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ADMINISTRATIVE DISCIPLINARY MEASURES RELATED TO THE 'TOP MANTA' PHENOMENON*

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Abstract

This study aims to identify the different administrative disciplinary measures established in the legal system that may be applied in cases of unauthorised street vending ('top manta'). An analysis is carried out of administrative penalties, provisional and expeditious measures, as well as the way these measures interrelate with penal law. It is well known that the exercising of this mode of vending can constitute a crime against industrial property, as provided for in article 274.3 of the Penal Code, or against intellectual property, as provided for in article 270.4 of the Penal Code.

Key words: administrative discipline; street selling; administrative law penalties; industrial property; unlicensed street vending; unauthorised street vending; top manta.

LES MESURES DE DISCIPLINA ADMINISTRATIVA AMB RELACIÓ AL FENOMEN DEL TOP MANTA

Resum

El present treball té com a objecte l'estudi de les diferents mesures de disciplina administrativa que preveu l'ordenament jurídic que poden ésser d'aplicació en els supòsits de l'exercici de la venda ambulant sense autorització. S'efectua una anàlisi de les sancions administratives, les mesures provisionals i les mesures sumaríssimes, així com també la interrelació d'aquestes mesures amb el dret penal. No es pot desconèixer que l'exercici d'aquesta modalitat de venda és susceptible d'ésser constitutiva d'un delicte contra la propietat industrial previst a l'article 274.3 del Codi penal o contra la propietat intel·lectual previst a l'article 270.4 del Codi penal.

Paraules clau: disciplina administrativa; venda ambulant; dret administratiu sancionador; propietat industrial; top manta.

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1 Introduction

‘Top manta’[1] (unauthorised street vending) is a phenomenon that has increased considerably over recent years in many municipal areas of our territory, particularly in coastal towns. Far from representing a small scale form of selling, it has grown increasingly in strength and now represents a serious problem which poses great difficulties for the town councils in the municipalities where it has become common practice. Moreover, as highlighted in the February 2016 *Informe sobre el comerç irregular a la via pública* (Report on irregular street trade) elaborated by the Catalan Ombudsman, the practice has a negative effect on different sectors: social, penal, legal, labour, use of public spaces, consumer protection and free competition.

Although it is at the bottom of an organised ladder of illegal trade, it is the most visible form. This means that many of the disciplinary actions taken are directed at street sellers, generating conflictive situations with law enforcement agencies, as well as with public order. Different incidents have occurred over recent years, some of them proving to have dreadful consequences, such as the death of a Senegalese citizen in Salou who plunged from a third floor balcony after an operation against illegal trade carried out by the Catalan police force, the Mossos d’Esquadra.[2]

We cannot forget that this group of people are victims of these organisations, who exploit them for their own purposes, and that these street vendors have sometimes ended up in the country in an irregular manner and are subject to complicated socio-economic conditions. All these factors make the prevention and eradication of illegal trade highly complex.

This article aims to study the phenomenon from the point of view of administrative law, specifically by identifying the mechanisms established in the legal system for combating the problem. The study will also refer to the penal treatment of this activity, which has generated contradictory positions in the jurisprudence of different provincial courts, resulting in various legal modifications to the Penal Code.

2 The regime of municipal administrative intervention in the exercising of street selling

The entry into force of Directive 2006/123/EC of the European Parliament and of the Council, of 12 December 2006, on services in the internal market, has led to radical changes in the regime of administrative intervention in the activity carried out by individuals. The pre-eminent role played by traditional administrative licences as a means of control prior to trading has been substituted by responsible declarations and prior notifications, as modes of a posteriori checks.[3] Given the approval of this directive, as well as the norms for implementing its internal legal dispositions,[4] the question arises as to whether this preventive control regime is applicable in the case of street selling, or whether the *ex post* control regime is applicable instead. Article 10.1 of Legislative Decree 1/1993, of 9 March, on internal trade, approving the consolidated text bringing together the precepts of Law 1/1983, of 18 February, and Law 23/1991, of 29 November, (hereinafter, LDIT), recently repealed by the sole repeal provision of Law 18/2017, of 1 August, on trade, services and trade fairs (hereinafter, LTSF), declares non-sedentary trade on municipal public streets to be subject to the regime of administrative licensing.

The preamble to Legislative Decree 3/2010, of 5 October, adapting legal norms to Directive 2006/123/EC of the European Parliament and of the Council, of 12 December 2006, on services in the internal market, justified maintaining the administrative licensing regime for this mode of trade in the following terms: ‘[…] With regards to the consolidated text on internal trade, the maintaining of the licensing regime is only admitted in relation to certain types of trade, when justified by pressing reasons of general interest. In line

1 ‘Top manta’ is the practice of selling pirated DVD, CDs, sunglasses, handbags, etc. using a blanket as a display area.

2 http://www.elpuntavui.cat/societat/article/5-societat/885086-la-mort-dun-ltop-manta-encen-salou.html

3 Bauzá Martorell, Felio J. ‘Declaración responsable y comunicación previa. Consideraciones críticas del procedimiento administrativo a raíz de la Ley Ómnibus’. *Diario La Ley* [La Ley], no. 7419 (2010).

4 In terms of state legislation, Law 17/2009, of 23 November, on the free access to service activities and their exercise (Umbrella policy), and Law 25/2009, of 22 December, modifying different laws in order to adapt them to the Law on the free access to service activities and their exercise (Omnibus Law). In the context of Catalonia, Legislative Decree 3/2010, of 5 October, adapting legal norms to Directive 2006/123/EC of the European Parliament and of the Council, of 12 December 2006, on services in the internal market.

with this principle, the licensing regime is withdrawn in relation to domestic and distance sales, and the requirements for carrying out certain activities are simplified.

The effect generated on public space and the need to limit the number of participants means that the licensing regime is maintained for non-sedentary trade. Given that the number of licenses is limited, it is established that licenses cannot be granted for an indefinite period of time, and a maximum term is established which is considered to be sufficient to enable the depreciation of investments and the equitable remuneration of the capital invested[…]’.

On similar lines, and although not applicable, the preamble to Royal Decree 199/2010, of 26 February, regulating the exercise of non-sedentary and street trade, highlights the fact that the exercising of street trade must be subject to administrative authorisation given its use of the public domain, and must be reconciled with all pressing concerns of general interest, such as public order, safety and public health.[5]

The LTSF came into force on 4 August 2017, establishing a new legal regime for the exercise of trade activities and the provision of services. Despite this, no significant changes have been introduced into the regulations in relation to the exercise of non-sedentary trade. Article 15.4 of the LTSF maintains the administrative licensing regime on the same lines as the preceding norms when it states that it is town councils’ duty to authorise the sale and provision of services using collapsible structures or stalls, or vehicles used to sell goods in public spaces, by way of municipal by-laws, regardless of the nature of the service. As such, town councils are expected to determine the dates and duration of such activity, to delimit the area in which it is to be carried out; to delimit the total number of stalls and their dimensions, as well as to establish the offer and conditions available to merchants. It is interesting to note that if the town council does not have the corresponding municipal regulations, it is understood that the municipality in question does not authorise this kind of trade in public spaces.

