JUDGMENT OF THE COURT (Fifth Chamber)

21 January 2016(*)

(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)

In Case C−74/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania), made by decision of 17 January 2014, received at the Court on 10 February 2014, in the proceedings

'Eturas' UAB,

'AAA Wrislit' UAB,

'Baltic Clipper' UAB,

'Baltic Tours Vilnius' UAB,

'Daigera' UAB,

'Ferona' UAB,

'Freshtravel' UAB,

'Guliverio kelionės' UAB,

'Kelionių akademija' UAB,

'Kelionių gurmanai' UAB,

'Kelionių laikas' UAB,

'Litamicus' UAB,

'Megaturas' UAB,

'Neoturas' UAB,

'TopTravel' UAB,

'Travelonline Baltics' UAB,

'Vestekspress' UAB,

'Visveta' UAB,

‘Zigzag Travel’ UAB,

‘ZIP Travel’ UAB,

v

Lietuvos Respublikos konkurencijos taryba,

intervening parties:

‘**Aviaeuropa’ UAB,**

‘Grand Voyage’ UAB,

‘Kalnų upė’ UAB,

‘Keliautojų klubas’ UAB,

‘Smaragdas travel’ UAB,

‘700LT’ UAB,

‘Aljus ir Ko’ UAB,

‘Gustus vitae’ UAB,

‘Tropikai’ UAB,

‘Vipauta’ UAB,

‘Vistus’ UAB,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Fourth Chamber, acting as President of the Fifth Chamber, D. Šváby, A. Rosas, E. Juhász (Rapporteur) and C. Vajda, Judges,

Advocate General: M. Szpunar,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2015,

after considering the observations submitted on behalf of:

– ‘AAA Wrislit’ UAB, by L. Darulienė and T. Blažys, advokatai,

– ‘Baltic Clipper’ UAB, by J. Petrulionis, L. Šlepaitė and M. Juonys, advokatai,

– ‘Baltic Tours Vilnius’ UAB and ‘Kelionių laikas’ UAB, by P. Koverovas and R. Moisejevas, advokatai,

– ‘Guliverio kelionės’ UAB, by M. Juonys and L. Šlepaitė, advokatai,

– ‘Kelionių akademija’ UAB and ‘Travelonline Baltics’ UAB, by L. Darulienė, advokatė,

– ‘Megaturas’ UAB, by E. Kisielius, advokatas,

– ‘Vestekspress’ UAB, by L. Darulienė, R. Moisejevas and P. Koverovas, advokatai,

– ‘Visveta’ UAB, by T. Blažys, advokatas,

– the Lietuvos Respublikos konkurencijos taryba, by Mmes E. Pažėraitė and S. Tolušytė, acting as Agents,

– ‘Keliautojų klubas’ UAB, by E. Burgis and I. Sodeikaitė, advokatai,

– the Lithuanian Government, by D. Kriaučiūnas, K. Dieninis and J. Nasutavičienė, acting as Agents,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by A. Biolan, V. Bottka and A. Steiblytė, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2 The request has been made in proceedings between ‘Eturas’ UAB (‘Eturas’), ‘AAA Wrislit’ UAB, ‘Baltic Clipper’ UAB, ‘Baltic Tours Vilnius’ UAB, ‘Daigera’ UAB, ‘Ferona’ UAB, ‘Freshtravel’ UAB, ‘Guliverio Kelionės’ UAB, ‘Kelionių akademija’ UAB, ‘Kelionių gurmanai’ UAB, ‘Kelionių laikas’ UAB, ‘Litamicus’ UAB, ‘Megaturas’ UAB, ‘Neoturas’ UAB, ‘Top Travel’ UAB, ‘Travelonline Baltics’ UAB, ‘Vestekspress’ UAB, ‘Visveta’ UAB, ‘Zigzag Travel’ UAB and ‘ZIP Travel’ UAB, which are travel agencies, and the Lietuvos Respublikos konkurencijos taryba (the Competition Council of the Republic of Lithuania, ‘the Competition Council’) concerning a decision by which the latter ordered those travel agencies to pay fines for having entered into and participated in anticompetitive practices.

The legal framework

3 The fifth recital in the preamble to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102] of the [FEU] Treaty (OJ 2003 L 1, p. 1) provides as follows:

‘In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this Regulation should regulate the burden of proof under Articles [101] and [102] of the Treaty. It should be for the party or the authority alleging an infringement of Article [101](1) and Article [102] of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate to the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.’

4 Article 2 of that regulation, entitled ‘Burden of proof’, provides:

‘In any national or Community proceedings for the application of Articles [101] and [102] of the Treaty, the burden of proving an infringement of Article [101](1) or of Article [102] of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming

the benefit of Article [101](3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 According to the order for reference, Eturas is the holder of exclusive rights to, and administrator of, the E-TURAS system.

