Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

21 January 2015*

(Competition — Abuse of a dominant position — Airport services market — Decision rejecting a complaint — Article 13(2) of Regulation (EC) No 1/2003 — Case dealt with by a competition authority of a Member State — Rejection of the complaint on priority grounds — Decision of the competition authority drawing conclusions, in competition law, from an investigation conducted under national legislation applicable to the sector in question — Obligation to state reasons)

In Case T-355/13,

easyJet Airline Co. Ltd, established in Luton (United Kingdom), represented by M. Werner and R. Marian, lawyers,

applicant,

v

European Commission, represented by A. Biolan and F. Ronkes Agerbeek, acting as Agents,

defendant,

supported by

Luchthaven Schiphol NV, established in Schiphol (Netherlands), represented by J. de Pree, G. Hakopian and S. Molin, lawyers,

intervener,

APPLICATION for annulment of Commission Decision C(2013) 2727 final of 3 May 2013 rejecting the complaint lodged by the applicant against Luchthaven Schiphol NV in relation to alleged anti-competitive conduct in the airport services market (Case COMP/39.869 — easyJet/Schiphol),

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 26 September 2014,

gives the following

* Language of the case: English.

Judgment

Facts

1 The applicant — easyJet Airline Co. Ltd — is a British air carrier that is highly active within the European Union, operating, inter alia, to and from Schiphol Airport, Amsterdam (Netherlands).

2 On 11 September 2008, the applicant lodged two initial complaints with the Nederlandse Mededingingsautoriteit (the Netherlands competition authority; 'the NMa') against Luchthaven Schiphol NV (the operator of Amsterdam-Schiphol airport; 'Schiphol'), in relation to the security and passenger service charges to be applied from 1 November 2008. The first complaint was based on Article 8.25f(1) of the Wet Luchtvaart (Law on Aviation; 'the WL'), and the second on Article 24 of the Mededingingswet (Law on Competition; 'the MW') and Article 102 TFEU.

3 On 20 November 2008, the applicant lodged a new complaint with the NMa, on the basis of Article 8.25f(1) of the WL, in relation to the security and passenger service charges to be applied by Schiphol from 1 April 2009 ('the third complaint').

4 On 19 December 2008, the NMa rejected the applicant's first complaint on the ground that it had been brought out of time. It also informed the applicant that it was suspending the review of the second complaint pending the outcome of its assessment of the third complaint.

5 By decision of 14 July 2009, the NMa rejected the third complaint on the grounds that the applicant had failed to prove that the charges applied by Schiphol from 1 April 2009 were in breach of the WL and, in particular, contrary to the principles that charges must be cost-orientated, non-discriminatory and reasonable. The applicant brought an action contesting that decision, which was dismissed by judgment of the Rechtbank Rotterdam (District Court of Rotterdam) of 25 November 2010. The applicant then lodged an appeal against that judgment before the College van beroep voor het bedrijfsleven (Administrative Court for Trade and Industry), which it subsequently withdrew.

6 By decision of 16 December 2009, the NMa rejected the second complaint. It found that the various complaints lodged by the applicant had features in common and that the charges scheduled to enter into force in April 2009 were not fundamentally different from those which had entered into force in November 2008. In addition, the NMa found that the concepts of non-discrimination and reasonableness, as referred to in Article 8.25d(2) and (3) of the WL, were similar to those concepts as referred to in European competition law (Article 102 TFEU) and national competition law (Article 24 MW). The NMa also noted that, in its decision of 14 July 2009, it had construed the provisions of the WL in accordance with the case-law of the Courts of the European Union in relation to Article 102 TFEU. It further stated that a definition of the relevant market, which it would have given as one of the steps in an investigation conducted on the basis of competition law, was not necessary in the circumstances, since it had assumed that Schiphol was in a position of economic strength. The NMa concluded that a review of the charges introduced in November 2008 in the light of Article 102 TFEU would have the same outcome as the review of the third complaint, and it consequently rejected the second complaint in accordance with its priority policy. The applicant did not appeal against this decision.

7 On 14 January 2011, the applicant lodged a complaint with the Commission pursuant to Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1). The applicant submitted that the charges set by Schiphol were discriminatory and excessive and amounted to an infringement of Article 102 TFEU. The applicant mentioned, moreover, that it had lodged a number of complaints with the NMa but that, in its view, that authority had not taken any final decision on the merits of a complaint relating to competition.

