



Some tips in case of dawn raid by the Spanish Competition Authority

Judgements of the Supreme Court of 25 and 26 February 2019 regarding the “incidental finding” doctrine

“Incidental finding” doctrine

During dawn raids, the Spanish Competition Authority (CNMC) is entitled to investigate any document that is related to the object and purpose of the investigation. However, what happens if during a dawn raid the CNMC finds evidence regarding a potential anti-competitive practice different from the one that is being investigated? Is the CNMC entitled to use such evidence to start a different investigation? The Supreme Court gives answer to these questions using the “incidental finding” doctrine.

In these cases, the CNMC carried out dawn raids at the headquarters of several companies in the healthcare waste sector. The object and purpose of such inspections was to verify the existence of a potential anticompetitive practice in the market of *“collection, transport and treatment of waste, both sanitary and any other type of waste”*.

During the inspections, the CNMC found evidence related to the treatment of waste different than healthcare waste. The CNMC intended to use such evidence against the companies using the “incidental finding” doctrine.

The “incidental finding” doctrine applies when, in the course of an inspection with a well-defined and specific purpose, the CNMC incidentally finds incriminating evidence not connected with such purpose. When the “incidental finding” doctrine applies, the CNMC can use such evidence to initiate a new

investigation. If it is not the case and the incidental finding doctrine does not apply, the evidence found cannot be used.

In the judgements, the Supreme Court concluded that the “incidental finding” doctrine did not apply and, therefore, the evidence found could not be used by the CNMC.

The Supreme Court understood that the finding was not incidental because the order was too imprecise and generic.

The Court used the fact that the investigation order was too broad (“any other type of waste”) to conclude that the finding was not casual and that the CNMC was looking for such evidence.

Being prepared pays off

Being prepared for dawn raids is highly recommended. First, it is convenient to keep the documentation and records neatly ordered to avoid that, during a particular investigation, the actions of the CNMC exceed the provisions of the investigation order. Second, it is advisable that the reception staff and those who attend the inspectors are well trained for these situations.

The staff must be aware of and understand the purpose of the inspection and must know that the inspection activities are limited by such purpose.