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# Analysis of the imposition of fines in case of reluctance to comply with administrative orders in Colombia: The case of sanctions against Uber Colombia

## *Análisis de la imposición de multas en caso de renuencia de incumplimiento de órdenes administrativas en Colombia: El caso de las sanciones contra Uber Colombia*

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**RESUMEN:** El artículo 90 de la Ley 1437 de 2011 prevé un mecanismo para la ejecución forzada de órdenes administrativas consistente en la imposición de multas económicas por la renuencia de un particular a cumplir tales órdenes. Si bien, la ley colombiana no prevé un procedimiento específico para la aplicación del artículo, este artículo sugiere que deben cumplirse cuatro presupuestos: (i) prexistencia de un acto administrativo definitivo que imponga una obligación no dineraria; (ii) renuencia del administrado a no cumplir dicha obligación; (iii) concesión de un plazo razonable para que cumpla con

la obligación, y (iv) razonabilidad y proporcionalidad de la multa a imponer. En Colombia la aplicación de esta norma se ha dado mayoritariamente en materia urbanística, esto es, en casos en los cuales se ordena desalojar un predio o demoler una construcción. Es decir, en estos casos, la administración impone obligaciones de hacer. Sin embargo, a la fecha se conoce un único caso en el que la administración ha impuesto una obligación de no hacer, concretamente contra la empresa Uber Colombia. Así las cosas, este artículo también analiza el cumplimiento de los cuatro presupuestos en este caso concreto.

**PALABRAS CLAVE:** sanciones administrativas, ejecución forzada de actos administrativos, Uber.

**ABSTRACT:** Article 90 of Law 1437 of 2011 provides a mechanism for the forced execution of administrative orders consisting of the imposition of financial fines for the reluctance of a private party to comply with such orders. Although Colombian law does not provide a specific procedure for the application of the article, this article suggests that four conditions must be met: (i) preexistence of a final administrative act that imposes a non-monetary obligation; (ii) reluctance of the person to not comply with such obligation; (iii) granting of a reasonable period to comply with the obligation, and (iv) reasonableness and proportionality of the fine to be imposed. In Colombia, the application of this rule has occurred mostly in urban planning matters, that is, in cases in which an order is issued to vacate the property or demolish a construction. In these cases, the administration imposes obligations to do. However, to date, there is only one known case in which the administration has imposed an obligation not to do, specifically against the company Uber Colombia. Thus, this article also analyzes the fulfillment of the four requirements in this specific case.

**KEYWORDS:** administrative sanctions, enforcement of administrative acts, Uber.

**JEL CODE:** K23, L62.

## INTRODUCTION

In administrative law in general and concerning the beginning and end of any administrative action, there is a classic division between administrative procedural acts and definitive administrative acts. Regarding the latter, Colombian law, specifically Article **43** of Law 1437 of 2011 (Code of Administrative Procedure and Administrative Litigation or CPACA) indicates that definitive [administrative] acts are those that directly or indirectly decide the merits of the matter or make it impossible to continue the action.

Regarding this type of administrative action, the contentious-administrative jurisprudence of the Council of State (Administrative Chamber. Second Section, Radication 2014-02393. Order of September 14, 2017. C.P. Sandra Lisset Ibarra Vélez) has stated that they are those that "...are issued to culminate the administrative proceedings initiated through the right of petition, ex officio or in compliance with a legal duty [of the administration]". Similarly, it has also been said that these are acts that "...put a peremptory end to the administrative action, so that in them the activity of the administration is exhausted, or only the execution of what has been decided remains pending" (Council of State. Contentious-Administrative Chamber. Second Section. Radicación 2010-00011 (0068-10) Ruling of March 8, 2012. C.P. Víctor Hernando Alvarado Ardila). In this order of ideas, and for this article, it is important to emphasize that final administrative acts decide,

create, define, modify, or extinguish legal situations concerning an administrative or private party.

For its part, concerning the acts of procedure within the administrative action, the same Council of State IN Auto del 14 de Septiembre de 2017 has stated that:

> Between the opening of the administrative action and its conclusion, there are certain actions of the authorities that tend to push it from one stage to another and/or prepare the final decision, building the reasons or legal grounds for a definitive decision on the matter (...) These acts, [those of procedure] do not contain a decision but an impulse to the action of the authority, and therefore, as a general rule, they are not liable to be judged, unless they make impossible its culmination.

Moreover, the character of impulse or preparation of the procedural acts means that they do not have their own identity or independence, but are, if anything, an instrument whose existence is dependent on a definitive administrative act. In this way it has been explicitly recognized by the administrative jurisprudence of the Council of State, Chamber for Contentious Administrative Proceedings, Second Section in its Ruling of March 8, 2012, when it states that the procedural acts are:

> Instrumental provisions that make it possible to develop in detail the objectives of the administration; then the existence of these acts is not explained by themselves, but insofar as they are part of a sequence or series of activities united and coherent with a spectrum of broader scope that forms a totality as an act.

