

BLOWING HOT AND COLD:
THE LAST WORD OF THE SUPREME COURT ON
SETTING FINES FOR COMPETITION LAW
INFRINGEMENTS IN SPAIN

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Abstract: *On January 29 2015 the Spanish Supreme Court issued an opinion clarifying the limits faced by Spanish competition authorities in imposing economic penalties for infringements of competition law and the criteria that guide the calculation of the amount of fines. This judgment is of paramount importance for the effectiveness of public enforcement actions by administrative authorities in Spain and it will force them to change the methods and steps followed in figuring the amount of fines.*

Though Supreme Court's holdings in the case move away from EU Law, it will surely have a positive impact in deterrence by pushing the amount of fines upwards through the clarification of the relevant turnover that should be used in calculating the limit to the fine ('total turnover' instead of 'turnover in the market affected by the infringement'). Nevertheless, the Supreme Court annuls the Guidelines that Spanish competition authorities have been using in the last four years in quantifying the amount of fines, leaving little room for new Guidelines to be adopted, and making more difficult to predict their amount in the future.

Keywords: *Spain, Competition Law, Fines, Proportionality, Deterrence, Constitutional Law, Business Turnover, Fines, Economic Penalties, Sanctions, Judicial Review, Public Enforcement*

JEL Codes: *K14, K21, K42, L49*

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1. Introduction

The institutional overhaul of public enforcement of competition law in Spain in 2013 through the creation of the new National Markets and Competition Commission (NMCC)¹ came together with the successful judicial annulment of many fines imposed by its predecessor (the National Competition Commission or NCC). Since March 2013 the National Court (*Audiencia Nacional*) has quashed most of the fines imposed by the NCC, arguing that the method followed in their calculation was not squared with Spanish constitutional law principles and limits governing the exercise of punitive powers by administrative authorities. This has had a dramatic impact on the blast-off the new NMCC, which stunningly kept sanctioning the violations of competition law thereafter.

As this article explains, the Supreme Court Judgment of 29 January 2015 clarifies many of the existing doubts concerning the fining powers by the competition authorities and clears up the future for economic penalties imposed against infringements of competition law in Spain.

Before assessing the relevance and impact of the Supreme Court judgment, the legal rules on calculating the amount of fines for violation of competition law in Spain are described (*infra* §2) and also the criteria followed in practice by the competition authorities in Spain in applying those rules (*infra* §3).

Against that background, in the last two years the National Court have been regularly setting aside the fines imposed by the NCC, considering that their amount and the procedures and methods guiding their calculation were against constitutional limits and principles governing punitive powers by administrative authorities (*infra* §4). Finally, in this relevant judgment the Supreme Court elucidates the steps and the criteria that Spanish competition authorities should abide to for determining the amount of the fine, but more unpredictability can be expected in estimating *ex ante* the amount of potential fines (*infra* §5).

¹ See C Gorriz 'The Spanish National Commission on Markets and Competition' (2014) 37 *World Competition* 349–367 and A Valiente 'What is it Like to Have a Single, Multi-sector Regulator—the Spanish Experience' (2014) 5 *Journal of European Competition Law & Practice* 373-378.

2. Fines in Spanish Competition Law

Anti-competitive actions forbidden by the 2007 Spanish Competition Act can be punished with fines.² Depending on their aggressiveness, the infringements can be minor, serious or very serious (article 62). Cartels are deemed very serious infringements (article 62.4.a).

The main legal rule concerning economic penalties fixes the amount of fines as follows (article 63.1): “*a) Minor infringements with a fine of up to 1% of the total turnover of the infringing undertaking in the business year immediately before that of the imposition of the fine. b) Serious infringements with a fine of up to 5% of the total turnover of the infringing undertaking in the business year immediately before that of the imposition of the fine. c) Very serious infringements with a fine of up to 10% of the total turnover of the infringing undertaking in the business year immediately before that of the imposition of the fine.*”³

This rule establishes a scale of three intervals of the infringing undertaking’s turnover (from 0,1% to 1%, from 1% to 5% and from 5% to 10%) that -varying with the seriousness of the violation- entrench the powers of the sanctioning authority. Apart from that, the Competition Act establishes in another rule a non-exhaustive list of criteria to be used for estimating the amount of the fines, including aggravating and mitigating circumstances (article 64).⁴ Discretion given to the competition authorities in calculating the amount of the

² Competition Act 15/2007, of 3 July 2007 (a non-official translation in English is available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=Core_Download&Method=attachment accessed on 17 February 2015).

³ Apart from fines to the infringing undertakings, the 2007 Spanish Competition Act enables public enforcers to impose sanctions to its legal representatives or members of their management bodies (art. 63.2) and also establishes rules concerning the amount of fine when the turnover of the infringing undertaking was impossible to calculate (article 63.3).

