

# THE CONSTITUTIONAL FRAMEWORK FOR SECURITIES MARKET SELF REGULATION IN COLOMBIA: AN ANALYSIS OF HOW THE CONSTITUTIONAL COURT CONTRADICTS ITS ESTABLISHED PRECEDENT WITH NO REASON AT ALL\*

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## ABSTRACT

Based on an applicable precedent, this paper evaluates the soundness of judgment C-692 of 2007, adopted by the Constitutional Court regarding the constitutionality of the Act 964 of 2005, under which the public nature of the securities market self regulation is denied. Contrary to the ruling of the Court in this case, it will be demonstrated that securities market self regulation is a public function, which should render unconstitutional legal provisions denying the public character thereof. The main consequence of defining securities market self regulation as a public function would be threefold: first, functional duplicity would be avoided, via the competences of the Financial Superintendent office; second, the Financial Superintendent office would be able to abstain itself from initiating administrative sanction proceedings against securities market intermediaries subject to the oversight of self regulatory organizations; and, finally, the evasion of functional duplicity as a consequence of defining securities market self regulation as a public function, which would allow Colombian authorities to comply to international standards.

**Key words autor:** Market Self Regulation, Financial Superintendency, Police Powers, Securities Market.

**Key word plus:** Stock Exchange, Judgments.

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## **EL MARCO CONSTITUCIONAL PARA LA AUTORREGULACIÓN DEL MERCADO DE VALORES EN COLOMBIA: UN ANÁLISIS DE CÓMO LA CORTE CONSTITUCIONAL CONTRADICE SU PROPIO PRECEDENTE SIN RAZÓN ALGUNA**

### **RESUMEN**

Con base en el precedente aplicable, este artículo evalúa la consistencia de la Sentencia C-692 de 2007, proferida por la Corte Constitucional al resolver sobre la constitucionalidad de la Ley 964 de 2005, conforme a la cual se niega el carácter de función pública de la autorregulación del mercado de valores. Al contrario de la decisión de la Corte en este caso, se demostrará que la autorregulación del mercado de valores es una función pública, lo cual debería conllevar la inconstitucionalidad de normas legales que nieguen el carácter público de ésta. Serían tres las principales consecuencias de la definición de la autorregulación del mercado de valores como función pública: primero, se evitaría la duplicidad funcional a través de la competencia prevalente de la Superintendencia Financiera; segundo, la Superintendencia Financiera podría abstenerse válidamente de adelantar procedimientos administrativos sancionatorios contra intermediarios del mercado de valores sujetos a la vigilancia de los organismos de autorregulación; y, por último, como consecuencia de la naturaleza pública de la función, se evitaría la duplicidad funcional, en consonancia con los estándares internacionales.

**Palabras clave autor:** autorregulación de los mercados, Superintendencia Financiera, poder de policía, mercado de valores.

**Palabras clave descriptor:** bolsa de valores, sentencias.

**Clasificación JEL:** E5, K41.

## **LE CADRE CONSTITUTIONNEL POUR L'AUTORÉGULATION DU MARCHÉ DES VALEURS EN COLOMBIE: UNE ANALYSE DE COMMENT LA COUR CONSTITUTIONNELLE CONTREDIT SON PROPRE PRÉCÉDENT ÉTABLI SANS AUCUNE RAISON**

### **RÉSUMÉ**

En se basant sur le précédent applicable, ce document évalue la cohérence de la Sentence C-692 de 2007, prononcée par la Cour Constitutionnelle en résolvant sur la constitutionnalité de la Loi 964 de 2005, conformément à laquelle on refuse le caractère de fonction publique de l'autorégulation du marché des valeurs. Contrairement à la décision de la Cour dans ce cas, on démontrera que l'autorégulation du marché des valeurs est une fonction publique, ce qui devrait entraîner l'inconstitutionnalité des normes légales qui nient le caractère public de celle-ci. Les principales conséquences de la définition de l'autorégulation du marché des valeurs en tant que fonction publique seraient au nombre de trois: d'abord, on éviterait la duplicité fonctionnelle à travers la concurrence prédominante de la Surintendance Financière; deuxièmement, la Surintendance Financière pourrait s'abstenir d'avancer valablement des procédures administratives de sanction contre des intermédiaires du marché des valeurs soumis à la surveillance des organismes d'autorégulation; et, finalement, suite à la nature publique de la fonction, on éviterait la duplicité fonctionnelle, en accord avec les standards internationaux.

**Mots clés:** Autorégulation des marchés, "Superintendance Financière", pouvoir de police, marché des valeurs.

**Mots clés descripteur:** Bourse des valeurs, sentences.

**Classification JEL:** E5, K41.

**Summary:** Introduction. 1. Securities market self regulation pursuant to Act 964, reglamentary decrees 1565 of 2006 and 3516 of 2006, and the sentencia 692 of 2007 of constitutional court. 2. Professional self regulation under colombian constitutional and administrative law. 3. Conclusions: legal consequences stemming from the public nature of securities market self regulation under constitutional law. Bibliography.

## INTRODUCTION

This paper discusses recent decisions adopted by the Constitutional Court, more specifically, the Sentencia C-692 of 2007, regarding the constitutionality of the Act 964 of 2005, under which the public nature of securities market self regulation is denied. Furthermore, it seeks to determine whether securities market self regulation constitutes a private activity. The legal outcomes of case law are discussed in light of the apparent public nature of this function.

On the basis of relevant Constitutional provisions, case law and doctrine, it will be demonstrated that securities market self regulation is a public function, which, subsequently, should render unconstitutional legal provisions defining it as a merely private securities market activity and expressly denying the public character thereof.

This study is structured as follows: 1) securities market self regulation under the Act 964, the Decree 1565 of 2006, and the Decree 3516 of 2006, *i.a.*; 2) professional self regulation as a public function and legal consequences thereof, regarding securities market self regulation, under Constitutional and Administrative Law; and, 3) avoidance of functional duplicity and other legal consequences with respect to securities market self regulation as a result of acknowledging its actual legal nature, as a public function.

