the tobacco companies of radio programs. On the date of adoption of the Directive, divergences had already arisen or were soon to arise between the domestic norms that could hinder the free rendering of services by depriving the broadcasting organizations established in a member State where a measure of prohibition were effective, as service recipients, of the possibility of relying on the sponsorship of tobacco companies established in another member State, where no such measure had been adopted.*
> *66. These divergences, as stated in recitals one and five of the Directive, also carry an evident risk of there being distortions to competition."* (Emphasis added).

23. Similar debates took place earlier, during the French constitutional control. In fact, in Decision No. 90-283 DC of January 8, 1991,[36] the Constitutional Council decreed, according to the French Constitution, Article 2 of the Law regarding the fight against tobacco addiction and alcoholism, which prohibits all direct or indirect publicity or advertising of alcohol or tobacco products, as well as any free distribution thereof. For the Council, a norm of this nature was in line with the contemporary understanding of the right of ownership, which allows for limitations in its exercise for the protection of the collective interest. Along these lines, a legislative decision of this nature is constitutional, inasmuch as it is based on *(i)* the State powers, also existing in French law, to regulate the advertising of the goods and services; and *(ii)* that a limitation of that nature has direct implications in the guarantee of the *constitutional principle of protection of public health*. Furthermore, it could not be considered that the prohibition affected the freedom of enterprise, inasmuch as such right is also subject to limitations for reasons of collective interest and, in any case, the norm in question does not impose any restrictions on the production, distribution and sale of tobacco resources.

24. Different aspects were studied by the Supreme Court of the United States in the case of *Lorillard v. Relly*[37]. This decision studies the action brought by Lorillard Tobacco Company against the legislation of the State of Massachusetts that prohibited both indoor advertising at less than five feet from the floor, and sales of tobacco within a distance of less than one thousand feet from schools and children playfields. The plaintiff considered this prohibition disproportionate, as it was in breach of the First Amendment on freedom of speech, considering that it was a protected form of commercial speech. The Supreme Court, relying on the decision methodology of the *Central Hudson Test,* concluded that the measure was indeed disproportionate, as it imposed a restriction on the commercial advertising of tobacco and its commercialization, beyond that necessary to satisfy the state public policy of prevention of consumption by minors. In the opinion of the United States constitutional court, *"the regulation that prohibited the indoor advertising at a point of sale, of smokeless cigarettes and cigars, at less than five feet from the floor of a sales establishment located within one thousand feet from a school or children's playfields, has failed in both the third and fourth step in the Central Hudson test. The five-foot rule does not show advancement in the objectives relating to the prevention of the consumption of tobacco products, through the control of the demand through the limitation of the exposure by the youths to advertising. Not all children are less than five feet tall, and those that are, are still able to notice the advertising around them. (...) Moreover, the prohibition does not conform to the objective of directing the restriction of advertising that is directed to children. Although*

[36] Available on the Internet: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1991/90-283-dc/decision-n-90-283-dc-du-08-janvier-1991.8752.html
[37] 533 U.S. 525 (2001)

the lower court considered that the restriction of commercial speech was limited, it did not meet the exception "de minimis" inherent in such restrictions. Therefore, this is not a measure that was designed narrowly to meet the referred objectives."[38]

25. The above judicial decisions allow for the conclusion that in comparative law there is a consensus in terms of the *prima facie* validity of legislative measures that tend to limit, and even ban, the commercial advertising of tobacco products. The common features of the various decisions studied, along these lines, relate to *(i)* the admissibility of such restrictions, by reason of the effects that the consumption of tobacco has for public health; *(ii)* the possibility that restrictions be imposed for reasons of constitutional value, even stringent restrictions, to the freedom of enterprise and the protected scope of commercial speech; and *(iii)* the need to conduct a proportionality trial to determine the validity of the arrangement between means and purposes, with respect to the limitation imposed on tobacco advertising and the discouraging of consumption, especially with respect to those subject to special protection.

Finding on charges brought

Content and scope of challenged norms

26. The first aspect that the Court considers should be analyzed is the content and scope of the challenged provisions, to clearly identify the regulatory provisions from which they derive and that are subject to the constitutionality analysis hereunder.

