JUDGMENT OF THE COURT (Second Chamber)

14 September 2017 (*)

(Reference for a preliminary ruling — Competition — Article 102 TFEU — Abuse of a dominant position — Concept of 'unfair price' — Fees collected by a copyright management organisation — Comparison with rates charged in other Member States — Choice of reference Member States — Assessment criteria for prices — Calculation of the fine)

In Case C-177/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Augstākā tiesa, Administratīvo lietu departaments (Supreme Court, Administrative Cases Division, Latvia), made by decision of 22 March 2016, received at the Court on 29 March 2016, in the proceedings

Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība

v

Konkurences padome,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal (Rapporteur), A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: X. Lopez Bancalari, Administrator,

having regard to the written procedure and further to the hearing on 8 February 2017,

after considering the observations submitted on behalf of:

– the Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība, by U. Zeltiņš, S. Novicka and D. Silava-Tomsone, advokāti,

– the Latvian Government, by J. Treijs-Gigulis, I. Kalniņš, G. Bambāne, I. Kucina and D. Pelše, acting as Agents,

– the German Government, by A. Lippstreu and T. Henze, acting as Agents,

– the Spanish Government, by M. Sampol Pucurull, acting as Agent,

– the Netherlands Government, by M.H.S. Gijzen and M.K. Bulterman, acting as Agents,

– the European Commission, by C. Vollrath, I. Rubene and F. Castilla Contreras, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (a) of the second paragraph of Article 102 TFEU.

2 This request has been made in proceedings between the Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība (Consulting agency on copyright and communications / Latvian authors' association, Latvia) ('the AKKA/LAA') and the Konkurences padome (Competition Council, Latvia), concerning a fine imposed by that council on the AKKA/LAA on grounds of abuse of a dominant position.

Legal context

EU law

3 Article 3 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU and 102 TFEU] (OJ 2003 L 1, p. 1) is entitled 'Relationship between Articles [101 TFEU and 102 TFEU] and national competition laws' and provides in paragraph 1:

'... Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].'

4 The first paragraph of Article 5 of that regulation, entitled 'Powers of the competition authorities of the Member States', provides:

'The competition authorities of the Member States shall have the power to apply Articles [101 TFEU and 102 TFEU] in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

...

– imposing fines, periodic penalty payments or any other penalty provided for in their national law.

...'

5 Article 23 of that regulation, entitled 'Fines', provides, in paragraphs 2 and 3:

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101 TFEU or Article 102 TFEU] ...

...

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

Latvian law

6 Article 13 of the Konkurences likums (Law on competition) of 4 October 2001 (*Latvijas Vēstnesis*, 2001, No 151), has the same scope as point (a) of the second paragraph of Article 102 TFEU.

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 The AKKA/LAA, a collective management organisation handling copyright for musical works, is the only entity authorised in Latvia to issue, for consideration, licences for the public performance of musical works in respect of which it manages the copyright. It collects the fees from which Latvian copyright holders are remunerated as well as, through contracts concluded with foreign collecting societies, those from which foreign copyright holders are remunerated. Holders of its licences include shops and service centres, as users of works protected by copyright and related rights.

8 By decision of 1 December 2008, the Competition Council imposed a fine on the AKKA/LAA for abuse of a dominant position as a result of the application of excessively high rates. The AKKA/LAA subsequently adopted new rates applicable from 2011. On 31 May 2012, the Competition Council opened a procedure to examine those new rates.

9 In the context of that procedure, the Competition Council first compared the rates applied in Latvia for the use of musical works in shops and service centres with those applied in Lithuania and Estonia as neighbouring Member States and markets. The Competition Council found that the rates applied in Latvia were higher than those applied in Estonia and, in most cases, higher than those charged in Lithuania. Although, in those three Member States, rates are set according to the surface area of the shop or service centre concerned, the Competition Council observed that, for surface areas of between 81 m^2 and 201-300 m^2, the rates applied in Latvia were two to three times higher than those applied in the other two Baltic States.

10 Secondly, the Competition Council, having recourse to the purchasing power parity index ('PPP index'), compared the fees in force in approximately 20 other Member States and found in this regard that the rates payable in Latvia exceeded the average level of those charged in those other Member States by 50% to 100%. More specifically, in the case of shops or service centres with surface areas of between 85.5 m^2 and approximately 140 m^2, only the rates applied in Romania were higher.

11 Having taken the view that the fees in force in Latvia, in the segments where they were significantly higher than in Estonia and in Lithuania, were unfair, the Competition Council, by decision of 2 April 2013, imposed a fine of 45 645.83 Latvian lats (LVL) (approximately EUR 32 080) on the AKKA/LAA for abuse of a dominant position pursuant to Article 13(1)(4) of the Law on competition and point (a) of the second paragraph of Article 102 TFEU ('the contested decision'). The Competition Council calculated the amount of that fine on the basis of the AKKA/LAA's turnover, considering in this regard that remuneration collected for rightholders constituted an integral part of that organisation's turnover and had to be taken into account.

12 The AKKA/LAA brought an action before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia) seeking the annulment of the contested decision, raising, in essence, four pleas in support of that action. First, it argued, the Competition Council essentially restricted the comparison of the rates applicable in Latvia to those applicable in neighbouring Member States, namely Estonia and Lithuania, whereas, in respect of gross domestic product and price levels, the situation in Latvia is also comparable to those in Bulgaria, Romania, Poland and Hungary. Secondly, it submitted, the Competition Council did not state clearly the method used to calculate the reference rates. Thirdly, in its opinion, the Competition Council erred in taking the view that it was incumbent on the AKKA/LAA to justify the level of its rates. Fourthly, it submitted, the Competition Council should not have taken into account, when calculating the AKKA/LAA's fine, the sums collected for the remuneration of authors, given that those sums do not form a part of the assets of that organisation.

13 By judgment of 9 February 2015, the Administratīvā apgabaltiesa (Regional Administrative Court) partially annulled the contested decision. That court held that the Competition Council was right to find that there had been an abuse of a dominant position by the AKKA/LAA. It also took the view that the comparison of rates for the same type of services between Latvia, Estonia and Lithuania was justified and that the AKKA/LAA had provided no explanation for the fact that the rates applicable in Latvia were significantly higher than those applicable in Estonia and Lithuania. However, since it found that the Competition Council had, for the purpose of calculating the fine, improperly taken into account the sums collected for the remuneration of authors, that court ordered the Competition Council to recalculate the amount of the fine within two months following the delivery of its judgment.

14 The AKKA/LAA appealed in cassation against that judgment to the referring court on the ground that that judgment had not given it full satisfaction. The Competition Council, for its part, also appealed against that judgment on the ground that, by that judgment, the Administratīvā apgabaltiesa (Regional Administrative Court) had annulled the provisions of the contested decision concerning the fine imposed.

15 According to the AKKA/LAA, the Administratīvā apgabaltiesa (Regional Administrative Court) had not set out objective and verifiable criteria to justify its view that the rates applicable in Latvia were capable of being compared with those in Estonia and Lithuania. Thus, it argued, that court had not based its reasoning on economic criteria, but on criteria relating to the territorial, historical and cultural situation common to those States.

16 The AKKA/LAA challenges, in particular, the finding that the geographical proximity of the other Baltic States could be a decisive factor.

17 The Competition Council, for its part, argues that the fine imposed is consistent with the national legislation in force. It emphasises in particular that, in competition law, 'turnover' means the total amount of all revenue resulting from the economic activity, which, in the present case, includes the sums collected by the AKKA/LAA for the remuneration of authors.

18 The Augstākā tiesa, Administratīvo lietu departaments (Supreme Court, Administrative Cases Division, Latvia) is uncertain as to the proper interpretation of point (a) of the second paragraph of Article 102 TFEU. First, that court is unsure whether the AKKA/LAA's activities have an impact on trade between Member States, and, therefore, whether the case at issue in the main proceedings comes within the scope of that provision. Secondly, that court has doubts as to the method used to determine the unfair nature of the prices. Thirdly, it has reservations concerning the calculation of the fine, in particular as to whether the remuneration collected for the rightholders should have been taken into account for that purpose.

19 Concerning the first point, the referring court notes that, in the contested decision, the Competition Council stated that the AKKA/LAA had also collected fees in respect of musical works originating in other Member States and that, consequently, unfair prices were liable to deter the use in Latvia of works of authors from other Member States.

20 As for the second point, concerning the method used to determine the unfair nature of the prices, the referring court takes the view, on the one hand, that, when rates charged in a Member State correspond to a multiple of rates applied in the other Member States, as in the case that led to the judgment of 13 July 1989, *Lucazeau and Others* (110/88, 241/88 and 242/88, EU:C:1989:326), that circumstance is indicative of an abuse of a dominant position. On the other hand, it draws attention to the fact that uncertainty still persists as to how rates are set in situations different to the one in that case.

