THE SATISFACTION OF INDIRECT PUBLIC INTEREST IN THE INDUSTRIAL AND COMMERCIAL ACTIVITIES OF THE STATE

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ABSTRACT

The State has become what is currently known as a Social Rule of Law that is based on the protection and fulfillment of the public interest. However, when analyzing the role of the State, we observe that it does not always act under the postulates of empire or power, since, in specific cases, it is limited to regulations specific to the law that governs the individuals. Then, we find a legal phenomenon called voluntary submission of the administration to the private law, where the latter acts in uniform conditions for the individuals in the fulfillment of the purpose for which it was created. Thus, a new form of administrative activity is created through the industrial and commercial role of the State that finds its aim framed in the satisfaction of an indirect public interest, since the State, through these institutions, does not generate the direct collective satisfaction of its partners, but it seeks the collection of resources that can be transferred so that the State complies with its purposes.

KEYWORDS: Intervention, indirect public interest, submission to private law, industrial and commercial activity of the State.

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RESUMEN

El Estado ha evolucionado en lo que hoy conocemos como Estado Social de Derecho fundando en la protección y satisfacción del interés general. Sin embargo, al analizar el papel que éste cumple en función del servicio a la comunidad observamos que no siempre el Estado actúa bajo los postulados de imperio o dominio, puesto que en ciertos casos específicos se circunscribe a regulaciones propias del derecho que rige a los particulares. Encontramos entonces, un fenómeno jurídico denominado sumisión voluntaria de la Administración al derecho privado, donde éste último actúa en condiciones uniformes a los particulares en el cumplimiento del objeto para el cual fue creado. Así pues, nace una nueva forma de desarrollar la actividad administrativa a través del rol industrial y comercial del Estado que encuentra su fin enmarcado en la satisfacción de un interés general indirecto, pues el Estado a través de estos organismos no genera la satisfacción colectiva directa de sus asociados, pero si busca la captación de recursos que al final pueden ser trasladados para que el Estado cumpla con los fines que éste se ha propuesto.

PALABRAS CLAVES: Intervención, Interés General Indirecto, sumisión al derecho privado, Actividad industrial y comercial del Estado.

INTRODUCTION

The relationship profile between public power and economy has historically preserved a variety of common factors, both external and internal, that have facilitated their joined evolution throughout the years.

The reference of the Economic Constitution, which emerges from a purely formal perspective, with the necessary contents to assess and interpret the choice of the intended economic system, is quite meaningful for the understanding of the public power-economy relationship.

Thus, the relationship between law and economy adopts two levels of interpretation. The first one is the abstract level, where rules assume a neutral role as a tool at the service of the system. While the second one is the concrete level, where rules can lose their impartiality (Miele, 1956, p. 5-6) in accordance with the political system that appropriates them. This means that, at a theoretical level, it is possible to show the impartiality of rules in relation to

economy, in the sense that economy does not condition the functioning of rules; still, it must be observed that rules are subordinate and at the service of the political system.

The State has evolved in what we now know as the Social Rule of Law, based on the protection and satisfaction of the general interest. However, when analyzing its role in terms of service to the community, we observe that the State does not always act under the postulates of empire or power, since it is limited to regulations characteristic of the law that governs individuals in certain specific cases. Hence, we find a legal phenomenon called the voluntary submission of the administration to private law, where the latter acts under uniform conditions for individuals in fulfilling the purpose for which it was created.

Consequently, a new way of developing administrative activity is born, which is framed in the satisfaction of an indirect public interest, since the State, through these institutions, does not generate the direct collective satisfaction of its associates, but it seeks the collection of resources that can be transferred so that the State complies with its purposes.

This type of activities are developed by the alleged State Industrial and Commercial Companies (henceforth, EICEs, in its Spanish acronym), which acquired a predominant value thanks to the change in the new conception of the State in the middle of the twentieth century, in which economic affairs can be intervened to achieve greater economic, social and political equality and equity. With that in mind, the birth of EICEs originated in the constitutional guarantees of free enterprise and private initiative, in which interventionism allows the State to assume the general direction of the economy under the principles of rationalization and economic planning. In this line of thought, the administration, in its industrial and commercial role, sets aside its supremacy, becoming one more actor in the economic development of our society, submitting to private law.

That being said, this reflection article analyzes that type of submission, classified as *voluntary*, of the administration to private law, but that, in the position of State authority, still retains some acts of *power* that generate a regime of inequality compared to other economic actors. Therefore, it is necessary to analyze and question the legislative treatment granted to this type of entities, which arise from a regulatory mix between public and private law. For this reason, we will analyze the legal, doctrinal and normative support of this submission to private law and the cause for maintaining the prerogatives of public law.

1. THE INDUSTRIAL AND COMMERCIAL ACTIVITY OF THE STATE AS A MEANS OF ECONOMIC INTERVENTION

The interventionist State of the twentieth century had its dogmatic and structural evolution, being empowered "to direct the public powers in order to correct the problems that the economic system alone cannot solve, both efficiency and distributive equity" (Cidoncha, 2006, p. 113). This implies that intervention is aimed at obtaining real equality in the constitutional order;

> this way, public intervention in general and the objective of equality in particular constitute a fourth defining element of the economic system inherent to the essential content of the three defining elements of the economic system of the Constitution (private property, free enterprise and market) (Cidoncha, 2006, p. 115).

