

**SENIOR CONFERENCE**  
**CAMILO ALFONSO ESCOBAR MORA ©, Ph.D.**

**Title:** *The preventive law for the legal effectiveness of consumer rights face to advertising in electronic commerce*©.

**Description:** begins with the presentation of the main normative aspects that are consecrated on this subject. Subsequently, the legal criteria for the validity of advertising are specified. Finally, it is stated that tailor-made advertising increases the level of effectiveness of their rights and generates a scheme of collective achievement (where the company wins by retaining more customers, the consumer being protected and enjoying their rights and the State in general when complying with the public order that is established in this matter); environment of harmony of rights and duties that is obtained through the proposed preventive law —that is, the generation of permanent validity, with the consequent increase (or, better, obtaining) of legal effectiveness—.

**Objectives:** to raise awareness about the way in which consumer law applies in relation to e-commerce advertising and good preventive law practices that must be implemented for effective compliance.

**Profile of the lecturer:** Lawyer graduated from the Universidad del Rosario (Bogotá D.C., Colombia). Specialist (Master) in Law and Information Technologies, Universidad del Rosario. Specialist (Master) in Telecommunications Law, Universidad del Rosario. Master (LL.M.) in Commercial Law, Universidad Externado de Colombia. Master Thesis©: *Expert System for Consumer Protection in Electronic Commerce*. Doctor (Ph.D.) in Law, Universidad Externado de Colombia. Doctoral Thesis©: *The Preventive Law for the Legal Effectiveness of Consumer Rights face to Advertising in Electronic Commerce*. It created a Particular Concept of Preventive Law, both at General and Special Level for Information and Communication Technologies (ICT's). Postdoctoral Fellow in *Premises of Preventive Law in the Consumer Tailor-Made Advertising in the Electronic Commerce*©. He held a Doctoral Research Stay at the Institute of Legal Research of the National Autonomous University of Mexico (UNAM). Professor of Postgraduate Studies at the Universities of Rosario, Externado de Colombia, Javeriana de Cali, La Sabana and Caldas. Doctrant, Trainer and International Lecturer. Founder of JURIDIA - Online Courses on Preventive Law for Information and Communication Technologies, ICT's ([www.juridia.co](http://www.juridia.co)). Full profile at: <http://juridia.co/our-team/camilo-alfonso-escobar-mora/>

**Trajectory of the lecturer:** in this link you can see some illustrative videos of the training that has taught: <http://juridia.co/contenidos-gratuitos/> Likewise, in these links is related part of the doctrine that has elaborated on the subject (in addition, an illustrative text of the conference is annexed —only for illustrative purposes, it is not a license nor a cession of copyright—):

- <http://juridia.co/tesis-doctoral-fundador/>
- <http://juridia.co/reflections-on-the-legal-effectiveness-of-consumer-rights-face-to-advertising-in-electronic-commerce/>

**Duration:** 4 hours (includes a half hour break).

**Integral logistics:** must be assumed by your organization.

**Memories:** the presentation of the conference is presented in .pdf format, under a specific use license for academic purposes. Also those interested in the subject can consult the doctoral thesis of the lecturer in the following link: <http://juridia.co/tesis-doctoral-fundador/>.

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Cordially,

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**ANNEXES:**

1. Article: *REFLECTIONS ON THE LEGAL EFFECTIVENESS OF CONSUMER RIGHTS FACE TO ADVERTISING IN ELECTRONIC COMMERCE*. Written by the lecturer.

## **REFLECTIONS ON THE LEGAL EFFECTIVENESS OF CONSUMER RIGHTS FACE TO ADVERTISING IN ELECTRONIC COMMERCE©**

**By Camilo Alfonso ESCOBAR MORA, Ph.D.  
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Communication is the transmission of information, while information is any kind of message (from a legal perspective). The duty consists that information is presented under a correct communicative form, according to the variables of each case; otherwise the receiver will not adequately understand the message and the presentation of information will be a simple formalism that materially will lack a positive and valid effect. This is decisive for the validity of advertising and the effectiveness of the right of the consumer to receive adequate information in relation to such message.

