

# Welcome clarifications by the EU Court on the concept of excessive pricing

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On the 14 September, the Court of Justice of the European Union provided detailed guidance on the concept of excessive pricing under Article 102 TFEU, in response to questions posed by the Latvian Supreme Court. In Case C-177/16, the Latvian Supreme Court referred a number of questions to the Court of Justice of the European Union (CJEU) regarding the concept of excessive pricing.

This resulted from a series of appeals relating to a decision that the Latvian Competition Council (LCC) took over conduct of the Consulting agency on copyright and communications / Latvian authors' association (AKKA/LAA), the Latvian collective management organisation handling copyright licences for (Latvian and foreign) musical works in Latvia. The 2013 infringement decision found that the AKKA/LAA had abused its dominant position by imposing excessive music licence fees for music played in Latvian retailers and service providers.

Under EU law, the imposition of 'excessive pricing' by a dominant entity amounts to an 'exploitative abuse' of dominance under Article 102 TFEU – a concept not recognized under US law. Until now, the EU Courts had applied a basic two prong test for excessive pricing – namely whether the difference between the costs incurred and the price actually charged is excessive, and thereafter, whether the price could be considered to be excessive in itself – or when compared with competing products.

## 1. An appropriate and sufficient comparator

First, the CJEU looked in detail at the concept of what an appropriate and sufficient comparator should mean. It found that:

1. The LLC's methodology of comparing AKKA/LAA's royalties with those in a limited number of Member States was **acceptable** – where those Member States were chosen using objective, appropriate and verifiable criteria. Such criteria may include consumption habits, and other economic and sociocultural factors such as gross domestic product per capita and cultural and historical heritage. *The Court took the view that there can be no minimum number of markets to compare, and the choice of appropriate comparator markets depends on the circumstances specific to each case.*
2. The LLC's methodology of comparing AKKA/LAA's royalties with those in a wider number of Member States (in this case twenty) was **also acceptable** where those Member States were chosen using objective, appropriate and verifiable criteria, and were adjusted in accordance with the PPP index – so that the comparisons were made on a consistent basis. The Court also confirmed that it was permissible to make a comparison within one or several specific segments, where there were indications of excessive fees in those segments. *The Court observed that such a comparison with a wider number of Member States may serve to verify the results of a comparison with a limited number of Member States.*

## 2. The threshold for an excessive price

The Court then considered what would be needed for a dominant undertaking's prices to be abusive and excessive. In doing so, it considered previous cases in which the difference in prices applied in one Member State in comparison to others was significantly higher than in the present case. However, it observed that the existence of such precedent could not lead to the conclusion that the differences in the present case could never be 'appreciable'.

The Court then went on to confirm that there is "no minimum threshold above which a rate must be regarded as 'appreciably' higher", since the circumstances specific to each case are decisive in that regard. The Court concluded that for a difference between rates to be **appreciable**, it must be both significant and persistent on the facts, with respect to the particular market in question. Advocate General Wahl's observation that the difference must be significant for the rates concerned to be regarded as abusive was emphasized on this point. Furthermore, the Court highlighted that any such difference must persist for a certain length of time, and should not be temporary or episodic.

## 3. Analysis of objective justification

As a final step in its analysis of excessive pricing, the Court observed that the above factors were merely indicative of abuse of a dominant position, and that it may still be possible for the AKKA/LAA to justify any difference by relying on objective dissimilarities between the situation of the Member State concerned and the comparator Member States. It acknowledged that factors that may justify such a difference include the relative level of the fee, and the proportion which is actually handed over to the rights holders.

The Court went on to explain that, where the proportion of fees taken up by collection, administration and distribution expenses was considerably higher, it might be that it is precisely the lack of competition in the market that accounts for the heavy burden of administration, and therefore the higher level of fees.

Accordingly, in examining the facts of this case, the Court concluded that, if:

1. The AKKA/LAA only retained 20% of the fees collected – as was argued during the hearing, such expenses did not appear to be unreasonable or to evidence inefficient management. It was further observed that, even where this level of expenses was higher than in the comparator Member States, this may be explained by objective factors including costs, such as regulations which impose a heavier administrative burden than in other markets.
2. The fees retained by the AKKA/LAA were established to be higher, and the difference could be regarded as appreciable – it was for the AKKA/LAA to justify them. The Court observed that, in such a case, the existence of a national law on fair remuneration, different from the laws applicable in the comparator Member State(s) could provide an objective justification.

This guidance provides both regulators, and dominant companies and their legal advisors, with invaluable insight into assessing whether conduct amounts to an exploitative abuse of dominance – involving excessive pricing – and whether it can be objectively justified under Article 102. This will be of significant value in ongoing probes involving allegations of excessive pricing.