⁴ Article 64. 1. *The amount of the fines shall be set in light, among others, of the following criteria: a) The dimension and characteristics of the market affected by the infringement. b) The market share of the undertaking or undertakings responsible. c) The scope of the infringement. d) The duration of the infringement. e) The effect of the infringement on the rights and legitimate interests of consumers or on other economic operators. f) The illicit benefits obtained as a consequence of the infringement. g) The aggravating and mitigating circumstances that exist in relation to each of the responsible undertakings.*

2. *To set the amount of the fines, the following aggravating circumstances, among others, shall be taken into account: a) The repeated commission of infringements typified in this Act. b) The position of leader in or instigator of the infringement. c) The adoption of measures to impose or guarantee the enforcement of the conduct constituting the infringement. d) The lack of collaboration or obstruction of the inspection task, notwithstanding the possible consideration as independent infringement pursuant to Article 62.*

3. *To set the amount of the penalty, the following mitigating circumstances, among others, shall be taken into account: a) The performance of actions that terminate the infringement. b) The effective non-application of the prohibited conduct. c) The performance of actions intended to repair the damage caused. d) The active and effective collaboration with the National Competition Commission carried out outside the cases of exemption and of reduction of the amount of the fine regulated by Articles 65 and 66 of this Act.*

fine within that scheme is large. They are expected however to motivate and justify their decision and the proportionality of the penalty imposed to the aggressiveness of the infringement in each case.

These two rules of the 2007 Competition Act constitute the only legal framework on economic penalties, guiding and constraining the powers of authorities in charge of sanctioning infringements of competition law in Spain (both the NMCC and the regional competition authorities).⁵

On the other hand, they also govern the imposition of penalties by Spanish authorities for violations of TFEU articles 101 and 102. There is not a harmonized penalty system for the infringement of EU competition prohibitions when they are imposed by National Competition Authorities (NCAs), and Member States do have different rules in accordance with their national laws (*procedural autonomy*).⁶ Member States do not need to follow the system of penalties observed by the European Commission (article 23 of Regulation 1/2003). It is true that the Spanish domestic competition rules partially coincide with the EU rules in this point, as they also include reference to the 1%, 5% and 10% of the total turnover of the infringing undertaking as one of the building features of the system of economic penalties in the 2007 Competition Act, but their wording is different: in EU Law these three parameters are conceived as *limits* for the fines to be imposed and not as part of a *punitive scale* like in the Spanish domestic legal rules.

Nevertheless, according to the Preamble of the 2007 Competition Act, this new regulation concerning economic penalties meant “*a significant advance in legal certainty insofar as it makes a graduation of the various infringements set out in it and clarifies the maximum penalties of each type, set in terms of a percentage of the total turnover of the offenders. Similarly, the criteria that shall determine the specific fine in each case are specified, in line with current trends in the European arena*”. Apparently, the new rules appeased the concerns that had been posed in the past on the constitutionality of the system of fines devised by the

⁵ Spain has a decentralized enforcement system for domestic competition rules in which regional authorities are competent “*when such conduct, without affecting a sphere that is larger than that of an Autonomous Community or than that of the national market as a whole, affects or may affect free competition in the sphere of the respective Autonomous Community*” (article 1.3 of Act 1/2002, of 21 February, regarding the Coordination of the State and Autonomous Communities’ Powers on Defense of Competition, an un-official English translation is available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30127&Command=Core_Download&Method=attachment, accessed 17 February 2015).

⁶ See article 5.1 of Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEU L1 of 4 January 2004, 1-25).

1989 Competition Act,⁷ which only provided that “*The Court may impose on the economic agents, undertakings, associations, unions or groups that have either deliberately or through negligence breached the terms of articles 1, 6 and 7, or failed to comply with a condition or obligation foreseen in Article 4.2, fines of up to 150.000.000 pesetas (€901.518,16), amount which may be increased up to 10 percent of the turnover corresponding to the financial year immediately prior to the Court resolution*” (article 10.1).⁸

From 1989 to 2007 this was the only substantive rule concerning the amount fines from 1989 to 2007 (coupled, again, with a list of graduating criteria that should be considered by the Court in their calculation): a capping ceiling of either €901.518’16 or 10% of the turnover of the infringing undertaking in the year preceding the imposition of the fine. Nothing else. Being so indeterminate, it was controversial if it met the requirements of legality and normative predetermination of infringements and sanctions set by the Spanish Constitution in article 25.1 (*nullum crimen, nulla poena, sine lege*).⁹ At that time, it could reasonably be argued that this system ran counter the basic requirements of legal description and certainty of violations and sanctions governing Spanish punitive law. Nor the infringements were adjusted based on a scale of their aggressiveness neither the level of sanctions was calibrated in intervals. They were enunciated in the most generic terms in the law, leaving the enforcing powers their determination.¹⁰ A wide margin of discretion was given to competition authorities in exercising their *ius puniendi* (though it was always subject to judicial review). Nevertheless, the Spanish Constitutional Court considered it was constitutional.¹¹

⁷ See J Costas ‘El procedimiento sancionador. Las multas’ (2008) 1 *Gaceta de la Competencia* 43-44. Contra P Tramoyeres & S Medrano ‘El régimen sancionador en el Anteproyecto de Ley de Defensa de la Competencia: persistencia de la inconstitucionalidad por vulneración del principio de legalidad sancionadora’ (2006) 241 *Gaceta jurídica de la competencia* 66.

⁸ Competition Act 16/1989 of 17 July 1989 (a non-official consolidated translation is available http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30128&Command=Core_Download&Method=attachment, accessed 17 February 2015).

