EUROPEAN COMMISSION
Competition DG

CASE AT.40401 - Second-hand Rolling Stock

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) No 1/2003

Article 7 Regulation (EC) 1/2003

Date: 23/10/2024

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EUROPEAN
COMMISSION

Brussels, 23.10.2024
C(2024) 7355 final

COMMISSION DECISION

of 23.10.2024

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

(AT.40401 - Second-hand Rolling Stock)

(Only the English text is authentic)

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COMMISSION DECISION

of 23.10.2024

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

(AT.40401 - Second-hand Rolling Stock)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ("TFEU"),

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions of 20 November 2020 to initiate proceedings in this case[2],

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[3],

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

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

Whereas:

1. INTRODUCTION AND EXECUTIVE SUMMARY OF THE COMMISSION'S FINDINGS IN THE PRESENT DECISION

(1) The addressees of this Decision participated in a single and continuous infringement of Article 101(1) TFEU. The infringement consisted of an agreement and/or concerted practice between the Czech rail incumbent České dráhy, a.s. (referred to in this Decision as "ČD") and the Austrian rail incumbent Österreichische

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[1] OJ L 1, 4.1.2003, p.1.With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 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".

[2] […]

[3] OJ L 123, 27.4.2004, p. 18.

Bundesbahnen-Holding Aktiengesellschaft, ÖBB-Personenverkehr Aktiengesellschaft, and ÖBB-Technische Services-Gesellschaft mbH (collectively referred to in this Decision as "ÖBB") aimed at impeding the market entry or expansion of the common competitor RegioJet a.s. ("RegioJet", Czechia) in the markets for the provision of domestic long-distance rail passenger transport services in Czechia as well as for the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport. ÖBB and ČD will in the following together be referred to as "the Parties". The infringement covered the whole territory of Czechia as well as the international railway route between Prague and Vienna ("Prague – Vienna route") and lasted from 9 May 2012 to 21 January 2016 (the "period of the infringement").

(2) More particularly, the present Decision finds that the Parties, in breach of Article 101 TFEU, took coordinated anti-competitive actions to ensure that ÖBB's used passenger railway wagons would not end up with RegioJet, which was a new entrant on the rail passenger transport markets in Czechia and neighbouring countries. To this end, the Parties colluded to rig sales procedures for ÖBB's used wagons, to the detriment of RegioJet. Out of the five sales processes of ÖBB's used wagons that took place during the period of the infringement, the Parties discussed avoiding a sale to RegioJet in all five instances and succeeded in doing so in three instances. Examples of the Parties' collusive efforts include the following:

(a) cancelling and delaying some wagon sales to ensure that those wagons did not end up with RegioJet (see below sections 5.4 and 5.5);

(b) ÖBB informing ČD of upcoming wagons sales and giving ČD extra time to improve its bid, thus giving preferential treatment to ČD (see below sections 5.6 and 5.12);

(c) publicly offering wagons for sale while actually intending to sell them to ČD, and reducing publicity around planned wagon sales in order not to attract bidders other than ČD (see below sections 5.7 and 5.9);

(d) exchanging information about other bidders' bids and the degree of interest of other bidders (see below recital (418) and section 5.12);

(e) ČD leaving the price it offers for ÖBB's wagons up to the consideration of the seller ÖBB (see above section 5.7);

(f) ČD contacting ÖBB in order to agree on a final price for wagons to avoid being outbid by other bidders (see above section 5.12);

(g) having contacts at top management level in order to prevent wagon sales to RegioJet (see above sections 5.6 and 5.11 and 5.12).

(3) The Parties' core business is the provision of rail passenger transport services in respectively Czechia and Austria as well as on international lines between the two Member States, where the Parties offer joint services in cooperation (e.g. on the Prague-Vienna route). During the period of the infringement, RegioJet was an actual competitor of ČD in Czechia and potential competitor of both Parties on the Prague-Vienna route.

(4) As a small new entrant with limited resources, RegioJet largely relied on used wagons for both its existing operations and potential further expansion. ÖBB

represented an ideal source of those wagons, due to their technical compatibility with the railway networks on both sides of the border and the large numbers of available wagons of good quality and with modern features. By agreeing to take measures to prevent, hinder or restrict RegioJet's access to such an important competitive input on the markets for long-distance rail passenger transport services, ČD and ÖBB pursued the broader objective to impede RegioJet's expansion on the long-distance rail passenger transport market in Czechia and on the Prague-Vienna route, where both ČD and ÖBB viewed RegioJet as a threat to their incumbent positions.

(5) In other words, two downstream players collusively rigged sales processes for used wagons to the detriment of their common downstream competitor. The nature of the Parties' agreement and/or concerted practice is therefore horizontal.

(6) The objective of the Parties' conduct, i.e. to harm their competitor RegioJet, was anticompetitive, and the Parties' conduct was capable of reducing RegioJet's access to suitable wagons and therefore reducing its ability to compete with the Parties on the downstream markets. As such, it amounted to a "by-object" infringement of Article 101 TFEU. The Parties were aware that ÖBB's used wagons represented an important competitive input for the new entrant RegioJet and that restricting RegioJet's access to ÖBB's wagons was at least capable of reducing RegioJet's expansion.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. Rail passenger transport services and their geographic scope

(7) The present Decision concerns the provision of domestic long-distance rail passenger transport services in Czechia as well as the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route.

(8) The Parties' anti-competitive behaviour described in the present Decision relates to the access to used railway passenger wagons suitable for long-distance passenger transport and authorised for circulation on the railway networks of Austria and of Czechia. Such wagons are an important input for providing passenger transport services in Austria and Czechia.

2.1.1. Used wagons for long-distance passenger transport and authorised for circulation on the railway networks of Austria and of Czechia

(9) Railway wagons suitable for long-distance passenger transport are different from wagons for local and regional passenger transport. For example, they are adapted for higher speeds (usually 160 km/h or more), have more comfortable seats, have fewer seats per wagon and instead provide for more space for luggage, have fewer entrance doors, and provide generally a higher level of comfort to cater for the longer travel times in long distance passenger transport. Depending on their age, they can be equipped with air conditioning and/or vacuum toilets.[4] The wagons for long-distance passenger transport comprise various categories such as first class wagons (A

[4] Although nowadays such features have also become common for regional transport wagons.

category), second class wagons (B category), dining wagons (W category), luggage wagons (D category), or couchette wagons (Bc category).[5]

(10) The wagons for long-distance passenger transport concerned by the Parties' anti-competitive behaviour in the present Decision are wagons that are authorised for circulation on the railway networks of Austria and Czechia.

(11) In general, passenger wagons are not freely deployable between the railway networks of different countries[6] due to different national technical parameters (for example level of station platforms, frequency of traction energy, voltage of the train's central electricity supply, etc.). To be internationally deployable, the wagon type concerned needs in principle a special permission.[7]

(12) An important agreement in the industry is the Regolamento Internazionale delle Carrozze ("RIC"), an agreement between 49 European railway undertakings about the international use of railway passenger wagons, laying down the technical requirements that a wagon must meet in order to be used in international services.[8] Wagons that fulfil these technical requirements for international deployment possess RIC clearance and are called "RIC wagons".[9] If a wagon type possesses RIC clearance, it can be used on the networks of all RIC railway undertakings without needing special permission.

(13) In principle, ČD and ÖBB may sell wagons that are suitable and authorised for circulation on the railway networks of Austria and Czechia to any buyer, for example to each other or to other railway undertakings, or to intermediaries active in the sale and purchase of railway rolling stock. In the period from 9 May 2012 to 21 January 2016, there were no sales of wagons from ČD to ÖBB, but only sales from ÖBB to rail undertakings active in Czechia, or to their intermediaries.[10]

2.1.2. Provision of long-distance rail passenger transport services

2.1.2.1. Commission's decisional practice

(14) Due to different regulatory frameworks and supply and demand conditions, the rail transport sector in general can be divided into the freight transport sector, the regional passenger transport sector, and the long-distance passenger transport sector.[11] The latter can be further divided into domestic and international passenger transport services.

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5 The classification in these categories is an international standard used in the rail sector. The categories are set according to the UIC, the International Railway Union.

6 […]

7 […]
See also Communication of the Commission to the Council and the European Parliament "Facilitating the movement of locomotives across the European Union" of 13 December 2006, COM(2006) 782 final, page 3 and 4, and the accompanying Commission Staff Working Document of 13 December 2006, SEC(2006) 1641, page 12. See also […] https://en.wikipedia.org/wiki/International_Coach_Regulations.

8 […] See also Article 21 (12) of Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on the interoperability of the rail system within the Community, OJ L 191, 18.7.2008, p. 1-45, no longer in force, repealed by Directive (EU) 2016/797.

9 […]

10 […]

11 Commission decision of 11 August 2010 in case COMP/M.5855 – *DB / Arriva*, paragraphs 130 and 140; Commission decision of 18 December 2013 in cases COMP/AT.39678 + AT.39731 – *Deutsche Bahn I + II,* paragraphs 32 and 33.

(15) The Commission's merger decisions have defined the relevant product market as the supply of public passenger transport services by rail[12], or have made a distinction between railway concessions ("competition for the market") and various offers to supply rail services ("competition in the market").[13]

(16) The geographic market for the supply of public passenger transport services is defined in the Commission's merger decisions by the extent of the network comprising the railway routes,[14] or exceptionally also as a point-to-point route.[15]

2.1.2.2. Application to the present case

(17) While for the purposes of the present Decision it is not necessary to precisely define the markets affected by the infringement (since the Commission concludes in this Decision that the agreement and/or concerted practice at hand is a restriction by object and a cartel under Article 101 TFEU),[16] the present Decision concerns the provision of long-distance rail passenger transport services and more particularly:

(a) the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route; and

(b) the provision of domestic long-distance rail passenger transport services in Czechia.

