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Gentlemen

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Subject: Definitive answer – Exception or Authorization of Promotional Games
for the promotion of tobacco
Initial locator – 20132160285032
Coltabaco Answer Locator 20132160401591

Esteemed Sirs,

Having analyzed your response to the request to hold the Coljuegos games, we hereby inform you that the Company shall abstain from continuing to grant instances of [exceptions] or authorizations to hold promotional games in your distribution channels, the purpose of which is to increase sales of tobacco, in application of the express prohibition established in Article 16 of Law 1335 of 2009.

The arguments for such determination that take as a reference the concept delivered by the consultant Rodrigo Escobar Gil S.A.S. are as follows:

- Pursuant to Judgment C-830 of 2010, upon studying the constitutionality of Article 16 of Law 1335 of 2009, the Constitutional Court stated that the prohibition “*of any form of promotion*” must be interpreted **in accordance with the international instruments ratified by Colombia concerning discouragement of tobacco consumption.**
- The interpretation of the term “promotion” according to the framework of definitions contained in the “**Framework Convention for Tobacco Control of the World Health Organization**” (the instrument that defines *advertising* and *promotion*) refers to **any form of communication, recommendation or commercial action that seeks directly or indirectly to encourage the use of tobacco and its derivatives.**
- The foregoing definition finds support in the considerations of the Court on the

- definition of promotion, the highest constitutional court in judgment in question stated: *“ that despite the fact that legislation does not define how promotion should be understood, the study of the international instruments signed by Colombia regarding the discouragement of tobacco consumption offers important specific indications on this point that can serve well as parameters for the interpretation of the precept. As indicated in the foregoing juridical assessment, **Article 1 – c of the Framework Convention on Tobacco Control of the World Health Organization defines the “advertising and promotion of tobacco” as any kind of communication, recommendation or commercial action with the purpose, effect or possible effect of directly or indirectly promoting a tobacco product or the use of tobacco.** In this light it is concluded that the prohibition contained in Article 16 of the Law under analysis must be construed as a broad clause that implies the complete prohibition of advertising for tobacco products, in the terms encompassed by the FCTC.”* (underlining and bold not in the text)
- From an analysis of the international instrument entitled “Guidelines for the implementation of Article 13 (Advertising, promotion and sponsorship of tobacco) from the “Framework Convention on Tobacco Control of the WHO,” it can be deduced that promotion also encompasses those activities that might possibly have as their purpose the indirect promotion of tobacco and products derived from it, as is the case for arrangements through sales and distribution outlets, and on this point the aforementioned jurisprudence specifies:

“According to this international document, useful for the interpretation of the standards of the Convention, among them those that impose responsibilities on the Signatory States, “...both “tobacco advertising and promotion” and “tobacco sponsorship” cover promotion not only of particular tobacco products but also of tobacco use generally; not only acts with a promotional aim but also acts that have a promotional effect or are likely to have a promotional effect; and not only direct promotion but also indirect promotion. “Tobacco advertising and promotion” is not restricted to “communications”, but also includes “recommendations” and “actions”, which should cover at least the following categories: (a) various sales and/or distribution arrangements¹; (b) hidden forms of advertising or promotion, such as insertion of tobacco products or tobacco use in various media contents; (c) association of tobacco products with events or with other products in various ways; (d) promotional packaging and product design features; and (e) production and distribution of items such as sweets and toys or other products that resemble cigarettes or other tobacco products.” (underlining and bold not in the text)

- The appropriate interpretation of the article is thus that which entails prohibition of arrangements for sale or distribution, as is the case with plans for incentives for retailers, and in general, the prohibition of any kind of promotion or advertising with respect to encouragement of this substance:

“The Guideline, for its part, identifies certain examples of arrangements for sale and/or distribution, such as incentive plans for retailers, display at points of sale, lotteries, gifts, free samples, discounts, contests (whether

or not they entail the purchase of tobacco products) and promotions along the lines of incentives or customer loyalty plans, for example, the issue of redeemable coupons to buyers of tobacco products.

