



EUROPEAN COMMISSION

NON-CONFIDENTIAL VERSION*

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[...]

easyJet Airline Company Limited
Hangar 89, London Luton Airport, Luton
Bedfordshire, LU2 9PF
UK

Subject: Case COMP/39.869 – easyJet/Schiphol
(Please quote this reference in all correspondence)

Dear Sir/Madam,

I refer to your complaint of 14 January 2011 pursuant to Article 7 of Council Regulation 1/2003,¹ regarding an alleged infringement of Article 102 of the Treaty on the Functioning of the European Union (TFEU) by N.V. Luchthaven Schiphol (Schiphol), as well as to your subsequent letter of 31 January 2013 submitted in response to the letter of the Commission informing you about its intention to reject your complaint.

Pursuant to Article 13 of Council Regulation 1/2003, the Commission may reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case. Where the Commission rejects a complaint pursuant to Article 13 of

* This version of the Commission Decision of 3 May 2013 does not contain any business secrets or other confidential information.

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, pages 1-25.

Regulation No 1/2003, it shall inform the complainant without delay of the national competition authority which is dealing with the case.²

As explained in the letter of 18 December 2012 from [...] the Competition Directorate-General of the Commission, the case referred to in your above complaint has already been dealt with by the Netherlands Competition Authority (NMa)³ under reference 6486/62 *easyJet v N.V. Luchthaven Schiphol*.⁴

In your letter of 31 January 2013, you contest that the NMa has dealt with the complaint submitted by easyJet in the sense of Article 13 of Regulation 1/2003. You argue that the NMa found it ineffective and inefficient to do an investigation in the case. You add that this conclusion was reached based on the rejection of complaint under the Dutch Aviation Act, i.e. in your opinion the NMa assumed that the results of such investigation would be the same as the result of the investigation conducted under Dutch aviation law. According to you, the requirement that a competition authority "has dealt with" the complaint should be linked to Article 5 of Regulation 1/2003 which regulates national competition authorities' power to enact decisions that "there are no grounds for action". Therefore, you argue that "the Commission cannot use as a valid ground for rejection under Article 13 of Regulation 1/2003 the judgement of a national aviation regulator which dealt with the case (since the NMa simply relied on the aviation regulator's judgment)".⁵

easyJet lodged a complaint on 11 September 2008 with the NMa contesting charges at Schiphol which would come into effect on 1 November 2008 under the EU and national competition rules and the Dutch regulatory provisions both.⁶ On 21 November 2008 it filed another complaint with the NMa contesting charges at Schiphol which would come into effect on 1 April 2009 exclusively under the Dutch regulatory provisions.

From the beginning, the NMa clearly connected the assessment under these two sets of rules, indicating that an infringement under the Aviation Act could be a reason to pursue the case under the competition rules later.⁷ The NMa deferred the assessment of the complaint under the competition rules and concentrated on the complaint of 21 November 2008 under the Aviation Act.

The NMa extensively examined the charges at Schiphol which would come into effect on 1 April 2009 that made the object of the complaint of 21 November 2008 under the

² Article 9 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

³ As of April 2013, the Netherlands Consumer Authority, the Netherlands Competition Authority (NMa) and the Netherlands Independent Post and Telecommunications Authority (OPTA) joined forces, creating a new regulator: the Netherlands Authority for Consumers and Markets (ACM). Throughout this decision we will still refer to the Dutch competition authority as NMa.

⁴ Decision of 16 December 2009 on the complaint of 11 September 2008, available at: <<https://www.acm.nl/nl/publicaties/publicatie/2366/easyJet-v-NV-Luchthaven-Schiphol/>> accessed 30 April 2013.

⁵ Paragraph 1.6 of your letter of 31 January 2013.

⁶ The NMa concluded that the complaint was not admissible under the Aviation Act.

⁷ Paragraph 4 of the Decision of 16 December 2009.

Aviation Act. After 8 months of investigation it found no infringement of those rules.⁸ As part of this procedure, the NMa provided the opportunity to easyJet and Schiphol to present their arguments both in writing and orally; it also put questions to KLM B.V., the main competitor of easyJet. The NMa examined the discrimination issue by referring to the definition of discrimination as contained in Article 102 TFEU. It discussed the equivalence of the service concerned and assessed the competitive disadvantage caused by the pricing of Schiphol. As regards the reasonableness of the airport charges, the NMa (1) examined whether the charges are cost-oriented, (2) compared the charges with international benchmarks and (3) assessed the charges in the light of the quality of the service easyJet receives.⁹

Following the above rejection of easyJet's complaint of 21 November 2008 under the Aviation Act concerning the charges that came into effect on 1 April 2009, the NMa had to decide on the question of whether it should deal with the complaint of 11 September 2008 under the competition rules. With its decision of 16 December 2009, the NMa has rejected, based on competition rules, the easyJet's complaint of 11 September 2008 against Schiphol concerning the alleged infringement of Article 102 TFEU and the corresponding provision of the Dutch Competition Act. The NMa considered that the charges that came into effect on 1 November 2008 and on 1 April 2009 do not differ considerably and their assessment under the Dutch regulatory rules is likely to lead to the same outcome, namely that they do not infringe the Dutch regulatory provisions. Therefore the NMa did not consider justified to also investigate the charges that came into effect on 1 November 2008. Consequently, the NMa found that an assessment based on EU and Dutch competition law was likely to lead to the same outcome.¹⁰

