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Case Comment: Collusion and Online Platforms in *Eturas**Katri Havu & Neža Zupancič**

I. INTRODUCTION

In January 2016 the Court of Justice ('the Court') issued a preliminary ruling in Case C-74/14 *Eturas*¹ on article 101 TFEU and its application in the digital environment. In particular, matters pertaining to evaluating the presence and 'outer borders' of competition infringing agreements and concerted practices stand at the core of the preliminary ruling.

E-commerce and online business are highly topical within EU competition law. In May 2015, the Commission opened an inquiry in the e-commerce sector² as an element of the Digital Single Market ('DSM') agenda that strives to optimize the EU's digital economy. The functioning of online platforms and their impact on markets is one of the central themes of the sector inquiry and the DSM project.³ The Commission defines platforms broadly, as 'software-based facilities offering two-or even multi-sided markets where providers and users of content, goods and services can meet.'⁴ One of the underlying issues, reflected in the e-commerce inquiry and the case under discussion here, appears to be whether and how by their very nature platforms might facilitate collusion.⁵ *Eturas* represents one of the first cases exploring the application of competition law in the online environment and in the context of an electronic sales platform, and may thus be setting the tone for future case law.⁶

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¹ Case C-74/14 *Eturas UAB and Others v Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42 (CJEU 21 January 2016).

² European Commission, 'Antitrust: Commission launches e-commerce sector inquiry', Press Release IP/15/4921 (Brussels, 6 May 2015).

³ Commission Communication A Digital Single Market Strategy for Europe COM(2015) 192 final, 11–12; Commission Staff Working Document A Digital Single Market Strategy for Europe – Analysis and Evidence SWD(2015) 100 final, 52–55.

⁴ Commission Staff Working Document A Digital Single Market Strategy for Europe – Analysis and Evidence SWD(2015) 100 final, 52.

⁵ See also, as to discussion, e.g., Marc Rysman 'The Economics of Two-Sided Markets' (2009) 23 *The Journal of Economic Perspectives* 125; Lars Kjølbye, Alessio Aresu, Sophia Stephanou, 'The Commission's E-Commerce Sector Inquiry: Analysis of Legal Issues and Suggested Practical Approach' (2015) 6 *Journal of European Competition Law and Practice* 465.

⁶ As to the broader issue whether traditional EU competition provision interpretations are problematic or inconclusive in situations central in the online environment, see, e.g., Kjølbye et al, (n 5) 465.

The preliminary ruling in *Eturas* contributes to clarifying dilemmas arising from the online environment and a common platform as a key ingredient for collusion. Particularly elaborately examined are Article 101 issues relating to tacit consent and measures required from platform user undertakings in order to sufficiently distance themselves from infringement or otherwise to avoid a finding that they participated in a competition infringing arrangement. Furthermore, EU law requirements and limits relating to enforcing EU competition provisions in Member States are to some extent clarified as to evaluation of evidence and standards of proof. In brief, the judgment touches upon an array of issues, ranging from presumption of innocence, enshrined in Article 48(1) of the Charter of Fundamental Rights of the EU ('CFR'), to dealing with collusion in the online environment.

II. FACTUAL AND LEGAL CONTEXT

The facts of the *Eturas* case raise questions as to the existence of a competition infringing arrangement and tacit approval of competition infringing terms between the administrator of an online travel booking system and individual travel agency ('TA') undertakings selling through the system. Moreover, evaluating the presence of concerted practices between TAs using the same online booking system is relevant. The preliminary ruling questions presented focused on the presence of horizontal concerted practices. Nevertheless, a similar factual situation could raise the issue of the existence of a vertical anticompetitive agreement or practice, or the issue of *defining the relationship* between the platform administrator and a TA from the standpoint of competition law.⁷

The facts and the situation in the main proceedings may be briefly described as follows: Eturas is the proprietor and administrator of an online travel booking platform (E-TURAS) for TAs. Under the platform licence, a TA is provided with uniform layout for their online booking services. The licence does not include pricing provisions.⁸ The TA is also provided with an electronic password-secured account that contains a mailbox for booking system notifications (messages). The mailbox operates like an email account: messages received have to be opened in order to read them.⁹

In August 2009, the administrator of the booking platform circulated an email (entitled 'Vote') inquiring about limiting the online discount level from 4% to 1–3%. The correspondence was not sent to all the TAs using the system.¹⁰ Two days later, the administrator sent a system notification about a newly adopted discount cap (3%).¹¹

⁷ See also Matthew Bennett, 'Online Platforms: Retailers, Genuine Agents or None of the Above?' (*CPI*, June 20, 2013) <<https://www.competitionpolicyinternational.com/online-platforms-retailers-genuine-agents-or-none-of-the-above/>> accessed 3 March 2016.

