Case C-161/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

29 February 2024

Referring court:

Krajský soud v Brně (Czech Republic)

Date of the decision to refer:

29 February 2024

Applicant:

OSA – Ochranný svaz autorský pro práva k dílům hudebním, z.s.

Defendant:

Úřad pro ochranu hospodářské soutěže

Subject matter of the main proceedings

The subject of the dispute in the main proceedings is whether the collective management company concerned has abused its dominant position by charging fees to accommodation facilities for the possibility to use television and radio sets in rooms regardless of whether the rooms in question were occupied.

Questions referred for a preliminary ruling

1. Can Article 102(a) of the Treaty on the Functioning of the European Union be interpreted as meaning that the conduct of a collective management company that has a de facto monopoly in a Member State and charges accommodation facility operators prices for the provision of a licence to make copyrighted works available by means of television and radio receivers located in rooms intended for the accommodation of private guests, which do not take into account the actual occupancy of the individual rooms of the accommodation facilities concerned, amount to an abuse of a dominant position, within the meaning of that article?

2. If the first question is answered in the affirmative, must such a practice be assessed in terms of (a) the application of unfair trading conditions or (b) the application of excessive prices?

– If the correct standard is the application of unfair trading conditions, what is the specific test to be applied in assessing it?

– If the correct standard is the application of excessive prices, what is the specific test to be applied – the general '*United Brands* test' or a particular modified version thereof?

3. In establishing an infringement of Article 102(a) of the Treaty on the Functioning of the European Union in relation to the conduct referred to in the first question, is it necessary to prove actual or potential adverse effects on competition (including effects on consumer welfare and the exploitative effects of the dominant entity's conduct)?

4. In establishing an infringement of Article 102(a) of the Treaty on the Functioning of the European Union in relation to the conduct referred to in the first question, is it necessary to prove that the conduct has a substantial effect on trade between EU Member States, or is it sufficient to have a reasonable assumption that such an effect might occur and it is not necessary to examine its actual extent?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union ('TFEU'): Article 102

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU]: Articles 3 and 5

Provisions of national law relied on

Zákon č. 143/2001 Sb., o ochraně hospodářské soutěže (Law No 143/2001 on the protection of competition):

Paragraph 11(1)(a):

'Abuse of a dominant position to the detriment of other undertakings or consumers shall be prohibited. Abuse of a dominant position shall consist particularly of (a) the direct or indirect imposition of unfair conditions in agreements with other market participants, particularly the imposition of performance which at the time of conclusion of a contract is manifestly disproportionate to the consideration provided'.

Paragraph 22a(1)(c):

‘A legal person or a natural person acting as an entrepreneur commits an administrative offence as an undertaking if it (…) (c) abuses a dominant position contrary to Paragraph 11(1)’.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant is one of the six collective management companies of copyrighted works in the Czech Republic, which has a de facto monopoly in this area. [1] Between 19 May 2008 and 6 November 2014, it charged fees to hotels and other accommodation facilities in the Czech Republic for the possibility to use television and radio devices in their rooms, even if some of those rooms were not occupied. The fees were identical, regardless of whether the rooms were actually used. By decision of 18 December 2019, the Office for the Protection of Competition (‘the Office’) found that the applicant had abused its dominant position and infringed the prohibition under Article 102(a) TFEU. It thus imposed on the applicant a fine of CZK 10 676 000 (namely, approximately EUR 429 000) and prohibited the impugned conduct (‘the decision of the Office’).

2 In the Office’s view, the applicant had by its conduct imposed unfair trading conditions on the market for the granting of licences for the use of copyright in the musical, literary, dramatic, musical drama, choreographic, pantomime, and audio-visual arts, the visual arts and architectural works, and the visual component of audio-visual works by means of devices enabling radio or television broadcasting in the rooms of accommodation facilities in the Czech Republic. It had thus abused its dominant position to the detriment of accommodation service providers and potentially affected trade between Member States in the exercise of copyright.

3 The applicant appealed against the decision of the Office, which was rejected by the Chairperson of the Office by decision of 23 November 2020 (‘the decision of the Chairperson’). The applicant has challenged that decision by submitting an action to the referring court.

