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The Modernization of the System of Implementation of Articles 81 and 82 of the Treaty of the European Community from the Spanish Perspective

I Introduction

In this paper we shall consider the impact of Community Antitrust Modernisation on Spain. The paper starts by describing the Spanish competition system and goes on to analyse different aspects of the impact of Community modernisation.

Spanish competition law has been inspired since its introduction by Community competition Law, even before Spain became a part of the European Communities.[1] Currently, the Competition Act of July 17th of 1989, on the Defence of Competition ('Spanish Competition Act') copies Community Competition Law, principally Articles 81 and 82 of the Treaty.[2]

Accordingly, 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 (Article1 of the Spanish Competition Act). It also lays down the possibility for the parties who are involved in an agreement to obtain an individual exemption from the prohibition when the agreement fulfils many conditions which are identical to those contained in Article 81(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 Article 82 of the Treaty.

In other areas, Spanish law does not copy European law, but in competition law it is integrated within the domestic law. This is the case in the application of the Spanish

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[1] Act 110/63, of 20th July 1963, of Protection against Restrictive Practices of Competition was 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 a 76.

equivalent to article 81(3) of the Treaty to categories of agreement.[3] Indeed, the Competition Act refers to the European Block Exemption Regulations. According to the provisions of the Spanish Competition Act (Article 5.1(a)), vertical agreements related only to the Spanish market, are authorised provided that they comply with the provisions in Commission Block Exemption Regulation (EC) No 2790/1999[4] and in Commission Block Exemption Regulation (EC) No 1400/2002.[5] Similar solutions are provided for Technology Transfer agreements, Horizontal agreements and agreements in the Insurance sector.[6]

Spanish Competition Authorities even interpret the Competition Act in exactly the same way that the Commission applies Community Law although they are not required to do so. As a result, most of Spanish interpretations of competition law concepts are identical to their European counterparts, for instance in relation to the notion of abuse of dominant position, and its application to related markets.[7]

More recently, Act 62/2003 has modified many articles of the Spanish Competition Act in order to adapt it to the new model.[8] Furthermore, a proposal for a Royal Decree regarding the application of Community competition law in Spain will provide additional powers for the competition authorities.[9] Unfortunately, Spain has been slow in reacting to Regulation 1/2003 and this necessary implementing Decree has not as yet been adopted.

II Organization of the Spanish NCA

A Bodies

The application of the Spanish Competition Act, which seeks to ensure the constitutional economic order in the market economy and defend the public interest, is entrusted to the following administrative bodies: The Spanish Competition Court (*Tribunal de Defensa de la Competencia*), which decides on competition law proceedings brought before it and the Competition Service (*Servicio de Defensa de la Competencia*), which is in charge of bringing proceedings before the Court.

The Competition Service is attached to the Ministry of Economy and its functions are, among others, to instruct proceedings for infringement 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

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[3] Royal Decree 378/2003, of March 28th, developing the Law 16/1989, of July 17th, on Defence of the Competition, as regards Block exemptions, singular authorization and registration of defence of the competition, (B.O.E. n. 90, of 15th April).

[4] 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, Official Journal L 336 29.12.1999, pp. 21-25 (Article 2 (1) Royal Decree 378/2003, cit.).

[5] 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 Official Journal L 203 1.8.2002, pp. 30-41 (Article 2 (1) Royal Decree 378/2003 cit.).

[6] *Vid.* Article 2 (2), (3) and (4) Royal Decree 378/2003.

[7] Vid. Res. TDC 11 November 1997, Relojes Rolex.

[8] Act 62/2003, of 30 December 2003 on tax, administrative and labour measures (de Medidas Fiscales, Administrativas y del Orden Social) (B.O.E. n. 313, of 31st December 2003, pp. 46934, 6992).

[9] Proposal for Royal Decree, of 28th January 2004; http://www.mineco.es/dgdc/sdc/anteproyecto4.htm.

Commission on the application of Articles 81 and 82 of the Treaty in Spain (Article 31, (a), (f) and (g) of the Spanish Competition Act).[10]

The Spanish Competition Court, on the other hand, is the primary institution in the Spanish competition law system. Although it is attached to the Ministry of Economy, it is an autonomous body, with a differentiated public legal personality and autonomous management enjoying full independence in the exercise of its functions.[11] The Court functions include determining competition law disputes instituted by the Competition Service and it may actually require the Competition Service to institute proceedings (Article 25(a), (c) and (f) of the Spanish Competition Act),[12] and to apply Articles 81 and 82 of the Treaty in Spain.

Any case shall be initiated by the Service *ex officio* or at the request of an interested party. Similar to the European Commission, the Competition Service may agree not to initiate proceedings when it considers that the behaviour does not have a significant effect on competition due to its relative unimportance.[13] In Spanish Law this is called *principio de oportunidad de investigación* (Articles 36, section 1(a) of the Spanish Competition Act).

