EUROPEAN COMMISSION
Competition DG

CASE AT.40098 - Blocktrains

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003

Commission Regulation (EC) 773/2004

Article 7 Regulation (EC) 1/2003

Date: 15/07/2015

EUROPEAN
COMMISSION

Brussels, 15.7.2015
C(2015) 4646 final

COMMISSION DECISION

of 15.7.2015

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union

(AT.40098 - Blocktrains)

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2] and in particular Article 10a thereof,

Having regard to the Commission decision of 10 June 2014 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 11(1) of Regulation (EC) No 773/2004,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case[3],

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1 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

2 OJ L 123, 27.4.2004, p. 18.

3 Final report of the Hearing Officer of 14 July 2015.

Whereas:

1. INTRODUCTION

(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty. The infringement consisted of the allocation and protection of customers and transport volumes and of price coordination. The infringement lasted from 2 July 2004 until 30 June 2012.

(2) The Decision is addressed to the following legal entities:

(a) Kühne + Nagel International AG and Kuehne + Nagel A.E. (collectively referred to as "K+N");

(b) ÖBB-Holding AG, Rail Cargo Austria AG, Rail Cargo Logistics – Austria GmbH and Express Interfracht Hellas A.E.[4] (collectively referred to as "EXIF");

(c) Deutsche Bahn AG, Schenker AG, Schenker & Co. AG and Schenker A.E. (collectively referred to as "Schenker");

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

(3) The services concerned by the anti-competitive conduct are rail cargo transport services in connection with blocktrains[5] between Central and South-Eastern Europe, such as 'Balkantrain' and 'Soptrain', operated jointly by the three undertakings subject to these proceedings. Those services include ancillary so-called 'pre-/post-' transport services, that is the legs of transport by connecting trains or other means of transport between the hubs of a blocktrain and the starting or end points of the full transport destinations required by customers.[6] Rail cargo transport services of this type but starting outside the Union, are excluded from the scope of this Decision.[7]

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4 Also known as "Express – Interfracht Hellas Societe Anonyme International & National Forwarding & Logistics".

5 Blocktrains are a rail cargo shipping method whereby all the waggons are shipped from one hub to another without being split up or stored "en route". This saves time and money as no assembling and disassembling trains at different rail stations is required. Blocktrains are economically more efficient in particular for high-volume customers, thus often the blocktrains carry only one commodity.

6 That is including legs A→B and B'→C, where B→B is the blocktrain line and A→C the full transport requirement of the customer.

7 The intrinsic coordination between blocktrain operators required to run a blocktrain service jointly, including joint purchasing of upstream transport services (locomotion/traction, trailers and additional equipment) from (national) rail carriers, is not covered by these proceedings.

2.2. Undertakings subject to the proceedings in this case

2.2.1. K+N

(4) The relevant legal entities are:

(a) Kühne + Nagel International AG with registered offices in Schindellegi (Switzerland);

(b) Kuehne + Nagel A.E. with registered offices in Athens (Greece).

(5) K+N is an undertaking active, inter alia, in the provision of rail cargo transport services in Europe, both inside and outside the EEA. The undertaking's worldwide turnover in 2014 was approximately EUR 14 billion.

2.2.2. EXIF

(6) The relevant legal entities are:

(a) ÖBB-Holding AG, with registered offices in Vienna (Austria);

(b) Rail Cargo Austria AG, with registered offices in Vienna (Austria);

(c) Rail Cargo Logistics – Austria GmbH[8], with registered offices in Vienna (Austria);

(d) Express Interfracht Hellas A.E., with registered offices in Athens (Greece).

(7) EXIF is an undertaking active, inter alia, in the provision of rail cargo transport services in Europe, both inside and outside the EEA. The undertaking's worldwide turnover in 2014 was approximately EUR 5 billion.

2.2.3. Schenker

(8) The relevant legal entities are:

(a) Deutsche Bahn AG, with registered offices in Berlin (Germany);

(b) Schenker AG with registered offices in Essen (Germany);

(c) Schenker & Co. AG with registered offices in Vienna (Austria);

(d) Schenker A.E., with registered offices in Athens (Greece).

(9) Schenker is an undertaking active, inter alia, in the provision of rail cargo transport services in Europe, both inside and outside the EEA. The undertaking's worldwide turnover in 2014 was approximately EUR 39 billion.

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[8] Formerly 'Express Interfracht Internationale Spedition GmbH'.

3. PROCEDURE

(10) On 28 March 2013, *K+N* applied for a marker under the Leniency Notice[9]. On 30 April 2013, *K+N* submitted an application for immunity from fines pursuant to point 8 of the Leniency Notice aimed at perfecting the marker. On 7 June 2013, the Commission granted *K+N* conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.

