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

**Pr. S. de La Rosa – 2023/2023**

**Chapter 2. - Network industries within the framework and EU economic law - Competition law and public procurement**

* **Main topics**
* Articulation with regulation 1/2003
* Network industries and abuse of dominant position:
* Network industries and special and exclusive rights : directive 2014/17 and procurement procedure
* **Useful cases and links**

Judgment of the Court (Sixth Chamber) of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH* : <https://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=41/90>

Judgment of the General Court (Fourth Chamber, Extended Composition) of 30 March 2022 (Extracts), *Air France-KLM v European Commission*, **Case T-337/17:** [**https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017TJ0337**](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017TJ0337)

Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance):[**https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2806%29**](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2806%29)

Judgment of the Court (Sixth Chamber) of 7 December 2000.

Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG :

<https://curia.europa.eu/juris/liste.jsf?language=en&num=C-324/98>

Judgment of the Court (Fifth Chamber) of 5 April 2017, UAB ‘Borta’ v VĮ Klaipėdos valstybinio jūrų uosto direkcija : <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-298/15>

* **Before the session – readings**
* Doc. 1 *Case Easy Jet 1/2003*, 21 january 2015
* Doc. 2 Case DB Station & Service AG, C 721/20, 27 october 2022

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 Case DB Station & Service AG, C 721/20, 27 october 2022**

JUDGMENT OF THE COURT (Fourth Chamber)

27 October 2022 ([\*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=267603&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=917663#Footnote*))

(Reference for a preliminary ruling – Rail transport – Article 102 TFEU – Abuse of a dominant position – Directive 2001/14/EC – Access to railway infrastructure – Article 30 – Railway regulatory body – Review of infrastructure charges – National courts – Review of charges in the light of competition law – Division of competence between the regulatory authority and the national courts)

In Case C‑721/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kammergericht (Higher Regional Court, Berlin, Germany), made by decision of 10 December 2020, received at the Court on 30 December 2020, in the proceedings

**DB Station & Service AG**

v

**ODEG Ostdeutsche Eisenbahn GmbH,**

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, L.S. Rossi, J.‑C. Bonichot (Rapporteur), S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–        DB Station & Service AG, by M. Köhler and M. Weitner, Rechtsanwälte,

–        ODEG Ostdeutsche Eisenbahn GmbH, by A.R. Schüssler and B. Uhlenhut, Rechtsanwälte,

–        the European Commission, by B. Ernst and G. Meessen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 April 2022,

gives the following

**Judgment**

1        This request for a preliminary ruling concerns the interpretation of Article 102 TFEU and of Articles 4, 7 to 12 and 30 of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of the railway infrastructure (OJ 2001 L 75, p. 29 and corrigendum OJ 2004 L 220, p. 16), as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 (OJ 2007 L 315, p. 44) (‘Directive 2001/14’).

2        The request has been made in the proceedings between DB Station & Service AG and ODEG Ostdeutsche Eisenbahn GmbH (‘ODEG’) concerning the amount of the charge payable by ODEG for the use of railway stations operated by DB Station & Service.

**Legal context**

***European Union law***

*Directive 2001/14*

3        Recitals 5, 11, 16, 32, 40 and 46 of Directive 2001/14 were worded as follows:

‘(5)      To ensure transparency and non-discriminatory access to rail infrastructure for all railway undertakings all the necessary information required to use access rights are to be published in a network statement.

…

(11)      The charging and capacity allocation schemes should permit equal and non-discriminatory access for all undertakings and attempt as far as possible to meet the needs of all users and traffic types in a fair and non-discriminatory manner.

…

(16)      Charging and capacity allocation schemes should allow for fair competition in the provision of railway services.

…

(32)      It is important to minimise the distortions of competition which may arise, either between railway infrastructures or between transport modes, from significant differences in charging principles.

…

(40)      A railway infrastructure is a natural monopoly. It is therefore necessary to provide infrastructure managers with incentives to reduce costs and manage their infrastructure efficiently.

…

(46)      The efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of these Community rules and acts as an appeal body, notwithstanding the possibility of judicial review.’

4        Article 1(1) of that directive provided:

‘This Directive concerns the principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity.

…’

5        Article 2 of Directive 2001/14 contained definitions. That article was worded as follows:

‘For the purpose of this Directive:

…

(b)      “applicant” means a licensed railway undertaking and/or an international grouping of railway undertakings, and, in Member States which provide for such a possibility, other persons and/or legal entities with public service or commercial interest in procuring infrastructure capacity … for the operation of railway service on their respective territories;

…

(f)      “framework agreement” means a legally binding general agreement on the basis of public or private law, setting out the rights and obligations of an applicant and the infrastructure manager or the allocation body in relation to the infrastructure capacity to be allocated and the charges to be levied over a period longer than one working timetable period;

…

(h)      “infrastructure manager” means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure. …

…’

6        Article 4 of that directive, entitled ‘Establishing, determining and collecting charges’, provided:

‘1.      Member States shall establish a charging framework while respecting the management independence laid down in Article 4 of [Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways (OJ 1991 L 237, p. 25)].

