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Antitrust Liability in the Context of Online Platforms. Case Comment to the Preliminary Ruling of the Court of Justice of 21 January 2016 *'Eturas' UAB v Lietuvos Respublikos konkurencijos taryba* (Case C-74/14)

by

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Key words: antitrust; coordination; e-commerce; online platforms; compliance.

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I. Introduction

In its judgment of 21 January 2016 in Case C-74/14 (hereinafter, judgment), the Court of Justice (hereinafter, CJ) responded to a preliminary question submitted by the Supreme Administrative Court of Lithuania. The latter

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asked whether the mere dispatch of an email relating to the maximum level of rebates may constitute sufficient evidence to establish that its addressees can be found liable for illegal concerted practices within the meaning of Article 101(1) TFEU. The CJ judgment raises novel issues specific to antitrust enforcement in e-commerce in two areas: (i) can users of a third party online booking platform be found liable for an anti-competitive practice purely on the basis of receiving unprompted email messages, even if they were not aware of their content, and (ii) what steps should they take in order to distance themselves from anti-competitive actions in an e-commerce environment.

II. Legal background

In a decision of 7 June 2012, the Lithuanian Competition Council (hereinafter, Council) found that 30 travel agencies as well as the administrator of the online booking system E-TURAS violated Article 101(1) TFEU and its national equivalent Article 5 of the Lithuanian Competition Act. The infringement took the form of the coordination of the level of discounts available on bookings made via the E-TURAS system between 27 August 2009 and the end of March 2010. The proceedings were instigated by a leniency application submitted by one of the travel agencies. On 8 April 2013, the Vilnius District Administrative Court upheld the decision in part but reduced the fines imposed. The case was subsequently appealed to the Supreme Administrative Court of Lithuania, which then asked the CJ for a preliminary ruling under Article 267 TFEU. Advocate General Szpunar delivered his Opinion on the case at hand on 16 July 2015. Following the CJ judgment, the Supreme Administrative Court of Lithuania ultimately upheld the decision of the Council on 3 May 2016.

III. Online booking system

E-TURAS is an online travel booking system that allows travel agencies to offer travel bookings for sale on their websites through a uniform presentation method determined by the administrator, who holds exclusive rights to the system. Each travel agency had a mailbox within the System in order to communicate with the administrator. On 25 August 2009, the administrator of the System sent an e-mail to several travel agencies through the internal messaging system, the email was named *Vote*. In that email, the administrator

asked each addressee to vote on the appropriateness of reducing the online discount rate from 4% to 1%-3%. Two days later, on 27 August 2009, the administrator sent another email to each travel agency with the header: *Message concerning the reduction of the discount for online travel bookings, between 0% and 3%*, with the following content:

> *Following an appraisal of the statements, proposals and wishes expressed by the travel agencies concerning the application of a discount rate for online travel bookings, we 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% as from 2:00 pm. If you have distributed information concerning the discount rates, we suggest that you alter that information accordingly*.

Following the dispatch of that message, technical modifications were made to the System so that when a booking was made a window appeared indicating that the travel package chosen was subject to a discount of 3%. Although travel agencies were not prevented from granting discounts greater than 3%, they were required to take additional technical steps in order to do so.

IV. Tool for coordination

The Council concluded that the System served as a tool for coordinating the rebate cap by travel agencies and eliminated the need for actual meetings. The authority also stated that failure to oppose the discount cap amounted to tacitly assenting to the cap, without the need for direct contacts. According to the Council, travel agencies, which had expressed no objection to the message, could be held liable for an illegal horizontal practice since they could reasonably assume that all other users of that System would also limit their discounts to a maximum of 3%. The administrator of Eturas was held liable too for its facilitating role in the practice.

By contrast, the travel agencies argued that they could not be held liable for the unilateral action of the administrator as they were not aware of the message send on 27 August 2009 and of the modifications made by the administrator. Moreover, they stated that the sales made via the System represented only a very small part of their turnover. In view of that, the Supreme Administrative Court of Lithuania raised doubts whether the mere presumption that the travel agencies had read, or should have read, the message of 27 August 2009 meets the standard of proof in establishing their participation in a concerted practice under Article 101(1) TFEU.

