

SECCIÓN II

ARTÍCULOS AUTORES NACIONALES

COLOMBIAN CONSTITUTIONAL JURISPRUDENCE IN COMPETITION: A DANCE WITH AN UNMATCHING COUPLE?

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ABSTRACT

The importance of Competition Law is widely acknowledged. Therefore it is necessary to regulate its applications in Economics. It should then be accepted that there must be some kind of flexibility for these competition norms to adapt themselves to the politics of State, usually dictated by daily situations.

Constitutional commands protect economic freedom, so it is necessary for Constitutional Jurisprudence to play an important role in the determinations related to Competition Law and economics in general.

This document presents an analysis of various Constitutional Court pronouncements over different issues that have dealt with communications (TV legislation), agreements of exclusivity, health security and others.

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RESUMEN

La importancia del derecho de la competencia es ampliamente reconocida, a partir de lo anterior hay que determinar su rol en el sistema económico. Debe reconocerse entonces que las normas de competencia deben ser flexibles para adaptarse a las políticas económicas del Estado dictadas coyunturalmente. Debido a la consagración constitucional de libertad económica, la jurisprudencia constitucional cumple un papel relevante en la determinación de las directrices del derecho de la competencia y las políticas económicas.

El artículo se desarrolla analizando varios pronunciamientos de la Corte Constitucional sobre diferentes temas que se han tratado como los servicios de televisión, contratos de exclusividad, sistema de salud y otros.

Palabras clave: jurisprudencia constitucional, políticas económicas, intervención del Estado, normas constitucionales.

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1. INTRODUCTION

Notwithstanding the broad consensus towards the importance of the competition process, of common sense, one of the biggest challenges structuring this discipline is the determination of the role that competition has to play within the economic system and how it must be performed.

The hardness of such definition can be explained because of the absence of paradigms or dogmatisms. On the contrary, more than one hundred years of experience has demonstrated that these matters are of mutable nature, since they depend very much upon economic policy.

Therefore, it is not odd that some scholars as professor WISH finally had concluded that at the end Competition Law is essentially related to matters of economic importance¹.

Administrative decisions, statutes and regulations but especially judicial rulings play an important role in the construction of the mentioned responses, since at the end high tribunals usually are the bodies that have the last words, fleshing this way the bones of the law.

This paper is dedicated to Colombian constitutional jurisprudence in competition and has the aim to establish and analysing the main trends this tribunal has towards the demarcation of the country's competition policy.

Since this paper is about the analysis of jurisprudence, its first section describes the constitutional cases involving competition decided until 2003. Besides its informative purpose, this section also has an additional intention of giving analysis tools to any other eventual approach any of our readers would like to trial.

Section two will comprises the analysis itself, in which some topics will be discussed as the legal security offered by the case law, the Court's distrust regarding the market, the constitutional perception of the two different approaches towards the market, their constitutional validity, how the current world conceives market oriented economies and the country's convenience of both approaches.

Finally I will offer some concluding remarks both in general and particular terms.

Since I freely translated all the transcriptions of texts in Spanish, I want to apologise in advance if involuntarily I had committed any inaccuracy, which if proper, undoubtedly I will amend.

1 WISH RICHARD, 1989, *Competition Law*, 2nd ed, Butterworths, London, p. 20.

2. SECTION ONE: THE RULINGS

2.1. PRELIMINARY EXPLANATION

According to many scholars, Colombian Competition Law has only been taken seriously since the enactment of the Constitution of 1991 in which the freedom of competition right was expressly established in article 333 then developed by some statutes, principally Decree 2153 of 1992.

Although before the Constitution of 1991 the one of 1886, amended several times, mentioned some of the core principles of economic freedom as private property, freedom of movement, freedom to chose profession and so on, it did not refer expressly freedom of competition as the one of 1991 did.

This is one possible reason why before 1991 Colombian high tribunals –specially the Supreme Court– did not rule anything regarding this matter, in despite that since 1959 there was a statute on Competition Law (Law 155 of 1959).

The 1991 Constitution detached the Supreme Court into two Courts: The Supreme Court with civil, criminal and labour law jurisdiction and the Constitutional Court, which main function is the guard of the supremacy of the Constitution, that is to say, the conformity of all the national legal order with the Constitution. It was also embodied as the tribunal of last resort regarding Tutelage Actions.

Owing into account the mentioned functions, the Court's rulings comprise both constitutionality and tutelage issues. Regarding the latter, it is important to note that although free competition is not considered as an essential right, some of the Court's rulings has been related to economic activities which somewhat tap competition, as it will be observed below.

2.2. CONSTITUTIONAL RULINGS

THRESHOLDS TO FINANCIAL INSTITUTIONS²

This case is related to the constitutionality of articles 3(b)(c)(d), 5, 6 and 18 of law 35 of 1993, which established a series of thresholds to active operations of credit institutions.

The Court upheld the constitutionality of the statute mainly arguing that the Constitution gave the State the function of correcting the weakness and anomalies of markets, a task that to be properly performed needs the enactment of statutes like the one analysed, impeding possible excesses of credit institutions. While they perform a series of activities crucial to the whole economy, the Court considered dangerous allowing credit institutions doing all what they want.

The plaintiff argued the statute's violation of the freedom of competition right but the Court did not agree stating that even though the mentioned right was granted by the Constitution, it supposes a series of responsibilities too, which include limits imposed by statute.

The Court also indicated that its rationale perfectly fitted into the concept of the social-rule-of-law (SROL) system adopted by the Constitution.

OWNERSHIP OF OPEN TELEVISION SERVICES³

Various issues were discussed in this case, all related to Law 182 of 1995 on TV services.

One of them was the ban to individuals to run directly T.V. services. The Court upheld the statute, mainly on grounds of the constitutional clauses on property, management and usage of the electromagnetic spectrum. The Court said that the state has the responsibility to assure its usage in the more rational manner, a task that demands its awareness about technical and professional necessities to perform adequately TV

2 Judgement C-560/94.

3 Judgement C-093/96.

services, which means that artificial persons were more adequate than individuals to grant the state the highest security in the granting of TV services.

Moreover, the Court stated that the limitation did not signify the exclusion of individuals, while they formed them.

Another subject treated was the type of artificial person fitting more precisely with the necessities of open TV services. The Court's conclusion was that only listed corporations were the ones properly qualified, since the more shareholders, the better.

The last issue was related to the transition period in which the State continued running the system, which lasted till 1998, the expiring time of the then current concessions, which to the plaintiff constituted an unauthorised monopoly. The Court's opinion differed, stating that the government's purpose was not the one argued, but to assure an effective transition period to give all the market partakers the right of evenness they merit.

Within its rationale, the Court explained that monopolies were only constitutionally authorised with budgetary or public service purposes, cases in which economic freedom was limited, but if no monopoly is established, economic freedom is the rule, which means that government's faculty to intervene in the economic process also applies even to public enterprises.

UNFAIR CONTRACTS OF EXCLUSIVE SUPPLY⁴

This case, related to Law 256 of 1996 (Unfair Competition Practices) was about the banning of unfair contracts of exclusive supply (Art. 19).

The Court admitted that although the prohibition was in the unfair competition statute it rather belonged to the restrictive commercial practices field because the norm is more related to market issues than to particular interests.

Not every contract of exclusive supply was banned, but only those which aim is to impede competition. A kind of test was proposed to

4 Judgement C-535 of 1997.

detect whether or not a given contract is of unfair nature. It is necessary to analyse the market involved, substitution options, market sharing of competitors, the existence of monopoly or oligopoly power, the effect of the exclusivity clause upon efficiency, market power generated by the exclusivity clause, the effect on prices and the competition degree and other relevant factors.

In this ruling, the Court reaffirmed its thought about the State's faculty to intervene the economy grounded on market failures that ought to be overhauled. In one of its statements she said the following:

‘[...] the crisis of market institutions, the erosion of consumer power, together with the factual importance [of markets] in the contemporary economy, had originated powerful economic intervention tools gave to the state to allow it penalise economic concentrations, abuses and malfunctions that constantly are occurring in such quantity that, the more imperfections, the more government intervention to arrange or compensate them and, in extreme cases, to substitute completely market mechanisms’.