⁹ See P Tramoyeres & S Medrano ‘¿Son Inconstitucionales las normas sancionadoras de la Ley de Defensa de la Competencia?’ (reconsideración a la luz de la sentencia 100/2003, del Tribunal Constitucional)’ (2004) 231 *Gaceta jurídica de la competencia* 97-111 and S Medrano ‘La tipicidad de la infracción y la cuantía de las multas’, in S Martínez & A Petitbò (eds) *La modernización del derecho de la competencia en España y en la Unión Europea* (M Pons 2005) 505-506.

¹⁰ See Medrano ‘La tipicidad de la infracción y la cuantía de las multas’ (*supra* n10) 509-522.

¹¹ See Third Legal Ground 3rd of Judgment of Spanish Constitutional Court (2nd Chamber) 15 of October 2012, *Buque Bus España, S.A.* 175/2012 (available at <http://www.boe.es/boe/dias/2012/11/14/pdfs/BOE-A-2012-14050.pdf> accessed 17 February 2015).

3. Steps and Criteria followed by Competition Authorities in calculating the amount of the fine

In 2009, to enhance transparency and objectivity in the calculation of fines and to provide certainty to undertakings, the NCC adopted the “Guidelines on the quantification of sanctions for violations of domestic and EU competition rules” (hereinafter NCC Guidelines).¹² They laid a method and quantitative criteria to be followed in estimating the amount of fines. Following an economic approach, the Guidelines were strongly inspired by the 2006 European Commission’s “Guidelines on the method of setting of fines for violations of EU Competition law”.¹³

The procedure is structured in three steps. Firstly, the Base Amount of the Fine (BAF) is determined by looking at the graduating criteria set in article 64.1 of the Competition Act.¹⁴ Therefore, the BAF is set by looking at the size and characteristics of the affected market, the market share held by the perpetrator, the scale and scope of the violation, its duration and effects. The BAF is a percentage of the sales volume affected by the violation, ranging between 10% and 30%.

Secondly, the basic amount of the fine is adjusted by looking at any aggravating or mitigating circumstances that may concur (art. 64.2 and 3). Thus, the BAF is increased or reduced in function of the aggravating or mitigating circumstances, the presence of each circumstance accounting for either a 5% increase or decrease.

¹² See Communication of the National Competition Commission on the quantification of sanctions arising from violations of articles 1, 2 and 3 of the Spanish Competition Act 15/2007 of 3 July 2007 and articles 81 and 82 of the European Community Treaty (a non-official translation available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30716&Command=Core_Download&Method=attachment accessed 17 February 2015).

¹³ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003 (OJEU C 210 of 1 September 2006, 2–5). See the (authorized) acknowledgement of this inspiration source by P Sánchez ‘Las sanciones tras la comunicación de la CNC’ in J Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* (Civitas 2013) 342 (stressing also the homogeneity in design and outcome with the Office of Fair Trading’s “Guidance as to the appropriate amount of a penalty”, Sept. 2012, OFT423, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf accessed 17 February 2015) and also P Sánchez & E Pérez ‘La elaboración de la comunicación de sanciones de la CNC’ (2009) 5 *Revista de Derecho de la Competencia y Distribución* 407-408.

¹⁴ This is a clear proof of how the NCC Guidelines were mirrored in the Guidelines of the European Commission and did not follow the systematics of the 2007 Act [critically, but ‘hostage’ of a clear pro-EU bias, F Cachafeiro ‘El volumen de negocio como criterio para graduar las sanciones en el derecho de la competencia’ (2014) 34 *Actas de derecho industrial y derecho de autor* 159-160].

Finally, the amount of the fine is finally fixed within the limits set by the legislative in article 63.1 of the Competition Law. The NCC started following its Guidelines in early 2009, and since then, they have been used to calculate the amount of the fine imposed to violators of the Spanish Competition Act and of TFEU articles 101 and 102.¹⁵ At that time, practitioners assessed positively the impact of the Guidelines in the practice of the NCC concerning sanctions, especially in comparison with the previous situation.¹⁶

4. The judicial repeal of fines imposed by competition authorities (2013-2014)

In the past, most of the decisions imposed by Spanish competition authorities have regularly been appealed later in court by the undertakings condemned.¹⁷ The adoption of the 2007 Competition Act did not change that practice. In the initial appeals filed after the NCC started utilizing the Guidelines, the National Court did not accept the complaints against the methodology followed in the quantification of the fine according to the Guidelines. Occasionally, as it had happened in the past (with the 1989 Competition Act) the National Court reviewed the amount of the fine imposed by the NCC based on the principle of proportionality.¹⁸

When the National Court was reviewing the NCC 2010 decision on the Sherry wine cartel,¹⁹ it delivered the judgment of 6 March 2013,²⁰ questioning the methodology followed

¹⁵ See M Cuerdo & J Briones 'Análisis Económico de la Imposición de multas en expedientes sancionadores de defensa de la competencia', in J Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* (2013) 327-331.

¹⁶ See R Allendesalazar & A Rincón 'El cálculo de las multas por la CNC' in Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* 354 and (only in part) S Medrano 'La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema' in M Pedraz & D Ordoñez (eds) *El derecho europeo de la competencia y su aplicación en España: Liber amicorum S. Martínez* (Wolters Kluwer 2014) 166.

¹⁷ See F Marcos 'The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions' in S Prasad (ed) *Antitrust Law- Emerging Trends* (Icfai Univ Press, Hyderabad 2007) 149-165.

