UNCONSTITUTIONAL SEIZURE OF ELECTRONIC MAIL

WITHOUT PRIOR COURT ORDER

Constitutional Court ruling no. 314/2023, of 11 July

INTRODUCTION

The rule that allows the examination, collection and seizure of emails in competition infringement proceedings without authorisation by prior court order has been declared unconstitutional.

In recent years, this is an issue that has sparked heated discussion in the courts.

HOW DOES THIS QUESTION ARISE?

The defendant challenged in court the seizure by the Competition Authority (CA) of emails without a prior court order.

The challenge was judged unfounded by the Competition, Regulation and Supervision Court and on appeal by the Lisbon Court of Appeal.

The Defendant has appealed to the Constitutional Court (CC), seeking, in the part to which this article refers, a declaration of unconstitutionality of the rule resulting from Articles 18(1)(c)(2), 20(1) and 21 of the New Legal Framework for Competition in the interpretation that, under this rule, the examination, collection and seizure of electronic mail is permitted, provided that it is authorised by the Public Prosecutor's Office (PPO), and that no court order is required.

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RELEVANT LEGAL STANDARDS

At stake are constitutional norms such as the principle of the democratic rule of law, based on respect for the fundamental rights of private individuals (Article 2 of the CPR), the principle of the judge's reserve for weighing up the impact of fundamental rights in sanctions law (Article 32(4) of the CPR), the guarantee of inviolability and secrecy of correspondence and the prohibition on public authorities interfering in it (Article 34(1) and (4) of the CPR).

These include the guarantee of the inviolability and secrecy of correspondence and the prohibition on public authorities interfering in it (Article 34(1) and (4) of the CPR), as well as the principle that the administration's actions are subordinate to the law and the Constitution (Article 266 of the CPR).

All these rules served as the basis for sending the matter for constitutional review.

CONSIDERATIONS LEADING UP TO THE DECISION

One of the factors to which the CC attached the greatest importance, and which was amply explained in the judgement in question, was whether it would be possible to apply to electronic mail the criterion of distinction that is generally used with regard to postal mail.

This is because, in cases where electronic mail is not involved, a distinction is made between mail that has already been received and duly opened by its recipient - which is considered a mere "document" and can be seized by the entity responsible for the investigation, without needing authorisation from the judge to do so - and mail that has not yet been received by the recipient - a situation in which a court order is required for its seizure by the Public Prosecutor's Office, as it still enjoys the constitutional protection of the inviolability of communications.

The CC concluded that this distinction has no practical applicability in a situation involving electronic mail, since the *distinction between open and closed messages is, in the case of electronic mail, artificial and fallible. Artificial, because the recipient can freely mark messages as open or closed (...) Fallible, because there is no guarantee that a message marked as open has exhausted its communicative nature and has actually been read.*

Alongside this conclusion, it considers how the inviolability of non-postal communications could be guaranteed.

It thus ends up determining that this protection of communications, which is the purpose and principle of the constitutional rules in question, can only be realised by definitively archiving these communications outside the email box.

This is because, *what is at stake is not the nature of the message but the protection of information in transit or in circulation,*

according to Judgement 91/2023 of the CC.

For this reason, it was concluded that any intrusion into communications in an email inbox is covered by the right to inviolability of communications in general, and therefore deserves the protection afforded by Article 34 of the CPR, regardless of whether there are open messages or unopened ones.

ADDITIONAL NOTE

There is already a decision on a similar matter concerning Article 16 of the Cybercrime Law, which has already been handed down, but not published, by the STJ in a Judgement Uniformising Case Law (the formal and substantial requirements for uniformity were verified by the STJ Judgement of 6 July 2022).

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