In accordance with article 15.5 of the LTSF, licenses for non-sedentary trade at markets are transferable and can be used for at least fifteen years, which can be extended for an equal period of time in view of the depreciation of investments and an equitable remuneration of the capital invested.

As we can observe, there is a close link between the exercise of economic activity and the use of the public domain. The exercise of non-sedentary trade is carried out in public spaces, such as streets, squares or coastal promenades which belong to the municipal authority. The occupation of the space to exercise trading activities thus constitutes a private use of the municipal public domain, since it stops other interested parties using it in accordance with article 57.1 of Decree 336/1988, of 17 October, approving the Regulations on local entity heritage (hereinafter RLEH). The fact that this type of non-sedentary trade is carried out without any kind of installation being set up in the public domain – neither fixed nor collapsible – means that it could be classified as a private use that does not transform or modify the public domain which is subject to municipal licensing in accordance with articles 218.4 of Legislative Decree 2/2003, of 28 April, approving the consolidated text of the Municipal and Local Regime of Catalonia, and 57.2 of the RLEH.[6] Consequently, the administrative intervention regime of local entities is twofold given the fact that it has a dual purpose: to authorise the exercise of economic actions in the strict sense of the term, and to authorise the use of the public domain with regards to the exercise of this activity.[7] One of the consequences that arises from the use

5 In Ruling 143/2012, of 2 July, the Constitutional Court considered the positive conflict of powers lodged by the Government of Catalonia against Royal Decree 199/2010, of 26 February, on the grounds that it violated the powers of the autonomous community of Catalonia.

6 Article 57.2 of the RLEH establishes that private use that does not entail the transformation or modification of the public domain is subject to the granting of a temporary occupation licence that leads to a situation of precarious possession, which can be revoked at any time for reasons of public interest and with the right to compensation, if applicable.

7 Cano Campos, Tomás. ‘Las autorizaciones municipales para el ejercicio de la venta ambulante: su confuso fundamento’. *Estudios y comentarios. La Administración al Día* [INAP], (2011), p. 6-7: ‘the justification of the administrative authorisation to carry out street vending not only resides in the use of the public domain which is present in most cases of street selling, but also in the pressing reasons of general concern related to street trade, such as security and public health, consumer protection, public well-being, protection of the environment and the urban space, the movement of people and vehicles, etc. In view of this, the licenses issued are mixed, as indicated by most of the norms that refer to them when they allude to the existence of pressing concerns of general interest in relation to the use of public space. Although undoubtedly related to the use of public space, these reasons are also connected to the distribution of mobile or non-sedentary trade.’

of the public domain is the calculation of the special usage tax, as provided for in article 20.1.*a*) of Royal legislative decree 2/2004, of 5 March, approving the consolidated text of the Law regulating local taxes. In general, the amount of the tax must be determined by considering what would be the market value of the use of the space if it did not belong to the public domain.

Notwithstanding the need to obtain the mandatory administrative license to exercise street vending, traders must also comply with the conditions established by mercantile regulations, by the LTSF and any other provision of a general or sectoral nature, in line with the provisions of article 7 of the LTSF. On the other hand, article 8.1 of the LTSF states that people who trade in Catalonia must comply with regulations in terms of taxation, labour, social security, health, consumption, accessibility and in relation to all norms corresponding to any other field that is applicable to the specific activity carried out, including municipal norms, and are responsible for complying with these norms. They must also ensure compliance with the provisions of this law. All these obligations are breached in a particular way in ‘top manta’ activities: an activity is carried out without the mandatory license, the specific regulations applicable to the products sold are breached and no taxation is paid in relation to the activity, among other points.

3 Penal law and ‘top manta’

Although not the key purpose of this study, and although only a brief introduction to the topic can be provided here, it is important to mention the penal side of ‘top manta’ activities. The products that are offered through this kind of vending are usually copies of original brands. As such, the activity is covered by articles 274.3 and 270.4 of the Penal Code. While initially the typical products sold were mostly compact disc copies of original music or videos, we can now assume that the downloading of this kind of material on the Internet has made this kind of sale redundant. We will focus here on the study of crimes against industrial property, given the importance and significance of this particular crime, despite the fact that it is widely known that this kind of conduct constitutes a crime against intellectual property as provided for in article 270.4 of the Penal Code.

Article 274.3 of the Penal Code, in the new version presented in Organic Law 1/2015, of 30 March, makes a special mention of street or occasional vending of products that have a distinctive symbol identical to or that can be confused with an industrial property right registered in accordance with branding legislation, when these products are the same or similar to products covered by a registered trademark. A prison sentence of 6 months to 2 years is contemplated in such cases. Depending on the characteristics of the accused and in cases where the profit made or which could be made is minimum, fines of one to six months or community service of between 31 to 60 days may be applied, as long as none of the circumstances described in article 276 are present.

The preamble to Organic Law 1/2015, of 30 March, justifies this reform, providing a scaled regime of penal liability depending on the gravity of the behaviour. In this way, lower fines are foreseen for street or occasional vending of products and prison sentences are excluded in non-serious cases, in view of the characteristics of the accused party and of the small amount of the economic profit obtained or that could be obtained. The following aspects of the modifications to the regulations should be noted:

a) The penal category establishes street or occasional vending as a typical form of criminal behaviour. Previously, only a general reference was made to the possession of goods for trading purposes, or to the sale of products or services (old article 274.2 of Penal Code, version in force from 23 December 2010 to 1 July 2015).

b) The penalties established by current article 274.3 of the Penal Code are identical to those established by the previous wording of article 274.2 of the Penal Code, except for fines in less serious cases.[8]

c) As a consequence of the removal of infringements, the infringement disappears from article 623.5 of the Penal Code for the activities described in the second paragraph of article 274.2 concerning regulations when profits do not exceed 400 euros.

8 At the moment, the fine is up to three months, whereas previously, in the case of distributing and retailing, the fine was between three and six months.

