**Case C-286/24**

**Request for a preliminary ruling**

**Date lodged:**

23 April 2024

**Referring court:**

Supremo Tribunal de Justiça (Portugal)

**Date of the decision to refer:**

4 March 2024

**Appellant:**

Meliá Hotels International, S.A.

**Respondent:**

Associação Ius Omnibus

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**Supremo Tribunal de Justiça (Supreme Court)**

**7.ª Secção (Seventh Chamber)**

…

**[Data identifying the case and the court]**

## I. BACKGROUND

1 **ASSOCIAÇÃO IUS OMNIBUS** brought against **MELIÁ HOTELS INTERNATIONAL, S. A. a special declaratory action for the disclosure of documents whereby it raised, in essence, the following heads of claim:**

1. That notice be served on the European Commission to submit, should it so wish, written observations to the court [of first instance] on the application made by Associação Ius Omnibus.

2. That notice be served on the defendant to submit, on the date, at the time and in the place specified by the court [of first instance], and in such a way as to make them accessible or provide them to the applicant, the documents listed in paragraph 62 of the application, accompanied, where appropriate, by such measures of assurance of proportionality as the [national] court may consider appropriate.

Or, in the alternative:

3. That the court [of first instance] determine which of the documents listed in paragraph 62 of the application, or such others as [national] court may consider [appropriate], are strictly necessary to enable the applicant to determine whether diffuse interests have been affected and whether consumers resident in Portugal have been affected by the anti-competitive practices referred to in the application, whether those practices have caused harm to those consumers and what the amount of that harm is.

4. That notice be served on the defendant to submit the aforementioned documents on the date, at the time and in the place specified by the court [of first instance] and in such a way as to make them accessible or provide them to the applicant;

In any event:

5. That access be granted to the documents strictly necessary to enable the applicant to determine whether diffuse interests and homogenous individual interests have been affected and whether consumers resident in Portugal are entitled to compensation for damage resulting from infringements of Article 101 TFEU and Article 9 of Lei No 19/2012 (Law No 19/2012) in connection with those anti-competitive practices, together with such measures of assurance of proportionality as the court [of first instance] may consider appropriate; and

6. That the defendant be notified of the intention of the applicant, acting on behalf of all consumers resident in Portugal, to bring against it an action for damages for the benefit of consumers resident in Portugal who have been affected by the anti-competitive practices in question, in the event that the harm to consumers' homogenous individual interests is confirmed, with a view to securing for consumers compensation for any harm caused to them by those practices, for the purposes and with the effects provided for in Article 323(1) of the [Portuguese] Civil Code.

It argued that:

a. The European Commission adopted the Decision of 21 February 2020 in Case AT.40528 – Holiday Pricing [('the Decision')], according to which, between January 2014 and December 2015, the defendant had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA), in contractually applying vertical practices that

differentiated between consumers on the basis of their nationality or country of residence by restricting active and passive sales of accommodation in hotels which it manages or owns to consumers who were nationals of or resident in the Member States which it itself determined, and for that reason ordered the defendant to pay a fine in the total amount of EUR 6 678 000 euros.

b. The Decision was adopted with the cooperation of the defendant (which benefited from a reduction of the fine for that reason) and is final, since it was not appealed.

c. The applicant seeks confirmation that, as the geographical scope of the practices described in the Decision appears to suggest, the defendant's anti-competitive conduct identified in the Decision harmed diffuse interests protected by the Portuguese Constitution and homogenous individual interests of consumers resident in Portugal, and, if appropriate, a determination of the *quantum* of the harm caused.

d. In the light of the information and the documents available to the public, the applicant cannot make in detail the determinations referred to in the foregoing paragraph or go beyond the general conclusion that the practice has had effects in Portugal.

e. In the event that the applicant shows, after obtaining the evidence it seeks in its application, that the defendant's anti-competitive conduct has harmed the diffuse interests and homogenous individual interests of consumers resident in Portugal, it intends to bring, on the basis of the evidence so obtained, an action at law seeking a declaration of anti-competitive conduct and compensation, solely on the ground of infringements of competition law, by exercising its right under the Portuguese Constitution and Portuguese law to bring an action in defence of diffuse interests on behalf of injured consumers resident in Portugal.

f. By letter of 15 April 2021, the applicant asked the defendant to provide the evidence referred to herein, for the reasons and for the purposes also set out in the application, and gave it a period of fifteen working days to respond.

g. By letter of 14 May 2021, the defendant informed the applicant of its refusal to grant access to any of the evidence requested, for the reasons given in the letter itself.

