

European Court Ruling May Reinvigorate Enforcement Against Excessive Pricing

IN SHORT

The Ruling: The European Court of Justice recently provided widely anticipated guidance on the concept of excessive pricing, clarifying the use of key legal criteria in identifying an excessive pricing abuse under Article 102 TFEU.

The Result: The ECJ confirmed the methodology adopted by the Latvian Competition Council in a national excessive pricing case, establishing that the only condition for a finding of excessive pricing is that the rate difference must be significant and persistent.

Looking Ahead: The ruling will be of significant value in various ongoing EU and national excessive pricing investigations, and it lays the groundwork for future investigations.

In September 2017, the European Court of Justice ("ECJ") issued its long-awaited preliminary ruling in case C-177/16 AKKA/LAA. The ruling provides guidance on the concept of excessive pricing and clarifies key legal criteria used to determine whether prices are "excessive." The ruling is of particular interest given the renewed attention of EU competition authorities to the issue of excessive pricing.

Under EU competition law, dominant undertakings are prohibited from charging a price that is deemed excessive. Until this ECJ ruling, EU competition law provided only vague guidance on determining whether a price is excessive. The European Commission ("EC") has appeared reluctant to open excessive pricing investigations, which could lead to its playing the role of a price regulator.

Recently, the EC appears to have changed course. In May 2017, the EC launched its first excessive pricing investigation in decades in relation to a major pharmaceutical company, Aspen Pharma. Moreover, the EU competition commissioner, Margrethe Vestager, has repeatedly hinted that the EC is considering the continued pursuit of excessive pricing allegations. National competition authorities, including the CMA (British Competition Authority) and the Italian Competition Authority, also have grown particularly active in this field.



The European Commission has appeared reluctant to open excessive pricing investigations, which could lead to its playing the role of a price regulator. Recently, the EC appears to have changed course.



This case relates to the Latvian Competition Council's ("LCC") finding of an abuse of dominant position by the Copyright and Communication Consulting Agency/Latvian Authors Association ("AKKA/LAA"), a collective management organization that handles copyrights for musical works. In Latvia, only AKKA/LAA is authorized to collect the fees used to remunerate Latvian and foreign copyright holders.

The LCC concluded that AKKA/LAA charged excessive fees, after comparing its prices with those applicable in its neighboring Member States, Estonia and Lithuania. The LCC also compared the prices of 20 other Member States using the purchasing power parity index ("PPP index").

AKKA/LAA challenged the decision before Latvian courts, and the Latvian Supreme Court referred questions to the ECJ for a preliminary ruling.

The ECJ's Ruling

The main clarifications resulting from the ECJ ruling include the following:

A Geographic Comparison Is a Valid Method for Determining Excessive Pricing—Not Just the Cost-Based *United Brands* Approach

Excessive pricing claims are generally assessed under the ECJ's two-pronged test set out in the *United Brands* case. Under this test, a price is considered to be excessive if: (i) the difference between the cost incurred and the price charged for a product or service is found to be excessive; and (ii) the price is unfair in itself or when compared with competing products.

The ECJ ruling in *AKKA/LAA* confirms earlier case law holding that a method solely based on a comparison of prices applied in other Member States (i.e., not taking into account costs incurred) is also valid in determining whether a price is excessive. According to the ECJ, even a comparison based on a limited number of Member States can be considered sufficiently representative, provided that the

reference Member States are selected in accordance with objective, appropriate, and verifiable criteria. The exact number of markets to compare depends on the specific circumstances of the case.

Importantly, the ruling also validates the LCC's price comparison with 20 other Member States. The ECJ found that a comparison of applicable rates in several Member States is equally valid, even if living standards differ, provided the PPP index is taken into account. The concerned competition authority should define the comparison framework, for the comparison with both neighboring and other Member States. Thus, the LCC was free to compare rates within one or several specific user segments.

No Minimum Threshold Above Which a Price Must Be Regarded as Excessive—The Sole Condition Is a Significant and Persistent Rate Difference

The ECJ determined that when a dominant undertaking imposes fee scales that are "appreciably higher" than those charged in other Member States, such disparity must be regarded as indicative of an abuse of dominance. The circumstances of each case are decisive in determining when a rate must be regarded as "appreciably higher." The court stated, however, that a rate difference may be found as "appreciable" only if it is significant, persists for a certain length of time, and is not temporary or episodic.

Costs Incurred—To Be Considered at the Objective Justification Stage

Under EU competition law, excessive pricing by a dominant undertaking is considered abusive only where not objectively justified. Under the price comparison method set out in the *AKKA/LAA* ruling, costs incurred by the dominant undertaking facing an excessive pricing allegation are to be considered at the stage of objective justification. The dominant undertaking must justify the price difference by demonstrating objective dissimilarities between the situation in the concerned Member State and the reference Member States. The ECJ in *AKKA/LAA* accepted that price differences could be justified by factors such as the amount of fees actually paid to right holders, as well as collection, administration, and distribution expenses.

THREE KEY TAKEAWAYS

1. Assessing excessive pricing cases still largely remains dependent on the circumstances of each case and thus is more prone to the discretion of the investigating authorities. The ECJ's ruling, however, will serve as a valuable guide for competition authorities and dominant undertakings, as it clarifies the benchmarks that may be relied upon in both pursuing and preparing against potential anticompetitive excessive pricing claims.
2. Although the ECJ declined to provide a detailed definition of the notion of "excessive price," the judgment nonetheless clarifies this notion in determining that rate differences must be both significant and persistent to be indicative of an excessive pricing abuse. The ECJ furthermore confirms the validity of the geographic price comparison method for assessing the excessive nature of a price.
3. The ruling considerably reduces the legal uncertainty that typically has surrounded excessive pricing cases. This will be of significant value in resolving ongoing excessive pricing investigations at the EU and national levels and also will provide firmer ground for competition authorities in pursuing their renewed interest in excessive pricing.

CONTACTS



Philipp Werner
Brussels



Cecelia Kye
Brussels

Henry de la Barre, an associate in the Brussels Office, assisted in the preparation of this Commentary.

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[France Moves Toward Ending All Regulated Tariffs for Natural Gas Sales](#)



[European General Court Rules \(again\) on Mandatory Access and Interoperability in Software Industry](#)



[Rewarding Loyalty: ECJ Holds that Loyalty Rebates Do Not Per Se Restrict Competition](#)



[No Traction: Authorities Drop Antitrust Investigation into Italy's Long-Term Car Rental Sector](#)

Jones Day is a legal institution with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2017 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113