6 E-TURAS is a common online travel booking system. It allows travel agencies which have acquired by contract an operating licence from Eturas to offer travel bookings for sale on their websites, through a uniform presentation method determined by Eturas. The abovementioned licensing contract does not contain any provisions which would allow the administrator of that system to alter the pricing set by the travel agencies using the system for the services that they offer.

7 Each travel agency possesses a personal electronic account in the E-TURAS system, to which it can connect using a password provided to it upon signature of the licensing contract. In that account, each travel agency has access to a mailbox specific to the E-TURAS booking system, which functions like an e-mail system. Messages sent using that system are thus read like e-mails and, accordingly, in order to be read, they must first be opened by their addressee.

8 In 2010, the Competition Council opened an investigation on the basis of information received from one of the agencies using the E-TURAS system, stating that the travel agencies were coordinating among themselves the discounts offered on bookings made through that system.

9 That investigation established that, on 25 August 2009, the director of Eturas sent to several travel agencies, or at least to one of them, an e-mail entitled 'Vote', asking the addressee to vote on the appropriateness of reducing the online discount rate from 4% to 1%-3%.

10 On 27 August 2009 at 12:20 pm, the administrator of the E-TURAS system sent, through the internal messaging system, to at least two of the travel agencies concerned, a message entitled 'Message concerning the reduction of the discount for online travel bookings, between 0% and 3%' ('the message at issue in the main proceedings') and worded as follows:

'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.'

11 After 27 August 2009, the websites of eight travel agencies displayed advertisements concerning a discount of 3% on the travel packages offered. When a booking was made, a window appeared indicating that the travel package chosen was subject to a discount of 3%.

12 The investigation carried out by the Competition Council established that, as a result of the technical modifications made to the E-TURAS system following the dispatch of the message at issue in the main proceedings, although the travel agencies concerned were not prevented from granting their customers discounts greater than 3%, they were nevertheless required to take additional technical steps in order to do so.

13 In its decision of 7 June 2012, the Competition Council found that 30 travel agencies as well as Eturas had participated, between 27 August 2009 and the end of March 2010, in an anticompetitive practice in respect of the discounts applicable to bookings made via the E-TURAS system.

14 According to that decision, the anticompetitive practice started on the date on which the message at issue in the main proceedings, concerning the reduction of the discount rate, appeared on the E-TURAS booking system and the systematic limitation of that rate in the operation of that system was implemented.

15 The Competition Council considered that the travel agencies which used the E-TURAS booking system during the period in question and which had expressed no objection were liable for an infringement of the competition rules, since they could reasonably assume that all the other users of that system would also limit their discounts to a maximum of 3%. It inferred from that that those agencies had informed each other of the discount rates which they intended to apply in the future and had thus indirectly — by way of implied or tacit assent — expressed their common intention with regard to conduct on the relevant market. It concluded that the conduct of those agencies on the market in question was to be treated as constituting a concerted practice and held that, although Eturas was not active on the market in question, it had played a role in facilitating that practice.

16 The Competition Council therefore found that Eturas and the travel agencies concerned had infringed, inter alia, Article 101(1) TFEU and imposed fines on them. The travel agency which had informed the Competition Council about that infringement was granted immunity from fines under a leniency programme.

17 The applicants in the main proceedings challenged the decision of the Competition Council before the Vilniaus apygardos administracinis teismas (Vilnius District Administrative Court). By judgment of 8 April 2013, that court upheld the actions in part and reduced the fines imposed.

18 Both the applicants in the main proceedings and the Competition Council lodged an appeal with the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania).

19 The applicants in the main proceedings contend that they did not engage in a concerted practice within the meaning of Article 101(1) TFEU or the relevant provisions of national law. They argue that they cannot be held liable for unilateral actions on the part of Eturas. Some of those applicants submit that they did not receive or read the message at issue in the main proceedings, since the use of the E-TURAS system represented only a very small part of their turnover, and that they did not pay attention to the modifications made to that system. They explain that they continued to use the E-TURAS system even after the technical implementation of the discounts cap, because there was no other system available and because it would have been too expensive to develop their own system. They submit, lastly, that, in principle, discounts were not restricted, since the travel agencies concerned were still able to grant additional loyalty discounts to individual clients.

20 The Competition Council contends that the E-TURAS booking system served the applicants in the main proceedings as a tool for coordinating their actions and eliminated the need for meetings. In that respect, it submits that, first, the conditions of use of that system enabled those applicants to reach a ‘concurrence of wills’ on a discounts cap without the need for direct contacts and, secondly, that the failure to oppose the discounts cap amounted to tacitly assenting to them. It indicates that the E-TURAS system functioned under uniform conditions and was easily recognisable on the websites of the travel agencies at issue in the main proceedings, on which information on applicable discounts was published. Those travel agencies did not object to the discounts cap imposed and thus made it clear to each other that they were applying limited discounts, thereby eliminating any uncertainty as to the discount rates. According to the Competition Council, the applicants in the main proceedings were obliged to be circumspect and responsible and could not ignore or disregard messages concerning the tools used in their business.

