EUROPEAN COMMISSION
Competition DG

CASE AT.40330 – RAIL CARGO

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 20/04/2021

EUROPEAN
COMMISSION

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PUBLIC VERSION

COMMISSION DECISION

of 20.4.2021

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

(AT.40330 – RAIL CARGO)

(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[1],

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[2], 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[3], as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008[4] and Commission Regulation (EU) 2015/1348 of 3 August 2015[5] as regards the conduct of settlement procedures in cartel cases, and in particular Article 10a thereof,

Having regard to the Commission Decision of 4 April 2019 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 12 of Commission 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,

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1 OJ, C 115, 9/5/2008, p. 47.

2 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 ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82of the EC Treaty where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market".

3 OJ L 123, 27.4.2004, p. 18.

4 OJ L 171, 1.7.2008, p. 3.

5 OJ L 208, 5.8.2015, p. 3.

Whereas:

1. INTRODUCTION

(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty. The infringement concerned **cross-border rail cargo transport services** in the European Union[6] provided under the so-called *freight sharing* model[7] and carried out in blocktrains[8] by the three railway undertakings ÖBB, DB and SNCB. The conduct amounted to anti-competitive customer allocation and lasted from December 2008 to April 2014.

(2) This Decision is addressed to the following entities:

ÖBB:

– Österreichische Bundesbahnen-Holding Aktiengesellschaft;

– Rail Cargo Austria Aktiengesellschaft;

DB:

– Deutsche Bahn AG;

– DB Cargo AG;

– DB Cargo BTT GmbH;

SNCB:

– Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht;

– LINEAS Group NV (formerly SNCB Logistics NV/SA);

– LINEAS NV (formerly Xpedys NV/SA).

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The services concerned

(3) The services concerned are cross-border rail cargo transport services for transport of goods in blocktrains in conventional rail cargo transport sectors provided under the so-called *freight sharing*[9] model. Cross-border rail cargo transports in blocktrains in

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6 The United Kingdom withdrew from the European Union as of 1 February 2020. Accordingly, any reference made to the EU in this Decision does not include the United Kingdom.

7 See footnote 9.

8 Blocktrains are cargo trains shipped from one site (e.g. the production site of the vendor of the transported goods) to another site (e.g. a warehouse of the purchaser of the goods) without being split up or stored on the way. Such blocktrains serve high-volume customers, often carry a single commodity and run on the same unchanged destination for long periods. Rail cargo transport services covered by Commission Decision of 15 July 2015 in case AT.40098 - Blocktrains are excluded from the scope of this case.

9 Under the so-called *freight sharing* model, railway undertakings cooperating on a given cross-border rail cargo transport service provide the customer with a single overall price for the entire service required under a single multilateral contract. See recital (29).

the automotive sector, as well as in the intermodal[10] sector, are outside the scope of this Decision.

(4) The services concerned:

– trilateral transports carried out by DB, ÖBB and SNCB, and

– bilateral transports carried out by DB and ÖBB.

(5) The transport services in question concerned some of the main rail corridors in the Union.

2.2. Undertakings subject to the proceedings

2.2.1. Undertaking ÖBB

(6) Österreichische Bundesbahnen-Holding Aktiengesellschaft with its subsidiaries ('ÖBB') is an undertaking active, among other things, in the provision of rail cargo transport services in Europe. The undertaking's worldwide turnover in 2019 was approximately EUR 4.4 billion. ÖBB is the incumbent in Austria and took over cargo operations in Hungary in late 2007.[11]

(7) The relevant legal entities of ÖBB that the Commission regards for the purposes of this Decision as constituting one undertaking at the time of the infringement are:

– **Österreichische Bundesbahnen-Holding Aktiengesellschaft**, with registered offices at Am Hauptbahnhof 2, 1100 Vienna, Austria;

– **Rail Cargo Austria Aktiengesellschaft**, with registered offices at Am Hauptbahnhof 2, 1100 Vienna, Austria.

2.2.2. Undertaking DB

(8) Deutsche Bahn AG with its subsidiaries ('DB') is an undertaking active, among other things, in the provision of rail cargo transport services in Europe. The undertaking's worldwide turnover in 2019 was approximately EUR 44 billion. DB is the incumbent in Germany and in the Netherlands.[12]

(9) The relevant legal entities of DB that the Commission regards for the purposes of this Decision as constituting one undertaking at the time of the infringement are:

– **Deutsche Bahn AG**, with registered offices at Potsdamer Platz 2, 10785 Berlin, Germany;

– **DB Cargo AG**, with registered offices at Rheinstr. 2, 55116 Mainz, Germany;

– **DB Cargo BTT GmbH**, with registered offices at Rheinstr. 2a, 55116 Mainz, Germany.

The *freight sharing* model was gradually phased out over time by several railway undertakings in the relevant period and thereafter.

10 Intermodal freight transport involves the transportation of freight in containers or vehicles, using multiple modes of transportation such as rail, ships and trucks.

11 […].

12 […].

2.2.3. Undertaking SNCB

(10) Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht with its subsidiaries ('SNCB') is an undertaking active, among other things, in the provision of rail cargo transport services in Europe. The undertaking's worldwide turnover in 2019 was approximately EUR 1.17 billion. SNCB is the incumbent in Belgium.

(11) The relevant legal entities of SNCB that the Commission regards for the purposes of this Decision as constituting one undertaking at the time of the infringement are:

– **Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht**, with registered offices at Rue de France/Frankrijkstraat 56, 1060 Brussels, Belgium;

– **LINEAS Group NV** (formerly SNCB Logistics NV/SA), with registered offices at Koning Albert II Laan 37, 1030 Brussels, Belgium;

– **LINEAS NV** (formerly Xpedys NV/SA), with registered offices at Koning Albert II Laan 37, 1030 Brussels, Belgium.

3. PROCEDURE

(12) On 24 April 2015, ÖBB applied for a marker, which it perfected with a full application for immunity from fines under the Commission notice on immunity from fines and reduction of fines in cartel cases[13] ('the Leniency Notice') on 29 May 2015. Further to its immunity application, ÖBB provided a number of submissions consisting of oral statements and documentary evidence. On 21 September 2015, the Commission granted ÖBB conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.[14]

(13) Beginning on 29 September 2015, the Commission carried out unannounced inspections at the premises of DB in Germany.