26.1. Article 14 of law 1135/09 offers two different regulatory contents. On the one hand, it bans all individuals and legal entities from promoting tobacco products in the media destined for the general public, such as the radio, television and the movies; and in the various modalities of print press and, in general, in any medium destined for mass communication. This broadness of the ban derives from the use of the expression *"or similar media"*, which shows the unequivocal intention of the lawmaker to extend the ban against promoting tobacco products to any instrument directed to transmitting information to the general public.

The second regulatory content of the Article establishes a specific prohibition, regarding cross-borders commercial advertising using television as a means of

[38] Free translation by the Court. It is also necessary to stress that the United States Congress recently adopted the *Family Smoking Prevention and Tobacco Act,* of June 2009. This act confers the States and towns the power to establish statutes and enact resolutions based on the damaging effects of tobacco consumption, consisting of the imposing of specific prohibitions or restrictions of time, place and mode, but not of content, with respect to the advertising or promotion of any tobacco product. (Section 203). It also establishes specific conditions of federal application for the presentation of the packages of tobacco products, with warnings regarding the effects on health caused by their consumption. (Section 204).

broadcast, consisting of ordering the operators of such services to prevent the broadcasting in the country of tobacco products advertising produced abroad.

26.2. Article 15 *ejusdem* regulates a ban specific to a particular type of advertising. It prohibits anyone from establishing outdoor advertising mediums, in their various modalities, for the promotion of tobacco products and their derivatives.

26.3. Article 16 of Law 1395 presents a broad clause, prohibiting *any form of promotion* of tobacco products and their derivatives. The plaintiff and some participants claim that such clause is ambiguous, inasmuch as by the lawmaker not providing a definition of the term *promotion*, a broad formula would be obtained, prohibiting all forms of tobacco advertising. The Court ascertains that although the lawmaker did not define what is to be understood by *promotion*, a study of the international instruments subscribed by Colombia to discourage tobacco consumption offers important facts in this regard, which may well serve as parameters for the interpretation of the precept. As mentioned in the preceding legal grounds, Article 1-c of the WHO Convention for Tobacco Control defines *"tobacco advertising and promotion"* as any form of commercial communication, recommendation or action with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly. Along these lines, it is concluded that the prohibition contained in Article 16 of the Law analyzed must be understood as a broad clause, implying a comprehensive ban on the advertising of tobacco products, upon the terms set out in the FCTC.

This conclusion may even be reaffirmed through a textual analysis of the term. Promotion, according to its idiomatic meaning, refers to the *"series of activities, the objective of which is to make something known or increase sales"*[39], suggesting that the term includes all modalities of advertising message. Therefore, the use by the lawmaker of the term *"any form"* implies that the prohibited behavior includes all its different modalities. This is corroborated, in turn, by analyzing the *Directives for the application of Article 13 (Advertising, promotion and sponsorship of tobacco) of the WHO Framework Convention for Tobacco Control*, adopted by the Conference of the Parties of the FCTC, gathered at the fourth plenary session of November 22, 2008. According to that international document, useful for the interpretation of the norms of the Convention, including those imposing duties upon the signatory States, *"... both the «advertising and promotion of tobacco» and the «sponsorship of tobacco» encompass the promotion of not only certain tobacco products, but also the consumption of tobacco in general, not only the acts, activities and actions with a promotional objective, but also those having or likely to have a promotional effect, and not only direct promotion, but also indirect promotion. Tobacco advertising and promotion are not limited to communications, but also encompass recommendations and actions, which should encompass at least the following categories: a) various*

[39] Diccionario de la Real Academia Española de la Lengua. 22nd edition. 2001.

sales and/or distribution arrangements; 1 b) concealed forms of advertising or promotion, such as the introducing of tobacco products or the consumption of tobacco in the content of various broadcast mediums; c) various forms of association of tobacco products with events or other products; d) promotional packaging and design characteristics of products; and, e) production and distribution of articles such as candy, toys and other products simulating the form of cigarettes or other tobacco products." The Directive further identifies certain examples of sales and/or distribution arrangements, such as incentive plans for retailers, displays at sales points, lotteries, toys, free samples, discounts, contests (whether or not implying the purchase of tobacco products) and promotions as incentives or fidelity plans, such as the delivery of reimbursable coupons to buyers of tobacco products.