21 The referring court seeks clarification as to the correct interpretation of Article 101(1) TFEU and, in particular, as to the allocation of the burden of proof for the purposes of applying that provision. It entertains doubts as to the existence of sufficient factors capable of establishing, in the present case, the participation of the travel agencies concerned in a horizontal concerted practice.

22 The referring court notes in that respect 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 at issue in the main proceedings and should have understood all of the consequences arising from the decision concerning the restriction of the discount rates on bookings. In that respect, it notes that the presumption of innocence applies in the context of punishing infringements of competition law and indicates its doubts as to the possibility of finding that the travel agencies concerned committed an infringement solely on the basis of the first of those presumptions, particularly since some of those agencies denied having any knowledge of the message at issue in the main proceedings, whereas others sold their first travel package only after the technical modifications had been made or indeed did not make any sales at all through the E-TURAS booking system.

23 At the same time, the referring court acknowledges that the travel agencies using the E-TURAS booking system knew or ought to have known that their competitors also used that system, as a result of which it may be considered that they were obliged to act with care and diligence and, accordingly, could not disregard the messages that they received. In that respect, the referring court notes that some of the agencies fined by the Competition Council admitted having had knowledge of the content of the message at issue in the main proceedings.

24 The referring court seeks therefore to establish whether, in the circumstances of the case before it, the mere sending of a message concerning a restriction of the discounts rate could constitute sufficient evidence to confirm or to raise a presumption that the economic operators participating in the E-TURAS booking system knew or ought to have known about that restriction, even though some of them claim not to have had any knowledge of the restriction, some did not change the actual discount rates applied and others did not sell any travel packages at all via the E-TURAS system during the relevant period.

25 In those circumstances, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court, Lithuania) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should Article 101(1) TFEU be interpreted as meaning that, in a situation in which economic operators participate in a common computerised information system of the type described in this case and the Competition Council has proved that a system notice on the restriction of discounts and a technical restriction on discount rate entry were introduced into that system, it can be presumed that those economic operators were aware, or ought to have been aware, of the system notice introduced into the computerised information system and, by failing to oppose the application of such a discount restriction, expressed their tacit approval of the price discount restriction and for that reason may be held liable for engaging in concerted practices under Article 101(1) TFEU?

(2) 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 computerised information system, in circumstances such as those in the main proceedings, have engaged in concerted practices within the meaning of Article 101(1) TFEU?’

Consideration of the questions referred

26 By its questions, which it is appropriate to examine together, the referring court asks, in essence, whether 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 modification necessary to implement that measure, it may be presumed that those operators were aware or ought to have been aware of that message and, in the absence of any opposition on their part to such a practice, it may be considered that those operators participated in a concerted practice within the meaning of that provision.

27 As a preliminary point, it is necessary to recall the Court's case-law that each economic operator must determine independently the policy which it intends to adopt on the common market. Such a requirement of autonomy thus strictly precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself or contemplates adopting on the market, where the object or effect of those contacts is to give rise to conditions of competition which do not correspond to the normal conditions of the market in question (see, to that effect, judgment in *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraphs 32 and 33 and the case-law cited).

28 The Court has also held that passive modes of participation in the infringement, such as the presence of an undertaking in meetings at which anticompetitive agreements were concluded, without that undertaking clearly opposing them, are indicative of collusion capable of rendering the undertaking liable under Article 101 TFEU, since a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery (see, to that effect, judgment in *AC-Treuhand* v *Commission*, C−194/14 P, EU:C:2015:717, paragraph 31 and the case-law cited).

29 In the first place, inasmuch as the referring court raises the issue whether the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the operators which used the system were aware, or ought to have been aware, of the content of that message, it must be noted that, in accordance with Article 2 of Regulation No 1/2003, in any national proceedings for the application of Article 101 TFEU, the burden of proving an infringement of Article 101(1) TFEU is to rest on the party or the authority alleging the infringement.

30 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.

31 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.

32 According to settled case-law, 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, provided, however, that those rules are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness) (see, to that effect, judgments in *VEBIC*, C−439/08, EU:C:2010:739, paragraph 63, and *Nike European Operations Netherlands*, C−310/14, EU:C:2015:690, point 28 and the case-law cited).

33 The Court has indeed held that the presumption of a causal connection between a concertation and the market conduct of the undertakings participating in the practice, according to which those undertakings, where they remain active on that market, take account of the information exchanged with their competitors in determining their conduct on that market, follows from Article 101(1) TFEU and consequently forms an integral part of the EU law which the national court is required to apply (see, to that effect, judgment in *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraphs 51 to 53).

