



Santarém - Competition, Regulation and Supervision Court
Competition, Regulation and Supervision Judge - Judge 1

Pç. do Município, Edif. Ex-Escola Prática de Cavalaria
2005-345 Santarém
Telef: 243090300 Fax: 243090329 Mail: tribunal.c.supervisao@tribunais.org.pt

Action for Special
Proceedings

**

SENTENCE

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I. REPORT

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ASSOCIATION IUS OMNIBUS, better identified in the records, under the legal provisions contained in Articles 52, paragraph 3 and 60, paragraph 3 of the CRP, 2 and 3 of Law No. 83/95 of 31 August, 31.º and 1045 º to 1047 º of the CPC, and 13º and 19º of Law nº 23/2018, of 5 June, brought, individually, a SPECIAL DECLARATIVE ACTION FOR THE PRESENTATION OF DOCUMENTS against:

- ❖ DREAM WORKS ANIMATION LICENSING LLC, ENTERPRISE CORPORATE SERVICES LLC, having its principal place of business at 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America¹ ;
- ❖ DREAM WORKS ANIMATION LLC, ENTERPRISE CORPORATE SERVICES LLC, having its principal place of business at 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America² ;
- ❖ DREAM WORKS ANIMATION PUBLISHING LLC, ENTERPRISE CORPORATE SERVICES LLC, having its principal place of business at 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America³ ;
- ❖ NBC UNIVERSAL MEDIA LLC, ENTERPRISE CORPORATE SERVICES LLC, headquartered at 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America ;⁴
- ❖ UNIVERSAL STUDIOS LIMITED, established at 1 Central St. Giles, St. Giles High Street, London WC2H 8NU, United Kingdom⁵ ;

¹ Autos principais



- ² Appendix A)
- ³ Appendix B)
- ⁴ Appendix C)
- ⁵ Appendix D)



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- ❖ UNIVERSAL STUDIOS LICENSING LLC, ENTERPRISE CORPORATE SERVICES LLC, headquartered at 100 Universal City Plz Universal City, CA, 91608-1085, United States or 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America⁶ ;
- ❖ COMCAST CORPORATION, headquartered at One Comcast Center, Philadelphia, PA 19103-2838, United States of America ;⁷
- ❖ NBC UNIVERSAL LLC, headquartered at Comcast Capital Corporation, 1201 N. Market Street Suite 1000, Wilmington, Delaware 19801, United States of America⁸

Formulating, finally, the following requests:

1. The European Commission is notified to submit, if it so wishes, written observations to the Court on the following application within a period of 10 days;
2. Summons the respective Defendant to produce, on a day, time and place to be designated by the Court, so that the documents listed in §73 of the respective initial petition are accessible or made available to the Plaintiff, possibly with the measures to guarantee proportionality that the Court deems appropriate;

Or, alternatively,

3. That the Court determines which of the documents referred to in the preceding paragraph, or others that the Court deems strictly necessary to allow the Plaintiff to understand whether the diffuse interests and individual homogeneous interests of consumers residing in Portugal were affected by the anticompetitive practices referred to in the Statement of Claim, causing them harm, and the amount of such harm, and summons the Defendant to produce them, on a day, time and place to be designated by the Court, so that they may be made accessible or made available to the Plaintiff;

In any case,

⁶ Appendix E)

⁷ Appendix F)

⁸ Appendix G)



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4. Granting access to the documents strictly necessary to enable the Plaintiff to determine whether diffuse and homogeneous individual interests have been affected and whether consumers residing in Portugal have a right to compensation for damages arising from infringements of Article 101 TFEU in connection with the aforementioned anti-competitive practices, with such measures to ensure proportionality as the Court deems appropriate; and
5. Summons the respective Defendant of the Plaintiff's intention, on behalf of all consumers residing in Portugal, to bring against it or against Comcast/Universal an action for damages for consumers residing in Portugal affected by the anti-competitive practices in question, should the injury to the consumers' individual homogeneous interests be confirmed, so that they may be compensated for the damages caused to them by the referred practices, for the purposes and with the effects set forth in Article 323, no. 1 of the Civil Code.

The Plaintiff bases its claims, in a narrow summary, on the following factual background:

- a.* According to the European Commission's Decision issued on 30 January 2020 in Case AT.40433 - Film Merchandise (hereinafter, the "Decision"), Comcast/Universal, between January 2013 and September 2019, infringed Article 101 TFEU and Article 53 of the EEA Agreement by having implemented practices, by contractual and non-contractual means, which partitioned the market within the EEA by dividing it into territories and customer groups, and was sentenced to a total fine of €14,327,000.
- b.* The Decision was adopted with the cooperation of Comcast/Universal (having benefited from a reduction of the fine for that reason), which did not appeal against the Decision within the time limit set out in the TFEU, and the Decision is now final.
- c.* It seeks to confirm that, as suggested by the geographic scope of the practices described in the Decision (covering the whole EEA), the anti-competitive conduct of Comcast/Universal - the economic unit of which the Defendants form part - identified in the Decision, caused damage to constitutionally protected diffuse interests in



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Portugal and the homogeneous individual interests of consumers residing in Portugal, and, if appropriate, the quantum of damages caused.

- d. It is impossible for him, in light of the publicly available information and documents, i.e. non-confidential version of the European Commission Decision rendered on 30 January 2020 in case AT.40433 - Film Merchandise, published on 24 April 2020; European Commission press release of 30 January 2020; contractual scheme published by the European Commission at https://ec.europa.eu/commission/presscorner/api/files/attachment/860790/NBCUnivers_al_graph_en.pdf and news published on the EU Law Live website, to make, in a detailed manner, the determinations referred to in "c.", beyond the broad conclusion that the practice had effects in Portugal.
- e. Should it be determined, following access to the evidence requested in the present action, that the anti-competitive behaviour at stake of Comcast/Universal, including the Defendants, has damaged diffuse interests and homogeneous individual interests of consumers living in Portugal, it is the Plaintiff's intention to file, based on the evidence obtained, an action for declaration of the anti-competitive behaviour and for damages before the Portuguese Competition, Supervision and Regulation Court, under Law no. 23/2018 of 5 June, with a cause of action based exclusively on infringements of competition law, exercising the right of popular action granted to it by the Portuguese Constitution and legislation, on behalf of the Portuguese consumers affected.No. 23/2018, of June 5, with cause of action exclusively based on infringements of competition law, exercising the right of popular action granted to it by the Portuguese Constitution and legislation, in representation of the injured Portuguese consumers.
- f. By communication dated 16 April 2021, it requested from each of the Defendants the evidence listed in the present action, with the grounds and for the purposes provided in these proceedings, and gave each of them a period of fifteen working days to respond.
- g. By communication of 12 May 2021, each of the Defendants informed her of their refusal to grant access to any of the evidence requested, for the reasons set out therein.



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- h.* The Plaintiff seeks access to the following documents, allegedly held by each of the Defendants, without prejudice to any other documents or to only some of them that the Court deems relevant and (sufficiently) necessary for the purpose of its request:
- For knowledge and proof of the scope and effects of the anti-competitive practices in question:
- i.* Standard Comcast/Universal intellectual property rights licence agreement (Master Merchandising License Agreement) used by the Defendant between January 2013 and September 2019, referred to, inter alia, in paragraph 24 and footnote 35 of the European Commission's Decision.
- ii.* Merchandising license agreements, and/or intellectual property use license agreements for the production and/or sale of merchandising items related to digital, television or cinema contents produced, acquired or disclosed by the Defendants or by the Comcast/Universal group, entered into directly between the Defendants and their licensees or entered into indirectly (through Comcast/Universal intermediaries), for the exploitation of the intellectual property rights of the Defendants or of Comcast/Universal covering, totally or partially, the Portuguese territory, being in force, totally or partially, between January 2013 and September 2019.
- iii.* The distribution agreements in the possession of each of the Defendants (or, alternatively, documents in their possession identifying and/or referring to the distribution agreements) entered into by the licensees with wholesalers and/or retailers for the sale of the merchandising products of each of the Defendants or of Comcast/Universal relating to digital, television or film content produced, acquired or disseminated by them or by the Comcast/Universal group to consumers resident in Portugal between January 2013 and September 2019.
- iv.* Notifications made to each of the Defendants, between January 2013 and September 2019, to authorise sales in Portugal or to consumers residing in Portugal not permitted by the geographical scope of the licence agreements for the use of intellectual property for the production and/or sale of merchandising items



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related to digital, TV or film content that you or Comcast/Universal produce, acquire or broadcast.

- v. Documents or open communications exchanged between each of the Defendants, or their agents, and licensees, from January 2013 until September 2019, on the possibility of passive sales outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanction proceedings: ID 479-16, ID 479-21, ID 479-34, ID 479-14, ID 479-39, ID 479-1, ID 479-36, ID 479-41 and ID 479-33).
- vi. Documents or open communications addressed to each of the Defendants, or their agents, by the EEA licensees, between January 2013 and September 2019, requesting them to prevent other licensees from selling merchandising outside contractually defined geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-31, ID 479-15, ID 523) and Comcast/Universal group's respective replies.
- vii. Documents or open communications addressed to each of the Defendants, or their agents, by the EEA licensees, between January 2013 and September 2019, requesting permission to use other languages in merchandising items, namely Portuguese, and their responses (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-26 and ID 479-25).
- viii. Documents or open communications exchanged between each of the Defendants, or their agents, and EEA licensees, from January 2013 until September 2019, regarding the need to ensure the absence of sales of the merchandising articles outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-43, ID 479-38, ID 479-2, ID 475, ID 479-30 and ID 479-44).



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- ix. Reports of audits carried out by each of the Defendants, or by entities engaged by them, to licensees with sales in Portugal or with sales in other EEA countries, relating to sales outside the designated geographic scope or customer group, involving sales in or to Portugal, between January 2013 and September 2019.
 - x. Document(s) in the possession of each of the Defendants identifying the license agreements for the use of intellectual property for the production and/or sale of merchandising items that it terminated on the grounds of breach of the restrictive sales clauses, in the EEA, between January 2013 and September 2019.
 - xi. Document(s) in the possession of each of the Defendants relating to the system for monitoring online sales of their products concerned in the EEA, including compliance with the online prohibited sales policy, between January 2013 and September 2019.
- For knowledge and proof of the economic unity constituted by the group Comcast/Universal and legal persons therein, determining the subjective scope of civil liability for the anti-competitive practices at issue:
- i. Document(s) in the possession of each of the Defendants showing the current shareholding structure of the commercial companies referred to in the Decision and their subsidiaries, as well as its evolution over time from January 2013 to September 2019;
 - ii. Documents or open communications exchanged between Comcast/Universal group company(ies) addressee(s) of the Decision, or their respective directors, from January 2013 until September 2019, on the approval of business plans, accounts, business strategy and appointment of directors.
- For knowledge and proof of the damage caused to consumers and its quantification:
- i. Confidential version of the tables with the turnover related to the assignment of intellectual property rights of each of the Defendants in Portugal (from January 2013 to September 2019) contained in the European Commission's Decision.
 - ii. Confidential version of the data and tables with relative percentages of the Defendant's sales volume in each type of product subject to the intellectual property licence, in Portugal, between January 2013 and September 2019, contained in the EC Decision.



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- iii.* Document(s) held by each of the Defendants that include(s) or allow(s) the calculation of their operating income, from January 2013 to September 2019, in Portugal and in the EU.
- iv.* Document(s) in the possession of each of the Defendants, including estimates and market studies carried out for/acquired by Comcast/Universal, which include or allow the calculation of the sales of its merchandising items and/or of the Comcast/Universal group in Portugal, in volume and value, broken down by sales to wholesale distributors, sales to retailers and direct sales to end consumers, including online and offline sales, by product and by month, from January 2013 until December 2020.
- v.* Reports or other type of sales reporting document sent to each of the Defendants by their direct or indirect licensees, including attached invoices, relating to sales made in or to Portugal between January 2013 and September 2019.
- vi.* Document(s) in the possession of each of the Defendants showing or from which the final prices (average unit PVP) of each merchandising item, in each EU Member State, in offline and online sales, and their evolution over time, between January 2013 and December 2020.
- vii.* Document(s) in the possession of each of the Defendants, including market studies carried out for/acquired by each of them or by the Comcast/Universal group, which include or allow the calculation of their market shares and/or of the Comcast/Universal group and of their main competitors (or estimates thereof), in each year between 2013 and September 2019, in Portugal (or, in the absence of specific data for Portugal, in the European Union), in each one of the types of merchandising product that may incorporate the intellectual property rights object of the license agreements entered into between January 2013 and September 2019.
- viii.* Document(s) in the possession of each of the Defendants, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of the Defendant's and/or Comcast/Universal's merchandising products that could not be sold in Portugal or to consumers



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resident in Portugal between January 2013 and September 2019 (namely because they could not be ordered by a consumer resident in Portugal from licensees, agents or distributors with licences for territories not including Portugal).

- ix. Document(s) in the possession of each of the Defendants, including market studies conducted for/acquired by it or the Comcast/Universal group, which include or allow the extraction of the list of promotions or offers linked to merchandising products of the Defendant and/or Comcast/Universal that were not available to consumers resident in Portugal between January 2013 and September 2019.
- x. Documents in the Defendant's possession, including market studies conducted for/acquired by each of the Defendants or Comcast/Universal, which describe or from which it can be deduced the different types/profiles of consumers of its and/or Comcast/Universal's merchandising products and their average consumption patterns in Portugal (or, in the absence of specific data for Portugal, in the European Union).
- xi. Original applications for damages filed against the Defendants in any EEA Member State by consumers or consumer associations, or by licensees, sellers or resellers of Comcast/Universal merchandising based on their or Comcast/Universal's group's anti-competitive practices concerned by the European Commission's Decision (or alternatively, identification of the relevant case number(s)).

*

Once *(i) the* European Commission has been served, *(ii) all* consumers in Portuguese territory have been served by public notice and *(iii) each* of the Defendants have been served [without prejudice to the Court's subsequent acknowledgement of the nullity of the service of process invoked by some of the Defendants and the subsequent ruling handed down in default of appearance by the respective Defendant]:⁹

- The European Commission stated that it would not be submitting written pleadings;

⁹ See Annexes E) and F)



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- Each of the Defendants has lodged an Answer to the Contest, finally pleading their acquittal of the Instance, on the merits of the procedural objections invoked, that is, the absolute lack of jurisdiction due to violation of the rules of international jurisdiction, the Plaintiff's illegitimacy and, in the alternative, the inadmissibility of the claim formulated by the Plaintiff in the initial petition under line c); or, failing that, for the dismissal of the claim, on the grounds that the action is unfounded;
- Once the Plaintiff has been granted the right to respond in writing to the matter of exception articulated by the Defendants in their Reply, it pleaded for its dismissal in the terms it better sustained therein;
- Verifying the legal prerequisites for the effect, it was determined to append to the present records of the actions brought by the Plaintiff against each of the Defendants;
- Following the procedure foreseen in articles 292 to 295 of the CPC, *ex vi* article 986, no. 1
In addition, in accordance with the provisions of Article 88 of the same Code, a date was set for the production of the testimonial evidence requested by the Defendants and the parties were given the opportunity to present their final arguments in writing, which was accepted.

*

In view of the defence presented by the Defendants, it is now important to consider the procedural objections raised.

ABSOLUTE LACK OF JURISDICTION FOR BREACH OF THE RULES OF INTERNATIONAL JURISDICTION:

The Defendants claim that the Portuguese courts do not have jurisdiction to hear the present action, in summary, because they are companies incorporated under US law, in accordance with the laws of the USA and headquartered in that country, being UNIVERSAL STUDIOS LIMITED a company incorporated under English law, incorporated under the laws of the United Kingdom and headquartered in the United Kingdom. In the present case, in the absence of applicable international instruments, the internal laws regulating the international jurisdiction of the Portuguese courts should be applied, that is, articles 62 and 63 of the CPC.