V. Not liable for incoming emails?

The fact that Article 101(1) TFEU applies to passive participation in meetings where anti-competitive topics are discussed has long since been an integral part of EU competition law – it is assumed that passive participants adjust their activity to what they heard in those meetings[1]. In the case at hand, the CJ commented on whether the same assumption should be applicable to online correspondence also. In other words, should the investigated travel agencies that received the email send by the administrator of the System on 27 August 2009 be presumed to have taken into account the content of this message, and thus be held liable for the concerted practice?

The CJ stated that unlike the participation in physical meetings, the mere dispatch of an electronic message is not sufficient evidence of the participation in a concerted practice. The approach of the CJ has to be welcomed since it takes into account the nature of electronic communication. Unlike the participation in physical meetings, the recipient of an email has no control over either the content of the incoming email or the number of the incoming messages. The risk of being involved in a concerted practice exists, provided there are other objective and consistent indicia showing that the undertaking was aware of the content of the message and did not publicly distance itself from the practice.

When it comes to electronic correspondence, one could imagine many situations where it may be difficult to determine, without any doubt, whether or not the recipient has read a given email. In a multitude of emails, marking them as read does not necessarily mean that one has actually familiarised oneself with their content. There may be doubts as to how the email system works (for instance, the possibility of marking an email as unread again, spam filters) and what people handling the email system do (for instance, deleting an email). The CJ judgment does not provide detailed guidelines on this matter and leaves the assessment of evidence and the standard of proof in a particular case to national procedures to decide.

VI. Public distancing in the digital era

The safest solution for an entrepreneur who has received an email suggesting illegal actions will undeniably be to distance oneself from that email. Yet another problem has emerged in this context and has been tackled by the CJ in this case – how to effectively distance oneself from the content of an email.

[1] See CJ judgment of 4 June 2009, Case C-8/08 *T-Mobile Netherlands and Others*, paras 51–53.

According to settled views of the CJ, in case of an actual meeting where anti-competitive discussions take place, participants may distance themselves from a concerted practice by leaving the meeting and communicating their opposition to other participants[2]. Yet unlike physical meetings, the recipients of the contested emails did not know who else received the emails[3]. They were therefore not able to communicate their opposition to other "participants". In its judgment, the CJ made it clear that in a situation such as this, a travel agency could distance itself from the practice by sending a clear and express objection to the practice to the administrator, by systematically applying discounts exceeding the cap in question, or by reporting the practice to administrative authorities.

VII. Compliance in e-commerce

The CJ judgment points out the antitrust risk related to participating in wider Internet communications. This pertains not only to electronic mail but also to social networks. As implied in the name itself, social networks are characterised by the fact that they make virtual participation in the society possible. This is manifested, among others, in that a profile user may follow posts featured by many people without having to actively engage in the conversation. In the context of the CJ judgment, it seems that even such a form of indirect contact may potentially be considered dangerous. So the question arises as to how to assess the awareness of illegal content (posts) among social network users, and how a network user should behave when s/he notices illegal content in posts of other users.

Furthermore, the CJ judgement stresses the need to raise awareness of antitrust risks typical for the Internet. It is the consequence of the freedom and mass character of Internet communications that participating entrepreneurs, even if they do so only passively, may be more exposed (than it would be the case for traditional meetings) to charges of partaking in illegal contacts. It is thus crucial for an entrepreneur to have a pro-active approach when it comes to distancing itself from an illegal practice. To do so, firms ought to commit employees within their compliance systems to notify their superiors about the appearance of dangerous electronic correspondence and establish a procedure of distancing themselves from it.

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[2] See CJ judgment of 17 September 2015, C-634/13 P *Total Marketing Services, venant aux droits de Total Raffinage Marketing v European Commission*, paras 23–24.

[3] The situation resembles that of receiving a group email in which the recipients are not disclosed, as their addresses are concealed in a blind carbon copy (bcc).

This case should also be taken into account by compliance policies of online intermediaries offering online commercial and communication services (such as online platforms, auction portals, price comparison websites, etc.). The administrator of Eturas was held liable for the anti-competitive practice, even though the company was in fact active on a different market than the travel agencies. The liability of Eturas was derived from its facilitating role in the emergence of the illegal contacts between the travel agencies. In this light, the CJ judgment confirms the position of the European Commission and the CJ with respect to facilitators of cartels first established in the *AC Treuhand* case[4].

[4] Judgment of CJ of 22 October 2015, Case C-194/14 P *AC-Treuhand AG v European Commission*.