



Reports of Cases

Case C-74/14

'Eturas' UAB and Others

v

Lietuvos Respublikos konkurencijos taryba

(Request for a preliminary ruling from the Lietuvos vyriausiasis administracinis teismas)

(Reference for a preliminary ruling — Competition — Agreements, decisions and concerted practices — Concerted practice — Travel agencies using a common computerised booking system — Automatic restriction of the discount rates available for online bookings — System administrator's message in relation to that restriction — Tacit agreement capable of being characterised as a concerted practice — Constituent elements of an agreement and of a concerted practice — Assessment of evidence and standard of proof — Procedural autonomy of the Member States — Principle of effectiveness — Presumption of innocence)

Summary — Judgment of the Court (Fifth Chamber), 21 January 2016

1. *Agreements, decisions and concerted practices — Concerted practice — Evidence of the existence of a concerted practice — Exchange of information between competitors — Absence of procedural rules in EU law — Application of national law — Condition — Respect for the principles of equivalence and effectiveness — Proof established by a number of indicia and coincidences evidencing the existence and duration of continuous anticompetitive conduct*

(Art. 101(1) TFEU; Regulation No 1/2003, Art. 2)

2. *Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market — Exchange of information between competitors — Presumption that the information used to determine market conduct*

(Art. 101(1) TFEU)

3. *Agreements, decisions and concerted practices — Participation by an undertaking in meetings with an anti-competitive object — Sufficiency, in order to engage the liability of the undertaking, of tacit approval without publicly distancing itself or reporting the matter to the competent authorities*

(Art. 101(1) TFEU)

4. *EU law — Principles — Fundamental rights — Presumption of innocence — Procedures in competition matters — Applicability*

(Art. 101 TFEU; Charter of Fundamental Rights of the European Union, Art. 48(1))

5. *Agreements, decisions and concerted practices — Concerted practice — Exchange of information between competitors — Travel agencies participating in an online travel booking system — Message from the system administrator informing those agencies of an automatic limitation of the discounts applicable to products sold through that system — Presumption of participation in the concerted practice — Rebuttable presumption — Application of national law — Mere dispatch of a message not sufficient evidence, in view of the principle of the presumption of innocence*

(Art. 101(1) TFEU; Charter of Fundamental Rights of the European Union, Art. 48(1))

1. In EU competition law, although Article 2 of Regulation No 1/2003 expressly governs the allocation of the burden of proof, that regulation does not contain any provisions on more specific procedural aspects. Thus, in particular, that regulation does not contain any provision in relation to the principles governing the assessment of evidence and the standard of proof in national proceedings for the application of Article 101 TFEU. That conclusion is confirmed by recital 5 of Regulation No 1/2003, which expressly states that the regulation does not affect national rules on the standard of proof.

In the absence of EU rules on the matter, it is for the national legal order of each Member State to establish them in accordance with the principle of procedural autonomy.

In that context, the answer to the question whether the mere dispatch of a message indicating that the discounts on products sold through an information system, intended to enable travel agencies to sell travel packages on their websites, will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure may, having regard to all of the circumstances of the case, constitute sufficient evidence to establish that its addressees were aware, or ought to have been aware, of its content, does not follow from the concept of a ‘concerted practice’ and is not intrinsically linked to that concept. That question must be regarded as relating to the assessment of evidence and to the standard of proof, with the result that it is governed — in accordance with the principle of procedural autonomy and subject to the principles of equivalence and effectiveness — by national law. In that respect, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.

(see paras 26, 30-37)

2. See the text of the decision.

(see paras 27, 33)

3. See the text of the decision.

(see para. 28)

4. See the text of the decision.

(para.38)

5. Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice within

the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of the systematic application of a discount exceeding the cap in question.

It is for the national court to examine — on the basis of the national rules governing the assessment of evidence and the standard of proof — whether, in view of all the circumstances before it, the dispatch of such a message may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.

(see paras 39, 40, 41, 43-47, 50, operative part)