



EUROPEAN UNION

The Court rules on the burden of proof in a case involving technological collusion

➦ [Case C-74/14 of the Court of Justice, *Eturas UAB e.a.*, January 22, 2016](#)

On January 21, 2016, the Court of Justice of the European Union (the “Court”) issued a preliminary ruling in *Eturas UAB e.a.*, C-74/14, that answered questions raised by the Supreme Administrative Court of Lithuania. The Court shed light on the level of evidence required to presume the existence of a concerted practice in the context of the unilateral announcement of rebates on an online booking system.

In this case, the administrator of the system sent a notice to travel agents via the internal E-TURAS messaging system informing them that they should apply a maximum 3% discount to their bookings. In addition, a

technical restriction was set in the E-TURAS system to cap the discounts that could be entered in the booking system at 3%. Some of the online agents argued that they had not read the message or not even sold the relevant product. As a consequence, the Lithuanian court sought clarification as to the correct interpretation of Article 101 (1) TFEU and, in particular, as to the allocation of the burden of proof.

The Court held that economic operators may, if they were aware of that message, be presumed to have participated in a concerted practice since they did not publicly distance themselves from that practice, or

report 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. The Court of Justice ruled that although the law of evidence is a matter for national law, it would be contrary to the presumption of innocence to infer the awareness of the travel agents on the sole basis of the message being sent to them.

In other words, if the mere sending of the message in question may, in the light of other objective and consistent

indicia, suffice to presume that the message recipients were aware of its content, they should nevertheless still have the opportunity to rebut such presumption. In this regard, the Court merely stated that ‘*excessive or unrealistic*’ steps cannot be imposed on the message recipients.

Also, in light of the *Eturas* judgment, it is necessary for undertakings, if they become aware of a concerted practice, to publicly distance themselves as quickly as possible or report it to the competent competition authorities without delay.