Arguments of the parties in the main proceedings

4 There is no dispute between the parties as to the basic facts of the case, rather they disagree as to how to assess the situation at hand in legal terms, from the point of view of Article 102(a) TFEU. In particular, the parties to the proceedings do not agree on the case-law of the Court of Justice that must be relied on in assessing the merits of the case.

5 In terms of EU law, the parties are in dispute on a total of five individual topics: (i) the applicability of the judgment in *SABAM*, [2] (ii) the correctness of the test

[1] See also the judgment of the Court of Justice of 27 February 2014, *OSA* (C-351/12).

[2] Judgment of the Court of Justice of 25 November 2020, *SABAM* (C-372/19) (‘the *SABAM* judgment’).

applied of unfair trading conditions, (iii) the applicability of the judgments in *United Brands*, [3] *SABAM*, and *AKKA* [4] if the applicant's conduct were to be assessed as the application of excessive prices, (iv) the material aspect of distortion of competition and the related standard of proof, and (v) demonstration of a substantial effect on trade between Member States.

(i) Applicability of the judgment in SABAM

6 Unlike the Chairperson of the Office, the applicant claims that the present case can be assessed on the basis of the judgment in *SABAM*. It is closest to it in fact as well as in law. Even though the *SABAM* case concerned a flat rate applied in taking into account the number of works reproduced, whereas the present case concerns a flat rate used in taking into account the size of the audience, namely not having regard to the occupancy of the rooms, the applicant states that this does not alter the substance of the case and that, in principle, the same issue is concerned – the nature of conduct consisting in the *method for determining* royalties. [5]

7 The Court of Justice, when assessing the *SABAM* case in terms of the standard of abuse of a dominant position, did not do so in the form of *unfair trading conditions* but in the form of the *application of excessive prices*. According to the applicant, that standard should also have been used by the Office. The applicant argues that this is the key error of the Office.

8 Furthermore, the applicant submits that the rate of royalties must be considered as a whole. According to the judgment in *SABAM*, collective management companies should not be obliged, in all cases, to take into account elements which are specific for various areas of the reproduction of musical works. They should not be subject to restrictions in terms of establishing a charging scheme for royalties, provided that the method does not result in an excessive rate. [6]

9 According to the applicant, royalties in the *SABAM* case were always at least in part charged even for works that were not played at a festival. In the present case, royalties were in part charged for periods when specific rooms were not occupied. The applicant claims that the Chairperson of the Office did not take into account the factual differences between the payment of royalties for making copyrighted works available at festivals (as was the case in *SABAM*) and in the rooms of accommodation facilities. It is obvious from the very nature of festivals that works will be made available to the public there; however, it may happen that at a

[3] Judgment of the Court of Justice of 14 February 1978, *United Brands* (C-27/76) ('the *United Brands* judgment').

[4] Judgment of the Court of Justice of 14 September 2017, *AKKA* (C-177/16) ('the *AKKA* judgment').

[5] With reference to the Opinion of the Advocate General in *SABAM* (point 17).

[6] Paragraph 46 of the judgment in *SABAM*.

particular festival not even a single work from the repertoire of the collective management company will be made available. In that situation, it might be disproportionate to demand a royalty payment.

10 Royalties for making works available in the rooms of accommodation facilities are paid to collective management companies in arrears on an annual basis. With a probability bordering on certainty, at least one guest is accommodated during that one-year period in every room. In the one-year period for which the applicant charges royalties, a copyrighted work was made available in nearly 100% of the rooms.

11 On the other hand, the Chairperson of the Office maintains that the *SABAM* judgment cannot be applied. The amount of fees demanded by the collective management company in the *SABAM* case was based on a rate that allegedly did not correspond to the economic value of the services provided by the collective management company. One of the purposes of the question addressed by the *SABAM* judgment was to determine the degree of precision required of a collective management company holding a dominant position when applying a price rate so that it does not thereby abuse its dominant position.