Subject to the said condition of management independence, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager.

…

5.      Infrastructure managers shall ensure that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market and that the charges actually applied comply with the rules laid down in the network statement.

…’

7        Under Article 5(1) of Directive 2001/14:

‘Railway undertakings shall, on a non-discriminatory basis, be entitled to the minimum access package and track access to service facilities that are described in Annex II. The supply of services referred to in Annex II, point 2 shall be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions exist. …’

8        Article 7 of that directive concerned charging principles and provided, in paragraph 7:

‘The supply of services referred to in Annex II, point 2, shall not be covered by this Article. Without prejudice to the foregoing, account shall be taken, in setting the prices for the services set out in Annex II, point 2, of the competitive situation of rail transport.’

9        Under Article 9(1) of Directive 2001/14:

‘Without prejudice to Articles 81, 82, 86 and 87 [EC] and notwithstanding Article 7(3) of this Directive, any discount on the charges levied on a railway undertaking by the infrastructure manager, for any service, shall comply with the criteria set out in this Article.’

10      Article 17 of that directive, entitled ‘Framework agreements’, provided in paragraph 1:

‘Without prejudice to Articles 81, 82 and 86 [EC], a framework agreement may be concluded with an applicant. Such a framework agreement specifies the characteristics of the infrastructure capacity required by and offered to the applicant over a period of time exceeding one working timetable period. The framework agreement shall not specify a train path in detail, but should be such as to seek to meet the legitimate commercial needs of the applicant. …’

11      Article 24(2) of Directive 2001/14 provided:

‘Where there are suitable alternative routes, the infrastructure manager may, after consultation with interested parties, designate particular infrastructure for use by specified types of traffic. Without prejudice to Articles 81, 82 and 86 [EC], when such designation has occurred, the infrastructure manager may give priority to this type of traffic when allocating infrastructure capacity.

…’

12      Under Article 30 of that directive, entitled ‘Regulatory body’:

‘1.      Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.

2.      An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:

(a)      the network statement;

…

(d)      the charging scheme;

(e)      [the] level or structure of infrastructure fees which it is, or may be, required to pay;

(f)      arrangements for access in accordance with Article 10 of [Directive 91/440, as amended by Directive 2004/51/EC of the European Parliament and the Council of 29 April 2004 (OJ 2004 L 164 p. 164)].

3.      The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiation between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.

…

5.      The regulatory body shall be required to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.

Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision.

…

6.      Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.’

13      Point 2 of Annex II to that directive was worded as follows:

‘Track access to services facilities and supply of services shall comprise:

…

(c)      passenger stations, their buildings and other facilities;

…’

*Directive 2012/34/EU*

14      Article 55(1) of Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32) provides:

‘Each Member State shall establish a single national regulatory body for the railway sector. Without prejudice to paragraph 2, this body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.’

15      Article 56 of that directive, entitled ‘Functions of the regulatory body’, provides:

‘1.      Without prejudice to Article 46(6), an applicant shall have the right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking or the operator of a service facility concerning:

(a)      the network statement in its provisional and final versions;

…

(d)      the charging scheme;

(e)      the level or structure of infrastructure usage charges which it is, or may be, required to pay;

…

(g)      access to and charging for services in accordance with Article 13.

2.      Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets and shall, in particular, control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.

…

6.      The regulatory body shall ensure that charges set by the infrastructure manager comply with Section 2 of Chapter IV and are non-discriminatory. …

…

9.      The regulatory body shall consider any complaints and, as appropriate, shall ask for relevant information and initiate consultations with all relevant parties, within one month from the receipt of the complaint. It shall decide on any complaints, take action to remedy the situation and inform the relevant parties of its reasoned decision within a pre-determined, reasonable time, and, in any case, within six weeks from receipt of all relevant information. Without prejudice to the powers of the national competition authorities for securing competition in the rail service markets, the regulatory body shall, where appropriate, decide on its own initiative on appropriate measures to correct discrimination against applicants, market distortion and any other undesirable developments in these markets, in particular with reference to points (a) to (g) of paragraph 1.

A decision of the regulatory body shall be binding on all parties covered by that decision, and shall not be subject to the control of another administrative instance. The regulatory body shall be able to enforce its decisions with the appropriate penalties, including fines.

…’

*Regulation (EC) No 1/2003*

16      Article 3(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) is worded as follows:

‘Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].’

