



EUROPEAN COMMISSION
Competition DG

***CASE AT. 40735 - Online rail ticket
distribution in Spain***

(Only the English text is authentic)

**ANTITRUST PROCEDURE
Council Regulation (EC) No 1/2003**

Article 9 Regulation (EC) 1/2003

Date: 17/01/2024

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Brussels, 17.1.2024
C(2024) 135 final

COMMISSION DECISION

of 17.1.2024

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the
European Union (TFEU)**

Case AT.40735 Online rail ticket distribution in Spain

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relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU)

Case AT.40735 - Online rail ticket distribution in Spain

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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 Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission decision of 28 April 2023 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 28 April 2023,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

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

Having regard to the final report of the Hearing Officer,

Whereas:

1. SUBJECT MATTER

- (1) The present Decision is addressed to Renfe-Operadora, E.P.E. and Renfe Viajeros, S.M.E., S.A. (hereinafter referred together as “Renfe”) and concerns the online distribution of rail tickets in Spain.
- (2) In its Preliminary Assessment of 28 April 2023, the Commission came to the provisional conclusion that Renfe’s practices in relation to the access of on-line rail ticket vendors (“Ticketing Platforms”) active in Spain to its full range of tickets, discounts and functionalities (collectively, “Content”) and real-time data (RTD) raised concerns as to its compatibility with Article 102 TFEU. Ticketing Platforms

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 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of “Community” by “Union” and “common market” by “internal market”. Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

are undertakings that provide ticketing for rail travel to individual and/or corporate customers through software application stores (e.g. Apple App Store or Google Play Store) or through a website. Content refers to all types of tickets, discounts and functionalities (e.g., possibility to process customers' reimbursement claims) related to Renfe passenger trains available on Renfe's own digital distribution channels and in any Renfe mobility platform.² RTD refers to information related to Renfe passenger trains, which can be pre-journey (e.g., platform number), on-journey (e.g., disruptions) or post-journey (e.g., information on delays that is needed to submit a compensation claim), that Renfe makes available for consumers through any of its direct digital distribution channels or communication channels or any Renfe mobility platform.

2. THE PARTY

- (3) Renfe is the Spanish 100% state-owned passenger rail incumbent operator. Renfe had a legal monopoly in the Spanish [...] rail sector since its founding in 1941 until 2005. In 2005, Renfe was separated from the Administrador de Infraestructuras Ferroviarias ("ADIF", the Spanish rail infrastructure manager) and, in 2012, Renfe-Operadora E.P.E. was constituted as the parent company of Renfe Viajeros S.M.E., S.A. (the affiliate active in passenger rail transport services), Renfe Mercanías S.M.E.³, S.A., Renfe Fabricación y Mantenimiento S.M.E., S.A.⁴, and Renfe Alquiler Material Ferroviario S.M.E., S.A.⁵. In 2022, Renfe Viajeros S.M.E., S.A. had EUR 1.8 billion of ticket revenues.⁶ Renfe sells its own passenger rail transport services as well as services of other mobility service providers through its mobility platform dōcō.

3. PROCEDURAL STEPS UNDER REGULATION NO 1/2003

- (4) On 28 April 2023, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003 and adopted a preliminary assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's preliminary competition concerns. The preliminary concerns of the Commission were that Renfe may have abused its dominant position in the Spanish market for the provision of passenger rail transport services by refusing to supply in full the Content and RTD displayed on its own online distribution channels to third-party Ticketing Platforms ("Third-party Ticketing Platforms") active in Spain. This assessment was notified to Renfe on 2 May 2023.
- (5) On 30 May 2023, Renfe submitted commitments (the "Initial Commitments") to the Commission to address the Commission's preliminary concerns as set out in the Preliminary Assessment.
- (6) On 27 June 2023, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case

² A mobility platform is a digital solution integrating different mobility services.

³ Freight railway.

⁴ Rolling stock maintenance and construction.

⁵ Rolling stock sales and rental.

⁶ Renfe Viajeros 2022 accounts: https://www.renfe.com/content/dam/renfe/es/Grupo-Empresa/Gobierno-corporativo-y-transparencia/cuentas-anales/renfe-viajeros/2022/InformeAuditoria/CuentasAnuales/InformeGestion_Viajeros.pdf.

and the Initial Commitments and inviting interested third parties to give their observations on the Initial Commitments until 8 August 2023.

- (7) On 29 September 2023, the Commission informed Renfe of the observations received from interested third parties following the publication of the notice. On 23 November 2023, Renfe submitted an amended proposal for commitments (the “Final Commitments”).

4. OVERVIEW OF THE PASSENGER RAIL TICKET DISTRIBUTION IN SPAIN

4.1. Renfe’s distribution system

- (8) Renfe sells its passenger rail tickets directly (i.e. through its own sales channels) and indirectly (i.e. through third-party sales channels), both offline and online.
- (9) Renfe’s direct offline channels are the following: (i) Renfe’s ticketing offices, (ii) Renfe’s ticketing machines, (iii) sales on board the train, and (iv) Renfe’s call centre. Renfe’s direct online channels are the following: (i) Renfe’s websites⁷, (ii) Renfe’s applications (“apps”) (the Renfe app and the Cercanías app⁸), and (iii) Renfe’s mobility platform dōcō.
- (10) Dōcō is Renfe’s new mobility platform app and website,⁹ offering multi-operator and multi-modal mobility services¹⁰ allowing to capture “last-mile” connections to Renfe’s rail network. Renfe launched it in September 2022. After an initial testing period where only a limited number of users could access the platform,¹¹ dōcō was launched at a broader scale in November 2022.
- (11) In a first phase [...], the following functionalities have been made available in dōcō: searching, planning, booking, purchasing and issuing of tickets. No RTD was available during this first phase. Six transport providers, including Renfe, were initially integrated in dōcō.¹²
- (12) In summer 2023, dōcō integrated new transport providers, additional services and additional areas. It is foreseen that dōcō will be completely operational, offering all functionalities and integrating additional transport providers, in [...].¹³ As regards the integration of rail services from competing rail operators (Ouigo and Iryo) in dōcō, Renfe has indicated that, [...]. Should competing rail operators be willing to be integrated in dōcō, Renfe would need to sign an agreement with them and to develop the technical tools needed for the integration.¹⁴

⁷ <https://www.renfe.com/es/es;> <https://www.avlorenfe.com>, <https://www.renfe.com/es/es>, and <https://www.avlorenfe.com>.

⁸ Cercanías is Renfe’s commuter rail system for Spanish metropolitan areas. In some metropolitan areas (Cataluña, Comunidad Valenciana, Islas Baleares, and País Vasco) there are also commuter rail systems operated by local rail companies.

⁹ <https://www.docomobility.com/es>.

¹⁰ Dōcō integrates different modes of transport (rail, bus, taxi, VTC –*Vehículo de Transporte con Conductor*, metro). See Renfe’s reply to Q.24 of the Commission’s RFI of 11 November 2021 and to Q.9 of the Commission’s RFI of 29 June 2022.

¹¹ <https://www.renfe.com/es/es/grupo-renfe/comunicacion/renfe-al-dia/sala-de-prensa/doco-plataforma-integral-movilidad-Renfe>.

¹² Renfe’s reply to Q.8 and Q.9 of the Commission’s RFI of 29 June 2022. This requires the integration of the IT systems of dōcō and each of the transport providers.

¹³ Annexes P7.1 and P7.10 of Renfe’s reply to the Commission’s RFI of 29 June 2022.

¹⁴ Renfe’s replies to Q.10 b and 11 of the Commission’s RFI of 29 June 2022.

- (13) Renfe also distributes its tickets indirectly, through (i) third-party travel agents, including travel management companies (“TMCs”)¹⁵, and (ii) national rail incumbents of other Member States (e.g. SNCF in France). As regards travel agents, tickets can be sold offline, through e.g. brick-and-mortar travel agents; and online, through online travel agencies (“OTAs”), including online TMCs. In this Decision, OTAs and online TMCs are also called Third-party Ticketing Platforms (see Section 4.2 below). In February 2022, out of [900-1200] travel agencies authorised by Renfe to distribute its passenger tickets in Spain, [900-1200] were brick-and-mortar travel agencies, while [20-40] operated both online and offline¹⁶ or online only (e.g. Trainline, Omio, Rail Europe).
- (14) In 2021, Renfe’s passenger rail sales broken down by its sales channels were as follows.¹⁷

	Direct sales						Indirect sales		
	Renfe physical points of sales			Renfe distance selling			Distributors		
Sales Channel	Ticket offices	Ticket machines	On board sales	Website	Apps	Call centre	Brick-and-mortar travel agents	Online travel agents	Sales through other rail incumbents
% of total sales	[10-20]%	[10-20]%	[0-5]%	[40-50]%	[0-5]%	[0-5]%	[10-20]%	[5-10]%	[0-5]%

- (15) Renfe has agreements with [...] Global Distribution Systems (“GDSs”)¹⁸ and with [...] Self-Booking Tools (“SBTs”)¹⁹. GDSs provide third-party travel agencies (both offline and online) with a technical tool that allow the latter to access Renfe’s inventory, so travel agencies do not need to develop specific IT system to access Renfe’s inventory. GDSs do not distribute the tickets, they only provide a technical solution that is used by the distributors (third-party travel agencies). SBTs provide the necessary technical tools to enable employees of a company served by a third-party travel agency to purchase Renfe’s tickets directly from their own computers.²⁰
- (16) Sales made through GDSs, SBTs and wholesale sales (i.e., sales made by one travel agency as a sub-agent of another travel agency that has a contract with Renfe and

¹⁵ TMCs provide solutions for the travel needs of corporations.

¹⁶ In addition, Renfe has also signed contracts with 5 operators (Iberia, Costa Cruceros, Balearia, Royal Caribbean and [...]) so they can offer rail connections to the transport services offered by these transport providers (i.e. Iberia may offer a Renfe ticket to allow its consumers to travel to an airport and take an Iberia flight; Costa Cruceros would do the same for the travel to the port of departure of one of its cruises). Renfe’s replies to Q. 15, Q.58 (a) and Q.58 (b) of the Commission’s RFIs of 18 February 2021 and of 11 November 2021, respectively.

¹⁷ Renfe Annex P.21 submitted in reply to the Commission RFI of 29 June 2022.

¹⁸ [...].

¹⁹ Cytric (Amadeus), TravelLoop-Pursuit, KDS, SAP-Concur [...] (Renfe’s reply to Q.58 (d) of the Commission’s RFI of 11 November 2021).

²⁰ Renfe’s replies to Q.15 of the Commission’s RFI of 18 February 2021 and to Q.9 (c) and Q.58 (d) of the Commission’s RFI of 11 November 2021.

acts as a wholesaler) represented approximately [5-10]% of total sales in number of tickets ([5-10]% offline and [0-5]% online) and [10-20]% in revenues ([10-20]% offline and [0-5]% online) in [...].²¹

4.2. Third-party Ticketing Platforms

- (17) In this Decision, Third-party Ticketing Platforms refer to the undertakings that distribute online the tickets for passenger rail services operated by independent rail operators, i.e. the Third-party Ticketing Platforms do not belong to the same groups as the rail operators. As described in recital (9), Renfe is a vertically integrated distributor of passenger tickets which has launched its own multi-operator and multi-modal mobility platform, *dōcō*.
- (18) Some Third-party Ticketing Platforms are international, multi-operator, and multi-modal as they sell tickets of many transport operators, across transport modes (e.g., rail, air, coaches, ferries), and may also offer other travel services (e.g. accommodation). They have developed their own added features, such as ticket combinations that are not available from individual transport operators, and their own functionalities, such as automated compensation schemes for delay claims.
- (19) To offer their services, Third-party Ticketing Platforms use in particular input from the passenger rail transport operator (e.g. content) as well as data that has been obtained from the infrastructure manager or from other operators, processed by and combined with data of the transport operator.
- (20) In particular, Third-party Ticketing Platforms need access, first, to all different types of rail tickets, tariffs, travel data (i.e. time schedules) and conditions (e.g. flexible tickets) attached to them. This information allows Third-party Ticketing Platforms to offer an encompassing set of alternatives that can correspond to different consumer preferences as well as important information to their customers. Because Third-party Ticketing Platforms, unlike metasearch operators which only aggregate information from travel service providers, do not redirect consumers to the rail operators' websites, but offer them a whole bundle of ticketing services which includes, among others, booking, payment, change of tickets, and possibly reimbursement or compensation in case of train cancellation and train delay, they also need access to the rail operators' technical functionalities that will allow them to offer these services. Finally, they need access to RTD (i.e. pre-journey RTD like platform numbers; in-journey RTD like disruptions, and post-journey RTD like information on rights to compensations) to offer a comprehensive and attractive service to consumers.
- (21) Renfe has different channels to give access to its Content and RTD to its different distributors. First, Renfe uses the VOL A website to give access to its Content and RTD to offline travel agencies²² and to (online or offline) travel agencies principally connecting through GDSs.
- (22) In addition to VOL A, Renfe has developed a specific Application Programming Interface ("API")²³, VAV API, to give access to its Content and RTD to Third-party

²¹ Renfe's Memorandum of 30.03.2023.

²² Access is done via the Renfe's website dedicated to travel agencies, which requires a user and a password assigned to each travel agency.

²³ An API allows software programmes to communicate with each other and exchange data between each other and with the hardware on which they are installed.

Ticketing Platforms and to dōcō.²⁴ Sales made through SBTs and wholesale sales are also done through a connection to the VAV API.²⁵

- (23) Providing Content or RTD to Third-party Ticketing Platforms requires technical work on Renfe's side and, for those using the VAV API, also on the side of Third-party Ticketing Platforms. For the Content or RTD that Renfe decides to provide online, Renfe has to plan, finance, and execute the technical work, e.g. using its in-house IT staff or external IT staff (possibly by sub-contracting the work). To allow Third-party Ticketing Platforms to access Content and RTD via the VAV API, Renfe needs to communicate in advance the necessary technical specifications so that platforms can adjust their own software to be able to receive this Content or RTD, and display it in their own interfaces. Both Renfe and Third-party Ticketing Platforms must ensure appropriate IT support and maintenance on an ongoing basis so that Content and RTD remain available through the VAV API without an excessive error rate,²⁶ and excessive unavailability rate²⁷²⁸ or possibly an excessive Look-to-Book ("L2B") ratio.²⁹ Limiting the error and unavailability rates ensures the reliability of the services offered by Third-party Ticketing Platforms. Limiting the L2B ensures the accessibility of Renfe's sales system, by preventing the risk that it is overburdened by requests about seat availability.

