SUMMARY:

I. Articles 573, 574 and 575 of the Civil Code, taken together, link the emergence of the obligation to provide *information* and to *produce things or documents to the need to ascertain the existence or content of the* right, *on condition that the defendant has no reason to be concerned.*
*"*justifiably *oppose the endeavour";*

II. Directive 20J4/f04/EU, *transposed internally by Law no. 23/2018 of 5 June,* stipulates that *the requirements for the compulsory taking of evidence must include reasoned justification of the plausibility of making a subsequent claim for damages, precise* and *precise* characterisation of *the evidence to be presented and proportionality;*

III. When the exemption from *investigating the effects* on *competition* of *an anti-competitive act* is stated *by object, one is thinking of the public enforcement of competition protection* rules *("public* enforcemanf"j - *for example, a practice* objectively *included in Article 101(1) of the Treaty* on the *Functioning of* the *European Union)* - and *not of the private enforcement* of *rights;*

IV. It is because we know *from* the *outset that the effects are likely to be produced* that *proof of* these *effects* is waived, *but for sanctioning purposes;*

V. The plausibility of damage is an essential requirement for granting a request to *produce documents with a view to bringing a subsequent action aimed at exercising private rights* arising from *the violation of competition rules;*

VI. The common law figure of the "fishing expedition" has *no connection whatsoever with the* clear *and legally* well-characterised *assessment of the plausibility of the* emergence of *damages and justification of the need* to *produce documents with a view to justly obtaining* compensation *for anti-competitive acts previously determined with rigour by the sanctioning body for those* acts, in a *context in which their* withholding *or* non-access to *them would correspond to a* veritable denial of *the exercise of rights that* have been *foreseen* and *indicated,* i.e. *an effective blockage of* access to *the courts for the recognition of rights (or the exercise of rights).*
"right *to a judge");*

VII. Directive 2014/104 prohibits national courts from ordering a party or a third party, "for the purposes of actions for *damages", to disclose settlement offers*.

DESCRIPTORS: competition - submission of documents - plausibility of damages - European Commission decision.

They agree in the Intellectual Property, Competition, Regulation and Supervision Section of the Lisbon Court of Appeal:

I. **REPORT**

ASSOCIAÇÃO IUS OMNIBUS, with the identifying marks shown in the case file, brought a "special declaratory action for the production of documents" against MELIÀ HOTELS INTERNATIONAL, S.A., also better identified in the case file.

The "a quo" court described the contours of the action and its main procedural events up to the judgement in the following terms:

> *ASSOCIAÇÃO IUS OMNIBUS, better identified in the case file, under the legal provisions contained* in *Articles 52(3)* and *60(3) of the CRP,* 2 and *3 of Law No 83/95 of 31* August, *31* and *1045 to 1047 of the CPC, 13* and *19 of* Law *no.23/2018, of 5 June 2018, to bring an ElfiPECIAL DECLARATTIvE ACTION to PRESENTATION* ***OF DOCUMENTS*** *against MELIÂHO I LS INTERNATIONAL, S.A., also better identified in the case file, formulating, finally,* the following *requests:*
>
> *1. Notification of the European Commission to present, if it so wishes* written observations *to the Court* on *its request;*
>
> *2. The summons of the Defendant to produce,* on a *day, time and place to be designated by the Court, so that* they *are* accessible *or made available to the Plaintiff,* the *documents listed in* §62 *of the Statement* of Claim, ever'fualmen/e with *measures to guarantee proportionality that the Court* deems *appropriate;*
>
> *Or, alternatively,*
>
> *3.* That *the Court determine which of* the *documents referred to in* §62 *of the Statement* of Claim*, or others that the Court deems* necessary *to enable the Plaintiff to* understand whether *diffuse* interests *have been affected* and whether *consumers* resident *in Portugal have been affected* by the *anti-competitive practices referred to in* this *Statement of Claim,* whether *the practices have caused them damage, and the amount of* that *damage;*
>
> *4. The* summoning of *the R& to* present *them, on a day, time and place to* be *designated by the Court, so that they are* accessible *or made available to the Plaintiff;*
>
> *In any case*
>
> *5. Granting access to the documents that are* necessary *to enable the Plaintiff to determine whether diffuse* and *individual homogeneous* interests have *been affected* and whether *consumers* resident *in Portugal have a* right to *compensation for damages arising from the infringements of Article 101 TFEU and Article 9 of* Law *No 19/2012, in the context of the* alleged *anti-competitive practices, with the measures* to *ensure proportionality that the Court* deems *appropriate;* and
>
> *6. R*&*'s* notification of *the Plaintiff's intention,* on *behalf of all* consumers residing in *Portugal, to bring an* action *against Ra* for *compensation of* consumers residing in *Portugal affected* by the anti-concurrent *practices* in *question, if the defence* of *the consumers' homogeneous individual interests* is confirmed, *so that* they may *be compensated for the damage caused to them by the said practices, for the purposes* and *with* the effects provided for *in Article 323(1) of the Civil Code.*
>
> *The Plaintiff bases her claim, in narrow* terms, *on the following factual* confexfo:

a. The European Commission adopted a decision on 21 March. /February 2020, in Case AT.40528 - Holiday Pricing, according to which, between January 2014 and December 2015, Ra infringed Article 101 of the TFEU and Article 53 of the EEA Agreement, by implementing vertical practices, by contract, which differentiated consumers according to their nationality.It was found guilty of violating Article 101 of the TFEU and Article 53 of the EEA Agreement by implementing vertical contractual practices that differentiated between consumers on the basis of their nationality or country of residence, restricting active and passive sales of accommodation in hotels it manages or owns to consumers who are nationals or residents of Member States it determines, for which it was ordered to pay a fine totalling €6,678,000.

b. This decision was adopted with the cooperation of R& (which benefited from a reduction in the fine for this reason), which is perfectly valid, as it has not been appealed.

c. The Plaintiff wishes to confirm that, as suggested by the geographic scope of the practices described in the Decision, Ra's anti-competitive behaviour identified in the Decision caused damage to constitutionally protected diffuse interests in Portugal and to homogeneous individual interests of consumers residing in Portugal, and, if so, the quantum of the damage caused d. It is impossible, in light of the publicly available information and documents, to make the detailed determinations referred to in the previous paragraph, beyond the broad conclusion that the practice had effects in Portugal.

e. Should the Plaintiff determine, following access to the evidence it requests in this action, that the anti-competitive behaviour in question by the Defendant has harmed the diffuse interests and individual homogeneous interests of consumers resident in Portugal, it is its intention to propose, on the basis of the evidence obtained, a judicial action to declare the anti-competitive behaviour and obtain damages, with a cause of action based exclusively on infringements of the law.interests of consumers resident in Portugal, it intends to bring, on the basis of the evidence obtained, a legal action to declare the anti-competitive behaviour and obtain compensation, with a cause of action based exclusively on infringements of competition law, exercising the right of popular action conferred on it by the Portuguese Constitution and legislation, on behalf of the injured consumers resident in Portugal.

f. By communication dated 15 April 2021, the Plaintiff requested the evidence indicated herein, on the grounds and for the purposes also set out in this Statement of Claim, and granted the defendant a period of fifteen working days to respond.

g. By communication dated 14 May 2021, the Defendant informed the Plaintiff of its refusal to grant access to any of the evidence requested on the grounds set out therein.

h. The Plaintiff wishes to have access to the following documents, currently in the Defendant's possession, without prejudice to others or to only some of them that the Court deems relevant and (sufficiently) necessary for the purpose of its application (taking into account the position it has taken in this regard in the meantime in the perfected initial application):

- For knowledge and proof of the scope and effects of the anti-competitive practice in question:

i. "Document containing the Defendant's standard contractual terms and conditions ("Meli4's Standard Terms") used between January 2014 and December 2015, referred to in particular in paragraphs 19 and 24 of the European Commission's Decision."

ii. The 42J6 contracts for the sale of accommodation concluded in 2014 and 2015 directly between the Defendant and/or its subsidiary Apartotel, S.A. and intermediary operators, referred to in the Decision, in which there was the express condition that sales in the European Union be made only to consumers with the nationality or residence established in the countries indicated in the contract or, in

al/emafiva, *the complete list of* these *contracts, indicating for each one the* parties, *the Ra hotels covered, the authorised sales* territory and the *period* of *validity* of *the contract.*

iii. Document(s) identifying the 140 Rê hotels covered by the a/accommodation *sales contracts signed directly* between *R& or its subsidiary Apartotel, S.A.* and infe/media *operators for* the sale of *accommodation* between *January* 2014 and December *2015;*

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

i. Document(s), table(s) or study(s) held by *R& setting out its total sales realised from 2014 to the present (2021), by year,* in execution of *all* of the *Rê's hotel-resort accommodation sales contracts* and, *in addition, document(s), table(s) or study(s) in the* possession of *the R& setting out, or able to* set out, the *percentage of* these *sales that have been* made *under the 4216 Rê hotel-resort* accommodation *contracts identified by the EC,* from 20J4 *to the* present (*2021*);

iii. Document(s) in the possession of the Defendant which show(s), *or from which they show, either accurately or by estimation or approximation, for the period between* January *2014 and the end of the term of any of the* 42J6 *contracts* for the *sale of accommodation which* took *place later (which is likely to* have *occurred after December 2015):*

§1) the number of *consumers resident in Portugal who stayed in the 140 hotels in the R& that were the subject of the contracts* for the *sale of accommodation with restrictive clauses;*

§2) the average number of nights *that consumers* have *stayed overnight in* these *R& hotels;*

iv. Document(s) in R&'s possession *containing or* deriving from the *minimum, average and maximum final prices for accommodation*, *by type* of accommodation *unit* for *each* mole/, *in the 140 hotels covered by the contracts for the* sale of *accommodation with* restrictive *clauses*, *in offline* and *online sales,* and *their evolution over time, from January 2014 to December 2020*,

*v. Document(*s) *in the possession of the Rê, including market* research *carried out for/acquired by the R&, which include or enable the calculation* of *the market shares of the R&* and *its main* competitors *(or estimates thereof), in the period* between *January 2014 and the end of the term of any of the* aforementioned 42'f6 *accommodation sales contracts that have* been verified *later,* in *each EU member state;*

*vi. Document(s) in R&'*s possession*, including market* research *carried out for/acquired by R&, which* describe *or from which can be drawn the different types/profiles* of *consumers* of *accommodation in the hot&is typology(*ies) among *the 140 hot&is which* were the *subject of sales contracts with restrictive clauses identified in the* Decision, *as well* as *their average consumption patterns;*

vii. Initial applications for *damages brought against R&* in *any EEA Member State by consumers or consumer* associations*,* based on *the anti-competitive practices of R&* at *issue in the European Commission* Decision *(or, alternatively, identification of the respective court case number(s)*).

Once this has been *done, (i) the European* Commission will be *notified, (ii) all consumers in Portuguese territory will be summoned by public notice* and *(iii) the Defendant will be summoned:*

- The European Commission declared that it would not present any allegations written;

- R& filed a defence, arguing in the end for its acquittal of the Court of First Instance, in view of the *validity of the procedural exceptions raised, namely absolute lack of jurisdiction, the inapplicability of the class action form to the present special action and the illegitimacy of the Plaintiff, or, failing that,* of the dismissal *of the action as unproven, rejecting* and *dismissing the claims made by the Plaintiff.*

- Once Aurora had been given the right to respond to the objections *raised by R& in the Statement of* Defence, the *Court considered the* same, *dismissing the* objections *raised by R& and invited the Plaintiff to perfect the initial* claim in the *terms set out in the court order dated 06/04/2022.*

- Dissatisfied with the Court's decision regarding its assessment of *its international (in)competence, the Râ* lodged an *independent appeal with the Lisbon Court of Appeal, which, in a judgement dated 13 July* 2022*, dismissed the appeal and confirmed the* contested *decision.*

- Once the Court's invitation had been accepted, the Plaintiff provided the clarifications requested, the Defendant exercised its right to a fair hearing and, after attaching to the case file the documents referred to in the respective pleadings by *hyperlink and also the Portuguese translation of the European Commission* Decision *CASE AT. 40528 - Melia (Holiday Pricing), the parties submitted* their *final written arguments.*

A judgement was handed down:

Accordingly, judging the action brought *by ASSOCIAÇÃO O IUS OMNIBUS, better identified in the case file, to be well-founded,* it is hereby ordered:

1. The notification of MELIÂ HOTELS INTERNATIONAL, S.A., better identified in the case file, to, within 90 (ninety) days, deliver to this *Court and to the order of these proceedings, so that the following* documents *are accessible* and *made available to the Plaintiff through* technical *support:*

i. "Document containing *the Defendant's standard contractual terms* and conditions *("Meliâ's Standard Terms") used* between *January 2014 and December 2015, as referred to, inter alia, in paragraphs 19 and 24 of the European Commission Decision."*

ii. The 4216 contracts for the sale of accommodation *concluded in 2014 and 2015 directly* between *R&* and/or *its subsidiary Apartotel, S.A. and intermediary operators, referred to in the Decision, in which there* was *the express condition that sales in the European Union* be *made only to consumers with the nationality or residence fixed in the countries indicated in the contract or, alternatively, the complete list of these contracts, indicating for each one the parties, the Defendant's hotels covered, the authorised sales territory and the period of validity of the contract.*

iii. Document(s), table(s) or study(s) in the Rê's possession showing its total sales from 2014 to the present (2021), by

year, in fulfilment of *all R&'s* hotel/dis-resort *accommodation sales contracts and, in addition, document(s), table(s) or study(*s) in R&'*s possession where it* is *possible to* extract *the* percentage of *these sales that have been made under the* 42 to 6 *R&'s hotel/resort accommodation* contracts *identified by the EC,* from *2014 to* the present *(2021);*

iv. Document(s) in the Ra's possession *which show(s) or show(s)*, *accurately or by estimation or approximation, for the period* between January *2014 and the end of the term* of *any of the aforementioned* 4216 *contracts* for the *sale of accommodation* which took *place later (which would probably have occurred after December* 20J5j:

§1) the number of *consumers* resident in *Portugal who stayed in* the *140 hotels in the Ra that* were *the subject of the accommodation sales contracts with* restrictive clauses;

§2) the average number of nights *that consumers have stayed Rê's hotels;*

v. Document(s) in the RE's possession containing *or deriving from the minimum, average* and maximum *final prices for accommodation*, *by type* of accommodation *unit in each hotel, in the 140 hotels* covered *by the contracts* for *the sale of accommodation with restrictive clauses, in online* and offline *sales, and their temporal* evolution, from *January* 20f4 *to December 2020;*

vi. Document(s) in the possession of the R&, including market studies carried out for/acquired *by the Rê, which include or allow the calculation* of *the* market *shares of the Rê* and its *main competitors (or their estimates), in the period* between *January 2014 and the end of the* term of *any of the* aforementioned *4216 accommodation sales contracts* that *have been* verified *more* ta/diamente, in *each EU Member State;*

vii. Document(s) in the possession of the Defendant, including market *research* carried out *for/acquired by the Defendant,* which describe *or from which can be* drawn the different types/profiles of *accommodation consumers in the hotel typology(ies)* en/re *the 140 hotels that were* the *subject of sales contracts with restrictive clauses identified in the* Decision, *as well as their average consumption patterns.*

2. Access to the documents in *question is restricted 4s* pa/Yes, *to* their *legal representatives and* experts subject *to confidentiality obligations*.

3. The Plaintiff's use of the information contained in the aforementioned documents *is limited to the filing of an action for damages for infringement of the right to information*, *and* may *not be used* in any *other way.*

This appeal is brought against that judgement by MELIÀ HOTELS INTERNATIONAL, S.A., which has argued and presented the following conclusions and claims:

a) Contrary to the view taken in the judgement under appeal, *the decision only* has *binding* effect *as regards its* operative part, i.e. as *regards the* "existence, nature and *subjective, temporal and territorial scope" of the offence, as is clear from Article 7(1) of the EPL:*

b) The Decision only establishes that the Court is bound by the existence of a breach of Article 101 TFEU and Article 53 of the EEA Agreement by *the Appellant, "through a single and continuous infringement in the period* from *1 January 2014 to 31* December *2015 by entering into and/or implementing* vertical *restraints* that differentiated between *EEA* consumers *on the* basis of *residence* set*/ pa/s, thereby restricting active* and *passive sales of hotel accommodation";*

c) The decision does not, however, have legally binding effects beyond this determination, and it is not enough, for the purposes of the present action, simply and without *further ado, to reproduce excerpts from its reasoning to justify the fulfilment of the assumptions for the decree of the requests formulated by the Plaintiff;*

d) Therefore, the court cannot, without *further ado, include in the proven facts* of *the judgement segments of the decision* that do *not correspond to its operative* part*, which implies the necessary* deletion of the *list of proven facts from* its *current paragraphs 16* and *17;*

e) All the more so since we are dealing *here* with *a preliminary ruling in a case that ended in a settlement, the interpretation of which* must *always be restrictive, strictly guided by the legal classification accepted by the entities* involved*, which in this case corresponded to a violation of the law by object, a fact that the court recognises,* without*, however,* drawing the *appropriate* conclusions from *it;*

f) In the judgement under appeal, the court went far beyond these narrow limits, transcribing and *adding to the proven facts various* sections of *the judgement*, which *don't even contain facts, but* rather *assessments and legal arguments, as is the case with points 16 and 17 of the proven facts, which should therefore simply be deleted;*

g) This concerns paragraphs (29) to (31), (34) to (38), (43) to (49), (51) and *(52*) of *the Decision in the* case of *point* f6 of the *proven facts and paragraphs (54), (59), (62), (63)* and *(64) of the Decision in the case of paragraph 17 of the proven facts, all of which are* set out *in its Chapter* 6.*In fact*, *legal considerations are* developed*, which are not confused* with *facts, which in* itself was *enough to justify their elimination from the* list *of proven* acts;

h) Indeed, as laid down in Article 607(4) of the CPC, the facts must be *stated clearly, without any kind of conclusive summary and without recourse to legal judgements, and it is clear that the* wording *adopted in the judgement under appeal for the facts proved and not proved does not* comply with these *teachings, and it is therefore necessary, in compliance with the provisions of Articles 640 and 652 of the CPC, to reform the decision on the facts.It is therefore necessary, in compliance with Articles 640* and 652 *of the CPC, to* reform *the decision on the facts, in accordance with the cognitive powers in this area of this Venerable Court, in this case by deleting its current points 16* and *17, on pages 13 to 18 of the* judgement *under* appeal*;*

i) We are therefore *faced with a situation in which the elements on which the decision of the court a quo* was based *are all available to the court ad quem, making it possible to* know *and measure, under the provisions of Article 662(1) of the Code of Civil Procedure, the* process of *forming the judge's conviction, which leads, for the reasons set* out *above, to the elimination of this entire* section of *the decision* on *the facts;*

j) The lower court used a non-uniform, not to say contradictory, criterion when *assessing the* Decision *for evidential* purposes, *since it only selected the alleged facts that fit or supported*

4 /thesis of *the plausibility of the damage he* had caused, *choosing to ignore all the other facts that pointed in the opposite direction,*

k) Thus, if the criteria and *approach* followed *in the judgement* upheld are *validated in* terms *of establishing the proven facts, which* is to be *expected* and *not granted, the* facts set *out in footnote 10 and paragraphs* 66a and *86 of the judgement, which relate* to *the outline of the offence, should* always be taken as *proven facts in* that *case:*

i. "The distribution of accommodation *in* Meia*'s* urban centres *through tour operators, as well as* Meia*'s* commercial relations *with other* intermediaries *(*travel *agencies, bedbanks, receptive agencies)* is based on *a different set* of *general* terms and *conditions which do not contain any clauses* limiting the *validity of the contract to certain markets only."*

ii. "the relevant contracts were *in force during 2014 and 2015, and the duration of the infringement of Article 101 TFEU and Article 53 of the EEA Agreement was* from *1* January *2014 to 31 December 2015*."

*iii. "*ve/Yical *offences are* less *damaging than the* horizontal".

These facts should be *considered proven through the* Oecisão, a copy of which *has* been *translated into Portuguese* and has *not* been *ºchallenged, pursuant to Articles 640(1)* and 662*(1) of the Code of Civil Procedure;*

l) In articles 181 to 186 of *its defence, the defendant invoked a series of facts* relating to *its organisation, structure and business practices, which* are *of undeniable* interest *for the proper decision of the* case, namely in *order to better assess* and *evaluate the necessity* and *proportionality of the claims made* by the *plaintiff, namely* that:

(A) The island/í4 *occupies first place in the ranking* of *hotel companies* in *Spain,* third in *Europe* and *nineteenth* in *the world;*

(B) It has been listed on the IBEX 35 since *1996* and *is the* first *company in the* sector to have *been included in the FTSE4Good social responsibility index since 2008;*

(C) The Mafia team is made up of *more than 40,000 people (pr&-COVID), spread* across *more than 40 countries;*

(D) Its vision, the *commitments it has made and the progress it has achieved in* terms *of sustainable management have earned it recognition and notoriety, reflected not least in its inclusion in the main* indices and *rankings at national,* European and *international level that* measure companies*' commitments in* these areas*:*

a) It was considered the *most sustainable company in* Spain and *Europe* in *2030, according to the last* Corporate *Sustainability Assessment* of *SRP Global 2020, having* made it *to* this *ranking in 2018* and *achieving the "gold"* status *the following year;*

b) It was ranked seventh in the world for *sustainable* management, *according to the Wall Street Journal (ranking first in the tourism sector) out of more than 5,500* companies;

c) It is the only Spanish company *operating in the tourism sector to be recognised by Europe's Climate* Leaders *2021, according to the Financial Times;*

d) It is the Spanish hotel company *with the best* business *reputation, according to the Monitor de Reputación Empresarial (MERCO)* and *was considered one of the most attractive* companies *to work for.*

(E) In the CSA S&P Global 2020, it is the sector leader in the social sphere *and is recognised as "best in class" in 4 areas* of *extreme relevance, namely: climate change adaptation strategy, risk/human rights strategy, human capital management, occupational health and safety,* among *others.*

m) All the facts indicated in *I) above, which attest to the size, structure and corporate policy* of *the appellant, are supported by evidence (namely Docs. 18, 19, 20, 21 and 22 of the application for the production of documents dated 17 June 2022, which, apart from not being contested, are publicly accessible). 18, 19, 20, 21 and 22 of the application* for the *attachment of documents dated 17 June 2022, which,* in *addition to not having been contested, are publicly* accessible, *so that we are* in *fact dealing with facts in the public domain, which* must *therefore* be *included in the list of proven facts following the current proven fact 9, under the powers of* this *Venerable Court set out in Article 662(1), by reference to the provisions of Article 640(1), both of the CPC.*

n) In Articles 327 to 332 of the Statement of Defence and *Articles 80 to 83 of the Statement of Defence, the Appellant alleged facts relating to the way in* which the *tour operator market in the EEA was organised* and *operated during the course* of *the conduct, i.e. during 2014* and *2015, namely* that:

(F) during the year 2014:

iv. The Portuguese made 17.9 million trips, *of which 91 per cent were within Portuguese territory and only nine per cent abroad;*

v. 55% of Portuguese who travelled abroad bought hotel accommodation, but only 9.2%" opted to buy a package tour;

vi. 90.8% of consumers organised their trips without using offers from *tour operators*

(G) Whereas in 2015:

iii. more than 86 per cent of domestic tourists still didn't go tour packages

iv. the use of hotel accommodation services was still in the order of 58 per cent.