As a result, the State attains a leading role for the regulation and management of economic affairs, where it can also become a direct actor by becoming an enterprise.

The creation of EICEs was justified in the first half of the twentieth century in the growing need to "intervene the economy, for public and social interest, in order to guarantee the efficient and low-cost service provision, price stability and the supply of collective needs" (Penagos, 1998, p. 625).

The Council of State, Consultation and Civil Services Office, in a concept from November 24, 1972, established that

> these entities constitute one of the means of intervention by the State. This is how in these companies, to be at their level, the State acts as the State, but it advocates certain activities, which, in the past, were considered to be particular of private companies (Council of State, 1972, s.p.).

Thus, the State becomes an agent of social change and economic transformation, which requires a functioning bureaucratic apparatus; however, through the EICEs, the State becomes an agent of the accumulation of capital and direct actor in production, distribution and financing, as an inherent result of State intervention. In its entrepreneurial role, the State has undergone an internal change in its administrative structure as a consequence of its intervention in economic affairs, abandoning its neutral position in said process.

On that basis, the terms of the relationship are given between the intervening public power, and the individual and freedom, whose reciprocal conservation is protected by

administrative law, which, in the face of the impact of economic intervention, updates its legal institutions. It should be noted that the technical value of traditional institutions has not disappeared; what has occurred is "a transformation in the contents, where it can be affirmed that the formal scheme remains intact." (Garrido, 1962, p. 12).

These transformations facilitated an advance and enhancement of administrative law as it became the guarantor of such activities, but leaving their execution to private law, to which it has voluntarily submitted. To this end, independence, in certain aspects of the industrial and commercial relations of the State concerning individuals, was diminished, while maintaining its control in the application of exorbitances in favor of State entities that carry out commercial and business activities.

Law then, is no longer facing the freedom of primitive industry and commerce, as understood in the nineteenth century, since the current Social State of Law is a guardian not only of legality but also of new freedom, which is manifested in the socio-economic sphere and demands a creative intervention from the State.

To achieve this new type of freedom in the economic and social sphere, the State should not be predetermined to the abolition of certain traditional freedoms that were supported in the economic sphere, since this refers, especially, to the freedom of industry and commerce, which has undergone a whole process of transformation by subjecting itself to the limits imposed by the police power. The disappearance of the boundary defined between public and private activity leads to the disappearance of primitive freedom and the establishment of a guided freedom.

Consequently, freedom is linked to the political and social regime on which it depends and to the extension of the limits of the economic public order, hence making it limited. "The regulation of industrial activity is a State duty, but the prohibition of an industry without legitimate reasons for it evidences an exorbitant power of the administration" (Dromi, 1985, p. 510). Yet, such exorbitance is not established for the State as an industrial actor, but simply for its role as general controller of the economy. Nevertheless, when the State acts as a private individual, a series of obstacles arise that allow us to understand the true industrial role, for which it is necessary to analyze its activity and therefore the legal regime that corresponds to it.

2. THE PRINCIPLES OF SOVEREIGNTY AND SPECIALTY IN THE LEGAL REGIME OF THE DECENTRALIZED BUSINESS STATE

Legal persons in public law, within their administrative actions, seek the adequate management of legal and economic relations with other legal or natural, public or private persons. However, public legal persons belonging to the State have privileges over individuals. Thus, the action by which the administration exercises its rights is called *ex officio action*, which can be confused with direct action. Likewise, "Hauriou (...) considers that royalty rights are not sufficient to characterize an administrative regime, but it is characterized for the special power by which royalty rights are exercised and managed" (Álvarez-Gendín, s.f., p. 400). On the other hand, in the field of private law, people can act for themselves, but if they lose one of their rights, they must go to the judge to recover it, while the administration can make decisions without resorting to the respective jurisdictions.

Nonetheless, the State does not act as a centralized whole, but rather resorts to the phenomenon of administrative decentralization, by means of which it manages to distribute public powers among different administrative entities acting as legal persons, limited by an area of territorial or functional competence.

From a dynamic point of view, this phenomenon, from which the State transfers functions, can be understood as a shift of competence from direct to indirect administration of the State. This maintains its objectives and purposes, understanding that its implementation is entrusted to other entities that have certain autonomy, and with general competence (regional scope) or special competence (specific matters) (Dromi, 1985, p. 434).

Administrative decentralization arises as the need of the State to intervene in specific, local, or regional contexts that justify the phenomenon at a territorial or functional level. The curious aspect about the phenomenon is that the decentralized entities carry out their tasks with certain autonomy and hierarchical independence from the central government, despite sharing goals and objectives. This is justified in the specialization of functions and in the need to relax hierarchical links between the central government and decentralized entities.

Decentralization is maintained through two concepts: (i) Transfer of powers from the State to another legal person under public law, and (ii) protection over acts or over people. From this double conceptualization, three variants can be understood:

A) Minimal decentralization (deconcentration): There is a limited transfer of powers, coupled with strong control by the central body.

B) Medium or normal decentralization: Broad transfer of powers, with great control by the higher body.

C) Maximum decentralization: Total transfer of powers from one institution to another, with a minimum of control.

