CPI's Europe Column Presents:

The CJEU's Ruling in AKKA / LAA on Excessive Pricing: One Small Step Forward on a Long Road?

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Introduction

The CJEU's ruling on excessive pricing in *AKKA / LAA* was, if anything, timely. Media coverage of alleged excessive pricing has been spurring competition authorities into action: the Danish Competition Council, the European Commission, Germany's FCO and the UK's CMA all have excessive pricing cases in sectors from generic pharmaceuticals to airline pricing.[2]

Commentators, courts and competition authorities continue, however, to struggle with the fundamental question of what makes a high price excessive. The jurisprudence up until now sheds little light. While Article 102(a) TFEU explicitly prohibits dominant firms from imposing, directly or indirectly, *'unfair'* selling prices, the line between a merely high price and an excessive and unfair price has remained unclear.

Courts and regulators continue to refer to the test set out in *United Brands (1978)* which stipulates only that:

'the difference between the cost actually incurred and the price actually charged is excessive and … [the] price … is either unfair in itself or unfair when compared with competing products.'[3]

Taken at face value, the test does not set a high bar. As AG Wahl diplomatically observed in his opinion in *AKKA / LAA*, the jurisprudence has left regulators *'a certain margin for manoeuvre'* when determining whether a price is excessive.[4] Or, put more bluntly: regulators are meant to know it when they see it.[5] The Commission has also offered little to supplement the jurisprudence: enforcement priorities for exploitative abuses expected in the late 2000s have never seen the light of day and the Commission has taken few excessive pricing cases.[6]

Yet despite the limited jurisprudence and guidance, the dividing line between high and excessive prices is profoundly important.[7]

At a superficial level, excessive pricing actions appear to go to the heart of what competition law seeks to prevent: dominant firms exploiting consumers. But, as Commissioner Vestager warned, over-intervention risks ending up *'with competition authorities taking the place of the market.'*[8] Indeed, over-intervention risks significant potential *anti-competitive* effects: reducing the investment

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[2] See, for example, https://www.ksta.de/wirtschaft/kapazitaeten-kartellamt-ueberprueft-preise-der-lufthansa-29405974, https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs, and https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en

[3] Case 26/76 *United Brands and United Brands Continentaal v Commission* [1978] ECLI:EU:C:1978:22, para 252

[4] Case 177/16 *AKKA / LAA,* [2017] ECLI:EU:C:2017:286, Opinion of AG Wahl, para 35

[5] https://chillingcompetition.com/2017/09/28/on-excessive-pricing-and-subjectivity-the-cjeus-judgment-in-case-c-17717-akkalaa/

[6] See, for example, *Scandlines Sverige AB v Port of Helsingborg* (Case COMP/A.36.568/D3). The Commission has however adopted decisions or accepted commitments in relation to "mixed" excessive pricing cases involving, notably, market partitioning. See *Gazprom* as an example. Commission Decision [2004], Massimo Motta and Alexandre de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in Konkurrensverket *'The Pros and Cons of High Prices'* (2007) http://www.konkurrensverket.se/globalassets/english/research/the-pros-and-cons-of-high-prices-14mb.pdf

[7] https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en

[8] https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en

incentives of new entrants (by reducing the incentives for entry); reducing the investment incentives of dominant firms (due to the risk of excessive pricing actions) and have a chilling effect on new entrants and dominant firms alike (due to the lack of clarity around intervention).[9]

Accordingly, distinguishing between a scenario where prices are high due to market failure (where intervention *may* be needed) and a scenario where prices are high simply due to the competitive process (where intervention is not needed, for example because the market is self-correcting) is crucial for the sound application of Article 102 to excessive pricing.

The CJEU's ruling in AKKA / LAA

This brings us to the CJEU's ruling on the preliminary reference from the Latvian Supreme Court in *AKKA / LAA*.