Now, without prejudice to the jurisprudential definition of the administrative acts of procedure, it is important to highlight that as they are acting with instrumental character and dependent on a definitive act, then, one of their species is the known administrative acts of execution whose particularity is that their existence is related to the enforceability of a definitive administrative act, then they are after this one. This is so not only because, according to the above definition of the definitive act, in these "...only the execution of the decision is pending" but also because the Constitutional Court has explicitly recognized it (Constitutional Court. Decision SU - 077 of August 08, 2018. Case T-6.326.444. M.P. Gloria Stella Ortiz Delgado), who based on the specialized legal doctrine (Rodríguez, 2008, pp. 290, 298). has indicated that the acts of execution are a kind of procedural acts, in addition, that they are different and after the definitive acts as follows:

> However, an act of execution is not an act of execution when it is not limited to simply complying with an act or judgment that it intends to execute and serves as a basis for it, but rather when it eliminates elements or introduces new ones. In this case, it is an act of apparent execution, which constitutes a new definitive act as to those new elements.

Having thus defined the administrative acts of execution, it is worth noting that they have three relevant and closely related characteristics, namely: (i) as they are a kind of procedural acts, they are not acts that can create, define, modify or extinguish legal situations concerning an administered party; (ii) as they are related to the enforceability of a definitive administrative act, they are acts whose purpose is to achieve the material effectiveness of the act on which they, in turn, depend

and enable it, therefore, they are a means, an instrument for the definitive act to be effective, that is to say, for it to produce effects; and finally, (iii) the production of these effects may depend on the fact that the act of execution leads to an eventual enforceable demand by the administration.

In its order, the first characteristic of the acts of execution has been ratified by the Council of State (Contentious-Administrative Chamber. Fourth Section. Radicación número: 68001-23-33-000-2013-00296-01(20212) Auto del 26 de Septiembre de 2013. C.P Jorge Octavio Ramírez Ramírez) by stating that "...the acts of execution are limited to comply with a judicial or administrative decision, without it can be stated that from them arise legal situations different from those of the executed sentence or act".

The second important characteristic of the act of execution as a component related to the effectiveness of the final administrative act has been highlighted by the local administrative legal doctrine when it states that

> Effectiveness, unlike validity, is projected to the outside of the administrative act in pursuit of its objectives and achievement of its purposes; hence institutions such as the administrative operation or the execution of the act are phenomena proper of this external instance of the administrative act. (...) the effectiveness of the administrative act can also occur by way of coercion or forced effectiveness of the same before the opposition of the passive subject for its acceptance and compliance. (Santofimio, 2017, p. 562)

Finally, it should be noted that this doctrinal citation is consistently linked to the third characteristic of the acts

of execution related to the eventual -although not always- requirement or forced execution of the final act on which it depends, as stated by the Council of State (Contentious-Administrative Chamber. Fourth Section. Radicación número: 25000-23-27-000-2010-00169-01(20350) del 28 de Septiembre de 2016. C.P. Martha Teresa Briceño de Valencia):

> Compulsory execution requires the pre-existence of an administrative act suitable for securing the execution, i.e., containing an imperative mandate that constitutes the enforceable performance, i.e., the one whose term for compliance has expired, without the defendant having satisfied it.

Now, when speaking specifically of the subsequent and forced execution of a definitive administrative act as something that is sometimes required for it to be effective, what is being said is that some administrative acts of execution -not all assume that the act to be executed contains a certain obligation, to be borne by the person administered and that this obligation is imperative in the sense that, beyond the simple will of this person administered, it becomes enforceable once the term for compliance has expired. In other words, by definition, final administrative acts always contain a declaration that creates, defines, modifies, or extinguishes legal situations, but only sometimes, for these legal situations to materialize and take effect, it may be necessary that the same administration, through subsequent acts, forces the execution precisely through acts aimed at the realization of such effects. In this way, it has been recognized by the Constitutional Court (Decision T-152 of March 12, 2009. Case file: T-2.030.895. M.P. Cristina Pardo Schlesinger) by stating that:

> In effect, the presumption of validity of the administrative act and the power of self-tutelage of the public administration constitute the main foundations of what is known as the enforceability of the act, according to which the administrative decision not only has binding force against individuals but also imposes itself against the same administration and against the same authority that issued it. It is, therefore, due to this attribute or quality of the administrative act that the execution of the decision adopted unilaterally produces all its effects even against the will of the person against whom it is directed and can even impose the forced execution of the same, either by the same authority that issued it (proper enforceability or enforceability) or by another authority with competence to do so (improper enforceability).