5. PRELIMINARY ASSESSMENT

5.1. Relevant markets

- (24) The Commission has preliminarily identified two relevant product markets: (i) the upstream market for the provision of passenger rail transport services; and (ii) the downstream market for the online distribution of passenger rail tickets (also referred to as online rail ticketing services). Renfe operates in both markets: in the upstream market for the provision of passenger rail transport services as a passenger rail carrier, and in the downstream market for the online distribution of passenger rail transport tickets via Renfe's websites, Renfe's apps (the Renfe app and the Cercanías app) and Renfe's mobility platform dōcō. Both markets are described in the sections below.

5.1.1. *The upstream market for passenger rail transport services*

5.1.1.1. Product market

- (25) In previous antitrust and merger decisions concerning the provision of passenger rail transport services, the Commission has concluded that other modes of transport such as car, bus, plane or ferry did not belong to the same product market as rail due to

²⁴ Renfe's replies to Q.19 and Q.20 of the Commission's RFI of 18 February 2021.

²⁵ Renfe's reply to Q.1 of the Commission's RFI of 17 March 2023.

²⁶ The error rate measures the percentage of reservation requests (i.e. requests by the Third-Party Ticketing Platform to Renfe for the booking of a passenger rail service ticket) which are returned with an error status (i.e. "service unavailable").

²⁷ Unavailability refers to a failure of the sales system which would affect all the channels connecting to it.

²⁸ The unavailability rate is the ratio between the number of minutes between 06:00 and 23:00 during which the sum of Renfe's ticket sales through all channels is zero and the total number of minutes between 06:00 and 23:00. By convention, the total number of minutes between 06:00 and 23:00 is set at 31 620 minutes for a month.

²⁹ The L2B ratio is the ratio between the number of availability requests ("look") made to the transport provider's ticket sales system and the number of actual sales ("book") made during a given period of time.

regulatory differences and limited demand substitutability (differences in terms of e.g. comfort, speed, connectivity, and price).³⁰ In particular, the specific modal environment (rail, road, air or water) usually requires a specific modal regulatory approach (different regulatory frameworks, particular safety regulations, etc.), as well as different policy approaches (taxation, emission control, infrastructure management, etc.).

- (26) Within the market for passenger rail transport services, the Commission has considered, in previous antitrust and merger decisions, distinguishing between (i) long-distance passenger rail transport services and regional (short-distance) passenger rail transport services;³¹ and (ii) rail services operated under a Public Service Contract and commercial services in “open access” mode.³² Those distinctions were mainly justified by supply-side considerations, notably the different regulatory regimes applying to those services.
- (27) However, when assessing the risks of input foreclosure by an upstream provider of travel services of downstream third-party distributors of such services, the Commission has not deemed it necessary to consider the same distinctions as those considered when assessing competition between upstream providers.³³ Indeed, in order to compete on the downstream market, distributors need access to the full range of travel services offered by the upstream provider (see recital (20)), so that the supply-side constraints faced by the upstream provider are not relevant where examining competition issues related to access to upstream travel services by the downstream third-party distributors.
- (28) Without prejudice of the above, in the Preliminary Assessment, the Commission came to the preliminary conclusion that there is no need to decide on the delineation of the upstream market for the provision of passenger rail transport services by type of service (operated under a Public Service Contract or on a commercial basis) or by distance (short or long distance), since the preliminary conclusion about Renfe’s market position is the same under any plausible product market definition.

5.1.1.2. Geographic market

- (29) The Commission has in previous antitrust and merger decisions relating to passenger rail transport services identified the relevant geographic market, depending on the specificities of each case, (i) as every individual route from a point of origin to a

³⁰ Commission Decision of 18 December 2013 in Cases No COMP/AT.39678 – Deutsche Bahn I and No COMP/AT.39731 – Deutsche Bahn II, paragraph 33; Commission Decision of 20 July 2001 in Case No COMP/M.2446 – Govia/Connex South Central, paragraph 13; Commission Decision of 11 August 2010 in Case No COMP/M.5855 – DB/Arriva, paragraphs 137 - 140.

³¹ Commission Decision of 18 December 2013 in Cases No COMP/AT.39678 – Deutsche Bahn I and No COMP/AT.39731 – Deutsche Bahn II, paragraph 33; Commission Decision of 11 August 2010 in Case No COMP/M.5855 – DB/Arriva, paragraphs 126 – 130.

³² Commission Decision of 27 January 2016 in Case No COMP/M.7897 – Arriva Rail North/Northern Franchise, paragraphs 15-18; Commission Decision of 11 August 2010 in Case No COMP/M.5855 – DB/Arriva, paragraphs 131-133.

³³ Commission Decision of 20 June 2014 in Case No COMP/M.7238 - AMERICAN EXPRESS COMPANY/ QATAR HOLDING/ GBT, paragraphs 30-31; Commission Decision of 20 October 2016 in Case M.8046 - TUI / TRANSAT FRANCE, paragraphs 309 and 348.

point of destination (“O&D approach”);³⁴ or (ii) as the entire national railway network (“national approach”).³⁵

- (30) When assessing the risks of input foreclosure by an upstream provider of passenger air transport services (an airline) of downstream third-party distributors (travel agencies), the Commission has considered that the O&D approach was less relevant, considering that airlines usually enter into distribution contracts with travel agencies for the full portfolio of their services.³⁶ In such a context, in *British Airways*, the General Court dismissed the airline’s arguments as to the need to define the relevant upstream market on an O&D basis.³⁷
- (31) Without prejudice of the above, in the Preliminary Assessment, the Commission came to the preliminary conclusion that there is no need to decide on the applicability of the O&D approach, since the preliminary assessment of Renfe’s position on the upstream market is the same under the O&D and national (Spain) geographic market definitions, i.e. the preliminary assessment is the same taking each single O&D to/from a Spanish rail station (including cross-border O&Ds) individually or aggregating all O&Ds to/from a Spanish rail station (including cross-border O&Ds).

5.1.2. *The downstream market for online rail ticketing services*

5.1.2.1. Product market

- (32) Online rail ticketing services refer to the distribution of passenger rail tickets by online ticket vendors.
- (33) In prior merger and antitrust decisions concerning travel services, the Commission has defined a product market for the *distribution* of travel services distinct from the product market for the *provision* of travel services.³⁸ In *British Airways*, the General Court confirmed the existence of such a separate market for the distribution of passenger air tickets (i.e., air travel agency services).³⁹ The Commission generally left open the question of the segmentation of the market for the distribution of leisure travel services by distribution channel (online vs offline travel agency services).⁴⁰
- (34) In addition, in prior merger decisions concerning online travel services, while ultimately leaving the product market definition open, the Commission has found evidence pointing towards the existence of a separate market for the online

³⁴ Commission Decision of 20 July 2001 in Case No COMP/M.2446 – Govia/Connex South Central, paragraph 14; Commission Decision of 27 January 2016 in Case No COMP/M.7897 – Arriva Rail North/Northern Franchise, paragraphs 19 – 23; see also Commission Decision of 19 September 2014 in Case No COMP/M.7011 SNCF/SNCB/Thalys, paragraphs 41-46; see also Commission Decision of 20 July 2011 in Case No COMP/M.6150 – Veolia Transport/Trenitalia/JV, paragraphs 20 and 22.

³⁵ Commission Decision of 18 December 2013 in Cases No COMP/AT.39678 – Deutsche Bahn I and No COMP/AT.39731 – Deutsche Bahn II, paragraphs 34-35; Commission Decision of 11 August 2010 in Case No COMP/M.5855 – DB/Arriva, paragraphs 159-160.

³⁶ Commission Decision of 13 July 2018 in Case M.8862 - GBT / HRG, paragraph 218.

³⁷ Case T-219/99 - *British Airways v Commission*, ECLI:EU:T:2003:343, paragraphs 105-106.

³⁸ Commission Decision of 13 July 2018 in Case M.8862 - GBT / HRG, paragraph 12; Commission Decision of 20 October 2016 in Case M.8046 - TUI / TRANSAT FRANCE, paragraph 95; Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 - Virgin/British Airways), paragraph 31.

³⁹ Case T-219/99 - *British Airways v Commission*, ECLI:EU:T:2003:343, paragraph 107.

⁴⁰ Commission Decision of 20 October 2016 in Case M.8046 - TUI / TRANSAT FRANCE, paragraph 99.

intermediation of travel services⁴¹ and, within that market, of distinctions (i) between services provided by metasearch engines allowing consumers to search for and compare prices (such as Kayak for flights) and OTAs allowing consumers to purchase tickets,⁴² and (ii) by type of travel products.⁴³

- (35) In line with those precedents, the Commission has considered in the Preliminary Assessment whether online rail ticketing services form part of the same relevant product market as (i) offline rail ticketing services; and (ii) metasearch engines for passenger rail transport services.
- (36) First, the Commission preliminarily considered that offline rail distribution services (i.e., tickets sales in stations, on board, or through brick-and-mortar travel agents) are not likely substitutable to online rail ticketing services, due to different specificities and functionalities (e.g. availability of online services at any time). Online rail ticketing services and offline rail distribution services may also seem to attract different types of customers (e.g. younger and elderly respectively) as they respond to different needs (e.g. customer support services). Overall, and for the purposes of the present case, the Commission preliminarily considered that online and offline rail ticketing services do not belong to the same product market.
- (37) Second, the Commission preliminarily considered that metasearch engines do not compete with online rail ticketing service providers, as the former do not have booking and paying capabilities but redirect consumers to the websites of the rail operator or OTA. Therefore, for the purposes of this case, the Commission preliminarily considered that metasearch services do not belong to the same relevant product market as online rail ticketing services.
- (38) Finally, in previous merger cases, the Commission has considered whether the direct distribution of travel services (i.e. through the own sales channels of the travel service providers) and the indirect distribution of travel services (i.e. through travel agents) belong to the same product market.⁴⁴ In the present case, the Commission considers that the question of a potential distinction between direct and indirect distribution can be left open since the competition concerns – and the appropriate measures to solve them – are the same under both possible market definitions, i.e. where the relevant product market is defined as indirect distribution services only, and where it includes direct and indirect distribution services together. More specifically, the competition concerns preliminary identified consist in Renfe adopting a behaviour in the upstream market able to distort actual and potential competition on the downstream market (see recital (120) below). Third-party Ticketing Platforms are Renfe's competitors under both possible definitions of the downstream market. On the one hand, Third-party Ticketing Platforms compete with Renfe on a downstream market defined as indirect distribution since Renfe (via *dōcō*, which is a multi-operator mobility platform) distributes not only its own travel services but also those of other (independent) travel service providers. Therefore

⁴¹ Commission Decision of 17 July 2017 in Case M. 8416 – Priceline/Momondo, paragraph 19.

⁴² Commission Decision of 23 October 2018 in Case M.9005 - BOOKING HOLDINGS / HOTELSCOMBINED, paragraph 43.

⁴³ Commission Decision of 17 July 2017 in Case M. 8416 – Priceline/Momondo, paragraphs 41-51; Commission Decision of 30 June 2011 in Case M.6163 – AXA/ PERMIRA/ OPODO/ GO VOYAGES/EDREAMS, paragraph 24.

⁴⁴ Commission decision of 19 January 2016 in Case M.7802 – Amadeus/Navitaire, paragraphs 41-42; Commission decision of 21 August 2007 in Case M.4523 – Travelport/Worldspan, paragraphs 42-51.

Renfe (via dōcō) acts as a Third-party Ticketing Platform. On the other hand, Third-party Ticketing Platforms compete with Renfe for the distribution of Renfe tickets on a downstream market defined as direct and indirect distribution.

- (39) To conclude, the Commission preliminarily defined the relevant downstream product market for the purposes of this case as the provision of online rail ticketing services which may encompass both direct and indirect ticketing services.

5.1.2.2. Geographic market

- (40) The Commission preliminarily considered that the relevant downstream geographic market is national (Spain), in line with the Commission's decisional practice⁴⁵ and by analogy to case-law⁴⁶ in relation to air ticketing services.

5.2. Dominant position

5.2.1. Principles

- (41) The dominant position referred to in Article 102 TFEU relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers.⁴⁷
- (42) Dominance does not imply that an undertaking has eliminated all opportunity for competition in the market.⁴⁸ For dominance to exist, the undertaking concerned must have substantial market power that allows it to have an appreciable influence on the conditions under which competition will develop.⁴⁹
- (43) The existence of a dominant position derives in general from a combination of several factors, which taken separately may not be necessarily determinative.⁵⁰ One important factor is the existence of very large market shares, which are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.⁵¹ That is the case where an undertaking has a market share of 50% or above.⁵² Likewise, a share of between 70% and 80% is, in itself, a clear indication of the existence of a dominant position in a relevant market.⁵³ Further, a

⁴⁵ Commission Decision of 20 October 2016 in Case M.8046 - TUI / TRANSAT FRANCE, paragraphs 104-106 and cases referred to therein.

⁴⁶ Case T-219/99 - *British Airways v Commission*, ECLI:EU:T:2003:343, paragraph 116.

⁴⁷ Case C-27/76 - *United Brands v Commission*, EU:C:1978:22, paragraph 65; Case C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 38; Case T-201/04 - *Microsoft v Commission*, EU:T:2007:289, paragraph 229.

⁴⁸ Case C-27/76 - *United Brands v Commission*, EU:C:1978:22, paragraph 113.

⁴⁹ Case C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 39.

⁵⁰ Case C-27/76 - *United Brands v Commission*, EU:C:1978:22, paragraph 66.

⁵¹ Case C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36, paragraph 41; Case T-65/98 - *Van den Bergh Foods v Commission*, EU:T:2003:281, paragraph 154; C-457/10 P - *AstraZeneca v Commission*, EU:C:2012:770, paragraph 176.

⁵² Case C-62/86 - *Akzo v Commission*, EU:C:1991:286, paragraph 60; Case T-340/03 - *France Télécom v Commission*, EU:T:2007:22, paragraph 100; Case T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, paragraph 150.

⁵³ Case T-30/89 - *Hilti v Commission*, EU:T:1991:70, paragraph 92; Joined Cases T-191/98, T-212/98 to T-214/98 - *Atlantic Container Line and Others v Commission*, EU:T:2003:245, paragraph 907; Case T-66/01 - *Imperial Chemical Industries v Commission*, EU:T:2010:255, paragraph 257; Case T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, paragraph 150.

decline in market shares, which are still very large, cannot in itself constitute proof of the absence of a dominant position.⁵⁴

- (44) Other important factors when assessing dominance are the likelihood of future entry by potential competitors or future expansion by actual competitors, in particular in view of barriers to entry, and the bargaining strength of the undertaking's customers (countervailing buyer power).