8 On 18 December 2012, the Commission informed the applicant of its intention to reject the applicant's complaint on the basis of Article 13(2) of Regulation No 1/2003, on the ground that a competition authority of a Member State had already dealt with the case. The applicant replied to the Commission by letter of 31 January 2013.

9 On 3 May 2013, the Commission adopted Decision C(2013) 2727 final rejecting the applicant's complaint on the basis of Article 13(2) of Regulation No 1/2003 ('the contested decision'). In addition, the Commission found that, in any event, the complaint could also be rejected because the European Union lacked a legal interest, given that, in the light of the NMa's findings, there was very little likelihood of being able to establish an infringement of Article 102 TFEU.

Procedure and forms of order sought

10 The applicant brought the present action by application lodged at the Registry of the General Court on 4 July 2013.

11 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

12 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

13 By document lodged on 4 October 2013, Schiphol applied for leave to intervene in the proceedings in support of the form of order sought by the Commission, pursuant to Article 115 of the General Court's Rules of Procedure. By order of the President of the Second Chamber of the General Court of 10 December 2013, Schiphol was granted leave to intervene in the case in support of the form of order sought by the Commission.

14 Schiphol claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Substance

15 The applicant relies on two pleas in law in support of its action, alleging respectively that: (i) the Commission erred in law, and made a manifest error of assessment, in finding that the applicant's complaint could be rejected on the basis of Article 13(2) of Regulation No 1/2003; and (ii) the contested decision contains an inadequate statement of reasons.

The first plea: error of law, and manifest error of assessment, in the application of Article 13(2) of Regulation No 1/2003

16 The applicant submits, first, that the Commission erred in law in finding that the NMa had dealt with its complaint within the meaning of Article 13(2) of Regulation No 1/2003, even though that complaint had been rejected on priority grounds. Secondly, the applicant submits that the Commission erred in law and made a manifest error of assessment in basing itself on a decision of the NMa relating to a complaint which was not subject to an investigation conducted under European Union competition law, but rather under national air navigation law.

17 As a preliminary point, it should be borne in mind that the Commission, which is entrusted by Article 105(1) TFEU with the task of ensuring the application of Articles 101 TFEU and 102 TFEU, is responsible for defining and implementing the competition policy of the European Union and for that purpose has a discretion as to how it deals with complaints (see judgment of 16 October 2013 in *Vivendi* v *Commission*, T-432/10, EU:T:2013:538, paragraph 22 and the case-law cited). The Court of Justice has also pointed out that Article 13 of and recital 18 in the preamble to Regulation No 1/2003 reflect the broad discretion which the national authorities joined together in the network of competition authorities have in order to ensure an optimal attribution of cases within the latter (judgment of 14 February 2012 in *Toshiba Corporation and Others*, C-17/10, ECR, EU:C:2012:72, paragraph 90). Given the role assigned to the Commission by the TFEU in defining and implementing competition policy, the Commission, *a fortiori*, also has a broad discretion when applying Article 13 of Regulation No 1/2003.

18 The case-law relating to the assessment of the European Union's interest has, however, drawn attention to the fact that the Commission's discretion is not unlimited. The Commission must take into consideration all the relevant matters of law and of fact in order to decide on what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention (see judgment of 17 May 2001 in *IECC* v *Commission*, C-450/98 P, ECR, EU:C:2001:276, paragraph 57 and the case-law cited).

19 In that regard, it follows from settled case-law that, where the institutions have a broad discretion, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance; those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see judgment of 17 December 2008 in *HEG and Graphite India* v *Council*, T-462/04, ECR, EU:T:2008:586, paragraph 68 and the case-law cited). However, review by the Courts of the European Union of the Commission's exercise of the discretion conferred on it in this regard must not lead them to substitute their assessment of the European Union interest for that of the Commission, but must focus on whether the contested decision is based on materially incorrect facts, or is vitiated by an error of law, manifest error of appraisal or misuse of powers (see judgment of 15 December 2010 in *CEAHR* v *Commission*, T-427/08, ECR, EU:T:2010:517, paragraph 65 and the case-law cited).