2.2. The regulatory framework for rail passenger transport services and the competitive situation

(18) Railway undertakings can either compete with each other by offering rail transport services to passengers on routes that are open for competition ("open access competition"), or railway undertakings can compete for public service obligation ("PSO") contracts for the provision of rail passenger transport services under a public service obligation, awarded by public bodies. In the latter scenario, railway

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12 Commission decision of 7 October 1996 in case M.816 – *CGEA/South Eastern Train Company Limited*, paragraph 13 and Commission decision of 20 September 2007 in case M.4797 – *Govia/West Midlands Passenger Rail Franchise*, paragraph 12.

13 Commission decision of 11 August 2010 in case M.5855 – *DB/Arriva*, paragraph 64 and Commission decision of 20 September 2007 in case M.4797 – *Govia/West Midlands Passenger Rail Franchise*, paragraph 13.

14 Commission decision of 8 December 2003 in case M.3273 – *First/Keolis/TPE JV*, paragraph 7 and Commission decision of 11 August 2010 in case M.5855 – *DB/Arriva*, paragraph 73.

15 Commission decision of 20 July 2001 in case M.2446 – *Govia/Connex South Central*, paragraph 14 and Commission decision of 11 August 2010 in case M.5855 – *DB/Arriva*, paragraph 74.

16 See Judgment of the Court of First Instance of 8 July 2004, *Mannesmannröhren-Werke AG v Commission*, T-44/00, ECLI:EU:T:2004:218, paragraphs 132 to 133; Judgment of the Court of First Instance of 18 July 2005, *Scandinavian Airlines System AB v Commission*, T-241/01, ECLI:EU:T:2005:296, paragraph 99; Judgment of the Court of First Instance of 6 December 2005, *Brouwerij Haacht NV v Commission*, T-48/02, ECLI:EU:T:2005:436, paragraph 59; Judgment of the Court of First Instance of 12 September 2007, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG v Commission,* T-30/05, ECLI:EU:T:2007:267, paragraph 87; Judgment of the General Court of 28 June 2016, *Portugal Telecom SGPS, SA v European Commission,* T-208/13, EU:T:2016:368, paragraphs 176 to 177; Judgment of the General Court of 28 June 2016, *Telefónica, SA v European Commission,* T-216/13, ECLI:EU:T:2016:369, paragraphs 214 to 215; Judgment of the Court of First Instance of 15 June 2005, *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission*, joined cases T-71/03, T-74/03, T-87/03 and T-91/03, ECLI:EU:T:2005:220, paragraph 90 and Judgment of the General Court of 29 September 2021, *Nichicon Corporation v European Commission*, T-342/18, ECLI:EU:T:2021:635, paragraph 318.

undertakings typically receive a compensation for the incurred loss, including a reasonable profit.

2.2.1. The regulatory framework for international passenger transport services and the competitive situation

(19) The Union's Third Railway Package[17] has fully liberalised international rail passenger transport services since 2010.

(20) The competitive situation for international rail passenger transport services in Austria and Czechia is as follows: Already long before 2010, ÖBB and ČD had been offering international services between stations in Czechia and Austria, including also on the Prague – Vienna route. At least since 2011, Deutsche Bahn has been offering services between Vienna and Prague with various international trains in cooperation with ČD.[18] Moreover, since December 2017, RegioJet has been offering services on the Prague-Vienna route.

2.2.2. The regulatory framework for rail passenger transport services in Austria and the competitive situation

(21) Railway transport in Austria is primarily regulated by the Railway Act 1957 (Eisenbahngesetz). In Austria, open access competition for long-distance rail passenger transport has so far mainly taken place on the Vienna-Salzburg route, even though legally a licensed railway undertaking can offer long-distance rail passenger transport services on every rail route in Austria. For example, liberalisation has enabled the railway undertaking WESTBahn to provide long-distance rail passenger transport services on the Vienna-Salzburg route as of December 2011 and to later expanded its services to the Austrian regions of Tyrol and Vorarlberg.

2.2.3. The regulatory framework for rail passenger transport services in Czechia and the competitive situation

(22) Railway transport in Czechia is primarily regulated by the Czech Act No. 266/1994 Coll., which lays down the conditions for the operation of the railways and of rail transport. The act allows open access competition on all routes. Since 2011, several new entrants have been offering rail passenger transport services on the Prague-Ostrava route, with RegioJet (entry in September 2011) and Leo Express (entry in November 2012) being the two most important ones. RegioJet serves also other routes, such as Prague-Brno.[19] Since 2013, the new entrant Arriva has been active on various routes mainly in the surroundings of Prague, as well as on the line between Prague and Trencin/Nitra in Slovakia.[20] Moreover, since December 2019, Arriva has been operating various regional and long-distance routes in Czechia under PSO contracts awarded by various Czech public bodies.[21]

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17 Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 315, 3.12.2007, p. 44).

18 […]

19 […]

20 […]

21 […]

2.3. The Parties

2.3.1. České dráhy

(23) ČD is the rail incumbent in Czechia. It is a joint-stock company (České dráhy, a.s.) fully owned by the Czech Republic. The shareholder rights are exercised by the Czech Ministry of Transport ("MoT"). ČD provides rail passenger and freight transport services in Czechia and in neighbouring countries.[22]

(24) In 2022, ČD's passenger-kilometres totalled 7 710 million[23] and it reported revenues of CZK 44 222 million (EUR 1 800.1 million), of which CZK 27 045 million (EUR 1 100.9 million) in passenger transport.[24]

(25) As regards long-distance rail passenger transport services in Czechia, ČD operates Ex-lines and R-lines.

(a) Ex-lines (Ex1, Ex2, Ex3, Ex4, SCP[25], etc.) are operated by ČD's higher-quality long-distance trains. They serve the country's higher-speed main backbone lines, establish connections with neighbouring countries, and stop only at the most important stations.

(b) R-lines (R8, R9, R13, etc.) are operated by ČD's lower quality trains, have more stops, and serve the more rural and lower-speed lines of the long-distance network.[26]

(26) On its Ex-lines and R-lines, ČD operates the following different types of long-distance passenger trains: SC (SuperCity), EC (EuroCity), IC (InterCity), railjet, Ex (expres), R (rychlík / fast train), Rx (a higher-quality "rychlík" train), EN (EuroNight), and NJ (Nightjet).[27]

2.3.2. Österreichische Bundesbahnen

(27) ÖBB is the Austrian rail incumbent. The ultimate parent company of the vertically integrated ÖBB-group is ÖBB-Holding AG, a joint-stock company which is 100% owned by the Republic of Austria. ÖBB provides rail passenger and freight transport services in Austria and in neighbouring countries. ÖBB-Holding AG fully owns the passenger rail operator ÖBB-Personenverkehr AG ("ÖBB-PV"). ÖBB-Technische Services GmbH ("ÖBB-TS") supplies ancillary rail services and is jointly owned by ÖBB-PV and Rail Austria AG, the latter of which is in turn wholly owned by ÖBB-Holding AG.[28]

(28) In 2022, ÖBB reported 11 400 million passenger-kilometres[29] and achieved total revenues of EUR 4 671 million, EUR 2 728 million of which were achieved in passenger transport.[30]

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22 […]

23 ČD, Annual Report 2022, […] page 41. Average annual exchange rate in 2022 according to ECB was 24.566 CZK/EUR.

24 ČD, Annual Report 2022, […] page 56. Average annual exchange rate in 2022 according to ECB was 24.566 CZK/EUR.

25 The Ex-lines that are operated with ČD's Pendolino-trainsets are called SCP = SuperCityPendolino.

26 […]

27 […]

28 […]

29 ÖBB, brochure *Zahlen, Daten, Fakten 2022/23*, page 4, […]

30 ÖBB, Annual Report 2022, page 77, […]

(29) As regards long-distance rail passenger transport services, ÖBB operates the following different types of long-distance passenger trains: RJ (railjet), RJX (railjet Xpress), ICE (InterCityExpress), EC (EuroCity), IC (InterCity), D (Schnellzug / fast train), NJ (NightJet), EN (EuroNight).[31]

2.4. Other undertakings relevant for the present proceedings

2.4.1. RegioJet

(30) RegioJet a.s. ("RegioJet") is a rail operator based in Brno, Czechia. It is a joint-stock company fully owned by the company STUDENT AGENCY k.s., which is in turn controlled by STUDENT AGENCY holding a.s. ("Student Agency"), whose only shareholder is Mr Radim Jančura. RegioJet is active in domestic and international long-distance rail passenger transport services in Czechia and Slovakia and other countries. Mr Radim Jančura is also chairman of RegioJet's board of directors.[32]

(31) RegioJet has been providing long-distance rail passenger transport services in Czechia, in particular on the Prague-Ostrava route since September 2011. It has later expanded on other long-distance routes (e.g. Prague-Brno in 2016), where it operates on a commercial basis (i.e. without a PSO contract) in parallel to ČD's trains operated under PSO contracts. RegioJet has also started providing similar services in Slovakia and, more recently, has started to offer regional transport services in Czechia under PSO contracts.[33] Since 2017, RegioJet has been offering international passenger services on the Prague-Vienna route, expanding the route in 2020 further south-east to Budapest.[34] Since 2020, RegioJet has been operating seasonal direct passenger trains to Croatia during summer periods.