With regard to whether 'top manta' constitutes a crime against industrial property, jurisprudence has shown itself to be incongruous. This situation ties in with the contradictory jurisprudential statements that have also been made in the case of the prosecution of 'top manta' vendors for committing crimes against intellectual property.[9]

At one end of the controversy we find the question of what legal good is being protected by the Penal Code in these cases.[10] One jurisprudential line points out that the legal good being protected by such laws is essentially the exclusive right of use and exploitation of industrial property which arises from the registration of such property on the corresponding registers, even when there is no risk that consumers will confuse the products.[11] This thesis is further supported by the inclusion of this precept in the second section of title XI of the Penal Code related to crimes against industrial property, rather than in the third section corresponding to crimes related to markets and consumers.[12]

The Seventh Section of Ruling no. 456/2016, of 5 September, of the Provincial Court of Madrid is significant. The fourth legal foundation refers to the legal good being protected by article 274.2 of the Penal Code in the following terms:

> '[...] The majority doctrine and more modern jurisprudence has established that consumers are not the ones being protected by article 274, under the heading 'Crimes related to Industrial Property', locating the offence in a different section to crimes related to markets and consumers.
>
> 'If consumers are tricked, defrauded or conned, in addition to article 274, other penal precepts related to fraud and consumer protection may also come into play. However, the existence of such fraud is not contemplated or is not a requirement for a charge to be made in accordance with article 274, which refers solely to crimes against industrial property.
>
> 'The only legal good protected by this penal precept is the exclusive right to use or exploit industrial property and, as a result, it becomes irrelevant whether this use of a fake brand may mislead consumers. The commercialisation of products with a registered trademark in a way which infringes exclusivity rights, as occurs in the case of cars, is typical of this practice, without reference to any particular law.
>
> 'As expressly stated in article 274.1 of the Penal Code, the confusability requirement refers to the distinctive symbol which has been used illicitly by the offender – with this symbol being identical or likely to be confused with the registered trademark – and not to the product on which it is used, which only needs to be the same or similar to the one for which the industrial property is registered.
>
> 'We are therefore talking about distinctive marks which can be confused and not about confusion between products. What needs to be considered is not whether consumers are confused about products when they buy them, but rather whether fake brand markings can be confused with the registered trademark.
>
> 'The fact that consumers could be confused in relation to the registered markings on products, whether in relation to their place of sale, the poor quality of the product, low price, etc., is irrelevant to the effects of article 274 of the Penal Code.
>
> 'Crimes against industrial property are considered to have occurred when products are consciously traded under the exclusive name of trademarks, without necessarily defrauding consumers. Accordingly, the legislator has not subordinated the application of the basic precept of article 274 to certain types of selling, but has rather established that it should be applied when the objective and subjective elements are present.
>
> 'The expression included in the precept of 'a symbol which is identical to or which can cause confusion to distinguish the same or similar products' refers to the possibility of confusion in relation to the identificatory virtue of the mark, but not to a property of the product itself.

9 On this question, see Iribarren Oscáriz, Juan. 'Top manta y derecho penal'. *Sentencias de TSJ y AP y otros tribunales* [Cizur Menor: Aranzadi], no. 9 (2006), p. 191-201, and Castiñeira Palou, María Teresa; Robles Planas, Ricardo. '¿Cómo absolver a los "top manta"? (Panorama jurisprudencial)'. *Revista para el Análisis del Derecho* [Barcelona: Indret], no. 2 (2007).

10 For temporal reasons, the Rulings mainly refer to the old article 274.4 of the Penal Code, in the version in force until the reform carried out by Organic Law 1/2015, of 30 March. This precept was the one used in cases of 'top manta'.

11 Among others, it is worth noting the First Section of Ruling no. 220/2016, of 4 May, of the Provincial Court of Alicante; the Third Section of Ruling no. 273/2015, of 2 July, of the Provincial Court of Almeria; the First Section of Ruling no. 32/2010, of 10 February, of the Provincial Court of Cadiz; the Second Section of Ruling no. 390/2010, of 30 November, of the Provincial Court of the Balearic Islands; the Fourth Section of Ruling no. 582/2009, of 5 October, of the Provincial Court of Valencia.

12 Ninth Section of Ruling no. 39/2016 of 26 July, of the Provincial Court of Malaga; Sixth Section of Ruling no. 166/2015 of 23 July, of the Provincial Court of Las Palmas.

> 'According to legislation, registered industrial property rights are protected regardless of whether the products mislead consumers or not.'[13]

By contrast, other pronouncements highlight that alongside this protected legal good we find another mediated legal good that the legislator also aims to protect: this is the economic order based on free competition and the general market in the interest of all agents who participate in it, including business people and consumers. For the conduct to be punishable, there needs to be a risk of confusion among those the product is aimed at; i.e. consumers. The First Section of Ruling no. 604/2009, of 9 September, of the Provincial Court of Seville, highlights:

> 'In the previously cited precept, the legally protected good is the individual and the holder of the exclusive right to use and exploit the products, services, activities or establishments for trade, as provided for in the corresponding industrial property law against certain attacks which severely injure them; in short, this refers to a legal monopoly and to exclusive use and exploitation (Supreme Court Ruling (SSTS) 6 May 1992 and 22 September 2000). However, the mediated legal good that leads the legislator to criminalise conduct prejudicial to industrial property rights is the protection of the general interest, through the protection of the economic order based on free competition and the market in general, in the interest of all its participants; i.e. not only that of competing business people, but also the collective interest of consumers and the public interest of the State to maintain undistorted competition (SSTS 6 May 1992 and 13 December 1993). […]
>
> All of this is not to say that the legally protected good is consumer interest (the product could be of better quality than the original), in detriment to the business person's right, but it does imply the need to relate it to the purpose of this law, which is none other than the capacity to identify and differentiate between products or services on the market. What is very different to sustain is that the protected good is the business person's asset, since this premise would lead us to punish any conduct which could cause economic damage, overlapping with civil jurisdiction. In this sense, if products or services are already identified and differentiated, then from the perspective of those involved in this mercantile traffic, Penal Law should not be applied since, if it is applied, there is a risk of criminalising tangential aspects of the protected law. If the atypical criminal conduct results in any kind of damage for the business person, the latter could take the civil action provided for in the Industrial Property Law.
>
> In short, the requirement of a risk of confusion must be included in the configuration of the precept since it is precisely this risk which threatens the right of the holders of trademarks or patents to compete fairly in the market.
>
> In other words, the requirement of 'confusability' is a common denominator of typical conduct: 'reproduction', 'imitation', 'modification', 'or the use of any kind of distinctive symbol identical to or that could be confused with a registered trademark', and this does not mean that the legally protected good is consumer protection.
>
> The requirement of 'confusability' is understood since the essential function of the distinctive symbol – particularly that of a brand – is to identify the origin of the product or service which carries it.
>
> When misappropriation may put such differentiation at risk as a result of confusion, the legal good is injured; the exclusive right to use the distinctive symbol.'

