1. Introduction

On 21 January, the European Court of Justice ("**ECJ**" or the "**Court**") ruled on the preliminary question referred by the *Lietuvos vyriausiasis administracinis teismas* (the Supreme Administrative Court of Lithuania, hereinafter the "**Referring Court**"), case C-74/14 *UAB Eturas and Others v Lietuvos Respublikos konkurencijos taryba* (hereinafter, the "**Decision**").

The Decision, published on 22 January, is of particular significance to companies that rely on common platforms or service providers – especially in the e-commerce sector – and it also represents an interesting focus on the ECJ approach when it comes to rules of evidence and public distancing in case of concerted practices.

2. Factual background and questions referred

In 2012, the *Lietuvos Respublikos konkurencijos taryba* (the national competition authority in Lithuania, "**NCA**") fined 30 tour operators/travel agents (the "**Parties**") for an anti-competitive concerted practice in the package tours sales market covering the entire territory of Lithuania. The anti-competitive conducts allegedly took place within the E-turas system, an online computer reservation system for the search and booking of package tours (the "**System**"). More specifically, as explained by the ECJ, the System allows travel agencies which have acquired the operating license "*to offer travel bookings for sale on their websites, through a uniform presentation method determined by E-turas*" (see par. 6 of the Decision).

The investigation carried out by the NCA proved that some time prior to alleged restriction the administrator of the System sent an e-mail to the Parties asking them to vote on the appropriateness of a reduction from 4% to 1%-3% of discounts offered to consumers purchasing online tours via the System. Shortly afterwards, the administrator sent another message to inform the Parties that "*following an appraisal of the* […] *proposals and wishes expressed by the travel agencies concerning the application of a discount rate* […] *we will enable online discounts in the range of 0%-3%* […] *For travel agencies which offer discounts*

in excess of 3%, these will automatically be reduced to 3% […] *If you have distributed information concerning the discount rates, we suggest that you alter that information accordingly*" (see par. 10 of the Decision, the "**Messages**"). After these events, the websites of the Parties displayed advertisements concerning a 3% discounts on the travel packages offered (a brief summary of the proceedings is available at http://ec.europa.eu/competition/ecn/brief/03_2012/lt_online.pdf).

According to the NCA, in spite of the fact that the case-file did not contain any evidence regarding the receipt or the acceptance of the Messages, the Parties were liable for an infringement of Article 101 (1) of the Treaty on the Functioning of the European union ("**TFEU**"). The decision of the NCA was first challenged before the Vilnius District Administrative Court and then before the Referring Court. It is noteworthy that the Referring Court itself noted that in the present case "*the principal piece of evidence supporting a finding of an infringement is a mere presumption that the travel agencies concerned read or should have read the message* […] *and should have understood all the consequences arising from the decision concerning the restriction of the discount rates*" (par. 22 of the Decision). Therefore, the main evidence in possession of the Referring Court are related to the conduct of a third party, the administrator of the System.

In any case, the Referring Court basically seeks clarification on *(i)* whether Article 101 (1) TFEU must be interpreted as meaning that there mere dispatch of a message in a common information system may allow a presumption that the undertakings knew (or should have known) about applicable discount restrictions and agreed to restrict price discounts and *(ii)* if the first question is answered in the negative, what factors should be taken into account in the determination as to whether economic operators participating in a common computerized information system have engaged in concerted practices.

3. The decision of the Court

As far as the question under *(i)* is concerned, after having recalled that passive modes of participation in the infringement might be caught by Article 101 TFEU, the ECJ states that the answer to the preliminary ruling does not follow from the concept of "concerted

practice", but from the rules governing the assessment of evidence and the standard of proof (par. 34). Since evidential issues have not been disciplined by EU law, according to the well-settled principle of procedural autonomy of the Member States, the issue shall be solved applying national law (the ECJ refers to its previous judgments in *VEBIC*, C-439/08 and *Nike European Operations Netherlands*, C-310/14). Of course, Member States' rules shall be compliant with the principle of effectiveness, pursuant to which national rules governing the assessment of evidence and the standard of proof must not render the implementation of EU competition rules impossible or excessively difficult. In this respect, since in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together and in absence of another plausible explanation, may constitute evidence of an antitrust infringement, that infringement "*may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent*" (par. 37).

Having said that, the ECJ states that if the national Court has doubts as to whether the Parties became or must have become aware of the content of the Messages, then the presumption of innocence must be applied. It follows that the presumption of innocence precludes the Referring Court from inferring from the mere dispatch of the Messages that the Parties were aware (or ought to have been aware) of the content of that message, but "*does not preclude the same Court from considering that the dispatch* [of the Messages] *may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message, provided that those agencies still have the opportunity to rebut it*" (par. 40).

The ECJ also specifies that the Referring Court cannot require the Parties to take unrealistic steps in order to rebut the presumption that they were aware of the content of the Messages. For example, they may prove that they did not receive the Messages or that they did not look at the section in question or did not look at it until some time had passed since that dispatch.