(32) Student Agency, the parent company of RegioJet, has been active on the domestic and international bus passenger transport markets since 2004. The buses are also operated under the commercial brand RegioJet. RegioJet trains and buses form a dense passenger transport network in Czechia with links to other European countries.[35]

(33) In 2022, RegioJet reported revenues of CZK 1 905 million (EUR 77.5 million).[36] The company transported approximately 6.8 million passengers in 2022.[37]

2.4.2. Leo Express

(34) Leo Express Global a.s. ("Leo Express") is a private rail undertaking which has been providing long-distance rail passenger transport services in Czechia, in particular on the Prague – Ostrava route, since November 2012. Leo Express has progressively started providing similar services in other Member States (Slovakia and Poland).[38]

(35) In 2022, Leo Express reported revenues of CZK 44.1 million (EUR 1.7 million).[39]

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31 […]

32 […]

33 […]

34 […]

35 RegioJet Annual Report 2015, […] page 9.

36 RegioJet, Annual Report 2022, […] page 30. Average annual exchange rate in 2022 according to ECB was 24.566 CZK/EUR.

37 RegioJet, Annual Report 2022, […] page 6.

38 Webpage of Leo Express, […]

39 Leo Express, Annual Report 2022, […] page 30. Average annual exchange rate in 2022 according to ECB was 24.566 CZK/EUR.

2.4.3. Transport Consult Austria

(36) Transport Consult GmbH Austria ("TCA") is an Austrian consulting and trading company which is active in trading and brokerage activities involving rail rolling stock and accessory parts, in rail transport management and in transport consulting. TCA is 100% owned by […]. […] are members of TCA's management board.[40]

(37) In particular, TCA acts as an intermediary in the purchase and resale activities of rail rolling stock. It searches in Europe for second-hand rolling stock. Subsequently, TCA either buys the rolling stock itself with the aim to later re-sell it, or supports its customers in the purchase.[41]

2.4.4. Deutsche Bahn

(38) Deutsche Bahn AG ("DB") is the German rail incumbent and the holding company of various subsidiaries that provide rail passenger and freight transport services as well as logistics services in Germany and worldwide. It is a joint-stock company under German corporate law ("Aktiengesellschaft"), fully owned by the Federal Republic of Germany. In 2022, DB reported total revenues of EUR 56 300 million worldwide.[42]

(39) In passenger transport, the main subsidiaries of DB are DB Fernverkehr AG for long-distance rail passenger transport services in Germany and DB Regio AG for regional passenger transport services in Germany.[43]

(40) At least since 2011, DB has been offering services between Berlin and Prague with various international trains […].[44]

(41) DB Arriva is the DB business unit that encompasses various passenger transport solutions such as buses, trains and trams in fourteen European countries. It contains a number of country- and transport-specific subsidiaries that are partly or fully owned by Deutsche Bahn AG.[45] For 2022, Arriva reported revenues of EUR 4 214 million in total and 6 167 million passenger-kilometres in its rail operations.[46] Since 2013, Arriva has been active in Czechia,[47] and it has constantly expanded its services (see above recital (22)).

2.4.5. WESTBahn

(42) WESTBahn Management GmbH ("WESTBahn") is a private railway operator and a new entrant on the Austrian railway market which has been providing long-distance rail passenger transport services between Vienna and Salzburg since December 2011. WESTBahn is a wholly owned subsidiary of Rail Holding AG whose shareholders are the Haselsteiner Family Private Foundation (49.9%), SNCF Voyages Developpement SAS (17.4%) and Augusta Holding AG (32.7%).[48]

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40 […]
41 […]
42 DB, Integrated Report 2022, […] page 95.
43 DB, Integrated Report 2022, […] page 37.
44 […]
45 DB, Integrated Report 2022, […] page 37 and 267 et seq.
46 DB, brochure *Daten & Fakten 2022*, […] page 11 and 17.
47 Under the legal name ARRIVA TRANSPORT ČESKÁ REPUBLIKA a.s.
48 […]

2.4.6. ZSSK

(43) Železničná spoločnosť Slovensko, a.s. ("ZSSK") is the Slovak rail incumbent which is 100% owned by the Slovak Republic. The Slovak Ministry of Transport and Construction exercises the state's shareholder rights. In 2022, ZSSK reported 3 226 million passenger-kilometres[49] and EUR 513.5 million in revenue, EUR 100.6 million of which were achieved in passenger transport.[50]

3. PROCEDURE

3.1. Procedural steps

(44) On 22 June 2016, the Commission adopted an inspection decision against ČD, ÖBB and a third party in case AT.40401 – "Twins". This inspection decision concerned alleged anticompetitive agreements or concerted practices related to rolling stock used in the rail passenger transport market, in breach of Article 101 TFEU. ČD appealed the inspection decision but the General Court and the Court of Justice dismissed ČD's challenges.[51]

(45) The inspection at the premises of ČD (in Prague) and of ÖBB (in Vienna) was carried out between 28 June and 1 July 2016.

(46) On 26 September 2016, ČD sent a spontaneous submission to the Commission commenting on the allegations in the inspection decision and laying out its view on the documents the Commission had seized at the inspections at ČD's premises.[52]

(47) On 7 October 2016, the Commission sent an Article 18(2) request for information (RFI) to ÖBB with a deadline of 28 October 2016. After a request to extend the deadline, ÖBB replied on 21 November 2016.[53]

(48) On 1 June 2017, the Commission sent an Article 18(2) request for information to RegioJet with a deadline of 22 June 2017. After a request to extend the deadline, RegioJet replied on 29 June 2017.[54]

(49) On 21 June 2017, the Commission sent an Article 18(2) request for information to TCA, to which TCA replied on 11 July 2017.[55]

(50) […][56] […][57] […]

(51) On 9 July 2019, the Commission sent an Article 18(2) request for information to ČD with a deadline of 21 August 2019. After a request to extend the deadline, ČD replied on 18 September 2019.[58]

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49 ZSSK, Annual Report 2022, […] page 15.

50 ZSSK, Annual Report 2022, […] page 28.

51 Judgment of the General Court of 20 June 2018, Case T-325/16, *České dráhy a.s. v Commission*, ECLI:EU:T:2018:368. Judgment of the Court of Justice of 30 January 2020, joined cases C-538/18 P and C-539/18 P, *České dráhy a.s. v Commission*, ECLI:EU:C:2020:53.

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57 […]

58 […]

(52) On 20 September 2019, the Commission sent an Article 18(2) request for information to […] with a deadline of 14 October 2019. After a request to extend the deadline, […] replied on 23 October 2019.[59]

(53) On 30 October 2019, the Commission sent a second Article 18(2) request for information to ČD with a deadline of 27 November 2019. After three requests to extend the deadline, ČD replied on 7 May 2020 and 17 June 2020.[60]

(54) […][61]

(55) From December 2019 to July 2021, several discussions and exchanges took place between the Commission and the Parties concerning the possibility to settle the case[62], including first formal settlement meetings with both ÖBB and ČD on 16 and 17 March 2021 respectively. On 29 July 2021, the Commission informed the Parties that settlement discussions were terminated due to the low probability that the Commission and both Parties agreed on the scope of the objections within a reasonable timeframe.

(56) On 9 January 2020, the Commission sent an Article 18(2) request for information to WESTBahn, to which WESTBahn replied on 24 January 2020.[63]

(57) On 25 September 2020, the Commission sent […] and a third Article 18(2) request for information to ČD. […] ČD replied on 5 October 2020.[64]

(58) On 20 November 2020, […] initiated proceedings against the Parties.

(59) On 3 March 2021, the Commission sent a fourth Article 18(2) request for information to ČD, to which ČD replied on 24 March 2021[65] and on 30 April 2021.[66]

(60) […][67]

(61) On 16 November 2021, the Commission sent a fifth Article 18(2) request for information to ČD with a deadline of 3 December 2021. After two requests for extension of the deadline, ČD replied on 7 January 2022.[68]

(62) In March 2022, the Commission re-opened settlement discussions, which however failed again in April 2022.

(63) On 10 June 2022, the Commission adopted a Statement of Objections (“SO”) in the present proceedings.

(64) On 21 and 23 June 2022, ÖBB and ČD respectively were provided access to the file by means of a DVD containing the accessible part of the case file. […][69]

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62 Commission Notice on the conduct of settlement procedures in view of the adoption of Decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (the “Settlement Notice”), OJ C 167 of 2 July 2008, page 1.
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(65) On 29 July 2022, ČD, by letter addressed to DG Competition, requested access to further information in the file.[70] DG Competition rejected this request on 9 August 2022.[71]

(66) On 15 August 2022, pursuant to Article 7(1) of Decision 2011/695/EU,[72] ČD addressed to the Hearing Officer a request for further access to the file.[73] In this request, ČD largely restated the request made before DG Competition of 29 July 2022, and addressed some of the points made in DG Competition's response of 9 August 2022.

(67) On 25 August 2022, the Commission provided ČD with some clarifications concerning certain documents covered by ČD's request addressed to the Hearing Officer of 15 August 2022.

(68) On 14 September 2022, ÖBB submitted its written reply to the SO ("ÖBB's RSO")[74] together with six annexes. While its deadline for a reply to the SO was on 16 September 2022, ČD sent a request to extend the deadline until 9 December 2022, which was rejected by the case team. Following an extension of the deadline by the Hearing Officer, ČD submitted its written reply to the SO ("ČD's RSO")[75] together with […] annexes on 30 September 2022.

(69) On 14 October 2022, the Hearing Officer informed ÖBB about the intention to disclose to ČD further information covered by ČD's request pursuant to Article 7(1) of Decision 201/685/EU of 15 August 2022, which the Hearing Officer did not consider to be confidential as originally claimed by the information provider ÖBB and sought consent from ÖBB for disclosing that information.

