**European Economic Regulation Law – M2 Droit européen / European Law**

**Pr. S. de La Rosa**

The European Union has taken, and continues to take, significant measures designed to liberalize certain network-based sectors. In opening up those sectors to greater competition, the European Commission has delegated a wide range of regulatory powers to National Regulatory Authorities, who work closely with National Competition Authorities in order to achieve the optimum competitive balance most likely to be able to deliver consumer welfare.

**Session 1. Legal background of the liberalization of network industries**

* **Main topics**
* How to define a network industry: existence of a general interest (art. 106), natural monopolies, economy of scale.
* How to define regulation in this context: seek of equilibrium under imperfect competition.
* Scope of network regulation in EU law: communications, gaz, electricity, rail, road, air, postal services.
* Principles underpinning regulated markets: Unbundling of upstream and downstream operations, Non-discriminatory third party access to the network, setting up of regulatory authorities, recognition of universal service.
* Article 106 TFUE (ex Article 86 TEC)

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

* **Substantial legal changes**
* Electricity & Gas

Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (Text with EEA relevance.)

* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0944>

Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas

* Telecommunication

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance

* Train / transport

Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure

* **Before the session - readings**
* Doc. 1 - Limitation of State intervention trough the determination of a price : **CJ, Anode, 7 septembre 2016**
* *To what extend State intervention can be seen as an exception on network markets ?*
* *How does the Court of justice try to mitigate the freedom of the market, free competition and public service obligations?*
* Doc. 2 – Communiication on Green Deal, 2019 : **COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS The European Green Deal:**  <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN>
* Doc. 3 – Communication autonomie strategic 2020 : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0456&from=EN>

UDGMENT OF THE COURT (Fifth Chamber) (doc 1)

7 September 2016 ([\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=183104&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4495668#Footnote*))

(Reference for a preliminary ruling — Approximation of laws — Directive 2009/73/EC — Energy — Gas sector — Fixing of prices for supplying natural gas to final customers — Regulated tariffs — Obstacle — Compatibility — Criteria of assessment — Objectives of security of supply and territorial cohesion)

In Case C‑121/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (France), made by decision of 15 December 2014, received at the Court on 10 March 2015, in the proceedings

**Association nationale des opérateurs détaillants en énergie (ANODE)**

v

**Premier ministre,**

**Ministre de l’Économie, de l’Industrie et du Numérique,**

**Commission de régulation de l’énergie,**

**ENGIE,** formerly GDF Suez,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, F. Biltgen, A. Borg Barthet (Rapporteur), E. Levits and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

after considering the observations submitted on behalf of:

–        Association nationale des opérateurs détaillants en énergie (ANODE), by O. Fréget and R. Lazerges, avocats,

–        ENGIE, by C. Barthélemy, avocat,

–        the French Government, by G. de Bergues, D. Colas and J. Bousin, acting as Agents,

–        the Hungarian Government, by M. Fehér, acting as Agent,

–        the Polish Government, by B. Majczyna, acting as Agent,

–        the European Commission, by C. Giolito and O. Beynet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 April 2016,

gives the following

**Judgment**

1        This reference for a preliminary ruling concerns the interpretation of Article 3(1) and (2) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

2        The reference has been made in proceedings between the Association nationale des opérateurs détaillants en énergie (National Association of Energy Retailers) (ANODE) and the Premier ministre (Prime Minister), the Ministre de l’Économie, de l’Industrie et du Numérique (Minister for Economic Affairs, Industry and the Digital Economy), the Commission de régulation de l’énergie (Energy Regulatory Commission) (France) and ENGIE, formerly GDF Suez, concerning regulated tariffs for the sale of natural gas.

 **Legal context**

 *EU law*

3        According to recitals 44 and 47 of Directive 2009/73:

‘(44) Respect for the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.

…

(47)      The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, can benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. …’

4        Article 3(1) and (2) of Directive 2009/73 states:

‘1.      Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations.

2.      Having full regard to the relevant provisions of the Treaty, in particular Article [106] thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for natural gas undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.’

5        Article 2(28) of Directive 2009/73 defines ‘eligible customer’ as a customer who is free to purchase gas from the supplier of his choice, within the meaning of Article 37 of the directive.

6        Article 37(1) of Directive 2009/73 provides:

‘Member States shall ensure that the eligible customers comprise:

(a)      until 1 July 2004, eligible customers as specified in Article 18 of Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [(OJ 1998 L 204, p. 1)]. Member States shall publish, by 31 January each year, the criteria for the definition of those eligible customers;

(b)      from 1 July 2004, all non-household customers;

(c)      from 1 July 2007, all customers.’

 *French law*

7        In accordance with Article L. 100‑1 of the Code de l’énergie (Energy Code):

‘Energy policy shall ensure the strategic independence of the nation and promote its economic competitiveness. That policy shall seek to:

–        ensure security of supply;

–        maintain a competitive energy price; …

–        guarantee social and territorial cohesion by ensuring universal access to energy.’

8        Article L. 121‑32 of that code provides that public service obligations are to be assigned to natural gas suppliers and are to relate inter alia to security of supply and the quality and price of the goods and services supplied.

9        Article L. 121‑46 of that code provides:

‘I. — The objectives and detailed rules for ensuring implementation of the public service missions defined in sections 1 and 2 of this Chapter shall be laid down in contracts between the State of the one part and … GDF-Suez … of the other part … on the basis of the public service missions assigned to the latter …

II. — The contracts provided for in point I shall relate inter alia to:

(1)      The public service requirements regarding security of supply and the regularity and quality of service to consumers;

(2)      Ways of ensuring access to the public service;

…

(4)      The multiannual development of the regulated tariffs for the sale … of gas;

…’

10      Article L. 410‑2 of the Code de commerce (Commercial Code) states:

‘Except in cases where the law specifies otherwise, the prices of goods, products and services … shall be determined by the free play of competition.

However, in sectors or areas in which price competition is limited by monopoly situations or long-term supply problems, or by laws or regulations, a decree after consultation of the Conseil d’État may regulate the prices after the Autorité de la concurrence (Competition Authority) has been consulted.’

11      Articles L. 445‑1 to L. 445‑4 of the Code de l’énergie, headed ‘Regulated tariffs of sale’, provide:

‘Article L. 445‑1

The provisions of the second paragraph of Article L. 410‑2 of the Code de commerce shall apply to the regulated tariffs for the sale of natural gas referred to in Article L. 445‑3.

Article L. 445‑2

Decisions on the tariffs mentioned in Article L. 445‑3 shall be taken jointly by the ministers responsible for economic affairs and energy, after obtaining the opinion of the Commission de régulation de l’énergie.

The Commission de régulation de l’énergie shall draw up its proposals and opinions, which must state reasons, after carrying out any consultations it considers useful of the actors in the energy market.

Article L. 445‑3

The regulated tariffs for the sale of natural gas shall be defined in accordance with the intrinsic characteristics of the supply of gas and the costs linked to supply. They shall cover all of those costs other than subsidies for customers who have exercised their right under Article L. 441‑1. …

Article L. 445‑4

A final consumer of natural gas may not benefit from the regulated tariffs for the sale of natural gas mentioned in Article L. 445‑3 except in relation to a place of consumption which is still subject to those tariffs.

However, a final consumer of natural gas who consumes less than 30 000 kilowatt hours a year may benefit, at any place of consumption, from the regulated tariffs for the sale of natural gas mentioned in Article L. 445‑3.’

12      Article L. 441‑1 of the Code de l’énergie provides:

‘Any customer who consumes the gas he purchases or who purchases gas with a view to reselling it has the right, as the case may be through his agent, to choose his natural gas supplier.’