⁸ *Eturas* (n 1) para 6.

⁹ *Ibid* para 7.

¹⁰ *Ibid* para 9.

¹¹ *Ibid* para 10 quotes the message: '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

Apparently, it was not obvious to the recipients who else received the notification. In addition, a technical restriction was imposed that limited online discounts to the new level. This signified that if a discount was set above the cap, it was automatically reduced back to the 3% discount rate.¹² Although this restriction did not preclude any TA from granting additional discounts to its individual customers, the TAs were required to take additional technical steps in order to do so.¹³

In 2012, the national competition authority ('NCA'), after having investigated the TAs using the E-TURAS system in terms of coordinating their discounts, found that 30 TAs as well as Eturas were involved in anticompetitive behaviour in breach of Article 101(1) TFEU and corresponding national provisions. The anticompetitive practice was considered to have started on the date of the 3% discount cap message.¹⁴ According to the NCA's reasoning, the TAs could reasonably expect that other users were also subject to the same 3% cap, which indicated that the agencies had reached tacit or implied consent on their common behaviour. Liability could have been avoided by expressing an objection. Eturas, not active in the same market as the TAs, was considered to have played the role of a facilitator.¹⁵

Upon appeal at the *Vilniaus apygardos administracinis teismas* (Vilnius District Administrative Court) in 2013, the decision was partially upheld.¹⁶ The judgment was appealed again, by both the undertakings and the NCA, to the *Lietuvos vyriausioji administracinis teismas* (Supreme Administrative Court, Lithuania).¹⁷

The TAs presented the argument that the actions in question had been unilateral on the part of the administrator, Eturas. Furthermore, it was stated that the controversial system notification was not received, read, or paid attention to by some TAs, since for some of the TAs the E-TURAS system represented only a minor part of their business, and that technical modifications in the system were not necessarily noticed. Furthermore, the TAs submitted that they continued to use the system even after the technical modification, because there was no alternative available and developing a new online system would be costly. Lastly, the TAs argued that the discounts were not truly restricted, since the cap did not preclude them from granting higher individual discounts.¹⁸

The NCA argued that the online platform enabled the TAs to reach a concurrence of wills regarding the 3% cap without the need to contact each other. Furthermore,

distributed information concerning the discount rates, we suggest that you alter that information accordingly.⁷

¹² Ibid para. 10.

¹³ Ibid para 12.

¹⁴ Ibid paras 13–16 and 19.

¹⁵ Ibid para 15.

¹⁶ Ibid para 17.

¹⁷ Ibid para 18–20.

¹⁸ Ibid para 19.

because the TAs failed to oppose the restriction, they tacitly consented to an anticompetitive practice.¹⁹

The Supreme Administrative Court stayed the proceedings and submitted a preliminary ruling request to the Court, expressing doubts on the correct interpretation of Article 101 TFEU and as to the issue when finding an infringement is appropriate in the context of facts like those in *Eturas*. In essence, the referring court inquired whether the mere dispatch of a message on a discount cap should lead to a presumption that the addressees knew or should have known of its content and whether it should be inferred from this that they may be liable for participating in a concerted practice, had they not opposed the illicit practice. Furthermore, the referring court asked about the factors required to be considered for establishing participation in a concerted practice.²⁰ The preliminary ruling questions, which encompass issues of interpretation of Article 101 and matters of EU law requirements relating to evaluation of evidence, read:

(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?²¹

In his Opinion, which the Court mainly followed, Advocate General ('AG') Szpunar stated that the national court could find that it was probable that undertakings became aware of the message.²² Furthermore, a concerted practice could be established between undertakings that became aware of the system notification and continued using the system without sufficient public distancing from the anticompetitive practice.²³ Sufficient public distancing, in the AG's opinion, entailed opposition to as many members of the concertation as possible, notifying the administrator²⁴ as well as

¹⁹ Ibid para 20.

