

THE MODERNIZATION OF THE SYSTEM OF IMPLEMENTATION OF ARTICLES 81 AND 82 OF THE TREATY OF THE EUROPEAN COMMUNITY FROM THE SPANISH PERSPECTIVE*

ALFONSO-LUIS CALVO CARAVACA
MARÍA PILAR CANEDO ARRILLAGA
NATIVIDAD GOÑI URRIZA**

RESUMEN

Este artículo analiza como las autoridades españolas de la competencia se van a ver implicadas en la aplicación del derecho comunitario de la competencia debido al impacto de la modernización de la legislación comunitaria para la aplicación del régimen del Tratado de Roma para las ententes y los abusos de posición dominante. existen una serie de problemas a resolver

Fecha de recepción: 25 de mayo de 2004

* This paper was presented in the Competition Law Scholars Workshop “Decentralised Enforcement: From the Idea to the Reality” held in Glasgow Graduate School of Law, University of Strathclyde the 22nd april 2004. It is forseen to publish the contributions of this workshop.

** Dr. ALFONSO LUIS-CALVO CARAVACA is Professor at Carlos III University in Madrid, Dra. MARÍA PILAR CANEDO ARRILLAGA is Lecturer at Universidad de Deusto in Bilbao and Dra. NATIVIDAD GOÑI URRIZA is Lecturer at Universidad Pública de Navarra in Pamplona.

como la posibilidad de forum shopping y el respeto al principio ne bis idem.

Palabras clave: Derecho comunitario de la competencia. Forum shopping, derecho internacional privado.

ABSTRACT

In this paper we are going to deal with the impact of the community antitrust modernisation in Spain. the present paper starts describing the spanish competition system and goes on to analyse different aspects of the impact of community modernisation. from an institutional point of view spanish legal system is well positioned to implement the new european model of control of the practices against the competition but an important group of problems are now without solution.

Key words: Community antitrust law. Competition. Forum shopping, international private law.

SUMMARY

I. Introduction

II. Organization of the spanish NCA

A Bodies

B The powers of inspection

III. Description of the procedure

IV. Question of the modernization from the spanish perspective

A. About the national authorities

B About the allocation of the cases and the suspension of proceedings

- C. The individual exemption
 - D. The prejudicial consequences of the Criminal Proceedings.
The prevail of judicial procedure over the administrative one
in the Spanish legal order
 - E. The application of the leniency programs in the Spanish legal
system
- V. Conclusion

I. INTRODUCTION

In this paper we are going to deal with the impact of the Community Antitrust Modernisation in Spain. The present paper starts describing the Spanish competition system and goes on to analyse different aspects of the impact of Community modernisation.

The Spanish Law of competition is inspired by the Community competition Law from its beginnings, even before Spain became a party of the European Communities¹. Now, the Competition Act of July 17th of 1989, of Defence of Competition (from now on Spanish Competition Act) copies the Community Competition Law, and mainly, the articles 81 and 82 of the Treaty².

In this way, the Spanish Law prohibits agreements, decisions by associations of undertakings or concerted practices which restrict competition in all or any part of the domestic market in similar terms to those of the article 81 of the Treaty (Article 1 of the Spanish Competition Act). It also lays down the possibility for the parties who are involved

1 Already the Law 110/63, of 20th July, of Protection against Restrictive Practices of Competition it is based mainly on the articles contained in the Treaty.

2 *Vid. S. HIERRO ANIBARRO, "La evolución de los órganos españoles de defensa de la competencia desde la perspectiva del derecho comunitario", Noticias de la Unión Europea, 2003, pp. 65-76.*

in an agreement to obtain an individual exemption from the previous prohibition when the agreement fulfils many conditions which are exactly the same foreseen in Article 81 section 3 of the Treaty (Article 3 of the Spanish Competition Act).

Moreover, any abuse by one or more undertakings of a dominant position shall be prohibited by Spanish Competition rules (Article 6 of the Spanish Competition Act) in similar terms to those of Article 82 of the Treaty.

In other subjects, Spanish law doesn't copy the European law, but ours integrates it. This is the case of the application of the Spanish equivalent to article 81 section 3 of the Treaty to agreements of the category³. Indeed, the Competition Act refers this matter to the European regulations on agreements of the category exemptions. According to the provisions of Spanish Competition Act from, July 17th from 1989 (Article 5.1 a)), vertical agreements related only to the Spanish market, are authorised provided that they comply with the provisions established in Commission Block Exemptions Regulation (EC) No 2790/1999, of 22nd of December 1999 on application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, or in those Community Regulations that substitute it, and in Commission Block Exemptions Regulation (EC) No 1400/2002, of 31st of July 2002 on application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, or in those Community Regulations that substitute it. Similar solutions are provided for Technology Transfer agreements, Horizontal agreements and agreements in the Insurance sector.

Spanish Competition Authorities even interpret the Competition Act in exactly the same way that the Commission applies Community Law. In consequence, most of Spanish notions of Competition Law are the

3 Real Decreto 378/2003, of March 28th, developing the Law 16/1989, of July 17th, of Defence of the Competition, as regards excuses for categories, singular authorization and registration of defence of the competition, (BOE n. 90, of 15th April).

same as European concepts. Spanish Authorities have copied the notion of abuse of dominant position, and their application to related markets⁴.

II. ORGANIZATION OF THE SPANISH NCA

A. BODIES

Anyway, the application of the Spanish Competition Act, (which aims to ensure for the constitutional economic order in the market economy with a view to defending the public interests) is entrusted to the following administrative bodies: The Spanish Competition Court (*Tribunal de Defensa de la Competencia*), with the functions of legal ruling and, in some cases, proposals, and the Competition Service (*Servicio de Defensa de la Competencia*), in charge of instructing the proceedings.

On the one hand, the Competition Service is attached to the Ministry of Economy and its functions are, among others, to instruct the proceedings for conduct included in the Competition Act, to co-operate on the issue of competition with foreign bodies and international institutions and to carry out the tasks of collaboration between the Spanish Administration and the European Commission to apply Articles 81 and 82 of the Treaty in Spain (Article 31, letters a, f and g of the Spanish Competition Act)⁵.

The Spanish Competition Court, on the other hand, is the main Body of the system of Spanish defence of competition. Although it is attached

4 *Vid.* Res. TDC 11 november 1997, *Relojes Rolex*.

5 It has also other functions as the to vouch for the execution and compliance with the resolutions adopted in applying the Spanish Competition Act, to keep the Competition Defence Register, to study and carry out research on the economic sectors, analysing the situation and degree of competition present in each one of them, as well as the possible existence of practices that restrict competition. As a result of the studies and research that is carried out, it may propose the adoption of measures to remove the obstacles on which the restriction is based. Finally, it may inform, provide advisory services and proposals on the matter of restrictive agreements and practices, the concentration and association of undertakings, the degree of competition in the internal and external market in comparison with the domestic market and on the other issues pertaining to competition defence (Article 31 letters b, c, d, of Spanish Competition Act).

to the Ministry of Economy, it is configured as an autonomous Body, with a differentiated public legal personality and autonomous management so it enjoys full independence in the exercise of its functions⁶. Spanish Competition Court functions are to settle and issue reports on competition issues, to apply in Spain Articles 81 and 82 of the Treaty and its developing Laws and to require the Competition Service to instruct proceedings (Article 25, letters a, c and f of the Spanish Competition Act)⁷.

Passing now to other matters, lets go now through the Powers of the Spanish Bodies:

Firstly, the procedure shall be initiated by the Service *ex officio* or at the request of the interested party. The same as the European Commission, the Competition Service may agree not to initiate proceedings derived from presumably committing the acts prohibited by the Law, when it considers that the behaviour do not have a significant effect on the competition conditions due to their relative unimportance⁸. Equally, the Spanish Competition Court, once the proceedings have been submitted, will decide on their admission by considering if the relevant background has been supplied by the Competition Service. This is call in Spanish Law *principio de oportunidad de investigación* (Articles 36, section 1, letter a and Article 39 of the Spanish Competition Act).

6 Article 63 of the Law 24/2001, of december 27th, of Tax, Administrative and Labour measures has modified the legal nature of the Competition Court and now it becomes an autonomous organism. The Competition Court has now its own statute, *vid.* RD 864/2003, of july 4, for which the Statute of the Competition Court is approved, (BOE n. 161, 10th july).

7 Other important functions of the Competition Court are the following: to authorize the agreements prohibited by Article 1 of the Spanish Competition Act in the cases and according to the requirements foreseen in Article 3 of the Spanish Competition Act, to inform on the economic concentration transactions with community dimensions, to rule the projects to open large commercial outlets, to carry out arbitration functions and to draw up reports on compensation for damages (Article 25 letters b, d, and, g, h of the Spanish Competition Act).

