Eturas – Any Conclusions on Platform Collusion..?

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Introduction
On a number of occasions the Court of Justice (CJEU) has been tasked with deciding how familiar concepts of competition law apply to novel facts. In *Eturas* (Case C-74/14, judgment of 21 January 2016), questions of how concerted practices should be considered in the online world were referred to the CJEU for a preliminary ruling.

The, perhaps even harder, task of applying the ruling to the specific facts then fell to the referring court and, later in 2016, the Lithuanian Supreme Administrative Court (SACL) gave judgment, applying the guidance of the CJEU.

This post reviews the CJEU judgment and its application by the SACL, before considering the implications for companies using the type of online platform considered in the ruling.

The Court of Justice (CJEU) judgment

The case arose from a decision of the Lithuanian Competition Council (**LCC**). The LCC imposed fines on Eturas and 30 travel agencies for applying a common cap on discounts applicable to services provided through the Eturas online booking platform. The discount cap was communicated to the agencies through an internal messaging system in the form of an amendment to the platform terms and conditions. It was then implemented by Eturas using technical means.

The decision of the LCC was appealed to the SACL, which referred two questions to the CJEU on the application of Article 101 TFEU. First, the SACL asked whether the actions of the platform administrator gave rise to a presumption that the platform users were aware of the anti-competitive measure, and thus tacitly engaged in a concerted practice. Second, if the answer to the first question was negative, the SACL asked what factors were relevant to determining whether the users of the platform were engaged in a concerted practice.

The CJEU confirmed that the terms of use of an online platform can in principle give rise to an anti-competitive agreement between the administrator and platform users. It then dealt with the questions about evidentiary issues relating to the burden of proof and the applicable presumptions for participation in a concerted practice. The CJEU held that if the travel agencies using the platform had knowledge of the content of the administrator messages which potentially gave rise to anti-competitive collusion, they may be presumed to have participated in that agreement unless they took steps to distance themselves.

The CJEU confirmed that actual knowledge was required for an infringement to exist. The transmission of the administrator message alone was not sufficient to give rise to a presumption of knowledge, but knowledge could be inferred from "objective and consistent" indicia. Further, the presumption of participation could be rebutted if a travel agency had sent a clear objection to the administrator or had consistently offered discounts greater than the level of the common restriction.

The application of the CJEU's ruling

In the light of the CJEU guidance, the SACL considered whether the agencies knew about the restriction and whether they had publically distanced themselves from the anti-competitive practices. The SACL grouped the agencies into three categories: first, those with knowledge of the restriction which did not oppose it; second, those with knowledge which opposed the restriction; and third, those about which there was insufficient evidence of knowledge.

Consistent with the CJEU's guidance, the SACL found that the LCC lacked justification for concluding that agencies in the second and third categories were engaged in a concerted practice. Only those agencies which knew of the restriction and did not oppose it should be held to have tacitly participated in the

anti-competitive practice.

The CJEU ruling left open some questions as to exactly what evidence would give rise to the presumption of knowledge. The English language summary of the SACL decision sheds a little more light, in that it is clear that admissions were made by some of the participating agencies. In the absence of admissions of knowledge, other evidentiary requirements in similar cases will be a matter for the relevant national court, subject to the overarching requirement that the courts take effective steps to apply EU law.

Final thoughts…

The Eturas case highlights a hazard of managing cooperation through an online platform and demonstrates that such platforms can facilitate unlawful cooperation amongst platform users, even without any direct contact. Although far from the archetypal "behind closed doors" cartel meeting, the *Eturas* decision demonstrates how information technology can distort markets in the digital space.

Following the SACL's implementation of the CJEU ruling, the precise scope of the "objective and consistent indicia" to be used by courts in assessing participation in infringements, and in particular when the rebuttable presumption of knowledge will be triggered, remains unclear.

Businesses using online platforms will need to ensure online communication channels are effectively monitored to avoid inferences of collusion. Deliberately turning a blind eye is not, however, recommended, and could not be guaranteed to avoid liability. Users should also be aware of the steps necessary to rebut any presumption of collusion. At the very least, the decisions should remind businesses to be vigilant in their management of online platforms.

The *Eturas* decision is consistent with the 2015 judgment in AC Treuhand (Case C-194/14), which recognised the liability of intermediaries for facilitating anti-competitive practices. Platform operators and administrators should therefore take particular care not to include anti-competitive restrictions in their terms and conditions to reduce the risk of liability for facilitating collusion between users – the defence of lack of knowledge would certainly not be available to the party which initiated the terms.

For more information on the SACL decision visit

http://www.lvat.lt/en/news/sacl-has-rendered-veae.html. Case No A-97-858/2016.

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