

Spanish Supreme Court annuls authority dawn raid

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The scope of a dawn raid order that Spain's antitrust enforcer used to obtain documents was too broad, the country's Supreme Court has ruled in annulling an infringement decision.

In a [judgment](#) handed down late last month, Spain's Supreme Court said the National Commission of Markets and Competition had seized documents not related to the initial scope of its dawn raid. The court also held the authority could not rely on the argument that it discovered the documents by chance or in an unforeseen manner.

The CNMC discovered the documents because it was seeking them under an order that was too broad, the court said.

The Spanish authority raided Isma in 2012 on suspicion that the waste collection company participated in anticompetitive agreements in the market for sanitary waste collection. The authority's dawn raid order said its raid concerned sanitary waste and "other types of waste". During the inspection, the enforcer discovered evidence of a paper collection agreement concerning consortium Unión de Empresas de Recuperación (UdER), of which Isma was part. The authority fined UdER and its members €3.8 million for anticompetitive agreements. However, the consortium argued the authority could not rely on the documents it seized from Isma, as the scope of its dawn raid was too broad. It also defended itself as enhancing competition in the paper collection market.

UdER was made up of regional Spanish companies, which collected discarded paper and cardboard from major retailers and resold them to paper makers. The consortium was needed to compete with the dominant player in the market, SAIC, and allowed members to pool resources to which they otherwise would not have had access, UdER argued.

In 2017, the consortium appealed against the CNMC's decision to the High Court, on the

grounds the enforcer's theory of harm was incorrect and its dawn raid was invalid. The court backed the authority's theory of harm and ruled that the evidence collected during the dawn raid amounted to a "random finding".

The competition authority argued that the documents seized were permitted under the order and the materials it collected showed illegal conduct. Its order met the required legal requirements, the CNMC said, and its discovery falls under the doctrine of "random finding".

Under Spanish law, if a dawn raid is sufficiently defined and an authority fortuitously discovers illegal conduct outside the scope of its investigation, those documents can form the basis for an infringement decision.

The authority also disputed arguments that the consortium's conduct was procompetitive or necessary to compete with SAIC, claiming that Uder had caused prices to increase.

However, in its judgment on 26 February, the Supreme Court relied on its previous caselaw and held that the authority's original dawn raid order was too vague and generic. The order was too broad as it referred to "other types of waste" and was not proportionate to the initial scope of the dawn raid, the court said.

It rejected the authority's "casual finding" argument, as only a well-drafted and sufficiently precise dawn raid order can rely on this legal doctrine, the court said. As the dawn raid was invalid, the court said it did not need to rule on the authority's theory of harm.

Pedro Callol, a partner at Callol Coca & Asociados and counsel to Uder, said fishing expeditions are forbidden and the CNMC's mistake was to include "other types of waste collection" in its dawn raid order. The authority has had to refine its dawn raid practices in light of recent Supreme Court rulings and must be careful to restrict its wording of such orders, he said.

In January, Spain's Supreme Court [upheld](#) a decision annulling €120 million fines on Orange, Vodafone and Telefónica; while Spain's National Court [annulled](#) €57 million fines on 17 cardboard and paper makers.

It is a shame the Supreme Court did not rule on the substantive effects of the conduct, Callol said, as he would have liked to think Uder would have prevailed in its arguments that the agreements were about enabling more competition.

Tomás Arranz at Uría Menéndez also said the Supreme Court's reasoning on fortuitous discovery in this case aligns with its recent rulings. The court has made it clear that the authority needs to correctly define the scope of the inspection when it carries out a dawn raid, he said, and the fortuitous discovery concept cannot fix an overly broad dawn raid order.

"The standard currently applied by the CNMC is stricter in response to these recent judgments of the Supreme Court," Arranz said.

Iñigo Igartua Arregui at Gómez-Acebo & Pombo said the judgement shows that for the CNMC to be shielded by the "casual finding" doctrine, the discovery must be truly casual and not guided by "vague illegal terms" contained in the order.

The CNMC did not respond to request for comment.

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