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Seizure of electronic mail in restrictive practices procedures is only permitted with prior authorisation of a judge: the Supreme Court judgement establishing case-law

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The Portuguese Supreme Court has ruled that **in restrictive practices procedures it is the judge who has exclusive authority to order the seizure of emails in the context of dawn raids conducted by the Portuguese Competition Authority**[1].

More precisely, we summarise the ruling: **"*In proceedings related to restrictive practices established in the Portuguese Competition Law (Law no. 19/2012, of 8 May), the judge is in charge of ordering or authorising the seizure of e-mails or other records of a similar nature, regardless of whether they are read or unread,* which appear to be of great interest for the discovery of the truth or for evidence, under the terms of article 17 of Law no. 109/2009, of 15/09 (Cybercrime Law), subsidiarily applicable (articles 13 (1) of the Portuguese Competition Law and article 41 (1), of the General Framework for Administrative Offences".**

[1] Supreme Court judgement of 26 June 2024, in case 28999/18.3T8LSB-B.L1-A.S1, available here.

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With this decision, the Supreme Court puts an end to years of contradictory rulings, mainly by the Competition Court and the Lisbon Court of Appeal, regarding which judicial authority is competent to order the seizure of emails in proceedings for anti-competitive practices: in other words, whether it is a Public Prosecutor or a Judge.

In the last judgements, in fact, the Supreme Court had already decided in the same way as it has now. In a nutshell, it has concluded that competition law must also be governed by the principles that derive from the case law concerning cybercrime (see Judgement no. 10/2023).

The Supreme Court concluded that, in the absence of specific provisions in the Competition Law Regime and in the General Framework for Administrative Offences regarding the seizure of emails, the **rules governing criminal proceedings apply in a subsidiary manner, including not only the Code of Criminal Procedure, but also the rules of Cybercrime Law**[2]. In other words, all seizures of emails are subject to the principle of the judge's exclusive oversight[3], adding an end to the discussion surrounding the distinction between emails marked as open (read) and closed (unread).

Furthermore, the court clarified that **even if there were no specific regime for the seizure of emails in criminal procedure, the constitutional regime protecting the privacy of correspondence enshrined in Article 34(4) of the Constitution would lead to the same conclusion**.

In this case, it is worth noting that the Public Prosecutor has endorsed the same position. According to the Deputy Attorney General of the Public Prosecutor's Office [*Procurador Geral Adjunto do Ministério Público*] at the Supreme Court, "*from all of the above-mentioned set of rules, it is therefore uncontroversial, in our view, that the seizure of emails that are stored on a company's computer system or that are related to it, can only be authorised or ordered, first and foremost by constitutional imperative, by court order*".

[2] Article 17 of Law 109/2009 of 15 September.
[3] See article 17 of the Cybercrime Law and articles 179 and 252 of the Code of Criminal Procedure, *ex vi* article 13 (1), of the Competition Law and article 41 (1), of the General Framework for Administrative Offences.

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This case therefore ensures, in accordance with the rule of law, a virtuous alignment, each at their own level, of the positions of the Supreme Court, the Constitutional Court and the Public Prosecutor's Office. The result is thus fully in line with the **case law of the Constitutional Court**, which had already ruled unconstitutional the interpretation of the Competition Law provisions[4], according to which, in competition law proceedings, the Portuguese Competition Authority is permitted to search and seize emails which were read, subject to authorisation from the Public Prosecutor's Office[5].

In the light of three Constitutional Court rulings on the same issue, the promotion of a successive abstract review of constitutionality ("*processo de fiscalização abstrata sucessiva da constitucionalidade*") is to be expected.

[4] See articles 18(2) and 20(1) of the Competition Law.
[5] See Constitutional Court judgments no. 91/2023, 314/2023 and Summary Decision no. 277/2024 (confirmed by the Constitutional Court judgment no. 510/2024).

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