¹⁸ See V Sopena & H Otero 'La reciente doctrina de la Audiencia Nacional en torno al cálculo de las multas por infracciones de la Ley 15/2007, de Defensa de la Competencia: ¿Hacia el fin de una política de competencia eficaz?' (2003) *Anuario de Competencia* 146-148.

¹⁹ See NCC Resolution of 28 July 2010 (S/0091/08 *Vinos Finos Jerez*).

²⁰ See Judgment of the National Court, Administrative Chamber (sect. 6), of 6 March 2013, *Bodegas Emilio Lustau, S.A.* (SAN 1217/2013).

by the NCC in calculating the amount of the fine imposed on two accounts.

First, it considered that the procedure followed by the NCC breached the proportionality principle that should inspire its exercise of sanctioning powers. The National Court interpreted that article 63.1 of the Competition Act introduced three intervals for sanctions varying in accordance with the aggressiveness of the infringement. Additionally, it deemed inapplicable in Spanish law the criteria used by the European Commission in calculating the amount of fines in accordance to article 23 of Regulation 1/2003 and the case-law of the EU Court of Justice and the European General Court on that matter.²¹

Second, it deemed that the intervals used by article 63.1 in grading the amount of the fine referred to turnover (sales volume) of the infringing undertaking in the market affected by the violation throughout 2013 and 2014.²²

Since that inaugural opinion, the National Court had issued more than two dozens of judgments putting down the fines imposed by the NCC for infringements of the 2007 Competition Act and of TFEU articles 101 and 102.²³

This trend of case-law concerning the fines imposed by the NCC was a bolt from the blue, overshadowing the last days of the NCC and the launch of the NMCC.²⁴ Indeed, probably this prompted that the first sanctions imposed by the NMCC in its beginnings it did not follow the NCC Guidelines for calculating the amount of the fines.²⁵

²¹ See Sopena & Otero (2003) *Anuario de Competencia* (*supra* n19) 159-161 and C Lillo 'La Audiencia Nacional ante las sanciones impuestas por la CNMC en aplicación de la Ley 15/2007, de Defensa de la Competencia' (2014) 15 *Revista de Derecho de la Competencia y la Distribución*, in press §2.2 (pointing out the contradiction incurred by the National Court, which had in most previous decisions followed the criteria and principles extracted from the practice of the European Commission) and Medrano 'La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema' (*supra* n17) 170-171.

²² See Cachafeiro (2014) 34 *Actas de derecho industrial y derecho de autor* (*supra* n15) 163-164, Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22) §2.1 and Medrano 'La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema' (*supra* n17) 172.

²³ An exhaustive list of those cases can be found in the Annex 1 of Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22).

²⁴ See Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22) §4 and A Ward 'Spanish CNMC: The Story so far' *Europe Column-Competition Policy International*, 17 June 2013, 3 (available at <https://www.competitionpolicyinternational.com/assets/Uploads/EUJune14.pdf> accessed 17 February 2015).

²⁵ See Medrano 'La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema' in Pedraz & Ordoñez (eds) *El derecho europeo de la competencia y su aplicación en España* 172-173. Since early 2014 it had begun using them again, but it has always done so with the dissenting opinion of two members of the Competition Chamber.

5. The judgment of Supreme court of 29 January 2015

Given the situation described, a decision of the Supreme Court on any of the appeals filed by the NCC against the National court judgments annulling its fines was eagerly awaited. There were even (unconfirmed) talks of the European Commission appearing as *amicus curiae* in some of these cases.

The judgment of the Supreme Court of 29 June 2015 could not come in better time.²⁶ It clarifies the sanctioning powers of the competition authorities and straightens out the principles and limits that they should follow in calculating the amount of the fine. The Supreme Court blows hot and cold because, on one hand, it confirms the reasoning of the National Court concerning the unconstitutionality of the methodology followed by the competition authorities in calculating the amount of the fines but, on the other hand, it emends the National Court's decisions of limiting fines to no more than 10% of turnover (sales) of the infringing undertaking in the affected market.

In assessing the relevance and the consequences of the Supreme Court decision these two issues will be examined next (*infra* §§4.1 and 4.2 respectively), as well as the *de facto* abrogation of the NCC Guidelines (*infra* §4.3). Finally, the holdings by the Supreme Court will necessarily entail a change in the way fines are calculated by the Spanish Competition authorities, but the limits of the fines remain the same and, therefore, in terms on deterrence, nothing changes, but the quantification exercise may be more uncertain and unpredictable (*infra* §4.4)

²⁶ See Supreme Court Judgment (Administrative Chamber, Sect. 3) of 29 June 2015, *BCN Aduanas y Transportes S.A.* (STS 112/2015, available at <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7274949&links=&optimize=20150204&publicinterface=true>, accessed 17 February 2015).

5.1. Unconstitutionality of the methodology followed by the competition authorities in calculating the amount of fines.

The NCC Guidelines conceive a scheme for calculating the amount of the fine which combines features of the legal regime set out in the 2007 Competition Act with several extra-legal elements which, inspired in the Guidelines of the European Commission, lack any explicit support on the 2007 Competition Act (see *supra* §3).

