

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Treatment of legally privileged information in competition proceedings – Note by  
Spain****26 November 2018**

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## Spain

### 1. Introduction

1. The powers of inspection of the Spain's Commission for Markets and Competition (CNMC) as Competition Authority (CA) are aimed at the effective performance of the functions that are proper to it, that is, to preserve, guarantee and promote the existence of effective competition, once the need to access the premises of the undertaking<sup>1</sup> subject to investigation has been assessed, in order to obtain possible files and relevant data to the possible infringement under investigation. It is not necessary to emphasize the relevant role played by dawn raids for the effective development of the functions of a CA. It is mainly in that context that privileged information issues arise.

2. In this contribution we will describe the main features of the Spanish treatment of privileged information in competition proceedings, indicating the legal framework and scope of legal professional privilege (section II) and our practical experience concerning privileged information (section III).

### 2. Legal framework and scope of legal professional privilege (LPP)

3. According to the Spanish legal framework, there is no express regulation or definition on privileged documents or communications, although external lawyer-client communications confidentiality is considered because of the fundamental right of defence that is guaranteed by the Constitution in Article 24. This constitutional precept (Article 24) provides:

*"2. [...] everyone has the right to the ordinary judge predetermined by the Law, to the defence and the assistance of a lawyer, to be informed of the accusation made against them, to a public process without undue delay and with all the guarantees, to use the means of evidence relevant to their defence, not to testify against themselves, not to confess guilt and the presumption of innocence."*

4. Moreover, specifically, the National Court (ruling of May 26, 2015, rec. 175/2013) has pointed out<sup>2</sup>:

*"[...] the confidentiality of lawyer-client relations is not a fundamental right because nothing enshrines the Constitution in this regard, but it is an integral element of the right of defence contained in article 24 of the Constitutional Text".*

5. So, although there is no definition of legal privilege protection under Spanish law, this Article 24 guarantees external lawyer-client confidentiality relationships, as a manifestation of the right to effective judicial protection, and this right cannot be violated by the inspection proceedings carried out by CNMC.

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<sup>1</sup> In this note, the term "undertaking" includes both undertakings and associations of undertakings.

<sup>2</sup> All the judgments quoted in this contribution are available in Spanish on the Judicial Power website <http://www.poderjudicial.es/search/indexAN.jsp> and on the CNMC website ([www.cnmc.es](http://www.cnmc.es)), linked to the connected case.

### 3. Scope of legal professional privilege

6. It is essential to differentiate between professional secrecy and confidentiality of lawyer-client communications. The Spanish Constitutional Court has declared that the right to professional secrecy is only invoked by the defence lawyer who would be the owner of that right, and not by the plaintiff on whom it only produces merely reflexive effects and lacks the legitimacy to claim under a fundamental right that is alien to it<sup>3</sup>. And the Spanish Law 6/1985, of the Judicial Power, regulates professional secrecy as a right-duty of the lawyer, not of his client ("Lawyers must keep secret all the facts or news they know by reason of any of the modalities of their professional performance, not being able to be forced to declare on them", article 437.2). Confidentiality or professional secrecy is regulated in detail in the General Statute of Spanish Lawyers<sup>4</sup>, and the Code of Conduct for Spanish Lawyers, approved by the General Council of Spanish Lawyers. Confidentiality and breach of confidentiality are monitored by the local bar associations, which control that professional secrecy is respected. Spanish in-house lawyers have the same obligations and rights as lawyers in private practice (independent legal counsels) regarding professional secrecy. However, Spanish national jurisprudence on the confidentiality of external lawyer-client communications follows, logically, the jurisprudence of the Courts of the European Union on that issue.

7. In this contribution, only the topic of the confidentiality of external lawyer-client communications (that is, privileged information in competition cases) will be analysed, for the purposes of the constitutional right of defence of the inspected undertaking protected by Article 24 of the Constitution, and not issues related to professional secrecy as a duty and right of lawyers.

8. Spanish case law shows that legal privilege is restricted to external lawyer-client communications that could affect the right of defence of the undertaking in an investigation. Therefore, the documentation prepared by internal lawyers of the undertakings can be seized and used as evidence by the CA.

9. As indicated by the National Court (and confirmed by the Supreme Court)<sup>5</sup>:

*"The protection must be given both to correspondence between the client and his external lawyer for the purpose of preparing his legal defence, as well as the preparatory notes prepared by the company with the specific objective of facilitating the defence." [unofficial translation]*

10. Regarding the internal communications between managers and administrators of the undertaking related to issues within the object of the investigation, which have not been transferred to an external lawyer in order to request their legal advice, they are not covered by such legal privilege and its seizure during the dawn raids and its incorporation into the administrative file is perfectly appropriate.

11. Referring to the EU case law (Akzo), the National Court states that it is not enough, to avail itself of the LPP exception, to obtain pre-existing documents from the undertaking

<sup>3</sup> Constitutional Court rulings numbers 141/1985, 11/1992 and 183/1994.

<sup>4</sup> Articles 32 and 42 of the General Statute of Spanish Lawyers, approved by Royal Decree 658/2001, of June 22.