(11) Starting on 18 June 2013, the Commission carried out unannounced inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of *Schenker* and *EXIF* in Greece and Austria.

(12) On 23 August 2013, *EXIF* submitted a leniency application and on 17 September 2013, *Schenker* submitted a leniency application.

(13) On 10 June 2014, the Commission initiated proceedings pursuant to Article 2(1) of Regulation (EC) No 773/2004 against the addressees of this Decision (referred to as the "parties" or, for each undertaking separately, as "party") with a view to engaging in settlement discussions with them under the Settlement Notice[10]. After each party had confirmed its willingness to engage in settlement discussions, those discussions started on 23 July 2014.

(14) Settlement meetings with the parties took place between 23 July 2014 and 25 March 2015. During those meetings, the Commission informed the parties of the objections it envisaged raising against them and disclosed the main pieces of evidence in the Commission file relied on to establish those potential objections. The parties were also given a copy of the relevant pieces of evidence as well as a list of all the documents in the file. Further, the parties were given access to the leniency applicants' oral statements at the Commission premises. The Commission also provided the parties with an estimation of the range of fines likely to be imposed.

(15) Each party expressed its views on the objections which the Commission envisaged raising against it. The parties' comments were carefully considered by the Commission and, where appropriate, taken into account. At the end of the settlement discussions, all parties considered that there was sufficient common understanding between them and the Commission with regard to the potential objections and the estimation of the range of likely fines to continue with the settlement process.

(16) Between [...] and [...], each party submitted its formal request to settle pursuant to Article 10a (2) of Regulation (EC) No 773/2004 (the "settlement submission") to the Commission. The settlement submission of each party contained:

(a) an acknowledgement in clear and unequivocal terms of the party's liability for the infringement, which was summarised in accordance with the results of the settlement discussions as to the object, the main facts and their legal

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9 Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

10 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1).

qualification, including the party's role and the duration of the party's participation in the infringement;

(b) an indication of the maximum amount of the fine the party expected the Commission to impose and which it would accept in the framework of the settlement procedure;

(c) the party's confirmation that it had been sufficiently informed about the objections the Commission intended to raise against it and that it had been given sufficient opportunity to make its views known to the Commission;

(d) the party's confirmation that it did not intend to request access to the file again or to be heard in an oral hearing, unless the Commission were not to reflect its settlement submission in the statement of objections and the decision;

(e) the party's agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in English.

(17) Each party made its settlement submission conditional upon the imposition of a fine by the Commission not exceeding the amount specified in its settlement submission.

(18) On 26 May 2015, the Commission adopted a statement of objections addressed to the parties. All parties replied to the statement of objections by confirming that it reflected the contents of their settlement submissions and that they remained committed to following the settlement procedure.

4. DESCRIPTION OF THE CONDUCT

4.1. Nature and scope of the conduct

(19) The parties operated a cartel with the overall aim to allocate and protect (that is, reserve) certain customers or transport volumes and to coordinate prices.

(20) To achieve this aim the cartel members (i) allocated existing and new customers, (ii) set up a customer protection scheme, including a notification system for new customers, (iii) exchanged confidential information on specific customer requests, (iv) shared transport volumes between them and (v) coordinated prices directly by providing each other with cover bids and discussing prices for specific customers.

(21) The cartel was implemented by way of detailed coordination arrangements allowing close monitoring of the agreed customer protection scheme. Customer protection between the three operators started in July 2004 and remained in operation, without interruption, until mid-2012. The scheme involved frequent contacts to discuss and exchange lists of, and information on, specific customers allocated to each of the participants.[11] Sometimes retaliation or compensation was provided for. For that purpose the cartel members held trilateral and bilateral meetings and had other

[11] See for example [...]

contacts by email or phone.[12] From 2005 to 2007/2008 each participant could reserve new customers through a (formal) notification system.[13] The notification system concerned new business (customers or connections) above a certain volume (above 1000 or 3000 tonnes; business listed on a so-called '1000tons-list' or a '3000s-list'), which the operators wanted to be protected. From 2007/2008, the notification system was dropped, but the customer protection understanding for certain key customers continued to apply. The cartel arrangements were then operated more secretly and the cartel participants increasingly took care not to exchange emails with explicit collusive content or lists of protected customers.[14]

(22) Management-level personnel of the companies jointly operating the blocktrains were directly involved in the cartel as they participated in discussions and meetings with competitors, directed their respective sales forces to implement the understanding reached with the competing blocktrain operators, discussed individual tenders and monitored the customer protection scheme.[15]

(23) Despite differing views and disputes over certain customers or transport destinations, the cartel was implemented systematically over a prolonged period of time on the understanding that all three blocktrain operators should adhere to the rules commonly agreed.[16]

4.2. Geographic scope of the conduct

(24) The geographic scope of the infringement involving all three parties was Union-wide for its entire duration.