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and subsequently to this Court of Competition, Regulation and Supervision.

The Plaintiff pronounced itself about the referred exception, in the sense of its unfounded, in narrow synthesis, because it understands that, being the international jurisdiction of the Portuguese courts governed by the provisions of articles 59 and 62 of the CPC, according to the provisions of articles 62, als. a) and b), of the CPC, in the terms exposed therein, the Portuguese courts are internationally competent to know the present cause and, in concrete, the TCRS is the competent court for the effect.

Let's see:

Whenever the litigation submitted to court presents elements of strangeness in relation to the Portuguese legal system, that is, it contains some objective or subjective element that puts it in contact with another legal system, other than the Portuguese, the question of the international jurisdiction of the Portuguese courts arises.

The rules on international jurisdiction merely make it possible to determine whether the Portuguese courts have jurisdiction on the whole to decide the dispute; but they do not define which court actually has jurisdiction within the national jurisdiction to hear the case. That is the function of the rules on internal jurisdiction.

The Portuguese courts shall assess their international jurisdiction in accordance with the rules of domestic law and the rules of international law binding on the Portuguese State.

Under the heading "international jurisdiction", article 59 of the CPC states the following: "*Without prejudice to what is established in European regulations and in other international instruments, Portuguese courts are internationally competent when any of the connecting factors referred to in articles 62 and 63 are present or when the parties have attributed jurisdiction to them pursuant to article 94*". In turn, Article 62 of the CPC establishes the factors for attributing international jurisdiction, while Article 63 provides for the exclusive jurisdiction of the Portuguese courts.



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As argued by Abrantes Gerales, Paulo Pimenta and Pires de Sousa¹⁰, "The international jurisdiction of Portuguese courts depends, in the first place, on what results from international conventions (v.g. Lugano Convention) or European regulations on the subject (v.g. Regulations no. 1215/2012 and 2201/2003) and, then, of the integration of some of the normative segments of arts. 62 and 63, notwithstanding that which may emerge from a pact attributing jurisdiction, under the terms of art. 94 (...)"

Where an instrument of international law is applicable, the jurisdiction of the Portuguese courts must be determined on the basis of the rules laid down in the instrument. If one of those instruments is applicable and the Portuguese courts do not have jurisdiction as a result of it, the jurisdiction cannot result from the application of internal rules either.

As regards the action brought against the Defendant UNIVERSAL STUDIOS LIMITED, with registered office in the United Kingdom, as the Defendant recalls, as a result of the "Exit Agreement, the United Kingdom ceased to be a member of the EU (the so-called "Brexit"), and a transition period was also established, which ended on 31.12.2020, until this date, EU law was applicable to the United Kingdom, throughout its territory. Thus, and specifically, Regulation 1215/2012, previously applicable for the determination of international jurisdiction in cases such as the present one (i.e., where one of the Parties is domiciled in the United Kingdom and the other, in another EU Member State), ceased to apply to court proceedings (with some connection to Great Britain and Northern Ireland) brought as of 01.01.2021. As such, Regulation 1215/2012 does not regulate the international jurisdiction of the courts in the present action. (...) Furthermore, the United Kingdom is not a signatory to any EU regulation, nor (...) to any other international instrument to which Portugal is also a signatory and which regulates the international jurisdiction of courts for judicial proceedings on civil matters." (sic).

And as to the other Defendants, based in the USA, as the Defendant recalls, "Whereas the USA is not a Member State of the EU, nor a signatory to any EU Regulation, nor (...) to any other international instrument of which Portugal is also a signatory,

¹⁰ In Annotated Civil Procedure Code, Almedina, 2nd edition, vol. I, page 95



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signatory, recourse must be had to the domestic laws governing the international jurisdiction of

Portuguese courts: articles 62 and 63 of the CPC." (sic).

Therefore, given the domicile of the Defendants, and in the absence of international instruments regulating international jurisdiction in this case, the rules of Portuguese domestic law governing the international jurisdiction of Portuguese courts apply to this matter.

That is, according to the transcribed article 59 of the CPC, since, in the present case, the international jurisdiction of the Portuguese courts does not emerge from any agreement attributing jurisdiction under the terms of article 94, it is verified by the integration of some of the normative segments of arts. 62 and 63, being that, according to the letter of the Law, the verification of any of these normative segments is enough for the international jurisdiction of the Portuguese courts to be recognized.

The aforementioned Article 62 of the CPC provides for the following three factors for attributing international jurisdiction to the Portuguese courts, traditionally referred to as the coincidence criterion (al. a)), the causality criterion (al. b)) and the necessity criterion (al. c)):

- a) *When the action may be brought before a Portuguese court in accordance with the rules of territorial jurisdiction laid down in Portuguese law;*
- b) *The cause of action or any of the facts included in the action must have been committed in Portuguese territory;*
- c) *When the right invoked cannot become effective except by means of an action brought in Portuguese territory or when there is an appreciable difficulty for the plaintiff in bringing the action abroad, provided that between the object of the dispute and the Portuguese legal system there is a weighty element of personal or real connection.*

Jurisdiction is fixed at the time the action is brought, with any subsequent changes in the facts being irrelevant (except in the cases specifically provided for by law - cf. no. 1 of art. 38 of Law no. 62/2013, of 26.08 - Law on the Organisation of the Judicial System) and is assessed by the cause of action and the claim described by the plaintiff in the initial petition.



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Through the present popular action, under the special declarative form for the submission of documents, as summarised in the previous report, the Plaintiff seeks access to a collection of documents held by the Defendants, in order to assess whether diffuse interests were affected, whether consumers residing in Portugal were affected by the anticompetitive practices referred to in the initial petition and whether these caused them damage, with a view to the filing of a future action for damages for infringements of Art. It is true that the European Commission condemned Comcast/Universal, by decision of 30/01/2020, for breach of those articles, for having implemented practices, by contractual and non-contractual means, which compartmentalised the market within the European Economic Area, dividing it into territories and client groups, that is to say, differentiating consumers in the European Economic Area according to their country of residence, all the countries of the European Economic Area being presented as affected countries.

As stated in the initial petition, the action in question has its legal basis in Articles 52(3) and 60(3) of the CRP, Articles 2 and 3 of Law 83/95 of 31 August, Articles 31 and 1045 to 1047 of the CPC, and Articles 13 and 19 of Law 23/2018 of 5 June (*Private Enforcement Law*).

The source of the obligation infringed is imposed by the aforementioned Article 101 TFEU and Article 53 of the EEA Agreement, and the action in question falls within the scope of protection of the rights of consumers harmed by anti-competitive practices.

The present action is provided for in Article 13 of the *Private Enforcement Law*, under the heading "Access to evidence prior to bringing an action for damages", and its merits depend on the allegation of facts and evidence to support the plausibility of the claim for damages.

The case in question falls within the broad concept of non-contractual civil liability¹¹ based on an unlawful, anticompetitive act, with effects in Portugal. Although there is no question of a claim for compensation, the granting of the present action

¹¹ As already recognised by the Lisbon Court of Appeal, in an action of a similar nature to the present one, in its judgement handed down on 13 July 2022, under Proc. no. 6/21.6YQSTR-A.L1



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depends on the allegation of facts and evidence reasonably available and sufficient to support the plausibility of the claim for damages. Hence, it is justifiable that the applicable criteria is the same as for damages actions, and the fact that hypothetical damages are at stake does not contradict this statement, as jurisdiction is always defined according to the cause of action as alleged by the Plaintiff.¹²

As articulated by the Plaintiff, given the subjective delimitation of the defendants in this popular action, we have an anticompetitive practice with effects in Portugal that is suspected to have led to a harmful event that occurred, materialized or manifested concretely in national territory (purchases in Portuguese territory and/or by consumers residing in Portugal with an overpricing caused by an anticompetitive practice, damaging assets attached to the residence of those consumers). Therefore, the court of the place where the anticompetitive effects and alleged damages occurred is the best placed (with greater proximity to the situation) to assess the existence of those effects and damages and the need for access to certain documents to make that determination and the respective proof, it being foreseeable for the infringer that, in reaction to the damages caused by its unlawful conduct, it would be sued before the courts of the country where those damages occurred. .¹³

It is clear from the above that both the criterion of coincidence and the criterion of causality set out in paragraphs a) and b) of Article 62 of the CPC are met.

The present action may be brought before a Portuguese court in accordance with the rules of territorial jurisdiction established in Portuguese law, as results from the provisions of article 71, paragraph 2 of the CPC, according to which, if the action is intended to enforce civil liability based on tort or risk, the competent court is the one corresponding to the place where the event occurred, as well as from the provisions of article 112, paragraph 4 of the LOSJ (territorial rule established in Portuguese law). According to this article, the *TCRS is competent to judge all the other civil actions whose cause of action is exclusively based on infringements to competition law foreseen in articles 9, 11 and 12 of Law nr.*

¹² As decided in the Sanctioning Order of this TCRS, dated 6 April 2022, within the scope of Proc. no. 6/21.6YQQSTR, confirmed by the aforementioned TRL judgment.

¹³ In this sense, read Abrantes Galdes, Pires de Sousa and Paulo Pimenta, Code of Civil Procedure Annotated, volume I, Coimbra, Almedina, 2018, p. 102.



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19/2012, of 8 May, in corresponding rules of other Member States and/or in Articles 101 and 102 of the Treaty on the Functioning of the European Union, as well as requests for access to evidence relating to such actions, under the terms provided for in Law 23/2018, of 5 June (emphasis added). This conclusion is also based on what was said with regard to the place where the fact serving as cause of action or any of the facts that comprise it was committed, in this case Portugal, given the reference made in the Decision and subsequently in the application, when all countries of the European Economic Area are mentioned as affected countries, which also calls for the verification of the criterion of causality.

In light of all the foregoing and without the need for any further considerations in view of the clarity of the response to be given to the question, it is necessary to conclude, in accordance with the provisions of Articles 59 and 62, als. a) and b) of the CPC, that the Portuguese courts (in this case the TCRS) have international jurisdiction to judge the present action, which means that the exception invoked by the Defendant of absolute lack of jurisdiction due to violation of the rules of international jurisdiction is dismissed.

The TCRS is the competent court.

The value of each of the (joined) actions is set at €60,000.00 - art. 303, no. 3 of the CPC and art. 44, no. 1 of the LOSJ.

The process is the process itself and does not suffer from defects that invalidate it in its entirety. There are no nullities that invalidate the entire process.

The parties have legal personality and capacity and are duly represented.

THE ILLEGITIMACY OF THE PLAINTIFF

The Defendants argue that "the Plaintiff lacks legal standing to file this popular action in the form of a special declaratory action for the submission of documents, given (i) the Plaintiff's lack of personal, material and even temporal substrate, (ii) but also due to its absolute lack of independence in relation to professionals and



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entities with their own interests (namely, economic, but not only) in bringing the present action as potentially preparatory to a future action for damages for infringement of competition law and the intricate web of conflicts of interest in which, for this reason, the Plaintiff is entangled". (sic).

The Plaintiff pronounced itself on the referred exception, in the sense of its unfoundedness, under the terms better articulated in its reply request, which we hereby reproduce for all due legal purposes.

Let's see:

Article 20(1) of the CRP guarantees the fundamental right to jurisdiction, defined as the right of everyone to have access to the courts for the defence of their legally protected rights and interests.

As a rule, the legitimacy of the exercise of this fundamental right is assessed by the ownership of the subjective right, legal situation or interest whose pursuit is sought in court, as described by the plaintiff (cf. art. 30 of the CPC).

This individualistic paradigm of jurisdictional protection is overcome by the guarantee of popular action, which constitutes an extension of the active procedural legitimacy to all citizens, regardless of their individual interest or their specific relationship with the goods or interests in question, for the protection of supra-individual goods or collective goods considered to be fundamental¹⁴.

Under the terms of Article 52(3) of the CRP, *"Everyone, personally or through associations for the defence of the interests in question, is entitled to take popular action in the cases and under the terms provided for by law, including the right to request the injured party or parties to receive the corresponding compensation, namely to: a) Promote the prevention, termination or prosecution of offences against public health, consumer rights, quality of life and the preservation of the environment and cultural heritage;*
b) To ensure the defence of the property of the State, the autonomous regions and the local authorities.

¹⁴ Cf. Gomes Canotilho and Vital Moreira, Annotated Portuguese Constitution, volume I, Coimbra Editora, 4th



revised edition, 2007, p. 697.



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The right to popular action, in turn, is regulated by Law No. 83/95 of 31-08 [Popular Action Law - LAP].

Article 1(2) of the LPA states that "*the interests protected by this law include public health, the environment, quality of life, protection of the consumption of goods and services, cultural heritage and the public domain*".

Article 2, no. 1 of that same Law provides that "*The holders of the procedural right of popular participation and the right to popular action are any citizens in the enjoyment of their civil and political rights and the associations and foundations defending the interests set out in the previous article, regardless of whether or not they have a direct interest in the claim*".

And in its Article 3 it is explained that the following are requirements for the active legitimacy of associations and foundations for the filing of popular actions: *a) Legal personality; b) Express inclusion in their attributions or in their statutory objectives of the defence of the interests at stake in the type of action; c) Not exercising any type of professional activity in competition with companies or liberal professionals.*

And Law no. 23/2018, of 05-06, which regulates the right to compensation for breaches of competition law - *Private Enforcement Law* -, contains an express rule that extends the active legitimacy, regarding actions for damages for breach of competition law, to associations and foundations whose purpose is to protect consumers and associations of companies whose members are injured by the breach of competition law in question, even if their statutory objectives do not include the protection of competition. This is Article 19(2).

Although the aforementioned rule expressly refers to actions for damages, this is a clear case where the declaratory meaning of the law has not followed its purpose, which is to ensure the effectiveness of the right to compensation for damages caused by practices restricting competition. Directive 2014/104/EU of the European Parliament and of the Council on the rules governing actions for damages under national law for infringements of the provisions of the competition laws of the Member States and of the



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European Union, transposed by Law no. 23/2018, of 05-06, in its recital (4), which reads as follows: *"The right, guaranteed by Union law, to compensation for damages caused by an infringement of Union competition law and national competition law requires each Member State to have procedural rules to ensure the effective exercise of that right. The need for effective judicial review mechanisms also follows from the right to effective judicial protection laid down in Article 19(1) of the Charter. The need for effective judicial review mechanisms also follows from the right to effective judicial protection laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States must ensure effective judicial protection in the fields covered by Union law"*.

It also follows from the same European diploma, namely from recitals (14) to (33) and Chapter II, that the request for access to documents is one of the mechanisms provided for to ensure the effectiveness of that right.

Therefore, it must be concluded that Article 19(2) of the *Private Enforcement Law* includes, by extensive interpretation, the actions brought for access to evidence prior to bringing an action for damages, provided for in its Article 13.

With relevance to the knowledge of this procedural exception, given the position assumed by the parties in their pleadings, the documents submitted and the facts that are public knowledge and those that are of the Court's own motion, by reference to the date of filing of the action, the following facts are evidenced:

1. Under Article 2(1) of its Statutes, the Plaintiff: "is a non-profit-making body whose purpose is to protect consumers in the European Union, aiming in particular at enhancing consumer welfare, and generally at promoting the rule of law, the environment and the economy of the European Union"¹⁵.
2. According to Article 2(2) of the Plaintiff's Statutes: "For the purposes of the preceding paragraph, consumer protection means the protection and promotion of the rights and interests of consumers who are citizens of the European Union or are citizens of third countries resident in the European Union and

¹⁹ Copy of the deed enclosed in the initial petition as document 01.



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covering, but not limited to, consumers associated with the Association"¹⁶.