According to the Supreme Court, the calculation of the Base Amount of the Fine (BAF) lacks any legal base, being not subject to any scale at all, and could reach up to 30% of the affected turnover of the infringing undertaking. The same goes with the adjustments made to the BAF given the aggravating or mitigating circumstances that could increase the BAF an additional 5-15%. After these two steps, the 10% capping ceiling set by article 63.1 of the Competition Act comes into play. The Supreme Court deems this procedure running counter to the requirements of the principle of proportionality, being biased to augment the amount of the fine.

It considers that the methodology embedded in the NCC Guidelines is incorrect because the three intervals of fines regulated in article 63.1 of the Competition Act introduce the maximum limits to be imposed for the infringements, depending on the aggressiveness of the violation. In words of the Supreme Court, “*each of these three percentages, precisely because of their quality of cap or ceiling of applicable sanctioning response to the most reprehensible breach within each category, should serve as a reference for, starting from them and downwards, calculate the fine to be imposed to the rest of the offenses.*”²⁷

As stated by the Supreme Court, the sliding scale established by the Competition Act should be the starting point and the framework where the process of calculating the amount of the fine takes place, and they always should be present in the quantification techniques used. It cannot be, like in the NCC Guidelines, that the legal scheme is used as an mere extrinsic limit applicable to the sanctions once the appropriate amount of the fine is estimated according to the methodology they set out. That can be a valid procedure in EU Law in accordance with article 23 of Regulation 1/2003, which only sets the final limit to the amount of the fine. However, the Spanish Supreme Court considers that cannot be the solution in Spanish Law, in which the public powers imposing sanctions have to respect the inescapable principles and limits of punitive law [*“The legal predetermination of the maximum and minimum amount of fines -criminal and administrative (whether they are a fixed amount or a percentage on certain magnitudes)- in order to individualize their calculation may well be*

²⁷ Legal Ground 5th paragraph 6 (*in fine*) of Supreme Court Judgment of 29 June 2015 (*supra* n27).

considered a common un-surmountable principle of punitive law”].²⁸

The Supreme Court gets it right when it says that EU Law does not require Member States to harmonize the sanctioning system for violations of competition law (see *supra* §2). The Spanish legislative can follow a different punitive path from that used in Regulation 1/2003 in drafting its domestic competition legislation.²⁹ It only requires that when NCAs apply TFEU articles 101 and 102 they enforce them with the same tools used for violations of domestic law (article 5 of Regulation 1/2003).³⁰ Additionally, as long as the penalties imposed are effective, proportionate and have deterrent value, no objection can be posed against the sanctions imposed according to the domestic rules.³¹

5.2. Reference in setting fines is to the total turnover of the infringing undertaking.

Despite article 63.1 of the 2007 Competition Act conspicuously refers to the “*total turnover of the infringing undertaking*” as the parameter that should be considered in calculating the amount of the fines, the National Court has startlingly considered in many judgments (since the above mentioned judgment of 6 March 2013) that it is rather the “*turnover in the market affected by the infringement*” the one that should be looked at. There was no basis at all for such interpretation (neither literal, nor historical, nor systematic, nor teleological).³²

²⁸ Legal Ground 5th paragraph 9 (*in fine*) of Supreme Court Judgment of 29 June 2015 (*supra* n27). This seems to contradict prior holdings of the Supreme Court (indeed of the same magistrate) several years before in enforcing the 1989 Competition Act (see, for example, the cases cited *infra* n40).

²⁹ See Legal Ground 6th of Supreme Court Judgment of 29 June 2015 (*supra* n27).

³⁰ Indeed, in my opinion, it cannot be that those cases in which the NCAs simultaneously apply domestic law and EU law are different [as suggested Cachafeiro (2014) 34 *Actas de derecho industrial y derecho de autor* (*supra* n15) 172 and 175 and Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22) §3.2.2.a)] the principle of equivalence and effectiveness require identical treatment, and there cannot be a different sanctioning method to be used in those cases in which TFEU articles 101 and 102 are enforced.

³¹ It is probably too extreme to argue that maintaining different punitive system could eventually be against EU Law, as reasoned by Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22) §3.2.2.a) and Sopeña & Otero (2003) *Anuario de Competencia* (*supra* n19) 161-162 and 172. More cautiously, Cachafeiro (2014) 34 *Actas de derecho industrial y derecho de autor* (*supra* n15) 172-173 (who hypothesizes that would occur only if the penalty loses its deterrent value, being profitable for the infringing undertaking to commit the violation and pay the fine).

³² See Cachafeiro (2014) 34 *Actas de derecho industrial y derecho de autor* (*supra* 15) 168-171 and Lillo (2014) 15 *Revista de Derecho de la Competencia y la Distribución* (*supra* n22) §3.2.1. Indeed, in several cases before

Thankfully, the Supreme Court judgment of 29 January 2015 mends this mistake, reasoning that the will of the legislative was crystal clear in encompassing the totality of the infringing undertaking business turnover. Although the Supreme Court beats around the bush considering that the alternative explanation would also be constitutional if the legislative had opted for it,³³ it definitely concludes that the percentages referred in article 63.1 “*are not limited to part of the turnover, but it embraces all of it*”.³⁴

The importance of this holding cannot be emphasized enough because the preposterous interpretation held by the National Court have had a very negative impact in the deterrent value of competition enforcement actions it had reviewed in the last two years.

5.3. Abrogation of the NCC Guidelines on the quantification of sanctions for violations of domestic and EU competition rules.