4.3. Duration of the conduct

(25) The cartel started on 2 July 2004 with a collusive meeting in Thessaloniki (Greece) and lasted until 30 June 2012.

5. LEGAL ASSESSMENT

(26) The legal assessment set out in this Section takes into account the facts as described in Section 4, the body of evidence on which they are based, the parties' clear and unequivocal acknowledgement in their settlement submissions of these facts and the legal qualification thereof, as well as the parties' replies to the statement of objections.

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12 See for example [...]

13 [...]

14 See for example [...]

15 See for example of involvement of management [...]

16 See for example [...]

5.1. Article 101(1) of the Treaty

5.1.1. Agreements between undertakings and concerted practices

5.1.1.1. Principles

(27) Article 101 of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

(28) An *agreement* under Article 101 of the Treaty may be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. Although Article 101(1) of the Treaty draws a distinction between the concept of *concerted practices* and that of *agreements between undertakings*, the object is to bring within the prohibition of that article any form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition. Conduct may fall under Article 101(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.[17] Article 101(1) of the Treaty precludes any direct or indirect contact between economic operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question.[18]

(29) The concepts of *agreement* and *concerted practice* may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It is not necessary to define exactly whether certain conduct constitutes an agreement or a concerted practice as long as it is established that the infringement involved anti-competitive agreements and/or concerted practices and that the participating undertakings intended to contribute by their own conduct to the common objectives pursued by all the participants and were aware of the actual

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[17] Judgment of the General Court of 17 December 1991, *Hercules* v *Commission*, T-7/89, ECLI:EU:T:1991:75, paragraph 256; Judgment of the Court of Justice of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, ECLI:EU:C:1972:70, paragraph 64; and Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and others* v *Commission*, 40-48/73 etc., ECLI:EU:C:1975:174, paragraphs 173-174.

[18] Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 120; Judgment of the Court of Justice of 4 June 2009, T-*Mobile Netherlands and Others*, C-8/08, ECLI:EU:C:2009:343, paragraph 33 and the case law cited there.

conduct planned or put into effect by the other undertakings in pursuit of the same objectives (or could reasonably have foreseen it and were prepared to take the risk).[19]

5.1.1.2. Application in this case

(30) The conduct described in Section 4 presents all the characteristics of an agreement between undertakings and/or a concerted practice within the meaning of Article 101 (1) of the Treaty.

(31) In order to restrict competition between them, the parties met and had other contacts in which they first agreed and then monitored a customer protection and allocation scheme. They also shared out certain transport volumes contracted by downstream customers, provided each other with cover bids in respect of customers protected under the customer allocation scheme and coordinated sales prices offered to downstream customers.

(32) That conduct therefore qualifies as an agreement between undertakings and/or a concerted practice within the meaning of Article 101(1) of the Treaty.

5.1.2. Single and continuous infringement

5.1.2.1. Principles

(33) An infringement of Article 101(1) of the Treaty can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission may impute responsibility for those actions on the basis of participation in the infringement considered as a whole. As long as the participating undertakings intended to contribute, by their own conduct, to the common objectives pursued by all the participants and were aware of the actual conduct planned or put into effect by the other undertakings in pursuit of the same objectives (or could reasonably have foreseen it and were prepared to take the risk) they participated in the same infringement.[20]

5.1.2.2. Application in this case

(34) The conduct described in Section 4 constitutes a single and continuous infringement of Article 101(1) Treaty.

(35) The various aspects of the conduct of the parties were interlinked and served the same goal. Overall, that conduct can be characterised as a complex infringement consisting of various actions which constituted a single anti-competitive arrangement

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[19] Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 81.

[20] Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 83 and Judgment of the General Court of 3 March 2011, *Siemens v Commission*, T-110/07, ECLI:EU:T:2011:68, paragraph 246.

in the form of an agreement and/or a concerted practice whereby they knowingly substituted practical co-operation between them for the risks of competition.

(36) The collusion between *K+N*, *EXI*F and *Schenker* took place in pursuit of a single anti-competitive objective and a single economic aim, namely to allocate customers and transport volumes through a customer protection scheme with a view to raising or maintaining prices to downstream customers. To that end, the cartel participants also engaged in direct price coordination activities.