To determine whether this risk of confusion is produced or not, jurisprudence takes into account different criteria:

a) The circumstances in which the non-authentic objects are acquired.

b) The price at which the objects are sold in comparison to the original product.

c) The possession or issuing of receipts at the place of sale.

d) The professionalism of the vendors of the non-authentic objects.

e) The impossibility of the objects being originals with defects.

The fact that the sale is carried out outdoors, outside commercial establishments, and at particularly low prices means that it is also impossible for consumers to be confused. These elements are a common denominator in the kind of selling represented by 'top manta'. In the terms used in the First Section of Ruling no. 43/2007, of 8 March, of the Provincial Court of Huelva, 'the retail sale carried out on streets or small markets does not represent a risk of fraud to any consumer with a fraction of awareness, nor does it undermine (as a result of

13 The same terms are used in Ruling no. 214/2015, of 24 October, of the Provincial Court of Barcelona, Second Section.

inferior quality) the prestige of the brand or reduce in any considerable way the percentage of people who will buy the authentic product. This form of sale does not injure or put at risk the legally protected good in any relevant way’. The buyer knows perfectly well that the products acquired are not authentic brands.[14] For this reason, in relation to the legal good which is indirectly protected by this precept, the results of some courts end in acquittals.

A second criterion which courts have used to opt for acquittals is the principal of minimal intervention.[15] These rulings link the application of this principle with the lack of effect of the conduct on the legally protected good due to the inexistence of the risk of confusion, as referred to above. They thus consider that the offence is not sufficiently important to be subject to penal law.[16] If this premise was taken as a truth, one of the consequences of not applying penal norms to restrict this conduct would be the application of the regulatory administrative norms on street and occasional vending.[17]

Nevertheless, and correctly in our judgement, other rulings have not admitted the application of the principle of minimum intervention.[18] This decision not to admit the principle is driven by the fact that its application corresponds to the legislator and not to judges. It is the legislator who must determine which conduct should be treated as having penal relevance within criminal policy. On the other hand, the principle of minimal intervention is limited by the principle of legality, in such a way that the former cannot omit the application of the latter.[19]

4 Administrative disciplinary measures

Administrative disciplinary measures are all instruments that the legal framework offers to public administrations to help them ensure compliance with the requirements and legal presuppositions established for the exercise of non-sedentary trade. Under this umbrella we find administrative penalties, provisional measures and a sub-genre of the latter in the form of expeditious measures.

The first problem is to determine if these measures can or cannot be applied directly. In the event that the circumstances do not constitute a crime against industrial property, in line with article 274.3 of the Penal Code, or against the intellectual property of article 270.4 of the Penal Code, administrative disciplinary measures may be applied directly in the terms established by law. However, if the circumstances constitute

14 Sixth Section of Ruling no. 92/2015, of 5 May, of the Provincial Court of Zaragoza; First Section of Ruling no. 516/2014, of 22 September, of the Provincial Court of Seville; Second Section of Ruling no. 337/2011, of 30 September, of the Provincial Court of La Coruña; Fifth Section of Ruling no. 506/2010, of 6 September, of the Provincial Court of Valencia; First Section of Ruling no. 494/2010, of 29 November, of the Provincial Court of Gipuzkoa; Fifth Section of Ruling no. 6/2007, of 11 January, of the Provincial Court of Murcia.

15 First Section of Ruling no. 604/2009, of 9 September, of the Provincial Court of Seville; First Section of Ruling no. 494/2010, of 29 November, of the Provincial Court of Gipuzkoa; Second Section of Ruling no. 607/2010, of 20 September, of the Provincial Court of Valencia; Second Section of Ruling no. 521/2011, of 30 June, of the Provincial Court of Valencia.

16 First Section of Ruling no. 516/2014, of 22 September, of the Provincial Court of Seville; the seventh of the legal grounds states that: ‘[...] People who know brands and the market value ascribed to individual objects are not tricked or defrauded with false products, since they would not dream of going to buy them from street sellers in small markets, nor of acquiring them at ridiculous prices, believing that they have got an amazing deal. As such, this practice does not cause injury to consumers or to the owner of the trademarks. The trademark is neither undermined with these objects that are not fabricated by the trademark owner, nor damaged in any substantial way, since, as it has been argued, those who purchase the inauthentic products are aware that what they have bought is not the authentic brand.

‘And this must also be related to the principle of minimal intervention in Penal law. Penal sanctions are reserved for conduct that really does deserve it. This is in line with both the restrictive hermeneutic guide on punitive measures (article 4.2 of the Civil Code) as well as interpretation in coherence with social reality (article 3.1 of the same code), resolving any doubts about the meaning of penal norms in favour of their strictest adherence’.

17 The Sixth Section of the interlocutory decision made by the Provincial Court of Bizkaia on 23 June 2006.

18 Second Section of Ruling no. 495/2009, of 9 October, of the Provincial Court of Granada; Sixth Section of Ruling no. 743/2009, of 9 November, of the Provincial Court of Barcelona; Second Section of Ruling no. 428/2010, of 27 October, of the Provincial Court of Madrid; First Section of Ruling no. 600/2013, of 19 December, of the Provincial Court of La Coruña; Sixth Section of Ruling no. 166/2015, of 23 July, of the Provincial Court of Las Palmas; Seventh Section of Ruling no. 456/2016, of 5 September, of the Provincial Court of Madrid.

19 First Section of Ruling no. 265/2012 of 18 May, of the Provincial Court of La Coruña.

a crime, as referred to in the previous epigraph and as tends to be the most common practice, the situation changes radically. The key element in deciding if the conduct does or does not constitute a crime according to article 274.3 of the Penal Code is if the products destined for sale include a distinctive symbol that is identical to or likely to be confused with a registered industrial property right, as long as the products in question are the same as or similar to the original versions.[20] In most cases, the products destined for sale in 'top manta' scenarios meet this criterion and can therefore constitute a crime.

From the point of view of administrative law, the exercise of illicit street vending is considered to be an administrative offence in articles 37.7 of Organic Law 4/2015, of 30 March on the protection of citizen safety (OLPCS hereinafter) and 73.5 of the LTSF.[21] Consequently, if the circumstances constitute a crime as established in article 274.3 of the Penal Code, we may find a concurrence of illicit acts, one of an administrative nature and another penal, which are contemplated in different norms that protect different legal goods. The principle of *non bis in idem* is not undermined because there are no legal foundations for it.[22] The good which is legally protected by article 274.3 of the Penal Code is that of industrial property, while in the case of article 37.7 of the OLPCS and article 73.5 of the LTSF, it is the illicit exercise of trade in connection with the use of the public domain with the prescribed licenses.