(14) On 15 October 2015, DB applied for a marker and, on 1 February 2016, DB perfected its marker application and applied for immunity from or a reduction of fines under the Leniency Notice.

(15) The Commission sent several requests for information under Article 18 of Regulation (EC) No 1/2003 to DB, SNCB and other railway undertakings in the Union.

(16) On 16 September 2016, SNCB applied for a reduction of fines under the Leniency Notice.

(17) On 4 April 2019, the Commission initiated proceedings pursuant to Article 2(1) of Regulation (EC) No 773/2004 against the addressees of this Decision (also referred to collectively as the 'parties' or individually as 'party') with a view to engaging in settlement discussions with them under the Commission Notice on the conduct of

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

14 The investigation file was originally contained in three separate administrative case files (AT.40301, AT.40302 and AT.40317) which were merged into case AT.40330 - Rail Cargo in January 2016.

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[15] (the 'Settlement Notice').

(18) On 4 April 2019, the Commission adopted decisions preliminarily concluding that DB and SNCB had met the conditions of point 27 of the Leniency Notice and established the applicable ranges of the reductions in the level of fines that each of the undertakings would receive in respect of the infringement, provided that they continued to meet the conditions of point 12 of the Leniency Notice.

(19) After each party had confirmed its willingness to engage in settlement discussions, settlement meetings between each party and the Commission took place between 2 May 2019 and 28 August 2020.

(20) During the settlement meetings, the Commission informed the parties of the objections it envisaged raising against them and disclosed to them the main pieces of evidence in the Commission file that it relied upon to establish those objections.

(21) Between 2 and 21 May 2019, the parties had access to the relevant documentary evidence, as well as to a list of all the documents in the file. The parties were granted access, at the Commission premises, to all oral statements submitted under the Leniency Notice. The Commission also provided the parties with a copy of the relevant pieces of evidence.

(22) Furthermore, the Commission provided the parties with an estimation of the range of fines likely to be imposed by the Commission.

(23) Each party expressed its view on the objections that the Commission envisaged raising against it. The Commission carefully considered the parties' comments and took them into account where justified. At the end of the settlement discussions, all parties considered that there was sufficient common understanding as regards the potential objections and the estimation of the range of likely fines to continue the settlement process.

(24) By […], the parties submitted to the Commission their formal requests to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004 (the 'settlement submissions'). The settlement submission of each party contained:

– an acknowledgement in clear and unequivocal terms of the party's liability for the infringement summarily described as regards its object, the main facts, their legal qualification, including the party's role and the duration of its participation in the infringement;

– an indication of the maximum amount of the fine that the party expects to be imposed by the Commission and which it would accept in the framework of a settlement procedure;

– the party's confirmation that it has been sufficiently informed of the objections the Commission envisages raising against it and that it has been given sufficient opportunity to make its views known to the Commission;

– the party's confirmation that it does not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Commission does

[15] OJ C 167, 2.7.2008, p. 1.

not reflect its settlement submission in the Statement of Objections and the Decision;

– 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.

(25) Each party made its settlement submission conditional upon the imposition of a fine by the Commission, which does not exceed the amount specified in its settlement submission.

(26) On 4 December 2020, the Commission adopted a Statement of Objections, which was notified to the parties in the following days.

(27) All of the parties replied to the Statement of Objections confirming that it reflected the contents of their settlement submissions and that they remained committed to following the settlement procedure. The parties declared that the allegations retained against them corresponded to their settlement submissions in which they had acknowledged in clear and unequivocal terms their liability for the infringement summarily described as regards its object, the main facts and their legal qualification, including their role and the duration of their participation in the infringement.

(28) Having regard to the clear and unequivocal acknowledgments of the parties given in their settlement submissions and to their clear and unequivocal confirmation that the Statement of Objections reflected their settlement submissions, it is concluded that the addressees of this Decision should be held liable for the infringement described in this Decision.

4. DESCRIPTION OF THE EVENTS

4.1. Nature, objective and scope of the conduct

(29) This case concerns customer allocation relating to cross-border rail cargo transport services by DB, ÖBB and SNCB. The anticompetitive conduct took place between December 2008 and April 2014. It concerned conventional transports of goods in blocktrains, except in the automotive sector, carried out under the so-called *freight sharing* model. Under the *freight sharing* model, railway undertakings cooperating on a given cross-border rail cargo transport service provide the customer with a single overall price for the entire service required under a single multilateral contract.[16]

(30) DB, ÖBB and SNCB protected each other's position as lead carrier for existing business. Under the *freight sharing* model, the lead carrier is the railway undertaking which acts as main interlocutor with the customer, although all railway undertakings involved become parties to the transport contract (unlike in a sub-contracting relationship). To that end, they coordinated their respective offers to the customers and provided each other with cover quotes to potential other customers requesting price offers for existing business where the position of lead carrier for such business was at stake.

[16] For a description of the functioning of the *freight sharing* model see below recitals 33 et seq.; […].

(31) The conduct originated from the joint provision of cross-border rail cargo transport services carried out under the *freight sharing* model. It was implemented by contacts between DB, ÖBB, and later SNCB, at all levels of business operations in the undertakings. DB, ÖBB and SNCB were at the time all vertically integrated railway undertakings, providing both railway services (traction) and logistics / shipping agent services within their groups.[17]

(32) Cooperation by railway undertakings on the joint provision of cross-border rail cargo services as such, including joint pricing in the framework of the *freight sharing* model, is outside the scope of Article 101(1) of the Treaty by virtue of Council Regulation (EC) No 169/2009[18] and is not put in question by the proceedings in this case.[19] However, apart from legitimate contacts in the context of cooperation in the framework of the *freight sharing* model, DB, ÖBB and SNCB held occasional meetings and had other contacts. In these exchanges conduct took place that went beyond what was required to carry out joint cross border rail cargo transport services, which do not fall under the exceptions foreseen by Council Regulation (EC) No 169/2009.

(33) Under the *freight sharing* model, the participating railway undertakings jointly agree on the conditions for the joint cross-border rail cargo transport service, including a single price originally calculated based on 'global tariffs'.[20]

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17 DB, ÖBB and SNCB are the incumbents in Germany, Austria and Belgium. DB took over cargo operations in the Netherlands from the former incumbent in 2003, ÖBB in Hungary in late 2007.