Now, within these acts of forced execution as a kind of acts of execution of a definitive act, it is worth noting that in Colombia, Article 90 of Law 1437 of 2011 establishes an alternative of coercive nature reserved to force the compliance of non-monetary obligations established in definitive administrative acts as follows:

> Without prejudice to the provisions of special laws, when an administrative act imposes a non-monetary obligation on an individual and the latter refuses to comply with it, the authority that issued the act shall impose successive fines for as long as he remains in default, granting him reasonable terms to comply with the order. The fines may range between one (1) and five hundred (500) legal monthly minimum wages in force and shall be imposed with criteria of reasonableness and proportionality.

In other words, forced execution, of which the administrative power of Article 90 of the CPACA is a species, is derived from two attributes of administrative acts: enforceability and enforceability. The first refers to the obligatory nature and the effectiveness of the act; it is an element even external to the validity of the act to be executed, being indifferent to the administration the will of the administered to fail to comply with its obligation. The second, enforceability (to which we have already referred), refers to the power (privilege) of self-judgment of the administration, which enables the possibility of forcibly and directly obliging the administration to comply without the need to go to court (heterotutela). (Sanchez, 2016, p. 269). Due to these attributes of the act, especially the second one, the possibility for the administration to impose fines for non-compliance (Art. 90 of the CPACA) must be based in each case on the fulfillment of certain requirements or assumptions, as we will explain below.

In effect, and according to what has been indicated so far, it is understood that if the administration intends to force the execution of a final administrative action through the alternative allowed by Article 90 of Law 1437 of 2011, we consider that four assumptions must be met: (i) the first, refers to the pre-existence of a definitive administrative act that imposes a non-monetary obligation to the administered party; (ii) the second refers to the reluctance of the administered party not to comply with such obligation; (iii) the third indicates that the administration must grant a reasonable term to the taxpayer to comply with the obligation; (iv) and the fourth refers to that, once the above assumptions are demonstrated, the imposition of fines must be subject to reasonableness and proportionality criteria by the administration.

Thus, we will now briefly explain each of these four suggested assumptions:

(i) Pre-existence of a final administrative act imposing a non-monetary obligation.

Following Article 90 of the CPACA, a mechanism has been established for the forced execution of definitive administrative acts that require the fulfillment of a certain personal obligation on the part of the administrative party, therefore, it is an obligation that cannot be fulfilled directly by the administration (including another public entity) or by third parties, including individuals obliged to follow its instructions, and this because in the definitive administrative act an obligation was imposed that only the administrative party to whom the act is addressed can comply with. Furthermore, this obligation, since it is required not to be monetary, cannot be applicable when it is a simple administrative economic sanction. In other words, the only options are that it is an obligation to do or not to do.

Thus, when it is a matter of acts of personal compliance and the obligor refuses to perform them, the first condition for imposing successive fines will be satisfied if the obligor continues to refuse to comply with the obligation imposed by the administration. In other words, as long as this omissive, passive or active conduct contrary to the order persists, the individual may be sanctioned with subsequent fines that, it is worth saying, in no way affect, compensate, excuse, or transform the compliance with any of the obligations contained in the final act, with the addition, however, that for the application of such fines a reasonable term

must precede him to comply with the order, which in turn is a term independent of the one eventually established in the final act.

(ii) The reluctance of the individual not to comply with the obligation imposed by the administration

The reluctance to comply with the obligation contained in the administrative act may occur either due to negative conduct of the person administered not to do when the obligation is to do, or when it displays positive conduct contrary to the obligation to do established in the administrative act or to the obligation not to do. In other words, the reluctance to comply may be the result of multiple options of conduct, either omissive or active, which depends on the type of obligation established in the final administrative act.

Of course, such reluctance must be at least supported by some evidence to activate the enforcement mechanisms contemplated in Article 90 of the CPACA, to bring to faithful compliance with the provisions of the administrative act. This means, among other things, that when the obligation is to do, the person administered may be required to demonstrate the active conduct with which he complied with the obligation, for example, in urban planning matters, to demonstrate that he demolished a construction that the administration ordered him to demolish. But it also means that when the obligation is not to do, by the burden of proof, it is up to the administration to demonstrate the active conduct that is opposed to the obligation not to do, for example, in matters of consumer law, if what was ordered was that the producer must

refrain from promoting a certain product, the burden of proof is on the administration itself through the verification of an advertising piece in which, after the final act, the producer promotes the product.