13      The rules on how regulated tariffs are to be calculated are laid down by Décret No 2009‑1603 relatif aux tarifs réglementés de vente de gaz naturel (Decree No 2009‑1603 on regulated tariffs for the sale of natural gas) of 18 December 2009 (JORF, 22 December 2009, p. 22082), as amended by Decree No 2013‑400 of 16 May 2013 (JORF, 17 May 2013, p. 8189) (‘Decree No 2009‑1603’).

14      Decree No 2009‑1603 provides that regulated prices for the sale of gas are to be fixed by the ministers responsible for economic affairs and energy, after obtaining the opinion of the Commission de régulation de l’énergie. In the first place, a decision is taken by those two ministers, who determine a price formula for each supplier, reflecting the entire costs of supplying natural gas and the methodology for evaluating costs other than those of supply. In the second place, a decree adopted by those ministers, after the Commission de régulation de l’énergie has made an analysis and issued an opinion, fixes the regulated prices for the sale of natural gas. Those prices are reviewed at least once a year and revised if need be, according to the development of the price formula. A supplier offering prices lower than the regulated prices can propose a change to the regulated price to the Commission de régulation de l’énergie, which must make sure that the change sought does indeed follow from the application of the price formula. Those provisions were amended with effect from 1 January 2016, a larger role being given to the Commission de régulation de l’énergie, which proposes regulated prices to the ministers responsible for economic affairs and energy. Those proposals are deemed to be accepted if the ministers do not object within a period of three months.

15      As regards the costs covered by the regulated prices, Decree No 2009‑1603 requires the supplier’s costs to be completely covered by the regulated prices. Articles 3 and 4 of the decree thus provide:

‘Article 3

Regulated tariffs for the sale of natural gas shall cover the costs of supplying natural gas and the costs other than those of supply.

They shall consist of a variable portion linked to actual consumption and a flat-rate portion calculated from the fixed costs of supply of natural gas, which may also take account of the quantity consumed, subscribed or reserved by the customer and the circumstances of use, including the division of the quantities asked for over the year.

Article 4

For each supplier a tariff formula shall be defined which reflects the entire cost of supplying natural gas. The tariff formula and the costs other than those of supply shall make it possible to determine the average cost of supplying natural gas, on the basis of which the regulated tariffs for the sale of gas are fixed, according to the detailed conditions of serving the customers concerned.

Costs other than those of supply shall include in particular:

–        the costs of using networks for the transmission of natural gas and, as the case may be, public distribution networks for natural gas, resulting from the application of the tariffs fixed by the Commission de régulation de l’énergie for the use of gas infrastructure;

–        the costs of using storage facilities for natural gas, if appropriate;

–        the costs of marketing the services supplied, including a reasonable commercial margin.

…’

16      The costs other than those of supply thus cover elements corresponding to transmission, storage, distribution, charges and profits, and the supply costs reflect the costs of supplying and are based mainly on long-term contracts between the supplier and foreign producers, since nearly all consumption in France comes from imports. Those long-term contracts are as a rule indexed to oil prices.

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

17      By application submitted on 17 July 2013, ANODE brought an action before the Conseil d’État (France) seeking for Decree No 2013‑400 to be annulled as ultra vires.

18      In its action ANODE submits inter alia that Articles L. 445‑1 to L. 445‑4 of the Code de l’énergie, implemented by that decree, disregard the objectives of Directive 2009/73.

19      ANODE argues in particular that the provisions in question of national law are not in accordance with the principle of application stated in the judgment of 20 April 2010 in *Federutility and Others* (C‑265/08, EU:C:2010:205).

20      The Conseil d’État is uncertain, first, whether State intervention in prices such as that provided for by the French legislation must be regarded as leading to determining the level of prices for the supply of natural gas to the final consumer independently of the free play of the market, thus constituting by its very nature an obstacle to the achievement of a competitive market in natural gas, contrary to Article 3(1) of Directive 2009/73.

21      Should that be the case, the Conseil d’État is uncertain, secondly, as to the criteria by which the compatibility of such legislation with Directive 2009/73 should be assessed, in particular whether Article 106(2) TFEU in conjunction with Article 3(2) of that directive allows the Member States, by establishing regulated prices, to pursue objectives such as security of supply and territorial cohesion. The Conseil d’État also raises the questions of the possibility of State intervention in the setting of the price on the basis of the principle of covering all the costs of the incumbent supplier, and of the cost components which may be taken into consideration in determining the regulated tariffs.

22      In those circumstances, the Conseil d’État decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)      Must the intervention of a Member State consisting in requiring the incumbent operator to offer to supply final consumers with natural gas at regulated tariffs, but not precluding competing offers from being made at prices lower than those tariffs by the incumbent supplier or alternative suppliers, be regarded as leading to determining the level of prices for the supply of natural gas to final consumers independently of the free play of the market, and does it constitute by its very nature an interference with the achievement of a competitive market in natural gas, as mentioned in Article 3(1) of Directive 2009/73?

(2)      If so, in the light of which criteria should the compatibility with Directive 2009/73 of such State intervention in the price of the supply of natural gas to final consumers be assessed?

In particular:

(a)      To what extent and under what conditions does Article 106(2) TFEU in conjunction with Article 3(2) of Directive 2009/73 allow the Member States, by intervening in prices for the supply of natural gas to final consumers, to pursue objectives other than maintaining the price of supply at a reasonable level, such as security of supply and territorial cohesion?

(b)      Having regard in particular to the objectives of security of supply and territorial cohesion, does Article 3(2) of Directive 2009/73 allow a Member State to intervene in fixing the price of the supply of natural gas on the basis of the principle that the incumbent supplier’s costs are covered in full, and may the costs intended to be covered by the tariffs include components other than the portion representing long-term supply?’

 **Consideration of the questions referred**

23      By its questions the referring court essentially asks whether a system of regulated tariffs for the sale of natural gas such as that at issue in the main proceedings is compatible with Directive 2009/73 and Article 106(2) TFEU.

24      As a preliminary point, it should be noted that the Court has previously had occasion, in its judgment of 20 April 2010 in *Federutility and Others* (C‑265/08, EU:C:2010:205), to outline a framework for analysis enabling the relevant national court to assess the compatibility with EU law of State intervention in prices, specifically in the natural gas sector. In that judgment and the subsequent case-law the Court gave some guidance as to the criteria on which such an assessment must be based, and it is in line with that case-law that the questions raised by the referring court should be examined (see judgments of 21 December 2011, *Enel Produzione*, C‑242/10, EU:C:2011:861, and 10 September 2015, *Commission* v *Poland*, C‑36/14, not published, EU:C:2015:570).

 *Question 1*

25      By its first question the referring court essentially asks whether Article 3(1) of Directive 2009/73 must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs, but not precluding competing offers from being made at lower prices than those tariffs by any supplier in the market, constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision.

26      Although it does not follow from any provision of Directive 2009/73 that the price of supply of natural gas must be fixed exclusively by the play of supply and demand, that requirement follows from the very purpose and general scheme of the directive, the aim of which is to pursue the achievement of an internal market in natural gas that is entirely and effectually open and competitive and in which all consumers can freely choose their suppliers and all suppliers can freely supply their products to their customers (see, to that effect, judgment of 10 September 2015, *Commission* v *Poland*, C‑36/14, not published, EU:C:2015:570, paragraph 45).

27      It should be recalled here that a public measure of intervention in sale prices of natural gas is a measure which by its very nature constitutes an obstacle to the achievement of an operational internal market in gas (see judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 35).

