

Kluwer Competition Law Blog

Employee's mobile phones not safe from dawn raid scrutiny, Spanish court finds

Jaime Rodríguez-Toquero Aymerich, Ivan Pico (Hogan Lovells) · Friday, September 16th, 2016

On 7 April 2016, the CNMC (Spain's National Authority for Markets and Competition) Council imposed fines totalling €6.12 million on six Spanish nougat ("turrón") producers for agreeing to share the market of the main distributors of white label nougat in Spain between 2011 and 2013^[1]. The companies also exchanged strategic information on prices, clients and other commercially sensitive data concerning the nougat market. The investigation was instigated by an anonymous complaint, after which inspections took place at the companies' premises. According to the CNMC, strategic information exchanges were made with the knowledge of senior executives and managers from different business areas of the nougat producers. To that end, the companies attended face-to-face meetings and contacted each other bilaterally by phone. Messages were also exchanged either by email or mobile instant messaging.

One of the companies involved in the cartel, Almendra y Miel SA, which received a fine of €271 893, appealed the investigation order of the CNMC to Spain's High Court (the "Audiencia Nacional") together with one of its employees, Mr Claudio. One of the grounds of appeal was that during the inspection, the CNMC inspectors gathered confidential and private information of Mr Claudio, in particular content stored on his mobile phone, which was irrelevant to the CNMC's investigation and whose access was not authorised by the investigation order. Mr Claudio claimed that the investigation order did not authorise the inspection team to view telephone conversations and graphic documents contained on his mobile phone.

In its judgment of 21 July 2016^[2], the Audiencia Nacional held that first, regarding the general framework of the CNMC's inspection powers, any confidential documents that are unrelated to the activity of the company must be excluded from the scope of the inspection. However, in order to decide whether a particular document is confidential or not, the inspection team has the right to conduct a cursory look at the document in question. This cursory look does not amount to an infringement of the right to privacy, because without such a brief review of the document, an effective inspection would not be possible. This is in line with the *Akzo Nobel and Ackros* judgment, where the Court of First Instance (now the General Court) stated that "*a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them to confirm the accuracy of the reasons invoked by the undertaking and to determine whether the document at issue was confidential, when deciding whether to put it aside*"^[3].

Second, concerning the conduct of the dawn raid by the inspection team, the Court held that the investigation order allowed the inspectors to check physical and electronic agendas of employees. The Audiencia Nacional further clarified that this *also* includes mobile phones. During the dawn raid, the inspectors of the CNMC asked the employees to discard any private documents which they considered to be unrelated to the investigation. According to Mr Claudio, the inspectors proceeded to take his mobile phone without his authorisation and viewed its private content (in particular telephone conversations and photographs in which he appeared naked) in a separate room next to his office without his presence. This claim was not supported by any evidence and there is no mention of this incident in the inspection act signed by Almendra y Miel SA after the completion of the inspection. In addition, the inspection act also indicated that while in Mr Claudio's office and in his presence, the inspectors asked Mr Claudio to identify which documents included private content or were covered by legal professional privilege. Once these documents had been identified by Mr Claudio, the inspectors discarded them and took the remaining ones (including his mobile phone) to a room next to his office where they were reviewed without his presence. Finally, none of the content of his mobile phone was included in the case file. For these reasons, the Audiencia Nacional ruled that the CNMC did not breach the privacy rights of Mr Claudio and dismissed the claim in its entirety.

The present case shows that employees' mobile phones may be examined by the CNMC's inspectors during a dawn raid, in particular when an investigation order allows access to their physical and electronic agendas. However, before such examination takes place, employees and companies will be given the chance to identify which documents/files include private content or are protected by legal professional privilege.

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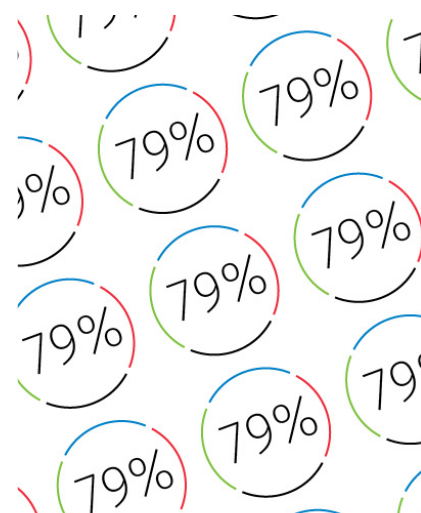
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