18 Council Regulation (EC) No 169/2009 of 26 February 2009 applying rules of competition to transport by rail, road and inland waterway (OJ L 61, 5.3.2009, p. 1).

19 […].

Such joint price formation processes are provided for in Council Regulation (EC) No 169/2009 :

"*Art.2(1) The prohibition in Article* [101](*1) of the Treaty shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation by means of:*

[…]

(c) the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;

[…]
(g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions."

[…].

20 Global tariffs ("*Verbandstarife*") are a jointly developed price matrix taking into account the distance serviced by each railway undertaking involved in a transport.

In other parts of Europe, notably in Eastern Europe, railway undertakings used another system of the *freight sharing* model whereby the prices for the different transport legs were simply added up. It is the so-called 'composite tariffs' system. Under that type, each railway undertaking autonomously decided a basic tariff for its own transport leg. The tariffs were composed from several tables (1 per transport leg) in which kilometre-staggered freight rates for all required transport legs could be identified. Based on the respective number of kilometres corresponding amounts could be added from the tables to get to the overall price. […].

(34) Within the group of railway undertakings involved in a given transport governed by the *freight sharing* model, one of the railway undertakings acts as 'lead carrier'. Before making an offer to a customer, the railway undertakings involved agree on an overall price for that customer. Such discussions are often initiated by the lead carrier. The lead carrier receives the entire freight from the customer and distributes individual shares to the other railway undertakings involved (therefore '*freight sharing'* model).

(35) Under the *freight sharing* model, the lead carrier is the main interlocutor with the customer. Customer agreements are concluded by the lead carrier (also on behalf of other railway undertakings involved) and the contract partner ('customer'), which may be a final customer, a (third party or in-house) freight forwarder organising the transport for a final customer or another intermediary.

(36) The role of lead carrier ("*Federführung*") can have important advantages, notably in building and maintaining customer relationships, which potentially provide further and/or future business opportunities.[21] Mutual recognition of the role of lead carrier in 'existing business' was therefore at the core of the collusive scheme operated by DB, ÖBB and SNCB.

(37) The mutual understanding between the parties was that the lead carrier position for 'existing business' should be protected for the rail undertaking which held that position for a given existing business, and that any switching of the lead carrier position by that customer should be avoided.

(38) For the purposes of the conduct by the parties, 'existing business' related to existing customer agreements under which transports had already been carried out by the railway undertakings involved and was defined by ÖBB, DB and SNCB in the context of their collusive understanding by its start or end point, type of good, and by the identity of the final customer for which the goods were transported.

(39) DB, ÖBB and SNCB developed a wide understanding of the notion of 'existing business', covering different situations in which a customer relationship had been established. They mainly considered as 'existing business' nearly all transport relations for which a (joint) *freight sharing* contract with a customer already existed, and in respect of which one of them therefore acted as lead carrier. However, they sometimes also considered contract renewals and re-tendering ("*Neuvergaben*" and "*Neuausschreibungen*") for transport relations of customers that had been serviced before as protected 'existing business' ("*geschützte Bestandsverkehre*").[22]

(40) To protect the role of lead carrier, DB, ÖBB and SNCB abstained from making offers to potential other customers, or made cover quotes to potential other customers who asked for quotes for an 'existing business'. Such cover quotes usually included a mark-up ("*Kundenschutz*", "*Schutzpreisangebote*") on top of the price of the respective 'existing business' (for example +2% or +5%). The railway undertaking which had received a request for quotation from a potential other customer for an

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21 Ancillary services offered may consist, for example, in transport to/from loading/unloading train stations and storage services for transported goods. If the financial climate allowed, income from interest on customer payments to the lead carrier was also not excluded (given that the lead carrier only passed on the respective shares to the other carriers at a later stage).

22 […].

'existing business' would therefore either offer a higher quote or let the lead carrier respond without making an offer itself.[23]

(41) The collusive scheme was implemented through competitor contacts concerning the protection of the role of lead carrier for one of the parties or to agree amongst themselves which carrier would be the lead carrier for a given 'existing business' where it was occasionally in dispute.[24]

(42) Protecting the role of lead carrier for 'existing business' was important for DB, ÖBB and SNCB, because key transport relations for big customers remained stable over time. The collusive scheme served to ensure that discussions during ongoing customer contracts or on the occasion of renewal/prolongation of customer contracts would not result in a change of the lead carrier.[25]

(43) Exceptionally, however, the role of lead carrier could nevertheless change between the railway undertakings involved in an 'existing business' despite their collusive scheme, if a customer insisted on a switch of lead carrier. In such situations, the approached railway undertaking would ask the customer to explicitly state its wish for change. Sometimes, the role of lead carrier could also change despite protection prices having been offered, for example, where the new customer could compensate the higher price with less costly ancillary services or in view of advantages due to bundling of different transports for the same customer.[26]

(44) The *freight sharing* model is characterised by a high degree of systemic transparency between the railway undertakings involved in any given transport as regards all important business aspects, including transported goods, type of transport, identity of the final customer, specific destination (start/end point) of the route served, overall price, prices for individual transport legs and even price comparisons across customers.[27]

(45) However, the conduct in this case that qualifies as collusive is not a necessary feature of the *freight sharing* model itself. Competing railway undertakings may use the *freight sharing* model to operate cross-border transport services together - without adhering to an anti-competitive understanding as was implemented in this case - to avoid competing for the lead carrier position in respect of certain customers and to maintain 'existing business'.

4.2. Geographic scope of the conduct

(46) The collusive scheme applied to cross-border rail cargo transport services on routes starting in, ending in or passing through Germany or Austria and carried out by DB and ÖBB.

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23 […].

24 […].

25 […]. This wide understanding of 'existing business' made, for example, that the majority of cross-border rail cargo transports of DB and ÖBB starting or ending in or passing through Germany and Austria were 'protected'.

26 […].

27 […].

(47) Cross-border rail cargo transports carried out by DB and ÖBB in this way extended also to Hungary (where ÖBB had taken over the incumbent railway undertaking) and to the Netherlands (where DB had taken over the incumbent railway undertaking).

(48) The same applied to transports starting or ending in Belgium carried out together with SNCB. SNCB participated in the infringement only to the extent that such trilateral transports were concerned.