(70) On 24 October 2022, ÖBB granted its consent to the disclosure of certain information[76] and subsequently, on 21 November 2022, submitted new non-confidential versions.[77] However, ÖBB refused its consent for further disclosure of certain personal data (i.e., names, including email addresses, and positions) of individuals.[78]

(71) On 2 November 2022, RegioJet applied to be granted the status of an interested third party in the present proceedings.[79] On 9 November 2022, the Hearing Officer granted RegioJet the status of an interested third party in the present proceedings. [80]

(72) On 15 November 2022, the Commission provided to ČD and ÖBB the respective other Party's reply to the SO (without the annexes).

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72 Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ('Decision 2011/695/EU').
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(73) On 23 and 25 November 2022, the Commission provided ČD further access to file by means of new non-confidential versions of certain file documents with a deadline for possible comments of 30 December 2022.

(74) On 30 November 2022, RegioJet, as interested third party in the present proceedings, submitted a written opinion within the meaning of Article 13(1) of Regulation No. 773/2004.[81]

(75) On 13 and 14 December 2022, both ÖBB and ČD further exercised their right to be heard by participating at the Oral Hearing. RegioJet also expressed its views during the Oral Hearing.

(76) On 16 January 2023, after a request to extend the deadline, ČD addressed a written submission to the Commission,[82] containing its comments on the additional information obtained on 23 and 25 November 2022. The Commission made this submission available to ÖBB on 18 January 2024.

(77) On 26 January 2023, the Commission provided RegioJet with a summary of the SO.

(78) On 31 January 2023, ČD addressed a written submission to the Commission,[83] commenting on ÖBB's RSO (received by ČD on 15 November 2022), on RegioJet's written opinion of 30 November 2022 (received by both ČD and ÖBB on 2 December 2022), and on the statements made by ÖBB and RegioJet during the Oral Hearing. The Commission made this submission available to ÖBB on 6 February 2023.

(79) On 10 February 2023, RegioJet submitted comments on the summary of the SO.[84] The Commission made this submission available to both ÖBB and ČD on 9 March 2023.

(80) On 20 February 2023, ÖBB submitted comments on ČD's submission of 31 January 2023.[85] The Commission made this submission of ÖBB available to ČD on 10 January 2024.

(81) On 21 March 2023, ČD addressed a written submission to the Commission commenting on RegioJet's comments of 10 February 2023.[86] The Commission made this submission available to ÖBB on 18 January 2024.

(82) On 15 June 2023, the Commission sent a sixth Article 18(2) request for information to ČD with a deadline of 30 June 2023. After a request to extend the deadline, ČD replied on 14 July 2023.[87] The Commission made this reply available to ÖBB on 12 April 2024.

(83) On 11 July 2023, ÖBB maintained its objections regarding further disclosure of certain personal data (i.e., names, including email addresses, and positions) of individuals contained in ÖBB documents (see above recital (70)) and referred its

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objections to the Hearing Officer, pursuant to Article 8(2) of Decision 2011/695/EU.[88]

(84) On 25 July 2023, to address observations made by ČD in its reply to the SO concerning access to meeting minutes, the Commission gave access to ČD to minutes of three meetings and phone calls held between the Commission and representatives of ÖBB and TCA in 2017, 2018 and 2021.

(85) On 22 August 2023, ČD addressed a written submission to the Commission commenting on the documents that it had received on 25 July 2023.[89] The Commission made this submission available to ÖBB on 18 January 2024.

(86) On 20 September 2023, DG Competition provided ČD further access to previously undisclosed parts of certain file documents, with a deadline for possible comments of 4 October 2023.

(87) On 21 September 2023, the Hearing Officer adopted a decision pursuant to Article 8 of Decision 2011/695/EU addressed to ÖBB, allowing the disclosure to ČD of certain personal data (i.e., names, including email addresses, and positions) of individuals contained in ÖBB documents.[90] On 18 October 2023, the Commission provided ČD with further access to that information, with a deadline for possible comments of 2 November 2023.

(88) On 13 October 2023, after a request to extend the deadline, ČD submitted written comments on the additional information it had obtained on 20 September 2023.[91] The Commission made this submission available to ÖBB on 18 January 2024.

(89) On 25 October 2023, ČD submitted a request to DG Competition for access to all yet undisclosed documents which were placed into the Commission's file after the adoption of the SO and for access to the Hearing Officer's decision addressed to ÖBB of 21 September 2023.[92]

(90) On 16 November 2023, after a request to extend the deadline, ČD submitted written comments on the additional information it had obtained on 18 October 2023 following the Hearing Officer's decision of 21 September 2023.[93] The Commission made this submission available to ÖBB on 18 January 2024.

(91) On 24 November 2023, the Commission provided ČD further access to previously undisclosed parts of a file document. ČD commented on this disclosure on 29 November 2023[94], and the Commission made this comment available to ÖBB on 18 January 2024.

(92) On 1 December 2023, the Hearing Officer adopted a decision pursuant to Article 7(1) of Decision 2011/695/EU, rejecting ČD's request for further access to the file of 15 August 2022.[95]

(93) On 20 December 2023, DG Competition informed ČD that it intended to disclose to ÖBB information included in ČD's reply of 14 July 2023 to the Commission's sixth

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Art. 18(2) request for information of 15 June 2023. Previously, on 14 December 2023, ČD had made several confidentiality claims in connection with its reply of 14 July 2023.[96]

(94) On 22 December 2023, the Commission gave ÖBB access to minutes of a meeting held between the Commission and representatives of ČD in 2019.

(95) On 5 January 2024, ČD objected to the intended disclosure mentioned in recital (93) above and referred its objections to the Hearing Officer, pursuant to Article 8(2) of Decision 2011/695/EU.[97]

(96) On 10 January 2024, in reply to ČD's request of 25 October 2023, DG Competition provided ČD with ÖBB's comments of 20 February 2023 on ČD's submission of 31 January 2023, but otherwise rejected ČD's request of 25 October 2023.

(97) On 28 February 2024, ČD submitted its views on ÖBB's submission of 20 February 2023.[98] The Commission made this submission of ČD available to ÖBB on 16 April 2024.

(98) On 28 February 2024, pursuant to Article 7(1) of Decision 2011/695/EU, ČD addressed to the Hearing Officer a request for further access to the file.[99] In this request, ČD restated the request made before DG Competition of 25 October 2023. Additionally, ČD also requested again to be given access to certain information in the Commission's file that had already been subject to the Hearing Officer's decision of 1 December 2023.

(99) On 13 March 2024, the Commission sent a seventh Article 18(2) request for information to ČD with a deadline of 27 March 2024. After two requests to extend the deadline, ČD replied on 19 April 2024 and 3 May 2024.[100] The Commission made this reply available to ÖBB on 3 May 2024.

(100) On 15 March 2024, the Hearing Officer adopted a decision pursuant to Article 8 of Decision 2011/695/EU according to which information in ČD's reply of 14 July 2023 to the Commission's sixth Article 18(2) request for information of 15 June 2023 may be disclosed to ÖBB.[101] On 12 April 2024, the Commission provided ÖBB with access to that information.

(101) On 10 June 2024, DG Competition provided ČD further access to parts of certain file documents, with a deadline for possible comments of 24 June 2024. After a request for deadline extension, ČD commented on this disclosure on 19 July 2024,[102] and the Commission made this submission available to ÖBB on 3 August 2024.

(102) On 11 June 2024, the Commission provided ČD and ÖBB with the respective other Party's annexes to its RSO (the replies to the SO had been provided to ÖBB and ČD on 15 November 2022, see above recital (72)), with a deadline for possible comments of 24 June 2024. After a request to extend the deadline, ČD replied on 19

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July 2024.[103] The Commission made this submission available to ÖBB on 3 August 2024.

(103) On 13 June 2024, ÖBB provided its total worldwide consolidated turnover for the business year 2023.[104]

(104) On 24 June 2024, ÖBB submitted written comments on the additional information it had obtained on 11 June 2024.[105] The Commission made this submission available to ČD on 26 June 2024, with a deadline for possible comments of 19 July 2024. After a request to extend the deadline, ČD commented on this disclosure on 26 July 2024.[106] The Commission made this submission available to ÖBB on 3 August 2024.

(105) On 12 July 2024, the Hearing Officer adopted a decision pursuant to Article 7(1) of Decision 2011/695/EU, rejecting ČD's request for further access to the file of 28 February 2024.[107]

(106) On 20 September 2024, the Commission held a state of play meeting with ÖBB.

(107) On 25 September 2024, the Commission had a state of play call with ČD.

(108) On 30 September 2024. ÖBB requested a meeting with EVP Vestager.[108] The Commission rejected this request on 4 October 2024.[109]

(109) On 2 October 2024, ČD submitted a request to DG Competition asking, first, for a further meeting with the Commission and, second, to be informed in writing of the method envisaged for setting the fine through a supplementary Statement of Objections or a letter of facts.[110] DG Competition rejected this request on 9 October 2024.[111]

(110) On 10 October 2024, ČD addressed to the Hearing Officer a letter requesting the Hearing Officer to use his powers *"to ensure that no decision is taken against ČD without its rights of defence being properly observed"*.[112]

(111) On 18 October 2024, the Hearing Officer replied to ČD's letter.[113]

3.2. Arguments raised by ČD and assessment by the Commission

(112) In its RSO of 30 September 2022 and in its subsequent submissions to DG Competition and its requests to the Hearing Officer, ČD raised a number of alleged procedural shortcomings. The Commission considers that these allegations are unfounded for the following reasons.