28      In the present case, the French legislation at issue in the main proceedings provides for State intervention consisting in requiring certain undertakings to offer natural gas in the market, to certain categories of customers, at prices that derive from a calculation performed in accordance with criteria and with the use of tables drawn up by the public authorities.

29      The tariffs established pursuant to that legislation are regulated prices which are not in any way the result of a free determination deriving from the play of supply and demand in the market. Quite the contrary, those tariffs are the result of a determination made on the basis of criteria imposed by the public authorities, which is thus outside the dynamics of market forces.

30      As the Advocate General observes in point 31 of his Opinion, a measure which requires a product or service to be offered on the market at a determined price necessarily influences the freedom of the undertakings concerned to act in the market in question and hence the process of competition in that market. Such a measure is by its very nature contrary to the objective of achieving an open and competitive market.

31      It follows that a determination of tariffs resulting from intervention by the public authorities necessarily affects the play of competition and that legislation such as that at issue in the main proceedings is therefore contrary to the achievement of an open, competitive market in natural gas as provided for in Article 3(1) of Directive 2009/73.

32      Moreover, as the Advocate General observes in point 35 of his Opinion, the fact that the undertakings concerned by the regulated tariffs can also freely determine what they offer in the market cannot call into question the finding that the State intervention at issue in the main proceedings affects the play of competition. The mere existence of two segments of the market, namely the segment in which prices are established outside the play of competition and the segment in which their determination is left to market forces, is incompatible with the creation of an internal market in natural gas that is open and competitive. It should be added that the French Government’s argument that the regulated tariffs play the part of a reference ceiling for fixing the prices of the other suppliers who are not concerned by the legislation at issue in the main proceedings supports the view that those tariffs actually affect the free determination of prices in the whole of the French natural gas market.

33      In the light of the foregoing, the answer to Question 1 is that Article 3(1) of Directive 2009/73 must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision, and that obstacle exists even though the intervention does not preclude competing offers from being made at lower prices than those tariffs by any supplier in the market.

 *Question 2*

34      By its second question the referring court essentially seeks clarification of the criteria to be taken into account for assessing whether the legislation at issue in the main proceedings is compatible with Article 3(2) of Directive 2009/73.

35      It should be noted, as a preliminary point, that the guidelines on the permissibility of State intervention consisting in the regulation of prices, set out in the judgment of 20 April 2010 in *Federutility and Others* (C‑265/08, EU:C:2010:205), with respect to Article 3(2) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57), are also valid with respect to Article 3(2) of Directive 2009/73, as that provision has not been amended in so far as it applies to the main proceedings (see judgment of 10 September 2015, *Commission* v *Poland*, C‑36/14, not published, EU:C:2015:570, paragraph 53).

36      Thus although State intervention in the fixing of the price of supply of natural gas to the final consumer constitutes an obstacle to the achievement of a competitive natural gas market, that intervention may none the less be accepted within the framework of Directive 2009/73 if three conditions are satisfied. First, the intervention must pursue an objective of general economic interest, secondly, it must comply with the principle of proportionality, and, thirdly, it must lay down public service obligations that are clearly defined, transparent, non-discriminatory and verifiable, and guarantee equal access of EU gas undertakings to consumers (see, to that effect, judgments of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraphs 20 to 22 and 47, and 10 September 2015, *Commission* v *Poland*, C‑36/14, not published, EU:C:2015:570, paragraphs 51 to 53).

37      As regards the first condition, the existence of a general economic interest, the referring court asks to what extent and on what conditions a Member State may pursue objectives of general economic interest other than that of maintaining the price of supply at a reasonable level, accepted by the Court in the judgment of 20 April 2010 in *Federutility and Others* (C‑265/08, EU:C:2010:205).

38      Directive 2009/73 gives no definition of the condition relating to general economic interest, but the reference in Article 3(2) of that directive both to that condition and to Article 106 TFEU, which concerns undertakings entrusted with the management of a service of general economic interest, means that that condition should be interpreted in the light of that provision of the Treaty (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 26).

39      The Court has pointed out that Article 106(2) TFEU provides, first, that undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, and, secondly, that the development of trade must not be affected to an extent contrary to the interests of the Union (judgment of 20 April 2010 in *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 27).

40      As the Advocate General observes in point 44 of his Opinion, the interpretation of the condition relating to general economic interest must be set in the new context following from the entry into force of the Treaty of Lisbon, which includes, as well as Article 106 TFEU, Article 14 TFEU, Protocol (No 26) on services of general interest, annexed to the EU Treaty, as amended by the Treaty of Lisbon, and the FEU Treaty (‘Protocol No 26’), and the Charter of Fundamental Rights of the European Union, which has acquired the same legal value as the Treaties, in particular Article 36 of the Charter on access to services of general economic interest.

41      In particular, Protocol No 26 expressly recognises the essential role and the wide discretion of the authorities of the Member States in providing, commissioning and organising services of general economic interest.

42      With respect specifically to the natural gas sector, the second sentence of recital 47 of Directive 2009/73 states that public service obligations should be defined at national level, taking into account national circumstances, while EU law must, however, be respected by the Member States.

43      In that context, Article 106(2) TFEU aims to reconcile the Member States’ interest in using certain undertakings as an instrument of economic or social policy with the EU’s interest in ensuring compliance with the rules on competition and preserving the unity of the internal market (see, to that effect, judgments of 21 September 1999, *Albany*, C‑67/96, EU:C:1999:430, paragraph 103, and 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 28).

44      The Court has explained that the Member States are entitled, while complying with EU law, to define the scope and organisation of their services of general economic interest. They may in particular take account of objectives pertaining to their national policy (see, to that effect, judgments of 21 September 1999, *Albany*, C‑67/96, EU:C:1999:430, paragraph 104, and 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 29).

45      In this respect, the Court has stated that, in the assessment which the Member States must carry out, in accordance with Directive 2009/73, to determine whether, in the general economic interest, public service obligations should be imposed on undertakings operating in the gas sector, it is for the Member States to reconcile the objective of liberalisation with the other objectives pursued by the directive (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 32).

46      In the present case, the referring court specifically mentions the objectives of security of supply and territorial cohesion, as relied on by the French Government, as objectives of general economic interest pursued by the legislation at issue in the main proceedings.

47      As regards security of supply, that objective is expressly envisaged at the level of primary EU law and by Directive 2009/73.

48      As the Advocate General observes in point 56 of his Opinion, Article 194(1)(b) TFEU identifies security of energy supply in the EU as one of the fundamental objectives of EU policy in the field of energy. As regards specifically the field of natural gas, it may be seen from several recitals and articles of Directive 2009/73 that the directive expressly envisages security of energy supply as one of its basic purposes.

49      By contrast, territorial cohesion is not expressly envisaged by Directive 2009/73 as an objective of general economic interest which could justify imposing public service obligations in the field of natural gas.

50      However, it should be noted, first, as the Advocate General states in points 52 to 54 of his Opinion, that Article 3(2) of Directive 2009/73 contains a non-exhaustive list of things which may the subject of public service obligations, and that the Member States remain free, in compliance with EU law, to define which objectives of general economic interest they wish to pursue by imposing public service obligations. Those obligations must, however, always be aimed at attaining one or more objectives of general economic interest.

51      Secondly, as the Advocate General states in point 57 of his Opinion, Article 14 TFEU expressly recognises the role of services of general economic interest in promoting the territorial cohesion of the EU. Moreover, Article 36 of the Charter of Fundamental Rights of the European Union expressly mentions territorial cohesion in connection with the right of access to services of general economic interest.

52      It follows that EU law, in particular Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU, allows the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in particular in order to ensure security of supply and territorial cohesion, provided that the other conditions laid down by that directive are satisfied.