The underlying case concerned whether AKKA / LAA, Latvia's only authorised entity for issuing licences for the public performance of copyrighted music works, had abused its legal monopoly by charging *'excessively high rates'*.[10] The Latvian Competition Authority decided that AKKA / LAA's rates were abusive following a comparison of the latter's rates against those prevailing in Lithuania and Estonia as well as 20 other Member States.

The Latvian Supreme Court was ruling on an appeal against the decision and referred seven questions to the CJEU covering whether AKKA / LAA's pricing was capable of affecting trade between Member States, the methodology for establishing that AKKA / LAA's rates were excessive, the threshold at which AKKA / LAA's rates were indicative of excessive pricing and the technicalities of calculating the fine imposed on AKKA / LAA.[11]

Leaving aside the judgment's views on whether AKKA / LAA's conduct was capable of affecting trade between Member States and the intricacies of calculating AKKA / LAA's fine, the CJEU's judgment distilled its response on the substance of excessive pricing into two key topics:

- first, how to conduct a price comparison across Member States to create a benchmark against which to compare the allegedly excessive price (establishing the benchmark price); and

- second, when is the difference between the allegedly excessive price and the benchmark sufficiently "appreciable" so as to be indicative of excessive pricing and how can this presumption be disproved (establishing when a high price is excessive).

[9] Massimo Motta and Alexandre de Streel, 'Excessive Pricing in Competition Law: Never Say Never?' in Konkurrensverket *'The Pros and Cons of High Prices'* (2007) http://www.konkurrensverket.se/globalassets/english/research/the-pros-and-cons-of-high-prices-14mb.pdf

[10] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689

[11] The Court of Justice also addressed the Latvian Supreme Court's questions on whether AKKA / LAA's rate setting had an effect on trade between Member States and whether AKKA / LAA's turnover which was passed through to copyright holders should be accounted for when calculating AKKA / LAA's fine.

Both topics offered the CJEU the opportunity to refine the case law on excessive pricing: in the first instance, by clarifying the methodology for establishing whether a price may be excessive; and, in the second instance, by clarifying the threshold at which a high price is indicative of an abuse.

Establishing the benchmark price

The CJEU summarised the Latvian Supreme Court's questions concerning the benchmark price as asking, first, whether it was appropriate to compare the allegedly excessive price *'with those applicable in the neighbouring States as well as those applicable in other Member States, adjusted in accordance with the PPP index'*[12] and, second, whether the comparison *'must be made for each segment of users or for the average level of rates.'*[13]

First, the CJEU held that the number of Member States used for comparison was irrelevant provided the *'reference'* Member States are selected in accordance with *'objective, appropriate and verifiable criteria'* and conducting the comparison *'on a consistent basis'* necessitated the use of a PPP index.[14] This seems unobjectionable. A pricing comparison made across multiple Member States would not guarantee a "better" comparison; indeed, unless done properly, it could well lead to a significantly less meaningful comparison. Likewise, stipulating the application of the PPP Index reinforced the need to conduct a robust, rather than cursory, price comparison.

Second, on whether a competition authority may compare specific segments or must use the average level of rates for the different customers to whom AKKA / LAA licenced copyrighted music works, the Court held that it is permissible *'if there are indications that the excessive nature of the fees affects those segments'* observing that *'it falls to the competition authority concerned … to define its framework'.*[15] While AG Wahl had argued that this was a question of market definition, the Court seemingly granted competition authorities more latitude presumably so that a dominant firm cannot escape liability under Article 102 simply because only some of its products for which it holds a dominant position are excessively priced.

But while the CJEU's responses largely make sense in and of themselves, in the context of the particular case, the judgment avoided addressing a number of fundamental questions on the methodology for excessive pricing. In particular, the judgment accepted that there are multiple potential tests for determining whether a price is excessive *including* a comparison of prices applied in other Member States.[16] The judgment is, however, silent on the implications of this conclusion. What are the criteria for the applicability of the different tests or are all equally appropriate in all cases? If so, which test takes priority when the results are conflicting? Put more practically, absent

[12] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, para 31

[13] Ibid

[14] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, paras 40 - 46

[15] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, para 50

[16] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, para 37

answers to these questions, are dominant firms left having to apply all plausible tests to assess whether their prices comply with Article 102 TFEU?