3.2.1. ČD's access to the case file

(113) ČD argues that the Commission curtailed its rights of defence and right to be heard. More particularly, ČD is of the view that (i) its access to key documents in the file has been restricted due to overly broad redactions, (ii) certain documents in the file

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have not been legible, (iii) other undertakings (namely ÖBB and RegioJet) have insufficiently justified their confidentiality claims, and (iv) references to documents in the SO could not have been paired with the documents accessible to ČD in the case file.[114]

(114) The Commission rejects that ČD's procedural rights have not been respected.

(115) First, the Commission points out that ČD's claim of an alleged restricted access to the case file also covers numerous documents in the file that are by default not accessible, such as leniency correspondence or discussions on confidentiality or draft non-confidential versions. Apart from that, in addition to providing ČD with the accessible part of the case file on DVD on 23 June 2022 (see above recital (64)), ČD has in the course of the present proceedings received additional access to various parts of documents that had previously been redacted (see above recitals (66) et seq.). The remaining very limited redactions of documents in the case file are justified by business secrets of other undertakings or by the protection of personal data, as confirmed by the Hearing Officer in its Decisions. Consequently, the Hearing Officer has rejected ČD's claim of an insufficient access to the Commission's case file in his Decisions of 1 December 2023 (see above recital (92) and of 12 July 2024 (see above recital (105)), to both of which reference is made here, too.

(116) Second, as to ČD's claims of illegibility of certain documents, the Commission points out that access was granted to the evidence in the Commission's file in its original state. Hence, the documents were made accessible to ČD in the format and legibility as the Commission has received them. As a result, the Hearing Officer has also rejected this claim of ČD in his Decision of 1 December 2023 (see above recital (92) - to which reference is made here, too – and has pointed out: *"I have not come across any documents ... whose content I could not read, even if the clarity of those documents may not be perfect in some instances."*).

3.2.2. ČD's access to proper minutes of meetings of the Commission with ÖBB and other undertakings

3.2.2.1. Principles

(117) Pursuant to the case law of the Court of Justice, the Commission has a duty to record and add to the case file the content of interviews aimed at collecting information on the subject matter of the investigation and therefore falling within the scope of Article 19 of Regulation (EC) No 1/2003.[115] The case law clarified over time that the Commission must provide an indication of the content of the discussions which took place during the interview, in particular the nature of the information provided from the subjects, but is free to record the statements made by the persons interviewed in the form of its choosing.[116]

(118) In *Intermarché Casino Achats*, the Court of Justice stressed that interviews conducted under Article 19 of Regulation (EC) No 1/2003 are those "*conducted for the purpose of collecting information relating to the subject matter of an*

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115 Judgement of the Court of Justice of 6 September 2017, *Intel*, C-413/14 P, EU:C:2017:632, paragraphs 89-93.

116 Judgement of the Court of Justice of 6 September 2017, *Intel*, C-413/14 P, EU:C:2017:632, paragraphs 90 and 91; Judgement of the General Court of 14 September 2022, *Alphabet (Google Android),* T-604/18 EU:T:2022:541, paragraph 912.

investigation, which presupposes that an investigation is ongoing".[117] Therefore, meetings discussing purely procedural or technical matters and not conducted for the purpose of collecting information relating to the subject matter of the investigation do not fall within the scope of Article 19 of Regulation (EC) No 1/2003 and therefore do not trigger an obligation to record minutes.

(119) The Court of Justice further clarified that, in order to find an infringement of the rights of defence of the investigated undertaking for lack or incompleteness of interview records, the investigated company would need to establish that: (i) it did not have access to certain exculpatory evidence and (ii) it could have used that evidence for its defence.[118]

(120) In particular, the General Court established that in assessing procedural errors in relation to records of interviews with third parties under Article 19 of Regulation (EC) No 1/2003, it is necessary to determine whether, in view of the factual and legal circumstances specific to the case, the investigated undertaking *"has adequately demonstrated that it would have been better able to ensure its defence had those errors not occurred"*. The General Court concluded that if that is not demonstrated, no infringement of rights of defence can be established.[119]

(121) Moreover, in *Google Android* the General Court took favourably into consideration that in the absence of records of interviews the Commission (i) *"endeavoured to reconstitute their content in order to enable Google to exercise its rights of defence"* (ii) *"had not made use of any of the notes provided as inculpatory evidence"* and (iii) *"it had provided Google with all potential exculpatory evidence provided at each of those meetings that could be useful for Google's defence"*.[120]

3.2.2.2. ČD's arguments and the Commission's assessment

(122) The Commission rejects ČD's claims of not having been provided with proper minutes of meetings and calls which the Commission has had with undertakings other than ČD. As laid out in more detail below, ČD's rights of defence have been preserved with respect to the meetings and calls in question, in line with the principles set out by the case law of the Courts.

Not all contacts the Commission has had during the investigation constitute interviews

(123) ČD submits that the documents made accessible to it by the Commission do not contain minutes or other records of discussions that the Commission has had with ÖBB or other undertakings with respect to the subject-matter of the present proceedings. ČD therefore requests to be informed about any such discussions and to be provided with sufficiently detailed records of those discussions.[121]

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117 Judgement of the Court of Justice of 9 March 2023, *Intermarché Casino Achats*, Case C-693/20 P, EU:C:2023:172, paragraph 112. See also judgement of the General Court of 14 September 2022, *Alphabet (Google Android),* T-604/18 EU:T:2022:541, paragraph 911.

118 Judgement of the Court of Justice of 6 September 2017, *Intel*, C-413/14 P, EU:C:2017:632, paragraph 98.

119 Judgement of the General Court of 14 September 2022, *Alphabet (Google Android),* T-604/18 EU:T:2022:541, paragraph 934.

120 Judgement of the General Court of 14 September 2022, *Alphabet (Google Android),* T-604/18 EU:T:2022:541, paragraph 941 and 942.

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(124) The Commission does not deny that it had, in the course of the present proceedings, various contacts (such as by phone or email) with ÖBB, ČD or other undertakings for which it does not dispose of agreed minutes. However, in those contacts the Commission discussed purely technical or procedural aspects (such as timing of meetings or calls, modalities of submissions of leniency statements, reminders of due submissions, information on contact persons etc). None of these contacts, for which no minutes were established, collected information relating to the subject-matter of the present investigation, and none of them were established for that purpose. Therefore, these contacts of technical or procedural nature do not constitute interviews pursuant to Article 19 of Regulation 1/2003.

ČD wrongly claims access to minutes of settlement meetings

(125) ČD claims that minutes of the meeting between ÖBB and the Commission of 16 March 2021 should have been provided to it.[122]

(126) However, ČD omits to mention that this meeting was the first settlement meeting that took place in the context of the settlement proceedings the Commission has conducted with both ČD and ÖBB in 2020 / 2021 (see above recital (55)). The fact that this meeting was a settlement meeting is clearly mentioned in document […], from which ČD claims to have learned of the meeting of 16 March 2021. A similar settlement meeting with ČD took pace one day later, and in this meeting and constantly throughout the course of the settlement proceedings ČD was informed that the content of any discussion that takes place within settlement stays confidential and is not accessible in case the settlement procedure fails.[123] Nevertheless, in full consciousness of these facts, ČD now claims access to the minutes.

ČD's rights of defence have been preserved with respect to contacts that may constitute interviews

(127) ČD further puts forward that it has not been provided with detailed minutes of meetings and discussions that the Commission has had with other undertakings. According to ČD, the minutes the Commission has provided only provide a cursory account of what has been discussed but not a true, detailed and precise account of the matters discussed, as required by the case law.[124]

(128) The Commission rejects this claim and would like to point out that not all meetings that ČD takes offence at[125] constitute interviews under Article 19 of Regulation 1/2003. However, in the spirit of transparency, the Commission has provided ČD with information as to the content of these meetings in the form of agreed minutes ([…]) or Commission-internal minutes ([…]) reflecting the content of the discussion with respect to each of the three meetings ČD takes offence at.

(129) ČD is also of the view that the Commission, by giving on 25 July 2023 (to address ČD's observations) access to ČD to minutes of three meetings and phone calls held between the Commission and representatives of ÖBB and TCA in 2017, 2018 and 2021 (see above recital (84)), has not sufficiently rectified the procedural errors committed by the Commission. According to ČD, these minutes were only provided at an advanced stage of the proceedings after ČD had submitted its RSO and also do

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123 See in this regard point 27 and 29 of the Settlement Notice.
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not provide a true, precise and detailed account of the matters discussed in the respective contacts, as required by the case law.[126]

(130) While indeed the minutes were drawn up ex-post in 2023, the Commission stresses that they were created on the basis of contemporaneous records and were agreed with the respective meeting / phone call participants. Moreover, the minutes list the persons that took part in the respective contacts and describe in detail the content of the respective discussions at stake.[127] For the meeting of EVP Vestager with ÖBB's […] on 19 December 2018 the Commission additionally provided ČD with the contemporaneous PowerPoint presentation given by […] during the meeting[128]. In essence, ČD has been provided with a sufficiently specific account of the matters discussed at the three meetings / phone calls for which ČD has been provided with ex-post minutes. Moreover, ČD has been given the opportunity to comment on these documents newly made accessible to it on 25 July 2023, and ČD took this opportunity by submitting its views on 22 August 2023 (see above recital (85)). ČD's rights of defence have therefore been fully respected.

3.3. Interim conclusion

(131) In light of the above, the Commission concludes (i) that ČD has been provided with access to the file as required by the case law and the applicable rules and (ii) that ČD has, where legally required, been provided with proper minutes of meetings and calls with other undertakings. Therefore, the Commission has not committed any procedural breach in conducting its investigation.