53      As regards the second condition mentioned in paragraph 36 above, compliance with the principle of proportionality, it follows from the very wording of Article 106 TFEU that the public service obligations which Article 3(2) of Directive 2009/73 allows to be imposed on undertakings must comply with the principle of proportionality and, therefore, that those obligations may, from 1 July 2007, compromise the freedom to determine the price of supply of natural gas only in so far as is necessary to achieve the objective of general economic interest which they pursue and, consequently, for a period that is necessarily limited in time (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 33).

54      While it is for the referring court to assess in the main proceedings whether that requirement of proportionality is satisfied, it is, however, for the Court to provide that court, on the basis of the information available, with all the necessary indications for that purpose from the point of view of EU law (see, to that effect, judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 34).

55      Compliance with the principle of proportionality means, first, that the measure in question must be appropriate for securing the objective of general economic interest which it pursues (judgment of 21 December 2011, *Enel Produzione*, C‑242/10, EU:C:2011:861, paragraph 55).

56      On this point, the referring court provides very little information for assessing why the imposition of gas prices should be necessary for the achievement of very general objectives such as those relied on by the French Government.

57      In particular, as regards the objective of security of supply, the referring court essentially refers to the French Government’s argument that the incumbent supplier’s supply contracts, which are long-term contracts indexed to prices of oil products, ensure greater security of supply than the alternative suppliers’ contracts, which are affected by the instability of the price of gas on the wholesale market.

58      While it cannot be ruled out that legislation introducing an obligation to offer and supply natural gas at a determined price may be regarded as capable of ensuring security of supply, it is for the referring court, in the absence of precise elements of analysis put before the Court, to determine whether that is the case with respect to the legislation at issue in the main proceedings.

59      As regards the objective of territorial cohesion, while it does not appear to be ruled out that such an objective may be pursued by the imposition of regulated tariffs throughout national territory, it will be for the referring court to assess, in its analysis of whether the measure at issue in the main proceedings is capable of ensuring that objective, whether measures exist that also enable the objective to be attained but are less of a hindrance to the establishment of an open internal market in natural gas, such as the imposition of a price that applies only to certain categories of customers in remote areas identified according to objective geographical criteria.

60      Secondly, the Court has held that the duration of State intervention in prices must be limited to what is strictly necessary for achieving the objective pursued (judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraphs 33 and 35).

61      According to the information available to the Court, the legislation at issue in the main proceedings does not lay down any limit on the duration of the obligation to offer final customers a supply of natural gas at regulated prices, which makes that obligation a permanent one.

62      Fixing a maximum duration for the tariffs adopted cannot constitute such a limit, in so far as that mechanism relates only to a periodical review of the level of those tariffs and does not concern the need for and terms of the public intervention in prices according to developments in the gas market.

63      In any event, it is for the referring court to assess, in the light of the precise elements available to it, whether the imposition of an obligation such as that laid down in Article L. 410‑2 of the Code du commerce, which is essentially permanent, satisfies the requirement referred to in paragraph 55 above.

64      Thirdly, the method of intervention used must not go beyond what is necessary to achieve the objective of general economic interest being pursued (judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 36).

65      According to the order for reference, the intervention at issue in the main proceedings is based on the principle of covering all the costs of the incumbent supplier by applying a formula representing its costs of supply and a methodology for assessing its costs other than those of supply, drawn up following an annual analysis of the development of costs by the regulatory authority.

66      In this connection, the requirement of necessity means in principle that the component of the gas price must be identified in which intervention is necessary in order to achieve the objective pursued by the State intervention (see, by analogy, judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraphs 36 and 38). It is for the referring court to assess whether the method of intervention in prices used does not go beyond what is necessary for achieving the objectives of general economic interest pursued and whether there are no appropriate measures that are less restrictive.

67      Fourthly, the requirement of necessity must also be assessed with regard to the scope *ratione personae* of the measure in question and, more particularly, its beneficiaries (judgment of 20 April 2010, *Federutility and Others*, C‑265/08, EU:C:2010:205, paragraph 39).

68      In this respect, it must be examined to what extent the State intervention at issue in the main proceedings benefits individuals and undertakings respectively as final consumers of gas.

69      In the present case, the legislation at issue in the main proceedings provides that from 1 January 2016 the beneficiaries of supplies at regulated prices are to be households and undertakings consuming less than 30 000 kWh/year. It is for the referring court to ascertain whether such a system, which appears to benefit domestic customers and small- and medium-sized undertakings in the same way, complies with the requirement of proportionality with respect to the scope *ratione personae* of the measure, having regard to the objectives of security of supply and territorial cohesion.

70      As regards, finally, the third condition mentioned in paragraph 36 above, namely that the State intervention must lay down public service obligations that are clearly defined, transparent, non-discriminatory and verifiable, and guarantee equal access of EU gas undertakings to consumers, the referring court has provided no elements of analysis in this respect.

71      With respect in particular to whether the legislation at issue in the main proceedings is non-discriminatory, as the Advocate General observes in point 82 of his Opinion, Article 3(2) of Directive 2009/73 allows public service obligations to be imposed generally ‘on undertakings operating in the gas sector’, not on certain undertakings specifically. Moreover, Article 3(1) of the directive provides that the Member States ‘shall not discriminate’ between natural gas undertakings ‘as regards their rights or obligations’. In this framework, the system of designating undertakings responsible for public service obligations may not exclude a priori any of the undertakings operating in the gas distribution sector (see, to that effect, judgment of 19 June 2008 in *Commission* v *France*, C‑220/07, not published, EU:C:2008:354, paragraph 31).

72      It is for the referring court to assess whether that requirement and the other conditions mentioned in paragraph 66 above are satisfied by the application of the system of tariffs at issue in the main proceedings.

73      The answer to Question 2 is therefore that:

–        Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU and Protocol No 26, must be interpreted as allowing the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in order in particular to ensure security of supply and territorial cohesion, provided that, first, all the conditions set out in Article 3(2) of the directive are satisfied, specifically the non-discriminatory nature of such obligations, and, secondly, that the imposition of those obligations complies with the principle of proportionality.

–        Article 3(2) of Directive 2009/73 must be interpreted as not precluding a method of determination of prices based on taking costs into consideration, provided that the application of the method does not have the consequence that the State intervention goes beyond what is necessary for achieving the objectives of general economic interest pursued.

 **Costs**

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

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

1.      **Article 3(1) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC must be interpreted as meaning that intervention by a Member State consisting in requiring certain suppliers, including the incumbent supplier, to offer to supply natural gas to final consumers at regulated tariffs constitutes by its very nature an obstacle to the achievement of a competitive market in natural gas as provided for in that provision, and that obstacle exists even though the intervention does not preclude competing offers from being made at lower prices than those tariffs by any supplier in the market.**

2.      **Article 3(2) of Directive 2009/73, read in the light of Articles 14 TFEU and 106 TFEU and Protocol (No 26) on services of general interest, annexed to the EU Treaty, as amended by the Treaty of Lisbon, and the FEU Treaty, must be interpreted as allowing the Member States to assess whether, in the general economic interest, public service obligations relating to the price of supply of natural gas should be imposed on undertakings operating in the gas sector, in order in particular to ensure security of supply and territorial cohesion, provided that, first, all the conditions set out in Article 3(2) of the directive are satisfied, specifically the non-discriminatory nature of such obligations, and, secondly, that the imposition of those obligations complies with the principle of proportionality.**