In conclusion, the Court considers that the interpretation that best describes the legal sense inherent in the term *promotion* and that which best conforms to the compliance with the international commitments of the Colombian State in terms of tobacco control, is that which considers it the equivalent to a comprehensive ban of the advertising of tobacco products and their derivatives, upon the terms described in the FCTC.

26.4. Finally, Article 17 of Law 1335/09 provides a ban against the sponsorship of cultural and sports events by related companies in the production, commercialization or importing of tobacco products, in cases in which such sponsorship implies the direct or indirect promotion of the consumption of tobacco products and their derivatives.

In this case, we are dealing with the prohibition that tobacco companies sponsor the referred events. The definition of *sponsorship,* although more precise than that of *promotion*, is also defined by the FCTC as any form of contribution to any event, activity or individual with the aim, effect or likely effect of promoting a tobacco product or tobacco use either directly or indirectly. It should be noted that in this case, the Colombian lawmaker adopted a formula that is less restrictive than the international norm, as it prohibited sponsorship solely as regards certain events and when implying a direct or indirect promotion of tobacco products, which restriction in any case encompasses a significant number of social activities.

It is also important to stress that the precept extends the prohibition to the sponsorship for both the direct and indirect promotion of tobacco products. Regarding the scope of these two types of promotion, once again we must look to the content of the Directive in question, which states that *"promotional effects, both direct and direct, may be the result of the use of words, drawings, images, sounds and colors, including the names of brands, trade names, logos, or names of manufacturers or importers of tobacco and colors or combinations of colors associated with products, manufacturers or importers of tobacco, or of the use of one or more words, drawings, images or colors. The promotion of the tobacco companies themselves (sometimes known*

as enterprise promotion) is a form of promotion of tobacco products or of the consumption thereof, although no names of brands or commercial names are presented. Advertising, including the display and the sponsorship of smoking accessories, such as paper or filters for cigarettes or cigarette rolling equipment, and imitations of tobacco products, may also have the effect of promoting tobacco products or their consumption." In short, for the purposes of the expression analyzed, direct advertising shall be considered to be that which promotes the consumption of tobacco products in themselves considered to be […]. Indirect advertising, on the other hand, is that which, in spite of not promoting the consumption of the product, has the effect of influencing the consumer for its acquisition.

Constitutionality of the comprehensive ban on the advertising of tobacco products and their derivatives

27. As the challenged legislative measures establish prohibitions on advertising and other actions directed to the promotion for the consumption of tobacco products and their derivatives, the control of the constitutionality of these norms is limited to verifying *(i)* whether the measure complies with the conditions required of the policies of intervention of the State in the economy; and *(ii)* whether that same policy responds to criteria of reasonability and proportionality, requiring the application of a minor trial, inasmuch as it is a measure of state intervention in the economy, as explained in the case law synthesis set out in legal grounds 5 of this Judgment. The Court turns to conduct such analyses.

28. The challenged measures are set out in a law of the Republic, crediting the first of the requirements inherent in the expressions of intervention by the State in the economy. Second, it is necessary to determine whether the challenged norms disavow the essential core of the freedom of enterprise. Along these lines, the first thing that needs to be stressed is that both the Constitution and the case law of this Court have characterized these economic freedoms as the power that an individual or legal entity has to *(i)* advance an entrepreneurial effort, consisting of the ordering of certain production means and factors, to create a good or service; and *(ii)* act at the marketplace for the purpose of commercial trade of the same good or service, in conditions of equality and free competition. In other words, the performance of a productive effort and the possibility of competing at the market to sell the product or service are the two activities making up the essential core of the freedom of enterprise, which cannot be affected *prima facie* by a legislative measure without clashing with the rules conforming what has come to be known as the *Economic Constitution.*

It is clear that the challenged norms merely impose prohibitions of behaviors directed to the *promotion* for the consumption of a group of given goods (tobacco products and their derivatives), without having the potential of affecting the manufacture of such products, or the possibility that they be

placed at the disposal of the consumer. Therefore, it cannot be concluded that the measure of prohibition of the advertising of tobacco products and the sponsorship of cultural and sporting events by the tobacco companies in itself affects their freedom of enterprise. This is irrespective of whether or not it may be considered a disproportionate measure, which is a matter forming part of the second stage of analysis, in accordance with the methodology described above.