5.2.2. *Application to this case*

5.2.2.1. Renfe's position in the upstream market for passenger rail transport services

- (45) Renfe is the only carrier operating state Public Services Obligation ("PSO") rail services in Spain, based on a Public Service Contract ("PSC") that will expire in 2027.⁵⁵ These PSO rail services include Cercanías,⁵⁶ Medium Distance (high-speed and conventional),⁵⁷ and narrow-gauge services (FEVE).⁵⁸ According to the Spanish Competition Authority, in Q4 2022, 93% of all rail passengers in Spain were PSO services' passengers.⁵⁹
- (46) As regards commercial rail services in Spain, which include conventional and high-speed long-distance services, Renfe currently faces actual competition in only three high-speed corridors: (i) Madrid-Barcelona-French border; (ii) Madrid-Levante (Valencia and Alicante); and (iii) Madrid-Toledo-Sevilla-Málaga as, from December 2020, ADIF also awarded these corridors to new entrants: Ouigo and Iryo. Other corridors (Madrid-León-Burgos, Madrid-Orense, Madrid-Murcia) are still only operated by Renfe at the moment.
- (47) ADIF structured the framework capacity for the abovementioned three corridors in three packages A, B and C. Package A represented 65% of the total framework capacity; package B represented 30% of the total framework capacity; and package C represented 5% of the total framework capacity. This system meant that, for each corridor, different capacities per package were assigned and there would be three competitors operating, each of them, with different intensity in terms of frequencies in particular.⁶⁰
- (48) As a result of the allocation procedure, package A was allocated to Renfe, package B was allocated to Iryo, and package C was allocated to Ouigo.

⁵⁴ Case T-340/03 – *France Télécom v Commission*, EU:T:2007:22, paragraph 104.

⁵⁵ https://www.mitma.gob.es/recursos_mfom/listado/recursos/contrato_2018-2027dic18_0.pdf.

⁵⁶ Renfe operates Cercanías services in Asturias, Rodalies Catalunya, Bilbao, Cádiz, Madrid, Málaga, Murcia/Alicante, Santander, San Sebastián, Sevilla, Valencia and Zaragoza (<https://www.renfe.com/es/es/cercanias>). There are local operators which operate commuting services in the Basque Country (Euskotren Trena), Cataluña (Ferrocarrils de la Generalitat de Catalunya), Mallorca (Serveis Ferroviaris de Mallorca), Murcia/Valencia (Ferrocarrils de la Generalitat Valenciana).

⁵⁷ Renfe currently operates 14 high-speed Medium Distance services. See map of Renfe Medium Distance services:

<https://www.renfe.com/content/dam/renfe/es/Viajeros/Secciones/pdf/mapageneralServiciocioPublico.pdf>.

⁵⁸ Narrow-gauge, also called "metre-gauge" refers to railways with track gauge of 1 metre, therefore narrower than the standard gauge. Renfe operates narrow-gauge services in Asturias, Santander, Bilbao, León, Murcia and Ferrol (<https://www.renfe.com/es/es/cercanias/cercanias-am/mapas>).

⁵⁹ <https://www.cnmc.es/sites/default/files/4599030.pdf> (page 6).

⁶⁰

<https://www.adif.es/documents/20124/7190955/Declaraci%C3%B3n+sobre+la+Red+Adif.pdf/7c2dfb39-f8d9-c7a1-08cd-92cc820f5cc8?t=1647936744372>.

- (49) Ouigo started operations in May 2021 and currently operates Madrid-Zaragoza-Tarragona-Barcelona; Madrid-Valencia (since October 2022); and Madrid-Alicante routes (since April 2023).⁶¹ Iryo started operations in November 2022 and currently operates Madrid-Zaragoza-Barcelona; Madrid-Cuenca-Valencia (since December 2022); Madrid-Córdoba-Sevilla-Málaga (since 31 March 2023) and Madrid-Alicante routes (since June 2023).⁶² Ouigo plans to start operations in Madrid-Córdoba-Sevilla-Málaga routes in 2024.
- (50) Despite the liberalisation, Renfe still holds a strong market position on these corridors, especially in the Madrid-Barcelona corridor, where passenger traffic after the Covid pandemic has been recovering better than in other corridors. Renfe's share (in passenger number) in the Madrid-Barcelona corridor, in Q4 2022, was 66%, whereas Ouigo's and Iryo's share were 29% and 4% respectively. In the Madrid-Valencia corridor, Renfe's, Ouigo's and Iryo shares (in passenger numbers) in Q4 22 were 63%, 36% and 1% respectively.⁶³
- (51) At national level, based on the monopoly that Renfe still holds on the PSO services (representing 93% of all rail passengers in Spain in Q4 2022) and on the fact that, for commercial services, actual competition is limited to three high-speed long-distance corridors, Renfe's position in the Spanish passenger rail transport market appears quasi-monopolistic.
- (52) In addition, Renfe's position in the market for passenger rail transport services may also be reinforced by the current structure of Renfe-Operadora, where there are links between its subsidiary Renfe Viajeros and the other Renfe-Operadora's subsidiaries dealing with rolling stock manufacture and with rolling stock maintenance.
- (53) Besides, Renfe has the economies of scale and scope, a brand name, and customer datasets, in particular as a result of its former legal monopoly, that other rail operators cannot match.⁶⁴
- (54) In light of the reasons outlined above, in the Preliminary Assessment, the Commission took the preliminary view that Renfe continues to hold a dominant position in the upstream passenger rail transport markets, regardless of the exact product market definition (long-distance vs. short-distance or PSOs vs. commercial services) and the exact geographic market definition (O&D or national). Although new rail transport operators have entered on some routes, liberalisation is still limited to some high-speed long-distance commercial services on certain routes, where Renfe also holds a strong position.

5.2.2.2. Renfe's position in the downstream market for online rail ticketing services

- (55) As indicated in recital (49)), Ouigo and Iryo have recently started to operate passenger transport services in Spain. In the Preliminary Assessment the Commission found that, at this stage, their market shares on the routes on which they

⁶¹ Situation up to 23 November 2023: <https://www.ouigo.com/es/destinos>.

⁶² Situation up to 23 November 2023: <https://iryo.eu/es/home>.

⁶³ CNMC Quarterly Report on Passenger Rail Transport (Q4 2022).
<https://www.cnmc.es/sites/default/files/4599030.pdf>.

⁶⁴ The fact that Renfe's dominant position "*has its origins in a former legal monopoly must, in that regard, be taken into account*" (see Case C-209/10 – *Post Danmark*, EU:C:2012:172, paragraph 23; Case T-851/14 – *Slovak Telekom*, EU:T:2018:929, paragraphs 107, 153, and 166-167; Case T-814/17 – *Lietuvos geležinkelai* ("*Baltic Rail*"), EU:T:2020:545, paragraphs 93-94 upheld in Case C-42/21 *Lietuvos geležinkeliai*, EU:C:2023:12, paragraph 87).

operate are still limited (see recital (50)) and, in any case, remain low at national level.⁶⁵ As a consequence, their ticket sales represent a minor part of the overall sales of rail tickets in Spain, including of online sales (even allocating all their ticket sales to the online channels). Therefore, on the basis of the information available, the Commission preliminarily considered that there are strong indications that the potential market for online rail ticketing services in Spain is, for the time being, mostly made up of the online distribution of Renfe's tickets.

- (56) The preponderant weight of Renfe's tickets in the potential market for online rail ticketing services in Spain has two consequences for the methodology applicable to the assessment of Renfe's position on that market. First, it would not be appropriate to remove the online sales of Renfe's tickets by Renfe (captive sales) from the downstream market for online rail ticketing services, since this would lead to assessing the competitive dynamics on a non-representative part of the overall downstream market. This means, in particular, that it would not seem appropriate to exclude the online sales of Renfe's tickets when establishing Renfe's position in the potential market for online indirect distribution services, where Renfe is active through its mobility platform *dōcō*.⁶⁶
- (57) Second, the total online sales of Renfe's tickets represent a fair proxy of the total size of the potential market for online rail ticketing services in Spain. Therefore, the shares of Renfe's online sales achieved through its different online distributors represent a fair proxy for their respective market shares. In that respect, in 2021, Renfe's revenues from its tickets sold through Renfe's online direct channels (Renfe's website and apps⁶⁷) accounted for [80-90]% of its total online sales, while revenues from the indirect online sales through Third-party Ticketing Platforms accounted for the remaining [10-20]%. Revenues from ticket sales through the Third-party Ticketing Platforms Omio, Trainline, Rail-Europe and El Corte Inglés accounted for [0-5]%, [0-5]%, [0-5]% and [0-5]%, respectively, of Renfe's total revenues from online sales.⁶⁸
- (58) Based on the above, in the Preliminary Assessment, the Commission took the preliminary view that Renfe, as the vertically integrated dominant passenger rail transport operator, holds a dominant position in the potential downstream Spanish online rail ticketing market through its own online distribution solutions.
- (59) In any case, the question of Renfe's dominance if the relevant downstream market is defined as indirect distribution only or on the downstream market in general (direct and indirect distribution) has no bearing on the competition concerns explained in section 5.3 below, in particular on the preliminary finding that Renfe's dominant position on the upstream market is likely to be leveraged and to lead to the elimination of effective competition on the downstream market.

⁶⁵ As indicated in recital (45), in Q4 2022, only 7% of all rail passengers in Spain travelled on non-PSO routes, including (but not limited to) the routes on which Ouigo and Iryo are active.

⁶⁶ Considering that Renfe does not currently distribute tickets for competing rail operators in Spain (Ouigo and Iryo), Renfe's economic strength on the potential Spanish market for online indirect distribution of train tickets (where it is active through *dōcō*) would be unduly underestimated if the Commission were to exclude captive sales..

⁶⁷ See recital (9) above.

⁶⁸ Annex P21 of Renfe's reply to the Commission's RFI of 29 June 2022.

5.3. Practices raising concerns

5.3.1. Renfe's behaviour

(60) In the Preliminary Assessment, the Commission expressed preliminary concerns that Renfe's practices may constitute a refusal to supply its full Content and RTD to Third-party Ticketing Platforms and that such refusal to supply may constitute an abuse of Renfe's dominant position prohibited by Article 102 TFEU.

(61) The following sections focus on Renfe's refusal to supply to Third-party Ticketing Platforms with (i) its full Content and (ii) RTD. In light of the context in which both practices take place, their purpose, and the interrelation between them, the Commission preliminarily considered that both practices would form part of a single conduct.

5.3.1.1. Renfe's refusal to provide its full Content to Third-party Ticketing Platforms

(62) As indicated in recitals (19) and (20), Content is an input for the provision of online rail ticketing services. Content refers to the full range of tickets, discounts and functionalities that Renfe displays in its own online direct distribution channels and that relates to the upstream passenger rail transport services operated by Renfe.

(63) Renfe's Content is dynamic and evolving. Renfe continuously changes its Content by progressively adding new type of tickets, discounts and functionalities, and replacing previous Content following market developments.

(64) The evidence gathered during the Commission's investigation indicates that Renfe has not provided to Third-party Ticketing Platforms access to all the Content which was available in Renfe's online channels. In particular, in the Preliminary Assessment, the Commission found that there is evidence of specific requests from Third-party Ticketing Platforms to obtain access to certain categories of Content, which were followed by Renfe's refusals:

- **"Special Content":** Special Content are features like "enlaces" fares (20% discount on a connecting trip using two Renfe trains), bicycle fares, dog fares, and functionalities like the possibility to process delay compensation claims, among others. At least before the start of the Commission's investigation, Renfe refused to provide access to Third-party Ticketing Platforms to such type of Content.^{69 70 71}
- **Cercanías tickets.** Cercanías are the commuter rail systems of Spain's major metropolitan areas. Cercanías are PSO services and are operated by Renfe by virtue of the Public Service Contract signed with the Spanish Ministry of Transport for the period 2018-2027. At least before the start of the Commission's investigation, Renfe continuously rejected all requests from Third-party Ticketing Platforms to sell standalone Cercanías tickets,⁷² arguing that Cercanías tickets sales through third parties was not planned by Renfe as it required technical and administrative developments.⁷³

⁶⁹ Trainline's reply to Q.1 of the Commission's RFI of 14 July 2022.

⁷⁰ Renfe's reply to Q.43 and Q.44 of the Commission's RFI of 18 February 2021 confirmed that Renfe did not make available some special Content in VAV, arguing technical issues.

⁷¹ Emails submitted by Omio as a reply to Q.18 of the Commission's RFI of 19 January 2022, concerning access to "mesa tariffs" (*tarifas mesa*) and to promotions.

⁷² Annex 7f of Trainline's reply to the Commission's RFI of 10 December 2021 [...].

⁷³ Renfe's reply to Q.26 and Q.27 of the reply to the Commission's RFI of 18 February 2021.

- **Corporate fares.** Corporate fares are special discounted fares that have been negotiated between Renfe and a given corporate customer. Before the start of the Commission’s investigation, Renfe refused to give access to corporate fares to Third-party Ticketing Platforms.⁷⁴
- (65) Since [...] 2019, Renfe has gradually started to provide access to some of the Content previously not accessible to Third-party Ticketing Platforms. For instance, after the start of the investigation, Renfe has given access to some special Content (e.g. large family discounts⁷⁵, seat selection in AVLO trains⁷⁶, “enlaces” fares, bicycle fares, “pets” fares⁷⁷), as well as to Cercanías tickets⁷⁸, and corporate fares,⁷⁹ among others.
- (66) However, in the Preliminary Assessment, the Commission found that there is still Content that Renfe displays in its own online channels but that it does not provide to Third-party Ticketing Platforms.⁸⁰ For instance, some Content such as functionalities to consult and collect compensations for train delays, sales of certain train passes, sales of Luxury Tourist Trains and Leisure Tourist Trains⁸¹, among others, are not available to Third-party Ticketing Platforms yet.⁸² Evidence in the file indicated that Third-party Ticketing Platforms have requested access to some of this Content and Renfe has – either directly or effectively – refused to make it available, including by delaying accessibility to this Content to Third-party Ticketing Platforms.⁸³
- (67) In the Preliminary Assessment, the Commission took the preliminary view that, although Renfe has provided some of the missing Content to Third-party Ticketing Platforms in the period between 2019 and the date of adoption of the Preliminary Assessment, there is still no full parity between the Content that Renfe displays in its own online channels, and the Content that it makes accessible to Third-party Ticketing Platforms.