8 Case T-24/90, 18 september 1992, *Automec v. Commission*, ECR.1992/II, p. 2223.

B. THE POWERS OF INSPECTION

a) Secondly, the investigation powers of the Spanish administrative bodies are equally similar to those of the European Commission: This way, in the course of their inspections, the officials may examine, obtain copies or take extracts from books and documents, including accountancy documents, on any material support, and if necessary, retain them for a maximum of ten days. On the contrary, the European Commission may not retain documents but may seal them, for the period and to the extent necessary for the inspection (Article 20.2 of the Regulation 1/2003). In the course of the inspections, under the Spanish Law the officials may also ask for explanations *in situ* (Article 33.2 of the Spanish Competition Act⁹) but the Competition Act does not specify who could be asked and the subject of the questions. In contrast to the Spanish Law, the Regulation 1/2003, states that any representative or member of staff of the undertaking or association of undertakings may be asked during the inspection for explanations on facts or documents linked with to the subject-matter and purpose of the inspections (Article 20.2 Regulation 1/2003). Besides, the Competition Act does not state if the answers can be recorded either. All these powers of inspection under the Competition Act have been modified by the Law December the 30th 2003, with the purpose of adapting the Spanish legislation to the Regulation 1/2003. In the Regulation 1/2003 and under Spanish Law access to premises may be made with the consent of the occupants or by means of a court order (Article 34 of the Spanish Competition Act).

Moreover, a proposal of *Real Decreto* sets up devices for cooperation between the Competition Service and the competition authorities of other Member States for the application of the articles 81 and 82 of the Treaty. It will enter into force the first of May of this year. It says that Competition Service may in its own territory carry out inspection under Competition Act on behalf and for the account of the

9 This Article has been modified by the Law 62/2003, of 30th December in order to adapt Spanish Law to the new model.

competition authority of another Member State in order to establish whether there has been an infringement or not of articles 81 and 82 of the Treaty¹⁰.

After talking about the powers of inspection it is time to deal with the fines which can be imposed by the Court.

b) Fines.

The Spanish Competition Court, like the European Commission may impose fines of up to 6.010,12 euros to those undertakings who intentionally or through negligence, fail to provide data or information or do so in an incomplete or inaccurate way. The Director of the Competition Service, on the other hand, may sanction them with coercive fines of between 60,10 and 3.005,06 euros for every day's delay in observing the duty to provide the data and information in the term referred to in the Spanish Competition Act (Articles 29.2 and 32.2 Spanish Competition Act).

The Commission may impose higher fines, up to 1% of the total turnover in the preceding business year when undertakings supply incorrect or misleading information or up to 5% of the average daily turnover in the preceding business year per day in order to compel them to supply complete and correct information which has been required (Article 23, section 1 of Regulation 1/2003)¹¹.

The Spanish Competition Court may, like the European Commission, impose on the undertakings, that have either deliberately or through negligence breached the prohibition of agreements or abuse of a dominant position which restrict competition, fines of up to 901.518,16 euros, amount which may be increased up to 10 percent of the turnover corresponding to the financial year immediately prior to the Court decision.

However, the Spanish Competition Act may also sanction the offenders, in the case of a legal entity, its legal representatives or the

10 Article 6 of the proposal of a Real Decreto about the application of European Competition Law in Spain, www.mineco.es/dgdc/sdc (last acces may 2004).

11 This Article has been also modified by the Law 62/2003, of 30th december in order to adapt Spanish Law to the new model.

members of the management bodies that have intervened in the agreement or decision with a fine up to 30.050,61 euros.

But the competence of the Spanish Competition Service and the Competition Court for applying the Spanish Competition Act has been restricted by the Constitutional Court.

In 2002 was adopted the Act of February the 21st, which constitutes the framework of a decentralised system of enforcement of the Competition Act. The new regulation implies, due to a Constitutional Court decision, the major administrative reform in the current institutional design of the Spanish competition system.

The Constitutional Court judgement issued on 11th of November 1999, acknowledges that the Autonomous Communities have executive powers in the enforcement of the competition legislation¹². Nonetheless, the exercise of these powers must be reconciled with the need to protect the unity of the national economy and the demand for a single market that can allow the State to develop its constitutional powers in laying down and co-ordinating the general plans for economic activity in the interests of respecting the equality of the basic conditions for the exercise of economic activity.

The Act 1/2002 is the result of that mandate and it came into force on May 23, 2002¹³. The main elements and effects of this Act are the following:

12 STC núm 208/1999 (Sala Segunda), 11th november 1999, *vid.* B. BELANDO GARÍN, “Defensa de la competencia y comercio interior (Comentario a la Sentencia del TC 208/1999, de 11 noviembre 1999”, *Civitas Revista Española de Derecho Administrativo*, n° 106, 2000, p. 271; P. BIGLINO CAMPOS, “Principio de competencia, inconstitucionalidad y nulidad a la luz de la STC 208/1999 (RTC 1999, 208), sobre la Ley 16/1989 de Defensa de la competencia” *Revista Española de Derecho Constitucional*, n° 59/2000 (mayo-agosto 2000), pp. 303-330; S. MARTÍNEZ LAGE, “La sentencia del Tribunal Constitucional de 11 de noviembre de 1999”, *Gaceta Jurídica de la CE*, n° 205/2000, pp. 3-9.

13 It is a very controversial judgement because four judges of the Constitutional Court cast a vote running counter the majority opinion setting out their reasons for withholding assent. *Vid.* STC núm. 208/1999 (Sala Segunda), 11th november 1999.

- The Autonomous Communities have only competences in the enforcement of the Spanish Competition Law concerning anticompetitive practices: agreements and abuse of dominant position. So, Competition legislation, Merger control, Public aids control and the approval of block exemption regulations are still exclusively State competences. Institutional representation before international organizations and the enforcement of articles 81 and 82 of the Treaty are State competences as well.
- The Autonomous Communities will be competent in proceedings when the conduct produces effects only in their territories and there is no a national market effect. This implies that the State remains competent for prosecuting practices that may alter free competition in the supra-autonomous sphere or in the national market as a whole.
- And the Autonomous Communities will set up their own institutions to develop their competences in relation to antitrust practices. At the end, this will mean an important increase in resources devoted to maintain competition in markets.

In consequence, the matter which concerns everybody is that, the Spanish Competition Service and the Competition Court are the only Competition Authorities in the sense of the Regulation 1/2003 on the implementation of articles 81 and 82 of the Treaty. We can conclude that the decentralised system of enforcement of certain articles of the Competition Act should not affect the modernization of the implementation of articles. 81 and 82 of the Treaty. Only these two Spanish administrative bodies, the Court and the Service have the power to apply those articles of the Treaty¹⁴.

Nowadays the Autonomous Communities are creating their bodies for the application of the Competition Act. Right now only Catalonia

14 *Vid.* Art. 1.5, letter d) of the Law 1/2002, of February 21, of Coordination of the Competitions of the State and the Autonomous Communities (BOE n. 22 February 46 2002).

has created the *Dirección General de Defensa de la Competencia de la Generalitat* that will instruct the proceedings and the *Tribunal Catalán Tribunal de Defensa de la Competencia* (from now on TCDC) in charge of settling the proceedings¹⁵.

Although the TCDC has not the power for the application of the arts. 81 and 82 of the Treaty, the TCDC sent a contribution in response to the public consultation on the “Modernization Package” and requested its participation in the cooperation mechanisms, that means, in the European Network of Competition, in order to the uniform application of the community law in the framework of its powers.

The TCDC alleges that if the Court is not in the European Network of Competition it would not be possible to ensure the due, effective and uniform application of articles 81 and 82 of the Treaty. Those are objectives in the Regulation for the implementation of the articles 81 and 82 of the Treaty. And those objectives are a limitation to the *institutional and procedural autonomy principle* of the Member States in the adoption of the necessary measures for the implementation of the Community Law¹⁶. This principle is settled down in art. 35 of the Regulation for the implementation of articles 81 and 82 of the Treaty¹⁷.

15 *Vid.* Real Decreto 222/2002, of August the 27th, creating the bodies for the defence of competition of the Generalitat de Catalunya, DOGC n° 3711, september the 2nd 2002, p. 15471.

16 *Comments of the Tribunal Catalán de Defensa de la Competencia de la Generalitat de Catalunya to the modernization package.* Tribunal Catalán de Defensa de la Competencia http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/comments/ (Last acces 20-05-2004).

17 This article set up that the Member States shall designate the Competition Authority or Authorities responsible for the application of articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before the one of May 2004.