The measure of a comprehensive ban, in the opinion of the Court, is based on grounds that are adequate and sufficient to justify such limitation. In fact, several sections of this decision show that there is an overall consensus regarding the serious consequences that the consumption of tobacco implies for the health of the people, both users and *passive smokers,* and for the environment. That consensus has served as grounds for international instruments such as the FCTC to establish obligations for the States, tending to control and discourage tobacco consumption. On the other hand, there is no doubt that the message, as an instrument directed to persuading the individual to adopt a decision in terms of their particular consumption, is an element of particular importance for the promotion of the use of tobacco products.

The nexus between advertising and tobacco consumption is described sufficiently by the Guideline for the application of Article 13 of the FCTC. According to that document, such relation is explained by the fact that it has been duly documented that the advertising, promotion and sponsorship of tobacco increase its consumption and that comprehensive bans on advertising, promotion and sponsorship reduce such consumption. Consequently, the imposing of intense restrictions on such activities is a measure suitable for accomplishing the constitutionally-binding purpose of the State of guaranteeing the health of the inhabitants and the environment (Article 49 C.P.) in this case by discouraging the consumption of tobacco products.

The ban against the advertising and promotion of tobacco products and the stringent limitation on sponsorship by companies producing them is an expression of the principle of solidarity. The undeniable restriction of the economic freedoms implied by the bans in question is intended to meet social objectives of first order such as the conservation of public health and of the environment. The legal framework, as explained, allows the production and commercialization of a product that is intrinsically hazardous to physical integrity and to the environment, but strongly restricts the possibility that its consumption be promoted directly or indirectly. The sole purpose of this is to discourage (but not prohibit) its use and, thereby, reduce the enormous social costs derived from the diseases and other damaging effects derived from tobacco consumption. Regarding this matter, it is necessary to insist that this social cost is increased by the nature of the illnesses associated with tobacco consumption, which is a statistically-appreciable cause of mortality, as was well documented by several of the participants in this process. Assuming the categories offered by comparative constitutional law, there is in the case of the

ban against the advertising, promotion and sponsorship of tobacco, both a substantial interest by the State, relating to the assurance of the highest level of public health and environmental stewardship, and a link between the purpose sought and the measure imposed. The latter being in the understanding that the activities in question have as a common objective encouraging the consumption of tobacco products and their derivatives, which is why their limitation and prohibition would aid in the reduction of such consumption.

29. Finally, the measure of economic intervention must pass a minor proportionality test, which is based on determining, on the one hand, if the purpose sought and the means used are not constitutionally prohibited, and on the other, whether the means of choice is suitable to accomplish the proposed objective.[40] It further ratifies the conclusion that the trial of proportionality shall be of minor intensity and the fact that in the case in point there is no evidence of the existence of discrimination based on constitutionally inadmissible grounds, and there is no unfavorable impact on subjects of special constitutional protection, nor does it establish a privilege, nor does it have a direct and serious impact on the enjoyment of fundamental rights, all conditions that the case law of the Court has recognized as warranting a strict proportionality trial.[41]

29.1. It has been stated that the purpose sought by the lawmaker for prohibiting the advertising, promotion and sponsorship of tobacco products is to guarantee public health and the environment, which objectives are not only compatible with the Political Charter but constitute true state obligations as they precede the effectiveness of the fundamental rights of the associates, such as life, health and physical integrity, along with other guarantees of a collective nature, such as enjoying a healthy environment.

29.2. The means used by the legislative measure in question are in turn not prohibited by the Constitution. In fact, there is no mandate in the Political Charter preventing the State from prohibiting the advertising of a certain product. As indicated in this decision, the economic freedoms encompass the powers of production and commercialization of goods and services, within the limits of the common good (Article 333 C.P.), without the norms of the economic Constitution preventing restrictions on the commercial advertising of lawfully-sold products. Along these lines, as recognized by the Court in Judgment C-010/00, cited above, it is even valid for the lawmaker to decide that certain productive segment must be set up as a passive market, in which the State allows the production and sale of the good or service, but at the same time exercises measures to discourage its consumption. The Court does not deny, according to the arguments described in legal grounds 8 of this Judgment, that advertising is a first-order factor to achieve success in the

