# Due process and the reform of Colombia's Competition Law Regime

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## I. Judicial decisions make for excellent gossip

On April 10, 2019, Colombia's Constitutional Court announced a decision regarding due process and the administrative investigations ("Dawn Raids") conducted by institutions that investigate violations regarding consumer law and transnational fraud. The press release for the decision stated that the institutions in charge of conducting such investigations have to ask a judge for authorization before performing unannounced visits and seizing equipment and information that is, according to the law, subject to legal reserve.[2] The full content of the decision has not been published yet, but the decision has caused considerable speculation across Colombia's competition law community.

Colombian practitioners and academics have complained for years about the way the competition authority — the *Superintendencia de Industria y Comercio*, or "SIC" — demands access to the corporate offices of investigated parties and seizes information stored in electronic equipment. According to the prevailing interpretation of SIC's faculties as established in the law, this institution can conduct administrative visits without any judicial oversight, and can seize information found in parties' equipment without a judicial order. Technically, the institution is not allowed to seize the information without consent of the owners of the equipment in which it is stored (as opposed to criminal prosecutors, who can do so). However, SIC can impose hefty fines on those individuals who refuse to collaborate willingly, hence compelling their consent. The current debate is precisely about the lack of judicial oversight when exercising these functions.

Since all that is available of the Constitutional Court's decision is a press release, practitioners, former members of SIC, and even the director of SIC himself are discussing the nuances of the Court's decision. Practitioners and academics (including this author) celebrate the decision, since we understand that it will limit how SIC conducts its functions.[3] This position contrasts starkly with that of the current and former directors of SIC, for whom this decision may unduly limit the ability of this institution to conduct its investigations.[4]

## II. Scratching the surface: Due Process in Colombia's Competition Law

The discussions concerning due process in Colombia's competition law regime prompted by the decision announced by the Constitutional Court are only the tip of the iceberg. There are other important issues regarding the design, performance, and overall legitimacy of this competition law regime that should be addressed. We consider here only those that are related to due process.

To begin with, Colombia's competition law regime revolves around public enforcement activities undertaken by SIC, with very little private enforcement activity. When Congress enacted Law 155 of 1959, most of which continues to be applicable, private and public enforcement were on equal footing. However, there is no evidence that private enforcement activities took place during the first decades of this law. Later amendments to Law 155 of 1959 created doubts as to whether private enforcement was even possible; it was only with the adoption of class

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[2] The press release can be found here: http://www.corteconstitucional.gov.co/comunicados/No.%2011%20comunicado%2010%20de%20abril%20de%202019.pdf. (Visited on April 24, 2019).

[3] See for example Gabriel Ibarra "El exsuperintendente Robledo y la Corte Constitucional" Diario La Republica – Asuntos legales, April 22, 2019. Available at https://www.asuntoslegales.com.co/analisis/gabriel-ibarra-pardo-558821/el-exsuperintendente-robledo-y-la-corte-constitucional-2853597. (Visited on April 24, 2019).

[4] Regarding the current director of SIC, see Andrés Barreto "Herejías jurisprudenciales." Diario Portafolio, April 23, 2019. Available at https://www.portafolio.co/opinion/otros-columnistas-1/herejias-jurisprudenciales-columnista-528850. (Visited on April 24, 2019). Regarding the position of the former director of SIC, see Pablo Felipe Robledo, "'Superintendencias no pueden dar aviso de sus inspecciones': Pablo Felipe Robledo." Newspaper El Espectador, April 12, 2019. Available at https://www.elespectador.com/noticias/judicial/superintendencias-no-pueden-dar-aviso-de-sus-inspecciones-pablo-felipe-robledo-articulo-850230. (Visited on April 24, 2019).

actions and other related figures in 1998 that private enforcement efforts have taken place. To my knowledge, there is no record showing that any of these efforts have led to a damages being awarded to the plaintiffs.