h. The applicant seeks access to the following documents, which are allegedly in the defendant's possession, without prejudice to any other documents or only some of them which the court [of first instance] may consider relevant and (sufficiently) necessary for the purposes of its application … [procedural details]:

In order to determine and prove the scope and effect of the anti-competitive practice in question:

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

ii. The 4 216 contracts for the sale of accommodation which were concluded in 2014 and 2015 directly between the defendant and/or its subsidiary Apartotel, S.A. and intermediaries, referred to in the Decision, and which contained the express condition that sales in the European Union must be made only to consumers who are nationals of, or permanently resident in, the countries referred to in the contract, or, alternatively, a full list of those contracts indicating for each of the parties the defendant's hotels included therein, the authorised sales territory and the period of validity of the contract.

iii. Documents that identify the defendant's 140 hotels included in the aforementioned contracts for the sale of accommodation concluded directly between the defendant and/or its subsidiary Apartotel S.A. and intermediaries between January 2014 and December 2015.

In order to determine, prove and quantify the damage caused to consumers:

i. Documents, tables or studies in the defendant's possession which show the total annual sales made by the defendant, from 2014 to date (2021), under all of the contracts for the sale of accommodation in its resort hotels, and, in addition, documents, tables or studies in the defendant's possession which show or from which it is possible to infer the percentage of those sales made under the 4 216 contracts for accommodation in the defendant's resort hotels, as identified by the Commission, from 2014 to date (2021).

[ii.] Documents in the defendant's possession that show or from which it is possible to infer, precisely or by estimate or approximation, for the period from January 2014 to the end of the term of the last of the aforementioned 4 216 accommodation contracts (which is likely to have been after December 2015):

1) the number of consumers resident in Portugal who stayed in the 140 hotels owned by the defendant that formed the subject of the contracts for the sale of accommodation containing restrictive clauses;

2) the average number of nights that consumers stayed at those hotels owned by the defendant.

[iii.] Documents in the defendant's possession which show or from which it is possible to infer the minimum, average and maximum final prices for

accommodation, by type of accommodation unit for each hotel, in the 140 hotels forming the subject of the contracts for the sale of accommodation containing restrictive clauses, by way of both offline and online sales, and their progression over time, from January 2014 to December 2020.

[iv.] Documents in the defendant's possession, including market studies commissioned or acquired by the defendant, which show or from which it is possible to calculate the market shares of the defendant and its main competitors (or estimates thereof) in the period from January 2014 to the end of the term of the last of the aforementioned 4 216 contracts for the sale of accommodation in each Member State of the European Union.

[v.] Documents in the defendant's possession, including market studies commissioned or acquired by the defendant, which describe or from which it is possible to infer the different types or profiles of guests staying at the various classes of hotel among the 140 hotels forming the subject of the sales contracts containing restrictive clauses identified in the Decision, as well as their average consumption patterns.

[vi.] Statements of actions for damages brought against the defendant in any Member State of the EEA by consumers or consumer associations on grounds of the defendant's anti-competitive practices referred to in the European Commission's decision [or, alternatively, identification of the respective court case numbers].

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Following i) the service of notice on the European Commission, ii) the service of notice by public announcement on all consumers in Portuguese territory and iii) the service of notice on the defendant:

The European Commission stated that it would not be submitting written observations.

…

… Documents adduced by the parties and the processing of each]

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The court of first instance then gave judgment upholding the action in which it held as follows:

'1. Let notice be served on MELIÁ HOTELS INTERNATIONAL, S.A., … to deliver to this court and add to the case file, in such a way as to make them accessible and provide them to the applicant by electronic means, the following documents:

i. "Document containing the defendant's standard terms and conditions of contract ('Meliá'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 4 216 contracts for the sale of accommodation which were concluded in 2014 and 2015 directly between the defendant and/or its subsidiary Apartotel, S.A., and intermediaries, referred to in the Decision, and which contained the express condition that sales in the European Union be made only to consumers who are nationals of, or permanently resident in, the countries indicated in the contract, or, in the alternative, a full list of those contracts indicating for each of the parties the defendant's hotels included therein, the authorised sales territory and the period of validity of the contract.

iii. Documents, tables or studies in the defendant's possession which show the defendant's total annual sales made from 2014 to date (2021) under all of the contracts for accommodation in the defendant's resort hotels, and, in addition, documents, tables or studies in the defendant's possession which show or from which it is possible to infer the percentage of those sales made under the 4 216 contracts for accommodation in the defendant's resort hotels, as identified by the European Commission, from 2014 to date (2021).