In the case of illicit concurrence, in the first instance, the organs of the penal jurisdiction are the ones who must establish the facts. We should not forget that the facts declared which are approved by judicial rulings link public administrations to the exercise of sanctioning power as established in articles 77 of Law 39/2015, of 1 October, on the common administrative procedures of public administrations, and 45.3 of the OLPCS, in such a way that a prior penal decision is needed.[23] The administration is obliged to halt sanctioning procedures when there are signs that the facts could constitute a crime, even if no penal action has commenced and even if the threefold nature of the facts, subjects and legal foundations is not apparent.[24]

20 As mentioned previously, we are focusing on this kind of crime since this kind of conduct is the most common today.

21 In reality, the two precepts categorise the same offence, which means that only one of them can be applied. We thus find ourselves bidding between two norms: between two different norms that categorise the same circumstances.

22 Cano Campos, Tomás. '*Non bis in ídem*, prevalencia de la vía penal y teoría de los concursos en el derecho administrativo sancionador'. *Revista de Administración Pública* [Centro de Estudios Políticos y Constitucionales], no. 156 (2001), p. 214: 'The competing offences, however, have nothing to do with *non bis in idem*. Its application to punitive administrative law does not arise from the need to ensure that the same offence is not penalised twice, since even if the penalties corresponding to each offence were imposed, they would not be penalising the same offence. The reason resides in the fact that when we are presented with a combination of offences, not all the requirements of *non bis in idem* are met: either because the status of fact is lacking, since there are a plurality of facts (real concurrence), or the foundational character is lacking, since one single fact injures various legal goods (conceptual concurrence)'.

23 On this question, the Constitutional Court Ruling 77/1983, of 3 October established that: 'The subordination of the acts of the Administration responsible for imposing sanctions to the judicial authority demands that any clash between a jurisdictional situation and an administrative act should be resolved in favour of the former. The following consequences arise necessarily from this premise: [...] b) the fact that it is impossible for Administrative bodies to carry out actions or sanctioning measures in cases in which the facts may constitute a crime or offence according to the Penal Code or special penal laws, until the judicial authority has ruled on them; c) the need to respect the thing judged.

'The thing judged has a positive effect, in such a way that what is declared during a firm ruling constitutes a legal truth and a negative effect that makes it impossible for a new ruling to be made on the same subject.

'4. (...) The principle of *non bis in idem* prevents the doubling up of administrative and penal sanctions regarding one and the same offence, but also, when the regulations allow for dual procedures, and when a hearing and a ruling has to be made on the same case, it renders it impossible for the judgements and rulings that may take place in the legal framework to be developed independently if they are subject to the application of different norms, although the same cannot occur in relation to the appreciation of the facts, since it is clear that the same facts cannot both exist and not exist for different bodies of the State.

'Consequently, and in relation to the rule of the subordination of the sanctioning action of the Administration to the actions of the Courts of Law, the former, as mentioned previously, cannot act until the latter party has acted and, when acting a posteriori, must respect at all times the practical approach followed by the latter. If this is not the case, there would be an exercising of punitive power which would exceed the limits of article 25 of the Constitution and violate citizens' rights to be sanctioned only according to the conditions established for said precept'.

24 This is what Alarcón Sotomayor, Lucía, states in this regard. *La garantía del non bis in ídem y el procedimiento administrativo sancionador.* Madrid: Iustel, 2008, p. 113-118. ISBN 978-84-96717-82-4.

Public administrations must abstain *ab initio* from adopting any disciplinary measures and must wait for the organs of the penal jurisdiction to issue a firm ruling.[25] Once a firm ruling has been made, administrative organs may issue the corresponding procedures and a final decision in accordance with article 90 of Law 39/2015, of 1 October, on the common administrative procedures of public administrations, and linked in full with the facts declared and approved by the penal ruling.

The question is to determine the penalty that should be imposed in view of the penal sanction already applied. The legal framework does not provide an answer to this question. It only does so in cases where there is a concurrence of illegal actions[26] or in the case of a concurrence of certain administrative infringements,[27] but not in the case of this concurrence of mixed infringements. In any event, the solutions provided for in the legal framework aim to diminish the negative consequences that the *strictu sensu* application of the penalties prescribed for each infringement would have if applied separately. A possible solution to this concurrence of penalties could be the adoption of the criteria established in article 31.2 of Law 40/2015, of 1 October of the legal regime in relation to other conflicts of the public sector. This article stipulates that it is the competent authority’s duty to issue the penalty and, if the subject and foundations are not identical, to take into account the penalties imposed previously by a European Union body in similar circumstances, in order to adapt the penalty to be imposed and to reduce it when necessary, without prejudice to the declaration of the offence.[28] The administrative body must consider the penalty imposed by the penal body in order to adapt the penalty to be applied, in such a way that the final result of the imposition of the two penalties is proportional to the seriousness of the actions committed. In spite of this, the application of this criterion in the case of the concurrence of a crime against industrial or intellectual property and an administrative offence for illicit street vending without a license is not easy. The compensation is easier to apply when both of the penalties imposed are of a pecuniary nature. By contrast, if the penalty imposed by the penal body involves community service or prison, it will be difficult for the administrative body to apply such compensatory measures. In any case, it would have helped enormously if the legislator had foreseen a solution for these particular situations in the drafting of the new law of the public sector legal framework.

4.1 Administrative penalties

The repressive mechanism par excellence which the Administration has at its disposal is that of administrative disciplinary measures. Specifically, and in contrast to its predecessor, article 37.7 of the OLPCS categorises the occupation of the public highway for non-authorised street selling as a minor offence. It is important to note that this precept, together with articles 20 and 35.1, points 1, 2, 8, 22 and 23 of article 36 and the final first provision of the OLPCS have been appealed against on the grounds of their inconstitutionality by the Parliament of Catalonia.[29] Likewise, the plenary meeting of the Constitutional Court, by order of 9 June 2015 (*BOE* [Official Gazette of the Government of Spain] no. 143, of 16 June 2015), also agreed to accept appeal against inconstitutionality no. 2896-2015, brought by over 50 MPs of the Socialist parliamentary groups, IU, ICV-EUiA, CHA: Izquierda Plural (United Left), Unión Progreso y Democracia (Union Progress and Democracy), and the mixed group of the Congress of Deputies against articles 19.2, 20.2, 36.2, 36.23 and 37.1 in relation to articles 30.3, 37.3 and 37.7 and the first final provision of the OLPCS.

25 At least in a general sense. There is one exception in the case of adopting injunctive measures in the terms provided for in article 5.4 of Decree 278/1993, of 9 November, on the punitive measures to be applied within the Government of Catalonia’s field of competence. The precept stipulates that the application of the penal process does not prevent the application of injunctive measures or the adoption of any other measures needed to re-establish the physical situation affected or to avoid new risks to persons, goods or protected environments. In this final case, the judicial authority responsible should be informed of the penal procedure.