(H) in the relevant period of 2014 / 2015:

iii. only *around 10 per cent of the tourist travel consumers resident in Portugal used the services* of *tour operators;*

iv. the share of Meli4 hotels in the direct or indirect supply of hotel accommodation to Portuguese consumers was ultra-residual, in *any case less than 1%.*

o) The facts reproduced in n) are supported by the es/a//sfic *data available on the portal of the National Statistics Institute ("INE") and also attached as DOC. 5 of the Statement* of *Defence* and *as DOC.* 26 *of the request to attach documents dated 17 June 2022,* as well as *in the* academic *analysis carried out by the Spanish Competition Authority, in the merger control procedure* of *8 May* 2020, *in case C/1109/20 - Barcelô* Corporacidn *Empresarial S.A. Globalia Corporaciôn Empresarial S.A.;*

p) Insofar *as this evidence is in the case file,* comes *from credible public bodies* and *has not been challenged by the Plaintiff, and is of* interest *in determining the potential impact of the sanctioned conduct on the domestic* market, *as well as the potential universe* of domestic *consumers* affected by it, the *facts reproduced* in *(F), (*G) *and (H) of* (*n) above* must *be taken as proven facts, under the powers of the Honourable Court set out in Article 662(1) of* the Code of Civil Procedure, by reference to *the provisions* of Article 640(1) of the Code of Civil Procedure.The Court of First Instance has the power to determine the facts of the case by reference to *Article 640(1) of the Code of Civil Procedure;*

q) In Articles 90 to 96 of the Improved Statement of Defence, *the Appellant alleged that:*

(I) In 2014 and 2015, Thomas Cook and TUI, two logistics operators that were allegedly part of *agreements* in *the Conduct*, *had no activity* in *Portugal*.

r) The fact reproduced in *q) above is supported by publicly accessible* e/emenfos, which *in* relevant part *were attached as DOCs. 30, 31, 32* and *33 of the request to attach documents dated 17 June 2022*, *which the Plaintiff* has *not challenged,* so *this matter must also be taken* into the facts *proved, under* the provisions of *Articles 640(1) and 662*(f) of *the Code* of Civil Procedure;

s) In article f29. *of the Improved* Statement of Defence, *R&*

claimed that: "(J) there were, in *2014* and *2015, more than 150,000*

hotel&is in the EEA, and
more than 4,000 hotels in Portugal"

t) This *fact is also incontrovertible, being supported* by *evidence provided by EUROSTAT attached as DOC.* 39 *of the request* to *attach documents dated 17 June 2022, which the* Plaintiff *has not contested, so this matter* must *also* be *taken into the facts proved, under the provisions of Articles 640(1)* and *662(1) of the CPC;*

u) With regard to the structure of the market for the provision of tourist accommodation services, *in particular outside the wholesale distribution channel by tour operators, as* described *in Articles 163, 174, 175, 177 and 179 of the Treaty on the Functioning of the European Union,*
183., 184., 185. and *186. of the Improved Statement of Defence, the Appellant pleaded the following facts:*

(K) There *is* strong *competitive* pressure from *operators such as Booking or Expedia, known as OTAs or online travel* agents, *which* offer particularly intense discounts and *upgrades, as does* Me/iá's direct *sales channel, which makes no* price *distinction* according *to the origin of the booking (Article 163* of the Civil Code);

(L) Tour *operators offer packages to travel agencies active* in *Portugal, targeting Portuguese consumers, with various configurations* and *including competing/substitutable options* from *the point of view of the final* customer *(Articles 174/175);*

(M) Travel agencies *buy tour* packages *from various operators, and* there are *no exclusivity* rules, as *the market* is *highly competitive (Article 177* of the Civil Code*);*

(N) The packages *put together by tour operators and marketed by travel agencies include a diverse range of hotels, where, in general* terms, it *is not* even *clear which hotel is included in the* package, *or, in other cases*, *there are* dozens of *possible* options *(Article 179 of the Civil Code);*

(O) In 2014 and *2015, the following* were *present on the* market

the following agents: Geofur, *Abreu, ES Viagens and Edreams,*

Viagens El Corte *Ingles, TUI Portugal and Halcon Viagens, corresponding to a* non-concentrated market *with an HHI of less than 500 (Articles 184/185).*

v) In order to prove the facts reproduced in u) above, the *Appellant offered, in addition to (i) the EC* Decision *of* 23 *October 2018, in* case *M.9005 - Booking Holdings / Hotelscombined, (ii) the Decision of the French Competition Authority of 16 March* 20f6, *in* case *16-DCC-35, paras 5,* 25 and *33, (iii) the PCA* Decision *of* 26 *May 2015, in case ccent 22/2015 -* Sonae *Investimentos, para.* 24 *(iv) of the Spanish* Competition *Authority's decision of 6 February 2013, in* case *C/0492/13 - Globalia Corporaciôn Empresarial, S.A./Orizonia Travel Group, S.L.U., paragraphs 102 and 105, (v) the* Decision of *the Spanish Competition Authority of 8 May 2020, in* case *C/1109/20 - Barceló Corporación Empresarial* S.AI *Globalia Corporacidn Empresarial S.A., paragraphs 203* to *206 of 16 March 2016, (vi) also DOCs. 40, 41, 42, 43, 44, 45, 46* and *47 of the request for the addition* of *documents dated 17 June 2022, without the Plaintiff having or being able to challenge them, so that this matter should also be taken as proven facts, under the provisions of Articles 640(1) and 662(1) of the Code of Civil Procedure,* which is *requested;*

w) The legal regime for the production of *documents invoked by the Plaintiff is regulated in general* terms *by Articles 574* and *575 of the Civil Code, which state that the prerequisites for the production* of *documents are (i) that they* are *in the possession of the defendant, (iii) over which the applicant has a* right *in rem or in personam, even if it is conditional or subject to a time limit, (iv)* the *examination of which is* necessary *to ascertain the* existence *or content of a right, (v) that they correspond to a valid legal interest;*

x) In addition to these positive assumptions, there is a negative one: that the defendant has no reason to oppose the demand;

y) These assumptions have since been *clarified and concretised in the LPE, which transposes the Damages Directive into the Portuguese legal order, through a set* of *specific rules on* access to *evidence held by third parties in cases of anti-competitive practices, with Article 13 being* of particular interest *here, according to which "anyone* who, *under the terms and for the purposes of Articles 573 to 576* of *the Civil Code, wishes to obtain information or to present evidence, including that which the possessor does not wish to provide, may, subject to justification of the need for the diligence and with the other requirements of the law, take the necessary* measures to ensure that the evidence is provided to him"."Anyone who, under the terms and for the purposes of Articles 573 to 576 *of the Civil Code, wishes to obtain information or the* presentation of *evidence, including that which the possessor does not wish to provide, may, subject* to *justification of the need for the endeavour, and subject to the other limitations laid down in this chapter, request the competent court to summon the refusing party to present* it *on the day, time and place designated by the judge, under the terms laid down in Articles 1045 to 1047 of the Code of Civil Procedure";*

z) It then adds, in Article 13(2), that "the provisions of paragraphs 2 to 9 of the preceding article shall apply, mutatis mutandis, to the requests for access referred to in the preceding paragraph", highlighting various assumptions, namely (i) the assumption of plausibility, according *to which "the request (....) & substantiated with facts* and *evidence reasonably available and sufficient to corroborate the plausibility of the claim for damages or the defence* and *indicates the facts* it *seeks to prove" (Article 12(2)).(ii) the requirement of specification, according to which "the application shall identify as precisely and strictly as possible the evidence or categories of* evidence the *production of which is requested, on the basis of the facts on which it is based" (Article 12(3)).(Article 12(3)), (iii) the requirements of necessity and proportionality, according to which "the court shall order the production of evidence* if it *considers that it is proportionate and* relevant *to the decision of the* case, *and requests which*

involve indiscriminate searches for information shall be refused" (Article 12(4)) and *(iv) the principle of* the *protection of confidential information (Article* f2*(7));*

aa) The judge seems to have considered that the burden of proof in relation to a significant part of these assumptions falls on the defendant, as exceptions preventing or restricting the claims made by the plaintiff, dealt with and analysed in Chapter B) - "The reasons given by the defendant for opposing the production of documents" of the judgment under appeal, when in reality we are dealing with positive assumptions that the plaintiff had to fulfil;

bb) The first and main prerequisite for the defence of the Plaintiff's claims is, as she herself states, to "allege and prove facts that corroborate the plausibility of the claim for compensation (...), this being the condition for the action to proceed", that is, the plausibility of the existence of damage to the legal sphere of consumers resident in Portugal as a result of the conduct sanctioned in the Decision;

cc) While it is true, as stated on page 33 of the judgement under appeal, that the Plaintiff has legitimacy to bring collective actions in the abstract to defend the diffuse interests and individual homogeneous interests of consumers resident in Portugal, this is clearly not enough to grant the requests for access to documents formulated in these proceedings, to the extent that the attainable legal interest here has to reach the level of plausibility of the damage, something that the Court of Appeal ultimately recognises at its own cost and seeks to circumvent by resorting to the Decision, in an obvious and frontal contradiction with what it has just stated, in order to fulfil the prerequisite of attainable legal interest;

dd) In effect, the Court of First Instance stated one thing - that the Decision and the Press Release are admittedly insufficient for the Plaintiff to substantiate the existence or plausibility of damages - and its opposite - that the Decision and the Press Release are sufficient to fulfil that same assumption - incurring in a manifest and insurmountable contradiction, which inadvertently renders the decision unintelligible and, to that extent, null and void, under the terms of Article 615(1)(c) of the Civil Procedure Code.Article 615(1)(c) of the CPC;

In fact, if the Decision and the Press Release were sufficient to fulfil this requirement, the Court would not have issued, as it did, the Sanctioning Order in which, recognising the deficiencies in the Statement of Claim, it invited the Plaintiff to submit an improved Statement of Claim, giving it a generous opportunity to set its sights on the target in full detail.in this regard in the initial petition, invited the Plaintiff to submit an improved initial petition, giving it a generous opportunity to set its sights, including indicating in full detail the target to be achieved, by explaining that it should "concretise in a more developed manner the possibility or plausibility of the practice restricting competition in cat/sa having caused damage to national consumers alleged in articles 44 and 45 of the initial petition, taking into account the specific configuration of the infringement, in particular the fact that only contracts with tour operators are at issue";

lf) This is yet another flagrant and direct contradiction, this time between the aforementioned Sanitising Order and the judgement under appeal, which cannot be accepted under any circumstances, on pain of completely discrediting justice and the courts,

gg) The Court of Appeal is bound by its decision on the Sanctioning Order, which the Plaintiff also complied with, having become final and unappealable, and therefore cannot go back on its decision to declare, as it does in the judgement under appeal, that the plausibility of damage has already been met, simply by looking at the Decision and the Press Release, which have always been available in the case file from the outset;

hh) And don't say, as you can read below on page 34 / 35 of the judgement under appeal, that "to conclude otherwise would be to curtail the right of action to claim damages for the commission of an infringement

of competition *law, whenever we were* faced with *a European Commission* decision which, *despite concluding that* the *practice had been committed".*

of an infringement of competition law, it does not focus on *the damage/effects on the market resulting from it, as* is the case *when we are dealing with infringements by* object", *since the Plaintiff's right of action does not depend, as is* evident, on the *decree of the measures requested, since even if the present special action is, as we hope, judged unfounded* on *appeal, nothing* prevents *it* from *still proceeding with a collective action* for damages *if it so wishes;*

ii) With all due respect, we are dealing *here with a* reasoning *that shows a distorted and unbiased view of the issue, forgetting that in the case at hand, in addition to being an infringement by object, it concerns a vertical infringement, which is known to be less damaging than horizontal infringements / cartels, so much so that the presumption of damage established in Articles 17(2) and 9(1) of the Damages Directive* and *the EPL, respectively, does not apply to them;*

jj) The court once again allows itself to be *ensnared by its tautological argumentation, by first claiming that we are dealing with a* decision *sanctioning an infringement by* objection, *which "does not address the damage/effects on the market resulting from it", and then arguing that, after all, such damage/effects (or their plausibility)* emerge from *the Decision;*

kk) And there is no point in the Court reproducing on pages 36 *to 40 of the judgement under appeal certain passages from the* Decision, *surgically selected to try to give the appearance of damage, after moments* earlier having *declared* that *the Decision and the Press Release are not sufficient for such an* e/'eifo;

ll) It should be noted that, as is clear from the legal wording, the Plaintiff's grounds must be *sufficiently robust to make the right to compensation plausible, i.e.* credible and *probable, which is clearly not the case here, given the dubious* and merely *hypothetical* terms *in which the Plaintiff continued to refer to the production* of *negative* effects *for consumers resident* in *Portugal in its final allegations;*

mm) The *criterion of plausibility* is *not reached by merely stating abstract* and *speculative theses, but by requiring the Plaintiff to provide a solid* theory *of damage, based on facts and evidence, which allows the court to make an evaluative judgement such that* it *points towards a scenario of damage to Portuguese consumers* as a *result of the conduct sanctioned in the decision being* more prov4able, *more credible, than the reverse* hypothesis, *i.e. the absence of damage to consumers in this territory;*

nn) In the context of the application of competition *provisions*, *plausibility as a criterion for compensating damages* is, of *course, equivalent to economic probability, in the light of the characteristics of the market and of the infringement, taking* into *account, for example, the geographical definition, the product, the supply and the elasticity of demand, all of which the court completely ignored, since it paid no attention to the allegations made in* this respect *by the appellant;*

oo) In *any case,* what was *needed* here*, and unless there was a better understanding, was for the Plaintiff to demonstrate that it was more likely that there was damage to Portuguese consumers than that there wasn't, a demonstration which, in the R&'s opinion, was not made in* these *proceedings, nor was it achieved in the judgement under appeal, leading to the necessary dismissal of the action;*

pp) As can be seen from the evidence, on the one hand, the number of *Portuguese who travelled in 2014* and *2015, using* packages *offered by tour operators, was residual, standing at* around *10%, with Meli4 hotels representing the direct or indirect offer* of *hotel accommodation to Portuguese consumers.*

an ultra-residual weight of less than 1% - proven facts (F), (G) and (H) - as a result of the huge number of *hotels available, both in the EEA (more than 150,000) and in Portugal (more* than *4,000) - proven fact (J).*

qq) This low weight of *the* offer in *the national* market *is a clear indicator of the low probability of any damage to national consumers, which is further reinforced by the fact that we are dealing* with *a particularly competitive market, with varied* offers *from multiple operators, competitive* pressure from travel *agencies* and *OTAs*, *not to* mention *Meli4's online offer,* which has *no restrictions* whatsoever *depending on the* market of *origin - proven facts (K) to (O);*

*rr) /V*In this *context, what the Court ultimately sanctioned was a fishing expedition, that is to say, a search of the Appellant's* organisation and *internal information to* try to ascertain whether *there had been any effects or damage to the legal* sphere *of consumers* resident in *Portugal as a result of the infringement sanctioned in the* Decision, *without first demonstrating the plausibility of* such *damage, which constitutes an unlawful decision, in breach of Article 12(2) of the EPL.This constitutes an unlawful decision, in breach of Article 12(2) of the EPL, which must be* reversed, *with the consequent dismissal of the action and of each of the claims made in it,*

ss) But even if that weren't the case, which she *claims as a* precaution and without conceding, the truth is *that even if we* were to agree that the *Plaintiff* had *overcome* this *first hurdle of demonstrating the plausibility of the damage,* she would *still have to* overcome *the other prerequisites* set out *in paragraphs 3 to 5 of the a/type*
12 of the EPL in order to be *able to* have *the* access to *evidence measures ordered, an* issue in *relation to which the Court once again failed miserably, with the* aggravating factor that it *did so with what* appears to be *an inversion of the* burden of *proof, since it analysed the assumptions of* specificity, necessity and *proportionality* as objections raised by the R4, *when in reality, we continue* to see *the presence of positive assumptions, which the Plaintiff* had *to fulfil;*

ft) In the judgement under appeal, the Court only addresses these *assumptions j4* in the context of *analysing the Appellant's* case, *in Chapter B., on pages 42* et *seq. under the heading "The reasons put* forward *by the Respondent for opposing the production of the documents", when strictly speaking it should have done so.*
4 analysed *in the* context of identifying and verifying *the positive presuppositions for upholding the action* and decreeing the access to *evidence measures requested, since it is undoubtedly up* to *the Plaintiff to prove that they have been* verified;

uu) It does so, moreover, in a *manifestly* perfunctory *manner, limiting itself to* understanding *these assumptions, without*, *however, applying them in the slightest, subverting the* terms in which the issue *at stake here should* have *been dealt with and analysed, in a situation that presents some parallels with that which gave rise to the* recent *ruling in* case *no. 20/20.9YQSTR-A.L1, in which Aufiore Omnlbus is also an Aufiore.No 20/20.9YQSTR-A.L1*, delivered *on 10 March* 2023*, in a case in which Aufiore a lus Omnlbus is also an Aufiore, in which it is pointed out precisely that in analysing and assessing a measure* for *the preservation* of *evidence, "the Court, in applying the proportionality test laid down in Article 12 of Law 23/2018, readArticle 12 of* Law *23/2018, must take into account the following: the extent to which the action for* damages *brought is supported by facts and evidence* already *available and attached to the file, which justify the request for* access to *the evidence*; *the scope and cost of the measure to preserve the evidence;* whether *the evidence to be* preserved *contains confidential information and the* provisions in *force to protect such confidential information - cf. Article* J2.5 and *7 of Law 33/2018 which implements Directive 20l4/i04/EU';*

w) Now, if *this is the* case in *a* case in *which the action for*

damages has already been initiated and *in which only the* decree of injunctive *relief* is being sought, then what is the point?

preservation of *evidence, as* was *the case here, is more likely to be the case in a case such as the one before us, in which* we are *dealing with a preliminary request for a hypothetical future action* for *damages;*

(ww) In the same vein, the recent Paccar Inc judgement of the CJEU placed particular emphasis on the need for *national courts* to take *proper account of the principle of proportionality when assessing requests for* access to *evidence under the relevant provisions of the Damages Directive, concluding in paragraph 69 that, although Article 5(1)* of the *Damages Directive* must be *interpreted "in the sense that the relevant* evidence is also sought by *the party to whom the request is addressed", the Court* should also take into account the relevant evidence.Although Article 5*(1) must be interpreted "as meaning that the* handling of *relevant evidence which* is *under the control of the defendant or a third party also covers evidence which the party to* whom *a request for disclosure of evidence* is *addressed must create* ex *novo by aggregating or categorising information,* knowledge *or data under his control", this must nevertheless be* done *"subject* to *strict* compliance *with Article 5(2) and (3)".This is subject to strict compliance with Article 5(2) and (3) of this Directive, which obliges national courts seised* of a *dispute to limit the disclosure of evidence to what is relevant, proportionate and necessary, taking* into *account the legitimate* interests *and fundamental rights of* that party";

xx) It is also worth referring in this respect to recital (23) of the Damages Directive, which states *that "the proportionality requirement should be carefully assessed when disclosure entails the risk of uncovering a competition authority*'s *investigative strategy by* revealing *which documents are part of the file*, *or the risk* of having *a negative impact on the way in which undertakings co-operate* with *competition authorities. Special care should be taken to prevent 'prospective research', i.e. the* non-specific *or excessively broad search for information that is unlikely to* be of *relevance to* the *parties to the case."*

yy) This is precisely what is at stake here - an unspecific and excessively broad search for information that is *unlikely to be relevant to the parties to the action - as can be seen from the almost endless catalogue of documents whose production is requested in Article 62 of the* initial application/ *which* should *therefore be rejected;*

zz) The Plaintiff does not need access to the full copy of the standard general *conditions used by the Appellant in the years 2014 and 2015 referred to in the* Decision - *request a) (i) formulated by the Defendant - in order to* know *the content* and *scope of the anti-competitive clauses* in *question, since the* re/avanfe *clause, the only one, there4s, that caught the EC's interest and can in some way* re/eve *to the* effects *sought by lus Omnibus,* is transcribed *in paragraph (20) of the Decision, which was even by the Court a quo brought to the proven facts;*

aaa) The reasons put forward in the contested judgement *in an attempt to justify the need to access the 4,216 contracts referred to in the Commission Decision - requests a) (ii) and (iii) - in order to assess the scope and effects of the anti-competitive practice in question, not only make no sense, but also contradict the proven* facts, *which is enough for the* contested *decision to* be *reversed, with the consequent dismissal of the claim at issue here*;

bbb) Moreover, in the grounds of the judgement, more specifically on page 40, the Court assumed that the 4.2J6 *contracts at issue here were in force in 2014 and 2015, so that in this part* there is *an insurmountable contradiction* between the *decision on the facts and the grounds of the judgement, which once again generates a nullity, under the terms of Article 615(1)(c) of the CPC.*