### **1. SECURITIES MARKET SELF REGULATION PURSUANT TO ACT 964, THE REGLAMENTARY DECREES 1565 OF 2006 AND 3516 OF 2006, AND THE SENTENCIA 692 OF 2007 OF THE CONSTITUTIONAL COURT**

Taking into account that the Constitutional Court has declared the validity of the provisions of Act 964 that define securities market self regulation as a mere “private function”, this section will address the following issues: (1.1.) the securities market self regulation under the Law 964, and the regulatory framework based thereon; and (1.2.) the legal doctrine arising out of the Sentencia C-692 of 2007.

### **1.1. SECURITIES MARKET SELF REGULATION UNDER ACT 964, AND ITS REGLAMENTARY DECREES**

Act 964 imposes upon all securities market intermediaries a self regulation duty. In accordance with Act 964, and the Reglamentary Decrees 1565 of 2006, and 3516 of 2006:

1. Every securities market intermediary shall be member of a self regulation entity, and must comply with its decisions. Even though self regulation is mandatory, it is defined as an activity of non public nature.
2. Self regulatory organizations are required to obtain permission by the financial supervision agency, the Financial Superintendency of Colombia (FSC), which oversees its activities, prior to start operating.
3. Self regulation function comprises the following three kinds of sub-functions: regulatory, supervisory and disciplinary. In addition, self regulatory organizations are authorized to conduct suitability examinations to which every person who pretends to be trader is subject.
4. The kind of entities legally enabled to undertake securities market self regulation functions are expressly and clearly defined.
5. The FSC and self regulatory organizations are enabled to sign “understanding memorandums”, in order to avoid duplicity among them, regarding the exercise of their competences in their capacity of self regulatory entities.
6. The FSC is entitled either to order mergers or to promote other agreements among self regulatory organizations with a view to merge them.
7. The FSC and self regulatory entities are authorized to share evidence.
8. There must be minimum requirements aiming at protecting due process of individuals subject to disciplinary procedures undertaken by self regulatory organizations.
9. Self regulatory entities are exonerated from any civil liability in which they may incur on the occasion of the exercise of their functions.

### **1.2. THE LEGAL DOCTRINE ARISING OUT OF THE SENTENCIA C-692 OF 2007**

Even though this decision exhaustively elaborates on types of state interventionism and subsequently focuses on its effect on financial markets entrepreneurship, the

actual legal analysis of the main *quaestio iuris* is surprisingly brief. The Court is of the view that the self regulation duty imposed by the State upon securities markets agents is irrelevant. The fact that the enforceability of self regulatory bodies' decisions is endorsed by the state through the Act 964 was not discussed in this decision. Additionally, the Court disregards that powers *iure imperii* have been conferred upon market agents.

Under the *ratio decidendi* of the aforementioned decision, self regulation is an activity constitutionally protected as part of the freedom of enterprise, the nature of which is private by the sole virtue of the definition provided for by the Act 964 itself<sup>1</sup>. Thus, this decision does not furnish arguments as to the whether or not securities market self regulation is not a public function despite its compulsory character, nor does it have regard to the constitutional concept of public function.

## 2. PROFESSIONAL SELF REGULATION UNDER COLOMBIAN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Contrary to the undemonstrated assumption relied upon by the Constitutional Court, the legal regime of professional self regulation is crucial for the purposes of ascertaining the public or private nature of securities market self regulation. Therefore, it is noteworthy having resort to the constitutional regime governing this kind of regulatory function, in order to fully understand why securities market self regulation is eminently a public function, even though it can be exerted by private entities. This analysis will demonstrate the unsoundness of the abovementioned decision.

1 “De acuerdo con lo expuesto en este acápite, se pueden sacar las siguientes conclusiones: (i) La autorregulación es una institución propia del derecho privado, a través de la cual se busca fijar unas reglas de juego para ordenar las relaciones en los distintos sectores sociales y en beneficio de la comunidad; (ii) dicha figura encuentra fundamento en la autonomía de la voluntad privada, que a su vez se ampara en los derechos a la libertad, al libre desarrollo de la personalidad, a la personalidad jurídica, a la libre asociación a la iniciativa privada y a la libertad económica, entre otros; (iii) la autorregulación es connatural a la actividad bursátil y conlleva, por parte de los participantes en el mercado, la imposición de unas normas de conducta, la supervisión de su cumplimiento y la consecuente sanción por su violación, así como también la observancia de la ley y la regulación estatal; (iv) la autorregulación en el mercado de valores de Colombia existe desde la creación de la Bolsa de Bogotá en 1928 y ha tenido expreso reconocimiento legal a partir del Decreto-ley 2969 de 1960; (v) el propósito de la autorregulación, a través de los entes autorreguladores, es contribuir con el Estado en la misión de preservar la integridad y estabilidad del mercado, la protección de los inversionistas y el cumplimiento de la ley; y (vi) la autorregulación en el mercado bursátil es una actividad complementaria a la actividad reguladora del Estado, en cuanto no busca reemplazar ni sustituir las funciones públicas de regulación, reglamentación, supervisión, vigilancia y control, que se encuentran en cabeza del Estado, por intermedio del Congreso y del Gobierno, y que ejercen, el primero directamente, y el segundo a través de la Superintendencia Financiera; y (vii) la propia ley acusada aclara que la actividad de autorregulación no tiene el carácter de función pública y, por lo tanto, no implica delegación de las funciones de inspección, vigilancia y control sobre el mercado bursátil.” (Sentencia C-692 of 2007).

Consequently, this section of the document will address the following topics: (2.1.) the concept of public function under Colombian Constitutional and Administrative Law; (2.2.) the public nature of securities market self regulation; and (2.3.) public functions exerted by private entities.

## 2.1. THE CONCEPT OF PUBLIC FUNCTION

Honoring its French ancestry, “public function” is the cardinal concept of Colombian Administrative Law. It can be defined as the set of activities carried out by state organs or even private entities in order to accomplish the ends of the state, particularly the collective interest.

In fact, in accordance with the Constitutional Court (see the Sentencia C-563 of 1998)<sup>2</sup>, the Colombian Constitution authorized the exercise of public functions (understood in its extensive meaning) by private organisms and individuals, provided that the constitutional and statutory applicable conditions were met. This criterion had already been adopted by the Court in the Sentencia C-286 of 1996.

In this connection, the abovementioned Sentencia C-563, in which the Constitutional Court analyzed the scope of the concept of public function regarding contracts passed between the State and either private entities or natural persons, is noteworthy. In fact, this decision is of particular relevance, for it highlighted that, by means of entering into a contract with the state, individuals became able to exert public functions while discharging their contractual duties<sup>3</sup>.

