

# The Spanish courts and the golden thread: the return of the presumption of innocence?

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Of all the fundamental rights enshrined in the Spanish Constitution, one of the most precious to the competition lawyer is the right to the presumption of innocence provided for in the second paragraph of Article 24.

That right has been repeatedly found, by both the Supreme Court and the Constitutional Court, to require a competition authority, when imposing fines after an administrative investigation, to provide sufficient evidence to prove the existence of the infringement. Moreover, the traditional case law required them to do so ‘beyond a reasonable doubt’, even if, in recent cases, the Courts have appeared to migrate towards the somewhat lesser standard of a ‘firm conviction’ that the infringement took place.

That burden and standard of proof, in turn, is an important threshold for the judicial review of the ever-growing number of decisions imposing antitrust fines.

For the past decade, particularly since the 2013 remodelling of the Spanish Competition Authority and the creation of the current Spanish Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia* or CNMC), much of the caselaw of Spanish Courts has been focused on leniency cases, with abundant evidence or otherwise, and on procedural controversies.

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As a result, there has been limited guidance from the courts on the assessment of the evidence put forward and required to meet the threshold required.

Therefore, while the standard of proof for competition authorities to establish an antitrust infringement was relatively clear, there was limited practical guidance as to the nature and amount of evidence required or the probative value of the evidence often put forward by the competition authorities, including, for example, the interpretation given to internal communications, handwritten notes or even Excel files.

So, it is encouraging and extremely helpful for both practitioners and the competition authorities that in a series of judgments issued in 2021, decisions of the CNMC have not only been annulled, but have been annulled following a thorough review of the evidence. This article aims to describe these cases and their lessons for authorities and future appellants.

### **The Spanish Courts, leniency cases and procedural controversies**

The Audiencia Nacional, the national court responsible for hearing appeals of CNMC decisions, has full jurisdiction in competition cases and can review them on grounds of both law and fact. Indeed, it is in practice the only judicial appraiser of evidence since there is no appeal on questions of fact to the Supreme Court (indeed, since a reform in 2015, appeals to the Supreme Court against Audiencia Nacional rulings are very limited in general).

Over the past decade, however, the caselaw of the Audiencia Nacional has not involved extensive reviews of the evidence used by the CNMC in its decisions. Instead, it has tended to revolve around procedural failings and legal controversies on issues such as the calculation of the fines, the calculation of time limits and the relevance of market definitions.

For example, in September 2017, the Audiencia Nacional upheld most of the appeals brought against the CNMC decision in the *Wooden pallets* case due to a procedural error. Whereas the Competition Directorate of the CNMC had proposed to establish two separate infringements, an information exchange and a price-fixing cartel, the Council of the CNMC fined the companies involved for a single infringement and did so without allowing the affected companies to submit observations to the change of legal qualification, thereby infringing their rights of defence.<sup>2</sup>

In 2018, the Audiencia Nacional annulled a number of cases on the basis that the CNMC exceeded the statutory time-limits for the investigation procedure (the *Cardboard manufacturers* case), without even analysing the legal issues arising from

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<sup>2</sup> Judgment of the Audiencia Nacional of 19 July 2017 (Appeal No 446/2014).

the CNMC decision.<sup>3</sup> Additionally, a large number of CNMC decisions of the past five to ten years have been annulled on the basis of the illegality of the dawn raids and the evidence thereby obtained.

More recently, however, the Audiencia Nacional has had the opportunity to carry out a more detailed review of the legal and factual aspects of cases. In 2018, the Audiencia Nacional's focus seemed to have started shifting towards the substantive legal aspects of cases, with several rulings (including *Waste management*, and later on *Refrigerated transport* and the retry of *Wooden pallets*)<sup>4</sup> assessing the application of the concept of 'single and continuous infringements' and others (including *Car Manufacturers* and *Car Dealerships*) analysing the consideration of information exchanges as 'cartels'.

In the *Waste management* case, the CNMC grouped several alleged infringements by various companies active in different markets related to waste management into a single and continuous infringement. The Audiencia Nacional, however, in a landmark judgment in 2018, annulled the decision by considering that given the factual findings that the companies were active in different affected markets and, as to the type of contacts among them, the CNMC had not correctly reasoned the connection between the different markets and the companies operating in them. On that basis, and without performing an in-depth assessment of the evidence, it concluded that there were no grounds to sustain an overall plan which could be qualified as a single and continuous infringement.<sup>5</sup>

These and other similar cases in recent years have allowed the Audiencia Nacional to build up a large body of case law in relation to procedural and substantive legal issues, which has helped to clarify the scope and limits of the authority's intervention. However, since most of the CNMC decisions were annulled on the basis of procedural or purely legal grounds (such as defects in the inspections, failure to meet the statutory time limits of investigations or the application of the doctrine of single and continuous infringement), the Audiencia Nacional did not need to carry out in-depth reviews of the substantive and evidentiary aspects of the decisions.