***German law***

17      The Allgemeines Eisenbahngesetz (General Law on Railways), as amended by the Drittes Gesetz zur Änderung eisenbahnrechtlicher Vorschriften (Third Law amending the provisions of the law on railways), of 27 April 2005 (BGBl. 2005 I, p. 1138), in the version applicable until 1 September 2016 (‘the AEG’), provided, in Paragraph 14b thereof:

‘(1)      The role of the regulatory body is to monitor compliance with the provisions of the railway legislation governing access to the railway infrastructure, in particular as regards

…

4.      the conditions of use, the principles of charging and the amounts of the charges.

(2)      This is without prejudice to the tasks and powers of the competition authorities provided for by the [Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions of competition)]. The regulatory body and the railway supervisory authorities, as well as the competition authorities and the competent regulatory bodies under the [Telekommunikationsgesetz (Law on Telecommunications)] and the [Energiewirtschaftsgesetz (Law on the management of energy)] shall exchange mutually information which may be relevant for the performance of their respective tasks. In particular, they must inform each other of proposed decisions to prohibit abusive or discriminatory conduct on the part of railway infrastructure undertakings. They must give each other the opportunity to submit observations before the procedure is closed by the competent authority.’

18      Paragraph 14d of the AEG provided:

‘Public railway infrastructure undertakings shall inform the regulatory body of

…

6.      the intended recasting or amendment of the conditions of use of the railway network and the conditions of use for service facilities, including the principles of charging and the amounts of charges respectively laid down.’

19      Paragraph 14e(1) of that law provided:

‘The regulatory body may, after receipt of the information referred to in Paragraph 14d, within

…

4.      four weeks, object to the proposed recast or amendment referred to in point 6 of the first sentence of Paragraph 14d,

in so far as the envisaged decisions infringe the provisions of the railway legislation on access to the railway infrastructure.’

20      Paragraph 14f of the AEG was worded as follows:

‘(1)      The regulatory body may verify of its own motion

…

2.      the provisions concerning the amount or structure of infrastructure charges and other charges

of a railway infrastructure undertaking. The regulatory body may, with prospective effect,

1.      require the railway infrastructure undertakings to amend, in accordance with its indications, the conditions referred to in point 1 of the first sentence, or the charging schemes referred to in point 2 of the first sentence, or

2.      declare invalid the conditions referred to in point 1 of the first sentence, or the charging schemes referred to in point 2 of the first sentence,

in so far as they infringe the provisions of the railway legislation on access to the railway infrastructure.

(2)      If no agreement on access referred to in Paragraph 14(6) or a framework agreement referred to in Paragraph 14a is concluded, the decisions of the railway infrastructure undertaking may be verified by the regulatory body on request or on its own initiative. Holders of access authorisations whose right of access to the railway infrastructure may be affected shall be entitled to make such a request. The request must be submitted within the period within which the proposal for the conclusion of agreements referred to in the first sentence may be accepted. The review may relate in particular to the following:

…

3.      the amount and structure of the infrastructure charges and other charges.

The regulatory body must request the parties to provide all relevant information within a reasonable period which may not exceed two weeks. On expiry of that period, the regulatory body shall decide on the request within two months.

(3)      If, in the situation referred to in subparagraph 2, the decision of a railway infrastructure undertaking adversely affects the right of the applicant for access to the railway infrastructure,

1.      the regulatory body shall require the railway infrastructure undertaking to amend the decision; or

2.      the regulatory body shall lay down the contractual terms, give a ruling on the validity of the contract and declare contracts which are not in conformity to be unenforceable.’

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

21      DB Station & Service, a subsidiary of Deutsche Bahn AG, which itself is the incumbent railway operator in Germany, operates approximately 5 400 railway stations and hubs in that Member State. The conditions of use of those installations are determined in framework contracts which it enters into with railway undertakings. Under those conditions, the amount of the charges is to be determined on the basis of a scale drawn up by DB Station & Service.

22      ODEG is a railway undertaking which uses the infrastructure of DB Station & Service in the course of its short-distance passenger rail transport business. The two undertakings entered into a framework contract for that purpose.

23      On 1 January 2005, DB Station & Service introduced a new price list, designated by the initials ‘SPS 05’. In ODEG’s case, that list resulted in an increase in the infrastructure charges, which it paid, without accepting that the increase was well founded, as it did not agree with the increase.

24      By decision of 10 December 2009, the Bundesnetzagentur (Federal Network Agency, Germany), in its capacity as the competent regulatory body, declared SPS 05 invalid with effect from 1 May 2010. DB Station & Service brought an action against that decision. By decision of 23 March 2010, the Oberverwaltungsgericht Nordrhein-Westfalen (Higher Administrative Court, North Rhine-Westphalia, Germany) recognised the suspensory effect of that action. However, at the time the order for reference was made by the referring court in the present case, that court had not yet adjudicated on the substance of the action.