(37) The contacts between the three blocktrain operators were of a continuous nature and numerous collusive trilateral and bilateral meetings, email exchanges and other contacts took place. The various anti-competitive incidents were interlinked and served the same economic aim.

(38) The existence of a single and continuous infringement is supported by the fact that the cartel followed the same pattern throughout the duration of the infringement – even if it was adapted to the circumstances. The undertakings involved remained the same throughout the infringement. There was continuity with respect to the individuals participating in the behaviour and the implementation of the cartel, which followed the same method, despite the fact that the explicit customer protection notification system was abandoned in 2007/2008.

(39) The conduct therefore qualifies as a single and continuous infringement of Article 101(1) of the Treaty.

5.1.3. Restriction of competition

5.1.3.1. Principles

(40) To come within the prohibition laid down in Article 101(1) of the Treaty, an agreement, a decision by an association of undertakings or a concerted practice must have as its object or effect the prevention, restriction or distortion of competition in the internal market.

(41) In that regard, it is apparent from the Court of Justice's case-law that certain types of coordination between undertakings shows a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[21] That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[22] Article 101 of the Treaty is intended to protect not only the interests of

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[21] Judgment of the Court of Justice of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 113.

[22] Judgment of the Court of Justice of 13 July 1966, *Consten and Grundig* v *Commission*, Joined Cases C-56/64 and C-58/64, ECLI:EU:C:1966:41; Judgment of the Court of Justice of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECLI:EU:C:2002:582, paragraph 508; Judgment of the Court of Justice of 8 December 2011, *KME Germany and Others* v *Commission*, C-389/10 P, ECLI:EU:C:2011:816, paragraph 75; Judgment of the Court of Justice of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph

competitors or consumers, but also the structure of the market and thus competition as such.[23]

(42) According to settled case-law, for the purposes of applying Article 101(1) of the Treaty, in order for an agreement or concerted practice to fall within the scope of that provision, it is sufficient that its object should be to restrict, prevent or distort competition, irrespective of its actual effects. In the case of agreements reached at meetings of competing undertakings, that provision is infringed where those meetings have such an object and are thus intended to organise artificially the operation of the market and the liability of a particular undertaking for participation in the infringement is properly established where it participated in those meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings.[24] Consequently, certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, is so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that it has actual effects on the market.[25]

5.1.3.2. Application in this case

(43) Through the conduct described in Section 4, the parties allocated and protected (that is, reserved) certain customers or transport volumes and coordinated prices for the jointly operated rail cargo transport services in connection with the 'Balkantrain' and 'Soptrain' blocktrains. The object of the conduct of the parties was to restrict competition within the meaning of Article 101 of the Treaty.

(44) Such conduct, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty.

5.1.4. Effect upon trade between Member States

5.1.4.1. Principles

(45) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm unfettered competition in the Union or the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market.

50; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 114.

[23] Judgment of the Court of Justice, of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, ECLI:EU:C:2009:610, paragraph 63.

[24] Judgment of the Court of Justice of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECLI:EU:C:2002:582, paragraph 508 and 509.

[25] Judgment of the Court of Justice of 11 September 2014, *Groupement des Cartes Bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 115.

5.1.4.2. Application in this case

(46) Throughout the infringement, the operators of blocktrains offered rail cargo transport services to destinations in different Member States, as well as to adjacent jurisdictions, notably Turkey and the Balkans. Significant cross-border trade between Member States such as Austria, Bulgaria, the Czech Republic, Germany, Greece, Hungary, Romania and Slovakia took place in large parts of the Union, namely in its Central European and South Eastern regions, and also with third-countries.

(47) Therefore, the infringement was capable of having an appreciable effect upon trade between Member States.[26]

5.2. Article 101(3) of the Treaty

5.2.1. Principles

(48) The provisions of Article 101 of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

5.2.2. Application in this case

(49) On the basis of the facts before the Commission, there are no indications that the conduct of *K+N*, *EXIF* and *Schenke*r entailed any efficiency benefits or otherwise promoted technical or economic progress. The conditions for exemption provided for in Article 101(3) of the Treaty are therefore not met in this case. The parties did not claim that an exemption applies to their conduct.

6. DURATION OF THE PARTICIPATION OF THE PARTIES IN THE INFRINGEMENT

(50) Anti-competitive contacts between the parties started on 2 July 2004 with a collusive meeting in Thessaloniki (Greece) concerning the 'Balkantrain' which representatives of all three undertakings attended. Collusive contacts concerning the 'Soptrain' between *K+N* and *Schenker* started at the same time. *EXIF*, however, joined 'Soptrain' as a full partner and co-blocktrain operator only in mid-2005.