To conclude, according to the Constitutional Court, the concept of public function comprises a set of activities carried out by competent authorities and either private legal entities or natural persons, within the framework of the Constitution and other applicable norms, in order to fulfill the ends of the state.

2 “3.7. En sentido amplio la noción de función pública atañe al conjunto de las actividades que realiza el Estado, a través de los órganos de las ramas del poder público, de los órganos autónomos e independientes, (art. 113) y de las demás entidades o agencias públicas, en orden a alcanzar sus diferentes fines. En un sentido restringido se habla de función pública, referida al conjunto de principios y reglas que se aplican a quienes tienen vínculo laboral subordinado con los distintos organismos del Estado. Por lo mismo, empleado, funcionario o trabajador es el servidor público que (sic) está investido regularmente de una función, que desarrolla dentro del radio de competencia que le asigna la Constitución, la ley o el reglamento (C.P. art. 123). El funcionario o empleado, al vincularse al servicio, adquiere una investidura que lo coloca en una relación de dependencia con el Estado, la cual determina que pueda exigírsele, en razón de su conducta, un grado específico de responsabilidad. De este modo, cuando incumple sus deberes o incurre en conductas prohibidas, debe acarrear con las cargas y consecuencias de orden patrimonial, disciplinario, e inclusive penal. Situación parecida se presenta con el trabajador oficial, con algunas variables derivadas de la naturaleza de la relación contractual.”

3 See the Sentencia C-563 of 1998: “no se traduce y se agota con la simple ejecución materia de una labor o prestación específicas, sino en el desarrollo de cometidos estatales que comportan la asunción de prerrogativas del poder público.”

## 2.2. THE SELF REGULATION OF SECURITIES MARKET IS A “PUBLIC FUNCTION”

Pursuant to Article 24 of Act 964, self regulatory organizations are entitled to exert a set of competences with respect to securities market intermediaries. These competences can be classified into three categories: normative, supervisory and disciplinary. It is noteworthy that the self regulation duty has been imposed by law, which entails that its exercise turns out to be mandatory, which, subsequently, implies that intermediaries cannot validly abstain from it through means of any kind of private agreement, insofar as it is imposed by the “empire of the state”, *i.e.*, by the legislative power, which is an activity in which States exert their *imperium*.

Then, in accordance with Colombian Constitutional and Administrative Law, given the mandatory character of this duty, self regulation is a public function, of administrative nature, and, specifically, of police. Neither the existence of a legal provision defining self regulation as a function of private nature, nor the unjustified omission by the Court on the occasion of judicial review thereof challenge the conclusion that has been put forward.

First, as has been clearly stated above, in accordance with the Constitutional Court, the main criterion applicable to ascertain whether a certain function has a public nature is a material one. Then, what has to be given consideration is the subject matter with respect to which a competence is attributed, rather than the public or private nature of the entity entitled to exert that function. This shift from a subjective to an objective or “material” perspective regarding the definition of public function is consistent with the fact that, under Colombian Constitutional and Administrative Law, public functions can be exerted by private entities or even natural persons, without being deprived of its public nature by the mere fact that such private entities or natural persons intervene.

Second, it flows from the language of Article 24 that this function is public and, additionally, of administrative nature. More specifically, on the basis of the language of Act 964 and Colombian Constitutional and Administrative Law and Doctrine, as stated by relevant case law, self regulation is a peculiar manifestation of the function of police attributed to the President of the Republic with respect to any sort of activity carried out in connection with public savings.

In relation to the character of self regulation as a function of police, it should be taken into account that it implies the exercise of public powers aimed at safeguarding public order, in every aspect of societal life. This public power, of course, can be exerted only within the framework of the “law”, understood in a broad sense, *i.e.*, including any applicable rules and principles, stemming from constitutional and legal provisions,

and even from other formal sources of a lower hierarchical degree, such as general provisions included in administrative regulations.

Under Colombian Constitutional and Administrative Law, the set of competences related to the “function of police” are described using three different concepts, which, in turn, reflect the three-tier hierarchical structure in which they are arranged: “police power”, “police function” and “police measures”. First, the “police power” refers to the public power attributed to the Congress of the Republic, the state organ entitled, as a general rule, with the competence to enact laws under the Constitution (exceptionally, this power may be exerted by the President of the Republic, via the issuance of decrees with “force of act”, deemed to be at the same hierarchical position as ordinary acts within the Colombian system of formal sources, from a material viewpoint), which are subsequently regulated in detail via administrative regulations issued and enforced by the executive branch of public power. Second, the “police function” is the public power vested upon administrative agencies, which they can exert within the framework put forward by the legislator. Finally, “police measures” are acts aimed at enforcing in each particular factual scenario the decisions made by administrative authorities in exercise of their “police function”.

Within the framework referred to above, it is clear that, under the Colombian Politic Constitution of 1991, the function of enacting laws which entitle the President of the Republic with the competence to oversee and control activities pertaining to the collection and investment of public savings is a public function and, more specifically, a “police power”; in addition, it is also self evident that the functions attributed to the President of the Republic by the Congress of the Republic regarding the abovementioned matters correspond to the concept of “police function”, which shall be exerted within the limits imposed by the Congress, which holds the “police power”. These conclusions have been endorsed by the First Section of the Contentious Administrative Chamber of the Colombian Council of State in a decision issued on May 17, 2001, *i.a*<sup>4</sup>.

As a corollary, under Colombian Constitutional Law, when the Congress of the Republic enact laws and subsequently the President of the Republic or any other competent administrative organ issues administrative regulations regarding securities markets, aimed at protecting public confidence, overseeing and controlling activities taking place in the securities market, or even imposing sanctions upon intermediaries who are not acting in compliance with the aforementioned rules, constitutes the exercise of “police power” and “police function”, respectively. Additionally, it is noteworthy that, pursuant to Article 4 of the Constitution, which establishes in Colombia the principle of the supremacy of the Constitution, the mere fact that a legal provision

4 “2.1.1. Contenido de la potestad policiva”

“2.1.1.1. La policía administrativa, según nuestra legislación, comprende el poder de policía, la función de policía y la mera ejecución policiva, (...)”

deny the public character of a certain function attributed to a private entity or natural person does not deprive that activity of its public nature. For this reason, in the instant case, the fact that Act 964 denies the public nature of self regulation of securities market ought not to amount to turning it into a private activity, contrary to the undemonstrated Statement contained in the Sentencia C-692 of 2007.