21 In the present case, the question is whether the comparison of the rates applicable in Latvia with the rates applicable in Estonia and Lithuania is sufficient. Such a limited comparison could, however, prove itself counter-productive in the sense that organisations in neighbouring Member States could, in concert, raise their rates without that being perceptible. In the event that such a method of comparison were not to be valid, the referring court is uncertain whether it would be appropriate also to compare the rates in all the Member States adjusted in accordance with the PPP index.

22 Subsequently, the referring court is uncertain under what conditions rates are to be considered 'appreciably higher' within the meaning of paragraph 25 of the judgment of 13 July 1989, *Lucazeau and Others* (110/88, 241/88 and 242/88, EU:C:1989:326), and the undertaking concerning is under an obligation to 'justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States', within the meaning of that same paragraph.

23 As for the third point, concerning the calculation of the amount of the fine, the referring court points out that a situation such as that in the main proceedings, in which a fine has been imposed on a copyright management organisation, has not yet been ruled adjudicated on by the Court. Thus, it is

necessary to clarify the question of whether the sums collected as remuneration for copyright holders should be taken into account.

24 In those circumstances, the Augstākās tiesas, Administratīvo lietu departaments (Supreme Court, Administrative Cases Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is [point (a) of the second paragraph of] Article 102 TFEU applicable to a dispute concerning the rates laid down by a national copyright management organisation if that entity also collects remuneration in respect of works of foreign authors and the rates laid down by it may be a deterrent to the use of those works in the Member State in question?

(2) For the purpose of defining the concept of "unfair prices" used in [point (a) of the second paragraph of] Article 102 TFEU, in the context of the management of copyright and related rights, is it appropriate and sufficient —– and in which cases —– to draw a comparison between the prices (rates) in the market in question and the prices (rates) in neighbouring markets?

(3) For the purpose of defining the concept of "unfair prices" used in [point (a) of the second paragraph of] Article 102 TFEU in the context of the management of copyright and related rights, is it appropriate and sufficient to use the PPP index based on gross domestic product?

(4) Must the comparison of rates be made for each separate segment thereof or in relation to the average level of the rates?

(5) When must it be considered that the difference in the rates examined in connection with the concept of "unfair prices [(rates)]" used in [point (a) of the second paragraph of] Article 102 TFEU is appreciable, with the result that it is incumbent upon the economic operator enjoying a dominant position to demonstrate that its rates are fair?

(6) What information can reasonably be expected from an economic operator to prove the fair nature of the rates for works covered by copyright, within the scope of [point (a) of the second paragraph of] Article 102 TFEU, if the cost of those works cannot be determined in the same way as that of products of a material nature? Is it solely a question of the cost of administering the copyright management organisation?

(7) In the event of infringement of competition law, is it appropriate to exclude from the business turnover of a copyright management organisation, for the purposes of determining a fine, the remuneration paid to authors by that economic operator?'

Consideration of the questions referred

The first question

25 By its first question, the referring court asks, in essence, whether trade between Member States is capable of being affected by the level of rates set by a copyright management organisation, such as the AKKA/LAA, with the result that Article 102 TFEU may be applicable.

26 In that regard, it follows from well-established case-law of the Court that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 101 TFEU and 102 TFEU must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by EU law and the law of the Member States. Thus, EU law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment on the objectives of a single market between the Member States, in particular by sealing off national markets or by affecting the structure of competition within the common market (judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/04 P, EU:C:2007:53, paragraph 89 and the case-law cited).

27 If an agreement, decision or practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant (judgment of 25 January 2007, *Dalmine* v *Commission*, C-407/74 P, EU:C:2007:53, paragraph 90 and the case-law cited).

28 The Court has already recognised implicitly that rates charged by a copyright management organisation that holds a monopoly are capable of affecting cross-border trade, with the result that Article 102 TFEU is applicable to such a situation (see, to that effect, judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319; of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326; and of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110).

29 Trade between Member States may be affected by the rates charged by a copyright management organisation, such as the AKKA/LAA, which has a monopoly in its Member State and which, in addition to managing the rights of Latvian rightholders, also manages in that State the rights of foreign rightholders.

30 Therefore, the answer to the first question is that trade between Member States is capable of being affected by the level of rates set by a copyright management organisation that holds a monopoly and also manages the rights of foreign copyright holders, with the result that Article 102 TFEU may be applicable.