20 With regard to the judicial review of a Commission decision based on Article 13(2) of Regulation No 1/2003, the purpose of that review is to verify that the contested decision is not based on materially incorrect facts and that the Commission has not erred in law, made a manifest error of assessment or misused its powers in finding that a competition authority of a Member State has already dealt with a complaint. It is necessary, by contrast, to bear in mind that review of decisions of the competition authorities of Member States is a matter for national courts alone, which perform an essential function in the application of EU competition rules.

The first limb of the first plea, alleging an error of law

21 The applicant submits that the concept of a case having been dealt with by a competition authority of a Member State within the meaning of Article 13(2) of Regulation No 1/2003 — whereupon the Commission may, under that provision, reject a complaint — must be construed in the light of Article 5 of that regulation, which refers to the different types of decision that may be taken by that authority. Consequently, in the applicant's view, a case may be considered to have been dealt with by a national authority only if that authority has at least decided that there are no grounds for action, following a preliminary investigation. By contrast, that authority cannot be regarded as having dealt with the case, within the meaning of Article 13(2) of that regulation, where it has merely rejected it on priority grounds. That interpretation, the applicant submits, is borne out by paragraph 20 of the Commission Notice on Cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) ('the notice on cooperation within the network of competition authorities').

22 The Commission and the intervener dispute the applicant's arguments.

23 Under Article 13(2) of Regulation No 1/2003, '[w]here a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it'.

24 In accordance with settled case-law, it is necessary, in interpreting a provision of EU law, to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (see judgments of 7 June 2005 in *VEMW and Others*, C-17/03, ECR, EU:C:2005:362, paragraph 41 and the case-law cited, and of 26 October 2010 in *Germany* v *Commission*, T-236/07, ECR, EU:T:2010:451, paragraph 44 and the case-law cited).

25 It is in the light of those principles that is appropriate to consider whether the expression 'complaint … which has already been dealt with by another competition authority' contained in Article 13(2) of Regulation No 1/2003 must be understood as allowing the Commission to reject a complaint in a case where the competition authority of a Member State has previously rejected the same complaint on priority grounds.

26 First of all, it appears that the answer to the question whether the Commission may reject a complaint which has previously been rejected by a competition authority of a Member State on priority grounds may be inferred from a literal interpretation of Article 13(2) of Regulation No 1/2003, in the light of the plain meaning of the expression 'complaint … which has already been dealt with by another competition authority'. It should, in that regard, be noted that that expression is broad in scope in that it is capable of including all cases of complaints which have been examined by another competition authority, whatever may have been the outcome. The legislature has thus chosen not to limit the scope of that article solely to cases of complaints which have already been the subject of a decision by another competition authority.

27 Secondly, the interpretation set out in paragraph 26 above also appears to be consistent with the general scheme of Regulation No 1/2003. It is important to read Article 13(2) of the regulation in the light of paragraph (1) of that article, which provides that the Commission may reject a complaint in the case where another competition authority of a Member State is dealing with it. It therefore appears that what matters is not the outcome of the review of the complaint by that competition authority, but the fact that it has been reviewed by that authority.

28 The interpretation set out in paragraph 26 above is also supported by recital 18 in the preamble to Regulation No 1/2003, which relates to Article 13 thereof (judgment in *Toshiba Corporation and Others*, paragraph 17 above, EU:C:2012:72, paragraph 90) and which states that '[t]his provision should not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority

has indicated its intention of dealing with the case'. Since the Commission may decide to dismiss a complaint for lack of Community interest, even though it has not been dealt with by a competition authority of a Member State, the Commission may, *a fortiori*, reject a complaint reviewed by that authority which has been rejected by the latter on priority grounds.

29 The notice on cooperation within the network of competition authorities, which is designed to implement the provisions of Regulation No 1/2003, and on which the applicant relies, also supports the interpretation set out in paragraph 26 above. Paragraph 20 of the notice states that, '[i]n Article 13 of [that regulation], "dealing with the case" does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf'. It does not, however, give any indication as to the finding reached by the competition authority of a Member State. Paragraph 22 of that notice expressly contemplates the case in which a complaint has been reviewed by a competition authority but rejected for reasons other than the investigation of the substance of the case; it gives the example of a case in which the authority was unable to collect the evidence necessary to prove the infringement, and states that it is important to be flexible in allowing another authority to carry out its own investigation and to deal with the case itself. The Court of Justice has, moreover, recognised the broad discretion which competition authorities enjoy in order to ensure optimal allocation of cases, stating, with regard to Article 13(1) of that regulation, that each authority has the possibility, but is not under any obligation, to reject a complaint which it has received, where another authority is already dealing with the same case (judgment in *Toshiba Corporation and Others*, paragraph 17 above, EU:C:2012:72, paragraph 90).