3. Under Article 2(3) of the Plaintiff's Statutes: "The Association shall protect all consumer rights conferred upon it by the legal systems of the European Union and of the Member States of the European Union, including those deriving from (...) Competition Law (...)"¹⁷.
4. Pursuant to Article 2(4)(i) and (m) of the Plaintiff's Articles of Association: "In pursuance of the purposes referred to in the preceding paragraphs, the Association shall have the power to perform all appropriate legal acts for that purpose, including(4)(i) and (m) of the Plaintiff's Articles of Association: "In pursuance of the purposes referred to in the preceding paragraphs, the Association shall have the power to perform all appropriate legal acts to that end, including: (...) i) Promoting and bringing legal actions, or recourse to alternative means of dispute resolution, to defend the collective and individual rights and interests of consumers in the European Union, to the extent allowed by the applicable laws, namely by resorting to "opt-in" or "opt-out" representative actions (including popular action) or any other procedural means for the defence of diffuse rights and interests, collective or individual homogeneous rights and interests, which may have the objective, among others, of obtaining a declaration of the existence of rights and obligations, the imposition of behaviours and/or compensation for damages suffered by consumers resulting from a violation of their rights or interests; (...) m) Exercise any other competence conferred upon it by rules of the European Union or its Member States"¹⁸.
5. Pursuant to Article 6(1) of the Author's Statutes, any natural person who is an EU citizen or who is a citizen of a third State resident in the EU, and who agrees with and wishes to promote the purposes of the Association, may become a member of the Author.¹⁹

¹⁹ Copy of the deed enclosed in the initial petition as document 01.



¹⁶ Copy of the deed enclosed in the initial petition as document 01.

¹⁷ Copy of the deed enclosed in the initial petition as document 01.

¹⁸ Copy of the deed enclosed in the initial petition as document 01.

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6. The Author is a consumer association recognised by the Directorate-General for Consumer Affairs²⁰
7. The Plaintiff has more than 100 associates and less than 500²¹.
8. The founder of IUS OMNIBUS is Miguel Sousa Ferro, Lawyer who signed the initial petition, Professor at the Faculty of Law of the University of Lisbon, where he currently teaches International Economics, and is a founding partner of "Sousa Ferro e Associados", a law firm that bears his name²².
9. The constitution of "Sousa Ferro e Associados" was publicly announced on 26/02/2020, through a press release that deserved the attention of the specialised media, at which time its founders declared themselves to be "specialists in obtaining compensation for damages for those injured by anti-competitive practices"²³.
10. At that time, the statement issued by "Sousa Ferro e Associados" stated the following: "Our strategic vision is to contribute to the revolution of private enforcement of competition law and to deepen the effectiveness of competition policy, with all the benefits that will result for consumers, businesses and the economy as a whole. We will focus, in particular, on the promotion of actions for the defence of consumers harmed by anti-competitive practices"²⁴.
11. The said firm was registered with the Bar Association on 26/11/2019.²⁵
12. Miguel Sousa Ferro is also the President of the General Assembly of the Author²⁶.

²⁰ Fact obtained in <https://www.consumidor.gov.pt/parceiros/sistema-de-defesa-do-consumidor/associacoes-de-consumers.aspx>

²¹ Fact accepted by the parties.

²² Copy of the deed attached to the application as document 01, in conjunction with the information published on the website <https://www.fd.ulisboa.pt/professores/corpo-docente/miguel-sousa-ferro/>

²³ Document 09 annexed by the Defendants in their Reply.

²⁴ Document 09 annexed by the Defendants in their Reply.

²⁵ Consultation made at the door of the Bar Association on 01/06/2023.



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13. Miguel Sousa Ferro made a public intervention, on behalf of IUS OMNIBUS, at the door of this Court, on 7/102021 , regarding the process in which the fines applied to several banks by the Competition Authority for alleged cartelisation are discussed .²⁷
14. Miguel Sousa Ferro and the law firm that bears his name are the main suppliers of legal services to the association .²⁸
15. Between December 2020 and July 2021, the aforementioned law firm filed nine class actions, with seven of them, with global requests worth more than one billion euros, being entrusted to Miguel Sousa Ferro and "Sousa Ferro e Associados"²⁹ .
16. In addition to these actions, there are two other popular actions, entrusted by IUS OMNIBUS to the law firm "Paes de Vasconcelos e Associados": Popular Action filed on 22 March 2021 before the Judicial Court of the Judicial District of Lisbon against Daimler / Mercedes, with indemnity claims amounting to EUR. 4,200 per affected vehicle; Popular Action filed on 10 May 2021 before the Judicial Court of the Judicial District of Lisbon against Stellantis / Fiat Chrysler, with claims for damages amounting to EUR. 2.702 per affected vehicle .³⁰
17. IUS OMNIBUS has no income of its own from membership fees, being 100% dependent on the revenue generated by the actions it promotes, disclosing the following on its website: "Ius Omnibus is a non-profit association. The members of the association's bodies are not remunerated. It does not depend on the financing of public funds, nor will it finance itself through quotas, donations or sale of products and/or services. Its financing model differs from the financing model of

²⁶ Copy of minute no. 1, annexed to the application

²⁷ Consultation made on 01/06/2023, in <https://iusomnibus.eu/pt/presidente-da-ag-da-ius-fala-a-sic-sobre-o-processo-cartel-da-banca/>

²⁸ Fact accepted by the parties.

²⁹ Consultation made on 01/06/2023, on the IUS OMINUS website

³⁰ Consultation made on 01/06/2023, on the IUS OMINUS website



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other consumer associations, with a view to ensuring the full independence of the association's actions, both in relation to public authorities and private economic interests. Ius Omnibus will pursue both "large" and "small" legal actions, not in the sense of the importance or size of the interests represented, but in the sense of the investment required to pursue them. Large" lawsuits are actions that require investments of several hundred thousand Euros, which explains why, until today, they have never taken place among us, as there are no consumers or consumer protection associations with the financial capacity to support such investments, nor public funds available for this purpose. Ius Omnibus overcomes this gap by resorting to a figure that is still little used in Portugal: *litigation funding*. The major legal actions brought by the association are fully funded by international litigation funders, who pay all the costs of litigation, as well as the operating expenses of Ius Omnibus associated with the pursuit of such actions. These funders fully accept the risk of the success of the legal actions, which means that they only invest in those actions that they believe are sound and have a high probability of success. The funders will only recover and be remunerated for their investment if Ius Omnibus wins the action and only if and to the extent that this is authorised by the court. The court will control the proportionality of that remuneration in the specific case. All funding agreements include anti-money laundering and anti-terrorist financing clauses and transparency as to where the funds come from. This scheme allows consumers to bear no cost in pursuing these actions. In case of success, any consumer claiming their share of the compensation, as determined by the court, will receive 100% of the compensation to which they are entitled, without having to give up any share to pay the costs of the action. These costs are paid by



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companies that violated the law and for the portion of the compensation that is not requested by the injured parties. Under Portuguese popular action rules, if any of these actions are won, the remainder of the total compensation that is not claimed by consumers will be given to the Ministry of Justice to promote access to justice and future popular actions. In the medium term, these actions will create a form of public funding for the judicial defence of consumer rights. All Ius Omnibus litigation funding contracts include clauses that prohibit funders from having any decision-making power in the actions they fund, making them totally disengaged funders. Funders receive a proposal from Ius setting out the risks and strategy of a case and carry out a due diligence, at the end of which they decide whether to fund the case, without power to intervene in it. The funders are only informed of developments in the case. Ius Omnibus instructs its lawyers in charge of legal actions to always act in the best interests of consumers and to refuse any instructions from Lenders. Ius diversifies its funding sources to ensure that it is not dependent on a single funder. Ius Omnibus does not operate in any market, does not supply goods or services and has no conflicts of interest with any company. Ius Omnibus' internal procedures ensure that no Board member can take part in a Board decision where he/she, or one of his/her close relatives, has a personal interest. Before entering into a funding agreement with any potential funder, Ius Omnibus carries out checks to confirm the absence of conflicts of interest. In addition to the large actions described above, Ius Omnibus also intends to promote "small" lawsuits, which do not require high investments. In these cases, it will be possible to finance these actions with a combination of the association's own scarce resources, *pro bono* work and



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remuneration of lawyers with deferred fee components and/or
success fees.³¹ .

It was not proven, as no evidence was produced by the Defendants in this regard, that the Plaintiff carries out any type of professional activity in competition with companies or liberal professionals and/or controls or participates in any entity that performs such activity, as explained below.

There are no other facts to which it is necessary to respond, with relevance to the present decision, since everything else alleged is a matter of law, conclusive or irrelevant.

Having regard to the Law and subsuming the aforementioned factuality to it, it is found that the Plaintiff is a consumer association, endowed with legal personality, non-profit-making and whose main objective is to protect the rights and interests of consumers in general or of its associated consumers, and does not engage in any kind of professional activity in competition with companies or liberal professionals.

As a logical and necessary consequence, *(i) the* exercise of the right to take popular action is not conditioned to the geographical category that the Plaintiff assumes, *(ii) the Plaintiff does* not have a legal personality; *(iii) the Plaintiff* does not serve any interests other than the protection of the rights and interests of consumers in general and of its associated consumers or *(iv) the Plaintiff* is engaged in any activity in competition with companies or liberal professionals.

As for the suspicions raised by the Defendants about the Plaintiff, in addition to the fact that they themselves do not assume the alleged with certainty, raising only a suspicion as to the nature and purpose of the Plaintiff, the elements on which they base this suspicion are publicly available elements and most of them disclosed by the Plaintiff itself, which suggests that there is no hidden purpose of benefiting interests other than those of consumers by the means considered appropriate and possible. Additionally, nothing in the records shows that the present action is being financed through *third party funders*, contrary to what is claimed by the Defendants, and is therefore without factual and legal basis,

³¹ Extracted from the IUS OMNIBUS website on 01/06/2023 - <https://iusomnibus.eu/pt/missao-e-valores/>



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the request formulated in Article 1373 of the Reply, that is, for the Plaintiff to attach to the case-file

the forensic mandate contract entered into between the Plaintiff and its attorneys, and, in the alternative, to notify the Plaintiff to disclose in the present proceedings the sources of funding on which it based itself to file the present action, which, therefore, should always be dismissed.

In light of all the foregoing, since all the legal assumptions for the recognition of the Plaintiff's legitimacy are verified, the plea of illegitimacy invoked by the Defendants is dismissed.

The parties are legitimate.

There are no other exceptions or preliminary issues to be considered.

*

All procedural assumptions having been complied with, following the knowledge that was made of the dilatory objections invoked by the Defendants in their respective Answer, the process appears to be provided with all the necessary elements to decide *de meritis*.

*

Aiming the present action the presentation of evidence for the purposes of an action for damages for infringement of competition law, submitted under the provisions of Articles 52, paragraph 3 and 60, paragraph 3 of the CRP, Articles 2 and 3 of Law no.No. 83/95, of August 31, 31 and 1045 to 1047 of the CPC, and 13 and 19 of Law No. 23/2018, of June 5, in view of the position assumed by the parties in their pleadings, the object of the action is based on the assessment by the Court of the following:

- A. The Plaintiff's legal interest in examining the documents requested;
- B. The reasons invoked by the Defendant to oppose the presentation of those documents;
- C. The Plaintiff's abuse of rights and fraud against the law.

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II. STATEMENT OF

*

REASONS

The following facts have been proven to be relevant to the case:

1. The Defendants are subsidiaries of Comcast Corporation, a global media and technology company operating worldwide in four principal areas of activity: (i) providing broadband, video, voice and other services to home and business customers, (ii) operating television and streaming platforms, including national, regional and international cable networks, broadcast networks and local television stations, (iii) operating film production and distribution activities and television studios, and (iv) operating Universal theme parks in Florida, California, Japan and China.
2. The Comcast Corporation group carries out the said activities through three main businesses, Comcast Cable, NBCUniversal and Sky.
3. DreamWorks Animation Licensing, LLC, NBCUniversal LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation Publishing, LLC, DreamWorks Animation L.L.C. and DreamWorks Animation Licensing, LLC are indirect, wholly owned subsidiaries of Comcast Corporation.
4. The Universal group, "NBCUniversal" provides a premium streaming service.
5. Within the corporate structure of Comcast Corporation, the latter holds 100% of the shareholdings of its subsidiaries.
6. Universal Studios Licensing, LLC (together with each of the DreamWorks entities) is an indirect, wholly-owned subsidiary of NBCUniversal Media, LLC.
7. NBCUniversal Media, LLC is a direct wholly owned subsidiary of NBCUniversal, LLC.
8. NBCUniversal, LLC is an indirect, wholly-owned subsidiary of Comcast Corporation.



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9. Universal Studios Limited is a subsidiary of Universal City Studios Productions LLLP, which in turn is a subsidiary of NBCUniversal Media LLC.
10. DreamWorks Animation L.L.C. is an indirect subsidiary of NBCUniversal Media, LLC.
11. Comcast/Universal is the producer of several films, such as Jurassic Park, Harry Potter, Minions, ET the Extraterrestrial, Fifty Shades of Grey, Fast & Furious, Back to the Future, American Pie, Transformers, The Big Lebowski, and television series and programmes, such as: The Office, Parks and Recreation, Battlestar Galactica, Parenthood, Seinfeld, Saturday Night Live, The Voice, Betty Boop.
12. Comcast/Universal develops its activity in Portugal, including the direct and indirect sale of merchandising products related to television and cinema entertainment contents, namely through websites such as "shop4nerds.pt"; "fnac.pt" and "unkind.pt".
13. According to the European Commission's Decision issued on 30 January 2020 in Case AT.40433 - Film Merchandise (hereinafter, the "Decision"), Comcast/Universal, between January 2013 and September 2019, infringed Article 101 TFEU and Article 53 of the EEA Agreement by having implemented practices, by contractual and non-contractual means, which partitioned the market within the EEA by dividing it into territories and customer groups, and was sentenced to a total fine of €14,327,000.
14. All the Defendants, companies of the Comcast/Universal group, were addressees of that Decision.
15. The Decision was adopted with the cooperation of Comcast/Universal (having benefited from a reduction of the fine for that reason), which did not appeal the Decision within the time limit set by the TFEU.
16. The Decision has become final.
17. The Decision describes the direct and indirect restrictions imposed by the Defendant and Comcast/Universal on the sale of licensed merchandising products on condition that they are destined for specific customers and territories within the Member States, in



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compliance with a global commercial strategy aimed at partitioning national markets and reducing or eliminating competition.

18. The division or partitioning of markets has directly affected competition over price, choice, quality and quantity of products, inevitably limiting consumer choice and competition over the conditions on which products are offered to them, thus damaging the rights and interests of consumers.
19. By contractual means, Universal, in the standard licensing contracts it concluded, directly or indirectly, with third parties, imposed, throughout the EEA, explicit clauses restricting sales to consumers resident in certain Member States (depending on the contract), directly affecting trade and healthy competition.
20. The licence agreements were either entered into directly between the Defendant and the licensees or were entered into with the intermediation of agents of Comcast/Universal who, under non-exclusive representation agreements, were empowered to identify business opportunities, negotiate and enter into licence agreements with third parties for the production and distribution of merchandising products in one or more specific territories, such territories varying according to the specific agreement.
21. The Defendant, directly, through the "Universal Brand Development" department or indirectly, through the said agents, presented the contracting third parties with a standard merchandising licence agreement that set out the terms and conditions to be observed, regulating, namely:
 - a) the scope of the licence: all rights not explicitly granted to the licensee were reserved to the Defendant or Comcast/Universal. The rights granted to the licensee were identified in tables annexed to the agreement and defined the intellectual property rights that the licensee could incorporate into the products it manufactured and/or distributed pursuant to the merchandising licence. Although Comcast/Universal's merchandising licence agreements are non-exclusive, any use of Comcast/Universal's intellectual property in any form, medium or in any



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territory beyond that expressly permitted by the contract constituted a breach of contract and a cause for contractual termination;

- b) the product(s) concerned: the contracts specified the products or product categories in respect of which the licensee could apply the licensed property for subsequent manufacture and/or sale;
 - c) territorial scope: licences were granted on a non-exclusive basis for one or more specific countries, with Comcast/Universal reserving the right to grant additional licences and directly or indirectly manufacture, distribute and sell products identical or substantially similar to the products covered by the licence;
 - d) distribution channels: merchandising licence agreements usually included a list of distribution channels and Comcast/Universal usually reserved specific channels;
 - e) the duration of the agreement: contracts were concluded, as a rule, for a period of up to five years; and
 - f) the financial consideration for the licensing: licensees had to pay Comcast/Universal a specific amount in consideration for the grant of the licence, consisting of three elements: i. royalty payments; ii. advance payment and a guarantee payment, calculated on the basis of the total expected royalties to be paid by the licensee for its sales within the licensed territory for the duration of the agreement; iii. marketing payments for the promotion of the licensed film, franchise, or character.
22. During the execution of the contract, Comcast/Universal maintained close contact with its licensees, supervising compliance with several matters, among which the distribution of the product in the geographic market specified in the merchandising license agreement.
23. The implementation of the non-contractual anti-competitive practices included audits of licensees to check compliance with the merchandising license agreement. The audits were conducted by



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external, with its main objective being to detect violations of contractual or other legal obligations of licensees that could be cause for contract termination or non-renewal of the contract.