²⁰ Ibid para 25.

²¹ Ibid para 25.

²² *Eturas* (n 1) Opinion of AG Szpunar, ECLI:EU:C:2015:493, paras 55–57. The AG emphasised that evaluation of evidence is a matter of national law.

²³ Ibid paras 71 and 103.

²⁴ Ibid para 88–89.

informing the site users. In case this was not effective, reporting to the competition authority was appropriate.²⁵ The AG highlighted, moreover, that rebuttable presumptions under competition law are not contrary to the presumption of innocence.²⁶

III. REASONING OF THE COURT

The Court noted that the questions referred should be evaluated together.²⁷ As to the substance, the Court first recalled its earlier case law requiring that each economic operator acts independently on the market.²⁸ Furthermore, the Court repeated that passive participation in an infringement is also indicative of potentially illicit collusion, since it implies tacit approval, encouragement of the infringement, and hindrance of discovery of the infringement.²⁹

The Court emphasised that while Article 2 of Regulation 1/2003 addresses distribution of the burden of proof, EU law does not regulate more specific procedural aspects in competition cases and, specifically, it does not contain rules on assessing evidence and the standard of proof.³⁰ Here, the Court also recalled the limits that EU law sets on use of so-called national procedural autonomy, that is, the principles of equivalence and effectiveness, the significance of the latter being that national rules must not make enforcing EU law practically impossible or excessively difficult. Moreover, the Court made the recently often seen addition that national rules must not jeopardise effective application of Articles 101 and 102.³¹

The Court noted, in any case, that it has been held in earlier case law that a presumption of the existence of a causal connection between a concertation and the market conduct of the actors participating in a practice follows from Article 101(1). Thus, it is an essential part of EU law that national courts must apply (and not a matter left to be governed by primarily national law).³² The Court, however, sought to point out a borderline between Article 101(1) interpretation and matters pertaining to the sphere of national procedural rules: the issue of the significance of mere dispatch of the discount cap message was stated to be an evidentiary and standard of proof matter, in

²⁵ Ibid para 92.

²⁶ Ibid paras 94–102.

²⁷ *Eturas* (n 1) para 26.

²⁸ Ibid para 27. See also Case C-8/08 *T-Mobile Netherlands and Others* ECLI:EU:C:2009:343, [2009] ECR I-4529, paras 32–35; Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie and Others v Commission* ECLI:EU:C:1975:174, [1975] ECR 1663, paras 173–174; Case 172/80 *Gerhard Züchner v Bayerische Vereinsbank AG* ECLI:EU:C:1981:178, [1981] ECR 2021, paras 13–14; Joined Cases C-89, 104, 114, 116, 117, and 125-129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120, [1993] ECR I-1307, para 63; Case C-7/95 P *Deere v Commission* ECLI:EU:C:1998:256, [1998] ECR I-3111, para 86–87.

²⁹ *Eturas* (n 1) para 28. See also Case C-194/14 P *AC-Treuband v Commission*, ECLI:EU:C:2015:717 (CJEU 22 October 2015), para 31 and the case law cited.

³⁰ *Eturas* (n 1) paras 29–31.

³¹ Ibid paras 32 and 35. See further Section IV below.

³² Ibid para 33.

other words, not a question of interpreting EU competition law.³³ Next, the reasoning of the Court nevertheless illustrates that interpretation of EU competition law and the limits that EU law sets on the acceptability of national solutions interact. The Court explained that because in many cases the existence of a concerted practice or an agreement must be concluded from coincidences and indicia, the principle of effectiveness actually requires that not only objective and direct evidence but also objective and consistent indicia may be used to prove competition infringement.³⁴

As to the issue whether it is appropriate to find that the TAs were aware or should have been aware of the contents of the discount cap message, the Court emphasised the relevance of the presumption of innocence (now Article 48(1) CFR), which the Member States must observe when applying EU competition law.³⁵ The Court clarified that in light of the presumption of innocence, the conclusion that mere dispatch of the message implies that the TAs *should have known* of the contents of the message is precluded.³⁶

