Reports of Cases

OPINION OF ADVOCAT GENERAL
MEDINA
delivered on 20 June 2024[1]

Joined Cases C-258/23 to C-260/23

IMI – Imagens Médicas Integradas SA (C-258/23)
Synlabhealth II SA (C-259/23)
SIBS–Sociedade Gestora de Participações Sociais SA,
SIBS, Cartões – Produção e Processamento de Cartões SA,
SIBS Processos – Serviços Interbancários de Processamento SA,
SIBS International SA,
SIBS Pagamentos SA,
SIBS Gest SA,
SIBS Forward Payment Solutions SA,
SIBS MB SA (C-260/23)
v
Autoridade da Concorrência

(Request for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal))

(Reference for a preliminary ruling – Infringement of the rules on competition – Application of Articles 101 and 102 TFEU by a national competition authority – Seizure of emails – Order issued by the Public Prosecutor's Office – Charter of Fundamental Rights of the European Union – Article 7 – Infringement of the right to respect for communications)

I. Introduction

1. By its three requests for a preliminary ruling, which form the subject matter of the present joined cases, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) asks the Court of Justice for a preliminary ruling on three questions concerning the interpretation of Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. These questions are asked in the context of three sets of proceedings between IMI – Imagens Médicas Integradas S.A. ('IMI'), a number of companies within the SIBS group (together, 'SIBS') and Synlabhealth II S.A. ('Synlabhealth') (together, 'the applicants in the main proceedings'), on the one hand, and the Autoridade da Concorrência (Competition authority, Portugal; 'the

[1] Original language: French.

Competition Authority'), on the other, concerning the lawfulness of the seizure of emails of employees of the applicants in the main proceedings, effected in the course of searches conducted at the premises of the latter as part of the Competition Authority's investigations into suspected infringements of the Portuguese rules on competition and of Article 101 or 102 TFEU, depending on the case.

II. Legal framework

A. European Union law

1. The Charter

3. Under Article 7 of the Charter, 'everyone has the right to respect for his or her private and family life, home and communications.'

4. Article 52(1) and (3) of the Charter provides as follows:

'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the [European] Union or the need to protect the rights and freedoms of others.

…

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ["the ECHR"], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent [European] Union law providing more extensive protection.'

5. Article 53 of the Charter, entitled 'Level of protection', provides that 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by [European] Union law and international law and by international agreements to which the [European] Union or all the Member States are party, including the [ECHR], and by the Member States' constitutions.'

2. Directive 2019/1

6. The purpose of Directive (EU) 2019/1[2] is to set out certain rules to ensure that national competition authorities have the necessary guarantees of independence, resources and enforcement and fining powers to be able to apply Articles 101 and 102 TFEU effectively. According to recital 31 of the directive, 'national … competition authorities should be able to carry out all necessary inspections of premises of undertakings and associations of undertakings [where they] can show that there are reasonable grounds for suspecting an infringement of Article 101 or 102 TFEU. This directive should not prevent Member States from requiring prior

[2] Directive 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 (OJ 2019 L 11, p. 3).

authorisation by a national judicial authority for such inspections.' Recital 32 of the directive, *in fine*, states that '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'. Recital 73 of the directive states that 'evidence is an important element in the enforcement of Articles 101 and 102 TFEU' and that '[national competition authorities] should be able to consider electronic messages as relevant evidence, irrespective of whether those messages appear to be unread or have been deleted'.

7. Article 6 of Directive 2019/1, entitled 'Power to inspect business premises', provides, in paragraph 1 thereof, that Member States are to ensure that national 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 and that they are empowered, inter alia, 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' and to 'take or obtain, in any form, copies of or extracts from such books or records'. Paragraph 3 of Article 6 states that this 'is without prejudice to requirements under national law for the prior authorisation of such inspections by a national judicial authority'.

8. Article 32 of the directive, entitled 'Admissibility of evidence before national competition authorities', provides that 'Member States shall ensure that the types of proof that are admissible as evidence before a national competition authority include … electronic messages'.

B. Portuguese law

9. Article 34(1) of the Constitution of the Portuguese Republic ('the Constitution'), which is entitled 'Inviolability of home and correspondence', states that 'domiciles and secrecy of correspondence and other means of private communication are inviolable'. Article 34(4) provides that 'the public authorities are prohibited from interfering in any way with correspondence, telecommunications or other means of communication, save in the cases in which the law so provides in matters related to criminal procedure.'

10. Lei No 19/2012 (novo regime jurídico da concorrência) (Law No 19/2012 approving the new legal framework governing competition) of 8 May 2012 ('the Law on Competition'), as applicable until 15 September 2022, provided, in Article 18(1)(c) thereof, that, in the exercise of its powers to impose penalties, the Competition Authority had the right to 'search for, examine, collect and seize written extracts and other documents, irrespective of the medium on which they are stored, at the premises, upon the land or in the means of transport of undertakings and associations of undertakings, whenever such steps prove necessary in order to obtain evidence'. In accordance with paragraph 2 of that article, those steps were subject to 'authorisation by the competent judicial authority'. [3]

11. Article 20(1) of that law provided that the seizure of documents, irrespective of the medium on which they are stored, is authorised, ordered or validated by decision of the judicial authority.

[3] Text provided by the European Commission.

12. Article 21 of the Law on Competition, as applicable until 15 September 2022, provided that 'the Public Prosecutor's Office or, when expressly provided for, the investigating judge, both for the area where the [Competition Authority] has its seat, shall have competence to authorise the steps provided for in Article 18(1)(c) and (d) and in … Article 20.' [4]

13. The Law on Competition was amended, with effect from 16 September 2022, by Law No 17/2022 of 17 August 2022, which transposed Directive 2019/1. That law inserted a new paragraph 4 into Article 18 of the Law on Competition, pursuant to which, a refusal on the part of the competent judicial authority to grant the Competition Authority an authorisation as referred to in the preceding paragraphs may be challenged '(a) in the case of a decision of the Public Prosecutor's Office, by lodging a complaint with the immediate superior; (b) in the case of a decision of an investigating judge, by bringing an appeal before the court of appeal having jurisdiction, which adjudicates at last instance'.

