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Filing a complaint before the NCAs and the European Commission: The General Court "puts complainants' thinking caps on"

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I. Introduction

By two recent judgments dated 17.12.2014 and 21.01.2015 in cases T-201/11 (*Si.mobil telekomunikacijske storitve v Commission*) and T-355/13 (*easyJet Airline Co. Ltd v Commission*) following two abuse of dominance complaints under article 102 TFEU, the General Court ("GC") provided an interpretation of article 13 ("Article 13") of the Regulation (EC) 1/2003 ("Regulation")[1].

In an interesting judgment in Si.mobil case, the GC interpreted for the first time par. 1 of Article 13 of the Regulation by ruling on European Commission's ("EC") discretion to reject a complaint on the grounds that a National Competition Authority ("NCA") is already dealing with the case. In EasyJet, the GC dealt with par. 2. of Article 13 of the Regulation and confirmed EC's approach in rejecting a complaint on the account that a NCA had already dealt with the complaint which, in the said case, had been rejected by the NCA on priority grounds.

II. Si.mobil telekomunikacijske storitve v Commission (T-201/11)

a. The facts of the case

On 14.08.2009, Si.mobil, a Slovenian company which operates in the mobile telephone sector, lodged a complaint with the EC (supplemented on 18.02.2010) against Mobitel, the incumbent operator on the mobile telephone market in Slovenia concerning an alleged infringement of article 102 TFEU on the wholesale and retail mobile telephone market in Slovenia. Infringements alleged on the retail market related to margin squeezing and/or predatory pricing by Mobitel and on the wholesale market to the reinforcement by Mobitel of the

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1 – 25.

effects of its action on the retail market by applying a strategy aimed at forcing rivals out of the wholesale market.

By its decision, the EC rejected Si.mobil's complaint. Concerning the infringements alleged on the retail market the EC rejected the complaint under Article 13 (1) of the Regulation by noting that the Slovenian NCA was already investigating the case and as regards the alleged infringements on the wholesale market the EC rejected the complaint on the ground that there was not a sufficient degree of European Union ("EU") interest in conducting a further investigation.

On 04.04.2011 Si.mobil brought an action against the rejection of its complaint before the GC and raised two pleas. Firstly, Si.mobil claimed an infringement of Article 13 (1) which was applied by the EC, in light of the Notice on cooperation within the Network of Competition Authorities ("Network Notice")[2], manifest incorrectly when rejected the complaint. In essence, this complaint consisted of two pleas, the first alleging misinterpretation of the conditions laid down in Article 13 (1), and the second misapplication of those conditions. Secondly, its second plea cited manifest error on the part of the EC in carrying out the balancing test established by EU case-law i.e. to ascertain if there is sufficient interest of the EU in investigating the case. Furthermore, Si.mobil claimed that the EC was particularly well placed to deal with the case within the meaning of par. 15 of the Network Notice, whereas the Slovenian NCA ("UVK") was not well placed to deal with the case for the purpose of par. 8 of the Network Notice.

[2] Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43–53.

b. GC's findings related to Article 13(1)

By judgment dated 17.12.2014 the GC upheld EC's decision and confirmed EC's discretion to reject a complaint pursuant to Article 13 (1) on the grounds that a NCA is already dealing with the case and noted initially the clear wording of Article 13 (1) for the purpose of this rejection.

For the said rejection, two conditions must be satisfied according to the GC. The first is that a NCA is dealing with the case that has been referred to the EC and, the second, is that the case under investigation relates to the same agreement, decision of an association or practice. If those two conditions are fulfilled, the EC has sufficient grounds to reject the complaint. The GC noted that the application of Article 13 (1) cannot be subject to any other conditions, such those claimed by Si.mobil, namely, that the EC failed to apply a rule of the allocation of powers between the EC and the NCAs; or that the EC was obliged to carry out a balancing test and ascertain with regards to the interest of the EU in conducting a further investigation of the complaint.