III. DESCRIPTION OF THE PROCEDURE

The procedure foreseen in the Spanish Competition Court begins in the *Competition Service* in charge of instructing the cases which afterwards will be solved by the Court.

- A. The procedure in cases being dealt with by the Competition Protection Service has three phases: initiation, instruction and termination.
 - a) Firstly, proceedings are initiated by the Competition Protection Service upon its own initiative or upon the application of an interested party. The accusations under the Competition Act are public, any person may carry it out be they an interested party or not (Article 36, section 1, paragraph 2nd Spanish Competition Act). This is a difference with the provisions of the Regulation 1/2003. The service may conduct a confidential investigation before taking any public step.
 - b) An investigating officer is appointed for each case, and the parties are notified accordingly.
 - c) The mentioned notice is published in the Official Gazette (BOE) and if it is convenient in a national daily newspaper, or in the daily with the largest circulation in the province where the disputed practice took place. The purpose of this notice is to enable interested parties to supply information to the Service.
 - d) Secondly, the Service takes all appropriate investigative steps in order to clarify the facts and identify those responsible.
 - e) When the Service has established the facts it sends a statement of objections to those who are supposed to be responsible, who must reply within 15 days and may quote evidence in their

defence. They are free to make additional submissions at any time.

- f) Finally, the Service draws up a report which is sent to the Competition Court by the Service itself. The report sets out the facts, describes their effects and proposes an assessment.
- g) The Service may also decide not to proceed further. Such decisions may be appealed before the Court.

B. Proceedings before the Competition Court also has several stages:

- a) Firstly the Competition Court receives the report from the SDC Competition Protection Service, and decides within five days whether or not to admit it.
- b) The second stage consist of the taking of evidence: the parties may cite evidence and request that a hearing take place within 15 days from the date on which the Court admitted the case.
- c) Afterwards, the Court agrees to a hearing if it considers it is necessary. Otherwise it gives the parties 15 days to make their submissions.
- d) After the hearing, or after receiving the submissions, the Court may order verification of certain items of evidence. It may also hear the investigating officer at the Competition Protection Service.
- e) And finally, once these proceedings have been completed the Tribunal must take a decision within 20 days.
- f) The Court's decisions may be appealed before the administrative courts, the *Audiencia Nacional*.

IV. QUESTION OF THE MODERNIZATION FROM THE SPANISH PERSPECTIVE

A. ABOUT THE NATIONAL AUTHORITIES

In Spain, at the moment, the Competition Service and the Competition Court are the only Spanish administrative authorities that may apply the articles 81 and 82 of the Treaty¹⁸. However, Spain could designate another authorities before the 1 May of 2004, by virtue of the art. 35.1 Regulation 1/2003. for example the authorities of the Comunidades Autónomas¹⁹.

Other Administrative Bodies, such as the Telecommunications Commission Market has the function of protecting the defence of competition in the Telecommunication Market. However it cannot apply Spanish Competition Act or European Competition Law. The Telecommunications Commission Market informs the Competition Service of actions, agreements, practices and behaviours contrary to the Spanish Competition Act and might ask it to initiate proceedings²⁰.

18 The Spanish Telecommunications Market Commission may adopt the necessary measures to safeguard a plural offer of services, access to electronic networks to operators, networks interconnection and the running of networks under open networks conditions; as well as the pricing and marketing policies implemented by the agents in the sector. To do so, the Telecommunications Market Commission may lay down binding Instructions for the entities operating in the electronic communications market. These Instructions must be published in Spain's Official State Journal. It may also inform the Spanish Competition Service of actions, agreements, practices and behaviours contrary to the Spanish Competition Act. But it cannot itself apply Spanish Competition Act or European Competition Law (Article 48, section 3, letter e of the Telecommunications General Act, Act 32/2003 of 3 november 2003, BOE num. 264, of 4 november 2003).

19 *Vid.* Art. 1.5, letter d) of the Law 1/2002, of february 21, of Coordination of the Competitions of the State and the Autonomous Communities (BOE n. 22 february 46 2002). The TCDC neither any other autonomous competition authorities could apply the Articles 81 and 82 of the Treaty.

20 Article 28 of the Real Decreto 1994/1996, of September the 6th, which develops the Act 12/1997, of april the 24th, for the Liberalization of the Telecommunications Market (B.O.E. n. 6/1996 de 25.09.96). *Vid.* Res. 1 April 2004, Astel/Telefónica, Expte. 557/03.

B. ABOUT THE ALLOCATION OF THE CASES AND THE SUSPENSION OF PROCEEDINGS

The Spanish national authorities obligated by the principles of allocation of cases, settled down in art. 11.6 of the Regulation 1/2003 are the ones in charge of the preparation and the adoption of the types of decisions foreseen in article 5 of the Regulation. Whenever it intervenes in first instance (art. 35.3 *in fine*). Therefore, only the Competition Service and the Competition Court are affected by Article 11, section 6 of the Regulation 1/2003 and not the administrative courts, as the Audiencia Nacional, because this Court deals with the appeals regarding the decisions of the Competition Court. In consequence, the Competition Service will not be able to file a procedure in application of the Articles 81 and 82 of the Treaty when the Commission has initiate a procedure; and, in the case the procedure was already initiated by the Competition Service or already before the Competition Court; these two authorities may suspend it if the European Commission initiates its own procedure. This question is already settled in the Articles 44.1 and 56 of the Competition Act so the new Regulation does not affect the Spanish practice at all²¹. But now, by virtue of the Article 13, section 1 of the Regulation 1/2003 these Spanish bodies will also be able to suspend the proceedings before them or to reject the complaint on the ground (on the basis of) that one competition authority of a Member State is dealing with the case²².

C. THE INDIVIDUAL EXEMPTION

It is widely known that the new community procedure is based on a system of directly applicable legal exception. That is why, Article 1

21 *Vid.* Res. TDC of November the 3rd 2003, *REPSOL/Estaciones de Servicio*, (AC2004/52), Res. TDC of November the 11th 1997, *Relojes Rolex* (AC1997/2379).

22 Communication of the Commission on the cooperation in the Net of competition Authorities, p. 24.

paragraph 2 of Regulation 1/2003 settle down that “Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required.” On the other hand article 10 settle down that “Where the Community public interest relating to the application of Articles 81 and 82 of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article 81 of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 81(1) of the Treaty are not fulfilled, or because the conditions of Article 81(3) of the Treaty are satisfied. The Commission may likewise make such a finding with reference to Article 82 of the Treaty”²³.

By these two articles we can conclude that the system of notifications and individual exemptions has disappeared of the community procedure with the advantages and inconveniences that this change implies²⁴. We can talk about less formalism and less handling charge for the parties in the administrative procedure before the Commission and on the other hand we must take into account a decrease in the legal certainty that the system implies that can impose a cost in itself for the companies.

Independently of the valuation or appraisal that this system deserves in our opinion, we have to show the situation and specially the problems that this modification implies in the Spanish legal order.

23 See also the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty Official Journal C 101, 27.04.2004, pp. 65-77, the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) Official Journal C 101, 27.04.2004, pp. 78-80.

24 Among others, *vid.* C. FOURGOUX, “Un nouvel Antitrust européen. Espoirs et craintes”, *Revue de Jurisprudence Commerciale*, 2001, pp. 51-65; W. JAEGER, “Die möglichen auswirkungen einer Reform des EG-Wettbewerbsrechts für die nationales Gerichte”, *Wirtschaft und Wettbewerb* 2000, n° 11, pp. 1063-1075; K. HOLMES, “The EC White Paper on Modernisation”, *World Competition*, n° 23, 4, 2000, pp. 51-79; M. MONTI, “The international Dimension of Competition Policy”, *Fordham Annual Conference on International Antitrust Law and Policy*, 31 de octubre de 2002, p. 5; M. MONTI, “European Competition for the 21st Century”, *Fordham International Law Journal*, junio 2001.

As we have just analysed in the first part of this work, our legal system is directly and expressly based on the Community regime both in relation to the legal aspect or statutory scheme and also in relation to the application and interpretation of all concepts which are used in our legal practice and theory. That is the reason why, Article 1 of our Competition Act and Article 81 of the Treaty have equivalent content and why Article 6 of our Competition Act is coincident with Art. 82 of the Treaty.

Directly based in the Community legal order when it was created, our internal law permits the possibility to grant exemptions from the prohibition of the agreements when the practices complete a group of conditions. These conditions are exactly the same as those in paragraph three of Article 81 of the Treaty. Our Act talks both about block exemptions (Article 5) and also singular exemptions called in our system "Individual Authorisations from the Court" (Art. 4). In fact the possibility to grant individual exemptions has been used by the Spanish Competition Court, -Tribunal de Defensa de la competencia- in a very high number of cases²⁵. (and the Court has published several Block exemption regulations).