**Article 3(2) of Directive 2009/73 must be interpreted as not precluding a method of determination of prices based on taking costs into consideration, provided that the application of the method does not have the consequence that the State intervention goes beyond what is necessary for achieving the objectives of general economic interest pursued.**

**Session 2. - Articulations between network industries and competition rules**

* **Main topics**
* Articulation with regulation 1/2003
* Network industries and abuse of dominant position: the case of margin squezze
* Network industries and special and exclusive rights : directive 2014/17
* **Before the session – readings**
* Doc. 1 *Case Easy Jet 1/2003*, 21 january 2015
* Doc. 2 CJ, 17 july 2014, aff. C-553/12 P

Doc. 1 - JUDGMENT OF THE GENERAL COURT (Second Chamber) - 21 January 2015 ([\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=161547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=681009" \l "Footnote*))

(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

**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.**

Doc. 2 JUDGMENT OF THE COURT (Third Chamber)

17 July 2014 ([\*](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0553&from=FR#Footnote*))

(Appeal — Competition — Articles 82 EC and 86(1) EC — Maintenance of preferential rights granted by the Hellenic Republic in favour of a public undertaking for the exploration and exploitation of lignite deposits — Exercise of those rights — Competitive advantage on the markets for the supply of lignite and wholesale electricity — Maintenance, extension or strengthening of a dominant position)

In Case C‑553/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 30 November 2012,

**European Commission,** represented by T. Christoforou and A. Antoniadis, acting as Agents, assisted by A. Oikonomou, dikigoros, with an address for service in Luxembourg,

appellant,

supported by

**Mytilinaios AE,**

**Protergia AE,**

**Alouminion AE,**

established in Amaroussion (Greece), represented by N. Korogiannakis, I. Zarzoura, D. Diakopoulos and E. Chrisafis, dikigoroi,

the other parties to the proceedings being:

**Dimosia Epicheirisi Ilektrismou AE (DEI),** established in Athens (Greece), represented by P. Anestis, dikigoros,

applicant at first instance,

**Hellenic Republic,** represented by M.-T. Marinos, P. Mylonopoulos and K. Boskovits, acting as Agents,

**Energeiaki Thessalonikis AE,** established in Echedorso (Greece),

**Elliniki Energeia kai Anaptyxi AE (HE & DSA),** established in Kifisia (Greece),

interveners at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, C.G. Fernlund, A. Ó Caoimh, C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 3 October 2013,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2013,

gives the following

**Judgment**

1        By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union in *DEI* v *Commission*, T‑169/08, EU:T:2012:448 (‘the judgment under appeal’), by which the General Court annulled Commission Decision C(2008) 824 final of 5 March 2008, on the granting or maintaining in force by the Hellenic Republic of rights in favour of Dimosia Epicheirisi Ilektrismou AE (DEI) for the extraction of lignite (‘the contested decision’).

 **Background to the dispute and the contested decision**

2        DEI was created in 1950 in the form of a public undertaking belonging to the Greek State. It enjoyed the exclusive right to generate, transmit and supply electricity in Greece. In 1996, Greek Law No 2414/1996 on the modernisation of public undertakings (FEK A’ 135), permitted the conversion of the applicant into a company limited by shares, but still held by the State as sole shareholder.

3        On 1 January 2001 it was converted into a limited liability company in accordance, in particular, with Greek Law No 2773/1999 on the liberalisation of the electricity market (FEK A’ 286), which, inter alia, transposed Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ 1997 L 27, p. 20). Under Article 43(3) of that law, the State’s shareholding in DEI’s capital may not in any case be lower than 51% of the shares with voting rights, even after an increase of capital. The Hellenic Republic held, at the time the contested decision was adopted, 51.12% of the shares in that undertaking. Since 12 December 2001, DEI’s shares have been quoted on the Athens Stock Exchange and the London Stock Exchange.

4        All Greek power stations operating on lignite belong to DEI. According to the Greek Institute for Geological and Mining Research, known reserves of lignite in Greece were estimated, as at 1 January 2005, at 4 415 million tonnes. According to the Commission, 4 590 million tonnes of lignite reserves still exist in Greece.

5        The Hellenic Republic has allocated to DEI exploration and exploitation rights for lignite in respect of mines the reserves of which amount to about 2 200 million tonnes. 85 million tonnes of reserves belong to private third parties. Over other public deposits, amounting to approximately 220 million tonnes, exploration and exploitation rights have been conferred upon other private third parties, those deposits partly supplying DEI’s power stations. No exploitation rights have yet been allocated in respect of about 2 000 million tonnes of lignite reserves in Greece.

6        Following the entry into force of Directive 96/92, the Greek electricity market was opened up to competition. In May 2005, a compulsory daily market for all sellers and buyers of electricity in the interconnected Greek network, which comprises mainland Greece and certain Greek islands, was created. On that market, generators and importers of electricity feed in and sell their production and their imports on a daily basis.

7        In 2003 the Commission received a complaint from an individual who requested confidentiality. According to the complainant, the Greek State’s decision to grant DEI, under Greek Legislative Decree No 4029/1959 of 12 and 13 November 1959 (FEK A’ 250) and Greek Law No 134/1975 of 23 and 29 August 1975 (FEK A’ 180), an exclusive licence to explore and exploit lignite in Greece was contrary to Article 86(1) EC, read together with Article 82 EC. Following correspondence with the Hellenic Republic, which took place between 2003 and 2008, the Commission adopted the contested decision.

8        By that decision, the Commission found, inter alia, that the grant and maintenance of those rights was contrary to Article 86(1) EC, read together with Article 82 EC, since it created a situation of inequality of opportunity between economic operators as regards access to primary fuels for the purposes of generating electricity and allowed DEI to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering any new entrants.

9        In the contested decision, the Commission states that the Hellenic Republic knew since the adoption of Directive 96/92, the transposition of which was due by 19 February 2001 at the latest, that the electricity market had to be liberalised. The Commission adds that the Hellenic Republic adopted State measures concerning two distinct markets, the first being that of supplying lignite and the second being the wholesale electricity market, which concerns the generation and supply of electricity in power stations and the importation of electricity by means of interconnection systems.

10      According to the Commission, DEI held a dominant position on both those markets, with a market share of more than 97% and 85% respectively. In addition, there was no prospect of new market entrants being capable of significantly reducing DEI’s share of the wholesale electricity market, since imports, which represent 7% of total consumption, did not constitute a genuine competitive restraint on that market.

11      Concerning the State measures in question, the Commission notes that DEI had been granted, pursuant to Legislative Decree No 4029/1959 and Law No 134/1975, exploitation rights for 91% of public deposits of lignite for which rights were granted. The Commission states that, during the period of application of those measures, despite the possibilities offered by the national legislation, no other right over a significant deposit was granted. Moreover, it indicates that DEI obtained without calls for tender exploration rights over some exploitable deposits for which exploitation rights had not yet been granted. The Commission adds that power stations operating on lignite, which are the least costly in Greece, are the most used, since they produce 60% of the electricity permitting the supply of the interconnected network.

12      According to the Commission, by granting DEI and maintaining in its favour quasi-monopolistic lignite exploration rights which ensure that it has privileged access to the most attractive fuel in Greece for the purposes of generating electricity, the Hellenic Republic thereby created inequality of opportunity between economic operators on the wholesale electricity market and thus distorted competition, maintaining or reinforcing DEI’s dominant position and excluding or hindering any new entrants, despite the liberalisation of the wholesale electricity market.

13      By the contested decision, the Commission also requested the Hellenic Republic to inform it, within a period of two months from notification of that decision, of the measures which it intended to take to correct the anti-competitive effects of the State measures at issue, whilst indicating that those measures were to be adopted and put into effect within eight months from its decision.