This being so, and since the verification of this presupposition on the reluctance to comply on the part of the administered party may certainly suggest an evidentiary debate, this also implies that, in general, the application of article 90 of the CPACA is not exempt from complying with the duties of due process to which the administration is always subject, especially when, as we have already said, it is an expression of the administration's power (privilege) of self-policing, and especially when this is another case in which the administration is deploying its power to sanction. (Rojas, 2020, p. 228 et seq.).

(iii) The administration must grant a reasonable period to the taxpayer to comply with the order.

Knotted to what has just been mentioned about the duty of due process that is required, this is reinforced by the fact that article 90 of Law 1437 of 2011 itself requires the concession to the administered party of a 'reasonable term' so that the administered party leaves its reluctance, that is so that it complies with the order in the final administrative act that is the object of forced execution. This presupposition then implies a narrowing of the administration's discretion, since even if the reluctance is demonstrated, it is necessary to add to it the concession of a term for compliance, which, since this is an enforcement action, is an additional term to the term of the first one. Of course, and due to the principle

of economy, this additional term may overlap with the eventual termination of the requirement made by the administration for the individual to prove compliance when the obligation is done.

(iv) Reasonableness and proportionality of fines.

As an expression that reinforces the due process required by the need to demonstrate the reluctance to comply, knotted to the additional reasonable term to achieve compliance with the obligation established in the final act, and insofar as -it is worth insisting- it is about the deployment of the administration's power of self-tutelage from which derives, in this case, the possibility of imposing fines, then, the application of Article 90 of Law 1437 of 2011 is also governed by the general principles and criteria of reasonableness and proportionality on which any type of administrative order must be based, especially when it is of a repressive or punitive nature. (Sarmiento, 2007, p. 443 and ff.).

In this regard, and as it has been widely recognized by the administrative contentious jurisprudence of the Council of State (Contentious Administrative Chamber, Third Section, Judgment of October 22, 2012, Rad. No. 05001-23-24-000-1996-00680-01(20738). C.P.: Enrique Gil Botero and Fourth Section, Judgment of December 9, 2013, Rad. No. 25000-23-27-000-2006-0046-01(18726). C.P.: Carmen Teresa Ortiz de Rodríguez), the imposition of administrative fines, in general, supposes by antonomasia the repressive affectation and contrary to the will of the administered party, but in any case, it is a legitimate affectation by the administration of an economic or patrimonial right of the individual, thus:

> From a material perspective, it is necessary that the legal consequence expressly qualified by the legal norm as an administrative sanction entails a coercively imposed evil by the Administration to the individual, and implies, therefore, the deprivation, reduction or affectation of a right, interest or legal situation of the offender as a response to the performance of behavior previously classified as an administrative infraction or misdemeanor. The administrative sanction will have then, by definition, a punitive, retributive sense of the transgression committed, for which it will have an inherent "afflictive character" and will always be the "repressive response of the State to the breach of obligations, duties and general mandates on the part of its addressees.

Due to the repressive nature of administrative sanctions in general, their reasonableness and proportionality are also requirements derived from administrative law in general, however, in the case of Article 90 of the CPACA, the legislator wanted the reasonableness and proportionality of those to be an explicit requirement, and therefore, The application of the fines of this article 90 is not subject to the formal and general rules applicable to the general administrative sanctioning procedure, which has a different nature and purpose than the economic sanction for reluctance referred to in article 90 of the CPACA.

In effect, although this or that fine coincides in affecting an economic right of an administered party, one of their differences is that, while the administrative sanction, in general, may have a retributive function (in which the public interest is implicit) the fine of article 90 has a strictly punitive function, hence the rule punishes the reluctance and permanence in the

rebellion of the administered party, which implies a special and even higher scrutiny on the reasonableness and proportionality of the fine.

In this regard, the Spanish legal doctrine (which contains a rule like the Colombian one) offers an approach to the nature and purpose of the fines established in Article 90 of Law 1437 of 2011 by stating that:

> The purpose of the coercive fine is to bend the will of the administrative party reluctant to comply with the administrative act, through the imposition of payment of monetary amounts of the moderate amount that, however, because they are repeated, may involve an economic impairment in the individual sufficiently important to compel him to comply. They lack a retributive purpose, although in essence they are imposed successively because of non-compliance with the original act. Therefore, García de Enterría considers them to be an intermediate figure between enforcement and sanction (...). Sanctions do not have a retributive purpose either, but rather a dissuasive purpose against the commission of future infringements. (Sanchez, 2016, p. 280)

Now, as a final note of this introductory part of the brief, it is important to emphasize that without prejudice to the set of the four assumptions to which the application of Article 90 of Law 1437 of 2011 is subject, it is important to emphasize that such application is not and cannot be subject to the general administrative sanctioning procedure, for both legal and practical reasons.