The modification that has been carried out in the Spanish Act in order to implement the Community rulings before the date of entry into force of the Regulation 1 last first may, has not implied any change regarding this question. That is why, when Spanish rules must be applied, the companies will be able to go before the Spanish Competition Court and request from him the grant of an individual exemption in application of Spanish competition Act.

It doesn't seem reasonable to conclude that this fact constitutes in itself an affectation to the uniform application of the European competition

25 In fact, in the last three years we have more than 80 decisions of individual exemption. It is interesting to analyse the web page of the *Servicio de Defensa de la Competencia* <http://www.mineco.es/dgdc/sdc/memorias.htm> (last access 20-05-2004) where the Annual Reports of the administrative body can be found since 1997 until 2002. In the web page of the *Tribunal de Defensa de la Competencia* (the other administrative body) we can find the annual reports of this institution since 1993 to 2002 <http://www.tdcompetencia.org/frames.asp?menu=2> (last access 20-05-2004).

rules because we have to take into account and even underline that we are only talking about the application of Spanish internal rules. Nevertheless, and given the identity —that goes beyond the mere likeness— between the Spanish legal system and the European one it would be possible to think that some problems could arise.

We could imagine the case of a company that goes before the Spanish authority to request of it an individual exemption and we could imagine that the exemption is granted in application of the Spanish rules. This fact could be considered as a certain guarantee for the aforementioned company that the same authority will not consider as a reasonable possibility that of applying against the agreement the European community legislation that, as we already know, has the same content.

It is clear that the Spanish authority will not be able to grant a decision of individual exemption in application of the European community legislation. As we also know the new Regulation restricts the possibility to grant that kind of decisions to the Commission. Even that institution grants them *ex officio*, so on it's own initiative, and only in that cases that she considers important enough for the Community public interest relating to the application of the articles 81 and 82 of the Treaty taking into account a group of different things.

However the granting of the exemption in the internal market could be considered as a certain guarantee for the company. This way, that company could obtain a non direct guarantee of the principle of legal certainty that, when disappearing the system of previous notification, can be considered in issue.

It is clear that the content of the Spanish legislation finds its reason of being in the old community regulation and not in an internal legislator's express will of being different of the community system. However, if Spanish legislator would have wanted the system to be changed he could have chosen different ways. For example, the Act 62/2003 that has been used to change some other questions and to adapt our Act to the new model²⁶, or the Real Decreto of 28 March

26 Ley 62/2003, of 30 December of tax, administrative and labour measures (de Medidas Fiscales, Administrativas y del Orden Social) (BOE. nº 313, de 31 de diciembre de 2003, pp. 46934, 6992).

2003²⁷ in which the Regulation is developed could have been considered as appropriate tools to make that change²⁸.

Talking about something quite different, we know that we are trying to establish a system which ensures that the competition is not distorted in the common market and with this aim articles 81 and 82 of the Treaty must be applied effectively and uniformly in the Community²⁹. We should have to consider if this situation could cause a problem of non equal treatment for the companies.

In certain way, we must think about that situation in the cases in which these three different conditions are fulfilled. The first condition is that we have a national legal system where the rules have the same content as in the European model. The second one is that the authority in charge of applying national law is the same that the one that has the task of applying the Articles 81 and 82 of the Treaty. The last one is that the internal procedure –inspired by the old community rules– has not been adapted to the new situation of the R 1/03. Then the companies

27 Real Decreto de 28 de marzo de 2003, that has developed the Act 16/89 (BOE nº 90 15 de abril de 2003).

28 All the spanish legislation including a proposal of change can be found in *Servicio de defensa de la competencia* <http://www.mineco.es/dgdc/sdc/> (last access 20-05-2004) and a version in english of the main legislation in the web page of the *Tribunal cit.*

29 Among others, X. ARZOZ SANTISTEBAN, “Las reformas del sistema comunitario de intervención administrativa en materia de competencia”, *Revista Vasca de Administración Pública*, 2001, pp. 81 to 117; E. BANNERMAN, *The future of EU Competition Policy*, Centre for European Reform, enero 2002, pp. 31-33; J.M BENEYTO, “Hacia un nuevo derecho de la competencia. El Libro Blanco de la Comisión sobre modernización y descentralización en la aplicación de los artículos 85 y 86”, *Gaceta Jurídica de la CE*, n. 202, 1999, pp. 9 to 19; A.L., CALVO CARAVACA; M.P., CANEDO ARRILLAGA, “Libre competencia y descentralización”, *Revista Española de Derecho Comunitario*, Ed. Civitas, nº 1, 2003, pp. 5-45; A. DERINGER, “Stellungnahme zum Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der art. 85 und 86 EG-Vertrag”, *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, pp. 5 to 11; D. EDWARD, “Competition and the law. Where are we going?”, *Wirtschaft un Wettbewerb*, 2001, pp. 1185-1190; C.D. EHLERMAN, “Reform of European Competition Law. Coherent application of EC Competition Law in a system of paralell competences” Freiburg 2000; C.D. EHLERMAN, “The modernization of EC antitrust policy: a legal and cultural revolution”, *Common Market Law Review*, 2000, pp. 537-590; W. FIKENTSCHER, “Das Unrecht einer

could have a legal way to foresee with a reasonable level of legal certainty the assessment that deserves a certain agreement or practice.

On the contrary in the States where some of this mentioned circumstances is not fulfilled, the companies will not have the possibility to foresee the opinion of the competent authority. They would be forced to carry out particular studies by private legal or economic advisers

Wettbewerbsbeschränkung: Kritik an Weissbuch und VO Entwurf zu art. 81, 82 EG-Vertrag”, *Wirtschaft und Wettbewerbs*, 2001, pp. 446-458; A. GEIGER, “Das Weissbuch der EG-Kommission zu Art. 81, 82 EG Eine Reform besser alr ihr Ruf”, *Europäische Zeitschrift für Wirtschaftsrecht*, 2000, pp. 165 to 169; L. IDOT, “Le nouveau système communautaire de mise en oeuvre des articles 81 et 82 CE (Règlement 1/2003 et projets de textes d’application) en *Cahiers de Droit Européen*, 2003, n° 3-4, pp. 302-308; J. LEVER, “The german Monopolies Commission’s Report on the Problems Consequent upon the Reform of the European Cartel Procedures”, *European Competition Law Review*, julio de 2002, pp. 321 to 325; E.J. MESTMÄCKER, “Versuch einer kartellpolitischen Wende in der EU”, *Europäische Zeitschrift für Wirtschaftsrecht*, 1999, pp. 523 to 529; W. MÖSCHEL, “Change of Policy in the European Competition Law?”, *Common Market Law Review*, 2000, pp. 495 to 499; J. NAZERALI, D. Cowan, “Modernising the Enforcement of E.U. Competition Rules, Can the Commission claim to be preaching to the Converted?”, *European Competition Law Review*, 1999, pp. 442 to 445; P. NICOLAIDES, “Reform of EC Competition Policy: A significant but Risky Proyect”, en *Eipascopie*, n° 2, 2002, pp. 16-24; S., REIFEGERSTE, “L’articulation du droit communautaire et du Droit National de la Concurrence. Le règlement n° 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en oeuvre des règles de concurrence prévues aux articles 81 et 82 du Traité CE”, *La semaine juridique, Ed. Générale*, n° 15-16, 9 avril 2003, p. 657; A. RILEY, “EC Antitrust Modernisation: The Commission Does Very Nice- Thank you! Part One: Regulation 1 and the Notification Burden”, *European Competition Law Review*, 2003, n° 11, pp. 605-606; A. RILEY, “EC Antitrust Modernisation: The Commission Does Very Nice- Thank you! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1”, *European Competition Law Review*, vol. 24, n° 12, December, 2003, pp. 657-672; B.J. RODGER, “The Commission White Paper on modernisation of the rules implementing Articles 81 and 82 E.C Treaty”, *European Law Review*, 1999, pp. 653 to 663; A. SCHAUB, “Modernisation of the EC Competition Law: Reform of regulation n. 17”, *Fordham International Law Journal*, Mars, 2000; A. SCHAUB, R. DOHMS, “Das Weissbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag”, *Wirtschaft und Wettbewerbs*, 1999, pp. 1055-1070; W. WILS, “The modernisation of the Enforcement of articles 81 and 82 EC: A legal and economic analisys of the Commission’s proposal for a new Council Regulation repalcing regulation n. 17”, *Fordham International Law Journal*, junio 2001.

that would give them a personal interpretation of the assessment that the practice deserves. This private advisers would base its opinion in precedent decisions of the Commission or the Court, but will not be able in any case to tell the opinion of the authority in charge of the procedure –and probably sanction– of that particular case³⁰. We consider that this non equal treatment of the different situations could let some companies in a non fair situation and could result in a situation of lack of protection.