Presumption of innocence, however, does not preclude adopting a presumption according to which the TAs were aware of the contents of the message as from the date of its dispatch, if objective and consistent indicia supported this and rebutting the presumption was not excessively difficult or did not require unrealistic steps.³⁷ Rebuttal must be possible, for instance, by showing that TAs did not receive or look at the message (on the day of the dispatch or at all).³⁸

After these remarks the Court moved on to recall and emphasise that the concept of concerted practice encompasses the element of subsequent market conduct which is affected by the concertation.³⁹ In the present case, following the notification, a technical limitation on discounts was implemented, thus, as a starting point, affecting market behaviour. If the TAs wanted to grant greater discounts to their customers than the 3% cap allowed, they would have had to take additional steps to do so. The Court continued by pointing out that concertation by the TAs that were aware of the content of the message could be found provided that elements of cooperation and subsequent *affected market conduct* (causal link) were present. The undertakings could be seen as having tacitly assented to the illicit concerted practice. The Court clarified this further by stating that, depending on the evaluation of evidence, a TA may be presumed to have participated in the concertation if it was aware of the content of the message.⁴⁰

³³ Ibid para 34.

³⁴ Ibid paras 36–37.

³⁵ Ibid para 38.

³⁶ Ibid para 39. See also paras 50–51.

³⁷ Ibid paras 40–41.

³⁸ Ibid para 41.

³⁹ Ibid para 42. See also Case C-286/13 P *Dole Food Company Inc. and Dole Fresh Fruit Europe v European Commission*, ECLI:EU:C:2015:184 (19 March 2015), para 126.

⁴⁰ *Eturas* (n 1) paras 44, 42, 50–51.

Nevertheless, if it could not be considered that a TA was aware of the message, its participation in concertation could not be concluded from the mere existence of the technical restriction, unless tacit assent to anticompetitive practices could be established on the basis of other objective and consistent indicia.⁴¹

The Court moved on to remark that a TA may rebut the presumption as to participation in a concerted practice by showing that it publicly distanced itself from the illicit practice or reported it to the authorities. Rebuttal is, moreover, possible by means of other evidence. It was highlighted that this is relevant in cases like the present one where an anticompetitive *meeting* is not a relevant mode to concert practices.⁴² As to distancing, the Court noted, as the AG had done, that the nature of the market in question rendered it impossible for a TA to announce its opposition to all other undertakings involved – it might not even have been aware who those undertakings were.⁴³ The Court stated that a clear and express objection sent to the system administrator may be accepted by the referring court as sufficient distancing.⁴⁴

As regards other ways of rebutting the presumption of participation in an anticompetitive arrangement, the Court explained that in a case like the present one, the presumption of a causal connection between concertation and an undertaking's market conduct could be rebutted by evidence of consistent application of discounts above the cap.⁴⁵ In the stricter view of the AG, such behaviour would merely have constituted cheating other members of the cartel and would not have sufficed to prove that the undertaking did not take part in the competition infringement.⁴⁶

IV. DISCUSSION

IV.1. Procedural autonomy, the principle of effectiveness and effective application of EU competition rules

The so-called procedural autonomy of Member States and the principle of effectiveness are topics for a vast mass of EU level case law even beyond competition law enforcement. National law fills in the gaps of EU law when it comes to remedial and procedural rules, and the limits of acceptability of national solutions are constantly discussed in preliminary rulings. The core content of the principle of effectiveness, as expressed by the Court, is that relying on EU law must not be 'excessively difficult or practically impossible'. Regardless of this modest wording, the Court has based many kinds of 'interventions' into national remedial and procedural rules on the principle or

⁴¹ Ibid para 45.

⁴² Ibid para 46. See also Case C-634/13 P *Total Marketing Services v Commission*, ECLI:EU:C:2015:614, (CJEU 17 September 2015), paras 22–24.

⁴³ *Eturas* (n 1) para 47; Opinion of AG Szpunar (n 22) para 88.

⁴⁴ *Eturas* (n 1) paras 47–48.

⁴⁵ Ibid paras 49, 50–51.