Turning to the issue discussed in this section, and within the framework of a historical method of constitutional interpretation, aimed at ascertaining the will of the drafters (“constituyentes”), it is noteworthy that in a report submitted to the Constituent Assembly on May 29, 1991<sup>5</sup>, as well as during the debate held on June 10, 1991<sup>6</sup>, several members of the Assembly expressly referred to self regulation exerted by private entities either at the national or local level as “public functions”. Thus, the drafters’ will was to deem self regulation as a “public function”.

The rationale underlying the drafters’ intent has been expressly taken into account by the Colombian Constitutional Court in several cases. In fact, in the Sentencia C-078 of 2003<sup>7</sup>, the Court held that professional self regulation regarding non-professional activities which entailed risks to the society was a public function, unlike self regulation with respect to liberal arts, the exercise of which in principle implied no risks to the society. This ruling has been reiterated by the Court in more recent cases, and, thus, constitutes applicable precedent. Among them, it is worth quoting the Sentencia C-570 of 2004<sup>8</sup>, where the Court put forward the public nature of self regulation regarding either professional or non-professional risky activities, when addressing the constitutionality of either creating public agencies or allowing private entities, such as professional associations, to exert normative, supervisory and even punitive powers with respect to people involved in the abovementioned activities.

To summarize, given the fact that the exercise of normative, supervisory and disciplinary functions regarding securities markets is a form of “police function”, it is quite evident that securities market self regulation under Colombian Constitutional Law is a “public function”, regardless of any legal provision to the contrary. This, as will be substantiated with more detail below, constitutes a strong ground to challenge the constitutionality of the second paragraph of Article 25 of the Act 964.

5 See. Constitutional Gazette No. 85, May 29, 1991.

6 See. Plenary Session, June 10, 1991. Transcription obtained at Luis Angel Arango Library of Bogotá.

7 “No escapa a la Corte la posibilidad permitida por la Constitución de que los particulares puedan ejercer funciones administrativas (art. 210 de la CP), sin que por esta razón se conviertan en entidades públicas. En este evento se trata de entes creados por particulares con naturaleza privada a los que posteriormente se le asignan funciones públicas.”

8 “En la sentencia, la Corte (...) aclara que “si bien el legislador goza de una amplia potestad en la determinación de la autoridad encargada de la inspección y vigilancia de la profesiones legalmente establecidas, cuando para estos efectos opta por crear un órgano o entidad del orden nacional debe, en cumplimiento a lo dispuesto en el artículo 154 de la Carta Política, contar con la iniciativa o el aval gubernamental.” (cita de la sentencia C-078-03)”

## 2.3. SECURITIES MARKET SELF REGULATION IS A PUBLIC FUNCTION WHICH CAN BE EXERTED BY PRIVATE ENTITIES

### 2.3.1. CONSTITUTIONAL REGIME

There are two constitutional grounds which justify the exercise of police functions upon securities market activities: first, pursuant to Article 26 of the Political Constitution, it amounts to a valid restriction imposed upon the fundamental freedom to choose a profession or occupation; and, second, under Article 189(24), it is a competence vested upon the President of the Republic.

Article 26, *idem*, reads as follows:

Every person is free to choose a profession or occupation. The Act may require certificates of competence. The competent authorities will inspect and supervise the exercise of professions. Occupations, arts or jobs which do not require academic training are to be freely exercised, except for those which involve a societal risk.

Legally recognized professions may be organized into professional associations. The internal structure and operation of the latter must be democratic.

The Act may assign public functions to them and establish the appropriate controls.

Even though, under Colombian Commercial Law, commercial enterprises are not, *prima facie*, professions, but rather occupations, it is worth noting that some professional activities carried out in connection with such enterprises are likely to be subject to the police function under Article 26, *in fine*.

Professions have been conceived of as those activities which can be exerted upon the completion an academic curriculum, after long periods of study in educative institutions, as well as the subsequent award of an academic title, whereas occupations have been referred to as those activities the exercise of which only requires “natural talent”, but not necessarily a formal academic training. Commercial activities, as a general rule, are regarded as occupations.

This explains why the distinction between professions and occupations was a cardinal concept within the framework of the Constitution of 1886, for the competence attributed to state agencies of regulating certain activities depended upon the fact that the activities were a profession. Nonetheless, this approach was reformed by the Constitution of 1991, which adopted societal risk as the main criterion to ascertain whether a certain economic activity is subject to the exercise of police functions on the part of competent state agencies<sup>9</sup>.

<sup>9</sup> See. The Sentencias C-606 of 1992, C-177 of 1993 and C-031 of 1999, *i.a.* In the Sentencia C-606 the Court stated: “A diferencia de lo que puede inferirse del artículo 39 de la Carta de 1886, la Constitución vigente señala

Thus, under the current constitutional regime, regardless of the distinction between profession and occupation, competent authorities, or even private entities in exercise of public functions, are entitled to exert police functions upon such activities, due to the high societal risk that their exercise entails. This criterion has been endorsed by the Constitutional Court in several decisions, among which the Sentencia C-031 of 1999 is noteworthy<sup>10</sup>.

In fact, the Court has reiterated this criterion in subsequent decisions. In the Sentencia C-131 of 1999, the Court emphasized that societal risk arose out from the high potentiality of inflicting harm upon thirds parties, and that this situation was typical of securities markets. It is also relevant to quote the Sentencia C-964 of 1999, where the Court put forward that societal risk was not referred to the constitutional protections against eventual individual contingencies, but rather to the tutelage of general interest, which comprised, *i.a.*, collective interests, including constitutional rights of eventual service users. Additionally, on the basis of the aforementioned understanding of what “societal risk” means, the Court stated that the rationale of requiring a formal academic training as a prerequisite to carry out activities entailing risks to the society was precisely the need for ensuring that those individuals involved in such activities are able to deal with societal risks the magnitude of which is susceptible of being substantially reduced through putting into practice a set of skills acquired as a result of a formal academic training (*i.e.*, professional skills)<sup>11</sup>.

