Overview

On January 21, 2016, at the request of the Supreme Administrative Court of Lithuania (SAC), the EU Court of Justice (CoJ) applied, for the first time, the concept of concerted practice to the online space (Case C-74/14, Eturas). The ruling is particularly interesting since the CoJ revisits in the online context the test that must be satisfied in order to find a concerted practice that is contrary to Article 101 TFEU. The CoJ was asked to rule on whether the mere sending of an e-mail by the online platform administrator in which it announces to the participating travel agents that it will be making a technical change, which will cap discounts that may be offered on bookings made through the platform, constituted sufficient evidence that the recipients were involved in a concerted practice.

The CoJ concludes in essence that, in the absence of other objective and consistent indicia, commercial users of an online travel booking platform may only be liable for taking part in a concerted practice if it is cumulatively shown that: (i) they were aware or ought to have been aware of the e-mail content and (ii) they did not object to it. Below, we examine the CoJ’s reasoning and what impact it may have in the online collaborative space.

Background

In June 2012, Lithuania’s Competition Council (CC) fined 30 tour operators/travel agents more than €1.5 million for engaging in an anticompetitive concerted practice in the sale of package tours in Lithuania through Eturas’ online tours searching and booking system. All travel agents using the system were free to determine their sales terms and conditions, including last-minute offers and discounts. The CC found that, in August 2009, Eturas sent e-questionnaires to a number of travel agents asking them about the discount level that they wanted the system to apply. Soon after this consultation, Eturas sent an e-mail message informing travel agents that it would be putting in place a technical change that would fix the maximum discount that could be applied to bookings made through the system. The CC concluded that this e-mail, the technical change that capped discounts at 3% and the fact that travel agents did not object to it, amounted to a concerted practice contrary to Article 101 TFEU. The reason was that the maximum level of discount available on the system limited price competition among travel agents in the online sale of package tours in Lithuania.

On appeal before the SAC, it was noted that the primary way that the CC established the allegedly illicit concerted practice was that it presumed that the travel agents read or should have read the e-mail sent by Eturas. However, the SAC doubted whether the mere dispatch and dissemination of a message to travel agents announcing discounts on sales made through the system would be capped, and that technical changes would be made to implement the measure, was sufficient to support that presumption, and in turn, prove that an illicit concerted practice existed.

Concerted Practice in the Online Space
In its ruling, the CoJ first clarified where EU law applied and where national law applied in this case. EU law provides the presumption (often referred to as the Anic presumption) that when undertakings concert and continue to participate on the market, they use the information they exchanged when determining their conduct on that market. In which case, a competition authority can allege that the undertakings have participated in an illicit concerted practice. But the question before the CoJ concerned the assessment of the evidence and standard of proof, not the concept of a “concerted practice.” This meant that national law applied.

This said, the CoJ recalled that national rules governing how evidence is assessed should not jeopardize the effective application of EU competition law. In this regard, the CoJ pointed out that the existence of a concerted practice is in most situations established through a consistent and objective body of coincidences and indicia, which taken together and in the absence of any plausible explanation, constitute evidence of an illicit concerted practice. Relying on the presumption of innocence, the CoJ then held that the mere act of sending an e-mail to travel agents is insufficient to infer that the recipients were aware or should have been aware of its illicit content. There would need to be additional corroborating facts and indicia in order to establish that the travel agents could be presumed to be aware of the initiative.

But, even there, according to the CoJ, the travel agents should have been able to rebut the presumption in a number of ways. For example, travel agents could prove that they had not received the e-mail or they had not opened it. Those travel agents who had opened and read the infringing message and, hence, were aware of its content, could be considered participants to the concertation. However, to be held liable, those “aware” recipients must have remained active on the market and failed to distance themselves from the infringing conduct.

According to the CoJ, the fact that Eturas had capped discounts at 3% after it had sent the infringing e-mail could be used to establish that the “aware” agents tacitly assented to the restrictive measure. However, for those e-mail recipients who claimed that they were unaware of the e-mail’s content, the CoJ indicated that the mere implementation of the technical measure was not sufficient, in the absence of other objective and consistent indicia, to conclude that they had given their tacit consent to the practice.

The CoJ also looked at the “aware” travel agents’ ability to publicly distance themselves from the infringing conduct, which is another way that they could rebut the presumption that they had participated in a concerted practice. The CoJ adapted the more conventional way in which undertakings can publicly distance themselves to take into account the specific online context in which the practice arose. In particular, it acknowledged that the travel agents did not have the list of recipients and those who wished to distance themselves from the conduct could not simply click the “reply all” button to tell the rest of the user community that they forcefully disagreed with the conduct. Therefore, a clear and express objection sent to the administrator would have been sufficient to satisfy the test. Finally, the CoJ recalled that public distancing was not the only way that a travel agent could have rebutted the presumption that it was a party to a concerted practice. For instance, the presumption could be successfully rebutted by showing that the travel agent(s) systematically applied a discount that was greater than 3%.

The Eturas ruling is interesting in a number of ways.

First, contrasting with a physical contact between competitors, where the mere passive attendance at a single meeting – remember T-Mobile – during which an illicit initiative is discussed is usually enough to establish participation to a concerted practice, the online space requires more concrete evidence. The investigative authority needs to provide adequate and sufficient evidence that those at the receiving end of the e-communication were aware or should have been aware of its illicit content. The mere sending of e-mails or e-messages is not enough to implicate the recipient.

This finding is consistent with the case-law on concerted practice, which rests upon the notion that an undertaking may only be held to be participating in such illicit conduct if it has adequate knowledge of the illicit plan or initiative. When contact among competing undertakings is indirect, i.e. through an intermediary, be it a supplier or a customer of the participants as in the context of a hub-and-spoke cartel or a service provider such as an online selling platform, investigative authorities need to pay particular attention to the surrounding circumstances and the context in which the communication takes place. In the Eturas case, this requires proof that the recipients got the message, opened it, and actually read the particular infringing statement. As direct proof of knowledge is certainly not simple to provide (although increasingly intrusive IT forensic technologies tell a whole lot about what is done with a document online), authorities will need to rely on indirect evidence, including indicia that provide conclusive evidence that the recipient knew or should have known about the initiative and accepted the consequences of it.

Second, the CoJ provides useful guidance on the types of defenses that undertakings can provide to rebut the presumption that they participated in an infringing concerted practice. As the CoJ acknowledged, making a public distancing statement in the online space is not comparable to a vocal and explicit public distancing in a physical or live meeting among competitors. Further, the adoption of a subsequent pattern of conduct that systematically departs from the collusive outcome may be a defense to antitrust liability.
Third, we find that the increasing use of the presumption of innocence in EU competition law allows the EU judicature to be increasingly skeptical of the use of presumptions and inferences to establish participation to an infringement. In that respect, this ruling is a welcomed reminder of the paramount principle that it falls to the competition authority to establish with an adequate, consistent and objective body of evidence that an undertaking has participated in an anticompetitive collusive plan.

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