

The Supreme Court partially revokes the High Court's judgment in the STANPA case, and confirms the full powers of the CNC during dawn raids

The Supreme Court has declared that the protection of free competition and the need to avoid obstacles that hinder the dawn raids carried out by the Spanish Competition Authority ("CNC") in suspected cartel cases prevails vis-à-vis the fundamental right to inviolability of the home.

Background

In June 2008, the CNC carried out dawn raids at the premises of nine companies active in the cosmetics and perfume sector, as well as at the National Cosmetics and Perfume Association ("STANPA"), suspecting possible agreements on joint commercial policies and price fixing, which are potential infringements of Article 1 of the Spanish Competition Act ("LDC").¹

STANPA and two of the companies investigated submitted appeals to the Council of the CNC, alleging that the Investigation Division had exceeded its powers during the dawn raids, appeals which were rejected by Resolutions of the Council that were subsequently appealed before the Spanish High Court.

While the High Court recognized the existence of limits to the investigative powers of the CNC, and stated that the right to inviolability of the home had been infringed because the inspection had exceeded the scope of the inspection authorisation,² the Supreme Court has recently rejected such an interpretation.³

Key issues

- Background
- Analysis
 - 1. Inviolability of the home
 - 2. Confidentiality of communications between lawyer and client
 - 3. Right to privacy of employee communications
- Conclusion

¹ Law 15/2007, of 3 July.

² Judgment of 30 September 2009. [See Clifford Chance Client Briefing of November 2009.](#)

³ Judgment of 27 April 2012.

Analysis

STANPA and the two appealing companies claimed before the High Court that the inspection by the CNC had infringed (i) their right to inviolability of the home, (ii) the legal privilege of communication between lawyer and client, and (iii) the right to privacy and the secrecy of employee communications.

The High Court judgment rejected the second and third claims, however it partially allowed the appeal, admitting that the CNC had infringed the STANPA's rights to inviolability of the home when collecting information without distinguishing between documents that were related to scope of the investigation and documents that were not.

However, the Judgment of the Supreme Court now denies the existence of such an infringement of the right to inviolability of the home, considering that the limiting of the investigative powers of the CNC as outlined by the High Court is not in line with the established European case law.

1. Inviolability of the home

The impossibility of distinguishing between the documents belonging to the objective scope of the investigation and those that do not, as well the difficulties derived from examining the sheer volume of information obtained in situ, were the reasons provided by the CNC to justify the seizing of copies of all the documents that the inspectors considered were relevant to the investigation after having applied their search criteria.

However, the High Court Judgment that was subsequently appealed, considered that said seizure exceeded the scope of the inspection authorisation granted to the CNC and that, therefore, it infringed the right to inviolability of the home provided for in Article 18.2 of the Spanish Constitution.

In its recent Judgment, the Supreme Court, rejects this interpretation by the High Court and denies that the right to inviolability of the home was infringed, as it considered that the protection of free competition and the need to avoid obstacles which may unjustifiably prevent the CNC from investigating must prevail over said right, thereby recognising the full investigative powers of the administrative authority. The Supreme court cited the *Dow Chemical* Judgment of the European Court of Justice ("ECJ")⁴ in support of its position, according to which the competition authority has to be able to search for all the necessary information that is not yet known or fully identified, without the authority being previously required to precisely identify the documents it wishes to have access to.

2. Confidentiality of communications between lawyer and client

As for the claim regarding the confidentiality of communication between lawyers and their clients, both the High Court and the Supreme Court rejected the notion that the seizing of documents protected by legal professional privilege (in this case, a report by a law firm regarding, precisely, the possible competition law risks resulting from the exchanges of information carried out within STANPA) was in itself an infringement of the appellant's rights of defence within the meaning of Article 24 of the Spanish Constitution. Yet the arguments put forward in support of this rejection by both courts were markedly different.

⁴ Judgment of 17 October 1989, Joined Cases 97 to 99/87 (paragraph 24).