4. RELEVANT FACTUAL CONTEXT

4.1. The process of sale and purchase of used wagons

(132) As far as this is relevant for the purposes of this Decision, the undertakings active in the process of sale and purchase of used wagons for long-distance passenger transport are ÖBB, ČD, RegioJet, and RegioJet's intermediary TCA. In general, ÖBB is the seller of the used wagons, and they are purchased by ČD and by RegioJet (sometimes via TCA as intermediary).

4.1.1. The process of sale of used wagons at ÖBB

4.1.1.1. The process at ÖBB in the time period prior to 1 June 2012

(133) […] Prior to 1 June 2012, ÖBB-PV was responsible within ÖBB for disposing of used wagons. The process of disposal of wagons consisted essentially of two steps, namely (i) deciding whether to withdraw wagons from service and (ii) deciding how to dispose of the wagons – sale or scrapping.[129] The ÖBB-internal procedural guidelines […][130]

(134) […] ÖBB strove to achieve the highest possible profit when disposing of wagons it no longer needed. Wagons were scrapped only when they were no longer usable, or when there was no interest from buyers. However, ÖBB did not actively pursue the

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sale of used wagons.[131] Potentially interested bidders were not systematically invited to bid.[132] Sales were only conducted upon requests by interested buyers.[133] If these requests matched the available wagons at that time, ÖBB negotiated a sales contract with such interested parties in order to achieve the highest possible price.[134]

(135) Prior to 1 June 2012, ČD was not systematically informed about envisaged sales of ÖBB.[135] ČD claims that RegioJet was therefore able to "snap up" the better-quality wagons while the ones with worse quality were left for ČD.[136]

4.1.1.2. The process at ÖBB in the time period from 1 June 2012 onwards

(136) […] As of 1 June 2012, ÖBB changed the internal and external processes for the sale of used wagons, and ÖBB-TS and ÖBB-PV shared responsibility for wagon sales from then on. Whenever ÖBB-PV identified wagons to be taken out of service and deemed suitable for sale, […].[137]

4.1.1.3. ÖBB personnel responsible for sales of used wagons

(137) The following persons were (amongst others) responsible at ÖBB for the sales processes of used wagons:[138]

(a) In the period prior to 1 June 2012: […] (until April 2011, ÖBB-PV, […]), […] (ÖBB-PV, […]), […] (ÖBB-PV, […]).

(b) In the period from 1 June 2012 onwards: […] (ÖBB-TS, […]), […] ([…], ÖBB-PV, […]), […] ([…], ÖBB-PV, […]), […] (ÖBB-PV, […]).

4.1.2. The process of purchase of used wagons at ČD

(138) ČD describes its internal process for the purchase of used wagons during the period of the infringement as follows: […] [139]

(139) The acquisition process generally consisted of a tendering procedure under Czech public procurement laws, usually in the form of a negotiated procedure without a call for tenders. ČD describes its course as follows: "[…].[140]

(140) ČD explains that *"*[…]*"*.[141]

(141) ČD comments further that *"with respect to public passenger transport, ČD is a contracting entity within the meaning of Article 2 of Directive 2004/17/EC and Article 4 of Directive 2014/25/EU ("sektorový zadavatel" within the meaning of Article 2(6) of Act no. 137/2006 and Articles 4(3) and 151 of Act no. 134/2016). As a contracting entity, ČD must normally follow the public procurement legislation when purchasing rolling stock. This is a considerable burden for ČD in terms of time (it may be difficult to process the purchase promptly), resources (staff responsible for public procurement, for example), regulatory scrutiny (by the respective Czech*

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public procurement authority which is the Office for the Protection of Competition) and otherwise. ČD is thus at a disadvantage because its main competitors – such as RegioJet, Student Agency, LEO Express, and others – are generally not limited by that legislation.”[142]

4.1.3. RegioJet’s reliance on used wagons and its process of purchase of used wagons

(142) RegioJet relies largely on used rolling stock for its operations. In particular, in the first years after the market entry in 2011, RegioJet’s business model was based on the exclusive use of used rolling stock, which accounted for 100% of its fleet until 2014. As of 2014, RegioJet started to acquire new rolling stock, but its share remained limited and included mostly locomotives. By June 2017, used rolling stock still accounted for 94% of RegioJet’s passenger wagons and 71% of its locomotives.[143]

(143) ÖBB has been an important supplier of used passenger wagons to RegioJet. By June 2017, RegioJet acquired 100 passenger wagons from ÖBB. In total, RegioJet acquired 158 used passenger wagons in 2010-2017. Thus, ÖBB was the source of over 63% of RegioJet’s used passenger wagons, and of almost 60% of its overall passenger wagons fleet.[144] It follows that used passenger wagons of ÖBB represented an important input for RegioJet.

(144) During the period of the infringement, RegioJet acquired used wagons either directly from rail operators, namely ÖBB and Schweizerische Bundesbahnen, or from specialist dealers that trade rolling stock they have previously bought from rail operators. Furthermore, RegioJet states that TCA acted as an intermediary in RegioJet’s purchases.[145]

4.1.4. The activities of TCA in the purchase of used wagons

(145) As a consulting and trading company, TCA either conducts the entire process of finding and acquiring wagons for its clients (as well as offering financial services) or it provides individual solutions. The latter include intermediary purchases in TCA's name, direct purchases by private railway companies, or hiring and leasing, all complemented by consulting activities. TCA states that it only purchases RIC wagons (see above recital (12)). TCA confirms that it has conducted a number of purchases for RegioJet.[146]

4.2. The Parties’ cooperation for the common operation of trains on the Prague-Vienna route (“railjet cooperation”)

(146) Regarding cross-border rail transport between Austria and Czechia, in the years 2011 and 2012 the Parties offered long-distance connections in cooperation, from Graz to Prague via Vienna, from Vienna to Poland via Ostrava, and from Linz to Prague, in both directions.[147]

(147) In 2011 and 2012, ÖBB tested alternatives to the services it was offering at the time on the long-distance connections between Vienna and Prague as well as between

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Linz and Prague, both operated jointly with ČD. To this end, ÖBB conducted talks with ČD […][148] […][149]

(148) After considering the advantages and disadvantages of cooperating with RegioJet or with ČD, in the spring of 2012 ÖBB decided […][150] […][151]

(149) Another argument for entering into the cooperation with ČD was that ČD had agreed to use the acquired railjet trainsets on the Prague-Vienna route. […][152]

(150) ČD and ÖBB signed a cooperation agreement on the joint operation of a direct connection with railjet trainsets between Prague and Vienna (and subsequently to Graz) on […] 2012 respectively. The project was named "Prague-Jet" by ÖBB and ČD. The Parties have been jointly operating the railjet connection Prague-Vienna(-Graz) since December 2014.[153]

4.3. Basic principles and structure of the collusion

4.3.1. The collusion and its objective

(151) At the latest by 9 May 2012, ČD and ÖBB entered into an agreement and/or concerted practice aiming to maintain their market position and to impede the market entry or expansion of the common competitor RegioJet on the long-distance rail passenger transport markets in domestic Czechia and on the Prague – Vienna route. This objective was to be achieved by preventing, hindering or restricting the access of RegioJet to used railway wagons that were an important input for RegioJet for operating on the long-distance rail passenger transport markets relevant for the present Decision (see above recital (17)).

(152) As is apparent from the inspection documents described below (in recitals (153) to (159)), […]:

(153) In a document prepared for a meeting with ÖBB, ČD observed that *"*[…].[154]

(154) ÖBB (in an internal e-mail sent by […] on 11 February 2015 requesting not to sell wagons to RegioJet) wrote: *"RegioJet is not only a really strong competitor to ČD but pushes again and again into the direction of Austria and needs and searches wagon material for this […] We don't want to get additional competitors for us on the rail route to Prague"*.[155]

(155) The Parties recognised in their internal correspondence (cited in recitals (156) to (159) below) that the purchase of suitable wagons is important for the market entry and growth of RegioJet both in domestic Czechia and on the Prague – Vienna route connecting Czechia and Austria.

(156) ÖBB (in an e-mail sent by […] on 26 November 2015) wrote internally about a purchase of wagons by RegioJet: *"ČD is obviously not very happy, because with this*

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148 […]

149 […]

150 The railjet trainset is a push-pull unit consisting of a locomotive and a fixed number of wagons, providing a high level of on-board service to the passengers.

151 […]

152 […]

153 […] The cooperation agreement governs the operational, financial and technical details for the Parties' joint offer of direct train connections between Prague and Vienna with railjet trainsets.

154 […]

155 […]

the „yellow” [= RegioJet[156]] *is going to compete with ČD on night services between Praha and Kosice […] RegioJet is a delicate issue at ČD as without our wagons the company in 2011 would not have succeeded in launching its operations”*.[157]

(157) ČD (in an internal e-mail sent by […] on […] 2014 […] noted: […][158]

(158) ÖBB observed in an internal e-mail (sent by […] on 25 May 2012): *"it would not be good to sell the wagons to RegioJet [...] it is not excluded that RegioJet deploys these wagons between Prague and Brno and thereby competes with the planned Railjet services Graz – Prague"*.[159]

(159) ČD wrote to ÖBB (in an e-mail sent by […] on […] 2015): *"*[…]*"*[160]

4.3.2. Instances of collusive actions

(160) The evidence in the file shows that the agreement and/or concerted practice between the Parties to prevent, hinder or restrict RegioJet's access to used railway wagons for long-distance passenger transport, aimed at impeding the market entry or expansion of RegioJet, manifested itself in various collusive acts.