14. Article 21 of the Law on Competition, as amended by Law No 17/2022 of 17 August 2022, provides that 'the competent judicial authority for the area where the Competition Authority has its seat shall have competence to authorise the steps provided for in Article 18(1)(a) to (d) and in Articles 19 and 20.'

III. The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court of Justice

15. It is apparent from the orders for reference that, in each of the investigations concerning the applicants in the main proceedings, [5] the Competition Authority considered it necessary to carry out 'measures involving the search for, the examination, the collection and the seizure of evidence'. To that end, it asked the competent judicial authority, in this instance the Public Prosecutor's Office, to authorise those measures. Those requests were granted and, under the orders issued by the Public Prosecutor's Office, authorisation was given for the seizure of 'copies or extracts of written records and other documentation, whether opened and filed or opened and in circulation among staff, in particular, emails 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 to 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'.

16. It is apparent from the case files sent to the Court Registry that the search, collection and seizure operations were carried out at the premises of the applicants in the main proceedings between January 2021 and March 2022. [6] In the course of those operations, several thousand computer files, deemed relevant to the investigations, were seized following a search of the electronic mailboxes of the employees of the companies under investigation. In each case, the

[4] Text provided by the Commission.

[5] The investigation concerning IMI was into the existence of an agreement or a concerted practice on the teleradiology market aimed at eliminating competition and increasing the price paid by the State for the provision of services in that sector. The investigation concerning SIBS was into a possible abuse of a dominant position consisting in the imposition on third parties of unfair terms of access to the Multibanco network, with the aim of restricting competition, in particular in the field of payment processing. The investigation concerning Synlabhealth was into a suspected anticompetitive practice consisting in the exchange of sensitive information between competitors and concerted action between them in connection with the negotiation, with the Portuguese public health authorities, of prices for Covid-19 test kits.

[6] Between January and February 2021 at the premises of SIBS, between September and October 2021 at the premises of IMI, and in March 2022 at the premises of Synlabhealth.

applicants in the main proceedings objected to the seizures, arguing that they were illegal because they infringed their right to secrecy of correspondence and, in any event, because they had not been authorised by the investigating judge. The applicants in the main proceedings subsequently appealed before the referring court the decisions of the Competition Authority rejecting their complaints.

17. The referring court explains that the Law on Competition requires the authorisation of an investigating judge solely in cases involving the seizure of documents in banks, searches of homes and searches in law firms and medical practices. In other cases, the authorisation of the Public Prosecutor, acting as judicial authority, is sufficient. It emphasises that, while the cases in the main proceedings concern administrative infringements, the rules of the Law on Competition adhere to the same criterion as informs the rules of criminal law. Accordingly, where the means of obtaining evidence could infringe fundamental rights, an investigating judge must intervene, while, in all other cases, only the intervention of the Public Prosecutor's Office, which is responsible for leading the investigation, is required. The question thus arises of whether, as the applicants in the main proceedings argue, the mere fact that the documents seized by the Competition Authority came from communications contained in the emails of a business nature of employees of the undertakings concerned supports the classification of the documents seized as 'correspondence', the inviolability of which is a fundamental right that enjoys greater protection. The referring court states that it has in the past answered that question in the negative.

18. It was in those circumstances that the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: [7]

'(1) Do the business records at issue in this case, which are transmitted by email, constitute "correspondence" for the purposes of Article 7 of the [Charter]?

(2) Does Article 7 of the [Charter] preclude business records arising from email 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 [EC]) [or, in Case C-260/23, Article 102 TFEU (ex article 82 [EC])]?

(3) Does Article 7 of the [Charter] 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?'

19. By order of the President of the Court, Cases C-258/23, C-259/23 and C-260/23 were joined for the purposes of the written and oral procedures and of the judgment. The parties to the main proceedings, the Portuguese, Czech and Greek Governments and the Commission submitted written observations, pursuant to Article 23 of the Statute of the Court of Justice of the European Union.

[7] In all three references for a preliminary ruling, the questions are drafted in the same terms, with the exception of the second question, in which reference is made either to Article 101 or to Article 102 TFEU.

IV. Analysis

20. As requested by the Court, I shall deal in this Opinion solely with the third question referred for a preliminary ruling. Nevertheless, the answer to that question is logically dependent on the answers to be given to the first and second questions referred, and so it is necessary for me to consider those too, briefly, before addressing the third question. I shall precede my analysis with some preliminary observations concerning the references for a preliminary ruling as a whole.

A. Preliminary observations

21. I would begin by pointing out that there is no doubt that the Charter applies to the cases in the main proceedings, in which the issue is raised of the observance of fundamental rights in the course of inspections carried out by a national competition authority as part of investigations into infringements of Articles 101 and 102 TFEU. [8]

22. Next, I must make two remarks concerning the legal framework of the present joined cases.

23. As regards the national legal framework first of all, I would observe that it is apparent from the written observations lodged by the parties to the main proceedings and by the Commission that, by two judgments, of 16 March 2023 [9] and 26 May 2023 [10] respectively ('the 2023 judgments'), the Tribunal Constitucional (Constitutional Court, Portugal) declared unconstitutional the provisions of Article 18(1)(c) and Article 20(1) of the Law on Competition, on the basis of which the Competition Authority had carried out searches for, and the seizure of, 'opened' emails, meaning emails marked as 'read', solely on the authorisation of the Public Prosecutor's Office. In those judgments, the Tribunal Constitucional (Constitutional Court), first, rejected the distinction between opened/read emails, as mere 'documents', and closed/unread emails, as 'correspondence', on which the Portuguese courts had relied in order to find the Competition's Authority's seizure of emails of the former category solely with the agreement of the Public Prosecutor's Office to be lawful. [11] The Tribunal Constitucional (Constitutional Court) held that all emails, opened or unopened, enjoyed the guarantees laid down in Article 34 of the Constitution, until such time as they were stored in a place to which only their recipient had access. [12] Second, the judges of the Tribunal Constitucional (Constitutional Court) held that the search for and seizure of emails in the course of inspections carried out by the Competition Authority for the purpose of gathering evidence in the context of proceedings for infringement of national and EU competition rules were covered by the exception laid down in Article 34(4) *in fine* of the Constitution, but could be authorised only by an investigating judge. [13] While the referring court has not alluded to the abovementioned judgments – the first of which alone predates the present references for a preliminary ruling [14] – it is clear, inter alia, from the observations lodged with the Court by the parties to the main proceedings that the declaration of unconstitutionality by the Tribunal Constitucional (Constitutional Court) forms part of the legal and factual context

8 See, by way of example, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2019:283, paragraph 36).

9 Judgment No 91/2023, Case No 559/2020 ('Judgment No 91/2023').

10 Judgment No 314/2023, Case No 145/2021.

11 The differing nature of opened emails and unopened emails seems to have excited extensive debate in Portuguese case-law and legal theory, as the Portuguese Government states. In particular, it has mentioned the fact that, until very recently, Portuguese courts considered that, when seizing opened/read emails, the Competition Authority was not interfering with the process of communication or 'correspondence', and that, accordingly, such emails were simply 'documents'.