D. THE PREJUDICIAL CONSEQUENCES OF THE CRIMINAL PROCEEDINGS.
THE PREVAIL OF JUDICIAL PROCEDURE OVER THE ADMINISTRATIVE ONE
IN THE SPANISH LEGAL ORDER

In this chapter we would like to study the relationship among the administrative procedures that can finish in a punitive sanction and the judicial procedures in the Spanish legal system and in special we would like to analyse the influence of this situation in the implementing of European Competition Law. In special we have to bear in mind Spanish interpretation of protection of the principle of interdiction of double jeopardy that in the continental systems is called *non bis in idem*³¹.

The new system settled down by the R 1/03 and all the Commission notices of development, is based, as we have already studied, in a decentralized system of parallel competence in the application of Articles

30 S. O'KEEFFE, "First among equals: the Commission and the national courts enforcers of EC competition law", *European Law Review* 2001, pp. 301-311.

31 M. BÖSE, *Strafen und Sanktionen im Europäischen Gemeinschaftsrecht*. Studien zum Internationales Wirtschaftsrecht und Atomenergierecht. Band 94, Institut für Volkerrecht der Universität Göttingen, Ed. Karl Heymans, Berlin, 1996, p. 175; K. LILICH, *Das Doppelstrafverbot bei Kartelldelikten im deutschen Recht und im Recht der Europäischen Gemeinschaft*, Ed. Dunker & Humblot, Schriften zum Prozeßrecht, Band. 56, Berlin, 1978, pp. 66, H.G. SCHERMERS, "Non Bis in Idem", F. CAPOTORTI, C.D. EHLERMANN, J. FROWEIN, F. JACOBS, R. JOLIET, T. KOOPMANS, R. KOVAR, *Du Droit International au Droit de l'integration. Liber Amicorum Pierre Pescatore*, Eds. Nomos, Baden Baden, 1987, pp. 601-612.

81 and 82 of the Treaty. That change implies an increment in the role that is recognised to the national authorities both administrative and judicial protecting the public interest. The courts and tribunals of the EU member states are called upon to apply Articles 81 and 82 of the Treaty in lawsuits between private parties and also as public enforcers³².

If we analyse the principles of allocation it is more than foreseeable that, in some cases in which we can find a material link between the infringement and our territory, the Spanish administrative authorities will be considered well placed to deal with a case³³. Then the authority will have to investigate certain behaviours that, if considered contrary to the community rules, would be sanctioned by our national authority³⁴.

We know also that Article 3 of the Council Regulation recognise again, and against the proposal of 2000, the cumulative application of national and European law (*double barrera*). By means of article 3, the same behaviour can be considered contrary to the European competition law and also contrary to the national law³⁵. The application of European

32 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC *Official Journal* C 101 27.04.2004, pp. 54-64.

33 Commission Notice on cooperation within the Network of Competition Authorities *Official Journal* C 101 27.04.2004, pp. 43-53.

34 A. PETITBO, L. BERENGUER “La aplicación del derecho de la competencia por los órganos jurisdiccionales y administrativos” pp. 25-70; S., HIERRO ANIBARRO, “La evolución de los órganos españoles de defensa de la competencia desde la perspectiva del derecho comunitario”, *Noticias de la UE*, nº 226, noviembre de 2003, pp. 65-76.

35 A.L. CALVO, M.P. CANEDO, “Comentarios al Libro Blanco de la Comisión sobre modernización de las normas de aplicación de los artículos 81 y 82 del TCE en relación con el principio *non bis in idem*”, A.L. CALVO CARAVACA, P. BLANCO MORALES LIMONES, *Derecho europeo de la competencia*, Ed. Colex, Madrid, 2000, pp. 407-428; N. COLETTE- BASECQZ, “Une conséquence de la nature pénale de la sanction communautaire au niveau des garanties procédurales: l’application du principe *non bis in idem*”, *La justice pénale et l’Europe. Travaux des XV journées d’études juridiques Jean Dabin organisées par le Département de criminologie et de droit pénal*, Ed. Bruylant, Bruselas, 1996, pp. 463-472; G. DANNECKER, “La recente giurisprudenza della Corte federale di giustizia sul significato dei principi ‘*nullum crimen sine lege*’ e ‘*ne bis in idem*’ per il diritto penale e penale-amministrativo dell’economia”, *Rivista Trimestrale di Diritto Penale dell’Economia*, Fasc. 2-3, 1990, p. 437; S. FARINELLI, “Sull’applicazione del principio *ne bis in idem* tra gli

competition law can restrict but not prevent the application of national law, in the Spanish case the Act 16/89³⁶.

Apart from the administrative legislation, in the Spanish legal system we have in our Criminal Code article 284 that typify and impose criminal sanctions to certain behaviours considered contrary to the competition because of their influence in the market and the consumers³⁷.

The same behaviour, agreement, concerted or unilateral practice, can therefore imply a triple infringement. Firstly an infringement to the internal competition law with the possibility of administrative sanction imposed by the Spanish administrative authority Spanish Competition Court. Secondly, an infringement to the European competition law with the possibility of administrative sanction imposed by the Commission or a national authority that would be the same Spanish Competition

stati membri della comunità europea”, *Rivista di Diritto Internazionale*, 1991, pp. 878-909. M. PRALUS, “Etude en droit pénal international et en droit communautaire d’un aspect du principe non bis in idem: non bis”, *Revue du Science Criminelle*, n° 3, juill- sept. 1996. pp. 551-574, o J.H. ROBERT, “Application ou non application de la règle non bis in idem entre les sanctions pénales, civiles et administratives”, *Archives de Politique Criminelle*, 1984, pp. 136-144. H.G. SCHERMERS, “Non Bis in Idem”, F. CAPOTORTI, C.D. EHLERMANN, J. FROWEIN, F. JACOBS, R. JOLIET, T. KOOPMANS, R. KOVAR, eds. *Du Droit International au Droit de l’integration. Liber Amicorum Pierre Pescatore*, Nomos, Baden Baden, 1987, pp. 601-612.

36 J. BASEDOW, “Souveraineté territorialité et globalisation des marchés: Le domaine d’application des lois contre les restrictions de la concurrence”, *Recueil des cours de l’Académie de Droit International de La Haye*, 1997, vol. 264, Ed. Marthinus Nijhoff, La Haya, 1998, pp. 9-178; J. S., VENIT, “Brave new world: The modernization and decentralization of enforcement under articles 81 and 82 of the EC Treaty”, *Common Market Law Review*, n° 40, 2003, p. 545; J.P. VIENNOIS, “La portée du droit communautaire de la concurrence et le mythe du champ d’application exclusif du droit national”, *Revue Trimestrielle de Droit Communautaire*, 2002, pp. 1 to 16; J. P. VIENNOIS, “Rapports entre droit Communautaire de la concurrence et droit national: Les apports du règlement CE n° 1/2003 du 16 Décembre 2002”, *La semaine juridique, Entreprise et affaires*, 2003, n° 5 p. 1.

37 The text of the article is “Se impondrá la pena de prisión de seis meses a dos años o multa de 12 a 24 meses, a los que, difundiendo noticias falsas, empleando violencia, amenaza o engaño, o utilizando información privilegiada, intentaren alterar los precios que habrían de resultar de la libre concurrencia de productos, mercancías, títulos valores, servicios o cualesquiera otras cosas muebles o inmuebles que sean objeto de contratación, sin perjuicio de la pena que pudiera corresponderles por otros delitos cometidos”.

Court. Finally a criminal infringement with the possibility of a criminal sanction imposed, of course, by the competent court or tribunal.

We are not going to study here the problems that could imply in our system the cumulative application of two administrative sanctions imposed to the same practice³⁸. The not very clear writing of article 3 of the Council Regulation implies serious interpretation problems that are common to all the member States.

We are going to restrict our comments to a reflection on the possible implications that can have in our system the beginning of a criminal prosecution³⁹.

In our legal system and after the entry into force of the Constitution of 1978, the interpretation that has been imposed of the principle of double jeopardy (*non bis in idem*) implies a really high level of guarantee for the parties⁴⁰. Either because of historical or political reasons or because of the youth of our system of constitutional guarantees, it can be considered that the Spanish legal order is one of the European systems where the fundamental rights of the individuals are respected with more zeal. This statement is clear both from the point of view of the law and also from the point of view of its application and

38 We could be thinking about different situations. The first one implies the implication of two different authorities in application of different legislation (Spanish competition court *TDC* in application of internal law and the Commission in application of European law). The second one implies the implication of the same authority in application of those mentioned rules (Spanish competition court *TDC* applying national and European law).