The second, third and fourth questions

31 By its second, third and fourth questions, which should be considered together, the referring court asks, in essence, first, whether it is appropriate, for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, to compare its rates with those applicable in the neighbouring States as well as with those applicable in other Member States, adjusted in accordance with the PPP index and, second, whether that comparison must be made for each segment of users or for the average level of rates.

32 It should be recalled from the outset that the concept of 'undertaking' referred to in Article 102 TFEU includes any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed (see, inter alia, judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 20 and 21 and the case-law cited).

33 Any activity consisting in offering goods or services on a given market is an economic activity (judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 22 and the case-law cited). In the present case, it is apparent from the file available to the Court that it is not disputed that the AKKA/LAA's activity, consisting in the collection of the fees from which authors of musical works are remunerated, is a service.

34 In addition, an organisation such as the AKKA/LAA, which holds a monopoly on the provision of such a service within the territory of a Member State, holds a dominant position in a substantial part of the internal market within the meaning of Article 102 TFEU (see, to that effect, judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110, paragraph 86 and the case-law cited).

35 The abuse of a dominant position within the meaning of that article might lie in the imposition of a price which is excessive in relation to the economic value of the service provided (see, to that effect, judgment of 11 December 2008, *Kanal 5 and TV 4*, C-52/07, EU:C:2008:703, paragraph 28 and the case-law cited).

36 In that regard, the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is in the affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products (judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 252).

37 onetheless, as observed in essence by the Advocate General in point 36 of his Opinion, and as the Court has also recognised (see, to that effect, judgment of 14 February 1978, *United Brands and United Brands Continentaal* v *Commission*, 27/76, EU:C:1978:22, paragraph 253), there are other methods by which it can be determined whether a price may be excessive.

38 Thus, according to the case-law of the Court, a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid. It is apparent from that case-law that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position (judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

39 However, having regard to the fact that, in the cases that led to the judgments referred to in the previous paragraph, the rates charged by a copyright management organisation of a Member State had been compared with those in force in all other Member States at that time, the referring court is unsure whether a comparison, such as that made by the Competition Council in the main proceedings between the rates applied by the AKKA/LAA in Latvia and those charged in Lithuania and Estonia, supported by a comparison with the rates charged in other Member States adjusted in accordance with the PPP index, is sufficiently representative.

40 In that regard, it should first be noted that a comparison cannot be considered to be insufficiently representative merely because it takes a limited number of Member States into account.

41 On the contrary, such a comparison may prove relevant, on condition, as observed by the Advocate General in point 61 of his Opinion, that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria. Therefore, there can be no minimum number of markets to compare and the choice of appropriate analogue markets depends on the circumstances specific to each case.

42 Those criteria may include, inter alia, consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage. It will be for the referring court to assess the relevance of the criteria applied in the case in the main proceedings, while taking into account all the circumstances of the case.

43 So far as concerns the comparison of the rates applied by the copyright management organisation at issue in the main proceedings with those applied by organisations in the approximately twenty Member States other than Estonia and Lithuania, such a comparison may serve to verify the results already obtained by means of a comparison including a more limited number of Member States.

44 Next, it should be borne in mind that a comparison between the prices applied in the Member State concerned and those applied in other Member States must be made on a consistent basis (judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

45 In the present case, it is for the referring court to verify whether, in the reference Member States selected, the method of calculating rates, based on the surface area of the shop or service centre concerned, is analogous to the method of calculation applicable in Latvia. If this were the case, it would be permissible for that court to conclude that the basis for the comparison was consistent, on condition, however, that the PPP index had been taken into account in the comparison with the rates charged in Member States in which the economic conditions differ from those in Latvia.

46 In that last regard, it should be noted, as pointed out by the Advocate General in point 85 of his Opinion, that there are, as a general rule, significant differences in price levels between Member States for identical services, those differences being closely linked with the differences in citizens' purchasing power, as expressed by the PPP index. The ability of shop or service centre operators to pay for the services of the copyright management organisation is influenced by living standards and purchasing

power. Thus the comparison, for an identical service, of the rates in force in several Member States in which living standards differ necessarily implies that the PPP index must be taken into account.

47 Finally, the referring court is uncertain as to whether it is appropriate to compare different user segments or, on the contrary, the average rate for all segments.

48 As was confirmed during the hearing, the term 'user segments' refers to shops and service centres of a specific surface area. In that regard, the case-file before the Court and the submissions made during the hearing show that there may be a difference in rates, inter alia, within the same specific segment.