Within this framework, it is quite clear that securities market activities involve societal risks, which, subsequently, makes it necessary to subject such activities to police functions exerted by the competent authorities, and even by private entities, in order

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que la Ley podrá exigir títulos de idoneidad, no sólo para el ejercicio de las profesiones, sino, para el ejercicio de los oficios. Igualmente, cualquier actividad que se clasifique como “profesional”, y las ocupaciones, artes y oficios que exijan formación académica o impliquen riesgo social, pueden ser objeto de inspección y vigilancia. Sólo las ocupaciones, artes y oficios que no exijan formación académica y que no impliquen riesgo social, son de libre ejercicio en el territorio nacional. La diferencia entre profesión u oficio no radica ya en la mayor o menor formación académica, ni en la necesidad de una especial cualificación técnica, pues la propia Carta señala que cualquier ocupación, arte u oficio puede requerir de dicha formación. De otra parte, queda expresamente consagrada la facultad de exigir títulos de idoneidad, así como de inspeccionar y vigilar tanto las profesiones como los oficios, artes y actividades en general que requieran para su ejercicio formación académica o que impliquen un riesgo social”.

- 10 “(...), la propia Carta fundamental establece la posibilidad de reglamentación, inspección y vigilancia sobre aquellas ocupaciones no profesionales que exijan formación académica o que, a pesar de no necesitar la mencionada formación, impliquen un riesgo social.” (Sentencia C-226 of 1994 cited by the Court in Sentencia C-031 of 1999, parentheses added).
- 11 “Por ende, el concepto de riesgo social no se refiere a la protección constitucional contra contingencias individuales eventuales sino al amparo del interés general, esto es, a la defensa y salvaguarda de intereses colectivos que se materializan en la protección de los derechos constitucionales de los posibles usuarios del servicio. (...). Por ende, sólo puede limitarse el derecho a ejercer un oficio y exigirse un título de idoneidad, cuando la actividad genera (i) un riesgo de magnitud considerable, (ii) que es susceptible de control o de disminución a través de una formación académica específica.” (Sentencia C-964 of 1999).

to protect public confidence, given the fact that the aforementioned activities are of “public interest”, pursuant to Article 335 of the Constitution.

### 2.3.2. SECURITIES MARKET SELF REGULATION CONSTITUTES A FORM OF “DECENTRALIZATION THROUGH COLLABORATION”

Under Colombian Administrative Law, the competence to vest upon private legal entities or natural persons the exercise of public functions in certain circumstances derives from the so-called “decentralization through collaboration”. This form of decentralization was explicitly authorized by the Constitution of 1991, as has been acknowledged several times by the Constitutional Court, especially in the Sentencias C-308 of 1994 and C-166 of 1995<sup>12</sup>, *i.a.*

More specifically, the Court stated in the Sentencia C-964 of 1999 that the power to oversee the exercise of professions vested upon professional associations was a form of “decentralization through collaboration”, and, subsequently, a public function, which could be only exerted either by the State or professional associations. Additionally, the Court pointed out that the exercise of public functions on the part of private entities, such as professional associations, did not deprive such functions of its public nature, insofar as the mere fact that public functions were exerted by private legal entities or natural persons did not transform such functions into a private activity<sup>13</sup>, then, as a corollary, when professional associations exert public functions of professional self regulation on the basis of the powers vested upon them pursuant to Article 26 of the Constitution, such functions are considered public, regardless of the private nature of the entities entitled to exercise them.

To summarize, under Article 26 of the Constitution, and in accordance with applicable precedent of the Constitutional Court, police functions of self regulation exerted by

12 “La presencia de organizaciones de naturaleza privada en la realización de actividades administrativas, de las cuales el Estado es titular originario, doctrinariamente es concebida como una especie de la denominada descentralización por colaboración, lo que permite afirmar sin lugar a dudas, que la función administrativa no atañe de manera exclusiva al poder público sino que también incumbe a personas privadas, aspecto este último que se inscribe dentro de la perspectiva, más amplia, de la participación de los administrados “*en las decisiones que los afectan y en la vida económica, política, administrativa y cultural de la Nación*”, que el artículo 2o. de la Constitución colombiana consagra como uno de los fines prevalentes del Estado. (se subraya) (...). Así las cosas, de las consideraciones anteriores se desprende con meridiana claridad que el desempeño de funciones administrativas por particulares, es una posibilidad reconocida y avalada constitucional y legalmente, y que esa atribución prevista en el artículo 210 de la Carta opera por ministerio de la ley y, en el caso de las personas jurídicas, no implica mutación en la naturaleza de la entidad a la que se le atribuye la función, que conserva inalterada su condición de sujeto privado sometido al régimen de derecho privado en lo atinente a la organización y desarrollo de las actividades anejas a su específica finalidad.”

13 “Por lo tanto, estas corporaciones privadas no forman parte de la administración, y su creación voluntaria y la cualificación objetiva de sus miembros autoriza una representación y una verdadera defensa de intereses particulares. No obstante, se insiste, por expresa disposición constitucional la Ley podrá asignar funciones públicas a los colegios profesionales, por lo que es posible atribuirles la tarea de ordenar el ejercicio de las profesiones.” (Sentencia C-964 of 1999).

professional associations upon professions and occupations, *i.e.*, non-professional activities implying risks to the society, are public functions, regardless of the fact that they are vested upon private entities. Therefore, the ruling contained in the Sentencia C-692 of 2007 of Constitutional Court constitutes a significant, though unjustified, departure from applicable precedents.

This decision not only deviates from the general rule stated by the majority of previous decisions regarding self regulation of professions and occupations, but also turns out to be an unfortunate judgment, for it omitted to interpret the Constitution in a systematic manner. Also, the ruling of the Court disregards the interpretive principle of effectiveness (*interpretatio fienda est ut res magis valeat quam pereat*), under which constitutional provisions should not be construed in such a manner that other provisions applicable to or having a bearing on the specific factual hypothesis would be rendered ineffective. Furthermore, this decision misunderstood the nature of decentralization through collaboration of self regulation of professions and occupations, as long as the Court failed to take into account that, under Article 26 of the Constitution, the exercise of such public functions on the part of private entities shall be subject to “appropriate controls” by state competent authorities. In fact, the ultimate control of activities of “public interest”, such as professions and occupations the exercise of which implies risks to the society, corresponds to the state.