26 In cases in which one single act constitutes two or more crimes, the upper half of Article 77.2 of the Penal Code shall apply to the penalty provided for the most serious offence, without this being able to exceed the penalty that would result if the offences were penalised separately. When the penalty is calculated in this way, and when it exceeds this limit, the offences are penalised separately.

27 Article 31.2 of the OLPCS states that, in cases in which one single act constitutes two or more crimes, or when one of these provides the means to commit the other, the conduct shall be penalised in relation to the offence that carries a heavier penalty.

28 This article has a clear precedent in the now repealed article 5.2 of Royal Decree 1398/1993, of 4 August, approving the Rules of Procedure for the exercise of sanctioning. The difference is that this precept spoke of ‘compensating’ instead of ‘reducing’.

29 The plenary meeting of the Constitutional Court, by order of 21 July 2015, agreed to accept appeal against inconstitutionality no. 3848-2015 (BOE no. 177, of 25 July 2015).

For the committing of this offence, article 39.1 of the OLPCS establishes a fine of between 100 and 600 euros. Likewise, article 39.2.*b)* of the law provides for ancillary penalties which empower the authorities to confiscate goods, resources or instruments used to prepare or carry out the offence and, if necessary, of the fruits of the offence, unless these belong to a bone fide third party not responsible for the offence who has acquired them legally.

In the context of 'top manta', the economic penalty is ineffective as a repressive measure and as a means of preventing further offences. Offenders are individuals who find themselves in precarious socio-economic situations, often living in the country in irregular conditions. Therefore, it is likely that they will not pay the fine imposed voluntarily and that constraining measures will be fruitless since the individuals have no assets which the Administration can confiscate. Furthermore, the processing of the administrative case is not straightforward. In most cases, attempts to notify offenders of administrative acts issued in the framework of sanctioning procedures are fruitless, meaning that the Administration must often resort to issuing edicts.

Secondly, with regards to the confiscation of assets, this does not make any sense unless the imposition of this ancillary penalty ratifies the confiscation carried out previously as an expeditious measure. Otherwise, by the time the sanctioning decision ratifying the administrative procedure is issued, an excessive amount of time will have passed since the offence was committed, which means that the offender will probably no longer have the goods in their possession.

On similar lines to the OLPCS, article 73.5 of the LTSF establishes non-sedentary trade without an administrative license as a serious administrative offence. Article 76.*b)* of the LTSF stipulates fines of between 20,001 euros and 100,000 euros for the committing of such offences. Nevertheless, article 77.2*a)* of the same norms can be applied, allowing for the imposition of a penalty lighter than the one established, if it is considered that the culpability of the accused or the illegality of the action is reduced as a result of the significant concurrence of at least two of the criteria provided for in the first section. It is clear that the volume of sales and amount of illicit profits obtained can be considered extenuating circumstances in view of the characteristics of this kind of vending. On these lines, the penalty to be imposed could be a fine of up to 20,000 euros.

The extension of responsibility for the actions to those who have acquired the goods, as provided for previously in article 45.*a)* of the first section of the new repealed LDIT, has now disappeared for this kind of offence. The LTSF only maintains this for the minor offences stipulated in article 72.4 of the regulations related to the exercise of non-sedentary trade breaching the provisions of the law, the implementing regulations and the municipal orders that regulate them. This suppression must be seen as a negative step given that it represented an important tool to combat the phenomenon in the form of a dissuasive mechanism to avoid the purchase of such products. It is widely acknowledged that buyers are aware that this form of vending is carried out in breach of legally established norms. The low price of the products, among other factors, offsets the lack of safety guarantees, the non-payment of the taxes corresponding to the activity, or the absence of the corresponding licences for the exercise of the vending and the occupying of the public space. Buyers are perfectly aware of this situation, which means they are complying to a certain degree with the offence by making the purchase. Administrative penalties can be effective when imposed on buyers in a way they fail to be when imposed on vendors.

Both article 37.7 of the OLPCS and article 73.5 of the LTSF refer to the same actions. Consequently, both regulations cannot be applied simultaneously to penalise the actions, as this would infringe the principle of *non bis in idem*. A case of regulatory concurrence would have to be resolved in favour of the LDIT, given that a more serious sanction is provided for in this regulation.[30]

From the perspective of consumer protection, the exercise of unauthorised street vending also includes the committing of different administrative offences, as provided for in Law 22/2010, of 20 July, of the Consumer Code of Catalonia (hereinafter CCC). Without being exhaustive, we would like to highlight the following:

30 Article 31.1 of the OLPCS, in line with the criteria of article 8.2 of the Penal Code, establishes the norms for resolving conflicts involving regulatory concurrence. The following norms are established: the special precept should be applied over and above general precepts; the broader or more complex precept predominates over the norms relating to the offences committed within the wider context; in lieu of the previous criteria, the most serious precept excludes those that penalise the actions with minor penalties.

a) Breach of the provisions protecting the safety of goods sold to consumers on the market. Article 331-1.*a)* of the CCC. Serious offence.[31]

b) Use of any kind of symbol or marking that could mislead consumers due to its appearance or configuration. Article 331-2.*d)* of the CCC. Serious offence.

c) Breach of the provisions regulating the informing and publicising of the price of goods and services. Article 331-3.*a)* of the CCC. Serious offence.

d) Failure to provide a bill or receipt for the sale of goods. Article 331-3.*g)* of the CCC. Minor offence.[32]

e) Failure to formalise insurances, guarantees or other security measures established by the regulations to protect consumers. Article 331-4.*a)* of the CCC. Minor offence.

f) Failure to comply with provisions regulating the branding, labelling and packaging of products. Article 331-4.*c)* of the CCC. Minor offence.

g) Failure to be in possession of official complaints or claims forms or to fail to notify consumers of their existence. Article 331-4.*m)* of the CCC. Minor offence.

Article 333-1, first section, letters *a* and *b* of the CCC establishes the penalties applicable for minor and serious offences. In addition to fines,[33] which are adjusted in line with a unique system of aggravating, extenuating and mixed circumstances, the second section of the same precept empowers authorities to confiscate and destroy merchandise as an ancillary penalty. Article 333-4 of the CCC specifies the terms for agreeing on the confiscation of the merchandise: in cases in which the immobilised merchandise represents an unacceptable risk to consumers' health, safety, economic interests or right to information. Products sold in 'top manta' conditions represent an unacceptable risk to consumers' health, safety, economic interests and right to information in the terms defined by the Consumer Code. Article 111-2.*k)* of the CCC considers any risk that results in a good being unsafe to be an unacceptable risk. Letter *i)* of the same precept defines a safe good as a good which, in conditions of normal or reasonable use, including conditions related to the duration of use and, if applicable, the set-up, installation and maintenance of such goods, does not present any risk or only the minimal risks associated with the goods or services, which are considered acceptable within the conditions related to the protection of people's health, safety and economic interests.

