'Eturas' UAB and Others v. Lietuvos Respublikos konkurencijos taryba

Case C-74/14, Judgment of the Court (Fifth Chamber) of 21 January 2016

In Eturas the CJEU held that the mere sending of an email to the commercial users of an online booking platform cannot lead to the conclusion that these users were aware or should have been aware of the anti-competitive content of the email.

The Court's ruling stems from a request for a preliminary ruling by the Supreme Administrative Court of Lithuania in the context of an appeal against an infringement decision of the Lithuanian Competition Council ('CC'). Following an investigation, the CC found that Eturas, an online booking platform, and 30 travel agents, its commercial users, had engaged in concerted practices in respect of the discounts applicable to bookings made on the platform.

An interesting detail of the case is that the CC's finding did not rely on evidence of direct meetings or communication between the travel agents. Rather, the unlawful initiative to cap the discount came from the administrator of Eturas. According to the CC, the administrator sent an email to the travel agents, inviting them to cap the discount rates for travel bookings and informing them that the platform would undergo a technical modification, whereby any discounts in excess of the cap would be automatically reduced. From that the CC concluded that the travel agents tacitly approved the administrator's unlawful initiative, given also that they did not object to the email and continued to use the platform.

Some of the travel agents contested the CC's findings, claiming that they had not received or read the email in question. On appeal the Supreme Administrative Court of Lithuania referred the matter to the CJEU, essentially asking the Court whether the travel agents may be presumed to have been aware of the administrator's email and to have thus participated in an unlawful concerted practice, absent any objections on their part.

The Court's ruling

Relying on the presumption of innocence, the CJEU held that the mere sending of an email to the travel agents is insufficient to infer that the recipients were aware or should have been aware of its unlawful content. There would need to be additional evidence - even indirect evidence - in order to justify the rebuttable presumption that the travel agents were aware of the contents of the email. The Court emphasised that a company should have the opportunity to rebut a presumption of awareness without having to "take excessive or unrealistic steps."

The Court recalled that a finding of concerted practice requires not only evidence of collusion between the implicated companies, but also subsequent market conduct and a relationship of cause and effect between the two. The Court confirmed that, even if the CC could demonstrate that a travel agent had knowledge of the contents of the email, that an agent could still rebut the presumption that it participated in the unlawful practice by showing that it had distanced itself from the practice or reported it to the authorities. The CJEU acknowledged that there could be other ways to rebut the presumption of a causal connection between the collusion and conduct on the market. In this case for instance, a member agent could rebut the presumption by showing that it had systematically applied discounts that exceeded the cap in question.

Importance of the judgment

Despite its brevity, the Court's ruling in *Eturas* is of particular interest in many respects:

This is the first time that the Court applied the concept of concerted practices to online platforms and in a context where no direct horizontal meetings or communications took place. The ruling suggests that in such circumstances the threshold for competition authorities to establish the element of awareness is higher than in the traditional 'smoke-filled' room setting, where the physical presence of a company at a meeting is usually sufficient proof of awareness. Competition authorities will therefore have to take account of the mode and features of communication in the online world and to introduce concrete evidence that the companies knew and consented to the unlawful practice.

The judgment provides useful guidance regarding the defences companies may use to rebut the presumption that they participated in an unlawful practice. The Court acknowledged the availability of defences other than the traditional public distancing and reporting, including evidence of market conduct that deviates from the allegedly agreed conduct.

Critically, the Court highlighted the fundamental role of the presumption of innocence as a guiding principle when national courts entertain doubts about the conclusiveness of evidence submitted by the competition authorities. In particular, the judgment seems to suggest that inferences, which are not supported by evidence, should be treated with skepticism. In this respect, the judgment serves as a reminder that the burden rests on the competition authorities to establish with sufficient evidence that a company has engaged in anti-competitive conduct.

Finally, the case illustrates the risks for companies sharing IT functions with their competitors. It is of paramount importance that these companies carefully monitor communications on a shared platform and take steps to distance themselves from unlawful conduct.

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