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Ius Omnibus v Meliá – Access To Evidence Before Filing a Follow-on Action for Damages

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Introduction

On February 21, 2020, the European Commission (EC), in the context of Case AT.40528 – Holiday Pricing, ordered Meliá Hotels International, S.A. to pay a fine in the total amount of EUR 6 678 000.

The European Commission found that Meliá Hotels International, S.A. participated in a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the Agreement on the European Economic Area (the EEA Agreement) spanning the period from 1 January 2014 to 31 December 2015. The infringement concerns vertical contracts concluded between Meliá and tour operators (Kuoni, REWE, Thomas Cook and TUI), which contained restrictive clauses that discriminated against EEA consumers on the basis of nationality and place of residence. In this way, Meliá differentiated EEA consumers, including Portuguese consumers, on the basis of their nationality or country of residence, restricting active and passive sales of hotel accommodation to consumers who were nationals or residents in specified countries.

Consumer Protection Association Ius Omnibus brought a pre-filing discovery action against Meliá before the Competition, Regulation and Supervision Court (TCRS), requesting that Meliá be obliged to provide the necessary documents to confirm that, as suggested by the geographical scope of the practices described in the EC Decision Meliá – Holiday Pricing, consumers resident in Portugal have been harmed by the anti-competitive practices identified in the aforementioned EC Decision and, if so, the *quantum* of the damage caused. It did so with a view to bringing an action to declare the anti-competitive behaviour and obtain compensation, based exclusively on the infringement of competition law, exercising the right of popular action conferred on it by the Constitution (cf., Articles 52(3) and 60(3)) and Portuguese legislation (cf. Articles 2 and 3 of Law no. 85/95 of August 31 and Article 19 of Law no. 23/2018 of June 5), on behalf of harmed consumers residing in Portugal.

On March 7 2023, the TCRS judged the action brought by Ius Omnibus well-founded, ordering Meliá to deliver to the Court the following documents requested by Ius Omnibus: (i) document containing the Meliá's Standard Terms used between January 2014 and December 2015; (ii) the 4216 accommodation sales contracts concluded in 2014 and 2015 directly between Meliá and/or its subsidiary Apartotel, S.A. and intermediary operators, referred to in the EC Decision or,

alternatively, the complete list of these contracts, indicating for each one the parties, the Meliá's hotels covered, the authorized sales territory and the period of validity of the contract; (iii) document(s), table(s) or study(s) showing its total sales from 2014 to 2021, by year, in execution of all accommodation sales contracts, and also document(s), table(s) or study(s) showing or extracting the percentage of these sales that were made under the 4216 accommodation contracts from 2014 to 2021; (iv) document(s) showing or from which are derived, either accurately or by estimation or approximation, for the period between January 2014 and the end of the term of any of the aforementioned 4216 accommodation sales contracts, the number of consumers resident in Portugal who stayed in the 140 Meliá hotels that are the subject of the accommodation sales contracts with restrictive clauses and the average number of nights that consumers stayed in the Meliá hotels; (v) document(s) containing or deriving from the minimum, average and maximum final prices of accommodation, by type of accommodation unit of each hotel, from January 2014 to December 2020; (vi) document(s) including or making it possible to calculate the market shares of the Meliá and its main competitors (or estimates thereof), in the period between January 2014 and the end of the term of any of the said 4216 accommodation sales contracts, in each EU member state; and, (vii) document(s) describing or from which can be drawn the different types/profiles of accommodation consumers in the typology(ies) of the 140 Meliá hotels that have been the subject of sales contracts with restrictive clauses, as well as their average consumption patterns.

Of all the documents requested by Ius Omnibus, the TCRS only not ordered Meliá to deliver the autonomous documents identifying the 140 Meliá hotels covered by the aforementioned accommodation sales contracts, since it granted access to the aforementioned 4,216 contracts which include the identification of the hotels in question, and the initial petitions for damages brought against Meliá in any EEA Member State by consumers or consumer associations on the basis of Meliá's anti-competitive practices at issue in the European Commission's Decision.

Meliá appealed this decision to the Lisbon Court of Appeal (TRL) which, in a judgment dated October 23 2023, fully upheld the decision of the TCRS, and there is no further ordinary appeal possible.

The judgment of the TRL represents a major victory for the Portuguese legal system and jurisprudence. For the first time ever, a judgment in Portugal has ordered a company to provide access to evidence in a very broad way, including categories of evidence, moving away from the restrictive approach that is typical of Continental Europe.

Binding Effect of European Commission Decisions

As we know, the Council Regulation (EC) No 1/2003 of 16 December 2002 recognize the binding effect to national courts of the EC Decisions relating to restrictive competition practices under Articles 101 and 102 of the TFUE. Such binding effect – which had already been enunciated in the paradigmatic Masterfoods and HB judgment of the CJEU – is expressly enshrined in Article 16 (1) of the regulation, which states that when national courts rule on agreements, decisions or practices under Article 101 and 102 of the TFUE which are already the subject of an EC decision, they cannot take decisions running counter to the decision adopted by the EC and must also avoid giving decisions which would conflict with a decision contemplated by the EC in proceedings it has initiated.