30 As for the applicant's arguments derived from Article 5 of Regulation No 1/2003, these do not make it possible to call into question the interpretation set out in paragraph 26 above.

31 The applicant claims that Article 13(2) of Regulation No 1/2003 must be read in the light of Article 5 of that regulation, relating to the powers of the Member States' competition authorities to apply Articles 101 TFEU and 102 TFEU in individual cases. According to the applicant, the Commission is prohibited from rejecting a complaint in the case where that complaint has not been the subject of a decision of a competition authority of a Member State under Article 5 of that regulation. The applicant submits that, in this case, the decision of the NMa of 16 December 2009 does not constitute a decision taken on the basis of that article, since it 'represents even less than the maximum allowed for [a national competition authority], which is to establish that there are no grounds for action on its part', as the NMa has not established whether the conditions for a prohibition were met.

32 Article 5 of Regulation No 1/2003 comes under Chapter II relating to powers and sets out the decisions which may be taken by the competition authorities of the Member States when applying Articles 101 TFEU et 102 TFEU in individual cases. The first paragraph of Article 5 of the regulation thus provides that those authorities, ruling on the substance, may, acting on their own initiative or on a complaint, take the following decisions, namely require that an infringement be brought to an end, order interim measures, accept commitments and impose fines, periodic penalty payments or any other penalty provided for in their national law. According to the second paragraph of Article 5 of that regulation, '[w]here on the basis of the information in their possession the conditions for prohibition are not met [national competition authorities] may likewise decide that there are no grounds for action on their part'. In answer to the question whether national competition authorities were entitled to take a decision finding that there had been no breach of Articles 101 TFEU or 102 TFEU, the Court of Justice has stated that Article 5 of that regulation is to be interpreted as restrictively defining the decisions which those authorities may take (judgment of 3 May 2011 in *Tele2 Polska*, C-375/09, ECR, EU:C:2011:270, paragraphs 19 to 30).

33 Article 13(2) of Regulation No 1/2003, which comes under Chapter IV on cooperation, provides, however, only that the complaint must have been dealt with by another competition authority, but not necessarily that a decision must have been reached in relation to that complaint (see paragraph 26

above). Accordingly, as noted by the Commission in the contested decision, that provision does not necessarily require that a decision must have been taken by the competition authority of a Member State that has already rejected the complaint. Consequently, even if it were to be supposed that the rejection of a complaint by a competition authority of a Member State on priority grounds does not constitute a decision within the meaning of Article 5, the Commission could apply, in such a case, the provisions of Article 13(2).

34 In the alternative, in any event, the decision of the NMa of 16 December 2009 may be considered to be a decision based on the second paragraph of Article 5 of Regulation No 1/2003. As submitted by the Commission, that provision covers all cases in which the competition authority of a Member State finds that the information in its possession does not allow it to conclude that the conditions for prohibition are met, without it being necessary for it to have ordered any preliminary measures of inquiry. In the present case, in finding, in its decision of 16 December 2009, that a review under Article 102 TFEU of the charges applied from April 2009 would have the same outcome as the review of the third complaint and in rejecting, consequently, the second complaint in accordance with its priority policy, the NMa necessarily took the view that the conditions for prohibition had not been satisfied. Moreover, a finding that a decision by a competition authority of a Member State to reject a complaint on priority grounds constitutes a decision taken on the basis of the second paragraph of Article 5 of that regulation is consistent with the judgment in *Tele2 Polska*, paragraph 32 above (EU:C:2011:270), in which the Court of Justice found that that article restrictively listed the type of decisions which could be taken by a national authority. Any different interpretation would have the effect of depriving the competition authorities of Member States of the possibility of taking decisions to reject complaints on priority grounds, even though competition authorities do rely on such grounds when taking closure decisions which are more or less formal. Consequently, the interpretation set out in paragraph 26 above is consistent with Article 5 of that regulation, since the Commission may reject a complaint on the ground that it has already been rejected by decision of a competition authority of a Member State on priority grounds.