25      By a number of actions brought before the Landgericht Berlin (Regional Court, Berlin, Germany), ODEG claimed reimbursement of the amount of the charges paid between November 2006 and December 2010 on the basis of SPS 05, in so far as it exceeded the amount that would have been payable under the price list previously in force, namely SPS 99. Those actions were allowed on ‘grounds of fairness’ on the basis of Paragraph 315 of the Bürgerliches Gesetzbuch (German Civil Code), which allows the court to restore contractual equilibrium when it is disrupted. DB Station & Service brought an appeal before the referring court, the Kammergericht (Higher Regional Court, Berlin, Germany), which joined the various cases by order of 30 November 2015.

26      The referring court notes that, by decision of 11 October 2019, the Bundesnetzagentur rejected as inadmissible the proceedings brought by a number of railway undertakings seeking an a posteriori review of the legality of the charges levied on the basis of SPS 05. That decision was the subject of an action which, at the time when the order for reference was made by the referring court in the present case, was still pending before the Verwaltungsgericht Köln (Administrative Court, Cologne, Germany).

27      The referring court considers that the outcome of the dispute before it depends on the interpretation of Directive 2001/14, which is applicable *ratione temporis* and *ratione materiae*. In particular, that court raises the question of the relationship between the competence of the regulatory bodies referred to in Article 30 of that directive and the jurisdiction of the national civil courts when the latter are called upon to apply Article 102 TFEU.

28      The referring court notes in that regard that the Court held, in paragraph 103 of the judgment of 9 November 2017, *CTL Logistics* (C‑489/15, EU:C:2017:834), that Directive 2001/14 precludes a review of the equity of infrastructure charges, on a case-by-case basis, by the ordinary courts, independently of the monitoring carried out by the regulatory body provided for in Article 30 of that directive. However, it is not certain that the considerations in that judgment could also apply where those courts are called upon to review the legality of those charges in the light of Article 102 TFEU and national competition law prohibiting, inter alia, abuse of a dominant position.

29      Several German courts have held that the principles identified in the judgment of 9 November 2017, *CTL Logistics* (C‑489/15, EU:C:2017:834), preclude them from adjudicating on actions for reimbursement, before the competent regulatory body has adopted a final decision in that regard. Conversely, in a judgment of 29 October 2019, known as ‘*Trassenentgelte*’, the Bundesgerichtshof (Federal Court of Justice, Germany) declared that the application of Article 102 TFEU by the civil courts is permissible and required, without a final decision of the regulatory body being necessary beforehand.

30      The referring court considers, however, that there are good reasons for departing from the position taken by the German supreme civil court.

31      In the first place, the review carried out by the civil courts could undermine the exclusive competence of the regulatory body, referred to in the judgment of 9 November 2017, *CTL Logistics* (C‑489/15, EU:C:2017:834).

32      In the second place, it is true that it follows from the case-law of the Court, in particular from the judgment of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs* (127/73, EU:C:1974:6), that national courts are required to apply Article 102 TFEU directly. However, the Court has not yet ruled on the relationship between that obligation and the competence of the regulatory body which, under Directive 2001/14, is responsible for monitoring charges.

33      In the third place, although, in paragraph 135 of the judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C‑295/12 P, EU:C:2014:2062), the Court held that the application of Article 102 TFEU by the European Commission was not subject to a prior examination of the measures at issue by the national regulatory authority, the referring court considers that that decision is justified by the fact that, contrary to the application of that provision by the civil courts, the Commission’s intervention does not present a risk of several, potentially divergent, decisions.

34      Lastly, by its judgment of 1 September 2020, known as ‘*Stationspreissystem II*’, the Bundesgerichtshof (Federal Court of Justice) held that Article 30(3) of Directive 2001/14 does not confer competence on the regulatory body to adjudicate on charges which have already been paid, still less to order reimbursement of such charges. That court inferred therefrom that the review of abuse under Article 102 TFEU does not interfere with the competences of the regulatory body, since that review on the basis of Article 102 TFEU is limited to awarding damages *ex post*, in respect of conduct adopted by undertakings in the past.

35      The referring court considers that that analysis of EU law is flawed. First, there is nothing in Directive 2001/14 to substantiate the interpretation according to which the regulatory body decides only *pro futuro*. Second, Article 102 TFEU permits the adoption of decisions declaring measures void or ordering conduct to be brought to an end. Furthermore, even the reimbursement of charges levied in the past might give rise to distortions of competition and interfere with the objectives of Directive 2001/14.

36      In those circumstances the Kammergericht (Higher Regional Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)      Is it compatible with [Directive 2001/14], including its provisions on the management independence of the infrastructure undertaking (Article 4), the principles of charging (Articles 7 to 12) and the tasks of the regulatory body (Article 30), for national civil courts to review the charges levied in the light of the criteria laid down in Article 102 TFEU and/or in national competition law on a case-by-case basis independently of the monitoring carried out by the regulatory body?