⁴⁶ Opinion of AG Szpunar (n 22) para 90.

on a combination of requirements including the principle.⁴⁷ In contemporary competition law enforcement case law, the Court has, moreover, pointed out several times that even though it is a matter for the national system to provide detailed procedural rules and that those rules should be evaluated in the light of the principles of effectiveness and equivalence, it must be ensured that rules of national law ‘specifically, in the area of competition law ... do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU’.⁴⁸

In *Eturas* the Court recalls the basic significance of procedural autonomy and the relevant principles, proceeding to explain in more detail what EU law demands from treatment of a court case like that under discussion.⁴⁹ The requirement for effective application of Article 101 directs the Court’s attention back to case law on interpretation of Article 101 as to the existence of concerted practices or agreements.⁵⁰ The significance of the principle of effectiveness is then explained: ‘(T)he 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.’⁵¹ As to the principles of effectiveness and equivalence, full effect of EU competition law and practical effect or effective application of the competition provisions in general, it may often be challenging to conclude what EU law requires from the treatment of a concrete case or issue before a national court. Reasoning as now presented by the Court reveals the detailed, practical implications of EU law requirements, but in a pointillist manner.

The Court left it for the national court to evaluate, in the light of national rules governing assessment of evidence and standard of proof and taking into account EU law requirements for national solutions, whether the dispatch of a message like that in the main proceedings may constitute sufficient evidence to establish that the addressees of the message were aware of its content in the present case.⁵² The Court underlined as

⁴⁷ As to competition case law, see, e.g., Case C-439/08 *VEBIC VZW v Raad voor de Mededinging* ECLI:EU:C:2010:739, [2010] ECR I-12471; Joined cases C-295-298/04 *Manfredi* ECLI:EU:C:2006:461 [2006] ECR I-6619, paras 60–64, 90–100. As to literature, see, e.g. Sacha Prechal, Rob Widdershoven, ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law* 31; Pieter Van Cleynenbreugel, ‘Transforming Shields into Swords: The VEBIC Judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU Law,’ (2011) 18 *Maastricht Journal of European and Comparative Law* 511; Katri Havu, ‘EU Law in Member State Courts: “Adequate Judicial Protection” and Effective Application – Ambiguities and Nonsequiturs in Guidance by the Court of Justice?’ (2016) 8 *Contemporary Readings in Law and Social Justice* 158.

⁴⁸ See Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389, [2011] ECR I-5161, para 24; See also *VEBIC* (n 47) para 57; Case C-536/11 *Bundeswetibenerbsbehorde v Donau Chemie AG* ECLI:EU:C:2013:366, paras 22, 27; Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317, paras 21–26. See similarly in *Eturas* (n 1) para. 35. As to discussion see, e.g., Katri Havu, Juha Vesala, ‘Competition Law Implications of Invalidation of Intellectual Property Rights to Licensing Agreements: Issues Raised by Genentech (C-567/14)—Request for a Preliminary Ruling from the Cour d’appel de Paris (France) Lodged on December 9, 2014’ (2015) 8 *GCLR* 150.

⁴⁹ *Eturas* (n 1) para. 35.

⁵⁰ *Ibid* para. 35–37.

⁵¹ *Ibid* para 37.

⁵² *Ibid* paras 34–41, 50–51.

an additional limit to acceptable national treatment that the presumption of innocence (Article 48(1) CFR) precludes the national court from adopting the approach that mere dispatch of a message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.⁵³ This express guidance eliminates uncertainties as to how EU law is correctly applied, but the entire conundrum of evaluating evidence and facts in the light of EU law remains an intricate task for the national court, both in this case and future cases of similar nature.

IV.2. Illegal collusion and tacit assent

Concerted practices and/or agreements, one-sided communications and ‘signalling’, as well as tacit assent, have been discussed by the Court in numerous previous cases. In *Eturas*, the Court explains the significance of Article 101 in the context of the situation in the case. From a broad perspective, the judgment in *Eturas* forms a continuation of earlier case law on one-sided communications and tacit assent and should be read as a part of that continuum, even though it also sheds light, in particular, on evaluation in an online environment.⁵⁴

Central for the concept of concerted practices is the fact that, regardless of the absence of true agreement, coordination between undertakings nonetheless substitutes practical cooperation for the risks of competition. Under the prohibition of competition restricting agreements and concerted practices, concerted practices rest at the far end of the spectrum of illicit behaviour, opposite to a demonstrable, fully formalistic contract or agreement.⁵⁵ An inherent issue as to concerted practices is deciding where the outer limits of illegal behaviour lie – in *Eturas*, the Court was once again faced with this challenge.