39 T.H. WEIGEND, "The legal and practical problems posed by the difference between criminal law and administrative law", *Revue Internationale de Droit Penal*, 1988, n° 1 and 2, p. 84.

40 J. GARBERI LLOBREGAT, *El Procedimiento administrativo sancionador. Comentarios, Jurisprudencia, Formularios y Legislación*, Ed. Ed. Tirant Lo Blanch, Valencia, 1994, pp. 177; E. GARCÍA DE ENTERRÍA, "La incidencia de la Constitución sobre la potestad sancionadora de la Administración", *Revista Española de Administración Pública*, n° 29, 1981, p. 362; S. LORENZO, *Sanciones Administrativas*, Ed. Julio César Faira, Uruguay, 1996; A., NIETO, "El principio non bis in idem", *Revista Vasca de Administración Pública*, 1990, n° 28, pp. 157-170; J. M. TRAYTER JIMENEZ, V. AGUADO I CUDOLA, *Derecho Administrativo Sancionador: Materiales*, Ed. Cedes, Derecho Administrativo, Barcelona, 1995, pp. 71-88; J.J. QUERALT, *El Principio*

interpretation⁴¹. This remark can be applied to the rights of defence and principles that inspire all the procedure that could finish in an administrative sanction, and must be even underlined dealing with the respect of the mentioned principle of double jeopardy (*non bis in idem*)⁴². We can conclude that our legal system implies a higher level of guarantee than the one of the Council of Europe Rome Convention for the Protection of Human rights and Fundamental Freedoms of 1950⁴³.

Art. 6 of that mentioned Convention restricts the protection of the principle to the criminal proceedings⁴⁴. However, after the famous judgement of the European Court of Human Rights in case ÖZTÜRK⁴⁵, we have an independent concept of “criminal matters” that lets us apply that principles, under certain conditions, to the punitive administrative

non bis in idem, Ed. Tecnos, Colección Jurisprudencia Práctica, Madrid, 1992, p. 9; S. REY GUANTER, *Potestad sancionadora de la Administración y jurisdicción penal en el orden social*, 1990, p. 111.

- 41 The historical and political reasons are analysed by F.J. LEÓN VILLALBA, *Acumulación de sanciones penales y administrativas. Sentido y alcance del principio ne bis in idem*, Ed. Bosch, Barcelona, 1998, pp. 31-77.
- 42 F. SANZ GANDASEGUI, *La potestad sancionadora de la Administración: la Constitución española y el Tribunal Constitucional*, Ed. *Revista de Derecho Privado*, Madrid, 1985, p. 129.
- 43 T. MERON, *Human Rights and Humanitarian Norms as Customary law*, Ed. Claredon Paperbacks, Oxford, 1991, p. 97; H.G. SCHERMERS, “Non Bis in Idem”, *Du Droit International au Droit de l'integration. Liber Amicorum Pierre Pescatore*, F. CAPOTORTI, C.D. EHLERMANN, J. FROWEIN, F. JACOBS, R. JOLIET, T. KOOPMANS, R. KOVAR, Ed. Nomos, Baden Baden, 1987, p. 607; COUNCIL OF EUROPE. *The administration and you. Principles of administrative law concerning the relations between administrative authorities and private persons. A handbook*, Ed. Council of Europe Publishing, 1996, p. 30.
- 44 R. GARCIA ALBERO, *'Non bis in idem' Material y Concurso de Leyes Penales*, Ed. Cedes, Derecho penal, Barcelona, 1995, p. 88.
- 45 Judgement of February 21 1984. Publications of the European Court of Human Rights, Series A, vol. 73. The matter deals with a Turkish citizen in Germany, that appealed before the tribunals a monetary sanction that had been imposed applying the *Gesetz über Ordnungswidrigkeiten* 1968, because of a traffic infringement. Mr. Öztürk alleged violation of the guarantees of the article 6.3 CEDH and, when being rejected its pretense before the internal tribunals it appealed before the European Commission of Human rights.

sanctions⁴⁶. The sanctions that can be imposed in competition law can be considered without any doubt within that group⁴⁷. Anyway, and considering that the mentioned application is possible, the prohibition of double jeopardy is considered respected when the second sanction imposed takes into consideration the first one in order to respect the

-
- 46 M. DELMAS MARTY, C. TEITGEN COLLY, *Punir sans Juger? De la Répression Administrative au Droit Administratif Pénal*, Ed. Economica, París, 1992, p. 100; M. G. RUBIO DE CASAS, “Potestad sancionatoria de la administración y garantía del administrado. Comentario a la Sentencia del Tribunal Europeo de Derechos Humanos de 21 de febrero de 1984: el caso Öztürk”, *Revista de administración pública*, nº 104 1984, pp. 375 and 390; L.E. PETTITI, “Les principes généraux de droit pénal dans la Convention européenne des droits de l’homme”, *Revue de Science Criminelle et de Droit Pénal Comparé*, vol. 1, enero-marzo, 1987, p. 174; J. PRALUS-DUPUY, “L’article 6 de la Convention européenne de sauvegarde des droits de l’homme et les contentieux de la répression disciplinaire”, *Revue du Science Criminelle*, nº 4, 1995, pp. 723-749.
- 47 J. BIANCARELLI, “Les Principes généraux du Droit communautaire applicables en matière pénale”, *Revue de Science Criminelle et de Droit Pénal Comparé*, 1987, pp. 131-166; M. DELMAS MARTY, C. TEITGEN COLLY, “France. Vers un droit administratif pénal?”, *Etude sur les systèmes de sanction administratives et pénales dans les Etats membres des communautés européennes*, Ed. Commission des Communautés Européennes, Bruselas, 1994, p. 210; C. HARDING, *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency*, Ed. Leicester University Press, Londres, 1993, p. 123; H. JOHANNES, “Le droit pénal et son harmonisation dans les Communautés européennes”, *Revue Trimestrielle de Droit Européen*, 1971, p. 347; K. LENAERTS, I. MASELIS, “Procedural rights and issues in the enforcement of the articles 81 and 82 of the EC Treaty”, en *Fordham International Law Journal*, junio 2001; A. NIETO MARTÍN, “Aspectos de la protección penal y sancionadora de la libre competencia”, *Estudios de Derecho Penal Económico*, Ediciones de la Universidad de Castilla-La Mancha, Madrid, 1994, pp. 111-137; A. NIETO MARTIN, *Fraudes Comunitarios Fraudes Comunitarios. Derecho Penal Económico Europeo*, Ed. Praxis, Barcelona, 1996, p. 167; A. NIETO MARTÍN, “Ordenamiento comunitario y derecho penal económico español. Relaciones en el presente y en el futuro”, *Administración Pública*, nº 34, septiembre 1995, p. 607; K. TIEDEMANN, “Europäisches Gemeinschaftsrecht und Strafrecht”, *Neue Juristische Wochenschrift*, 1993, p. 29; J.A.E. VERVAELE, “Procédures communautaires: enquête et mise en œuvre des sanctions”, M. DELMAS MARTY, *Quelle politique pénale par l’Europe*, Ed. Economica, 1993, p. 256; R. WINKLER, *Die Rechtsnatur del Geldbuße im der Europäischen Wirtschaftsgemeinschaft. Ein Beitrag zum Wirtschaftsstrafrecht der Europäischen gemeinschaften*, Ed. J.C.B. Mohr, Tubinga, 1971, p. 100.

principle of proportionality⁴⁸. That is the same interpretation that the Court of Justice of the European Union has applied in all the cases since its historical judgement WALT WILHELM⁴⁹.

That interpretation is not accepted in the Spanish legal order⁵⁰. In our system the principle of prohibition of double jeopardy receives an interpretation really wider than the one that we have just referred, and that, with two different meanings⁵¹.

Firstly, in our system the interest protected by the norm that contains the infringement and sanction has absolutely no importance. That is why in Spain is not possible to sanction the same behaviour twice applying two different rules even if the legal interests protected by them are not the same. We must highlight that we consider that the principle

48 J.H. ROBERT, "Application ou non application de la règle *non bis in idem* entre les sanctions pénales, civiles et administratives", *Archives de Politique Criminelle*, 1984, p. 144; D. SPINELLIS, "The legal and practical problems posed by the difference between criminal law and administrative law", *Revue Internationale de Droit Penal*, 1988, p. 223

49 Case T-14/68, 13 february 1969, Walt Wilhelm v Commission of the European Communities, ECR. 1969-I, p. 15, Advocate General ROEMER. This judgement begins a jurisprudence that has not changed until the more recent C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P 15 October 2002, *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH, Hoechst AG, Imperial Chemical Industries plc (ICI)/ Comisión*, Rec. 2002, para. 54-69. R.H. LAUWAARS, "Annotation", *Common Market Law Review*, 1969, pp. 489-490; M. ZULEEG, "Der Rang des europäischen im Verhältnis zum nationalen Wettbewerbsrecht", *Europarecht*, 1990, pp. 123-134; U.B. HENRIKSEN, *Anti-competitive State Measures in the European Community. An Analysis of the Decisions of the European Court of Justice*, Ed handelshojskolens, Dinamarca, 1994, p. 21; C. HOOTZ, "Anmerkung", *Europarecht*, 1969, pp. 151-153, J. BOULOUIS, R.M. CHEVALIER, *Grands arrêts de la Cour de Justice des Communautés européennes*, tomos I y II, Ed. Dalloz Sirey, 1983, p. 249.