5.3.1.2. Renfe’s refusal to supply RTD to Third-party Ticketing Platforms

- (68) As indicated in recitals (19) and (20), RTD is also an important input for the provision of online rail ticketing services in Spain.
- (69) RTD is all real time data related to Renfe passenger trains concerning rail traffic, operations and travel, that Renfe makes available for consumers through any of its direct digital distribution channels (e.g., Renfe’s website and apps) or communication channels (e.g., email and SMS) or any Renfe mobility platform (such as dōcō). This information can be pre-journey (e.g., platform number), on-journey

⁷⁴ Trainline’s reply to Q.2 of the Commission’s RFI of 16 March 2022, and Trainline’s reply to Q.1 of the Commission’s RFI of 14 July 2022.

⁷⁵ Renfe’s reply to Q.2 of the Commission’s RFI of 29 June 2022.

⁷⁶ Renfe’s reply to Q.11 of the Commission’s RFI of 11 November 2021. AVLO stands for “Alta Velocidad Low Cost”.

⁷⁷ Renfe’s reply to Q.11 of the Commission’s RFI of 11 November 2021.

⁷⁸ Minutes of the call with Trainline of 23 November 2022.

⁷⁹ Renfe’s reply to Q.2 of the Commission’s RFI of 29 June 2022.

⁸⁰ Renfe’s email to the case team of 3 February 2023.

⁸¹ Luxury Tourist Trains: holiday product lasting between 3 and 7 nights which includes accommodation and full board in a luxury historic hotel train (up to 100 years old). Leisure Tourist Trains: touristic product which includes visits by special conventional trains - not regular ones - to some areas. See e.g. <https://www.renfe.com/es/es/grupo-renfe/comunicacion/renfe-al-dia/sala-de-prensa/trenes-turisticos-inician-temporada>.

⁸² Renfe’s email to the case team of 3 February 2023.

⁸³ Trainline reply to Q.1 of the Commission’s RFI of 14 July 2022.

(e.g., disruptions) or post-journey (e.g., information on delays that is needed to submit a compensation claim).

- (70) RTD is however an evolving concept. The Rail Passengers' Rights and Obligation Regulation⁸⁴ contains a list of minimum data to be provided to passengers by railway undertakings and ticket vendors.⁸⁵ However, this is not an exhaustive list, as this Regulation sets the minimum information to be provided. This minimum list is also a static one. On the contrary, in this case RTD covers not only all RTD that Renfe currently makes available through its own distribution and communication channels, but also any RTD that Renfe may in the future make available through its own distribution and communication channels. This is an important factor since RTD is frequently increasing and may be evolving following new developments and functionalities implemented by rail operators or by third parties, mainly rail infrastructure managers. Another difference with the Rail Passengers' Rights and Obligation Regulation is that under the latter, railway undertakings are obliged to provide travel information to those ticket vendors that already sell their services. In this case, the notion of Third-party Ticketing Platforms is not limited to those platforms already selling Renfe's tickets at the time of this Decision.
- (71) Renfe obtains RTD directly from its operations and from ADIF.
- (72) [*Strategic information on internal processes for real-time data collection*]^{86, 87}
- (73) Renfe also obtains RTD from ADIF, in particular RTD on delays and cancellations of trains (including Cercanías trains); on planned platform numbers (including for Cercanías trains);⁸⁸ on train location (i.e. kilometre point or station); on changes on the planned train route; on the estimated and actual arrival and departure times on each of the stations of the train route (including Cercanías); and on the legal documentation related to the train running.⁸⁹ According to ADIF, Renfe does not need its authorisation to share RTD originated from ADIF and related to Renfe passenger trains.⁹⁰
- (74) ADIF also has RTD on the reasons for train delays and cancellations (i.e., works in the rail infrastructure, train failures), but does not communicate them on real time to Renfe. However, this information is available on ADIF information system, which Renfe can access.⁹¹ ADIF may also report to Renfe infrastructure incidents through direct communications to train drivers.
- (75) ADIF has indicated that it obtains from Renfe RTD on coach order and that it publishes this information in the stations.

⁸⁴ Regulation 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (recast), OJ L 172, 17.5.2021, p. 1.

⁸⁵ Annex II of the Rail Passengers' Rights and Obligation Regulation.

⁸⁶ Global Positioning System.

⁸⁷ Renfe's reply to Q.31 of the Commission's RFI of 29 June 2022.

⁸⁸ There are IT limitations that prevent ADIF from informing the rail operators about real time changes on the platform numbers. ADIF is currently working on a system that will make available this information on real time. As regards those Cercanías stations that are currently managed by Renfe, RTD on platform numbers are already available for Renfe.

⁸⁹ ADIF reply to Q.1 of the Commission's RFI of 10 February 2022.

⁹⁰ ADIF reply to Q.6 (c) of the Commission's RFI of 10 February 2022.

⁹¹ [*Strategic information on internal processes for real-time data collection*] (Renfe's reply to Q.32 of the Commission's RFI of 29 June 2022).

- (76) ADIF has also confirmed that it provides to any undertaking or user, free of charge and through a concrete app (“*ADIF en tu móvil*”), with RTD on (i) arrivals and departures on each station, (ii) train services disruptions, (iii) train delays, and (iv) train platforms. However, it has not implemented a specific RTD channel for Third-party Ticketing Platforms yet.⁹²
- (77) [*Strategic information on internal processes for real-time data collection*].⁹³
- (78) Furthermore, Renfe makes available to consumers the following RTD on commercial services and Medium Distance services. First, Renfe provides RTD on planned timetables and possible deviations (i.e., delays) through Renfe App, Renfe.com and VOL A. Renfe also communicates to consumers some RTD on delays through SMS or e-mail. Renfe also uses these two channels to communicate RTD on incidents, and to inform consumers about train cancellations.⁹⁴ The communications via SMS or email are manually sent by Renfe’s personnel to the consumers.⁹⁵ Finally, Renfe publishes RTD on some incidents on X (formerly called Twitter).⁹⁶
- (79) As regards Cercanías, Renfe does not provide RTD on delays, but provides the best available information on passage planning per station of all the Cercanías trains scheduled for the concrete route and time the consumer is interested in.⁹⁷ This information is provided on Cercanías app, Renfe.com, and through the public address system of the stations. In the main Cercanías areas, Renfe also publishes RTD on incident on X (formerly called Twitter).⁹⁸
- (80) Renfe also provides RTD on Cercanías trains platform numbers and accessibility for people with reduced mobility through Cercanías app, Renfe.com/Cercanías, public address systems, and information panels of the stations.
- (81) Finally, regarding narrow-gauge services (FEVE), Renfe’s FEVE app shows the scheduled time and the estimated time of the train passing through the station requested by the passenger.⁹⁹ In addition, Renfe.com/Cercanías shows the timetables of FEVE trains, but no RTD on these trains. Information on the GPS position of FEVE trains is also used to show the train on a map in the FEVE app.
- (82) In the future, Renfe currently anticipates that it will provide more RTD directly to consumers in two ways.
- (83) [*Future strategic technical and commercial information on tools used to make real time data available to consumers*].¹⁰⁰
- (84) Furthermore, Renfe plans to display RTD on its mobility platform *dōcō*. Internal documents collected during the investigation show that Renfe referred on a number

⁹² ADIF reply to Q.7 of the Commission’s RFI of 10 February 2022.

⁹³ Renfe’s reply to Q.31 (c) of the Commission’s RFI of 29 June 2022.

⁹⁴ Cancellations are also published on Renfe website (Renfe’s reply to Q.37 (a) of the Commission’s RFI of 29 June 2022).

⁹⁵ Renfe’s reply to Q.22 (a) of the Commission’s RFI of 11 November 2021.

⁹⁶ Renfe’s reply to Q.31 (c) to the Commission’s RFI of 29 June 2022.

⁹⁷ For Cercanías trains, the consumer does not buy a ticket for a particular train but buys a trip from a departure station to a destination station, to be done on the same day of the purchase and normally immediately after it.

⁹⁸ Renfe’s reply to Q.31.(c) of the Commission’s RFI of 29 June 2022.

⁹⁹ Scheduled time refers the initial programmed time, whereas estimated time considers possible delays.

¹⁰⁰ Renfe’s replies to Q.22 of the Commission’s RFI of 11 November 2021 and to Q.32 of the Commission’s RFI of 29 June 2022.

of occasions to the importance of comprehensive RTD so that needs of consumers are fully addressed.¹⁰¹ According to those documents, [*Future strategic information on RTD in dōcō*].¹⁰² According to Renfe, RTD will be made available on dōcō through the same VAV API used for Third-party Ticketing Platforms, therefore, the latter will have access to this RTD at the same time and under the same conditions as dōcō.¹⁰³

- (85) The evidence from the Commission’s investigation indicates that Third-party Ticketing Platforms have requested access to Renfe’s RTD and the latter has refused to make it available to them, including by delaying their availability to Third-party Ticketing Platforms.^{104 105}
- (86) Since the start of the Commission’s investigation, Renfe has provided access to some RTD previously not accessible to Third-party Ticketing Platforms. This is the case, for example, for RTD related to delays of trains: as of 6 September 2022, Renfe’s VAV API includes RTD on delays relating to commercial services¹⁰⁶ and Medium Distance PSO that were already available on the Renfe app, the Renfe.com Web and VOL A.¹⁰⁷
- (87) Renfe has also provided the RTD referred to in Annex II of the Rail Passengers’ Rights and Obligation Regulation since 7 June 2023.¹⁰⁸
- (88) As regards ADIF RTD on train location, Renfe stated that it does not make it available through the VAV API or any other channel. According to Renfe, RTD on train location is merely instrumental as it is used to produce the RTD relevant for consumers: RTD on potential train delays, which has been included in the VAV API as of 6 September 2022. Renfe has also pointed out that ADIF publishes on its app RTD on train location on rail stations, and therefore this information is publicly available.¹⁰⁹
- (89) In the Preliminary Assessment, the Commission took the preliminary view that, although Renfe has provided some more RTD to Third-party Ticketing Platforms after the start of the Commission’s investigation, there is no full parity between the RTD that Renfe makes available to consumers having purchased tickets through its own online distribution channels (website, apps) and the RTD that Renfe makes available to Third-party Ticketing Platforms and that the latter can provide to passengers as part of their own services.

¹⁰¹ Annexes P.7.1, of Renfe’s reply to the Commission’s RFI of 29 June 2022.

¹⁰² Renfe has also indicated that dōcō could provide consumers with RTD related to [...] (Renfe’s reply to Q.34 of the Commission’s RFI of 29 June 2022).

¹⁰³ Renfe’s reply to Q.35 of the Commission’s RFI of 29 June 2022.

¹⁰⁴ [...]: “*RENFE insists they are unable at this stage to provide real time data. They do not close the door for providing this information to our B2C and B2B customers. Currently not a priority for them and time frame could be 6 to 12 months*”.

¹⁰⁵ Renfe’s replies to Q.34, 35 of the Commission’s RFI of 18 February 2021; Trainline’s reply to Q.30, 31 of the Commission’s RFI of 10 December 2021 and to Q.1 of the Commission’s RFI of 14 July 2022; Omio’s reply to Q. 19, 22, 23 of the Commission’s RFI of 19 January 2022.

¹⁰⁶ Commercial services refer to long-distance services, both conventional and high-speed.

¹⁰⁷ Renfe’s reply to Q.31 (a) of the Commission’s RFI of 29 June 2022. This list is non-exhaustive.

¹⁰⁸ Renfe’s replies to Q.33 and to Q.35 of the Commission’s RFI of 29 June 2022.

¹⁰⁹ Renfe’s reply to Q.36 (b) of the Commission’s RFI of 29 June 2022.

5.3.2. Preliminary legal assessment

5.3.2.1. Principles on the notion of abuse

- (90) The fact that an undertaking holds a dominant position is not in itself contrary to EU competition rules. However, dominant undertakings have a special responsibility not to impair, by engaging in conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market.¹¹⁰ A system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators.¹¹¹
- (91) Article 102 TFEU prohibits as incompatible with the internal market any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, insofar as it may affect trade between Member States.
- (92) The Court of Justice stated in relation to the concept of abuse: “That concept is thus intended to penalise the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened because of the presence of the undertaking concerned, adversely affects an effective competition structure.”¹¹²
- (93) It follows from the nature of the obligations imposed by Article 102 TFEU that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted by non-dominant undertakings.¹¹³ The actual scope of the special responsibility imposed on a dominant undertaking must be considered in light of the specific circumstances of each case which show that competition has been weakened.¹¹⁴
- (94) Furthermore, Article 102 TFEU applies both to practices which may harm consumers directly and to practices which may harm them indirectly, including by weakening an effective structure of competition in a market.¹¹⁵

5.3.2.2. Principles on the notion of refusal to supply

- (95) Regarding refusals to supply under Article 102 TFEU, undertakings are, as a rule, free to choose their business partners.¹¹⁶ In that sense, the Commission considers that intervention on competition law grounds requires careful consideration where the

¹¹⁰ Case C-413/14 P – *Intel v Commission*, EU:C:2017:632, paragraph 135; Case C-377/20 – *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraphs 73 to 74; Case C-680/20 – *Unilever Italia Mkt. Operations*, EU:C:2023:33, paragraph 38.

¹¹¹ Case C-280/08 P, *Deutsche Telekom v Commission*, EU:C:2010:603, paragraph 230; Case T-336/07, *Telefónica SA v Commission*, EU:T:2012:172, paragraph 204.

¹¹² Case C-680/20 – *Unilever Italia Mkt. Operations*, EU:C:2023:33, paragraph 36; Case C-377/20 – *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraph 68 and the case-law cited.

¹¹³ Case 322/81 – *Michelin v Commission*, EU:C:1983:313, paragraph 57; Case T-111/96 – *ITT Promedia v Commission*, EU:T:1998:183, paragraph 139; Case T-301/04 – *Clearstream v Commission*, EU:T:2009:317, paragraph 133.

¹¹⁴ Case C-52/09 – *TeliaSonera Sverige*, EU:C:2011:83, paragraph 84 and the case-law cited; Case T-612/17 – *Google Shopping*, EU:T:2021:763, paragraph 165.

¹¹⁵ Case C-95/04 – *British Airways v Commission*, EU:C:2007:166, paragraphs 106-107; Case 6-72 – *Europemballage and Continental Can*, EU:C:1973:22, paragraph 26; Case T-612/17 – *Google Shopping*, EU:T:2021:763, paragraph 153; Case C-680/20 – *Unilever Italia Mkt. Operations*, EU:C:2023:33, paragraph 36; Case C-377/20 – *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraphs 40-48.