Regarding product safety, article 3.5 of Royal Decree 1801/2003, of 26 December, on the general safety of products, stipulates that in order to adopt the corresponding administrative measures, a rebuttable presumption is established according to which products are unsafe when, among other factors, they do not carry the minimum data needed to identify the producer and, in addition, when products are sold without the prescribed bill, receipt or proof of transaction, which represents an unacceptable risk to the economic interests of consumers.[34] On similar lines, when there is an absolute lack of guarantee on the products offered, in such

31 The first section of article 332-3 of the CCC states that the offences described in the following articles are categorised as serious:
a) Articles 331-1 and 331-2.
b) Sections *a*, *b*, *c* and *d* of article 331-3.
c) Sections *a* and *s* of article 331-4.
d) Sections *a*, *b* and *c* of article 331-5.
e) Sections *a*, *b*, *c*, *d* and *e* of article 331-6.

32 The first section of article 332-2 of the CCC stipulates that the actions or omissions established as offences to defend consumers are initially categorised as minor offences, unless they can be categorised as serious or very serious in line with the provisions of this chapter.

33 For minor offences, fines of up to 10,000 euros can be imposed on the scales indicated below:
- low level: up to 3,000 euros.
- mid level: between 3,001 and 7,000 euros.
- high level: between 7,001 and 10,000 euros.

For serious offences, fines of between 10,000 and 100,000 euros can be imposed on the scales indicated below:
- low level: between 10,001 and 30,000 euros.
- mid level: between 30,001 and 70,000 euros.
- high level: between 70,001 and 100,000 euros.

34 Article 123-2.*b)* of the CCC establishes that consumers are entitled to receive a copy of the contract, invoice, receipt or proof

a way that the consumer is unable to exercise their right to repairs, replacement or a discount in the terms provided for in title IV of the second book of Royal legislative decree 1/2007, of 16 November, approving the consolidated text of the General Law protecting consumers and users and other complementary laws. The regulatory norms controlling the labelling of textile products[35] and footwear,[36] are also breached, directly affecting consumer safety and right to information. We refer to these particular products since they are the main kind of products sold in this way. Thus, under article 333-4 of the CCC, the confiscation of the product can be agreed.

Regarding the destruction of the goods as an ancillary penalty, the first section of article 333-4 of the CCC includes the obligation to destroy the merchandise if its use or consumption entails any risk to consumer safety. If the products breach labelling regulations, if the producer cannot be identified, or if the concurrence of other circumstances represents a risk for consumer safety, then they must be destroyed. In practice, this will therefore be the most common scenario.

4.2 Expeditious measures

The expeditious measures provided for constitute a means of applying provisional measures. These kinds of measures are characterised by the fact that authorised officers can adopt them directly without the need for a prior administrative act to justify their intervention. These therefore represent provisional measures directly imposed by law, without the need for a prior procedural act of authorisation.[37] Furthermore, they can be adopted *in situ*, at the time when the administrative offence is committed, in order to prevent the continuation of the illegal activity. This immediacy means that such measures are an effective tool to combat the 'top manta' phenomenon. We can distinguish between two main types of measures: on the one hand, those provided for in the OLPCS, consisting in the intervention and capturing of the instruments used to commit the offence and the money, benefits or products obtained directly: and, on the other hand, those provided for in the Consumer Code, which consist in removing and destroying the goods.

Despite this distinction, it is also important to note that, in urgent cases, in view of the entry into force of the LTSF, article 57.1*f*) the law authorises inspectors to adopt the relevant provisional measures needed which must be subsequently ratified by the competent authorities in accordance with the initiation of the proceedings.

4.2.1 The intervention and capturing of the instruments used to commit the offence and the money, profits or products obtained directly

Article 47.1 of the OLPCS provides for the intervention and precautionary confiscation of the instruments used to commit the offence and the money, profits or products obtained directly, which shall be kept in the deposits reserved for this purpose or under the custody of the law enforcement authorities while the sanctioning procedure is under way, or until their return is authorised or an issue is made for their confiscation. The adoption of this measure represents an essential mechanism in order to stop the continuation of the administrative offence described in article 37.7 of the OLPCS, which consists in the occupation of the public highway to carry out unauthorised street vending. If the goods are confiscated, then measures have been taken to prevent the sale of the goods either on the same day or during subsequent days. Despite this, and as a result of the enormous capacity of those who work in this context to adapt to the circumstances, unlike

of payment from the supplier, stating at least the personal or legal and fiscal identity of the supplier, along with their address, the quantity paid, the item or service paid for and the date paid.

35 Royal decree 928/1987, of 5 July, related to labelling on textile composition and (EU) Regulation no. 1007/2011 of the European Parliament and the Council, of 27 September 2011, on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council.

36 Royal Decree 1718/1995, of 27 October, regulating the labelling of materials used in the main components of footwear. Article 8.1 of the regulations highlights that it is the retailer's responsibility to ensure that there is labelling on the footwear sold, and that it corresponds to that established by the Royal Decree.

37 González Pérez, Jesús; González Navarro, Francisco. *Comentarios a la Ley de régimen jurídico de las administraciones públicas y procedimiento administrativo común*. 4th ed. Cizur Menor: Aranzadi, 2007, p. 1915-1916. ISBN 978-84-470-2786-6.

in the early days of the phenomenon, ‘top manta’ vendors tend to be the owners of the products sold. This fact poses problems in relation to public order such as those presented in different coastal towns where law enforcement authorities have tried to confiscate the products and been met with violence from the vendors.[38] As a result, although confiscating the goods is an effective tool, on many occasions it cannot be done due to the lack of sufficient law enforcement officers.

4.2.2 The confiscation of goods and their destruction

On the grounds of urgency, section 7 of article 323-1 of the CCC authorises inspectors to adopt the precautionary measures established in the Consumer Code, issuing an explanatory inspection report. Regarding the withdrawal of the goods from the market, if we take the legislation literally, it talks of ‘forcing their withdrawal’ and not of ‘withdrawing them’. However, we understand that the withdrawal carried out directly by the Administrative body through inspectors is feasible given that, among other reasons, the same article provides for the adoption of other measures which are complementary to those mentioned previously in order to guarantee their effectiveness. Moreover, it is important to link this authorisation with the duty attributed to public administrations by article 122-8 of the Consumer Code: the adoption of the appropriate measures to detect and withdraw goods with unacceptable risks for consumer health or safety from the market. As discussed previously, the products sold in ‘top manta’ contexts represent an unacceptable risk to consumer safety. Therefore, public administrations have a duty to adopt suitable measures to ensure the withdrawal of the products destined for sale in this way from the market. One of the consequences of this duty is the need to adopt the expeditious measures provided for in the Law on the protection of consumer rights, among which we find the withdrawal of products from the market. In favour of this option, we also find the provisions of the new legal regime of provisional measures established in Law 39/2015, of 1 October, on the common administrative procedure of public administrations. Among the precautionary measures provided for in Article 56.3.*e*) of this law, we find the deposit, retention or immobilisation of movable goods, and letter *i)* of the same precept stipulates other measures deemed necessary to ensure the effectiveness of the decision.

