Due process and The Reform of Colombia's Competition Law Regime (II)

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I. Gossiping is wrong!

In a previous column published here at CPI, I discussed a press release issued by Colombia´s Constitutional Court regarding the constitutionality of a series of provisions regarding surprise visits and evidence collection. During the press release, which took place on April 10, 2019, the President of the Court stated that the administrative institutions in charge of conducting such visits and collecting evidence had to follow strictly the procedures established in the codes of civil and administrative procedure. This announcement was well received by the local competition law community, in spite of the fact that the provisions that were challenged were not explicitly about competition law. This author expected that the Court´s decision would narrow considerably the scope of the challenged provisions and thus how the competition law enforcer, the *Superintendencia de Industria y Comercio* (hereinafter SIC) carries out its functions; however, as is often the case when gossiping about judicial decisions, we were wrong.

II. Decision C-165 of 2019.

The Court´s decision, published officially on June 6 of 2019 as decision C-165 of 2019, establishes the constitutionality of a series of legal provisions regarding surprise visits ("dawn raids") and evidence collection in matters regarding consumer protection and transnational fraud.[1] In general, the challenged provisions stated i) that the administrative institutions could collect any evidence without delimiting how this could take place, ii) that the surprise visits could take place without notifying the investigated party and without *ex ante* judicial oversight, iii) that the evidence collected could include documents that are subject to reserve, and iv) that resisting an investigation and the collection of evidence is a conduct that merits a fine.

The Court established the constitutionality of the challenged provisions by arguing that these must be interpreted in light of the general rules of evidence and procedures established in the Civil and Administrative codes. Under this interpretation, (i) the administrative institutions were bound by the Code of Civil Procedure regarding both the types of evidence it can collect and the process for doing so. It also stated that investigated parties could challenge the evidence collected *ex post* as per the general rules applicable to the investigations conducted by the referred institutions. As to surprise visits (ii), the Court stated that the law did not require that these had to be subject to any judicial oversight and, in turn, that this followed from the legal regulation of these proceedings. Also, the Court distinguished between the domicile of an individual, which is considered unbreachable, and the domicile of a corporation, which can be subject to surprise visits given the nature of the commercial acts that take place in it. Regarding the documents considered under reserve (iii), the Court considered that both the Political Constitution of 1991 and the law allowed for administrative institutions like SIC to collect documents that would be otherwise reserved from public knowledge, as long as doing so was related to their functions and the documents themselves were directly related with the activities being investigated. This distinction enabled the Court to draw the line between information that is personal from information that is part of the regular commercial affairs of individuals and corporations; only the latter are admissible for the sort of investigations carried out by institutions like SIC. Finally, the Court also stated that it was constitutional to fine an individual or a corporation that resisted a visit or the collection of evidence; however, it also established that it was lawful to resist this when such collection was done without adhering strictly to the law.

Hence, the Court´s decision basically upheld the provisions that were challenged. The Court did emphasize, though, that the collection of evidence carried by administrative institutions like SIC, such as unannounced visits,

[1] The decision can be found here: http://www.corteconstitucional.gov.co/relatoria/2019/C-165-19.htm.

must have clear and precise objectives directly related with its functions and should not become "fishing expeditions" where authorities simply collect anything that calls their attention. Just as well, the information that can be collected as evidence has to be related to the commercial activities investigated and must not include aspects unrelated to such activities or involving personal affairs. This would prevent administrative institutions from collecting personal conversations stored in the same electronic equipment that contains professional or commercial information, or from copying all the information stored in such equipment.