The extent to which illegal collusion may be stretched conceptually touches on matters pertaining to evaluation of the evidence in *Eturas*. The Court underlines the difference between issues of EU competition law and evaluating evidence on the basis of national rules of procedure.⁵⁶ The presumption of innocence is highlighted as affecting evaluation of evidence, not the core of competition law interpretation.⁵⁷ Regardless of underlining the difference between evidentiary standards (a matter of national law within the limits set by EU law) and interpreting Article 101 (a matter of EU law), the judgment in its entirety shows that the border between the *concept of concerted practices in EU competition law* and *practical matters pertaining to finding or showing* such practices is hazy.

⁵³ Ibid paras 38–40, 50–51.

⁵⁴ See also, as to other commentaries on the preliminary ruling, e.g., Alfonso Lamadrid, ‘ECJ’s Judgment in Case C-74/14, *Eturas* (on the scope of “concerted practices” and on technological collusion)’ (*Chilling Competition*, 22 January 2016) <<http://chillingcompetition.com/2016/01/22/ecjs-judgment-in-case-c-7414-eturas-on-the-scope-of-concerted-practices-and-on-technological-collusion/>> accessed 3 March 2016.

⁵⁵ See further Case C-455/11 P *Solvay SA v European Commission* ECLI:EU:C:2013:796, paras 53–54; Case C-49/92 P *Commission of the European Communities v Anic Participazioni SpA* ECLI:EU:C:1999:356, [1999] ECR I-4125, para. 108. See also Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities (Dyestuffs)* ECLI:EU:C:1972:70, [1972] ECR 619, para. 64; *T-Mobile Netherlands* (n 28) para. 23–28.

⁵⁶ *Eturas* (n 1) para 34.

⁵⁷ Ibid paras 37–51.

Throughout the ruling, the Court actually moves between the concept of concerted practices and de facto developing evidentiary standards or EU law limits on applying national rules on evaluation of evidence.

The Court did not address the practice at issue as either vertical or horizontal. Some of the TAs, however, apparently attempted to raise the argument that the situation is an example of a vertical hub and spoke collusion signifying a triangular relationship of information exchange through common trading partners.⁵⁸ While the qualifier vertical is not entirely correct, since by definition such collusion contains vertical and horizontal elements,⁵⁹ the decision in a case similar to *Eturas* could benefit from exploring the concept further. Under current EU competition law, evaluating the liability of the system operator or collusion facilitator may still be challenging in some situations and might ultimately entail a balancing act between *effet utile* and legal certainty.⁶⁰ Nevertheless, the formulation of the preliminary ruling questions has, of course, impacted the focus of the Court and the discussion presented in *Eturas*. The role of *Eturas*, the platform administrator, and the nature of the collusion under discussion were not central to the questions referred.

A further remark to be made on the case is that the judgment and the Opinion by the AG in *Eturas* illustrate the intriguing role and topicality of *presumptions* in EU competition law.⁶¹ The complex nature of many competition cases on the one hand dictates the need for different presumptions. However, and as the Court also emphasised, on the other hand these presumptions should always be implemented with deference to fundamental rights.⁶² The present ruling and the Opinion by the AG illustrate a tendency to, in any case, try and restrain the implications of fundamental rights in terms of the ‘core of competition law’.

IV.3. The online environment

Communications by means of email and the like are nowadays probably common in cases dealing with one-sided announcements and tacit assent, regardless of the field of business. The possibilities of collusion are shifting from the proverbial ‘smoke filled room’ to the online landscape. In that sense, the evaluation and guidance presented by the Court as to the significance of a message being sent may be relevant for a broad

⁵⁸ *Eturas* (n 1) Opinion of AG Szpunar (n 22) paras 64–65. See further, e.g. Okeoghene Odudu, ‘Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion’ (2011) 7 European Competition Journal 205; Gian Luca Zampa, Paolo Buccirossi, ‘Hub and Spoke Practices: Law and Economics of the New Antitrust Frontier?’ (2013) 9 Competition Law International 91; Jonathan Faull, Ali Nikpay (ed) *The EU Law of Competition* (3rd edition, OUP 2014), 1051.