50 *Vid.* A.L., CALVO CARAVACA; M.P., CANEDO ARRILLAGA, "El principio non bis in idem en Derecho Comunitario de Defensa de la competencia" in A.L., CALVO CARAVACA; P., BLANCO MORALES, *Derecho Comunitario de Defensa de la Competencia*, Ed. Colex, Madrid, 2000, pp. 407-429; L. CASES PALLARES, *Derecho Administrativo de la Defensa de la Competencia*, Ed. Marcial Pons, Madrid, 1995, p. 62.

51 A. NIETO GARCÍA, *Derecho administrativo sancionador*, Ed. Tecnos, 2ª edición, Madrid, 1994, p. 398; J. SUAY RINCÓN, *Sanciones administrativas*, Ed. Publicaciones del Real Colegio de España, Bolonia, 1989.

of double jeopardy can be imposed in different criminal proceedings, in different administrative procedures and even when the problem is created with a criminal procedure with an administrative one. A criminal sanction has not as a consequence that of reduction of the administrative one, it simply prevents it⁵².

To avoid unfair solutions, our model contains a system of preference of the criminal proceedings. It takes into account that the interests protected by the criminal rules are more outstanding or important, and that is the reason why if we have a criminal infringement, the criminal procedure must take place and then this procedure prevails⁵³.

We have even some examples, really exceptional indeed, of judgements in which bad functioning of the administration of justice has as a consequence that the administrative procedure takes place firstly and concluding in a sanction. That extreme situation prevents the possibility to carry out the criminal proceeding⁵⁴.

52 But in the situations in which the rules have different scope and objective. See the decision of the Spanish Competition Court (Expte 557/03 *cit.*)

53 J.J GONZÁLEZ RIVAS, *Las Sanciones Administrativas en la Doctrina Jurisprudencial del Tribunal Constitucional, del Tribunal Supremo, de la Audiencia Nacional y de los Tribunales Superiores de Justicia*, Ed. Actualidad, 1994, p. 44; J. GONZÁLEZ PÉREZ, *Comentarios a la Ley de Procedimiento Administrativo*, Ed. Civitas, Madrid, 1991, p. 1267; A. LUCIANO PAREJO, A. JIMÉNEZ BLANCO, L. ORTEGA ÁLVAREZ, *Manual de Derecho Administrativo*, Ed. Ariel Derecho, Barcelona, 1990, p. 251, E. RIVERA TEMPRANO, "Principios de la potestad sancionadora en la ley 30/92", *Cuadernos de Derecho Judicial. Estudio de la L.R.J. de las administraciones públicas y del procedimiento administrativo común*, tomo II, Ed. Consejo General del Poder Judicial, Madrid, abril de 1994, pp. 173-175; J.M. TRAYTER, "El principio non bis in idem en la jurisprudencia", *Poder Judicial*, nº 22, 1991; A. PRIETO SANCHIS, "La jurisprudencia constitucional y el problema de las sanciones administrativas en el Estado de Derecho", *Revista Española de Derecho Constitucional*, nº 4, 1982, pp. 115; A. DOMÍNGUEZ VILA, *Constitución y Derecho Sancionador Administrativo*, Ed. Gobierno de Canarias, Marcial Pons, Madrid, 1997.

54 C. FERNÁNDEZ CANALES, "Potestad sancionadora de la Administración Pública y Principio non bis in idem. Comentario a la STS (Sala 3ª Secc. 7ª) de 7 de julio de 1992", *La Ley*, 1992-4, p. 515; A. MUÑOZ QUIROGA, "El Principio non bis in idem. Comentario a la Sentencia del Tribunal Constitucional de 3 de octubre de 1983, recurso de amparo", *Civitas Revista Española de Derecho Administrativo*, enero-marzo 1985, nº 45, pp. 129-142.

Secondly, in the Spanish legal order the principle of interdiction of double jeopardy implies not only a prohibition of double sanction, but even implies a prohibition of double prosecution. The purpose of the principle is not only to reduce the quantity of the sanctions, or to take them into consideration in order to guarantee the principle of proportionality of the final sanction. Its purpose is to avoid or prevent a second procedure for the same facts that have already been analysed⁵⁵.

If we try to put together this interpretation of the principle of interdiction of double jeopardy, the parallel application of European and national competition law and the content of our internal law we can easily think of important problems.

We could think about a hypothetical situation. Suppose that the Spanish Competition Court begins a procedure in order to enforce the Spanish competition rules. Studying the facts, the Spanish NCA reaches the conclusion that the same practices can also imply a criminal infringement and, if it is the case, a criminal sanction. In that situation, without any doubt, the Spanish Competition court (that is, we must remember, an administrative authority) would put an end to its procedure. The Spanish authority would respect the preference of the jurisdiction of the criminal court that should have to carry out the prosecution of the behaviour (art. 55 of the Spanish Competition Act). The respect to the principle of interdiction of double jeopardy would prevent the administrative authority to continue with the procedure even once finished the criminal prosecution. Therefore the criminal sanction prevents the administrative sanction.

We can not think of any reason that would impel the administrative Spanish authority to change this interpretation when she has to enforce European law to a practice. The problem in this situation would be that the solution given by the Spanish administrative authority (the Spanish Competition Court) would be absolutely different from the one that would give other national authorities. Due to the different interpretation of the principle of interdiction of double jeopardy existing in other legal

55 E.C. MANZANO MORENO, "El ilícito penal y el administrativo, el principio non bis in idem y la jurisprudencia", *Boletín de información del Ministerio de Justicia*, 15 de junio 1985, nº 1386, pp. 3-14.

orders –for example but not only the French one⁵⁶– the infringement would deserve a different treatment depending on the national authority competent. The solution would be also different if the Commission would decide to initiate proceedings in order to apply articles 81 and 82 of the Treaty.

Could we consider that the principle of uniform application of European competition law is guaranteed in this situation and taking into consideration that the same practice can be sanctioned because of breach of arts 81 and 82 of the Treaty by some national authorities or the Commission and not by other national authorities (in our case the Spanish one)? Couldn't we have in this situation a problem of forum shopping among the different national authorities when the complainants try to avoid the competence of the authorities of States that are more protecting with the rights of the companies? would it not be possible on the contrary that the companies could begin criminal procedures in some cases when they consider that the sanction would not be of special importance only trying to avoid the imposition of an administrative sanction that could reach a very important quantity? Is it foreseeable that in that situation, –not taking into account the principles of allocation of the Notice of the Commission creating the Network- the Commission or another internal authority would consider that is better placed to carry out the procedure in order to avoid that the competence of a national authority and consequent application of the internal law of that country make impossible the application of the sanction based in the European Law? Would it be acceptable then for the companies to follow a procedure with non respect of the procedural guarantees that would have been respected by its internal authority? All these questions are at the moment without any answer.

56 N. COLETTE-BASECQZ, “Une conséquence de la nature pénale de la sanction communautaire au niveau des garanties procédurales: l’application du principe non bis in idem”, *La justice pénale et l’Europe. Travaux des XV journées d’études juridiques Jean Dabin organisées par le Département de criminologie et de droit pénal*, Ed. Bruylant, Bruselas, 1996, p. 465; F. MODERNE, *Sanctions administratives et justice constitutionnelle. Contribution à l’étude du jus puniendi de l’Etat dans les démocraties contemporaines*, Ed. Economica, Paris, 1993, p. 268; F. MODERNE,

E. THE APPLICATION OF THE LENIENCY PROGRAMS IN THE SPANISH LEGAL SYSTEM

In the Spanish legal order we have by the moment no programs of leniency⁵⁷. We know that some of the European Union States have developed those mentioned programs, so we could have expected the development in our country. However in our legal order that kind of programs could be problematic for different circumstances.