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3 Judgment of the Audiencia Nacional of 12 Decembr 2018 (Appeal No 456/2015).

4 Although some of the Audiencia Nacional's rulings annulling the CNMC decision on the basis of a change of legal qualification were confirmed by the Supreme Court, others were sent back to the Audiencia for a second review on the merits, which has confirmed the CNMC decision in different rulings focusing mostly on the legal evaluation of the investigated conduct.

5 Judgment of the Audiencia Nacional of 28 December 2017 (Appeal No 131/2015). The CNMC reopened the investigation on the basis of the exact same facts, but the Audiencia Nacional annulled the decision reopening the proceedings on the basis of the *ne bis in idem* principle. See Judgment of the Audiencia Nacional of 25 March 2018 (Appeal No 2/2018).

## Recent signs of a renewed interest in the evidence

However, a number of decisions in 2021 appear to signal a renewed judicial interest in evidentiary review in competition cases.

The first of these cases is the ruling of the Audiencia Nacional in the *Port of Santander* case.<sup>6</sup> In that judgment, the Audiencia Nacional annulled the fine imposed by the CNMC on an industry association, concluding that there was absolutely no proof that the various elements relied on by the competition authority constituted an overall common plan to restrict competition.

In fact, the ruling established that the CNMC decision contained no description or analysis of the plan, nor even the traces of its existence, nor any indication as to who participated in it, finding that these key elements had all been simply presumed. Indeed, the Audiencia Nacional also considered that the CNMC did not provide any reasoning as to the existence of intent or negligence.

Interestingly, the Audiencia in its judgment recalled the standard of proof set by the case law of the European Union courts, which require a ‘firm, precise and consistent body of evidence’<sup>7</sup> or ‘sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place’,<sup>8</sup> thus laying down the conditions under which the CNMC cases must be reviewed by the Spanish Courts.

This ruling, which was the first adopted in 2021 to annul a decision of the CNMC on the basis of insufficient evidence, marks the starting point of a series of very relevant decisions upholding appeals based on the lack of incriminating evidence. Since then, the recent judgments in the *Cement*, *Nougat* and *Railway Infrastructure* cases appear to confirm an encouraging trend in the Audiencia’s substantive analysis of competition cases.

All three cases are characterised by an in-depth assessment of the evidence put forward by the CNMC to support its theories of harm, from which it is possible to extract some very useful takeaways for practitioners and the authority itself (which clearly needs to improve the reasoning and evidence behind its decisions).

## The *Cement* case: the Audiencia and the interpretation of internal documents

Following unannounced inspections in September 2014 and May 2015, the CNMC opened a formal investigation into several companies active in the cement and

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6 Judgment of the Audiencia Nacional of 29 January 2021 (Appeal No 165/2015).

7 Judgment of the Court of Justice of the European Union, 31 March 1993 (Joined cases C-89/85, C-104/85 and others; *Ahlström Osakeyhtiö*), Rec. p I-1307, para 127.

8 Judgment of the General Court, of 6 July 2000 (Case T-62/98, *Volkswagen*), Rec. p I-2707, para 43.

concrete industry. The proceedings ended in September 2016, when the CNMC issued its decision sanctioning with €29.1m a total of 24 cement and concrete companies (Decision of 5 September 2016 in Case S/0525/14 – *Cementos*).

The CNMC imposed fines for the following conduct: (1) in the concrete market: three alleged single and continuous infringements consisting of exchanges of commercially sensitive information, market-sharing and price-fixing agreements of varying duration (between 1999 and 2014), in three Spanish regions; and (2) in the cement market: an alleged single and continuous infringement between 2013 and 2014 consisting of a market-sharing agreement and an exchange of commercially sensitive information between competitors at national level.

The companies that had been fined filed appeals against the CNMC decision arguing, among others, the inexistence of an anti-competitive practice, and that the investigated conducts did not, in any case, constitute a single and continuous infringement.