24. As a means of ensuring compliance with these restrictive clauses, Comcast/Universal carried out the said audits which, on the one hand, verified punctual compliance with the licence and, on the other hand, discouraged non-compliance by implying the possibility of an early termination of the contract or non-renewal of the licence, reactions which in the Decision are referred to as "standard business tools" used to intimidate licensees.
25. Contractual restrictions referred to a set of countries and/or specific customer groups, depending on the contract, to whom licensees were prohibited from selling offline or online, actively or passively.
26. Although the contracts usually contain a so-called "European Union Sales" clause stating that contractual restrictions should apply to the extent permitted by European law or any applicable international treaty, the European Commission has found that the vague wording of this clause, the behaviour of the licensees and the audits carried out impose the understanding that the clause was not interpreted as allowing passive sales of the merchandising outside the geographic markets assigned to the licensees.
27. The same 'European Union Sales' clause provided that the licensee could not, in any event ('in any event'), seek, advertise or solicit sales of any licensed item outside the geographic market defined in the agreement nor establish a branch or agency, factory or warehouse outside that same territory without Comcast/Universal's prior written consent.
28. The license agreements prohibited licensees from selling online, expressly reserving this distribution channel to Comcast/Universal, or limited its possibility to customers resident in the geographic markets defined in the agreement or to specific customer groups.



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29. The licence agreements contained notification obligations binding the licensees to report to Comcast/Universal all sales made outside their allocated territory or through distribution channels they were obliged not to use.
30. To underline these prohibitions, the merchandising contracts determined the language(s) to be used on the packaging of the products and/or on the products themselves, precisely to prevent their sale outside the specified territories. The Comcast/Universal group only authorised additional languages after having obtained a promise that the licensee would not sell the products outside the territory defined in the contract.
31. Comcast/Universal, in some contracts, expressly provided to which customers or customer groups the licensees could sell the merchandising, allowing for sales to 'certain Retail Partners (as defined herein)'.
32. The licence agreements also provided for a penalty for licensees who did not comply with the restrictions imposed, giving Universal the possibility to charge licensees higher royalties or require them to surrender to Universal all revenues obtained from sales made in any way outside the geographic or customer scope defined in the agreement.
33. In addition, Comcast/Universal obliged the licensees to bind their respective customers to the same sales restrictions, actively monitoring and supervising their relationships and contractual practices, without refraining from issuing warnings or injunctions for them to cease any contractual relationship with customers selling the merchandising articles outside the established scopes.
34. In the European Commission's Press Release dated 30/01/2020 regarding the said Decision, the following is relevant:
"Action for damages
Any person or company affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases



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before national courts, a Commission decision constitutes binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without being reduced on account of the Commission fine." (sic).

35. The summary of this Decision was published in the Official Journal of the European Union on 24/04/2020.
36. By registered letters dated 15/04/2021, the Plaintiff requested each of the Defendants to provide the documentary evidence requested in the present action and on the same grounds, giving the Defendant fifteen working days to respond.
37. By e-mail dated 12/05/2021, "Universal Studios", in response to all the letters sent by the Plaintiff to each of the Defendants, informed her of its refusal to grant access to any of the requested documentary elements, invoking the following: Portuguese law is not applicable to the right of access to documents that is sought to be exercised here; the requirements of Portuguese law for access to documents are not met because the plausibility of the alleged right to compensation and the effects on Portuguese territory must be demonstrated; the request does not respect the principle of proportionality; the request includes access to confidential information and there are no mechanisms to safeguard confidentiality.

*

There are no relevant unproven facts that should therefore be listed.

*

For the decision of the case, no other facts alleged in the pleadings and requests of the subsequent parties were proven or not proven, which are not in opposition or have not been prejudiced by those evidenced, and there were others that were not replied to as they constituted irrelevant, repeated, conclusive or legal matters.

*

The Court has formed its opinion taking into account the position taken by the parties in their written pleadings and the documents in the case-file, considered in isolation from each other and in accordance with



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with the rules on the distribution of the burden of proof and the criteria of logic and common experience.

Concretizing:

The facts described in points 1. to 10. are the result of the Defendants' own statements in their Reply.

The factuality described in point 11. resulted from the consultation made to the electronic address indicated by the Plaintiff, in footnote 5 of the initial petition, from which the fact was established as proved.

The factuality described in point 12. resulted from the respective assumption by the Defendant, despite not recognizing it as a notorious fact, when, however, in fact, it is, insofar as it is a fact perceived by the generality of average citizens, in addition to the consultation made to the *websites* in question, which are publicly accessible (cfr. art. 41, no. 1 of the CPC).

The factuality described in points 13. to 33. results from the Decision of the European Commission rendered on 20 January 2020 in Case AT.40433 - *Film Merchandise*, the only authentic text of which is English.

The facts set out at paragraph 34 above are apparent from the Press Release of the European Commission's Decision, annexed to the application.

The factual background described in paragraph 35, which is a matter of public record, is apparent from the Court's consultation of the Official Journal of the European Union.

The factuality described in points 36. and 37. resulted from the letters sent by the Plaintiff to each of the Defendants and the e-mail sent, in response, to the Plaintiff, which were attached to the Statement of Claim.

It should be noted that, after questioning the witness enrolled by the Defendants, no facts emerged from his testimony that would require a different response to that given to the facts deemed relevant to the decision of the present action.

In fact, Michal Steinberg, Senior Vice President at Universal Brand Development (on the "products and experiences" side), working for Universal City Studios Production, LLP, although he mentioned that he was aware of



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of the documentary evidence requested in the present proceedings, it emerged from her statement that she did not understand its true scope, that is, the delimitation of its geographical and temporal scope, as well as the fact that it refers to elements related to the Decision of the European Commission, which she said she was not aware of. For this reason, despite the fact that she had elaborated on the resources and time necessary to collect the information requested, the truth is that she based this assertion on a factual assumption that was not entirely correct, that is, she was convinced that its scope was much greater than that effectively intended by the Plaintiff.

*

All things considered, it only remains to add that there is no evidence in the case file that, on its own or complemented with the position taken by the parties in their pleadings and subsequent submissions, allows a different response to the factual matter considered relevant/essential to the proper ruling of the case.

**

DE DIREITO/LEGAL FRAMEWORK

ASSOCIAÇÃO IUS OMNIBUS brought the present special declaratory action for submission of documents with the ultimate purpose of filing a popular action for damages, under Law No 23/2018, of 5 June, with cause of action founded on the Decision of the European Commission issued on 30 January 2020, within the scope of Case AT.40433 - *Film Merchandise*, exercising the right of popular action conferred upon it by the Portuguese Constitution and legislation, in representation of consumers who have been injured and who reside in Portugal. He did so under the provisions of Articles 52(3) and 60(3) of the CRP, Articles 2 and 3 of Law 83/95 of 31 August, Articles 31 and 1045 to 1047 of the CPC, and Articles 13 and 19 of Law 23/2018 of 5 June.

It is therefore important to begin the necessary exegesis in order to assess the justness of the Plaintiff's claim - knowing that the Court is not bound to the investigation, interpretation and application of the rules of law invoked by the parties [Article 5(3) of the Code of Civil Procedure] - by referring to the legal rules considered relevant, interpreting them in accordance with and respecting the principles of European loyalty, primacy,



conforming interpretation and the responsibility of the State-judge for breach of European obligations, recognised by the



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Constitution of the Portuguese Republic, by the Treaty of Lisbon, by the Treaty on the Functioning of the European Union and also by the settled case-law of the Court of Justice of the European Union, which we do not need to describe here, out of respect for the simplicity that should guide this decision, made within the scope of a voluntary jurisdiction procedure, characterised by a simple and expeditious procedure in which the Court is not subject to criteria of strict legality, "but must adopt in each case the solution it deems most convenient and appropriate" (cfr. Article 987 of the Code of Civil Procedure). Indeed, in voluntary jurisdiction proceedings, the function exercised by the judge is not so much that of interpreter and enforcer of the law, acting more as a "business manager", business which the law has placed under the supervision of the State through the judicial power³².

NATIONAL LAW

Constitution of the Portuguese Republic

- Article 20(1) ["Access to the law and effective judicial protection"]:
Everyone is guaranteed access to the law and to the courts to defend their rights and legally protected interests, and justice cannot be denied for insufficient economic means.
- Article 52(3) ["Right of petition and right of popular action"]:
Everyone, either personally or through associations that defend the interests in question, shall be entitled to take popular action in the cases and under the terms provided for by law, including the right to request the injured party or parties to receive the corresponding compensation, namely
 - a) *To promote the prevention, termination or prosecution of offences against public health, consumer rights, quality of life and preservation of the environment and cultural heritage;*
(...).
- Article 60(3) ["Consumer rights"]:
Under the terms of the law, consumer associations and consumer co-operatives have the right to State support and to be heard on issues related to consumer protection, and are recognized as having legal standing to defend their members or collective or diffuse interests.



³² In this sense, Antunes Varela, Miguel Bezerra and Sampaio e Nora, Manual of Civil Procedure, page 66



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Law no. 83/95, of 31 August, which defines the cases and terms in which the right to procedural participation and popular action is and can be exercised

- Article 2 ["Entitlement to procedural rights of participation and the right of popular action"]:

The procedural right of popular participation and the right to popular action shall be vested in any citizen in the enjoyment of his civil and political rights and in associations and foundations defending the interests provided for in the preceding article, regardless of whether or not they have a direct interest in the claim. (...).

- Article 3 ["Legal standing of associations and foundations"]:

The following shall constitute requirements for the active legitimacy of associations and foundations: a) To have legal personality; b) To include expressly in their attributions or in their statutory objectives the defence of the interests at stake in the type of action in question; c) Not to exercise any type of professional activity competing with companies or liberal professionals.

Code of Civil Procedure

- Article 31 ["Actions for the protection of diffuse interests"]:

Any citizen in full enjoyment of their civil and political rights, associations and foundations defending the interests in question, local authorities and the Public Prosecutor's Office, under the terms provided for by law, have legitimacy to initiate and intervene in actions and precautionary procedures aimed at protecting public health, the environment, quality of life, cultural heritage and the public domain, as well as protecting the consumption of goods and services.

- Article 1045 ["Submission of things or documents" - "Application"]:

The person who, under the terms and for the purposes of Articles 574 and 575 of the Civil Code, intends to produce things or documents that the possessor or holder does not wish to provide, shall justify the need for the diligence and request that the refuser be summoned to produce them on the day, time and place designated by the judge.



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Civil Code

- Article 573 ["Obligation to provide information and to produce things or documents" - "Obligation to provide information"]:

The obligation of information exists whenever the holder of a right has reasonable doubts about its existence or content and someone else is in a position to provide the necessary information.

- Article 574 ["Presentation of things"]:

A person who invokes a right, whether personal or in rem, even if conditional or temporary, to a certain item, whether movable or immovable, may require the possessor or holder to produce the item, provided that the examination is necessary to ascertain the existence or content of the right and the defendant has no reason to oppose it (...).

- Article 575 ["Submission of documents"]:

The provisions of the preceding article shall, with the necessary adaptations, be extended to documents, provided that the applicant has a compelling legal interest in examining them.

Law no. 23/2018, of 5 June, which sets out rules on damages claims for infringement of competition law, transposing into national law Directive 2014/104/EU, of the European Parliament and of the Council, of 26 November 2014

- Article 2 [Definitions]:

For the purposes of this law, the following definitions shall apply: (...)

o) "Evidence" means all types of legally admissible evidence in actions for damages, including documents and other objects containing information, regardless of the medium on which that information is stored;

p) "pre-existing evidence" means evidence that exists independently of a competition authority's investigation, whether or not it is in the competition authority's file; (...)

- Article 13 ["Access to evidence prior to bringing an action for damages"]:

1 - Any person who, under the terms and for the purposes of Articles 573 to 576 of the Civil Code, wishes to obtain information or evidence, including that which the possessor does not wish to provide may, on the basis of justification of the need for the diligence and subject to the other limitations set out in this chapter, request the court to



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competent to summon the refuser to present them on the day, time and place designated by the judge, in accordance with Articles 1045 to 1047 of the Code of Civil Procedure.

2 - The provisions of paragraphs 2 to 9 of the preceding article shall apply, with the necessary adaptations, to the requests for access referred to in the preceding paragraph.

— Article 19 ["Popular action"]:

1 - Actions for damages for infringement of competition law may be brought under Law 83/95, of 31 August, as amended, and the provisions of the following paragraphs shall also apply to them.

2 - The following entities, in addition to those referred to in Law 83/95 of 31 August, as amended, have legitimacy to file actions for damages for infringement of competition law:

a) Associations and foundations whose purpose is to protect consumers; and b) Associations of companies whose members are harmed by the infringement of competition law in question, even if their statutory objectives do not include the protection of competition. 3 - The condemnatory ruling shall determine the criteria for identifying those injured by the infringement of competition law and for quantifying the damages suffered by each individually identified injured party.

4. Where not all the injured parties are individually identified, the judge shall fix a global amount of compensation under the terms of Article 9, paragraph 2. (...).

— Article 23(2) [Applicable law]:

The application of the substantive and procedural rules on actions for damages arising from infringements of competition law shall not render practically impossible or excessively difficult the exercise of the right to compensation.

EUROPEAN UNION LAW

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the provisions of the competition laws of the Member States and of the European Union

Recital (13):

The right to redress is recognised for any natural or legal person - consumers, businesses and public authorities, without distinction - regardless of whether there is a relationship



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direct contractual relationship with the infringing undertaking and a prior finding of infringement by a competition authority (...).

Recital (14):

Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence required to support a damages claim is often in the sole possession of the opposing party or third parties and the claimant does not have sufficient knowledge of, or access to, that evidence. In those circumstances, strict legal requirements requiring claimants to specify in detail all the factual elements relating to their allegations at the beginning of an action and the precise production of specific evidence may unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

Recital (15):

Evidence is important for bringing an action for damages for an infringement of Union or national competition law. However, since litigation in the field of Union competition law is characterised by an asymmetry of information, it is appropriate to ensure that claimants have the right to obtain disclosure of the evidence relevant to their claim, without the need to specify individual items of evidence. (...)