4.3. Duration of the conduct

(49) There is a consistent pattern of collusive contacts between DB and ÖBB relating to the lead carrier role in rail cargo transport services on blocktrains carried out under the *freight sharing* model since **8 December 2008**.[28]

(50) Collusive trilateral contacts between DB, ÖBB and SNCB started on **15 November 2011**.[29] The last collusive contact between DB, ÖBB and SNCB took place on **30 April 2014.**[30]

(51) On this basis, the overall infringement is considered to have lasted from **8 December 2008** to **30 April 2014**. The starting date for SNCB however, was **15 November 2011**. The duration of the infringement has been determined on the basis of the documentary evidence in the Commission file proving the first and last collusive contacts between the parties.

(52) DB participated in the infringement throughout the duration of the infringement in bilateral transports with ÖBB and in trilateral transports with ÖBB and SNCB.

(53) ÖBB participated in the infringement throughout the duration of the infringement in bilateral transports with DB and in trilateral transports with DB and SNCB.

(54) SNCB participated in this scheme with DB and ÖBB as concerns trilateral cross-border rail cargo transport services under the *freight sharing* model provided in blocktrains starting or ending in Belgium. SNCB did not participate in the scheme as concerns bilateral cross-border rail cargo transport services that only DB and ÖBB carried out together.

5. LEGAL ASSESSMENT

(55) Having regard to the body of evidence, the facts as described above and the parties' clear and unequivocal acknowledgement of the facts and the legal qualification thereof contained in their settlement submissions, the legal assessment is set out as follows:

5.1. Application of Article 101(1) of the Treaty

5.1.1. Agreements and concerted practices

5.1.1.1. Principles

(56) Article 101 of the Treaty prohibits *agreements* between undertakings, decisions by associations of undertakings and *concerted practices*, which may affect trade

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28 […].

29 […].

30 […].

between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

(57) 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 a 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. Thus, conduct may fall under Article 101 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.[31]

(58) Article 101(1) of the Treaty precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself, or contemplates following, on the market, where the object or effect of those contacts is to restrict competition.[32]

(59) The concepts of *agreement* and *concerted practice* are fluid and 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.

(60) It is not necessary to define exactly whether a 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 by their own conduct intended to contribute 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 those common objectives (or could reasonably have foreseen it and were prepared to take the risk).[33]

5.1.1.2. Application in this case

(61) As it emerges from the facts described above and from the parties' clear and unequivocal acknowledgement of the facts and the legal qualification thereof contained in their settlement submissions, the parties participated in a collusive scheme, which consisted in a common understanding to maintain the role of lead carrier for each other so as to protect existing business. To implement the scheme, DB, ÖBB and SNCB mutually protected each other's role of lead carrier in existing

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31 See Case T-7/89, *Hercules v Commission*, EU:T:1991:75, paragraph 256. See also Case 48/69, *Imperial Chemical Industries v Commission*, EU:C:1972:70, paragraph 64, and Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission*, EU:C:1975:174, paragraphs 173-174.

32 Case T-396/10, *Zucchetti v Commission*, EU:T:2013:446, paragraph 56 and case-law cited therein.

33 Case C-49/92 P, *Commission v Anic Partecipazioni*, EU:C:1999:356, paragraphs 81-87.

rail cargo transport business in blocktrains carried out under the *freight sharing* model, including by way of cover quotes, and exchanged sensitive information in that respect.

(62) These different forms of conduct can be classified as agreements and/or concerted practices.

(63) The Commission therefore concludes that the conduct described above presents all the characteristics of an agreement between undertakings or a concerted practice, or both, within the meaning of Article 101(1) of the Treaty.

5.1.2. Single and continuous infringement

5.1.2.1. Principles

(64) 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 common objective distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[34]

(65) An undertaking that has participated in such a single and continuous infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anti-competitive objective for the purposes of Article 101(1) of the Treaty and was intended to help bring about the infringement as a whole, may accordingly be liable also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the case where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participating undertakings and that it was aware of the anti-competitive conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk.[35]

(66) An undertaking may thus have participated directly in all the aspects of anti-competitive conduct comprising a single infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the anti-competitive conduct comprising a single infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such a case, the Commission is also entitled to attribute

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34 Joined Cases C-204/00 etc. *Aalborg Portland et al.*, EU:C:2004:6, paragraph 258.

35 Case C-441/11 P, *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph 42; Case 49/92 P *Commission v Anic Partecipazioni*,EU:C:1999:356, paragraph 83.

liability to that undertaking in relation to all the anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.[36]

(67) On the other hand, if an undertaking has directly taken part in one or more of the aspects of anti-competitive conduct comprising a single infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other unlawful conduct planned or put into effect by those other participants in pursuit of the same objectives or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it participated directly and the conduct planned or put into effect by the other participants in pursuit of the same objectives as those pursued by that undertaking where it has been shown that the undertaking was aware of that conduct or could reasonably have foreseen it and was prepared to take the risk.[37]

5.1.2.2. Application in this case

(68) The collusive arrangements between DB, ÖBB and SNCB pursued a single economic aim, namely to protect the role of the lead carrier for existing business with rail cargo transported on blocktrains.

(69) The undertakings involved remained the same throughout the infringement period (without prejudice to SNCB's later entry) and there was generally a considerable degree of continuity among the individuals directly involved in the collusive conduct.

(70) The existence of a single and continuous overall infringement is supported by the fact that the conduct of the participants followed broadly the same pattern throughout the infringement period – even if the arrangements were adapted to the circumstances, in particular in light of the fact that the *freight sharing* model was gradually phased out[38] over time. The evidence reflecting the collusive understanding of DB, ÖBB and SNCB concerning protection of the role of lead carrier ("*Federführung*") also refers to the German term "*Bestandschutz*" or "*Kundenschutz*" and a price mark-up for cover quotes. This type of evidence relates to various conventional cross-border rail cargo transports in blocktrains. For certain participants, the same individuals dealt with transports concerned by the different legs of infringement. There is documentary evidence i) concerning bilateral transports of DB and ÖBB and ii) covering discussions of several transport sectors or the broader relationship between the railway undertakings on the same occasion.[39]

(71) None of the railway undertakings involved distanced itself publicly from the collusive arrangements at any point in time during the duration of the infringement.

(72) The conduct described above therefore presents all the characteristics of a single and continuous infringement of Article 101(1) of the Treaty.

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36 Case C-441/11 P *Commission* v *Verhuizingen Coppens*, EU:C:2012:778, paragraph. 43.