49 It falls to the competition authority concerned to make the comparison and to define its framework, although it should be borne in mind that that authority has a certain margin of manoeuvre and that there is no single adequate method. For example, it should be noted that, in the cases which led to the judgments of 13 July 1989, *Tournier* (395/87, EU:C:1989:319), and of 13 July 1989, *Lucazeau and Others*, (110/88, 241/88 and 242/88, EU:C:1989:326), the comparison related to fees collected in several Member States from discothèques with certain specific features, one of which was the surface area.

50 Thus, it is permissible to make a comparison within one or several specific segments if there are indications that the possibly excessive nature of the fees affects those segments, this being a matter for the referring court to verify.

51 In the light of all of the foregoing, the answer to the second, third and fourth questions is that, for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.

The fifth and sixth questions

52 By its fifth and sixth questions, the referring court asks, in essence, on the one hand, above what threshold the difference between the rates compared is to be regarded as appreciable and, therefore, indicative of an abuse of a dominant position and, on the other hand, what evidence the copyright management organisation can adduce in order to demonstrate that those rates are not excessive.

53 It should first be recalled that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in the other Member States, that difference must be regarded as indicative of an abuse of a dominant position (judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

54 However, in the present case, as indicated by the referring court, the difference between the rates charged in Latvia and those charged in the other reference Member States is not as large as the differences observed between the fees in certain Member States in the cases that led to the judgments of 13 July 1989, *Tournier* (395/87, EU:C:1989:319), and of 13 July 1989, *Lucazeau and Others* (110/88, 241/88 and 242/88, EU:C:1989:326). In that regard, the referring court notes that, according to the findings of the Competition Council, for surface areas of between 81 m^2 and 201-300 m^2, rates in Latvia were at least twice as high as those applied in Estonia and in Lithuania. As for the comparison made with the rates applied in the other Member States referred to in paragraph 43 of the present judgment, that court found that the rates applicable in Latvia were between 50% and 100% higher than the average level of EU rates, even specifying that, with regard to the fees due for surface areas of between 85.5 m^2 and approximately 140 m^2, only those charged in Romania were higher than the fees in force in Latvia.

55 Nonetheless, it cannot follow from the judgments of 13 July 1989, *Tournier* (395/87, EU:C:1989:319), and of 13 July 1989, *Lucazeau and Others* (110/88, 241/88 and 242/88, EU:C:1989:326), that

differences such as those observed in the case in the main proceedings can never be qualified as 'appreciable'. There is in fact no minimum threshold above which a rate must be regarded as 'appreciably higher', given that the circumstances specific to each case are decisive in that regard. Thus, a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify.

56 It should be emphasised in this regard that, as observed by the Advocate General in point 107 of his Opinion, the difference must be significant for the rates concerned to be regarded as 'abusive'. Furthermore, that difference must persist for a certain length of time and must not be temporary or episodic.

57 Next, it should be noted that these factors are merely indicative of abuse of a dominant position. It may be possible for the copyright management organisation to justify the difference by relying on objective dissimilarities between the situation of the Member State concerned and that of the other Member States included in the comparison (see, to that effect, judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 38, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 25).

58 In order to justify such a difference, certain factors can be taken into consideration, such as the relationship between the level of the fee and the amount actually paid to the rightholders. When the proportion of fees taken up by collection, administration and distribution expenses rather than by payments to copyright holders is considerably higher, the possibility cannot be ruled out that it is precisely the lack of competition on the market in question that accounts for the heavy burden of administration and hence for the high level of fees (see, to that effect, judgments of 13 July 1989, *Tournier*, 395/87, EU:C:1989:319, paragraph 42, and of 13 July 1989, *Lucazeau and Others*, 110/88, 241/88 and 242/88, EU:C:1989:326, paragraph 29).

59 In the present case, the AKKA/LAA argued at the hearing that the collection, administration and distribution expenses did not account for more than 20% of the total amount collected. If that is the case – and this is a matter for the referring court to verify –, those expenses do not appear prima facie to be unreasonable in comparison with the sums paid to the copyright holders and, subsequently, as evidence of inefficient management. Furthermore, the fact that those expenses are higher than those in the reference Member States might be explained by objective factors affecting costs, such as specific regulation that places a heavier burden on the administration or other features specific to the market concerned.

60 By contrast, if it were established that the remuneration paid by the AKKA/LAA to the rightholders is higher than that paid in the reference Member States and that that difference can be regarded as appreciable, it would fall to the AKKA/LAA to justify that circumstance. Such a justification could be the existence of a national law on fair remuneration that is different from such laws in the other Member States, which would be a matter for the referring court to verify.