12 See Judgment No 91/2023, paragraphs 15 to 18 of the grounds.

13 See Judgment No 91/2023, paragraph 19 et seq. of the grounds.

14 The first judgment was, however, placed on the case files for the main proceedings sent to the Court Registry.

which led the referring court to make the references to the Court of Justice. Against that background, I would point out that, in April 2024, the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court) made two new references for a preliminary ruling that raise in essence the same issues, in which the 2023 judgments and their consequences for the Competition Authority's powers of inspection and seizure are explained in detail. [15]

24. In the second place, as regards the EU legal framework, I would point out that it is not certain that Directive 2019/1 applies to all of the cases in the main proceedings. Pursuant to Article 36 of that directive, it in fact entered into force on 3 February 2019 and, as is clear from Article 34(1) of that directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 4 February 2021. In any event, as I shall explain further on in my analysis, that directive is not directly relevant, at least not to the answer I shall propose to the third question referred for a preliminary ruling, on which I am to focus in this Opinion.

25. That said, it is necessary briefly to express a position on the arguments which the applicants in the main proceedings have put forward disputing the admissibility of the references for a preliminary ruling.

26. In Case C-258/23, IMI submits that, since the referring court did not bring Judgment No 91/2023 to the Court of Justice's attention, it is uncertain whether the Court's answers to the questions referred for a preliminary ruling will be as complete and as useful as possible. I would observe in this connection that this reference for a preliminary ruling is aimed at obtaining clarification from the Court of the extent of the protection afforded by Article 7 of the Charter against measures such as those at issue in the main proceedings in circumstances where EU law is applicable. The usefulness of such an interpretation for the resolution of the dispute in the main proceedings cannot therefore be called into question, at least not without exceeding the ambit of a simple challenge to the admissibility of the reference and entering into the substance of the case.

27. In Case C-259/23, Synlabhealth argues that the orders for reference omit several facts that are essential to understanding the dispute [16] as well as the applicable legal provisions. I must point out in this connection that, according to settled case-law, reflected in Article 94(a) and (b) of the Rules of Procedure of the Court of Justice, the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and regulatory context of the questions it is asking or, at the very least, to explain the factual hypotheses on which those questions are based. [17] The request for a preliminary ruling in Case C-259/23 meets those requirements, in my view. First, it includes sufficient information to enable the Court to understand both the legal and factual context of the dispute in the main proceedings and the meaning and scope of the questions referred for a preliminary ruling. Second, the question of whether, as Synlabhealth submits, the Competition Authority exceeded the Public Prosecutor Office's authorisation when it carried out the inspections and seizures at its premises forms part of the assessment of the facts and, consequently, falls within the exclusive jurisdiction of the referring court. [18] Synlabhealth also submits that it was not allowed to make any representation regarding the questions referred for a preliminary ruling, in breach of procedural requirements of Portuguese law, for which reason it has brought an action challenging the order for

[15] These references for a preliminary ruling are the subject of Cases C-132/24, *Apap and Others* and C-195/24, *Blueotter and Others*.

[16] The same argument is raised by SIBS in Case C-260/23.

[17] See judgment of 21 December 2023, *European Superleague Company* (C-333/21, EU:C:2023:1011, paragraph 59).

[18] See, to that effect, judgment of 11 January 2024, *Global Ink Trade* (C-537/22, EU:C:2024:6, paragraph 40).

reference.[19] It asks the Court to stay the proceedings until a ruling has been given on that action. I would point out in this connection that it is settled case-law that, in the context of the preliminary ruling procedure referred to in Article 267 TFEU, it is not for the Court, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law.[20] Synlabhealth's request should therefore be rejected. For the sake of completeness, I would point out, lastly, that, in its written observations, Synlabhealth alleges that its right to participate in the proceedings before the Court has been infringed, inasmuch as it received no notification of the President's decision to join Case C-259/23 with Cases C-258/23 and C-260/23 or of the requests for a preliminary ruling in those other two cases. On this point, I would merely emphasise that Article 23 of the Statute of the Court of Justice of the European Union and Article 96(1) of the Rules of Procedure contain an exhaustive list of the parties authorised to submit observations in the course of preliminary ruling proceedings. That right does not extend, therefore, to natural or legal persons not expressly mentioned.[21] Moreover, the 'parties to the main proceedings' are, in accordance with Article 97(1) of the Rules of Procedure of the Court of Justice, those determined as such by the referring court or tribunal in accordance with national rules of procedure. Since Synlabhealth is not a party to the disputes in Cases C-258/23 and C-260/23, it is not authorised to submit observations to the Court in those two cases. That conclusion is not called into question by the fact that the Court has decided to join a number of cases, pursuant to Article 54 of its Rules of Procedure, in view of the connection between them.

28. In Case C-260/23, SIBS argues, first, that the reference for a preliminary ruling was made at a time when the facts had not yet been established, or indeed discussed and, second, that the questions referred are not relevant to the subject matter of the dispute, which calls for an assessment of the lawfulness of the measures at issue under Portuguese law, rather than under the Charter. As for the first argument, it must be borne in mind that it is for the national court to decide at what stage of the proceedings it is appropriate for that court to refer a question to the Court of Justice for a preliminary ruling.[22] That argument should, therefore, be rejected. The same applies to the second argument, which is based on allegations that call for an assessment of the substance of the questions referred.

B. The first and second questions referred for a preliminary ruling

29. As mentioned, I shall briefly express a position on the first two questions referred, which, logically, are a preliminary to the third question.