Indeed, in the framework of administrative proceedings in general, we have already said that these are framed at a beginning and an end, that is, they begin by a request, ex officio, or by compliance with a legal duty of the administration, and end with a final administrative action. In the specific case of the administrative sanctioning procedure regulated by the CPACA itself, this means that the administrative action may be initiated ex officio or at the request of any person, and then it may evolve in the procedural stages of (i) preliminary inquiries, (ii) formulation of charges by an administrative act, (iii) presentation of discharges and request or submission of evidence, (iv) evidentiary period, (v) closing arguments and (vi) finally the final decision eventually sanctioning. (Fernández, 2015, pp. 347-349).

However, although the application of Article 90 of Law 1437 of 2011 may result in the imposition of a fine on the individual, it is important to emphasize that this is an act of execution (a kind of procedural act) aimed at punishing reluctance and forcing compliance with an obligation established in a final act on which in turn it depends. Thus, it would not make sense for the imposition of a fine for the reluctance to comply with an administrative act to be subject to the rules of the general administrative sanctioning procedure, since this would be like opening an administrative action within another administrative action, in which the imposition of the fine for reluctance would have the character of a definitive act, therefore it would no longer be an act of execution.

However, it is important to insist, on the fact that the application of Article 90 of Law 1437 of 2011 is not subject to the general rules of the administrative sanctioning procedure of the same law, this does not imply disregarding the fundamental

guarantee of due process in favor of the individual. On the contrary, the strictly punitive nature of this fine and the absence of a specific procedure regulated by law, suggests a greater observance of the guarantees and high scrutiny of the principles to which the same administration is subject, which in addition to the reasonableness and proportionality of the fine, also includes, according to Article 3 of Law 1437 of 2011, the guarantee of the right of defense, the principle of contradiction (including evidence), impartiality, morality, accountability, transparency, among others.

Now, having a clear legal framework regarding the application of fines in case of reluctance to comply with an order issued by the administration, i.e., the assumptions that must be met, to which administrative acts it applies, against which obligations the fine can be imposed and what is the procedure to be followed, all in light of Article 90 of Law 1437, we will analyze a specific case specific to Colombian administrative law, to determine whether its application was correct concerning a series of administrative acts issued by the Superintendence of Transportation, in the framework of the case against Uber Colombia, focusing especially on Resolution 14920 of December 18, 2019.

## 1. ADMINISTRATIVE ORDERS AND THEIR ENFORCEMENT AGAINST UBER COLOMBIA

### 1.1. Relevant facts for the analysis of the specific case

To identify the scope of Article 90 of the Code of Administrative Procedure and Administrative Disputes for the "administrative orders" issued by the Superintendence of Transportation, it is necessary to briefly review the administrative process that resulted in such order.

a) On November 26, 2014, through Resolution 19712, the Superintendence of Transportation opened an administrative investigation against Uber Colombia, for allegedly facilitating the provision of unauthorized - illegal - transportation services.

b) Said investigation culminated with Resolution No. 18417 of September 14, 2015, in which the company Uber Colombia was sanctioned with the imposition of a fine amounting to COP 451,045,000 equivalent to 700 legal monthly minimum wages in force (SMLMV) at the time.

c) The latter is a definitive administrative act in that, as required by Article 43 of Law 1437 of 2011 it is deciding the merits of the matter initiated with Resolution 19712 of 2014.

d) Resolution 18417 of 2015 as a definitive administrative act creates or defines a specific legal situation for Uber Colombia expressible in two obligations: On the one hand, we said **(i)** orders the payment of a monetary obligation by way of penalty for $451,045,000. COP, and on the other hand, **(ii)** obliges the company to cease the facilitation of the violation of the rules on the provision of the public service of special motorized land transportation.

e) Now, in an act after Resolution 18417 of September 14, 2015, specifically Resolution 40313 of August 19, 2016, the same Superintendency ordered Uber to "*(...)* cease *facilitating and promoting the provision of unauthorized transportation services. Through spokespersons or third parties, or advertising or dissemination media of any kind (whether individual or massive)*".

f) Subsequently, the same entity issued Resolution 72653 of December 13, 2016, in which it imposed on Uber the sanction established in Article 90 of Law 1437 of 2011 for the reluctance to comply with what was ordered in Resolution 40313 of August 19, 2016. The fine imposed was the maximum cap of 500 SMLMV effectively allowed by Article 90 of Law 1437 of 2011. Which to date corresponded to a value of COP 414,058,000.

g) Then, in December 2019, the Superintendency again requested explanations from Uber for allegedly being in default for not complying with the order issued in Resolution 40313 of 2016. In the same month, and without Uber having yet given any explanation to the Superintendency's requirement, the Superintendency again sanctioned with the fine provided for in Article 90 of Law 1437 of 2011, this using Resolution 14920 of December 18, 2019.

h) Finally, in 2021 the same Superintendency resolved appeals filed by Uber against Resolution 14920 of 2019 and revoked such administrative act arguing a violation of Uber Colombia's due process.