35 Finally, the interpretation set out in paragraph 26 above is consistent with the mechanism of Article 13(2), which also provides that a competition authority of a Member State may reject a complaint where it has already been dealt with by the Commission. As the case-law has consistently recognised the Commission's power to take decisions rejecting a complaint on priority grounds (see, for example, the judgment in *Vivendi* v *Commission*, paragraph 17 above, paragraphs 22 to 25 and the case-law cited), the competition authority of a Member State may also reject a complaint which has been the subject of a prior rejection by the Commission on such a ground.

36 Thirdly, the interpretation set out in paragraph 26 above appears to be in keeping with one of the main objectives of Regulation No 1/2003, which is to establish an effective decentralised scheme for the application of EU competition law rules. It is apparent from recital 6 in the preamble to that regulation that, '[i]n order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application'. Recital 15 in the preamble to that regulation states, moreover, that '[t]he Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation'. That regulation thus put an end to the previous centralised regime and, in accordance with the principle of subsidiarity, established a wider association of Member States' competition authorities, authorising them to implement EU competition law (judgment of 8 March 2007 in *France Télécom* v *Commission*, T-339/04, ECR, EU:T:2007:80, paragraph 79). 'To ensure that cases are dealt with by the most appropriate authorities within the network', recital 18 in the preamble to Regulation No 1/2003 states that 'a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority'.

37 By contrast, the interpretation put forward by the applicant, the effect of which would be to require the Commission to review a complaint systematically each time a competition authority of a Member State has investigated a complaint but has not taken one of the decisions provided for in Article 5 of Regulation No 1/2003 or taken a decision to reject the complaint on priority grounds, would not be compatible with the objective of Article 13(2) of that regulation, which is to establish, with a view to ensuring effectiveness, an optimal allocation of resources within the European competition network.

38 Furthermore, as noted by the intervener, the interpretation proposed by the applicant appears to be at variance with the drafting history of Regulation No 1/2003. The explanatory memorandum relating to Commission proposal COM (2000) 582 final for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty indicates that the purpose of Article 13 was to remove the risk of duplication of work and the incentive for multiple complaints.

39 Finally, as noted by the Commission, the interpretation put forward by the applicant runs contrary to Article 6 of Regulation No 1/2003, pursuant to which national courts have the power to apply Articles 101 TFEU and 102 TFEU. Requiring the Commission to review, as a matter of course, complaints rejected on priority grounds by competition authorities of Member States would be tantamount to transferring to the Commission the power to review the decisions of those authorities, which is a matter for national courts alone. It is true that Regulation No 1/2003 created a cooperation mechanism between the Commission and those authorities (judgment in *Tele2 Polska*, paragraph 32 above, EU:C:2011:270, paragraph 26), but it did not provide for a mechanism by which the Commission would be substituted for national courts, which have an essential part to play in applying EU competition rules (see recital 7 in the preamble to Commission proposal COM (2000) 582 final for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).

40 It is thus apparent from both the wording and the scheme of Regulation No 1/2003, on the one hand, and the objective pursued by that regulation, on the other, that the Commission may, in order to reject a complaint, properly rely on the ground that a competition authority of a Member State has previously rejected that complaint on priority grounds. Accordingly, the circumstance — even on the assumption that it is proved — that, in the present dispute, the NMa did not close the complaint which had been brought before it by taking a decision within the meaning of Article 5 of that regulation and that it relied on priority grounds did not preclude the Commission from finding, pursuant to Article 13(2) of that regulation, that that complaint had been dealt with by a competition authority of a Member State and from rejecting it on that ground.

The second limb of the first plea, alleging an error of law and a manifest error of assessment

41 The applicant asserts that the Commission erred in law and made a manifest error of assessment in relying on a decision of the NMa relating to a complaint which was not the subject of an investigation conducted under European Union competition law, but rather under national air navigation law.

42 The Commission and the intervener take issue with the applicant's arguments.

43 It is true that Article 13(2) of Regulation No 1/2003, as is the case for all of the provisions of that regulation, refers to the situations in which Articles 101 TFEU and 102 TFEU are implemented. In particular, Article 3(1) of that regulation provides that, where the competition authorities of Member States apply national competition law to an abusive practice by an undertaking having a dominant position on the market which may affect trade between Member States, they must also apply Article 102 TFEU.