III. The Aftermath – Or How a Constitutional Decision Fails to Settle a Legal Issue

As expected, decision C-165 of 2019 was taken as a legal victory by former members of SIC, who view the decision as a statement of support for their activities when they worked for this institution. However, the victory is far from being complete. The lawyers who expected a different outcome do celebrate that the Court emphasized the importance of stating that all administrative institution that conduct surprise visits and collect evidence without judicial supervision are not free to exercise these prerogatives in any way they see fit. Because each side can claim a win, the discussion between the different camps has not waned; on the contrary, members of both camps have turned to the media to celebrate their own interpretation of the decision. The discussion has gained so much traction that the President of the Constitutional Court had to issue a statement asking the discussants to stop spreading inaccurate opinions about the original press release and the formal decision as published.[2]

In this author´s view, the Court´s decision fails to properly address the core constitutional issues raised by the claimants. In particular, the Court fails to consider and resolve the tensions that result between the protection of certain constitutional rights *vis a vis* the effectiveness of the State and its administrative institutions. One particular tension is crystal clear: administrative institutions that act without judicial oversight *ex ante* (regarding surprise visits and the collection of evidence, for example) can easily violate individual rights, some of which are fundamental according to the Constitution. From this perspective, the advantage of *ex ante* over *ex post* judicial oversight is that it is meant to filter unlawful acts before they take place; the latter can only redress harms that have already been committed, and even so may be inadequate for such purposes. It is highly dubious that *ex post* judicial oversight is an effective mechanism of the constitutional rights under risk of harm.

The tension mentioned above becomes evident when considering that, in other fields of Colombian law, ex ante judicial control of the evidence requested and practiced is the rule. Such is the case, for example, of judicial inspections of equipment or documents that take place before a formal process has begun. (Articles 183 and 189 of the General Process Code). The use of this figure has become very common. The collection of such evidence must be requested previously before a judge, who in turn will determine if it is appropriate and, in particular, if the facts that are sought to be proved are duly identified, in order to avoid abuses. In some cases, such inspections can be made without notifying the affected party (and therefore without their consent), but never without authorization from the judge. On the other hand, in the case of the administrative visits of the SIC, this entity does not have to request judicial authorization, nor does it have to delimit the facts that it seeks to prove; in fact, it has the power to decide when and in what way its visits take place and the evidence to be collected. Faced with these crucial differences, the Court did not consider why, according to the Constitution, state entities such as the SIC should be subject to fewer controls than the parties in a lawsuit - even in the case of procedures based on the protection of collective rights.

[2] Corte Constitucional, Comunicado de 12 de Junio de 2019. Available at: http://www.corteconstitucional.gov.co/noticia.php?Comunicado-oficial-8740.

Moreover, the Court´s arguments in decision C-165 of 2019 begs the question of the limits the Constitution imposes on administrative institutions. By arguing that the challenged provisions can be upheld if they are interpreted benignly and under the light of other current laws, the Court simply steps aside from considering the substantive constitutional issues raised by the claimants. Moreover, what if the evidence collection instances and the regulation of surprise visits in the law that is meant to harmonize the challenged provisions was meant for scenarios that are quite different to administrative law? And what if the law that is meant to harmonize the challenged provisions is also unconstitutional? The blunder of the Court, in this author´s view, stems from assuming that the referred laws can determine their own constitutionality and that of other laws that are interpreted together. Instead, the Court should have assessed the challenged provisions from a constitutional perspective, and under the light of both their purposes – which are constitutional – and their effects on individual rights – which are much less so. The result of such balancing exercise may (also) turn out to be a decision that upholds the challenged provisions, but that in the process of doing so, may at least establish conditions for the exercise of the prerogatives of SIC contained in said provisions. For example, the Court could determine that surprise visits that are only subject to *ex post* judicial review should be a last recourse, to be used only when it is demonstrable that there are no other ways of collecting evidence that are less intrusive and disruptive (including, for example, leniency filings). The Court´s position ruling should result from balancing constitutional rights, on the one hand, and the faculties of the administration, on the other; Although "surprise" administrative visits are legitimate, what requirements must they meet to not affect the constitutional rights of the parties investigated? By failing to address the issues raised by the claimants directly, the Court missed an opportunity to lay down much needed rules that determine how administrative institutions conduct surprise visits and collect evidence absence *ex ante* judicial oversight.

As suggested in a previous column, this discussion raised by the proper limits of administrative institutions enforcing legal provisions related to competition law hints at the importance of a having a mayor reform of this regime. The issue of the legitimacy is of the uttermost importance: it is highly difficult to trust institutions that carry on procedures that are hardly justifiable, especially when they are upheld via faulty constitutional reasoning. This author hope that new opportunities for change will take place in the near future.