Case C-258/23

Request for a preliminary ruling

Date lodged:

24 April 2023

Referring court:

Tribunal da Concorrência, Regulação e Supervisão

Date of the decision to refer:

21 April 2023

Applicant:

IMI – Imagens Médicas Integradas, S.A.

Defendant:

Autoridade da Concorrência

REQUEST FOR A PRELIMINARY RULING

1. Referring court

Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) (First Chamber)

2. Parties in the main proceedings

A. Defendant: *Autoridade da Concorrência* (Competition Authority)

B. Applicant: *IMI – IMAGENS MÉDICAS INTEGRADAS, S.A.*

3. Subject matter of the main proceedings and relevant facts

1. In the context of administrative infringement proceedings — in relation to which the present proceedings are of an interlocutory nature —, the Autoridade da Concorrência (Competition Authority) is investigating a number of anticompetitive practices as prohibited by Article 9 of the Lei da Concorrência (Law on Competition) and Article 101 TFEU.

2. In particular, the Competition Authority is investigating whether there is an agreement or concerted practice aimed at eliminating competition between undertakings in the healthcare field which are active on the teleradiology market, and at increasing the price paid by the State for the provision of services in the aforementioned field, given that Portuguese hospitals belonging to the Serviço Nacional de Saúde (National Health Service) use external private teleradiology services, and periodically launch public invitations to tender in order to purchase such services.

3. During its investigation, the Competition Authority considered it necessary to carry out measures involving the search for, and examination, collection and seizure of, evidence.

4. To that end, it asked the competent judicial authority, in this case the Public Prosecutor's Office, to authorise those measures. The Public Prosecutor's Office, considering this to be necessary to the investigation under way, granted the Competition Authority's request and issued the relevant orders, including for the seizure of:

'*Copies or extracts of written records and other documentation, whether open and filed or open and in circulation among staff, in particular, e-mails and internal documents for the dissemination of information between various levels of hierarchy and for the preparation of commercial policy decisions by the undertakings, as well as minutes of executive or management meetings, whether or not held in a secure location or one not freely accessible by the public, including any computer storage media or computers, and [for] the examination and copying of the information stored on them, be they directly or indirectly related to practices restrictive of competition*'.

5. The authorisation granted by order of the judicial authority excluded the seizure of evidence on premises where healthcare services are provided or where documents covered by medical confidentiality are stored.

6. Following a search of the electronic mailboxes of the employees of the undertaking concerned, the Competition Authority seized 1 405 computer files considered relevant to the investigation.

4. Relevant legal provisions

Article 9 of the Lei da Concorrência (Law on Competition)

Article 101 TFEU

5. Reasoning in the request for a preliminary ruling

In Portuguese law, Lei n.º 19/2012, de 8 de maio (*novo regime jurídico da Concorrência*) (Law No 19/2012 of 8 May 2012 (*New legal framework governing competition*); 'the Law on Competition') confers on the Competition Authority the power to *seize documents, whatever the medium on which they are stored, on the prior authorisation of the judicial authority* (Articles 18(1)(c) and 20(1), (6) and (8) of the Law on Competition).

The Law on Competition reserved the intervention of the investigating judge to cases involving the seizure of documents in banks, house searches and searches in law firms and medical practices. In all other situations, such as that at issue here, that Law requires the intervention of the judicial authority, in this case the Public Prosecutor's Office.

This case is concerned with the imposition of administrative penalties, as distinct from the prosecution of any criminal offence.

Nonetheless, the rules of the Law on Competition adhere to the same criterion that informs the rules of criminal law: where the means of obtaining evidence may jeopardise or infringe fundamental rights, the investigating judge must intervene; in all other cases, authorisation/validation of the means of obtaining evidence requires (only) the intervention of the Public Prosecutor's Office, acting as judicial authority, which is responsible for leading the investigation.

This therefore raises the question as to whether, in the context of an investigation into anticompetitive practices carried on by undertakings, the exercise of the evidence-gathering powers conferred on the Competition Authority infringes any fundamental right.

The Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court), supported by the most authoritative legal literature and by the […] higher court, has maintained that documentation seized by the Competition Authority in the aforementioned context does not constitute *correspondence*, [the inviolability of which] is a fundamental right enjoying a higher level of protection.