**1.2. Analysis of the specific case**

Having clear the context of our case under study, we will proceed to analyze the legal nature of Resolution 40313 of August 19, 2016, by which Uber was ordered to cease facilitating and promoting the provision of unauthorized transportation services, through spokespersons or third parties, or advertising or dissemination media of any kind (whether individual or massive). Likewise, we will analyze whether the sanctions

provided in Article 90 of Law 1437 of 2011 apply to this "administrative order".

In this regard, note first that Resolution No. 40313 of September 19, 2016, is intended to serve as an execution of the obligation imposed by Resolution No. 18417 of September 14, 2015. Therefore, that one is a kind of a procedural act. This is so much so that it was ratified by the Council of State in an order of June 29, 2018, in which, before the claim filed by Uber Colombia against Resolution No. 40313 of 2016 itself, the Court rejected the claim because the contested act was not susceptible to jurisdictional control, precisely because it was an administrative procedural decision. Specifically, the order rejecting the claim stated that.

> The censured acts are limited to ordering the company Uber Colombia S.A.S. to cease the provision of the public individual transportation service, which is why they are not subject to prosecution before this jurisdiction, since in addition to having been issued on the occasion of the administrative decision that imposed the sanction consisting of a fine of seven hundred (700) s.m.m.l.v. [COP 451,045,000], their nature certainly corresponds to the so-called preventive acts of procedure issued in the exercise of the administrative control function.

Thus, Resolution No. 40313 of 2016 is an administrative act of execution, and therefore a kind of procedural act, against which jurisdictional controls did not proceed , since, as recurrently established by the jurisprudence of the Council of State:

> Only the decisions of the Administration resulting from the conclusion of an administrative procedure

> or the acts that make the continuation of such action impossible are susceptible to control of legality by the administrative contentious jurisdiction, which, in other words, means that "the acts of execution of an administrative or jurisdictional decision are excluded from such control since they do not definitively decide an action since they are only issued to materialize or execute those decisions.

Now, as noted, through Resolution 14920 of 2019, the Superintendence of Transportation declared Uber in reluctance for failure to comply with the order given in Resolution 40313 of 2016, this in the terms of Article 90 of Law 1437, and consequently in the same act imposed the highest fine allowed by the same Article 90, i.e., five hundred (500) SMLMV. As anticipated, this Resolution will be the specific object of our analysis to verify the correct or incorrect application of the article in question.

**1.3. Analysis of a case of imposition of fines for non-compliance with an administrative order by the SuperTransporte to Uber Colombia.**

As just stated, for this analysis we focus on Resolution 14920 of 2019 of the Superintendence of Transportation to verify whether it meets the four requirements for the application of Article 90 of Law 1437 of 2011 and that we developed in the first paragraph of this letter, as explained below:

> (i) Pre-existence of an administrative act imposing a non-monetary obligation.

The non-monetary obligation is effectively found in the first article of the operative part of Resolution 40313 of 2016, in which it was indicated that

> To ensure effective compliance with the rules governing the provision of public motorized land transportation services, the company UBER COLOMBIA S.A.S., (...) to cease facilitating and promoting the provision of unauthorized services, through spokespersons or third parties, or advertising or broadcast media or of any kind (whether individual or mass).

Thus, the verb ceases the action is the one that ultimately defines that we are facing a non-monetary obligation, more specifically, it is an obligation not to do, concerning which the doctrine has established that "(...) here the interest of the creditor consists in that a certain situation remains unaltered, and that the debtor is obliged not to execute (...) above all, that the debtor by this means is restricted in his radius of action, his initiative, his freedom" (Hinestrosa, 2007, p. 229)..

However, since Resolution 40313 of 2016, as we have already said, is an administrative act of execution that then depends on a previous definitive act, this is Resolution 18417 of 2015, for this reason, one could not create, define, modify or extinguish legal situations for the administered party, or at least, it could not make any modification, if only reiterate the obligations not to do originally established in Resolution 18417 of 2015.

The forced conclusion of this point is that, although, in the administrative action that is the subject of our analysis if there is an administrative act that imposes a non-monetary obligation to a private individual, this final act is Resolution 18417 of 2015, and not, as mistakenly held by the Superintendency that the obligation was established in Resolution 40313 of 2016.

(ii) Reluctance of the individual not to comply with the obligation imposed by the administration.