Spanish judges and courts cannot apply the Spanish Competition Act. However, under Article 13(2) of the Spanish Competition Act, the civil courts may award damages to those affected by an anti-competitive practice once the Competition Court has taken a Decision declaring the existence of an illegal practice.

The application of Articles 81 and 82 of the Treaty is entrusted, under Article 25(c) of the Spanish Competition Act, to the Competition Service and to the Competition Court.[14] These are the only competition authorities 'designated' for the purposes of Article 35 of Regulation 1/2003, although it should be noted that, in any event, they have been empowered to apply Community competition law since 1998 and the proposed Royal Decree will merely confirm this as required by Article 35. On the other hand, the judicial application of Community

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[10] It has also other functions such as to ensure 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 economic sectors, 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(b), (c) and (d) of Spanish Competition Act).

[11] Article 63 of the Act 24/2001, of December 27th, of Tax, Administrative and Labour measures has modified the legal nature of the Competition Court such that its is now an autonomous organism. The Competition Court now has its own statute, vid. RD 864/2003, of July 4, under which the Statute of the Competition Court was approved, (B.O.E. n. 161, 10th July).

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

[13] Case T-24/90, 18 September 1992, *Automec v. Commission,* ECR.1992/II, p. 2223.

[14] This article has been modified by Act 62/2003, cit. Nonetheless, the Competition Service and Competition Court have been competent to apply and enforce Community competition law by virtue of Royal Decree 295/1998, of 27 February 1998.

competition law is entrusted to the "mercantile courts". These new "mercantile courts" were created by Act 8/2003, of 8 July.[15]

B Powers of Inspection

The investigation powers of the Spanish administrative bodies are also similar to those of the European Commission. Accordingly, in the course of their inspections, the officials may examine, obtain copies or take extracts from books and documents, including accountancy documents, 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 under Article 20(2) of Regulation 1/2003. In the course of an inspection, under Spanish Law officials may also ask for explanations *in situ,*[16] but the Competition Act does not specify who could be asked and the permitted subject-matter of any questions. In contrast to Spanish Law, 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 under Article 20(2) of Regulation 1/2003. In Regulation 1/2003 and under Spanish Law, Article 34 of the Spanish Competition Act, access to premises may be made with the consent of the occupants or by means of a court order.

Moreover, the proposal for a *Royal Decree*, of 28th January 2004, proposes the institution of 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.[17] It provides that the Competition Service may in its own territory carry out an inspection under the Competition Act on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Articles 81 and 82 of the Treaty.[18]

The Spanish Competition Court, like the European Commission, may impose fines to those undertakings which intentionally or negligently fail to provide data or information or do so in an incomplete or inaccurate way. The Spanish Competition Court may impose fines of up to €6,010.12.[19] The Director of the Competition Service, on the other hand, may impose fines of between €60.10 and €3,005.06 for every day's delay in observing the duty to provide the data and information in as required by the Spanish Competition Act, Articles 29(2) and 32(2).

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

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[15] These "mercantile courts" have the same functions as civil courts had until Act 8/2003 was adopted. Accordingly, they can only declare infringements, annul agreements, declare compliance with Article 81(3) of the Treaty, order the end of a breach, take interim measures and grant damages. The mercantile courts' jurisdiction will commence as of the 1st September 2004 (B.O.E. n. 164, 10 July 2003, p. 26901).

[16] Article 33(2) of the Spanish Competition Act. This Article has been modified by the Law 62/2003, of 30th December in order to adapt Spanish Law to the new model.

[17] Proposal for Royal Decree concerning the application of European Competition Law in Spain, *cit.*

[18] Article 6 of the proposal for a Royal Decree concerning the application of European Competition Law in Spain, *cit*.

[19] Article 29 (2) of the Spanish Competition Act states that the Competition Court may impose fines of up to 1,000,000 pesetas but this quantity has been converted to euros by Resolución of 28 September 2001 (B.O.E. n. 238 of 4 October 2001, p. 36831).

to supply complete and correct information which has been required (Article 23(1) of Regulation 1/2003).

The Spanish Competition Court may, like the European Commission, impose on undertakings which have either deliberately or negligently breached either of the prohibitions fines of up to 10% of the undertaking's turnover for the financial year immediately prior to the Court decision (Article 10(1) of Spanish Competition Act).

The Spanish Competition Act also provides for fines up to €30,050.61 euros on any parties, in the case of a legal entity, its legal representatives or the members of the management bodies which have intervened in an agreement or decision. On the other hand, the Commission, under Regulation 1/2003, cannot impose fines on individuals.

However, the competence of the Spanish Competition Service and the Competition Court to apply the Spanish Competition Act has been restricted by the Constitutional Court.

The Act of February the 21st 2002 ("Act 1/2002")[20] set out the framework for a decentralised system of enforcement of the Competition Act. The new regulation constitutes, as a result of an earlier Constitutional Court decision, major administrative reform in the institutional design of the Spanish competition system.