TAXES OF STOCK EXCHANGES AND FIDUCIARY ENTERPRISES⁵

This case was related to Decree 624 of 1989, establishing VAT to fees of fiduciary enterprises while exempting stock exchanges in similar operations.

The Court decided that the challenged measure constituted an unjustified discrimination affecting competition.

In this case the Court analysed the role of Tax Law into competition. To the Court's opinion, Tax Law has the possibility to hinder competition when it establishes differences amongst similar subjects, if not justified or serious reason exist.

5 Judgement C-183 of 1998.

NATURAL GAS TRANSPORT⁶

Law 401 of 1997, created the Coordination Centre of Natural Gas Transportation (CCNGT), organised as a technical unit attached to ECOGAS, a public enterprise entrusted with a series of commercial objectives and regulatory powers related to natural gas business. Notwithstanding the mentioned attachment, the CCNGT was granted with technical independence from ECOGAS.

The CCNGT functions comprise the coordination and operation of the overall national system of gas transportation. To performing its functions, it was authorised to use private pipelines providing that economic agreements must be reached in advance with the owner of the facility.

The Court upheld the constitutionality of the statute, arguing that it created a different system of gas transportation, totally unified with the aim to perform an adequate service for the wellbeing of all the people.

Regarding the usage of private pipelines, the plaintiff argued that this kind of organisation created an unauthorised monopoly. The Court did not agree. To her opinion, such organisation was necessary to properly ordering the national gas transportation system, a choice of regulation that was legally possible because of the scope of the powers gave by the Constitution to the Congress to organise public services. Moreover, the Court argued that private pipelines owners were assured with adequate economic provisions to avoid expropriation risks.

The plaintiff also argued about the insertion of the CCNGT within ECOGAS, because of the privileged situation in relation with the latter competitors. The Court rejected the plea arguing that while such insertion was established assuring technical independence, this limit has the ability to shield the CCNGT against its capture by ECOGAS. The law, hence granted the independence of the CCNGT: *‘[ECOGAS] was not situated in a privileged situation in relation to other transporters of the same product, not even in a supposed dominant position, but in the same level of the others, controlled by the same rules established by a third party and embodied with same opportunities of competition of the other companies which are in the same business’*.

6 Judgement C-532 of 1998.

HEALTH SYSTEM ORGANISATION⁷

This case was related to the constitutionality of some clauses of Law 100 of 1993, the basic legal framework of the nation's public health system.

The mentioned law created various kinds of organisations to perform the different tasks related to the operation of the whole system. Amongst them, there are the EPS⁸ or companies in charge of the administration of health services, which are the only authorised to affiliate customers to be attended by IPS⁹ or health services operators, such as hospitals, health centres and so on. To contract IPSS, EPSS were authorised to supervise and evaluate them.

Since EPSS were allowed to own IPSS, providing that the latter should operate separately from the former, the constitutionality of the statute was challenged but the Court backed the law.

The Court's analysis comprised three features.

The first one was whether EPS' IPS could obtain preferred treatment. The Court's opinion was that the supervision and evaluation faculties of EPSS did not hinder competition, arguing three different reasons. First, EPSS and IPSS ought to operate separately. Second, both EPSS and IPSS were free to establish conditions to contract services and to offer commercial advantages to gain customers and reach the market share they want to obtain. Third, customers were also entitled to choose the EPS and IPS of their choice.

The second one was the supposed preferential treatment EPS could give to their own IPS. To the Court's opinion, the mentioned faculties of supervision and evaluation were not of law enforcement, but only of commercial management nature, with the objective benefit customers.

The third problem was whether the challenged statute granted dominant position to EPS. Since EPS are companies regulated and controlled by government, the Court's opinion was that the law did not

7 Judgement C-616 of 2001.

8 *Empresas Prestadoras de Salud* (Health Management Enterprises).

9 *Instituciones Prestadoras de Salud* (Health Services Enterprises).

grant any dominant position to them. Additionally, antitrust rules established in the health services' legal framework had the function to protect the market from any abuse of this kind.

In this ruling the Court once again reasserted the meaning of the freedom of competition within the Constitution.

The Court said that although before the enactment of the Constitution of 1991 freedom of competition was considered as a right pertaining to the scope of individuals' own will, under the new one such right is different, immersed in the SROL system and melted in a scheme of mixed social economy model.

Freedom of competition in Colombia then is developed within the concept of social market economic system in which the State is an instrument of social justice, which intervenes to redistribute resources and correct social inequalities originated by both particular and collective excesses.

Owing into account the mentioned principles, the Court concluded that in order to preserve superior values, the state could regulate any economic activity introducing exemptions and restrictions without lessening the basic freedoms, which grant the existence of free competition. However, such regulations only can limit economic freedom when it is necessary to protect superior values established in the Constitution and under criteria of reasonability and proportionality.

GOVERNMENT PRINTING OFFICE¹⁰

The challenged statute in this case was article 5 of Law 109 of 1994, which obliged public entities to contract the National Printing Office to their official publications. Printing works made by private business only were allowed in limited exemptions and embodying lots of red tape.

The Court backed the norm arguing that the freedom of competition was not of absolute nature, and that such right should yield to other state interests, like the necessity of adequate flows of information of the

10 Judgement C-1262 of 2000.

state activity, an objective of the utmost hierarchy, since it constitute the main source of legal certainty.

To the Court's opinion, this kind of statute was necessary to assure the fulfillment of the mentioned function of information, rether importante than freedom of competition. The Court also said that at the end the statute did not restrain free competition totally, since public agencies were allowed to contract private business because of the exemptions established in the challenged statute.

COMMERCIAL PROMOTIONS OF FINANCIAL INSTITUTIONS¹¹

Article 20 of law 35 of 1993 banned financial institutions transferring to customers the cost of promotional campaigns and rewards.

The plaintiff argued that such kind of regulation lessened the freedom of competition, an argument rejected by the Court.

To the Court's opinion, freedom of competition ought to be interpreted within the context of the whole Constitution, a matter that the plaintiff did not understand properly. Besides the right to compete, the Constitution also established norms to protect consumers' rights, an interest that needs to be protected in a particular manner when it concerns to the relationship between individuals and financial institutions, since the latter are by large stronger than the former. To the Court, then, the measure not only was justified but reasonable.

By developing its arguments, the Court tackled once again the subject of the principles of the SROL State and in relation with competition stated the following:⁷

[...] freedom of competition cannot be understood as an absolute right, neither as an unbreakable barrier to government interventionism, which ought to be done by statute in the exploitation of natural resources, the usage of the land, the production, distribution, utilization and consumption of goods, which mean undoubted limitations, correctional measures and control to particular initiative. At the end, this is all about the realisation of the state's main objectives, like the promotion of welfare and the granting of the

11 Judgement C-232 of 2000.

effectiveness of principles, rights and duties established in the Constitution's preamble and article 2nd.

To the Court, the proper understanding of the freedom of competition right could be reached in relation to monopolies proscription, since '*concentration quarrels with free markets and economic competition*'.

FOUNDING OF PUBLIC TV¹²

According to article 22 of Law 14 of 1991, 10% of the advertisement budget of decentralised public institutions ought to be spent in to the founding of public television institutions, both at national and regional levels, in accordance to the proportions established in the mentioned article.

The plaintiff's main argument was that private TV businesses broadcasting cultural programs were in an uneven position regarding public TV and therefore they were discriminated in an unjustified manner.

The Court upheld the constitutionality of the challenged statute. According to its opinion, private TV even broadcasting cultural programming were not in the same position of public TV services. The latter functions' are quite distinguishable from the ones of the former, because public services were established to accomplish one of the state's main objectives, which is the promotion of the access and divulgation of culture, particularly national culture. The Court concluded then that the mentioned difference was sufficient to justify the pleaded discrimination.

Once again, the Court explained its position about the meaning of competition, sating the following:

'[although] article 333 [*of the Constitution*] established a generic right of freedom of economic competition, this does not mean that all the issues, which could be related to market ought to be subdued to the dynamic of

12 Judgement C-180 of 2001.

market [*forces*] It is a fact that the state has the freedom to choose whether or not subdue to market [*forces*] issues like the fulfilling of its core functions. Therefore, market [*forces*] not necessarily ought to be applied to cases like this one, in which the Congress, using its discretionary powers [granted by the Constitution] has decided to retain one radio frequency exclusively dedicated to the accomplishment of the State's functions, avoiding the risks that characterises commercial activities, with the objective of the fulfillment of the State's obligations, both at national and international levels, to promote cultural values'.