Minimal decentralization is not an authentic decentralization, but refers to a phenomenon that perfectly derives from a centralized system. For this reason, it has been called deconcentration. Decentralization, in turn, offers two modalities: (i) Territorial, which implies a spatial, constituent, regional or local scope, and (ii) functional, which is decentralized by virtue of a group of functions and services. There is also a third form of decentralization called “by collaboration, foundational or corporate”. This refers to public utility establishments, corporations or consortia; functions that, despite not being part of the State or subordinated with hierarchy and dependency, actively contribute to the functions and purposes of the State.

Territorial administrative decentralization entails the transfer of functions and competencies to legal entities governed by public law that exercise them within a limited spatial scope (region, locality, etc.), as in local authorities such as municipalities, which are even considered the most evolved form of this kind of decentralization. These entities carry out tasks that are characteristic of the State, where this does neither lose ownership nor all management functions.

Administrative decentralization has implied a political problem, since its exercise leads to movements of political autonomy, regionalism, municipalism and provincialization.

For its part, institutional administrative decentralization (or by functions) is not limited to a territorial scope, but to the exercise of specific functions of a technical and independent nature. The problems of political autonomy are not generated here, since the reason for decentralization is the satisfaction of a service or function. It is worth mentioning, regarding institutional administrative decentralization, “that French doctrine has called

entities ‘public establishments’, while Italian doctrine prefers to call them ‘parastatal institutions’” (Dromi, 1985, p. 440).

Institutionally decentralized entities, due to the specific functions they perform, are located outside the hierarchical structure of the central administration; but it should be noted that their independence does not remove them from the control of their acts.

Within decentralized administrative entities, there is a varied classification, (e.g. administrative State entities with general competence: this refers to municipalities, departments, special districts, etc.; or administrative State entities with special competence: those who provide a service or a group of certain services, whose functionality is purely administrative, thus being different from the EICEs). However, for the purpose at hand, State companies have been subdivided by the doctrine, especially by Dromi (1985), like this:

A) State Partnerships: created under the regime of private law, basically corporations, and their shares are held by the State.

B) State Companies: Entities that carry out a commercial or industrial activity, and are subject to a mixed regime: public and private law.

Public companies have certain fundamental characteristics: (i) entirely State-owned (where they differ from mixed economy companies), (ii) they do not adopt the forms of private society as state partnerships, (iii) they have legal status, (iv) they are engaged in a certain economic activity, and (v) they are subjected to a mixed regime of regulation between private and public law.

Secondly, there are non-State public entities, which are subdivided into two: (i) with State participation, and (ii) without State participation.

Within the non-State public entities with State participation are the mixed-economy partnerships: participation of public and private capital. When it pursues public purposes (public services), it constitutes a non-State public entity; on the other hand, when it carries out purely economic and industrial activities, they are configured as a private entity. Non-State public entities without State participation are public corporations and non-State public functions or institutions.

It is necessary to remember that Colombian legislation determines that the industrial development of the State occurs due to its intervention in economy. In this regard, Law 489

of 1998 states that these are: “bodies created by law or authorized by it, which carry out activities of an industrial or commercial nature and economic management in accordance with the rules of private law” (Law 489, 1998). However, legislators reserve certain activities that deserve attention from public law, since the rule foresees some exceptions. For instance, those that are carried out for the fulfillment of the administrative functions that the law has entrusted to them are administrative acts, that is to say, the acts or facts that the companies or mixed-economy partnerships carry out to fulfill the purposes of the law are governed by public law (Penagos, 1988, p. 625). As it can be seen, the legal regime of the EICEs is not entirely limited to the sphere of common law (civil or commercial), but it rather contains manifestations of public law.

It is observed that the State does not leave its EICEs at the chance of private law, but tries to reserve some acts by applying a special regime to them. This reserve is made by virtue of the principle of sovereignty, with which it seeks to develop the general interest that should inspire all its actions.

The difference with private law is that it is based on principles such as contractual freedom and free competition, where the interest of people (natural or legal) is the increase in capital, earnings and private profit. Such a regime is not entirely in accordance with the State’s intention to achieve general benefits, hence allowing the EICEs to be governed by private law to guarantee their competitiveness, or even their existence in the markets, as it removes certain acts from public law to protect that “general interest”. In this sense, the Council of State has stated that the prerogatives and benefits that the law recognizes to the EICEs and to the mixed-economy partnerships are specific, for which it is necessary to study each company in particular. The EICEs have benefits or provisions typical of public law, which are not within the normal scope of private law. Their purpose must be understood as the performance of State intervention in the economy, as well as the provision of its own services, with its characteristics of: (i) continuity, (ii) generality, (iii) regularity and (iv) equality (Penagos, 1988, p. 629).

The EICEs have determining elements that differentiate them and facilitate their identification:

A) Legal status, as they are subjects of rights and obligations. It should be noted that the ability to enjoy these rights also arises, since, in a strictly procedural sense, these rights

attribute them the capacity to be a party. Therefore, an EICE can be, in itself, a party to a dispute, e.g. as plaintiff or defendant.

B) Administrative autonomy, in order to fulfill the functions determined by law or its statutes.

C) Independent capital, totally constituted with goods or common public funds, the products from them, or the yield of taxes, rates or contributions of special destination (Article 6, Decree 1050 of 1968).