<sup>5</sup> Judgments of the National Court of November 19, 2014 (rec. 1/2014) and of May 16, 2018 (rec. 345/2016).

even if they were discussed with a lawyer. The Spanish Courts have indicated that the decisive element to qualify for the exception is the proof of the express creation of the document to request legal advice from an external lawyer in the exercise of the right of defence, which implies the precise identification of the content of the document prepared for that purpose, following the jurisprudence of the Courts of the Union on that issue, with citations mainly to the Judgment of the Court of First Instance of the European Communities of September 17, 2007 (CJEC 2007, 375, Case T-253/03, Akzo, paragraphs 76 et seq.) and the judgment of the Court of Justice of 18 May 1982 (AM & S vs Commission, 155/79). It is worth noting that the National Court has specified that statements of internal order of a State cannot invalidate the existence of a European concept of confidentiality of communications between external lawyer and client within the Competition EU Framework, because national particularisms that limit the scope and effectiveness of that EU concept cannot be admitted<sup>6</sup>. Also, in a recent judgment (May 16, 2018, rec. 345/2016), the National Court stated “*the cited document is not protected by the client-attorney confidentiality, since it is not about communication with an external lawyer and the document has not been drafted in order to seek advice from an external lawyer*” [unofficial translation].

12. So, according to the Spanish case law, the privilege is limited to communications with independent/external legal counsel, and therefore communications with in-house counsel are not protected. Therefore, CNMC is prohibited from accessing communications between external lawyers (independent legal counsel) and the company's staff, if they are drafted to protect the client's rights of defence. The undertaking, for its part, must provide useful elements that justify that the documents affected deserve legal protection. It follows the consolidated doctrine at European level that this protection does not operate automatically and that requires active and diligent behaviour of the inspected undertaking. As indicated by the Supreme Court, that burden imposed on whoever claims the protection of the confidentiality of external lawyer-client communications, is aimed at preventing that the mere invocation of the privilege may be an unjustified obstacle to the powers recognized in the legal system to ensure that the protection of the free game of the competition reaches the due levels of effectiveness<sup>7</sup>.

13. Taking into account the above-mentioned points, in dawn raids carried out by the CNMC, detailed procedures are in place, first, to detect that privilege information and, second, once it is probed that information is really related to communications between an external lawyer and the undertaking, it is not seized during the dawn raid. The Spanish Supreme Court has confirmed this procedure, stating the following<sup>8</sup>:

*"To maintain that a simple access to a supposedly confidential document constitutes in itself a violation of the right of defense would lead to the absurdity of making silence more favourable than diligence. To merely invoke the privilege of the external attorney-client communication cannot become a cause of cancellation*

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<sup>6</sup> Judgment of the National Court of November 19, 2014 (rec. 1/2014).

<sup>7</sup> The initial mention of this doctrine by the Spanish courts takes place through the judgment of the National Court of March 2, 2011 (rec. 1/2010). The Supreme Court rulings of April 22 and July 9, 2012 (STANPA) reaffirms the need for the identification of the documents benefited by the legal privilege. Also insisting on the burden of the company to provide the reasons for which the documents indicated are inscribed in the communications external lawyer-client, Supreme Court Judgment of September 21, 2015 (rec. 2595/2014).

<sup>8</sup> Supreme Court Judgment of September 21, 2015 (BALAT 2).

*of powers that the LDC [Spanish Competition Law] and Law 3/2007 [Act that established the CNMC] attribute to duly authorized inspectors” [unofficial translation].*

14. For this purpose, in particular, the inspection of the offices and computer equipment is done in the presence of the workers or their representatives or, if it were the case, the external lawyers could be during the dawn raid, to guarantee their rights and to facilitate identifying the privileged documentation. Consequently, the collaboration of each inspected employee within the inspected undertaking is requested for the identification of those documents that could be protected by the confidentiality of the external lawyer-client communications (as well as for the location or identification of documents that could be related to the privacy of the person inspected) and such request and the response given by the undertaking is reflected in the official summary record or minutes signed at the end of the dawn raid. In fact, the undertaking as the one with the best knowledge of the existing documentation within their premises and computers should indicate to the inspection team that condition of external lawyer-client communication of certain documentation at any time during the inspection. Besides, at the request of the undertaking inspected, the names of external legal counsels and law firms of that undertaking are used as keywords within the electronic data selection process to avoid seizure potentially privileged information.

15. In addition to these precautions taken during the inspections, procedural mechanisms to guarantee the protection of potentially privileged information have been arbitrated to resolve possible discrepancies generated in the framework of a dawn raid between the CNMC’s inspectors and the inspected undertaking. Therefore, the inspectors are enabled to make a brief glance of the information that is alleged by the undertaking to be protected by legal privilege. Indeed, when that potentially privileged information is detected and there is no agreement between the inspection team and the undertaking about its confidentiality, this information is sealed and the controversy is deferred to the CNMC legal services. If this controversy remains, the undertaking is able to submit or appeal this controversy to the Courts to decide about the privileged character or not of that information, without the CNMC having access to it until then.

16. This procedure has been rarely used in practice and when it has taken place, the National Court and the Supreme Court have confirmed the controversial information was not covered by such legal privilege and, therefore, its seizure was appropriate during the dawn raid and it can be incorporated into the administrative file. In that case, the National Court resolved the controversial information constituted internal communications between managers and administrators of the undertaking in electronic format and handwritten notes, exchanging information on issues related to the object of the investigation, but without mentioning elements that allowed to conclude that they were prepared to transfer them to an external lawyer in order to request their advice<sup>9</sup>. The Supreme Court upheld this decision<sup>10</sup>.

17. Additionally, with regard to information requests made by the CNMC to the undertakings under investigation, those compulsory requests are carefully designed to avoid any legal privilege and confidentiality issue. Specifically, the requests include questions for the undertakings to provide data and information, not legal assessments or statements about their possible involvement in the conduct. Thus, information requirements

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<sup>9</sup> Judgment of the National Court of November 19, 2014.

<sup>10</sup> Judgment of the Supreme Court of July 4<sup>th</sup>, 2016.

typically refer to the corporate purpose, structure of ownership and control, organization chart and identification of their management positions, activities in the affected market or public reports on the referred market.