44 Consequently, the Commission may reject a complaint on the basis of Article 13(2) of Regulation No 1/2003 only where it has been the subject of a review carried out in the light of EU competition law rules.

45 None the less, no provision of that regulation prohibits a competition authority of a Member State from relying, in the investigations which it carries out with a view to ascertaining whether there has been compliance with EU competition law rules, on conclusions which it reached as part of the investigation carried out under different national legislation. Paragraph 21 of the notice on cooperation within the network of competition authorities, moreover, merely states that 'Article 13 of [Regulation No 1/2003] can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets'.

46 It follows from the foregoing that the Commission may, in order to reject a complaint on the basis of Article 13(2) of Regulation No 1/2003, properly rely on the ground that a competition authority of a Member State has previously rejected that complaint following a review based on conclusions reached by that authority in the course of an investigation conducted under separate provisions of national law, on condition that that review was conducted in the light of the rules of EU competition law.

47 In the present case, it is apparent from the contested decision that the Commission found that the NMa had dealt with the applicant's complaint on the basis of Article 102 TFEU. It noted that the NMa had in particular indicated the extent to which the findings of the investigation conducted under air navigation law were relevant to its review based on competition law, by describing the similarities between the two sets of rules, comparing the equivalence of the relevant services and ascertaining the competitive disadvantage caused by Schiphol's pricing. The Commission found that the NMa had thus examined whether the charges were proportionate to the costs, had compared those charges with those of other international airports and had assessed them in the light of the quality of service received by the applicant. Finally, the Commission held that it was not its task to rule on the arguments and findings set out by the NMa or on the methodology used by the latter.

48 Moreover, it is apparent from the NMa's decision of 16 December 2009 that the applicant's complaint was reviewed in the light of the provisions of Article 24 of the MW and of Article 102 TFEU. The NMa in particular held therein, as noted by the Commission in the contested decision, that the assessment of the concepts of non-discrimination and reasonableness set out in Articles 8.25d(2) and (3) of the WL was similar to that carried out under EU competition law. The NMa also pointed out that, in its decision of 14 July 2009, it had interpreted the provisions of the WL in accordance with the case-law of the Courts of the European Union relating to Article 102 TFEU. It further noted that a definition of the relevant market, which was to be carried out as part of an investigation conducted on the basis of the provisions of competition law, was not necessary in this case, since it had assumed that Schiphol was in a position of economic strength.

49 It follows from the foregoing that the Commission did not err in law in rejecting the applicant's complaint on the basis of Article 13(2) of Regulation No 1/2003, since the Commission found that the competition authority of a Member State had dealt with that complaint on the basis of Article 102 TFEU.

50 While acknowledging that the provisions of the WL at issue refer in part to concepts derived from EU competition law, the applicant puts forward five arguments designed to establish that the Commission made a manifest error of assessment in finding that the NMa had dealt with its complaint on the basis of Article 102 TFEU.

51 It is apparent from paragraph 20 above that, in order to respond to the applicant's arguments, the Court must confine itself to establishing that, in rejecting the complaint on the basis of Article 13(2) of Regulation No 1/2003, the Commission did not err in law or make a manifest error of assessment in forming the view that the NMa had already dealt with the applicant's complaint in the light of EU

competition law. It was for the Commission, in that context, to establish that the NMa had not rejected the applicant's complaint without having first conducted its examination in the light of EU competition law rules. However, the Court's review must not lead to an appraisal of the merits of the NMa's decision or of the procedure or methodology used by the latter, which assessment the Commission did not itself carry out, moreover, and which is a matter for the national courts.

52 First, the applicant states that the NMa did not define the relevant market, which, in its view, is an essential element of any examination of compliance with Article 102 TFEU, and that the Commission could not, therefore, conclude that the complaint had been dealt with by the NMa on the basis of that provision. Such an argument must, however, be rejected as irrelevant in the light of the scope and purpose of the review carried out by the Court, referred to in paragraph 51 above. That argument relates to the methodology and merits of the analysis applied by the NMa for the purpose of processing the applicant's complaint.

53 For the sake of completeness, it must be held that, in the present case, the NMa was not required to define the relevant market.