[19] SIBS has also brought such an action.

[20] See judgment of 21 December 2023, *Krajowa Rada Sądownictwa* (Continued holding of a judicial office) (C-718/21, EU:C:2023:1015, paragraph 42 and the case-law cited).

[21] See, to that effect, judgment of 6 October 2015, *Orizzonte Salute* (C-61/14, EU:C:2015:655, paragraph 31).

[22] See, to that effect, judgment of 17 July 2008, *Coleman* (C-303/06, EU:C:2008:415, paragraph 29).

30. By its first question, the referring court in essence asks the Court of Justice whether emails of a professional nature sent between employees and managers of undertakings via the undertaking's messaging service, are 'communications' [23] within the meaning of Article 7 of the Charter. This question, which I regard as admissible, despite the arguments to the contrary put forward by IMI, [24] must, in my view, be answered in the affirmative.

31. I would point out in this connection that, referring to the case-law of the European Court of Human Rights ('ECtHR'), the Court, in its judgment of 17 December 2015, *WebMindLicenses*, [25] had occasion to confirm that the seizure of emails in the course of searches at the professional or business premises of a natural person or the premises of a commercial company constitutes interference with the exercise of the right to respect for the correspondence guaranteed by Article 8(1) of the ECHR [26] and, therefore, in accordance with Article 52(3) of the Charter, with the exercise of the corresponding right laid down in Article 7 of the Charter. [27] That finding applies to seizures in the context of both criminal proceedings and administrative procedures. [28] Moreover, the classification of emails as 'correspondence' within the meaning of Article 8(1) of the ECHR, and 'communications', within the meaning of Article 7 of the Charter, is independent of whether or not they have already been received by the addressee, have been read, or are unread or deleted and of whether or not the communication was sent from work premises or equipment [29] or using a work email [30] and of the fact that the sender's address or recipient's address belonged to a legal person, [31] or indeed of whether or not the content was of a private nature. [32] Thus, the fact that, in view of its content, an email may be classified as 'professional' does not deprive it of the protection which Article 7 of the Charter guarantees for communications. Lastly, this protection relates not only to the content of emails, but also extends to personal data relating to the traffic generated, which is also protected by Article 8 of the Charter. [33]

[23] I would point out that the word 'correspondence', used in the first question referred and appearing in the original version of Article 7 of the Charter, was replaced in 2007 by the word 'communications', in order to take account of developments in technology. See the explanations relating to the Charter (OJ 2007 C 303, p. 17).

[24] As regards, first of all, IMI's argument that the first question is inadmissible because the referring court omitted to mention Judgment No 91/2023, I would refer to the considerations set out in point 26 of this Opinion. Secondly, as regards the argument that this question does not leave room for 'any reasonable doubt', I would merely point out that, according to settled case-law, that circumstance is, at most, capable of relieving a national court ruling as court of last instance of its obligation under the third paragraph of Article 267 TFEU to make a reference, and does not show the inadmissibility of the request for a preliminary ruling; see judgment of 7 February 2023, *Confédération paysanne and Others* (*In vitro* random mutagenesis) (C-688/21, EU:C:2023:75, paragraphs 35 and 36 and the case-law cited). See also judgment of 25 January 2024, *Croce Rossa Italiana and Others* (C-389/22, not published, EU:C:2024:77, paragraph 52).

[25] Case C-419/14, ('the judgment in *WebMindLicenses*'), EU:C:2015:832.

[26] Article 8(1) of the ECHR states that 'everyone has the right to respect for his private and family life, his home and his correspondence'.

[27] See judgment in *WebMindLicenses*, paragraphs 70 to 73. The Court referred to the judgments of the ECtHR of 16 December 1992, *Niemietz v. Germany* (CE:ECHR:1992:1216JUD001371088, §§ 29 to 31, of 16 April 2002, *Société Colas Est and Others v. France* (CE:ECHR:2002:0416JUD003797197 §§ 40 to 41), and of 2 April 2015, *Vinci Construction and GTM Génie Civil et Services v. France*, (CE:ECHR:2015:0402JUD006362910, § 63). See also, more recently, ECtHR, 4 April 2023, *UAB Kesko Senukai Lithuania v. Lithuania* (CE:ECHR:2023:0404JUD001916219, § 109).

[28] Although the case which gave rise to the judgment in *WebMindLicenses* concerned the seizure of emails in the context of criminal proceedings, the Court nevertheless clarified, in that judgment, that their 'use' in the context of an administrative procedure also constituted, as such, a limitation on the exercise of the right guaranteed by Article 7 of the Charter (see paragraph 80).

[29] See ECtHR, 11 January 2024, *Arregui v. Spain* (CE:ECHR:2024:0111JUD004254118, § 31 and the case-law cited). In its judgment of 5 September 2017, *Bărbulescu v. Romania* (CE:ECHR:2017:0905JUD006149608, § 74), which concerned private messages sent using an employer's computer, the ECtHR held that an employer's instruction to employees to refrain from any personal activities in the workplace, which included a ban on using company resources for personal purposes, did not affect the classification as 'correspondence' for the purposes of Article 8(1) of the ECHR.

[30] See ECtHR, 3 April 2007, *Copland v. the United Kingdom* (CE:ECHR:2007:0403JUD006261700, §§ 41 and 42).

[31] See ECtHR, 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway* (CE:ECHR:2013:0314JUD002411708, § 106).

[32] See ECtHR, 5 September 2017, *Bărbulescu v. Romania* (CE:ECHR:2017:0905JUD006149608, §§ 72 and 73), and of 16 December 1992, *Niemietz v. Germany* (CE:ECHR:1992:1216JUD001371088, § 32 *in fine*).

[33] See ECtHR, 16 October 2007, *Wieser and Bicos Beteiligungen GmbH v. Austria* (CE:ECHR:2007:1016JUD007433601, § 45).

32. By its second question, the referring court asks the Court of Justice, in essence, whether Article 7 of the Charter precludes the seizure by a national competition authority, during an inspection at the business premises of undertakings suspected of infringing Article 101 or 102 TFEU, of emails of a business nature between employees and managers of those undertakings. This question should, to my mind, be answered in the negative.