(51) Thereafter the parties had numerous trilateral meetings and bilateral contacts. Even though the notification system for protected customers was stopped in 2007/2008, the customer protection scheme did not come to a complete halt before 2012. In view of the latest documented collusive incident in spring 2012 and the statements provided by the parties, the Commission considers that the cartel ended on 30 June 2012.

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[26] Judgment of the Court of Justice of 24 September 2009, *Erste Group Bank and Others v Commission*, C-125/07 P, ECLI:EU:C:2009:576, paragraph 39.

(52) In view of the facts described in Section 4, the participation of all three parties in the infringement lasted from 2 July 2004 until 30 June 2012.

7. LIABILITY

7.1. Principles

(53) Article 101 of the Treaty refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[27]

(54) A parent company may be personally liable for the conduct of its subsidiary, including in circumstances where the subsidiary has a separate legal personality, if that subsidiary's conduct can be imputed to it. When the subsidiary infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. The conduct of the subsidiary can be imputed to the parent where the parent exercises a decisive influence over it, namely where that subsidiary does not decide independently upon its own conduct on the market. In effect, as the controlling company in the undertaking, the parent is deemed to have itself committed the infringement of Article 101 of the Treaty.[28]

(55) It is, as a rule, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the legal entities may have over the other.[29]

(56) However, in particular in those cases where one parent holds all or almost all of the capital in a subsidiary which has committed an infringement of the Union competition rules, there is a rebuttable presumption that that parent company exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in a subsidiary is held by the parent company in order to take the view that that presumption applies.[30] Where the presumption applies, the Commission will then be able to regard the

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27 Judgment of the Court of Justice of 13 June 2013, *Versalis v Commission*, C-511/11 P, ECLI:EU:C:2013:386, paragraph 51.

28 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, para. 61; Judgment of the Court of Justice of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, ECLI:EU:C:2011:620 paragraphs 57 and 63; Judgment of the Court of Justice of 19 July 2012, *.Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others ("Alliance One")*, Joined cases C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479; Judgment of the Court of Justice of 8 May 2013, *ENI* v *Commission*, C-508/11 P, ECLI:EU:C:2013:289, paragraph 47; Judgment of the Court of Justice of 16 November 2000, *Stora Kopparbergs Bergslags v Commission*, C 286/98 P, ECLI:EU:C:2000:630, paragraph 29; Judgment of the General Court of 23 January 2014, , *Evonik Degussa et AlzChem v Commission*, T-391/09, ECLI:EU:T:2014:22, paragraph77; Judgment of the Court of Justice of 11 July 2013, *Stichting Administratiekantoor Portielje ("Portielje"),v Commission*, C-440/11 P, ECLI: EU:C:2013:514, paragraph 41.

29 Judgment of the General Court of 27 March 2014, *Saint Gobain v Commission*, T-56/09 and T-73/09, ECLI:EU:T:2014:160, paragraph 311.

30 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, paragraph 60.

parent company as forming part of the undertaking which participated in the infringement and therefore, jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[31]

(57) It is not incompatible with the principle of personal responsibility to impute liability for an infringement to another company in its quality as absorbing company of the legal entity which directly committed the infringement when it existed.[32] Indeed, if undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes, the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties would be jeopardised.[33]

7.2. Application in this case

(58) Having regard to the body of evidence, and the facts described in Section 4, and in view of the parties' clear and unequivocal acknowledgement of these facts and their legal qualification, liability for the infringement found in this Decision should be imputed to the undertakings consisting of the following legal entities:

7.2.1. K+N

(59) For the infringement committed by *K+N*, the following legal entities should be held jointly and severally liable:

(a) Kühne + Nagel International AG; and

(b) Kuehne + Nagel A.E.

(60) Kuehne + Nagel A.E. and Proodos S.A. (Proodos S.A. was completely absorbed by Kuehne + Nagel A.E. on 1 January 2012) directly participated in the cartel. During the duration of the infringement, Kuehne + Nagel A.E. and Proodos S.A. were wholly owned subsidiaries of Kühne + Nagel International AG. Kühne + Nagel International AG does not contest liability for the cartel conduct of its subsidiaries.

(61) Kühne + Nagel International AG and Kuehne + Nagel A.E. (also as successor of Proodos S.A, which is no longer in existence) should therefore be held jointly and severally liable for the infringement.