The Constitutional Court judgement issued on 11th of November 1999,[21] acknowledges that the Autonomous Communities within Spain have executive powers in the enforcement of the competition legislation.[22] 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.

Act 1/2002 was consequently adopted and it came into force on May 23, 2002.[23] The main elements and effects of the Act are as follows:

- The Autonomous Communities only have competence in the enforcement of the Spanish Competition Law concerning anticompetitive practices: agreements and abuse of a dominant position. Accordingly other competition law tools in relation to merger control, Public aids control and the approval of block exemption regulations are still exclusively within the State competence. Institutional representation before international organizations and the enforcement of Articles 81 and 82 of the Treaty also remain within State competence.

- The Autonomous Communities will be competent in proceedings when the conduct produces effects only in their territories and there is no national market effect. This

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[20] Act 1/2002, of February 21st 2002, of Coordination of the Competitions of the State and the Autonomous Communities (B.O.E. n. 46, of 22 February 2002).

[21] STC núm 208/1999 (Sala Segunda), 11th November 1999.

[22] 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, pp. 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.

[23] It is a very controversial judgment because four judges of the Constitutional Court rejected the majority opinion, setting out their reasons for withholding assent. Vid. STC núm 208/1999 (Sala Segunda), 11th November 1999.

means 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.

- The Autonomous Communities will set up their own institutions to develop their competition law competence. This will mean an important increase in resources devoted to maintain competition in markets.

Consequently, the key issue is that the Spanish Competition Service and Competition Court are the only Competition Authorities in the sense of Article 35 of Regulation 1/2003 for the purposes of the implementation of Articles 81 and 82 of the Treaty. Therefore, it is submitted that the decentralised system of enforcement of certain provisions of the Competition Act should not affect the modernization of the implementation of Articles 81 and 82 of the Treaty. Only the two central Spanish administrative bodies, the Court and the Service have the power to apply those articles of the Treaty.[24]

Currently, the Autonomous Communities are developing their institutions for the application of the Competition Act. At the present time only Catalonia has taken action by setting up the *Dirección General de Defensa de la Competencia de la Generalitat* to initiate proceedings and the *Tribunal Catalán Tribunal de Defensa de la Competencia* ('TCDC') to determine competition law disputes brought before it.[25]

Although the TCDC has no power to apply Arts 81 and 82 of the Treaty, the TCDC responded to the public consultation on the "Modernization Package" and requested its participation in the cooperation mechanisms in the European Network of Competition in order to ensure the uniform application of Community competition law.

The TCDC considers that if it is not within the European Competition Network it would not be possible to ensure the due, effective and uniform application of articles 81 and 82 of the Treaty, key objectives in Regulation 1/2003. Those objectives limit the *institutional and procedural autonomy principle* of the Member States in the adoption of the necessary measures for the implementation of the Community Law,[26] as required by Art 35 of the Regulation.[27]

III The Procedure under The Spanish Competition Act.

The procedure in cases being dealt with by the Competition Service has three phases: initiation, instruction and submission of proceedings to the Court.

a) First, proceedings are initiated by the Competition Service upon its own initiative or upon the complaint of an interested party. Complaints under the Competition Act are public, any person may make a complaint whether they are an interested party or not,[28] a key

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[24] Vid. Art. 1.5, letter d) of Act 1/2002, of February 21, cit.

[25] Vid. Royal Decree 222/2002, of August the 27th, creating the bodies for the defence of competition of the Generalitat de Cataluña, DOGC n. 3711, September the 2nd 2002, p. 15471.

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

[27] This article provides 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 1st May 2004. As we have already stated, the Competition Court and the Competition Service are the only Authorities designated to apply Articles 81 and 82 of the Treaty.

[28] Article 36(1), para. 2 of Spanish Competition Act.

difference from the provisions of 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) A notice is published in the Official Gazette (BOE) and if it is convenient in a national daily newspaper, or in the daily newspaper 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 the parties allegedly responsible, who must reply within 15 days providing evidence in their defence. They are also able 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.

Proceedings before the Competition Court also have several stages:

a) First, 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 consists of the taking of evidence: the parties may provide 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) 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 Modernization from the Spanish Perspective

A National Competition Authorities

In Spain, at the moment, the Competition Service and the Competition Court are the only Spanish administrative authorities which may apply Articles 81 and 82 of the Treaty.[29] Spain

[29] The Spanish Telecommunications Market Commission may adopt the necessary measures to safeguard a plural offer of services, access to electronic networks to operators, network 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 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 behaviour

has not designated any other administrative authorities, nor does the proposed Royal Decree seek to designate other authorities for the purposes of Art 35(1) of Regulation 1/2003.[30]