Over time SIC has done very little to improve private enforcement or to strengthen the position of consumers in the competition law regime. In spite of the fact that the protection of consumer welfare is an explicit goal of Colombia's public enforcement activities (as stated in article 2 of Decree 2153 of 1992), consumers are not a "protected class." Consumers do not have standing to participate in the administrative investigations undergone by SIC, they are not entitled to any portion of the fines imposed by this institution, and the fines themselves are not conceived as damages awards relating to the harm caused by the investigated parties.

As a result, due process considerations bear mostly on the administrative investigations undertaken by SIC and, specifically, on the particular evidence-gathering faculties it has for conducting said investigations. In Colombia there are several administrative institutions that by law have the power to ask individuals and corporations for documents, and they do so on a regular basis in order to comply with their legal mandates. Institutions like SIC can also conduct administrative visits in order to check by themselves how well said individuals and corporations have complied with the law. However, it is unclear that when these faculties were first given to SIC through Decree 149 of 1976, they were meant to be exercised as this institution currently does — to conduct surprise raids and seize information (or risk a hefty fine). Furthermore, it is also unclear that later reiterations of these faculties established in more contemporary decrees — the latest being from 2011 — should be read as being exempt from the guarantees established in the Colombian Constitution of 1991.

The underlying reason why this is so problematic has to do with the administrative process that SIC follows when conducting an investigation. Article 52 of Decree 2153 establishes the procedure that SIC has to follow when conducting an investigation for potential violations of competition law. The faculties discussed above are mainly exercised during the initial stages of an investigation, but are not limited to these stages, there being no statutory text that explicitly states so. In practice, SIC grounds its decisions based on information that is disclosed to the investigated parties during the formal stages of the investigation, and that they have had the opportunity to contradict.

The administrative process established in article 52 of Decree 2153 of 1992 is prone to confirmation biases resulting from its design. The bias first results from the fact that SIC officials conduct investigations and, later on, decide based on their findings whether the conducts observed amount to violations of the law. Furthermore, SIC's final decisions are not subject to appeal, and so there is no official or administrative institution that may independently revise substantive and procedural aspects of SIC's decisions. The investigated parties can challenge SIC's decision before the administrative courts; however, the process before these courts may take a decade or so, which makes judicial oversight of SIC decisions largely ineffective.

## III. Conclusion: Time For A Change.

Important amendments to Colombia's competition law regime are long overdue. Besides the due process considerations mentioned above, it is certainly time to consider amending other aspects, such as how to improve the role of consumers. However, due process considerations are just as good as any starting point to think about how the reforms should take place.

There are many premises that could guide the design of the faculties of competition law enforcement authorities and, overall, the investigations conducted by such institutions from the perspective of due process. One of these premises is fashioned after John Rawls's "veil of ignorance"; it considers that any individual or corporation should be willing to accept the decisions reached by the competition enforcer, if and when said institution rigorously follows the procedure established in the law. Such an acceptance depends, crucially, on the faculties exercised by the competition enforcer being viewed as legitimate and adequate by any individual before they are investigated. One way to materialize this premise is by establishing an explicit bill of rights of the investigated

parties in the law, and granting their rights to the standard of protection used in other jurisdictions (including human rights jurisdictions established by international treatises). Given the importance that due process rights have in the Colombian Constitution of 1991, such a premise could be fashioned into legal mandates that follow the jurisprudence of the Constitutional Court on this matter.

Perhaps the Constitutional Court's decision that sparked this debate about the faculties of SIC will also contribute to a larger overhaul of Colombia's competition law regime. Amendments to this regime are long overdue, and they should reflect our best understanding about the interaction between due process rights, the roles of competition enforcement institutions, and the goals of competition law regimes. Due process considerations should lead to a wider discussion about the design of SIC itself. In particular, it enables discussions about the desirability of making prosecutors and adjudicators (within SIC) separate and independent from each other, or whether such a process should include the possibility of being challenged on appeal. There is also considerable room to learn from the experiences of other jurisdictions in all of these issues. This author certainly hopes so, and is looking forward to how this discussion evolves.