34 However, in contrast to that presumption, the answer to the question whether the mere dispatch of a message, such as that at issue in the main proceedings, may, having regard to all of the circumstances before the referring court, 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.

35 The principle of effectiveness requires however that 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 and, in particular, must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (see, to that effect, judgment in *Pfleiderer* C−360/09, EU:C:2011:389, point 24*)*.

36 In that respect, it must be recalled that, according to the case-law of the Court, 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, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see, to that effect, judgment in *Total Marketing Services* v *Commission*, C−634/13 P, EU:C:2015:614, paragraph 26 and the case-law cited).

37 Consequently, 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.

38 In so far as the referring court has doubts as to the possibility, in view of the presumption of innocence, of finding that the travel agencies were aware, or ought to have been aware, of the message at issue in the main proceedings, it must be recalled that the presumption of innocence constitutes a general principle of EU law, now enshrined in Article 48(1) of the Charter of Fundamental Rights of the European Union (see, to that effect, judgment in *E.ON Energie* v *Commission*, C−89/11 P, EU:C:2012:738, paragraph 72), which the Member States are required to observe when they implement EU competition law (see, to that effect, judgments in *VEBIC*, C−439/08, EU:C:2010:739, paragraph 63, and *N.*, C−604/12, EU:C:2014:302, paragraph 41).

39 The presumption of innocence precludes the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message.

40 However, the presumption of innocence does not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings 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 as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it.

41 In that regard, the referring court cannot require that those agencies take excessive or unrealistic steps in order to rebut that presumption. The travel agencies concerned must have the opportunity to rebut the presumption that they were aware of the content of the message at issue in the main proceedings as from the date of that message's dispatch, for example by proving that they did not receive that message 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.

42 In the second place, as regards the participation of the travel agencies concerned in a concerted practice within the meaning of Article 101(1) TFEU, it must be recalled, first, that under that provision, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two (judgment in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C−286/13 P, EU:C:2015:184, paragraph 126 and the case-law cited).

43 Secondly, it must be pointed out that the case at issue in the main proceedings, as presented by the referring court, is characterised by the fact that the administrator of the information system at issue sent a message concerning a common anticompetitive action to the travel agencies participating in that system, a message which could only be consulted in the 'Notices' section of the information system in question and to which those agencies did not expressly respond. Following the dispatch of that message, a technical restriction was implemented which limited the discounts that could be applied to bookings made via that system to 3%. Although that restriction did not prevent the travel agencies concerned from granting

discounts greater than 3% to their customers, it nevertheless required them to take additional technical steps in order to do so.

44 Those circumstances are capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice, provided that the two other elements constituting a concerted practice, noted in paragraph 42 above, are also present. Depending on the referring court's assessment of the evidence, a travel agency may be presumed to have participated in that concertation if it was aware of the content of that message.

45 However, 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 at issue in the main proceedings, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action.

46 In the third place, it must be pointed out that a travel agency may rebut the presumption that it participated in a concerted practice by proving that it publically distanced itself from that practice or reported it to the administrative authorities. In addition, according to the case-law of the Court, in a case such as that at issue in the main proceedings, which does not concern an anticompetitive meeting, public distancing or reporting to the administrative authorities are not the only means of rebutting the presumption that a company has participated in an infringement; other evidence may also be adduced with a view to rebutting that presumption (see, to that effect, judgment in *Total Marketing Services* v *Commission*, C−634/13 P, EU:C:2015:614, paragraphs 23 and 24).

47 As regards the examination of whether the travel agencies concerned publicly distanced themselves from the concertation at issue in the main proceedings, it must be noted that, in particular circumstances such as those at issue in the main proceedings, it cannot be required that the declaration by a travel agency of its intention to distance itself be made to all of the competitors which were the addressees of the message at issue in the main proceedings, since that agency is not in fact in a position to know who those addressees are.

48 In that situation, the referring court may accept that a clear and express objection sent to the administrator of the E-TURAS system is capable of rebutting that presumption.

49 As regards the possibility of rebutting the presumption of participation in a concerted practice by means other than public distancing or reporting it to the administrative authorities, it must be held that, in circumstances such as those at issue in the main proceedings, the presumption of a causal connection between the concertation and the market conduct of the undertakings participating in the practice, referred to in paragraph 33 of the present judgment, could be rebutted by evidence of a systematic application of a discount exceeding the cap in question.

50 In the light of all the foregoing, the answer to the questions referred is that:

– 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 a systematic application of a discount exceeding the cap in question.

– It is for the referring 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 a message, such as that at issue in the main proceedings, 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.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

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 referring 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 a message, such as that at issue in the main proceedings, 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.

[Signatures]

** Language of the case: Lithuanian.