12 The difference between the two cases lies in the aspect of the communication of a work to the public and the existence of performance and consideration. In the present case, no communication to the public occurred (in the unoccupied rooms). In the matter addressed by the *SABAM* judgment, there was demonstrably communication of a work to the public. If no communication of a work to the public had occurred, the fee would not have been paid. [7] According to the *SABAM* judgment, 'the royalty applied by a collective management organisation must take account of the number of musical works protected by copyright actually used'. [8]

13 According to the Chairperson of the Office, the *SABAM* judgment addressed only (a) what proportion of the repertoire managed by *SABAM* was communicated and (b) to what number of members of the public, and whether the rate of royalties subsequently applied was in line with Article 102 TFEU. The collective management company was entitled to charge royalties for the service rendered (communication of a work to the public). That, however, is not the applicant's case. There was no communication of a work at all to the public in the unoccupied rooms of accommodation facilities, and hence the operators of those accommodation facilities paid the applicant for services that they did not actually receive. Consequently, the defendant claims that the judgment in *SABAM* does not offer any guidance for evaluating the applicant's practices, which should not be assessed in terms of the imposition of unfair prices.

7 Point 80 of the Opinion of the Advocate General in *SABAM*.

8 Paragraph 50 of the *SABAM* Judgment.

14 According to the Chairperson of the Office, the subject of the case in *SABAM* was the question of the legality of the use of a certain rate of royalty, but that was only when a work was demonstrably communicated to the public. Paragraph 41 of the *SABAM* judgment says: '… the royalties resulting from such a charging scheme represent the consideration paid for the communication to the public of those musical works.'

(ii) Correctness of the application of the test of unfair trading conditions

15 The applicant disagrees with the Office that the method of price determination must be assessed in terms of the application of unfair conditions. Furthermore, the Office relied on case-law and decisions that are not applicable, [9] misinterpreted them, and erred in its assessment. Part of the case-law relied on concerned conduct by a dominant undertaking with serious adverse effects on competition. It also relied on the judgment in *STIM*, which, however, dealt with the practice of charging excessive prices, whereas it refused to apply the *SABAM* judgment, which also dealt with excessive prices.

16 The applicant asserts that, according to EU decision-making practice and the relevant legal literature, [10] a three-step test is applied in the case of abuse of a dominant position in the form of the application of unfair trading terms, assessing (i) whether the trading term is unrelated to the purpose of the agreement or is not necessary for ensuring its expected effect, (ii) whether the trading term causes harm to the other party, and (iii) whether the trading term is neither appropriate nor reasonable. The Office failed to perform the first two steps of the test and only addressed in isolation a form of abstract 'proportionality' of the trading condition.

17 The Chairperson of the Office deems the decisions referred to as applicable. The Commission and the EU Courts examined the same practice, namely the imposition of unfair trading conditions (with the exception of the *STIM* judgment). According to the Chairperson, that decision-making practice has not been superseded. Key for the evaluation of the practice in question is the question of its absolute necessity for the accomplishment of the set goal, and it is necessary to examine whether the collective management company takes into account all the relevant interests for the purpose of ensuring a balance between the maximum freedom of authors to make dispositions with their rights and the effective management of their rights. [11]

9 Commission Decision of 2 June 1971, GEMA (71/224); Judgment of the Court of Justice of 27 March 1974, *BRT* (C-127/73) ('*BRT*'); Commission Decision of 20 April 2001, DSD (2001/463/EC, COMP D3/344493); ('Commission Decision in DSD'); Judgment of the General Court of 24 May 2007, *DSD*, T-151/01; and Judgment of the Court of Justice of 11 December 2008, *STIM* (C-52/07) ('the *STIM* judgment').

10 O'Donoghue, Robert, Padilla, Jorge, *The Law and Economics of Article 102 TFEU*, 3rd edition, Hart Publishing, Oxford, 2020, p. 1043.

11 Referring to the judgment in *BRT*.

18 As concerns the claim that the three-step test was not carried out properly, the Chairperson of the Office is not aware of any specific decision of the Commission or of the EU Courts where such a test has been applied, and the applicant has only referred to legal literature. Other foreign legal literature does not refer to any such test in the context of unfair trading terms. On the contrary, it states that it is difficult to define the applicable tests, owing to the small number of cases of abuse of a dominant position through the imposition of unfair terms. The tests applied by the Commission and the Court of Justice consider the anti-competitive effects of the condition concerned and its justification. [12] Hence, the application of the three-step test was unnecessary in this case. It sufficed for the Office to consider the proportionality of the trading term in relation to the consideration and the existence of possible justifiable reasons for the applicant's conduct.