PERSONAL COMMUNICATIONS SERVICES - PCS¹³

The Court had emitted two rulings regarding Law 555 of 2000, the statute that established and regulated Personal Communications Systems (PCS).

The first case was related to paragraph 2 of article 11, which ordered that economic conditions of the bid to grant the first concession ought to be appraised having into account an adequate economic balance in relation to the concessions granted to cellular telecommunications services.

The Court backed the statute based in the leveling of the playing field criterion. To its opinion, both cellular and PCS telecommunication services were of similar technical nature, a reason which justified the levelling purpose of the law.

The second case was related to the prohibition established by article 11(b), banning concessionaries of mobile services (cellular, trucking, and so on) to bid for the first concession of PCS.

The Court backed the statute arguing that the social concept of market perfectly justified this kind of restriction.

Beyond the mere protection of competition between particular competitors —said the Court— the constitutional protection of competition tends to protect the competition process itself. The scope of such right demands plurality of suppliers to avoid monopoly, restrictive commercial practices or eventual abuses of dominant position.

13 Judgements C-1268 and C-815 of 2001.

Since at the time of the bid, concessionaries of the mobile systems were already using the electromagnetic spectrum, they had been gaining steadily experience for years not only in technical features, but in administrative and commercial ones as well. According to the Court's opinion, they had undeniable advantages over the newcomers. Hence, applying again the leveling the playing field criterion, the participation of concessionaries could constitute an unjustified discrimination against newcomers, whose must be protected in this occasion.

Additionally, the Court considered that the limitation was of temporary nature, because the challenged norm was established only to the first concession, which exclusivity period was of three years. After that date, subsequent concessions were not subject to such ban.

AUTOMATIC EXTENSION OF TELECOMMUNICATIONS CONCESSIONS¹⁴

Article 35 of law 80 of 1993, established that the original term of 10 years of concessions in telecommunications services were automatically extended for an extra ten years period.

The Court considered that the automatic extension constituted an unreasonable restraint to competition, because at the end all the concessions real term was of twenty years, a term excessively long involving an unnecessary affectation of the usage of the electromagnetic spectrum.

The Court also argued that the challenged measure was unrealistic. In the current world of fabulous technological advancement, not any state can be blind to this phenomena and therefore, freedom of competition is needed to improve constantly quality and efficiency.

14 Judgement C-949 of 2001.

2.3. TUTELAGE RULINGS

NEWSPAPERS' CREDIT ADVERTISEMENT¹⁵

In this case, the plaintiff argued that his credit facilities with newspapers were withdrawn because of the failure of payments, caused because ANDIARIOS, a Newspapers Trade Association, lobbied newspapers to stop credit to a group of customers that was transferred from one advertisement agency to another one.

Although the action was directed to protect the right to work, the Court nevertheless made some reflections about freedom of competition, specifically on the matter of abuse of dominant position.

The Court said that the Constitution raised the freedom of competition right to a higher hierarchy, as a main principle of the economic activity to the benefit of both consumers and the economic freedom itself.

Regarding the abuse of dominant position, the Court analysed the concept using as a reference article 86 (now 82) of the EC Treaty, since it influenced the Constitutional Assembly in the drafting of article 333.

To the Court, the mentioned concepts pertain to a particular manifestation of a kind of state power of economic intervention aimed to correct individuals' self-determination and the freedom of competition.

Since the Court concluded that this case was related to a contract dispute rather than any anti-competitive behaviour of ANDIARIOS, because the plaintiff's failure of payments, his argument was rejected and hence the Court did not grant tutelage rights.

REGIONAL PROCUREMENT¹⁶

The city of Pereira called for a public bid in which one of the evaluation factors was the bidder's residence. Business situated in Pereira within

15 Judgement T-240/94.

16 Judgement T-147/96.

the previous six months of the tender's opening date were awarded with some extra points.

Although the Court did not grant the tutelage because of procedural reasons, it nevertheless expressed criticisms against the city's behaviour.

To the Court's opinion, a condition like this constituted an undoubted unconstitutional act because there was not any legal reason justifying such discrimination. The city of Pereira, however, argued fiscal and budgetary reasons, which did not convince the Court, who found them extremely flawed, while the two extra points of advantage did not secure any city's highest levels of tax collection.

In addition to this, the Court also argued about the balkanisation risk of the national market if conditions like this were allowed.

PARAFFIN DISTRIBUTION¹⁷

In this case, a small candle factory of Florencia—a city located in the periphery—complained before municipal authorities against its paraffin supplier TERPEL because it invoiced more than what was dispatched.

By far TERPEL was the only supplier in Florencia and because of the claims, decided not to sell anymore paraffin to the mentioned factory, which in response sued looking for the protection of its labour rights.

The Court analysed the abuse of dominant position and its relation with fundamental constitutional rights, the only ones able to be protected through tutelage actions.

Although the Court did not mention the case of newspapers credit advertisement, again it made reference to the EC Treaty concept of dominant position, adducing the lack of domestic developments.

The mentioned concept of abuse of dominant position, however, was analysed from the contractual approach, leaving behind the competition law point of view, since freedom of competition is not of fundamental character. Owing into account the mentioned situation, the Court concluded that TERPEL was obliged to contract with the plaintiff,

17 Judgement T-375/97.

no matter the complaint before the municipality, an obligation that was not accomplished.

To reach such conclusion, the Court analysed the available legal hypothesis regarding the obligation to contract, mainly to scrutinise if they were the only possible, a matter solved answering that because of the social function of private business, the obligation to contract cannot be enclosed just to the few three hypothesis founded in legal texts. The Court stated:

‘The rules and principles of economic nature inserted into the Constitution did not allow to assert that the mentioned hypothesis [*about the obligation to deal*] are of exceptional nature. On the one hand, besides economic freedom assured to business, the constitution assigns to them —as the pillars of economic development— social functions, which implies obligations. Discouraging any attempt to subjugate economic agents to a centralised direction [business] activities are justified not only in terms of individuals performing legal activities [*towards their own interests*] but to the economy interests as well [*hence*] business can be explained in a twofold dimension, as an economic freedom [*expression*] and a social function. The legitimacy, therefore, of a given business decision cannot be judged through its own autonomy. That approach ought to be added with social and ecological consequences. Economic freedom must cede and reconciles with constitutional values and principles, which are of superior hierarchy. It is possible then that in a given situation of refusal to deal, if unjustified, unreasonable or disproportionate, could not be considered as protected under the scope of economic freedom rights, a situation that usually happens when constitutional values and principles are breached’.

In the case of small business, the refusal to deal violates constitutional labour rights if such denial leads to closure and consequently the lack of the living earning means of the affected entrepreneur.

LONG DISTANCE TELECOMMUNICATIONS SERVICES¹⁸

Since Colombia followed the French approach about public utilities, telecommunications were operated under monopoly and long distance

18 Judgement T-074/02.

services were supplied by the government's enterprise TELECOM, who also operated local services in many cities, until the economic reform wave of the 90's.

Although law 142 of 1994, about public utilities, liberalised long distance services, it stated that regulation of the Telecommunications Regulatory Commission (TRC) should be enacted.

While liberalisation generated strong opposition within TELECOM's trade unions that led to bitter strikes, the TRC guaranteed a pact between TELECOM and the trade unions of not to issue regulations allowing local companies to supply long distance services.

Various local companies went before the judiciary through tutelage actions against the TRC, aimed to protect of the right of evenness and the Court granted the pleaded protection, on grounds that regulatory decisions of utilities impeding consumers to choose amongst legally and materially possible suppliers constituted an unjustified discrimination, unconstitutional by nature.

The Court stated that public authorities should perform their functions in an objective manner and are not allowed to discriminate by granting privileges, prerogatives or exclusions.

Since failure to regulate long distance services was a consequence of the pact between TELECOM and its trade unions, the Court also stated that the right of evenness applies not only in the formulation of rules and regulations but in their material application as well, which includes administrative acts and facts.

