

Case C-619/23

Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 October 2023

Referring court:

Administrativen sad Sofia-Oblast (Bulgaria)

Date of the decision to refer:

21 September 2023

Applicants:

‘Ronos’ OOD

MA

TI

Defendant:

Komisia za zashtita na konkurencsiata (KZK)

Subject matter of the main proceedings

The subject matter of the judicial review before the referring court is a decision by the Komisia za zashtita na konkurencsiata (Commission on Protection of Competition; ‘the KZK’) which found an infringement of the Zakon za zashtita na konkurencsiata (Law on the protection of competition; ‘the ZZK’) on the ground of a failure to comply with the obligation to cooperate with an inspection conducted under Article 50 of that law.

Subject matter and legal basis of the request

Request for a preliminary ruling under Article 267 TFEU on the interpretation of Article 3 and Article 6 of Directive (EU) 2019/1 in the light of Article 4(2) TEU

Questions referred for a preliminary ruling

1. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as limiting the powers of a national competition authority, when conducting an inspection, to access private correspondence, the inviolability of which is guaranteed by the Member State's constitution, when the grounds for restricting the right to freedom and confidentiality of correspondence, enshrined in the constitution itself, are not in place?

2. Is Article 6 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, read in conjunction with Article 3 thereof, and in the light of Article 4(2) of the Treaty on European Union, to be interpreted as meaning that, when an inspection is conducted by the national competition authority, a person who is asked to provide access to a data carrier is entitled to refuse access to content which forms part of his or her private correspondence, given that the inviolability of private correspondence is guaranteed by the Member State's constitution and that the grounds for restricting the right to freedom and confidentiality of correspondence and other communications, enshrined in the constitution itself, are not in place?

Provisions of European Union law and case-law relied on

Treaty on European Union (TEU) – Article 4(2)

Charter of Fundamental Rights of the European Union ('the Charter') – Articles 7 and 52

Explanations relating to the Charter of Fundamental Rights

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market – recitals 32 and 35, Articles 3 and 6

Judgment of 11 December 2003, *Minoan Lines v Commission*, T-66/99, EU:T:2003:337, paragraph 49

Judgment of 26 October 2010, *CNOP and CCG v Commission*, T-23/09, EU:T:2010:452, paragraphs 40, 41 and 69

Judgment of 14 November 2012, *Prysmian and Prysmian Cavi e Sistemi Energia v Commission*, T-140/09, not published, EU:T:2012:597, paragraph 62

Judgment of 20 June 2018, *České dráhy v Commission*, T-325/16, EU:T:2018:368, paragraphs 165 to 170 and 173

Judgment of 5 October 2020, *Les Mousquetaires and ITM Entreprises v Commission*, T-255/17, EU:T:2020:460, paragraphs 32 to 36, 39, 40 and 42

Judgment of 9 March 2023, *Les Mousquetaires and ITM Entreprises v Commission*, C-682/20 P, EU:C:2023:170, paragraph 44

Provisions of national law and case-law relied on

Konstitutsia na Republika Balgaria (Constitution of the Republic of Bulgaria) – Articles 5, 34 and 57

Zakon za zashtita na konkurentsia (Law on the protection of competition; ‘the ZZK’) – Articles 46, 47, 50, 51, 64, 100 and 102

Administrativnoprotsesualen kodeks (Code of Administrative Procedure) – Article 144 et seq.

Judgment of the Konstitutsionen sad (Constitutional Court, Bulgaria) No 4 of 18 April 2006 in Case No 11/2005

Judgment of the Constitutional Court No 2 of 12 March 2015 in Case No 8/2014

Judgment of the Constitutional Court No 1 of 10 February 1998 in Case No 17/1997

Judgment of the Constitutional Court No 10 of 29 May 2018 in Case No 4/2017

Judgment of the Varhoven administrativen sad (Supreme Administrative Court) No 7982 of 22 December 2000 in Case No 3351/2000

Succinct presentation of the facts and procedure in the main proceedings

- 1 By decision of 23 June 2022, adopted following a notification from the Minister for Finance, the KZK initiated a procedure to establish a possible infringement under Article 15 of the ZZK committed by several companies, in the form of a prohibited agreement and/or concerted practice (cartel) the object of which was to prevent, restrict and distort competition by manipulating tendering procedures.
- 2 In the context of that procedure, with the authorisation of the court having jurisdiction, an inspection (within the meaning of Article 50(1) of the ZZK) was carried out at ‘Ronos’ OOD in order to investigate, clarify and establish the facts and circumstances relevant to the infringement under Article 15 of the ZZK. The judicial authorisation covered all premises, vehicles and other objects used by the company being inspected.
- 3 During the inspection, the lead inspector explicitly informed the persons present that the inspectors had the right to access all data carriers and to consult

everything they considered relevant to the subject matter of the inspection. Accordingly, access was granted (at 10.15) to a laptop belonging to one of the members of the board of directors ('the managing director'). The examination of the laptop was undertaken by a KZK official, a member of the inspection team ('inspection official'). He found that the software application Viber for desktop computers was installed on the laptop, which is generally used as a calling and messaging application for private correspondence and is widespread in Bulgaria.