Firstly, in the Spanish legal system and, due to the administrative character of the Spanish competition Court, the procedure is governed

Sanctions administratives et justice constitutionnelle. Contribution à l'étude du jus puniendi de l'Etat dans les démocraties contemporaines, Ed. Economica, Paris, 1993, p. 268; J. MOURGEON, *La répression administrative*, Ed. L.G.D.J., Paris, 1967, p. 277; J. PRALUS-DUPUY, "Cumul et non Cumul de Sanctions en Droit Disciplinaire", *Recueil Dalloz*, 1993, 19^e Cahier, Chonique, pp. 135-140; C. TEITGEN COLLY, "Sanctions administratives et autorités administratives indépendantes", *Les Petites Affiches*, 17 enero 1990, n^o 8, p. 39; A. VARINARD, E. JOLY-SIBUET, "Les problemes juridiques et pratiques posés par la difference entre le droit pénal et le droit administratif pénal", *Revue Internationale de Droit Penal*, 1988, p. 209.

In other scopes of application, *vid.* M. DELMAS-MARTY, "Rapport général. XIVth International Congress on Penal Law", *Revue Internationale de Droit Pénal*, vol. 59, 1988, pp. 27-64; E. DOLCINI, "Les problemes juridiques et pratiques posées par la difference entre le droit criminel et le droit administratif penal", *Revue Internationale de Droit Pénal*, 1988, n^o 1-2, p. 290; EUROPEAN COMMISSION *Etude sur les systèmes de sanction administratives et pénales dans les Etats membres des communautés européennes*, Ed. Commission des Communautés Européennes, Bruselas, 1994; J. FARIA COSTA, J., "Rapport au colloque de Stockholm. Les problemes juridiques et pratiques posés par la différence entre le droit criminel et le droit administratif pénal", *Revue Internationale de Droit Penal*, 1988, n^o 1-2, p. 347; G. GRASSO, "Nuove prospettive in tema di sanzioni amministrative comunitarie", *Rivista Italiana di Diritto Pubblico Comunitario*, n^o 5, 1994, pp. 870-872; O. LAGODNY, "Teileuropäisches ne bis in idem durch Art. 54 des Schengener Durchführungsübereinkommen (SDU)", *Neue Zeitschrift für Strafrecht*, 1997, 15 junio 1997, pp. 265-266; A.M. SANDULLI, *Le sanzioni amministrative pecuniarie*, Ed. Jovene, Napoles, 1983, p. 133.

57 In the web page of the Commission one can find a list of the EU Member states that can operate a Leniency Programme. Of course Spain is not there because of the reasons we have highlighted. *Vid.* Commission of the European Union http://europa.eu.int/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf (last access may 2004).

by the general rules on administrative procedure (art. 50 Spanish Competition Act). The mentioned rules establish as one of the governing principles of all Spanish administrative procedure, the principle of legality of the Administration. In fact this principle is considered a guarantee of the individuals that protects them against the power of discretion of the Administration. That principle would prevent the administration in our system to admit a complaint conditioned to the informer's impunity.

The most similar thing that we have in our system would be the system called of conventional termination of the procedure (art. 36 bis of the Spanish Competition Act)⁵⁸. That mentioned article foresees the possibility to reach an agreement among the individual and the Administration that puts an end to the procedure and imply a reduction of the sanction imposed if a voluntary payment of the sanction agreement takes place before the moment of adoption of the final decision⁵⁹.

It is important to underline that the application of the legality principle is not against the application of what we call *principio de oportunidad* that governs the Spanish administrative procedure exactly the same as the European one (art. 1.3 Spanish Competition Act)⁶⁰. In application of that principle, the administration could decide not to begin proceedings due to reasons of general interest. They retain full discretion in deciding whether or not to investigate a case. This possibility does not seem to be, in our opinion, a good way to solve the problem that we have outlined.

In special because we have to take into account that the system of leniency seeks to begin procedures that conclude in the sanction of the most serious infringements to the rules of competition law. That is why

58 M. PEDRAZ, "Cuestiones que plantea la aplicación en España de los sistemas de clemencia en defensa de la competencia", *Anuario de Competencia*, 2002, pp. 327-362.

59 See also the art. 88 of Act 30/92 that contains the general procedure of the Administration in Spain. Also, the art. 8 of the Real Decreto 1398/1993, foresees the end of the procedure and a reduction of sanctions but not impunity.

60 J.C. FOURGOUX, "L'exercice du pouvoir discretionnaire de la Commission des Communautés européennes en matière de concurrence. Tentative d'extension et coup de frein par la juridiction communautaire", *Revue de Science Criminelle*, 2002, pp. 599-603.

we do not consider as a reasonable possibility in fact that of foreseeing as the best solution the inactivity of the administrative authority.

On the other hand with this system we could not guarantee impunity for the complainant. If we do not have a procedure, we will not be able to guarantee that the administration will not modify its view of the situation by means of the respect to the interdiction of double jeopardy. This option would only be possible if, as in the European system, the complainant was acquitted and, as we have seen, that is not possible in our system.

As another problem related to this situation, we have to take into account that, as we said before, in our legal system we have criminal rules dealing with anticompetitive measures and that situation would also be considered problematic with a hypothetical program of leniency.

With this situation the complainant before an administrative authority, must take into consideration that he can be considered as self-charged in those behaviours that could imply a criminal sanction. In our legal system if an administrative authority has knowledge of some practices that could deserve a criminal sanction, that authority would have to let the competent criminal court know about the facts.

In the criminal field the solution to our problem, far from being easier, is somehow more complicated. In this field we have in Spain an internal rule of the Public Prosecution Service (1989) that settles down what we call the principle of *consensus*⁶¹. In accordance with that rule, the individual that recognises facts that can be considered as a crime and admit the penalty can see the sanction reduced. Furthermore, in order to make this solution possible, and if a third person is part in proceedings, that third person must accept the agreement and the accused person must also assume the civil liability directly derived of the crime. Even in that case, the court can not make the sanction disappear.

61 See the judgement of the Tribunal de lo Penal of Madrid of 21 January 2003 in application of the art. 285 of our Criminal Code.

Keeping in mind that the administrative authority is forced to stay the proceedings when a criminal procedure begins, it is difficult to imagine how a program of leniency could be settled down in Spain and this situation takes us again before a problem of forum shopping.

Is it necessary to think about the possible uniform application of the European competition law when in some states one can follow a program of leniency and in other states this situation is not possible? will not this situation decide the complainants to go before the authorities of those states in which this possibility exists instead of going to the best placed to deal with the case if these do not have these advantages? Could an authority that has received the complaint consider that another authority of the Net is better placed to deal with the case and decline jurisdiction to carry out the prosecution? What could be the consequences of that situation in relation with the leniency programs? In what situation would this leave the complainant that is member of the agreements? Would be perhaps the Commission the one who should deal with the case to avoid the leniency applicant's lack of protection?

Finally this question outlines another query. The Notice on the cooperation within the Network of competition authorities settles down that the competition authorities will transmit to the other members of the Network with the consent of the applicant. In such cases, however, information submitted to the network will not be used by the other members of the network as the basis for starting an investigation on their own behalf whether under the competition rules of the treaty or in the case of national authorities under the national competition laws (administrative or criminal in our legal order) or other laws (like for example the legislation on tax law)⁶².

In the same Notice we have a group of situations in which the consent of the applicant for the transmission of information to other authorities of the network is not considered necessary. The first one talks about the situations in which the national authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority. The second one deals directly with the national

62 See pr. 39 of the Commission Notice. *cit.*

authority. If the national authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions. a) on the leniency applicant; b) on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme; c) on any employee or former employee of any of the persons covered by a) or b).

In the Spanish legal system this commitment could not be provided due to the principle of legality that, as we have already explained, governs the administrative procedure. For that reason we think that we could already consider to the Spanish NCA as outside of the information that other authorities receive in exercise of the programs of leniency⁶³.

However, we have to outline that the Notice of the Commission doesn't avoid, at least expressly, the possibility to transmit the information to those authorities that, committed not to impose sanctions, could however have the obligation of informing to other authorities, for example of the commission of a crime.

This way the Notice of the Commission would be protecting the applicant against the application of the national competition law neglecting the possibility that he could be subject of more serious sanctions including the criminal ones.

V. CONCLUSION

Even if we must conclude that from an institutional point of view Spanish legal system is well positioned to implement the new european model of control of the practices against the competition, we must underline that an important group of problems are now without solution.

63 In fact the web page of the Commission contains information over the Countries that have provided the commitment and Spain is not in the list. Comisión http://europa.eu.int/comm/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf (last access 20- may 2004).

Perhaps, as with the ancient R. 17, is in practice of the Commission and control of the European Court of Justice where the practitioners will have to look for these solutions. Perhaps risk of forum shopping and protection against double jeopardy are the most important. Once again, principle of efficient application of the rules by the authorities has been considered as more important as legal certainty for the companies.