Of course there are other administrative bodies concerned generally with competition law, such as the Telecommunications Market Commission, which has the function of protecting competition in the Telecommunication Market. However, it cannot apply the Spanish Competition Act or European competition Law. The Telecommunications Market Commission informs the Competition Service of actions, agreements, practices and behaviour contrary to the Spanish Competition Act and may ask it to initiate proceedings.[31]

B The Allocation of Cases and the Suspension of Proceedings

The Spanish national authorities which are bound by the case allocation principles, set out in Art 11(6) of Regulation 1/2003 and in Commission Notice on cooperation within the Network of Competition Authorities,[32] and are the authorities in charge of the preparation and the adoption of the types of decisions foreseen in Article 5 of the Regulation, at first instance (Art 35(3) *in fine*). The proposal for a Royal Decree, of 28 January 2004,[33] provides that the Competition Service and the Competition Court are to be the competition authorities responsible for the application of Articles 81 and 82 of the Treaty in Spain. Accordingly, only the Competition Service and Competition Court, and not the administrative courts, such as the Audiencia Nacional, are affected by Article 11(6) of Regulation 1/2003 because the latter deals with appeals from decisions of the Competition Court.

By virtue of Article 11(6) of Regulation 1/2003 and the Commission Notice on cooperation within the Network of Competition Authorities[34] the Competition Service will not be able to initiate a procedure in application of the Articles 81 and 82 when the Commission has already initiated a procedure. However, under Article 13(2) of Regulation 1/2003, where a procedure has already been initiated by the Competition Service or is already before the Competition Court, these two authorities may suspend it if the European Commission initiates its own procedure. Indeed, this question is already settled in Articles 44(1) and 56 of the Competition Act, and therefore Regulation 1/2003 does not affect the Spanish practice at all.[35] However, by virtue of Article 13(1) of Regulation 1/2003 these Spanish

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contrary to the Spanish Competition Act. But it cannot itself apply the 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, B.O.E. n. 264, of 4 November 2003).

[30] Neither the TCDC nor any other autonomous competition authorities can apply Articles 81 and 82 of the Treaty. Vid. Art. 1.5, letter d) of Act 1/2002, of February 21, of Coordination of the Competition of the State and the Autonomous Communities (B.O.E. n. 46, 22 February 2002).

[31] Article 28 of Royal Decree 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 of 25 September 1996). *Vid.* Res. 1 April 2004, Astel/Telefónica, Expte. 557/03.

[32] Official Journal C 101, 27.04.2004, pp. 43-53.

[33] This proposal for a Royal Decree does not alter the existing position that the Spanish Competition Authorities are already empowered to enforce Community competition law by virtue ofRoyal Decree 295/1998, of 27 February 1998, *cit*. *Vid.* Proposal for a Royal Decree concerning the application of European Competition Law in Spain, *cit.*

[34] Para. 2.1 of the Commission Notice, *cit*.

[35] *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),

bodies will also be able to suspend proceedings before them or to reject a complaint on the grounds that a competition authority of another Member State is dealing with the case.[36]

C Individual Exemption

It is widely known that Regulation 1/2003 directly applicable legal exception system in Community law. Article 1(2) of Regulation 1/2003 states 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."

However, Article 10 sets 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."[37]

Accordingly the system of notification and individual exemption has disappeared from the community procedure with all the consequent advantages and inconveniences of this change.[38] On the one hand it means less formalism and less charge for the parties during the administrative procedure before the Commission, but, on the other hand it may result in a decrease in legal certainty within the system and an increase in cost for companies.

Irrespective of appraisal of its merits, we shall consider the problems which modernisation may pose for the Spanish legal order.

As we have noted, the Spanish legal system is directly and expressly based on the Community regime both in relation to the substantive aspects of the statutory scheme and also the application and interpretation of all concepts which are used in Spanish legal practice and theory, as exemplified by the equivalent nature of Article 1 of the Competition Act with Article 81 and Article 6 of the Competition Act with Art 82 of the Treaty.

Directly based on Community law from the outset, Spanish domestic law provides for the grant of exemption from the prohibition on anti-competitive agreements, subject to satisfying certain conditions which are based on those in Article 81(3) of the Treaty. The Spanish Act provides for both block exemptions (Article 5) and also individual exemptions

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[36] Surprisingly, the proposal for a Royal Decree of 28th January 2004, which provides for cooperation with the competition authorities of other member states in the application of Articles 81 and 82, does not clarify this issue. *Vid.* also Commission Notice on cooperation within the Network of Competition Authorities, cit.

[37] 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

[38] Inter. alia, *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", W*irtschaft und Wetwebwerb* 2000, nº 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.

entitled “Individual Authorisations from the Court” (Article 4). In fact individual exemptions have been granted by the Spanish Competition Court, - Tribunal de Defensa de la competencia - in a considerable number of cases[39] (and the Court has published several Block exemption regulations).