iv. Documents in the defendant's possession which contain or from which it is possible to infer, precisely or by estimate or approximation, for the period from January 2014 to the end of the term of the last of the aforementioned 4 216 accommodation contracts (which is likely to have been after December 2015):

1) the number of consumers resident in Portugal who stayed in the 140 hotels owned by the defendant that formed the subject of the contracts for the sale of accommodation containing restrictive clauses;

2) the average number of nights that consumers stayed at those hotels owned by the defendant.

v. Documents in the defendant's possession which show or from which it is possible to infer the minimum, average and maximum final prices for accommodation, by type of accommodation unit for each hotel, in the 140 hotels forming the subject of the contracts for the sale of accommodation containing restrictive clauses, by way of both offline and online sales, and their progression over time, from January 2014 to December 2020.

vi. Documents in the defendant's possession, including market studies commissioned or acquired by the defendant, which show or from which it is possible to calculate the market shares of the defendant and its main competitors (or estimates thereof) in the period from January 2014 to the end of the term of the last of the aforementioned 4 216 contracts for the sale of accommodation in each Member State of the European Union.

vii. Documents in the defendant's possession, including market studies commissioned or acquired by the defendant, which describe or from which it is possible to infer the different types or profiles of guests staying at the various classes of hotel among the 140 hotels forming the subject of the sales contracts containing restrictive clauses that are identified in the aforementioned decision, as well as their average consumption patterns.

2. Access to the documents in question is to be confined to the parties, their legal representatives and experts subject to an obligation of confidentiality.

3. Use by the applicant of the information contained in the aforementioned documents is to be confined to the bringing of an action for damages for infringement of competition law; that information cannot be used for any other purpose'.

2 On appeal by the defendant, the Tribunal da Relação (Court of Appeal) upheld in full the judgment under appeal.

3 By preliminary decision of 7 February 2024, the Supremo Tribunal de Justiça (Supreme Court) [('the STJ' or 'the Supremo Tribunal')] decided to allow the appeal in cassation to proceed.

**That decision stated the following:**

'…

Thus, this matter, in addition to not forming the subject of any precedent on the part of the Supremo Tribunal, is very complex and calls for a demanding effort of interpretation, inasmuch as it requires a combined analysis of provisions of national law and provisions of EU law in the light of the existing relevant case-law of the CJEU (see the judgments in Cases C-163/21, paragraphs 67 and 68, and C-57/21, paragraphs 72 to 77).

…

…' [Grounds for the admissibility of the appeal]

4 **The question referred to the STJ** as part of the 'special declaratory action for the disclosure of documents' which ASSOCIAÇÃO IUS OMNIBUS brought against MELIÁ HOTELS INTERNATIONAL, S.A, calls for the assessment and application of national law and EU law; in particular, it is necessary to determine how Articles 5(1) to (3) of Directive 2014/104/EU of 26 November [2014] and Articles 12 and 13 of Lei No 23/2018 (Law No 23/2018) of 5 June 2018 are to be interpreted and applied, in particular as regards compliance with the requirements of plausibility, necessity and proportionality upon which the adoption of the information access measures requested in this case are contingent.

The heads of claim raised by the applicant also require the assessment, interpretation and application of provisions of EU law.

**The appellant [in cassation] considers that a request for a preliminary ruling must be made** and sets out the specific questions to be referred.

We [the STJ] are aware that the (national and EU) courts and legal commentators take the view that the national court is under no obligation to make a request for a preliminary ruling only in the case where the question is so obvious as to leave no room for reasonable doubt as to the interpretation of how that question is to be disposed of (*acte clair* doctrine).

In principle and as a general rule, a request for a preliminary ruling is purely optional, in accordance with the second and third paragraphs of Article 267 TFEU.

However, there are exceptions to that rule.

One of these derives from the third paragraph of the aforementioned Article 267 TFEU, pursuant to which a request for a preliminary ruling is compulsory where a question is raised before a 'court or tribunal of a Member State against whose decisions there is no judicial remedy under national law', which is to say where the question is raised before a court or tribunal of a Member State which adjudicates at final instance, as the STJ does.

Nonetheless, it is also common ground that the obligation to make a request for a preliminary ruling incumbent on the STJ, the national court, is not absolute.