In the judgments, rendered at the end of 2020, the Audiencia Nacional annulled the CNMC decision because the CNMC wrongly qualified the investigated conducts as a single and continuous infringement and did not meet the required standard of proof.<sup>9</sup> In this regard, the Audiencia Nacional recalled that, on the basis of settled case law,<sup>10</sup> there are three requirements to find a single and continuous infringement, namely: (1) the existence of an overall plan pursuing a common objective; (2) the intentional contribution of the investigated undertaking to that plan; and (3) the fact that the undertaking has knowledge (proved or presumed) of the infringing conduct of the other participants.

In its rulings, the Audiencia Nacional carried out an individualised assessment of the evidence relied upon by the CNMC to rule out the existence of a preconceived overall plan with a common objective. In that regard, there are interesting takeaways from the Audiencia Nacional's assessment of the different elements used by the CNMC to build its case.

To reinforce the existence of an overall plan, the CNMC had relied on certain expressions included in the documents and emails gathered during the investigation ('gentlemen's agreement', 'board', 'club', 'market sharing', 'prices', 'meetings'). The Audiencia Nacional, however, considered that although it was true that these expressions may constitute evidence of collusive conduct, they do not demonstrate the existence of a common plan pursued by all the accused companies in the same market and geographical area.

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9 Some of the judgments of the Audiencia Nacional were appealed by the CNMC. The Supreme Court inadmitted the appeals due to the lack of cassational interest.

10 Judgment of the General Court of the European Union, of 16 June 2011, case T-211/08, *Putters International NV*; and Judgment of the Court of Justice of the EU, of 8 July 1999, in Case C-49/92 P, *Commission v Anic Partecipazioni*.

The CNMC also interpreted that stand-alone Excel tables and spreadsheets in which the investigated undertakings were mentioned constituted evidence of the existence of that common plan. According to the CNMC decision, these tools were used to allocate customers, follow-up competitors, and monitor compliance with the agreements.

The Audiencia Nacional, however, concluded that these documents do not prove the existence of a common plan underlying a single and continuous infringement because there was no proof of the origin of the data nor the actual use of the documents and there was no evidence that the investigated companies were aware of their existence.

Further, the CNMC had relied on mentions of competitors in some internal e-mails as proof of their participation in the investigated conduct. However, the Audiencia Nacional again found that there was no evidence that the companies referred to in these internal emails had knowledge of the correspondence, let alone of their content, since they were not listed as recipients, senders or copied on the emails. As a result, the CNMC erred in finding that these emails constituted proof of a common objective between all of the companies involved. The Audiencia Nacional ruled that emails of this kind cannot be generally used as incriminating proof of a company's participation in anti-competitive conduct and must be supported with additional evidence that confirms participation.

The Audiencia Nacional also recalled the law on evidentiary proof and states that 'for the evidentiary proof to overcome the barrier of the presumption of innocence, it is required that the indicia are not based on mere suspicions, rumors or conjectures, but fully accredited; and that there is a precise and direct link between the basic facts and one that is to be accredited, according to the rules of human judgment'.

Based on the above, the Audiencia Nacional held that the CNMC 'made an artificial and voluntarist construction of the data obtained in the dawn raids to conclude that the sanctioned companies acted according to a preconceived plan [...] without the support of solid and substantiated evidence'.

### **The *Nougat* case: the Audiencia Nacional and unsubstantiated communications**

In November 2021, the Audiencia Nacional upheld appeals filed against the CNMC decision of 7 April 2016 in Case S/DC/0503/14, *Nougat Manufacturers*, by which it had imposed fines on several companies amounting to €6.2m. The judgments not only represented a further wake-up call for the CNMC about the assessment of the evidence used to charge an anti-competitive practice, but again raised the bar the authority must meet in future cases on exchanges of information.

Following receipt of an anonymous complaint, the CNMC carried out dawn raids in November 2013 at several companies involved in the manufacturing of nougat. Based on the information gathered during the inspections (which included handwritten notes, internal documents, emails and WhatsApp messages), the CNMC initiated a formal investigation that ended with the adoption of the Decision of 7 April 2016.

In the decision, the CNMC concluded that there had been exchanges of strategic information on prices, customers and other commercially sensitive data among the investigated companies with the aim of sharing the market for the supply of private label nougat to large-scale retailers. The decision also held that these actions were carried out by senior managers of the companies, who for the implementation of the agreement, arranged face-to-face meetings, had bilateral contacts by telephone and exchanged e-mails and WhatsApp messages.