This paper presents a preventive law approach to the consumer to have a valid advertising in electronic commerce and at the same time enjoy their rights to sufficient, truthful and timely information in relation to this kind of messages. It has as reference to Colombia but it is extendable to any Democratic Rule of Law. It begins with the presentation of the main normative aspects that are enshrined in the Consumer Statute on this subject. Subsequently, the legal criteria for the validity of advertising are specified. Finally, it is stated that tailor-made advertising increases the level of effectiveness of their rights and generates a scheme of collective achievement (where the company wins by retaining more customers, the consumer being protected and enjoying their rights and the State in general when complying with the public order that is established in this matter); environment of harmony of rights and duties that is obtained through preventive law —that is, the generation of permanent validity, with the consequent increase of legal effectiveness—.

Paragraphs 12 and 13 of article 5 of Law 1480 of 2011 (Consumer Statute, Colombia) provide the following definitions, respectively: *"Advertising: Any form and content of communication that has as purpose to influence the decisions of consumption; Misleading*

*advertising: The one whose message does not correspond to reality or is insufficient, in a way that induces or can induce error, deception or confusion". In turn, Article 29 states: "The objective and specific conditions announced in advertising oblige the advertiser, in the terms of such advertising". In addition, article 30 states: "Misleading advertising is prohibited. The advertiser will be responsible for the damages caused by misleading advertising".*

Finally, article 61 indicates the (administrative) sanctions that can be imposed for the violation of consumer protection rules, which are: *"1. Fines up to two thousand (2,000) minimum monthly legal wages in force at the time of the imposition of the sanction. 2. Temporary closure of the business establishment for up to 180 days. 3. In the event of a repeat offense and taking into account the seriousness of the faults, definitive closure of the business establishment or the final withdrawal order of a web page portal on the Internet or the means of electronic commerce used. 4. Temporary or definitive prohibition of producing, distributing or offering to the public certain products. The producer may request the competent authority to withdraw this sanction prior demonstration that it has introduced to the production process the modifications that ensure compliance with the conditions of quality and suitability. 5. Order the destruction of a particular product, which is detrimental to the health and safety of consumers. 6. Successive fines up to one thousand (1,000) legal minimum monthly salaries in force, for nonobservance of orders or instructions while in default. When it is verified that the administrators, directors, legal representatives, tax examiners, partners, owners or other natural persons have authorized or executed behaviors contrary to the norms contained in this law, they may be fined up to three hundred (300) minimum salaries Legal monthly in force at the time of the imposition of the sanction and the prohibition of exercising the trade for up to five (5) years, counted from the execution of the sanction".*

With this scenario, companies have to develop effective mechanisms to ensure that their advertising is valid for consumers. The general concept of such validity is that advertising is not misleading. However, more than this, advertising must be generated that fulfills — with adequate communicative capacity— the information criteria, form and substance, that

contemplate the general and special rules that are applicable in each case (for example, if it is an advertising of health products must comply with the provisions of the National Drug and Food Surveillance Institute, INVIMA for its acronym in Spanish, and other entities in this sector, in addition to the ordinary guidelines established in the consumer statute and in the general premises of business diligence enshrined in the Commercial Code and the Civil Code).

At this point the complexity that exists in determining the legal validity of advertising is emphasized. WITTGENSTEIN points out in his work *"On Certainty"* (p.12c, Gedisa editorial, reprint of the year 2015): *"With the truth of my statements it is proved that I understand those statements. That is, if I make some kind of false statements it is not clear that I understand them. What is to be considered as sufficient proof of a statement belonging to logic. It belongs to the description of the language game. The truth of some empirical propositions belongs to our system of reference"*.

The above serves as a basis for establishing the character of validity —more than truth— and within this the level of deception, which may possess advertising, however the following questions arise: Who establishes the reference system? For who is it established? These factors do not have an explicit response by the written rules of law. However, although from the point of view of language there are multiple reference systems —based on various realistic or conventionalist worldviews—, at the normative level, positive law —approached in an integral and harmonious way— is the reference system for determining validity of the messages between a sender and a receiver (the problem is that in multiple situations the connotations and denotations of their content may be diverse —by vagueness or by ambiguity, especially—).

For the particular subject, the consumer protection regime involves duties of information by the entrepreneur and for the benefit of this privileged subject (the consumer). In the face of how to attend to them, the company is free to determine and use the reference system (communicative) that it considers most successful in each case. Such liberality has as limit of validity respect for the premises of discretion —make decisions that do not increase,

without just cause, the levels of risk allowed or that do not generate or increase threats of harm that are predictable in a specific context— and the prohibition of incursion into arbitrariness —disregard for the rights of others—; aspects that are established based on the criteria that govern the diligence that the company has in charge, including that which ensures the fulfillment of such duties of information.