Meliá argued on appeal that the Meliá – Holiday Pricing EC decision only has binding effects with regard to its dispositive part. As such, the court would only be bound to determine the existence of a breach of Article 101 TFEU and Article 53 of the EEA Agreement by Meliá, through a single and continuous infringement in the period relevant by implementing vertical contracts that differentiated EEA consumers on the basis of their country of residence, restricting active and passive sales of hotel accommodation. Accordingly, since it considers that the EC decision has no binding effects beyond this determination, Meliá argued for the deletion from the proven facts of the excerpts from the Meliá – Holiday Pricing EC decision that did not correspond to the dispositive part of the decision.

Contrary to Meliá's position, the TRL highlighted "*the interest of the overall content*" of the EC Decision, "*with a view to understanding the decision as regards the characterization of the unlawful act and the likelihood of damage arising*". For this reason, the relevance of the Commission Decision "*is not limited to the dispositive part*". Consequently, the Court can take excerpts from the EC Decision (as a whole), "*whatever they may be and as long as they are relevant to the decision*".

In this context, in the TRL's view, Meliá's pretension – for the "*substantial and extensive erasure*" of the content of the Meliá – Holiday Pricing EC Decision, which found the existence of Meliá's anti-competitive practices – would be equivalent to preventing the Court from accessing relevant facts to the decision of the case, which has "*no legal support*".

Pre-filing discovery actions: requirements and purpose

The TRL, confirming the legal regime applicable by the TCRS for the decision of the case, stated that under the terms established in Directive 2014/104/EU (cf., Article 5 (2) and (3)), transposed into the Portuguese legal order by Law no 23/2018 of June 5 (cf., Articles 13 (1) and (2) and Articles 12 (1) to (5)), the obligation to present evidence, for purposes of compensation, is dependent on compliance with the following requirements: (i) the reasoned justification of the plausibility of the formulation of a subsequent claim for compensation; (ii) the precise and strict characterization of the evidence to be presented; and, (iii) the proportionality of the request for the presentation of evidence, that is, the weighing of the legitimate interests of all parties and interested third parties.

Based on these requirements, the TRL rejected the arguments put forward by Meliá to include certain facts in the proven facts, for having understood that these facts, on their own or because they were unaccompanied by other allegations, were not relevant to rule out the plausibility of the emergence of damages arising from the anti-competitive practices determined in the Meliá – Holiday Pricing EC Decision.

In this context, the TRL considered that are irrelevant to rule out the plausibility of the emergence of damages arising from the anti-competitive practices determined in the aforementioned EC Decision and, therefore, to the decision to impose the presentation of documents in Meliá's possession, namely, the position that Meliá occupies in the ranking of hotel companies in Spain, at european or world level, its recognition, notoriety or reputation, the characterization of the activity of tour operators, the potential impact of the conduct sanctioned on the national market, the potential universe of national consumers affected, the number of existing hotels in Portugal or in

the EEA, the structure of the market for the provision of tourist accommodation services, in particular, outside the wholesale distribution channel by tour operators, the competitive pressure from operators such as Booking or Expedia, the availability of packages by tour operators, the knowledge of agents in the national market and their possible inclusion in an unconcentrated market.

The TRL pointed out that in the pre-filing discovery action, the aim is not to define and quantify the concrete damages and determine if there is a link between the damages and the anti-competitive practices in question, but only to assess the plausibility of the damages, ascertained that is the unlawfulness by force of the Meliá – Holiday Pricing EC Decision, and the CJJEU case law Masterfoods and HB, and considering that the restriction of competition by object identified by the EC is susceptible to produce effects in terms of damages emerging to citizens and companies.

In this context, the TRL states that the limit imposed by the binding effect of EC decisions refers only to the prohibition of contradicting the provisions of EC decisions, which does not mean that national courts are prevented from extracting from the EC decision all its consequences, namely those relating to civil liability. For this reason, in the words of the Court of Appeal, *"the European Commission's decision works as a marker of unlawfulness and never as a limit to the determination of damages suffered by citizens and companies"*.

Consequently, the fact that the EC Meliá – Holiday Pricing Decision is limited to identifying a competitive restriction by object–dispensing, for sanctioning purposes (public enforcement), of the evidence of its negative effects on competition -, does not mean that harmed consumers, in the subsequent private enforcement action, are prevented from proving the effects or damages arising from the restrictive practice of competition in question.

The TRL clarified that the decision in the pre-filing discovery action has to follow a logical iter: firstly, the court has to assess the verification of the technical requirements for imposing the presentation of documents, under the terms set out in Articles 573, 574 and 575 of the Civil Code, Directive no. 2014/104/EU and Law no.23/2018 of June 5; secondly, if these requirements are verified, namely the plausibility of the emergence of damages and, thus, a subsequent action for damages is justified, it is important to assess which documents the court will have to access in order to be able to demonstrate the materialization of damages, as an assumption for non-contractual civil liability; and, thirdly, the court will have to assess if the documents requested by the plaintiff are potentially relevant to prove the damages.