7.2.2. EXIF

(62) For the infringement committed by *EXIF*, the following legal entities should be held jointly and severally liable:

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31 Judgment of the Court of Justice of 29 March 2011, *ArcelorMittal Luxembourg v Commission*, C-201/09 P, ECLI:EU:C:2011:190, paragraph 98.

32 Judgment of the Court of Justice of 5 December 2013, *SNIA v Commission*, C-448/11 P, ECLI:EU:C:2013:801, paragraph 23.

33 Judgment of the Court of Justice of 5 December 2013, *SNIA v Commission*, C-448/11 P, ECLI:EU:C:2013:801,paragraph 24.

(a) ÖBB-Holding AG;

(b) Rail Cargo Austria AG;

(c) Rail Cargo Logistics – Austria GmbH; and

(d) Express Interfracht Hellas A.E.

(63) Rail Cargo Logistics – Austria GmbH and Express Interfracht Hellas A.E. (as well as Raabersped Speditionsgesellschaft GmbH which was later absorbed by Rail Cargo Logistics – Austria GmbH) directly participated in the cartel contacts. During the period of the infringement, these two companies were wholly owned by the ultimate parent company of the group, namely ÖBB-Holding AG through the intermediate parent company Rail Cargo Austria AG. ÖBB-Holding AG and Rail Cargo Austria AG do not contest liability for the cartel conduct of their subsidiaries.

(64) ÖBB-Holding AG, Rail Cargo Austria AG, Rail Cargo Logistics – Austria GmbH and Express Interfracht Hellas A.E. should therefore be held jointly and severally liable for the infringement.

7.2.3. Schenker

(65) For the infringement committed by *Schenker*, the following legal entities should be held jointly and severally liable:

(a) Deutsche Bahn AG;

(b) Schenker AG;

(c) Schenker & Co. AG; and

(d) Schenker A.E.

(66) Schenker & Co. AG and Schenker A.E. (as well as Fertrans GesmbH which was later merged into Schenker & Co. AG, Schenker Railog GmbH which was later merged into Schenker & Co. AG and Railog GmbH, which was later merged into Schenker AG directly participated in the cartel contacts. During the period of the infringement, Schenker AG was the intermediate parent company of Schenker & Co. AG and Schenker A.E. Deutsche Bahn AG is the ultimate parent company of the DB-Group which exercised direct or indirect decisive influence over all entities of the undertaking *Schenker*, including the wholly owned Schenker AG. Deutsche Bahn AG and Schenker AG do not contest liability for the cartel conduct of their subsidiaries.

(67) Deutsche Bahn AG, Schenker AG, Schenker & Co. AG and Schenker A.E. should therefore be held jointly and severally liable.

8. REMEDIES

8.1. Article 7 of Regulation (EC) No 1/2003

(68) Where the Commission finds that there is an infringement of Article 101 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(69) Given the secrecy in which the cartel arrangements were carried out, in this case it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and to refrain from any agreement or concerted practice which may have the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003

(70) Under Article 23(2) of Regulation (EC) No 1/2003[34], the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(71) Based on the facts described in Section 4, the Commission considers that the infringement was committed intentionally.

(72) Fines should therefore be imposed on the undertakings to which this Decision is addressed.

(73) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard both to the gravity and duration of the infringement. In setting the fines to be imposed, the Commission also refers to the principles laid down in its Guidelines on fines[35].

(74) Finally, the Commission applies, as appropriate, the provisions of the Leniency Notice and the Settlement Notice.

8.3. Calculation of the fines

(75) In accordance with the Guidelines on fines, a basic amount is to be determined for the fine to be imposed on each undertaking, which results from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement directly or indirectly relates in a given year (normally, the last full

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[34] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area (OJ L 305, 30.11.1994, p. 6) "the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 TFEU] […] shall apply *mutatis mutandis*".

[35] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

business year of the infringement) multiplied by the number of years of the undertaking's participation in the infringement. The additional amount ("entry fee") is calculated as a percentage between 15% and 25% of the value of sales, irrespective of the duration of the infringement. The resulting basic amount can then be increased or reduced for each undertaking if there are any aggravating or mitigating circumstances. The Commission may depart from the methodology set out in the Guidelines on fines where this is justified by the particularities of a given case or the need to achieve deterrence in a particular case (point 37 of the Guidelines on fines).

8.3.1. The value of sales

(76) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of their sales[36], that is the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EEA. In this case the relevant value of sales relates to sales of rail cargo transport services in connection with blocktrains between Central and South-Eastern Europe and operated jointly by *K+N*, *EXIF* and *Schenker* (Balkantrain and Soptrain), including ancillary transport services.