¹¹⁶ Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraph 46.

application of Article 102 TFEU would lead to the imposition of an obligation to supply on the dominant undertaking.¹¹⁷

- (96) The concept of refusal to supply covers a broad range of practices, such as a refusal to supply products to existing or new customers,¹¹⁸ refusal to license intellectual property rights,¹¹⁹ or refusal to grant access to an essential facility or a network.¹²⁰
- (97) In order for a refusal to supply to constitute an abuse within the meaning of Article 102 TFEU, three cumulative conditions must be fulfilled: (a) the input (product or service) must in itself be indispensable to the undertaking requesting it; (b) the refusal of the input in question must be likely to eliminate effective competition in the market from that undertaking requesting the input; and (c) such refusal must not be objectively justified.¹²¹
- (98) An input is considered indispensable if there is no actual or potential substitute.¹²² This means that the input (a) cannot be duplicated realistically and in a viable way; (b) an equivalent input cannot be obtained from other sources; and (c) access to the input is necessary for the requesting firm to “remain viably on the market”, which means exerting “effective competition”.¹²³
- (99) The indispensability condition “does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market”.¹²⁴ Moreover, “[t]he fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.”¹²⁵

¹¹⁷ Joined cases C-241/91 P and C-242/91 P – *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)*, EU:C:1995:98, paragraph 50; Case C-418/01 – *IMS Health v NDC Health*, EU:C:2004:257, paragraph 35; Case T-201/04 – *Microsoft v Commission*, EU:T:2007:289, paragraphs 319, 330, 331, 332 and 336.

¹¹⁸ Joined cases 6/73 and 7/73 – *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, EU:C:1974:18.

¹¹⁹ Joined cases C-241/91 P and C-242/91 P – *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill)*, EU:C:1995:98; Case C-418/01 *IMS Health v NDC Health*, EU:C:2004:257.

¹²⁰ Case 7/97 – *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft*, EU:C:1998:569, paragraphs 44 and 45. See also Commission Decision 94/19/EC of 21 December 1993 in Case IV/34 689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18 I 1994, page 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33 544 *British Midland v Aer Lingus* (OJ L 96, 10 4 1992, page 34).

¹²¹ Case 7/97 – *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft*, EU:C:1998:569, paragraph 41; Case T-301/04 – *Clearstream v Commission*, EU:T:2009:317, paragraph 147; Case T-814/17 – *Baltic Rail*, EU:T:2020:545, paragraph 89; Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraph 44.

¹²² Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraph 49; Case T-301/04 – *Clearstream v Commission*, EU:T:2009:317, paragraph 147; Case 7/97 – *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft*, EU:C:1998:569, paragraph 41.

¹²³ Case C-418/01 – *IMS Health v NDC Health*, EU:C:2004:257, paragraphs 28-29.

¹²⁴ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paragraph 82 (as renumbered by the Amending Communication published on 27 March 2023).

¹²⁵ Case T-201/04 – *Microsoft v Commission*, EU:T:2007:289, paragraph 563.

- (100) In addition, although they do not constitute a refusal to supply on the part of a dominant undertaking, practices such as unduly delaying or otherwise degrading the supply of the product or involving the imposition of unreasonable conditions in return for the supply may nevertheless be abusive pursuant to Article 102 TFEU. As regards those practices, the Court of Justice has stated that the absence of the indispensability condition is not in itself decisive for the purposes of the examination of potentially abusive practices on the part of a dominant undertaking.¹²⁶ However, as the Court has also pointed out, the indispensability of the input increases the likelihood that the unfair practices will have at least potentially anticompetitive effects on the downstream market and will constitute abuse within the meaning of Article 102 TFEU.¹²⁷
- (101) With regard to the elimination of effective competition, in line with the case-law, the Commission considers that if the input is indispensable, the dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market.¹²⁸
- (102) Finally, in the enforcement of Article 102 TFEU, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified. The burden of proving the existence of an objective justification or efficiencies which outweigh any anticompetitive effects on consumers, lies with the dominant undertaking. Thus, where a competition authority shows that a practice of an undertaking in a dominant position is capable of impairing effective and undistorted competition in the internal market, it remains possible for that undertaking, in order to prevent that practice from being regarded as abuse of a dominant position, to show that that practice is or was justified objectively, either by certain circumstances of the case, which must, *inter alia*, be external to the undertaking concerned, or, having regard to the objective ultimately pursued by Article 102 TFEU, by the interests of consumers.¹²⁹

5.3.2.3. Application to this case

- (103) In the Preliminary Assessment, the Commission came to the preliminary conclusion that Renfe appears to be dominant in the upstream market for passenger rail transport services in Spain.
- (104) As indicated in Section 5.3.1, the evidence gathered in the Commission's investigation shows that Renfe has either refused to make available to Third-party Ticketing Platforms all the Content and RTD that Renfe uses itself when providing

¹²⁶ Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraphs 50-51 and Case C-42/21 P – *Lietuvos geležinkiai AB v European Commission*, EU:C:2023:12, paragraphs 81 to 84 and 91.

¹²⁷ Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraph 50. Annex to the Communication of the Commission “Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (2023/C116/1), point 4.

¹²⁸ Case T-201/04 – *Microsoft v Commission*, EU:T:2007:289, paragraph 563, Case C-165/19 P – *Slovak Telekom, a.s. v European Commission*, EU:C:2021:239, paragraph 50. Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paragraph 84 (as renumbered by the Amending Communication published on 27 March 2023).

¹²⁹ C-377/20 – *Servizio Elettrico Nazionale and Others*, EU:C:2022:379, paragraph 84 and case-law cited therein.

online ticketing services to consumers through its own distribution channels, or unduly delayed such access following the Third-party Ticketing Platforms' request.

(105) In the Commission's view, not giving full access to Content and RTD or delaying such full access in a fast-evolving dynamic market, may prevent Third-party Ticketing Platforms from competing effectively with Renfe in the downstream market for online distribution of train tickets in Spain.

(106) Based on the principles of the notion of refusal to supply referred to in Section 5.3.2.2 above, the Commission assessed whether (a) the full Content and RTD are indispensable for Third-party Ticketing Platforms to compete on the downstream market, (b) Renfe's refusal to make available to Third-party Ticketing Platforms the full Content and RTD used for the provision of its own online rail ticketing services is likely to eliminate effective competition from Third-party Ticketing Platforms on the downstream market, and (c) there are objective justifications for Renfe's behaviour.

(a) Indispensability

(107) In its assessment of indispensability in the Preliminary Assessment, the Commission considered the following arguments: Renfe is the incumbent dominant rail undertaking in the rail passenger transport market in Spain and, therefore, no other undertaking may be in a position to replicate its operations, notably to have access to the assets needed to offer passenger services on a similar scale and scope (e.g. access to network, staff, rolling stock, supply contracts) or to benefit from the competitive advantages inherited from its former monopoly (e.g. experience, brand recognition). In particular, other rail operators have started only recently to operate in some routes, so that their services may only cover a limited part of the demand for passenger rail tickets in Spain served by third-party ticket distributors, and therefore the sale of their tickets only would not be economically viable for Third-party Ticketing Platforms.¹³⁰ Comprehensive access to Renfe's Content and RTD is a pre-requisite for any Ticketing Platform in Spain.

(108) The *Magill* case also provides a good analogy to the present case. The Court confirmed the Commission's finding that television guides covering only part of the programmes were only to a limited extent substitutable for television guides containing comprehensive listings and, therefore, that the basic information on programme scheduling was the indispensable input for television guides.¹³¹ The distribution services provided by Third-party Ticketing Platforms based on only part of Renfe's Content and RTD would be only to a limited extent substitutable for the online distribution services directly provided by Renfe based on its full Content and RTD.

(109) In view of the above, the Commission preliminarily concluded that the full Content and RTD which are available on Renfe's own online distribution channels are indispensable for Third-party Ticketing Platforms to create their own product and to be able to exercise effective competition on the downstream market for online rail ticketing services.

(b) Elimination of effective competition

¹³⁰ See, by analogy, Case T-612/17 – Google Shopping, EU:T:2021:763, paragraph 227.

¹³¹ Joined cases C-241/91 P and C-242/91 P – Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) v Commission (Magill), EU:C:1995:98, paragraphs 53-54.

- (110) In the Preliminary Assessment, the Commission expressed preliminary concerns that absent full access to Content and RTD, Third-party Ticketing Platforms would not be able to represent a competitive constraint for Renfe's online distribution solutions and would likely be gradually eliminated from the market or prevented from entering it. In addition to the indispensability of full Content and RTD explained in point (a) above, the risk of elimination of effective competition is reinforced by certain features of the downstream market which favour a consumer bias towards Renfe's online ticketing services, specifically the competitive advantages inherited by Renfe from its former rail monopoly (e.g. brand recognition, after-sale support services).
- (111) Some Third-party Ticketing Platforms submitted that Renfe has hindered consumers from building trust in their services, as well as from attracting and retaining them due to its refusal to provide all of its Content and RTD.^{132 133}
- (112) Consumer surveys submitted by Trainline suggest that consumers require trust in a particular ticketing platform and that seeing the full range of Content and RTD is a crucial element.¹³⁴ In particular, consumers point to the ability to find the cheapest or more convenient tickets, the notification in case of delay or cancellation of the train, and the automatic refund in case of train delays/cancellations as key selling points of rail operators and Third-party Ticketing Platforms. Also, when requested about their preferred options, a survey commissioned by Trainline and issued in June 2022 confirmed that:¹³⁵
- “70% of Spanish train travellers would prefer to have all train travel options in one app/website”;
 - “68% of Spanish train travel[l]ers would choose to buy directly with the rail operator as it is essential for them to have all the travel options available when making the purchase” [compared to a rail ticketing platform that does not offer all options];
 - “88% of Trainline users would prefer to buy with Renfe if they have promotions or discounts that are not available on Trainline”;

¹³² Trainline: "... product parity with Renfe is required to reach viable economics" (reply to Q.44); "Trainline (as other independent retailers) should receive altogether full product parity with Renfe, fair access to all inventory, product content, and real time data in order to be credible in the passenger rail ticket market in Spain. Indeed customers want to know that they are given the opportunity to make an informed decision according to their needs" (reply to Q.17); "Retention is achieved when a customer trusts the brand they are using. If a customer perceives that there are limitations such as missing prices, missing live service updates, missing inventory when using a ticketing service such as Trainline, then they will not trust a brand to fulfil their travel needs and are unlikely to come back and use our service again" (reply to Q.22). Trainline's reply to the Commission's RFI of 10 December 2021.

¹³³ Omio has stated, in Q.19 and Q.20 of the Commission's RFI of 19 January 2022, that: "By way of priority for Omio, it is difficult to assign a particular value to (Renfe) individual functionality enhancements and it is clear that functional parity with Renfe's own channels is the overriding objective (...). Our baseline is that we must have access to all the relevant content from Renfe, at the same prices and with all relevant supporting datasets. Parity of offer is thus the first principle that Omio considers – this allows Omio and other independent ticket vendors to compete on their own merits and to succeed due to their own efforts and innovation. Renfe secures a competitive advantage for its own channels by a) imposing unworkable commercial terms and b) refusing to share certain features/data."

¹³⁴ Insight Angels 2018 and 2019 surveys submitted by Trainline as Annex 3 of the reply to the Commission RFI of 10 December 2021.

¹³⁵ Yougov June 2022 survey "Content and access restrictions Spain", submitted by Trainline on 28 June 2022.

- “86% of the Trainline users would prefer to buy with Renfe if they have prices or fares that are not available in Trainline”;
 - “87% of the Spanish train travellers would change their current ticket provider for Renfe, if Renfe were the only provider to offer them real time data”;
 - “84% of the Trainline users would consider switching to Renfe, if Renfe were the only train ticket provider that could process ticket changes and compensation claims”.
- (113) Renfe’s own documents also refer to the importance of wide range of options (Content and RTD) for the attraction and retention of consumers, as a potential competitive advantage for a platform to allow its customers to purchase the needed tickets:
- *“(…) Consequently, this platform [Renfe’s mobility platform dōcō] should have access to all the data and content of RENFE VIAJEROS’ sales system (content, offers, promotions, real-time data), as well as to the data and content of all other operators who wished to integrate and are willing to provide them”*.¹³⁶
- (114) The Preliminary Assessment suggests that, as long as Third-party Ticketing Platforms do not have parity of Content and RTD with Renfe, they could only offer an inferior user experience compared to Renfe’s own online distribution channels and may therefore only retain a marginal presence in the Spanish market for online rail ticketing services. Not only would they be limited by Renfe’s inherited brand advantage, but they would also be limited by lack of Content and RTD, so that they would not be able to compete with Renfe solely on the merits of their respective websites and apps. For example, as long as Third-party Ticketing Platforms do not have all of Renfe’s Content and RTD, Renfe could advertise that only Renfe’s own distribution channels offer all of them. Because of that, Third-party Ticketing Platforms would likely lose not just sales associated with some particular Renfe Content which was not available, but they would likely lose any customer looking for any Renfe Content.
- (115) Therefore, the Commission expressed preliminary concerns that Renfe’s behaviour may be capable of eliminating effective competition for the following reasons. First, Renfe’s behaviour degrades consumers’ ease of booking with Third-party Ticketing Platforms, in the sense of the consumer being able to search, compare and buy rail tickets easily. Specifically, due to the lack of parity between Renfe and Third-party Ticketing Platforms in terms of Content and RTD, consumers tend to use Renfe’s own digital distribution services since Renfe is the only online ticketing provider for which they are assured of accessibility to all the Content and RTD they need. If there were parity between Renfe and Third-party Ticketing Platforms in terms of Content and RTD, consumers would be able to choose between different online ticketing providers, notably between Renfe and Third-party Ticketing Platforms, based on the quality of their services, and to use the provider offering better or more innovative ticketing experience (e.g. in terms of attractive graphical user interface, clear information, fast process and payment, good customer service, extra features or functionalities).

¹³⁶ Renfe's reply to the Commission's RFI of 18 February 2021.