[40] A comprehensive and recent synthesis of the matter is found in judgment C-354/09 (Justice Rapporteur: Gabriel Eduardo Mendoza Martelo).
[41] See Constitutional Court, judgment C-673/01 (Justice Rapporteur: Manuel José Cepeda Espinosa).

commercialization of goods and services and that, accordingly, it forms part of the guarantees protected by the economic freedoms, which is why its limitation cannot be generated at the whim of the lawmaker, but must be founded in the accomplishment of objective and relevant purposes. Such recognition, nonetheless, does not imply that commercial advertising cannot be restricted or even prohibited, provided there are sufficient constitutionally relevant grounds for reaching a legislative decision of that order. This in turn implies that the degree of restriction of commercial advertising admissible is directly proportional with the level of impact on goods of constitutional value. In the case in point, the admissibility of the full prohibition of advertising and promotion, and the broad restriction of sponsorship, are explained through the *devastating* effects – as characterized by the World Health Organization – caused by the consumption of tobacco products. It is only facing an impact of this nature, involving the high social costs referred to earlier, that a prohibition such as that studied is valid from a constitutional viewpoint.

The suitability of the measure with the proposed purpose shall also be confirmed based on the interpretation of the rules of international law applicable to the matter, which stated that the most effective manner of dissuading the consumption of tobacco is a comprehensive ban on the various modalities of the advertising message. In accordance with the Directive for the application of Article 13 of the FCTC, *"an effective prohibition of the advertising, promotion and sponsorship of tobacco, as recognized in paragraphs 1 and 2 of Article 13, the Parties to the Convention, must be comprehensive and apply to all forms of advertising, promotion and sponsorship."*

29.3. Finally, there is an objective and veritable relation between means and purposes. The purpose of the commercial advertising of the tobacco products is to affect the consumption decisions of the people, so that they will choose to regularly acquire and use such goods. Along these lines, as indicated, the comprehensive ban of these acts of advertising and promotion, and the intensive restriction of sponsorship, inures in the reduction of such consumption.

Along these lines, the Chamber finds it relevant to clarify that, considering the conditions of the minor proportionality trial of the measures of State intervention in the economy, the relation between means and purposes must be proven plausible or reasonable, without it being necessary to prove, based on factual data, that the objective is accomplished. In the case analyzed, both the participants and the recitals supporting the FCTC coincide in affirming that there is a link between the ban in question and the reduction of tobacco consumption indices. These verifications, in the opinion of the Court, are sufficient to pass this suitability trial. According to the considerations set out in this section, the challenged norms are therefore not unconstitutional.

30. Notwithstanding this conclusion, the Chamber also stresses that the constitutionality of the legislative measures may be validly subject to several questionings, which must be undertaken by the Court. First of all, it may be said that the measure of prohibition of the advertising of tobacco products, by seeking to discourage their consumption, is a paternalistic measure, contrary to individual autonomy, represented in the power that Colombian adults would have to acquire and consume tobacco products. Therefore, the instruments established in the challenged norms would disproportionately affect the free development of the personality of such consumers.

This Chamber considers that this objection is based on regulatory content not present in the challenged norms. In fact, for it to be concluded that the framework has established a paternalistic measure, it must impose upon the individual a *duty of self-care*, i.e., the exercise of a will consisting of an action or omission, tending to satisfy a good deemed valuable for the same individual, which duties this Court has considered *prima facie* not to conflict with the Political Charter.[42] It is clear that the challenged norms did not impose any measure of protection of the interests of the persons themselves, as the prohibition of advertising, promotion and sponsorship of tobacco does not prevent people of legal age from acquiring and consuming tobacco, nor does it impose barriers or conditions for access to such products. It has been said in this Judgment that the legislative decision in question is limited to the promotion of the product, but not to its production and commercialization, which continue to be admitted by the framework. Therefore, the question based on the presumptive impact of individual autonomy is unfounded.