33. I would point out that, in accordance with Article 52(1) of the Charter, limitations on the exercise of the right to respect for communications enshrined in Article 7 of the Charter are possible only if they are provided for by law and respect the essence of that right and if, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. [34]

34. In this instance, as regards, first of all, the condition of compliance with the principle of legality, I must point out that the measures at issue in the main proceedings were based on Article 18 to 21 of the Law on Competition.

35. Second, as regards respect for the essence of the right to the confidentiality of communications, searches and seizures such as those at issue in the main proceedings admittedly entail access to the content of communications as such. [35] However, in this instance, it is clear from the orders for reference that, in principle, only emails relating to the subject matter of the investigation were targeted by those measures, and then only momentarily. Moreover, as regards the interference with the right of the natural persons concerned to respect for communications, the measures at issue apparently related only to aspects of their professional lives, not their personal and private lives. It is clear from the Court's case-law that infringement of the essence of the rights enshrined in Article 7 of the Charter is determined quantitatively rather than qualitatively. [36] I am therefore of the view that, subject to the findings which it is for the referring court to make, the second condition laid down in Article 52(1) of the Charter is also met in this instance, and that the measures which gave rise to the main proceedings did not infringe the essential content of the right of the natural and legal persons concerned to respect for communications.

36. Third, as regards the objectives pursued, the interference in the exercise of the rights enshrined in Article 7 of the Charter which arises from inspections and seizures carried out by national competition authorities when, in accordance with Article 3(1) and Article 5 of Regulation (EC) No 1/2003, [37] they apply Articles 101 and 102 TFEU, serves the purpose of uncovering practices contrary to those provisions. The Court has already had occasion to hold that Articles 101 and 102 TFEU are provisions that pertain to a matter of public policy and which

[34] See the judgment in *WebMindLicenses*, paragraph 73.

[35] I note that, in its judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, EU:C:2014:238), the Court held, in substance, that the obligation to retain data imposed by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ 2006 L 105, p. 54) was not so serious an interference as to adversely affect the essence of the right to privacy, because it did not permit 'the acquisition of knowledge of the content of the electronic communications as such'. See also, with reference to Directive 2002/58, the judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970, paragraph 101).

[36] See, to that effect, Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592, paragraph 150), the judgment of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraph 120) and the Opinion of Advocate General Pitruzzella in that case (EU:C:2022:65, point 93).

[37] Council Regulation No 1/2002 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L 001, p. 1).

prohibit cartels and abuses of a dominant position respectively and pursue the objective – indispensable to the functioning of the internal market – of ensuring that competition is not distorted in that market. [38]

37. In so far as concerns, fourth, observance of the principle of proportionality, I would point out that that principle requires that the limitations which may be imposed on rights and freedoms enshrined in the Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued and that, where there is a choice between several appropriate measures, recourse must be had to the least onerous. In addition, an objective of general interest may not be pursued without having regard to the fact that it must be reconciled with the fundamental rights affected by the measure, by properly balancing the objective of general interest against the rights at issue, in order to ensure that the disadvantages caused by that measure are not disproportionate to the aims pursued. Thus, the question whether a limitation of the rights guaranteed in Article 7 of the Charter may be justified must be assessed by measuring the seriousness of the interference which such a limitation entails and by verifying that the importance of the objective of general interest pursued by that limitation is proportionate to that seriousness. [39]

38. In this instance, the importance of the objective of safeguarding effective, undistorted competition in the internal market is, to my mind, capable of justifying interference, even serious interference, with the right of undertakings to respect for communications, having regard also to the fact that, as the ECtHR and the Court of Justice have acknowledged, interference by public authorities may be more far-reaching where professional or business premises or activities are involved. [40] Moreover, as the Commission has correctly emphasised, in the current digital environment, electronic correspondence is one of the principle means of communication for undertakings. Therefore, the various forms such correspondence may take, including emails exchanged via professional messaging systems, have become items of evidence that are often indispensable for uncovering anticompetitive practices. [41] Furthermore, it is clear from the Court's case-law that the Commission may search for and seize emails in the exercise of its powers under Article 20 of Regulation No 1/2003, [42] provided that only relevant emails are placed on the file. [43] Similarly, it is clear from the case-law of the ECtHR that such measures are not *a priori* excluded in the context of administrative procedures, where the interference with the right to respect for correspondence is commensurate with the importance of the legitimate objective pursued. [44]

[38] See, regarding Article 101 TFEU, the judgment of 22 March 2022, *Nordzucker and Others* (C-151/20, EU:C:2022:203, paragraph 51 and the case-law cited), and, regarding Article 102 TFEU, the judgment of 22 March 2022, *bpost* (C-117/20, EU:C:2022:202, paragraph 46 and the case-law cited).

[39] See, to that effect, the judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963, paragraph 41 and the case-law cited).

[40] See ECtHR, 16 December 1992, *Niemitz v. Germany* (CE:ECHR:1992:1216JUD001371088, § 31). See also the judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission* (C-583/13 P, EU:C:2015:404, paragraph 20).

[41] See, to that effect, Directive 2019/1, recital 32 and Article 32, which includes electronic messages among the types of proof deemed admissible as evidence before national competition authorities.

[42] See the judgment of 16 July 2020, *Nexans France and Nexans* v *Commission* (C-606/18 P, EU:C:2020:571, paragraphs 56 to 64) of 30 January 2020, *České dráhy* v *Commission* (C-538/18 P and C-539/18 P, not published, EU:C:2020:53, paragraphs 101 to 104).

[43] See, to that effect, the judgments of 24 September 2020, *Prysmian and Prysmian Cavi e Sistemi* v *Commission* (C-601/18 P, EU:C:2020:751, paragraphs 58 and 59), and of 30 January 2020, *České dráhy* v *Commission* (C-538/18 P and C-539/18 P, not published, EU:C:2020:53, paragraph 99 and the case-law cited).

[44] See ECtHR, 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway* (CE:ECHR:2013:0314JUD002411708, paragraphs 172 to 175), which concerned inspections carried out for the purposes of a tax audit.

39. Having regard to the foregoing considerations, I am of the view that Article 7 of the Charter does not preclude a national competition authority from searching for and seizing emails exchanged via the internal email system of an undertaking whose professional or business premises are being inspected in the course of an investigation into the infringement of the rules on competition, provided that those emails are relevant to the subject matter of the inspection.

