

You've got mail: message may be proof of participation in a concerted practice

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Not paying attention to incoming emails may have inadvertent consequences. The European Court of Justice recently ruled that the mere dispatch of a message through a common computerised booking system capping the discounts to be used by travel agents is sufficient proof of a concerted practice. A travel agent can rebut the presumption of having participated in this practice only if it can: prove that it was not aware of the message's content; publicly distanced itself from the discount cap; reported it to the authorities; or systematically applied discounts exceeding the cap. It is therefore advisable for companies to have an action plan in place on what to do when receiving potentially anti-competitive messages either by email or through online databases.

The administrator of a common online travel booking system used by most travel agents in Lithuania sent a message, via the system, informing travel agents that the online discount rate would be capped. Following that message, the travel agents needed to take a number of additional technical steps to do so, although they were not prevented from granting discounts to their customers exceeding the cap. The question was whether the dispatch of the message was sufficient to presume that the travel agents were aware of the discount cap and, by not objecting to it, participated in a concerted practice within the meaning of the cartel prohibition.

The ECJ [ruled](#) that to establish whether the travel agents participated in a concerted practice, it first needed to be determined if the travel agents knew of the discount cap. According to the ECJ, the dispatch of the message constituted a rebuttable presumption that the travel agents were indeed aware of the message's content. It was up to the travel agents to rebut this presumption. This could be done by proving, for example, that they did not receive the message; that they did not look at the communication section of the online system; that they did not look until some time had passed since the dispatch; etc. Once it was established that a travel agent was aware of the message's content, it could be presumed it had participated in the concerted practice, unless the travel agent:

- proved it had publically distanced itself from the practice,
 - had reported the practice to the administrative authorities, or
 - provided other evidence, such as proof of a systematic application of a discount exceeding the cap in question.
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