The Commission points out that the NMa did not simply cross-refer to its regulatory decision establishing, without further consideration, that due to the lack of infringement under the regulatory rules, competition law cannot be infringed either. On the contrary, the NMa rejected the complaint under the competition rules after explaining why it is not likely that it would find an infringement of those rules, and therefore why the complaint is not given priority.¹¹ In particular, the NMa described the comparable terminology of the two sets of rules and the fact that discrimination and reasonableness (excessiveness) are used either with exactly the same meaning or with comparable methods as established in the case law of Union Courts on competition law.¹² The NMa concluded after this assessment that the likelihood of arriving to a different result under the competition rules, i.e. finding an infringement, cannot be reasonably expected for the discrimination claim

⁸ Decision of 14 July 2009, available at: <<https://www.acm.nl/nl/publicaties/publicatie/2557/Tarieven-en-voorwaarden-Schiphol-per-1-april-2009--easyJet-klachtafhandeling/>> accessed 30 April 2013.

⁹ Paragraph 12 of the Decision of 16 December 2009.

¹⁰ Paragraph 17 of the Decision of 16 December 2009.

¹¹ Ibid. paragraphs 8-17.

¹² These circumstances are also supported by easyJet's reference to Union Courts' case law related to the application of competition rules in the regulatory case. See footnotes 71 and 72 of the NMa's decision of 14 July 2009.

and would not be very likely in the case of excessive pricing. This shows that the NMa has investigated the case and it did not merely receive a complaint.¹³

easyJet argues¹⁴ that NMa decision did not find that there are no grounds for action according to the last paragraph of Article 5 of Regulation 1/2003 and therefore the NMa did not act as a competition authority. The Commission considers that this argument is unfounded because the formulations used in Article 13 of Regulation 1/2003 "*dealing with the case*" or "*already been dealt with*" do not require one of the decisions listed in Article 5 of Regulation 1/2003. The national competition authority could investigate the case and find an insufficient interest to pursue it, as in the present case. In light of the wording of Article 13 of Regulation 1/2003, the mere investigation by another competition authority is a sufficient ground to reject that complaint.

Based on the above, the Commission considers that the NMa has dealt with the case under Article 102 TFEU for the purpose of Article 13 of Regulation 1/2003 in a way that goes beyond the simple fact that a complaint has been lodged with it.¹⁵ The NMa explained why the conclusions reached after a thorough investigation under the Aviation Act are relevant from a competition law assessment point of view. The Commission is not required to assess the adequacy of the arguments used, conclusions reached and methods applied by the national competition authority. That would be the role of the various appeal bodies in a national judiciary system.

The Commission considers that the case dealt with by the NMa and the present complaint concern the same type of practice on the same product and geographic market.¹⁶ The complaint of 11 September 2008 filed with the NMa related to the charges that came into effect on 1 November 2008 while the complaint filed with the Commission concerned both the charges that came into effect in April 2010 and the previous ones. The Commission letter of 18 December 2012 stated that the 2008 and 2010 charges are similar. easyJet did not contest this aspect.

easyJet also claims that, even if Article 13 of Regulation 1/2003 applies, the Commission should have assessed the seriousness of the alleged practices before defining its priorities.¹⁷ The Commission considers that Article 13 of Regulation 1/2003 provides a stand-alone rejection ground based solely on the fact that a Member State competition authority, like the NMa, has dealt with the same conduct of an undertaking. It is clear from the first sentence of Article 13(1) of Regulation 1/2003 that "*the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint*" (emphasis added). This applies to the Commission as well ("*likewise*" in the second sentence) and also to cases which have

¹³ See paragraph 20 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, pages 43–53.

¹⁴ Points 1.3 and 1.5 of its letter of 31 January 2013

¹⁵ See paragraph 20 of the Commission notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, pages 43–53.

¹⁶ See paragraph 20 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, pages 43–53.

¹⁷ Paragraph 2.2 of your letter of 31 January 2013.

"already been dealt with". Therefore, it is sufficient grounds for the Commission to reject a complaint that the conditions of Article 13 are fulfilled. In other words, Article 13 of Regulation 1/2003 foresees the possibility to reject a complaint without examining its merits on the substance. Contrary to easyJet's claim, there is no additional obligation for the authority rejecting the complaint to assess the seriousness of the alleged practices or how persistent their consequences are.¹⁸ If the Commission were obliged, as the applicant claims, to examine whether there is a Union interest in pursuing the case, then Article 13 of Regulation 1/2003 would be devoid of substance. This rejection ground is different from those provided by Union Courts' case law for the lack of Community interest or other reasons pertaining to the nature of a complaint as referred by you in paragraphs 2.1-2.3 of your letter. Therefore, when the Commission rejects the complaint, it is sufficient to show that the same practice has been dealt with by the NMA. In any event, the Commission considers that the complaint would also lack Union interest because of the limited likelihood to find an infringement in light of the similar conclusion reached by the Dutch NCA further to its investigation.

For these reasons, I inform you that, pursuant to Article 13 of Council Regulation 1/2003, the Commission rejects your complaint.

Yours faithfully

For the Commission

Joaquín ALMUNIA

Member of the Commission

¹⁸ The Ufex case-law invoked by easyJet (points 2.1-2.3 of its letter of 31 January 2013) does not concern the application of Article 13 of Regulation 1/2003 but the rejections of complaint for lack of sufficient Union interest which is a different ground for a rejection of a complaint.