In its appeal against the TCRS decision, Meliá argued that the decision was unlawful on the grounds that it violated Article 12(2) of Law no. 23/2018 of June 5, claiming that the obligation to present documents constituted an invasion of its organization and information in an attempt to ascertain if had been damages to consumers residing in Portugal as a result of the infringement sanctioned in the EC Decision Meliá – Holiday Pricing (*fishing expedition*), without having previously demonstrated the plausibility of such damages.

The Court of Appeal considered that Meliá's argument could not proceed for two reasons. Firstly, because the plausibility of damage is an indispensable requirement for granting a request to present documents, with a view to the future filing of an action for damages for breach of competition rules (cf. Article 5 (1) of Directive 2014/104/EU and Article 12 (2) ex vi Article 13 (2) of Law no. 23/2018 of June 5) and, therefore, such plausibility could in no way fail to be assessed. The TRL confirms that this assessment was made by the TCRS which, with great importance, "*took into*

account that the compartmentalization 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 made available", recalling that *"Portugal is covered by the action contrary to the rules of sound and fair competition, since all the countries of the European Economic Area were affected"*.

Secondly, the TRL points out that it is not legitimate to confuse the identification of damage whose plausibility has been recognized which, therefore, justifies the obligation to present documents, with any indiscriminate intrusion on a set of documents in Meliá's possession, which have been properly specified and whose need for disclosure has been duly substantiated.

This would be equivalent to confusing, in the words of the Court of Appeal, *"an essential mechanism for «private enforcement», enshrined as a fundamental by European Union Competition Law, with the private «Common Law» figure of the «fishing expedition» (or «pretrial discovery»)"*.

This figure from the anglo-saxon tradition – which is not accepted in the continental legal framework – is not to be confused with the system of access to evidence established in the European framework and in Portuguese law, which not only requires an assessment of the plausibility of the emergence of damages but also imposes on the requesting party a duty to specify the evidence or categories of evidence as precisely and strictly as possible, as well as a duty to justify the need to present that evidence. Furthermore, taking into account the requirement of proportionality, it expressly prohibits *"requests that presuppose indiscriminate searches for information"* (cf., Article 12 (4) of Law no. 23/2018, of June 5).

As stated in recital (23) of Directive 2014/104/EU, when assessing the proportionality requirement, *"particular attention should be paid to preventing 'fishing expeditions', i.e. nonspecific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings"*, in such a way that *"disclosure requests should therefore not be deemed to be to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case"*, for not being *"compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible"*.

In the view of the Court of Appeal, if a different regime were to be accepted in a context in which not having access to evidence meant denying access to the courts for the recognition of rights, the fight against the violation of competition rules, with the negatives consequences that such violations have for the market, would be exhausted in *public enforcement* and would never protect the *"rights of those who are ultimately truly harmed, id est, citizens and companies"*.

Confidentiality of transaction processes

Meliá argued that the request for the presentation of documents requested by Ius Omnibus should have been rejected on the grounds that these documents were covered by confidentiality relating to transaction processes, since these documents served as the basis for the EC Decision Meliá – Holiday Pricing.

The Court of Appeal considered that Meliá's argument made no technical sense, given that Article

6(6)(b) of Directive 2014/104/EU and, consequently, the regime transposed into portuguese law (cf., Article 14(5)(b) of Law no. 23/2018 of June 5) prohibit national courts from ordering a party or a third party, for the purposes of damages actions, to submit evidence containing settlement proposals.

It follows that the documents contained in a public enforcement case in which there has been a settlement are not subject to this confidentiality protection if they are not, in themselves, a settlement proposal. Indeed, since the documents ordered to be presented by Meliá did not include any proposal for a transaction, Meliá's claim could not be accepted.

Conclusions

The judgment of the TRL in the Meliá case represents a big change of paradigm in our courts and a victorious revolution for the Competition Law and for the protection of those harmed by anti-competitive practices.

We terminate with a very expressive citation of the TRL that emphasises not only the importance of the duty to disclosure but also the importance of private enforcement for the protection of those harmed by anti-competitive practices.

Just like us, the Court of Appeal *"hopes that the type of defence and argumentation used by the Appellant and its resistance to fulfilling its duty to disclosure will become less and less common with the normalization and vulgarization of private enforcement in the area of competition and with the internalization of the importance of protecting the real players in the economy and those harmed by it whenever it is shaken by anti-competitive practices"*.

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** The author did not participate directly in the litigation of the case, although Sousa Ferro & Asociados was involved. All of the opinions established in the piece are those of the author and are not to be ascribed to Sousa Ferro & Asociados or any of its clients.*

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This entry was posted on Wednesday, November 22nd, 2023 at 9:00 am and is filed under Anticompetitive agreements, Confidentiality, Source: UNCTAD“>Damages, Portugal, Private actions, Private enforcement
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