(161) Such acts of collusive rigging of sales processes for used wagons to the detriment of their common competitor RegioJet included:

(a) […] ČD and ÖBB in […] 2012 discussing the market entry of RegioJet and its need for wagons to further expand its service, and referring to an agreement between ČD and ÖBB to restrict the sale of used wagons to new entrants competing with ČD and ÖBB (see below section 5.3);

(b) ÖBB in September 2012 colluding with ČD in order to circumvent a right of first refusal of RegioJet (see below section 5.4);

(c) ÖBB in January 2013 delaying an envisaged sale of wagons in order to circumvent a right of first refusal of RegioJet (see below recitals (272), (274) and (275));

(d) ÖBB in March 2013 issuing an internal instruction to offer available rolling stock first to ČD, and only in case of ČD's refusal, to make offers to other interested parties (see below recital (278));

(e) ÖBB in October 2013 granting ČD a grace period to improve its offer for wagons in order to match the competing bid of another bidder which was acting as intermediary for RegioJet (see below recitals (301) and (302));

(f) ČD in December 2013 contacting […] ÖBB to prevent a sale of wagons to RegioJet (see below recitals (327), (328) and (329));

(g) ČD, acting as a buyer of wagons in January 2014, leaving the price it offered for ÖBB's wagons up to the consideration of the seller ÖBB (see below recital (368));

(h) ÖBB in February 2014 keeping an envisaged sale of wagons to ČD secret to avoid the appearance of other bidders (see below recital (378));

156 "Yellow" refers to the yellow corporate colour of RegioJet's wagons and locomotives.

157 […]

158 […]

159 […]

160 […]

(i) ÖBB in July 2014 preferring ČD in a bidding process by reserving wagons for ČD and by forwarding to ČD offers of other bidders so that ČD could match the competing bids (see below recital (408));

(j) ÖBB in September 2014 exclusively informing ČD about (i) the state of play of a bidding process for wagons, (ii) the offers of other bidders and (iii) the degree of interest of other bidders (see below recital (418));

(k) ÖBB[…] in September 2014 declaring to ČD's […] that ÖBB would not “make the same mistake as in the past”, meaning that the mistake was selling to RegioJet (see below recital (422));

(l) ÖBB in October 2014 telling ČD the price it has to bid in order to get the wagons and giving priority to ČD by offering them the possibility of a "last call" (see below recitals (431) and (433));

(m) ČD requesting from ÖBB in February 2015 not to sell wagons to RegioJet and ÖBB accepting this request (see below recitals (488) to (490)).

4.3.3. The organisation of the Parties’ collusion and the persons involved

(162) The Parties’ representatives had several bilateral contacts via e-mail or in person when there was an envisaged sale of ÖBB wagons for long-distance passenger transport.

(163) In the e-mails, the Parties’ […] The personal contacts took place mostly in the framework of the Parties’ railjet cooperation on the Prague-Vienna route (see above section 4.2), in which they held various technical meetings related to the common operation of the ÖBB and ČD railjet trains. […] e.g. see below section 5.9, section 5.11 and section 5.12.

(164) The Parties’ collusion was based to a large extent on personal relationships and trust between the personnel of ÖBB and ČD […].

(165) The main ÖBB employees involved in the infringement in the period from 9 May 2012 to 21 January 2016 were:

(a) […] at ÖBB-PV […];

(b) […] at ÖBB-PV, […];

(c) […] of ÖBB-TS.

(166) On the ČD side, the employees particularly involved in the infringement in the period from 9 May 2012 to 21 January 2016 were:

(a) […], […]

(b) […], […]

(c) […], […].[161]

[161] […]

5. FACTS

5.1. Sale of 13 wagons from ÖBB to RegioJet in January and February 2011

5.1.1. Summary

(167) In early 2011, i.e. before the start of the period of the infringement, ÖBB regarded a sale of used wagons to RegioJet as problematic for the relationship between ČD and ÖBB. These concerns stemmed from the competitive relationship between RegioJet and ČD, as ČD was already ÖBB's cooperation partner in international long-distance rail passenger transport at the time[162] (see above recital (146)). However, ÖBB overcame its concerns in view of the high sales price that RegioJet was willing to pay.

5.1.2. The sales process

(168) In January and February 2011, RegioJet bought a total of 13 wagons for long-distance passenger transport from ÖBB.[163]

(169) ÖBB wagons sold to RegioJet in 2011 were of "*good quality, adapted for a speed of 200 km/h, and equipped with air-conditioning, vacuum toilet and electric sockets. České dráhy was aware of these sales only to some extent, i.e. it didn't know about the intended sale of some of these carriages*".[164]

(170) This purchase was made on the basis of bilateral negotiations between purchaser and seller and no public tender was organised.[165]

(171) The purchase agreement of 25 January 2011 for a first tranche of wagons contained in its point 2 a right of first refusal awarded to RegioJet for future sales of used wagons of ÖBB with the same technical specifications for a period of two years.[166]

5.1.3. ÖBB's internal assessment of this sales process

(172) An ÖBB-internal e-mail of 19 January 2011 at 13.13 from […] (both ÖBB) shows that this sale to a competitor of ÖBB's cooperation partner ČD was regarded as problematic for the relationship between ÖBB and ČD and that therefore the ÖBB long-distance transport department ÖBB Fernverkehr ("ÖBB-FV") should be informed about the sale. The concerns were however dispelled in view of the high price RegioJet was willing to pay for the wagons. The e-mail reads as follows:

"*I have just talked to* […]*. He made* […] *aware that by this the wagons are sold to a competitor of ČD (= cooperation partner). The wagons should be used as reinforcers for trains between Prague and Ostrava which RegioJet in principle is going to operate with new wagon material from Romania. In my view and in view of the high sales revenue (€* […]*) the deal should not be regarded as problematic. However, I*

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162 […]

163 […]
The sale was completed in two tranches. The purchase agreement between ÖBB and RegioJet for the first tranche was concluded on 25 January 2011 and comprised 5 passenger wagons of type ABmz 30-90 for a total price of EUR […]. The purchase agreement for the second tranche was concluded on 14 February 2011 and comprised 6 wagons of the type Bmz 21-90 and 2 wagons of the type ABmz 30-90 for a total price of EUR […]. […]

164 […]

165 […]

166 […]

would in any case inform [ÖBB-]*FV about this so that they do not look 'stupid' vis-à-vis ČD*”[167].

(173) A few minutes later, on 19 January 2011 at 14.07, […] (ÖBB) sent an e-mail to […], […] ÖBB TS […]. In this e-mail, […] expressed concerns about the communication on this sale in view of the fact that the wagons were to be sold to ČD’s competitor:

“*I wanted to enquire if the sale of the ABmz to RegioJet was communicated to* [ÖBB-]*FV, so that* [ÖBB-]*FV does not look "stupid" vis-à-vis ČD. Indeed, RegioJet is comparable to a Czech "Westbahn GmbH.*”[168]

(174) […] replied a day later: “[…] [ÖBB-]*FV is informed*”.[169]

(175) […] on 20 January 2011 also directly informed […], the […] at ÖBB-PV, that the wagons will be used in competition to ČD: “*some additional information: the wagons are to be used in competition with ČD between Ostrava and Prague*”.[170]

5.1.4. Arguments raised by ČD and assessment by the Commission

(176) ČD submits that the sale of the wagons to RegioJet in January and February 2011, without offering them to any other interested party, demonstrates that ÖBB never had any preference for ČD. The hesitation on the side of some ÖBB employees about the sales to RegioJet stemmed from the fact that ÖBB was negotiating with both ČD and RegioJet about a potential cooperation on the Prague – Vienna route.[171]

(177) It should however be emphasised that the sale at hand took place before the start of the infringement on 9 May 2012, and the Commission does not claim any restriction of RegioJet’s access to used wagons or any preferential treatment of ČD in this sale. Rather, the evidence quoted in section 5.1.3 above shows that ÖBB internally regarded the sale as problematic for the relationship between ÖBB and ČD, because RegioJet wanted to use the wagons in competition with ČD.

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167 […]
The German original reads as follows (spelling mistakes not corrected):
"habe gerade mit […] *gesprochen. er hat* […] *darauf aufmerksam gemacht, dass die wagen damit einem konkurrenten der ČD (=Kooperationspartner) verkauft werden.*
die wagen sollen als verstärker für züge zwischen praha und ostrava verwendet werden, die regiojet grundsätzlich mit neuem wagenmaterial aus rumänien fahren wird.
meiner meinung nach und angesichts des hohen verkaufserlöses (€ […]*) würde ich das geschäft deshalb nicht so kritisch sehen.*
ich würde aber auf jeden fall FV davon informieren, damit die gegenüber der ČD nicht „dumm“ dastehen."

168 […]
The German original reads as follows (spelling mistakes not corrected):
"ich wollte nachfragen, ob der verkauf der ABmz an RegioJet an [ÖBB-]FV kommuniziert wurde, damit FV gegenüber der ČD nicht „dumm“ dastehen. RegioJet ist ja durchaus mit einer tschechischen „ Westbahn GmbH“ vergleichbar."

169 […]
The German original reads as follows:
"[…] *[ÖBB-]F[ern]V[erkehr] ist informiert"*.

170 […]

171 […]

5.2. Sale process of […] wagons to ČD in […] 2011 and the link to the railjet option at Siemens

5.2.1. Summary

(178) In the course of 2011, ÖBB was aware that RegioJet was a competitor of ČD in Czechia and that, […] it may become a competitor of ÖBB in the long term.[172] This led to an internal preference for ÖBB to sell used wagons to ČD instead of selling to RegioJet. This internal understanding was not communicated to ČD at that stage.