In conclusion, the Court considers **that the interpretation that best describes the actual legal meaning of the term 'promotion' that is most in keeping with the fulfillment of the international commitments of the Colombian State with regard to tobacco control, is to consider it as equivalent to the total prohibition of advertising for tobacco products and derivatives, pursuant to the terms set forth in the FCTC.**" (underlining and bold not in the text)

In the appendix entitled *Indicative (non-exhaustive) list of forms of tobacco advertising, promotion and sponsorship within the terms of the Convention* of the guidelines for the implementation of the Framework Convention on Tobacco Control of the World Health Organization, a series of practices are noted that are considered to be promotion of tobacco in light of the principles set forth in the Convention, as is the case for **payments or other contributions to retailers to encourage or induce them to sell products, including retailer incentive programmes (e.g. rewards to retailers for achieving certain sales volumes).**¹

- Thus, it is noted that in the international instrument in question there is listed by way of illustration a series of activities relating to the promotion of tobacco, expressly indicating contributions to retailers to induce an increase in sales of the products, although, since it is not an exhaustive list, it does not imply what other kinds of activities relating to incentives for this product might be construed as promotion or advertising.
- Accordingly, international instruments ratified by Colombia concerning the prevention of tobacco consumption are clear in indicating that not only is the advertising that companies that produce, distribute and sell tobacco directly engage in a form of promotion of the product, but so is any activity that directly or indirectly relates to such encouragement, whether in phases of commercialization or directly aimed at promoting consumption.
- Taking into account the jurisprudence of the Constitutional Court on the matter, it is concluded that the appropriate interpretation of the prohibition contained in Article 16 of Law 1335 of 2009 is that which harmonizes with the principles and aims enshrined in the international instruments concerning the prevention of tobacco use.
- The nature of the promotional games is **to promote products and services**, in this light, these games clearly fall within the broad definition that the jurisprudence of the Constitutional Court has established on the prohibition of the promotion of tobacco.

¹ http://www.who.int/fctc/guidelines/article_13_es.pdf

- The exception adduced by the tobacco companies that have filed applications with Coljuegos,² for the purpose of establishing instances of exceptions for the execution of promotional games, is that established in Article 5 of Law 643 of 2001, which states: *Excluded from the scope of this law (...) are promotional raffles conducted by the local operators of games, **businessmen or industrial executives to stimulate their sales.***”
- With regard to this exception, the Constitutional Court, upon reviewing its applicability, stated:

*“Promotions conducted by businessmen or industrial executives are not for the purpose of engaging in a game of chance or fortune of a professional nature, **but rather to create a usually sporadic or occasional stimulus as a strategy to stimulate their sales;** this purpose is not unreasonable if it is borne in mind that the principal aim is for businessmen to increase their cash flow, spur business development and the creation of employment both directly and indirectly.”*
- Thus it is clear that the applications for granting an exception that have been filed with Coljuegos have the purpose **of increasing sales of tobacco** through promotional **raffles at distribution outlets**, it being **clearly a promotion of tobacco**, which conduct is contrary to the prohibition established in Law 1335 of 2009.

On the basis of Article 16 of Law 1335 of 2009, the Framework Convention on Tobacco Control of the World Health Organization and the guidelines adopted by the States for its interpretation, the Colombian legal system shall not authorize promotional games or grant exceptions to tobacco companies for the promotion of tobacco and its derivatives.

With regard to the proposal sent on January 27, 2014, Coljuegos takes the following position:

- The interpretation of the company that you consulted does not take into consideration the legislation on games of chance and fortune in Colombia and focuses its interpretation on instruments and jurisprudence that do not have any bearing on Colombia. It is recalled that by the express provision of Article 15 of Law 153 of 1887, *“All Spanish laws are abolished,”* and it is the purpose of the State in accordance with Article 2 of the Political Constitution of Colombia *“to defend national independence.”*
- It does not take into consideration the Vienna Convention on the law of treaties of 1969 which states:

*"SECTION THREE**Interpretation of treaties.*

31. General rule of interpretation. 1. A treaty should be interpreted in good faith in accordance with the common meaning that is to be attributed to the terms of the treaty in the context thereof, and bearing in mind their purpose and aim.

2. For purposes of interpretation of a treaty, the context shall encompass, in addition to the text, including its preamble and attachments:

a) any agreement to which the treaty refers and has been arrived at by all the parties for the purpose of executing the treaty:

b) any instrument formulated by one or more of the parties for the purpose of executing the treaty and accepted by the rest as an instrument having to do with the treaty;

3. In addition to the context, the following must also be taken into account:

a) any separate agreement among the parties concerning the interpretation of the treaty or the implementation of its provisions:

b) any practice separately followed in the implementation of the treaty that records an agreement of the parties concerning the interpretation of the treaty;

c) any relevant instance of international law applicable to relations between the parties.

4. A term shall be given a special meaning if it is recorded that this was the intention of the parties."

As can be seen at the website of the Framework Convention on Tobacco Control of the WHO (http://www.who.int/fctc/guidelines/adopted/article_13/es/), the guidelines on advertising, promotion and sponsorship of tobacco were approved by the parties to the treaty, for which reason they constitute a valid standard for its interpretation.