The proposition that the mere fact of their having come from communications contained in the work e-mails of employees of the undertakings concerned supports the classification of the documents seized as *correspondence* for the purposes of their eligibility for the guaranteed greater protection which the fundamental rights of natural persons automatically enjoy, has therefore been rejected.

The undertaking concerned rejects that approach and argues that the documentation seized from the e-mails of its employees constitutes *correspondence*, which cannot be seized in the context of administrative penalty proceedings, and **cannot therefore be seized during the investigation of anticompetitive practices prohibited by Articles 101 TFEU and Article 102 TFEU**; it goes on to say that, at most, even if such documentation *could* be seized,

the seizure would in any event have to be pre-authorised by an investigating judge, since such a measure is an interference with *correspondence*, [the inviolability of which] is a fundamental right requiring such authorisation.

For all the foregoing reasons, and having regard to:

1. The fact that EU law has primacy, irrespective of the rank and nature of the national provisions concerned, even if they are constitutional in nature; [1] [2]

2. The fact that the provisions of EU law under examination here are intended to ensure the economic well-being of the country and to protect the proper functioning of the internal market as (i) a fundamental driver of the well-being of citizens, (ii) a guarantor of effective competition between businesses, ensuring that businesses compete on a level playing field as between all Member States, and (iii) an incentive for businesses to maintain their efforts to offer consumers the best possible products at the best possible prices;

3. The prohibition, to that end, of any misuse by one or more undertakings of a dominant position within the market that may affect trade between Member States, and the fact that such a practice may consist in imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development; applying dissimilar trading conditions; or making the conclusion of contracts subject to acceptance of supplementary obligations which have no connection with the subject of such contracts (Article 102 TFEU, ex Article 82 TEC);

4. The fact that social, economic, geopolitical and technological changes repeatedly pose new challenges for EU competition policy, in particular in

[1] See the case-law of the CJEU (judgment of 17 December 1970 in Case 11/70, EU:C:1970:114, paragraph 3), in which the Court emphasised that provisions of EU law take precedence over domestic provisions, including those of a constitutional nature:

'The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law […]; […] the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure'.

[2] In legal literature, see to that effect:

Professor Ana Maria Guerra Martins, in *Curso de Direito Constitucional da União Europeia*, p. 34:

'EU law, both primary and secondary, takes precedence over all provisions of domestic law, including those of a constitutional nature, which will not apply'.

And Professor Fausto de Quadros, in *Direito da União Europeia – Direito Constitucional e Administrativo da União Europeia*, fourth reprint, 2012, Almedina, p. 403:

'Primacy does not exist unless it is supraconstitutional'.

the context of an increasingly digitised economy which, as such, requires the existence of effective instruments to enable the objectives referred to in the paragraph preceding the last to be effectively protected;

5. The fact that, according to Article 20 of Council Regulation No 1/2003, the Commission, in order to carry out the duties assigned to it by that regulation — on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty —, may conduct all necessary inspections of undertakings and associations of undertakings and *examine the books and any other records related to the business, irrespective of the medium on which they are stored*;

6. The fact that, according to Article 21 of that regulation, the Commission may carry out inspections and seizures at other premises, such as the homes of directors, managers and other members of staff, provided that prior authorisation is obtained from the national judicial authority;

7. The fact that Article 22 of Council Regulation No 1/2003 provides that *the competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law*;

8. The fact that the Law on Competition, as approved by Law No 19/2012 of 8 May 2012, provides in Article 20(1) that: [3]

[3] The Portuguese legislature retained this provision unchanged when transposing **Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018**, which contains the following recitals (30 [and] 32), concerning Article 6 of that directive:

- *'The investigative powers of national administrative competition authorities should be adequate to meet the enforcement challenges of the digital environment, and should enable NCAs to obtain all information related to the undertaking or association of undertakings which is subject to the investigative measure in digital form, including data obtained forensically, irrespective of the medium on which the information is stored, such as on laptops, mobile phones, other mobile devices or cloud storage'.*

- *'[…] [T]he power of national administrative competition authorities to carry out inspections should enable them to access information that is accessible to the undertaking or association of undertakings or person subject to the inspection and which is related to the undertaking or the association of undertakings under investigation. This should necessarily include the power to search for documents, files or data on devices which are not precisely identified in advance. Without such power, it would be impossible to obtain the information necessary for the investigation where undertakings or associations of undertakings adopt an obstructive attitude or refuse to cooperate. The power to examine books or records should cover all forms of correspondence, including electronic messages, irrespective of whether they appear to be unread or have been deleted'.*

Article 6 of that directive provides that:

'1 Member States shall ensure that national administrative competition authorities are able to conduct all necessary unannounced inspections of undertakings and associations of undertakings for the application of Articles 101 and 102 TFEU.