We found that concerning the reluctance of the private individual not to comply with the non-monetary obligation it is held that, in December 2019, the Superintendence of Transportation, certainly requested explanations from Uber indicating that:

> As of 2017, the Superintendence of Transportation has received different complaints which would account for an alleged disregard of the order issued through Resolution No. 40313 of August 19, 2016, which is enforceable and in effect
>
> To date, this Directorate does not have the evidentiary support that accredits compliance with the order issued through Resolution 40313 of August 19, 2016.
>
> In attention to the fact that the company UBER COLOMBIA S.A.S, is allegedly in alleged default of complying with the order issued by Resolution No. 40313 of 2016, please submit any explanations within five (5) working days following receipt of this request.

From the foregoing, it follows that the Superintendency established the reluctance of Uber Colombia since it did not prove compliance with the orders of Resolution 40313 of 2016, whereas we have already said- the company was ordered to cease the conduct of facilitating and promoting the provision of unauthorized services, through spokespersons or third parties, or advertising or broadcasting media or of any kind.

However, as already explained, the non-monetary obligation that should have eventually been subject to forced execution comes from Resolution 18417 of 2015, since this is the final administrative act that culminated the administrative sanctioning procedure against Uber Colombia, and not Resolution 40313 of 2016, since this is nothing more than an administrative act executing the 2015 Resolution.

Now, regarding the analysis of the same second assumption, it is also necessary to study the issue of the burden of proof regarding the reluctance to not comply with the obligation on the part of the individual, this taking into account two facts: on the one hand, that in the aforementioned request for explanations of December 2019 it was said that some allegations would account for an alleged disregard of the order to cease the action ordered in Resolution 40313 of 2016, and on the other hand, that in Resolution No. 14920 of 2019, the Superintendency itself supported the application of the fine referred to in Article 90 of Law 1437 of 2011, indicating textually "(...) what is notorious is that the company did not accredit compliance with the order in the ten days granted by this entity for such purpose, and since then the date, more than two years have passed without UBER COLOMBIA having accredited compliance with the order issued (...)".

Bearing in mind these two factual elements, we already said that the non-monetary obligation included both in Resolution 40313 of 2016 and in Resolution 18417 of 2015 is an obligation not to do, and regarding this type of obligation, the specialized doctrine has indicated that these are fulfilled or not fulfilled plainly (Hinestrosa, 2007, p. 232). In more concrete terms it is said that "*(...) as a general rule they are indivisible (...) whose infringement [utilizing an action], however minimal it may*

*be, implies its non-compliance (...)*" (Ospina, 1994, p. 254). In turn, for proof of the breach of this type of obligation, the same doctrine adds that:

> For logical reasons, as well as of a practical nature, it is not the debtor who bears the burden of proof of performance: it is not possible to think of the demonstration of an undefined fact, here negative, (...) and therefore, it is the creditor who must prove the non-performance of the debtor, by showing, with appropriate means, the infringement incurred by the debtor, or more precisely, the traces left by this (...). Think first of judicial inspection, but more broadly of confession and photographs, recordings, documents attesting to the commission of the prohibited act and the delays left by the infraction. (Hinestrosa, 2007, pp. 232-233)

Thus, it follows that when it comes to demonstrating the reluctance to comply with an obligation not to do, such as "...cease the facilitation and promotion of transportation services..." it is not the debtor of the obligation, in our case Uber Colombia, who had to give explanations or demonstrate that it was not doing something, i.e. a negative fact, but, on the contrary, in this or any other case of obligation not to do, it is the administration who has to prove that there is a positive fact that demonstrates the breach of the obligation.

> (iii) The administration must grant a reasonable period to the taxpayer to comply with the order.

Taking into account that in this case, the obligation that corresponded to Uber Colombia was not to do, this implies that in addition to the fact that the reluctance to comply in this

case was demonstrated was not from a proof of the debtor but the demonstration of a positive fact by the administration that then broke the indivisibility that, as we said, is a characteristic of the obligations of this type, then, after demonstrating such positive fact, it was necessary to grant a reasonable term and we also said, in addition to the term established in the final administrative act for it to 'stop doing what it was doing.

In the present case, the administration not only disregarded its burden of proof related to demonstrating non-compliance on the part of the administered party but never gave any kind of additional term for it to stop doing what it was 'supposedly' doing.

(iv) Reasonableness and proportionality of fines.