3. SECTION TWO: SOME THOUGHTS ABOUT THE CURRENT CONSTITUTIONAL TREND

Since Competition Law is closely related to business, it is important knowing as precisely as possible what they can and cannot expect. Therefore, the first question to discuss within this section is the certainty and predictability degree that this case law offers.

The second one—rather theoretical—is whether the Court's approach about the matter encourages or discourages the competition policy Colombia needs to enhance its economic performance.

3.1 CONSTITUTIONAL JURISPRUDENCE AND CERTAINTY

If a guide is going to be done, the pattern seems to be the Court's tendency supporting statutes' constitutionality in despite their effects upon competition. Not only because of the spate of goals of 9-2 favouring constitutionality but for the content of the rulings such tendency can be clearly observed.

In the case, for instance, of *Thresholds to Financial Institutions*, the imposed thresholds were apprehended as necessary to shield the economy against possible bank's excesses, without mentioning anything about whether the imposed limits could be viewed as output control—a competition restraint—while at the end banks were not allowed to decide freely their own production levels.

The case of *Government Printing Office* offers another example of the Court's inclination to back statutes without paying too much attention to their effects upon competition, owing the huge captive clientele granted and the entry barrier imposed.

In the case of *Ownership of Open Television Services*, the Court's arguments were mainly related to efficiency in the management of the electromagnetic spectrum, without paying too much attention to the imposed entry barriers to individuals. Indeed, such barrier was justified ignoring core principles of Corporate Law as the differentiation between individuals and artificial persons expressly established in many statutes and recognised by the doctrine as the *raison d'être* of the legal personification of corporations.

In the case of *Natural Gas Transport*, emphasis was made in the state power to organise public services rather than competition. Centralisation of the whole operation of gas transport and inconvenient linkages between regulation and trade, undoubtedly restrains competition though economic recognitions were allowed to private pipelines owners.

The mentioned pro-statutory tendency, however, does not mean that the lack of attention to competition issues signifies that Court's decisions always restrain competition. Sometimes they do not.

In the case of *Ownership of Open Television Services*, backing the transition period the Court ruled on grounds of competition and decided in a competitive friendly manner, leveling the playing field.

In the case of *Health System Organisation*, the ruling had positive consequences to competition. Otherwise, absolute restraints of vertical integrations could have been placed.

As it could be observed, these ruling suggests that by backing the State power to intervene into the economic process, effects on competition are of random nature; sometimes competition loses but sometimes (few) wins either.

The mentioned trend, however, implies a race to the bottom, since the Court protects competition over the state power of economic intervention only when blatant negative effects upon competition appear. The lack of evenness, for instance, in the case of *Taxes of Stock Exchanges and Fiduciary Enterprises* was quite evident, as the fiduciary's taxed activities were identical to the ones exempted of stock exchanges. In the same vein, in the case of *Automatic Extension of Telecommunications Concessions* it is easily observable the unreasonable privilege granted to concessionaires.

Having into account the above depicted pattern, thus the certainty and predictability degree that could bring the Court's case law could bring is that the State has huge constitutional powers of intervention into the economy no matter –almost- what the consequences into competition could be.

Regarding tutelage actions, the adopted doctrine of precedents helps certainty and predictability while lower Courts and tribunals are bound by the Court's decisions and its rationale either.

In despite of the fact that freedom of competition is not a fundamental right while evenness does the Court has established some guidelines about the latter in economic matters. As in constitutionality rulings, in the field of tutelage the Court is not willing to accept blatant restraints.

In the case of *Newspapers Credit Advertisement*, the plaintiff's payments failure blurred its arguments about the supposed Trade Association lobbying, a controversial situation in which the Court decided not to tackle.

Unlike the mentioned case, the remaining ones correspond to situations in which the restraint blatantly appeared; a municipality openly discriminating against non-local bidders, a powerful revenging enterprise and a captured regulatory agency.

3.2. THE COURT'S CHOSEN COUPLE: THE SOCIAL RULE OF LAW

The random reading of some of the Court's transcribed statements produces a kind of paradoxical sensation of formal acceptance but underlying distrust in markets and great confidence in the social concept of the rule of law, which most of the times seems to evoke a sort of epic struggle between the good—the state—and the evil—the market and consequently competition.

Although at first glance all what the Court has decided is about to protect and nourish the market, a second and more serene look leads to different conclusions.

In the case of *Thresholds to Financial Institutions*, for instance, the Court argued that the state needs the power to control banks output since excesses could infringe a lot of damages to the whole economy, a threat that must be avoided even restraining competition, given that this is better to society's wellbeing.

Naturally, nobody can reasonably deny the Court's viewpoint about irresponsible banks; everybody fears them. However, looking after the point of view of the market the question is whether the statutory solution was the proper one and whether by chance there was another more competition-friendly alternative.

Output is of crucial importance to prices, while they tend to drop when output increases and vice-versa, an economic principle that also applies to banking. If banks were allowed, for instance, to establish their own output under well designed insurance schemes in accordance to risk levels, perhaps competition would not be as restrained as the statute did.

In the case of *Ownership of Open Television Services*, it is difficult to understand why the professionalism and technical skills needed to attain a more rational usage of the electromagnetic spectrum corresponds

only to listed corporations. It seems as a puzzling argument since it suggests that the statute is banning the individual because as a simple human being cannot run properly TV business. To my knowledge, this constitutes an artificial entry barrier.

A sole human being, naturally, cannot do that -indeed almost nothing- but individuals can organise many things, from simple ones to more complex, even TV business if the proper support exists, which in business terms does not mean only listed corporations but organisation. As far as I am concerned I believe that plain human beings well organised are able to run TV business.

If technical accuracy and professionalism was the Court's argument, properly organised individuals arguably could bring the required standards the Court stated were needed to manage properly the electromagnetic spectrum.

Once again, a more competition friendly solution could have been reached through the allowance of individuals running TV services, provided that appropriate organisation were required to get into them, avoiding this way the artificial entry barrier imposed.

Furthermore, as the Court decided that listed corporations were the only subjects allowed to do TV business, such decision arises more questions related to competition restrains.

Although democracy is an ideal that not only fits well in the political arena but in the economic field either, the thesis nonetheless seems quite unrealistic. Commercial TV is big business, which in a country like ours, practically absent of capital markets, means that it can only be afforded by a few investors, to whom such requirement does not mean anything else but a little bit of extra red tape. As experience has demonstrated, this additional requirement did no lead the corporate democracy the Court was looking for. Commercial TV pertains to economic conglomerates, as in many other countries.

A bit more of extra red tape means little to big business, especially in a country where senseless bureaucracy is their every day's bread, but do matter to appreciate the Court's approach towards economic freedom.

In the case of *Natural Gas Transport*, the regulatory choice picked by the statute is one of the must criticised in view of the fact that conflicts

of interest easily could arise. In the telecommunications sector, for instance, even though there is statutory independence between the TRC and TELECOM, the Ministry chairs the both Board of Directors, a mechanism that did not work properly as the case of *Long Distance Telecommunication Services* shown.

This precedent serves to question whether the statutory provisions organising the system of gas transport in such a manner could repeat the telecommunications experience in regulatory capture.

In the case of the *Government Printing Office*, once again although no one can reasonably deny the Court's stance about the importance of the State's functions regarding the publicity of its actions, the question, however, is not the depiction of the problem but the statutory solution, the granted privilege.

The commitment towards the protection and nourishment of market then is not always as it could appear at first glance. Moreover, even in cases where the decision was of pro-competitive or neutral effect upon competition the Court's statements about the market made clear what she really thinks, as could be observed in the case of *Unfair Contracts of Exclusive Supply*, the case of *Health System Organisation*, the case of *Commercial Promotions of Financial Institutions* and the case of *Founding of Public TV*.

What all these restraints on competition have in common is the necessity to protect the country's economy from market inherent failures, embracing the concept of the SROL system, which to the Court's opinion prevails over the whole Constitution.

The Court's reluctant position towards the market is especially acrimonious with mere economic concentration, as it can be observed in the cases of *Ownership of Open Television Services*, *Thresholds to Financial Institutions*, *Unfair Exclusivity Provision Contracts* and *Commercial Promotions of Financial Institutions*.

