Cooley

European Court Provides Guidance on Application of Antitrust Rules to IT Platforms

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On 21 January, the European Court of Justice (ECJ) issued an interesting judgment on the extent to which existing antitrust price-fixing principles can be applied to interactions between the administrator of a shared technology platform and its users. Specifically, in the *Eturas* case (Case C-74/14), the ECJ had to consider the extent to which users' involvement in an anticompetitive concerted practice initiated by the system administrator of a shared IT platform may be inferred simply from the fact that the administrator sent messages to users concerning pricing and centrally implemented technical rules that affected how users could display their prices.

The Court concluded that, as long as users were at least aware of such messages, such liability could be inferred as a matter of EU competition law. Users could nevertheless rebut this inference by proving that they had not in fact received or read the problematic message; publicly distanced themselves from the conduct; or systematically overridden the technical measures implemented by the administrator. Given the increasing popularity of shared IT platforms in many areas of the economy, and the interest in the potential of such platforms to facilitate collusion on the part of competition authorities, this judgment is a timely reminder of the need for caution to mitigate antitrust risk when operating or using such platforms.

Background

This judgment arose from a request for a preliminary ruling from the Lithuanian Supreme Administrative Court (LSAC), which is hearing an appeal concerning an infringement decision of the Lithuanian Competition Commission (the LCC). That decision, which was issued in June 2012, found that 30 Lithuanian travel agencies that used a shared IT platform to facilitate online bookings by end customers (called E-TURAS) had engaged in an unlawful concerted practice, contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU), under which member agents' advertised discounts on holidays were effectively capped at 3%.

Crucially, this finding did not rely on evidence of horizontal collusion between member agents. Rather, the move to cap discount rates (and hence reduce price competition) appears to have been initiated by the administrator of the E-TURAS system, Eturas AB. According to the LCC, Eturas contacted member agents by email on 25 August 2009 with a request for a 'vote' on whether discounts offered through the system should be reduced to between 1-3%. Two days later, Eturas sent a message to member agents (this time, using the platform's internal messaging system) announcing capping of discount rates at 3% "to preserve the amount of the commission and to normalise the conditions of competition". According to that message, Eturas had taken these steps "following an appraisal of the statements, proposals and wishes expressed by the travel agencies". Eturas followed up on this by unilaterally implementing various technical measures that made it harder for member agents to offer higher discounts. (Although it remained technically possible for agents to advertise holidays with higher discounts, evidence showed that the majority of travel agencies did not do so.)

In the absence of evidence of direct communication between member travel agencies, the LCC inferred from this course of conduct that they had engaged in an unlawful concerted practice by indirectly expressing a common intention regarding their future market conduct, through implied or tacit consent to the actions taken by Eturas. (While the LCC also found that Eturas had itself

infringed Article 101 TFEU by facilitating this infringement, this aspect of the decision did not form part of the reference to the ECJ.) A number of the member agents objected to this finding, which in at least some instances had been reached in the absence of any evidence of active participation in the arrangement, or even awareness of the message announcing implementation of the discount cap.

To assist with its consideration of the legality of the LCC's finding, the LSAC asked the ECJ the following questions:

1. Was the LCC entitled to: (1) presume that member agents using a shared IT system were aware, or ought to have been aware, of the notice posted by the system administrator concerning implementation of the discount cap; or (2) find that, by failing to oppose the application of the discount restriction announced by that notice, they had expressed tacit approval of the restriction and thereby engaged in an unlawful concerted practice?
2. If such a presumption was not permitted, what factors should the authority take into account in determining if users have engaged in a concerted practice?

The judgment

Before addressing these specific questions, the ECJ examined the European case law on concerted practices. First, it noted the principle that economic operators must determine their commercial strategy independently, which precludes any direct or indirect contact that may influence market conduct or reveal future strategy. It then noted that a company may infringe Article 101 TFEU passively (for example, by simply attending a cartel meeting without saying anything) if it fails to publicly distance itself from an unlawful initiative. The Court also confirmed that, in addition to relying on direct evidence, a competition authority is entitled to find an infringement by reference to "indicia, provided that they are objective and consistent".