 **The action before the General Court and the judgment under appeal**

14      By application lodged at the Registry of the General Court on 13 May 2008, DEI brought an action for the annulment of the contested decision. During the proceedings, the Hellenic Republic intervened in support of DEI, whilst Elliniki Energeia kai Anaptyxi AE (HE & DSA) and Energeiaki Thessalonikis AE, limited liability companies operating in the electricity generation sector in Greece, intervened in support of the forms of order sought by the Commission.

15      In support of its action, DEI relied on four pleas, claiming, first, errors of law in applying the combined provisions of Articles 86(1) EC and 82 EC, and a manifest error of assessment; second, infringement of the duty to state reasons under Article 253 EC; third, (i) infringement of the principles of legal certainty, the protection of legitimate expectations and the protection of private property and (ii) misuse of powers; and, fourth, infringement of the principle of proportionality.

16      The first plea was divided into five parts, the second and fourth of which called into question the Commission’s conclusion that the exercise of the lignite exploitation rights granted to DEI had had the effect of extending its dominant position from the lignite supply market to the wholesale electricity market in breach of Article 86(1) EC read together with Article 82 EC. In essence, according to the General Court, DEI put forward two arguments against that conclusion of the Commission. By its first argument, DEI asserted that, in order to prove the infringement of the combined application of those provisions, it was necessary for the undertaking concerned to enjoy an exclusive or special right within the meaning of Article 86(1) EC, which was not the case.

17      By the second of those arguments, which the General Court examined first, DEI criticised the Commission for not establishing the existence of an actual or potential abuse of DEI’s dominant position on the markets concerned, although such proof was a precondition for the application of Article 86(1) EC in conjunction with Article 82 EC.

18      In paragraph 85 of the judgment under appeal, the General Court found that the focus of the dispute, in this case, was primarily whether the Commission had to identify an actual or potential abuse of DEI’s dominant position, or whether it was sufficient for it to establish that the State measures in question distorted competition in favour of DEI by creating inequality of opportunity between economic operators.

19      Regarding the lignite supply market, the General Court held, in paragraphs 87 to 89 of the judgment under appeal, that, by the State measures at issue, the Hellenic Republic had granted DEI lignite exploitation rights in respect of mines the reserves of which amounted to around 2 200 million tonnes; that those measures, which predated the liberalisation of the electricity market, had been maintained and continued to affect that market; and that in addition, despite the interest shown by DEI’s competitors, no economic operator had been able to obtain from the Hellenic Republic exploitation rights over other lignite deposits, even though Greece had around 2 000 million tonnes of lignite reserves which had not yet been exploited.

20      The General Court considered however that the fact that it was impossible, for other economic operators, to gain access to the lignite deposits still available could not be imputed to DEI since the granting of lignite exploitation licences depended exclusively on the will of the Hellenic Republic. The General Court added that, on that market, DEI’s role had been limited to exploiting deposits over which it held rights, since the Commission had not claimed that, as regards access to lignite, DEI had abused its dominant position on the market for the supply of that raw material.

21      The General Court went on to analyse, in paragraphs 90 to 93 of the judgment under appeal, the Commission’s finding that the fact that it was impossible for DEI’s competitors to enter the lignite supply market had repercussions on the wholesale electricity market. The Commission had argued in that regard that, as lignite is the most attractive fuel in Greece, its exploitation allowed the generation of electricity with a low variable cost, and the electricity to be put on the compulsory daily market with a more favourable profit margin than the electricity generated using other fuels. According to the Commission, DEI could thus maintain or strengthen its dominant position on the wholesale electricity market by excluding or hindering all new entrants to that market.

22      After recalling, in paragraph 91 of the judgment under appeal, that, following the liberalisation of the wholesale electricity market, a compulsory daily market had been created in Greece; that the rules for the functioning of that mechanism were not called into question by the contested decision and had to be observed both by DEI and its competitors; and that, moreover, DEI had been present on that market before its liberalisation, the General Court pointed out the following:

‘92      The Commission has not established that privileged access to lignite was capable of creating a situation in which, by the mere exercise of its exploitation rights, [DEI] could have been able to commit abuses of a dominant position on the wholesale electricity market or was led to commit such abuses on that market. Similarly, the Commission does not accuse [DEI] of having, without objective justification, extended its dominant position on the market for the supply of lignite to the wholesale electricity market.

93      By finding simply that [DEI], a former monopolistic undertaking, continues to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by privileged access to lignite and that that situation creates inequality of opportunity on that market between [DEI] and other undertakings, the Commission has neither identified nor established to a sufficient legal standard to what abuse, within the meaning of Article 82 EC, the State measure in question has led or could lead [DEI].’

23      The General Court then examined, in paragraphs 94 to 103 of the judgment under appeal, the settled case-law mentioned in the contested decision, according to which a Member State infringes the prohibitions laid down by Articles 86(1) EC and 82 EC where the undertaking in question is led, by the mere exercise of the exclusive or special rights conferred upon it, to exploit its dominant position in an abusive manner or where those rights are capable of creating a situation in which that undertaking is led to commit such abuses. After analysing the judgments in *Raso and Others,* C‑163/96, EU:C:1998:54, *Höfner and Elser*, C‑41/90, EU:C:1991:161, *Merci convenzionali Porto di Genova*, C‑179/90, EU:C:1991:464, *Job Centre*, C‑55/96, EU:C:1997:603, and *MOTOE*, C‑49/07, EU:C:2008:376, the General Court concluded, in paragraph 103 of the judgment under appeal:

‘It is apparent from those judgments … that the abuse of a dominant position by the undertaking enjoying an exclusive or special right may either result from the possibility of exercising that right in an abusive way or be a direct consequence of that right. However, it does not follow from that case-law that the mere fact that the undertaking in question finds itself in an advantageous situation in comparison with its competitors, by reason of a State measure, in itself constitutes an abuse of a dominant position.’

24      Lastly, in paragraphs 104 to 118 of the judgment under appeal, the General Court replied to a final argument put forward by the Commission, which considered that the contested decision complied with the case-law according to which a system of undistorted competition could not be guaranteed unless equality of opportunity between the various economic operators was assured. The Commission maintained in that regard that if inequality of opportunity between economic operators, and thus distortion of competition, was the result of a State measure, such a measure constituted an infringement of Article 86(1) EC read in conjunction with Article 82 EC.

25      In paragraph 105 of that judgment, the General Court held that it does not follow from the judgments on which the Commission had relied, namely the judgments in *France* v *Commission,* C‑202/88, EU:C:1991:120, *GB-Inno-BM*, C‑18/88, EU:C:1991:474, and *Connect Austria*, C‑462/99, EU:C:2003:297, that, for it to be concluded that an infringement of Article 86(1) EC, applied in conjunction with Article 82 EC, had been committed, it was sufficient to establish that a State measure distorted competition by creating inequality of opportunity between economic operators, without it being necessary to identify an abuse of the undertaking’s dominant position.

26      After analysing those judgments, the General Court found, in paragraph 113 of the judgment under appeal, that, whilst it was true that the Court of Justice had in its judgments used the formulations relied on by the Commission, the latter could not rely only on those formulations without taking into consideration their context. In paragraphs 114 to 117, the General Court also held that the Commission’s argument was not supported by the judgment in *Dusseldorp and Others*, C‑203/96, EU:C:1998:316, which the Commission had relied on at the hearing.

27      The General Court concluded, at paragraph 118 of the judgment under appeal, that it did not follow from that case-law that the Commission ‘was not required to identify and establish the abuse of a dominant position to which the State measure in question led, or could lead, [DEI]’.