00D-$ A J7tâNOS, Ctãfo astã, that *lus Omnióus wants to substitute* itself for the Commission *in the* and/lee *of the general conditions used by Meliá* and *in the detemiinação of its (in)confamiidada* with the zegres of the *eoncozr8nria, in which* case it is v'a/ard *to recall parfigrefo 65 of the Aaórd8* Paccer Inc. *alluded* to *above: "the principles 8pliGáVBIS to the lUt8 COTitra the anti-consensial-* compo/tdmenfos *by public* inir/al/va *are not transposable to the fight against the anfiaoncompetitive somportamantos by* private/niciafiya°;

ddd) The Plaintiff does not need access to such contracts in order to assess the *impact of the infringement on the final sales* of spheres *in Dutch*, *since, once again, it does not appear in paragraph* {25} of the *Decision,* as the *Court* has *taken to* point *15 of the proven facts*: 'The *total* value *of* sales *realised by the Relevant Contracts* was *75 t08 1h4 euros in 2014 (which corresponds to* approximately *5.19% of Meliã's net* turnover in 20J4} and 88 145 187 euros *in* 20f5 (*which* corresponds to approximately *3.*82Sf' *of Mellá's net turnover* in *20'l5)';*

Without hesitation, the *donations* at *issue here have* always been *covered by the content of the settlement procedures referred* to *in* section 3.4.8 of the *confession, since they constituted the basis for the Decision issued* by the Chamber, and therefore, *all things considered*, *the request at issue here* must be *rejected;*

(iff) The request made by the applicant under paragraph 6*(c)(*iii) is, in *my opinion, a case of the school making a disproportionate* and *improper request,* which *can only* be accepted *by a court which applies the rules of Article 12 of the EPL correctly* and *legitimately.Article 12(2) to (8) of the EPL, interpreted in the light of Article 5(1) and (2) of the Children's Directive and of its provisions:*

ggg) The Court cannot prove one thing - *that the conduct* was *limited to the* years *2014* and *2015* and *that* Me/iá *put an* end to *it - in order to* sepu/r, when it comes *to assessing the necessity* and *propomionality of the request at issue, to* admit, in *a* specu/ative and *contre0tory* way, that *the conduct could* have been *prolonged for* another S years, until *2020;*

hhh) Contrary to what is stated *in the* reasoned statement, the *Plaintiff does not* need *the documents at issue here in order to know the time* and place *of the offence, as* these are already *known* and even *result from the* proven *facts, more so from points 13 and 15* thereof;

iii) In a scenario such as the one we are dealing with here, of vertical restrictions translated into high sales prices by geography, proof of the hypothetical damage depends exclusively *on analysing the prices charged in the country.*
perfOÓO d8 *Vigência* de33es Cor/fratoS, pOr jbfzrie O 8pUfaF se cOfist//7ifdOfBS /Ófdfzi *prevented* from *accessing* more favourable *prices* than they *would otherwise have been able to access in* that *period, and it is* impossible to *know which prices were 'fii@OiafatTi* nos a/tOs pOs/sfiofBs aO tef'7iO *da ififreç8o;*

jj) There is no question here of *the possibility under the EPL of* ordering *the production of* ex novo documents *using information in the defendant's possession, but* rather of *obliging a* party to *produce evidence in accordance with Article 5(1) of the EPC, which was certainly not in the spirit of the* European *legislator, as is clear from the Paccar Inc. which the Court cites,* but *does not* note: "the interpretation *of Article 5(f), first sentence, of the EC Treaty is not justified*. The first *subparagraph of Article 5(*f) *of Directive* 2008/20td/f04 *cannot* lead to the *defendants in the main* proceedings 6uôsfitc/sm the *applicants in the task* incumbent on *them* of *demonstrating the extent* and *scale of the damage suffered*" *(which is* precisely *what* the *Court of First Instance* agreed would be *upheld* in response to the present *appeal);*

(hkk) any *interpretation of Articles 12 and 13 of the EPL to the effect* that they require the *court to order the defendant to produce* evidence

ex *novo, i.e. compiling and ordering economic data* according *to criteria dictated by the plaintiff, to prove the* axisfãncia *of a hypothetical damage* in *the context of a private enforcement action or as a preliminary to such an action, would be unconstitutional, for violation of Article 20(4) of the Constitution of the Portuguese* Republic, which *enshrines everyone's right to a fair* and *just trial;*

III) It was not entirely in *vain that the CJEU also clarified at that time that "the provisions of this directive* must be *applied with due regard for the fundamental rights* and *principles recognised by the Charter of Fundamental Rights of the European Union", in a clear allusion to the fundamental rights of defence of the plaintiffs, who cannot be required to substitute themselves for the plaintiffs* and *their experts in establishing the hypothetical* existence of *damages and their quantification;*

mmm) The Court cannot intend to oblige R8 to collect, compile and organise information for a period of *eight years (2014 to 2021)*, *according to a criterion defined by the Plaintiff, to* serve as a *basis for proving the existence of damages and their quantification in the future* and *already announced private enforcement class action*, *substituting itself for the* latter *and its experts in* this *evidential* effort;

nnn) And let it *not be said that it is not* credible *that the Appellant did not have such tables* and *studies at its disposal, not* least *because it* had *to prepare them for the purposes of the Commission Decision, since the tables and information* which *the Appellant prepared* for *the transaction* procedure *with the Commission, in addition to only relating* to *two years (2014 and 2015) and covering only the 4.216 contracts in* crisis, are part of *a* settlement procedure *and are protected under Article 14(5) of the EPL and Article 6(6) of the Damages Directive;*

ooo) The decision handed down on request c) (iii), by simply referring *to the previous request for a statement of reasons, is null and void for lack* of a *statement of reasons, pursuant to Article 615(1)(b) of the* ***CPC;***

ppp) The Court was required, in the first place, to verify whether the positive assumptions for the decree of the request formulated by the Plaintiff, namely the plausibility of the damage and *the necessity,* specification *and proportionality of the request, were fulfilled, giving adequate reasons for its decision with recourse to the* facts, *evidence and the law, which it manifestly failed to do* and *results* in *a nullity for lack of reasoning*;

qqq) We are once *again faced with a case illustrating an abusive and disproportionate request, which goes beyond the circumstances and limits with which national courts must order the production* of ex *novo evidence, in the light of the case law of this Venerable Court (Judgement in Case No 20/20.9YQSTR-A.L1) and of the CJEU* (*Paccar Inc. Judgement);*

rrr) In 2014 and *2015 they were safely housed in the 140 hotels* in *question millions of guests, from dozens of different origins, through thousands of contracts, and in many cases the information on the place of* residence *of each one is not even registered in the computer systems of each of these hotels, so it is objectively impossible for the Appellant to comply with the* decision *handed down;*

sss) Due to the document retention rules in force in Spain and in most of the countries where R& Meli4 operates, *data of this nature and detail simply no longer exists, so the Appellant also* has *no way of* responding *to such a request in the unlikely event that it is confirmed by* this *Venerable Court;*

III) To make matters worse, the decision *handed* down *is ambiguous* and *unintelligible, j4* which *identifies the beginning of the period of time to be covered by the information to be made available - "January 2014" - but leaves the* end of that *period in the balance, j4 which states* that it "will *probably take place after* December *2015",* without, *however,* specifying *when,* and *is therefore null and void, under the terms and pursuant to the provisions of Article 615(1)(c) of the CPC;*

uuu) Without waiver, the Court cannot intend to oblige the Defendant to collect, compile and organise *information for an indefinite period* of *time* (from January 2014 *to an uncertain date after* December *2015), according to a* schedule drawn up by *the Plaintiff, to serve as a* basis *for proving the* existence of *damages and their quantification in the future* and already *announced co/e/iva action* for *damages enforcement, substituting itself for the* Defendant *and its* experts in *this evidential* effort;

vw) Once again, any interpretation of Articles 12 and 13.º of the EPL in the sense *that they* allow *the court* to *order* the *defendant to produce evidence* ex novo, i.e. *by compiling and ordering* economic *data according to* criteria *dictated by the plaintiff, to prove the* existence *of a hypothetical damage in the* context of *a* private enforcement action *or as a preliminary to such an action,* would be *unconstitutional, for violation of Article 20(4) of the Portuguese Constitution.Article 20(4) of the Constitution* of *the Portuguese Republic, which* enshrines *everyone's right to a fair* and just trial;

www) The decision to *grant request c) (iv) requires the Appellant* to *collect* and *process data that, due to its age, simply no longer exists, and also imposes a task that* is *impossible to fulfil, as it presupposes the collection* and *processing of the value* of *each and every one of the tens of millions of overnight stays made in the* aforementioned *7-year period, in the 140 hotels in question, each of which has*
hundreds of *rooms, of various types* and *marketed through numerous* sales channels, to determine which were the most *expensive* and *cheapest* and the respective *average, broken down by hotel and by type of accommodation;*

xxx) In addition, *the contracts at* issue *in the Commission's Decision* concerned *contracts with tour operators, typically intermediaries between accommodation* providers *and travel agencies, so the issue of* prices in this context is *particularly diluted and outside the sphere and control of Ra,* which *also contributes to the* necessary *dismissal of* this *claim;*

yyy) It seems that this *information is not suitable, much less necessary, for defining the moral,* professional *and temporal scope of the offence*, which *also* contributes *to the dismissal of* this *claim;*

zzz) It should also be noted *that the interpretation of the articles 12* and *13 of the EPL in the* sense that they *allow the court to order the defendant to produce evidence* ex *novo, i.e. by compiling* and *ordering* economic *data according to criteria dictated* by the *plaintiff, to prove the existence of a hypothetical damage* in *the context of an action* for privafe enforrement *or as a preliminary to such an action,* would be *unconstitutional, for violation of Article 20(4) of the Constitution* of *the Portuguese Republic, which enshrines everyone's right to a fair* and *just trial;*

aaa) In an infringement such as the one in *question here, the only* hypothetically *possible* theory of *damage, and* if it is *possible, it is not plausible, relates* to analysing *the prices charged under the* contracts in *the strict time frame in* which *they were in force, in order to ascertain* whether *Portuguese consumers were prevented* during that *period from* accessing packages with *lower total prices (as a result of a hypothetical reduction in the price of accommodation which would not* have been *absorbed by the tour* operator*) which,* in the absence of restriction, they would have been *able to access, or if they were not able to do so, they* would have been *prevented* from accessing packages with *lower total prices (as a result of* a *hypothetical reduction in the price of accommodation which would not* have been *absorbed by the tour* operator*).*

which means that the prices charged in subsequent years and on *different channels are absolutely irrelevant,*

bbbb) There is yet another insurmountable contradiction in the judgement under appeal, because at first (on page 52) the Honourable Judge raises the possibility that the practice has extended beyond the time frame *defined in the Decision, and then says* that *the data for this period will be needed to carry out a counterfactual exercise (!) i.e. comparing prices over the years 2014 and 2015* with *prices in the following years;*

(eeee) This part of the judgement under *appeal should therefore be declared null and void on the grounds of ambiguity* and *unintelligibility, in accordance with Article 615(1)(c) of the Code of Civil Procedure, and replaced by another judgement which dismisses the claim.- It should therefore be declared null and void, on the grounds* of ambiguity and *unintelligibility, pursuant to and in accordance with the provisions of Article 615(1)(c) of the CPC, and replaced by another judgement that dismisses the claim at issue here, on the grounds that it violates the principle of proportionality and the Appellant's constitutionally enshrined right to a fair and just trial, in which she is not obliged to substitute herself for the Plaintiff in proving the grounds for the announced private enforcement class action;*

dddd) The Court's decision to grant claim c) (v) is based on a preliminary error *of judgement, because contrary to* what *was stated in the judgement under appeal, the information* on *market shares, especially of its competitors, is not under Meli4's control;*

eeee) Not least because, in this *case, there is not even the typical asymmetry* of *information that justifies measures* of this *type, since the information* on *market shares that the Plaintiff wishes to obtain is not* only *not in Meliâ's possession, but can be obtained from companies specialising in market research or from public sources, which lus Omnibus can and should access if it so wishes;*

ffff) What is not permissible, in any case, is for the Appellant to be obliged to contract and produce such market studies, bearing the high costs that external constf//ors *engaged in such activity usually incur*, *substituting itself for the Plaintiff in the evidential effort to support a future and possible private enforcement action, which would constitute an interpretation of Articles 12 and 13 of the LPE that is unconstitutional due to its violation of the right to a fair and equitable trial.This would constitute an unconstitutional interpretation of Articles 12 and 13 of the EPL, as it violates Article 20(4) of the Constitution of the Portuguese Republic, which enshrines everyone's right to a fair* and *just trial;*

gggg) The decision handed down on request c) (vi), by *simply referring to the previous request for a statement of reasons, is null and void for lack of a statement of reasons, pursuant to Article 615(1)(b) of the Civil Procedure Code;*

hhhh) Notwithstanding, the Appellant does not have market studies that correspond to what is indicated in this segment of the contested decision, and *therefore has no way of complying with such an order;*

iv) What is not admissible, in any case, is to force the Appellant to hire and produce such studies, bearing the high costs *that external consultants who dedicate themselves to this activity usually charge, substituting itself for the Plaintiff in the evidential effort to support a future and possible private enforcement action, which would constitute an interpretation of Articles 12 and 13 of the LPE that is unconstitutional, for violating Article 20(4) of the Portuguese Constitution.This would constitute an unconstitutional interpretation of Articles 12 and 13º of the EPL, as it violates Article 20(4) of the Constitution of the Portuguese Republic, which enshrines everyone's right to a fair and just trial;*

jjj) The judgement *upheld* misinterprets the *application of Articles 7(1), 12(2) to (9),* YJ.:, *14* and *19 of Law 23/2018 of 5 June* and *Articles 1045 to 1047 of the Code of Civil Procedure.*

Whereupon, with Your Honour's *permission, the present appeal* and incident to the provision of security are *admitted, and the appeal is* granted:

(i) To grant *suspensive* effect *to this* appeal *by means of* a *bank guarantee in the amount of EUR.* 60,000.00 (sixty *thousand euros);*

(ii) The *judgement under* appeal *should* be reversed and *replaced by another judging the action to be unfounded, as unproven, rejecting* and *dismissing all the requests made by the Plaintiff, or in* limine and without granting them, *limiting* the *data and information to be provided to the period of the infringement contained in the decision on which* the *action* is *based.*

The IUS OMNIBUS ASSOCIATION responded to the grounds of appeal by concluding and maintaining:

A. The information asymmetry between the parties *would irremediably jeopardise the* success of *any* action *for* access to *documents indispensable to the* exercise of the *right* to *damages for* competition *infringements* if, as the *R&C has claimed, a diabolical burden were imposed on the claimant to obtain access to such evidence, or if the use of this market were to become so onerous and time-consuming.has sought, a diabolical burden would be imposed on the plaintiff in order to obtain* access to *such evidence, or if* the *process of gaining access to this evidence were* to *become so costly* and time-consuming *that the use of this procedural* mechanism *would be unfeasible and the plaintiff would no longer have* recourse *to* it. *And all of this for the* ultimate *purpose of* the Frog: *to* avoid *assuming responsibility for the damage caused to consumers by the anti-competitive practice recognised by the Frog itself in a settlement with the European* Commission.

B. The Sanitising Order did not adopt a different *position to the Judgment:* in *no part of the* Sanitising Order *is it alleged that* access to the *documents requested would depend on* alleging and *proving facts other than those to which the Court* was *already bound by the EC Decision. The Sanctioning Order only ordered the Plaintiff* to *concretise how* the *practice caused damage, "taking* into account the specific configuration of *the Infringement", which* is *an obvious* reference *to the definition of the infringement in the EC Order*.

C. A decision of the Court of Justice, although it may not provide *data* on *the existence of* damage, can describe an offence in terms that *make it plausible that the* offence *caused damage in Portugal. This is what* happens *when you look at the EC's* Case A7.40528 - Ho//dsy *Pfioing, a practice that aimed to increase prices* and *which* affected *the entire* E°EP territory, *including Portugal. /\/In this case*, *the appeal* against the *EC*'s decision *does not have to prove* the *existence of the damage, but it does* have to *prove the* p/at/diô//ity of the *damage.*

D. Dismissing this position, as the applicant claims, has the *sole purpose of making it* excessively *difficult for injured consumers or* their *representatives to prove that* an *inflation* dec/arasfa *by a competition authority has caused damage to consumers. Demanding that this proof be provided* by *documents that* the *plaintiff, equl Reaorfida,* does *not* have and *cannot* readily accept ot/ *by* resorting to extremely *expensive* economic studies*, at a time when* it is *not even* certain *that there has* been *damage*

nor do we *know whether the amount of damage caused justifies a follow-on action,* means*, in practice, making it impossible to access the* necessary *evidence* and, *consequently, to claim damages. And this is all the more the case because, unfortunately, the courts have interpreted popular action* claims *in* terms *that do not allow the popular plaintiff, in an action of this type, to fully recover the expenses he has incurred, even* in the *event of success.*

E. The normative interpretation *of Article 13 of the EPL and/or any other rule in the legal order according to which proof of the plausibility of damage in an action under Article 13 of the EPL cannot be made by recourse to the description of the infringement contained* in a *decision by a competition authority is unconstitutional on the grounds of violation of Article 20 of the CRP.*

F. The Plaintiff, in compliance with the section of the Sanctioning Order that ordered it to specify the *universe of potential* aggrieved *national consumers*, *clarified that the consumers represented are identified by category and not individually, and the universe of potential aggrieved national consumers is determined based on the criteria that the analysis of the evidence* accessed *allows for the delimitation* of *the anti-competitive effects of* these *practices. This section of the Sanctioning Order* and *the clarifications provided* to the *Court by the Plaintiff in fulfilment of it were considered by the court in its logical-rational "iter" of forming the decision, justifying the admission of access to the documents identified under points iv) and vii) of the Judgment. Furthermore, since the delimitation* of *the universe of potential injured national consumers is not a matter that forms part of any of the assumptions necessary to order the measures requested in this action, it was not for this Court to determine whether or not the criteria proposed by the Plaintiff for this purpose were adequate, which can only be assessed in a possible future action for damages.*

G. In this *case, the EC* decision *identified and penalised a restriction by object,* describing *the* characteristics of *the practice* and *the market* and *demonstrating that* this *practice is likely to* have *appreciable effects restricting competition in the market, including* effects on fleets *between Member States.*

H. European case law has established that the identification of *a restriction by object does not dispense with the need to demonstrate that the practice is likely to have effects on the market. As part of* this *demonstration, competition authorities often look* at *the characteristics of practices* and *markets that make such effects plausible. It should be noted that, at this stage of the analysis*, *the objective of public enforcement decisions overlaps with what also has to* be *proved in the action sub judice: the plausibility (even if not* certainty) *of the practice in question having anti-competitive* effects on *the market. It is therefore natural that facts associated with the* characteristics of *the practices and markets declared in the* Decision, *as an indispensable component in identifying the* restriction *by object, imply the plausibility* that *the practice caused damage.*

I. In the light of the case law of the CJEU, a national court cannot, without contradicting the European Court and *thereby violating its obligation to cooperate in good faith, disregard the* e/'eifs and characteristics of *the markets* identified by the C/2 *in the description of an offence by object, which were* BS58ztC/ais to the *identification of that offence by object. This* is *the meaning of the Masterfoods case law, reaffirmed in the Otis judgement, on the subject we are dealing with.*

J. National courts are bound by the *description of the characteristics of the infringing conduct* as *defined by the Commission, and not just by the statement of the infringement in the operative part of the EC decision. In fact, by logical necessity, national courts are bound by the Commission's decision.*

identification not only of the *offence itself that was declared, but also of the facts that underlie* that decision, insofar *as* they are necessary for it; and *likewise, they were also bound by the infierpfections* of *law and the application of law* to the *facts by the Committee when* they were nacass4/ies to *the conclusions reached in the* respective decision.

K. In short, the binding nature of the national courts covers the essential *facts for identifying the infringement declared by the EC*, *including* the characteristics of *the infringement of the markets, and all the other essential facts* con/figuration of *the* infringement by the *Commission, as well as the Commission's interpretations of* DffBffo 0 B's *application of the law to the facts when* they *were* nBC0S44ffBS *to the conclusions reached in the* decision. *The Court* was *therefore right* to *include points 16* and *17 of the judgement.*

L. It is important *to identify the scope of the offence, or to* assess *the plausibility of the damage, whether or not the* decision is the *result of a* criminal *proceedings. What* must be done is the *identification of the infringement, with all the facts and* data necessary for this *identification. And* this identification of the *infringement can either result from a* transactional decision or from a *non-transactional decision*. *In the case of a transacted decision, this means that the Appellant has seen the identification of the offence* and *of the legal* irif6fp/BÇ0es *contained in the* decision that *sanctions its*charge Agoand*quo osfa This decision has* become *final. Consequently*, *even if the characterisation of the Infringement contained in the* Commission*'s Decision was not valid - quod non - and the EC's Decision resulted from* a waiver, it would always be necessary to *prove* that this *characterisation* had *become res judicata, which, after all, was the result of an annulment by the infringer itself. In this case, the EC* decision *resulted* from *a settlement.*

ivi. As the Court of First Instance rightly pointed out*, in the case of infringements by object, the European Commission is exempt from proving* that the practice has*, in fact,* had an effect on *the market*, *which does not mean that it does not have an* effect *(including damage).* The *fact that the* EC *concluded that* the *practices in question* infringed Article *101 of the TFEU, as such* does not *require the demonstration of anti-competitive effects (because it is a restriction by object), necessarily implies that these practices are sufficiently important to* be capable of *significantly affecting competition in the* markets *concerned. If* this were *not the case*, {# the *requirement of being able* to *read a rene/ve/ impact* on the competition *would not* be *met, and the practices would be minimal* and not *prohibited by* e/article *101 of the TFEU;* and *(ii) it* would *not be* possible to *identify* a /restriction *by object*, as /z/z of the *jurisprudential cútarii.*
The case of *Budepest Bank (C-228/18) is similar.*

N. Santença did not apply any presumption in order to recognise the plausibility of the damage. Presuming damage is not the same *as* believing that *the damage* is *plausible.*

0. The lower court did not base its conviction on any presumption of *damage, basing its position on the evidence produced in the* present *case. Faced* with *a practice based on confidential contracts, this proof of* the p/atzsi6i/ity of *damages could only be made on* the basis *of* public *data*, with *the* Plaintiff and *Titbunol relying on all available* public/campaign information *on the content of* these *contracts. and EC Decision,* the *European Commission Press Release* dated *21/02/2020 and the Summary of the* Decision *published in the Official Journal of the European Union on day* P2/0B'202d. *On the other hand, the* Râ takes access to sevs *aonfidencleis* and *detailed data* on esfas *memados* and so#ises *the anticompetitive prfession in question. It has had* the *opportunity* to present to the *Court* the *arguments and* means of *proof that* could *persuade the Court of the* absence of *any evidence* of damage *caused by the arrow,* and it has not *been able to* do so.