On the basis of this analysis, it is possible to conclude that the argument made by the Court in the instant case is unsound, given the fact that decentralization though collaboration shall never impede the state from exerting an overall control upon activities the oversight of which has been vested upon private entities. Finally, the Court also neglected that authorities are not deprived of their power to undertake activities decentralized through collaboration, in which case those authorities will reassume the powers once vested upon private entities.

### **2.3.3. SECURITIES MARKET SELF REGULATION AS A PRESIDENTIAL POLICE FUNCTION SUSCEPTIBLE OF BEING ATTRIBUTED BY THE LEGISLATOR TO PRIVATE ENTITIES THROUGH DECONCENTRATION**

Pursuant to Article 198(24), of the Constitution of 1991, the oversight and control of commercial activities such as those exercised by intermediaries within the framework of the securities market has been explicitly attributed to the President of the Republic, in his capacity of supreme administrative authority of the Colombian State.

As a general rule, and in accordance with principles of statutory interpretation, in order to determine the scope of a certain provision, it is necessary to construe it in the light of other relevant provisions within the legal system. Then, in the instant case, given the fact that the oversight and regulation of professions and occupations which are

likely to generate risks to the society constitute a police function, it is necessary to refer to Article 26, in order to accurately ascertain the scope of the powers granted to the President of the Republic under Article 189(24), *idem*.

Thus, on the one hand, pursuant to Article 26, the legislator may enact laws attributing police functions to professional associations with respect to the oversight and control of professions and occupations likely to generate societal risks. On the other hand, under Article 189(24), the President of the Republic will exert the inspection, supervision and control of intermediaries in securities markets, as well as of persons –individuals and legal entities– who undertake financial, stock market, insurance, and any other activities “connected with the management, use, or investment of savings collected from the public”, and the supervision of cooperative entities and commercial companies.

Then, *prima facie*, there is a conflict between the aforementioned constitutional rules, insofar as Article 26 scope is restricted by Article 189(24), in such a manner that the legislator may not enact laws attributing police functions to private entities, such as professional associations, via decentralization through collaboration, with respect to professions and occupations which can entail risks to the society, if such professions and occupations are connected with the management, use, or investment of savings collected from the public. Given this conflict between these rules, and in order to conciliate their scopes of application with regard to activities “connected with the management, use, or investment of savings collected from the public”, it is quite relevant to further examine basic concepts of Public Law which are at stake in the instant case, such as “administrative function” and “deconcentration”, *inter alia*.

With respect to the concept of administrative function, it is worth reviewing decisions issued by the Constitutional Court, in which the scope of this concept has been ascertained in light of Colombian Constitutional and Administrative Law. In the Sentencia C-189 of 1998, the Court concluded, after a long analysis, that the control of activities undertaken by private entities or natural persons was an administrative function, in its “passive” sense. More specifically, the Court has pointed out that the administrative functions of inspection, oversight, and control attributed by the Constitution to the President of the Republic are susceptible of deconcentration, but not of delegation. In accordance with the *ratio decidendi* in the Sentencia C-561 of 1999, superintendencies, as organs of public administration at the national level, may undertake administrative functions attributed to other authorities as a consequence of either decentralization or deconcentration.

The abovementioned criteria, put forward by the Constitutional Court on the occasion of examining the constitutionality of Act 489 of 1998 - which comprises the most

important rules governing the exercise of public functions in Colombia, were once reiterated by the Court in the Sentencia C-205 of 2005. In this decision, the Court explicitly held that oversight, control and inspection public functions attributed to the President of the Republic by the Constitution were susceptible of “deconcentration through services” on the basis of the powers conferred upon the legislator by Article 150(7), of the Constitution, regarding the organization of the structure of the public administration at the national level<sup>14</sup>. As a corollary, deconcentration and delegation of administrative functions are compatible, insofar as administrative authorities may exercise administrative functions once attributed to other state organs either via deconcentration or delegation of such functions.

Nonetheless, it is worth pointing out that the transference of a certain public function via deconcentration requires that the legislator enact a law authorizing it, under the assumption that, in accordance with the Constitution, the authority whose public function is transferred to another entity by virtue of such a law retains the power to control the exercise of the function subject to deconcentration, as long as the authority upon which the function is vested after the deconcentration is subordinate to the organ which has transferred that function. Unlike deconcentration, delegation can take place by virtue of an administrative act directly issued by the authority which will delegate and, in this case, the delegator is entitled with the power to reassume the delegated function at any moment, as well as to challenge the validity of administrative acts issued by the delegatee, pursuant to Article 211 of the Constitution.

The relevance of the distinction between deconcentration and decentralization lies upon the fact that, even though under Article 211 of the Constitution the President of the Republic cannot delegate public functions to private entities, such as professional associations, it is not prohibited under Colombian Constitutional and Administrative Law to transfer public administrative functions of the President to private entities via deconcentration. This second hypothesis of transference of public functions perfectly fits the case of private entities such as securities market self regulatory organizations, which would be able to exert police functions upon securities markets in a manner consistent with Constitutional applicable rules, as has been stated above.

In sum:

1. Pursuant to Article 189(24) of the Constitution, the inspection, oversight and control of securities markets is a public function of administrative nature, and more

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14 “En lo que respecta a la materia del presente proceso de constitucionalidad, la Corte ha realizado importantes precisiones conceptuales sobre la naturaleza jurídica de la facultad presidencial de inspección, vigilancia y control de las personas de que trata el artículo 189-24 de la Constitución: Sin embargo, como ha sido expuesto, las funciones de inspección, vigilancia y control son ejercidas por el Presidente en su calidad de suprema autoridad administrativa y, por tanto, pueden ser objeto de desconcentración en otras entidades administrativas. En este sentido, las normas demandadas no resultan inconstitucionales por este concepto.”

- precisely, a police function, attributed by the Constitution to the President of the Republic, insofar as such police functions are “connected with the management, use, or investment of savings collected from the public”;
2. Under Article 211, *idem*, the aforementioned police function can be delegated only to “the ministers, directors of administrative departments legal representatives of decentralized entities, superintendents, governors, mayors, and agencies of the state which the same law determines”. Therefore, private entities cannot be delegates of such police functions;
  3. Nonetheless, the inspection, oversight and control of securities markets is susceptible of being transferred to either State organs or private entities via “deconcentration through services”;
  4. Pursuant to Article 150(7), the legislator is competent to transfer police functions regarding securities markets, among other public functions, via deconcentration.