By holding that the methodology and procedure followed by the NCC for quantifying the amount of fines breaches the requirements of the constitutional principles of legal description of sanctions and of proportionality, the Supreme Court is directly nullifying the 2009 Guidelines. There is not an express *dictum* of the Court to that effect, but that outcome is obviously imbued in the reasoning of the court (see *supra* §5.1). Several times across the judgment the Court incidentally rejects the founding premises underlying the NCC Guidelines.³⁵

On the other hand, the Supreme Court also questions the hypothetical legal basis for the power of the Spanish Competition authorities to draft rules such as the Guidelines,³⁶ given that Spanish law does not award them rulemaking powers to design the system of sanctions

the judgment of 6 march 2013, the very same National Court had instead considered “total turnover”, see Sopeña & Otero (2003) *Anuario de Competencia* (*supra* n19) 153.

³³ And later, when it argues, approvingly of the case-law of the National Court, that the principle of proportionality also points in the direction of looking at the turnover in the market affected by the infringement, Legal Ground 9th paragraph 3 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

³⁴ Legal Ground 8th paragraph 9 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

³⁵ Legal Ground 5th paragraphs 4 (*in fine*), 5 and 7 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

³⁶ Legal Ground 7th paragraph 3 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

for violations of competition rules.³⁷

5.4. Restoration of deterrent value of fines and vanishing of their predictability.

Once the storm caused by the recent case-law of the National Court has been cleared by the Supreme Court Judgment of 29 January 2015, a more luminous future awaits the exercise of punitive powers by Spanish Competition authorities.

The correction of the quaint mistake in the business turnover that should be used for calculating the amount of the fine is the main positive outcome that springs from the judgment (*supra* §5.2).

Aside from that, the decision by the Supreme Court causes mixed feelings. The Supreme Court blows hot and cold when downplaying the method and procedures used by the authorities in working out the amount of economic penalties for violations of competition law. Once the NCC Guidelines have *de facto* been repealed, and the competition authorities have been instructed to use a different scheme in quantifying the amount of fines, the intervals and limits at hand for that purpose are still the same. Indeed, the amount of economic penalties imposed for competition law infringement could easily attain the same levels that were reached when the NCC Guidelines were used, but now what must change is that the guidelines cannot be used anymore and the appraisal of the criteria used for calculating the fine and the order in which those criteria are assessed needs to strictly toe the legal standards (one may well recall Lampedusa's *Ill Gattopardo*: "*If we want things to stay as they are, things will have to change*").

The Supreme Court could not stand the NCC Guidelines. Although the challenge against them is apparently grounded on their lack of proportionality, that cannot easily be sustained because it seems to contradict prior case-law of the Supreme Court itself.³⁸

The proportionality argument is a disguise; the real claim against the Guidelines is rather about the legitimacy of NCC powers in approving them ("*corresponds to the legal rules, and not to those execute or interpret them, to establish the rules on penalties and the quantitative*

³⁷ Legal Ground 6th paragraph 2 (literally) of Supreme Court Judgment of 29 June 2015 (*supra* n27).

³⁸ Following another path of argumentation, and before the Supreme Court Judgment of 29 January 2015 was issued, Cachafeiro (2014) 34 *Actas de derecho industrial y derecho de autor* (*supra* n15) 168, reaches a similar puzzle. He refers how it is not plausible that the Supreme Court deemed that the system of fines devised in the 1989 Competition Act –*supra* n9- respected the principle of proportionality but the one of the 2007 Competition Act and the NCC Guidelines did not .

*limits, fixed or a percentage, the legislator considers necessary to fulfill the deterrent aim of penalties in this part of the legal system”).*³⁹ Consequently, even if the NMCC adopted a set of guidelines in accordance with the systematics of the 2007 Competition Act and with the *dicta* of the Supreme Court on this case (*rectius* ignoring absolutely the Guidelines of the European Commission) they would still be deemed inadequate.⁴⁰

Although the Supreme Court underlines the crucial deterrent value of sanctions for infringements of competition law, with its decision it is clearly restricting that economic analysis could provide a new scheme for the calculation of the fines if it is not embodied in the Competition Act itself.⁴¹ Naturally, economic analysis can well illustrate the motivation of the fines and the reasoning of their proportionality in each case (which will be subject to judicial review), but the Competition authorities cannot elaborate themselves a set standards for calculating the amount of the fines if the law does not contemplate so.

And even if powers were granted to the competition authorities to adopt guidelines on the calculation of fines-which is not the case- the law itself should contain the basic principles, parameters and steps that should be followed. The architecture of the punitive system needs to be embodied in the law, and only minor adjustments within the “legal building of sanctions” can be decided and done by the enforcing authorities. They cannot decide to build additions to the legislative design.⁴²

³⁹ Legal Ground 9th paragraph 8 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

⁴⁰ The insufficiency of the scheme for economic penalties set by the 2007 Competition Act “*cannot be substituted by a mere communication authorities lacking regulatory powers in the matter, much as it is laudable their purpose of enhancing the level of predictability in the imposition of economic penalties*” (Legal Ground 9th paragraph 4 of Supreme Court Judgment of 29 June 2015, *supra* n27).