(77) When calculating the basic amount of the fine, the Commission normally takes the sales made by the undertakings during the last full business year of their participation in the infringement.[37] If that last full business year is not sufficiently representative, the Commission may exceptionally take other years into account for the determination of the value of sales. In this case, the value of sales was clearly not constant over the entire period of the infringement. Based on that and on the information provided by the parties in this respect, an average of each party's relevant sales during the entire infringement period should be used, to adequately reflect the considerable volatility of sales during that period and, hence, to take account of the scale of the infringement.

(78) Each party has, in its settlement submission, confirmed the relevant value of sales for the calculation of the fines.

(79) Accordingly, the value of sales for each party should be as set out in Table 1.

Table 1: Value of Sales

Undertaking	**Value of Sales (EUR)**
K+N	[...]
EXIF	[...]
Schenker	[...]

[36] Point 12 of the Guidelines on fines.
[37] Point 13 of the Guidelines on fines.

8.3.2. Determination of the basic amount of the fines

(80) The basic amount consists of an amount of up to 30% of an undertaking's relevant value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of an undertaking's relevant value of sales, irrespective of duration.[38]

8.3.2.1. Gravity

(81) The gravity of the infringement determines the percentage of the value of sales taken into account in setting the fine. In assessing the gravity of the infringement, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(82) Customer allocation and price coordination arrangements are, by their very nature, among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for such infringements should be set at the higher end of the scale.[39]

(83) Furthermore, the infringement featured different anti-competitive elements (customer allocation and price-coordination) and was thoroughly and rigorously implemented.

(84) Therefore, the proportion of the value of sales to be taken into account should be 17%.

8.3.2.2. Duration

(85) In calculating the fine to be imposed, the Commission also takes into consideration the duration of each party's participation in the infringement, as set out in Section 6.

(86) The time period to be taken into account for the purposes of calculating the fine and the increase of the fines corresponding to that period ("multiplier") should be as set out for each party in Table 2.

Table 2. Duration

Undertaking	**Period of participation**	**Multiplier**
K+N	2 July 2004 – 30 June 2012	7.91
EXIF	2 July 2004 – 30 June 2012	7.91
Schenker	2 July 2004 – 30 June 2012	7.91

[38] Points 19 to 26 of the Guidelines on fines.

[39] Point 23 of the Guidelines on fines.

8.3.2.3. Additional amount

(87) The infringement committed by the parties concerns a customer allocation and price coordination cartel. Therefore, the basic amount of the fine should include a sum of between 15% and 25% of the value of sales to deter them from even entering into such illegal practices which is determined on the basis of the criteria listed under Heading 8.3.2. with respect to the variable part of the basic amount.[40]

(88) In this case, taking into account the nature of the infringement, the proportion of the value of sales to be taken into account for the purpose of calculating the additional amount should be 17%.

8.3.2.4. Calculation of the basic amount

(89) The application of the criteria set out under heading 8.3.2. leads to basic amounts of the fine to be imposed on each party as set out in Table 3:

Table 3. Basic amounts of the fine

Undertaking	**Basic amount in EUR**
K+N	[...]
EXIF	[...]
Schenker	[...]

8.3.3. Adjustments to the basic amount: aggravating or mitigating factors

(90) The Commission may increase the basic amount of the fine if there are aggravating circumstances. Those circumstances are listed in a non-exhaustive way in point 28 of the Guidelines on fines. The Commission may also reduce the basic amount where mitigating circumstances exist. Those circumstances are listed in a non-exhaustive way in point 29 of the Guidelines on fines.

(91) There are no aggravating or mitigating circumstances in this case.

8.3.4. Deterrence

(92) Particular attention should be paid to the need to ensure that fines have a sufficiently deterrent effect; to that end, the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates may be increased.[41]

(93) In this case, such an increase for deterrence should be applied to *Schenker* which had an annual world-wide turnover of approximately EUR 39 billion in 2014. A multiplier of 1.1 should be applied to take account of the comparatively large size of that undertaking (DB group).

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40 Point 25 of the Guidelines on fines.

41 Point 30 of the Guidelines on fines.

(94) The resulting adjusted basic amounts are set out in Table 4.

Table 4. Basic amounts after the adjustment

Undertaking	Deterrence multiplier	Adjusted basic mount in EUR
K+N	1	[...]
EXIF	1	[...]
Schenker	1.1	[...]

8.4. Application of the 10% of turnover limit

(95) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking having participated in an infringement of Article 101 of the Treaty must not exceed 10% of its total turnover in the preceeding business year.