With all my respect to the Court's opinion, they merit some comments. On the one hand, although the Court has the last word in constitutionality matters, I think that her points of view are tighter than the ones of the Constitution itself and, on the other hand, I found that the SROL system flagged by the Court does not help very much to the establishment of

the market oriented economy our country needs to reach competitiveness and the benefits accrued to it.

3.2.1. CONSTITUTIONALITY OF CONSTITUTIONAL RULINGS?

The accordance of the rulings with the meaning of the constitutional framework on competition at the end is a matter of interpretation. In the U.S., for instance, despite the steadiness of the antitrust legal framework, of more than a century, the Supreme Court nonetheless has been adopting different tendencies, which means different understandings¹⁹.

Even though during these thirteen years the Court's underlying feelings have been reluctant to market, it seems that such tendency paradoxically does not follow the Constitutional Assembly's criterion, embraced after debate, of broadening protection to economic freedom.

As some scholars as Mr. EMILIO ARCHILA have pointed out, the objective of article 333 was mainly the broadening of the scope of economic freedom, the improvement of market economy constituent elements, the determination of the state responsibility in the conduction of the economic process and the endowment to the state of proper tools to assure the achievement of its goals²⁰.

While the Constitution of 1886, as amended, granted protection only to private initiative and property, the Constitution of 1991 expanded the scope of such protection to all kinds of property rights and all kinds of economic activities either, not just enterprises, as it was stated in the explanation of the draft article:

‘[...] general reference to economic activity recognises pluralism in the satisfaction of human needs, without privileging some of them in grounds of its specific structure or property rights type. The term [economic activity]

19 CORTÁZAR, JAVIER, 2003, *Hacia un nuevo derecho de la competencia en Colombia. Análisis crítico y prospectiva*, Doctrina y Ley, Bogotá.

20 ARCHILA, EMILIO, “Antecedentes constitucionales y régimen de prácticas comerciales restrictivas”, *Revista del Centro de Estudios de Derecho de la Competencia*, Pontificia Universidad Javeriana, colección Seminarios, n° 5, Bogotá, 11-20, pp. 13-14.

covers both enterprises and non-organised activities as well, private, solidarity and public initiative²¹.

The drafters conceived the improvement of the market economy system as an express insertion of the country's economy into the market system sustained in three pillars: private property, economic freedom and competition²².

Regarding the determination of the state responsibility in the conduction of the economic process and development, two issues were debated. The first one was its role, which should be an active one, implying the burden to prevent and repress anti-competitive schemes and the subsequent obstruction of the freedom of competition²³. The second issue was the internationalisation of the Colombian economy. While competition rights were granted to all the people because of the pro-competitive adopted tendency and the internationalisation aim, proper tools were also endowed to businessmen to compete successfully at international level. Mere business size was not considered enough to trigger the state's interventionism powers.

This was indeed a matter of discussion, in which different tendencies were at stake. The original draft, written by Mr. RODRIGO LLOREDA CAICEDO included one statement allowing authorities intervening

'to avoid capital concentration and every practice tending to obstruct or impair competition'. As Mr. LLOREDA stated, '[*in order*] to benefit the country with freedom of competition, it is not enough restraint authorities to intervene directly into business [...] it is indispensable to allow them to avoid monopoly formation'²⁴.

The draft text as proposed by Mr. LLOREDA, however, did not pass. The final text excluded the mention about the State power to restraint mere concentration as a *per se* anticompetitive situation. The

21 *Ibidem*, p. 14.

22 *Ibidem*, p. 15.

23 *Ibidem*, p. 17.

24 *Constitutional Gazette*, n° 23 pp 3-4, quoted by ARCHILA, *op cit.*, p. 17.

Constitutional Assembly finally decided adopting the European model of concentration allowance, provided that abuses of such concentration were banned nevertheless²⁵.

Regarding the endowment of the State's proper tools to assure the achievement of its goals, the Constitution gave it the power to establish the adequate procedural means and the institutional organisation to handle competition issues, which was materialised mainly in Decree 2153 of 1992.

Such economic thought, as conceived in the drafting process of article 333, however, does not appear in the rulings. In some cases, as for instance the ones of *Ownership of Open Television Services*, *Unfair Contracts of Exclusive Supply*, *Commercial Promotions of Financial Institutions* and *Personal Communication Systems*, the Court has manifested rejection of concentration, even allowing preventive statutes.

This does not mean, however, that the Court's rulings could be somewhat unconstitutional, but that the Constitution offers diverse readings. Different circumstances as political thoughts, the manner how the Hon Justices conceive economic phenomena or prevailing conceptions, could lead different tendencies, and the current one is obviously different to the one of the drafters of article 333, less favourable to market and more akin to economic interventionism.

As the Court's constitutional understanding is a matter of tendency and the Court's rulings then neither can be qualified unconstitutional nor constitutional, what can be done instead is to analyse the tendency, a task that will take place in the following lines.

3.2.2. THE SOCIAL RULE OF LAW ANALYSIS

The conception of the prevailing character of the SROL system, however, not only pertains to the Court's own domain, while it has its followers, as for instance Mr. CARLOS MOLINA BETANCUR.

25 ARCHILA, *op cit.*, p. 17.

Mr. MOLINA, whom states that the economic ideology of the Constitution was inspired in the ‘*neo liberalism*’ doctrine²⁶ states that although economic freedom was broadened, it nevertheless was sharpened within the scope of the social-rule-of-law system, in which private economic activity means rights altogether with social responsibilities and the state huge interventionist powers to avoid or amend the roughness that inherently pertain to capitalism, specially to the less favoured sectors.

To Mr. MOLINA our competition system follows the French model rather than the U.S. one, since it is inspired in solidarity issues in which social evenness is privileged over individuals’ economic freedom.

The amendment of the social inequalities in not only the State’s responsibility but of the *homo economicus* either to whom the state has granted freedom to do business but also the burden of returning social benefits to the state.

Mr. MOLINA concludes that one of the main state; duty is avoiding economic concentration, since it is not good to economic efficiency. As he states,

‘in a system of participative democracy, self-initiative must lead to development of the market in terms of efficiency and technological innovation. Hence it is a state duty to impede restrictive practices, monopolies and dominant position in markets’.

Indeed to him such duty is established in several constitutional clauses²⁷.

However, while academics like Mr. JUAN MANUEL CHARRY states that the formula of the SROL system ‘*was included into the Constitution without enough doctrinarian support*’²⁸ the discussion

26 MOLINA BETANCUR, CARLOS, 2003, “*Constitución y competencia*”, in *Derecho de la competencia*, Cámara de Comercio de Medellín, Colegio de Abogados de Medellín and Biblioteca Jurídica Diké, Medellín, 96-115, p. 100.

27 *Ibidem*, pp. 103-105.

28 CHARRY, JUAN MANUEL, 2004, “*Del Estado social al Estado promotor*”, 156, *Ámbito Jurídico*, p. 13a.

about the matter constitutes a possibility. Indeed is an invitation to critically discuss a lot of things.

Amongst them, I found of the utmost interest whether the alluded model has helped competition or even whether such conception would work properly especially in a globalised world in which market oriented economies has been demonstrating largely that although they do not are like heaven, nevertheless have begot benefits to people.

Is the SROL system the proper one to attain competition? Is the SROL system really as bound as the Court proclaims? are questions that worth answers.

3.2.2.1. THE SOCIAL-RULE-OF-LAW SYSTEM AND COMPETITION

As Mr. CHARRY explains, the SROL system is rooted in the days of the French upraise of 1848 in which artisans –victims of a deplorable economic crisis and insufferable unemployment– demanded the State to become entrepreneur to solve their prostration²⁹, and after flagged by labour movements, Marxists and the followers of Lasalle and the Eisemach Circle as well³⁰.

If the SROL could be understood as an expression of the never-ending struggle of the weak against what causes the weakness, and competition law as a mean to protect small business against strong and powerful ones³¹, there is then a sort of identity between these two concepts.

Such identity, however, is blurred at the very beginning since huge differences separate them.

The SROL system proclaims a series of features like huge state interventionism into the economic process, even as an entrepreneur, which signifies that it must play simultaneously the roles of arbiter and incumbent. The social conception of the state therefore inherently distrusts market forces, which conceive as an untamed horse that must be bridled by only one authorised raider, the state, because nobody

29 *Ibidem*.