- (116) Furthermore, Renfe's behaviour could be hampering the rise of Third-party Ticketing Platforms in Spain, which, in turn, may discourage them from investing in new functionalities for the distribution of rail tickets in Spain, which would improve their competitiveness.
- (117) For example, Trainline submitted that the lack of full Content and RTD is preventing it from developing, in the Spanish market, innovative features which are already present in Trainline's channels in other EU markets.¹³⁷ These features would be developed by Trainline to attract and retain customers to rail.
- (118) Omio also submitted that "our ability to innovate to improve our service to customers is hindered by lack of certain data such as real-time running data for trains".¹³⁸
- (119) Moreover, Renfe's behaviour may also reduce the added value for consumers of the listing on Third-party Ticketing Platforms of new rail operators in Spain and of the comparability of their passenger train services on Third-party Ticketing Platforms. Because Renfe's behaviour prevents Third-party Ticketing Platforms from offering a comprehensive product, it likely has the potential to reduce their attractiveness to consumers, with the potential effect that consumers are likely less inclined to go to Third-party Ticketing Platforms to compare Renfe's tickets with the rail new entrants' tickets, and/or to travel with the rail new entrants.
- (120) Therefore, the Commission preliminary concluded that Renfe's behaviour would be able to hamper the ability of its current and potential competitors to compete on the downstream market and, ultimately, eliminate effective competition on that market. In other words, Renfe would be leveraging its position in the upstream market for passenger rail transport services to gain an advantage in the downstream market of online rail ticketing services, where it faces competition from Third-party Ticketing Platforms.
- (c) No objective justification
- (121) In the Preliminary Assessment, the Commission took the preliminary view that the evidence from the Commission's investigation shows that Renfe's decision to limit the Content and RTD it provides to Third-party Ticketing Platforms is a commercial decision and not a decision based on criteria that may be considered to be an objective justification for the following reasons.¹³⁹
- (122) As regards the cost of developing the necessary IT connections, Renfe has explained its process and costs. Renfe's internal documents also shed light on this area. There is

¹³⁷ Examples of such features are: (i) Live Tracker - a functionality that allows consumers to watch their train as it travels along their route, live, and see the expected arrival times at each stop; (ii) Automated Delay Repay - if a customer is entitled to get a portion or all of their money back because a train has been delayed, Trainline will notify that customer and assist them by automating as much of the administrative work as possible; (iii) Split Save - Trainline's functionality which offers customers extra value by splitting fares and stitching them back together so that the customer gets the same journey for a cheaper price - this arises where the price of a through ticket is more expensive than the sum of its parts; (iv) Discount vouchers; (v) Enriched disruption notification - when delay and cancellation disruptions happen, Trainline would notify customers and suggest alternative options; (vi) Save Your Commute - the option for customers to save their regular journey and access it in one click; (vii) Railcard Renewals.

¹³⁸ Omio's reply to the Commission's RFI of 19 January 2022.

¹³⁹ See for example Renfe's internal e-mail of 12 December 2019: "*Current retailers and resellers such as Trainline, trenes.com, etc. will become comparators of train travel, which will reduce the traffic to renfe.com and the sales possibilities of our services (...)*".

evidence suggesting that some IT connections to some Third-party Ticketing Platforms were technically possible at short notice but were not switched on:

- Renfe’s internal e-mail of 4 May 2021: *"Well, if it is also configuration and does not involve anything more than making or not the commercial decision, it can also be included in this XML enhancement package and with that we cover practically 100% of what they have been asking us for some time."*¹⁴⁰
- Renfe’s internal e-mail of 4 May 2021: *"We have been left to make a first concession in XML of what does not require further development. I believe that with this we do not need development as it is all in the configuration and is not available in XML because of past business decisions?"*¹⁴¹

(123) There is also evidence that IT development work enabling – among other improvements – Third-party Ticketing Platforms to have access to the requested Content was ongoing, even though Renfe had neither decided whether to provide the requested Content to Third-party Ticketing Platforms nor had informed them of the planned availability of the requested Content. For example, in a Renfe’s internal e-mail of 8 May 2020 discussing the reply to be made to a Third-party Ticketing Platform's request for access to a particular type of Content, it is stated that: *"They can't, [meaning "they can't get it"] it is not feasible at the moment. You can tell them that we have it registered as an improvement but we don't even have it planned. P.S. In a way it's true, because I'm working on evolutions of VAV to 'make it cooler' but we can't say this to them because it's going to take a long time, if it goes ahead in the end..."*

(124) Thus, the Commission preliminarily concluded that Renfe’s decision to limit the Content and RTD that it provides to Third-party Ticketing Platforms is a commercial decision, not a decision based on an objective justification.

5.4. Effect on trade between Member States

5.4.1. Principles

(125) Article 102 TFEU prohibits as incompatible with the internal market an abuse of a dominant position *"in so far as it may affect trade between Member States"*.

(126) The effect on trade criterion consists of three elements. First, “trade” must be potentially affected. The concept of trade is not limited to traditional exchanges of goods and services across borders, but covers all cross-border economic activity. Second, the practice does not necessarily need to reduce trade;¹⁴² it is sufficient to show that the abuse “may affect trade between Member States”. In other words, it must be foreseeable with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the practice in question has an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.¹⁴³ Third,

¹⁴⁰ “Configuration” means “in the standard configuration” and “XML” refers to the VAV API.

¹⁴¹ “XML” refers to the VAV API.

¹⁴² Case T-141/89 – *Tréfileurope v Commission*, EU:T:1995:62, paragraphs 57 and 122.

¹⁴³ Case C-5/69 – *Franz Völk v Établissement J. Vervaecke*, EU:C:1969:35, paragraph 5/7; Case C-322/81 – *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, paragraph 104; Case C-41/90 – *Höfner and Elser v Macrotron*, EU:C:1991:161, paragraph 32; Case T-228/97 – *Irish Sugar v Commission*, EU:T:1999:246, paragraph 170.

the effect on trade between Member States must be “appreciable”.¹⁴⁴ The stronger the position of an undertaking, the more likely it is that the effect of a practice on trade between Member States will be appreciable.¹⁴⁵

5.4.2. *Application to this case*

- (127) In the Preliminary Assessment, the Commission reached the preliminary conclusion that, *prima facie*, Renfe’s refusal to provide full Content and RTD may have an appreciable effect on trade between Member States for the following reasons.
- (128) First, Third-party Ticketing Platforms are generally active in several Member States. In this sense, for example Trainline is not only active in Spain but also in Austria, Belgium, the Czech Republic, France, Germany, Italy, Luxembourg and the Netherlands. As regards Omio, it is also active in the aforementioned Member States, as well as in Croatia, Hungary, Poland, Portugal, Slovakia, Slovenia and Sweden. Renfe’s position on the affected markets also indicates that Renfe’s conduct may affect trade between Member States. According to the Guidelines on the effect on trade concept, “where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected. Such abusive conduct will generally make it more difficult for competitors from other Member States to penetrate the market, in which case patterns of trade are capable of being affected”.¹⁴⁶ In this sense, Renfe’s behaviour may hinder the entry into the Spanish online ticketing market of potential competitors established in other Member States.
- (129) Second, Third-party Ticketing Platforms like Trainline and Omio sell train tickets from their Spanish ticketing platform to customers located in other Member States. In this sense, it has to be noted that Spain is the second most popular tourist destination of the world (71.5 million of visitors in 2022), and is the preferred tourist destination for French and German visitors, with a strong presence of other EU visitors (Netherlands, Portugal, Belgium, Ireland, Denmark, etc.).¹⁴⁷
- (130) Third, Renfe’s conduct also concerns passenger rail transport services on cross-border O&Ds (e.g. between Spain and France or Portugal).
- (131) Therefore, in the Preliminary Assessment, the Commission reached the preliminary conclusion that Renfe’s refusal to provide full Content and RTD may be capable of having an appreciable effect on trade between Member States.

6. THE INITIAL COMMITMENTS

- (132) On 30 May 2023, Renfe submitted the Initial Commitments, with the following key elements.

¹⁴⁴ Case C-5/69 – *Franz Völk v Établissement J. Vervaecke*, EU:C:1969:35, paragraph 5/7.

¹⁴⁵ Case T-65/89 – *BPB Industries and British Gypsum v Commission*, EU:T:1993:31, paragraph 138.

¹⁴⁶ Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07), paragraph 93.

¹⁴⁷ <https://www.tourspain.es/es/notas-prensa-turismo/mercados-emisores-gasto-turistico/>.

6.1. Access to full Content and RTD

- (133) Renfe would make available for Third-party Ticketing Platforms, via the VAV API, all the Content and RTD that is available on the Effective Date¹⁴⁸ or that may become available on any of its own online channels, including its mobility platform *dōcō*, after the Effective Date. The Initial Commitments contained two provisions exempting Renfe from the obligation to provide Third-party Ticketing Platforms with access to, respectively, third-party Content not owned by Renfe and third-party RTD not owned by Renfe.
- (134) Renfe's commitments would therefore be dynamic, and not limited to Content or RTD already provided by Renfe through its own online channels. They would remain in force from an indefinite period starting from the Effective Date.
- (135) To implement the Initial Commitments, Renfe would make available for Third-party Ticketing Platforms any Renfe Content or RTD available on Renfe's own online channels and/or Renfe's mobility platform (such as *dōcō*) on the Effective Date by, at the latest, 29 February 2024. As an exception, for the Content or RTD which requires launching a tender procedure to give access to Third-party Ticketing Platforms, Renfe would give access to such Content or RTD at the latest by 30 June 2024; however (i) RTD on scheduled incidences affecting tickets that have already been sold would be available by 30 November 2024, and (ii) tickets for Luxury Tourist Trains and Leisure Tourist Trains would be available by 31 December 2024.
- (136) As regards Renfe Content or RTD that may become available to Third-party Ticketing Platforms after the Effective Date, to allow Third-party Ticketing Platforms to prepare their IT systems, Renfe would announce at the same time to Third-party Ticketing Platforms and *dōcō* the inclusion of any new Renfe Content or RTD four months in advance, and would also communicate at the same time to both the technical specifications required to adapt their systems one month in advance until 31 December 2024 and two months in advance after 31 December 2024. The one-month advance notice deadline aimed at ensuring compliance with the Initial Commitments related to access to Content and RTD available on Renfe's own online channels but not yet available on Third-party Ticketing Platforms on the Effective Date (recital (135)). The two-month deadline would apply to future Content and RTD (Content and RTD not available on Renfe's own online channels on the Effective Date).

6.2. Look-to-Book ratio

- (137) The L2B was defined as the ratio between the number of requests related to the sale of tickets ("look") made to Renfe's ticket sales system and the number of actual sales ("book") made during a given period of time.
- (138) The inclusion of a maximum L2B mechanism in the Commitments aims at striking a right balance between the need to protect Renfe's sales system from an excessive number of availability requests coming from Third-party Ticketing Platforms and the need to protect the individual operations and competitiveness of Third-party Ticketing Platforms.

¹⁴⁸ The Effective Date is the date upon which Renfe would receive formal notification of the Commitments Decision.

- (139) Based on the above, Renfe would not require from Third-party Ticketing Platforms a maximum monthly average L2B lower than 140. The minimum value for the maximum monthly average L2B would be periodically reviewed and may be modified by the Commission in response to a request by Renfe. In justified cases, if a Third-party Ticketing Platform exceeds the L2B ratio, Renfe may suspend the platform's access to its IT system.

6.3. Maximum Error Rate

- (140) The Error Rate was defined as the ratio between the number of failed reservation requests and the number of total reservation requests made to Renfe's ticket sales system during a given period of time.
- (141) The inclusion of a Maximum Error Rate ("MER") in the Commitments, aims at ensuring that the quality of the ticketing services provided by Third-party Ticketing Platforms will not be materially and negatively impacted by frequent failures in Renfe's sales system.
- (142) Based on the above, Renfe committed to a MER, on an annual average basis, of 14.23%. That maximum value would be periodically reviewed and may be modified by the Commission in response to a justified request by Renfe. In the event of non-compliance with the MER, Renfe would make the necessary efforts to analyse the causes and implement the necessary technical measures to resolve them as soon as possible.

6.4. Non-circumvention clause

- (143) Renfe would not in any way circumvent or attempt to circumvent the commitments directly or indirectly by any action or omission.

6.5. Monitoring Trustee

- (144) Renfe committed to appoint a Monitoring Trustee that would monitor and report to the Commission on the implementation of the Initial Commitments for a period of ten years from the Effective Date.

7. COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION 1/2003

- (145) The Commission published a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "Article 27(4) Notice") on 26 June 2023. In response, the Commission received eight responses from interested third parties.
- (146) The respondents generally considered that the Initial Commitments were a good starting point and welcomed the general aim of the Initial Commitments, namely to enable Third-party Ticketing Platforms to compete on an equal footing with Renfe's own digital distribution channels thanks to parity in the access to Content and RTD. However, several respondents expressed, in particular, concerns related to the fees charged by Renfe to Third-party Ticketing Platforms for the provision of access to its Content and RTD (access fees) and the fees paid by Renfe to Third-party Ticketing Platforms for the sale of its tickets (distribution fees).
- (147) The respondents also frequently identified certain clauses that would need to be modified to ensure that the Initial Commitments effectively guarantee parity between Renfe's own digital distribution channels and Third-party Ticketing Platforms in terms of access to Content and RTD.

- (148) The more detailed comments submitted in response to the Article 27(4) Notice are summarised in Section 7.1 below. Section 7.2 sets out the Commission's assessment of the Initial Commitments taking account of those comments.

7.1. Summary of respondents' comments on the Initial Commitments

7.1.1. Comments on access and distribution fees

- (149) Several respondents argued in favour of the addition of specific provisions regulating distribution and access fees. In particular, the respondents claimed that Renfe should commit to (i) fair, reasonable and non-discriminatory (FRAND) access fees, if Renfe required such access fees; and (ii) a minimum level of distribution fees, possibly by undertaking to abide by anti-margin squeeze principles.

7.1.2. Comments on the channels used by Renfe to give access to Content and RTD

- (150) As explained in recitals (21) and (22), Renfe has different channels to give access to its Content and RTD to travel agencies. Renfe uses the VOL A channel for offline travel agencies, and the VAV channel for online travel agencies (Third-party Ticketing Platforms and *dōcō*). Furthermore, certain Third-party Ticketing Platforms use VOL A to sell tickets online, in particular those connecting through a GDS.
- (151) Several respondents submitted that the Initial Commitments, which only covered the access to Content and RTD of Third-party Ticketing Platforms through the VAV API, should also cover VOL A, to ensure parity for all Third-party Ticketing Platforms, regardless of the technological choices they may make to access Renfe's Content and RTD.

7.1.3. Comments on access to Content and RTD not owned by Renfe

- (152) Several respondents made reservations on the exemptions for third-party Content and RTD (see recital (133) above) and considered that Renfe should grant access to all Content and RTD even where the latter are not legally owned by Renfe, provided they relate to trains operated by Renfe (e.g., RTD owned by ADIF, Content and RTD owned by public authorities, including PSO authorities).

7.1.4. Comments on L2B

- (153) Several respondents raised the following main issues regarding L2B.
- (154) Some respondents requested that the definition of L2B should be amended to clearly indicate that "look" refers only to availability requests and not to any other requests that Third-party Ticketing Platforms may need to make on Renfe's sales system, such as requests related to RTD.
- (155) Several respondents criticised the value of the maximum L2B (140) that Renfe may require from a Third-party Ticketing Platform as too low and asked for materially higher values.
- (156) Several respondents considered that Renfe's broad margin for discretion in deciding on the suspension of access to its sales systems by a Third-party Ticketing Platform exceeding the maximum L2B risked defeating the purpose of the Initial Commitments, as it would give Renfe an excessively broad right to cut entirely the access of a Third-party Ticketing Platform to Renfe's Content and RTD. Some respondents requested that Renfe should be required to demonstrate and substantiate actual, and significant impact to its sales system before suspending access of a Third-party Ticketing Platform to Renfe's sales system. They also requested the removal of

Renfe's right to exceptionally suspend access of a Third-party Ticketing Platform without any prior notice.