However, it should be clarified that, although the EICEs enjoy administrative autonomy, this should be understood as the power to order the service or activity independently from other public bodies; but said autonomy does not remove them from the protection control, nor from strict compliance with the law or rule that created them, and their statutes. It can be concluded that administrative autonomy does not reach the point of allocating EICEs assets or resources for purposes or destinations different from those contemplated in the law or its statutes. As it was seen, the EICEs are not removed from the protection control that the State can exercise, but there is no hierarchical relationship, since we are facing a typical case of decentralization by services.

This is because, although the protection control must be exercised, it would not be logical for the EICEs not to exercise their functions autonomously and to depend on other entities, since (i) decentralization by services would not become a reality, and (ii) their decisions and administrative functioning would become slow, incapable of reacting to abrupt changes in the market, which would make it impossible for them to compete with the private sector. Hence, it is stated that the legal appearance of the EICEs is corporate, but different from those entirely subjected to private law.

Administrative autonomy must be combined with the financial autonomy of the EICEs, which is understood as the power to determine the use of the economic resources assigned by law. Without the exercise of financial autonomy, administrative autonomy does not exist in practice, since the lack of autonomous management over assets would mean that the EICEs would see their ability to distribute expenses and react quickly to the market diminished, and would lead them to their extinction.[2]

[2] "It should be noted, regarding the capital of the EICEs, that it is considered independent, that is, that assets are not part of the common funds, and may well consist of tangible or intangible goods." (Penagos, 1988, p. 629).

Other principle that underpins the EICEs is the principle of specialty, which is understood as the prohibition of carrying out activities that do not satisfy the objectives indicated in the law, and that neglect the functions assigned in the law and statutes.

By virtue of the principle of sovereignty and the principle of company specialty, the EICEs are linked to public law. These are legal entities governed by public law, linked to the administration, but destined to carry out industrial and commercial activities in which they are subject to the regime of private law. Therefore, the EICEs have a double legal manifestation: (i) governed by public law and (ii) governed by private law.[3] Therefore, it is worth distinguishing:

A) The acts and facts that they carry out for the development of their commercial and industrial activities are subject to the rules of private law.

B) The acts and facts that they carry out in fulfillment of administrative functions, for the fulfillment of the aims indicated by the law, are administrative in nature, governed by public law.

C) Their assets and funds are of a public nature, and their management must conform to legal precepts.

D) People who provide their services in EICEs fall into two categories:

a. Official workers, bound by an employment contract.

[3] In this regard, it should not be forgotten that, for example, article 2 of Law 80 of 1993 includes as part of the public entities to the EICE, to which the rules and principles with respect to public procurement will be applied (Republic´s Congress, Law 80 of 1993, art. 2, literal a). Likewise, in article 93 of Law 489 of 1998, it is stated:

> The acts issued by the industrial and commercial companies of the State for the development of their own, industrial or commercial activity or economic management will be subject to the provisions of Private Law. The contracts that they enter into to fulfill their purpose will be subject to the provisions of the General Contracting Statute of state entities. (Republic´s Congress, Law 489 of 1998).

In Article 14 of Law 1150 of 2007, modified by Article 93 of Law 1474 of 2011, it is argued that:

> The Industrial and Commercial Companies of the State (...) will be subject to the General Contracting Statute of the Public Administration, with the exception of those that carry out commercial activities in competition with the private and / or public sector, national or international or in regulated markets, if applicable. in which they will be governed by the legal and regulatory provisions applicable to their economic and commercial activities, without prejudice to the provisions of article 13 of this law. Science and technology contracts are excepted, which will be governed by Law 29 of 1990 and existing regulatory provisions. (Republic´s Congress, Law 1150 of 2007).

b. Public servants, linked by a general, objective and regulatory relationship; as deduced from the provisions of Decree 3135 of 1968, article 5, subsection 2; and Decree 1848 of 1969, articles 1 and 2; regulations of the former article 91, Law 489 of 1998[4].

Finally, it should not be forgotten that, in activities of the EICEs, despite not seeking exorbitant profits (such as in the private sector), a good administration must strive to achieve a correct investment of resources, and thus generate dividends in its development. Sometimes, the doctrine tends to limit the charge of fees, in the case of monopolistic services, without degenerating into exorbitant economic returns. It has been accepted that, in monopolistic situations, companies can bear natural losses, if social needs demand it (Penagos, 1988, p. 638).

3. THE INDIRECT ADMINISTRATIVE FUNCTION OF THE INDUSTRIAL AND COMMERCIAL STATE

The position that determines the existence of public administration as a correlative to the institutional aims pursued by the State for its citizens has been unanimous. Modern administrative law and the institutions it regulates and creates must aim for the materialization of the common welfare, which has the Political Constitution as its superior normative framework, a fundamental rule that distributes the competencies of public power and imposes on them a common denominator, general interest.

The development of this concept can have various configurations that can be abstract, as the plea for a principle, or concrete, which are reduced to produce particular effects in an institution assigning tasks, benefits or restrictions regardless of its essence, that is, it is a constitutional requirement that can be invoked before the State or the citizens. The importance of the teleological aspect of administration and the commitment of its management to the achievement of constitutional objectives invade the entire orbit of this aspect of public power to such an extent that "if this were not the case, we would not be really and materially facing phenomena of that nature. There is only public administration

[4] The positions of president, director, or manager of decentralized entities, both national and territorial, may be appointed by the legislator as positions of free appointment and removal, as they involve the formulation of policies within the respective entity. These jobs constitute one of the cases in which, with clear reasons, the law can introduce exceptions to the general principle, where jobs in State organs and entities are of a tenure nature (Constitutional Court, Sentence C-599-00)

where the object and purpose of the organs and public activities are justified and developed in response to the needs of the population" (Santofimio, 2003, p. 35).