Recital (16):

National courts should be able, under their strict control, to order the disclosure of specified items of evidence or categories of evidence, in particular as regards the necessity and proportionality of the disclosure measures, upon request of a party. It follows from the requirement of proportionality that disclosure can only be ordered where a claimant has plausibly alleged, on the basis of facts reasonably available to him, that he has suffered harm caused by the defendant. Where the purpose of a disclosure request is to obtain a category of evidence, that category should be identified by the common features of the constituent elements, such as the nature, object or content of the documents the disclosure of which is requested, the time at which they were drawn up, or other criteria, provided that the evidence falling within that category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

Recital (18):



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While relevant evidence containing business secrets or other confidential information should in principle be accessible in actions for damages, that information should be protected in an appropriate way. National courts should therefore have a range of measures in place to protect such information from disclosure during the proceedings. Such measures could include the possibility of concealing sensitive excerpts of documents, conducting hearings in camera, restricting the number of persons allowed to see the evidence, and instructing experts to provide summaries of information in aggregated or otherwise non-confidential form. However, measures to protect business secrets and other confidential information should not prevent the exercise of the right of redress.

- Article 5 ["Disclosure of evidence"]:
1. *Member States shall ensure that, in proceedings relating to an action for damages in the Union, and upon request by a claimant who has presented a reasoned justification by submitting reasonably available facts and evidence sufficient to support the plausibility of his claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence within their control, subject to the conditions set out in this Chapter. (...)*
 2. *Member States shall ensure that national courts may order the disclosure of specified items of evidence or relevant categories of evidence, characterised as precisely and narrowly as possible on the basis of reasonably available facts indicated in the reasoned justification.*
 3. *Member States shall ensure that national courts limit the disclosure of evidence to what is proportionate. In determining whether the disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, take into account:*
 - a) *the extent to which the claim or defence is supported by facts and evidence available to justify the request for disclosure of the evidence;*
 - b) *The scope and costs of disclosure, in particular to interested third parties, including to avoid non-specific searches for information of unlikely relevance to the parties to the proceedings;*
 - c) *whether the evidence the disclosure of which is requested contains confidential information, in particular concerning third parties, and the procedures adopted to protect such confidential information.*



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4. *Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that national courts have effective measures in place to protect such information when ordering its disclosure.*
5. *The interest of undertakings in avoiding actions for damages following an infringement of competition law does not constitute an interest that warrants protection.*

In order to avoid any doubts about the application *ratione temporis* of paragraph 1 of the aforementioned rule, it should only be mentioned that, as it is a procedural provision, it applies to the case at hand, considering that the present lawsuit was filed on 09 July 2021, i.e. after 26 December 2014 (date of entry into force of the Directive) and after the date of transposition of the Directive into our legal system, through the entry into force of Law no. 23/2018 of 05 June, i.e. after 05 August 2018, as results from the provisions of Article 22(2) of the Directive and from the most recent Jurisprudence of the Court of Justice.No 23/2018, of 05 June, i.e. after 05 August 2018, as results from the provisions of Article 22(2) of the Directive and from the most recent Jurisprudence of the Court of Justice³³ , called upon to pronounce on the matter.

Given the legal framework considered relevant and the proven factuality, let us see:

The person who, under the terms and for the purposes of Articles 573 to 576 of the Civil Code, intends to obtain information or the presentation of evidence, including that which the possessor does not wish to provide may, on justification of the need for the diligence and with the other limitations set out in this chapter, request the competent court to summon the refuser to present it on the day, time and place designated by the judge, under the terms set out in Articles 1045 to 1047 of the Code of Civil Procedure. - Article 13, no. 1 of Law no. 23/2018, of 5 June, which establishes rules regarding claims for damages for breach of competition law, transposing Directive 2014/104/EU, of the European Parliament and of the Council, of 26 November 2014, into national law.

Being aware that actions for damages for infringements of Union (or national) competition law typically require a complex factual and economic analysis and that the

³³ See judgments dated 22/02/2022 [VOLVO and DAF Trucks, C-267/20] and 10/11/2022 [PACCAR Inc. and DAF, C-163/21].



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evidence necessary to support a claim for damages is often in the exclusive possession of the opposing party or third parties, of which the claimant does not have sufficient knowledge or access, in order to remedy that asymmetry of information and thus ensure that the claimant can exercise his right of action, the European legislature, in Directive 2014/104/EU enshrined the duty of the Member States to ensure that national courts may order the defendant or a third party to disclose relevant evidence within their control, in proceedings relating to actions for damages in the Union and at the request of the claimant who provides a reasoned justification with reasonably available facts and evidence sufficient to support the plausibility of his claim for damages.

Hence, the national legislator, in the transposition of that Directive, through Law no. 23/2018, of 5 June, has consecrated a procedural mechanism for that purpose, the one provided in article 13, no. 1, of which the Plaintiff has here resorted to.

This procedural mechanism refers to the provisions of Articles 1045 to 1047 of the Code of Civil Procedure, i.e. the special procedure for the presentation of things or documents, Article 1045 of which in turn refers to the substantive provisions of Articles 574 and 575 of the Civil Code. *Under the terms and for the purposes of Articles 574 and 575 of the Civil Code, [a]ny person who, under the terms and for the purposes of Articles 574 and 575 of the Civil Code, wishes to produce things or documents which the possessor or holder does not wish to provide justifies the need for this procedure and requests that the refuser be summoned to produce them on the day, time and place designated by the judge.*

At the level of substantive law, the first paragraph of the above-mentioned Article 574 of the Civil Code states that *[a]ny person claiming a right, whether personal or in rem, even if conditional or for a fixed term, to a certain item, whether movable or immovable, may require the possessor or holder to produce the item, provided that the examination is necessary to ascertain the existence or content of the right and the defendant has no reason to object to the diligence.* And the aforementioned Article 575 of the Civil Code establishes that *the provisions of the previous article extend, with the necessary adaptations, to documents, provided that the*



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*claimant has a relevant legal interest in examining them, i.e. a situation which, if not remedied, would involve unlawful damage*³⁴.

And national jurisprudence³⁵, on this special action for the presentation of things or documents, has unanimously stated that it is dependent on the verification of the following requirements:

- i.* that the possessor or holder of the documents does not wish to provide them;
- ii.* that the defendant has no reason to oppose production; and
- iii.* that the applicant has a sufficient legal interest in having them examined.

At the same time, the discipline on the presentation of things or documents, arising from Articles 574 and 575 of the Civil Code and Articles 1045 et seq. of the Code of Civil Procedure, is based on the weighing of conflicting interests. On the one hand, there are several reasons in favour of the right to demand the production of things or documents: the interest in uncovering the truth and in defending rights that depend on the production of the thing or document, and possibly the interest of the administration of justice. On the other hand, one cannot forget the interest of the holder of the thing or document in not having his or her individual freedom infringed.

In this context, it is well understood that the law establishes, firstly, the need to exhibit the thing or document in order to ascertain the existence or content of a right of the applicant and, secondly, that the holder has no reasonable grounds to oppose its presentation³⁶.

In this way, this special action for the presentation of things or documents is based on an indispensable and adequate weighing of the interests in conflict, taking into account the interest of the applicant, in the sense of the defence of rights dependent on the exhibition of the thing or document with a focus on the discovery of the truth and the good administration of justice, but

³⁴ Cf. ANTÓNIO MENEZES CORDEIRO and A. BARRETO MENEZES CORDEIRO, "Código Civil Commented - II - General Obligations", CIDP, Almedina, 2021, page 593.

³⁵ Cfr. STJ Ac. of 19.5.2016, proc. 352/11.7TVPR.T.P1.S1, reporter Orlando Afonso; Ac. Rel. Porto of 25.2.2010, proc. 26/08.6TBVCD.P1, reporter Amélia Ameixoeira and Ac. Rel. Lisboa of 15.12.2020, proc. 11451/19.7T8LSB.L1-7, reporter Cristina Coelho, all available in www.dgsi.pt

³⁶ Cfr. ALMEIDA COSTA, "Direito das Obrigações", 11th ed.



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never ignoring the interest of the holder of the thing or document in not having his individual freedom offended.

As it is well established that the Defendants refused to produce the documents sought by the Plaintiff, when asked to do so by the latter - see facts 36 and 37, which they reiterated in their Reply, it is important to ascertain the Plaintiff's legal interest in examining the documents in the Defendants' possession.

A. Plaintiff's legal interest in examining documents in the Defendants' possession:

ASSOCIAÇÃO IUS OMNIBUS, private law consumers' association, through the documents whose consultation it requests, intends to confirm, in accordance with the geographical scope of the practices described in the European Commission Decision issued on 30 January 2020, in Case AT.40433 - *Film Merchandise* [hereinafter Decision], that the Defendants' anticompetitive behaviours, identified in that Decision, caused damage to constitutionally protected diffuse interests in Portugal and to homogeneous individual interests of consumers residing in Portugal, and, if so, what is the quantum of the damage caused; as well as, concluding in the affirmative, based on the evidence obtained, to bring an action for a declaration of anti-competitive conduct and for damages, based exclusively on breaches of competition law, exercising the right of popular action conferred on it by the Portuguese Constitution and legislation, on behalf of consumers who have suffered loss in Portugal, so that they may be compensated for the harm caused to them by the abovementioned practices. To this end, he claims that it is impossible for him, in light of the information and documents publicly available, restricted to the non-confidential version of the decision of the European Commission issued on 30 January 2020, in case AT.40433 - *Film Merchandise*, published on 24 April 2020; press release issued by the European Commission on 30 January 2020; contractual scheme published by the European Commission³⁷ and news published on the EU Law Live website, to reach a sustained conclusion as to the existence of damages and their quantification.

³⁷ https://ec.europa.eu/commission/presscorner/api/files/attachment/860790/NBCUniversal_graph_en.pdf



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Therefore, in addition to the Plaintiff's already recognised legitimacy to bring an action under the terms of the present action, its right to bring a popular action to defend the rights of consumers affected by an infringement of competition law is recognised, within the scope of the exercise of its right to effective judicial protection, as set out in the Constitution of the Portuguese Republic and in the ordinary law - cfr. arts. 20, no. 1, 52, no. 3 and 60, no. 3 of the CRP; arts. 2 and 3 of Law no. 83/95, of 31 August; art. 30 of the CPC and art. 19 of Law no. 23/2018, of 5 June.

Alongside, in accordance with Directive 2014/104/EU and Law No. 23/2018, of June 5, which transposed it - in view of the Decision of the European Commission issued on January 30, 2020, in Case AT.40433 - *Film Merchandise*, by which the Defendant was condemned for adopting an *anti-trust* behaviour, more specifically, for the fact that, during the period between January 2013 and September 2019, it violated Article 101 TFEU and Article 53 of the EEA Agreement by having implemented a *trust in the territory of the EU*. In particular, that it infringed Article 101 TFEU and Article 53 EEA by implementing practices, by contractual and non-contractual means, which partitioned the market within the EEA into territories and customer groups, consisting in differentiating between consumers in the European Economic Area according to their country of residence between January 2013 and September 2019, and that the countries affected were all countries in the European Economic Area (EEA) (see Facts 12 to 32). In other words, it is concluded that there is an asymmetry of information between the Plaintiff and the Defendants, the latter as targets of the Decision in question, i.e., as infringers. The Plaintiff is not in possession of the information/documentation necessary to bring an action for damages when, moreover, it is known that this type of action requires a complex factual and economic analysis. And this is where, in our view, resides the Plaintiff's reasonable legal interest in having access to documentary evidence held by the Defendants.

It is important to say here that, at this stage, there is no legal certainty about the success of the action for damages that the Plaintiff is considering bringing against the Defendants if, after the



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analysis of documents in the Defendants' possession, conclude that the anticompetitive behaviours, identified in the Decision, caused damage to constitutionally protected diffuse interests in Portugal and to individual homogenous interests of consumers residing in Portugal. Therefore, it is sufficient to conclude that the Plaintiff provides a reasoned justification with reasonably available facts and evidence, sufficient to corroborate the plausibility of its claim for compensation - see recital (16) and Article 5(1) of the Directive and Article 13(1) of Law no. 23/2018, of 5 June.

From the facts presented by the Plaintiff, based on the Decision of the European Commission, and the evidence made available, of public access, and therefore limited to the Decision, the Press Release of the European Commission dated 30/01/2020 and the Summary of the Decision published in the Official Journal of the European Union - see facts 12 to 34, we consider that the Plaintiff presents a justification supported by facts and evidence reasonably available, sufficient to corroborate the plausibility of its right.

To conclude otherwise would be to restrict the right of action for damages caused by the commission of an infringement of competition law whenever we are faced with a Decision of the European Commission which, although concluding that an infringement of competition law has been committed, does not address the damages/market effects resulting therefrom, as happens when we are faced with infringements by object, in which case the European Commission is not required to comment on the matter, The fact of being faced with an infringement by object does not mean, by itself and in an undoubted manner, to be faced with an infringement that did not cause damage in the market. And it should not be said that the fact that the European Commission's Decision does not expressly rule on the existence of any type of restrictive effects as a result of the conduct sanctioned in its Decision and, thus, on the existence of damages, means that no civil liability for the commission of the offence described.



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It is therefore perfectly possible³⁸ that conduct which is sanctioned 'by object' under Article 101 TFEU, as in the present case, also has an 'effect' in distorting or restricting competition on the market. The fact that the Commission, in the Decision at hand, did not assess the effects on the market or calculate (any) overcosts that may have been caused by the infringement does not necessarily lead to the conclusion that the infringement at issue had no effects on the market and therefore did not cause harm.

On the other hand, the fact that the European Commission, in the present case, chose not to submit written submissions, having been invited to do so, certainly because the Decision in question was the result of a settlement procedure with the infringer, also does not offer us any conclusion as to the (lack of) plausibility of the right invoked by the Plaintiff. It is an innocuous position for the issue at hand.

On the contrary, in addition to the European Commission's Press Release, the Commission has ruled on the damages action, i.e. that any person or company affected by the anti-competitive behaviour described in this case may bring an action before the courts of the Member States and claim damages. The case law of the Court and Council Regulation 1/2003 confirm that, in proceedings before national courts, a Commission decision constitutes binding proof that the conduct took place and was illegal. Even though the Commission has imposed a fine on the company concerned, damages can be awarded without reduction on account of the Commission's fine

- In fact, the Decision itself does not rule out the existence of negative effects on the market caused by the infringement committed by the Defendant.

Therefore, from a possible analysis of the Decision, in particular §§ 32, 33, 34, 36, 37, 38, 39, 43, 44, 45, 46, 7, 48, 49, 58, 59, 60 and 63, contained in the proven facts, in the description of the infringement made therein, that is, the restrictions imposed by the group to which the Defendants belong on active and passive sales of licensed merchandising in different territories and to different groups of customers, the following is relevant:

³⁸ See CJEU judgment of 2-4-2020 as. C-228/18 § 33 to 40



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- The anti-competitive practice at issue consisted in differentiating between consumers in the European Economic Area according to their country of residence between January 2013 and September 2019, and that the countries affected were all EEA countries
European Economic Area (EEA), which, without excluding any country, includes Portugal;
- The anti-competitive practice restricted the ability of commercial agents contracting with any of the companies in the Comcast/Universal group to sell freely the Defendant's merchandising products throughout the EEA, which, by not with the exception of any country, includes Portugal;
- Those direct and indirect restrictions imposed by the Defendants on the sale of licensed merchandising products on condition that they are intended for specific customers and territories within Member States were taken in compliance with a global trade strategy aimed at partitioning national markets and reducing or eliminating competition.
- This concerns agreements restricting competition by limiting the sale of the products
- of Comcast/Universal merchandising to consumers resident in certain Member States. Member States, pre-defined in each licence agreement for the exploitation of intellectual property rights linked to the film, TV or digital entertainment content produced or acquired by Comcast/Universal, which constitutes conduct that is caught by Article 101 TFEU and Article 53 EEA.
- The division or partitioning of markets directly affects competition on price, choice, quality and quantity of products, inevitably limiting the consumer choice and competition over the conditions on which products are offered to them, thereby harming consumers' rights and interests.
- By contractual means, Universal, in the standard licensing contracts it entered into, directly or indirectly with third parties, imposed throughout the EEA explicit clauses restricting sales to consumers resident in certain Member States (depending on the contract), directly affecting trade and healthy competition.