The ECJ observed that companies are nevertheless entitled to the presumption of innocence, which is a general principle of EU law under Article 48(1) of the Charter of Fundamental Rights of the EU. In the Court's view, this principle precludes an authority from inferring an infringement from the "mere dispatch" of a message by a system administrator. Rather, the authority must present "other objective and consistent indicia" to justify a (rebuttable) presumption that users were aware of the content of the message. The ECJ noted that users should not be required to take "excessive or unrealistic steps" in order to rebut this presumption. For example, they could do so if they could show that the message was not received or that the section in question was not looked at or was looked at only after "some time" had passed.

The Court noted that a finding that a company had participated in an unlawful concerted practice (which is a looser concept than anticompetitive agreement) requires not just evidence of concertation between undertakings but also subsequent conduct on a market and a relationship of cause and effect between the two. Crucially, the Court confirmed that the LCC was entitled to presume a travel agent's participation in a concerted practice at the behest of a system administrator only if the agent was aware of the content of the message from the administrator. If such awareness could not be demonstrated, then the "mere existence of a technical restriction implemented in the system" was not sufficient to infer concertation.

The Court also confirmed that, even if the LCC could show that a member agent was aware of the contents of the message, the agent could avoid an infringement finding by showing that it had publicly distanced itself from the practice or reported it to the authorities. Interestingly, the Court noted that on the facts of this case sending a clear and express objection to the system administrator's message, rather than contacting every member agent to object, would be sufficient to distance a member agent from the infringement (since members would not be able to identify all other addressees). A member agent could also rebut the presumption of a causal connection between the concertation and its market conduct by demonstrating that it had systematically applied discounts that exceeded the cap announced in the message.

It is now for the LSAC to apply this guidance to the facts before it in deciding the appeal.

Commentary

As is often the case with preliminary references, the ECJ judgment in this case is rather brief and suffers from a lack of clarity on important details. In particular, the ECJ does not address the specific evidence that should be examined by the LSAC when assessing member agents' awareness of the contents of the message, since it determined that this is a question of Lithuanian law.

Some further helpful guidance can be gleaned from the Opinion of Advocate General Szpunar of 16 July 2015 in this case, to which the full Court will have referred when reaching its judgment. In his Opinion, AG Szpunar noted that, while the mode of communication in itself is not relevant to the assessment of whether collusion took place, the *form* of that communication may be significant in assessing the parties' interaction. In this context, he noted that system administrator notices were not a usual channel for commercial communication and did not create a "commercial dialogue". As such, they were not comparable to meeting in the same room or an exchange of emails as evidence of a collusive practice. On the other hand, the *contents* of the administrator's message in this case, which in the Advocate General's view "could under no circumstances be considered as forming a part of legitimate commercial dialogue", meant that the message could not be understood otherwise than as "an initiative to engage in an illicit anticompetitive practice". Given this, and the fact that the sender possessed the technical means to enforce the cap, undertakings who were aware of the notice "must have appreciated that – absent their expeditious reaction – the initiative would be automatically and immediately implemented with respect to all users". In the Advocate General's view, this was sufficient grounds for an infringement to be inferred.

It is clear from this that, while technical messages sent by system administrators will not be equated directly with cartel discussions in a proverbial 'smoke-filled room', they can still give rise to an infringement, even if they are ignored by the recipient. As a result, it is important that companies that use online platforms that are also used by competitors actively monitor messaging accounts for problematic messages and take immediate steps to distance themselves from any apparent attempts to coordinate users' market behaviour. While the need for caution when dealing with competitors is not a new thing, and has long been essential for members of trade associations or joint ventures, the speed and ease of communication on such platforms, and the difficulty of monitoring such communications, creates new challenges for businesses. This case also underlines the need for platform operators to implement and follow strict compliance policies, to ensure that they stick to providing a shared service, rather than facilitating collusion between members.