"The submission of public administration to the law and the consequent justification of its behavior, no longer from conditions of supremacy and power (*puissance*), but to social and solidarity purposes" (Montaña, 2005, p. 134) imposed a new perspective that internalizes the social and democratic sense, giving rise to the appearance of the concept of "public service" as a legitimizing factor of State action. In this vision, the State is an executor of popular will and articulates all its efforts to achieve general welfare and gives rulers specific tasks and optimal legal tools –administrative law– that differ from common law because they have a social essence.

Indeed, the provision of public services has traditionally been an activity of the State that required the creation of a special regulatory body with different principles and bases to those that support the common order; as well as the creation of a specialized jurisdiction to deal with disputes arising from the provision of services, all stemming from the general interest that fills the State with material content. French administrative law, of great influence in Colombia, indicates with Jean Rivero the chain of relationship between general interest, the provision of public services in the solution of collective needs and the responsibility attributable to their execution to a certain public authority. Despite this, the positioning of the concept during evolution has not been much less passive, it has been subjected to the changing tides of economy and politics in order to adjust to the new social practices.

This is how the exercise of public service is pluralized and nuanced allowing individuals the provision or incursion of the State in the activities of private subjects in what has been known as the crisis of the concept of public service. This variation, which has been shown as the adaptability of the administration, carries with it the theoretical basis of general interest to justify the modification of the term[5] that is now incompatible with its first

[5] The reasons that have motivated the crisis of the notion of public service

> (...) are the birth of a sector considered of public services that obeys to strict economic budgets (...), the resulting insertion of rules belonging to common law to regulate these and other situations related to the concept (…), the appearance of the individual as a provider of public services (…), the reappearance of different means of management other than direct provision and concession. (Montaña, 2005, p. 152).

manifestations as a central element of the administrative function of the State and its right[6]; which leads us to

> (…) a strict conception of public services which, based on these considerations, abandons its initial claims, but which, closely related to the general interest pursued by the actions of the public administration, constitutes a very important and definitive part of these (Montaña, 2005, p. 154)

Affirmation that Professor Montaña acknowledges, in spite of the deficiency of the State to determine an object of study of administrative law, since invoking the protection of collective interest, the State has decided to create mixed legal regimes where both public and private law concur to be applied in the commercial activities that it develops.

The exclusiveness of the provision of public services at the head of the State has been lost, so it is free to participate in the activities carried out by individuals or to allow them to enter the administration of these services by opening a two-way traffic gate.

Then, there is a tension between the subjective, all public services are provided by the State, and objective, public services are those that develop general interest, conceptions of public service that is resolved in favor of the latter[7]. At the same time, it poses an obstacle, according to the work of Alberto Montaña Plata, since it considers that the activities that procure a profit for the public administration do not seek a benefit for the general interest, since this economic vocation only benefits administrative management: "in the case of economic administrative activity, a teleological connotation oriented towards the public cannot be verified, and consequently, we do not consider it appropriate to refer to it in the framework of an effective exercise of administrative function" (Montaña, 2005, p. 213); hence, leaving this activity exempt from the exercise of public powers.

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[6] Professor Alberto Montaña Plata (2005) points out that

> the construction of the notion of public service corresponds to Duggit who conceptualizes the state as an organization and cooperation of public services in open criticism to the *puissance publique*. It follows that the activity of public power and the object of study of administrative law are public services as they are exclusively provided by the State. Duggit's vision was later complemented by followers such as L. Rolland who, using the jurisprudential precedents of the French administrative courts, constructed a principle-based legislation for the purpose of determining which actions of the State are presented in the form of public service. The doctrinal statements were those of continuity, adaptability and equality. Later, other authors such as M Hariou, De Laubadere and Latouneire introduced other concepts such as morality, gratuitousness, proportionality and neutrality (p. 152-153).

[7] In this regard, Professor Montaña (2005) affirms that

> the subjective conception, in its original inspiration, considers public services as those that are 'provided' or 'carried out' by the public administration. This simple consideration (…) includes those that are provided in a similar or identical way to individuals (public, industrial or commercial services in French law). (p. 164).

In other words, the EICEs, under a subjective criterion, acquire the name of *administrative* entities; however, when these types of activities are carried out, there is no real exercise of administrative function, since this satisfies public interest, which is not susceptible "to be developed through the exercise of functions of a legislative and judicial nature" (Montaña, 2005, p. 209), let alone commercial or industrial.

From the aforementioned, we could summarize the following. Although it is true that the administrative function for jurisprudence

> is one of the functions of public power, that is, a kind of public function, so that the public function is general and the administrative function is specific, insofar as it is part of the executive function, so that its first characteristic is that of being inherent to the power of the State, just as the other classic public functions: the legislative and the jurisdictional, corresponding to the three branches in what constitutes the traditional tripartite division of public power, as established in Article 113 of the Political Constitution (Council of State, 2007, s.p.).

But which, in the case of the EICEs, is not clear if they are framed within this function, because if it is categorically accepted that they do not carry out administrative functions, they would not have the possibility of exercising certain public powers, but as can be seen nowadays, they carry out commercial and industrial activities without losing some public powers granted by law.