The GC stressed that neither the Regulation nor the Network Notice is a) laying down any rule for the allocation of powers between NCAs and EC and b) create any rights or expectations for an undertaking to have its case dealt with by a specific competition authority. Furthermore, according to the GC, it cannot be accepted that Article 13 (1) and recital 18 of the Regulation establish a criterion for the allocation of cases or competences between NCAs and EC that may have an interest in the case in question. In addition, the GC referred to par. 4 of the Network Notice which states that consultations and exchanges within the network are

matters between public enforcers, and, according to par. 31, the Notice does not create individual rights for the companies involved to have the case dealt with by a particular authority.

Accordingly, the GC observed that even on the assumption that the EC had been particularly well placed to deal with the case and the UVK had not been well placed to do so, Si.mobil did not have a right to bring the case before the EC in order to be dealt with by the EC.

Si.mobil claimed that the UVK was not handling the case effectively and criticized the EC for taking the view that the case investigated by UVK concerned the same alleged infringement on the same market within the same timeframe. The GC mentioned the wide margin of EC's discretion in applying Article 13 and clarified that EU judicial review must be limited to verifying whether the rules on procedure and the requirement of statement of grounds have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.

The GC examined then whether the EC complied with the two abovementioned conditions laid down in Article 13 (1) for the rejection of the complaint. For this exercise, the GC clarified the meaning of the expression "to deal with" as used in Article 13 (1) and examined how that provision was applied by the EC. The GC stated that the expression "to deal with" cannot simply mean that another competition authority has received a complaint or that authority has taken steps on its own initiative in relation to a case due to the reason that this does not mean that the NCA used its powers or, *a fortiori*, examined the relevant facts and points of law in the case in question. The GC ruled that when the EC is rejecting a complaint according to Article 13 (1), is obliged, on the basis of the available information to it at the time it gives its decision, to be satisfied, inter alia, that the NCA is investigating the case.

Si.mobil also claimed that the EC failed to fulfill its obligation to ensure the proper application of the EU competition rules when it rejected its complaint. The GC noted first that from the preamble of the Regulation (in particular recitals 1, 6, 8 and 35) it occurs that the purpose of the greater participation of the NCAs in the implementation of Articles 101 and 102 TFEU, and the obligation they are under to apply those provisions when trade between member states is likely to be affected, is precisely to ensure that the objective pursued by the Regulation, namely the effective application of EU competition rules, is attained.

Consequently, the requirement to ensure the effective application of EU competition rules cannot have the effect of imposing an obligation on the EC to verify, in implementing Article 13, whether the NCA concerned has the means (institutional, financial and technical) available to it to enable it to accomplish the task entrusted to it by the Regulation. In any case, the GC noted that, from the available evidence, it does not appeared that there were institutional shortcomings within the UVK, such as a lack of independence, of means or of due diligence.

With regards to Si.mobil's claim that the EC made a manifest error when it expressed the view that the claims made to the EC concerned "the same alleged infringements on the same market within the same timeframe" the GC

ruled that where the EC is minded to reject a complaint on the basis of Article 13 (1), it must, inter alia, be satisfied that the case being dealt with by the NCA concerned relates to the "same factual matrix" as that set out in the complaint and the EC cannot be bound by the subject-matter or the cause of action identified by complainants or by the manner in which they characterize the matters of which they complain.

III. EasyJet Airline Co. Ltd v Commission (T-355/13)

a. The facts of the case

EasyJet, a British air carrier that carries out business, among others, to and from Schiphol Airport in Amsterdam, the Netherlands, lodged on 14.01.2011 a complaint with the EC alleging that the security and passenger service charges set by Schiphol (the operator of Amsterdam-Schiphol airport) were discriminatory and excessive and amounted to an infringement of Article 102 TFEU.

Three complaints by EasyJet in 2008 had been preceded the EC complaint with the NCA of the Netherlands ("NMa") concerning the abovementioned infringements. The first and the third complaint were based on the national law of the Netherlands and the second was based on the national competition law and Article 102 TFEU. In a nutshell, the NMa rejected the first complaint for procedural grounds, and suspended the review of the second complaint pending the outcome of its assessment of the third complaint.