⁴¹ Evidence of the (long-time) aversion of the Supreme Court to such a scheme is will illustrated in several prior judgments of the Supreme Court (penned by the same magistrate): “*So it is not always possible to quantify in each case, the amount of the monetary penalty based mere mathematical calculations and it is, however, unavoidable to give the Defense Competition Tribunal certain margin of discretion in setting the amount of fines without links to arithmetic parameters of ‘sanctioning dosimetry’ strictly required*”, Legal ground 13th, paragraph 6 of Judgment (Administrative Chamber, Sect. 3) of 8 march 2002, *Aceites* (STS 1666/2002) Legal ground 10th, paragraph 7 of Supreme Court Judgment of 6 march 2003, *Telefónica v 3C Communications* (STS 1519/2013) and Legal ground 9th, paragraph 7 of Supreme Court Judgment of 23 march 2005, *Telefónica v BT Communications* (STS 1817/2005). In the same vein, see J E. Soriano ‘Límites al poder sancionador de los órganos nacionales de competencia: el mercado geográfico como coordenada jurídica básica para establecer el importe de las multas impuestas por el Tribunal de Defensa de la Competencia. ¿Es Goliat siempre culpable?’ (2004) 252 *Revista de Derecho Mercantil* 551 (‘*Some limit must be put to the inventiveness with which economic theory, always variable, detects each violation. And I think it must be, at least, a plausible application of the principle of legality*’).

⁴² See Medrano ‘La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema’ (*supra* n17) 167-168 and 176-177.

In sum, in the view of the Spanish Supreme Court, competition authorities should be well-tied when exercising their punitive powers and there should be room for discretion but only within the framework provided by the law. Proportionality is the key concern that enforcing authorities need to have in mind in the complex task of exercising their punitive powers.⁴³ The higher the aggressiveness of the infringement, the larger the severity of the penalty, within the limits set by the legislature. The deterrent effect of economic penalties is built-in the system (by the legislature),⁴⁴ and nothing extra can be added on that account by the enforcing authorities. To be deterrent enough, the Court reckons fines have to reach a level of sufficiency in which their amount should exceed the unlawful gains obtained by the infringing business.⁴⁵ Moreover, penalties imposed to individual managing directors of infringing businesses and private claims for damages compensation also contribute to effective deterrence.⁴⁶

Conclusion

The Spanish Supreme Court judgment of 25 January 2015 has clarified the interpretation that should be given by competition authorities to the legal rules on quantifying the amount of fines of the 2007 Competition Act. They are built around a sliding scale with three capping ceilings referred to the total turnover of the infringing undertaking, and the method and steps followed in estimating the amount of the fine cannot be those of the NCC Guidelines, which *de facto* have been repealed.

Although the legal scheme provides enough strength for the deterrence force of penalties imposed by competition authorities, the decision of the Supreme Court will impede any prediction of the amount of fines, and make more difficult to assess and compare the sanctions imposed to undertakings for similar infringements.

⁴³ See the interesting general reflections made recently by A Raskolnikov ‘Six Degrees of Graduation: Law and Economics of Variable Sanctions’ (2014) 508 *Columbia Law and Economics Working Paper* 2.

⁴⁴ Which is the “*ultimate responsible to fix the deterrent feature of penalties*” (legal ground 9th paragraph 8 of Supreme Court Judgment of 29 June 2015, *supra* n27).

⁴⁵ Considering even the probability of detection, as it expressly says in legal ground 9th paragraph 8 of Supreme Court Judgment of 29 June 2015 (*supra* n27), which remains of the costs of apprehension and conviction described by G Becker ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 174-175.

⁴⁶ Legal Ground 9th paragraph 10 of Supreme Court Judgment of 29 June 2015 (*supra* n27).

The process and methods for calculating the amount of fines have to toe *closely* the principles set by the legislative, and the enforcing authorities cannot create *soft law* to provide guidance. Of course, adequate motivation of the decision and of the amount of the fine and its relationship with the requirement of proportionality is always needed.

As stated by the Supreme Court, the ‘cocktail’ of sanctions is to be designed in the law, and the ‘barman’ (the enforcers, the Competition authorities) have to follow the instructions set in the ‘legal recipe’, variations in each individual ‘cocktail’ are possible within the leeway set in the law and variations in the amount of ingredients used are only possible in the range provided by the law and respecting the principle of proportionality.

References

A) Legal

EU

Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJEU L1 of 4 January 2004, 1-25)

Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation n° 1/2003 (OJEU C 210 of 1 September 2006, 2–5).

Spain

Communication of the National Competition Commission on the quantification of sanctions arising from violations of articles 1, 2 and 3 of the Spanish Competition Act 15/2007 of 3 July 2007 and articles 81 and 82 of the European Community Treaty (a non-official translation available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30716&Command=Core_Download&Method=attachment accessed 15 February 2015).

Competition Act 15/2007, of 3 July 2007 (a non-official translation in English is available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=18425&Command=Core_Download&Method=attachment accessed on 15 February 2015).

Act 1/2002, of 21 February, regarding the Coordination of the State and Autonomous Communities' Powers on Defense of Competition (an un-official English translation is available at http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30127&Command=Core_Download&Method=attachment, accessed 17 February 2015).

Competition Act 16/1989 of 17 July 1989 (a non-official consolidated translation is available http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=30128&Command=Core_Download&Method=attachment , accessed 17 February 2015).