28      Since the General Court held in paragraphs 87 to 93 of the judgment under appeal that the Commission had not, in its contested decision, established an abuse of a dominant position, it accordingly held, in paragraph 119 of that judgment, that the second argument raised by DEI in the context of the second and fourth parts of the first plea was well founded and annulled the contested decision, ‘without it being necessary to examine the other complaints, parts and pleas submitted’.

 **Forms of order sought and procedure before the Court**

29      The Commission claims that the Court should:

–        set aside the judgment under appeal;

–        dispose of the case finally;

–        order DEI to pay the costs of the proceedings at both instances.

30      DEI and the Hellenic Republic contend that the Court should:

–        dismiss the appeal;

–        in the alternative, examine the other pleas for annulment relied upon in Case T‑169/08 and annul the contested decision;

–        order the Commission to pay the costs of the proceedings at both instances.

31      By documents lodged at the Court Registry on 25 March 2013, Mytilinaios AE, Protergia AE and Alouminion AE applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

32      By order of 11 July 2013 the Vice-President of the Court granted that request.

 **The appeal**

33      In support of its appeal, the Commission relies on two grounds, alleging, first, an error of law in the interpretation and application of Article 86(1) EC in conjunction with Article 82 EC and, secondly, deficient, incorrect and insufficient reasoning.

 *Arguments of the parties*

34      By its first ground, directed against paragraphs 94 to 118 of the judgment under appeal, the Commission claims that the General Court erred in law in the interpretation and application of Article 86(1) EC in conjunction with Article 82 EC in holding that the Commission was required to identify and establish the conduct constituting abuse of a dominant position to which the State measure in question had led, or could have led, DEI.

35      According to the Commission, when Article 82 EC is applied in conjunction with Article 86(1) EC to situations where there is inequality of opportunity between economic operators, and thus distorted competition which stems from a State measure, that State measure in itself constitutes an infringement of Articles 86(1) EC and 82 EC. It is therefore sufficient to prove that the measure indeed created inequality of opportunity by favouring the privileged public undertaking and thereby affected the structure of the market by allowing that undertaking to maintain, strengthen or extend its dominant position to another, neighbouring or downstream market, for example by preventing new competitors from entering that market.

36      Accordingly, the Commission criticises the General Court for having incorrectly applied the case-law of the Court of Justice to the facts of the present case and for having distorted the basis of the contested decision. It states in that regard that, contrary to what the General Court held, that decision was not based on the finding that the mere fact that DEI found itself in an advantageous situation in comparison with its competitors, by reason of the State measures at issue, in itself constituted an abuse of a dominant position. On the contrary, that decision described the infringement in detail; it stated that the State measures at issue had created inequality of opportunity between DEI and its competitors and that, by the mere exercise of the rights conferred by those measures on DEI, that undertaking was able to extend its dominant position from the (upstream) lignite supply market to the (downstream) wholesale electricity market in Greece. That extension to the downstream market had the effect of restricting competition on it by excluding new entrants to that market, even after the adoption of measures to liberalise it. Moreover, despite requests to that effect, no right over a significant lignite deposit was granted to competitors of DEI.

37      According to the Commission, since the contested decision explained how, in the first place, the maintenance in force of the contested measures and, in the second place, the mere exercise of the preferential rights granted to DEI and its conduct on the downstream market led to the risk of abuse of its dominant position on that market by preventing or restricting access by new competitors, the Commission had satisfied all the criteria laid down by the case-law of the Court concerning the application of Articles 86(1) EC and 82 EC.

38      DEI and the Hellenic Republic submit that that ground of appeal is unfounded. They argue that it is clear from the case-law of the Court of Justice that, in order to be able to apply Article 86(1) EC in conjunction with Article 82 EC, the Commission must establish the conduct constituting abuse to which the State measure in question led or could have led the undertaking concerned. The fact that the State measure at issue led to a situation of inequality of opportunity was a necessary, but not sufficient, precondition for the application of those articles. The Commission is seeking in essence to transform Article 86(1) EC into an autonomous, higher-ranking provision. The General Court did correctly apply that case-law to the facts of the present case.

 *Findings of the Court*

39      It should be recalled that, pursuant to Article 86(1) EC, Member States are not to enact or maintain in force, in the case of public undertakings and the undertakings to which they grant special or exclusive rights, any measure contrary to the rules contained in the EC Treaty, in particular those provided for in Article 82 EC.

40      In so far as it may affect trade between Member States, the abuse of a dominant position within the common market or in a substantial part thereof is prohibited by Article 82 EC.

41      It should be noted that, according to the case-law, a Member State is in breach of the prohibitions laid down by Article 86(1) EC in conjunction with Article 82 EC if it adopts any law, regulation or administrative provision that creates a situation in which a public undertaking or an undertaking on which it has conferred special or exclusive rights, merely by exercising the preferential rights conferred upon it, is led to abuse its dominant position or when those rights are liable to create a situation in which that undertaking is led to commit such abuses (see, to that effect, the judgments in *Connect Austria*, EU:C:2003:297, paragraph 80, and *MOTOE*, EU:C:2008:376, paragraph 49 and the case‑law cited). In that respect, it is not necessary that any abuse should actually occur (judgments in *GB-Inno-BM*, EU:C:1991:474, paragraphs 23 to 25; *Raso and Others*, EU:C:1998:54, paragraph 31; and *MOTOE*, EU:C:2008:376, paragraph 49).

42      Thus, a Member State will be in breach of those provisions where a measure imputable to a Member State gives rise to a risk of an abuse of a dominant position (see the judgment in *MOTOE*, EU:C:2008:376, paragraph 50 and the case-law cited).

43      It is clear from the Court’s case-law that a system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators (see the judgments in *GB-Inno-BM*, EU:C:1991:474, paragraph 25; *MOTOE*, EU:C:2008:376, paragraph 51; and *Connect Austria*, EU:C:2003:297, paragraph 83 and case‑law cited).

44      It follows that if inequality of opportunity between economic operators, and thus distorted competition, is the result of a State measure, such a measure constitutes an infringement of Article 86(1) EC read together with Article 82 EC (see the judgment in *Connect Austria*, EU:C:2003:297, paragraph 84).

45      The Court has moreover had occasion to state in that regard that, although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article 82 EC, the EC Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive that provision of its effectiveness (judgments in *ERT*, C‑260/89, EU:C:1991:254, paragraph 35; *Corbeau*, C‑320/91, EU:C:1993:198, paragraph 11; and *Deutsche Post*, C‑147/97 and C‑148/97, EU:C:2000:74, paragraph 39).

46      It follows from the matters addressed in paragraphs 41 to 45 above that, as the Advocate General states in point 55 of his Opinion, infringement of Article 86(1) EC in conjunction with Article 82 EC may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti‑competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.

47      In those circumstances, it follows that, contrary to the General Court’s analysis in paragraphs 105 and 118 of the judgment under appeal, it is sufficient to show that that potential or actual anti-competitive consequence is liable to result from the State measure at issue; it is not necessary to identify an abuse other than that which results from the situation brought about by the State measure at issue. It also follows that the General Court erred in law in holding that the Commission,  by finding that DEI, a former monopolistic undertaking, continued to maintain a dominant position on the wholesale electricity market by virtue of the advantage conferred upon it by its privileged access to lignite and that that situation created inequality of opportunity on that market between the applicant and other undertakings, had neither identified nor established to a sufficient legal standard the abuse to which, within the meaning of Article 82 EC, the State measure in question had led or could have led DEI.

48      The first ground of appeal must therefore be upheld and the judgment under appeal must be set aside, without there being any need for the Court to examine the second ground of appeal, which is put forward purely in the alternative to the first.