61 It follows that the answer to the fifth and sixth questions is that the difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.

The seventh question

62 By its seventh question, the referring court asks whether, where the infringement referred to in point (a) of the second paragraph of Article 102 TFEU is established, remuneration intended for rightholders must be included, for the purpose of determining the amount of the fine, in the turnover of the copyright management organisation concerned.

63 Article 5 of Regulation No 1/2003 provides that the competition authorities of the Member States may, in the context of the application of Article 102 TFEU, impose fines, periodic penalty payments or any other penalty provided for in their national law.

64 In that regard, it is necessary to ensure that Article 102 TFEU is applied uniformly in order to achieve the effective application of that article. Thus, although Article 23(2) of Regulation No 1/2003, applicable to fines imposed by the European Commission for infringements of Articles 101 TFEU and 102 TFEU, is not binding on national competition authorities, it is permissible for such authorities, when they examine the turnover of an undertaking for the purposes of setting the maximum amount of the fine to be imposed on that undertaking for infringement of Article 102 TFEU, to adopt an approach consistent with the interpretation of the concept of 'turnover' in Article 23 of that regulation.

65 It is settled case-law of the Court that that concept covers the value of the concerned undertaking's sales of goods or services, thereby reflecting its real economic situation (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraphs 16 to 18 and the case-law cited).

66 In the present case, as stated in paragraph 33 of the present judgment, the services provided by the AKKA/LAA consist in collecting fees from which authors of musical works are remunerated. It is for the referring court to examine, in the light of all the relevant circumstances of the case in the main proceedings, whether the portion of those fees that corresponds to the remuneration paid to those authors is included in the value of the services provided by the AKKA/LAA.

67 In that regard, the referring court could, inter alia, take into account the legal and economic links that exist under national law between the AKKA/LAA, as intermediary, and the rightholders in order to determine whether they constitute an economic unit. If that should prove to be the case, the portion of the fees that corresponds to the remuneration intended for those rightholders could be regarded as forming part of the value of the service provided by the AKKA/LAA.

68 Furthermore, it should be noted that, when a national competition authority imposes a fine, that fine must, like any penalty imposed by national authorities as a result of an infringement of EU law, be effective, proportionate and dissuasive (see, to that effect, judgment of 8 July 1999, *Nunes and de Matos*, C-186/98, EU:C:1999:376, paragraph 10 and the case-law cited).

69 In that regard, in order to determine the final amount of the fine, it is also relevant to take account of the fact that the Competition Council had already imposed a first fine on the AKKA/LAA in 2008 on the grounds that it was charging unfair prices, and that, in 2013, following a fresh investigation, a second fine was imposed on the AKKA/LAA by the contested decision for infringement of point (a) of the second paragraph of Article 102 TFEU.

70 It is therefore appropriate to take into consideration the overall duration of the infringement, its repetitive nature and whether the first fine was sufficiently dissuasive, in order to ensure that the penalty imposed is effective, proportionate and dissuasive, as referred to in paragraph 68 of this judgment.

71 In the light of the foregoing considerations, the answer to the seventh question is that, in the case where the infringement referred to in point (a) of the second paragraph of Article 102 TFEU is established, remuneration intended for rightholders must be included, for the purpose of determining the amount of the fine, in the turnover of the copyright management organisation concerned, provided that that remuneration forms part of the value of the services provided by that organisation and that that inclusion is necessary in order to ensure that the penalty imposed is effective, proportionate and dissuasive. It is for the referring court to verify, in the light of all the circumstances of the case, whether those conditions are met.

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Trade between Member States is capable of being affected by the level of rates set by a copyright management organisation that holds a monopoly and also manages the rights of foreign copyright holders, with the result that Article 102 TFEU may be applicable.**

2. **For the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.**

3. **The difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.**

4. **In the case where the infringement referred to in point (a) of the second paragraph of Article 102 TFEU is established, remuneration intended for rightholders must be included, for the purpose of determining the amount of the fine, in the turnover of the copyright management organisation concerned, provided that that remuneration forms part of the value of the services provided by that organisation and that that inclusion is necessary in order to ensure that the penalty imposed is effective, proportionate and dissuasive. It is for the referring court to verify, in the light of all the circumstances of the case, whether those conditions are met.**

[Signatures]

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* Language of the case: Latvian.