This aspect of Spanish domestic law has not been modified following the entry into force of Regulation 1/2003 on May 1st, 2004. Accordingly, when Spanish rules are to be applied, companies will still be able to go before the Spanish Competition Court and request the grant of an individual exemption under the Spanish competition Act.

This factor does not necessarily impede the uniform application of the European competition rules because it only concerns the application of Spanish internal rules.[40]

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

[40] Inter. alia, 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 descentralizacion”, *Revista Española de Derecho Comunitario*, Ed. Civitas, nº 1, 2003, pp. 5 to 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 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 (Réglement 1/2003 et projects de textes d’application) en *Cahiers de Droit Européen,* 2003, nº 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 *Eipascope*, n. 2, 2002, pp. 16-24; S., REIFEGERSTE, “L’articulation du droit communautaire et du Droit National de la Concurrence. Le règlement nº 1/2003 du Conseil du 16 décembre 2002 relatif à la mise en oeuvre des régles de concurrence prévues aux articles 81 et 82 du Traité CE”, *La semaine juridique, Ed. Générale*, nº 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, nº 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,* ol. 24, No. 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*,

Nevertheless, and given the similarities between the sets of Spanish and Community provisions, it is possible that some problems may arise.

D The Prejudicial Consequences of Criminal Proceedings

In this part we shall assess the relationship between administrative procedures which can result in a punitive sanction and judicial procedures in the Spanish legal system, particularly in the context of modernisation of European Competition Law. In particular we would emphasise the potential impact of the particular Spanish interpretation of the principle of double jeopardy that in continental systems is called *ne bis in idem.*[41]

The new system set out by Regulation 1/2003 and consequent Commission notices, is based on a decentralized system of parallel competence in the application of Articles 81 and 82 of the Treaty. That change means an increase in the role of the national authorities, both administrative and judicial. For instance, courts and tribunals of the EU member states are required to apply Articles 81 and 82 of the Treaty in lawsuits between private parties and also as public enforcers.[42]

On closer inspection of the principles of allocation it is more than foreseeable that, in some cases in which there is a material link between the infringement and Spain, the Spanish administrative authorities will be considered well placed to deal with a case.[43] In that case, the authority will have to investigate certain behaviour which, if considered contrary to the community rules, could be sanctioned by our national authority[44]. It is also clear that Article 3 of Regulation 1/2003 recognises the cumulative application of national and European law (*doble barrera)*. Under Article 3, the same behaviour can be considered contrary to European competition law and also national law.[45] The application of European competition

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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 Vorsriften zur Anwendung der Artikel 81 und 82 EG-Vertrag", *Wirtschaft und Wettbewerb*, 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.

[41] M, BÖSE, *Strafen und Sanktionen im Europäischen Gemeinschaftsrect*. Studien zum Internationales Wirtschaftsrecht und Atomenergierecht. Band 94, Institut für Volkerrecht der Universität Göttingen, Ed. Karl Heymans, Berlín, 1996, p. 175; K. LILLICH, *Das Doppelstrafverbot bei Kartelldelikten im deutchen Recht und im Recht der Europäischen Gemeinschaft*, Ed. Dunker & Humblot, Schriften zum Prozeßrecht, Band. 56, Berlín, 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.

[42] 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.

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

[44] 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.

[45] 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

law can restrict but not prevent the application of national law, in the Spanish case the Spanish Competition Act.[46]

In addition to the administrative legislation, Articles 262, 281 and 284 of the Spanish legal system's Criminal Code provides criminal sanctions for certain behaviour considered contrary to competition because of its influence on the market and consumers.[47]

The same behaviour, agreement, concerted or unilateral practice, can therefore constitute a triple infringement: (i) an infringement of domestic competition law with the possibility of administrative sanction imposed by the Spanish administrative authority - the Competition Court; (ii) an infringement of European competition law with the possibility of administrative sanction imposed by the Commission or a national authority - again the Spanish Competition Court; and, finally (iii) a criminal infringement with the possibility of a criminal sanction imposed by a competent court or tribunal.

We are not going to consider here the problems that could result in the Spanish system from the cumulative application of two administrative sanctions imposed in relation the same practice.[48] The uncertain wording of Article 3 of Regulation 1/2003 can cause interpretation problems which are common to all the member States.

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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 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*, nº 3, juill- sept. 1996. pp. 551-574, o J.H. ROBERT, "Application ou non application de la regle *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.

[46] J. BASEDOW, "Souveraineté territorialité et globasisation des marchés: Le domaine d'application des lois contre les restrictions de la concurrence", *Recueil des cours de l'Academie 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,* nº 40, 2003, p. 545; J.P. VIENNOIS, "La portée du droit communautaire de la concurrence et le mythe du camp d'application exclusif du droit national", *Revue Trimmestrielle de Droit Communautaire*, 2002, pp. 1 to 16; J. P. VIENNOIS, "Rapports entre droit Communautaire de la concurrence et droit national: Les apports du réglement CE nº 1/2003 du 16 Décembre 2002", *La semaine juridique, Entreprise et affaires*, 2003, nº 5 p. 1.