(2)      If the answer to the first question is in the affirmative: Are the national civil courts permitted and required to conduct an assessment of abusive practices in the light of the criteria laid down in Article 102 TFEU and/or in national competition law, even where the rail transport undertakings have the possibility to request the competent regulatory body to review the fairness of the charges paid? Must the national civil courts await a decision in the matter by the national regulatory body and, where applicable, if it is contested before the national courts, for that decision to become enforceable?’

**Consideration of the questions referred**

***The first question***

*Preliminary observations*

37      It should be noted, first of all, that ODEG, a railway undertaking, has applied to the referring court for reimbursement of an alleged overpayment of infrastructure charges to DB Station & Service in respect of services referred to in point 2 of Annex II to Directive 2001/14, namely, in the present case, access to ‘passenger stations’.

38      That application concerns only the charges already paid by ODEG, namely between November 2006 and December 2010. On the other hand, that undertaking does not seek modification of the charges which it was or still is required to pay since that date.

39      Next, by its first question, the referring court asks whether it is possible for national civil courts to apply, on the one hand, Article 102 TFEU and the relevant provisions of national competition law concurrently, and, on the other, exclusively the latter provisions.

40      It should be noted from the outset that, under Article 3(1) of Regulation No 1/2003, where the national competition authorities or national courts apply national competition law to any abuse by an undertaking having a dominant position on the market, which may affect trade between Member States, they must also apply Article 102 TFEU (see, to that effect, judgment of 3 May 2011, *Tele2 Polska*, C‑375/09, EU:C:2011:270, paragraph 20).

41      In this instance, that appears to be the case, according to the information provided by the referring court in its request for a preliminary ruling.

42      By contrast, it is in no way apparent from the description of the dispute in the main proceedings that that court has the possibility or the intention of applying exclusively the provisions of national competition law, which prohibit the unilateral conduct of an undertaking. Consequently, that part of its question is hypothetical and inadmissible.

43      Lastly, it is apparent from the request for a preliminary ruling that the difficulties of interpretation encountered by the referring court concern, in essence, the relationship between the regulatory body’s powers, determined in Article 30 of Directive 2001/14, and the jurisdiction of the national courts, to apply Article 102 TFEU.

44      In the light of the foregoing considerations, it must be found that, by its first question, the referring court asks, in essence, whether Article 30 of Directive 2001/14 must be interpreted as precluding national courts from ruling, independently of the monitoring carried out by the competent regulatory body, on a claim for reimbursement of infrastructure charges based on Article 102 TFEU and, concurrently, on national competition law.

*The requirements under Article 102 TFEU*

45      It must be borne in mind that Article 102(a) and (c) TFEU covers abusive practices such as those which directly or indirectly impose unfair purchase or selling prices or other trading conditions and apply dissimilar conditions to equivalent transactions with other trading parties.

46      Article 102 TFEU produces direct effects in relations between individuals and creates rights for the persons concerned, which the national courts must safeguard (see, to that effect, judgments of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, EU:C:1974:6, paragraph 16, and of 28 March 2019, *Cogeco Communications*, C‑637/17, EU:C:2019:263, paragraph 38).

47      The full effectiveness of Article 102 TFEU and, in particular, the practical effect of the prohibition laid down in that article would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by abusive conduct of a dominant undertaking liable to restrict or distort competition (judgment of 28 March 2019, *Cogeco Communications*, C‑637/17, EU:C:2019:263, paragraph 39 and the case-law cited).

48      It follows that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an abuse of a dominant position prohibited by Article 102 TFEU (judgment of 28 March 2019, *Cogeco Communications*, C‑637/17, EU:C:2019:263, paragraph 40 and the case-law cited).

49      The right of any individual to claim compensation for such a loss actually strengthens the working of the European Union competition rules and discourages abuses of a dominant position which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union (judgment of 28 March 2019, *Cogeco Communications*, C‑637/17, EU:C:2019:263, paragraph 41 and the case-law cited).

50      It is in the light of those considerations that the scope of Article 30(2) of Directive 2001/14 and the resulting requirements for a national court hearing a claim for reimbursement of infrastructure charges on the basis of Article 102 TFEU must be examined.

*The scope of Article 30(2) of Directive 2001/14*

51      In the first place, with regard to the regulatory body, recital 46 of Directive 2001/14 states that the efficient management and fair and non-discriminatory use of rail infrastructure require the establishment of a regulatory body that oversees the application of the EU rules and acts as an appeal body, notwithstanding the possibility of judicial review.

52      In accordance with Article 30(1) of that directive, Member States are required to establish such a body, to which, by virtue of Article 30(2) thereof, an applicant may have a right to appeal if it considers itself to be ‘unfairly treated, discriminated against or is in any other way aggrieved’ (judgment of 9 November 2017, *CTL Logistics*, C‑489/15, EU:C:2017:834, paragraph 56).