C. The third question referred for a preliminary ruling

40. By its third question, the referring court asks the Court of Justice, in essence, whether Article 7 of the Charter precludes the seizure, by a national competition authority, of emails between employees and managers of an undertaking in the course of an inspection carried out at the undertaking's professional or business premises as part of an investigation into the infringement of Article 101 or 102 TFEU, from being authorised by a body, such as the Public Prosecutor's Office under Portuguese law, which is responsible for representing the State, bringing criminal prosecutions in the public interest and defending democratic legality in accordance with the Constitution, and which is independent.

41. In order to answer that question, it is necessary first of all to recap the case-law of the ECtHR and of the Court of Justice relating to searches and seizures at professional premises, in order to define the standards of protection which Article 8 of the ECHR and Article 7 of the Charter provide for against such interference with the right, in particular, to respect for business correspondence.

42. As regards Article 8 of the ECHR, it must first of all be remembered that it is clear from the case-law of the ECtHR that the protection provided for by Article 8 can extend to certain commercial premises and that searches and seizures carried out at such premises constitute an interference with the right of the undertaking concerned to respect for its 'home' and 'correspondence'.[45] The ECtHR has nevertheless clarified, as I have already mentioned, that interference by public authorities may be more far-reaching where professional or business premises or activities are involved than in other cases.[46] In addition, the discretion which a State enjoys in determining whether greater interference is necessary is broader when the measure in question concerns legal persons rather than individuals.[47] Next, it must be observed that an analysis of the judgments of the ECtHR on this subject shows that that court assesses the consistency with Article 8 of searches and seizures conducted at business premises by making an overall assessment of all the points of fact and law relevant to the case, such as the extent of the powers conferred on the competent authority, the circumstances of the interference and the various safeguards provided for by the legal system in question,[48] including, in particular, the possibility of effective *a posteriori* judicial review,[49] which the ECtHR regards as capable of constituting a fundamental guarantee.[50] The ECtHR has also emphasised the need to strike a balance between the interference and the importance of the public interest being

[45] See ECtHR, 4 April 2023, *UAB Kesko Senukai v. Lituania* (CE:ECHR:2023:0404JUD001916219, § 109 and the case-law cited).

[46] See ECtHR, 16 December 1992, *Niemitz v. Germany* (CE:ECHR:1992:1216JUD001371088, § 31).

[47] See ECtHR, 2 October 2014, *Delta Pekárny A.S. v. the Czech Republic* (CE:ECHR:2014:1002JUD000009711, § 82 and the case-law cited).

[48] See ECtHR, 16 April 2002, *Société Colas Est and Others v. France* (CE:ECHR:2002:0416JUD003797197, §§ 48 and 49), and, with regard to business correspondence in particular, ECtHR, 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway* (CE:ECHR:2013:0314JUD002411708, §§ 172 to 174), ECtHR, 23 June 2022, *Naumenko and Sia Rix Shipping v. Latvia* (CE:ECHR:2022:0623JUD005080514, § 62), and ECtHR, 4 April 2023, *UAB Kesko Senukai Lithuania v. Lithuania* (CE:ECHR:2023:0404JUD001916219, §§ 113 and 118 and the case-law cited).

[49] See ECtHR, 4 April 2023, *Uab Kesko Senukai Lithuania v. Lithuania* (CE:ECHR:2023:0404JUD001916219, §§ 113 and 117 and the case-law cited).

[50] See judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission* (C-583/13 P, EU:C:2015:404, paragraph 32).

protected.[51] In its judgment of 2 October 2014, *Delta Pekárny a.s. v. the Czech Republic*,[52] which concerned inspections at business premises in connection with anticompetitive practices, the ECtHR expressly held that, in the case of on-site visits at business premises, the absence of prior judicial authorisation could be counterbalanced by a post-inspection review of the lawfulness and necessity of that investigatory measure, provided that the review was effective in the particular circumstances of the case in question. This means that the persons concerned should be able to obtain an effective judicial review, both in fact and in law, of the measure at issue and its conduct, and that, where an operation found to be irregular has already taken place, the remedy or remedies available provide the person concerned with appropriate redress. Generally, for the purposes of the present case, it is clear from the case-law of the ECtHR that the fundamental right to the inviolability of private premises, as protected by Article 8 of the ECHR, is not infringed, in the case of inspections at the premises of undertakings, by the mere fact that there has been no prior judicial authorisation, provided that effective and adequate safeguards against abuse are in place, in particular comprehensive *ex post facto* review of the measures at issue. The same applies to the right to respect for correspondence, guaranteed by that article, the question of the seizure of the companies' correspondence being closely linked, in the case-law of the ECtHR, to that of searches of their premises.[53]

43. The same principles may be found in the case-law of the Court of Justice concerning Article 7 of the Charter. In its judgment in *WebMindLicenses*, which concerned the seizure of emails in connection with criminal proceedings, the Court confirmed that, in the absence of prior judicial authorisation, a strict legal framework for, and strict limits on such seizure were required if individuals were to be protected from arbitrary interference by the authorities with the rights guaranteed under that article. The Court clarified, first of all, that such seizure could be compatible with Article 7 only if domestic legislation and practice afforded adequate and effective safeguards against abuse and arbitrariness and, second, that the absence of a prior judicial warrant could, to a certain extent, be counterbalanced by the availability to the person concerned by the seizure of an *ex post facto* judicial review relating to both the legality and the necessity of the seizure, a review which must be effective in the particular circumstances of the case at issue.[54] As regards, more specifically, the Commission's investigatory powers, the Court has already had occasion to clarify that the system put in place in the European Union satisfies the requirements of Article 8 of the ECHR, as interpreted by the ECtHR, as well as Article 7 of the Charter and that the lack of prior judicial authorisation is not capable, in itself, of rendering an inspection measure decided upon by the Commission unlawful. The Court has emphasised in particular that Article 20 of Regulation No 1/2003 lays down both a legal framework for those powers and strict limits on their exercise and expressly provides, in paragraph 8 of that article, that the lawfulness of the Commission's inspection decision is to be subject to review by the Court of Justice, a review which addresses both the law and the facts and which is therefore an in-depth review.[55]

[51] See ECtHR, 14 March 2013, *Bernh Larsen Holding AS and Others v. Norway* (CE:ECHR:2013:0314JUD002411708, § 174).