P. It is indisputable that the contested Court is *not bound by the European Commission's Press Release dated 21/02/2020, which it* rightly *cites in its fact 18. This means, in practice, that the Court of First Instance* based *its decision on the available evidence of the plausibility of the damage, regardless of the discussion of the* validity of *the* EC Decision.

Q. Despite all the considerations made by the Appellant regarding vertical practices and their lesser *degree* of *harm to competition law, the* Respondent *did not rule out* these *harmful aspects in the specific case. In* fact, *the Defendant has not produced any evidence in* these *proceedings of the absence of the effects of the anti-competitive practices it has implemented. And even if - ad arguendum - it were true that,* generically *and absolutely,* vertical restrictions *cause less damage than horizontal restrictions, this would not mean that* vertical *restrictions do not cause damage, only that they* cause *less damage. The requirement of plausibility of (some) damage would still be met.*

R. Paragraph 41 of the decision is of no relevance to the matter under *discussion in these proceedings, since the legal* assessment *contained therein did not* serve *to characterise the infringement.*

S. All the paragraphs of the decision *cited by the Court include information that is indispensable to the identification of an infringement of competition law for violation of Article 101 TFEU, including the delimitation of the scope of the infringement declared. And even those paragraphs which the* Appellant *considers to contain "legal considerations, evaluative judgements and hypothetical* reasoning*" are, in fact, matters which constitute "logical steps" and intermediate legal conclusions which are indispensable for the fulfilment of the requirements of Article 101 TFEU.*

T. Paragraphs 16 and 17 of the content of the judgement contain *information that* was indispensable for the Commission to conclude that Qtd/Recorrente had *committed an infringement of Article 101 TFEU. Without these paragraphs, the offence would appear merely as an abstract qualification, devoid of its characteristics.*

U. Not admitting the Court's appeal against that decision means placing *a diabolical burden of proof on the Plaintiff to demonstrate the plausibility* of *the damage and to have access to indispensable documents and, consequently, means making it impossible to bring a future action for compensation against the Defendant for the damage caused to consumers by the anti-competitive practice* in *question, thus ostensibly violating the principle of the effectiveness of European law* and the *constitutional right* of *access to justice.*

V. Thus, the contested court was right to incorporate the paragraphs of the decision set *out* in *paragraphs 16 and 17 of the judgement into the facts of the case and to consider* those *facts in order to assess whether the requirement of the plausibility of the* existence of *damage had been met.*

W. Footnote (10) contains facts relating to contracts other than those we are dealing with here. These contracts referred to in the footnote do not contain the *anti-competitive clauses analysed in the Decision and do not fall within the scope of the anti-competitive practices in question, and are therefore completely irrelevant for assessing the plausibility of damages in this action. The Court of First Instance was therefore* right *not to include footnote (10) in* this *case.*

X. With regard to §66, the *matter contained* therein *that the* Appellant *wishes to bring to the facts of* the case *was considered in the* Judgement, *which refers, in various sections, to the years in which the contracts were* signed. *Paragraph 66 of the*

The EC Decision does not contain any negative delimitation as to the duration of the contracts, and it is by *no means certain that such contracts could not have* been in *force in other years (on the contrary, common experience suggests that the validity of some of* these contracts *began* earlier *and/or ended later). The* temporal *scope of the offence is not sufficiently defined in the EC* Decision, even if it is due *to* the *succinct nature of the* Decision, *as it is the result of a transaction. In* possession of *the contracts in question, the Plaintiff will be able to* ascertain *the duration of the anti-competitive practice* and *subsequently consider the configuration of the future action for damages, either as a follow-on action or* as a *partially stand-alone action, claiming, in* the *latter* case, *that the infringement lasted longer than the one indicated in the EC* decision, *because the* same contracts were in *force for a longer period. Thus, the non-inclusion of* §66 *of the EC* Decision in *the proven facts deserves no comment.*

Y. The assertion that vertical restrictions *tend to* be *less harmful than horizontal restrictions does not form part of the logic for* concluding *that* there has been *a vertical infringement for violation of Article* DO'/.- of *the TFEU, but is only relevant for determining the fine* imposed. It is *therefore a matter that does not bind the national court in a follow-on action. This* same *consideration that vertical* restrictions *tend to cause less damage than horizontal restrictions is* irrelevant *when discussing* whether it *is plausible that the vertical restrictions* in question *have caused damage. Contrary to* what the Appellant claims, *assuming the less harmful* nature of *these* restrictions is *tantamount to admitting that they are likely* to *produce harmful* effects*, albeit to* a *lesser extent than horizontal restrictions.*

Z. Therefore, as it is an irrelevant matter in terms of determining whether *the action is* well-founded, *the appealed court was* right *not to include §86 in the matter proven.*

AA. None of the matters that the Appellant *intends to bring to the list of proven facts is likely to influence the assessment of the plausibility of the damages. It is therefore* irrelevant to the presentation *of* this *action.*

BB. As for the alleged facts in Articles 181 (with the exception of *point 9 thereof) to* 86 *of the* Statement of *Defence*, they *are nothing more than* the invocation *of the Defendant's* prestige *in the* maritime sector. This *prestige - which has never* even *been denied* by the *Plaintiff/Defendant - as well as the size of the* Defendant/Defendant, have *no bearing on the* assessment of *the plausibility of the damage.*

CC. The alleged *facts set out in Articles 327 to 332 of the Statement of Defence* and *Articles 80 to 83 of the Statement of Defence* to the *Improved Statement of* Claim *would, at most (and* without *conceding it), be capable of limiting the* extent of *the damage, but* they *are not* capable of ruling *out* its occurrence, *i.*e. they *do not prove that* the anti-competitive *practices identified in the* EC Decision *did not* cause *damage* to *consumers* resident in *Portugal.* Consequently, since *this action* does *not discuss the* extent of *the damage, but rather whether it is plausible* that *such damage occurred, this matter is irrelevant and* the *contested decision does not* merit *any amendment.*

DD. As for Articles 90 to 96 of the Perfected Confession*, not* only *has the Defendant failed to prove the alleged facts, but the matter contained therein is* irrelevant *to the discussion of the case and concerns two* of *the tour operators affected by the* anti-competitive *practices* in *question,* and *not the others.*

EE. The alleged facts contained in Article 129 of the Statement of Defence are nothing more than *general information that does not contribute to the discussion of the plausibility of the damage* and *does not serve to prove the absence of damage. Once again,* Defendant/Recorenfe resorts to the *strategy of trying to confuse what is different. It* wants to *dilute its action in the world of hotel* supply, *ignoring the contradiction* in *which it* has *previously failed*

to recognise.

stated as a *prestigious and sizeable company in the hotel sector. What's more, the* extent of *the hotel* offer *can never be a* criterion *for assessing the plausibility of the damage, and the probability of damage being* caused is *not affected by the market share of* /l//e/iá, *since the damage must correspond to the* price *that consumers living in Portugal had to pay when buying the tour packages in question, which included the Meliâ offer at the respective price, geographically differentiated, resulting from the anti-competitive practices in question. Meliâ's argument flies in the face of common* sense *and the rules of common experience.* If *this sophisticated and prestigious multinational company felt that it was in its interest to negotiate restrictive clauses* with *tour operators, with the* inherent *risk of* being *penalised for* this *conduct, it was naturally because it felt that it would benefit from these clauses. And* these *benefits can* only *correspond to an increase in the prices charged, at* least *in some* countries. *Therefore, since this matter is not capable of contributing to the discussion of the case, the Court of Appeal was right not to include it in the matter under appeal*.

FF. As regards the intended inclusion in the substantive issues of Articles 163, 174, 175, 177, 179, 183, 184, 185 and *186 of the* Statute of *the Court of First Instance's* Statement of Objections
The appellant continues with *the same strategy of trying to convince the Court that, since there is a lot of* competition *in terms of tour operators, sales channels and* different *options in tour packages, the damage is not plausible. This is an* invalid *argument because, as has already been mentioned, the plausibility of the damage is independent of the competition* from *other companies or products. Everything indicates that* it *will be confirmed that the price of stays* in *Meli4 hotels, included in packages sold to consumers in some countries*, *was higher than the price of the* same *stays included* in packages *sold to consumers in other countries. This is enough4 to prove that consumers in the disadvantaged country paid an overprice, because if they had had access to the prices offered in the other country, they would have paid a lower* price. *Market shares and offers from other companies have no bearing on this assessment. All of this is therefore irrelevant and should not be included in the* list *of proven facts.*

GG. The legally cognisable interest, within the framework of the action provided for in Article 13 of the EPL, will have to *pass through the sieve of the assessment of a specific requirement set out in Article 12(2), applicable by* reference to *Article 13(2), all of the EPL: that of the plausibility of the damage. In other words, in order for the* Plaintiff/Appellant to *demonstrate that it has a legally cognisable interest in access to the documents requested, it must demonstrate (as it has) that* there is *plausible damage to* Portuguese *consumers as a result of the Defendant/Appellant's anti-competitive conduct. This burden of proof lies with the Plaintiff/Defendant, and the Court, contrary to what the Appellant claims, did not order any reversal of the burden of proof.*

HH. The Judgement adheres to the Plaintiff's position, arguing (i) that the publicly available documents, including the EC Decision, do not allow confirmation of the existence of damage to consumers residing in *Portugal as a result of R&'s anti-competitive conduct, and that the Plaintiff needs to* read *the documents* in the *Defendant's possession requested in these proceedings to verify* whether *such damage* has actually *occurred and thus consider the viability of a future action for damages against the Defendant; but (ii) such publicly available documents, including the EC Decision, are sufficient to demonstrate the plausibility of the damage, i*.e. *that it is plausible that the anti-competitive behaviour of the Defendant/Appellant has caused damage to consumers resident in Portugal. In view of this* emphasis *on the* Judgement, it is *concluded that it does not contain any contradiction* and *that no defect can be pointed out and that it is perfectly intelligible.*

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Il. In the Sanctioning Order, the *Court* a *quo* invited the *Plaintiff to* conafef/ise the prea8Uppose of *the plaueiôiiity of the damage ooneídfising from the con# ufiefi8o espefilfifia of the* /rtfragdo, in *paffianlar the faalo'de* e6farefrt in cBz/sa only oorióatba *with the tour* operators*".* This *invitation to improve*
/Article 590 of the CPC and does not bind the court as to the meaning of the future judgement. It *would not even make any logical sense for it to do so*: if, in the *sanitising order, the Court* had *already* decided *that the assumption of the plausibility of damage had not been* verified, then it would not even have *invited the Plaintiff to* make it concrete.

JJ. A' A'ulaie data cpmyr/mene to cariv/f8 to apa/fefpoame/tio, *justifying that to Wuet/í8s an6aonaoneaoiais* ex/s/eofgg *us fionfiefie* enóe *Meliâ and tour operators probably caused damage to consumers* parfuguasea: *to* the 9rri *extent that Im díre n* by v/# d8 ç*'xnj2arffmeritBy8o* óá
/re/sedog, de ler aceaso a yecofeé furfdfsoa corri. *pzeçoe* ma/a reduz/dóe
/inteersnôb oe/adlesani.fiéis Sfefd aaah #/eçox leais rediJz/dósy.

KK. The Judgement took into *account the matter alleged by the Plaintiff in its Amended* S t a t e m e n t of Claim and the *other publicly available documents to which the Plaintiff* had recourse, *and rightly proved the plausibility of the damage. This does not imply any contradiction with the Sanctioning Order. The Sanctioning Order did not* recognise that the *damage* was *not plausible,* and *it did not disregard the fact that* the *plausibility of the damage was demonstrable t h r o u g h t h e p u b l i c l y a v a i l a b l e documents*. The *intention was* simply to clarify *the reasoning or* economic *argument that made the* existence of damage *plausible, given the publicly available data. And the Plaintiff* provided *these clarifications.*

LL. Without access to *the documents* in *question, in the R&'s possession, the Plaintiff will not be able* to *determine the* exact facts in which *the R&'s anti-competitive practices caused damage to consumers. At* this *point, the Plaintiff cannot* even be certain *that plausible damage has been caused to* Portuguese *consumers. It is therefore absurd to bring an action* in *court under these conditions claiming* that *these practices* have caused *damage to Portuguese consumers*. *At the* moment, *the Plaintiff would not be able to fulfil its* duty to *act in an action* f o r d a m a g e s , *because it does not know many of the facts that it would have* to allege *in order* to *support its claim, and* which it would only have to *know once it* had access to the *documents* in *question*. *The* Appellant *intends to confuse the possibility* of a *post-trial* sumpifr,. *j4. rio &mbIto :':le an action for*
/ridamnizaçdo, o drtxa *da* p/oya, com *a* tmpossibit/áfade õe*'eumfi'rtrpoatfiriofmente o ónúe de eIegag&a .EfiIe últimolfiio. The onus is not on the company* **to prove** that the behaviour caused the damage. It is *necessary to* deduce the facts that demonstrate the cause,

td/II O aaaaso pe/a At/fora *soa dammen¡as //ptí Sanadas na .passe da R&*. alexis a aeaime8fa fnhwrst/vá naóaa/mür'/áaz/a/enfe fls f6 re/aç8o *arz/feas partes,* :4 a ü n i f i e . *vis. pala* s.6/\/zsgtis/da/'o prfris/plo da ftttf'r/daôe.

NN. The Defendant/Appellant has never invoked, in the many hundreds of pãg/r'ã" qt/e d0rrpÕa/rt O8 68Us 8ftfdti/aÔo4, om 0/"fcQ fri8fD Ó6 p/ovB ófVtdpado
publicamente que pudesse ter sido junto ou considerado pela Autora para cumprir o
bfibôllao the onus'of proving that /*zfsfc his /ôe atrfôufr. QrB, zc he *doesn't, he* can't aza/vJr a.'/e/ev8üc/B db pffnc/p/o.da *aíaifi/idede* para *Nndemehtez .In o r d e r t o* accept the lack of a document, it is *impossible* to *obtain proof of the fact* that it *is in breach of the principle of* inefficiency.

õO: geaenrid'o them *in the* cn/eaáutzeç8o of *the* i/z/feçao and in the eou úmô/fa
/d5'¢o, /8/ "ofz/# Ô8@i/dzts n8 Den/isdd' d8 GE 6 "Nos.:.6sC/8z8Ci/zi0zdoB. /Bs/B':/0e

PP. The Court assessed, in relation to the various documents requested by the Plaintiff, whether the assumptions of specification, *relevance or necessity* and *proportionality were met, weighing up the evidence of their fulfilment presented by the Plaintiff* and the *arguments and evidence to the contrary presented by R&. This does not imply any reversal of the burden of proof, but rather the combined weighing of all the evidence brought before the court.*

QQ. The Plaintiff has complied with the duty *to specify, referring to specific* and *duly identified documents, enabling the defendant to understand which documents the Plaintiff's requests refer to. This* duty *to specify must* be *framed, as the Court of Appeal rightly understood, in the light of the difficulties faced by the applicant, the Plaintiff, in identifying in detail the documents* to which access is *requested, given* the *information* asymmetry and *the circumstances* in which *these documents are in the exclusive possession of the defendant* and are *known* only *to* it. *Therefore, an* asphyxiated *application of the* duty to specify should *be ruled out, safeguarding that the applicant does not bear an impossible burden of proof,* jeopardising the *principle of effectiveness.*

RR. The need for access to such documents has also been demonstrated in the present case. The publicly accessible *documents do not make it* possible to *confirm the existence of damage to consumers* resident in *Portugal or to quantify it. The documents that* allow *such confirmation* and quantification *are exclusively in R&'s* possession. *The Defendant refused to hand them over to the Plaintiff. And without access to* ***these*** *documents, the Plaintiff cannot assess the appropriateness and feasibility* of *bringing an action for damages against the Defendant,* since *such an action is doomed to failure due to the lack of knowledge of the essential* facts that *would have* to be *alleged and the absence of evidence.*

S. The criterion of proportionality was also duly considered in the judgement, taking into *account the costs of disclosure, particularly when access to information involves the creation* of *ex novo documents,* and the need to *implement mechanisms* to *protect business secrets when the documents to which access is requested contain confidential information.*

TT. The proportionality judgement involves a case-by-case assessment of the conflicting interests*, bearing in* mind *that the principle of effectiveness (principle of European law and Article 23(2) of the EPL)* prohibits *an interpretation of the proportionality* criterion *in such a* way as to *make it practically impossible or excessively difficult to* exercise the *right to compensation. In this* case-by-case *assessment*, it should be borne *in mind that business documentation is now* practically *all compiled in computerised files, which are easily accessible and under the control of the defendant, and that it is therefore very easy to* retrieve, sort *and make available* this *documentation. Hence, as the judgement under review rightly emphasises, in this context, the production of an ex novo document reflecting the information sought* is *not disproportionate in view of the Plaintiff's interest, as* well as the *much lower costs for the Defendant to compile this information than for the Plaintiff to compile it* on the *basis of thousands of documents with highly fragmented data.*

UU. When weighing up the proportionality judgement, account should be taken of the fact that the documentation requested may already have *been compiled by the defendant in order to transmit information to the European Commission, and is therefore easily accessible - a circumstance to which the appellate court was also not unaware.*

VV. The alleged lack of documents cannot constitute grounds for the Court not to order that they be provided. Rather, it is a ground for refusing the Court's order on the grounds that it is impossible to provide the documents.

fulfilment. Otherwise, it would be very difficult for the irj/'/eforas to *avoid providing documents.* If every *time an infringer claimed*, *without proof, that they had not* read *a document,* the *court did not* order *them to provide it, the infringers could simply* claim *that they* had not *violated an obligation* to *provide a document, and the court would never order them to do* so. *Only after a court order* to *provide certain documents, which the Defendant* refuses to provide *because it claims they do not* exist, *can -* if it *is later proved that the documents do* exist - procedural and st/6stanffve consequences be applied for breaching *the obligation to provide* documents ordered by *a court {consequences which include the potential reversal of the burden of proof as to the facts proved by those documents and the* application of the *sanctions provided for in Article 18 of Law 23/2020}.º of* Law 23/20t8 of *5* December.

WW. With regard to safeguarding confidentiality, although evidence containing trade secrets *or other* confidential information *must* be considered in *damages* actions, *the courts may protect information* that is confidential or *contains trade* secrets *from disclosure during the* proceedings by means *of measures recommended* in the judgement.

XX. In principle, only *documents which* are *applications* for *remission or reduction of* fines *or which* are unrevoked *settlement proposals* are covered by *absolute protection, excluding documents* for *or accompanying* anaxor existerifs. *In the present petition,* access to *any document benefiting* from *absolute protection has not been requested.*

YY. It is well-established *in European competition law jurisprudence, with regard to* access to *documents* in *European Commission competition proceedings, that information older than five years does* not, *in principle,* merit *approval where it is* accompanied by *individualised justification that the (legitimate)* commercial *interests of the company in question are still being protected,*

zz. it is up to the party that claims that *a piece of information/document* has characteristics that merit protection *as a* trade *secret, or on any other basis, to prove this fact. N*4 *Therefore, it is* not *enough to generically allege, as the defendant has done,* that certain *information deserves to be treated as confidential; it is up to the defendant to justify* these *allegations in an individualised* manner and *in terms that allow for judicial appraisal, The reason for maintaining confidentiality is that more* than 10 *years have passed since the date of the facts* and *documents in question.*

AAA.The interest *of preventing or hindering actions* for *damages is not an* interest *that deserves legal protection and cannot* be invoked *as grounds for safeguarding the confidentiality* of *a document - Article 12(6) of the EPL and Article 5(5) of Directive 2014/104/EU.*

The judgement *upheld was correct in finding that the defendant had failed to meet its burden of proof of proving the confidential nature of the information contained in the requested* documents. *This is enough to conclude that there can be no justification for refusing the Plaintiff access to documents* without *confidential content* that are *necessary to assess the existence of a right to compensation* for *the consumers represented.*

ccc. Any and *all documents to* which *the Plaintiff has* access in *the context of this* action *may* only be vti//zed, *ünlce* and *exolusively, in order to* e/er/r *the existence of the antioonoonential practices* described, *the effects of these practices on tenitófio* porfug//8s, *the detemilna8on of the exist8ng damage caused to consumers residing in Portugal by* these *practices* and its *quantifica8on,* and *to*

prove these facts in court as part of a future action for damages against *the Defendant. This is why the Judgement under appeal rightly emphasised that it has not been proven that the Plaintiff's access to these documents, under these extremely limited and controlled conditions, subject to legal sanctions* in the *event of a* breach, is likely *to cause any* damage *to a* legitimate interest of *the Defendant. This conclusion also decisively shapes the proportionality judgement, by delimiting the legitimate interests of the Defendant that* are at *stake here* and *whose restriction* would *need to be* assessed in *the light of the principle of proportionality.*

DDD. In view of the above, the judgement under *appeal does not* merit *any revision in its assessment of the assumptions of specificity*, *necessity* and *proportionality, and* the *sense of the* decision and *its reasoning must be maintained in their entirety.*

(A)(i) A document containing *the standard contractual terms and conditions of the RE ("Meliâ's Standard Terms") used between January 2014 and December 2015, referred to, inter alia, in paragraphs 19* and *24 of the European Commission* Decision*; and*

(A)(ii) 4.2J6 *Accommodation Sales Contracts signed between 2014 and 2015 and (iii) identification of the 140 hotels covered by* them.