On multiple occasions, the Council of State has differentiated the concept of administrative function and public service. For example, in a sentence issued on August 5, 1999, it stated that the public function should be understood as

> the one that participates in any case of power of the State and is always of a legal nature; on the other hand, it defines public services as activities of a material and technical nature that in many of their manifestations do not use public power (Council of State, 2001, s.p.).

Having said that, the industrial activity of the State is neither an administrative function as such nor a public service, but it belongs to the executive branch of public power and, in accordance with the law, it is feasible to exercise public prerogatives that are conventional of the entities that fulfill this function. Thus, if they do not perform an administrative function as such, why do legislators grant such prerogatives?

In this event, legislators, via Law 80 of 1993, empower the EICEs to use exorbitant clauses in their contracts, clearly constituting the development of public powers, which does not have a very clear support, since the corporate State, as we have already mentioned,

does not fulfill an administrative function[8] as such. However, let us go a bit into identifying the purpose of the industrial and commercial State and the justification of acts of power and control in its action.

2. THE PURPOSE OF THE INDUSTRIAL AND COMMERCIAL STATE

The commercial status of State companies is derived from the systematic analysis of article 85, Law 489 of 1998, which expressly recognizes this characteristic, in accordance with article 10 of the Commercial Code. From the comparison of these two rules, the following considerations can be made.

Far from any theoretical discussion about the objective and/or subjective criteria that define a merchant as a legal person, which can be summed up in the paradoxical phrase "a merchant is the one who carries out acts of commerce, and acts of commerce are those carried out by a merchant" the elements offered by the Code can be taken to specify, not without some difficulties, the essence of the EICEs.

According to the aforementioned article 10, a merchant is the subject who professionally deals with activities that the law considers commercial even when they are carried out through a third party. Article 20 of the Commercial Code, when listing commercial activities, partly solves the problem; not so the requirement of professionalism that is demanded. In an attempt to clarify the meaning of the word *professional*, the dictionary has been used, from which it can be deduced that it is about people who usually work in a field of knowledge and derive their livelihood from it, in other words, they do it for payment. Now, in the case of legal persons, the activity they carry out can be easily verified by observing their corporate purpose, but with regard to legal persons governed by public law, the General Plan for Public Accounting (PGCP, in its Spanish acronym) says in its Conceptual Framework 1.1: "The institutions that perform government functions do not

[8] In addition to the above, the aforementioned author explains that public services are a category of State activity that do not imply the exercise of authority, develop general interest and are the responsibility of the public administration, although they do not provide them directly. This definition removes the foundations behind the exorbitant clauses that industrial and commercial companies can exercise in their contractual activity and that, without a doubt, constitute a form of authoritative unilateral imposition; however, as seen in the multiply cited work of Alberto Montaña Plata, service providers can issue acts of power as an exception that confirms the rule. Nonetheless, the importance of this position, due to its excellent dogmatic argument, will not be explored because, as it is stated, the EICEs do not provide public services properly speaking and understood from a strictly objective point of view.

pursue profit, but there are market functions such as EICEs…, where prices are set following the free game of supply and demand". (s.p.)

Regardless of whether they pursue profit or not, since the law does not mention it as a characteristic of the merchant, the EICEs are true market agents for containing in their corporate purpose the task of carrying out activities of this type expecting a compensation for it. The Council of State says, in a ruling from March 14, 2002,

> (...) the regime applicable to public companies belonging to the decentralized sector is the same as the EICEs, from which it appears that their corporate purpose necessarily identifies with that of these companies, such as carrying out industrial and/or commercial activities with a clear profit motive. (s.p.)

And in a later concept clarifies that "although the purpose of the EICEs focuses on the welfare of the community, such entities become true competitive agents in the market" (Council of State, 2002, s.p.) for which –says the High Court– they require a support that depends precisely on the profits received as a result of the marketing policies they adopt, being only a percentage of surpluses that generate the call to be transferred to the Treasury in order to meet the objectives set by the National Council for Economic and Social Policy (CONPES, in its Spanish acronym). Thus, precisely, according to the methodology implemented by the National Planning Department, the liquidation of financial surpluses should seek the reintegration of resources to the National Treasury to meet the multiple spending needs without harming the operation and strengthening of these entities (Council of State, 2002).

Then, it is clear that the commercial nature of any company does not affect the destination of resources that may well increase the public budget or enrich the assets of those who exercise it. In any case, there is an obligation to seek the strengthening and efficiency of the EICEs, for which part of the resources must be reinvested in the entity[9].

[9] Decree 111 of 1996, article 97:

> The financial surpluses of non-corporate national State industrial and commercial companies are property of the Nation. The CONPES will determine the amount that will be part of the capital resources of the national budget, set the date of its allocation in the Directorate of the National Treasury and will assign, at least, 20% to the company that has generated said surplus. The profits of the State industrial and commercial companies and of the mixed-economy companies at a national level are owned by the Nation in the amount that corresponds to the national state entities for their participation in the capital of the company. The CONPES will issue instructions to the representatives of the Nation and its entities at the shareholders' meetings on the profits that will be capitalized or reserved and those that will be distributed to the shareholders as dividends. The CONPES, when adopting the determinations provided in this article, will take into account the concept of the legal representative regarding the applications of the allocation of financial surpluses and profits, as the case may be, on the entity's

Although the EICEs generate a profit for their own patrimony, they also make appropriations of those resources at the head of the administration to which they belong, increasing the public treasury; which is beyond the object of commercial companies because their purpose is to compete in market conditions to obtain profits, that is, they do not seek to generate a general primary welfare but an economic benefit, and therefore cannot be considered as public-service-providing entities nor located in order to satisfy the direct general interest.