⁵⁹ See further Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreement [2011] OJ C 11/1, para. 55; Guidelines on Vertical Restraints [2010] OJ C 130/01, para 211.

⁶⁰ See further *AC-Treuband* (n 29) Opinion of AG Wahl, ECLI:EU:C:2015:350, para 87 in particular. Note that the ECJ did not adopt the AG’s view and attributed greater weight to *effet utile*.

⁶¹ *Eturas* (n 1) paras 38–40; *ibid* Opinion of AG Szpunar (n 22), paras 94–102.

⁶² *Eturas* (n 1) paras 38–40, para 38. See also, e.g., David Bailey, ‘Presumptions in EU Competition Law’ (2010) 31 ECLR 20; Cristina Volpin, ‘The ball is in your court: Evidential burden of proof and the proof-proximity principle in EU competition law’ (2014) 51 CMLR 1159.

spectrum of cases. In *Eturas*, the Court also had the opportunity to present remarks on the significance of a technical discount restriction applied on a common online sales platform.⁶³ Guidance presented regarding this matter may be interesting in many contemporary and future cases.

Moreover, a development taking place in *Eturas*, relating to the new issues of the online environment, is the detailed discussion of the issue of sufficient or public distancing from competition restricting practices and the issue of other ways to rebut a presumption on participation in an anticompetitive practice. Traditionally, it has been considered that distancing can be done in two ways, either by reporting an infringement to the authorities or by informing all other members of the infringement that the undertaking does not intend to participate in the illicit practice.⁶⁴ The Court has now pointed out that that distancing and objection may be sufficient even when expressed only to the online system administrator.⁶⁵ This is a reasonable approach to the realities of the online environment and susceptible to being relevant in many situations where an email or the like is distributed so that recipients are uncertain as to who else has received the same notification.

The Court, furthermore, expressed a new possibility to rebut the presumption of causal connection between concertation and market conduct.⁶⁶ Departing from the Opinion of the AG,⁶⁷ the Court decided that under the circumstances of the case, proof of consistently different market conduct by applying higher discounts could suffice to rebut the presumption.⁶⁸ This represents a departure from the practice in ‘bricks and mortar’ markets, where the Court previously did not accept proof of consistent application of different pricing as sufficient.⁶⁹

The issue whether and how electronic platforms by their nature might facilitate collusion, is, as explained in the Introduction (I), topical within EU competition law. The *Eturas* case seems to support the conclusion that platforms may easily be perceived as collusion-prone – and that undertakings should be ready to promptly oppose problematic communications regarding sales through platforms they use. Furthermore, it should be noted that the question of unilateral behaviour as opposed to Article 101(1) infringements might open up new discussions and require updated interpretations of the EU competition rules. Drawing the line between unilateral behaviour of platforms

⁶³ *Eturas* (n1) para 45.

⁶⁴ See *Total* (n 42) paras 20–21. See also David Bailey, “‘Publicly distancing’ Oneself from the Cartel’ (2008) 31 *World Competition* 177.

⁶⁵ *Eturas* (n 1) paras 47–48.

⁶⁶ Repeated in *ibid* para 33.

⁶⁷ *Eturas* (n 1), Opinion of AG Szpunar (n 22) para 90.

⁶⁸ *Eturas* (n 1), para 49.

⁶⁹ See e.g. Joined cases C-204, 205, 211, 217 and 219/00 P *Aalborg Portland and Others v Commission* ECLI:EU:C:2004:6, [2004] ECR I-123, paras 84–85 (knowledge of a competitor’s intended market behaviour was considered to still be influencing the competitor). See also Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 and 104/95 *Cimenteries CBR and Others v Commission of the European Communities* ECLI:EU:T:2000:77, [2000] ECR II-491, paras 1909–1913.

and vertical anticompetitive arrangements in the sense of Article 101 could prove to be challenging.