With regards to the destruction of goods as an expeditious measure, we understand that this would not be pertinent at this procedural stage in accordance with the principles of proportionality and least hardship inspired by the adoption of precautionary measures.[39] Withdrawing goods from the market *ad cautelam* helps to ensure that goods posing a risk to consumers are not put back on the market. In our judgement, no grounds of urgency exist to justify the destruction of goods at this stage of the procedure. Furthermore, once the goods have been withdrawn from the market, there is nothing to say that the final decision of the procedure will not order their destruction under article 333-4 of the CCC as an ancillary penalty, with all the guarantees provided by the sanctioning procedure to the interested parties, among which we find the possibility of making a claim against and providing any evidence deemed relevant in defence of their rights, which are not provided for in the adoption of expeditious measures.

Unlike the previous expeditious measure provided for in the OLPCS, the Consumer Code demands more caution when adopting such measures. In the first place, it stipulates the existence of sufficient grounds of urgency. Regarding the withdrawal of goods from the market, the urgency could be justified by *periculum in mora*. If the goods are not withdrawn at that time, it will be difficult to secure their withdrawal subsequently, since the goods destined for sale will no longer be owned by the offender. In the second place, these measures must be confirmed, modified or revoked in accordance with the competent authority in the briefest period possible, and no later than 15 days after their adoption. Otherwise, they become ineffective. The person being inspected must be notified of this agreement.

38 The following news reports can be consulted in this respect:

http://delcamp.cat/baixpenedesdiari/noticia/1001/una-trentena-de-manters-intenten-agredir-dos-mossos-de-paisa-a-coma-ruga-
http://www.ara.cat/societat/caosplaca_catalunyaenfrontamentguardia_urbanamanters_0_1424257756.html

39 Section six of article 323-1 of the CCC stipulates that precautionary measures must be proportionate to the gravity of the irregularities detected and must not restrict the free circulation of merchandise and freedom of enterprise whenever possible.

4.3 Provisional measures

With the same objective as expeditious measures, provisional measures also carry the same policy measures, in the sense that they aim to put a stop to the illegal activity, preventing its continuation in order to preserve the breached legal order.[40] They are different from expeditious measures insofar as they require the prior decision of a competent authority and cannot be adopted by authorised officers unless they are imposed within the framework of a prior administrative act. The omission of this requirement could result in a challenge being presented in the Contentious Administrative Courts in accordance with article 30 of Law 29/1998, of 13 July, regulating contentious administrative jurisdiction. They can be agreed once a procedure has been initiated by a competent authority to resolve the case or prior to its initiation in urgent cases that cannot be postponed and for the provisional protection of the interests involved.[41] In this latter case, the provisional measures must be confirmed, modified or revoked in the agreement to initiate proceedings, which should be adopted within 15 days after the decision. Otherwise, the measures will be deemed ineffective.

We shall limit ourselves to naming the provisions that sectoral legislation establishes to this effect, since the effectiveness of these measures is non-existent in the case of 'top manta': i.e. they become difficult or impossible to execute since the goods in question cannot be found. Neither shall we study each specific measure here, since these have already been analysed in the discussion of expeditious measures or ancillary penalties.

Article 49.1 of the OLPCS stipulates the adoption of provisional measures by the competent authority in order to resolve the procedure once the case has been opened as a result of a reasoned agreement, in order to ensure the effective resolution of the case, the effective completion of the procedure, to prevent the continuation of the offence, or to preserve the safety of citizens, although these measures should not be considered sanctioning measures under any circumstances. The same precept details which measures can be adopted, among which we find the safe depositing of the instruments or goods used to commit the offence. This article thus provides for the possible depositing of the products sold in the context of unauthorised street vending once a case has been opened through the corresponding decision of a competent body. Nevertheless, the adoption of this measure turns out to be fruitless since the goods cannot be located, given that they are no longer in the vendor's possession due to the time that has passed since the offence was committed and the execution of the agreement to adopt the precautionary measures.

On the other hand, section 2.*b)* of article 323-1 of the CCC describes precautionary measures as the immobilisation of goods, the duty to withdraw them from the market and to destroy them in appropriate conditions, if applicable. In addition, it stipulates the option of adopting other ancillary measures to guarantee the efficacy of the previous measures. The discussion carried out in the previous paragraph about the effectiveness of the measures adopted is equally applicable in this case.

Finally, it is important to highlight that article 70 of the LTSF also stipulates the option of adopting provisional measures in order to ensure the efficacy of the final ruling brought. Nevertheless, the content of the precept does not offer anything new to the regulations on precautionary measures established by Law 39/2015, of 1 October, on the common administrative procedure of public administrations.

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40 Tardío Pato, José Antonio. 'Las medidas provisionales en el procedimiento administrativo'. *Revista Jurídica de Navarra* [Pamplona: Gobierno de Navarra], no. 38 (2004), page 118 states that: 'This is how this was understood by the Supreme Court Ruling (STS) on 14 September 1987 (Case law (RJ) 1987\6006), judging the case of the imposition of provisional measures consisting in a declaration demanding the cessation of the activity, the confiscation and administrative intervention of the elements at play and the sealing of the premises used by the trading entity that promoted, sold and distributed the coupons and tickets, within the framework of the corresponding sanctioning procedures, since the Ruling indicated that "the provisional measure not only ensures the achievement and content of the final ruling, but also prevents an illegitimate action from being carried out." On similar lines, the STS of 24 May 1994 (RJ 1994\4317) indicates that the precautionary measure of intervening and withdrawing the game material found in the organisation's club was carried out to stop the continuation of the illegal gaming activity being practised there. And the STS of 27 July 1999 (RJ 2000\10103, 4th Legal Grounds) indicates that "the objective of the precautionary measure is to preserve the legal good or goods protected by the procedure".'

41 Article 56.1, of 1 October, on the common administrative procedure of public administrations highlights that once a procedure has been initiated, and in order to resolve the procedure, the competent authority may adopt any provisional measures deemed appropriate, either on the application of a party or on its own initiative, to ensure the effectiveness of the decision that may be brought, if there are substantial grounds and in line with the principles of proportionality, effectiveness and least hardship.

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