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- The license agreements were either entered into directly between the Defendant and the licensees or were
- entered into with the intermediation of Comcast/Universal agents who, in the context of non-exclusive representation agreements, had the power to identify business opportunities, negotiate and enter into licensing agreements with third parties for the production and distribution of merchandising products in one or more specific territories, those territories varying according to the specific agreement.
- The Defendants, directly, through the "Universal Brand Development" department or indirectly, through the said agents, presented to the contracting third parties a standard merchandising licence agreement which set out the terms and conditions to be observed, regulating, inter alia, the scope of the licence; the product(s) concerned; the territorial scope; the distribution channels; the duration of the agreement and the financial consideration for the licensing;
- During the execution of the contract, Comcast/Universal maintained close contact with its licensees, supervising compliance with several matters, including distribution of the product on the geographic market specified in the merchandising licence agreement;
- The implementation of non-contractual anti-competitive practices included audits of licensees to check compliance with merchandising license contract. The audits were conducted by external entities, and their main objective was to detect violations of contractual or other legal obligations of licensees that could be cause for contract termination or non-renewal of the contract;
- In order to ensure compliance with these restrictive clauses, Comcast/Universal
- carried out these audits which, on the one hand, checked that the licence was being complied with on time and, on the other, discouraged non-compliance by implying possibility of early termination or non-renewal of the licence, reactions which in the Decision are referred to as "standard business tools" used to intimidate licensees;



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- Contractual restrictions referred to a set of countries and/or specific customer groups, depending on the contract, to whom licensees were prohibited from selling offline or online, actively or passively;
- Although the contracts usually contain a so-called "European Union Sales" clause stating that contractual restrictions should be applied in the
To the extent permitted by European law or any applicable international treaty, the European Commission has concluded that the vague wording of the clause, the behaviour of the licensees and the audits carried out impose the understanding that the clause was not interpreted as allowing passive sales of the merchandising outside the geographic markets assigned to the licensees;
- The same "European Union Sales" clause provided that the licensee could not, in any event ("in any event"), seek, advertise or solicit sales of any licensed item outside of the geographic market defined in the agreement or establish a branch or agency, plant or warehouse outside such territory without Comcast/Universal's prior written consent;
- The licence agreements prohibited licensees from making online sales, expressly reserving such distribution channel to Comcast/Universal, or limited its possibility to customers resident in the geographic markets defined in the contract or to specific customer groups;
- The licence agreements contained notification obligations binding the licensees to report to Comcast/Universal all sales made outside the territory that had been allocated to them or through distribution channels they were obliged not to use;
- The merchandising contracts determined the language(s) to be used on the packaging of the products and/or on the products themselves, precisely to prevent their sale outside the specified territories. The Comcast/Universal group authorised additional languages only after obtaining a promise that the licensee would not sell the products outside the territory defined in the contract;



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- Comcast/Universal, in some contracts, expressly provided to which customers or customer groups the licensees could sell the merchandising, allowing for sales to 'certain Retail Partners (as defined herein)';
- The licence agreements also provided for a penalty for licensees who did not comply with the restrictions imposed, giving Universal the possibility to charge the licensees higher royalties or require them to pass on to him the entire revenue earned from sales made in any way outside the geographic or customer scope defined in the agreement;
- In addition, Comcast/Universal obliged the licensees to bind their respective customers to the same sales restrictions, monitoring and supervising actively their relationships and contractual practices by issuing warnings or injunctions to terminate any contractual relationship with customers selling the merchandising items outside the established scopes.

According to the Plaintiff's interpretation, it results from the Decision that it is plausible that the Defendants' anticompetitive behaviour has harmed consumers residing in Portugal, not being ruled out by any means, nor have the Defendants demonstrated that such behaviour could not have occurred, having complied with the Decision's description of their infringing behaviour.

Moreover, the relevant contracts referred to in the Decision and the Member States excluded by the restrictive clauses from all the contracts affected are not listed in the Decision, nor are they publicly available, although the Decision expressly states that all the States of the European Economic Area are affected.

However, given the size, presence and scope of the activity provided by the Defendant in the European Union and given the geographical scope stated in the Decision, there is a likelihood that consumers who are Portuguese or resident in Portugal have been affected by the clauses declared illegal by the European Commission.

Therefore, given the text of the Decision (and in the absence of other data, which could have been provided by the Defendants to enable a different conclusion to be drawn, given their



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proximity to the sources), we cannot conclude, as the Defendants have tried to make us believe in their Reply, that there is no plausibility of the Plaintiff's right. On the contrary, as already stated, the Plaintiff presents a grounded justification with facts and evidence reasonably available (as possible), but sufficient, to corroborate the plausibility of its claim for damages and, consequently, its reasonable interest in consulting the documents in the possession of the Defendant, which is necessary to ascertain the existence and content of such right.

Despite the perfunctory analysis carried out of the European Commission's Decision (the only one possible), for the sole purpose of assessing the Plaintiff's interest in accessing documents held by the Defendant, the truth is that it does not contain sufficient information to confirm whether the Defendant's restrictive practice described therein caused damages to consumers residing in Portugal and, if so, the extent of such damages. In other words, the public information available to the Plaintiff (the only information) is not sufficient to enable it to exercise its right of access to justice, to fully understand the content of its rights and thus meet its burden of alleging the essential facts from which the right to compensation arises, a circumstance which the legislator sought to overcome by providing for the procedural mechanism in question.

Having concluded that the Plaintiff has a compelling interest in consulting documents held by the Defendant, it is now important to assess the reasons for the Defendant's refusal, given the necessary balancing of the conflicting interests.

B. The reasons invoked by the Defendants to oppose the presentation of the documents:

Once the Defendants' arguments to justify their refusal to submit the documents are dismissed, let us look at the other reasons alternatively invoked by them with the same objective:

- i. Because the documents do not exist and are not in their possession.
- ii. Because some of the documents were destroyed under internal policies and in compliance with legal obligations.
- iii. The documents include confidential information and personal data.



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In the light of the concerns raised by the Defendants, the following should be said in advance: As is apparent from recitals (13), (14), (15), (16) and (18) of the Directive 2014/104/EU, since actions for damages for infringement of Union or national competition law typically require a complex factual and economic analysis and the evidence necessary to support a claim for damages is often in the exclusive possession of the opposing party or third parties and the claimant does not have sufficient knowledge of, or access to, such evidence, the existence of strict legal requirements requiring claimants to specify in detail all the factual elements relating to their allegations at the beginning of an action and the precise production of specific evidence may unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

As evidence is important for bringing an action for damages for infringement of Union or national competition law and litigation in the field of Union competition law is characterised by an asymmetry of information, it is appropriate to ensure that claimants have the right to obtain disclosure of evidence relevant to their claim without the need to specify individual items of evidence.

Nevertheless, national courts should, under their strict control, order the disclosure of specified evidence or categories of evidence, in particular as regards the necessity and proportionality of the disclosure measures, upon request of a party. And, while relevant evidence containing business secrets or other confidential information should be accessible in damages actions, such information should be appropriately protected.

National courts should therefore have a range of measures in place to protect such information from disclosure during proceedings. Such measures could include the possibility to redact sensitive passages of documents, to conduct hearings in camera, to restrict the number of persons allowed to see the evidence and to instruct experts to provide summaries of information in aggregate form or otherwise



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non-confidential form. However, measures to protect trade secrets and other confidential information should not prevent the exercise of the right of redress.

Hence, according to Article 5(3) of the Directive, Member States shall ensure that national courts limit the disclosure of evidence to what is proportionate. In determining whether the disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall take into account, in particular: (a) the extent to which the claim for damages or the defence is supported by facts and evidence available which justify the request for disclosure of the evidence; (b) the scope and costs of disclosure, in particular to interested third parties, including to avoid non-specific searches for information of unlikely relevance to the parties to the proceedings; (c) whether the evidence the disclosure of which is sought contains confidential information, in particular as regards third parties and what procedures are in place to protect such confidential information.

And, according to paragraph 4 of that Article 5, Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that national courts have effective measures in place to protect such information when ordering its disclosure.

Finally, according to Article 5(5), the interest of undertakings in avoiding actions for damages following an infringement of competition law does not constitute an interest that warrants protection.

Hence, the national legislator, transposing the referred Directive into the national legal system, through Law nr 23/2018, of June 5th, in its article 13, under the epigraph "Access to evidence before filing the action for damages", more specifically in its paragraph 2, provides the following: *The provisions of paragraphs 2 to 9 of the preceding article shall apply, with the necessary adaptations, to the requests for access referred to in the preceding paragraph, i.e., as far as relevant to the case:*

"[...]"



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2 - The request referred to in the preceding paragraph shall be supported by facts and evidence reasonably available and sufficient to corroborate the plausibility of the claim for compensation or defence and shall indicate the facts to be proved.

3 - The request shall identify as precisely and as narrowly as possible the means of evidence or categories of evidence the disclosure of which is sought on the basis of the facts on which it is based.

4 - The court shall order the presentation of the evidence if it considers it proportional and relevant to the decision of the case, and requests that presuppose indiscriminate searches for information shall be refused.

5 - In determining the proportionality of the request for the submission of evidence, the court shall weigh the legitimate interests of all parties and third parties concerned, taking into account in particular:

- a) The extent to which the claim or defence is founded on facts and evidence available to justify the request for production of documents;*
- b) the scope and costs of providing evidence, in particular for interested third parties, taking into account in particular the need to avoid indiscriminate searches for information of unlikely relevance to the parties;*
- c) the existence of confidential information in the evidence required to be produced, in particular vis-à-vis third parties, and the nature of the procedures adopted to protect such information.*

6 - For the purposes of paragraphs 4 and 5, the interest in avoiding actions for damages following an infringement of competition law shall not constitute an interest justifying protection.

7 - Without prejudice to the following paragraph, the court shall order the production of evidence containing confidential information where it considers it relevant to the action for damages, by taking effective measures to protect it, in particular:



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- a) *Hide sensitive excerpts of documents;*
- b) *Conduct hearings behind closed doors;*
- c) *Restricting the number of persons authorised to have access to evidence, in particular by limiting access to the parties' legal representatives and defending counsel or experts subject to a confidentiality obligation;*
- d) *Ask for expert summaries of information to be prepared in aggregated or otherwise non-confidential form.*

In view of the reasons underlying the Defendant's refusal, it is clear from the outset that the court may order the production of evidence containing confidential information or business secrets when it deems them relevant and necessary for the exercise of the Plaintiff's right, as there are legal and effective safeguard mechanisms for the protection of information deemed confidential or secret. Nevertheless, it is immediately apparent in the present case that the Defendant did not even duly allege which of the documents, among those whose examination is sought by the Plaintiff, are of a confidential and/or secret nature, and to what extent they are so, bearing in mind that *"the decision to classify a document as confidential, in terms of competition law, is conditioned by the defendant's compliance with a triple burden, which the aforementioned rules refer to, namely of identifying the information it considers confidential; of substantiating such understanding and of providing a non-confidential copy of the relevant documents, purged of confidential information. The protection of business secrecy is limited to not unreasonably restricting the publicity of the process and the rights of defence of the other persons concerned".*³⁹ (sic) - emphasis added.

Let us now look, by reference to each document listed by the Plaintiff as proof of the factual matter respectively indicated.

— For knowledge and evidence of the scope and effects of the anti-competitive practice concerned:

- i. Comcast/Universal's standard intellectual property rights licence agreement (Master Merchandising License Agreement) used by

³⁹ See TRL judgement dated 18/12/2019, rendered by Mr. Justice Graça Santos Silva, in the scope of Proc. 228/18.7YUSTR-G.L1-3, available at www.dgsi.pt



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Defendants between January 2013 and September 2019, in particular paragraph 24 and footnote 35 of the European Commission's Decision.

In this regard, the Defendants claim not to have or hold contracts to which it was not a party, as they were entered into by third parties.

As the Plaintiff did not request contracts signed by third parties, but those used by the Defendants themselves during the infringement period, namely those referred to in paragraph 24 and footnote 35 of the European Commission's Decision, of which it is naturally aware, as they are the subject of the Decision, there is no obstacle to making them available.

The fact that the documents in question were examined by the European Commission and referred to in the Decision does not prevent the court from ordering the Defendants to have access to them, since they hold them and can therefore reasonably provide them - see Article 14(2).

- ii. Merchandising license agreements, and/or intellectual property use license agreements for the production and/or sale of merchandising items related to digital, television or cinematographic content produced, acquired or disseminated by the Defendant or by the Comcast/Universal group, entered into directly between the Defendant and its licensees or entered into indirectly (through intermediaries of Comcast/Universal), for the exploitation of the intellectual property rights of the Defendant or of Comcast/Universal covering, in whole or in part, the Portuguese territory, in force, in whole or in part, between January 2013 and September 2019.

In this regard, the Defendants admit having entered into these contracts, but only until January 2017, further refuting that they hold contracts entered into indirectly, through their intermediaries.



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Therefore, given the Plaintiff's request, nothing prevents the Defendants from making available the contracts in question, entered into between them and their licensees, covering all or part of the Portuguese territory, between January 2013 and January 2017.

- iii. The distribution agreements held by the Defendants (or, alternatively, documents held by the Defendants identifying and/or referring to the distribution agreements) entered into by the licensees with wholesalers and/or retailers for the sale of the Defendants' or Comcast/Universal's merchandising products relating to digital, television or film content produced, acquired or disseminated by the Defendants or the Comcast/Universal group to consumers resident in Portugal between January 2013 and September 2019.

In this regard, the Defendants claim not to have or hold contracts to which it was not a party, as they were entered into by third parties.

In view of this affirmation by the Defendants and since there is nothing that would allow us to conclude otherwise, the Defendants are not required to provide these distribution contracts.

- iv. Notifications made to the Defendant between January 2013 and September 2019 to authorise sales in Portugal or to consumers resident in Portugal not permitted by the geographical scope of the licence agreements for the use of intellectual property for the production and/or sale of merchandising items related to digital, television or film content produced, acquired or disseminated by the Defendant or Comcast/Universal.

In this respect, the Defendants claim not to possess or hold the said notifications.

In view of this affirmation by the Defendants and since there is nothing that would allow us to conclude otherwise, the Defendants are not required to provide these distribution contracts.



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- v. Documents or open communications exchanged between the Defendant, or its agents, and licensees, from January 2013 until September 2019, on the possibility of passive sales outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-16, ID 479-21, ID 479-34, ID 479-14, ID 479-39, ID 479-1, ID 479-36, ID 479-41 and ID 479-33).

In this respect, the Defendants claim not to possess or hold the said notifications.

Notwithstanding this assertion of the Defendants, with respect to these documentary elements, the Plaintiff listed the concrete documents sought by reference to the European Commission's sanctioning process.

The fact that the documents in question were examined by the European Commission and referred to in the Decision does not prevent the court from ordering the Defendants to have access to them, since they hold them and can therefore reasonably provide them - see Article 14(2).

Therefore, since the elements in question are of their natural knowledge, as covered by the Decision, there is no obstacle to making them available.

- vi. Documents or open communications addressed to the Defendant, or its agents, by EEA licensees between January 2013 and September 2019 requesting them to prevent other licensees from selling merchandising articles outside contractually defined geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanction procedure: ID 479-31, ID 479-15, ID 523) and Comcast/Universal group's responses thereto.

In this respect, the Defendants claim not to possess or hold the said notifications.



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Notwithstanding this assertion by the Defendants, with respect to these documentary elements, the Plaintiff listed the concrete documents sought by reference to the European Commission's sanctioning process.

The fact that the documents in question were examined by the European Commission and referred to in the Decision does not prevent the court from ordering the Defendants to have access to them, since they hold them and can therefore reasonably provide them - see Article 14(2).

Therefore, since the elements in question are of their natural knowledge, as covered by the Decision, there is no obstacle to making them available.