53      Thus, first of all, the legal remedy provided for in Article 30(2) of Directive 2001/14 is available only to ‘applicants’. The latter concept, defined in Article 2(b) of that directive, covers, inter alia, any licensed railway undertaking (see, to that effect, judgment of 24 February 2022,*ORLEN KolTrans*, C‑563/20, EU:C:2022:113, paragraph 55) and other persons or legal entities with public-service or commercial interest in procuring infrastructure capacity.

54      Next, it is apparent from the list set out in Article 30(2)(a) to (f) of Directive 2001/14 that that appeal encompasses decisions and conduct of infrastructure managers or, where appropriate, railway undertakings, in so far as they concern access to the railway infrastructure, including the services referred to in point 2 of Annex II to that directive. In particular, in accordance with Article 30(2)(d) and (e), decisions relating to the charging scheme or to the level or structure of charges for the use of infrastructure which an applicant is or may be required to pay may be challenged.

55      Lastly, it must be borne in mind that the competence of the regulatory body to hear and determine an appeal provided for in Article 30(2) is exclusive, subject, where appropriate, to subsequent review by the national courts called upon to rule on actions brought against its decisions (see, to that effect, judgment of 9 November 2017, *CTL Logistics*, C‑489/15, EU:C:2017:834, paragraph 86).

56      Applicants are thus required to apply to that body when they seek compensation for any damage related to the infrastructure charges set by an infrastructure manager or by a service operator referred to in point 2 of Annex II to Directive 2001/14.

57      In the second place, it should be noted that the exclusive competence of the regulatory body to hear and determine any dispute falling within Article 30(2) of Directive 2001/14 is closely linked to the technical constraints specific to the railway sector.

58      As the EU legislature pointed out, inter alia, in recital 40 of Directive 2001/14, railway infrastructure is a natural monopoly. Its limited capacities can be used only by a determined number of undertakings in keeping with the slots which have been attributed to them by the managers of that infrastructure, namely, the bodies or undertakings responsible, in particular, for organising access to it. The latter are therefore by construction, in a dominant position in relation to railway undertakings.

59      From that point of view, as is apparent, in particular, from recitals 5 and 11 thereof, Directive 2001/14 is intended to ensure non-discriminatory access to the railway infrastructure. Recital 16 of that directive states, in that regard, that charging and capacity allocation schemes should allow for fair competition in the provision of railway services (see, to that effect, judgment of 9 November 2017, *CTL Logistics*, C‑489/15, EU:C:2017:834, paragraphs 36 and 37).

60      As is apparent from the case-law of the Court, the exclusive competence attributed to rail regulatory bodies is justified by those objectives themselves (see, to that effect, judgment of 9 November 2017,*CTL Logistics*, C‑489/15, EU:C:2017:834, paragraph 87) and implies the specific powers conferred on them by Article 30(2), (3) and (5) of Directive 2001/14.

61      Those powers enable the regulatory bodies to achieve those objectives and to meet the technical requirements of the railway infrastructure, referred to in paragraph 58 above.

62      In that regard, as far as Directive 2012/34 is concerned, which repealed and replaced Directive 2001/14, the Court has held that the regulatory body’s power to monitor the application of the rules laid down by that directive may be exercised of its own motion and is not therefore subject to the lodging of a complaint or an appeal. It also stated that the efficient management and fair and non-discriminatory use of the rail infrastructure, which underpins that directive, requires the establishment of an authority which is responsible both for overseeing, on its own initiative, the application by the stakeholders in the railway sector of the rules laid down in that directive and for acting as an appeal body (see, to that effect, judgment of 3 May 2022, *CityRail*, C‑453/20, EU:C:2022:341, paragraphs 57 and 60).

63      Thus, where an appeal is brought before a national regulatory body established under Article 55 of Directive 2012/34, that circumstance is without prejudice to the competence of that body to take, if necessary of its own motion, appropriate measures to remedy any infringement of the applicable rules (see, to that effect, judgment of 3 May 2022, *CityRail*, C‑453/20, EU:C:2022:341, paragraph 61).

64      Those considerations also apply to Directive 2001/14, Article 30 of which essentially corresponds to Article 56 of Directive 2012/34, referred to in paragraphs 57, 60 and 61 of the judgment of 3 May 2022, *CityRail* (C‑453/20, EU:C:2022:341).

65      It follows, in particular, that, in accordance with Article 30(2) and (3) of Directive 2001/14, the regulatory body is responsible both for acting as an appeal body and for overseeing, on its own initiative, the application by stakeholders in the railway sector of the rules laid down by that directive. In accordance with Article 30(5) of that directive, it is competent to take any measures necessary to remedy infringements of that directive, if necessary of its own motion.

66      In addition, the latter provision provides that the effects of decisions adopted by the regulatory body are not limited solely to the parties to a dispute before it, but are binding on all relevant parties in the rail sector, whether transport undertakings or infrastructure managers. In that way, the regulatory body is able to ensure equal access to the infrastructure of all the undertakings concerned and to ensure fair competition in the sector of the provision of railway services (see, to that effect, judgment of 9 November 2017, *CTL Logistics*, C‑489/15, EU:C:2017:834, paragraphs 94 and 96).