54 It is true that, according to the case-law, the determination of the relevant market is of critical importance for the purpose of establishing whether a company is in a dominant position, since the possibilities of competition can be judged only in relation to the characteristics of the goods or services in question, as a result of which characteristics those goods or services are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services (judgments of 21 February 1973 in *Europemballage and Continental Can* v *Commission*, 6/72, ECR, EU:C:1973:22, paragraph 32, and of 30 January 2007 in *France Télécom* v *Commission*, T-340/03, ECR, EU:T:2007:22, paragraph 78). Furthermore, according to settled case-law, a dominant position is demonstrated by the fact that the undertaking concerned is in a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers (judgments of 14 February 1978 in *United Brands and United Brands Continentaal* v *Commission*, 27/76, ECR, EU:C:1978:22, paragraph 65; of 13 February 1979 in *Hoffmann-La Roche* v *Commission*, 85/76, ECR, EU:C:1979:36, paragraph 38; and in *France Télécom* v *Commission*, EU:T:2007:22, paragraph 99).

55 In the present case, however, it is clear from the decision of the NMa of 14 July 2009 that it was assumed that the intervener was in a position of economic strength and that, consequently, as the NMa has noted in paragraph 16 of its decision of 16 December 2009, since the intervener was in a dominant position, it was not necessary to proceed with the determination of the relevant market. The Commission has therefore not, on any view, marred its decision with a manifest error by forming the view that the applicant's complaint had been dealt with in compliance with the rules for assessment laid down by EU competition law.

56 Secondly, the applicant contends that a review carried out under Article 102 TFEU would have led the NMa to a different conclusion, with regard to the intervener's abusive conduct in relation to price discrimination.

57 It should be noted at the outset that it is not for the Court to review the legality of the decision of the NMa (see paragraph 51 above). It is, by contrast, the Court's task to verify that the Commission has not erred in law or made a manifest error of assessment in finding that the NMa had already dealt with the applicant's complaint by using the definition of the concept of discrimination contained in Article 102 TFEU.

58 In that regard, it is apparent from the contested decision that, in the analysis that led to its decision of 14 July 2009, the NMa took account of the definition of discrimination contained in Article 102 TFEU. As noted by the Commission in the contested decision, the NMa, in its decision of 14 July

2009, both examined the equivalence of the services offered by the intervener to various airlines and assessed the competitive disadvantage caused by the prices charged (paragraphs 113 to 156). In order to carry out that review, the NMa explicitly stated that it was using the definition of discrimination contained in Article 102 TFEU, as interpreted by the Court of Justice (paragraph 33).

59 The applicant submits, thirdly, that the NMa stated in another decision that, although the concepts contained in the WL could be interpreted with the aid of competition law, the overall assessment of a case under the WL did not take place within the framework of competition law and that any question relating to a breach of competition rules could not be resolved as part of an investigation conducted under the WL. That matter, however, even if it is not disputed, has no bearing on the lawfulness of the contested decision, since here, on the one hand, the Commission was not bound by the assessments made by the NMa in a separate case and, on the other, it is clear from the foregoing that the Commission did indeed check that the NMa had investigated, in the light of Article 102 TFEU, the complaint which had been brought before it.

60 The applicant maintains, fourthly, that the review of a complaint under the WL is carried out exclusively by the aviation control department, which has separate powers and duties from those of the competition directorate, and does not take account of the general objectives of EU competition policy. That argument must be rejected, however, since the aviation control department was part of the Netherlands competition authority and the decision of the NMa on which the Commission relied in rejecting the applicant's complaint was adopted by its single board. It is important to bear in mind that Article 13(2) of Regulation No 1/2003, and indeed the provisions of that regulation as a whole, refers to the 'competition authority of a Member State' without distinguishing between the different departments of that authority. Consequently, it is unnecessary to establish the composition of the teams which investigated the applicant's complaint on the basis of the WL, since the NMa conducted a review of the applicant's complaint in the light of competition law and it is apparent from the foregoing that the NMa was properly entitled to rely on the analysis carried out in connection with the complaint based on the WL.

61 Finally, the applicant's argument that the contested decision has the effect of enabling a large class of potential abuses to avoid the scrutiny of competition authorities, in breach of Article 102 TFEU, must be rejected. It is clear from the foregoing that the contested decision specifically did not have the effect of enabling the intervener to avoid application of Article 102 TFEU.

62 It follows from all of the foregoing that the applicant has not established that the Commission made a manifest error of assessment in finding that the NMa had dealt with the applicant's complaint on the basis of Article 102 TFEU.