37 Case C-441/11 P *Commission* v *Verhuizingen Coppens* EU:C:2012:778, paragraph. 44.

38 See footnote 9.

39 See footnote 25.

(73) DB and ÖBB were involved in all aspects of the collusive scheme throughout the infringement period. SNCB was involved only in the collusive contacts concerning trilateral transports carried out by DB, ÖBB and SNCB. SNCB was not involved in collusive contacts concerning bilateral transports carried out by DB and ÖBB. Based on the evidence on file, it cannot be established that SNCB was aware or should have been aware of bilateral anti-competitive contacts between ÖBB and DB.

(74) The Commission therefore concludes that DB and ÖBB should be held responsible for the single and continuous infringement in its entirety, while SNCB should only be held responsible to the extent that it participated in it, i.e. for trilateral transports carried out by DB, ÖBB and SNCB.

5.1.3. Restriction of competition

5.1.3.1. Principles

(75) To come within the prohibition laid down in Article 101(1) of the Treaty, an agreement or 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.

(76) It is apparent from the case-law of the Court of Justice of the European Union that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[40] That principle 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.[41] Article 101 of the Treaty is intended to protect not only the interests of competitors or consumers, but also the structure of the market and thus competition.[42]

(77) Consequently, certain collusive behaviour 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.[43]

(78) Customer allocation is a classic form of hard core cartel conduct and a form of market sharing. Article 101(1)(c) of the Treaty explicitly prohibits market sharing. Market sharing between competitors is therefore an infringement by object.

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40 Case C-67/13 P, *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 49 ; Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 113.

41 Joined Cases 56/64 and 58/64, *Consten and Grundig* v *Commission*, EU:C:1966:41.; 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, *Limburgse Vinyl Maatschappij and Others* v *Commission*, EU:C:2002:582, paragraph 508 ; Case C-389/10 P, *KME Germany and Others* v *Commission*, EU:C:2011:816, paragraph 75 ; Case C-67/13 P, *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 50 ; Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 114.

42 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others* v *Commission and Others*, EU:C:2009:610, paragraph 63.

43 Case C-67/13 P, *Groupement des Cartes Bancaires v Commission*, EU:C:2014:2204, paragraph 51 ; Case C-286/13 P, *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 115.

5.1.3.2. Application in this case

(79) The market for cross-border rail cargo transport services in the Union has been liberalised since 2007, so that no legal barriers to entry exist for railway undertakings to provide such services in the Member States concerned by the conduct. Competition on the market was therefore possible.

(80) Competition was already possible in the infringement period, because blocktrain services could be carried out profitably, certainly when provided on long-distance cross-border destinations, and notably in high-volume segments. Since liberalisation, new market participants have started to offer blocktrain services on certain cross-border rail cargo routes at issue. Competition had therefore become possible as regards cross-border rail cargo transport services on blocktrains in the relevant period on the routes concerned.

(81) All cross-border rail cargo transport services concerned by the conduct of DB, ÖBB and SNCB were carried out under the *freight sharing* model and in the form of blocktrain services.

(82) The anti-competitive conduct of DB, ÖBB and SNCB constituted a form of coordination, which went beyond what was required to jointly provide cross-border rail cargo blocktrain services and consisted in a general understanding to maintain the role of lead carrier for each other so as to protect existing business. To implement the anti-competitive conduct, the parties mutually protected each other's role as lead carrier in existing rail cargo transport business in blocktrains carried out under the freight sharing model, including by providing cover quotes, and exchanged sensitive information in that respect. This conduct was capable of restricting competition in the Union and had the purpose of doing so.

(83) In light of the above and based on the submissions of the parties and the other evidence obtained in the course of the investigation, it is therefore concluded that the conduct should be regarded as having as its object the restriction of competition within the meaning of Article 101(1) of the Treaty.[44] There is no need to take into account the effects of the conduct and to consider whether or not the parties ultimately succeeded in reaching their aim.[45]

5.1.4. Capability to affect trade between Member States

5.1.4.1. Principles

(84) 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.[46]

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44 See Case C-8/08, *T-Mobile Netherlands and Others*, EU:C:2009:343, paragraphs 33, 35, 41; C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, paragraph 134, T-270/12 *Panalpina World Transport (Holding) and Others v Commission*, EU:T:2016:109, paragraph 200, T-180/15 *Icap plc v European Commission*, EU:T:2017:795, paragraph 63 and 75.

45 See Case-T-62/98, *Volkswagen v Commission*, EU:T:200:180, paragraph 178; Case T-264/12 *UTi Worldwide and Others v Commission*, EU:T:2016:112, paragraph 118.

46 Case T-265/12, *Schenker Ltd v Commission*, EU:T:2016:111, paragraph 151.

5.1.4.2. Application in this case

(85) Between December 2008 and April 2014, DB, ÖBB and - since November 2011 - also SNCB offered cross-border rail cargo transport services in blocktrains. Cross-border trade between Member States is significant for high volume cargo transports in the Union. The rail cargo corridors concerned by the coordination activities are key West-East and North-South rail corridors connecting essential industrial areas in the Union.

(86) The Commission therefore concludes that the conduct was capable of having an appreciable effect upon trade between Member States within the meaning of Article 101(1) of the Treaty.

5.1.5. Non-applicability of Article 101(3) of the Treaty

(87) On the basis of the facts before the Commission, there are no indications - and the parties do not allege - that the conditions of Article 101(3) of the Treaty are met in this case. Accordingly, the Commission concludes that the conditions of Article 101(3) of the Treaty are not fulfilled in this case.