Thus, the legal and political elements that specify the reason for the existence of contractual privileges for the EICEs must be located, having as a reference the constitutional framework outlined above that imposes the need to find a foundation on the principle of general interest in the acts of the administration, and theorize about it.

3. THE PUBLIC PREROGATIVES IN THE INDUSTRIAL AND COMMERCIAL REGIME OF THE STATE

As a starting point, it is stated that the protection of the general interest can be direct or indirect. Through the first means, acts are carried out with the obvious purpose of satisfying collective needs and protecting their interests. This is where most of the administration's activities are located because they invoke the aforementioned principle to produce destined legal effects to solve the problems of a social, cultural, economic nature, among others, that occupy budgetary investments manifestly destined to the commercial or industrial activity of the State. It is easy to determine that said activity does not seek the satisfaction of the general interest, also called direct, but it seeks to indirectly benefit those ends, with the resources obtained from its business activity, which could be called *indirect promotion theory* of the general interest or *public interest*.

Apparently, the concepts of general interest and public interest are synonyms, both meanings indicating the existence of some goods or collective legal, political and economic

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programs and projects. This concept is not mandatory for the CONPES, which may adopt the decisions provided in this article even in its absence (Law 38 of 1989, article 26; Law 179 of 1994, article 55, subsection 9 and 11; Law 225 of 1995, article 6).

The considerations of the Council of State can shed light on the matter by consulting the concept no. 2110 of February 7, 2002, Council of State, Consultation and Civil Service Office, March 14, 2002. The previous references get strong ideological support in the concept of Dr. Enrique Gaviria Gutiérrez for Confecámaras on August 30, 1996.

circumstances under treatment.[10] This phenomenon has been consolidated in the Colombian tradition, although it should be noted that there are some different specificities among these concepts.

The *public* particle of the principle that defines the sum of individual interests of a society submitted to the administration must change in its content and not refer to the social abstraction of these claims in order to address the official nature of the State institution. In other words, *public* does not indicate the presence of the citizens in general, but of the public administration, for which reason it could be said that the public interest is absorbed by the general interest, that is, the former is more specific.

The constitution of pure official claims must hint at its own foundation in the general interest without confusing it, since guaranteeing the interests that the State –represented by its entities– can legitimately have to safeguard its management and stability, hence protecting its associates. It should not be understood that this has made the State an end in itself because it is not a common feature but, on the contrary, exceptional.

In any case, the recognition of a capacity to reserve power for its own benefit cannot be seen as unconstitutional because this expresses a claim for institutional maintenance that is in the general interest, which is why it is called *indirect* general interest. The secrecy of military operations, the imprescriptibly of public goods, the presumption of legality of acts until proven otherwise, the investment of the public treasury in financial movements in currencies stronger than the local one and the imposition of taxes on heritage, goods and services are means that demonstrate the existence of public interests on the maintenance of national order and independence, monetary strengthening, valuation of public actions, and the enrichment of the treasury, all unquestionably legitimate claims that provide the survival of the institutionally, which, in turn, works for the fulfillment of constitutional purposes, that is, the full satisfaction of the general interest.

Thus, for the protection of public heritage, fully invested in the creation of the EICEs, the State presents itself as a contractual advantage with the capacity to terminate, interpret,

[10] Professor Orlando Santofimio Gamboa (2003) affirms that

> from the point of view of its finalistic and expressive nature of common interests, in the Colombian case, the constituent has grammatically used terms with similar ideas in the pertinent regulations. For this reason, we consider that in our environment it is indistinct to speak of general, public or community interest. Likewise, its purposes can be found in many of the expressions that the constituent uses in the Constitution to refer to the teleological purposes or commitments of the State. (p. 369).

modify, unilaterally sanction and even declare expiration of contractual texts in which it appears as a part.

In the same way that the delegation of powers is justified for individuals who provide public services, those who venture into this area to obtain a profit just as the EICEs enter the private sector for the same reason, obtaining powers to issue acts of power in behalf of the entity to guarantee the continuity and strengthening of the service basing and justifying its power in its "public interest" limited to a general interest. However, since it is a form of display of power in which the State reserves special competencies to protect its management, this attitude must be included within the supreme framework that subjects power to the law and its principles, and for this it requires that such acts establish legitimate purposes and use reasonable and proportional means.

Legitimacy requires that ends with legal and political support can be found. In this case, they are the protection of the investment of public assets in the companies, against contractual unforeseen events that may break the balance against public entities and avoid the enrichment of the contractor at the expense of public investment that would not otherwise occur, all without the need to report a dispute in the jurisdictional branch and be subjected to a long process.

The protection of the economic strain of public assets through contractual prerogatives is the measure that gives greater immediacy to administrative action in the protection of their investment. In the case of exceptional contractual prerogatives, the concept operates as a means of safeguarding administrative management to tackle the effects of eventual economic losses on state-owned companies that seek to enrich the treasury through participation in the market.