On 19 November 2021, the Audiencia Nacional upheld the appeals filed by the nougat manufacturers and annulled the CNMC decision.<sup>11</sup> After again carrying out an in-depth review of the evidence used to build the charges, the Audiencia Nacional considered that the CNMC had not sufficiently proven an anti-competitive exchange of information. Furthermore, the Audiencia Nacional establishes that the CNMC's burden of evidence is higher when the conduct is qualified as a 'single and continuous infringement'. According to the Court, such a qualification required an extra evidentiary effort, since it entails justifying not only the existence of the anti-competitive conduct, but also an overall plan pursuing a common anti-competitive objective, in the terms described by the case law of the Court of Justice of the EU (CJEU).

The Audiencia Nacional considers that the CNMC's decision did not provide sufficient evidence of an exchange of sensitive information, since the data described referred mostly to public information or information that because of its content or date could no longer be considered commercially sensitive.

In this regard, the analysis carried out by the Audiencia Nacional on an evidence-by-evidence basis is particularly useful both for practitioners and the CNMC itself insofar as it allows to extract some grounds of analysis for future exchange of information cases.

- As for an alleged meeting convened by one of the companies, the Audiencia Nacional considered that its anti-competitive nature was not proven; instead, the purpose of the meeting was fully defined as aimed at discussing the substantial modifications of certain technical-sanitary regulations, with absolutely no indication to the contrary.

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<sup>11</sup> Judgments of the Audiencia Nacional of 19 November 2021 (Judgment Nos 4889/2021, 4900/2021, 4895/2021, 4883/2021, 4960/2021 and 4961/2021).



- Regarding invitations to meetings allegedly convened by e-mail, the judgment concluded that there was no evidence that the meetings finally took place, and not even an ‘indicative reference’ of their content.
- In the case of certain bilateral contacts between two manufacturers, which the CNMC evidenced through alleged notes from a third party, the ruling affirmed the need for additional evidence to prove the existence of these contacts. In particular, the ruling stressed that the information provided by a third party could be sufficient grounds to carry out an investigation, but a finding of wrongdoing required other elements that corroborate that the information provided by the third party was true or plausible.
- Regarding certain seized documents, including product references and weights by distribution companies and private labels by competitor and distribution company, as well as an email sent by one of the companies with the prices of several brands at the beginning of the campaign, the Audiencia Nacional considered that the information was not commercially sensitive or company secrets, since it was publicly known at the time it was exchanged.
- Additionally, regarding the WhatsApp messages between the managers of the different companies, the judges concluded that they could not be considered incriminating evidence, either because of its content or because of its date, since it was information transmitted after the signing of the agreements between the nougat manufacturers and the distributors.
- Finally, in relation to some handwritten notes found during the home inspections in one of the companies and which had allegedly been sent by one of their competitors, the decision of the Audiencia Nacional took into account the handwriting report provided by the parties, which showed that they were handwritten documents of the director of the inspected company, thus contradicting the allegations of the CNMC.

### **The rail equipment case: the Audiencia Nacional and second guesses**

Most recently (but hopefully not finally), the Audiencia has issued rulings clarifying the legal test for the evaluation of joint bidding through temporary consortia, annulling a decision of the CNMC on the basis of a lack of sufficient evidence of the anti-competitive object of the joint bid.

The case concerns a decision of 30 June 2016 (Case S/0519/14, *Railway Infrastructures*), by which the CNMC fined four companies and nine executives a total of €5.58m for rigging bids in tenders organised by the state-owned railway infrastructure provider (ADIF). According to the CNMC decision, for 15 years, the companies allocated markets and agreed on prices and other commercial



conditions for the supply of equipment for railway turnouts, and other related products, in public tenders of ADIF.

In particular, the CNMC based its decision on the fact that the companies had persistently used consortiums to make joint offers for tenders during the 15 years of the infringement and then divided the contracts almost equally among them while they could have tendered individually in view of their relevant turnover. For the CNMC, the consortiums did not seem to obey a coherent business and economic logic, and lacked objective justification.

During the administrative procedure, the investigated companies justified the decision to bid in a consortium based on the fact that they could not bid individually, as none of them had all of the patents needed. However, the CNMC dismissed the arguments, considering that it would have been more reasonable for the companies to request cross licenses and bid individually.