19 As concerns the *STIM* judgment, the Chairperson of the Office states that it indeed concerned excessive prices, nevertheless, it addressed conceptual issues related to the interpretation of Article 102 TFEU; the Court of Justice elaborated in that judgment on the principle of proportionality, which, according to the Chairperson of the Office, can also be applied to unfair trading terms. On the other hand, the Chairperson claims that the judgment in *SABAM* did not contain any conceptual conclusions that could be transferred to the applicant's case.

(iii) Applicability of the judgments in United Brands, AKKA, *and* SABAM, *if the applicant's actions are assessed in terms of the application of excessive prices*

20 The applicant claims that if the Office had assessed the applicant's actions as it should have, namely in terms of the application of excessive prices, then the royalties that it charged were not excessive. The applicable tests arise from the judgments in *United Brands*, *AKKA*, and *SABAM*. By characterising the applicant's conduct as the application of unfair trading conditions, the Office is attempting to circumvent the need to apply those judgments.

21 Furthermore, the applicant claims that, according to that case-law, the test for the assessment of excessive prices consists of the following two steps: (i) an evaluation of whether there is an excessive disproportion between the actual costs and the price claimed, and, if that is the case, then this is followed by (ii) an examination of whether the price charged is not disproportionate in absolute terms or in comparison with competing products [13] or also in comparison with the amount of fees charged in other Member States, or with a focus on specific user segments. [14]

[12] González-Díaz F. E., Snelders R., *EU Competition Law. Volume V. Abuse of Dominance under Article 102 TFEU*, Claeys & Casteels Law Publishers nv, 2013, p. 692).

[13] Paragraph 252 of the *United Brands* judgment.

[14] Judgment in *AKKA*, paragraph 2 of the operative part.

22 The applicant claims that it did not breach Article 102 TFEU. With regard to the first step of the test mentioned above, the applicant states that there is no other method to precisely quantify the occupancy of rooms in accommodation facilities while, at the same time, achieving the legitimate goal of protecting the interests of authors, without this resulting in an undue increase in the costs of contract management and oversight over the use of the musical works protected by the applicant. It is not within the applicant's powers to continuously check on the occupancy of each accommodation facility. As concerns the second step of the test, the applicant adds that, even if another method for the determination of room occupancy existed, the amount of royalties would be proportionate in comparison with the fees charged by collective management companies abroad, which is also confirmed by the information from the Office used in the administrative proceedings.

23 The Chairperson of the Office stated that it did not assess the practice of the applicant from the point of view of excessive prices, but rather from the point of view of unfair terms as unfair terms under Article 102 TFEU constitutes an exploitative practice of abuse of a dominant position, consisting in the imposition of unfair terms by an undertaking in a dominant position, in particular those which are, at the time of conclusion of the contract, manifestly disproportionate to the consideration.

(iv) Material element of distortion of competition and the related standard of proof

24 According to the applicant, the Office did not address the question of whether the failure to take room occupancy into account in the determination of royalty rates led to a distortion of competition. It claims that, according to the case-law, the conduct of an undertaking with a dominant position cannot be qualified as abuse unless there is at least a minimal anti-competitive effect on the market. It suffices to show a potential anti-competitive effect, but it must not be an effect that is purely hypothetical in nature. [15] The anti-competitive effect need not be proved for practices distorting competition by object, [16] but in that case, there must be adequate and sufficiently substantiated experience showing their anti-competitive nature. [17] The Office did not, however, point to any such practice and, according to the applicant, the fact that the collective management companies did not take room occupancy in accommodation facilities into account does not constitute such a practice.

[15] See judgments of the Court of Justice of 6 December 2012, *AstraZeneca* (C-457/10 P, paragraph 112); of 17 December 2011, *TeliaSonera* (C-52/09); 'TeliaSonera judgment'); and of 6 October 2015, *Post Danmark* (C-23/14, paragraph 65).

[16] See judgment of the Court of Justice of 30 January 2020, *Paroxetin* (C-307/18, paragraph 155).

[17] Judgment of the Court of Justice of 2 April 2020, *Budapest Bank* (C-228/18, paragraphs 76 and 79).