6. DURATION OF ADDRESSEES' PARTICIPATION IN THE INFRINGEMENT

(88) In view of the facts and the evidence set out in Section 4, the Commission concludes in Table 1 that the duration of the participation of each party in the infringement was as follows:

TABLE 1

Undertaking	**Participation in the infringement** (start and end date)		**Duration** (in days)	**Duration** (in years)
ÖBB	8 December 2008	30 April 2014	1970 days	5,39
DB	8 December 2008	30 April 2014	1970 days	5,39
SNCB	15 November 2011	30 April 2014	898 days	2,45

7. LIABILITY

7.1. Principles

(89) Union competition law 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.[47]

(90) When such an entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. The conduct of a subsidiary can be imputed to its parent company where the parent company exercises a decisive influence over it, namely where that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company. In effect, as the

[47] Case C-511/11 P, *Versalis v Commission*, EU:C:2013:386, paragraph 51.

controlling company in the undertaking, the parent company is deemed to have itself committed the infringement of Article 101 of the Treaty.[48]

(91) The Commission cannot merely find that a legal entity is able to exert decisive influence over another legal entity, without checking whether that influence was actually exerted. As a rule, it is for the Commission to demonstrate such decisive influence on the basis of factual evidence, including any management power one of the legal entities may have over the other.[49]

(92) Where one parent holds all or almost all of the capital in a subsidiary, which has committed an infringement, there is a rebuttable presumption that that parent company in fact does exercise 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 the subsidiary is held by the parent company in order to take the view that that presumption applies.[50]

(93) When an entity, which has committed an infringement, is subject to a legal or organisational change, this change does not necessarily create a new undertaking free of liability for the conduct of its predecessor, which infringed the competition rules, when, from an economic point of view, the two entities are identical. Where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been under the control of the same person and have, therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions.[51]

(94) Where several legal entities of one and the same undertaking may be held liable for the participation in an infringement, they must be regarded as jointly and severally liable for that infringement.

7.2. Application in this case

(95) Having regard to the facts described above, the body of evidence relied on, and the clear and unequivocal acknowledgements by the parties in their settlement submissions of the facts and the legal qualification thereof, as well as of their liability for the alleged infringement, the Commission attributes liability for the infringement

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48 Case C-97/08 P, *Akzo Nobel and others v Commission*, EU:C:2009:536, paragraph 61;Case C-521/09 P, *Elf Aquitaine* v *Commission*, EU:C:2011:620, paragraphs 57 and 63; Joined cases C-628/10 P and C-14/11 P, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, EU:C:2012:479, paragraphs 43 and 46; Case C-508/11 P, *ENI* v *Commission*, EU:C:2013:289, paragraph 47; Case C-286/98 P, *Stora Kopparbergs Bergslags v Commission*, EU:C:2000:630, paragraph 29; Case T-391/09, *Evonik Degussa et AlzChem v Commission*, EU:T:2014:22, paragraph 77; Case C-440/11 P, *Commission v Stichting Administratiekantoor Portielje*, EU:C:2013:514, paragraph 41.

49 Joined Cases T-56/09 and T-73/09 *Saint-Gobain Glass France and others v Commission*, EU:T:2014:160, paragraph 311.

50 Case C-97/08 P, *Akzo Nobel and others v Commission*, EU:C:2009:536, paragraph 60.

51 Case C-434/13 P, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, EU:C:2014:2456, paragraphs 40-41.

of Article 101(1) of the Treaty to the undertakings involved in the collusive conduct as set out below.

7.2.1. DB: Deutsche Bahn AG, DB Cargo AG and DB Cargo BTT GmbH

(96) Deutsche Bahn AG is the ultimate parent company of the DB Group. Throughout the infringement, DB Cargo AG and DB Cargo BTT GmbH were 100% subsidiaries of Deutsche Bahn AG. DB Cargo AG was the parent company in charge of DB's cargo business. The Commission therefore presumes that Deutsche Bahn AG exercised decisive influence on all relevant subsidiaries to which this Decision is addressed. DB did not put forward arguments or demonstrate that its subsidiaries acted independently of the decisive influence of Deutsche Bahn AG in that period.

(97) For the participation of DB in the infringement, the Commission concludes that the following legal entities should be held jointly and severally liable:

– for its direct participation: **DB Cargo BTT GmbH** (formerly BTT Bahn Tank Transport GmbH and later DB Schenker BTT GmbH);

– for its direct participation, as well as intermediate parent company: **DB Cargo AG** (formerly Railion GmbH, later DB Schenker Rail GmbH and then merged into DB Schenker Rail AG; also formerly Railion Deutschland AG, later DB Schenker Rail Deutschland AG, later DB Schenker Rail AG);

– as ultimate parent company: **Deutsche Bahn AG**.

7.2.2. ÖBB: Österreichische Bundesbahnen-Holding Aktiengesellschaft and Rail Cargo Austria Aktiengesellschaft

(98) Österreichische Bundesbahnen-Holding Aktiengesellschaft ('ÖBB Holding AG') is the holding company and responsible for strategic control of the ÖBB Group of companies. Rail Cargo Austria Aktiengesellschaft is a 100%-subsidiary of ÖBB Holding AG. Rail Cargo Austria Aktiengesellschaft operates as a railway undertaking in the rail cargo sector and is the parent company in charge of ÖBB's rail cargo business. Throughout the infringement, ÖBB Holding AG was the sole shareholder of Rail Cargo Austria Aktiengesellschaft. The Commission therefore presumes that ÖBB Holding AG exercised decisive influence on all relevant subsidiaries to which this Decision is addressed. ÖBB did not put forward arguments or demonstrate that its subsidiaries acted independently of the decisive influence of ÖBB Holding AG in that period.

(99) For the participation of ÖBB in the infringement, the Commission concludes that the following legal entities should be held jointly and severally liable:

– for its direct participation: **Rail Cargo Austria Aktiengesellschaft**;

– as parent company: **Österreichische Bundesbahnen-Holding Aktiengesellschaft**.

7.2.3. SNCB: Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht, LINEAS Group NV and LINEAS NV

(100) Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht, is the ultimate operational parent company of the SNCB-group. Throughout the infringement, LINEAS Group NV (formerly named SNCB Logistics NV/SA) was a 100%-subsidiary of SNCB SA and was in charge of SNCB's cargo business. The

Commission therefore presumes that SNCB SA exercised decisive influence on all relevant subsidiaries to which this Decision is addressed. SNCB did not put forward arguments or demonstrate that its subsidiaries acted independently of the decisive influence of SNCB/NMBS SA/NV in that period.

(101) For the participation of SNCB in the infringement, the Commission concludes that the following legal entities should be held jointly and severally liable:

– for its direct participation: **LINEAS NV** (formerly Xpedys NV/SA);

– as intermediate parent company: **LINEAS Group NV** (formerly SNCB Logistics NV/SA);

– as parent company: **Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht**.

8. REMEDIES

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

(102) 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) 1/2003.