EEA. The purpose of *obtaining* these *documents (first* to *second points) is*, *firstly, to ascertain and, secondly, to possibly prove (in a future action* for *damages) the content of the relevant conditions of the contracts concluded* between *the Defendant and tour operators during the relevant period. The anti-competitive infringement in question* centres *precisely on the anti-competitive* clauses of these *contracts and on other* clauses *and instrumental contents of* these *contracts.*

FFF. In the absence of *any proof that the anti-competitive* practice *in question did not cover or have any effect on Portuguese consumers - proof which the Defendant/Appellant has failed to provide - the Plaintiff (and any consumer represented), in order to be able to determine whether the practice identified by the European Commission corresponded to an infringement of competition law and/or had an effect on Portuguese consumers (namely by causing an overpricing for certain Meliâ hotel stay services which they purchased), must be able to determine whether the practice in question directly covered Portuguese territory, and/or had any effect on Portuguese consumers (namely by causing an overpricing for certain Meliâ hotel stay services which they purchased).In order to determine whether the practice identified by the European Commission amounted to an infringement of competition law which directly covered Portuguese territory,* and/or *which had an effect on Portuguese consumers (namely, by causing overpricing for* certain *Meliâ hotel stay* services *which they purchased, directly or indirectly, during the relevant period, in Portugal or abroad), it* needs *to* know *various aspects relating to* these *contracts, namely: (i) the exact content of those clauses*, and the *content* of *other contractual clauses may include relevant details; (ii) with* which *tour operators the contracts including those clauses were concluded during the relevant period: (iii) which Meliâ hotels were covered by those contracts; (iv) which sales* tools *were covered/affected by those contracts*; *(v) for how long those contracts* were *in force, and for how long they had an effect on the market.*

GGG. The information to be *obtained through access to* these *documents (together* with *other information contained in other requested documents) is indispensable for carrying out an economic analysis that* will *allow us to conclude whether or not the practice in question has caused damage to Portuguese consumers, and in what amount.*

HHH. The documents referred to above, to which access has *been requested, are suitable for obtaining* this *data, as they contain it. They are*

necessary for *the Plaintiff to obtain these data, because they are confidential data held by the Defendant, the third parties with whom it has contracted and the European Commission, and the Defendant is the best placed to provide them and to whom it is fairest to impose the burden of providing them. And* they do *not* go *beyond what is* necessary *to obtain the indispensable information.*

III. As these are documents compiled and *analysed as part* of *the public enforcement* process*,* the provision of these *documents by the Defendant* will *not* require *any significant* effort*. In addition, the contracts can* be *presented in digital format, on a CD or USB stick, which eliminates any logistical difficulty* in presenting them, and *it is* not *credible that the Defendant,* given *its corporate* and *organisational structure, does not have these contracts* in *digital format.*

JJJ. The Court did not prove that the contracts were only in force in 2014 and 2015. What was established, *by* appeal 4 *EC* decision*, & that* the *contracts were signed* in *2014* and *2015, and* their *period* of *validity is* uncertain. *Thus, there* is *no contradiction* and, *consequently, no defect can* be *attributed 4 the* judgement upheld.

KKK. Absolute protection in settlement proceedings, as the judgement under appeal *rightly states* (and as *mentioned above), never covers* pre-existing documents, it only covers documents *created* on *purpose for the settlement (*the settlement *proposal). If this were not the case, anyone* requesting *leniency or proposing a settlement could* attach to these *requests/proposals all the evidence of their offence and all the documents necessary for the success of the* claim, *in order to block* access *to* these *documents by the injured parties* and *the courts* and *prevent the* success of *the claim. Therefore, the documents requested are not covered by this absolute confidentiality protection*.

t.LL. Furthermore, as the *contested judgement also stated*, this *absolute* protection only *covers the evidence contained* in *a competition authority file* and *not that* which, *although it may* have *been analysed by the European Commission,* is *in the* possession of *the defendant. Therefore, the documents indicated* in *points i) and ii)* did not benefit from this *absolute confidentiality protection*.

(c)(ii) Documents, tables or studies setting out *its total sales from 2014 to the* present, *by* year, in detail *of all of the Defendant's contracts* for the *sale of* hotel-resort *accommodation* and, *furthermore, documents, tables or* studies *setting out or making it possible to extract the* percentage of *such sales that have been made under the Defendant's 4,216* hotel-resort accommodation *contracts* from 20 January 2014 to the present

MMM. One of the most widely used methods of calculating overpricing is to compare prices during the period of the infringement with prices before *and after that period.* Without this *comparison, it is possible to achieve misleading results, as in the hypothesis* that *the practice caused a generalised rise in prices in the hotels affected by the anti-competitive agreements during the period of the infringement. However, if the analysis only centred on the prices offered in* those *hotels during* that *period, it would not* be possible *to conclude* that *consumers could* have *had* access *to lower prices, because all prices* were *inflated.*

NNN. The argument that the R&R cannot be *required to prepare a study with the characteristics, detail and systematisation sought by the Plaintiff* and *admitted by the Court does not hold water. And, contrary to what the Appellant claims, the preparation of a study of* this *nature* falls precisely *within the framework of the admission* of *ex novo production of documents enshrined by the CJEU and the Court of First Instance. The* defendant *dismisses* this *framework with an alleged unconstitutionality that it* knows will *never* be *declared, on* the grounds *that the defendant* is being required *to "produce evidence* against *itself".* This *last argument* is relevant *because* it *constitutes an assumption* by the *Appellant that such studies will be unfavourable to it.*

OOO. *The* presentation *of* this *data,* in the form of studies or *any other* ex *novo document, does not lead, contrary to what the*

Appellant, 4 *substituting the plaintiff for the defendant in the burden of alleging and proving damages* in a *future action for damages. With* this *statement, the* Appellant *wants to confuse the distribution of the evidential effort with the impossibility of* accessing *confidential information that is exclusively in the possession of the Respondent, since we cannot ignore the fact that, without access to this data, it becomes impossible for the Plaintiff to prove the damage,* to the *clear detriment of the principle of effectiveness.*

PPP. Any pre-existing documents (in fact, any document that is not the transaction proposal or has been drawn up specifically to accompany it) do not merit absolute protection. This includes documents in which the R& has compiled data, namely to instruct the *transaction process before the Commission (as long as they were not created specifically to accompany the transaction proposal itself).*

(C)(iii) Document(s) in the RE's possession which show(s) or from which they show(s), either accurately or by estimation or approximation, for the period between January 2014 and the end of the term of any of the 4216 contracts: §1) the number of consumers resident in *Portugal who stayed in the 140 R& hotels which are the subject of the contracts* for the *sale of accommodation with restrictive cl4usulas;*
§2) the average number of nights *that consumers stayed in* these *hotels in Réunion.*

QQQ. The judgement does not omit the grounds for granting this request. It merely refers to the grounds of the preceding document, since the opposing arguments put forward by the parties are identical, which is legitimate, especially given the simplified procedure of this *type of case. The* judgement *under appeal can therefore* be *declared null and void for lack of reasoning.*

RRR. It is not credible that the Appellant does not have *in its possession all the data* necessary *to comply with this request for documents, particularly considering that it is common practice for hotels to ask guests for* their *residence details. Furthermore, the Appellant does not provide any evidence or even a single indication that such data does not* exist. *Now, the Court cannot take into account the allegation of alleged facts that are not supported by competent evidence, so the Appellant's argument that it does not have the guests' residence data is not worthy of consideration.*

SSS. Likewise, considering the structure and size of the Applicant and the advanced level of information *systems that we all know exist* in *these structures, it is not credible that this task would represent an unreasonable* effort *to carry out, since all the data will most likely already be in digital format, and it will only be necessary to process it properly, and many of the documents will already have* been *compiled, which is why it was necessary as part of the public enforcement process.*

TTT. The appellant also argues that, "due to the document retention rules in force in Spain and in most countries where Rê Meliâ operates, data of this nature and detail simply no longer exists". *This is such a vague allegation that it could never have been taken into account by the Court under appeal. In order for* this *argument to merit treatment by the Court, the Appellant would first* have had to *identify the countries affected by the agreements in question, and then analyse the respective legal regime* for the *preservation and storage of documents from each of them. The Appellant did not even attempt to do this because it would have meant providing some (albeit very limited) information on these contracts, which it endeavours to avoid at all costs. But even if, absurdly, it were to be confirmed, in relation to each of* these *regimes, that Meliâ was not obliged to keep and store documents dating back to* 2Of4/20f5, *this does not demonstrate the non-existence* of *such documents, since nothing in the legal framework of* the contracts *is in dispute.*

prevented R& from keeping them in its archives. What's more, *several of the documents requested were compiled for the purposes* of *the publicity* process and *have not been preserved. This is yet another alleged fact that* tg has *neither proved* nor tried to *prove* and *which* therefore does not (and *could not*) merit *consideration by the Court.*

(C)(iv) Documents containing or derived from *the minimum, average and maximum final prices for accommodation, by type* of *accommodation unit* in *each* fiota/, *in the 140 hotels covered by the contracts* for the *sale of accommodation with* restrictive *clauses*, *in offiine* and *online sales, and their evolution over time,* from *January 2014 to December 2020.*

UUU. The Appellant uses the *argument that this data no longer* exists, *going as far as* to say *that it did* not even exist *in its possession. The* fact is that if the applicant claims, as R8 repeatedly does, that the documents *no* longer exist *or never* existed, *or that certain data/information is no longer in its possession, without proving it, this is no reason for the Court not to* order the *production of such* documents. The fact is *that,* without such a *court order, the defendant* cannot *be* penalised *under Article 18 of the EPL if he* refuses to hand over *documents* which he later *proves* exist. If *the documents or data no longer* exist, and *Ra wants to* run the *risk* of later proving the *opposite, obviously R& cannot comply with* this *order to hand them* over, *which does not mean that such an* order will *not be issued by the Court.*

VVV. As for the need *to know data* up to *the end of 2020, it has already* been stated *that the temporal extent of the* effects of *the Infringement is not* determined *in the EC* Decision, nor is *the period of* validity of *the* ***contracts*** *known.* ***Furthermore, determining the damage*** *will involve* comparing *prices between the period of the* infringement and the period *after the infringement, which justifies* access to *this data* for *the* period *requested.*

WWW. This data is indispensable for the author to have an overview of the evolution of prices in *each hotel affected by the anonymous practices* in question. This is *how it will be* possible *(together with other fingers):*
(i) to compare the prices of the different hotels and ferr/fõ/ios; *(ii) to* caJru/ the vo/ume of *trade affected* by the *anti-competitive practices, including that which has been taken over by consumers in Portugal*; (iii) to *assess the overlap caused* by the *self-serving* practices in question. With this in mind, none of these *determinations is possible* without having access to *the* prices *charged at* these *hotels. And it is not enough to* know *the* prices charged *for the stays covered by the tourist packages, because it is* necessary to analyse *the differentiation* between *the prices charged in* these packages and *through other sales* channels*, in* particular *to conclude* whether *the practices have caused a generalised increase in prices in the various sales* channels.

(C)(v) - documents, including market research carried out *at the request of R&, which include or make it possible to calculate the market shares* of *Râ* and its *pifincipaic competitors (or their estimates), in the period referred to* in *c)*
(iii) in oada /2sfacfo *EU member*

XXX. It goes without saying *that a sophisticated* company *like* Me/i4 *estimates its* market *shares* and, *at least,* those of its main competitors. *Such estimates will be part of its* research *strategies* and it *is* inconceivable *that they do not* exist.

*YYY.*This *situation also* shows an asymmetry of *information, justifying* access to these documents. A company *the* size of *the Appellant* has under *its control access to internal data, studies of sectoral organisations* only *shared with their respective members, market studies commissioned by it... All this data, which would enable the measures ordered to be complied with,* is *not accessible to the Plaintiff.*

It is always theoretically possible for an injured party or their *representative to invest in the purchase of studies to estimate the data they need to assess whether they have a* right to *compensation as a result of* anti-competitive *practices. But if,* with *this argument, it is not possible for a consumer to ask the offending company for the documents it has* at its *disposal in which* this *data is already included (and on the* basis of *more* viable *input, because it comes* from *confidential sources), access to potentially very valuable information held by the offenders is cut off, and the result could be a complete lack of effectiveness* of *the right to compensation, given the high costs of such studies.*

AAAA. The data contained in the documents requested are necessary *to allow a properly informed* assessment of the appreciable *impact of the practices in question on each market and the possibility of broader effects of* these *practices*, *beyond the sales* of *accommodation* in *Meliá hotels directly affected (included in tour packages sold under the contracts that include the anti-competitive clauses in question). They could also make it possible to identify the* existence of *differences* in *market shares between territories, which could indicate the* success or *additional motivation of* spheres of *geographic distribution of markets and prohibition of sales outside the area allocated to operators* in *each market.*

(C)(vi) - Documents, including market studies carried out at the request of the Rê, which describe or from which can be drawn the different types/profiles of *consumers of accommodation in the hotel typologies among the 140 hotels that were* the subject of *sales contracts with restrictive clauses identified in the Decision, as* well as *average consumption patterns*

BBBB. Referring to explained grounds does not equate to an omission or insufficient reasoning.

CCCC. It is unlikely that these studies do not exist in the possession of the Respondent, and it is unfeasible for them to be *produced at the expense of the Plaintiff/Defendant, as this jeopardises the principle of* effectiveness.

In these terms and to the best of your judgement, the appeal should *be dismissed for lack of a legal basis and, consequently:*

(i) the contested decision be upheld in its entirety,

(ii) the public prosecutor's office is *fixed in accordance with Article 21 of the LAP, i.e. taking into account the value of the* case

Having complied with the provisions of the second part of Article 657(2) of the Code of Civil Procedure, it is necessary to assess and decide.

Since the subject-matter of the appeal is delimited by the appellants' conclusions (cf. Articles 635(4) and 639(1) of the Code of Civil Procedure) - without prejudice to questions which are known to the court of its own motion (cf. Article 608(2), by reference to Article 663(2) of the same Code) - the questions to be assessed are as follows:

1. On the grounds of an error of judgement, should the answer to the question of fact be amended in the terms proposed in the legal challenge?

2. The Court "a quo" declares one thing - *that the Decision and the Press Release are admittedly insufficient for the Plaintiff to substantiate the existence or plausibility of damages - and* its *opposite - that in the end the Decision and the Press Release are sufficient to fulfil that same assumption - thus incurring in a manifest and insurmountable contradiction that even renders the decision unintelligible and, to that extent, null and void, under the terms of Article 615(1)(a)/(c) of the Civil Procedure Code (CPC)?Is this* a manifest and insubstantial contradiction that renders the decision unintelligible, and therefore null and void, under the terms of Article 615*(1)(*a)(*c) of the Code of Civil Procedure (CPC)?*

3. The "a quo" court assumed that the 4,216 contracts at issue here were in force in 2014 and 2015, so *that in this respect there is an insurmountable contradiction* between the decision *on* the *mat5úa* de facfo and the *grounds of the* judgement, *resulting in a nullity under Article 615(1)(c) of the CPC?*

4. The preliminary ruling is ambiguous and unintelligible, since it identifies the beginning of the period of time to be covered by the information to be made available - "January 2014" - but leaves the end of that period in the balance, since it states that "it will probably have occurred after December 2015", without, however, specifying when, and is therefore null and void, under the terms and pursuant to Article 615(1)(c) of the CPC?

5. There is an insanely contradictory nature to the contested judgement because, at first (on page 52), it raises the possibility that the practice has extended beyond the time frame *defined in the Decision, and then says that the data for this period will be needed to compare prices over the years 2014 and 2015 with prices in the following years, which creates ambiguity and unintelligibility under the terms of Article 615(1)(c) of the CPC?*

6. The preliminary ruling on claim c)(iii}, by *simply referring to the previous claim for a statement of reasons, is null and void for lack of a statement of reasons, pursuant to Article 615(1)(b) of the CPC;*

7. Is the decision on request c) (vi), which simply refers to the previous request for a statement of reasons, null and void for lack of a statement of reasons, under the provisions of a/Yipo 615(1)(b) of the CPC?

8. What the Court "a quo" ended up sanctioning was a raid on the Appellant's internal organisation and information in order to try to ascertain whether there had been any effects or damage to the legal sphere of consumers resident in Portugal as a *result of the infringement sanctioned in the Decision, without first demonstrating the plausibility of such damage, which is why it constitutes an illegal decision?*

9. The "a quo" court reversed the burden of proof, j4 analysing the assumptions of specification, necessity and *proportionality as objections raised by the Defendant, which, being positive assumptions, the Claimant failed to prove.*

10. The documents in question *would* always *have been covered by the confidentiality of the transaction procedures, as they formed the basis for the decision issued by the Commission, so should the request have been rejected?*

11. Any interpretation of Articles 12 and 13 of Law 23/2018 of 5 June, to the effect that they allow the court to order the defendant to

producing "ex novo" evidence, i.e. compiling and *ordering economic data according to criteria dictated by the plaintiff, to prove the existence of a hypothetical damage in the context of a "public enforcement" action or as a preliminary to such an action, would this be unconstitutional on the grounds of violation of Article 20(4) of the Constitution of the Portuguese Republic?*

12. Can't the "a quo" court oblige the Defendant to collect, compile and organise information for a period of eight years (2014 to 2021), according to a schedule defined by the Plaintiff, to serve as a basis for proving the existence of damages and their quantification in the future and already announced "private enforcement" class action, replacing it and its experts in this evidential effort?

13. Due to the document storage rules in force in Spain and in *most of the countries where the Defendant Meliá operates, data of this nature and detail simply no longer exists, so the Appellant is also unable to respond to such a request?*

14. The decision to reject request c) (iv) requires the Appellant to collect and process data that, due to its age, simply no longer exists, and also imposes an impossible task in relation to the data that does exist, because it presupposes the collection and processing of the value of each and every one of the tens of millions of overnight stays made in the aforementioned 7-year period, in the 140 hotels in question, each with hundreds of rooms, of multiple types and marketed through countless sales channels, in order to determine which is the most expensive and cheapest and the respective average, broken down by hotel and by type of accommodation?

15. The contracts in question in the Commission's Decision were concluded with tour operators, intermediaries between accommodation providers and travel agencies, so the issue of prices in this context is particularly diluted and totally outside the Defendant's sphere and control, adding that this information is not suitable, much less necessary, for defining the material, geographical and temporal scope of the infringement?

16. The decision to order c) (v) is based on an error of judgement on the part of the "a quo" court because the information on market shares, especially of its competitors, is not under Meliá's control and can be obtained from companies specialising in market research or from public sources, which lus Omnibus can and must access if it sees fit, and the Appellant does not have market research that corresponds to what is indicated in this segment of the contested decision, so it has no way of complying with this order?

17. The judgment under appeal misinterprets and misapplies Articles 7(1), 12(2) to (9), 13, 14 and 19 of Law No 23/2018 of 5 June 2018 and Articles 1045 to 1045 of the EC Treaty.
1047." of the CPC?

II. BACKGROUND

Statement of facts

1. On the grounds of an error of judgement, should the answer to the question of fact be amended in the terms proposed in the legal challenge?

In the first part of its challenge to the factual crystallisation, the appellant argued that " its current points 16 and 17" should be removed from the "list of proven facts".

These points were given the following content:

16. Also:

"6. *LEGAL ASSESSMENT*

(29/ The *conduct referred to in* Section *5 of this* Decision *concerns* the *territory of the Union and the European Economic Community. To* the *extent that the conduct has* affected trade between *Member States, Article 101 TFEU applies.* The *operation of* these *agreements and concerted practices in Norway, Iceland and Liechtenstein* and their effect *on trade* between *the Union* and these countries *are covered by Article* 53 *of the EEA Agreement.*

{30} In this case, the Commission will be the one responsible for the country a#/icar *both Article 101 of the TFLIE* and *Article* 53 of the *fiE£ Agreement,* on *the* basis of *Article 56 of the* Agreement + ¸z/ma y'ez q¢ta *a aandut8* affect/óu d9 *modo signfficaf/v'o trade* between *the Member States.*

(31) In so far as the *EEA* Agreement is *not* specifically *mentioned, the* references *in the following recitals of* this Decision *to Article 101 TFEU, to the EEA Agreement and to competition on the internal market should be considered as including Article 53 TFEU.- (31) In so far as the EEA Agreement is not specifically mentioned, the references in the following recitals of this Decision to Article 101* TFEU, *to the effect on* trade *between* Member States and to competition on the Finnish *market should* be *considered as including, respectively, Article 53 of the EEA Agreement, the effect* on *trade between the Contracting Parties to the EEA Agreement and competition on the market covered by the EEA Agreement*.

6.2. Agreement between *companies*

6.2.2 Application to this *case*

(34) Rolling contracts constitute agreements within the meaning of Article 101(1) TFEU and Article 53*(1) EEA.*

(3õ) The relevant agreements were entered into between, *on the one hand*, *Mello* ot/ *Aparl'ofe/* S.A. */Var"onsiderenda (24)) and, on the other hand,* vdrfos opar8dores tt/r/sl/cos. Both parts of these agreements constitute undertakings for *the* purposes of *Article* 10 *TFEU* and Article 53 of the *EEA* Agreement.