- It omits, and it is not known whether this is intentional, the doctrine of the Constitutional Court, which in studying this precept established as follows:

"26.3 Article 16 of Law 1395 [sic] presents a broad clause that prohibits all kinds of promotion of tobacco products and derivatives. The plaintiff and some of the parties taking part affirm that this clause is ambiguous, considering that because the law does not offer a stipulative definition regarding the concept of promotion, it would arrive at a broad formula that would prohibit all expressions of advertising for tobacco. The Court observes that despite the fact that the law does not define what should be understood to be promotion, the study of the international instruments signed by Colombia regarding disincentives for the consumption of tobacco offers key clarifications of this concept, which could well serve as parameters for interpretation of the precept. As was indicated in a prior legal premise, Article 1-c of the Framework Convention on Tobacco Control of the WHO defines "advertising and promotion of tobacco" as any kind of communication, recommendation or commercial action for the purpose, effect or possible effect of directly or indirectly promoting a tobacco product or the use of tobacco. In this light, it is concluded that the prohibition contained in Article 16 of the Law under consideration

must be understood as a broad clause that implies total prohibition of advertising for tobacco products, in the terms encompassed by the FCTC.

*Moreover, this conclusion can be reaffirmed through a textual analysis of the concept. Promotion, according to its idiomatically accepted sense, refers to the “set of activities whose purpose it is to make something known or to increase its sales” [39], from which it can be inferred that the concept extends to different forms of advertising message. Therefore, the use by the law of the phrase “any kind” implies that these different forms are included within the prohibited conduct. This is corroborated, in turn, from the analysis of the Guidelines for the implementation of Article 13 (Advertising, promotion and sponsorship of tobacco) of the Framework Convention on Tobacco Control of the WHO, adopted by the Conference of the Parties of the FCTC, assembled at the 4th plenary session on November 22, 2008. According to this international document, useful for the interpretation of the standards of the Convention, among them those that impose duties on the signatory States, “...both “tobacco advertising and promotion” and “tobacco sponsorship” cover promotion not only of particular tobacco products but also of tobacco use generally; not only acts with a promotional aim but also acts that have a promotional effect or are likely to have a promotional effect; and not only direct promotion **but also indirect promotion**. “Tobacco advertising and promotion” is not restricted to “communications”, but also includes “recommendations” and “actions”, which should cover at least the following categories: **(a) various sales and/or distribution arrangements**¹; (b) hidden forms of advertising or promotion, such as insertion of tobacco products or tobacco use in various media contents; (c) association of tobacco products with events or with other products in various ways; (d) promotional packaging and product design features; and (e) production and distribution of items such as sweets and toys or other products that resemble cigarettes or other tobacco products.” In turn, the Guideline identifies some examples of sales and/or distribution arrangements, such as plans with incentives for retailers, display at points of sale, lotteries, gifts, free samples, discounts, contests (whether or not they entail the purchase of tobacco products) and promotions along the lines of incentives or customer loyalty plans, for example, the issue of redeemable coupons to buyers of tobacco products.”*

- It is not restricting the possibility of competing in the marketplace, of manufacturing or of commercializing products. This erroneous assessment demonstrates an ignorance of the actual regimen for games of chance and fortune and their scope, inasmuch as Coljuegos has no authority to regulate the market for tobacco or its production or distribution, **a separate issue is the approval and/or exception of promotional games of a national character**, which is indeed the **sole and exclusive authority of Coljuegos**, which it **exercises through this decision**.

- The Company considers that it is not violating the regimen of competency, inasmuch as it is deciding over a matter involving the **authorities that have been legally granted to it**,³ and it is not going to grant exceptions or authorizations for **promotional games** to all tobacco companies that may request it hereinafter, since these games are a promotion of tobacco, which is legally prohibited.

It is reiterated that it is not necessary to adduce interpretations or legislation that do not have any legal value in Colombia, when their meaning is understood from a reading of the law, and the highest constitutional court has taken a position on the matter, in the case analyzed in this decision, establishing that the prohibition of promotion of Law 1335 of 2009 is broad, and the guidelines on advertising, promotion and sponsorship of tobacco of the WHO can be used to interpret it, all the more so when, according to the Vienna Convention on the Law of Treaties, that instrument is one of the sources for valid interpretation.

Very truly yours,

[illegible signature]

CRISTINA ARANGO OLAYA

President

Coljuegos

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³ See Article 31 of Law 643 of 2001, and Decree 493 of 2001