- 4 The Viber application installed on the managing director's laptop is linked to her personal and sole mobile phone. The inspection official opened the application in question, looked it over and, having examined the correspondence, made screenshots of certain chats – relevant, in his view, to the inspection – including their contents at that point in time (at around 10.45). The Viber application contained additional chats conducted by the managing director, of which no screenshots were made.
- 5 At the beginning of the inspection, all the persons present (including the managing director) were explicitly informed that, pursuant to Article 47 of the ZZK, they could not rely on any information protected by law, and therefore the managing director's consent was not obtained for the contents of her correspondence in the Viber application to be examined. It was subsequently established (at around 15.00) that the contents of the correspondence conducted via the Viber application, of which screenshots had previously been made, had been almost completely deleted.
- 6 The exact time of the deletion of the Viber correspondence could not be determined, but, in the inspection official's recollection, the lead inspector, after noting that circumstance, issued a warning to the effect that, if Viber messages were deleted, it was highly likely to result in a penalty for obstructing the inspection.
- 7 By a decision of 6 October 2022, the KZK found that there had been a failure to comply with the obligation to cooperate laid down in Article 46 of the ZZK, in that the deletion of the contents of chats (correspondence) in the Viber application, which was linked to the managing director's phone number, was classified as obstruction of access to electronic and digital evidence essential to the procedure. Accordingly, 'Ronos' OOD was issued with a financial penalty of BGN 50 000 for the infringement committed and two natural persons present at the inspection (the applicants MA and TI) were issued with fines of BGN 500 each for having participated in the commission of that infringement. The main proceedings arise from three actions brought before the referring court by 'Ronos' OOD, MA and TI against the KZK decision at issue.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 8 In order to assess whether the deletion of the chat contents from the Viber application, which was linked to the managing director's phone number,

constitutes a form of obstruction of KZK officials in the exercise of their powers under Article 50(2) of the ZZK (to access, examine and seize electronic and digital evidence essential to the procedure in the course of an inspection), the referring court must first ascertain whether access to and examination of the managing director's correspondence in the Viber application, which was installed on her laptop and connected to her personal mobile phone, constituted a legitimate exercise of the powers of the KZK officials in the conduct of the inspection.

- 9 According to the referring court, since the application in question was linked to the managing director's only phone number, it also contained her private correspondence (chats), which is apparent from the evidence submitted in the case.
- 10 Under Article 46 of the ZZK, all natural and legal persons are obliged to cooperate when the KZK exercises its powers under that law. Under Article 47(1) of the ZZK, the persons asked to cooperate under that law cannot rely on business or trade secrecy or any other kind of confidentiality protected by law and, under Article 50(2)(5) of the ZZK, the officials appointed by order of the chairperson of the KZK are authorised during inspections to obtain access to all data carriers, including servers, accessible through computer systems or other means and located on the business premises under inspection.
- 11 The referring court states that there is no contradiction between the abovementioned provisions of the ZZK and the provisions of secondary EU law, in particular those in Articles 3 and 6 of Directive 2019/1. The provisions of the ZZK are also consistent with the relevant case-law of the Court, with Article 7 of the Charter and, by analogy, with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), read in conjunction with Article 52(3) of the Charter.
- 12 However, according to the referring court, the Constitution of Bulgaria provides its citizens with stronger safeguards to protect the inviolability of their correspondence than EU law. Thus, under the Charter and the ECHR, any of the three fundamental rights (respect for private and family life, home and correspondence) may be limited by public authorities where this is provided for by law and is necessary to safeguard a particular public interest. The Constitution of Bulgaria treats the inviolability of correspondence differently: the writers of the constitution made provision directly in the constitution (Article 34) to ensure that the fundamental right to inviolability of correspondence may be limited only with the authorisation of a judge and for a single purpose (reason) – to uncover or prevent serious criminal offences. In that context, the referring court states that, although the prohibited agreements governed by Article 15 of the ZZK (and Article 101 TFEU) constitute the most serious form of infringement of competition law, they are not criminal offences within the meaning of the Nakazatelen kodeks (Criminal Code) of the Republic of Bulgaria.