The High Court, in its judgment of 30 September 2009, going further than the EU case law in this area,⁵ considered that the fact that the CNC did not use the information protected by legal professional privilege seized by inspectors, precluded the existence of any material lack of legal defence, whereas, according to the ECJ and the European Commission practice, in principle, inspectors cannot even seize a confidential document protected by legal professional privilege.

For its part, the Supreme Court finds that the protection of the confidentiality of the lawyer-client communications had not been breached because at no time during the course of the dawn raid was the protection of the particular communication in question invoked, nor was any evidence identified or produced, within the 10 days allowed for this purpose, to prove that some of the documents seized showed features that would allow their confidentiality, for the purposes of legal professional privilege, to be recognised.

Accordingly, considering the reasoning of the Supreme Court, it follows that, whoever claims the protection of the confidentiality of legally privileged information, bears the burden of invoking and claiming said protection and of identifying each of the documents protected by legal professional privilege in an individualised and motivated manner at the appropriate time. It could be inferred from the stance of the Supreme Court that, should the protection of the legal professional privilege of the seized documents have been invoked, the alleged infringement of STANPA's rights of defence would have been recognised, thus contradicting the aforementioned "use theory" put forward by the High Court, although the Supreme Court did not expressly state this.

3. Right to privacy and the secrecy of employee communications

The third ground for appeal provided by STANPA to challenge the Resolutions of the CNC was the violation of the right to privacy and the secrecy of the communications of its employees, established in Articles 18.1 and 3 of the Spanish Constitution, as a result of the seizure by the CNC of personal documents and emails.

The High Court concluded that such an infringement had to be subsumed into the violation of the right to inviolability of the home and not be considered independently, since the scope of the CNC's investigation did not extend to the seizure of personal documents of the employees. The Supreme Court, on the other hand, did not expressly adopt a stance on this issue, which could lead to the interpretation that, insofar as it denies the existence of a violation of the inviolability of the home, it also dismisses the existence of an infringement of these other rights.

Conclusion

Although the High Court seemed to have put some limits on the investigative abilities of the CNC, the recent Supreme Court judgment removes such limits and recognises the full powers of the CNC regarding the possibility of taking copies of documents without discriminating between those included in the scope of the investigation and those excluded. The Supreme Court seems to interpret the ECJ *Dow Chemical* Judgment to an extent contrary to its spirit, because in that case the ECJ recognised the European Commission's obligation to identify the object and purpose of the dawn raid, which implies that the search for documents cannot be

⁵ Judgment of the ECJ of 18 May 1982 in Case 155/79, *AM&S Europe Limited v. Commission*; Judgment of the General Court of 17 September 2007 in Joined Cases T-125/2003 and T-253/2003, *Akzo Nobel Chemical LTD. Akros Chemical LTD v. Commission*.

indiscriminate. Nevertheless, by overturning the High Court Judgment, the Supreme Court seems to allow for the seizing of documents that fall outside the scope of the inspection.

As for the legal professional privilege, the Supreme Court has considered, based on the criteria established by EU case law, that there was no infringement of the rights of defence, since no claims were made in relation to the need to protect the confidentiality of the documents in question neither when the documents were seized in the presence of an in-house lawyer nor within the 10 days allotted for this purpose. While the Supreme Court does not refer to the "use theory" which the High Court based its Judgment on, it cannot be excluded that, contrary to this "use theory", the Supreme Court Judgment may be interpreted as recognising that legally privileged documents are impossible to access, as long as the privileged nature of these communications are claimed in a motivated manner during the inspection or at a later point in time.

In conclusion, it is indispensable for the company's lawyer (whether internal or external) to supervise the actions of the inspectors during the inspection with the utmost care, and to exhaustively analyse the seized documents in order to identify documents that fall outside the scope of the inspection and are protected by legal professional privilege and, if applicable, reflect, in a motivated manner, the probable existence of both types of documents in the inspection report.

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