[47] 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."

[48] This could arise in different situations. The first one would result in the involvement of two different authorities applying of different legislation (Spanish competition court *TDC* in application of internal law and the Commission in application of European law). The second one involves the same authority applying the sets of rules (Spanish competition court TDC applying national and European law).

We shall restrict our analysis to a reflection on the possible implications in the Spanish system of a criminal prosecution.[49]

In the Spanish legal system, since the entry into force of the Constitution of 1978, the interpretation of the principle of double jeopardy (*ne bis in idem)* provides a very high level of protection for parties.[50] Because of historical or political reasons, or because of the immaturity of the Spanish system of constitutional guarantees, the Spanish legal order appears to be one of the European systems where the fundamental rights of the individuals are respected with more zeal. This is clear with respect to both the law and its application and interpretation.[51] This general point is cogent in relation to the rights of defence and principles underlying any administrative procedure which may result in a sanction, and is highlighted in respect of the principle of double jeopardy (*ne bis in idem).*[52] Accordingly, it is our view that the Spanish 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 1950.[53]

Art 6 of the 1950 Convention restricts the scope of the protective principle to criminal proceedings.[54] However, after the landmark judgment of the European Court of Human Rights in *Öztürk,*[55] there is an independent concept of "criminal matters" which allows the application of the principle, under certain conditions, to punitive administrative sanctions.[56]

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[49] T.H. WEIGEND, "The legal and practical problems posed by the difference between criminal law and administrative law", *Revue International de Droit Penal,* 1988, nº. 1 and 2, pp. 84.

[50] 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,* nº 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, nº 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 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.

[51] The historical and political reasons are analysed by F. J. LEON VILLALBA, *Acumulación de sanciones penales y administrativas*, *Sentido y alcance del principio ne bis in idem,* Ed. Bosch, Barcelona, 1998, pp. 31-77.

[52] 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.

[53] 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.

[54] R. GARCIA ALBERO, *'Non bis in idem' Material y Concurso de Leyes Penales*, Ed. Cedes, Derecho penal, Barcelona, 1995, p. 88.

[55] Judgment 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, who appealed before the tribunals against a monetary sanction imposed under 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 this was rejected by the domestic courts he appealed before the European Commission of Human rights.

[56] M. DELMAS MARTY, C. TEITGEN COLLY, *Punir sans Juger?. De la Répresion Administrative au Droit Administrartif Pénal,* Ed. Economica, París, 1992, p. 100; M. G. RUBIO DE CASAS, "Potestad

The sanctions which can be imposed in competition law can clearly be considered within that category.[57] In any event, the prohibition on double jeopardy is respected where the second sanction imposed takes into consideration any prior sanction in order to respect the principle of proportionality.[58] This is the same interpretation applied by the Court of Justice in all cases since its historical judgment in *Walt Wilhelm.*[59]

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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 Ötztürk", *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 répresion disciplinaire", *Revue du Science Criminelle*, nº 4, 1995, pp. 723-749.

[57] 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 Bussiness 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, "Europäishes 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 por 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, pp. 100.

[58] J. H. ROBERT, "Application ou non application de la regle *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 International de Droit Penal*, 1988, p. 223

[59] Case T-14/68, 13 February 1969, Walt Wilhelm v Commission of the European Communities, ECR. 1969-I, p. 15, Advocate General Roemer. This judgment begins a jurisprudence that has not changed until more recently; see 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 arrets de la Cour de Justice des Communnautes europeennes*, Tomos I y II, Ed. Dalloz Sirey, 1983, pp. 249.

However, that interpretation is not accepted in the Spanish legal order.[60] In the Spanish legal system the principle of prohibition of double jeopardy receives a considerably wider interpretation, incorporating two different aspects.[61]

First, the interest protected by the norm that contains the infringement and sanction has absolutely no importance. Accordingly, in Spain it is not possible to sanction the same behaviour twice by applying two different rules even if the legal interests protected by them are not the same. It must be stressed that the principle of double jeopardy can be applied in relation to different criminal proceedings, different administrative procedures and even as between criminal and administrative proceedings. A criminal sanction does not only reduce the extent of an administrative sanction, it simply prevents its imposition.[62]

To avoid unfair outcomes, the Spanish model gives priority to the criminal proceedings. It takes into account that the interests protected by the criminal rules are more important, and therefore if there is a criminal infringement, the criminal procedure prevails and must take place.[63]

There are some exceptional examples in which the administration of justice malfunctions and the administrative procedure proceeds first and leads to the imposition of a sanction. That extreme situation prevents the criminal proceedings from taking place.[64]

Secondly, in the Spanish legal order the principle of prevention of double jeopardy means not only a prohibition of double sanctions, but requires a prohibition on 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

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[60] *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.