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[42] See Constitutional Court, judgment C-309/97 (Justice Rapporteur: Alejandro Martínez Caballero). In this decision, the Court found that the norm imposing penalties on the drivers of automotive vehicles for not wearing a seatbelt was not unconstitutional. In this regard, the Chamber stated that *"these policies of protection of the interests of the person itself, which are constitutionally admissible, are denominated by some sectors of the ethical philosophy as "paternalism", a designation that this Court, in accordance with its case law, does not adopt, inasmuch as although in the ethical theory the expression "paternalism" may be afforded a rigorous meaning, in day-to-day language, it carries inevitable pejorative semantic implications, as it tends to imply that citizens are minors that are not sure of their interests, which is why the State would be authorized to fully run their lives. That is why this Court had already warned that by the benevolent path of paternalism it is possible to arrive at the denial of individual freedoms, as it would be instating a State that is "protective of its citizens, knowing better than they do what is best for their own interests, and making mandatory what for a free person would be optional". For this reason, this Court considers that it better suits constitutional values to denominate these policies as measures of protection of the interests of the persons themselves or, in short, measures of protection, inasmuch as by reason thereof, the State, respecting the autonomy of the people (CP Article 16), seeks to accomplish the purposes of protection indicated by the Charter itself (CP Article 2). In fact, these protective measures, some of which have express constitutional embodiment, such as mandatory basic education (CP Article 67), the vested nature of social security (CP Article 48), or parenting rights (CP Article 42), are constitutionally legitimate in a State founded on human dignity, inasmuch as in the end, they also seek to protect the very autonomy of the individual. For instance, mandatory basic education clearly seeks to strengthen the options of the person when reaching adult age.* || *These policies of protection are also based on the fact that the Constitution, although deeply respectful of personal autonomy, is not neutral in relation to certain interests, which are not only fundamental rights, which the person is invested with, but are also values of the legal framework, guiding the intervention of the authorities and granting them specific powers. This is particularly clear in relation to life, health, physical integrity and education, which the Constitution not only recognizes as rights of the person (CP Articles 11, 12, 49 and 67) but also incorporates as values that the legal framework seeks to protect and maximize, upholding them in their entirety."*

31. Another group of objections to the constitutionality of the challenged measures relates to the position defended by the plaintiff and some participants, in the sense that the comprehensive ban against tobacco advertising would affect the degree of constitutional recognition of advertising as speech, encompassed by the freedoms of information and speech. The central argument of the criticism[43] is that the information contained in the commercial advertising of tobacco is closely related with the rights of the consumer, upon the terms of Article 78 C.P., regarding the obligation that the market provide the necessary information on the quality of the goods and services. Therefore, an absence of all advertising would preclude the consumers of a lawful product from accessing the information necessary to sufficiently research their consumption decisions, thus violating the constitutional principle on the subject matter.

To resolve this objection, the Court must remember how commercial advertising, upon the terms described in legal grounds 8, is expressed on an informative plain and on a persuasive plain. The first has constitutional recognition by reason of its ties to the protection of consumer rights and, in a restrictive and exceptional manner, due to the freedom of speech and information. The persuasive content of an advertising message is exclusively an expression of economic freedoms and therefore may be limited, even quite stringently, provided the requirements supporting the validity of the policies of State intervention in the economy are met.

Tobacco products and their derivatives have a particular characteristic distinguishing them from other goods and services competing at the market: they are intrinsically hazardous to the health of those consuming them and to the environment. This explains both the legitimacy of the State measures which, as in the case in point, form part of a passive market therefor, such as the possibility of imposing strong restrictions, to the degree of prohibition, with respect to the advertising messages destined for promoting such consumption.

This trial carries an obvious question: so what is the informative content of the commercial advertising of tobacco that is subject to constitutional recognition, due to its relation to the rights of the consumers? The answer to this question must be based on the previous consideration, whereby tobacco products are intrinsically hazardous, so the information that must be given constitutional recognition is that informing the potential consumer of the damages implied by the use of that substance. Along these lines, the Court finds that the lawmaker, in conformity with the international commitments derived from the

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[43] This questioning is also well documented in the academic area. Along these lines, for instance, there are those who consider that the application of the *Central Hudson Test* with respect to the ban against the advertising of tobacco products would lead to the unconstitutionality of the measure, as the need for the consumers to have access to the information would be protected by the freedom of speech clause. *See* BASSUK, Gregory D. "Advertising Rights and Industry Fights: A Constitutional Analysis of Tobacco Advertising Restrictions in a Federal Legislative Settlement of Tobacco Industry Litigation" *85 The Georgetown Law Journal 1996-1997* (715-749)

FCTC, was especially meticulous in the definition of instruments directed to informing the consumer of the risks incurred by consuming tobacco products.