67      In the third place, the appeal provided for in Article 30(2) of Directive 2001/14, followed, where appropriate, by judicial review of decisions given by the regulatory body in that context, ensures compliance with Article 102 TFEU prohibiting abuse of a dominant position.

68      Indeed, it follows from the very objectives of Directive 2001/14, which seek to guarantee non-discriminatory access to infrastructure under fair conditions of competition, and from the obligations imposed, from that point of view, on infrastructure managers, that railway undertakings may invoke, before the regulatory body, an infringement of Article 102 TFEU.

69      The substantive rules laid down by Directive 2001/14, in particular as regards the determination of infrastructure charges, including the tariffs, which apply to the services referred to in point 2 of Annex II to that directive, contribute to ensuring the objectives pursued by Article 102 TFEU.

70      In that regard, the Court has repeatedly held that it is for infrastructure managers, who are required to set up and collect charges in a non-discriminatory manner, not only to apply the rail network conditions of use in an equal manner to all users of that network, but also to ensure that the charges actually received meet those conditions (judgment of 24 February 2022, *ORLEN KolTrans*, C‑563/20, EU:C:2022:113, paragraph 53 and the case-law cited).

71      Furthermore, as is apparent from Articles 9, 17 and 24 of Directive 2001/14, the application of the provisions on access to the railway infrastructure is without prejudice to the rules on competition deriving directly from the FEU Treaty, in particular from Article 102 TFEU. Thus, the EU legislature intended to confirm that infrastructure managers are required to comply with those rules of primary EU law when taking decisions on capacity allocation and infrastructure charges.

72      That finding applies in particular to the services referred to in point 2 of Annex II to Directive 2001/14. Indeed, it follows from Article 5(1) and Article 7(7) of that directive not only that those services must be provided in a non-discriminatory manner, but also that, in order to determine the applicable tariffs, account must be taken of the competitive situation of rail transport.

73      In those circumstances, where an appeal has been brought before it by a railway undertaking, the regulatory body, whose task it is to ensure that both infrastructure managers and railway service operators comply with their respective obligations, is required to examine, in the words of Article 30(2) of Directive 2001/14, unfair or discriminatory treatment and any other harm, which includes issues relating both to the levying of infrastructure or service charges and to competition.

74      It follows that, where an appeal has been brought before it on the basis of Article 30(2) of Directive 2001/14, the competent national regulatory body cannot properly decline its competence to hear and determine an alleged infringement of Article 102 TFEU on the ground that a provision of national law, such as Paragraph 14f of the AEG, does not allow it to rule on the lawfulness of the infrastructure charges already levied.

*The relationship between appeals before the regulatory body and actions before the national courts*

75      The second subparagraph of Article 30(5) of Directive 2001/14 provides that decisions taken by the regulatory body are binding on all the parties covered by those decisions, but does not contain any rules as to whether those decisions may be binding on courts hearing a claim for reimbursement of an overpayment of infrastructure charges on the basis of Article 102 TFEU.

76      Admittedly, in paragraph 97 of the judgment of 9 November 2017, *CTL Logistics* (C‑489/15, EU:C:2017:834), the Court held that the jurisdiction of civil courts to rule, pursuant to provisions of national civil law, on the reimbursement of infrastructure charges is limited to cases in which, in accordance also with provisions of national law, the illegality of the charge in the light of the legislation concerning access to railway infrastructure has first been found by the regulatory body or by a court which has reviewed that body’s decision. Furthermore, it is apparent from paragraphs 84 and 86 of that judgment that entrusting any national civil court with the task of directly applying the railway legislation arising from Directive 2001/14 would disregard the exclusive competence conferred on the regulatory body by Article 30 of that directive.

77      However, the case which gave rise to that judgment and, therefore, the request for a preliminary ruling made to the Court concerned a dispute between a railway undertaking and an infrastructure manager concerning a request for reimbursement of railway charges based on provisions of German civil law which allowed, in essence, the civil court to carry out an *ex aequo et bono* assessment of the amount of those charges. By contrast, in the present case, in order to rule on ODEG’s claim for reimbursement of infrastructure charges, the referring court is required to apply not German civil law but a provision of primary EU law, namely Article 102 TFEU and, concurrently, the corresponding provisions of national competition law.

78      Furthermore, although the review of infrastructure charges in the light of the provisions of civil law of a Member State which are unrelated to the rules laid down by Directive 2001/14 is, by its very nature, incompatible with the technical requirements of the rail transport sector, with the objectives of that directive and with the tasks of the regulatory body, referred to in paragraphs 58 to 60 above, that cannot be the case where their amount is disputed on the basis of Article 102 TFEU, as follows, inter alia, from paragraphs 71 to 73 above.