UK

Office of Fair Trading's Guidance as to the appropriate amount of a penalty, Sept. 2012, OFT423, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284393/oft423.pdf

B) Case Law

Spanish Constitutional Court

Judgment (2nd Chamber) of 15 of October 2012, *Buque Bus España, S.A.* 175/2012 (available at <http://www.boe.es/boe/dias/2012/11/14/pdfs/BOE-A-2012-14050.pdf> accessed 15 February 2015).

Spanish Supreme Court

Judgment (Administrative Chamber, Sect. 3) of 29 June 2015, *BCN Aduanas y Transportes S.A.*, STS 112/2015 (available at <http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&referente=7274949&links=&optimize=20150204&publicinterface=true>, accessed 17 February 2015).

Judgment (Administrative Chamber, Sect. 3) of 23 March 2005, *Telefónica v BT Communications* (STS 1817/2005).

Judgment (Administrative Chamber, Sect. 3) of 6 March 2003, *Telefónica v 3C Communications* (STS 1519/2013)

Judgment (Administrative Chamber, Sect. 3) of 8 March 2002, *Aceites* (STS 1666/2002)

National Court

Judgment (Administrative Chamber, Sect. 6) of 6 March 2013, *Bodegas Emilio Lustau, S.A.*, SAN 1217/2013.

National Competition Commission

Resolution of 28 July 2010 (S/0091/08 *Vinos Finos Jerez*).

C) Bibliographical

F Cachafeiro 'El volumen de negocio como criterio para graduar las sanciones en el derecho de la competencia' (2014) 34 *Actas de derecho industrial y derecho de autor* 153-175.

M Cuerdo & J Briones 'Análisis Económico de la Imposición de multas en expedientes sancionadores de defensa de la competencia', in J Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* (Civitas 2013) 299-333

R Allendesalazar & A Rincón 'El cálculo de las multas por la CNC' in Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* 351-367

G Becker 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169-217.

J Costas 'El procedimiento sancionador. Las multas' (2008) 1 *Gaceta de la Competencia* 43-44.

C Gorriz 'The Spanish National Commission on Markets and Competition' (2014) 37 *World Competition* 349-367.

C Lillo 'La Audiencia Nacional ante las sanciones impuestas por la CNMC en aplicación de la Ley 15/2007, de Defensa de la Competencia' (2014) 15 *Revista de Derecho de la Competencia y la Distribución*, in press (advanced access available at revistas.laley.es, accessed 15 February 2015).

F Marcos 'The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions' in S Prasad (ed), *Antitrust Law- Emerging Trends* (Icfai Univ Press, Hyderabad 2007) 149-165.

S Medrano 'La fijación de las multas por infracciones de competencia: Garantías, eficacia y crisis del sistema' in M Pedraz & D Ordoñez (eds) *El derecho europeo de la competencia y su aplicación en España: Liber amicorum Santiago Martínez* (Wolters Kluwer 2014) 161-184.

S Medrano 'La tipicidad de la infracción y la cuantía de las multas', in S Martínez & A Petitbò (eds) *La modernización del derecho de la competencia en España y en la Unión Europea* (M Pons 2005) 505-523.

A Raskolnikov 'Six Degrees of Graduation: Law and Economics of Variable Sanctions' *Columbia Law and Economics Working Paper* 508 (Dec. 2014).

P Sánchez & E Pérez 'La elaboración de la comunicación de sanciones de la CNC' (2009) 5 *Revista de Derecho de la Competencia y Distribución* 407-417.

P Sánchez 'Las sanciones tras la comunicación de la CNC' in Guillén (ed) *Cuestiones actuales de Procedimiento Sancionador en Derecho de la Competencia* 335-350.

V Sopeña & H Otero 'La reciente doctrina de la Audiencia Nacional en torno al cálculo de las multas por infracciones de la Ley 15/2007, de Defensa de la Competencia: ¿Hacia el fin de una política de competencia eficaz?' (2003) *Anuario de Competencia* 133-172.

J E. Soriano 'Límites al poder sancionador de los órganos nacionales de competencia: el mercado geográfico como coordenada jurídica básica para establecer el importe de las multas

impuestas por el Tribunal de Defensa de la Competencia. ¿Es Goliat siempre culpable?’ (2004) 252 *Revista de Derecho Mercantil* 533-568.

P Tramoyeres & S Medrano ‘¿ Son inconstitucionales las normas sancionadoras de la Ley de Defensa de la Competencia? (reconsideración a la luz de la sentencia 100/2003, del Tribunal Constitucional)’ (2004) 231 *Gaceta jurídica de la competencia* 97-111.

P Tramoyeres & S Medrano ‘El régimen sancionador en el Anteproyecto de Ley de Defensa de la Competencia: persistencia de la inconstitucionalidad por vulneración del principio de legalidad sancionadora’ (2006) 241 *Gaceta jurídica de la competencia* 61-70.

A Valiente ‘What is it Like to Have a Single, Multi-sector Regulator—the Spanish Experience’ (2014) 5 *Journal of European Competition Law & Practice* 373-378.

A Ward ‘Spanish CNMC: The Story so far’ *Europe Column-Competition Policy International*, 17 June 2013 3 (available at <https://www.competitionpolicyinternational.com/assets/Uploads/EUJune14.pdf> accessed 15 February 2015).