Law 1335/09, for instance, incorporates the State duty of establishing an anti-tobacco public health policy with specific obligations of education and prevention of consumption, at both the national and territorial level (Article 5 et seq.). It is also provides strict and specific […] on the packaging and labeling of tobacco products, which provide for *(i)* the prohibition that the product be directed to minors or be especially attractive to them; *(ii)* that the act of smoking not be linked to success in athletics or sports, popularity and professional or sexual success; *(ii)* the prohibition that the labeling use expressions suggesting that the product causes less damage, such as *light, mild,* smooth, or low in tar and carbon monoxide; and *(iii)* the requirement that the presentations of such goods warn of their hazardous effects. (Article 13). It also grants the Government the authority to request cigarette manufacturers or importers to inform of the ingredients added to the tobacco, same as the levels of smoke components corresponding to levels of tar, nicotine and carbon monoxide.

Consequently, in the case in point it cannot be inferred that commercial speech has been affected, in its informative aspect, by the comprehensive ban against its advertising and promotion. Quite the opposite, there is a clear will of the lawmaker to maximize the measures so that the potential tobacco consumer may be duly informed of the qualities of the product and, especially, the consequences of its acquisition and use. Therefore, the objection raised does not question the constitutionality of the challenged articles.

32. A new objection stemmed from the text of the action, this time relating to the decision adopted at such time and its alleged disregard for case law rules established the Court in Judgment C-524/95, whereby a legal norm limiting the advertising of tobacco products is enforceable, provided it does not incorporate a comprehensive ban, as that would disregard the essential core of freedom of enterprise. On this topic, the Chamber warns that the interpretation made by the plaintiff of the cited finding is mistaken, inasmuch as it assumes the existence of case law rules on aspects that were clearly not addressed by the Court. As explained in legal grounds 17 of this finding, this Court considered that the legislative measure studied at the time did not imply a disproportionate limitation to the freedom of enterprise, inasmuch as, in reality, the precept did not establish any material limitation to the broadcasting of the advertising message, but rather merely assigned to an administrative authority the regulation of the times for broadcasting of advertising for tobacco products on the media. With regard to this matter, the Court stated the following:

> "By the challenged precept establishing that broadcasting stations, television programmers and cinematographers may solely transmit publicity for alcoholic beverages, cigarettes and tobacco during the times and with the intensity indicated by the Stupefacients Council, upon hearing from its Technical

> Advisory Committee, could it be inferred as an affront to the right to information and the ban against censoring the media? The answer is no, inasmuch as the lawmaker is empowered by the very constitutional canon that the plaintiff has claimed to have been violated, i.e., Article 78 of the Constitution, and has the power to state the information that is to be furnished to the public in the commercialization of goods and services, which must necessarily include advertising or publicity of such products, which translates into protection and guarantees for the consumers of the products or users of the services offered.
>
> It should further be noted that the challenged norm does not prevent the dissemination of publicity through the media therein mentioned, but conditions their broadcast to the times determined by the National Stupefacients Council, for plausible purposes, such as: the general interest, life, health, safety and children's rights. For these purposes, it is necessary to bear in mind that the respective regulation of the Council in question (Resolution 03/95), solely permits the transmission by radio and television of publicity for alcoholic beverages, cigarette and tobacco between eleven o'clock pm and six o'clock am the next day, and cinematographers in the screening of movies for adult audiences, and that law 124 of 1994 prohibits the sale of intoxicating beverages to minors."

From the transcribed section it is necessary to infer that the Court, in Judgment C-524/95, concluded that *(i)* the lawmaker is constitutionally empowered to regulate the advertising of tobacco products; and *(ii)* that the norm did not have the scope that it is sought to be attributed, as a ban against such commercial advertising cannot be inferred from the norm. This means that the particular legal problem consisting of the constitutionality of the comprehensive ban against the advertising of tobacco products and their derivatives was not a matter expressly studied and resolved upon by the Court. This matter is indeed analyzed in depth in this decision, based on not only the prior judgments of the Court, which have studied analogous matters, but also facing the international commitments assumed by Colombia in terms of tobacco control, which have relied on such decision as guidance in the interpretation of the legal norms subject to constitutionality control. Consequently, the objection for the alleged disregard of case law rules does not preclude the constitutionality of such norms either.