#### **2.4. THE DUTY OF ENSURING A DEMOCRATIC STRUCTURE WITHIN SELF REGULATORY ORGANIZATIONS**

Pursuant to Article 26 of the Constitution, self regulatory organisms are required to ensure that their structure is democratic, in order to be qualified to exert inspection, control and oversight functions upon professions and other occupations.

The main consequence of this duty is that the validity of decisions made by such organisms restricting fundamental subjective rights of those subject to their regulatory power is conditional upon the existence of procedural protections and, particularly, of democratic decision making mechanisms, which implies that voting rights ought to be granted equally to every member of the respective professional association or regulatory body, rather than on the basis of the percentage of shares held, which is a plutocratic criterion opposed to the drafters’ will in this respect. Finally, it is noteworthy that the Court has held similar criteria regarding voting rights within private associations. In fact, in the Sentencia C-522 of 2002, the Court referred to democratic criteria on the occasion of examining disciplinary powers of condominium assemblies<sup>15</sup>.

<sup>15</sup> “En un régimen democrático la regla *una persona un voto* sólo puede ser alterada por mandato constitucional y en especial se considera un tema que le compete exclusivamente al denominado poder constituyente. (...) la votación no debe definirse a partir del coeficiente de propiedad sino de la participación de cada propietario en igualdad de condiciones: *un voto por cada unidad privada*.”

## 2.5. UNCONSTITUTIONALITY OF A LEGAL MONOPOLY OVER SELF REGULATION

In accordance with applicable precedents of the Constitutional Court, the freedom of association comprises a positive and a negative aspect. This distinction is relevant to the issue at stake, insofar as, on grounds of this negative aspect of freedom of association, it would be unconstitutional to enact legal norms establishing a monopoly over self regulation of professions and other occupations by granting self regulatory powers to only one private entity and, subsequently, impeding those who are subject to such a regulatory body from exerting their fundamental negative freedom of association. The aforementioned distinction has been expressly acknowledged by the Court, among others, in the Sentencia C-606 of 1992<sup>16</sup>. Nonetheless, pursuant to Articles 26, 84, 333, 334 and 335 of the Constitution, *i.a.*, the negative freedom of association does not entail the unconstitutionality of provisions requiring membership to certain associations as a condition to validly engage in certain activities.

## 2.6. FINAL REMARKS REGARDING THE CONSTITUTIONAL REGIME OF SELF REGULATION

On the basis of the previous analysis, pursuant to applicable constitutional provisions, and in accordance with relevant precedent of the Constitutional Court, it is possible to draw the following conclusions:

1. The regulation, oversight and control of professions and occupations likely to generate risks to the society constitute a public function, and, more specifically, a police function;
2. The legislator is competent to assign such police functions to either public or private entities;
3. Professional associations ought to have a democratic structures and decision-making procedures, in order to exert police functions upon professions and other occupations;
4. Any law restricting “negative freedom of association” by imposing a monopoly over self regulation would be clearly unconstitutional; nonetheless, it is consistent with freedom of association to establish the membership to certain associations

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16 “En efecto, el derecho de asociación, entendido como el ejercicio libre y voluntario de los ciudadanos encaminado a fundar o integrar formalmente agrupaciones permanentes con propósitos concretos, incluye también un aspecto negativo: que nadie puede ser obligado directa o indirectamente a formar parte de una asociación determinada. Si no fuere así, no podría hablarse del derecho de asociación en un sentido constitucional, pues es claro que se trata de un derecho de libertad, cuya garantía se funda en la condición de voluntariedad”.

as a condition to validly engage in certain activities, provided that freedom of choice is guaranteed<sup>17</sup>.

More specifically, the constitutional limits of self regulation, regarded as a mere securities market activity are as follows:

1. The FSC, as a state agent responsible for the exercise of police functions upon securities markets, ought to keep control over self regulation activity, in addition to the power of overseeing self regulatory organizations;
2. Any law requiring the existence of only one self regulatory entity would be unconstitutional on grounds of violation of the negative freedom of association;
3. Finally, even though there are neither constitutional nor legal rules specifically governing the structure of self regulatory organizations, these entities ought to ensure that their structure and decision-making procedures are democratic, under Article 26 of the Constitution.

### **3. CONCLUSIONS: LEGAL CONSEQUENCES STEMMING FROM THE PUBLIC NATURE OF SECURITIES MARKET SELF REGULATION UNDER CONSTITUTIONAL LAW**

Given the fact that there are sound grounds for concluding that securities market self regulation is a public function, and, more precisely, a police function, it is worth addressing the main legal consequences arising out of the public nature of this function.

The public nature of securities market self regulation furnishes an explanation to the inconsistency between the “Understanding Memoranda” entered into by the FSC and the Colombian Securities Market Self Regulator (*Autorregulador del Mercado de Valores* and hereinafter “SMSR”) on December 21<sup>st</sup>, 2006, and November 7<sup>th</sup>, 2007. This inconsistency arises out of the private nature wrongly attributed by the Sentencia C-692 of 2007 to securities markets self regulation functions<sup>18</sup>.

#### **3.1. THE *NON BIS IN IDEM* PRINCIPLE WOULD OPERATE**

The Constitutional Court has unequivocally held that the *non bis in idem* principle entails the prohibition of imposing two or more consecutive sanctions of the same

<sup>17</sup> The following decisions lend support to this assertion: Sentencias C-251/98, C-039/93, C-226/94, C-606/92, C-177/93, T-554/95, C-429/96, C-1265/00, C-087/98, C-031/99, C-520/00, C-505/01, C-038/03, C-570/04.

<sup>18</sup> See. [www.superfinanciera.gov.co](http://www.superfinanciera.gov.co) to consult these memoranda.

legal nature in relation to a certain conduct. Nonetheless, it is consistent with this principle to apply sanctions of a different legal nature upon a certain person for the same offence. This exception to the principle has been expressly acknowledged by the Court in several decisions such as, *i.a.*, the Sentencias C-088 of 2002<sup>19</sup> and T-162 of 1998<sup>20</sup>. Under the assumption that securities market self regulation is a police function, once a self regulatory body imposes an administrative sanction upon a certain person for a wrongful conduct under a given set of rules, the FSC would not be able to impose a consecutive administrative sanction upon the same person and regarding the same conduct, by virtue of *non bis in idem* principle. However, given the fact that the functions undertaken by self regulatory organizations are considered as securities market activities of a private nature, then the *non bis in idem* principle would not apply, due the difference in kind between the sanctions that both self regulatory organizations and the FSC are competent to impose upon intermediaries within the securities market.