On 14.07.2009 the NMa rejected the third complaint on the ground that EasyJet had failed to prove that the charges applied by Schiphol were in breach of the national law. EasyJet brought unsuccessfully actions before the national courts against NMa's decisions. On 16.12.2009, the NMa rejected the second complaint and noted the similarities of national and EU competition law in EasyJet's complaints. The NMa also noted, inter alia, that it had construed the provisions of the national aviation law in accordance with the Article 102 TFEU case law when examined the second complaint. Subsequently, the review of the charges by NMa, 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.

On its abuse of dominance complaint before the EC, EasyJet alleged the same infringements concerning the charges that had brought to NMa' s attention, and mentioned also that it had lodged a number of complaints with the NMa but that, in its view, the last had not taken any final decision on the merits of a complaint relating to competition law. On 03.05.2013, the EC rejected EasyJet's complaint on the basis of Article 13 (2) and stated that, in any case, the complaint could also be rejected because the EU lacked a legal interest, in view of the fact that, according to NMa's findings, it was unlikely for an infringement of Article 102 TFEU to be established.

On 04.07.2013 EasyJet brought an action against the rejection of its complaint before the GC and raised two pleas alleging that the EC erred in law, and made a manifest error of assessment, in finding that EasyJet's complaint could be rejected on the basis of Article 13(2) and the EC's

decision contains an inadequate statement of grounds.

b. GC's findings related to Article 13 (2)

The GC took the opportunity in this case to interpret Article 13 (2) of the Regulation and provide clarification as to the functioning of the European Network of NCAs.

The GC noted first that the judicial review of a EC decision based on Article 13 (2), is limited in verifying that the decision is not based on materially incorrect facts and that the EC has not erred in law, making a manifest error of assessment or misusing its powers in finding that a NCA has already dealt with a complaint. The GC also noted that the review of NCAs' decisions is a matter relating exclusively to the national courts, which perform an essential function in the application of EU competition rules.

EasyJet alleged then that the concept of a case having been dealt with by a NCA within the meaning of Article 13 (2) must be construed in the light of Article 5 of the Regulation. A case may be considered to have been dealt with by a NCA only if that authority has at least decided that there are no grounds for action, following a preliminary investigation. If the complaint was merely rejected on priority grounds it cannot be regarded as having dealt with the case.

The GC, based initially on a literal interpretation of par. 2 of Article 13, held that the expression provided in this paragraph i.e. "*a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority*" is clear and broad in scope in that it is capable of including all cases of complaints which have been examined by another NCA, regardless of the outcome of the investigation of the complaint.

The GC stated further that its interpretation is consistent with the general scheme of the Regulation and this is confirmed from the recital 18 in the preamble of the Regulation which relates to Article 13. The GC, by mentioning that it is important to read par. 2 of Article 13 in the light of par. 1, which provides that the EC may reject a complaint in the case where another NCA is dealing with it, ruled that the crucial point is not the outcome of the review of the complaint by the NCA, but the fact that it has been reviewed by that NCA.

Another argument of the GC for this interpretation is that since the EC may reject a complaint for lack of EU interest, even though it has not been dealt with by a NCA, the EC may, *a fortiori*, reject a complaint reviewed by that NCA which has been rejected by the latter on priority grounds. With respect to the Network Notice, the GC referred to par. 20 of the notice and ruled that the expression "*dealing with the case*" does not merely mean that a complaint has been lodged with another NCA but it means that the other NCA is investigating or has investigated the case on its own behalf and as a result concluded that the finding of the NCA on the case is an irrelevant fact.

Furthermore, EasyJet claimed that the EC cannot reject a complaint where that complaint has not been the subject of a decision of a NCA under Article 5 of the Regulation. The GC rejected EasyJet's argument and noted that Article 13 (2) (which concerns the cooperation within the European Competition Network "ECN"),

provides only that the complaint must have been dealt with by another competition authority, and not necessarily that a decision must have been issued in relation to that complaint, and as a result par. 2 of Article 13 does not necessarily require that a decision must have been taken by the NCA, rejecting the complaint. Subsequently, even assuming that the rejection of a complaint by a NCA on priority grounds does not constitute a decision within the meaning of Article 5, the EC could apply, in such a case, the provisions of Article 13 (2).