The companies appealed the decision before the Audiencia Nacional, which ruled that the companies had indeed provided ‘reasonable’ explanations to why they opted for joint bidding. It concluded that the CNMC should have made a greater effort to explain why the information exchanged in the context of the consortiums was excessive or how they altered contract prices.<sup>12</sup>

To reach such conclusion, the Audiencia Nacional first states that merely having the economic solvency required does not mean that the companies met the technical requirements, especially given the complexity of each of the contracts. Then, the judgments highlight that it was evident that the companies could not tender on their own, since they lacked the licenses for the required technology to be able to execute the contracts. Against that background, the Audiencia Nacional considered the basis of the CNMC’s decision – that the companies could have tendered separately by a different arrangement between them – was not proven.

The Audiencia Nacional also pointed out that the possibility of subscribing licensing agreements was a mere assertion made by the CNMC, based on hypothetical and unconfirmed suppositions, for example that companies could indeed have access to any license, or that there was no legal or contractual restriction preventing the possibility, but without any clear basis in the decision.

Last, the ruling emphasises that the circumstances, competitors involved, technological needs, or the distribution of the licenses for the development of the infrastructures, do constitute a reasonable objective explanation for joint bidding. Moreover, the expert reports submitted by some of the parties would support the objective necessity of the joint bids derived from technological, economic and

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<sup>12</sup> Judgments of the Audiencia Nacional of 27 December 2021 (Appeal No 432/2016), 26 January 2022 (Appeal No 429/2016) and 28 January 2022 (Appeals No 437/2016 and 441/2016).

productive capacity reasons, which were not refuted by the CNMC. On that basis, to conclude that the consortiums were anti-competitive, the CNMC should have made a greater effort to explain why the information exchanged exceeded what was essential for the contractual collaboration, how the contract prices were altered, or how the consortium effectively restricted competition in the market.

All in all, and although the Audiencia Nacional's ruling does not reflect a detailed in-depth assessment of the evidence akin to that performed in the *Cement* and *Nougat* cases, it is clear from the judgment that the evidence put forward in the CNMC decision lacked sufficient weight to demonstrate that the practices were anti-competitive, in line with the aforementioned *Puerto de Santander* case.

The rulings also make a very clear and interesting statement about the boundaries of the CNMC review in competition cases, pointing out that the administrative review is not intended to second-guess business decisions, but limit itself to evaluating whether those decisions constitute anti-competitive conduct:

'The exercise of the sanctioning power cannot go to the extreme of interfering to the point of marking options of a business nature or to decide what option is more or less convenient for companies [...]. Instead, the CNMC's duty is to assess whether the chosen option infringes the rules of competition, especially when the decision contains no particular reasons other than mere assertions without any supporting arguments.'<sup>13</sup> (Own translation.)

It seems that the Audiencia Nacional wanted to pass on a clear message to the CNMC to enhance its scrutiny of cases, pushing for more in-depth assessments of the evidence used to prove an infringement.

In this regard, it must also be noted that consortiums of this kind have been in the headlines of both the CNMC and the regional competition authorities in recent years and a number of those decisions could also be questioned on a similar basis – as the Superior Regional Court (*Tribunal Superior de Justicia*) of Catalonia appears to have done in another recent ruling.

### **Concluding remarks: a more rigorous standard for the CNMC**

The detailed, rigorous review of the CNMC's evidence and reasoning by the Audiencia Nacional in its recent rulings is a welcome development for parties under investigation and will likely be relied on increasingly in future appeals.

It also sends a clear message to the CNMC and to Spain's regional competition authorities to improve the quality of the reasoning and evidence behind their decisions, a particular challenge in light of the apparent decrease in the number

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<sup>13</sup> Judgment of the Audiencia Nacional of 27 December 2021 (Appeal No 432/2016; Judge Gandarillas Martos).

of cases relying on leniency evidence (possibly a result of Spain's fertile ground for antitrust damages actions).

It will be fascinating to see how the authorities react. Dawn raids may get longer, investigations more data intensive, and that in turn may require more radical changes. In this regard, some legislative measures that are expected to be implemented in the current legislature promise to assist the CNMC in better handling cases and adopting more rigorous decisions.

These measures include longer deadlines for investigations and greater independence regarding the management of human and economic resources. But there are also calls for the CNMC to open itself up to greater interaction with the parties during its investigation, particularly through oral hearings, which have been rare in practice even in the most suitable cases.

Most fundamentally, however, the rulings demonstrate the willingness of the courts to ensure due process, and by doing so honour a fundamental freedom recognised by the Constitution in Spain and cherished by lawyers everywhere.

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