33. A third objection is raised by some of the participants, who have questioned the enforceability of Article 14 based on the argument that the ban against the issue in Colombia of audiovisual commercials produced abroad that promote tobacco products, is incompatible with the legal regulation preventing cable and satellite television operators from participating in the foreign programming broadcast in the country. Censorship of this nature is inappropriate in this process, as it is based on the presumed contradiction between two provisions of the same legal status, which dispute is completely extraneous to the abstract constitutionality control, founded in the comparison between the legal norms and the Constitution. Along these lines, it would be necessary to harmonize the practical application of the legal norms imposed

by the system for the transmission of satellite and pay TV, with the precepts subject to analysis in this decision.

34. Finally, the constitutionality of the challenged precepts could be questioned based on the argument proposed by Mr. Cáceres Corrales, whereby the measure of legislative prohibition is disproportionate, as it is limited to a particular group of products and is not extended to others, such as the consumption of certain elements that may cause cardiovascular damage or to alcoholic beverages. Along these lines, it is suffice to note that the measure of State intervention in the economy forms part of the broad margin of legislative configuration, which is why Congress must decide in which fields and to what matters such intervention is to be directed, as the constitutional jurisdiction is charged with evaluating whether such instruments meet the conditions described in this order for the validity of norms of such nature, but not to replace the activity of the lawmaker, in the sense of identifying and regulating any other matters which must be subject to regulation, limitation or restriction. Additionally, in the particular case posed, the lawmaker based the decision on the need to meet the obligations assumed by the Colombian State as a result of the subscription of the FCTC, which duties have been set out in full in various parts of this Judgment.

Conclusion

35. Articles 14, 15, 16 and 17 of Law 1335/09, studied harmoniously, allow concluding that the lawmaker, planned for a comprehensive ban on the advertising and promotion of tobacco consumption, and the restriction on the sponsorship of cultural and sporting events, when the objective is the direct and indirect advertising of tobacco products and their derivatives. These measures are compatible with the freedom of enterprise and free private initiative, as the lawmaker may impose restrictions, including up to prohibition, on commercial advertising, when there are compelling reasons to render measures of such nature proportional. In the case analyzed, there is an overall consensus in terms of the intrinsically-hazardous nature of tobacco products and their derivatives, considering the certain, objective and veritable damage that it causes to the health of its consumers and *second-hand smokers*, as well as to the environment. This verification, in addition to the fact that the legal prohibition in question, *(i)* does not affect the essential core of the economic freedoms, as it is compatible with the production and commercialization of tobacco products and their derivatives; *(ii)* preserves the right of the consumers to know about the effects and consequences of the consumption of such goods; and *(iii)* develops commitments subscribed by the Colombian State in matters of tobacco control; together allow concluding that the analyzed norms do not breach the aforementioned freedoms.

VII. DECISION

By reason of the foregoing, the Constitutional Court, administering justice on behalf of the People and by mandate of the Constitution,

RESOLVES:

To declare **ENFORCEABLE**, upon the charges analyzed, Articles 14, 15, 16 and 17 of Law 1335 of 2009 *"provisions by which harm to the health of minors and the non-smoking population is prevented and public policies stipulated for the prevention of tobacco use and smoker"s cessation of dependence on tobacco and its derivatives among the Colombian people"*

Be it notified, communicated, published, inserted in the Gazette of the Constitutional Court, carried out and the docket filed.

MAURICIO GONZÁLEZ CUERVO
President

MARÍA VICTORIA CALLE CORREA
Justice

JUAN CARLOS HENAO PÉREZ
Justice

GABRIEL EDUARDO MENDOZA MARTELO
Justice

JORGE IVÁN PALACIO PALACIO
Justice

NILSON PINILLA PINILLA
Justice

JORGE IGNACIO PRETELT CHALJUB
Justice

HUMBERTO ANTONIO SIERRA PORTO
Justice

LUIS ERNESTO VARGAS SILVA
Justice (P)

MARTHA VICTORIA SÁCHICA MÉNDEZ
General Secretary
Judgment C-830/10