- vii. Documents or open communications addressed to the Defendant, or its agents, by EEA licensees, between January 2013 and September 2019, requesting permission to use other languages in merchandising items, namely Portuguese, and responses thereto (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-26 and ID 479-25).

In this respect, the Defendants claim not to possess or hold the said notifications.

Notwithstanding this assertion by the Defendants, with respect to these documentary elements, the Plaintiff listed the concrete documents sought by reference to the European Commission's sanctioning process.

The fact that the documents in question were examined by the European Commission and referred to in the Decision does not prevent the court from ordering the Defendants to have access to them, since they hold them and can therefore reasonably provide them - see Article 14(2).

Therefore, since the elements in question are of their natural knowledge, as covered by the Decision, there is no obstacle to making them available.



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- viii. Documents or open communications exchanged between the Defendant, or its agents, and EEA licensees, from January 2013 until September 2019, regarding the need to ensure the absence of sales of the merchandising articles outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-43, ID 479-38, ID 479-2, ID 475, ID 479-30 and ID 479-44).

In this respect, the Defendants claim not to possess or hold the said notifications.

Notwithstanding this assertion by the Defendants, with respect to these documentary elements, the Plaintiff listed the concrete documents sought by reference to the European Commission's sanctioning process.

The fact that the documents in question were examined by the European Commission and referred to in the Decision does not prevent the court from ordering the Defendants to have access to them, since they hold them and can therefore reasonably provide them - see Article 14(2).

Therefore, since the elements in question are of their natural knowledge, as referred to in the Decision, there is no obstacle to making them available.

- ix. Reports of audits carried out by the Defendant, or by entities contracted by it, on licensees with sales in Portugal or with sales in other EEA countries, relating to sales outside the designated geographical scope or customer group, involving sales in or to Portugal, between January 2013 and September 2019.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.



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- x. Document(s) in the possession of the Defendant identifying the license agreements for the use of intellectual property for the production and/or sale of merchandising items that the Defendant terminated on the grounds of breach of the restrictive sales clauses, in the EEA, between January 2013 and September 2019.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

- xi. Document(s) in the possession of the Defendant relating to the system for monitoring the Defendant's online sales of the products concerned in the EEA, including compliance with the online prohibited sales policy, between January 2013 and September 2019.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

— Paracognition e proof of the unit economic unit
formed the Comcast/Universal group and the legal entities which are
part of it, determining the scope
subjective civil liability for the anti-competitive practices at issue:

- (i) Document(s) in the possession of the Defendant showing the current shareholder structure of the commercial companies referred to in the Decision and their subsidiaries, as well as their evolution over time from January 2013 to September 2019;



- (ii) Documents or open communications exchanged between Comcast/Universal group company(ies) to whom the Decision is addressed, or their respective directors,



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from January 2013 until September 2019, on the approval of business plans, accounts, commercial strategy and appointment of directors.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

— For knowledge and proof of the damage caused to consumers and its quantification:

- (i) Confidential version of the tables with the turnover related to the assignment of intellectual property rights of the Defendant in Portugal (from January 2013 to September 2019) contained in the Decision of the European Commission.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

- (ii) Confidential version of the data and tables with relative percentages of the Defendant's sales volume in each type of product subject to intellectual property licence, in Portugal, between January 2013 and September 2019, contained in the EC Decision.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.



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- (iii) Document(s) in the possession of the Defendant that include(s) or allow(s) the calculation of the Defendant's operating income, from January 2013 to September 2019, in Portugal and in the EU.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

- (iv) Document(s) in the possession of the Defendant, including estimates and market studies carried out for/acquired by Comcast/Universal, which include or allow the calculation of the Defendant's and/or Comcast/Universal group's merchandising sales in Portugal, in volume and value, broken down by sales to wholesale distributors, sales to retailers and direct sales to end consumers, including online and offline sales, by product and by month, from January 2013 until December 2020.

In this regard, the Defendants claim not to possess or hold any documents that refer to third-party entities.

As the Plaintiff has not requested any documents that it is unreasonable to assume the Defendants have in their possession, such as those explained therein, there is no obstacle to making them available.

- (v) Reports or any other type of sales reporting document sent to the Defendant by its direct or indirect licensees, including attached invoices, relating to sales made in or to Portugal between January 2013 and September 2019.

The Defendants made no specific allegations in this regard.



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Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

- (vi) Document(s) in the Defendant's possession showing or from which the final prices (average unit PVP) of each merchandising item, in each EU Member State, in offline and online sales, and their evolution over time, between January 2013 and December 2020, are derived.

The Defendants made no specific allegations in this regard.

Therefore, as they are relevant to the purpose of the action, and as their scope is duly delimited in terms of object and time period, there is no reason why they should not be made available.

- (vii) Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the calculation of the market shares of the Defendant and/or the Comcast/Universal group and its main competitors (or their estimates), in each year between 2013 and September 2019, in Portugal (or, in the absence of specific data for Portugal, in the European Union), in each of the types of merchandising product that may incorporate the intellectual property rights subject to the licence agreements entered into between January 2013 and September 2019.

In this regard, the Defendants claim not to possess or hold any documents in question after January 2017 and those that refer to third-party entities.

As these documents were made for and acquired by the Defendants, they constitute documents that can reasonably be presumed to be in the Defendants' possession. On the other hand, the Defendants have not denied having the items in question or any other similar type of document reflecting the information sought.



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Therefore, we do not see any obstacle to their availability, however, limited to the time period between January 2013 and January 2017.

- (viii) Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of the Defendant's and/or Comcast/Universal's merchandising products that could not be sold in Portugal or to consumers resident in Portugal between January 2013 and September 2019 (namely because they could not be ordered by a consumer resident in Portugal from licensees, agents or distributors with licences for territories that did not include Portugal).

In this regard, the Defendants claim not to possess or hold any documents that refer to third-party entities.

As these documents were made for and acquired by the Defendants, they constitute documents that can reasonably be presumed to be in the Defendants' possession. On the other hand, the Defendants did not deny having the elements in question or any other similar type of document reflecting the information sought

Therefore, there is no obstacle to its availability.

- (ix) Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of promotions or offers linked to merchandising products of the Defendant and/or Comcast/Universal that were not available to consumers resident in Portugal between January 2013 and September 2019.

In this regard, the Defendants claim not to possess or hold any documents that refer to third-party entities.



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As these documents were made for and acquired by the Defendants, they constitute documents that can reasonably be presumed to be in the Defendants' possession. On the other hand, the Defendants have not denied having the items in question or any other similar type of document reflecting the information sought.

Therefore, there is no obstacle to its availability.

- (x) Documents in the possession of the Defendant, including market studies conducted for/acquired by the Defendant or Comcast/Universal, which describe or from which it can be deduced the different types/profiles of consumers of the Defendant's and/or Comcast/Universal's merchandising products and their average consumption patterns in Portugal (or, in the absence of specific data for Portugal, in the European Union).

In this regard, the Defendants claim not to possess or hold any documents that refer to third-party entities.

As these documents were made for and acquired by the Defendants, they constitute documents that can reasonably be presumed to be in the Defendants' possession. On the other hand, the Defendants did not deny having the elements in question or any other similar type of document reflecting the information sought

Therefore, there is no obstacle to its availability.

- (xi) Original applications for damages filed against the Defendant in any EEA Member State by consumers or consumer associations, or by licensees, sellers or resellers of Comcast/Universal merchandising based on the Defendant's or Comcast/Universal group's anti-competitive practices concerned by the European Commission Decision (or alternatively, identification of the relevant case number(s)).

The Defendants claim that such elements will be accessible to the Plaintiff



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The Defendants are
right.

In effect, the essentiality of the information in question for the purposes of the present action and that it cannot be obtained by any other means available to the Plaintiff is not reached.

Therefore, the Defendant is exempted from submitting it.

Finally, a final consideration regarding the alleged disproportionate task that making the information available entails for the Defendants, according to her, because it is a Herculean task of collecting and compiling documents.

It is certain that the Defendants, within the scope of the administrative offence proceeding in question, collected at least a large part of the said documentary evidence, and it does not therefore appear that this is a task that is not within their reach, and given the corporate dimension of the Defendants, it is certain that the same is stored in computer files that are easily accessible and under their control.

In any case, as an alternative to the submission of the elements in question, the Defendants may choose to submit the information requested by the Plaintiff, through the preparation of document(s) *ex novo*⁴⁰, as it sees fit, thus leaving to its discretion how to provide the information in question.

And as to the alleged circumstance that such documents contain confidential information, as already stated, although the Defendants have not met their burden of allegation, nor can it be seen to what extent their commercial interests could be endangered with the consultation by the Plaintiff of such documents, since it does not assume any competitive activity of the Defendants, the Court will not fail to limit its access to the parties in this lawsuit and its use only for the purposes of this lawsuit.

And as to the Defendants' allegation that some of the documents are covered by the confidentiality of the settlement proceedings, the fact that some of the documents were examined by the European Commission and referred to in the Decision does not prevent the

⁴⁰ In this sense, see the already mentioned CJEU judgment, dated 10/11/2022, delivered in Case C-163/21 [AD and v PACCAR Inc. and Others]



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court may order the Defendants to have access to them, since they hold them and can therefore provide them in a reasonable manner - see paragraph 2 of art. 14 of Law No. 23/2018, of 5 June.

Under the terms exposed, concluding that the requested documentation does not show an appearance of indiscriminate search for information, but rather offers the possible materialization regarding the intended elements, in all of which there is a link between the characterization of the infringement and the mentioned documentation; as well as due to the Plaintiff's compelling interest in having access to documents held by the Defendants and in its need to allow the Plaintiff to understand whether diffuse interests were affected and whether consumers residing in Portugal were affected by the anti-competitive practices in question, whether these caused them damages and the amount of such damages, and once the reasons invoked by the Defendants to oppose the presentation of the documents sought by the Plaintiff have been analysed, the Defendant must submit the following documents, or a summary of the information contained in these documents:

- a. Comcast/Universal's standard intellectual property rights licence agreement (Master Merchandising License Agreement) used by the Defendants between January 2013 and September 2019, namely in paragraph 24 and footnote 35 of the European Commission's Decision.
- b. Merchandising licence agreements, and/or intellectual property use licence agreements for the production and/or sale of merchandising items related to digital, television or cinema content produced, acquired or disseminated by the Defendant or by the Comcast/Universal group, entered into directly between the Defendant and its licensees, for the exploitation of the Defendant's or Comcast/Universal's intellectual property rights covering, in whole or in part, the Portuguese territory, in force, in whole or in part, between January 2013 and January 2017.
- c. Documents or open communications exchanged between the Defendant, or its agents, and licensees, from January 2013 until September 2019, regarding the possibility of passive sales outside of assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in



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European Commission penalty proceedings: ID 479-16, ID 479-21, ID 479-34, ID 479-14, ID 479-39, ID 479-1, ID 479-36, ID 479-41 and ID 479-33).

- d.* Documents or open communications addressed to the Defendant, or its agents, by EEA licensees between January 2013 and September 2019 requesting them to prevent other licensees from selling merchandising outside contractually defined geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanction procedure: ID 479-31, ID 479-15, ID 523) and Comcast/Universal group's responses thereto.
- e.* Documents or open communications addressed to the Defendant, or its agents, by EEA licensees, between January 2013 and September 2019, requesting permission to use other languages in merchandising items, namely Portuguese, and responses thereto (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-26 and ID 479-25).
- f.* Documents or open communications exchanged between the Defendant, or its agents, and EEA licensees, from January 2013 until September 2019, regarding the need to ensure the absence of sales of the merchandising articles outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-43, ID 479-38, ID 479-2, ID 475, ID 479-30 and ID 479-44).
- g.* Reports of audits carried out by the Defendant, or by entities contracted by it, on licensees with sales in Portugal or with sales in other EEA countries, relating to sales outside the designated geographical scope or customer group, involving sales in or to Portugal, between January 2013 and September 2019.
- h.* Document(s) in the possession of the Defendant identifying the license agreements for the use of intellectual property for the production and/or sale of articles of



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merchandising which the Defendant terminated on the grounds of breach of the restrictive sales clauses, in the EEA, between January 2013 and September 2019.

- i.* Document(s) in the possession of the Defendant relating to the system for monitoring the online sales of the relevant products of the Defendant in the EEA, including compliance with the policy of prohibited online sales, between January 2013 and September 2019.
- j.* Document(s) in the possession of the Defendant showing the current shareholder structure of the commercial companies referred to in the Decision and their subsidiaries, as well as their evolution over time from January 2013 to September 2019;
- k.* Documents or open communications exchanged between Comcast/Universal group company(ies) addressee(s) of the Decision, or their respective directors, from January 2013 until September 2019, on the approval of business plans, accounts, business strategy and appointment of directors.
- l.* Confidential version of the tables with the turnover related to the assignment of intellectual property rights of the Defendant in Portugal (from January 2013 to September 2019) contained in the Decision of the European Commission.
- m.* Confidential version of the data and tables with relative percentages of the Defendant's sales volume in each type of product subject to intellectual property licence, in Portugal, between January 2013 and September 2019, contained in the EC Decision.
- n.* Document(s) in the possession of the Defendant that include(s) or allow(s) the calculation of the Defendant's operating income, from January 2013 to September 2019, in Portugal and in the EU.
- o.* Document(s) in the possession of the Defendant, including estimates and market studies carried out for/acquired by Comcast/Universal, which include or allow the calculation of the Defendant's and/or Comcast/Universal group's merchandising sales in Portugal, in volume and value, broken down by sales to wholesale distributors, sales to retailers and direct sales to end consumers, including online and offline sales, by product and by month, from January 2013 until December 2020.



- p.* Reports or any other type of sales reporting document sent to the Defendant by its direct or indirect licensees, including attached invoices, relating to sales made in or to Portugal between January 2013 and September 2019.



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- q.* Document(s) in the Defendant's possession showing or from which the final prices (average unit PVP) of each merchandising item, in each EU Member State, in offline and online sales, and their evolution over time, between January 2013 and December 2020, are derived.
- r.* Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the calculation of the market shares of the Defendant and/or the Comcast/Universal group and its main competitors (or their estimates), in each year between 2013 and until January 2017, in Portugal (or, in the absence of specific data for Portugal, in the European Union), in each of the types of merchandising product that may incorporate the intellectual property rights subject to the licence agreements entered into between January 2013 and until January 2017.
- s.* Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of the Defendant's and/or Comcast/Universal's merchandising products that could not be sold in Portugal or to consumers resident in Portugal between January 2013 and September 2019 (namely because they could not be ordered by a consumer resident in Portugal from licensees, agents or distributors with licences for territories that did not include Portugal).
- t.* Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of promotions or offers linked to merchandising products of the Defendant and/or Comcast/Universal that were not available to consumers resident in Portugal between January 2013 and September 2019.
- u.* Documents in the possession of the Defendant, including market studies conducted for/acquired by the Defendant or Comcast/Universal, which describe or from which the different types/profiles of consumers of the Defendant's and/or Comcast's merchandising products can be derived



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Comcast/Universal and its average consumption patterns in Portugal (or, in the absence of specific data for Portugal, in the European Union).

We further note the following, considering the nature of the case and thus the fact that the Court is not bound by criteria of strict legality, but must adopt the solutions best suited to the interests at stake:

- Notwithstanding what has been stated regarding the confidential nature and business secrecy of the information/documentary elements in question, in order to safeguard the interests of the Defendants and third parties who may be affected by their disclosure, the content and extent of which are unknown, access to the documents in question is restricted to the parties, their legal representatives and experts subject to an obligation of confidentiality.
- The Plaintiff is further limited to the use of the information contained in the documentary elements in question for the purpose of bringing an action for damages for infringement of competition law, and may not use or dispose of it in any other manner.
- In order to facilitate the availability of the documentary evidence in question by the Defendants, in addition to its extension, the Defendants may make use of technical support, such as
as a DVD or CD.
- A period of 120 days is set for the Defendant to make the documentary information in question available in the case-file, this period being considered sufficient and reasonable for the purpose.