(36) In the Relevant contracts, the EU and *the tour operators specialised in the profiles to which each term applied* and *thus differentiated between* European *consumers* based *in their country of residence.*

(37) Article 1, paragraph J, a/. e/ of Commission Regulation 33Q'20f027 *de//nees a* va/t/ca/ agreement *as 'an* agreement *or pr&tlae* concsrfada *between two* or more amp/eses, axeming *each* team of their *aúvidadas,* to *efeitos do acordo ou da prática concertada, a um nível diferente da cadeia de production or distribution* and *which concern the* conditions *under* which *the* parties may *acquire,* sell or resell *certain goods or* services*;

(38) For the purposes of the Relevant Contracts, Meliâ (the accommodation service provider) and the tour operators (the distributors or sales intermediaries for) the accommodation service, operate at different levels of the supply chain. *Therefore, the Relevant Contracts are* vertical *agreements* between *undertakings within the* meaning *of* Article 1*(1)(a) of* Regulation (*EU) No 330/2010.*

6.3. Restriction of competition by object

6.3.2 Application to this case

(43) The clause together with *Observation 16 is an example of a clause which, by specifying the territories* to *which the contract applies,* makes *a distinction* between *European consumers on the basis of their country of* residence and *which can result in the internal market being compartmentalised along national lines.*

(44) In particular, the first sentence of *the Clause* stated *that the contract was "valid only and exclusively for the markets that are specified in Observation 16". In the individual contracts between Meli4* and the *tour operator,* Clause *16 specified the country or* countries *in which the contract* was *valid, such* as *Spain, the United Kingdom, Germany and Italy.*

(45) The second and *subsequent sentences of the Clause allowed Meliâ to verify the "market of origin of any booking" directly - upon the consumer's arrival at the hotel - or indirectly - through the tour operator party to the contract when* "there is *any reasonable doubt". If it turned out that the consumer's country of residence was not* among those *listed in* Note *16, Meli4 had the right to reject the booking.*

(46) The general aim of the Clause and Note 16 was thus to *ensure that the tour operator adhered to the terms of the contract and that those contractual terms (namely the price) were valid* only *for* bookings *by consumers resident in the country or countries specified* in *Note 16. These provisions dissuaded tour operators, through the Relevant Agreements, from distributing hotel accommodation in countries* other *than those indicated in Observation* '16. *Thus,* these *agreements restricted the ability of tour operators* to *freely* market *hotel accommodation* in *all EEA countries* and *thus could have resulted in the compartmentalisation of the internal market according to national borders.*

(47) In this *respect, the Clause did not distinguish between bookings that followed unsolicited requests from consumers* and *those that were actively* marketed *by tour operators. Thus, the Clause not* only *discouraged tour operators from advertising Meliá's hotel accommodation outside the* specified *market or markets, but also covered* situations *where a* reservation in *one of Meliá's hotels* was *made at the direct request of consumers,* resident *outside the defined* markets, *to a tour operator party to the Relevant Contracts.*

(48) Consequently, the *content* and *purpose of the Meli4 General* Terms *Clause,* in *conjunction* with Observation *16 of the Relevant Contracts,* was to *restrict the ability of tour operators to market Meli4's hotel accommodation* and/or *respond to unsolicited requests from consumers residing outside the country or countries specified in* Observation *16.*

(49) Clauses in *hotel accommodation distribution contracts that restrict the ability of tour operators to freely market hotel accommodation in all EEA countries - such as*

such as Clause and Option *16 of the Relevant* Contracts - *have the* object of *restricting* competition *by limiting cross-border sales, thus constituting an infringement of Article 101(1) TFEU* and *Article 53(1) of the EEA Agreement.*

6.4. *Single and continuous offence*

6.4.2 Application to this *case*

(51) For *the distribution of accommodation in its resort hotels, in 2014* and *2015,* /Ue/iá *concluded* a series of contracts *(the Relevant Contracts, see recital (22)) which specified the* countries *for which the contract was valid. Thus, the contracting* pa/Yes *differentiated* between *EEA consumers* on *the* basis of their *country of residence.*

(52) The Relevant Contracts prove the existence of *a similar pattern adopted by Meliá with regard to the distribution of* its *accommodation.*
/This is underpinned by the fact that *the* Relevant *Contracts were all based on Meliá*'s *General* terms *containing the Clause. The identical* objective of *all* the Relevant Contracts *in* force in that *period* was to *differentiate between European consumers on the basis of their country of* residence. *Therefore, the agreements resulting from the Relevant Contracts* (see *recitals (34)* and *(49)) constitute a single and continuous infringement of Article 101(1) TFEU* and *Article 53(1) of the EEA Agreement." (sic).*

17. And finally, with re/evo:

"6.5 Effect on *trade*

6.5.2 Application to this *case*

(54) In 2014 and *2015, tour operators* that *were parties to the Relevant Contracts distributed accommodation* in *Meli4 hotels located* in *several Member States to consumers* residing *in several Member States or EEA* countries. *Since the* Relevant *Contracts contained restrictions on cross-border sales, they* were *liable* to *affect* trade *between Member States. The very* purpose of *these types of restrictions* was to *impede trade between Member States. Therefore, the* Re/evanfes *Contracts significantly affected trade between Member States* and between *the* contracting *parties to the EEA Agreement.*

6.6 Non-applicability of Regulation (EU) No 330/2010, of Article 101(3) TFEU and *Article 53(3)º of the EEA Agreement*

6.6.2 Application to this *case*

(59) The clauses in *hotel accommodation distribution contracts that* specify *the nationality of the* clients or the country/countries *to which the contract is valid* restrict the territories *in which, or the* clients *to whom, the tour operator party to the contract can sell the hotel accommodation.*

/\/In this case, *the clause restricts* the *ability of tour operators* to sell *accommodation to consumers outside the country/countries specified in* Observation *16 and also to respond to unsolicited requests from consumers* residing *in a country not* specified *in* Observation *16. (...)*

(60) Therefore, contracts that contain restrictive clauses such as the Clause in *conjunction with Observation 16* are *a* prave *restriction in the*

/Article 4(b) of Regulation (EU) No 330/2010, and do not benefit from the exemption from *the application of Article 101(1) TFEU provided for in that Regulation*.

(62) Firstly, the Clause - like any other clause of a similar nature - did not directly address Meliâ's desired e/'ici4ences*, namely to increase the room occupancy rate*, *taking into account different consumption patterns in the various markets (such* as *seasonality,* daily bookings, *behavioural* and *travel habits of residents of the different countries); or to ensure that the low prices of the rooms to be included in the* packages *reached the target consumers and* were *not used by tour operators in high-price markets.*

(63) Secondly, consumers *must get a fair share of the resulting benefit. In* this *case, even though there may* have *been a* positive *effect for consumers in some markets (namely those for whom the lower price was intended), "negative effects for consumers in a given geographic or product market (namely consumers who were prevented from buying the accommodation at* that *lower price) cannot* normally *be offset or compensated for by positive effects for consumers in another geographic or product market unrelated to the first".*

(64a) *Thirdly, clauses restricting the ability of tour operators to sell accommodation to consumers outside a specified country - such as the Clause - are not indispensable for improving the efficiency of Meliâ's hotel accommodation distribution system. The desired objectives (namely a higher occupancy rate and better yield management) can be achieved through other more direct and personalised solutions that do not differentiate between consumers* on *the basis of their country of residence or nationality (such as seasonal* rates and *"single package" clauses). Furthermore*, *research has shown that the vast majority of hotels do not have such clauses*, which calls *into question the existence of efficiencies and indispensability under Article 101(3) TFEU and Article 53(3) of the EEA Agreement.*

(...)" (sic).

By linking these figures to the first line of point 13, we can see that these mentions were made in reference to the statement:

It is clear from the decision in question *that.*

The "a quo" court justified its factual response, with regard to the block in which the aforementioned figures were inserted, in the terms set out below:

The facts described in points 11 to 17 are the result of the *European Commission's* decision *of 21 February 2020 in Case AT.40528 - Holiday Pricing, the only authentic text of which is English.*

The logical area of the decision questioned in this part of the appeal is that of establishing the simple facts and not of carrying out any operation of subsumption and drawing conclusions.

What emerges from the foregoing is that the Court considered that the European Commission's decision of 21 February 2020, referred to in point 11 of the statement of facts, is as follows.

This decision was officially published (see document C(2020) 893 final, in httos://se.europa_eu/coMD6tition/antItrusVcssea/dec_doca/40528/40528_418_3,odf_a 13.10.2023).

There is no doubt about its content.

The appellant did not challenge the probative value of the official document, as required by Article 640(b) of the Code of Civil Procedure.

The importance of the overall content of this document is unquestionable, given the understanding of the decision regarding the characterisation of the offence and the likelihood of damage arising. This importance is not limited to the operative part of the European Commission's decision.

Blocking access to all the available evaluative elements, which is apparently the aim of the appeal, would correspond to the materialisation of a blind justice system that would decide in the dark and, preferably, would issue unlawful *non liquet* verdicts, because procedural strategies geared towards purposes that are the opposite of those that motivate the creation of any rule of adjective law do not allow it to see.

What is stated has exclusive factual relevance, given the place where it is located. Drawing conclusions follows downstream, in another logical space.

The reaction to such conclusions is not to criticise the factual decision, but to confront it with legal subsumption and evaluation.

It is undeniable, because it represents a linear logical corollary, that the European Commission's Decision (the whole of it) and not just the operative part, exists and says what it says and if the Court extracts excerpts, whatever they may be and as long as they are relevant to the decision, as is the case in this situation, it is adequately performing its evaluative duty, which can only be challenged by evidence of equal importance and of the opposite sign.

There is no legal support for the claim to conceal from the Court facts that are relevant to the decision of the case, i.e. the substantial and extensive erasure of the content of the European Commission's decision document that emerged in Case AT.40528 - Melia (Holiday Pricing), which found the existence of anti-competitive practices by the Applicant that fall under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area.

There should be no confusion between the mandatory space corresponding to the dispositive area of a decision and the materiality of its reasoning and content. The latter has factual relevance, at least in the sense that the decision says what it says, and the importance that can be extracted from it later through legal analysis; the former is valid on both these levels and also within a cogent framework that can be immediately enforced, especially in terms of sanctions.

The emphasis on what had to be decided in the case in which the appeal was lodged, on what was accepted by way of instruction, and the obligation that always rests on the judge not to close his eyes in the search for the truth, in the context of the operation of the principle set out in art. 411 of the Code of Civil Procedure (albeit with the tempering that emerges from the operation of the principle of the device, with legal outcropping,

in particular in paragraph 1of article5 of the same set of rules), would always rule out the thesis put forward in the appeal.

There can be no doubt, in this context, that the part of the appeal that has now been heard makes no sense and has no reason to be upheld.

Furthermore, the Appellant argued that *"the facts (...) set out in footnote (10) and in paragraphs (66) and (86) of the Decision, concerning the contours of the offence, should* be taken as *proven facts".* According to the Appellant, such a matter would be of interest for the proper decision of the case because it would allow for a better *"assessment and evaluation of the necessity and proportionality of the requests formulated by the Plaintiff".*

According to the "a quo" court, no matter other than the one entered would be relevant to the decision.

This criterion is the right one. The facts established must clearly include only facts (i.e. elements that do not constitute conclusions of fact or law), and these factual elements must be relevant to what needs to be assessed - see, for example, Article 5 of the Code of Civil Procedure.

The cornerstone of the analysis proposed in this context is therefore the evaluation of the importance of the proposal for the decision.

The regime applicable in the case was well identified by the "a quo" court in terms that it would be pointless to reproduce in full and on which there is no real debate pending.

Articles 573, 574 and 575 of the Civil Code, taken together, associate the emergence of the obligation to provide information and the obligation to produce things or documents with the obligation to provide information.

the need to ascertain the existence or content of the right, on condition that the defendant has no *reason* to *oppose the endeavour".*

For its p a r t , the key directive known in European jargon as the

The "private enforcement directive" or, in Portuguese terminology, the Directive on *"*actions for *damages under national law for infringements of the competition law provisions of the Member States and of the European Union"* (Directive 2014/104/EU, transposed internally by Law no. 23/2018, of 5 June), established the following requirements for the compulsory collection of evidenceNo 23/2018, of 5 June), established as requirements for the compulsory taking of evidence the reasoned justification of the plausibility of the subsequent claim for damages, the precise and strict characterisation of the evidentiary material to be presented and proportionality (i.e., in the words of the EU legislator, the balanced consideration of the need to ensure a balanced and protective relationship of the relative proportions between "the *legitimate interests of all the parties and the third parties concerned*" - cf. recital 15 and Article 5(2) and (3) of the Directive.

There is an underlying concept throughout this article: that of the instrumentality or relevance of the evidence to the decision (clearly verbalised by the legislator with regard to confidential information) - cf. paragraph 4 and article 13 of the above-mentioned law.

It is within this framework that the challenge under consideration must be assessed.

In this respect, it is of no relevance whatsoever what position Meliá occupies in the "ranking" of hotel companies in Spain, at European level or worldwide. This is a matter that does not affect the definition of the plausibility of the right to compensation, nor does it affect the assessment of conflicting interests. Whatever the position

This does not remove the obligation to compensate for damages inflicted by a seriously unlawful act in competition matters.

The same is true of its labour dimension, its recognition and notoriety, its reputation, particularly in terms of sustainability, namely in terms of management, its social, climate and fiscal strategy and practice, or in the area of human rights, human capital management and health and safety at work.

The organisation of the tour operator market is also irrelevant to the decision requested, since the damage is not quantified in the present action, but rather the sole aim is to assess its plausibility, given that the unlawfulness is established (by virtue of the aforementioned Decision and the Masterfoods - *C-344/98 - Masterfoods and HB.* case law of the Court of Justice of the European Union), of the Court of Justice of the European Union, hereinafter also referred to as the CJEU) and considering that the restriction of competition by object is, in view of the facts (in a judgement of mere plausibility which is not that of a fine and rigorous assessment of the damage), likely to produce effects at the level of damage to citizens and companies.

None of the statements that have been transformed into facts are capable of ruling out the admissibility of damages as a result of the unlawful conduct.

For this action to produce documents, it is of no interest to *"determine the potential impact of the sanctioned conduct on the national market,* as *well as the potential universe of national consumers affected"* since this determination would always be quantitative and not relative to the possibility of damage arising, as opposed to the allegation and demonstration through solid and credible evidence that there was not

any impact on the national market, which would never result from what is being added. Such quantification is a matter to be considered in the subsequent action for damages and not here.

In this context, a case-by-case, one-off assessment is of no relevance, apart from eliminating all possibilities of damage. As such, it is not important to characterise the activity of the tour operators Thomas Cook and TUI.

The same applies to the number of hotels in Portugal or in the EEA (an acronym that the appellant has certainly used to designate the European Economic Area). It could never be inferred from this figure that there was no plausible damage resulting from the offence established at European level.

These are the constraints and limits that make it irrelevant to know the structure *of the market for the provision of tourist accommodation services, in particular, outside the channel of wholesale distribution by tour operators". This* would only not be the case if the statements relating to this matter had been accompanied by others, to be transformed into facts in the event of a successful investigation, which demonstrated that, with such a structure, damage could never arise from the illegal acts found, which has not materialised.

The *same* applies to the matter of the allegation of the existence of "strong *competitive pressure* from *operators such as Booking or Expedia", "which offer particularly intense discounts and upgrades, as does Meliá's direct sales channel, which does not make any price distinction according to the price of the booking"* since these spaces and channels have not been pointed out and demonstrated as exclusive, so the possibility of producing damages has not been ruled out.

References to the provision of "packages" by tour operators are also irrelevant in this context, as they have nothing to do with

Neither damage nor other forms of acquisition can be excluded, nor can this argument be raised in isolation, without a precise definition of the terms of the design of these "packages".

The good news that a competitive market existed at that level would not have the virtue of ruling out the possibility of damage or the distortions of the market that the appellant wanted not to be characterised by free competition.

In the same context of lack of prominence, for the same reason, there is mention of multi-supply, the absence of exclusive relationships and the possible invisibility of the hotel included in the package tourism market, not least because invisibility is not synonymous with irrelevance or diminishing the central importance of the hotel in the composition of costs, and not all the ways of acquiring the product involved in the Appellant's practice contrary to the law are concentrated there, so that its simple demonstration (not done in the case file) would never exclude the other possibilities of damage arising.

The knowledge of the agents in the national market and their possible inclusion (conclusive and therefore detached from the required factual singularity) in a non-concentrated market is also irrelevant to counter the plausibility of the appearance of damage justifying the strengthening of the investigation.

We are faced with the proposal to insert conclusions between the proven facts (thus violating a central prohibition) as well as the addition of circumstantial elements of no relevance to the decision which, once again, was about the obligation to produce documents and not about setting any amount of compensation due to the fulfilment of the assumptions of civil liability in tort.

If it had included among the proven facts the one claimed by the Appellant, the "a quo" court would have acted in violation of the constituted Law. Because it didn't,

The decision of the Court in this regard deserves confirmation, and this part of the case is unfounded.

resource.

It has been proven that:

1. The plaintiff is a private consumer association recognised by the Directorate-General for Consumers.

2. According to Article 2(1) of its Statutes, the Plaintiff: "is a non-profit organisation whose purpose is to defend consumers in the European Union, aiming in particular to increase consumer welfare, and in general to promote the rule of law, the environment and the economy of the European Union".

3. Under the terms of Article 2º (2) of the Plaintiff's Statutes: "For the purposes of the preceding paragraph, consumer protection shall mean the protection and promotion of the rights and interests of consumers who are citizens of the European Union or who are citizens of third countries resident in the European Union and shall include, but not be limited to, consumers who are members of the Association."

4. According to Article 2"(3) of the Plaintiff's Statutes: "The Association shall protect all consumer rights conferred on them by the legal systems of the European Union and the Member States of the European Union, including those arising from (...) Competition Law (...)".

5. Under Article 2(4)(i) and (m) of the Plaintiff's Articles of Association: "In pursuit of the purposes set out in the preceding paragraphs, the Association shall have the power to perform all appropriate legal acts to that end, including:

(...)

i) Promote and bring legal actions, or resort to alternative means of dispute resolution, to defend the collective and individual rights and interests of consumers in the European Union, to the extent permitted by the applicable laws, namely by resorting to "opt-in" or "opt-out" representative actions (including popular action) or any other procedural means of defending diffuse rights and interests, collective or individual homogeneous rights and interests, the aim of which may be, among other things, to obtain a declaration of the existence of rights and obligations, the imposition of behaviour and/or compensation for damages suffered by consumers as a result of a violation of their rights or interests;

(...)

m) Exercise any other competence conferred on it by rules of the European Union or its *member states."*

6. The Plaintiff does not carry out any type of professional activity in competition with companies or liberal professionals, nor does she control or participate in any entity that carries out such an activity.

7. *Pursuant to Article* 6(Jj) *of the Plaintiff's Articles of Association, any natural person who is an EU citizen or a citizen of a Member State may be a member*

of the Plaintiff.

third country resident in the EU, and which agrees with and wishes to promote the aims of the Association.

8. The Defendant is a company founded in 1956 and dedicated to hotel operation and management, the organisation of holiday clubs, tourist activities in general and real estate activities.

9. The defendant manages more than 370 hotels under the Gran Meli4 Hotels & Resorts, Paradiaus by Meliá, ME by Meliá, Meliá Hotels & Resorts, INNSiDE by Meli4 and Sol by MELIÁ brands.

10. 'Apartotel S.A.' is a subsidiary of the Defendant, which acts under the control and *direction of the Defendant, exercising decisive influence over it, determining its strategic decisions and behaviour in the market.*

11. The European Commission, on 21/02/2020, in Case AT.40528 - Holiday Púcing, adopted the decision to order the defendant to pay a fine totalling €6,678,000 for having infringed Article 101 TFEU and Article 53 of the EEA Agreement in the period from January 2014 to December 2015.It was found guilty of violating Article 101 of the TFEU and Article 53 of the EEA Agreement by implementing vertical contractual practices that differentiated between consumers on the basis *of their nationality or country of residence, restricting active and passive sales of accommodation in hotels it manages or owns to consumers who are nationals or residents of Member States it determines.*

12. The defendant was the sole addressee of that decision.

13. It is clear from the decision in question that:

"3. THE SERVICE IN QUESTION

3.1. Distribution of Meliá hotel accommodation

(8) Meliá markets its hotel accommodation to *consumers through direct and indirect channels. The direct channel includes the Meli4 website and call centre, as well as direct calls and reservations for guests without an appointment.*

(9) The indirect channel includes various travel and accommodation companies - such as travel agencies, tour operators (both online and physical), receptive agencies and bedbanks - which act as intermediaries between Meliá and its customers for the distribution of accommodation in Meliá hotels.

(10) Travel agencies and tour operators are mainly "business to consumer" companies, which buy accommodation directly from hotels or other intermediaries (receptive agencies and bedbanks) and distribute it to customers. They can distribute hotel rooms on their *own or combine them with other tourism and travel components to create a holiday package.*

(11) Reception agencies and bedbanks are business-to-business companies that buy hotel capacity from hotels and supply it to travel agencies and tour operators. They sign *contracts with hotels on the one hand and with tour operators and travel agencies on the other.*

3.2. The service in question, the relevant time period and the areas *geographical areas in question*

(12) The service at issue in this case is the distribution of hotel accommodation in Me/iá holiday *resorts* through vertical *contracts* between *Meli4, on the one hand, and tour operators, on the other.*

(13) These contracts contained clauses specifying the countries for which the contracts were valid. The contracting parties therefore differentiated between EEA consumers on the basis of their country of residence. The countries in question are all EEA countries. This Decision covers contracts in force in the years 2014 and 2015. According to Meliá, the residence criterion was used as an indicator to reflect differences in consumer behaviour.

14. And it works:

"4. PROCEDURE

(14) By decision of 2 February 2017, the Commission initiated proceedings under Article 2(1) of Regulation (EC) No 773/20049 against *Meliá in order to investigate further whether Meliá's contracts with tour operators for hotel accommodation contained a clause that could be used to discriminate between customers on the basis of their nationality and/or country of residence.*

(15) On 5 August 2019, Meliá submitted a formal proposal for cooperation in Case AT.40528 with a view to the adoption of a decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 ("proposal for a settlement"). The draft agreement contained:

(1) the recognition, in clear and unequivocal terms, of Meliá's responsibility for the infringement described in the draft agreement, with regard to the main facts, their legal classification, Meliá's role4 in the infringement and the duration of Meliá's participation in the infringement;

(2) an indication of the maximum fine that Meliá expected the Commission to impose and accept in the context of a co-operation procedure;

(16) The settlement proposal was conditional on the Commission imposing a fine not exceeding the amount specified in the settlement proposal.