[61] A. NIETO GARCIA, *Derecho Administrativo Sancionador*, Ed. Tecnos, 2º Edición, Madrid, 1994, p. 398; J. SUAY RINCON, *Sanciones administrativas*, Ed. Publicaciones del Real Colegio de España, Bolonia, 1989.

[62] Except where the rules have different scope and purpose (for example if a public official commits an infringement, the general sanction can be imposed together with a particular sanction due to the special nature of the offender. See the decision of the Spanish Competition Court (Expte 557/03 *cit.* and decision of the 3 November 2003, Expte. 536/02)

[63] J.J GONZALEZ 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, pp. 44; J. GONZALEZ PÉREZ, *Comentarios a la Ley de Procedimiento Administrativo,* Ed. Civitas, Madrid, 1991, pp. 1267; A. LUCIANO PAREJO, A. JIMENEZ BLANCO, L. ORTEGA ALVAREZ, *Manual de Derecho Administrativo*, Ed. Ariel Derecho, Barcelona, 1990, pp. 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. DOMINGUEZ VILA, *Constitución y Derecho Sancionador Administrativo*, Ed. Gobierno de Canarias, Marcial Pons, Madrid, 1997.

[64] C. FERNANDEZ 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", *Cívitas Revista Española de Derecho Administrativo*, Enero- Marzo 1985, nº 45, pp. 129-142.

sanction. Its purpose is to avoid or prevent a second procedure in relation to the same facts which have already been analysed.[65]

Tying together this interpretation of the prohibition of double jeopardy, in the context of the parallel application of European and national competition law we can envisage a range of potential problems.

We could envisage the following hypothetical situation. Suppose that the Spanish Competition Court begins a procedure in order to enforce the Spanish competition rules. Thereafter, the Spanish NCA reaches the conclusion that the same practice can also constitute a criminal infringement and, if that is the case, lead to a criminal sanction. In that situation, it is certain that the Spanish Competition court (that is, we must remember, an administrative authority) would close its procedure. The Spanish authority would respect the preference for the criminal court's jurisdiction to carry out the prosecution of the behaviour, under Art 55 of the Spanish Competition Act. Respect for the principle of prevention of double jeopardy would prevent the administrative authority from continuing with its procedure even once the criminal proceedings had been completed. Accordingly, the criminal process and sanction would prevent the application of an administrative sanction.

We can think of no reason which would compel the administrative Spanish authority to change this interpretation and practice in the context of enforcing European competition law. The problem in this situation would be that the approach of the Spanish Competition Court is likely to diverge from that adopted by other national authorities. As a result of differing interpretations of the double jeopardy principle in other legal orders – for example in France[66] – any infringement would be afforded differential treatment depending on the

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[65] 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.

[66] 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 constitutionelle. Contribution à l'etude du jus puniendi de l'Etat dans les démocraties contemporaines*, Ed. Economica, París, 1993, p. 268; F. MODERNE, *Sanctions administratives et justice constitutionelle. Contribution à l'etude du jus puniendi de l'Etat dans les démocraties contemporaines*, Ed. Economica, París, 1993, p. 268; J. MOURGEON, *La répression administrative,* Ed. L.G.D.J., París, 1967, p. 277; J. PRALUS-DUPUY, "Cumul et non Cumul de Sanctions en Droit Disciplinaire", *Recueil Dalloz*, 1993, 19º Cahier, Chonique, pp. 135-140; C. TEITGEN COLLY, "Sanctions administratives et autorités administratives indépendantes", *Les Petites Affiches*, 17 enero 1990, nº 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 International de Droit Penal*, 1988, p. 209. In other scopes of application, *vid*. M. DELMAS-MARTY, "Rapport géneral. XIVth International Congress on Penal Law", *Revue International 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 International de Droit Pénal*, 1988, nº 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 International de Droit Penal,* 1988, nº 1-2, p. 347; G. GRASSO, "Nuove prospettive in tema di sanzioni amministrative comunitarie", *Rivista Italiana di Diritto Pubblico Comunitario*, nº 5, 1994, pp. 870-872; O. LAGODNY, "Teileuropäisches ne bis in idem durch Art. 54 des Schengener Durchfürungsübereinkommen (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.

competent national authority. The solution would be also different if the Commission decided to initiate proceedings in order to apply Articles 81 and 82.

Can the principle of uniform application of European competition law be guaranteed in this situation, 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? In this situation there may be a problem of forum shopping among the different national authorities where complainants seek to avoid the competence of NCAs in States which afford greater protection to the rights of companies? On the other hand it may also be feasible for defending companies to encourage NCAS in certain states to proceed against them under the criminal process where they consider the criminal sanction would not be particularly serious in order to avoid the imposition of a more 'punitive' administrative sanction? Is it foreseeable that in this situation, in disregard of the Network case allocation principles the Commission or another NCA would consider that is better placed to deal with an alleged infringement in order to avoid the non-application of sanctions envisaged by European competition law? It is clear that there are a number of questions concerning the *non bis in idem* principle and wider issues of the protection of the rights of defence in the new Network which have still to be answered.