(103) Given the secrecy in which the cartel arrangements are usually carried out and the gravity of such infringements, the undertakings to which this Decision is addressed should be required to bring the infringement to an end (if they have not already done so) and to refrain from any future agreement, concerted practice or decision of an association which may have the same or a similar object or effect.

8.2. Article 23(2) and (3) of Regulation (EC) No 1/2003

(104) Under Article 23(2) of Regulation (EC) No 1/2003[52], the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(105) The Commission considers that, based on the facts described above and the legal assessment that the infringement is tantamount to a customer allocation scheme between competitors. Such an infringement is committed either intentionally or negligently.

(106) Fines should therefore be imposed on the addressees of this Decision.

(107) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of any fine, regard shall be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission refers to the principles laid down

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[52] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102] of the Treaty […] shall apply *mutatis mutandis*" (OJ L 305/6 of 30 November 1994).

in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003[53] ('the Guidelines on fines').

(108) 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/or whether or not the infringement has been implemented.

(109) In assessing the fines to be imposed on each undertaking, the Commission also takes account of the respective duration of its participation in the infringement as described in point 24 of the Guidelines on fines.

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

8.3. Calculation of the fines

(111) In accordance with the Guidelines on fines, the Commission determines a basic amount 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 relates in a given year (normally, the last full 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 may then be increased or reduced if either aggravating or mitigating circumstances are retained.

8.3.1. The value of sales

(112) 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,[54] 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 in the European Union.

(113) In this case, the relevant value of sales is each undertaking's sales of conventional cross-border rail cargo transport services (except in the automotive sector) provided on blocktrains under the *freight sharing* model and carried out in cooperation a) by the three railway undertakings DB, ÖBB and SNCB and starting or ending in or passing through Austria or Hungary, Germany or the Netherlands and Belgium and b) by DB and ÖBB and starting or ending in or passing through Austria or Hungary and Germany or the Netherlands.

(114) The Commission normally takes into account the sales made by the undertakings during the last full business year of their participation in the infringement.[55]

(115) In this case, the Commission takes into account for all undertakings their relevant sales in 2013, the last full business year of the infringement.

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53 OJ C 210, 1.09.2006, p. 2.

54 Point 12 of the Guidelines on fines.

55 Point 13 of the Guidelines on fines.

(116) Accordingly, the Commission takes into account the value of sales for each undertaking set out below to calculate the fine for the infringement. Each party has confirmed the relevant value of sales in its settlement submission.

TABLE 2

Undertaking	Value of sales (EUR)
ÖBB	[30 000 000 - 50 000 000]
DB	[50 000 000 – 70 000 000]
SNCB	[700 000 – 900 000]

8.3.2. Determination of the basic amount of the fines

(117) The basic amount consists of an amount of up to 30% of an undertaking's relevant sales, depending on the degree of gravity of the infringement and 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 sales, irrespective of duration.[56]

8.3.2.1. Gravity

(118) The gravity of the alleged 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.

(119) The Commission considers the facts described above, and, in particular, the fact that customer allocation is, by its very nature, among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale of the value of sales.[57]

(120) The proportion of the value of sales to be taken into account should, therefore, be 15% for this infringement.

8.3.2.2. Duration

(121) In assessing the fine to be imposed on each undertaking, the Commission also takes into consideration the respective duration of the participation of each undertaking in the alleged infringement, as described above. The increase for duration is calculated on the basis of days.[58]

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56 Points 19-26 of the Guidelines on fines.

57 Point 23 of the Guidelines on fines.

58 Point 24 of the Guidelines on fines.

TABLE 3

Undertaking	**Duration** (in days)	**Multiplication factor**
ÖBB	1970 days	5,39
DB	1970 days	5,39
SNCB	898 days	2,45

8.3.2.3. Determination of the additional amount

(122) The infringement committed by the parties is a customer allocation cartel. Therefore, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales to deter undertakings from even entering into such illegal practices on the basis of the criteria listed above with respect to the variable amount[59] namely 15%.

8.4. Adjustments to the basic amount

8.4.1. Aggravating or mitigating factors

(123) The Commission may consider aggravating circumstances that result in an increase of the basic amount. These circumstances are listed in a non-exhaustive way in point 28 of the Guidelines on fines. The Commission may also consider mitigating circumstances that result in a reduction of the basic amount. These circumstances are listed in a non-exhaustive way in point 29 of the Guidelines on fines.

(124) According to the case-law, the analysis of the gravity of the infringement must take account of any repeated infringement.[60]

(125) According to point 28 of the Guidelines on fines, where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102 of the Treaty, the basic amount will be increased by up to 100 % for each such infringement established.

(126) In this case, the Commission considers an aggravating circumstance for DB, namely recidivism due to a previous cartel prohibition Decision against Deutsche Bahn AG. The Commission considers in particular:

– Firstly, Deutsche Bahn AG, the ultimate parent company of the group, was an addressee of a previous Commission cartel prohibition Decision in case AT.39462 - *Freight Forwarding* in March 2012 ('*Freight Forwarding* Decision 2012'). The previous cartel prohibition Decision was therefore known to Deutsche Bahn AG;

– Secondly, both the infringement found by the Commission in the *Freight Forwarding* Decision of 2012 and the alleged cartel infringement in this case are prohibited by Article 101 of the Treaty, qualify as classic hard-core cartels and are the type of secret cartels explicitly covered by the Commission's

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59 Point 25 of the Guidelines on fines.

60 See Case C-3/06 *Groupe Danone v Commission*, EU:C:2007:88, paragraph 26.

Leniency Notice.[61] The liberalisation of the rail cargo sector since 2007 does not change this assessment;

– Thirdly, Deutsche Bahn AG continued the alleged infringement in this case for a significant period of time (more than two years) after having received the *Freight Forwarding* Decision 2012 (Rail Cargo infringement: December 2008 - April 2014, Freight Forwarding Decision: March 2012);

– Fourthly, DB argued that an uplift for recidivism would also not appropriately consider DB's early determination to switch from the *freight sharing* model to the *purchase/sale* model. However, this has no impact on the fact that DB repeated the same or a similar infringement after the Commission had found that the undertaking infringed Article 101 of the Treaty pursuant to paragraph 28 of the Guidelines on fines.

(127) The Commission therefore increases the basic amount of the fine for Deutsche Bahn AG by 50%.

(128) In the light of the facts described in Section 4, the Commission does not consider that there are any mitigating circumstances relevant for the purpose of this Decision.