- 13 The referring court is aware that the exercise of fundamental rights may, in principle, be limited, provided that a legitimate objective is being pursued, that objective can be achieved by the limitation at issue and that arrangement is the least onerous means of achieving the legitimate objective (the classic elements of the constitutional requirement of proportionality in determining the limits on the exercise of fundamental rights). The referring court is also aware of the importance of the powers and tasks of national competition authorities and of the essential objective pursued by the protection of competition in the internal market. It takes into account the means which are provided for in EU law to balance the public interest and private interests and intended to ensure the effectiveness of inspections as an indispensable instrument for the performance of the functions of the competition authorities.
- 14 In the present case, however, the limits on what is permissible under the Constitution of Bulgaria in order to balance private interests and the public interest stem from the applicable constitutional rules and, as the law applicable to the dispute in the main proceedings does not respect those limits, it is incompatible with Article 34 of the Constitution of Bulgaria. An arrangement (even where enshrined in law) which limits the fundamental right to inviolability of correspondence for any reason other than those specified in the Constitution of Bulgaria is not only unlawful but unconstitutional. Therefore, it is not possible to assess the proportionality and appropriateness of such a limitation provided for by law, whatever the public, State or other high-level interest it is intended to serve.
- 15 On the basis of those considerations, it is the view of the referring court that the provisions of the ZZK relevant to the main proceedings (namely Article 47 and Article 50(2)(5) of the ZZK) contravene Article 34(2) of the Constitution of Bulgaria and should therefore be disapplied in the present case.
- 16 However, as stated above, the provisions of Article 47 and Article 50(2)(5) of the ZZK are consistent with the provisions of Article 6 of Directive 2019/1, read in conjunction with Article 3 thereof, so that, if the referring court were to disapply the abovementioned provisions of the ZZK on the ground that they contravene the Constitution of Bulgaria, it would be also disapplying the abovementioned provisions of EU law, thereby failing to comply with its obligation to ensure the full effectiveness of those provisions.
- 17 A national court which is called upon, within the exercise of its jurisdiction, to apply the provisions of EU law has an obligation to ensure the full effectiveness of those provisions, but, if it is unable itself to arrive at an interpretation consistent with EU law, it must request a preliminary ruling from the Court of Justice on the interpretation of the provision of EU law concerned, and the Court of Justice must provide all the points of interpretation required. Therefore, in the view of the referring court, an interpretation by the Court of Justice of those provisions of EU law is necessary, taking into account, in particular, the stronger safeguards which the Constitution of Bulgaria provides to protect the citizens' fundamental right to freedom and confidentiality of correspondence.

- 18 The reason for those stronger safeguards is bound up with Bulgarian **national identity** within the meaning of Article 4(2) TEU. In that context, the referring court draws attention to the following:
- 19 During the period from 1944 to 1990, a main instrument for the exercise of State authority was the Darzhavna Sigurnost (Committee for State Security; ‘the DS’), an institution uniting the secret services of the People’s Republic of Bulgaria. The DS had a separate sub-unit the function of which was to inspect correspondence and make use of operational listening technology. Precise and clear data on the scope of the measures carried out by that unit have not been made public, but the firm conviction has formed in Bulgarian society that those measures were used on a large scale and without any scrutiny, targeting many people. Even today, Bulgarian society is particularly sensitive as regards the inviolability of private correspondence.
- 20 When the current constitution was adopted, therefore, the members of the Veliko narodno sabranie (Grand National Assembly) held a serious public and political debate on the text governing the inviolability of correspondence. Two versions were discussed: (1) the adoption of a text fully corresponding to Article 8 of the ECHR and (2) the adoption of a text granting stronger safeguards for the inviolability of citizens’ correspondence. The second version of the text, under which the reasons for limiting the right to inviolability of correspondence would be explicitly enshrined in the constitution itself, was adopted by an overwhelming majority. The idea of governing the limitation of that fundamental right by ordinary law was rejected on the grounds that only a constitutional provision could guarantee an end to the reprehensible practice, which had been followed for decades, of inspecting the correspondence of all members of the public within the framework of numerous derogations provided for in special laws which had different objectives from those specified in the constitution.
- 21 In addition, the referring court draws attention to the settled and consistent case-law of the Constitutional Court of the Republic of Bulgaria, according to which Article 34 of the Constitution of Bulgaria provides stronger safeguards for the inviolability of correspondence than Article 8 of the ECHR and Article 7 of the Charter, as it provides for a more restrictive regime as regards the possible grounds and procedures for limiting that right. However, that divergence between the ECHR and the Charter on the one hand and the Constitution of Bulgaria on the other should be interpreted not as a contradiction in respect of the inviolability of correspondence but as establishing a regime more favourable to the protection of that fundamental right. It is well known that the requirements of the ECHR with regard to the promulgation of rights are to be recognised as minimum standards in national constitutional orders and in the protection of fundamental rights in ordinary law. At the same time, however, in order to comply with the constitution, the disclosure of confidential correspondence must be entirely in line with the requirements governing any limitation of that right, laid down in Article 34(2) of the Constitution of Bulgaria.

- 22 Determining the relationship between Member States' constitutional law and EU law is therefore essential to the present request for a preliminary ruling. The present case requires clarification of the relationship between the safeguards for fundamental rights enshrined in the Constitution of Bulgaria and the provisions of EU law which it is for the national court to apply. Although the referring court must respect the primacy of EU law over national law, it must do so without curtailing the stronger safeguards (compared to EU law) provided by the Constitution of Bulgaria to protect citizens' fundamental right to freedom and confidentiality of correspondence.
- 23 In the view of the referring court, the questions referred for a preliminary ruling should therefore be answered in the affirmative if account is taken of the fact that the Member State's constitutional law contains an individual right in respect of which, although it corresponds to that guaranteed by Article 7 of the Charter and Article 8 of the ECHR, more extensive protection is provided for and the importance of which for the citizens of the Member State determines its nature as part of the national identity of the State concerned.