It is worth noting that the current understanding memoranda do not provide for the *non bis in idem* principle or any other similar rule, given the allegedly private nature of self market regulation.

### **3.2. THE FINANCIAL SUPERINTENDENCY WOULD BE ABLE TO VALIDLY ABSTAIN FROM INITIATING SANCTIONATORY PROCEEDINGS**

If securities market self regulation is not conceived of as a public function, the FSC would not be able to abstain from exerting its inspection, oversight and control without incurring in the different kinds of liability arising out of the omission in the exercise of its public functions with respect to activities subject to control on the part of self regulatory organizations.

Therefore, defining self regulation as a public function would allow the FSC to validly abstain from instituting sanctionatory proceedings against intermediaries who are being or have been subject to proceedings initiated by self regulatory entities, given the fact that, under the *non bis in idem* principle, the administrative nature of

19 “Sin embargo, la prohibición del doble enjuiciamiento no excluye que un mismo comportamiento pueda dar lugar a diversas investigaciones y sanciones, siempre y cuando éstas tengan distintos fundamentos normativos y diversas finalidades. Esta Corte ha precisado que el *non bis in idem* veda es que exista una doble sanción, cuando hay identidad de sujetos, acciones, fundamentos normativos y finalidad y alcances de la sanción.”

20 “Como quiera que el significado primigenio de los principios de *non bis in idem* y de cosa juzgada consiste en impedir que los hechos o conductas debatidos y resueltos en un determinado proceso judicial vuelvan a ser discutidos por otro funcionario en un juicio posterior, esta Corporación ha considerado que la relación que debe existir entre los hechos, el objeto y la causa de esos dos procesos debe ser de identidad. En efecto, la jurisprudencia señala que debe tratarse de motivos idénticos, de juicios idénticos, del mismo hecho, del mismo asunto o de identidad de objeto y causa. Así, por ejemplo, la Corte ha estimado que no se violan los principios constitucionales en comento cuando una misma conducta es juzgada por dos jurisdicciones diferentes con base en normas de categoría, contenido y alcance distintos”.

sanctionatory proceedings initiated by self regulatory organizations in exercise of a police function will bar FSC's competence to entertain subsequent administrative proceedings regarding the same factual hypothesis. Once again, it shall be noticed that current understanding memoranda do not establish this specific possibility, even though FSC and SMSR activities and competences shall be coordinated under the terms provided thereby.

### **3.3. UNDERSTANDING MEMORANDA AS INTER-ADMINISTRATIVE COVENANTS UNDER A DEFINITION OF SECURITIES MARKET SELF REGULATION AS A PUBLIC FUNCTION**

Traditionally, inter-administrative covenants have been defined as bilateral agreements entered into by two state organs. As a general rule, this kind of agreements, usually referred to as "covenants", are aimed at governing cooperation between the parties to the agreement, rather than a mere synallagmatic legal relationship between them<sup>21</sup>. Therefore, such agreements, formally known as inter-administrative contracts, coordinate the performance of activities falling within the subject matter of the contract on the part of the parties thereto, as a means of exercising public functions assigned to them.

Then, had securities market self regulation function been defined as a public one, the FSC would be able to enter into inter-administrative contracts with self regulatory organizations, in order to coordinate the public functions that it is entitled to exert upon securities market intermediaries in connection with their activities falling within the scope of its competence, without the likelihood of incurring in any sort of liability stemming from the eventual failure to exert its public function with respect to securities market intermediaries already subject to self regulatory organizations.

Furthermore, under the current circumstances, given the private nature of securities market self regulation attributed to self regulatory organizations, the FSC cannot validly celebrate any sort of legally enforceable agreement with the aforementioned private entities, for it would amount to an invalid delegation of public functions to private entities. In this sense, it is noteworthy that the specific wording of the current understanding memoranda, in accordance with Act 964 and the Sentencia C-692 of 2007, expressly denies their enforceability, because FSC and SMSR are not in privity of contract<sup>22</sup>.

21 L, G, Davila Vinueza, (2003). *Régimen Jurídico de la Contratación Estatal*. 316, (Legis, Bogotá, 2003).

22 "Este instrumento establece los compromisos entre las Partes, respecto a los principios que orientan y facilitan el cumplimiento de las funciones de cada entidad, la vocación de colaboración mutua entre ellas y la realización coordinada de actividades y esfuerzos en desarrollo de sus respectivas funciones. El presente Memorando no genera ningún derecho ni impone vínculos legalmente exigibles a las Partes." See. [www.superfinanciera.gov.co](http://www.superfinanciera.gov.co). "*Memorando de Entendimiento AMV - SFC*".

### **3.4. FUNCTIONAL DUPLICITY BETWEEN THE FINANCIAL SUPERINTENDENCY AND SELF-REGULATORY ENTITIES WOULD BE AVOIDED**

Had self regulation been defined as a public function, constitutional norms governing the distribution of state competences would be fully applicable and enforceable. As a consequence, it would be possible to clearly determine under which circumstances the FSC will supersede the competences of self regulatory organizations, in exercise of prevailing competence. This prevailing competence is applicable in cases where competence conflicts arise between two entities exerting public functions with respect to the same subject matter. In the instant case, given the private nature attributed to self regulation, a rule superseding self regulatory competences of a certain self regulatory entity would allow the FSC to validly intervene, which will exercise a prevailing competence therefore, is not provided for by applicable norms. This problem is allegedly addressed by understanding memoranda, which pretend to avoid functional duplicity.

Thus, the consequence of defining securities market self regulation as a public function would be threefold: first, functional duplicity would be avoided, via the operation of rules superseding regulatory competences vested upon self regulatory organizations and enabling the FSC to validly intervene; second, the FSC would be able to abstain from instituting sanctionatory proceedings against securities market intermediaries subject to oversight on the part of self regulatory organizations, among other competences, on a constitutional and legal valid ground; and, finally, the avoidance of functional duplicity, as a consequence of defining securities market self regulation as a public function, would allow Colombian authorities to comply with international standards, according to which functional duplicity ought to be avoided.

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