30 *Ibidem*.

31 WISH, *op cit*, p. 18.

else can do it. Individuals' lack of interest amending social inequalities and markets incapable of self-correction are not the proper subjects to bring evenness and welfare to people, specially the less well-off³².

Differently, competition is rooted in the liberal conception of the state in which individuals and markets play more significant roles and the banning of restricted practices does not deny market ability to channeling economy.

3.2.2.2. WHAT IS WRONG WITH THE SROL FORMULA?

Since the social thinking of the Court embraces a fundamental distrust in market-oriented economies giving competition a second-class seat, I think that the formula is unsuitable to achieve the proper level of competition defence our country needs to enhance its economic performance.

Section one of this paper mentioned various cases in which the Court's decisions disfavoured competition on grounds of other state's interests, of more relevance. There were for instance, the cases of *Thresholds to Financial Institutions*, *Ownership of Open Television Services*, *Natural Gas Transport*, *Government Printing Office* and *Personal Communications Services*.

Under the SROL system, other policies easily prevail over competition.

The system makes easy enactment of statutes and regulations jeopardising competition. Since at the end competition is not as important as many other issues like the financial survival of one public enterprise, competition can easily be relegated. Only blatant competition distorting statutes are the ones that merit the Court disagreement.

3.2.2.3. HOW BOND THE SOCIAL RULE OF LAW IS?

The SROL concept, of interventionist nature, and a two-folded state, however, when tested did not work. Its materialisation in the Weimar

32 MOLINA, *op cit.* p. 105.

Constitution of 1919 failed and received bitter criticism like the one of LORSTHOFF related by Mr. CHARRY. He adverted about the embodied risk of dependency generation and domination over the people. The social and welfare conception of the state generates difficulties in the creation of the state will, since representation does not depend upon principles but interests and, on the other hand, wealth distribution measures could be taken breeding the risk of relegation of political warranties to vacuum programmatic promises or even manipulation (populism)³³.

Why then, the Constitutional Assembly embraced such formula? As Mr. CHARRY states, the Assembly did not really intend to embrace that political thought. The lack of adequate doctrinarian analysis —yet referred— was because of two proposals introduced by Mr. ALBERTO ZALAMEA—in which the SROL was mentioned—but were not aimed to establish the system but to emphasise the unitary political system with administrative decentralisation framework, a formula already adopted by the Constitution of 1886.

The Constitution of 1991 faithfully resembles the Colombian soul, exuberant like our environment but ambivalent nevertheless.

While Colombia, for instance, had never suffered any blatant tyranny it never has reached real democracy. ‘*to truly conservatives, look out for the liberals of Rionegro*’ is a quite common adage that accurately describes our never ending ambivalence. Rionegro used to be one of the most renowned liberal provinces during the XIXth Century.

The constitutional insertion of the SROL system hence rather resembles this particularity of our national soul than a thoughtful process of political decision. The lack of debate towards such a crucial matter eloquently proves that it should not be taken as seriously as the Court pretends.

The predominance of the SROL system thus depends upon the Court’s own choice rather than upon the Constitution itself. It was the Court, not the Constitutional Assembly the body that really embraced and developed the concept through a series of rulings in which it has been preaching that, unlike the ordinary meaning of the Rule of Law principle,

33 CHARRY, *op cit*.

the SROL looks for material rather than formal evenness, an exigency that demands a State capable to transform bitter realities to achieve people's dignity³⁴.

Owing into account that on the one hand the formula got into the Constitution without proper knowledge and real debate about the implications of such commitment and, on the other hand, that the formula cohabit with different ones, like the mentioned of the market oriented economy of article 333, there is therefore space to debate whether such formula prevails over other constitutional principles.

This debate is indeed one that must be carried out regarding competition since the Court is called to play a crucial role in the definition of the country's competition policy.

The OECD Report of Regulatory Reform of 1997 stated that in countries where competition authorities are not independent from the government '*the Courts tend to become key decision makers*'³⁵ a situation that applies to our country since not only the ordinary authority but all the agencies having special jurisdiction in the matter lack independence from the government.

3.3. SOME ISSUES TO DEBATE

While Colombia needs higher commitments with competition, the Court's tendency does not help much. Like many other countries where freedom of competition has not been considered as an element of business environment, Colombia needs tons of support to attain proper levels of competition culture and, in achieving this, the role of the Court is called to play is of crucial importance, as it was mentioned above.

Additionally, since competition authorities are of administrative nature, resource against their decisions corresponds to the Contentious

34 *Ibidem*.

35 OECD, 2004, *Regulatory Reform: Stock Taking of Experience with Reviews of Competition Law and Policy in the OECD Countries and the Relevance of Such Experience for Developing Countries* – Note by the Secretariat – document CCNH/GFI/COMP (2004) / p. 25.

Administrative jurisdiction, which ought to follow the Court's direction if a given case involves constitutional issues.

That means that not only statutes and tutelage rulings depend upon the Court's rulings, but even particular cases.

This is a huge responsibility, specially owing into account that the Court's functions are not of economic but of judiciary nature, a handicap that puts in the hands of judges burdens which they usually are not properly trained to carry on. Judges usually are people dedicated to law and not to economics. Not surprisingly then the OECD also has pointed out that Courts '*have been slow to warn the importance of competition issues*'³⁶.

If the Court then has such responsibility in the characterization of the country's competition policy it is worth questioning whether it should act in consonance with society's thoughts and whether it can impose its own viewpoints, which in a manner could not embrace what business community and also society are asking for.

Although the Court has the last word, it nevertheless should consider the environment in which is acting, at least in its most fundamental issues. As Wish states

'competition policy does not exist in a vacuum. It is an expression of the current values and aims of society'³⁷.

Even though the Court's ample interpretative powers, there are nevertheless limits. I believe that if society and even the current world tend to market oriented economies then the Court should bear it in mind to adopt its particular thoughts. Otherwise, it could mean swimming against the current, causing trouble to important issues as certainty and stability.

Since fight against poverty and inequalities of wealth distribution are State's objectives that can be reached through different paths, the SROL system is not the only one that serves; indeed it could be a costly and inefficient one.

36 *Op cit*, p. 25.

37 *Op cit*, p. 17.

I do not think, that the SROL system is the only possible response to the problems related to poverty and lack of evenness. As far as I am concerned, market oriented economies do not proclaim inequality as one of their aims. On the contrary, such system is also highly committed to society's wellbeing, no matter if the concerned country is an industrialised or a developing one.

Market oriented economies do not collude with the struggle against poverty and inequality. Indeed, the world's panorama clearly shows that in countries with market-oriented economies, poverty rates are lower and wealth distribution is less rough. In the Western Hemisphere, for instance, countries like Chile or Costa Rica —comparable with Colombia— already seriously engaged in the market economy system, posses the mentioned characteristic.

Colombia's per capita GDP was of US\$2,020 in 2002³⁸, while in 2001 the Chilean's one was of US\$4,590³⁹ and the Costa Rican's one was of US\$3,810⁴⁰, almost twice. Paradoxically, ours is rather similar to the Cuba's one, which in 2002 was of US\$2,300⁴¹. In the same vein, while Colombia's unemployment rate was of 17% in 2002, Chile was of 10,1% in 2001 and Costa Rica of 5,2% in 2000.

It is not necessary then thinking about the SROL system as the unique tool to fight against poverty and unequal income distribution. Indeed, although this paper is not of economic nature it is worth refer some thoughts about the political economy within the SROL formula. Mr. CHARRY, for instance, states that this formula is a costly one that generates public administration pitfalls, which at the end frustrates the overall society.

'The welfare state crisis [*states the author*] has played havoc in bureaucracies and inefficiency indexes of [*state*] administrative structures. Limited state

38 <http://www.dane.gov.co>

39 <http://www.gobiernodechile.cl>

40 <http://www.casapress.go.cr>

41 <http://www.cubagob.cu>

financial conditions [...] could lead to huge frustrations or even the production of fatal paradoxes⁴².

3.3.1. THE CURRENT TREND

Regulatory reform of the 90's, globalisation, the establishment of the World Trade Organisation (WTO), proliferation of Regional Trade Agreements, the collapsing of centrally planned economies are facts that clearly denotes that market oriented economies and free trade broadly constitute the direction where today's world is going on.