'1- Seizures of documents, whatever their nature and whatever the medium on which they are stored, shall be authorised, mandated or validated by order of the judicial authority';

9. The fact that Article 20(6) of the Law on Competition provides that it is only seizures in banks or other *credit institutions of documents covered by banking secrecy* that require *prior authorisation from the investigating judge, who must authorise such seizures where he or she has good reason to believe that those documents relate to an offence and are highly relevant to the task of establishing the truth or proving the case, even if they do not belong to the person concerned*;

10. The fact that paragraphs 3 and 5 of Article 2 of the Law on Competition respectively provide that:

'3- This Law shall be interpreted in a manner consistent with European Union law, in the light of the case-law of the Court of Justice of the European Union, including in matters of practices restrictive of competition which are not capable of affecting trade between Member States.

5- In the context of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the implementation of this Law shall respect the general principles of European Union law and the Charter of Fundamental Rights of the European Union';

11. The fact that the documents under examination in this case relate to the conduct of the business activities of undertakings operating in the single

Member States shall ensure that the officials and other accompanying persons authorised or appointed by national competition authorities to conduct such inspections are, at a minimum, empowered: (a) to enter any premises, land, and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business irrespective of the medium on which they are stored, and to have the right to access any information which is accessible to the entity subject to the inspection; (c) to take or obtain, in any form, copies of or extracts from such books or records and, where they consider it appropriate, to continue making such searches for information and the selection of copies or extracts at the premises of the national competition authorities or at any other designated premises; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

2 Member States shall ensure that undertakings and associations of undertakings are required to submit to the inspections referred to in paragraph 1. Member States shall also ensure that, where an undertaking or association of undertakings opposes an inspection that has been ordered by a national administrative competition authority and/or that has been authorised by a national judicial authority, national competition authorities are able to obtain the necessary assistance of the police or of an equivalent enforcement authority so as to enable them to conduct the inspection. Such assistance may also be obtained as a precautionary measure.

3 This Article is without prejudice to requirements under national law for the prior authorisation of such inspections by a national judicial authority'.

market and that, in today's digital age, those documents are transmitted by e-mail;

12. The fact that e-mails, which act as a vehicle for the transmission of documents relating to the business activities of undertakings, are institutional in nature [@undertaking], inasmuch as they are the sole property of those undertakings, which unilaterally impose on their employees the terms on which that medium is to be used for the duration of their employment relationship with them;

13. The fact [that], in accordance with the internal rules of undertakings, e-mails, which act as a vehicle for the transmission of documents relating to the business activities of undertakings, are to be used only for work purposes, their use for personal purposes and purposes relating to the employee's private life being prohibited;

14. Recital 26 of Council Regulation No 1/2003, which classifies the aforementioned documents as *business records*;

In order to dispose of the issues raised above, recourse must be had to the reference for a preliminary ruling mechanism, on the basis set out below.

6. Questions referred for a preliminary ruling

In accordance with Article 267 TFEU and Article 19(3) of the Treaty on European Union, the following questions are referred for a preliminary ruling:

I. Do the business records at issue in this case, which are transmitted by e-mail, constitute 'correspondence' for the purposes of Article 7 of the Charter of Fundamental Rights of the European Union?

II. Does Article 7 of the Charter of Fundamental Rights of the European Union preclude business records arising from e-mail communications between managers and employees of undertakings from being seized in the course of an investigation into agreements and practices prohibited under Article 101 TFEU (ex Article 81 TEC)?

III. Does Article 7 of the Charter of Fundamental Rights of the European Union preclude such business records from being seized on the prior authorisation of a judicial authority, in this case the Public Prosecutor's Office, which is responsible for representing the State, defending the interests determined by law, bringing criminal prosecutions on the basis of the principle of legality and defending democratic legality in accordance with the Constitution, and which operates independently of the other central, regional and local authorities?

21 April 2023

Judge

Mariana Gomes Machado

[…]