(17) On 4 November 2019, the Commission adopted a Statement of Objections concerning Meliá's participation in the anti-competitive conduct, as described in this decision.

(...)" (sic).

15. Just like that:

"5. FACTS

(19) Meliá's commercial relations with tour operators for the distribution of hotel accommodation in Meliá holiday resorts are based on written contracts. Some of these contracts are based on Meliá's general terms and conditions ("Meliá General Terms").

(20) One of the clauses in Meliá's General Terms ("Clause") stated the following: "MARKET OF APPLICATION: contract valid only and exclusively for the markets that are specified in observation 16. the hotel may ask the agency/tour operator to verify the market of origin of any reservation in which there is any reasonable doubt, in any case, if upon arrival of the clients at the hotel, it is found that their country of residence is different from that agreed contractually, the hotel would have the right to reject the reservation".

(21) In individual contracts with tour operators, Note 16 was either blank or specified the country or countries for which the contract was valid.

(22) According to *the* information *submitted by Meliâ, 2 212 of Meliâ's contracts with tour operators that contained the Clause specified at least one EEA country in* Note *16 in contracts that were in force in 2014. In 2015, this figure was 2,004 contracts. Contracts containing the Clause and specifying at least one EEA country in Note 16* that *were in* force in *2014* and *2015* are together referred to *as "Relevant Contracts". For each of these years, this represented approximately 30 per cent of the contracts in force for Meli4 resort hotels.*

(23) In 2014 and 2015, 140 of Meliá's hotels were party to at least one Material Contract (corresponding to approximately 44.6% of all hotels).
- city and resort - operated by Meli4 in 2015, see recital (4)).

(24) The hotel accommodation, which was distributed on the basis of the Relevant Contracts, came from hotels owned, managed or rented by Meliá. Almost all the Relevant Contracts were signed by a person acting "in the name and on behalf *of Meliâ Hotels International". In only a few cases were the Relevant Contracts signed by a person acting in the name and on behalf of Apartotel, S.A., an entity 99.73 per cent owned and controlled exclusively by Meliá. In the latter case, Apartotel, S.A., was urged by Meliá to use Meli4's General Terms and Meliá also specified which countries were* to *be included in Note 16. Therefore, either* Me/iá or *Apartotel*, *S.A. were parties to all the Relevant Contracts.*

(25) The total value of sales realised by the Relevant Contracts was 75,908,194 euros in 2014 (corresponding to approximately 5.19% of Meli4's net turnover in 2014) and 68,145,187 euros in 2015 (corresponding to approximately 3.92% of Meliá's net turnover in *2015).*

(26) Meliá has confirmed that the necessary measures have been taken to completely abolish Clause and Observation 16 of its contracts.

(...)" (sic).

16. Also:

"6. LEGAL ASSESSMENT

(29) The conduct described in Section 5 of this Decision concerns the territory of the Union and the EEA. To the extent *that the conduct has affected trade between Member States, Article 101 TFEU applies. The operation of those* agreements *and concerted practices in Norway, Iceland and Liechtenstein and their effect on* trade *between the Union* and those *countries are covered* by Article *53 of the EEA Agreement.*

(30) In this case, the Commission is the authority competent to apply both Article 101 TFEU and Article *53 of the EEA Agreement, on the basis of Article 56 of the EEA Agreement, since the conduct significantly affected trade between Member States.*

(31) Insofar as the EEA Agreement is not specifically mentioned, references in the following recitals of this Decision to Article

Article 53 of the EEA Agreement, the effect on trade between the Contracting Parties to the EEA Agreement and competition in the territory covered by the *EEA Agreement are to be considered as including Article 101 TFEU, the effect on trade between Member States or competition in the internal market, respectively.*

6.2. Agreement between companies

6.2.2. Application to this case

(34) The Relevant Contracts constitute agreements within the meaning of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

(35) The Relevant Contracts were concluded between, on the one hand, Meliá or Apartotel S.A. (see recital (24)) and, on the other hand, several tour operators. Both parties to these agreements constitute undertakings for the purposes of Article 101 TFEU and Article 53 of the EEA Agreement.

(36) In the Relevant Contracts, Meliá and the contracting tour operators specified the territories to which each contract applied and thus differentiated between European consumers on the basis of their country of residence.

(37) Article 1(1)(a) of Commission Regulation (EU) No 330/201027 defines a vertical agreement as "an agreement or concerted practice between two or more undertakings, each of which carries out its activities, for the purposes of the agreement or concerted practice, at a different level of the production or distribution chain and which concerns the conditions under which the parties may purchase, sell or resell certain goods or services";

(38) For the purposes of the Relevant Contracts, Meliá (the accommodation service provider) and the tour operators (the distributors or sales intermediaries for) the accommodation service, operate at different levels of the supply chain. Therefore, the Relevant Contracts are vertical agreements between undertakings within the meaning of Article 1(1)(a) of Regulation (EU) No 330/2010.

6.3. Restriction of competition by object

6.3.2. Application to this case

(43) The Clause together with Observation 16 is an example of a clause which, by specifying the territories *to which the contract applies, establishes a distinction between European consumers on the basis of their country of residence and which may result in the internal market being compartmentalised along national lines.*

(44) In particular, the first sentence of the Clause stated that the contract was "valid only and exclusively for the markets that are specified in Observation 16". In the individual contracts between Meliá and the tour operator, Observation 16 specified the country or countries in which the contract was valid, such as Spain, the United Kingdom, Germany and Italy.

(45) The second and subsequent sentences of the Clause allowed Meliá to check the "travel market of any /ese/va" *directly - on the consumer's arrival at the hotel -* or *indirectly - via the tour operator party to the contract when* "there is *any* /azoable/ *doubt*". *If it turned out that the country of residence*

of the consumer was not among those indicated in Observation 16, Meliá had the right to reject the reservation.

(46) The general aim of the Clause and Note 16 was thus to ensure that the tour operator adhered to the terms of the contract and that those contractual terms (namely the price) were valid only for bookings by consumers resident in the country or countries specified in Note 16. These provisions dissuaded tour operators, party to the Relevant Contracts, from distributing hotel accommodation in countries *other than those indicated in Observation 16. Thus,* these agreements *restricted the ability of tour operators to freely market hotel accommodation in all EEA countries and may have resulted in the partitioning of the internal market along national lines.*

(47) In this respect, the Clause did not distinguish between bookings that followed unsolicited requests from consumers and those that were actively marketed by tour operators. Thus, the Clause not only *discouraged tour operators from advertising Meliá's hotel accommodation outside the specified market or markets, but also covered situations where a booking at one of Meliá's hotels was made at the direct request of consumers, resident outside the defined markets, to a tour operator party to the Relevant Contracts.*

(48) Consequently, the content and purpose of *the Meli4 General Terms Clause, in conjunction with Observation 16 of the Relevant Contracts, was to restrict the ability of tour operators to market Meliá hotel accommodation and/or respond to unsolicited requests from consumers residing outside the country or countries specified in Observation 16.*

{clauses in hotel accommodation distribution contracts that restrict the ability of tour operators to freely market hotel accommodation in all EEA countries - such as the Clause and the Observation
16 of the Relevant Contracts - have the object of restricting competition by limiting cross-border sales, thus constituting an infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement.

6.4. Single and continuous

offence [...j

6.4.2. Application to this case

(51) For the distribution of accommodation in its resort hotels, in *2014 and 2015 Meliá entered into a series of contracts (the Relevant Contracts, see recital (22)) which specified the countries for which the contract* was *valid. Thus, the contracting parties differentiated between EEA consumers on the basis of their country of residence.*

(52) The Relevant Contracts prove the existence of a similar pattern adopted by Meliá with regard to the distribution of its hotel accommodation in 2014 and 2015. This is supported by the fact that the Relevant Contracts were all based on the General Terms of /Ue/iá *containing the Clause. The identical aim of* all the *Relevant Contracts in force in that period was to differentiate between European consumers on the basis of their country of residence. Therefore, the agreements resulting from the Relevant Contracts (see recitals (34) and (49)) constitute a single and continuous infringement of Article 101(1) TFEU and Article 53(1) of the EEA Agreement." (sic).*

17. And finally, with relief:

"6.5 Effect on trade

[...]

6.5.2 Application to this case

(54) In 2014 and 2015, tour operators that were parties to the Relevant Contracts distributed accommodation in Meliá hotels located in several Member States to consumers residing in several Member States or EEA countries. Since the Relevant Contracts contained restrictions on cross-border sales, they were likely to affect trade between Member States. The very purpose of these types of restrictions is to prevent trade between Member States. The Relevant Contracts therefore significantly affected trade between the Member States and between the contracting parties to the EEA Agreement.

6.6 Non-applicability of Regulation (EU) No 330/2010, Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement

[...]

6.6.2 Application to this case

(59) The clauses in hotel accommodation distribution contracts that specify the nationality of the clients or the country/countries for which the contract is valid restrict the territory/territories in which, or the clients to whom, the tour operator party to the contract can sell the hotel accommodation.

In this case, the Clause restricts the ability of tour operators to actively sell accommodation to consumers outside the country/countries specified in Note 16 and also to respond to unsolicited requests from consumers residing in a country not specified in Note 16. (...)

(60) Therefore, contracts containing restrictive clauses such as the Clause in conjunction with Observation 16 *are a hardcore restriction under Article 4(b) of Regulation (EU) No 330/2010, and do not benefit from the exemption from the application of Article 101(1) TFEU provided for in that Regulation.*

[...]

(62) Firstly, the Clause - like any other clause of a similar nature - did not directly address the efficiencies desired by Meliá, namely increasing the room occupancy rate, taking into account different consumption patterns in the various markets (such as seasonality, different bookings, behavioural and travel habits of residents of the different countries); or ensuring that the low prices of the rooms to be included in the packages reached the target consumers and were not used by tour operators in *high-price markets.*

(63) Secondly, consumers should get a fair share of the resulting benefit. In this case, even though there may have been a positive effect for consumers in some markets (namely those for whom the lower price was intended), "negative effects for consumers in a given geographic or product market (namely consumers who were prevented from buying the accommodation at that lower price) cannot normally be offset or compensated for by positive effects for consumers in another geographic or product market unrelated to the first."

(64) Thirdly, clauses restricting the ability of tour operators to sell accommodation to consumers outside a specified country - such as the Clause - are not indispensable for improving the efficiency of Meliá's hotel accommodation distribution system. The desired objectives (namely a higher occupancy *rate and better yield management) can be achieved through other more direct and personalised solutions that do not differentiate consumers on the basis of their country of residence or nationality (such as seasonal rates and "single package" clauses). Furthermore, the investigation showed that the vast majority of hotels do not have clauses like this, which calls into question the existence of efficiencies and indispensability under Article 101(3) TFEU and Article 53(3) of the EEA Agreement.*

(...)" (sic).

18. In the European Commission's press release dated 21/02/2020, regarding *the above-mentioned Decision, the following is highlighted:*

"Action for damages

Any person or company affected by the anti-competitive behaviour described in this case can go to the courts of the Member States and claim compensation. Court case law and Council Regulation 1/2003 confirm that, in proceedings before national courts, a Commission decision constitutes binding evidence that the behaviour occurred and was unlawful. Although the Commission has imposed a fine on the companies concerned, damages may be awarded without reduction because of the Commission's fine." (sic).

19. The summary of this decision was published on 2 June 2020 in the Official Journal of the European Union.

20. By registered letter, dated 15/04/2021, the Plaintiff requested from the RS the documentary elements whose *exhibition she is requesting through the present action and on the same grounds, and granted the Defendant a period of fifteen working days to respond.*

21. By email dated 14/05/2021, the Defendant informed the Plaintiff of its refusal to grant *access to any of the requested evidence*, *on the following grounds: Portuguese law is not applicable to the right of* access to *documents that is sought; 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 Decision does not specifically refer to Portugal; the Decision does not state that the practice produced effects in Portugal; the request does not respect the principle of proportionality; the request includes access to confidential information, and there are no mechanisms to safeguard confidentiality.*

Rationale

2. The Court "a *quo" declares one thing - that the* Decision and the *Press Release are admittedly insufficient for the Plaintiff to substantiate the existence or plausibility of damages - and its opposite - that in the end the Decision and the Press Release* are *sufficient to fulfil that same assumption - thus incurring in a manifest and insurmountable contradiction which,*

*does it even make the decision unintelligible and, to that extent, null and void under the terms of Article 615(1)(*a)(*c) of the Code of Civil Procedure (CPC)?*

According to the applicant, there was a contradiction between the "sanitising order" and the judgment, which would have considered the "Decision and Press Release" sufficient to demonstrate the plausibility of the damage - because it invited *"the Plaintiff to present an improved initial petition, giving it a generous opportunity to set its sights, including indicating in full detail the target to be hit, by explaining that it should "concretise in a more developed manner the possibility or plausibility that the practice restricting competition in question has caused damage to national consumers, as alleged in articles 44 and 45 of the initial petition, taking into account the specific configuration of the infringement, in particular the fact that only contracts with tour operators are at stake"".*

The appellant has alleged a nullity that falls under Article 615(c) of the Code of Civil Procedure. This subparagraph is part of a set of provisions on grounds for nullity of the judgement. It corresponds to a list of internal defects in the judgement that are very relevant because they *"cause* it to be *null and void".* It is a list of internal defects in the final judgement, from the strictly formal - lack of signature - to omissions of structural elements that make up the reasoning, including unintelligibility, excess, omission, diversity of subject matter or logical collision.

In this context, having analysed the sentence, there is no logical clash between one part of what is stated there and any other area of what is assumed in it. In fact, not even that was alleged. There is no internal collision in the judgement. The grounds set out therein have coherently underpinned the judgement.

Even if the precept did not only refer to the judgement and its content, but was a pretext for rethinking the logical coherence of all the procedural documents, there could also be no confrontation between a final decision that all

After a long chain of procedural moments and phases and an order with merely ordering purposes that did not even reflect a conviction of the total lack of elements, but suggested the development of what had already been submitted, which would result in a petition presented in the meantime, necessarily prior to the judgement, therefore informing a broader framework of allegation and demonstration, so that there would never be a collision between the final decision and the previous context that had been overcome.

The rest are reasons for dissenting from the ruling that go beyond the field of nullities in which this issue is situated.

There is no alleged nullity of the judgement. It is

quite clear that the judgement has not been upheld.

3. The "a quo" court assumed that the 4,216 contracts at issue here were in force in 2014 and *2015, so that in this respect there is an insan4able contradiction between the decision on the facts and the grounds of the judgement, resulting in a nullity under Article 615(1)(c) of the CPC?*

Article 615(1)(c) of the Code of Civil Procedure refers to the logical collision between the decision and the judgement. This is clear and straightforward from a mere literal and grammatical interpretation of the precept.

The grounds of the judgement are the bases of fact and law (reasons of fact and law). When the operative part and these grounds lose their logical *continuity, there* can be talk of opposition between the grounds and the decision.

The rule does not, therefore, refer to the inadequate subsumption of the facts to the law, the failure to consider a certain fact or the wrong assessment of its meaning in the legal reasoning (which seems to correspond to the only aspect of the judgements that the

Appellant calls it a statement of reasons, as it does not also identify it with the "decision on the facts").

There is no contradiction between reasons of fact and reasons of law. When there is, there is an error of judgement, an inappropriate decision that deserves to be **overturned** in a challenge on the merits.

The object of the precept materialises when, for example, it is proven and subsumed under the law that someone has not contracted, technically affirming that they are not bound and, in the decision, condemning them to comply with a clause of the negotiating pact that has not been concluded.

We are therefore once again faced with an inadequate and technically inappropriate invocation of the nullity of the judgement.

Furthermore, the Court *of First Instance* consistently and without contradiction analysed the proven facts in the area in question, which, in particular, are those set out in paragraphs 11, 13 (13), 15 (22) and (25) and 17 (54) of the factual material established in the decision in question.

There is no blurry statement on the fringes of the crystallised body of facts, which was then converted into a decision opposing that same statement.

It makes no sense, nor does it have any legal or circumstantial basis, to claim an affirmative answer to this question.

4. The decision handed down is ambiguous and unintelligible, since it identifies the beginning of *the period of time to be covered by the information to be made available - "January 2014" - but leaves the end of that period in the balance, since it states that "it will probably have occurred after December 2015", without however specifying when, and is therefore null and void, under the terms and pursuant to Article 615(1)(c) of the CPC?*

The Appellant, in claiming in the terms that generated this question, resorted to a collage of excerpts disconnected from the respective contexts of affirmation to generate a picture of the appearance of obscurity and inscrutability that does not correspond to reality.

In defining the starting point for the need to provide documents, the court rightly took account of what it had established in its enquiry, specifically in paragraphs 16 (51), (52) and (54) of the statement of facts. It never departed from this.

In order to cover the entire year of 2014 referred to in the factual points without distinction, it is clear that the Court had to order the investigation to begin in January of that year.

There is no obscurity here and no impossibility of understanding. Everything is precise and there is no doubt about the obligation imposed in points i. and iv. of the operative part of the judgement criticised.

When, in this last point, it says "(which is likely to have occurred after December 2015)", it is also clear - outside of the imaginative selection that was used to jeopardise the decision - that the Court demanded that the Appellant hand over to the Court the documents "in the *possession of the Defendant which appear or occur, Ngoroso or by estimation or approximation, for the period between January 2014 and the end of the term of any of the content of the 4216 contracts for the sale of accommodation that took place later".*

Any minimally skilful Portuguese-speaking reader, plus a qualified interpreter, can read here, within the framework of very simple and straightforward semantics, what the addressee has to fulfil, namely: a) attach documents; b) relating to

c) for the period between January 2014 and the expiry date of the longest contract; d) containing the elements set out in the paragraphs of this point.

By referring to the likelihood that this longer-lasting contract would have finished producing its effects after December 2015, the Court, in a very cautious, realistic and appropriate manner, trying to obviate the appearance of any interpretative doubts and vaguenesses of non-compliance by analytical resistance, made the obvious very clear: we know that the contracts were concluded in 2014 and 2015, so it is clear that, depending on the date of conclusion and term of the contract, the party ordered should not try to limit the injunction to contracts whose term of performance ends in 2015 (just imagine, for hypothesis, the situation regarding a contract concluded in December 2015 valid for six months).

Only a very interested and very partial analysis, biased by interests, would be able to understand the simplicity of what was and is at stake here.

The inadequacy of the plea that generated the question analysed is blatant and, consequently, can only be answered in the negative, dispensing with any further considerations of support.

5. The contested judgement contains an insurmountable contradiction because, at first (on page 52), it raises the possibility that the practice has extended beyond the time frame defined in the Decision, and then says that the data for this period will be needed to compare the prices for 2014 and 2015 with the prices for the following years, which creates ambiguity and unintelligibility under the terms of Article 615 of the Civil Procedure Code (CPC)º ?

There is no contradiction (which, as has already been made clear, would have to occur between the grounds - of fact and/or law - and the decision, but what the appellant seems to be pointing to is a logical inconsistency between parts of the judgement).

This is outside the scope of the problem of nullity and only affects the analysis of the merits).

It is extremely sensible to admit, in argumentative terms, that the behaviour may have had subsequent reverberations.

There is also no denying the potential usefulness of comparing data relating to the strict period of contractual agreements with those relating to periods no longer covered by the unlawful practice, which are still unknown and to be ascertained in a different forum from the present one, which only had to take into account plausibilities and not define concrete damages and their causal link with the law-breaking facts admittedly practised by the defendant MELIA(...).

Likewise, it is clear that we are at the antechamber or preparing the operation of "private enforcement", a system which, while it is an adjunct to "public enforcement" - particularly because it also acts as a deterrent to unlawful behaviour - does not follow on from it, and in particular does not rule out the principle of full compensation arising from Article 562 of the Civil Code.

As can be seen from *CJEU* judgement *C-344/98 - Masterfoods and HB, the* limit imposed on national courts when ruling on an agreement or practice whose compatibility with the then Articles 85(1) and 86 of the EC Treaty had already been the subject of a Commission decision concerned the prohibition on going against what that Union body had decided and not on drawing all the consequences from it, particularly those covered by civil liability law.

In this respect, the European Commission's decision acts as a marker of wrongdoing and never as a limit to the calculation of damages suffered by citizens and companies.

When we say that there is no need to investigate the effects of an anti-competitive act on competition by object, we are thinking of "public enforcement" (for example, a practice that objectively falls under Article 101(1) of the Treaty on the Functioning of the European Union), and not "private enforcement" - see CJEU judgements *C-228/18 - Budapest Bank and* Others, C-345/14, Maxima Latvija and C-373/14, *Toshiba Corporation v Commission.* But let's not lose sight of the raison d'être for replacing the assessment of effects with an objective analysis, in accordance with stated in paragraph 36 of the first of the cited judgements in the following terms: "it is a *well-established fact that certain collusive behaviour, such as that which leads to the horizontal fixing of prices by cartels, may be regarded as capable of having negative effects, in particular on the price, quantity or quality of products and services" -* see also Judgments C-67/13 P, *CB v Commission* and C-345/14, *Maxima Latvj"a. It is* because it is known from the outset that effects are likely to be produced that proof of these effects is dispensed with for sanctioning purposes.

In such a context, neither the references contained in the question under consideration contradict each other (rather, they explore different possibilities of the reality under consideration, which is not being assessed in the context of the strict knowledge of the action for damages but only in the context of the judgement of the tax action for production of documents, which does not assert rights but only imposes procedural obligations), nor does that relationship, which arises within the legal grounds, have any connection with the problems relating to the nullity of the judgement attacked in subparagraph (c) of Article 615(1) of the Code of Civil Procedure. c) of Article 615(1) of the Code of Civil Procedure.

Therefore, the argument that led to the question being asked does not have the slightest chance of being valid, but rather its inadequacy is clear.

The logical line of the decision had to be based on the following points of control: are the technical requirements of the obligation to produce documents set out in Articles 573, 574 and 575 of the Civil Code, Directive 2014/104/EU and Law 23/2018 of 5 June met or not?in the affirmative, if the plausibility of the emergence of damage(s) (i.e. the justifiability of further action for compensation) has been demonstrated, what documents will the court have to have access to in order to be able to demonstrate the materialisation of this assumption of aquiline civil liability; and are the documents indicated potentially important for producing such evidence?

