# The *Eturas* case

## Online platforms offer no special protection for possible cartel conduct

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The European Commission's scrutiny of ecommerce business practices is increasing; there is an ongoing sector inquiry as part of the digital single market (DSM) strategy, launched in May 2015, together with large-scale investigations into Google, Amazon and several Hollywood studios. In addition, national competition authorities (NCAs) have been actively challenging the commercial terms of online platforms – for example, in the online hotel booking sector and, more recently, in an investigation by the German competition authority of Facebook. In these cases, authorities must confront the challenge of applying traditional competition rules to increasingly innovative and complex digital tools and business models.

A preliminary reference from the Lithuanian Competition Council (LCC) to the Court of Justice of the European Union (CJEU) touched upon the difficulties that come with regulating online business practices. The CJEU recently handed down its judgment on whether restrictions on discounting on an online booking system used by travel agents could amount to an anticompetitive concerted practice under article 101(1) of the treaty on the functioning of the European Union (TFEU).

### Background

Eturas UAB (Eturas) licenses and administers an online booking system for travel packages, E-TURAS, which is used by multiple travel agents in Lithuania. The LCC investigated whether travel agencies were co-ordinating the discounts on tours offered to consumers purchased through the E-TURAS booking system.

The LCC found that the director of Eturas emailed travel agents via E-TURAS asking them to vote on whether discounts should be reduced. Some but not all participating travel agents responded. Following this, a notice (the Notice) was sent by the system administrator via the internal E-TURAS messaging system, informing travel agents that based on the travel agents' feedback, E-TURAS "will enable online discounts in the range of 0% to 3%. This 'capping' of the discount rate will help to preserve the amount of the commission and to normalise the conditions of competition. For travel agencies which offer discounts in excess of 3%, these will automatically be reduced to 3%." Subsequently, technical modifications were made to the E-TURAS system, limiting discounts to 3% for online bookings, such that travel agencies had to take additional technical steps to apply a higher discount on an individual basis.

The LCC found that 30 travel agencies, together with Eturas as a facilitator, had been participating in concerted practices which amounted to a cartel-type infringement of both EU and national competition law and imposed fines. The travel agency that reported the conduct to the LCC was granted immunity from fines.

In its findings, the LCC considered that the travel agents could reasonably have assumed that other travel agents would have received the Notice and followed the initiative, and could have publicly distanced themselves (but did not) from the discount-capping scheme announced by the system administrator (ie Eturas). The LCC held that, on the facts, the travel agents had tacitly consented to the discount-capping scheme. The arguments by some travel agents that they were not aware of the Notice or did not sell any travel packages on the E-TURAS system during the relevant period did not succeed in avoiding liability.

The LCC's decision was challenged before the Vilnius District Administrative Court, which upheld the actions in part and reduced the fines imposed. Both the applicants in the main proceedings and the LCC lodged a further appeal with the Lithuanian Supreme Administrative Court, which in turn referred two related questions to the CJEU for a preliminary ruling under article 267 TFEU: (1) whether the sending of a computerised message by the administrator of an online travel booking system is sufficient to presume knowledge and tacit consent, in the absence of any act of public distancing; and (2) if the sending of such a message is not sufficient to establish a concerted practice, what factors should be taken into account in deciding whether undertakings participating in a common system are taking part in a concerted practice?

### CJEU judgment

The CJEU considered that the "circumstances are capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice." However, this is subject to two important considerations:

- **Awareness of the anticompetitive proposal.** First, the CJEU stressed that the "mere dispatch" of the Notice cannot support an inference that the recipients were aware or ought to have been aware of its content; such an inference would violate the presumption of innocence. However, a rebuttable presumption of knowledge may arise where "other objective and consistent indicia" suggest the communication was in fact received and read. Where the message was not read and understood, no presumption of knowledge arises.

  This qualification is important in today's world where many of us typically receive hundreds of emails per day. It would be unrealistic to presume that email/message recipients necessarily notice, let alone read, all messages that have been sent to them. However, it is unclear what "objective and consistent indicia" the CJEU had in mind and this could lead to practical dilemmas. Responding to or forwarding a message, or replicating its content in other communications, would surely suffice. But would merely opening a message (even by accident) be enough, and what of email/message systems that allow content to be previewed without actually opening the message?
- **"Public distancing".** Second, where a presumption of knowledge arises (for example, objective and consistent indicia suggest a recipient received and read the message's content) it can

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be rebutted by proving, under national evidence laws, that the recipient had not in fact read the message. The CJEU made it clear that the national court should not make it excessively onerous for parties concerned to rebut this presumption.

Alternatively, having read the message, parties may rebut the presumption of concertation by publicly distancing themselves from the proposal. Under established law, to be effective, such distancing must be communicated externally, and in clear and unambiguous terms.