25 Furthermore, the applicant disagrees with the opinion of the Chairperson of the Office that it is not necessary to establish the actual effects on competition on the ground that the application of unfair conditions is merely potential in nature. According to the case-law, the competition authority must prove that 'competition has "in fact" been restricted or distorted or "in fact" prevented.' [18]

26 According to the applicant, it is unclear how accommodation facility operators could have sustained competitive harm, [19] with the Office criticising the applicant for the method of determining royalties rather than their amount. The amount of royalties could be higher without any penalty being incurred as long as the applicant adheres to the pricing method preferred by the Office. The applicant was unable to obtain a so-called 'supra-competitive advantage' as a result of the method chosen for setting royalties. Even if there were several collective management companies operating on the market, competing with one another, they would definitely not compete with one another in terms of which one of them takes into account the occupancy rate of accommodation facilities. Competition would take place on the basis of price and the size of the repertoire. The pricing method is not an element of competition.

27 The applicant argues that the objective of the prohibition on abuse of a dominant position is to prevent practices that have a direct or indirect effect on consumer welfare. [20] The defendant has failed to demonstrate an adverse effect on consumer welfare. [21] Instead of that case-law standard, it used only the vague concept of 'reasonableness'. Furthermore, the defendant has failed to demonstrate the exploitative effects of the applicant's conduct, even though it assessed it as such – for that, it should have demonstrated that the trading term leads (i) to a distortion of the structure of the market with an effect on consumer welfare, or (ii) to an attack on the fundamental values of human society, which certainly include the cultural activities of consumers. [22]

28 The Chairperson of the Office states that merely a potential distortion of competition is required as the material element of an infringement. In any event, the defendant did not treat the applicant's practices as practices distorting competition by object, in respect of which anti-competitive effects need not be proven. It is evident from the decision of the Office that the applicant distorted

[18] See judgment of the General Court of 12 December 2018, *Servier* (T-691/14, paragraph 1129); judgment of the Court of Justice of 30 June 1966, C-56/65 (*LTM*, paragraphs 359 and 360); or judgment of the General Court of 12 December 2018, *Krka* (T-684/14, paragraph 361).

[19] Judgment of the Court of Justice of 19 April 2018, *MEO* (C-525/16, in particular paragraph 37) ('the *MEO* judgment').

[20] Judgment of the Court of Justice of 27 March 2012, *Post Danmark I* (C-209/10) ('the *Post Danmark I* judgment').

[21] Judgment of the Court of Justice of 12 May 2022, *SEN* (C-377/20).

[22] See point 22 of the Opinion of the Advocate General in *SABAM*.

competition by exploiting its business partners by imposing unfair trading conditions without having an objective reason to do so, as a result of which its business partners sustained material harm, in a context where its business partners had practically no other option. [23]

29 As concerns harm and the line of argument based on the *MEO* judgment, the Chairperson of the Office adds that EU case-law defines harm very broadly. [24] The actions of the applicant had a demonstrable effect on the costs and profits of accommodation facility operators and put them at a competitive disadvantage.

30 According to the Chairperson of the Office, it follows from the case-law that the prohibition on abuse of a dominant position is not only directed at practices that may cause harm to consumers directly, but also at practices which are detrimental to them through their effects on the effective structure of competition. [25] In order to decide whether a competitor's conduct has been abusive, it is unnecessary to examine whether that conduct was to the detriment of consumers. It suffices to check whether it had a restrictive effect on competition. [26] The Office did not establish whether the applicant's conduct had an effect on consumers (and indeed it did not have to do so), but it established that it had an effect on other competitors – the applicant's contractual partners, namely, the operators of accommodation facilities.

31 According to the Chairperson of the Office, as based on the judgment in *United Brands*, the applicant acted in an anti-competitive manner by imposing unfair conditions and in fact exploiting its contractual partners (the operators of accommodation facilities). The rationale in respect of exploitative practices is that an undertaking with a dominant position should not take advantage of weakened competition to the detriment of its business partners, beyond a reasonable level, thereby distorting competition even further. That was of course precisely what the applicant did.

32 According to the Chairperson of the Office, the judgment in *Post Danmark I* does not change anything in the latter's position that an adverse effect of the conduct on consumer welfare need not be proved. The applicant's conduct constitutes a practice that does not affect consumers directly, rather it does so indirectly – through the applicant's business partners. However, the issue in the *Post Danmark I* judgment was principally the exclusionary practice of abuse of a dominant position, whereas the applicant's conduct consisted of exploiting its business

23 See paragraphs 111 to 115 of the Commission Decision in DSD.

24 Paragraph 64 of the judgment in *TeliaSonera*.

25 Paragraph 36 of the judgment of the Court of Justice of 21 February 1973, *Continental Can* (6/72).

26 See judgment of the Court of Justice of 15 March 2007, *British Airways* (C-95/04 P, paragraphs 106 to 107).

partners – the operators of accommodation facilities – rather than their exclusion from competition.