This was the line followed, with no discontinuities at this level.

Once again we are confronted with the same analytical cosmetics or interpretative resistance, as if the reader refuses to actually read the text they are confronted with because it doesn't serve their interests.

In this respect, what I said in the previous answer applies.

This part of the appeal, which does not even have a basis in the nullity provision relied on by the appellant, is unfounded.

6. *The preliminary ruling on claim c)(iii), by simply referring to the grounds of the previous claim, is null and void for failure to state reasons, pursuant to Article 615(1)(b) of the CPC;*

According to the Appellant, the Court would have generated the nullity provided for in Article 615(1)(b) of the Code of Civil Procedure by referring the decision on *"Request c) (iii) - documents containing or derived from, for the period between January 2015 and the End of validity of each of the 4216 (!) Contracts for the sale of accommodation concluded* between *2014 and 2015, §1 the number of consumers resident* in *Portugal who stayed in the defendant's 140(!) Hotels".*

Object of contracts for the sale of accommodation with restrictive clauses and §2 *the average number of nights that these consumers stayed in these hotels".*

This emerges from the fact that the court "a quo" entered on page 53 of the judgement that :

> *In this regard, R& reiterated the arguments put forward for the document background.*
>
> *Therefore, the Court also* reiterates *the considerations made here* about the *justification, necessity and lack* of *disproportionality for the R&'s* provision of *the information* in *question, when,* moreover, *compared with the justification presented by the Plaintiff for its necessity/essentiality.*

In this context, it should be borne in mind that the object of the of this statement is the following (and not exactly the one indicated):

> *iii. Document(s) in the RE's possession which show(s) or show(s), accurately or by estimation or approximation, for the period between January 2014 and the end of the term of any of the aforementioned* 42T6 *accommodation sales contracts which took place later (which will probably have occurred after December 2015):*
>
> *§1) the number* of *consumers resident in Portugal who stayed in the 140 hotels owned by the Defendant which are the subject of contracts for the sale of accommodation with restrictive* covenants,
>
> *§2) the average number* of nights *that consumers* have *stayed in these hotels in Réunion;*

Next, it is essential to note that the Appellant has identified the Court's reasoning, namely that the Court, considering that the problem to be considered was exactly the same as the one analysed above, reproduced its previous considerations.

It is also important to bear in mind that point b) of that paragraph and article is refers to a very different reality: the lack of grounds in fact and in law. And when we say lack, we are referring to the absolute absence of a basis (because the legislator has not made any precision in the aforementioned precept), not to the grounds for a judgement.

is deemed to be inept, meagre, undue or inadequate. For these cases, the appeal on the merits of the decision works instead.

In this case, there are undeniably grounds (and the appellant has even managed to cite them), which does not change because the appellant considers them to be insufficient or inadequate. And let it not be said that a statement of reasons by reference is equivalent to an absence of reasons, since this would only occur if the space for reference, for example by mistake, did not exist. Then you could say: you are referring to a non-existent statement of reasons because there is no justification for the decision.

This is not the case here, since it has not been pointed out that the justification to which reference was made was not, for example, entered in the case file by mistake. On the contrary, nothing was done to show that there was no previous justification (nor could this reasonably be the case given the content of pages 50 to 53 of the judgement under consideration).

Therefore, this part of the appeal is also unfounded.

7. Is the decision handed down on request c) (vi), by simply referring *to the previous request for a statement of reasons, void for lack of a statement of reasons under Article 615(1)(b) of the Civil Procedure Code?*

At issue in this question are the documents referred to in fl. 57 of the judgement cited by the Appellant, which are as follows:

> *vi. Document(s) in R&'s* possession*, including market research carried out for/acquired by R&, which* describe *or from which can* be drawn *the different* types/profiles of *accommodation consumers in the hotel typology(ies) among the 140 hotels* that *were* the object of *sales contracts with* restrictive *clauses identified in the* Decision, *as well as* their *average consumption patterns;*

The reasoning to which the Appellant refers is:

In this regard, *the Defendant argues in the exact same* terms as *the lawyers in the previous document.*

Therefore, the Court also reaffirms *the considerations made* about *the justification,* necessity *and lack* of *disproportionality* for *the R&'s* provision of the *information in question, when, moreover, compared to the justification presented by the Plaintiff for its necessity/essentiality.*

The grounds for referral are those relating to the attachment of *"Document(s) in the possession of the Defendant, including market studies carried out for/acquired by the Defendant, which include or which make it possible to calculate the market shares of the Defendant and its main competitors (or estimates thereof), in the period between January 2014 and the end of the term of any of the aforementioned 4216 contracts for the sale of accommodation which took place later, in each EU Member State".*

It's a complete, consistent and persuasive indication of where to start.

Anything but absent or omitted.

In this respect, the same applies as in the previous question.

There is no absolute lack of reasoning for the purposes of Article 615(1)(b).

The answer to this question is negative.

8. What the Court "a quo" ended up sanctioning was a raid on the Appellant's internal organisation and information to try to ascertain whether there had been any effects or damage to the legal sphere of consumers resident in Portugal as a result of the infringement sanctioned in the Decision*, without first demonstrating the plausibility of such damage, which is why it constitutes an unlawful decision?*

The plausibility of damage is a prerequisite for granting a request for the production of documents made in the context under consideration - cf. Article 5(1) of Directive 2004/104 and Articles 13 and 12 (the latter by reference to Article 13(2)) of Law 23/2018 of 5 June.

Consequently, this possibility could never be left out of the assessment of the court decision being criticised. It was the technical core of the judgement to be handed down.

And that consideration has been made.

With great emphasis, the "a quo" court considered that the compartmentalisation of geographical markets according to nationality and residence has the potential to directly affect competition in terms of prices, freedom of choice, quality and quantity of products available, and it is even tautological to conclude that these attacks correspond to quantifiable damage. In the same vein, he pointed out that, in the light of the evidence, Portugal was covered by the action contrary to the rules of healthy and fair competition, since all the countries of the European Economic Area to which Portugal belongs were affected.

In this line of argument, the Court of First Instance rightly discerned that there was a likelihood (one might add a "strong" likelihood) that national consumers had been excluded from the opportunity to find accommodation in the Defendant's hotels, either on Fuso soil or in another state in the area, under better contractual conditions and at better prices. If this were not the case, what would be the point of the market restriction'7 What are the gains? What would be the point? Would MELIA(...) be carrying out a useless act with no economic consequences by closing and compartmentalising markets, even though it is an economic agent? Could it be presumed not to have sought profit and unjustified advantages (because they were based on illicit acts)? Of course, the answers that must be given, in the light of the evidence, are all in favour of the plausibility of the damage.

For this reason, the Court concluded that the Defendant had duly justified, both in terms of allegations and evidence, the plausibility of a valid claim for damages (see, in particular, pages 40 and 41 of the judgement under appeal).

It is unreasonable in this context to confuse actions, purposes and claims. The special action for the production of documents has no connection (apart from the precursory and instrumental connection) with the subsequent ordinary declaratory proceedings aimed at establishing compensation. In the latter, it is not known or necessary to know what damage has been caused and what the specific causal relationship is with the unlawful acts. All that is considered is whether there are damages that could justify a subsequent claim for compensation.

It is in the action for damages that the losses will have to be precisely indicated. And these, in situations such as the one being assessed, can only be defined through documents in the possession of the counter-party or third parties (through operations that are generally highly complex).

It is not legitimate to confuse the identification of damage, the plausibility of which has been recognised and which justifies the obligation to produce documents, with any indiscriminate and unhelpful raid on someone else's collection of documents, since here you know what you want and the reasons why you want it. And the law allows it.

It makes no sense to confuse an essential mechanism for the *"private enforcement",* enshrined as fundamental by European Union Competition Law, with the exclusive *Common* Law figure of *"fishing expedition"* (or "pre-trial discovery") which, as the Appellant cannot ignore, refers to a mechanism not permitted by Continental Law because it corresponds to an enquiry without a process and without the obligation to indicate the reasons for the enquiry.

This figure (pre-trial discovery), which the United Kingdom tried to introduce as a valid structure in the negotiations for *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters* and which was not

This is precisely because it is incompatible with the cultural and legal framework of continental Europe (cf. Article 3(2) of the European Convention on Human Rights).This has nothing to do with the legitimate and legally well-characterised assessment of the plausibility of the emergence of damage and the justification of the need to produce documents in order to obtain fair compensation for anti-competitive acts previously determined with rigour by the body sanctioning those acts, in a context in which their concealment or non-access to them would correspond to a veritable denial of the exercise of rights that have been glimpsed and indicated, in other words, an effective blockage of access to the courts for the recognition of rights (or the exercise of the "right to a judge").

A different regime would mean that the fight against the violation of legitimate competition that is severely damaging to the market would never leave the public sphere and would never protect the rights of those who are ultimately the real victims, *i.e.* citizens and companies.

It is for this reason that it hopes that the type of defence and argumentation used by the applicant and its resistance to fulfilling its duty to disclose will become less and less common with the normalisation and vulgarisation of private enforcement in the area of competition and with the internalisation of the importance of protecting the real players in the economy and those harmed by it whenever it is shaken by anti-competitive practices.

After all, the word "economy" in its original linguistic root *oikos* + *nomos,* or rules for the (administration of the) house - where man livesJ points to nothing more than the citizen who rightly takes centre stage here.

There has been no acerbic and arbitrary raid, nor has the "a quo" court ruled without evaluating the plausibility of the damage, which it rightly and appropriately determined.

The answer to this question is no.

9. The "a quo" court reversed the burden of proof, since it analysed the assumptions of specification, necessity and proportionality as objections raised by the Defendant, and since these were positive assumptions, the Claimant failed to prove them.

The matter of the burden of proof, which can be found in Articles 342 to 348 of the Civil Code, is based on a set of rules defining the procedural subjects who must prove the facts invoked. Article 342 dominates this body of law, which places the onus on the Claimant to prove the constitutive facts of the right invoked and on the Defendant to reveal the veracity of those which prevent, modify or extinguish that right.

This system has important consequences for the judgement. If the person who had the burden of proof failed to do so, the case is judged against the interests they supported.

We are therefore dealing with a question of fact and not of law, with consequences downstream in the formation of the operative part of the judgement.

In this case, there is no doubt about who proved what. The facts were proven by the Plaintiff, by the Defendant's confession and by direct enquiry made by the Court. This is directly apparent from the reasoning of the factual answers contained in the judgement.

The Plaintiff has fulfilled its burden of proof.

The Defendant did not produce any evidence accepted as support for the factual crystallisation and this was not assessed against it in terms of the evaluation of impeding, modifying or extinguishing facts.

What was established and recognised was based on the demonstration made by the Claimant or in the terms described and not because the Defendant failed to prove something.

Plausibility emerged as described in the previous answer.

Necessity and proportionality arose from the assessment of the evidence considered relevant in the judgement and not from the failure of the defendant to prove any fact.

Since the damage was plausible, the documents were deemed necessary in view of their impact on what would have to be assessed in a subsequent declaratory action. Since the documents indicated in the operative part have a bearing on what is sought and it was not concluded that the order for production would cause more harm than good, it was recognised that the judicial production proposed in the application should be ordered.

The proposal to give a positive answer to the above question is therefore meaningless.

10. The documents in question would always have been covered by the confidentiality of the French authorities' *procedures, as they were* the basis *for* the *decision issued by the* Commission, *so should the application have been rejected?*

In this regard, the Appellant insists on raising a question before the Court of First Instance regarding the inclusion of documents covered by a settlement procedure, once again contravening the legal regime in force.

What Directive 2014/104 prohibits is national courts from ordering a party or a third party, *"for the purposes of* actions *for damages", to* disclose settlement proposals - cf. Article 6(6)(b) of the Directive - with such proposals having the content and meaning expressly defined in recital (18) as "any *voluntary communication*

submitted by a party or a third party".

an undertaking, or on its behalf, to a competition authority in which the undertaking acknowledges or waives its right to contest its participation in an infringement of competition law and its liability for that infringement of competition law, and specifically designed to enable the competition authority to apply a simplified or accelerated procedure".

There is no proposal for a transaction with this content among the documents that have been joined together in an orderly manner.

The same applies to the transposed regime, i.e. Article 14(5)(b) of Law 23/2018 of 5 June.

Similarly, no documents relating to the proposed transaction in the possession of the European Commission were ordered to be attached.

We are not dealing with a case that falls within the purposes set out in Article 12(1) of the same Law and the provisions of Article 13 of the same set of rules, and the provisions of Article 12(2) of the same Law have not been applied.

14.°. There is therefore no reason to consider what could be asked of the Commission and what could not.

It is clear from the above that this aspect of the appeal makes no technical sense and can therefore only be rejected if it recognises the positive meaning of the question asked.

11. Would any interpretation of Articles 12 and 13 of Law 23/2018 of 5 June, in which they allow the court to order the defendant to produce evidence "ex novo", i.e. by compiling and sorting economic data according to criteria dictated by the plaintiff, to prove the existence of a hypothetical damage in the context of a "public enforcement" action or as a preliminary to such an action, be unconstitutional, for violation of Article 20(4) of the Constitution of the Portuguese Republic?

The appellant wanted to ensure that a question of constitutionality was raised in this context.

However,he did so invoking reality e circumstantial procedural non-existent.

The defendant was not ordered to produce "ex novo" evidence by generating new documents.

The Defendant was not required to commission or carry out studies, make new enquiries or engage in expensive market analyses. It was required to do what it already had.

Once again, we are faced with a worrying resistance to reading what was actually written by the "a quo" court and a great pertinacity in reconstructing the decision for the purpose of expressing indignation against the non-existent, in the absence of reasons to validly attack the inconvenient reality.

Defendant MELIA(...) has been ordered to produce a document that it must necessarily have in its possession, relating to its contractual terms and conditions, which relate to its current commercial practice.

He has to put together the contracts that he has signed and that logo has to know and own.

In points iii, iv, v, vi and vii, it was ordered, always with express verbalisation, that documents "in the possession of the defendant" be attached. Any reader, even the uneducated and unskilful, can see here that these are documents that the Defendant had at the time of the decision and not any other documents to be ordered or analytical or evaluative texts to be obtained on the market or to be formed through the research of others.

At this point, therefore, we are assessing the seriousness of the non-existent.

What's more, we are asked to consider whether this fiction complies with the Constitution of the Portuguese Republic.

In this context, it is quite blatant that the allegation that generated the question makes no sense at all and that it deserves an immediate negative answer, without further consideration.

12. Can't the "a quo" court oblige RS to collect, compile and organise information for a period of *eight years (2014 to 2021), according to a criterion defined by the Plaintiff, to serve as a basis for proving the existence of damages and their quantification in the future and already announced "public enforcement" class action, replacing* esfa *and its experts in this evidentiary effort?*

There are no texts among the documents that could not be pieced together.

Everything that the Defendant was obliged to present to the court corresponds to documents in its possession, and it is unacceptable that a company of the size that the Defendant wished to demonstrate in these proceedings should have destroyed the documents that mark its commercial history in recent years and without which its very existence would be greatly diminished and even weakened by the risks of being sued in various types of actions or of not being able to assert rights in those actions or before the tax authorities.

Moreover, there is no evidence of any difficulty on the part of the Defendant, especially in the digital age, in locating and presenting its own documents, which are central to its commercial activity, since this matter is, beyond doubt, included in its burden of proof under the provisions of Article 342(2) of the Civil Code.

This part of the appeal is dismissed.

13. Because of *the document storage rules in force in Spain and in most of the countries in which the Defendant Meliá operates, data of this* nature *and detail simply does not* exist, *so the Appellant is also unable to respond to such a request?*

In this area, the same considerations apply as in the response previous.

Furthermore, we are dealing with a new issue, which was not considered by the "a quo" court, and it is only for this Court of Appeal to reassess the issues considered by the court that handed down the contested decision - cf. the provisions of Article 627(1) of the Code of Civil Procedure - or those which it did not consider under the terms of Article 665(2) of the same Code, a rule which is not applicable in the situation analysed.

No facts have been proven to support what is now being said, nor was the issue raised and assessed by the Court of First Instance, as it should have been so that it could now be reassessed by this Court of Appeal.

The rest has to do with the enforcement of judgements, forms of injunctive relief and the binding nature of final court decisions.

This is how we answer the question posed above, by rejecting it and denying it any merit.

14. The decision to reject request c) (iv) requires the Appellant to collect and process data that, due to its age, simply no longer exists, and *also imposes an impossible task in relation to the data that does exist, because it presupposes the collection and processing of the value of each and every one of the tens of millions of overnight stays made in the aforementioned 7-year period, in the 140 hotels in question,* each *with hundreds of rooms, of multiple types and marketed through countless sales channels, in order to determine which is the most expensive and cheapest and the respective average, broken down by hotel and by type of accommodation?*

As far as this question is concerned, the statements made in the answers to the previous two questions stand out.

There is no proven fact to support the claim. In fact, there is

a lack of allegations, proof and prior knowledge.

This is a matter based on allegations that were thrown into the file without support, in a serous manner, without any procedural insertion and contrary to established adjective law.

If the Defendant MELIA(...) wanted to invoke facts that prevented fulfilment and did not do so with the appropriate demonstrative effort, in the proper terms and at the proper venue, it blames itself.

This part of the appeal is certainly unfounded.

15. 0the contracts at issue in the Commission's Decision were concluded with tour operators, intermediaries between accommodation providers and travel agencies, so the issue of prices in this context is particularly diluted and totally outside the Defendant's *sphere and* control, *adding that this information is* not *suitable, much less necessary, for defining the material, geographical and temporal scope of the infringement?*

It would be idle, and therefore pointless, and therefore forbidden in the light of the principle of procedural economy, to rehash here references aligned with previous answers on a question that shares limitations that have already been analysed.

There is no evidence to allow the judgement to be made on the dilution of the subject matter of the
prices.

Without knowing the content of the contracts, we would be analysing a
fiction.

It is crucial to have an idea of the content of the documents referred to in point ii. the operative part of the judgement under appeal. They make the connection between the offence and the damage.

It would be condemning the further action to failure to keep crucial data for characterising the damage from the court that will judge it, and it would simply be making it impossible for the process in which this appeal was brought to have any useful effect.

In the same way, the injunction contained in point v. of the operative part of the judgement is very relevant for a future action for compensation for damages, and it cannot be admitted (nor proven, as would have to be the case) that MELIA(...), carrying out the commercial activity that has been established in the case file and being its business object, does not even know its final, minimum and average prices.), carrying out the commercial activity that has been established in the case and which is its object of business, does not know its final, minimum and average prices and does not even know whether its illegal practice has paid off and what its profits have been in the context of the contracts concluded with the illegal circumscription and closure of markets.

This aspect of the legal challenge is clearly unfounded.

16. The decision to order c) (v) is based on an error of judgement on the part of the "a quo" court because the information on market shares, especially of its competitors, is not under Meliá's control and can be obtained from companies specialising in market research or from public sources, which lus Omnibus can and must access if it so wishes, and the Appellant does not have market research that corresponds to what is indicated in this segment of the contested decision, so it has no way of complying with this order?

Some aspects that have already been analysed are repeated here. There are no facts to analyse, only opinions and hunches.

As has been said, what was ordered in the context of what was invoked was the gathering of documents in the possession of the Defendant, not the use of

specialised companies to obtain them, and nothing has been shown about any impossibility of complying with the order. Consequently, the "a quo" court could not have taken non-existent evidence into consideration, and there is therefore no room to rethink what has not been done.

was assessed in the light of the facts provided and patented by the Defendant, as it was obliged to do.

The facts preventing fulfilment had to be proven by the defendant, and the onus was on him to do so, as shown above.

It is unknown what information is under control. You either have the information or you don't. The documents either exist or they don't, and this non-existence could and would always have to be revealed during the investigation, which has not happened.

What had to be presented was:

> *vi. Document(s) in R&'s possession, including market studies carried out for/by R&, which include or which make it possible to calculate the market shares of the Defendant* and its *main* competitors *(or estimates thereof), in the period* between *January 2014 and the end of the* validity *of any of the aforementioned 4216 accommodation sales contracts which took place later,* in *each EU Member State,*

Nothing can be gleaned from the case file about the impossibility of attaching them, which has not only not been demonstrated, but is not even credible, since it is inconceivable that a company of the alleged size of the appellant would not have documentary evidence of the relative positions of its main competitors in a market that it even wanted to distort in its favour.

This aspect of the appeal does not stand up.

17. The judgment under appeal misinterprets and misapplies Articles 7(1), 12(2) to (9), 13, 14 and 19 of Law No 23/2018 of 5 June 2018 and Articles 1045 to 1045 of the Civil Code.
1047." of the CPC?

Articles 7(1), 12(2) to (9), 13, 14 and 19 of Law 23/2018 of 5 June form part of a legal framework already examined in this appeal.

No errors were made in assessing the probative force of the European Commission's decision for the purposes of Article 7(1), since the inescapable nature of the presumption of "the existence, *nature and material, subjective, temporal and* territorial *scope" of* the infringement found therein was not called into question, but the judgement made on plausibility and other assumptions was fully based on it.

The provisions of Articles 12 and 13 have been strictly observed, as mentioned above.

The provisions of Article 14 *do* not apply to this case, since "*a competition authority" has* not been ordered to provide evidence.

This appeal does not raise an issue that falls under the provisions of Article 19, the rule on popular action, and there is no material reason to claim that it has not been complied with.

No violation of the procedural mechanism set out in Articles 1045 to 1047 of the Code of Civil Procedure is apparent in the case file.

The answer to this final question is blatantly negative.

question.

III. DECISION

For the foregoing reasons, we dismiss the appeal and, consequently, we uphold the contested judgement.

Costs for the Appellant.

Lisbon, 23 October 2023

LISBON COURT OF APPEAL

Carlos M. G. and Melo Marinho
(Rapporteur)

Eleonora M. P. ten mel Viegas (1st Deputy)

Armando M. dauz Cordeiro (2nd Deputy)