 **The action before the General Court**

49      In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

50      In the present case, the Court has the necessary information to give final judgment on the second and fourth parts of the first plea submitted at first instance.

51      In paragraph 59 of the judgment under appeal, the General Court considered it appropriate first to examine the second part of the first plea, alleging an error on the Commission’s part inasmuch as the Commission claims that the existence of exclusive or special rights is not a necessary condition of the infringement of the combined provisions of Articles 86(1) EC and 82 EC, and the fourth part of that plea, alleging that DEI did not extend its dominant position from the lignite supply market to the wholesale electricity market because of its alleged privileged access to a primary fuel.

52      The General Court, in the same paragraph, took the view that there was no need, at that stage, to rule on the validity of the definition of the relevant markets adopted by the Commission in the contested decision, which was the subject of the first part of the first plea raised by DEI, and started from the premiss that that definition, contrary to what was claimed by DEI, was not vitiated by a manifest error of assessment.

53      In the circumstances, and on the basis of that same premiss, the Court has the necessary information to give final judgment on the second and fourth parts of the first plea raised at first instance by DEI.

 *The second part of the first plea*

 Arguments of the parties

54      DEI, supported by the Hellenic Republic, states that the Commission incorrectly held that the legal classification of DEI as a ‘public undertaking’ was sufficient to demonstrate an infringement of the combined provisions of Articles 86(1) EC and 82 EC. It is clear from the case-law that, in order to apply the theory that the public undertaking extended its dominant position from one market to another, which was neighbouring and separate, the Commission must necessarily show that the measure grants or reinforces exclusive or special rights. In the present case, DEI did not have exclusive rights, since it was not the only undertaking carrying out the economic activity at issue. Nor could DEI’s exploration and exploitation rights be classified as ‘special rights’ within the meaning of Article 86(1) EC, since they were granted to a limited number of beneficiaries.

55      The Commission, supported by the interveners, replies, in essence, first, that the scope of the combined provisions of Articles 86(1) EC and 82 EC is not restricted to State measures which grant special or exclusive rights and, secondly, that in any event, such rights were granted to DEI.

 Findings of the Court

56      It is clear from the wording of Article 86(1) EC that the provision is applicable, on the one hand, to public undertakings and, on the other, to the undertakings to which Member States grant special or exclusive rights. In the present case, it is not disputed that DEI is a public undertaking.

57      In addition, as pointed out in paragraphs 41 to 44 above, if inequality of opportunity between economic operators, and thus distorted competition, is the result of a State measure, such a measure, be it legislative, regulatory or administrative, constitutes an infringement of Article 86(1) EC read in combination with Article 82 EC.

58      DEI therefore was wrong to assert that, in order to apply the theory that the public undertaking extended its dominant position from one market to another, which was neighbouring and separate, the Court’s case-law requires the Commission to show that the State measure at issue grants or enhances special or exclusive rights.

59      It is sufficient that the measure at issue creates a situation in which a public undertaking or an undertaking on which the State has conferred special or exclusive rights is led to abuse its dominant position (see, to that effect, the judgment in *Connect Austria*, EU:C:2003:297, paragraph 80 and case-law cited).

60      The second part of the first plea must therefore be dismissed.

 *The fourth part of the first plea*

 Arguments of the parties

61      DEI disputes the Commission’s conclusion that the exercise of the lignite exploitation rights, which DEI owns, had the effect of extending its dominant position from the lignite supply market to the wholesale electricity market in breach of Article 86(1) EC, in conjunction with Article 82 EC, since the conditions governing the application of the theory of the extension of a dominant position are not fulfilled in the present case. First of all, in all the cases in which the Courts of the European Union have applied that theory, the undertaking enjoyed a legal or de facto monopoly over a market and the State measure at issue awarded exclusive or special rights over a neighbouring and separate market, which is not the case here. Secondly, DEI has neither the power conferred by legislation to enable it to determine the activity of its competitors nor is it able to impose costs on its competitors. Thirdly, the Commission, in examining the possible abuse, should have examined the impact of the alleged infringement on the interests of consumers. Finally, fourthly, the Commission defined lignite as an essential facility, but failed to show that lignite was essential for operating on the wholesale electricity market.

62      The Hellenic Republic submits that the Commission does not mention any abuse of a dominant position by DEI, whether existing or even potential. In the present dispute, the existence of such an abuse is a necessary precondition for the purposes of the combined application of Articles 86(1) EC and 82 EC.

63      The Commission, supported by the interveners, argues, first, that the State measures which may fall within the prohibitions of Articles 86(1) EC and 82 EC are not restricted to special or exclusive rights. Secondly, the finding that those provisions have been infringed does not depend on the exercise of powers and competences conferred by legislation. Thirdly, the case-law does not require that the potential damage caused to consumers by the infringement of those provisions should be examined. Fourthly, DEI incorrectly asserts that the Commission, in recitals 132 and 238 of the contested decision, took the view that access to lignite was an essential facility.

 Findings of the Court

64      As a preliminary point, the arguments of the Hellenic Republic should be rejected, for the reasons stated in paragraphs 39 to 46 above.

65      In addition, the Court must disregard the claimed ‘conditions of application’ of the theory of the extension of a dominant position, which are summarised in paragraph 61 above and which, according to DEI, follow from the case-law of the Court.

66      It is settled case-law that practices by an undertaking in a dominant position which tend to extend that position to a neighbouring but separate market by distorting competition amount to abuse of a dominant position within the meaning of Article 82 EC (see, to that effect, the judgment in *Connect Austria*, EU:C:2003:297, paragraphs 81 and 82 and case-law cited).

67      Similarly, the Court has previously stated that the extension of a dominant position, without any objective justification, is prohibited ‘as such’ by Article 86(1) EC in conjunction with Article 82 EC, where that extension results from a State measure. As competition may not be eliminated in that manner, it may not be distorted either (see, to that effect, the judgments in *Spain and Others* v *Commission*, C‑271/90, C‑281/90 and C‑289/90, EU:C:1992:440, paragraph 36, and *GB‑Inno‑BM*, EU:C:1991:474, paragraphs 21, 23 and 24).

68      It is therefore not necessary, as claimed by DEI, for the Commission to show, in every case, that the undertaking concerned enjoys a monopoly or that the State measure at issue awards it exclusive or special rights over a neighbouring and separate market, or that it has any regulatory powers. Having regard to the case‑law referred to in paragraphs 41 to 44 above, the claim that there is an obligation on the Commission to show the impact of the infringement of the combined provisions of Articles 86(1) EC and 82 EC on the interests of consumers must also be rejected; Article 82 EC may moreover cover practices which are harmful as a result of their impact on an effective competition structure (see, to that effect, the judgment in *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26). Finally, DEI’s argument that the Commission defined lignite as an essential facility is based on a false premiss, as the Commission only referred to DEI’s situation of ‘quasi-monopoly’ on the electricity wholesale market.

69      The fourth part of the first plea must therefore be rejected.

70      In the light of the foregoing, the second and fourth parts of the first plea raised by DEI before the General Court must be rejected, and the case must be referred back to the General Court so that it may examine the first, third and fifth parts of the first plea and the other pleas relied on by DEI.

 **Costs**

71      Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

On those grounds, the Court (Third Chamber) hereby:

1.      **Sets aside the judgment of the General Court of the European Union in *DEI* v *Commission,* T‑169/08,  EU:T:2012:448;**

2.      **Refers the case back to the General Court of the European Union for adjudication on the pleas raised before it on which the Court of Justice of the European Union has not ruled;**

3.      **Reserves the costs.**