(v) Establishing a substantial effect on trade between Member States

33 The applicant claims that two criteria need to be met in order for Article 102 to apply: (i) the dominant position of an undertaking on the internal market or a substantial part thereof, and (ii) a substantial effect of its actions on trade between Member States.

34 The applicant acknowledges that it has a dominant position on a substantial part of the internal market. It denies, however, that its action (namely the method of setting prices) was able, in isolation, to result in an increase in the rates of royalties paid to foreign authors. [27] Even though, according to the Chairperson of the Office, even the mere potential of its having a substantial effect on trade between Member States sufficed, the amount is negligible in the context of the total income of the authors represented. Hence, the defendant has failed to establish that the conduct under review had a *substantial effect* on trade between Member States.

35 The Chairperson of the Office observes that the Office relied on the case-law of the Court of Justice and the Commission Notice on the interpretation of the concept of the *effect on trade between Member States*. [28] The effect on trade between Member States may also be potential and it is not necessary to examine the actual degree of interference. [29] The Court of Justice has recognised that fees charged by an organisation managing copyright that enjoys a monopoly position may have an effect on cross-border trade and, therefore, Article 102 TFEU [30] will apply to that situation. In the *STIM* and *AKKA* [31] judgments, the Court of Justice held that trade between Member States may be affected by the rates charged by a collective management company, if that company also manages the rights of foreign rightholders. The applicant itself concedes that it also manages the works of foreign authors, hence, its conduct has an effect on competition not only in the Czech Republic but also in other Member States.

27 See paragraph 29 of the judgment in *AKKA*.

28 *Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, (2004/C 101/07), available at: https://bit.ly/4bMnQsc

29 Judgment of the General Court of 7 October 1999, *Irish Sugar* (T-228/97, paragraph 170), or judgment of the Court of Justice of 1 February 1978, *Miller International Schallplatten GmbH* (19/77, paragraph 15).

30 See judgments of the Court of Justice of 13 July 1989, *Tournier* (395/87, paragraphs 35–38), and of 13 July 1989, *Lucazeau and Others* (110/88, 241/88 and 242/88, paragraphs 21–25).

31 Paragraph 23 of the judgment in *STIM* and paragraph 29 of the judgment in *AKKA*.

Succinct presentation of the reasons for the reference for a preliminary ruling

36 According to the referring court, the Court of Justice has not yet addressed the issue concerned in the present case – whether the failure to take into account the occupancy of rooms in an accommodation facility in the rate of a royalty may constitute abuse of a dominant position under Article 102(a) TFEU. The referring court is not certain whether – as the applicant claims – specific applicable standards may be inferred from the judgment in *SABAM* for assessing the conduct of the applicant, which did not take room occupancy into account in the royalties claimed from accommodation facilities.

37 In terms of whether the Office should have assessed the applicant's actions in terms of (a) excessive prices (opinion of the applicant), or (b) unfair business practices (opinion of the Office), the Court of Justice has not offered any guidance in its case-law in the form of specific criteria which national authorities could use as a basis to evaluate which of the two options to choose and which test to carry out in which case.

38 Furthermore, there is uncertainty as to how to deal with the issue of the substantive aspects of an infringement in the form of distortion of competition, that is, whether that aspect is merely of a potential nature or whether the Office should have established that the applicant's conduct resulted in at least minimal actual anti-competitive effects. If the Office were obliged to prove this, it would lead to another question – whether it is necessary also to prove a direct or indirect effect on consumer welfare, or the effect of exploitative practices to the detriment of the applicant's business partners.

39 Related to this is also the question of whether it is necessary to prove a substantial effect of the applicant's actions on trade between Member States (opinion of the applicant) or whether a reasonable assumption that such an effect could occur will suffice, and thus it is not necessary to examine its actual extent (opinion of the Office). That is also one of the conditions for the application of Article 102 TFEU.

40 At issue are important fundamental rights of the applicant laid down in the EU Charter of Fundamental Rights, namely the freedom to conduct a business (Article 16), the right to property (Article 17), and the right to a fair trial (Article 47).