8.4.2. Deterrence

(129) 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.[62]

(130) In this case, the Commission applies a deterrence multiplier of 1.1 only to DB due to its worldwide turnover of approximately EUR 44 billion in 2019.

8.5. Application of the 10% turnover limit

(131) Article 23(2) of Regulation (EC) No 1/2003 provides that for each undertaking participating in the infringement, the fine imposed shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission Decision.

(132) None of the fines calculated for any of the parties exceeds 10% of the undertaking's total turnover in 2019.

8.6. Application of the Leniency Notice

(133) On 24 April 2015, ÖBB applied for a marker, which it perfected on 29 May 2015. The Commission granted ÖBB conditional immunity from fines for the alleged infringement on 21 September 2015. ÖBB has continued to cooperate fully under the Leniency Notice throughout the procedure. The Commission hereby grants ÖBB immunity from fines for the infringement.

(134) On 15 October 2015, DB submitted an application for immunity from fines or, alternatively, for a reduction of fines under point 27 of the Leniency Notice. On 4 April 2019, the Commission informed DB of its intention to grant DB a leniency

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61 See Cases T-101/05 and T-111/05, *BASF and UCB / Commission*, EU:T:2007:380, paragraph 64.

62 Point 30 of the Guidelines on fines.

reduction within the range of 30%-50% of any fine that would otherwise have been imposed for the infringement.

(135) DB applied for leniency at a relatively early stage of the investigation, shortly after the inspections. It submitted evidence of the infringement, which represented significant added value with respect to the evidence already in the Commission´s possession. DB reported and confirmed a number of facts and submitted supporting contemporaneous documents, which facilitated the investigation. DB also recognised that a number of contacts went beyond what can be considered legitimate cooperation under the *freight-sharing* model. DB also provided detailed information on the extent of cooperation between railway undertakings for cross-border transport services under the (legal) freight-sharing model. However, certain information that DB provided in the application was already in the possession of the Commission.

(136) The fine imposed on DB should therefore be reduced by 45%.

(137) On 16 September 2016, SNCB submitted an application for immunity from or a reduction of a fine pursuant to Section II and III of the Leniency Notice. On 4 April 2019, the Commission informed SNCB of its intention to grant SNCB a leniency reduction within the range of 20%-30% of any fine that would otherwise have been imposed for the infringement.

(138) SNCB submitted contemporaneous, documentary evidence of contacts with ÖBB and DB and detailed information on the subject matter of these contacts, which helped the Commission to understand the functioning of the cartel and the relationships among the cartel members, and which largely and unequivocally corroborated the allegations made by the immunity applicant. Overall, SNCB's leniency application represented added value and considerably facilitated the establishment of the infringement, notably with regard to DB.

(139) The fine imposed on SNCB should therefore be reduced by 30%.

8.7. Application of the Settlement Notice

(140) According to point 32 of the Settlement Notice, the reward for settlement results in a reduction of 10% of the amount of the fine to be imposed after the 10% turnover cap has been applied having regard to the Guidelines on fines. Pursuant to point 33 of the Settlement Notice, when settled cases also involve leniency applicants, the reduction of the fine granted to them for settlement is to be applied in addition to their leniency reward.

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

9. CONCLUSION

(142) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are set out in Table 4.

TABLE 4

Undertaking	Fines (EUR)
ÖBB	0
DB	48 324 000
SNCB	270 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings infringed Article 101 of the Treaty on the Functioning of the European Union by participating, during the periods indicated in this Article, in a single and continuous infringement in the European Union consisting of customer allocation and the exchange of commercially sensitive information related to the provision of cross-border rail cargo transport services in conventional sectors (other than the automotive sector) under the *freight sharing* model carried out on routes (i) starting in, ending in or passing through Germany or the Netherlands, Austria or Hungary and Belgium by ÖBB, DB and SNCB and, (ii) starting in, ending in or passing through Germany or the Netherlands and Austria or Hungary by ÖBB and DB:

(a) **ÖBB:** Rail Cargo Austria Aktiengesellschaft and Österreichische Bundesbahnen-Holding Aktiengesellschaft, from 8 December 2008 to 30 April 2014;

(b) **DB:** DB Cargo BTT GmbH, DB Cargo AG and Deutsche Bahn AG, from 8 December 2008 to 30 April 2014;

(c) **SNCB:** LINEAS NV, LINEAS Group NV and Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht, from 15 November 2011 to 30 April 2014.

Article 2

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

(a) **ÖBB:**

– on Rail Cargo Austria Aktiengesellschaft and Österreichische Bundesbahnen-Holding Aktiengesellschaft, jointly and severally, the sum of **EUR 0**;

(b) **DB:**

– on Deutsche Bahn AG, DB Cargo BTT GmbH and DB Cargo AG jointly and severally the sum of **EUR 32 216 000**;

– on Deutsche Bahn AG the sum of **EUR 16 108 000**;

(c) **SNCB:**

– on LINEAS NV, LINEAS Group NV and Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht, jointly and severally, the sum of **EUR 270 000.**

The fines shall be credited, in euro, within six months of 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.: EC/BUFI/AT.40330

After the expiry of that 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 fines by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fines in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council.[63]

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:

(a) Rail Cargo Austria Aktiengesellschaft, Am Hauptbahnhof 2, 1100 Vienna, Austria;

(b) Österreichische Bundesbahnen-Holding Aktiengesellschaft, Am Hauptbahnhof 2, 1100 Vienna, Austria;

(c) DB Cargo BTT GmbH, Rheinstr. 2a, 55116 Mainz, Germany;

(d) DB Cargo AG, Rheinstr. 2, 55116 Mainz, Germany;

(e) Deutsche Bahn AG, Potsdamer Platz 2, 10785 Berlin, Germany;

(f) LINEAS NV, Koning Albert II Laan 37, 1030 Brussels, Belgium;

(g) LINEAS Group NV, Koning Albert II Laan 37, 1030 Brussels, Belgium;

(h) Société Nationale des Chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen (SNCB/NMBS) SA de droit public/NV van publiek recht, Rue de France/Frankrijkstraat 56, 1060 Brussels, Belgium.

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 20.4.2021

For the Commission
Margrethe VESTAGER
Executive Vice-President

[63] Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ L 193, 30.7.2018, p.1).