This trend enclosed huge macroeconomic reforms that led to a microeconomic reform too, in which competition occupies an important place, a quite understandable situation since macroeconomic reform without the necessary complement at microeconomic level does not mean much.

This point of view has been expressed in many different ways. Amongst them, I would like to refer those of the UNCTAD and the OECD, some academics and business consultants as well.

UNCTAD has opted to back competition since the organisation believes that the last two decades of economic reform regarding price liberalisation, deregulation, privatisation, free trade and promotion of direct foreign investment have the common necessity of sustainable competition frameworks to achieve the benefits those reforms are looking for.

The following statement clearly expresses the point of view of the organisation:

'All the economic reforms have one feature in common: the need for competition policy if market-oriented policies are to given the best possible chance of success. For example price liberalisation, if not accompanied by competition laws and policy aimed at controlling economic behaviour and structures, can result in substantial price increases and reduced benefits for the overall economy. If monopolistic structures are allowed to continue unchecked, price liberalisation will not proceed satisfactory. The same can be said of privatisation of state monopolies into private monopolies. Finally, opening the markets through import competition

42 CHARRY, *op cit*.

and FDI [...] liberalisation might bring enhanced competition, but if no safeguards exist, foreign firms might also engage in anti-competitive practices and abuse of dominant market positions⁴³.

For years, competition has been one of the main features of interest within the OECD. In 1997, the organisation issued an in-deep report about regulatory reform, containing seven basic recommendations, in which the importance of competition was clearly highlighted in relation to several matters, from the linkage between competition policy and other policies to regulation gaps, special treatment regimes and so on.

The fourth recommendation, for instance, praises for the elimination of sectorial gaps

‘unless evidence suggests that compelling public interest cannot be served in better ways [*and also providing*] competition authorities with the authority and capacity to advocate reform’⁴⁴.

Although the OECD recognises that gaps or exclusions are inevitable since other policies could be considered of more importance, the organisation, however, praises about the prevalence of competition⁴⁵.

Recommendation seventh, related to the linkage with other policies implies the priority that competition should have. The following passage constitutes a good guidance about this approach:

‘[...] competition policy should enjoy privileged position in regulation, by combining a strong presumption in terms of competition market solutions to problems with the principle that other policies should be pursued only through means that distort competition as less as necessary to achieve them’⁴⁶.

After the issuing of the report, the OECD has been continuing working towards the matter and, since 1998 it has been reviewing in-depth

43 UNCTAD, 2002, *Closer Multilateral Cooperation On Competition Policy: The Development Dimension*, WT/WGTCP/W/197, p. 4.

44 *Op cit.*

45 *Ibidem*

46 *Ibidem.*

competition policies and institutions in more than twenty OECD countries, a task that has been taken into consideration in the issuing of the next report to the Council, coming out in 2005. Recently, the organisation called the attention about the usefulness of the experience of the OECD countries to be profited by non-OECD countries.

Many of the reviewed countries experienced considerable reforms both in the administrative, economic and even political field and accordingly to the organisation,

‘through competition-based reform programs have aimed to stimulate development and improve economic performance’⁴⁷.

The issues discussed in the reviews involve the scope of competition policy (exclusions, exemptions and special treatment) sectorial regulation and deregulation, competition policy advocacy, institutions and enforcement, linkages to other market-related policies and the role of competition in large scale reform.

Although any extensive reference to these reviews falls beyond the limits of this paper, I nevertheless like to call the attention to some issues, I believe is worth alluding.

Firstly, competition tends to collude with other policies, especially within entrepreneurial states. As the report expresses

‘where government interests or actions are involved, application of competition policy commonly encounters problems. Government operations may provoke complaints from users about monopoly or from private sector providers about unfair competition. Local officials may encourage non-competitive private conduct or deny licences and thus prevent entry [...]’⁴⁸.

Secondly, pro-competitive economic reform has demonstrated benefits in terms of growth and development. In the case of Australia, for instance, after two decades of declining economic performance, federal and regional governments embraced an ambitious program

47 *Ibidem*.

48 *Ibidem*, p. 4.

derived from the 1993 Report on National Competition Policy, which stated that one of the major challenges to economic reform was ‘*the reform of regulation which unjustifiably restricts competition*’⁴⁹. The report suggested a sort of ‘code’ of principles to enact laws and regulations in which the aim was whatever possible not to restraint competition, unless it would be really necessary on public interest grounds.

The following were the established principles:

“Acceptance of the principle that any restriction of public competition must be clearly demonstrated to be in the public interest.

“Subjecting new regulatory proposals to increased scrutiny, with a requirement that any significant restrictions on competition lapse after a set period unless re-enacted after scrutiny through a public review process.

“Subjecting existing regulations imposing a significant restriction on competition to systematic review to determine if they conform with the first principle, and thereafter lapsing within no more than five years unless re-enacted after scrutiny through a further review process.

“Ensuring that reviews of regulations take an economy-wide perspective to the extent practicable”.

The Council of Australian Governments adopted the ‘code’ in 1995. After an in-deep review process, 1700 pieces of legislation were identified as containing measures unjustifiably restraining competition.

However, more than the work done, what matters the most is its outcome, in economic terms, referred by the OECD in the following terms:

‘[...] reform of labour and financial markets and tax policy as well as competition policy, has strengthened Australia’s economy performance. The limited impact of the 1997 Asian financial crisis on Australia showed that its economy was becoming more resilient. The OECD’s economic surveys of Australia link the program of structural reform to growth in output, income, employment and productivity. The most recent noted that the structural

49 *Ibidem*, pp. 11-12.

reforms over the last two decades were the principal factor underlying the pick-up in productivity growth finding that the program has improved multi factor productivity growth by about 1 percentage point. Australia GDP is now about 2½ per cent higher than it would otherwise have been and Australian households' annual income are about A\$7,000 higher as a result of reforms'⁵⁰.

The OECD also noted the case of Hungary, in which the first elected government enacted the competition law, which according to the Prime Minister words '[...] constitutes the Constitution of the country's economic life'⁵¹. In despite of the country's background as one behind the Iron Curtain and its condition of transitional economy, Hungary's per capita GDP is of us\$13,000, one of the highest amongst the former European communist's countries⁵².

Last but not least the following excerpt is a good concluding remark of the OECD report:

'the reviews has shown that successful reform efforts include strong competition policy elements. An early review offered an insight that explains the linkage between competition-based reform and long-term economic improvement. "Healthy competition trains an economy in adaptive capacities". That observation was made by an official of a member country which implemented in the 1990's a broad-based long-term reform program based on competition principles and established for the first time in its history a credible competition enforcement system'⁵³.

While I do not want to discuss entirely the Latin American situation, I nevertheless would like to make reference to some issues.

Owing into account that the Latin American panorama offers different approaches, for years I have been pointing out that countries which has embraced market oriented economies has become more successful than countries which not, no matter their political orientation. The

50 *Ibidem*, p. 12.

51 *Ibidem*, p. 11.

52 <http://www.hsh.hu>

53 *Op cit*, p. 6.

evidence seems to be clear. Countries like Brazil with a per capita GDP of US\$3,580 in 2000⁵⁴, Argentina, of US\$7,460⁵⁵, Chile, already mentioned or Mexico, of US\$5,070⁵⁶ show evidently that such affirmation has enough factual support.

In all the mentioned countries, competition has a kind of prevalence. In despite, for instance, of the leftist political orientation of the current Brazilian government, the country is clearly committed with competition, as the work hitherto done by the CADE and the SDE denotes. Actions taken against hard-core cartels, the advocacy work reflected in regulatory issues or in the competition accomplishment certification programme and international cooperation agreements are examples that clearly speaks about the commitment of this country with market oriented competition issues⁵⁷.

In the case of Argentina, the engagement of the country with competition principles was quite explicit in the submitted document before the WTO's Working Group on Competition, in which this country stated that in despite of the financial crisis that the country was going through some years ago, affecting largely the overall economy, and even the presidential posting, the country nevertheless decided not to sacrifice the microeconomic revolution in which the country was involved by pursuing short-term macroeconomic stability.