63 Consequently, the Commission did not err in law or make a manifest error of assessment in holding that the NMa had dealt with the applicant's complaint in the light of EU competition law.

64 The first plea in law must therefore be rejected in its entirety.

The second plea, alleging infringement of the obligation to state reasons

65 The applicant submits that, inasmuch as it rejects, on a subsidiary basis, the applicant's complaint for lack of European Union interest, the contested decision is inadequately reasoned.

66 The Commission contends that the second plea in law, which is necessarily subsidiary in nature, must be rejected, since the contested decision, supplemented by the decision of the NMa of 16 December 2009, sets out clearly the reasons why the case did not present a sufficient European Union interest.

67 It is apparent from the contested decision that the Commission, which founded that decision on Article 13(2) of Regulation No 1/2003, further indicated that it was of the opinion, in any event, that the complaint could be rejected for lack of European Union interest by reason of the limited prospect of establishing an infringement, given the similar conclusion reached by the NMa at the end of its investigation.

68 As a preliminary point, it is important to note that, since it was merely on a subsidiary basis that the Commission rejected the applicant's complaint for lack of European Union interest, the second plea in law, even if it were to be upheld, could not lead to annulment of the contested decision (see, to that effect, judgment of 27 February 1997 in *FFSA and Others* v *Commission*, T-106/95, ECR, EU:T:1997:23, paragraph 199).

69 In any event, the contested decision does appear to be sufficiently reasoned. It should be recalled that, according to settled case-law, Article 7 of Regulation No 1/2003 does not give a complainant the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement and does not oblige the Commission to continue the proceedings, whatever the circumstances, right up to the stage of a final decision (judgments of 18 October 1979 in *GEMA* v *Commission*, 125/78, ECR, EU:C:1979:237, paragraph 18, and of 17 May 2001 in *IECC* v *Commission*, C-449/98 P, EU:C:2001:275, paragraph 35). By contrast, the Commission is required to consider attentively all the matters of fact and of law which the complainant brings to its attention (judgments of 11 October 1983 in *Schmidt* v *Commission*, 210/81, ECR, EU:C:1983:277, paragraph 19, and of 17 November 1987 in *British American Tobacco and Reynolds Industries* v *Commission*, 142/84 and 156/84, ECR, EU:C:1987:490, paragraph 20). Complainants are entitled to have the fate of their complaint settled by a decision of the Commission against which an action may be brought (judgment of 18 March 1997 in *Guérin automobiles* v *Commission*, C-282/95 P, ECR, EU:C:1997:159, paragraph 36, and *IECC* v *Commission*, EU:C:2001:275, paragraph 35).

70 In that regard, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint. Since the reasons stated must be sufficiently precise and detailed to enable the General Court to review effectively the Commission's use of its discretion to define priorities, the Commission must set out the facts justifying the decision and the legal considerations on the basis of which it was adopted (order of 31 March 2011 in *EMC Development* v *Commission*, C-367/10 P, EU:C:2011:203, paragraph 75).

71 In the present case, it is apparent from the contested decision that the Commission found that the likelihood of establishing an infringement of Article 102 TFEU was limited, given the conclusions reached by the NMa. It should, however, be recalled that, under Articles 4 and 5 of Regulation No 1/2003, the Commission and the competition authorities of the Member States have parallel powers to apply Articles 101 TFEU and 102 TFEU, and that the scheme of that regulation is based on close cooperation between them. Accordingly, in its assessment, the Commission may also take account of the steps taken by those national authorities (judgment in *Vivendi* v *Commission*, paragraph 17 above, EU:T:2013:538, paragraph 26).

72 It follows from the foregoing that the Commission fulfilled its obligation to state reasons by setting out, clearly and unequivocally, the factual and legal considerations which led it to conclude that the likelihood of establishing the existence of an infringement of Article 102 TFEU was no more than very limited. Since those details enable the Court to review effectively the Commission's exercise of its discretion in the contested decision, it must be concluded that the contested decision is sufficiently reasoned in that regard.

73 The second plea in law can therefore be rejected as being unfounded and, consequently, the action must be dismissed in its entirety.

Costs

74 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs and those of Schiphol, in accordance with the forms of order sought by those parties.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders easyJet Airline Co. Ltd to pay the costs.

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 21 January 2015.

[Signatures]