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

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.

[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**
>
> 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