In this order, although the exceptional clauses that regulate the hiring of public commercial companies propose a prerogative, they cannot be used as a means of promoting trade so as to promote superiority in the game of demand and supply, since they are powers that are exercised considering certain factual assumptions and cannot be used arbitrarily. Therefore, it can be validly concluded that they are adequate prescriptions for the purpose they pursue and proportional to the freedom of free procurement that it restricts, which is why the inclusion of these clauses is no longer considered part of the exorbitant action of

the State in the way of the *puissance publique*, but an excepted way of acting in contrast to the general rule of collective interest.

To speak of public interests is to deal with a specific category that is immersed in a broader one, general interest. This is because the first endorses the maintenance and development of the administration in its provision, while the second tries to preserve not only the existence and function of the administration, but also the existence of the State and therefore the development of its ends that are of general interest because everyone is involved in its purpose.

Consequently, "for a public prerogative to be adequate to the Constitution, it is necessary that it exists to fulfill a constitutionally legitimate purpose and that it is useful, necessary and proportionate to said purpose" (Constitutional Court, Sentence C-539-99). In any case, there are always additional control mechanisms that guarantee the submission of any act to the mandates of the Constitution, which may include the due administrative process, administrative judges and actions for nullity and liability.

Finally, it must be said that the content of general interest is not defined by a finished concept. From its metaphysical background origins[11] to its current definition, it has been modified by incessant intersections of political-legal trends that, in the absence of legislative precision, have evolved thanks to the intervention of judges and the theorists of public law. In the words of Marta Franch Saguer, quoting the pronouncements of the French Council of State, "general interest is a concept often invoked and poorly defined" (Franch Saguer, s.f., p. 134).

[11] The idea of general interest is born as a substitute for the notion of common good of religious and moral content. This concept was born in French law in the eighteenth century with a double meaning, the first one that considered it as the sum of all private interests and the second that understood it as a divine mission entrusted to the State. Christianity created a concept of the common good that was objective and spiritual based on adherence to the law that was understood as the way to seek the just and the good, mandatory in that regard. The decline of absolutism led by the French Revolution introduced changes to the concept of general interest as a way to reconcile the opposing interests that exist in any pluralistic society. Power no longer emanates from the divine but from the democratic pact that expresses the popular will through the law, an instrument that positions generality over personal interests. According to Rousseau's theory, men do not have the ability to understand each other on their own initiative and that is why they need to agree on the creation of a superior being that imposes social order according to popular mandates. The notion was complemented by the need to weigh it against the fundamental individual rights that are predominant in current constitutional organizations.

Meanwhile, the elements that this study describes so far allow the legislator to fill the aforementioned areas of uncertainty according to their political reason, as long as they do not constitute an excessive abuse of power.

CONCLUSIONS

We have seen how the State, under a new conceptual and dogmatic structure, radically transformed the economy. The State's intervention in it not only generated the possibility of being the general director of economic affairs to correct and solve the problems that the system –given its connotation– by itself cannot do, but also made it one more actor, stripped of certain privileges and aimed at obtaining a benefit in the public interest through the actions of the so-called EICEs. It was also verified that their appearance is due to the constitutional restructuring that the 1968 reform implemented in our legal system, which caused direct consequences in the new way of acting of the administration.

The tendency of the State is evident as a new public actor regulated by private law and involved in industrial and commercial affairs on equal terms with other production companies, as an agent of capital accumulation; appearing as a direct leader in production, distribution and financing, as an inherent effect of State intervention.

Along these lines, the administration must use the means specified in private law to satisfy industrial or commercial interests, since it establishes greater dynamism when fulfilling the objective developed by the EICEs. This way, for convenient reasons, we are talking about voluntary submission to private law with the corresponding voluntary resignation of the administration to its position of supremacy, since the agility and dynamism of private law has no point of comparison to public law, facilitating the fulfillment of the business or commercial object of State entities. In other words, the administration's submission to private law, and therefore the abdication of its power and supremacy, may not only be voluntary, but also necessary to entirely fulfill the purpose of the EICEs.

Nevertheless, despite the fact that the administration's submission to private law is not only voluntary but also necessary, it should be noted that legislators may establish a legal regime at their discretion, to regulate matters concerning EICEs in accordance with its wide legislative self-configuration capacity. For example, for the role of the corporate State,

legislators could totally exclude the application of the contractual statute or, on the contrary, give full application of it in their economic affairs. However, a mixed regime was established, sheltered strongly by private law, but without forgetting the granting of public powers in its contractual acts through the ability to make use of exceptional clauses typical of public procurement.

Likewise, through the EICEs, the State intends to carry out economic activities by virtue of a public purpose, which legitimately seeks to guarantee the satisfaction of the general interest of all its associates. This is achieved with the attainment of resources generated by its own industrial or commercial activity that allow it to consolidate, stabilize, protect and contribute to the management carried out within the purposes set by the State. In any case, the recognition of a capacity to reserve power for its own benefit cannot be seen as unconstitutional because this expresses a claim to institutional maintenance that is in the general interest, for this reason the creation of the EICEs is sustained by the objective of developing an "indirect" general interest.

Therefore, public prerogatives are justified insofar as they are the ideal and effective mechanism for the fulfillment of a legitimate, useful, necessary and proportionate constitutional purpose, as in this case of the EICEs for the benefit of general interest (through a public interest or indirect general interest).

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