In order to reinforce its argumentation, the GC made references to the main objectives of the Regulation, which is to establish an effective decentralized scheme for the application of EU competition law rules. According to the GC, EasyJet's argument, which would be to require the EC to review a complaint systematically each time a NCA has investigated a complaint but has not taken one of the decisions provided in Article 5 of the Regulation or taken a decision to reject the complaint on priority grounds, could not be compatible with the objective of par. 2 of Article 13, which is to establish, with a view to ensuring effectiveness, an optimal allocation of resources within the ECN. The GC fittingly noted that the enforcement of an obligation to the EC to review systematically complaints rejected on priority grounds by NCAs would be equate to the transfer to the EC the power to review the decisions of those authorities, for which only the national courts are competent.

Concerning par. 2 of article 13 the GC concluded that both the wording and the scheme of the Regulation, on the one hand, and the objective pursued by the Regulation, on the other, have the meaning that, the EC could reject a complaint, properly relying on the grounds that a NCA has previously rejected that complaint on priority grounds. This is why the fact that, (even if that was the case), the NMa did not complete the investigation of the complaint, by taking a decision within the meaning of Article 5 of the Regulation and it relied on priority grounds, did not impede the EC to find, on the basis of par. 2 of Article 13, that this complaint had been dealt with by a NCA and to reject it on that grounds.

To put it another way, the GC ruled that when a complaint it is rejected by a NCA on priority grounds without examining the case on its merits but however has reviewed the complaint, this is enough to consider that the NCA has "dealt with" the case for the purposes of par. 2 of Article 13. More specifically, according to the GC, the EC may, in order to reject a complaint on the basis of Article 13 (2), properly rely on the ground that a NCA 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.

IV. Conclusion

The GC's judgments clarified the application of Article 13 of the Regulation, in particular the two other reasons for the EC (with the entry into force of the Regulation) to dismiss cases i.e. where "*one authority is dealing with the case*" (par. 1) or where a complaint "*has already been dealt with by another competition authority*" (par. 2).

In both cases the NCAs have already launched an investigation for the same facts invoked by the complaints filed with the EC. The GC ruled that the EC is, as usually, enjoying great discretion to reject, shelve or prioritize cases and complaints. As a consequence the complainants cannot transfer the investigations before the EC only because they are not satisfied from the conduced investigation by the NCAs.

The rulings of the GC regarding application of Article 13, could be considered as "food for thought" for the complainants concerning the competition authority they choose first to file their complaint. Complainants could expect the EC to look itself at their cases already being dealt with by NCAs only if there is sufficient EU interest at stake in further investigating the case.

It is worth mentioning the fact that the GC considered that the EC is not entitled when handling a complaint to appreciate whether the NCA in question is sufficiently independent and has the necessary means of action in order to effectively exercise its powers stemming from Regulation 1/2003, although that the GC noted in an obiter dictum that in the present case (T-201/11) it did not seem that the Slovenian NCA suffered of such deficiencies. It is also important to note that according to the GC the affectation of trade does not *eo facto* amount to sufficient community interest justifying the intervention of the EC. This is a plausible position to the extent that admitting the opposite would result in divesting the NCAs from all cases implying application of articles 101 and 102 TFEU (obviously cumulatively with national provisions). However, it is important to note that a substantial condition of application for Article 13 of the Regulation is that the complaint is or has been treated by the NCA in question also in regard to the application of article 101 or 102 of the TFEU.

Conclusively, what is notable for the GC's rulings is in essence that neither the Regulation nor the Network Notice, as a "soft law", creates rights or expectations for the undertakings concerned to have its case dealt with by a specific competition authority. Not even establish or create a rule which governs the allocation of powers between the EC and the NCAs, as the GC stressed.

Due to the reason that the NCAs are obliged to apply articles 101 & 102 of TFEU according to the Regulation, it could be claimed that the ECN has not been designed on a hierarchical structure and the Network Notice establishes mainly a set of soft rules of internal allocation of tasks between EC and NCAs without creating "superior" and "inferior" bodies during the procedural process of the application of competition rules.

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