The following excerpt is quite illustrative about the decision adopted:

‘[...] In Argentina, there is constant talk of the devastating effects of the crisis [...] The Argentine Government and society are currently facing a number of challenges that had already arisen in both ancient Greece and Germany in the industrial era. We can address these challenges by ignoring the lessons of experience, imposing ceiling prices and isolating and protecting the economy without any strategic plan or credible institutions – or we can follow the correct path and think ahead [...] In times of crisis, it is highly

54 <http://www.IBGE.gov.br>

55 <http://www.indec.mecon.ar>

56 <http://www.inegi.gob.mx>

57 FTAA- Negotiation Group on Competition Policy, 2002, *Report on Developments and Enforcement of Competition Policy and Laws in the Western Hemisphere*, FTAA.ngco/inf/04/Rev 1, pp. 40-52.

tempting to use legislation for the defence of competition to adopt measures that directly impact the markets, to impose price controls or to institute legal proceedings. In Argentina, after the initial moment of confusion the idea of intervening directly in the markets fortunately gave way to the decision to restore stability by other means [...] Contrary to many people's views, Argentina is in an excellent position not to repeat past errors —whether its own or those made by others— by integrating competition into its social culture [...] Restoration of the macroeconomic balance will not mean that we can abandon the sweeping microeconomic reform initiated in the public and private sectors. Regulatory changes in order to curb informal practices, the adoption of new technologies and more efficient organizational structures, coupled with an indefatigable will to foster competition, are the pillars of the action we need to take in order to play our part on the global productivity and export scene [...] Macroeconomic balance is necessary but not sufficient to guarantee wealth and well-being. Sustained economic wealth depends on the productivity of each country's resources. Countries with high levels of overall productivity are those in which teachers, police officers and nurses receive the highest wages. And we already know that productivity rises as competition grows'⁵⁸.

In the case of Costa Rica, as Mr. IGNACIO DE LEÓN states, the country has adopted a progressive competition regime. Regarding the matter of regulatory reform the author expresses the following:

'Most Latin American statutes are rather short in the provisions dealing with regulatory reform. However, most recent Latin American competition policy statutes attempt to extend these powers. For example, Costa Rica's Competition Act establishes a detailed regime for deregulation and competition advocacy. Article 3 sets forth guidelines for government agencies on the control and regulation of the economy. The provisions also apply to existing regulators [...] similar considerations apply to article 4, which enables COPROCOM to make a cost benefit analysis of regulations restricting competition [...] articles 5 and 6 set forth the conditions by which the cabinet may eliminate price controls or other restrictions on trade. These provisions are supplemented in article 7, which establishes the conditions for the provisions on services related to trade, and article 8, which lays down the conditions for the functioning of standard-setting bodies. All these provisions

58 MONTANAT, EDUARDO, 2002, *Competition in Times of Crisis*, WT/WGTCP/W/206 en <http://www.wto.org>

confirm the general conditions set forth in articles 3 and 4 in particular areas, or supplement the system by laying down specific requirements'⁵⁹.

Regarding the case of Mexico, Mr. DE LEÓN also refers the development of economic deregulation initiatives⁶⁰.

The mentioned author concludes stating the following:

‘A clear conceptualisation of the problem of promoting competition in developing countries has evolved from this provisions. Competition advocacy is not base solely on challenging the restrictive activities or firms, but also on subjecting the government activity to technical supervision and political accountability. In the light of Latin American traditional support for restrictive trade measures, the provisions taken by Costa Rica’s COPROCOM to advocate competition before the cabinet are a clear step forward and a very welcome legislative initiative’⁶¹.

Market oriented economies are not, however, promoted only by international organisations or scholars, but by business consultants as well as, for instance, Mr. MICHAEL PORTER, who praises for market oriented economies based on strong entrepreneurial thought to Latin American countries becoming able to achieve better levels of competitiveness.

According to the business competitive index he developed, LA countries has been experiencing a steady decrease in despite of the macroeconomic reforms of the 90’s. In a published interview, he stated that the disillusionment about the result of such reforms can be explained because of the lack of the microeconomic reinforcement of the macroeconomic reforms and infrastructure improvement. Competitiveness and regulatory efficiency has failed and without them,

59 DE LEÓN, IGNACIO, 2001, *The Role of Competition Policy in the Regulation of Infrastructure Industries. Some Lessons from Latin American Experience*, in <http://www.worldbank.org>

60 *Ibidem*, p. 16.

61 *Ibidem*, p. 16.

economic growth is not possible even if macroeconomic measures are accurate.

To him, the necessary microeconomic reforms comprise

‘everything related with the business environment in which enterprises must compete; quality of human resources, administrative efficiency, regulations, intellectual property related incentives, competition policy [...]’⁶².

He continues stating the following:

‘During the 1990’s countries were dedicated to privatisations, macroeconomic reforms, free trade agreements and infrastructure enhancement [...] all this is important but unless enterprises become more efficient and sophisticated, none of this things will lead to prosperity enhancement. You can open markets but unless you enhance business efficiency you will not have export business, There is only one way to create wealth and this through enterprises [...] the main concern of the Latin American problem is productivity’⁶³.

Mr. PORTER, however, does not express such point of view without support. According to his analysis, 83% of the per capita GSP differences amongst LA countries can be explained in terms of business productivity, a calculation that explains stating that

‘when a country is really surmounting incoming increases in equalitarian terms, for sure, it is because of its enterprises’⁶⁴.

At domestic level, in despite of the fact that as a legal discipline competition law is in its firsts stages of development and the understandable lack of competition culture, there is nevertheless some debate towards the direction the economy should take, which obviously involves constitutional concerns.

Besides the market distrust tendencies above mentioned, it is also possible adverting some different points of view.

62 MEJÍA MAZUERA, JAIME, 2004, “*La receta de PORTER para la competitividad de Latinoamérica: es el turno de las empresas*”, *El Tiempo*, 10-VI-04, p. 13.

63 *Ibidem*.

64 *Ibidem*.

Of them, I would like to refer once again to the one expressed by Mr. CHARRY. To him, the problem with the welfare state is that is in a way an anachronism. Colombia embraced it 72 years since the failure of the Weimar Constitution to be exact.

Although Mr. CHARRY does not mention it, because he did not write strictly about competition it is worth to note that after the failure of the Weimar Constitution, Germany enacted two statutes of the utmost importance on competition. They were the Competition Law and the *Bundeskartellant*, both of them market oriented, which were the main influence in the drafting of the Treaty of Rome clauses in competition⁶⁵. Although the French system was also considered, its influence was quite different

‘in much smaller degree [...] particularly in its concerns to protect the smaller trader’⁶⁶.

Why, then heralding a model of lesser importance as the French one?

Anyway, continuing to Mr. CHARRY discussion about the constitutional role the state should adopt, he argues that today is not the right time to develop the welfare formula, but thinking about the coming exigencies of the near future of Regional Trade Agreements and question how the state would be able to create wealth rather than how to distribute poverty. The new global order entails thoughts beyond state models benefiting social classes, but wealth promotion models instead, which could grant production and competitiveness according with the imposed conditions established by international markets, creating this way employment, the only known method to nourish income redistribution.

65 STEINER, JOSEPHINE, and LORNA WOODS, 2000, *EC Law*, 7th ed, Blacstone, London p. 211.

66 *Ibidem*, p. 211.

CONCLUDING REMARKS

Colombia's current economic situation offers a challenging panorama. On the one hand, poverty indexes and unemployment denote structural failures and, on the other hand the coming RTAs for sure will create situations never experienced before, which could be as good or as bad as the country wishes.

Under such circumstances, experimenting towards long time ago failed systems or unsuitable models could be of catastrophic consequences. As long as an efficient economic system ought to be placed, the Court has an important –crucial- role to play. Its decisions have the potentiality to nourish welfare or uncertainty as well.

If it decides to adopt a more market friendly approach towards the importance of competition, according with the devised economic system drafted in article 333, then the legal framework established towards the defence of competition will be backed properly, given competition the importance it deserves.

However, if the path to follow continues embracing the social tendency relegating competition to a second-class seat, the outcome could not be different than the one depicted in this paper.

As experience clearly has demonstrated, the welfare formula failed by far.

As it has been stated above, the Court has the constitutional tools to embrace a more market friendly tendency. Today's world gives enough arguments to do that, and the Constitution itself has the mean to make it legally.