

Spanish Competition Commission's power of inspection under the microscope: judgment of the National Court of 30 September 2009, *Stanpa*

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This judgment assessed the legality of the dawn raids carried out by the Spanish Competition Commission (CNC) in the professional hairdressing sector in 2008 in relation to alleged price-fixing and other anti-competitive practices. The appeal was launched before the National Court by the Spanish Cosmetic Toiletry and Perfumery Association (*Stanpa*) after inspections at its premises in Madrid and Barcelona on 19 June 2008.

The appellant claimed that during the inspections the CNC gathered data unrelated to the hairdressing sector and therefore, exceeded the scope of the inspection order. Apparently, the CNC took copies of the hard drives of *Stanpa* employees which contained information on other sectors such as pharmaceuticals and cosmetics as well as private information belonging to the employees and correspondence with an external EU legal counsel. The appellant sought to annul the inspections based on a breach of the Constitutional fundamental rights of employees' privacy, attorney-client privilege as well as the inviolability of the domicile of the undertaking concerned. The Court found that the CNC had exceeded its powers in taking copies of the hard drives of company employees and that therefore, the Constitutional principle of the inviolability of the domicile, enshrined in Article 18(2) of the Spanish Constitution, had been violated. The appellant's arguments relating to the "fruit of the prohibited tree" were dismissed and the Court declared that only the documents that were unrelated to the scope of the inspection order were to be

considered unlawful and that therefore the remaining documentation gathered during the inspection was not contrary to law. On this basis the Court ordered the restitution to the appellant of all the documents unrelated to the scope of the investigation but not those that fell within the scope of the inspection order.

The Court also clarified that companies subject to a dawn raid have access to the search criteria used by the CNC to recover information in computer hard drives. During the inspections, the CNC denied access to the search criteria arguing that it was confidential and therefore not accessible to the parties subject to the inspection.

Regarding the attorney-client privilege argument, the Court stated that this is not a Constitutional right as such but is part of the broader principle contained in Article 24 of the Spanish Constitution which provides for the right to a defence. The Court argued that in order to adduce a breach of the right of defence it is necessary that the CNC uses the privileged information against *Stanpa* and, since this has not occurred in this case, there has been no breach of the right to defence.

Regarding the breach of employees' privacy rights, the Court considered that the taking of personal documents by the CNC did not amount to a breach of these specific rights as established in Articles 18(1) and 18(3) of the Spanish Constitution but was, in part, a breach of the principle of the inviolability of the domicile contained in Article 18(2) of the Spanish Constitution.



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Finally, it must be noted that one of the Court members, Jose Maria del Riego Valledor, was not in agreement with the Court and issued a dissenting opinion ("*voto particular*"). In this he stated that the Court should have dismissed in its entirety the appeal and upheld the practices of the CNC during the inspections. This dissenting opinion is not legally binding and only states the different view of one of the four members of the Court.

This ruling is very innovative as it touches upon a topic which has hardly been raised before in the Spanish courts. It is also an important judgment as it sets certain limits that the CNC has to respect during the inspections. Both aspects are very positive. Companies consider that the law is not appropriately applied demonstrating the confidence to obtain guidance from the courts and the courts have also demonstrated that they are ready to rule on these issues. While one could argue that this judgment is limited as some questions are not sufficiently clear, e.g. client-attorney privilege, it should be seen as the first of many that will contribute to the clarification of the CNC's powers during inspections. The introduction of the leniency system in Spain, will certainly lead to further dawn raids being undertaken by the CNC, and subsequent litigation before the courts challenging their legality. The judgments that follow will significantly clarify the powers of the CNC in this regard, reassuring both official and companies embroiled in a dawn raid.

The judgment has been appealed to the Spanish Supreme Court.

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