7.1.5. *Comments on MER*

- (157) Several respondents criticised the proposed MER value of 14.23% and considered that it was unacceptably high. One respondent explained that, to ensure the reliability of its ticketing service, the average level of total errors should not be higher than 1%.
- (158) Several respondents also took issue with the list of errors that would not be considered as attributable to Renfe and, therefore, would not be accounted for Renfe's actual Error Rate.

7.2. The Commission's assessment of the Initial Commitments

- (159) The Commission notes, first, that respondents put emphasis, in their comments, on issues related to fees. In that respect, the Commission considers that a distinction needs to be drawn between (i) access fees; and (ii) distribution fees.
- (160) On the one hand, for the Commission to find that the Initial Commitments effectively solve the preliminary concerns, they should adequately address the issues of access fees. These fees directly relate to the conditions imposed by Renfe for the access of Third-party Ticketing Platforms to its Content and RTD. Access fees, therefore, fall within the scope of Renfe's behaviour covered by this Decision. Although Renfe has not proposed in the Initial Commitments a provision addressing specifically that issue, the Commission considers that access fees are covered by the non-circumvention clause (clause 16 of the Initial Commitments), by which Renfe is prohibited from using any technical or commercial measures that unreasonably impede or hamper Third-party Ticketing Platforms' ability to access and distribute Renfe Content and RTD. Nevertheless, to increase the legal certainty for Third-party Ticketing Platforms, the Commission considers that the non-circumvention clause should explicitly include that Renfe shall not use any *unfair, not reasonable or discriminatory* measure.
- (161) On the other hand, the Commission considers that the issue of distribution fees does not directly relate to the conditions imposed by Renfe for the access of Third-party Ticketing Platforms to its Content and RTD.¹⁴⁹ Therefore, it falls outside of the scope of the behaviour covered by this Decision. As a consequence, the Commission considers that the fact that distribution fees are not covered by the Initial Commitments does not call into question the ability of the Initial Commitments to effectively address the preliminary concerns. Nevertheless, as recalled in recital (216) below, the Commission retains full discretion to investigate and open proceedings under Article 102 TFEU as regards Renfe's practices concerning distribution fees.
- (162) As regards the remaining comments of respondents described in Section 7.1. the Commission considers that they need to be taken into account to strengthen the ability of the Initial Commitments to effectively address the preliminary competition concerns outlined in the Preliminary Assessment (see section 9 of this Decision).

¹⁴⁹ The comments of respondents to the Article 27(4) Notice concerning distribution fees are akin to allegations of margin squeeze, which constitutes an independent form of abuse distinct from that of refusal to supply (judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 56).

8. THE REVISION OF THE INITIAL COMMITMENTS

- (163) In response to the comments received pursuant to the Article 27(4) Notice, Renfe modified the Initial Commitments with a revised proposal submitted on 23 November 2023 (the “Final Commitments”). The main modifications contained in the Final Commitments are summarised in the following sections.

8.1. Channels used by Renfe to give access to Content and RTD

- (164) Pursuant to the Final Commitments, Renfe undertakes to make available, in full, the Content and RTD distributed or communicated on its own digital channels, to Third-party Ticketing Platforms through all the channels that it currently uses for that purpose, namely the VAV API and VOL A, and the channels that it may use in the future, namely the channels that may replace or be used in parallel to the VAV API and/or VOL A in the future (section A of the Final Commitments).
- (165) Although the VOL A channel will be covered by the Final Commitments, three types of RTD are not part of the IT developments for VOL A tendered by Renfe and are excluded from the scope of RTD that Renfe will have to make available through VOL A: (i) unscheduled incidents in the operation of all services; (ii) scheduled incidents in the operation of Cercanías trains and mid-distance trains without reservation; and (iii) scheduled incidents affecting tickets that have been already sold (paragraph 2 of clause 10 of the Final Commitments).

8.2. Content and RTD not owned by Renfe

- (166) The two provisions exempting Renfe from the obligation to provide Third-party Ticketing Platforms with access to third-party Content or RTD have been replaced by: (i) a clarification that Renfe Content covered by the Final Commitments refers to content related to Renfe passenger trains and excludes content related to services provided by third parties (e.g. travel, mobility, accommodation, cultural or leisure services, or other services provided by third parties); and (ii) a clarification that RTD covered by the Final Commitments refers to information related to Renfe passenger trains and excludes information related to travel or mobility services operated by third parties (section A of the Final Commitments).

8.3. L2B

- (167) Renfe has amended the definition of L2B to clearly indicate that “look” refers only to availability requests (section A of the Final Commitments).
- (168) Renfe has also proposed a new mechanism to set the monthly maximum L2B that it may contractually require from Third-party Ticketing Platforms (clause 8 of the Final Commitments). To that end, Third-party Ticketing Platforms will be classified in three categories depending on the monthly number of available requests that each of them makes on Renfe’s sales system: (a) lower than 50 000; (b) equal to or higher than 50 000 and lower than 400 000; or (c) equal to or higher than 400 000. For each category, Renfe may not require a maximum monthly L2B ratio lower than (a) 600; (b) 200; and (c) 140, or the maximum monthly average L2B contractually required by Renfe from any Renfe mobility platform (such as dōcō) falling within the corresponding category, whichever is higher.
- (169) The Final Commitments make clear that, if Renfe does not contractually require any maximum monthly average L2B from a Renfe mobility platform (such as dōcō), Renfe will not require any maximum monthly average L2B from any Third-party Ticketing Platform.

- (170) Renfe has also amended the clauses pertaining to the suspension by Renfe of the access of a Third-party Ticketing Platform to Renfe's sales system if it exceeds the maximum L2B (clauses 8(i) and 8(ii) of the Final Commitments) as follows. First, Renfe has clarified the exceptional nature of the situation in which, pursuant to clause 8(ii), it may suspend the access of a Third-party Ticketing Platform to its sales system without prior notice. Second, as a principle, Renfe will not suspend the access of a Third-party Ticketing Platform for exceeding the maximum L2B if it does not suspend the access of its mobility platform(s) being in the same situation. Specifically, if the L2B of the Third-party Ticketing Platform negatively affects Renfe's sales system (clause 8(i) of the Final Commitments), Renfe will not suspend the access of the Third-party Ticketing Platform if Renfe does not suspend the access of a Renfe mobility platform (such as *dōcō*) belonging to the same category as the Third-party Ticketing Platform and having a L2B equal to or higher than the L2B of the Third-party Ticketing Platform. If the L2B of the Third-party Ticketing Platform immediately threatens to impede the sales of Renfe tickets (clause 8(ii) of the Final Commitments), Renfe will not suspend the access of the Third-party Ticketing Platform if Renfe does not suspend the access to a Renfe mobility platform (such as *dōcō*) having a L2B equal to or higher than the L2B of the Third-party Ticketing Platform. Third, the Final Commitments provide for the possibility for the Monitoring Trustee to intervene in the suspension process. More concretely, Renfe commits to send an alert to the Monitoring Trustee both at the time of detection of the actual L2B exceeding the maximum L2B set contractually (the "incident") and after the joint assessment of the cause of the incident. In addition, Renfe has added, in Annex I of the Final Commitments, a specific fast-track dispute resolution procedure for disagreements linked to the suspension. Specifically, if a Third-party Ticketing Platform triggers this procedure, the Monitoring Trustee will have to approve the suspension by Renfe *ex ante* in the scenario described in clause 8(i) of the Final Commitments, or *ex post* in the scenario described in clause 8 (ii) of the Final Commitments. Renfe undertakes to immediately reinstate access if the Monitoring Trustee considers that the suspension was not in line with the Commitments.
- (171) The Final Commitments also clarify the cases where the cause of the incident shall not be considered as having its origin in the Third-party Ticketing Platform's system (e.g. incidents related to the unavailability of Renfe's sales system).
- (172) Finally, Renfe has removed the specific review mechanism for the maximum L2B (last two paragraphs of clause 8 of the Initial Commitments).

8.4. MER

- (173) Renfe has clarified in the Final Commitments that the Error Rate is calculated on the basis of errors attributable only to Renfe (Section A of the Final Commitments).

Renfe has also proposed a lower value for the MER. Renfe has committed to an annual average MER of 4% as from 2024. In addition to the MER, Renfe commits to a maximum monthly Unavailability Rate¹⁵⁰ of 1% as from 2025 (clause 9 of the Final Commitments). A maximum monthly Unavailability Rate of 1% means that, for a month, the maximum number of minutes between 06:00 and 23:00 during which the sum of Renfe's ticket sales through all channels is zero is 316.2 minutes.

¹⁵⁰ See footnote 29.

- (174) Furthermore, Renfe has modified the non-exhaustive list of errors that shall not be considered as attributable to Renfe and, therefore, shall not be taken into account when calculating Renfe's actual Error Rate (paragraph 3 of clause 9 of the Final Commitments). First, errors due to planned or emergency maintenance of the VAV API shall not be considered as attributable to Renfe as long as Renfe informs Third-party Ticketing Platforms of the planned maintenance at least three days in advance, and, in case of urgent maintenance, as soon as possible. Second, errors due to functionalities or services under development (i.e. Beta or trial versions) have been removed from the list and, consequently, shall be considered as attributable to Renfe and shall be taken into account for the calculation of the Error Rate. Third, it is made clear that failures due to the substitution of the sales system shall not be considered as attributable to Renfe only during the year following the entry into operation of the new sales system.
- (175) Finally, Renfe has removed the specific review mechanism for the MER (last two paragraphs of clause 9 of the Initial Commitments).

8.5. Non-circumvention clause

- (176) Renfe has amended the non-circumvention clause to explicitly commit not to use any *unfair, not reasonable or discriminatory* technical or commercial measure, that would impede or hamper Third-party Ticketing Platforms' ability to access and distribute Renfe Content and RTD (clause 16 of the Final Commitments).

9. PROPORTIONALITY OF THE FINAL COMMITMENTS

9.1. Principles

- (177) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued.¹⁵¹ Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.¹⁵²
- (178) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question are sufficient and respond adequately to the concerns expressed by the Commission and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately.¹⁵³
- (179) When carrying out that assessment, the Commission must take into consideration the interests of third parties.¹⁵⁴ The Commission enjoys discretion when assessing the appropriateness of proposed commitments.¹⁵⁵

¹⁵¹ See, e.g., Case T-260/94 *Air Inter v Commission*, EU:T:1994:265, paragraph 144; Case T-65/98 *Van den Bergh Foods v Commission*, EU:T:2003:281, paragraph 201; Case T-76/14 *Morningstar v Commission*, EU:T:2016:481, paragraph 84.

¹⁵² Case 265/87 *Schröder*, EU:C:1989:303, paragraph 21; Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu*, EU:C:2006:170, paragraph 28.

¹⁵³ Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraphs 41 and 61; Case T-76/14 *Morningstar v Commission*, EU:T:2016:481, paragraphs 45 and 86; Case T-873/16 *Canal+ v Commission*, EU:T:2018:904, paragraph 114.

¹⁵⁴ Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraph 41.

¹⁵⁵ Case T-76/14 *Morningstar v Commission*, EU:T:2016:481, paragraph 40; Case C-441/07 P *Commission v Alrosa*, EU:C:2010:377, paragraph 94.

9.2. Application to this case

- (180) As explained in recital (120), the Commission preliminary considered that Renfe's refusal to grant access to all its Content and RTD to Third-party Ticketing Platforms would be capable of distorting competition on the downstream market for online rail ticketing services.
- (181) Taking account of the comments made by the respondents to the Article 27(4) Notice and for the reasons detailed in sections 9.2.1 to 9.2.5 below, the Commission considers that the Final Commitments effectively and proportionately address the concerns identified by the Commission in its Preliminary Assessment.

9.2.1. Scope of the Final Commitments

- (182) The Final Commitments grant parity of access to Renfe Content and RTD between Renfe's online distribution channels (including *dōcō*) and Third-party Ticketing Platforms. This means that Third-party Ticketing Platforms will have access to the same Content and RTD as the Content and RTD displayed by Renfe on its own digital distribution channels and, therefore, will be able to effectively compete with Renfe on the market for online rail ticketing services. Parity will benefit all Third-Party Ticketing Platforms, irrespective of the channel (i.e. through the VAV API, VOL A, or any future channel) used to access Renfe Content and RTD and cover, in a comprehensive and dynamic manner, any Content and any RTD related to Renfe passenger trains that is or will be displayed on Renfe's own digital distribution channels (including *dōcō*).
- (183) The definition of Renfe Content in the Final Commitments includes a non-exhaustive list of tickets, discounts and functionalities whose access will be granted by Renfe. The only conditions for those tickets, discounts and functionalities to fall within the scope of the Final Commitments are that (i) they relate to Renfe passenger trains and (b) they are displayed on Renfe's own digital channels, including *dōcō*. The first condition excludes from the scope of the Commitments content related to services provided by third parties (e.g. travel, mobility, accommodation, cultural, leisure, etc.) which may be distributed by Renfe. This exclusion does not negatively affect the effectiveness of the Final Commitments, since there is no indication that the dominant position of Renfe on the upstream market for passenger rail transport services in Spain gives it a more favourable access to content related to services provided by third parties. In other terms, there is no indication of an unlevel playing field between Renfe and Third-party Ticketing Platforms where they compete for the distribution of third-party services. Moreover, the competition concerns identified in the Preliminary Assessment relate to Renfe hindering the distribution of Renfe's tickets by Third-party Ticketing Platforms. They do neither relate to the distribution of tickets of other rail operators nor to the distribution of other services than passenger rail services.
- (184) In the Final Commitments, RTD is defined as (i) all RTD related to Renfe passenger trains, which (ii) Renfe makes available for consumers through any of its own digital distribution channels, including *dōcō*, or communication channels (e.g., email and SMS). Similarly to the situation as regards Renfe Content, any RTD related to travel or mobility services operated by third parties (e.g. services operated by another rail carrier), even if displayed on one of Renfe's own digital distribution channels (e.g. *dōcō*), will be excluded from the scope of the Final Commitments, as it is not related to Renfe's passenger rail transport services. However, ADIF RTD related to Renfe's passenger rail transport services is covered by the Final Commitments, as long as it is

displayed on Renfe's own digital channels or communicated by Renfe using its own communication channels. Since the exclusion of content related to third-party services is not considered as detrimental to the effectiveness of the Final Commitments (see recital ((183))), the exclusion of RTD related to those third-party services is not considered as negatively affecting the effectiveness of the Commitments.