[52] CE:ECHR:2014:1002JUD000009711, §§ 86 and 87 and the case-law cited. See, to the same effect, ECtHR, 19 January 2017, *Posevini v. Bulgaria* (CE:ECHR:2017:0119JUD006363814, § 84).

[53] See the European Court of Human Rights *Guide on Article 8 of the ECHR-Right to respect for private and family life, home and correspondence*, August 2022, point 602.

[54] See paragraphs 77 and 78 of that judgment.

[55] See, to that effect, judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission* (C-583/13 P, EU:C:2015:404, paragraphs 29 to 36). See also judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 74 to 100). As to whether the full set of remedies available to challenge a Commission inspection measure is capable of counterbalancing the absence of prior judicial review, see judgment of 9 March 2023, *Les Mousquetaires and ITM Entreprises* v *Commission* (C-682/20 P, EU:C:2023:170, paragraph 57 et seq.)

44. The level of protection afforded by Article 7 of the Charter, as interpreted by the Court of Justice, very clearly applies to the exercise by national competition authorities of their search and seizure powers when they are applying Articles 101 and 102 TFEU. [56]

45. Thus, in light of what I have set out in points 42 and 43 of this Opinion, it must be concluded that Article 7 of the Charter does not preclude legislation of a Member State pursuant to which, in the course of an investigation into a suspected infringement of Article 101 or 102 TFEU, the national competition authority may search for and seize emails whose content relates to the subject matter of the inspection without having prior judicial authorisation, provided that a strict legal framework for that authority's powers has been laid down together with adequate and effective safeguards against abuse and arbitrariness, in particular comprehensive *ex post facto* judicial review of the measures at issue.

46. That conclusion is not, however, sufficient in order for a complete answer to be given to the question asked by the referring court. It is, in fact, necessary to address this question also from another viewpoint and to determine whether EU law precludes a Member State, in circumstances such as those of the main proceedings, from applying a national level of protection of the fundamental right to respect for communications, guaranteed by Article 7 of the Charter, that is higher than that provided for by that provision, as interpreted by the Court, in particular by rendering it necessary for the national competition authority to obtain prior judicial authorisation in order to be able to carry out inspections and seizures at a company's premises.

47. It must be observed in this connection that the Charter forms part of a system for the protection of fundamental rights in the European Union that comprises several levels alongside the rules and conventions of international law, which include the ECHR, and national constitutions. In that context, Article 53 of the Charter is intended to make clear that the Charter cannot be used to justify any lowering of the level of protection of fundamental rights afforded by international law, EU law or the legal systems of the Member States. The protection of fundamental rights afforded by the constitutional laws of the Member States may therefore, in principle, coexist with that guaranteed by the Charter and supplement it. [57]

48. The Court has repeatedly held that, where, in a situation in which action of the Member States is not entirely determined by EU law, a national provision or measure implements EU law for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised. [58]

49. Thus, the application of national standards of protection of fundamental rights in areas in which the Charter applies is limited in three ways.

[56] The application of EU competition law is based on a system of parallel powers in the context of which both the Commission and the national competition authorities may apply Articles 101 and 102 TFEU (see judgment of 23 November 2017, *Gasorba and Others*, C-547/16, EU:C:2017:891, paragraph 23). In exercising those powers, these authorities are required to observe the Charter, and in particular Article 7 thereof, in so far as concerns powers of inspection.

[57] See, to that effect, in particular, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 115).

[58] See judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraph 21 and the case-law cited). See, to the same effect, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraph 110), and order of 9 January 2024, *Unitatea Administrativ Teritorială Județul Brașov* (C-131/23, EU:C:2024:42, paragraph 81).

50. First, the application of such standards presupposes that the situation in question is not entirely governed by EU law. In so far as concerns, more specifically, the implementation by the Member States of the provisions of a directive, it is conceivable only where the directive does not effect full harmonisation. [59]

51. In this instance, it must be observed that Article 20 of Regulation No 1/2003 is intended solely to regulate the Commission's investigatory powers and that it does not follow, either from its wording or the context of which it forms part, or its purpose, that it is intended to apply to national competition authorities also. [60] Moreover, Directive 2019/1, assuming it to be applicable to the facts at issue in the disputes in the main proceedings, is not intended to effect complete approximation of the laws of the Member States concerning the powers of the competition authorities in connection with inspections at professional premises and seizures, in particular in so far as concerns the conditions to which the validity of decisions to carry out such measures are subject. Such conditions therefore fall within the competence of the Member States, which are in principle at liberty to apply to the interference resulting from such measures the constitutional safeguards provided for in their own legal system, which may include a requirement for prior judicial authorisation, subject to the observance of EU law. Moreover, Article 6(3) of Directive 2019/1, read in the light of recital 31 thereof, expressly provides that it applies without prejudice to requirements under national law for the prior authorisation of such inspections by a national judicial authority. [61]

52. Second, the application of a national standard of protection of fundamental rights must not compromise the level of protection provided for by the Charter. In the EU legal order, the Charter sets the minimum level of protection of the rights and freedoms which it recognises, and consequently the institutions, bodies and agencies of the European Union, as well as the Member States, when implementing EU law, may not offer a lower level of protection.

53. The Member States are therefore at liberty to provide that, in accordance with provisions of national constitutional law safeguarding the fundamental right to respect for correspondence, the search for and seizure, by the national competition authority, of emails in the course of inspections carried out at the professional premises of an undertaking as part of an investigation into infringements of Article 101 or 102 TFEU must be authorised in advance by a judicial authority, whether that be the Public Prosecutor's Office, which is responsible for bringing criminal prosecutions in the public interest, or an investigating judge, provided that, taken as a whole, the safeguards which surround the interference with that fundamental right which results from such measures, including the legal remedies available to the persons concerned, protect that right to at least the same level as is guaranteed by Article 7 of the Charter, as interpreted by the Court.

54. Third, the application of national standards of protection of fundamental rights must not compromise the primacy, unity and effectiveness of EU law. [62] On this point, the Court has rejected any interpretation of Article 53 of the Charter according to which the Charter gives general authorisation to a Member State to apply the higher level of protection of fundamental rights guaranteed by its Constitution and, where necessary, give it priority over the application of

[59] See judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, EU:C:2019:623, paragraph 33).