In *Eturas*, we have the unusual position that the potential cartel participants did not know who else was a party to the proposed arrangements. The question arose: how can a party distance itself from a group whose members are unknown to it? The CJEU took a pragmatic view: the party should just tell the system administrator that it wants nothing to do with the proposal. Alternatively, one can of course report the matter to a competition authority.

Furthermore, the CJEU also noted that a party can avoid liability by breaking the causal link between the proposal and its market conduct. This can be done by "systematically" applying a discount in excess of the 3% cap proposed by the system administrator. In adopting this view, the CJEU departed from the recommendations of Advocate General Szpunar, who considered that discounting below the 3% cap would not be a defence to an infringement of article 101 TFEU as "such conduct could not be easily distinguished from mere cheating on other cartel members". The CJEU judgment demonstrates a welcome pragmatic approach that avoids excessively expanding liability under article 101 TFEU for the actions of a third-party online platform administrator.

## US developments

In *Eturas*, an online platform was instrumental in facilitating collusion without competitors' active participation. However, as technology becomes smarter, more complex and automated, it will continue to test the boundaries of antitrust enforcement.

Last year, the US Department of Justice (DoJ) brought a criminal conspiracy prosecution against David Topkins, a former chief executive of an online seller of posters through Amazon Marketplace. Topkins pleaded guilty to agreeing with other online sellers to fix the prices of particular posters sold via Amazon Marketplace, and then writing pricing algorithms to set prices according to the agreement and which could also co-ordinate price changes. A UK citizen, Daniel Aston, has also been indicted by the US DoJ for his involvement in the price-fixing conspiracy and is currently fighting the charges.

In many ways, the Topkins case was simply an old-fashioned price-fixing agreement. However, what made it novel was that the implementation of the agreement involved automated price-setting algorithms.

Some commentators have suggested that the practice of algorithmic price-fixing in ecommerce is likely to be widespread; and could be of interest for future EU antitrust enforcement. Indeed, the CMA has opened a separate civil investigation into the suspected anticompetitive arrangements and carried out dawn raids at the headquarters of Aston's company Trod and a company officer's domestic premises. The CMA expects to decide in April 2016 whether to proceed with or close the investigation.

The DoJ clearly aims to send a wider message through the Amazon Marketplace prosecution in a relatively small market, with limited impact. In its press release, the DoJ wrote: "We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the internet using complex pricing algorithms. American consumers have the right to a free and fair marketplace online, as well as in brick and mortar businesses."

The European Commission has made similar statements: "Our task as competition enforcers is making sure that the digital single market is a place where all players – large and small – can compete on the merits of their products."

## In conclusion

The liability of third-party cartel facilitators (such as Eturas) is not a novel concept, having been previously considered by the CJEU in *AC-Treuhand* (in this case, a consultancy firm infringed article 101 TFEU by facilitating a cartel, notwithstanding that it did not operate or achieve sales on the same market as the colluding parties). The UK's (then) Office of Fair Trading considered the role of a facilitator using an online B2B platform in its Whatif? Private Motor insurance case. The OFT concluded that the Whatif? platform facilitated the gathering and dissemination of competitively sensitive information among UK private motor insurers, which could facilitate collusion.

However, *Eturas* establishes an important precedent for the application of a presumption of concertation under article 101 TEFU where the concertation takes place via online platforms and, in particular, where anticompetitive proposals are disseminated by platform facilitators to an effectively anonymous group of recipients. The judgment makes two important points. First, it says that recipients of an email/computerised system message cannot be presumed to know its content simply because the message has been dispatched (and therefore cannot be presumed to have acquiesced in the anticompetitive proposition) in the absence of other objective and consistent indicia proving awareness of the message's content. Second, if the evidence shows that recipients have read the message, so that the presumption of concertation arises, the judgment spells out the way in which they can "publicly distance" themselves from the practice where other recipients of the message are unknown.

As the landscape in which we now communicate and trade becomes increasingly digitised, online platforms and software tools are the focus of increased scrutiny both at member state and EU level. The use of complex digital tools and automated systems present a challenge to antitrust enforcement but with ecommerce and the DSM now a political priority, the Commission can be expected to increase its levels of intervention in ecommerce practices which it considers to be problematic.

In addition to challenges of horizontal co-ordination in online markets, the Commission has also made clear its intention to play a greater part in pursuing cross-border vertical competition law cases, in the past typically left to NCAs. This follows criticism of the Commission's previous reluctance to consolidate the fragmented challenges of certain '"most favoured nation" clauses in agreements between online travel agencies and hotels.

*Eturas* is a timely reminder that the automated and often anonymous environment of online platforms offers no special protection from detection and enforcement against cartel conduct. Indeed, such shared platforms or systems are likely to attract increased scrutiny in the near future across the EU and beyond.