- (185) In addition, the Commission considers that the exclusion of content and RTD related to third-party services from Renfe's obligation to provide access contributes to the proportionality of the Final Commitments.
- (186) Similarly, the fact that certain RTD will not be made available through VOL A (see recital (165)), does not alter the Commission's conclusion on the effectiveness and proportionality of the Final Commitments. Third-party Ticketing Platforms using GDS include primarily, according to the GDS having responded to the Article 27(4) Notice, TMCs serving corporate customers. Those TMCs are less likely to be at a competitive disadvantage for not informing themselves¹⁵⁶ passengers of unscheduled incidents, of scheduled incidents following the sale of tickets, or of scheduled incidents for services that are less relevant for corporate customers (Cercanías trains and mid-distance trains without reservation).
- (187) Finally, the Final Commitments will be in force indefinitely, which ensures the establishment of lasting non-discriminatory conditions necessary to the maintaining of effective competition on the downstream market for online rail ticketing services in Spain. The Commission considers that the indefinite duration is appropriate and proportionate taking into account the entrenched dominant position of Renfe on the passenger rail transport and online distribution markets in Spain. Should the market conditions change, Renfe may ask for a review of the Commitments pursuant to Article 9(2)(a) of Regulation 1/2003 (clause 22 of the Final Commitments).

9.2.2. *Implementation of the Final Commitments*

- (188) The Commission considers that the Final Commitments can be immediately and effectively implemented for the benefit of competition on the downstream market between Renfe and Third-party Ticketing Platforms.
- (189) Renfe commits to make available to Third-party Ticketing Platforms all its Content and RTD already available on its own digital channels (including dōcō) and, for RTD, on its communication channels, by 29 February 2024 at the latest (clauses 5 and 13 of the Final Commitments). The Commission considers this deadline reasonable and proportionate.
- (190) As an exception, for Renfe Content and RTD which require the launch of a tender procedure for the IT works necessary to make them available to Third-party Ticketing Platforms, Renfe commits to make them available by 30 June, 30 November or 31 December 2024, depending on the specific Content or RTD (clauses 5 and 13 of the Final Commitments). The Commission considers that this exception is justified since Renfe is a public undertaking subject to public procurement rules. In this context, taking into account the duration of the procedure to award IT contracts,

¹⁵⁶ Regardless of the communication of RTD by the Third-party Ticketing Platform, Renfe will communicate RTD to all passengers with available contact details irrespective of how passengers have booked the tickets.

the Commission considers that the deadlines proposed by Renfe are reasonable and proportionate.

- (191) Parity regarding the timing for the access to future Content and future RTD is also granted by the Final Commitments, as Renfe commits to make them available for its own digital channels and for Third-party Ticketing Platforms simultaneously (clauses 6 and 14 of the Final Commitments).
- (192) The Final Commitments contain an exception regarding RTD on unscheduled incidents that Renfe has to communicate immediately to passengers and whose availability in the VAV API (or any future API) requires new IT developments. Although this RTD will not be immediately available in the VAV API (or any future API), Renfe commits to carry out the necessary developments to include this RTD in the VAV API (or any future API) as soon as possible.¹⁵⁷ The Commission considers that this exception is justified and reasonable and contributes to the proportionality of the Final Commitments.
- (193) Moreover, Renfe commits to communicate to all Third-party Ticketing Platforms, in advance and simultaneously to its own mobility platform (such as dōcō), the inclusion of new Content or RTD in VAV or in VOL A. Regarding the inclusion of new Content or new RTD in the VAV API, which may require adaptations to the Third-party Ticketing Platforms' IT system, Renfe will also communicate simultaneously to Third-party Ticketing Platforms and to its own mobility platform (such as dōcō) the technical specifications required to adapt their IT system (clauses 7 and 15 of the Final Commitments). This commitment ensures parity in terms of preparedness plans. In addition, the notice periods proposed by Renfe (at least four months in advance for the communication of the inclusion of new Content or RTD and at least one or two months in advance for the communication of the technical specifications) are reasonable and proportionate.

9.2.3. *L2B*

- (194) The Commission considers that the L2B mechanism (clause 8 of the Final Commitments) strikes the right balance between the need to protect Renfe's sales system, so that all Third-party Ticketing Platforms and Renfe can operate seamlessly, and the need to protect the individual operations and competitiveness of Third-party Ticketing Platforms. Moreover, the Commission considers that the modifications brought to the L2B provisions in the Final Commitments adequately address the comments from respondents to the Article 27(4) Notice about the risks that the L2B is used by Renfe to undermine the competitiveness of Third-party Ticketing Platforms. Therefore, for the reasons explained below, the Commission considers that the L2B mechanism in the Final Commitments contributes to the effectiveness and proportionality of the Final Commitments.
- (195) The clarification added in the Final Commitments that the notion of "look" exclusively applies to availability requests¹⁵⁸ and not to any other requests that Third-party Ticketing Platforms may need to make on Renfe's sales system, increases the legal certainty for Third-party Ticketing Platforms.

¹⁵⁷ This means that Renfe would be relieved from its obligation if it were not possible, i.e. for technical reasons, to include this RTD in the VAV API (or any future API).

¹⁵⁸ Availability requests are the type of request with the greatest impact on the performance of Renfe's sales system.

- (196) Following the call for an increased L2B by respondents to the Article 27(4) Notice, Renfe has deepened its analysis of the number of availability requests currently made by Third-party Ticketing Platforms and the impact that an increase in their availability requests and, consequently, their L2B could have on Renfe's sales system. On that basis, Renfe has proposed the categorisation of Third-party Ticketing Platforms depending on their level of activity and adjusted the maximum L2B values applicable to each category.¹⁵⁹ The Commission has reviewed the data provided by Renfe and considers that the categorisation of Third-party Ticketing Platforms and the corresponding L2B values proposed by Renfe are objectively justified by the capacity of Renfe's sales system.¹⁶⁰
- (197) In addition, data provided by Renfe demonstrates that, for most Third-party Ticketing Platforms, the actual L2B is below the applicable maximum L2B by a significant margin, which could accommodate a possible increase in the actual L2B due to the implementation of innovative features or functionalities. As there is a very limited number of Third-party Ticketing Platforms having an actual L2B exceeding the applicable maximum L2B, the risk that their operations have a negative impact Renfe's sales and, consequently, that Renfe suspends their access, is deemed low. Therefore, overall, the Commission considers that the proposed maximum L2B values are reasonable and do not hamper the ability of Third-party Ticketing Platforms to compete and innovate.¹⁶¹
- (198) In addition, the additional use, in the Final Commitments, of the maximum L2B required from a Renfe mobility platform (such as dōcō) as a benchmark for the maximum L2B required from Third-party Ticketing Platforms guarantees that Renfe will not use the L2B as a way to discriminate against Third-party Ticketing Platforms.
- (199) Furthermore, the amendments in the Final Commitments pertaining to the suspension of the access of Third-party Ticketing Platforms to Renfe's sales system in case they exceed the maximum L2B (clauses 8(i) and 8(ii) of the Final Commitments) adequately address the comments raised in response to the Article 27(4) Notice. First, the references to abnormal peaks in clause 8(ii) of the Final Commitments bring clarity and legal certainty as regards the exceptionality of the suspension without prior notice. Second, under the Final Commitments, Third-party Ticketing Platforms and Renfe mobility platform(s) (such as dōcō) will be treated equally in cases of L2B in excess of the maximum L2B value, which negatively affects Renfe's sales system, as well as in cases of abnormal peak in the L2B immediately threatening to impede the sales of Renfe tickets. This additional rule provides a further guarantee against the use by Renfe of the L2B to restrict competition by Third-party Ticketing Platforms. Third, in line with the call for tightened scrutiny of Renfe's right to suspend, the Final Commitments clarify and reinforce the involvement of the Monitoring Trustee in the suspension process, which ensures that suspension follows a transparent, fair and balanced process.

¹⁵⁹ 600 for low-impact platforms (<50.000 availability requests per month); 200 for medium-impact platforms (>= 50,000 and < 400,000 availability requests per month); 140 for high-impact platforms (>=400,000 availability requests per month).

¹⁶⁰ Should there be a material change in the facts supporting that conclusion, Renfe may request the Commission to review and modify the categories and maximum L2B values pursuant to Article 9(2)(a) of Regulation 1/2003.

¹⁶¹ Should there be a material change in the facts supporting that conclusion, the Commission may review and modify the categories and maximum L2B values pursuant to Article 9(2)(a) of Regulation 1/2003.

- (200) The Commission considers that the removal of the L2B review clause initially foreseen in the Initial Commitments does not alter its conclusion on the effectiveness of the Final Commitments. Indeed, given the inclusion in the Final Commitments of additional, higher L2B values better adapted to ramp-up phase of the activities of Third-party Ticketing Platforms, the Commission considers that the potential need for a modification of the L2B value is lower than in the Initial Commitments, so that the general review mechanism regulated in Article 9(2)(a) of Regulation 1/2003 is sufficient to cope for that potential need.
- (201) Finally, the amendments introduced by Renfe on the non-exhaustive list of cases where the cause of the incident shall not be considered as having its origin in the Third-party Ticketing Platform's system (e.g., incidents related to the unavailability of Renfe's sales system) also respond to the call for increased legal certainty by respondents to the Article 27(4) Notice.

9.2.4. *MER*

- (202) The Commission considers that, for the reasons explained below, (i) the amendments introduced by Renfe in the Final Commitments adequately address the comments expressed by respondents to the Article 27(4) Notice regarding the MER, and (ii) the amended obligations of Renfe concerning the correction of errors or failures in its system contribute to the effective resolution of the concerns identified in the Preliminary Assessment, without imposing a disproportionate burden on Renfe.
- (203) First, in the Final Commitments, the explicit reference in the definition of Error Rate to errors attributable to Renfe is accompanied by the clarification that, in case Renfe cannot conclude if an error is or is not attributable to Renfe, the error will be deemed attributable to Renfe and, therefore, will be included in Renfe's Error Rate. This provision incentivises Renfe (i) to identify the causes of the errors, and (ii) to improve the performance of its sales system even if it faces difficulty in identifying the causes of the errors.
- (204) Second, Renfe has substantially reduced the MER, from a maximum annual average of 14,24% in the Initial Commitments, to a maximum annual average of 4% in the Final Commitments. Based on the information provided by Renfe, the Commission considers that the new proposal is sufficient to ensure that the quality of the ticketing services provided by Third-party Ticketing Platforms is not materially hampered by frequent failures in Renfe's sales system.
- (205) Third, the Commission values positively the inclusion of an additional mechanism contributing, like the MER, to guaranteeing the quality of services provided by Third-party Ticketing Platforms to customers. More specifically, under the Final Commitments, Renfe commits to a Maximum Unavailability Rate of 1% as from 2025. The Commission considers that the Maximum Unavailability Rate usefully complements the MER, as the Maximum Unavailability Rate measures the unavailability caused by the failure of the sales system which would affect all the channels (i.e., all of Renfe's direct and indirect distribution channels) connecting to it, and not the unavailability due to failures or errors in the transaction carried out by a given Third-party Ticketing Platform.
- (206) Fourth, Renfe has amended the indicative list of errors that shall not be considered attributable to Renfe. Importantly, the Final Commitments do not include anymore as errors not attributable to Renfe errors due to services or functionalities under

development considered Beta or trial versions, whose inclusion on the list in the Initial Commitments had been heavily criticised by respondents.

- (207) Finally, the Commission considers that the removal of the MER review clause initially foreseen in the Initial Commitments does not affect the effectiveness of the Final Commitments. Indeed, given the significant reduction in the MER initially foreseen, the Commission considers that the potential need for a modification of the MER value is lower than in the Initial Commitments, so that the general review mechanism regulated in Article 9(2)(a) of Regulation 1/2003 is sufficient to cope for that potential need.

9.2.5. *Non-circumvention clause*

- (208) The non-circumvention clause (clause 16 of the Final Commitments) has been defined in broad terms to avoid that the Commitments could be undermined by any unfair, not reasonable or discriminatory measure adopted by Renfe, including any commercial or technical measure. This definition would allow the Commission, as stated in recital (160), to assess any potential Third-party Ticketing Platform's claim regarding access fees, among other issues.

9.2.6. *Effective monitoring of Renfe's implementation of the Final Commitments*

- (209) Renfe's implementation of the Final Commitments will be subject to independent expert review by a Monitoring Trustee, acting under the Commission's supervision, for a period of 10 years (clause 21 of the Final Commitments). The involvement of a Monitoring Trustee is a proportionate and necessary commitment for ensuring effective implementation of the Commitments. The appointment process, the period of appointment and the powers of the Monitoring Trustee, which are regulated in Annex 1 of the Commitments, are standard practice in such cases.

9.2.7. *Conclusion on the effectiveness and proportionality of the Final Commitments*

- (210) The Commission considers that the Final Commitments effectively meet the competition concerns identified in its Preliminary Assessment.
- (211) Renfe has not offered less onerous commitments in response to the Preliminary Assessment that also address the Commission's concerns adequately.
- (212) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the Article 27(4) Notice and considers that the Final Commitments will not hinder the legitimate commercial interests of any third party. The Commission has carefully analysed all comments received. To the extent that they contributed to solve effectively and proportionately the competition concerns identified in the Preliminary Assessment, those comments were discussed with Renfe and are reflected in the Final Commitments.
- (213) This Decision accordingly complies with the principles of effectiveness and proportionality.

10. CONCLUSION

- (214) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its preliminary assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an

infringement. The Commission's assessment of whether the Final Commitments offered by Renfe are sufficient to meet its concerns as set out in its Preliminary Assessment is based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

- (215) In the light of the Final Commitments, the Commission considers that there are no longer grounds for action on its part as regards the concerns as set out in the Preliminary Assessment and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings with respect to those concerns should be brought to an end.
- (216) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Commitments as listed in the Annex shall be binding on Renfe-Operadora, E.P.E. and Renfe Viajeros, S.M.E., S.A. for an indefinite period starting from the date of notification of this Decision.

Article 2

There are no longer grounds for action in this case.

Article 3

This Decision is addressed to:

Renfe-Operadora E.P.E. and Renfe-Viajeros S.M.E, S.A., Avenida de Pío XII, 110, Madrid 28036, Spain.

Done at Brussels, 17.1.2024

For the Commission

(Signed)

*Margrethe VESTAGER
Executive Vice-President*