The ECJ then tackles the issue of the elements to be taken into account in determining

whether the conducts under scrutiny can be treated as constituting a concerted practice. The ECJ recalls its previous case-law (with particular regard to *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 and cited case-law), according to which the concept of a concerted practice implies, in addition to concertation between undertakings, subsequent conduct on the market and a relationship of cause and effect between the two (par. 42). Therefore, with regard to the present case, the evidence collected are capable of justifying a finding of a concerted practice between the parties which were aware of the content of the Messages, which could be regarded as having tacitly assented to a common anticompetitive practice, only in the presence of (i) a subsequent conduct on the market and (ii) a causal connection between the concertation and market conduct.

In other words, depending on the Referring Court assessment of the evidence, a travel agency may be presumed to have participated in that concertation if it is aware of the content of the Messages. However, the ECJ also points out that "*if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the System, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action*" (par. 45).

As far as the public distancing of the Parties is concerned, the ECJ seems to give relevance to the particular circumstances of the proceedings, which regarded undertakings active on online platforms. In fact, since the Parties do not know who the addressees of the Messages are, it cannot be required "*that the declaration by a travel agency of its intention to distance itself be made to all of the competitors*" (par.47). In that situation, the Referring Court may accept that a clear and express objection sent to the administrator of the System or evidence of a systematic application of a discount exceeding the cap in question are capable of rebutting that presumption.

4. Conclusion

The Decision will surely give rise to many controversial issues and provided much food for thoughts. For the purposes of this work, three elements deserve to be taken into particular

consideration.

First of all, the Decision gives an interesting contribution to the debate about the relationship between competition law and the internet. As we all know, the last decade has seen an internet-based disruptive innovation in many sectors of the economy, and competition law has to adapt to these developments. In this respect, as other Authors already noted (see A. Lamadrid, *ECJ's Judgment in case C-74/14, Eturas*, available here http://chillingcompetition.com/2016/01/22/ecjs-judgment-in-case-c-7414-eturas-on-the-scope-of-concerted-practices-and-on-technological-collusion/), companies sharing important IT functions with competitors will now have to act accordingly to the output of the Decision. More specifically, even when there is no information exchange of explicit agreement between competitors, undertakings participating in such arrangements should closely monitor the operations carried out on the platform and consider the appropriate reaction to avoid antitrust liabilities. Moreover, the adjustments made by the ECJ to public distancing within online platforms confirm that even in those cases in which undertakings use the internet to directly execute instructions, such use of the internet can't always be subject to a traditional enforcement approach. This leads to another interesting issue, which is the role and responsibility of the system administrator in light of the Decision. There will be time to discuss these issues in details in a near future.

The Decision also gives an interesting contribution to the definition of concerted practices, with particular regard to the evidence regime. In this respect, the ECJ gives much importance to the presumption of innocence. In fact, since – as the ECJ stated – in most cases the existence of a concerted practice must be inferred from a number of coincidences and indicia, it is actually quite frequent that national competition authorities are doubtful as to whether an illicit concerted practice actually occurred. In those cases, the ECJ makes clear that what has to prevail is the principle of innocence, which is a general principle of EU law even before of EU competition law, as it is now enshrined in Article 48 of the Charter of Fundamental Rights of the European Union ("**Charter**"), which the Member States are obliged to observe when they implement EU competition law.

The relationship between competition law and the Charter is certainly a tricky one and would be worth exploring. Nevertheless, for the purposes of the present contribution, suffice it to say that several principles included in the Charter are relevant for competition law. After all, recital 37 of Regulation 1/2003 states that it should be interpreted in accordance with the rights and principles recognised in the Charter and – even more important – Article 6 of the Treaty on the European Union provides that the Carter has the same force as the other Treaties. Therefore, with particular regard to the presumption of innocence – pursuant to which the Commission is required to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged competition infringement has taken place – since the entry into force of the Lisbon Treaty, Article 6 has surely become the clear reference at primary level to the need to respect for this principle, whereas before the Treaty the presumption of innocence had been applied to competition law cases only by the ECJ case law (in this regard, the ECJ recognised that the presumption of innocence and the applicable rules of evidence were general principles of law, whose non-observance would amount to an error of law, see further Case C-199/92 – *Huls v. Commission*).

In this scenario, the Decision gives an important contribution to the relationship between competition law and the Charter, given that it applies to one of the most controversial issues in EU competition law, which is the evidence regime in case of concerted practices. Under the Decision, Courts are expected not to conclude that the NCAs or the Commission have established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on whether the evidence and other information relied on by the Commission are sufficient to establish the existence of the alleged infringement, in particular in proceedings for the annulment of a decision imposing a fine (from this point of view, the Decision is consistent with previous the previous ECJ case law, e.g. T-56/02 *Bayerische Hypo-und Vereinstbank AG v EC Commission*, in which the ECJ found the evidence adduced by the Commission “debatable” or “not convincing”).

Lastly, it is noteworthy the importance given by the ECJ to the awareness of the Parties of the content of the Message. In this respect, the ECJ clearly states that a travel agency may

be presumed to have participated in the illicit concertation only in so far as it was aware of the content of the Messages. It will be interesting to see how the Referring Court will assess the evidence collected.