In short, while the suitability of each test may, as AG Wahl observed, depend *'very much on the specific features of each case'*, it is surely also important that dominant firms understand how Article 102 is applied to them.[17]

Establishing when a high price is excessive

Turning to the CJEU's responses on the threshold at which a high price is excessive, the CJEU summarised the Latvian Supreme Court's questions as asking, first, what are the criteria for determining the threshold at which a price above the relevant benchmark price was "appreciable" and thus indicative of an abuse and, second, what evidence can the undertaking concerned adduce to show that its prices are not abusive.

For the first question, the Court held that while the circumstances are *'specific to each case'*, there are two criteria to establish that a price difference is appreciable and thus indicative of abuse: first, the price difference must be *'significant'* and, second, the price difference *'must persist for a certain length of time and must not be temporary or episodic.'*[18] In simple terms, the dominant undertaking's price remained significantly and consistently above the benchmark for a material period of time.

While the Court again avoided any wider discussion of the limits on excessive pricing under Article 102, this stipulation – in line with AG Wahl's opinion – that the price difference must *'persist'* and not be *'temporary or episodic'* marks a potentially important articulation of its limits.[19] High prices should, in simple terms, only persist in markets where entry barriers prevent new competitors from driving down the price and, as such, the condition implies that excessive pricing is confined – as proposed by AG Wahl and other commentators – to markets where there are barriers to entry that preclude the ordinary processes of competition from returning the market to a competitive state. As such, the statement indicates a potential direction of travel for the jurisprudence in clarifying the limits of excessive pricing under Article 102.

As to the second question, the Court held that a dominant undertaking could show that its prices are fair notwithstanding an appreciable difference from the benchmark prices *'by reference to objective factors'* (in AKKA / LAA's case by reference to factors that impacted on *'management expenses or the remuneration of rights holders.'*).[20]

The Court's answer has both substantive and procedural implications. In the first instance, the Court's reference simply to *'objective factors'* implies that the dominant firm can advance a wide

[17] Case 177/16 *AKKA / LAA,* [2017] ECLI:EU:C:2017:286, Opinion of AG Wahl, para.37

[18] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, para. 56

[19] Ibid

[20] Case 117/16 *AKKA / LAA* [2017] ECLI:EU:C:2017:689, para. 61

array of (economic) arguments to justify its prices; a view corresponding with AG Wahl's opinion that a dominant firm's prices can only be excessive when there is no other *'rational economic explanation.'*[21] On the procedural front, the Court held that the burden of proof lies with the dominant undertaking. So once a competition authority has shown that the prices are *appreciably* higher than the benchmark, the dominant firm must submit sufficiently credible economic arguments to rebut this conclusion. So perhaps a partial win for dominant firms.

Concluding remarks

The material question at the start was whether the Court's judgment would clarify the circumstances in which high prices are abusive.

Did it?

The judgment itself certainly purports to do nothing of the kind; the Court confined itself to answering the Latvian Supreme Court's questions avoiding any broader statements of principle. Furthermore, the Court's responses on the methodology for establishing a "benchmark" price leave open a number of key questions crucial for dominant firms seeking to understand the application of Article 102 to excessive prices.

But this does not entirely do the judgment justice. By articulating the need for excessive prices to be significantly and persistently higher than benchmark prices, the Court articulated a potentially key limiting factor on the application of Article 102 to excessive pricing. Not exactly a big step, but perhaps a step nonetheless.

[21] Case 177/16 AKKA / LAA, [2017] ECLI:EU:C:2017:286, Opinion of AG Wahl, para 131