79      Therefore, in order to preserve the full effectiveness of Article 102 TFEU and, in particular, in order to guarantee applicants effective protection against the adverse consequences of an infringement of competition law, the exclusive competence conferred on the regulatory body by Article 30 of Directive 2001/14 cannot prevent the national courts having jurisdiction from hearing claims for reimbursement of an alleged overpayment of infrastructure charges based on Article 102 TFEU.

80      However, that provision in no way precludes, in view of the need for consistent management of the rail network referred to in particular in paragraphs 57 to 66 above, the retention, subject to the following considerations, of the exclusive competence of the regulatory body to hear all aspects of the disputes brought before it pursuant to Article 30(2) of Directive 2001/14.

81      Thus, where a railway undertaking intends, on the basis of Article 102 TFEU, to obtain reimbursement of an alleged overpayment of infrastructure charges, it must, prior to any action being brought before the national courts having jurisdiction, refer the question of their lawfulness to the national regulatory body.

82      Furthermore, the Court has already held that a regulatory obligation may be relevant for the purposes of assessing abusive conduct, within the meaning of Article 102 TFEU, on the part of a dominant undertaking subject to sectoral rules (see, to that effect, judgments of 14 October 2010, *Deutsche Telekom*v*Commission*, C‑280/08 P, EU:C:2010:603, paragraph 224, and of 25 March 2021, *Deutsche Telekom*v*Commission*, C‑152/19 P, EU:C:2021:238, paragraph 57).

83      Thus, in order to meet the technical requirements relating to the operation of the railway sector and to preserve the effectiveness of the rules on access to infrastructure, while ensuring compliance with Article 102 TFEU and its full effectiveness, national courts hearing a claim for reimbursement of an overpayment of infrastructure charges are under an obligation to cooperate in good faith with the national regulatory bodies. It follows that, even if those courts are not bound by the decisions of those bodies, they are required to take them into consideration and to give reasons for their own decisions in the light of the assessments of fact and law made by the same bodies in the dispute before them and, in particular, concerning the application to case at issue of the relevant sectoral rules.

84      It should be noted, in that regard, that the requirements relating to the prior referral to the national regulatory body and to the cooperation in good faith between it and the national courts, referred to in paragraphs 81 and 83 above, make it possible to avoid – by contrast with the situation at issue in the case giving rise to the judgment of 8 July 2021, *Koleje Mazowieckie* (C‑120/20, EU:C:2021:553), and which the Court has pointed out in paragraph 54 of that judgment – calling into question the task of the regulatory body and, hence, the practical effect of Article 30 of Directive 2001/14, when a claim based on Article 102 TFEU is brought before the national courts.

85      In order to ensure the full effectiveness of the latter provision, national courts hearing a claim on that basis for reimbursement of an alleged overpayment of infrastructure charges are not required to await the outcome of judicial proceedings brought against decisions of the competent regulatory body.

86      The same considerations apply where a national court is called upon, in accordance with Article 3(1) of Regulation No 1/2003, to apply, concurrently, Article 102 TFEU and the corresponding provisions of national competition law.

87      Furthermore, as regards the case in the main proceedings, it must be borne in mind that, by its decisions mentioned in paragraphs 24 and 26 of the present judgment, the Bundesnetzagentur merely found that the charge for access to the infrastructure at issue in the main proceedings was unlawful with prospective effect only. However, as follows from paragraph 74 above, when an appeal has been brought before it on the basis of Article 30(2) of Directive 2001/14, that body cannot properly decline its competence to rule on the lawfulness of infrastructure charges levied in the past.

88      In the light of all the foregoing considerations, the answer to the first question is that Article 30 of Directive 2001/14 must be interpreted as not precluding national courts from applying Article 102 TFEU and national competition law concurrently, in order to hear and determine a claim for reimbursement of infrastructure charges, provided, however, that the competent regulatory body has previously ruled on the lawfulness of the charges in question. In that context, a duty of sincere cooperation is incumbent upon those courts which are required to take account of decisions delivered by that body as a criterion of assessment and to give reasons for their own decisions in the light of all the documents in the files submitted to them.

***The second question***

89      In the light of the answer to the first question, there is no need to reply to the second question.

**Costs**

90      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 (Fourth Chamber) hereby rules:

**Article 30 of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007,**

**must be interpreted as not precluding national courts from applying Article 102 TFEU and national competition law concurrently, in order to hear and determine a claim for reimbursement of infrastructure charges, provided, however, that the competent regulatory body has previously ruled on the lawfulness of the charges in question. In that context, a duty of sincere cooperation is incumbent upon those courts, which are required to take account of decisions delivered by that body as a criterion of assessment and to give reasons for their own decisions in the light of all the documents in the files submitted to them.**

[Signatures]