[60] See, by analogy, judgment of 21 January 2021, *Whiteland Import Export* (C-308/19, EU:C:2021:47, paragraphs 35 to 38).

[61] I would point out that the Member States also enjoy discretion in cases where Directive 2019/1 provides that prior authorisation is necessary: see Article 7(2), read in conjunction with recital 34 of that directive.

[62] See, to that effect, judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 60).

provisions of EU law.[63] Whether or not a Member State may apply its own constitutional safeguards in connection with searches and seizure in the course of investigations into infringements of Article 101 or 102 TFEU, where they afford a level of protection of the fundamental right to respect for correspondence that is higher than that guaranteed by the Charter, therefore depends on whether doing so would be liable to undermine the effectiveness of the prevention of anticompetitive practices within the European Union. I would point out in this connection that the Court has repeatedly held that the competition authorities and the courts and tribunals of the Member States are required to apply Articles 101 and 102 TFEU, where the facts come within the scope of EU law, and to ensure that those articles are applied effectively in the general interest.[64]

55. The fact that, in accordance with the Constitution of a Member State, as interpreted by the constitutional court of that State, the search for and seizure of emails, even opened/read emails, by the national competition authority in the course of inspections at the professional premises of an undertaking suspected of anticompetitive practices must be authorised in advance by an investigating judge is not, in itself, such as to undermine the effective application of Articles 101 and 102 TFEU. As I have already observed in point 51 of this Opinion, it is clear from Directive 2019/1 that, in the mind of the EU legislature, enacting a mechanism for prior authorisation by a judicial authority before a national competition authority may exercise its power of inspection falls within the competence of the Member States and, moreover, Article 6(3) of that directive expressly envisages the option for Member States to provide for such authorisation.

56. The Competition Authority here argues that not only does the interpretation given by the Tribunal Constitucional (Constitutional Court) call into question the possibility of using the emails seized in the course of the searches at issue in the main proceedings as evidence, but it could also result in the invalidation of final decisions finding infringements of Articles 101 and 102 TFEU, on the ground that the evidence on which the Competition Authority had relied was obtained unlawfully, going back some 10 years. That interpretation therefore obstructs the effective application of the competition rules of the European Union.

57. I would observe, in this connection, that not only has the referring court not asked the Court about this, but it has also not provided the Court with the necessary information to enable it to assess the consequences of the 2023 judgments or the extent of their application *ratione temporis*, or their possible effect on final decisions adopted by the Competition Authority finding infringements of Articles 101 and 102 TFEU.

58. That being so, I shall confine myself to the following remarks.

59. The rules on conditions governing the obtaining of evidence and its use in national administrative proceedings for the application of Articles 101 and 102 TFEU fall, in the absence of provisions of EU law in the field, within the competence of the Member States.[65] Accordingly, a Member State is at liberty to provide that, in circumstances such as those of the main proceedings, evidence collected in the course of inspections carried out by the competition

[63] See judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 56).

[64] See judgment of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 19 and the case-law cited). See also, to the same effect, judgment of 18 January 2024, *Lietuvos notarų rūmai and Others* (C-128/21, EU:C:2024:49, paragraph 108 and the case-law cited).

[65] Neither Regulation No 1/2003 nor Directive 2019/1, with the exception of Article 32, which concerns the types of evidence that are admissible before national competition authorities, contains provisions in this regard.

authority without the prior judicial authorisation required by the Constitution of that Member State, as interpreted by its constitutional court after the inspections have been carried out, must be excluded from the proceedings. [66]

60. Nonetheless, while the establishment and application of those rules falls within the competence of the Member States, the latter must exercise that competence in accordance with EU law, and in particular the principle of effectiveness. Accordingly, they may not render the implementation of EU law impossible in practice or excessively difficult and, specifically in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 and 102 TFEU, which the national competition authorities are required to ensure, in the general interest. [67]

61. In this instance, first of all, it is in my view incumbent on the referring court, when assessing the consequences to be drawn from the 2023 judgments, to take account of the need to ensure the effective application of the European Union's rules on competition and so to have recourse to all of the possibilities offered by national law, including, where appropriate, the possibility of redressing, in circumstances such as those of the disputes in the main proceedings, the lack of prior judicial authorisation by means of *a posteriori* judicial review, in order to ensure that the non-observance of the European Union's rules on competition is penalised.

62. Second, in order to give full effect to Articles 101 and 102 TFEU, the Portuguese courts might find it advisable to disapply a national rule that would allow the interpretation adopted in the 2023 judgments to have retroactive effect the consequence of which would be to call into question the liability of the undertakings concerned in cases in which the Competition Authority had made a final finding of infringement of EU rules on competition, thus creating a systemic risk of impunity for such offences. [68]

V. Conclusion

63. In the light of all the foregoing considerations, I propose that the Court answer the third question referred by the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal) for a preliminary ruling in each of the Joined Cases C-258/23 to C-260/23 as follows:

Article 7 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding legislation of a Member State pursuant to which, in the course of an inspection at the premises of an undertaking, carried out as part of an investigation into an infringement of Article 101 or 102 TFEU, the national competition authority may search for and seize emails whose content relates to the subject matter of the inspection without having prior judicial authorisation, provided that a strict legal framework for that authority's powers has been laid down together with adequate and effective safeguards against abuse and arbitrariness, in particular comprehensive *ex post facto* judicial review of the measures at issue.

[66] Moreover, such a rule would merely reflect the requirements which flow from compliance with the principles of legality and the rule of law and from the observance of fundamental rights. See, by analogy, judgment of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30, paragraph 38). See also judgment in *WebMindLicenses*, paragraphs 80 to 89.

[67] See judgment of 21 January 2021, *Whiteland Import Export* (C-308/19, EU:C:2021:47, paragraph 46).

[68] See, by analogy, judgment of 24 July 2023, *Lin* (C-107/23 PPU, EU:C:2023:606, paragraphs 111 to 124 and point 1 of the operative part). See also, by analogy, judgment of 21 January 2021, *Whiteland Import Export* (C-308/19, EU:C:2021:47, paragraph 53).