Therefore, what is relevant is that their advertising messages have validity and provide legal effectiveness to the rights of the consumer, an aspect that will depend on the type of advertising, if it is in the abstract (e.g. A message where a recognized artist is consuming the product that is sought to promote with advertising) should only comply with the ordinary and special duties of information applicable to it whereas if it is an advertisement presented in the form of a commercial offer (e.g. An advertisement that establishes in detail the conditions of acquisition of a good or service) must fulfill both these duties and the particular duties of the offer in question.

Then, as previously stated, it is more than a matter of validity in advertising, which is detected in each individual case —that is to say, it depends on the legal pragmatics and on the integral, transversal and systematic basis of the positive law—. This validity is achieved by harmonizing the sources of public order —as well as incidental, ie accidental, if so agreed and favorable for the weak subject of the respective legal relationship— that are applicable in each specific case. If the above is achieved, validity is obtained, and, consequently, legal effectiveness. That is the concept of preventive law that is promoted in this writing.

That is to say, what is decisive is that the model of legal foundation (detection, systematization, conceptualization, interpretation, argumentation, instrumentalization and application of the binding norms) of advertising is suitable. Model that materializes in the message that is sent to the consumer. This aspect is measured according to the level of harmony that the message generates between the rights and duties that are applicable in each situation (by mandate of public order sources or by acts of the parties) to the company and its stakeholders (consumers, workers, allies, suppliers, impact community, etc.). This

harmony is verified according to the effectiveness of all the rights and duties present in the specific case.

Definitely, the company has a large margin of freedom over the communicative reference system of its advertising (which in digital media is instrumented in the so-called technological neutrality, ie the ability to choose one or another technique, procedure, service, platform, infrastructure, technology, etc., since all are recognized, are not restricted—except for special cases— and are subject to the law), but the determining factor is that such a system ensures at least compliance with the rules and principles that contemplate the positive law for the respective kind of advertising that will be made. Finally, the aim is to establish and harmonize the content and scope of business freedom in advertising when it is developed within consumer relations (ie relations between a company and a consumer); since in these cases it should generate legal effectiveness to the rights that the consumer has face to these kinds of messages.

This leads to a vision of empathy in advertising, it is to think for the consumer, the company cannot argue that its advertising is valid because it subjectively considers it—or because it is based on an abstract concept of average consumer—. Everything will depend on the communicative ability and agreement of the objective language that advertising establishes with the consumer, thus allowing a greater degree of legal certainty in this field. Therefore, it is crucial to establish the multiple subsystems of consumer profiles that will receive the message (from the most abstract, such as ages, the devices they use, the level of digital literacy, the language they handle, trade preferences, class gender—man or woman—, location, budget, etc., to the most concrete, such as obtaining information on the specific need of a particular consumer). Of course, the consumer has the duty to collaborate by providing complete and truthful data to make this profile ideal. However, it is the company that must establish what types of data it collects and for what treatments and purposes it will do, here it is a responsibility and direct diligence of the company—if it does not collect data for the profiling of the receivers, consumers, prior to the issuance of the message must respond by an unjustified increase in the level of risk allowed on advertising, since they increase the possibilities of ambiguity or vagueness in the

interpretation of the message, generating a greater degree of responsibility for the company; it is a liability for omission—.

At this point, tailor-made advertising in e-commerce becomes relevant. To generate a valid communicative system it is necessary to have clarity on the aspects that govern the validity of the message that will be projected to the consumer as well as on the specific profile of this subject. In this way, the company will have greater elements of judgment and will increase the objective premises for the generation and communication of its advertising. Now, the profiling of a consumer can be considered as an immediate consequence of the violation of his right to privacy in the sense in which his private or semi-private personal information will be known; because the public personal data does not require the authorization of its owner to be able to be used, the important thing is to determine the purpose for which it is public since they only have that character for that focus, in the other uses if it will have to have the endorsement of the person.

It is worth indicating that the validity of the advertising to the measure depends on the validity in the treatment of the personal data of the consumer. Therefore, from its collection to the other strategic treatments that are carried out to issue the consumer the most personalized advertising possible —the more accurate the better—, the premises (conditions) *sine qua non* that are enshrined in the rules of protection of personal data — such as obtaining the prior, express and informed consent of the data subject to be subsequently entitled to perform treatments on them, proportional determination of the principle of necessity to avoid collecting data that are excessive and unprofitable with direct advertising , and to count the adequate levels of security of the information in the environments where they are present or related such data—, under penalty of entering into the field of illegality.