(96) In this case, none of the fines calculated (see Table 4) exceed 10% of the respective undertaking's total turnover in 2014.

8.5. Application of the Leniency Notice

(97) On 7 June 2013, the Commission granted *K+N* conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. *K+N*'s co-operation fulfilled the requirements of the Leniency Notice. *K+N* should therefore be granted immunity from fines for the infringement found in this Decision.

(98) *EXIF* was the first undertaking to meet the requirements of points 24 and 25 of the Leniency Notice. On 10 June 2014, the Commission preliminarily granted *EXIF* a reduction of the fine within the range of 30-50%. *EXIF* had submitted contemporaneous, documentary evidence of multi- and bi-lateral cartel meetings and contacts and detailed information on the subject matter of those meetings and contacts. More particularly, *EXIF* provided detailed, corroborating information on the pricing coordination, on the customer protection arrangements through "wish lists", on the functioning of the notification system and on exchanges of commercially sensitive information between the cartel members. *EXIF* should therefore be granted a 45% reduction of the fine that would otherwise have been imposed.

(99) *Schenker* was the second undertaking to meet the requirements of points 24 and 25 of the Leniency Notice. On 10 June 2014, the Commission preliminarily granted *Schenker* a reduction of the fine within the range of 20-30%. *Schenker* submitted detailed information on the subject matter of several meetings and contacts which shed further light on the organisation of the cartel. *Schenker* also provided precise insights on key cartel meetings. Schenker should therefore be granted a reduction of 30% of the fine that would otherwise have been imposed.

8.6. Application of the Settlement Notice

(100) In accordance with point 32 of the Settlement Notice, the reward for settlement is a reduction of 10% of the amount of the fine to be imposed on an undertaking after the 10% of turnover limit has been applied having regard to the Guidelines on Fines. Pursuant to point 33 of the Settlement Notice, when settled cases involve leniency applicants, that reduction is added to their leniency reward.

(101) Consequently, the amount of the fines to be imposed on each party should be further reduced by 10%.

8.7. Conclusion: Final amount of individual fines to be imposed in this Decision

(102) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be as set out in Table 5.

Table 5. Fines

Undertaking	**Fines (in EUR)**
K+N	0
EXIF	17 356 000
Schenker	31 798 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings participated, between 2 July 2004 and 30 June 2012, in a single and continuous infringement of Article 101 of the Treaty consisting of the allocation of customers and transport volumes and of price coordination in the sector of rail cargo transport services in connection with blocktrains between Central and South-Eastern Europe ('Balkantrain' and 'Soptrain') operated jointly by them:

(a) Kühne + Nagel International AG and Kuehne + Nagel A.E.;

(b) ÖBB-Holding AG, Rail Cargo Austria AG, Rail Cargo Logistics – Austria GmbH and Express Interfracht Hellas A.E.;

(c) Deutsche Bahn AG, Schenker AG, Schenker & Co AG and Schenker A.E.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) Kühne + Nagel International AG and Kuehne + Nagel A.E., jointly and severally: EUR 0;

(b) ÖBB-Holding AG, Rail Cargo Austria AG, Rail Cargo Logistics – Austria GmbH and Express Interfracht Hellas A.E., jointly and severally: EUR 17 356 000;

(c) Deutsche Bahn AG, Schenker AG, Schenker & Co AG and Schenker A.E., jointly and severally: EUR 31 798 000.

The fines shall be credited, in euros, within a period of three months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1–2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI/AT.40098

After the expiry of this period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.[42]

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

[42] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

Kühne + Nagel International AG, Dorfstraße 50, 8834 Schindellegi, Switzerland;

Kuehne + Nagel A.E., 330 Venizelou Ave, 17675 Kallithea, Athens, Greece;

ÖBB-Holding AG, Am Hauptbahnhof 2, 1100 Vienna, Austria;

Rail Cargo Austria AG, Am Hauptbahnhof 2, 1100 Vienna, Austria;

Rail Cargo Logistics – Austria GmbH, Am Hauptbahnhof 2, 1100 Vienna, Austria;

Express Interfracht Hellas A.E., P.O. Box 1166, Block 32/Zone C, Industrial Area of Sindos, 57022 Thessaloniki, Greece;

Deutsche Bahn AG, Potsdamer Platz 2, 10785 Berlin, Germany;

Schenker AG, Alfredstraße 81, 45130 Essen, Germany;

Schenker & Co. AG, Stella-Klein-Löw-Weg 11, 1020 Vienna, Austria;

Schenker A.E., 29, Lyssikratous str., 17674 Kallithea, Athens, Greece.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 15.7.2015

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION