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Jurisprudential analysis of the social market economy in Colombia

Análisis jurisprudencial de la economía social de mercado en Colombia

Análise jurisprudencial da economia social de mercado na Colômbia

Reflection Article

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Abstract

Objective: the most relevant decisions of the Constitutional Court of Colombia regarding the social market economy are analyzed, in order to establish the level of development and guarantee of this model of economy by the aforementioned Judicial Court. **Method and/or methodology:** The text is supported by the documentary method and is organized as follows: it initially addresses some conceptual considerations, and then develops the analysis of the social market economy based on the jurisprudence of the Constitutional Court on the matter, and closes with the respective conclusions.

Key words: Economy; Social market economy; Jurisprudence; Economic freedom; State Intervention in the economy.

Resumen

Objetivo: se analizan las decisiones más relevantes de la Corte Constitucional de Colombia en cuanto a la economía social de mercado, con el fin de establecer el nivel de desarrollo y garantía de este modelo de economía por parte del referido Tribunal judicial. **Método y/o metodología:** El texto se soporta en el método documental y se organiza de la siguiente forma: inicialmente aborda algunas consideraciones conceptuales, para luego desarrollar el análisis de la economía social de mercado con base en la jurisprudencia de la Corte Constitucional sobre la materia, y cierra con las respectivas conclusiones.

Palabras clave: Economía; Economía social de mercado; Jurisprudencia; Libertad económica; Intervención del Estado en la economía.

Resumo

Objetivo: as decisões mais relevantes do Tribunal Constitucional colombiano sobre a economia social de mercado são analisadas a fim de estabelecer o nível de desenvolvimento e garantia deste mercado, com o objetivo de estabelecer o nível de desenvolvimento e garantia deste modelo de economia pela Tribunal acima mencionado. **Método e/ou metodologia:** O texto é apoiado pelo método documental e está organizado da seguinte forma: inicialmente trata de algumas considerações conceituais, para depois desenvolver a análise da economia social de mercado com base na jurisprudência do Tribunal Constitucional sobre o assunto, e encerra com as respectivas conclusões.

Palavras-chave: Economia; Economia social de mercado; Jurisprudência; Liberdade econômica; A intervenção do Estado na economia

Introduction

The set of articles of the Political Constitution of Colombia with economic content, especially those comprising Title XII, which deals with the economic system and public finances, implicitly establishes, as an economic system, the social market economy model, in harmony with the social rule of law, a sense in which the Constitutional Court, through jurisprudence, has made permanent pronouncements. The social market economy seeks to combine the needs of economic freedom, as a guaranteeing perspective, and state interventionism in the economy, as a corrective perspective.

In view of the above, we propose to analyze the most relevant decisions of the Constitutional Court of Colombia regarding the social market economy. In order to achieve the aforementioned purpose, the article addresses the conceptual considerations of economy, political economy and social market economy. Subsequently, we analyze the most significant rulings handed down by the Constitutional Court on the referred topic, in order to establish some answers to the question "Has the Constitutional Court of Colombia developed and guaranteed the social market economy model?

2. CONCEPTUAL CONSIDERATIONS

The following is an approach to the understanding of economics, political economy and social market economy.

2.1. Concept of economy

Economics is defined as the social science that focuses its concern on how to survive and, in general, on how to have better living conditions, i.e., it refers to the means of human life. In this sense, human beings are permanently required to satisfy needs of various kinds through the development of economic activities that involve the production, distribution and consumption of goods (tangible elements) and services (intangible elements), depending on the availability of resources characterized by scarcity, a situation that implies their proper administration.

Since there are multiple needs versus limited resources, it is necessary to organize these needs according to their importance in order to achieve their satisfaction. An example of the organization of needs is that proposed by (Maslow, 1968, cited in Arbole- da, 1991), who classified needs into physiological or primary, security, social or affiliation, recognition and self-fulfillment needs.

Physiological or primary needs seek to preserve and perpetuate life, such as food, clothing, shelter, sex. These needs are the most basic in the hierarchy proposed by the referenced American psychologist. Therefore, they are vital for survival and are of a biological order. Safety needs refer to the fact that human beings do not want dangers in their lives, such as physical, psychological, social and labor-related aggressions.

Social or affiliation needs refer to the fact that human beings need to belong to different social groups, i.e., they establish links with the social environment, for which it is necessary to have the

division of labor and specialization. The needs for recognition or esteem are framed in the human being's desire to excel with prestige, self-confidence, power and control. Self-realization needs have to do with the achievements that a person is capable of reaching, according to his or her own potentialities, abilities and skills.

The provision of goods and services aimed at satisfying needs can be carried out by the market or by the State. To identify the field of action of each of these institutions, Miranda (1999) presents the classification of needs, which includes the principle of exclusion, into individual, general and essential.

Individual needs are satisfied through tangible goods, such as food, clothing and housing, characterized by being exclusive and rivalrous, which are generally supplied by the market, an institution that charges prices in exchange for such provision. General needs are met by the market or the State, through the provision of goods and services such as education, health and public utilities, which are exclusive but not rivalrous, i.e., the consumption of such goods and services by one person does not limit the consumption of others. When the good or service is provided by the State, it charges fees, generally on the understanding that there is direct consideration.

Essential needs are met mainly through intangible goods or services, including security and justice, which are non-excludable and non-rivalrous. Because the social base is large, the provision of such services corresponds to the State, for which it charges taxes to natural and legal persons.

In terms of economic activities, goods and services are derived from production. Human beings must participate in some way in the global production process at a given time, depending on the roles we play throughout our lives. Production, according to Resico (2010) is related to labor, the organization of the productive process and technological innovation, since it is the result of the combination of the factors of production: labor, human capital, physical capital and natural resources. Production is carried out in the primary or agricultural, secondary or industrial and tertiary or service production sectors.

Between production and consumption, goods and services must go through some stages of transfer and transportation at the local, regional, national or international level, a process that involves a segment of the population called intermediary. The distribution process is complemented by social reallocation, which depends on individual and social solidarity, a situation that contributes to the exchange and distribution platform that society must establish in order to satisfy the needs of human beings.

The consumption of goods and services allows human beings to satisfy needs that are indispensable for a normal existence, such as food, clothing and housing, among others. However, at present, developed societies, fundamentally, are moving towards consumerism, which is an extra-economic value.

2.2. Political economy

It is related to the administration of the economy by the State, an institution that seeks to

project and positively consolidate the trends of economic life at a general and particular level. In this sense, Article 334 of the Political Constitution assigned the general direction of the economy to the State, a situation that means State interventionism in order to improve the living conditions of the population, among other purposes. Some of the economic functions of the State are regulations, management and financing of public spending, provision of public goods and services, as well as redistributive and stabilizing responsibilities.

Political economy implies the articulation of politics with economics. Thus, it contributes to understanding how public authorities make decisions through the process of economic policy formation, aimed at solving or avoiding problems, especially those of an economic nature. In practice, it seeks a balance between state interventionism and economic freedom through the model known as the social market economy.

2.3. Social market economy

The set of articles of the Political Constitution with economic content implicitly establishes, as an economic system, the social market economy model, in harmony with the social rule of law. The social market economy seeks to combine the needs of economic freedom with social justice.

Economic freedom implies entrepreneurship, freedom of individual initiative and innovation as sources of productivity and economic growth, while social justice is related to the pursuit, on the economic plane, of equal opportunities for the deployment of one's talents, and is based on solidarity. Social justice is a social value characterized by human coexistence, and guides the creation of social bonds for the common good.

State interventionism, within the framework of the social market economy model, aims to correct market failures, promote equity and materialize rights, in accordance with Article 334 of the Constitution. Economic freedom is a function of free economic competition, free enterprise and free private initiative, according to articles 38, 88 and 333 of the Constitution.

The economic principles of the social market economy are structural and regulatory. The structural principles are aimed at guaranteeing the scope of economic freedom, which implies the deployment of a market economy, i.e., that economic activities are carried out on the basis of autonomous plans, given that private property exists and the coordination of such activities is carried out by the functioning of the price system that exists in the markets. Regulatory principles prevent possible abuses of economic freedom and ensure that the benefits generated in the market are spread in a socially just manner. Therefore, such principles have to do with the institutional framework and the economic policies pursued by the State.

3. OBJECTIVE

The purpose of this article is to analyze the most relevant decisions of the Constitutional Court of Colombia regarding the social market economy, in order to establish the level of development and guarantee of this economic model by the referred judicial Court.

4. METHODOLOGY

The development of this article is based on the interpretative paradigm, since it seeks the understanding and meaning of the most relevant decisions of the Constitutional Court of Colombia regarding the social market economy. The method from which this study is approached is documentary, consisting of a technique of selection and compilation of information, which allows to observe and reflect systematically on a theoretical reality, using different types of documents, for which reason, jurisprudence and doctrine were consulted as fundamental inputs that support the developed topic.

5. RESULTS

For the preparation of this analysis, three criteria were established in the selection of the sentences that comprise it:

- That the charges and the accused norm have a direct relationship with the social market economy.
- That the Constitutional Court, in its obiter dictum and ratio decidendi, develop with full sufficiency and relevance the factual and legal components of this model.
- That the jurisdictional decisions establish clear and specific standards in relation to the matter under study.

The jurisprudential analysis starts from the following legal problem: has the Constitutional Court of Colombia developed and guaranteed the social market economy model?

Ruling T-533 of 1992: it should be clarified, first of all, that in Ruling T-425 of 1992 a brief mention was made of what is called market economy, without specifying the term social market economy, as follows:

Based both on its antecedents and on the current text of Article 333 of the Charter, this Court considers that the Constituent Assembly of 1991 wanted to perfect the instruments of the market economy, to specify the responsibility of the State and to provide it with new and more effective instruments for the achievement of social equity. (Decision T-425 of 1992).

However, due to the limited development of this concept in this pronouncement, we will continue with the analysis of Ruling T-533 of 1992, which corresponds to the first ruling issued by the Constitutional Court where the term social market economy was mentioned. There, the plaintiff requested the constitutional judge to order the State to grant him financial assistance for an eye operation that would allow him to recover his vision and thus be able to work.

In its decision, the Constitutional Court determined, as the main measure, to order Judge 36 of Criminal Investigation of Ibagué, who had heard the action in the first instance, to determine whether the plaintiff was absolutely indigent and whether it was appropriate for him to receive the special protection requested by the respective public authority.

In its arguments, the Constitutional Court stated:

> The State as an instrument of social justice, based on a social market economy, with private initiative, but with a certain redistributive intervention of wealth and resources, makes it possible to correct individual or collectivist excesses.
>
> The economic system in the social rule of law, with its characteristics of private ownership of the means of production, freedom of enterprise, private initiative and state interventionism, is guided by a human content and by the aspiration to achieve the essential ends of the social organization. For this reason, the legal system establishes both programmatic rights, which depend on the budgetary possibilities of the country, and benefit rights that give rise -when the requirements are met- to the exercise of a subjective public right in the hands of the individual and in charge of the State. (Decision T-533 of 1992).

Accordingly, the Constitutional Court began to develop the concept of social market economy, with two important and not mutually exclusive elements. The first one refers to private initiative and the second one is related to the state function of redistributing wealth to correct market excesses.

In this particular case, the Court ordered the Court to determine whether the plaintiff was in fact in a condition of absolute indigence in order to generate a state intervention to protect him from this situation within the framework of a social market economy model.

Decision C-265 of 1994. In this jurisprudence a claim of unconstitutionality was filed against articles 12 and 38 (partial) of Law 44 of 1993. There the Court, in its analysis, determined the following legal problem: may the Legislator establish a minimum number of members for copyright collective management societies?

This Agency initially referred to the social market economy as follows:

> The Constitution enshrines a directed social market economy, since it generically recognizes that private initiative and economic activity are free, but it also establishes, in a global manner, that the general direction of the economy will be the responsibility of the State. (Decision C-265 of 1994).

In accordance with the above, the two fundamental elements of the social market economy are once again evident: free private initiative and state intervention in the economy.

Now, with respect to the case under study in this ruling and its relation to the social market economy, the Constitutional Court stated:

> Indeed, the Constitution - based on a managed market economy - provides for forms of state regulation that can be intense for companies with patrimonial content, since not only do property and companies have a social function that entails obligations (Constitution, art. 58 and 333), but also, by constitutional mandate, the State must intervene to "rationalize the economy in order to achieve an improvement in the quality of life of the inhabitants, an equitable distribution of wealth, and a more equitable distribution of wealth.P art 58 and 333), but also, by constitutional mandate, the State must intervene to "rationalize the economy in order to achieve the improvement of the quality of life of the inhabitants, the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment C.P art 4 .

> Finally, the very nature of a social State under the rule of law authorizes such forms of regulatory intervention by the State in private economic processes (Judgment C-265 of 1994).

Accordingly, the Constitutional Court concluded that, in effect, the Legislator may establish a minimum number of members for copyright collecting societies and, consequently, declared Article 12 and Article 38 (c) and (d) of Law 44 of 1993 constitutional.

Decision C-616 of 2001. It is necessary to indicate that the concept of market economy was developed with Rulings C-524 of 1995 and C-535 of 1997. However, the category of social market economy was not taken up again until Ruling C-616 of 2001.

In the aforementioned 2001 ruling, in the exercise of the public action of unconstitutionality, the plaintiff challenged the unconstitutionality of some sections contained in Articles 156, 177, 179, 181 and 183 of Law 100 of 1993, arguing that:

> The expressions of the challenged norms contradict the superior mandate that establishes as a duty of the State to intervene to prevent the obstruction or restriction of economic freedom and to avoid or control any abuse by individuals or companies of their dominant position in the market, since they empower the Health Promoting Entities -EPS to provide services directly, that is, through their own Service Providing Institutions -IPS. (Decision C-616 of 2001)

In other words, the plaintiff considered that the accused provisions violate Articles 333 and 334 of the Political Constitution of Colombia, stating that the power granted to the EPSs to directly provide health services through their IPSs limited free competition and allowed the EPSs to take a dominant position, fully controlling the health services market and privileging their own IPSs.

In response to the plaintiff's arguments, the Constitutional Court stated at a general level that:

> Competition is a structural principle of the social market economy, which is not only oriented to the defense of the particular interests of the businessmen who interact in the market, but also tends to protect the public interest, which is materialized in the benefit obtained by the community of a higher quality and better prices of the goods and services derived as a result of a healthy competition. Hence, the Constitution has expressly imposed on the State the duty to prevent the obstruction or restriction of economic freedom and to prevent or control the abuse of the dominant position that businessmen have in the market. (Decision C-616 of 2001).

Based on the foregoing, competition was developed as a structural principle of the social market economy, which is based on two dimensions, namely: the public interest and the private interest, with which this premise is applicable to the specific case, in the face of a possible abuse of a dominant position in the market.

The Constitutional Court concluded, in this case, declaring the enforceability of Articles 156, 177, 179, 181 and 183 of Law 100 of 1993, stating that:

> In the field of control and prevention of acts contrary to economic freedom, there is no deficiency attributable to the accused provisions, and that the situations that, in fact, may arise in these matters, are expressly prohibited and are subject to the imposition of sanctions by the State in the exercise of the administrative powers attributed to it by law to repress restrictive practices of competition and acts of unfair competition. For this reason, any deficiencies that may arise in this matter cannot be resolved in the constitutional venue, but must be addressed by the administrative authorities of surveillance and control. (Decision C-616 of 2001).

In accordance with the foregoing, the Constitutional Court indicated that in the constitutional venue it is not possible to clarify any conditionality or unenforceability of the accused provisions, and in this sense, the respective state intervention corresponds to the administrative venue; this clearly, under the model of a social market economy.

Decision C-865 of 2004. Continuing with the jurisprudential analysis, the Constitutional Court subsequently reiterated the concepts already studied on the social market economy in Rulings C-389 of 2002 and C-615 of 2002, and it was not until Ruling C-865 of 2004 that a new development was produced on the subject under study, since the Constitutional Court defined the concept of social market economy in a more precise manner, as follows:

> The conjunction of private interests through the adoption of a model of economic freedom, based on free initiative, freedom of enterprise, freedom of establishment and free economic competition (C.P. art. 333), together with the recognition of the State's power of intervention in the economy, with the purpose of giving full employment to human resources and ensuring that all people, particularly those with lower incomes, have effective access to basic goods and services for the normal development of a decent life, has allowed this Corporation to understand that our economy, subject to the provisions of the Constitution, is regulated under the premises of the so-called "social market economy", according to which the rules of supply and demand must be at the service of the progress and economic development of the Nation.
>
> In order for this to happen, in terms of economic freedom, the Political Constitution allows the autonomy of private will and the attributes of property to be expressed in the consolidation of free markets for goods and services, through which the circulation of wealth is facilitated and the benefits derived from the natural cycle of income can be obtained. This means that the different actors of the social market economy obtain a benefit by allowing its existence. The State receives resources via taxation to allocate them to employment and social welfare. Entrepreneurs accumulate wealth and develop a free activity as an expression of their autonomy. And the workers are able to provide their services and receive wages and benefits in exchange. (Decision C-865 of 2004).

A new element was introduced in the conceptual development of the social market economy, which is related to the receipt via taxes of resources that reach the State, to be invested in the generation of employment and public policies of social welfare, with which we find a new facet of the State as a redistributor of wealth, product of those tax revenues, an issue that had not been addressed by the Constitutional Court in this context.

With respect to the particular case of this ruling, the plaintiffs challenged the unenforceability of the articles

Articles 252 (total) and 373 (partial) of the Code of Commerce, for violating the provisions of the preamble and Articles 1, 2, 4, 5, 6, 11, 13, 25, 29, 48, 53, 58, 83, 86, 93, 94, 333 and 338 of the Political Constitution, mainly because they considered it unconstitutional to restrict the liability of the partners in joint stock companies to the amount of their contributions, in the payment of the obligations arising from the employment contract.

Examining the foregoing, the Constitutional Court concluded that:

> The declaration of conditional unenforceability requested by the plaintiffs would lead to disregarding the right to legitimate trust of investors and shareholders of capital and, in addition, would be contrary to the economic model of the Political Constitution.
>
> The foregoing is not an obstacle for the Legislator, in the exercise of his power of normative configuration, to expand the labor protection mechanisms provided for in the law in favor of workers and pensioners, extending the liability of the partners of limited risk companies to other social and legal realities, which imply the indispensable need to adopt intervention and corrective measures that make valid the mandates of the social market economy. (Decision C-865 of 2004).

Thus, the Constitutional Court gave to understand that there are limits to state intervention, and consequently in a social market economy, therefore, such intervention is not absolute, which only attends to specific needs where, as already mentioned in other analyzed pronouncements, they correspond to market failures or abuses. In accordance with the foregoing, the Constitutional Court, among other points, determined to declare constitutional the expressions: "(...) responsible up to the amount of their respective contributions (...)", provided in paragraph 1 of Article 373 of the Code of Commerce.

Decision C-228 of 2010. Before starting with the analysis of the respective judgment, it is pertinent to note that prior to this ruling, Judgment C-352 of 2009 was issued, which briefly stated a relationship between freedom of enterprise and the social market economy in the following terms:

> Pursuant to Article 333 of the Constitution, freedom of enterprise and private initiative are free within the limits of the common good. In this sense, the Constitution provides that the enterprise, as the basis for the economic development of society, has a social function that implies certain obligations. Corresponding to the foregoing, the same provision establishes that the State, by mandate of the law, shall prevent the obstruction or restriction of economic freedom and shall prevent or control any abuse by individuals or companies of their dominant position in the national market.
>
> By virtue of the foregoing, the Constitutional Court has held that freedom of enterprise consists of the "freedom recognized to citizens to affect or allocate assets of any kind (mainly capital) for the performance of economic activities for the production and exchange of goods and services. Thus, freedom of enterprise implies "the right to exercise and develop a certain economic activity, in accordance with the economic model or institutional organization, which in the Colombian case is based on freedom of competition and a "social market economy". (Sentence C-352 of 2009)

Once this brief mention has been made with respect to the 2009 Judgment referred to, and since it will not be taken into account in the jurisprudential analysis due to its little development with the subject matter under study, it is appropriate to address Ruling C-228 of 2010. In this case, a claim of unconstitutionality was filed against Articles 9, 11, 12, 13, 13, 22 and 25 (partial) of Law 1340 of 2009. The plaintiff indicated that the accused norms establish an unjustified restriction to economic freedom and private initiative, inasmuch as they require a prior control of business integration operations that is not in accordance with the purposes set forth in Articles 333 and 334 of the Constitution for the intervention of the State in the economy. Thus, the plaintiff stated that a control over the assets of the participating companies or of the integration itself is contrary to the Constitution because it censures the possibility that the companies acquire a dominant position in the market through certain operations, despite the fact that the Charter only limits itself to prohibit the abuse of the dominant position and not any expression thereof.

Regarding the analysis made by the Constitutional Court, it initially indicated that:

> The Colombian Constitutional State is incompatible both with a model of classical economic liberalism, in which State intervention is proscribed, and with forms of centrally planned economy in which the State is the only relevant market agent and the production of goods and services is a public monopoly. On the contrary, the Charter adopts a social market economy model, which recognizes the company and, in general, private initiative, as the driving force of the economy, but which reasonably and proportionally limits freedom of enterprise and free economic competition, with the sole purpose of fulfilling constitutionally valuable purposes, aimed at protecting the general interest. (Decision C-228 of 2010)

Consequently, and in accordance with the above premise, the Constitutional Court stated that the State's function of preventing and punishing the abuse of a dominant position, as a practice contrary to free competition, is based on the fulfillment of the purposes prescribed by the Constitution for the State's intervention in the economy. It is for this reason that the work of the State, within the social market economy, is to prevent abuses through a series of controls and instruments of intervention that are aimed at avoiding conduct or practices contrary to honesty and commercial loyalty, such as: imposing prices, limiting production, applying unequal conditions in contractual relations, and subordinating the conclusion of contracts to the acceptance of supplementary benefits.

The Constitutional Court concluded that the rules in question are in accordance with the constitutional parameters and the social market economy as a model adopted in the Political Constitution, since this guarantees free competition as a relational criterion, whose effective compliance depends on the balance between the individual actions of the companies and individuals participating in the market.

This balance, stated the Constitutional Court, would be broken when a business integration of such magnitude is formed that it results in a practice with monopolistic tendencies, fully incompatible both with free private initiative and with the rights of consumers, which depend on the existence of a market with effective competition. If the work of market intervention were only of an ex post sanctioning nature, the state apparatus would cause a deficit in the protection of the right to free competition, since it would defer its effective safeguarding to the verification of conduct constituting abuse of a dominant position, which would imply a backward step in the power of the State to intervene in the market, adopting a position typical of classical economic liberalism, which is incompatible with the idea of a social market economy model.

Based on the foregoing, the Constitutional Court declared articles 9, 11, 12, 13, 22 and 25 of Law 1340 of 2009, "whereby rules are issued regarding the protection of competition", to be constitutional.

Decision C-830 of 2010. In this case, the plaintiff requested the Constitutional Court to declare the unenforceability of Articles 14, 15, 16 and 17 of Law 1335 of 2009, provisions "which prevent damage to the health of minors, the non-smoking population and stipulate public policies for the prevention of tobacco consumption and the abandonment of tobacco dependence of the smoker and its derivatives in the Colombian population".

The plaintiff considered that the accused norms, which univocally provide for the prohibition of advertising, dissemination and promotion of tobacco products and their derivatives, as well as the sponsorship of sporting or cultural events by the companies that produce, import or market them, contradict articles 333 and 334 of the Political Constitution.

Developing the aforementioned premise, the petitioner indicated that:

> The power to promote the consumption of tobacco, a product whose commercialization is lawful, is part of the essential core of such powers, so that prohibiting advertising would mean a disproportionate and unreasonable impact on the production and sale of tobacco, activities that are recognized by the legal system and which are legitimate expressions of the exercise of free private initiative. It adds that the exercise of advertising of such products is necessary, not only in order to guarantee the exercise of the freedom of enterprise, but also to fulfill constitutionally valuable purposes, such as informing consumers about their effects. (Decision C-830 of 2010).

Now, the Constitutional Court in the development of its arguments regarding the case, and its relationship with the social market economy model expressed:

> It is a sufficiently defined topic in the constitutional jurisprudence that the Political Charter does not offer a neutral perspective regarding the acceptable economic model, but rather takes the side of a social market economy regime, which has among its defining characteristics (i) the constitutional recognition of freedom of enterprise and free private initiative, as indispensable guarantees for the achievement of economic development and general prosperity. To this end, a complex general clause is imposed, which prevents the demand for prior permits or requirements, as well as the State's obligation to promote free competition and economic freedom, and (ii) the assignment to the State of the function of general management of the economy, a task that is expressed at various levels, such as the verification that free enterprise is exercised within the limits of the common good and the power to impose limitations on that freedom when required by the social interest, the environment and the cultural heritage of the Nation (Decision C-830 of 2010). (Sentence C-830 of 2010)

The aforementioned technical direction is based, according to the Constitutional Court, on two aspects, namely:

- The State exercises the measures aimed at ensuring that companies, which have their private property status, comply with the obligations inherent to their social and ecological function (Article 58 of the Constitution).

- The State's legal powers of intervention, in an attempt to regulate the exploitation of the

> natural resources, land use, production, distribution, use and consumption of public and private goods and services for the improvement of the quality of life of the inhabitants; the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment (article 334 of the Constitution).

Complementing the previous idea, and defining fundamental elements of State intervention in the economy, the Constitutional Court referred:

> These constitutional provisions lead to the conclusion that the conceptual delimitation of economic freedoms is inserted in the balance between the recognition of the necessary guarantees for economic exchange and the correlative state obligation to intervene in the market in order to (i) guarantee the supremacy of the common good, represented in the objectives identified by the Constitution as being in the general interest; and (ii) correct, within the framework of the protection of equal opportunities, the imperfections of such market that constitute a barrier to access to goods and services for people with lower incomes or in conditions of manifest weakness. (Decision C-830 of 2010)

As can be seen, the pronouncement of this Constitutional Court gave greater clarity regarding the conditions under which the State can act as a corrector of the economic dynamics of the country through the function of general direction of the economy in those activities that are permitted to it under Article 334 of the Constitution, such as the exploitation of natural resources, land use, production, distribution, use and consumption of public and private goods and services, among others.

Now, for the resolution of this case, the Constitutional Court indicated that the definition of the concept and scope of economic freedoms must necessarily be analyzed, as mentioned above, based on the recognition of the State's power of general direction of the economy, which implies, in a judgment of constitutionality, the prima facie admissibility of legislative and administrative measures that regulate and limit economic freedoms, as long as they meet the criteria of reasonableness and proportionality, with a level of scrutiny that is not too high, the prima facie admissibility of legislative and administrative measures that regulate and limit economic freedoms, as long as they comply with criteria of reasonableness and proportionality, with a low level of scrutiny, due to the constitutional formula that recognizes the need for State intervention in a social market economy, in order to ensure the constitutional purposes.

Once this analysis of constitutionality had been carried out, this Constitutional Body stated that:

> Articles 14, 15, 16 and 17 of Law 1335 of 2009, studied in a harmonious manner, allow concluding that the Legislator foresaw the total prohibition of advertising and promotion of tobacco consumption, as well as the restriction of sponsorship in cultural and sporting events, when the same is aimed at direct or indirect advertising of tobacco products and its derivatives. These measures are compatible with freedom of enterprise and free private initiative, since the legislator may impose restrictions, even at the level of prohibition, on commercial advertising, when there are compelling reasons that make such measures proportional. In the case under analysis, there is a global consensus on the intrinsically harmful nature of tobacco products and their derivatives, given the certain, objective and verifiable harm they cause to the health of consumers and passive smokers, as well as to the environment. This verification, together with the fact that the legal prohibition in question,
> (i) does not affect the essential core of economic freedom, since it is compatible with production and

(ii) preserves the right of consumers to know about the effects and consequences of the consumption of tobacco products and their derivatives; and (iii) is a development of commitments signed by the Colombian State in the area of tobacco control; it allows concluding that the analyzed norms do not contravene the aforementioned freedoms. (Decision C-830 of 2010).

In view of the above, the Constitutional Court declared articles 14, 15, 16 and 17 of Law 1335 of 2009 to be constitutional.

Ruling C-263 of 2011. Before addressing the referred Judgment, it is pertinent to point out that Judgment C-978 of 2010 mentioned the social market economy and free competition in one of its paragraphs, as follows:

However, one cannot lose sight of the fact that the assurance of competition in the market in equitable con- ditions between public and private institutions must be carried out under the premise of guaranteeing the quality of the service and its effective provision, and not only the protection of the individual profit of private agents. This is so because free competition in Colombia takes place within a social market economy, in which there is free private initiative, but in which the State, in turn, presents itself as an instrument of social justice, exercising certain redistributive intervention of wealth and resources to correct social inequalities caused by individual or collectivist excesses. (Decision C-978 of 2010).

The foregoing is a reiteration of what was indicated in Judgment T-533 of 1992 already studied, for which reason it will not be discussed in greater depth, so we will continue with the analysis of Judgment C-263 of 2011.

In this 2011 pronouncement, a claim of unconstitutionality was examined against paragraph 2 of Article 13 of Law 1101 of 2006, "whereby Law 300 of 1996 is amended", and literal g) of Article 71 of Law 300 of 1996, "whereby the General Law of Tourism is issued and other provisions are dictated".

The plaintiff considered that the challenged legal precepts are unconstitutional, since they contravene the principles of economic freedom and freedom of enterprise stipulated in Article 333 of the Constitution. Thus, he indicated that the accused norms, since they establish that the National Tourism Registry is a prior requirement for the operation of tourist establishments, affect the essential nucleus of the principles of economic freedom and freedom of enterprise recognized in the Political Constitution and openly contravene the forms of limitation and state interference of such freedoms.

To resolve this case, the Constitutional Court established the following methodology and legal problem:

It is up to the Court to determine whether the requirement of registration in the National Tourism Registry as a requirement for the operation of tourist establishments, and the provision of the omission of registration as an infraction punishable by the Ministry of Commerce, Industry and Tourism, does not comply with Article 333 above, in particular the freedom of enterprise.

In order to resolve this legal problem, the Chamber will first examine the scope of the freedoms

> The second is the possibility of establishing prior permissions and requirements as conditions for the exercise of economic activities. Based on these considerations, the final part will analyze the charges brought by the plaintiff. (Sentence C-263 of 2011)

In view of the above, the Court developed the concept of economic freedoms in the social market economy model, as follows:

> The 1991 Constitution, especially by adopting a model of social rule of law, introduced a model of social market economy in which, on the one hand, it admits that the enterprise is the engine of social development (article 333 above), thus recognizing the importance of a market economy and the promotion of entrepreneurial activity, but on the other hand, it assigns to the State not only the power but also the obligation to intervene in the economy in order to remedy market failures and promote economic and social development (articles 333 and 334 of the Constitution).

State intervention in the economy thus seeks to reconcile the private interests present in business activity with the general interest involved in the proper functioning of markets in order to achieve the satisfaction of the needs of the entire population under conditions of equity. In this sense, Article 334 of the Charter provides that the State shall intervene in the economy to rationalize it in order to achieve the improvement of the quality of life of the inhabitants, the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment.

One of the most important elements of this model is the recognition of the economic freedoms of individuals, understood as the power of all persons to engage in economic activities, according to their preferences or abilities, with a view to creating, maintaining or increasing their wealth. In this sense, Article 333 of the Constitution provides (i) that economic activity and private initiative are free within the limits of the common good, (ii) that free competition is a right of all and (iii) that for the exercise of these freedoms no one may demand prior permits or requirements, without authorization by law. (Decision C-263 of 2011)

The Constitutional Court also indicated that with respect to the limits of these economic freedoms, as well as the intervention of the State in the economy, it can adopt different modalities, among which are:

- Global state intervention, when it concerns the economy as a whole.
- Sectorial, when it falls within a specific area of activity.
- Particular, if it points to a certain situation such as that of a company.
- Direct state intervention, when it affects the existence or activity of economic agents.
- Indirect, when it is oriented not to the economic activity itself, but to the result thereof.

- Unilateral intervention, when the State authorizes, prohibits or regulates an economic activity.
- Conventional intervention, when the State agrees with economic agents on policies or programs that are in the general interest.
- Intervention by means of directives, when the State adopts measures to guide private economic agents.
- Intervention by way of management, when the State itself takes charge of economic activities through legal entities that are generally public.

Likewise, the Constitutional Court stated that, according to its function, the intervention of the State in the economy can also be grouped into three types of economic interventionism:

- Conformative, which establishes the requirements for the existence, formalization and operation of economic actors.
- Finalistic, which indicates the general objectives or concrete goals to be pursued by the economic actors.
- Conditional, which properly sets the rules of the game of the market or of an economic sector.

In addition, the Constitutional Court cited that, depending on their content, acts of state intervention may subject economic actors to certain regimes of:

- Declaration, which is based on a low level of intervention that only requires economic actors to submit certain information to the authorities.
- Regulation, whereby conditions are set for the performance of an activity.
- Prior authorization, which prevents the commencement of private economic activity without an act of the public authority permitting it.
- Interdiction, which prohibits certain economic activities deemed undesirable.
- Monopoly, whereby the State excludes certain economic activities from the market and reserves for itself the development of such activities, either directly or indirectly, as established by law.

Finally, with respect to the case under analysis, the Constitutional Court concluded that the provisions in question do not disregard the essential core of freedom of enterprise or imply a disproportionate sacrifice of the same, since:

- It pursues a legitimate purpose in light of the Charter, corresponding to publicizing which establishments provide tourist services and what kind of services they offer.
- The means chosen by the Legislator is suitable to achieve this purpose, since, the re

The registry allows users of tourism services to know the providers that exist in the market and the type of service they provide in order to choose the best conditions.

- The measure is proportionate in the strict sense, since although it means a sacrifice of freedom of enterprise, it is a minor sacrifice that is easily overcome, since the requirements for registration are simple.

Thus, based on the foregoing, this Constitutional Court declared paragraph 2 of Article 13 of Law 1101 of 2006 and Article 71(g) of Law 300 of 1996 to be constitutional.

Ruling C-263 of 2013. Before studying the Ruling in this section, it is necessary to indicate that the Constitutional Court previously issued Ruling C-197 of 2012. However, since its content is similar and reiterative in relation to Ruling C-263 of 2011 already studied, we will proceed to analyze Ruling C-263 of 2013.

Thus, in the aforementioned ruling, a claim of unconstitutionality was filed against Article 74 (partial) of Law 142 of 1994. It was indicated in its argumentative burden that it was necessary to establish the limits to the powers of the regulatory commissions in residential public utilities, specifically in order to establish rules of differential behavior, according to the position of the companies in the market, whose characteristic is that of being natural monopolies where access and rates are regulated, so that the only justification for State intervention, in a social market economy, would be the abuse of the dominant position and not the proper management of business or business success.

Likewise, the plaintiffs stated that the challenged norm implied a restriction to the economic rights and freedoms, by disregarding the reserve of law clause and delegating its exercise to the administrative authorities (regulatory commissions), not only because they lacked popular and democratic origin, but also because there were no objective parameters to limit its exercise. To that extent, they warned that, with the rule being in force, the regulatory commissions were authorized to arbitrarily restrict the rights of the companies providing residential public utilities, when in the best of cases they could only do so to correct duly accredited failures in the market.

In its argumentation, the Constitutional Court indicated that the Political Constitution adopted a social market economy model, which allows harmonizing the right to private property and the recognition of economic freedoms, such as freedom of enterprise, free competition and private initiative, with the intervention of the State in the economy, so that the invisible hand of the market and the visible arm of the State converge, indicating that the role of the market as an instrument of resource allocation is reconciled with the economic, political and social role of the State as a redistributor of resources.

Continuing with its arguments, the Constitutional Court referred that in the social market economy model there are several mechanisms of intervention in the economy, thus, the State is in charge of the general direction of the economy and, to that extent, its intervention is legitimate and necessary in order to rationalize it and achieve the improvement of the quality of life of the population, the equitable distribution of opportunities and the benefits of development.

Regarding the social market economy model and its relationship with state intervention in public services, the Constitutional Court stated:

> The intervention of the State in the economy, particularly in the area of public services, is linked to its duty to guarantee the effective realization of the minimum postulates of the social State governed by the rule of law. In order to comply with this objective, the 1991 Constitution gives entry to subjects of different nature (organized communities and/or individuals) enabling them to provide services, but under the regulation that in each case corresponds to the Legislator. This is how it is guaranteed, on the one hand, that agents external to the State may exercise their economic freedoms within the dynamics of the market; and on the other hand, that the efficient provision of services and the protection of users' rights will be ensured within the constitutional and legal limits established.

The regulation of public services is therefore one of the forms of State intervention in the economy, to correct the errors of an imperfect market and to limit the exercise of freedom of enterprise, as well as to preserve healthy and transparent competition, in order to achieve a better provision of those services. (Decision C-263 of 2013).

In the same analysis, the Constitutional Court concluded that as a result of a systematic interpretation within the context of Law 142 of 1994 and of several provisions of its articles, the Legislator has not failed to comply with the obligation to establish clear and precise rules so that the regulatory commissions may adopt differential treatments to the companies according to their position in the market, This allows affirming that the power granted to the regulatory commissions to adopt differential treatments to public utility companies, according to their position in the market and the social market economy model, does not disregard the reserve clause of the law.

This is because, according to this Constitutional Court:

> On the one hand, several norms of Law 142 of 1994 delimit and condition the margin of intervention of the Commissions when exercising its powers -including the one now being sued-, such as those that indicate the purposes of State intervention (Article 2), the instruments of intervention (Article 3), the special obligations of the service rendering companies (Article 11) and the general functions (Article 73), all of them directly defined by the Legislator.

On the other hand, Articles 74.1 and 74.2 (a) of the aforementioned law indicate the specific objectives that support the adoption of differential treatment for public utility companies. (Judgment C-263 of 2013).

Due to the argumentative burden expressed, the Constitutional Court declared constitutional the expression "the commission may adopt rules of differential behavior, according to the position of the company in the market", contained in literal a) of articles 74.1 and 74.2 of Law 142 of 1994.

Decision C-837 of 2013. First of all, before the issuance of the judgment to be analyzed, the Constitutional Court issued Judgment C-313 of 2013. However, the aforementioned judgment will not be studied in this analysis because it makes a tangential mention of the social market economy in the Colombian State, and develops in a limited way the concept of state intervention in the economy under this model. In this sense, we proceed to analyze Ruling C-837 of 2013.

> In this ruling, the plaintiff considered that the rules being challenged, i.e. Articles 2, 3 and 21 (paragraph 1), were not in conformity with the law.

The provisions of Law 98 of 1993, "whereby norms on democratization and promotion of the Colombian book are issued", contradict Articles 1, 2, 13, 20, 61, 61, 70, 70, 71, 73, 95-9, 333 and 363 of the Constitution, since they circumscribe the application of the rules contained in Law 98 of 1993 only to the publication of books, magazines, pamphlets or serialized collections of a scientific or cultural nature.

With more depth on the plaintiff's charges, it was indicated that:

> The central argument of the lawsuit is that the digital and written press is an analogous and comparable medium to the publishing industry, since in both cases it is a vehicle for the dissemination of culture and education. Therefore, there is an unjustified discriminatory treatment, based on a relative legislative omission by excluding newspapers from the scope of protection of Law 98 of 1993. Based on the same reason, the plaintiff argues that the legislator exceeded the constitutional limits for the granting of tax benefits to certain groups and economic activities, since, according to the assimilation described, there would be no reason to distinguish between the press and the publishing industry, which leads to the disregard of the principles of equality and tax equity that form the basis of these benefits.

Based on the aforementioned assimilation, the lawsuit builds three additional charges. First, it states that the absence of the incentive to the written and digital press affects the freedom to establish mass media, since it discourages the press industry, which has to assume full tax obligations, which is not the case of the publishing industry. Secondly, the plaintiff states that the rules violate the copyright, since the precautions contained in Law 98 of 1993 regarding books are not applicable to newspapers, due to the relative legislative omission explained above. Thirdly, the lawsuit states that the rules violate the right to culture of the citizens, since the lack of promotion and incentive to the press unjustifiably limits the possibilities of wide dissemination of newspapers as goods with cultural content. (Decision C-837 of 2013).

Having the plaintiff's arguments clear, the Constitutional Court decided, in order to resolve the present action, to formulate three legal problems, which were:

- Is there a relative legislative omission when Law 98 of 1993 excludes from its benefits, particularly of a fiscal nature, the digital and written press, providing them specifically to some printed matter belonging to the publishing industry?

- Is the exercise of freedom of information, freedom to found mass media and freedom of enterprise impeded by the fact that Law 98 of 1993 excludes the written and digital press from the benefits contained therein, including the income tax exemption provided for in Article 21 of that law?

- Is copyright not recognized and is people's access to culture impeded because the accused norms exclude the digital and written press from the benefits granted to the publishing industry?

With regard to the resolution of these legal problems, this Constitutional Body argued that there was a clear relationship between the accused with the economic model adopted by Colombia, that is, a social market economy, indicating the following:

Article 333 C.P. provides that economic activity and private initiative are free, but at the same time imposes a limit defined in the defense of the common good and the social function of property and business. It is for this reason that article 334 C.P. determines that the general direction of the economy corresponds to the State, which is granted intervention tools aimed at (i) the rationalization of the economy; (ii) the search, within a framework of fiscal sustainability, for the improvement of the quality of life of the inhabitants, the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment; (iii) the achievement of a policy of full employment and progressive access to basic goods and services, especially for the poor; and (iv) the promotion of productivity and competitiveness, as well as the harmonious development of the regions. Likewise, the constitutional provision in question imposes a precise limit, which gives priority to public social spending. (Decision C-837 of 2013).

Continuing with this same line of argumentation, the Constitutional Court referred that:

Constitutional jurisprudence, based on this frame of reference, has indicated that the Political Charter is not neutral with respect to the economic model, but rather adopts what has been called a social market economy. This concept is based on the consideration that the State has specific duties in two defined aspects: On the one hand, it is called upon to protect and guarantee a free and competitive market, where the different agents offering goods and services can compete fairly. On the other hand, it must correct the imperfections of that market, but not only with respect to the promotion of free competition, but especially with respect to the enforcement of the fundamental rights of individuals, which are necessarily tied to market situations. Hence, ultimately, state intervention in the economy is based on the compatibility between the market and the purposes of the Social and Democratic Rule of Law. This means, then, that what is privileged is the effectiveness of rights, which must have place and validity in a scenario that encourages a competitive market. (Decision C-837 of 2013).

Based on the foregoing, the Constitutional Court indicated that the challenged provisions do not involve a relative legislative omission, since there are several differences between newspapers and the publishing industry, in terms of economic and commercial phenomena, which make it reasonable for the legislator to provide for a differentiated treatment with respect to tax benefits.

Similarly, the Constitutional Court found that the aforementioned different treatment does not affect the freedoms of information and press, as well as economic freedoms, since the challenged rules do not contain any specific and burdensome treatment for digital and written press, but are only based on the rule of the general duty of taxation, which has a constitutional basis. Based on the same criterion, neither can it be asserted that there is a limitation on access to the cultural goods offered by newspapers, since the challenged rules do not incorporate restrictions of that nature.

In accordance with the foregoing, this Constitutional Court finally declared the accused expressions of Law 98 of 1993 to be constitutional.

Ruling C-148 of 2015. In this ruling, a claim of unconstitutionality was filed against Articles 31 and 32 of Law 1493 of 2011, on the grounds that they are contrary to numeral 21 of Article 150 numeral 21 of the Constitution, inasmuch as such provisions disregard the duty of the

The Legislator must specify the purposes, scope and limits imposed on economic freedom, in this case of the figure of "taking possession" of a copyright collecting society to administer or liquidate it, leaving the intervened economic agents, exposed in an unlimited, irrational and unpredictable manner, to the free will of the National Directorate of Copyright.

The Constitutional Court began its argumentation with respect to the present case, stating that Colombia is a social state of law (article 1 of the Constitution), in which economic interventionism is combined, which allows a permanent possibility of state restriction of economic freedoms, with the radical respect for civil and political rights; therefore, the restriction of the latter must have an express and specific basis. This Court understands that such parameters effectively establish a social market economy model, since it generically recognizes that private initiative and economic activity are free (article 333 of the Constitution), but it also establishes, in a general manner, the precept that the general direction of the economy will be in charge of the State (article 334 of the Constitution) and that interventions will be made by mandate of the law. In conclusion, this Agency refers that the intervention of the State in the economy is justified to the extent that it is intended to reconcile the private interests of those who participate in the market with the general interest of the community, as expressed in Articles 333 and 334 of the 1991 Constitution.

The Constitutional Court indicated, in accordance with what was stated, that this implies two circumstances:

- The recognition that the Political Charter grants the general direction of the economy to the State.

- The fact that the regulation also delimits the attributes of the intervention it proposes, by stating that it is by legal mandate that such intervention may be made, and by establishing a series of economic activities on which the intervention will particularly fall, together with the designation of a series of specific objectives for this purpose.

Specifically, the law mandates intervention in the following activities: in the exploitation of natural resources, in the use of land, in the production, distribution and consumption of goods, and in public and private services. Now, with respect to the specific objectives that must be fulfilled, the Constitutional Court established that they are: a) economic efficiency and stability, where the State will interfere for the rationalization of the economy, in order to achieve at the national and territorial level the improvement of the quality of life of the inhabitants; to progressively achieve the objectives of the social State of law and to give full employment to human resources; b) in aspects of equity and distribution, it shall act with the objective of achieving an equitable distribution of opportunities and the benefits of development and effective access to basic goods; and c) with respect to economic development and competitiveness, it shall intervene with the objective of promoting productivity and competitiveness, harmonious development in the regions and the preservation of a healthy environment.

In the constitutionality analysis concerning the case under examination, the Constitutional Court determined that the challenged regulation has to do with the powers of inspection, surveillance and control of the management societies of such rights and with the regulation of the performing arts from a fiscal perspective, not with the production, distribution or consumption of such intangible goods in themselves considered. This is why the legislation analyzed, indicated this Court, does not account for one of the determining and necessary elements to establish whether or not it is a law of economic intervention, inasmuch as it does not substantively regulate either the performing arts or the author's rights, under the following conditions

the requirements of Article 334 of the Political Constitution, nor does it develop some of the specific objectives set forth in the aforementioned constitutional article. In this sense, although Law 1493 of 2011 tangentially states that one of its objectives is to increase competitiveness, such expression cannot be seen, then, as a statement that makes it evident that the accused law is about those laws of economic intervention. It is in merit of the foregoing that the Constitutional Court determined to declare Articles 31 and 32 of Law 1493 of 2011 constitutional.

Ruling C-620 of 2016. In this Ruling, a public action of unconstitutionality was filed against Articles 71 and 72 (partial) of Law 1753 of 2015, "whereby the National Development Plan 2014-2018 is issued", for the alleged violation of Article 333 of the Constitution, by unjustifiably limiting free competition in the margin of prices of those who commercialize with medicines, supplies and medical devices without committing public monies.

The Constitutional Court again reiterated, as in several pronouncements already analyzed, that:

> The social rule of law model adopted by our constituent implied the option for a social market economy, in which, although economic freedom is guaranteed, mainly through freedom of enterprise and free competition (with self-restrictions), it also provides for the obligation of the State to intervene in such dynamics, with a view to correcting market failures and achieving scenarios of equity and justice in which the effectiveness of fundamental rights is possible. (Decision C-620 of 2016).

Such interference, said the Constitutional Court, must comply with criteria of proportionality and reasonableness, for which a light test must be carried out to verify whether or not the restriction on economic freedom imposed by the regulation is in accordance with the legal system. It also clarified that, if the regulation falls within the framework of the public health service, the State has an intense power of intervention, since it involves the protection of a fundamental right.

The Constitutional Court, in its constitutionality study, indicated that the objective of effecting centralized price negotiations and prohibiting all purchasers and suppliers of medicines, supplies and devices from engaging in transactions above the price thus determined, is to guarantee the sustainability of the social security health system. It also stated that it is necessary to establish whether the measure under analysis meets a legitimate purpose and is adequate in light of the constitutional order.

He then stated that it is understandable that the limitation imposed by the Legislator according to the social market economy model, must be developed within the limits of the common good, therefore, in the scenario of the provision of a public service, such as health, it is justified because it guarantees the principles of a) universality, since the control in the price of medicines allows the expansion in the coverage of the right to health; b) solidarity, by allowing the actors of the system to facilitate, without intensely affecting their rights and freedoms, an improvement in the provision of services, through the setting of fair prices in the market; and c) efficiency, by facilitating a better use of resources, the purpose of the analyzed measure having a strong constitutional support, related to the satisfaction of fundamental rights.

The Constitutional Court went on to state that the measure under analysis is also appropriate as a

The right to health is universal and, therefore, the obligations of state control and surveillance do not only apply to operators that manage public resources, since the general interest is at stake.

In conclusion, the Constitutional Court determined that the partially challenged provision does not disregard the social market economy model, since it is the product of the State's obligation to intervene and formulate public policies aimed at progressively guaranteeing the satisfaction of positive facets of the right to access to the highest possible level of health, in a framework of the social market economy, which guarantees the provision of the service under the principles of universality, solidarity and efficiency, thus establishing that the charges brought do not prosper, and in this sense Articles 71 and 72 (partial) of Law 1753 of 2015 were declared exequitable.

Decision C-032 of 2017. In the present action, the unconstitutionality of the expressions "and in general, all kinds of practices, procedures or systems tending to limit free competition", of Article 1 of Law 155 of 1959, amended by Article 1 of Decree 3307 of 1963, was challenged for violating Article 29 of the 1991 Charter. The plaintiffs indicated that the challenged statement violated the right to due process, for violation of the principles of typicality and legality, since, according to them, it was an indeterminate statement, constructed with expressions containing a high degree of vagueness. In this regard, they have said that the expressions "practices", "procedures" and "systems" tending to limit free competition, suffer from great ambiguity, which prevents determining up to what point the permitted practices go and where the prohibited ones begin, which, in addition to violating due process, fills with insecurity and uncertainty the persons who exercise or want to exercise the constitutional right to free competition and competition in the market.

In order to resolve the accused, in the complaint the Constitutional Court raised the following legal problem: is the normative statement contained in Article 1 of Law 155 of 1959, on restrictive business practices that prohibits and, in general, all kinds of practices, procedures or systems tending to limit free competition, a violation of the right to due administrative process established in Article 29 of the Constitution, and more precisely, of the principles of legality and typicality?

Thus, to resolve it, the Court began by indicating that in economic matters, the 1991 Constitution adopted the social market economy model, which corresponds to:

> A type of organization that develops agile exchange processes, which seek not only to satisfy basic needs, but also to obtain profit, under the assumption that economic activity must be dynamic and growing, all in a scenario (the market) based on the freedom of action of individuals (economic freedoms), in which the laws of production, distribution, exchange and consumption are subtracted from the conscious and planned regulation of individuals, taking on a life of their own. (Decision C-032 of 2017).

In this way, the Constitutional Court indicated that a central issue, with respect to the aforementioned, are the limits of action that market players have, and more precisely, the limits that must be imposed on economic freedom, which are materialized in the regime of protection of competition. For which there are, according to this Court, two types of limits: a) those that are freely imposed by the pro-

b) those imposed on them by means of regulation, by law, including the set of rules that protect the right to free competition, within the framework of a social market economy.

Finally, in the specific case, this Constitutional Body concluded that:

> The challenged prohibition is executory and, therefore, does not violate the principle of typicality or due process. To this effect, it states that it was not an indeterminate and ambiguous statement, but a general prohibition, which is part of the "general competition regime", created by Article 4 of Law 1340 of 2009, which is a particular subsystem, contained within the legal system formed by Law 155 of 1959, Decree Law 2153 of 1992, Law 1340 of 2009, Decree 3523 of 2009, Decree 1687 of 2010 and Decree 4886 of 2011, as basic rules. Within this understanding, the interpretation of the expressions "and in general, any kind of practices, procedures or systems tending to limit free competition", must be read, inter- pretted and applied, in relation to the normative subsystem to which it belongs, as provided by Article 4 of Law 1340 of 2009, thus satisfying the control parameter established by the Constitutional Court for that kind of statements. (Decision C-032 of 2017).

Decision C-284 of 2017. In this ruling, a claim of unconstitutionality was filed against Article 98 (partial) of Law 30 of 1992, "whereby the public service of higher education is organized", for affecting Articles 13 and 333 of the Constitution. The plaintiff considered that the Legislator, in the exercise of the freedom of normative configuration, has regulated public services in different areas, as is the case, for example, of public utilities, health, central banking, among others, allowing private individuals to provide them for profit, While in the case of higher education it establishes that it must be provided through non-profit legal entities of common utility, organized as corporations, foundations or institutions of solidarity economy, which it considers discriminatory and, in addition, harmful to the right to equality and freedom of enterprise (Articles 13 and 333 of the Political Constitution).

The Constitutional Court, in the present ruling, initially indicated that:

> In a social market economy such as the Colombian one, the State guarantees economic freedoms - freedom of enterprise and free competition-, however, such prerogative is not absolute since it is a State obligation to intervene in order to correct market failures and achieve scenarios of equity and justice in which the effectiveness of the social purposes of the State can be achieved, among which is the general welfare through the satisfaction of unsatisfied basic needs, as is the case with the provision of public services, where the intervention is materialized in the broad power of normative configuration of the legislator and in the powers of inspection and oversight of the Executive. (Sentence C- 284 of 2017)

Now, in the specific case, the Constitutional Court determined whether the restriction whereby private higher education institutions do not seek to make a profit was reasonable and proportionate, and whether this decision was within the scope of the Legislator's configuration. To this end, this Constitutional Body carried out an intermediate test of proportionality and examined the fact that education is a public service with a valuable social function. From this derives the imperative need for the State to exercise regulation, control and oversight over it in terms of quality, coverage and accessibility,

affordability, permanence and gradualness. In accordance with the foregoing, this Constitutional Court affirms that the limitation imposed on private legal entities that provide the public service of higher education pursues a constitutionally admissible purpose.

Continuing with its argumentation, the Constitutional Court pointed out that the objective that allowed the Legislator to exclude the profit motive of private higher education institutions was to ensure quality, access, continuity and gradualness in the training processes because under the established modality, the profits are reinvested in the activity, which is reflected as a constitutionally valid option within its margin of configuration in the design of the educational policy, which is why the measure is adequate.

Finally, the Constitutional Court indicated that it found this measure to be appropriate because, although it is true that it is not the only way to achieve quality, access and continuity of higher education service, it is also true that the formula adopted allows to ensure it, by establishing limits to the distribution of profits, which is nothing more than compliance with higher mandates due to the special interest of the State in education. Consequently, this Constitutional Court stated that the accused precepts do not violate the right to equality and freedom of enterprise of the legal entities interested in forming private higher education institutions, since there is no violation of the right, but rather the establishment of the conditions under which they must be organized and operate.

Thus, the Constitutional Court determined that the rule that excludes the profit motive in the public service of higher education, contained in Article 98 (partial) of Law 30 of 1992, is in accordance with the Constitution and therefore, it was declared constitutional.

Decision C-092 of 2018. In the present case, the plaintiff, in exercise of the public action of unconstitutionality, filed a claim of unconstitutionality against Article 208 of Law 1753 of 2015, on the grounds that the rule contravenes Articles 1, 2, 4, 5, 6, 29, 58, 90, 121, 150 numerals 3, 8 and 21, 158, 169,
189 paragraphs 11 and 22, 209, 243, 333, 334, 339, 359, 365 and 370 of the Political Constitution, considering that the power of the Superintendence of Residential Public Utilities to impose sanctions violated the principles of: reserve of law, due process, legality, typicity, freedom of enterprise, responsibility, the prohibition of specific destination of resources, unity of matter and legal certainty.

Regarding the charges related to the infringement of the freedom of enterprise and the economic regime, due to the sanctioning authority of the Superintendence of Residential Public Utilities, the plaintiff pointed out that the accused norm subjects its addressees to a measure that limits the freedom of enterprise, not because the Constitution orders it, but by decision of the executive through a regulatory decree in which the criteria and methodology for graduating and calculating such fines are determined. The foregoing is evidenced by the establishment of a sanctioning regime with a high degree of indeterminacy, without the care and rigor required for the issuance of a rule of economic intervention, imposing limits to an activity developed by individuals that requires a clear and concrete legal mandate.

The fact that the National Government may establish fines of up to one hundred thousand minimum wages for legal entities, according to criteria and methodologies of graduation established by itself, violates the constitutional economic model of free enterprise adopted in the 1991 Constitution, since the providers of residential public utilities will be subject to severe economic sanctions provided for in the following provisions

The plaintiff considers that the freedom of enterprise enshrined in Articles 333, 365 and 370 of the Constitution is affected by the rule being challenged, since the intention and essential guarantee of the Charter is that the State minimizes the intervention of the State in the provision of such services. In the opinion of the plaintiff, the freedom of enterprise enshrined in Articles 333, 365 and 370 of the Constitution is affected by the challenged provision, since the intention and essential guarantee of the Charter is that the employer is not subject to the discretion of the executive in sanctioning matters, but only to the mandates of the law.

Among the legal problems raised by the Constitutional Court, the one that is relevant to the present study was indicated: are the rights to due process (legality and typicality) and to freedom of enterprise infringed by the delegation made in favor of the holder of the regulatory power to define the exact criteria for the assessment of fines that may be imposed by a superintendency in the exercise of its inspection, surveillance and control functions?

To resolve this question, the Constitutional Court began its argument by indicating that within the social market economy model there is the capacity for state intervention through its sanctioning power in the event of market abuses. Specifically, in this regard, it indicated that:

The model defends freedom of enterprise, from which the intensity of state intervention is based on the potential impact on other constitutional principles and values. In this context, State intervention, far from being a characteristic of a planned or centralized economy, is justified in order to allow the market to function, regulating it in those aspects in which it is not capable of maximizing benefits for consumers, either due to the existence of structural failures or because of dominant positions. In these circumstances, one of the elements that define the State's capacity to intervene in the economy is its sanctioning power. In exercising it, the administration operates in the dual perspective of punishing conduct that affects consumers, while at the same time discouraging the occurrence of acts similar to those that gave rise to the sanction. Therefore, the intervention in the economy is both a regulated power of the State and an obligation that must be deployed to avoid an affectation of the collective interest materialized in a loss of consumer rights (Decision C-092 of 2018).

Along the same lines, the Constitutional Court determined that the norms with punitive content, such as the one in the present case, require a democratic deliberation with a higher degree of transparency than that presented in a transitory norm such as a National Development Plan, since the relationship between these and the Plan is null. This Court continued affirming that the sanctioning norms, due to their nature of ultima ratio and immediate interference in the scope of human self-determination, cannot be issued without an analysis of the elements of the sanctioning type, these are, the subjects, the objects of protection, the conduct, among others, and that in this case they were not foreseen in the law and were delegated to the executive.

The Constitutional Court also indicated that although the domiciliary public utilities are closely related to fundamental rights and, therefore, with the administrative sanctioning power, for example to increase the penalties to be imposed on the companies providing domiciliary public utilities; Article 208 of Law 1753 of 2015 is not materially related to any of the objectives set forth in the Development Plan Law, nor to the programs, objectives, goals and strategies set forth therein.

Thus, this Constitutional Court determined that article 208 does not have a connexion of cone

xity directly and immediately with the objectives, programs, goals and strategies set forth in Law 1751 of 2015, none of which makes reference to the links between the companies providing services and the users, reason for which, the principle of unity of subject matter enshrined in Article 158 of the Political Charter was violated. Consequently, it declared Article 208 of Law 1753 of 2015, "whereby the National Development Plan 2014-2018 is issued", unconstitutional for violating Articles 29, 158 and 243 of the Political Constitution.

Ruling C-265 of 2019. In this ruling, an action of unconstitutionality was filed against Article 100 (partial) of Law 1819 of 2016, "whereby a structural tax reform is adopted, the mechanisms for the fight against tax evasion and tax avoidance are strengthened, and other provisions are enacted". The plaintiff considered that the challenged provision is contrary to Article 333 of the Constitution, because the loss of the preferential tax treatment established in Law 1429 of 2010 due to the change in the shareholder composition, affects the freedom of enterprise because it restricts the power of organization and autonomous management of its interests through the unjustified interference of the State in the management of its internal affairs, particularly those related to the strengthening of the equity of the corporate entity.

More specifically developing his claims, he argued that:

> The expression "change in the shareholding composition" contained in the accused norm as a cause for the loss of the transitional tax regime, configures a limitation for companies to capitalize and strengthen themselves through the issuance of shares, so that they would always have to resort to indebtedness as a source of financing. Likewise, he insisted that it limits the management of the internal affairs of the company, in the sense that the partners may not hold more shares of the company without varying their shareholding percentage.

On this understanding, it specified that the legal proposition analyzed establishes an unreasonable and disproportionate limitation of the right to freedom of enterprise of the companies benefiting from the transitional tax regime because it restricts the power of organization and autonomous management of their interests through unjustified interference of the State in the management of their internal affairs, particularly those related to the strengthening of the assets of the corporate entity, since it forces them to resort to bank indebtedness as a source of financing. (Decision C-265 of 2019).

Now, in order to resolve what is questioned in the present action, the Constitutional Court established the following legal problem: does Article 100 (partial) of Law 1819 of 2016, disregard Article 333 of the Constitution by establishing that companies benefiting from the preferential income tax regime, established in Article 4 of Law 1429 of 2010, will lose the tax benefit if a change in their shareholding composition is configured?

This Constitutional Body began its argument by stating that:

> The Colombian State is incompatible with a model of classical economic liberalism, which proscribes state intervention, as well as with forms of authoritarian economics centered on the State as the only relevant market agent. On the contrary, the Constitution adopted a model of social market economy, which recognizes business and private initiative as the driving force of the economy, but which reasonably and proportionately limits freedom of enterprise, with the sole purpose of fulfilling the constitutional purposes that protect the general interest. (Sentence C-265 of 2019)

According to what has been previously developed by the Constitutional Court, the content and scope of freedom of enterprise must be understood within the framework of a social market economy, which allows the State to interfere in order to correct inequality without these actions being incompatible with private initiative and with the constitutional purposes that regulate the economy.

Likewise, the Constitutional Court indicated that freedom of organization and the right of the State not to interfere in the internal affairs of the company, such as its organization and management methods, are fundamental elements of the right to freedom of enterprise, but these are not absolute and may be limited by the State, provided that they respect the contents that make up its essential elements, obey constitutional purposes, and guarantee the reasonableness and proportionality of the measures adopted.

Making its constitutionality review, it concluded that:

> The accused provision does not disregard the principle of freedom of enterprise because the analyzed measure aims to achieve constitutionally legitimate purposes, such as strengthening the tax system, combating tax avoidance and evasion and preventing abuse of the exercise of freedom of enterprise. (Decision C-265 of 2019).

To determine this, the Constitutional Court implemented a mild test of proportionality, typical of the nature of state interventions in the market, on the basis of which it determined that:

> The measure adopted by the Legislator, tending to establish the loss of the three-year transition regime due to the change in the shareholding composition of the companies receiving the benefit of Law 1429 of 2010, is not prohibited by the Charter and is adequate in superior terms, in order to achieve the proposed purposes, in attention to the fact that it does not affect the essential core of the freedom of enterprise and it is considered an effective instrument to fight against tax evasion and avoidance, and also allows to make compatible the exercise of economic freedom with the limits of the common good and social responsibility established by the Constitution. (Sentence C-265 of 2019)

Finally, the Constitutional Court, based on the foregoing, declared numeral 6 of paragraph 3 of Article 100 of Law 1819 of 2016, as it is in accordance with Article 333 of the Constitution.

6. CONCLUSIONS

It is possible to affirm that the Colombian Constitutional Court has adequately guaranteed and developed the social market economy model, establishing the following standards, parameters and jurisprudential guidelines:

a) The social market economy and its concept. The Constitutional Court of Colombia has understood that the Constitution of 1991 has adopted a model called "social market economy", which re- cognizes the company and, in general, private initiative, as the driving force of the economy, but which reasonably and proportionally limits economic freedoms, i.e., freedom of enterprise and free economic competition, with the sole purpose of fulfilling constitutionally valuable ends, aimed at protecting the general interest, correcting market failures and achieving scenarios of equity and justice in which the effectiveness of the social ends of the State is achievable, among which is the

general welfare through the satisfaction of unsatisfied basic needs. In this sense, social market economics is incompatible with a model of classical economic liberalism, which proscribes state intervention, as well as with forms of authoritarian economics centered on the state as the only relevant market agent.

b) The social market economy and its characteristics. The social market economy model finds its defining characteristics:

- The constitutional recognition of freedom of enterprise and free private initiative, as indispensable guarantees for the achievement of economic development and general prosperity. To this end, a complex general clause is imposed, which prevents the demand for prior permits or requirements, as well as the state's obligation to promote free competition and economic freedom (article 333 of the Constitution).

- The assignment to the State of the function of general management of the economy, which is expressed in two fundamental aspects i) the imposition of measures aimed at ensuring that companies, which have the status of private property, comply with the obligations inherent to their social and ecological function (Article 58 of the Constitution), and ii) intervention through the legal powers of the State, in order to regulate the exploitation of natural resources, land use, production, distribution, use and consumption of public and private goods and services, for the improvement of the quality of life of the inhabitants, the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment (article 334 of the Constitution).

c) The social market economy and its classifications. The social market economy is classified according to the Constitutional Court as follows:

- According to the modalities of government intervention: i) global, when it deals with the economy as a whole; ii) sectoral, i.e., it falls on a certain area of activity; iii) particular, if it targets a certain situation such as that of a company; iv) direct, when it affects the existence or activity of economic agents; iv) indirect, if it is not aimed at the economic activity itself, but at the result thereof; (v) unilateral, when the State authorizes, prohibits or regulates an economic activity; (vi) conventional, i.e., the State agrees with economic agents on policies or programs that are in the general interest; (vii) directive, when the State adopts measures that guide private economic agents; and (viii) managerial, if the State takes charge of economic activities through legal entities that are generally public.

- According to the types of interventionism: i) formative, which establishes the requirements for the existence, for- malization and functioning of economic actors; ii) finalistic, which establishes the general objectives or specific goals to be pursued by economic actors; and iii) conditioning, which establishes the rules of the game of the market or of an economic sector.

- According to their content, there are regimes of: (i) declaration, which is based on a low level of intervention that only requires economic actors to submit certain information to the authorities; (ii) regulation, which sets conditions for the performance of an activity; (iii) prior authorization, which prevents the start of private economic activity without an act of the public authority permitting it; (iv) interdiction, which prohibits certain economic activities; (v) prohibition, which prohibits certain economic activities; and (vi) regulation, which prohibits the performance of certain economic activities.

(v) monopoly, whereby the State excludes certain economic activities from the market and reserves for itself their development, either directly or indirectly, as established by law.

d) The social market economy and its objectives. The general direction of the economy corresponds to the State, which is granted intervention tools with priority to public social spending and aimed at: (i) the rationalization of the economy; (ii) the search, within a framework of fiscal sustainability, for the improvement of the quality of life of the inhabitants, the equitable distribution of the opportunities and benefits of development and the preservation of a healthy environment; (iii) the achievement of a policy of full employment and progressive access to basic goods and services, especially in favor of those with the least resources; and (iv) the promotion of productivity and competitiveness, as well as the harmonious development of the regions.

e) The social market economy and intervention activities. State intervention by law is in the following activities: i) in the exploitation of natural resources; ii) in land use; iii) in the production, distribution and consumption of goods; and iv) in public and private services.

f) The social market economy and the control of constitutionality. In a constitutionality trial, legislative and administrative measures that regulate and limit economic freedoms in a social market economy model must be analyzed, provided that they are (i) reasonable, and (ii) in conformity with the provisions of the Constitution.
ii) proportionate. This control of constitutionality is of a weak or mild level, since it is an intervention in the economy with the purpose of remedying market failures and promoting economic and social development. On the other hand, it must be recognized that the State has the power of intense economic intervention in rights such as health or education, since it involves the protection of a fundamental right. However, there is a particularity in the case of the right to education, since in this case an intermediate test of proportionality must be carried out.

g) The social market economy and the sanctioning power of the State. The Constitutional Court indicates that one of the elements that define the State's capacity to intervene in the economy is its sanctioning power. In exercising this power, the administration operates in the dual perspective of i) punishing conduct that affects consumers, and ii) discouraging the occurrence of acts similar to those that gave rise to the sanction.

The Constitutional Court also indicates that the sanctioning rules, as measures of state intervention in the economy, due to their nature of last resort and immediate interference in the sphere of human self-determination, cannot be issued without an analysis of the elements of the type of sanction. These are the subjects, the objects of protection, the conduct, among others. In this sense, intervention in the economy, within the social market economy model, is both a regulated power of the State and an obligation that must be deployed to avoid an affectation of the collective interest materialized in a loss of consumer rights.

h) The social market economy and limits on free competition. According to the Constitutional Court, the limits to free competition are: i) those that are freely imposed by the actors themselves, set forth, among other instruments, in the good practice manuals, and ii) those that are imposed by means of regulation, by law, among which are the set of rules that protect the right to free competition, within the framework of a social market economy.

i) The social market economy and limits on freedom of enterprise. Freedom of organization and the right of the State not to interfere in the internal affairs of the company, such as its organization and management methods, are fundamental elements of the right to freedom of enterprise, but these are not absolute and may be limited by the State, provided that they respect the contents that make up i) its essential elements, ii) obey constitutional purposes, and iii) guarantee the reasonableness and proportionality of the measures adopted.

j) The social market economy and the limits on the provision of public health services. The limits must be developed within the common good, states the Constitutional Court, and must also guarantee the principles of i) universality, since the control in the price of medicines allows the expansion of the coverage of the right to health; ii) solidarity, by allowing the actors of the system to facilitate, without intensely affecting their rights and freedoms, an improvement in the provision of services, through the establishment of fair prices in the market; and iii) efficiency, by facilitating a better use of resources, whose constitutional support is related to the satisfaction of fundamental rights.

k) The social market economy and the limits to the right to education. Education as a right and as a public service fulfills a valuable social function. From this derives the imperative need for the State to regulate, control and monitor education in terms of quality, coverage, accessibility, affordability, permanence and gradualness.

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