It is important to note that the general legal norm for the protection of personal data in Colombia is Law 1581 of 2012, which applies unless there is a special rule (as is the case of Law 1266 of 2008 with respect to reports of personal information in central of risk, among other assumptions where it is binding); without prejudice to the fact that even in those events the framework legislation may become effective if it becomes more favorable —

provided that there is no greater legal interest— in a specific situation, the validity of which depends on legal compliance with the rules and principles (norms) of the positive law of the country or countries involved.

Therefore, if these criteria are met in an integral and transversal way, the consumer will have an added value in relation to the advertising that is sent by the companies with whom he has established a direct link, while the company will operate validly from the beginning. Current e-commerce has multiple possibilities to achieve this (an example is business intelligence supported in digital tools that perform robust data management to achieve effective services, ie efficient and effective —as is the case of a data mining contemporary popularly called "*Big Data*"—); the key is to begin to implement and create true experiences of enjoyment of law in consumer relations in the field of advertising, which is one of the first direct meetings between the company and the consumer —as in any other topic where compliance with legal norms is achieved in a preventive, appropriate and innovative way through artificial intelligence ecosystems, whose background is human—.

This can be done through expert systems. An expert legal system, of artificial intelligence, is a robust digital tool that allows self-regulation of the law that is applicable to a human relationship. It is structured based on the model of legal foundation that is designed and included in its operating algorithms, its operational structure is fed back with the experience, allowing its base of facts and knowledge to increase gradually and, consequently, its capacity to solve problems (situations between the parties) to avoid, manage or mitigate the risks and threats of damages and thus have a high level of validity and legal effectiveness, in a preventive way.

It is important to note that the background of these expert systems is legal —formal and material—, their management model is carried out by humans —a tangible and anthropocentric analogical dimension—, that act both in the back office (aspect not visible by the consumer. E.g. administrative offices) and the front office (interacting directly with the consumer. E.g. the contact center), and the communicative structure face the consumer can be digital —digital content— or mixed —content or digital

functions and messages or analogical performances—, if they are projected or given elements in atoms—that is, analog inputs— (how could it be that a sales man might rely on an expert system to indicate which type of shoe should show an individualized profile of potential buyer, and subsequently show the product directly to the particular consumer).

In this way, the confidence, security, harmony, legitimacy, efficiency and effectiveness of the legal system (and public order) can be increased, thus overcoming some disenchantment of the State self-regulation model (tridivision of powers and special entities) based on the concept of the public function as a cardinal structure of custody of effectiveness (many of its mechanisms are ineffective. E.g. The judicial function does not have short-term procedures to protect the rights of a consumer who has been injured by an international agent in electronic commerce). We are all the State and of all depends the (timely) fulfillment of the right.

It is even possible that tailor-made advertising is an added value of the companies if it communicates beyond what the basic duties of information enshrined in the binding legal rules establish (e.g. Advertising that even simulates the experience of using the product in the specific profile of the consumer that is interacting with the digital system), further increasing the level of validity of advertising and the degree of legal effectiveness of consumer rights.

If all this is accomplished, through the legal self-regulation of each of the variables that are involved and the projection of a valid advertising in each specific case, a collective achievement scheme is obtained (where the company earns by retaining more customers, the consumer to be protected and the State in general when complying with the public order that is established in this matter); environment of harmony of rights and duties that is obtained through the concept of preventive law proposed here: to generate validity at all times and, consequently, legal effectiveness.

The determinant thing is that the system of tailor-made advertising is valid, otherwise the whole thing will be fallacious and the problem is not solved (it can even increase). For that

reason, the premises of legal validity of the measure advertising, and the effects of effectiveness on the rights of the consumer that it generates, have to be established in each case through instruments of preventive law —such as the acceptance of the platform of consumer tailor-made advertising (through the creation and publication of instruments of preventive law to be known and accepted validly by the consumer. E.g. 1) Terms and conditions of use; 2) Software license agreement and its annexes, such as: service level agreement, SLA (including the legal matters of the information security), user manual, product description, technical product description and graph of the geographic, functional and sectorial field of action of the product; and 3) A personal data treatment policy with the foundations for the collection, use and interpretation of consumer data), the business diligence criteria in the design, implementation and issuance of advertising, and the axioms and theorems for the harmonization of civil law and common law in order to achieve the validity and efficacy of consumers and companies of different legal system—.