That rule has exceptions, one of these being that the provision to be applied must be so clear and obvious as to leave no room for reasonable doubt (see in this regard Mariana Nogueira Sá, *Artigo 267 TFUE: Lex Imperfecta? Das Consequências da Omissão do Reenvio Prejudicial à Luz da Lei Civil Portuguesa*, p. 24 et seq., where the author, citing the judgment of the Court of Justice in *Cilfit*, lists the three situations in which a national court, notwithstanding that it adjudicates at last instance, is exempt from the obligation to make a request for a preliminary ruling).

This being an exception to the compulsory nature of a request for a preliminary ruling, 'the court or tribunal of a Member State against whose decisions there is no judicial remedy under national law must be certain that the interpretation in question is also obvious to the other courts or tribunals of the Member States and to the CJEU' (Alessandra Silveira, cited above, p. 4).

Consequently, 'a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law', according to the judgment of the [Court of Justice] of 9 September 2015,

*Ferreira da Silva e Brito*, paragraph 44, cited and annotated by Alessandra Silveira, cited above.

It follows from this that a failure to submit a request for a preliminary ruling may undermine the effective judicial protection of the rights that EU law confers on individuals.

In the light of the case-law of the CJEU, it may be concluded that a court or tribunal of a Member State which adjudicates at last instance must 'comply with its obligation to submit a request for a preliminary ruling provided that it is seised of a question relating to EU law'.

It will be exempt from that obligation only if it concludes that 'the question is irrelevant, that the provision of EU law in question has been interpreted by the CJEU or that the correct application of EU law is so obvious as to leave no room for reasonable doubt as to interpretation' (Alessandra Silveira, cited above, p. 14).

This case, as, moreover, is noted by the preliminary decision allowing the appeal in cassation to proceed, calls for a determination of the criteria that '*must inform compliance with the requirements of plausibility, necessity and proportionality when it comes to applying the mechanism for access to specific documents of the LPE, in particular whether it is sufficient for this purpose simply to rely on an adverse decision of the European Commission*'.

There is no known decision of the STJ on the question forming the subject of this case.

As stated in the aforementioned preliminary decision of this court, 'this matter, in addition to not forming the subject of any precedent on the part of the Supremo Tribunal, is very complex and calls for a demanding effort of interpretation, inasmuch as it requires a combined analysis of provisions of national law and provisions of EU law in the light of the existing relevant case-law of the CJEU (see the judgments in Cases C-163/21, paragraphs 67 and 68, and C-57/21, paragraphs 72 to 77)'.

As the appellant rightly notes, this case concerns the '**interpretation and application of provisions originating in the directive concerning actions for damages, more specifically Article 5(1) thereof, and of the requirement as to the plausibility of the [claim for damages] laid down there**', and, since the STJ is the national court adjudicating at last instance, this question must be the subject of a request for a preliminary ruling under **point (b) of the first paragraph of Article 267 TFEU**.

…

… [Question for a preliminary ruling as requested by the appellant]

5 In the light of all the considerations set out, the STJ considers it appropriate to stay the proceedings and submit a request for a preliminary ruling to the Court of Justice under Article 234 of the EC Treaty (a system intended to guarantee a fundamental principle of the [EU] legal system: the principle of uniformity in the interpretation of EU law).

…

## II. Decision

**[After having been notified of it, the parties gave their views on the request for a preliminary ruling that was to be submitted to the Court of Justice. By order, the STJ agreed that it was appropriate to add a first question to be referred, an answer in the affirmative to which would resolve the issue concerned. By order of the STJ, which forms part of the present request, the STJ raises the following questions for a preliminary ruling].**

In the light of all of the foregoing and in accordance with the provisions cited above, it is decided that the appeal cannot proceed further and that the following questions must be referred to the Court of Justice for a preliminary ruling, the proceedings [pending before the STJ] being stayed pending a ruling from the Court of Justice:

**1. Is Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 applicable to an action for access to evidence prior to the bringing of an action for damages within the meaning of Article 2(4) of that directive?**

**If the foregoing question is answered in the affirmative:**

**2. Does the requirement as to the plausibility of the [claim for damages] laid down in Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 always compel the applicant to demonstrate that, in the case at issue, harm is more likely to have been caused to the consumers represented, in this instance those resident in Portugal, than not?**

**3. May national courts base the criterion as to the plausibility of the [claim for damages] laid down in Article 5(1) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 exclusively on the existence of a decision adopted by the competent competition authorities[?] In particular, what bearing would it have on this analysis if the decision in question were one adopted as part of a settlement procedure relating to a vertical infringement by object of EU competition law?**

…

Lisbon, 4 March 2024 [procedure]