As we pointed out at the time, both the procedure and the fine for reluctance specifically addressed by Article 90 of Law 1437 of 2011 have two peculiar characteristics that distinguish it from the procedure and eventual sanction of the regular administrative procedure, namely: (i) that this procedure is not subject to the formal and general rules applicable to the administrative procedure in general, because if it were, it would be like opening an administrative action within another; and (ii) that the fine, in particular, has a strictly punitive function, since what it punishes is the simple reluctance and defiance of the defendant to comply with the obligation established in a final act on which then the fine for reluctance necessarily depends. As we also said, these two characteristics do not minimize but on the contrary raise the degree of scrutiny, the guarantees of due process, and a greater requirement to ensure compliance with the other principles to which the public administration is subject (Article 3 of Law 1437 of 2011).

Now, in the specific case analyzed here of the administrative action of the Superintendency concerning Uber Colombia in applying Article 90 of Law 1437, it is far from having satisfied such principles, not only because of the three previous assumptions required by the same rule, the administration did not comply with any of them and could have done so, but also, even without having complied with them, the Superintendency itself chose to impose the maximum fine allowed by the aforementioned Article 90.

In effect, on the one hand, the conduct of the Superintendency, even though it could have complied with the requirements of Article 90, does not fail to generate suspicion. Thus, (i) the Superintendency would have been able to advance the process of forced execution concerning Resolution 18417 of 2015 and not as it mistakenly did concerning Resolution 40313 of 2016. (ii) Assuming hypothetically that it had complied with this first assumption required by Article 90, the Superintendency should have, since it had the burden of proof concerning an obligation not to do, demonstrated with a positive fact of the individual that it was reluctant to comply with the obligation, however, the Superintendency did not do so either, or it could have done so. (iii) Even if it had demonstrated such a positive fact showing the reluctance to comply, the Superintendency should have granted an additional reasonable term to comply with the obligation, and it did not do so either, or it could have done so.

Without prejudice to the already sufficient confusion produced by the fact that even if all the elements were present for the Superintendency to have been able to satisfy the requirements for the application of Article 90, such confusion is further deepened by the fact that it was decided to impose the

maximum fine allowed by Article 90 of Law 1437 of 2011, which is far from withstanding any examination of reasonableness or proportionality.

## CONCLUSIONS

From the case analyzed, it is an atypical situation of application of Article 90 of Law 1437 of 2011, since this article has been used mostly in administrative orders that entail an obligation to do, for example, to vacate a property, demolish a construction not authorized by the administration or obtain a construction license, however, in the case under analysis the obligation outlined in the administrative order was an obligation not to do, therefore, the civil doctrine itself has insisted on the reversal of the burden of proof, so it is then the administration who must prove, through a positive fact, that the person administered did not cease the execution of the conduct.

As could be evidenced, in this case, the administration indeed requested explanations from the company regarding its obligation to cease the facilitation of the violation of the rules on the provision of public service of special motorized land transportation, however, the question remains as to how to prove that certain conduct was not executed, is it not the administration who must prove that the conduct did not cease on the part of Uber and from there initiate an administrative sanctioning process providing the guarantees of due process?

From this question, we were able to establish that, although article 90 does not bring a special procedure for its application, not because of this, on the contrary, with greater reason, the administration must respect the due process of the individuals it intends to fine, now, in the common cases of application of these fines in the face of the reluctance to

comply with an administrative order there is, on the one hand, an administrative order that contains (i) an obligation to do and (ii) a deadline to comply with such obligation. In this case, no special process is required, since once the term has expired, the administration must verify whether the party in question has accredited compliance with the obligation; if not, it may impose the fine, the purpose of which is to complete compliance.

However, in our case under study, the obligation contained in the 'administrative order' consisted in ceasing conduct, i.e., an obligation not to do, and no specific term was granted to cease the conduct of facilitating the provision of unauthorized public transportation service. On the other hand, the administration received a series of evidence indicating that Uber continued to advance its activities regarding intermediation for the provision of public transportation service, as well as the dissemination through the media of such activity, counting on such evidence, the administration requested explanations to Uber indicating that it would prove that the conduct had ceased, that is, it did not impose the fine contemplated in Article 90 immediately the breach of the order was accredited but created an additional procedure, that is, a request for explanations with a term to respond, without transferring it to Uber so that it could know the evidence against it.

Therefore, in our opinion, the issuance of Resolution 14920 of 2019 confuses the purpose of the fines established in Article 90 of Law 1437 of 2011, since these do not constitute a new administrative sanction, but have exclusively a punitive and dissuasive function so that the taxpayer who has been reluctant to comply with the obligation imposed by the final administrative act complies with the orders of the administration. However, the cited administrative act is reiterative in pointing out that it

imposes a sanction of an administrative nature, which ratifies the erroneous interpretation of article 90 of the CPACA.

In that order of ideas, the administration should have taken the evidence in its possession and in case of finding merit, initiate an administrative sanctioning process in the terms provided in Article 47 of Law 1437 of 2011, guaranteeing the right to due process and defense of the company.

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