*

It is also important to clarify, in relation to the alleged inadmissibility of the alternative request contained in paragraph c) of the request formulated in the respective initial petitions, that since the Court did not order the presentation by the Defendants of documents other than those sought by the Plaintiff, without prejudice to the fact that, as explained, in this special procedure for the presentation of documents, the judge is not subject to criteria of strict legality, and must seek the solution that best fits the specific case, by virtue of its nature as a voluntary jurisdiction procedure, the concrete assessment of the alleged



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the inadmissibility of the alternative claim formulated by the Plaintiff, is prejudiced.

Art. 608, no. 2 of the Code of Civil Procedure.

C. Plaintiff's abuse of rights and fraud against the law:

The Defendants claim, in summary, that if it is understood that the denial of the Plaintiff's popular legitimacy does not proceed by way of interpretation or by way of integration, it should be understood that such result proceeds by way of the operation of the institute of fraud against the law and abuse of right.

The Plaintiff replied to the referred matter, claiming its refusal, under the terms stated in its request for reply, which we hereby reproduce in full for all legal purposes.

Let's see:

Article 334 of the Civil Code provides that: "*The exercise of a right is illegitimate when the holder manifestly exceeds the limits imposed by good faith, good customs or the social or economic purpose of that right*".

As Prof. ALMEIDA COSTA teaches⁴¹, the principle of abuse of rights constitutes one of the technical expedients dictated by the legal conscience to counteract, in some particularly clamorous situations, the consequences of the rigid structure of the legal rules. The conceptions that seek to specify the content of the abuse of rights are basically reduced to two opposing guidelines: one subjectivist and the other objectivist.

The subjective theory considers the psychological attitude of the holder of the right to be decisive; having acted with the sole purpose of harming the injured party (emulative act). The objective theory, on the other hand, disconnects itself from the agent's intention, giving relevance instead to the factual data, to the objective scope of his conduct, according to the criterion of public conscience.

According to PIRES DE LIMA and ANTUNES VARELA, "the adopted conception of abuse

of law is the objective one. It is not necessary to be aware of exceeding yourselves by exercising it,



⁴¹ *In* Direito das Obrigações, 7th ed.



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the limits imposed by good faith, good customs or the social or economic purpose of the right; it is enough that these limits are exceeded."⁴²

Fraud against the law, in turn, translates the idea of behaviour which, while maintaining the appearance of conformity with the law, obtains something that is understood to be forbidden by it. Since in Portuguese law there are no general written rules on fraud against the law, either in the Constitution or in the Civil Code, resorting to the case-law of our Supreme Court of Justice⁴³, we will say that "the requirements for establishing the existence of fraud against the law are the legal rule that is the object of fraud (the rule from whose imperative it is sought to escape); the legal rule that the fraudulent party seeks to protect; the fraudulent activity and result that the law prohibits, whereby the fraudulent party sought and obtained the illicit modelling of a situation covered by this second rule, the allegation and proof of fraudulent intent not being required."

In the present case, as stated above, in the assessment of the Plaintiff's acknowledged legitimacy, its right of action, the procedural mechanism that the European legislator placed at its disposal and that the national legislator thus accepted, and the merits of the requests it formulated, in an evolving area of law, it is not foreseeable to what extent the Plaintiff abusively exceeds the right conferred to it by law, nor to what extent it makes fraudulent use of that law with the aim of obtaining a prohibited result.

In conclusion, given that actions for damages for infringement of EU or national competition law usually require a complex factual and economic analysis, and given the latent lack of information available to potential victims and, therefore, the asymmetry of information between the infringer and the victims, the following questions are asked: If it is not possible for consumers (and the Plaintiff, its representative) to use the legal mechanism provided for in Article 13 of the EPL and in the present proceedings to have access to evidence to determine the details of the infringement declared by the European Commission, which are not known (especially when that infringement has been described, for example, by the European Commission), it is not possible for consumers to have access to it. If it is not possible for consumers (and the Plaintiff, who represents them) to use the legal mechanism provided for in Article 13 of the EPL and the present proceedings to gain access to evidence that will enable



them to determine the details of the infringement declared by the European Commission, which are not known (especially when that infringement has been described by

⁴² Annotated Civil Code, 4th ed.

⁴³ Ruling dated 17-11-2021, reported by Mr. Manuel Capelo, in Proc. 700/10.7TBABF.E3.S1, consultable in www.dgsi.pt



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negotiation with the offending company, in succinct terms), how can they confirm that they have been harmed and understand exactly how and by how much they have been harmed, in order to be able to allege these facts in a claim for damages? It is not achievable.

Therefore, without any further considerations being necessary, and since the Plaintiff's alleged abuse of rights and fraud against the law cannot be inferred from her actions, the Defendants' allegations in this regard are unfounded.

*

As regards the Defendants' claim that the costs associated with the research, collection and other necessary steps for the implementation of the ordered presentation should be borne by the Plaintiff, which has no legal grounds, the request is rejected.

**

LIABILITY FOR COSTS

According to the provisions of Article 527, nos. 1 and 2 of the CPC, *ex vi* Article 23, no. 1 of Law no. 23/2018, of 05 June, 1 - *The decision that judges the action or any of its incidents or appeals condemns in costs the party that caused them or, if the action has not been won, the party who profited from the process.* 2 - *It is understood that the losing party is responsible for the costs of the process, in the proportion in which it is.*

And, according to the provisions of Article 529, no. 2 of the CPC, *[the] court fee corresponds to the amount due for the procedural impetus of each intervener and is fixed according to the value and complexity of the case, in accordance with the Rules of Procedural Costs; that is, according to the provisions of Articles 6 and 7 of the CPC.*

In turn, Article 91 of the LAP provides as follows: *[the] judge of the case shall arbitrate the amount of the procuration, according to the complexity and value of the case.*

The concept of procuracy, abolished with the new court fees regulation, historically integrates the concept of party fees, which, according to Article 533(2) of the CPC, include: a) Court fees paid; b) Charges actually borne by the party; c) Fees paid to and expenses incurred by the enforcement agent;
d) The agent's fees and the expenses incurred by him.



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However, since the aforementioned LAP norm was maintained, despite the fact that the concept of prosecution service was not maintained in the Regulation of Procedural Costs, in order to harmonise the two regimes and since the prosecution service integrates the concept of party costs, it is considered that, by fixing the amount of the justice fee according to the value and complexity of the case, the norm foreseen in article 91 of the LAP will be complied with.

Although not specifically dealing with the LAP, Councillor Salvador da Costa⁴⁴ is explicit in stating that there was the "inclusion in the concept of party costs, in substitution of the extinct attorney's office, of the fees of the representative of the winning party and the expenses incurred by him. But the Regulation, through Articles 25, no. 2, al. d) and 26, no. 3, al. c), no. 4 and 5, limits the requirement of credit right of that kind by the winning party"; and adds⁴⁵ that, in the former regime "included the prosecution fees, fixed by the judge between 1/10 and ¼ the justice fee due, or if not fixed, in the amount of 1/10 that fee, as provided in Article 41 of the CCJ. In the current regime, in substitution of the prosecution, the costs of part now include the fees paid by the winning parties to their attorneys, with the same purpose of compensation as before in relation to the expenses incurred with the judicial mandate".

On the other hand, in popular action there is, as a rule, an exemption from the payment of the initial court fee. Previously, the prosecution was arbitrated by the court, "taking into account the value, complexity of the cause, volume and nature of the activity developed and also the economic situation of the responsible, between 1/10 and ¼ of the justice fee due" (Article 41, paragraph 1, of the CCJ). Saying nothing, it would always be 1/10.

Now, while it is true that Article 21 of the LAP states that the prosecution is fixed by the court, the criterion was, according to Article 41 of the CCJ, which limited the prosecution between 1/10 and

¼ (maximum) of the justice fee due.

Currently, the reimbursement of the costs of the representative is provided for in the costs of the party

(corresponding to the former procuratorate), of a fixed proportion of "50% of the sum of the fees



⁴⁴ In "As Custas Processuais - Análise e Comentário", 7th Edition, 2018, p. 33

⁴⁵ Page 220 of the aforementioned Work.



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justice fees paid by the losing party and by the prevailing party" (Article 25, no. 2, paragraph d) of the CPR), which corresponds in this case, in practice, to double the maximum of the previous prosecutor's office: 50% of the justice fees paid by both parties is double $\frac{1}{4}$ of the justice fee provided in Article 41 of the CCJ and Article 21 of the LAP.

*

Therefore, taking into account the amount fixed for each one of the actions and the complexity of the case, characterized, on the one hand, by the minimum number of interveners, by the examination of only one witness, but also by the length of the pleadings of the parties, whose reading and analysis did not cease to make the Court's task difficult (note that the initial petition contemplates 46 pages; the defence contemplates 244 pages and the response to the matter of exception contemplates 21 pages; the court fee is fixed at the maximum amount provided for in table I, that is, at 7 (seven) CUs.

Since the losing party in the action is the Defendants and, therefore, it was they who caused the action, they are individually responsible for the costs due in court.

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III. DECISION

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On these terms, the action proposed by ASSOCIAÇÃO IUS OMNIBUS, better identified in the records, being upheld, it is determined:

1. The notification of DREAM WORKS ANIMATION LICENSING LLC, ENTERPRISE CORPORATE SERVICES LLC; DREAM WORKS ANIMATION LLC, ENTERPRISE CORPORATE SERVICES LLC; DREAM WORKS ANIMATION PUBLISHING LLC, ENTERPRISE CORPORATE SERVICES LLC; NBC UNIVERSAL MEDIA LLC, ENTERPRISE CORPORATE SERVICES LLC; UNIVERSAL STUDIOS LIMITED; UNIVERSAL STUDIOS LICENSING LLC, ENTERPRISE CORPORATE SERVICES LLC; COMCAST CORPORATION and NBC UNIVERSAL LLC, all better identified in the records, to, within one hundred and twenty (120) days, deliver to this Court and to the order of the present proceedings, so that they are accessible and made available to the Plaintiff through technical support, the following documentary elements or a summary of the



information contained therein:



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- Comcast/Universal's standard intellectual property rights licence agreement (Master Merchandising License Agreement) used by the Defendants between January 2013 and September 2019, namely in paragraph 24 and footnote 35 of the European Commission's Decision.
- Merchandising licence agreements, and/or intellectual property use licence agreements for the production and/or sale of merchandising items related to digital, television or cinema content produced, acquired or disseminated by the Defendant or by the Comcast/Universal group, entered into directly between the Defendant and its licensees, for the exploitation of the Defendant's or Comcast/Universal's intellectual property rights covering, in whole or in part, the Portuguese territory, in force, in whole or in part, between January 2013 and January 2017.
- Documents or open communications exchanged between the Defendant, or its agents, and licensees, from January 2013 until September 2019, on the possibility of passive sales outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-16, ID 479-21, ID 479-34, ID 479-14, ID 479-39, ID 479-1, ID 479-36, ID 479-41 and ID 479-33).
- Documents or open communications addressed to the Defendant, or its agents, by EEA licensees between January 2013 and September 2019 requesting them to prevent other licensees from selling merchandising articles outside contractually defined geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanction procedure: ID 479-31, ID 479-15, ID 523) and Comcast/Universal group's responses thereto.
- Documents or open communications addressed to the Defendant, or its agents, by EEA licensees between January 2013 and September 2019 to



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request permission to use other languages in merchandising articles, namely Portuguese, and their replies (including the following documents referred to in the European Commission's sanction case: ID 479-26 and ID 479-25).

- Documents or open communications exchanged between the Defendant, or its agents, and EEA licensees, from January 2013 until September 2019, regarding the need to ensure the absence of sales of the merchandising articles outside assigned geographic markets or customer groups, including in Portugal (including the following documents referred to in the European Commission's sanctioning proceedings: ID 479-43, ID 479-38, ID 479- 2, ID 475, ID 479-30 and ID 479-44).
- Reports of audits carried out by the Defendant, or by entities contracted by it, on licensees with sales in Portugal or with sales in other EEA countries, relating to sales outside the designated geographical scope or customer group, involving sales in or to Portugal, between January 2013 and September 2019.
- Document(s) in the possession of the Defendant identifying the license agreements for the use of intellectual property for the production and/or sale of merchandising items that the Defendant terminated on the grounds of breach of the restrictive sales clauses, in the EEA, between January 2013 and September 2019.
- Document(s) in the possession of the Defendant relating to the system for monitoring the Defendant's online sales of the products concerned in the EEA, including compliance with the online prohibited sales policy, between January 2013 and September 2019.
- Document(s) in the possession of the Defendant showing the current shareholder structure of the commercial companies referred to in the Decision and their subsidiaries, as well as their evolution over time from January 2013 to September 2019;
- Documents or open communications exchanged between Comcast/Universal group company(ies) to whom the Decision is addressed, or their respective



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directors, from January 2013 until September 2019, on the approval of business plans, accounts, business strategy and appointment of directors.

- Confidential version of the tables with the turnover related to the assignment of intellectual property rights of the Defendant in Portugal (from January 2013 to September 2019) contained in the Decision of the European Commission.
- Confidential version of the data and tables with relative percentages of the Defendant's sales volume in each type of product subject to intellectual property licence, in Portugal, between January 2013 and September 2019, contained in the EC Decision.
- Document(s) in the possession of the Defendant that include(s) or allow(s) the calculation of the Defendant's operating income, from January 2013 to September 2019, in Portugal and in the EU.
- Document(s) in the possession of the Defendant, including estimates and market studies carried out for/acquired by Comcast/Universal, which include or allow the calculation of the Defendant's and/or Comcast/Universal group's merchandising sales in Portugal, in volume and value, broken down by sales to wholesale distributors, sales to retailers and direct sales to end consumers, including online and offline sales, by product and by month, from January 2013 until December 2020.
- Reports or any other type of sales reporting document sent to the Defendant by its direct or indirect licensees, including attached invoices, relating to sales made in or to Portugal between January 2013 and September 2019.
- Document(s) in the Defendant's possession showing or from which the final prices (average unit PVP) of each merchandising item, in each EU Member State, in offline and online sales, and their evolution over time, between January 2013 and December 2020.



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- Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the calculation of the market shares of the Defendant and/or the Comcast/Universal group and its main competitors (or their estimates), in each year between 2013 and until January 2017, in Portugal (or, in the absence of specific data for Portugal, in the European Union), in each of the types of merchandising product that may incorporate the intellectual property rights subject to the licence agreements entered into between January 2013 and until January 2017.
- Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of the Defendant's and/or Comcast/Universal's merchandising products that could not be sold in Portugal or to consumers resident in Portugal between January 2013 and September 2019 (namely because they could not be ordered by a consumer resident in Portugal from licensees, agents or distributors with licences for territories that did not include Portugal).
- Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant or the Comcast/Universal group, which include or allow the extraction of the list of promotions or offers linked to merchandising products of the Defendant and/or Comcast/Universal that were not available to consumers resident in Portugal between January 2013 and September 2019.
- Documents in the possession of the Defendant, including market research undertaken for/acquired by the Defendant or Comcast/Universal, which describe or from which it can be deduced the different types/profiles of consumers of the Defendant's and/or Comcast/Universal's merchandising products and their average consumption patterns in Portugal (or, in the absence of specific data for Portugal, in the European Union).



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2. Access to the documents concerned shall be restricted to the parties, their legal representatives and experts bound by an obligation of confidentiality.
3. The use of the information contained in these documents by the Author is limited to the filing of an action for damages for breach of competition law, and may not use it for any other purpose.
4. Costs for each one of the Defendants, with a Justice Fee of 7 (seven) UCs - Article 527, no. 1 of the CPC, Article 7, no. 1 of the CPR and Table I attached, and Article 91 of the LAP.
5. Register, notify, including PCA - art. 90-A LdC.

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Santarém, 02 June 2023

The Judge of Law, with signature electronically affixed