E The Application of Leniency Programmes in the Spanish Legal System

There is currently no provision for leniency programmes in the Spanish legal system,[67] despite their development in a number of other European Union States. However in Spain the introduction of a leniency programme could be problematic for a number of reasons.

First, due to the administrative character of the Spanish competition Court, competition law procedure is governed by the general rules on administrative procedure, under Art 50 Spanish Competition Act. These rules establish the principle of legality of the Administration as one of the governing principles of all Spanish administrative procedure. In fact this principle is considered a guarantee to individuals of protection against the power of discretion of the Administration. That principle would prevent the administration in our system from admitting an application based on the informers impunity: if the administrative body begins a procedure and considers that there is an infringement, it is obliged to impose the sanction fixed by law. A Spanish administrative body can not decide whether or not to impose such a sanction.

The closest aspect in the Spanish system to a leniency programme is the process of 'conventional termination of the procedure', under Art 36 of the Spanish Competition Act.[68] This provides for the possibility of reaching an agreement between the individual and the Administration which puts an end to the procedure and results in a reduction of the sanction imposed if an agreed voluntary payment of the sanction takes place before adoption of the final decision.[69]

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[67] 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.

[68] M. Pedraz, "Cuestiones que plantea la aplicación en España de los sistemas de clemencia en defensa de la competencia", A*nuario de Competencia,* 2002, pp. 327-362.

[69] See also art. 88 of Act 30/92 which contains the general administrative procedurein Spain. See also art. 8 of Royal Decree 1398/1993.

It should be stressed that the application of the legality principle is not contrary to the application of what is called the *principio de oportunidad* which governs Spanish administrative procedure, per Art 1(3) Spanish Competition Act, as under Community law.[70] In applying that principle, the administration may decide not to begin proceedings for reasons of general interest. Nonetheless, the authorities retain full discretion in deciding whether or not to investigate a case. The existence of this principle does not seem to be, in our opinion, a good way to solve the problem of the absence of a leniency programme.

This is partly because we have to acknowledge that leniency programmes initiate procedures which conclude with sanctions for the most serious infringements of the competition law rules. Accordingly, we do not consider inactivity of the administrative authority as the best solution to the leniency issue. Another problem related to the leniency problem is the co-existence within the Spanish our legal system of criminal rules dealing with anticompetitive activity. In Spain, if an administrative authority has knowledge of activity which may be subject to criminal sanction, that authority is required to inform the competent criminal court about the factual background.

In the criminal field, the solution to the leniency problem is in fact considerably more complicated. In Spain there is a Public Prosecution Service rule (1989) which sets out what is known as the principle of *consensus.*[71] In accordance with that rule, the individual who admits which are considered as constituting criminal activity can have their 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 any civil liability directly derived from the crime. Nonetheless, even in that situation, the court can not avoid imposing a sanction altogether.

Bearing in mind that the administrative authority is forced to stay its proceedings when a criminal procedure begins, it is difficult to envisage how a leniency programme could be established in Spain, and this again raises the issue of forum shopping and problems in the uniform application of European competition law, where there are different approaches to the question of leniency within the European Competition Network.

Finally the leniency issue raises another potential problem. The Notice on cooperation within the Network of Competition Authorities provides that the competition authorities will transmit the information contained in a leniency application 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).[72]

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 concerns 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 deals directly with the national authority. If the requesting 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

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

[71] See the judgment of the Tribunal de lo Penal of Madrid of 21 January 2003 in application of art. 285 of our Criminal Code.

[72] See pr. 39 of the Commission Notice. *cit.*

authority to which the information is subsequently transmitted to impose sanctions on: (a) the leniency applicant; (b) 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; or (c) 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 because of the principle of legality which, as we have already explained, governs the administrative procedure. Accordingly, the Spanish NCA will not be able to access information which other authorities receive under their leniency programmes.[73]

V CONCLUSION

Although from an institutional point of view Spanish legal system appears to be well positioned to implement the new modernised system of European competition law enforcement, we must stress that an important group of problems still need to be resolved.

Perhaps, as under Regulation 17, it will be to developing Commission practice and European Court of Justice jurisprudence where practitioners will have to look for the solutions. In our view, and from a Spanish perspective, it is perhaps the concerns regarding the risk of forum shopping and the protection against double jeopardy which are the most crucial and problematic. Nonetheless, it is clear that the reform demonstrates that the principle of efficient application of the rules by the authorities has been considered to be more important than providing legal certainty for companies.

[73] In fact the web page of the Commission contains information concerning Member Status which have provided the commitment and Spain is not included in the list. http://europa.eu.int/comm/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf (last access 20- may 2004).