5.2.2. The sales process

(179) ČD declared its interest in purchasing used wagons from ÖBB during the negotiations which led to the conclusion of the railjet cooperation agreement with ÖBB (see above recital (150)).[173]

(180) On […] 2011, ÖBB sold […] wagons of the type […] to ČD for a total price of EUR […].[174] […], negotiations on this sale were also conducted with other interested parties, including RegioJet and its intermediary TCA.[175]

5.2.3. The Parties' internal assessment of this sales process

(181) An ÖBB-internal presentation of 28 February 2011 to inform the ÖBB […] about the strategy in upcoming wagon sales[176] shows that […] about its […]. Moreover, it demonstrates that ÖBB was aware that RegioJet is not only a competitor of ČD on the Czech domestic market but may, in the long term, become a competitor of ÖBB:

"*Five ÖBB wagons have already been sold to RegioJet* […]
Further 20 – 25 Bmz series 21-70 are for sale: […]
RegioJet = one of the potential buyers → with altogether 30 wagons RegioJet could form 5 units of 6 wagons each
More ÖBB wagons are to be sold […]
ČD has been lacking wagons since several years → tender for 100 RIC wagons in 2009 […]
[…]
RegioJet = competitor of ČD on the Czech domestic market
- Purchase of 5 ÖBB wagons
- Interest in further ÖBB wagons
- Plans to deploy the purchased wagons on the Prague – Ostrava route (Praha – Brno is not excluded in the long-term)
- Potential long-term competitor of ÖBB?
[…]"[177]

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172 […]
173 […]
174 […]; […]. […] there was also a further sale of 2 wagons of the type 21-70 0 to ČD on 18 April 2011.
175 […]
176 […]
177 […]
The German original reads as follows:
„5 Fahrzeuge der ÖBB PV AG wurden bereits an RegioJet a.s. verkauft […]
Ca. 20 – 25 Stück Bmz Serie 21-70 500 stehen zum Verkauf: […]
RegioJet = einer der potentiellen Käufer → mit insgesamt 30 Wagen könnte RegioJet 5 Garnituren à 6 Wagen aufstellen

(182) On 3 March 2011, […], […] at ÖBB-PV, wrote an e-mail to […], […] in ÖBB TS. The e-mail shows that preventing the sale of the wagons to ČD's competitor RegioJet was important to ensure that ČD does not quit the ongoing negotiations regarding the Parties' joint operation of a direct railjet connection between Prague and Vienna (see above recital (150)) and […] (see above recital (148)). A potential sale of wagons to RegioJet was considered problematic as a de facto support of ČD's competitor. ÖBB considered that it may also discourage ČD from taking over the railjet option, especially if the Czech ministry of transport decided to award PSO contracts to RegioJet and to drop its co-financing of the railjet investment. The e-mail reads as follows:

"*We in FV regard it as very positive that it is still possible* […].
This is important for several strategic reasons:
1. ČD is our cooperation partner and has an interest in (and a substantial lack of!!) RIC wagons since a few years.
2. In case further of these carriages are sold to RegioJet, ČD may quit the ongoing […] *negotiations* […]*, because the sale of the old wagons is de facto a support of their competitor and is in contradiction to the good negotiation-basis in the framework of the railjet talks.*
3. Already now RegioJet is lobbying the Czech ministry of transport that it as railway undertaking could purchase cheaper rolling stock than ČD (railjets) could do to ensure the transport offer in Czechia (with altogether 30 wagons 5 units of 6 wagons each could be formed.) As the Czech state would co-finance the […]*, such lobbying activities and as a consequence the real putting into service of the wagons by RegioJet could have negative repercussions on our* […]*, if the transport ministry decides against the* […].
If the take-over of the […] *fails*
• *there would be no creation of value at ÖBB Technische Services GmbH (where the final assembly of the railjets is envisaged to take place)*
• […]
We are certainly in favour that the sale of the mentioned […] *wagons gains the highest price possible for the OP*[178] *or generates an additional value creation at TS. In this sense ČD is, in my view, a reliable partner with whom one can negotiate and with whom the chances for a positive conclusion of the negotiations are relatively high.*"[179]

Weitere ÖBB Wagen sollen ebenfalls verkauft werden […]
Seit einigen Jahren hat die ČD einen Fahrzeugmangel → Ausschreibung über 100 RIC Wagen in 2009 […]
[…]
RegioJet = Konkurrenz der ČD im tschechischen Binnenmarkt
- Kauf von 5 Fahrzeugen von der ÖBB
- Interesse an weiteren ÖBB Wagen
- plant den Einsatz der gekauften Fahrzeiuge voraussichtlich auf der Strecke Praha – Ostrava (Praha – Brno ist langfristig nicht ausgeschlossen)
- möglicher langfristiger Konkurrent der ÖBB?
[…]*"*

178 […] the abbreviation "OP" stands for the operations department of ÖBB-PV, led by […]. […]

179 […]
The German original reads as follows:
"wir im FV sehen es sehr positiv, […].
Dies ist aus mehreren strategischen Gründen sehr wichtig:

(183) […] of ÖBB TS replied on 4 March 2011 and mentioned possible implications regarding the application of procurement law in respect of a sale of wagons to ČD. Referring to […] statement in the email above that the ÖBB […] *"regards it as very positive that it is still possible to enter into negotiations with ČD"* about the sale of the wagons, […] wrote:

"*possible was it rather not – and now it is getting thrilling how the offer of ČD looks like – also here we have to 'navigate around' something – this is called procurement law.*"[180]

(184) The aforementioned e-mail of […] (ÖBB) shows […] that ÖBB was aware that ČD was bound by Czech procurement law during the negotiations, which caused a certain degree of uncertainty as to the final outcome of the sale and made the deal less attractive to ÖBB as the vendor. […].[181]

(185) Consequently, a few days later, on […] 2011, ÖBB's […] sent a letter to ČD's […], […]. In this letter, ÖBB listed […] wagons of the type […] and offered them to ČD for a total price of EUR […]. According to the receipt stamp, this letter reached ČD on […] 2011.[182] The sale was then concluded on […] 2011.[183]

(186) ČD finally […].[184]

(187) The Commission concludes that ensuring the […] was one of the initial motivations for ÖBB to sell the […] wagons at hand to ČD instead to RegioJet's intermediary TCA. The Commission also concludes that in the final stage of the negotiations over the railjet cooperation with ČD in 2012 (see above section 4.2), an (initially ÖBB-internal) understanding emerged among the ÖBB employees involved in the

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1. ČD ist unser Kooperationspartner und hat Interesse (und einen beträchtlichen Mangel!) an den RIC Fahrzeugen seit einigen Jahren.

2. Sollten weitere dieser Fahrzeuge an RegioJet verkauft werden, könnte die ČD aus den laufenden […] *Verhandlungen aussteigen (*[…]*), weil der Verkauf des älteren Wagenmaterialverkaufs de facto die Unterstützung ihrer Konkurrenz ist und im Widerspruch zu der guten Verhandlungsbasis im Rahmen der railjet Gespräche steht.*

3. RegioJet betreibt bereits jetzt Lobbying beim Verkehrsministerium in Tschechien, dass es als EVU günstigere Fahrzeuge als die ČD (railjets) beschaffen könnte, um die Verkehre in Tschechien sicherzustellen (mit insgesamt 30 Wagen können 5 Garnituren à 6 Wagen gebildet werden). Da der tschechische Staat die […] *Investition mitfinanzieren würde, könnten sich derartige Lobbyingaktivitäten und folglich die tatsächliche Aufstellung der Fahrzeuge von RegioJet ebenfalls negativ auf unsere* […] *auswirken, falls sich das Verkehrsministerium gegen den* […] *entscheidet.*

Durch das Platzen der Übernahme der […]*:*

- *würde keine Wertschöpfung bei der ÖBB-Technische Services GmbH stattfinden (wo die Endfertigung der 16 railjets vorgesehen ist)*
- […]

Wir sind durchaus dafür, dass der Verkauf der obenerwähnten […] *Wagen einen möglichst hohen Preis für die OP lukriert bzw. eine zusätzliche Wertschöpfung bei der TS generiert. In diesem Sinne ist die ČD, meiner Meinung nach, ein verlässlicher Partner, mit dem man die Verhandlungen führen kann und bei dem die Chancen auf einen positiven Abschluss relativ hoch sind."*

180 […]
The German original reads as follows:
"Möglich war es eher nicht – und jetzt wirds spannend wie das Angebot von ČD aussieht – auch hier müssen wir dann noch etwas "umschiffen" – nennt sich Ausschreibungsgesetz."

181 […]

182 […]

183 […]; […]. […] there was also a further sale of […] wagons of the type […] to ČD on […] 2011.

184 […]

negotiations: ČD was the preferred partner in sales of used wagons of ÖBB, and sales to RegioJet should be avoided as far as possible. […] this internal understanding was not communicated to ČD at that stage.[185]

(188) ČD, however, was not satisfied with the acquired ÖBB passenger wagons of the type […], mentioning that the wagons […] previously sold to RegioJet. ČD states that […][186]

(189) In e-mails of 23 and 30 September 2011 to ÖBB's […], TCA expressed again the interest of RegioJet to buy further used wagons from ÖBB in order to be able to expand its services in Czechia.[187]

(190) In a meeting between ČD and ÖBB on […] 2012, ČD asked for timely information from ÖBB in case ÖBB decides to sell further wagons.[188]

5.2.4. *Arguments raised by ČD and assessment by the Commission*

(191) ČD argues that it was able to acquire the wagons in question from ÖBB because it had offered the highest bid. ÖBB's sale to ČD was therefore not an expression of an ÖBB-internal preference for ČD but rather an expression of ÖBB's aim to achieve the best price and of ÖBB's strategy in the negotiations with its future cooperation partner ČD.[189]

(192) The Commission notes that the contemporaneous ÖBB-internal documents relating to this sale show that ÖBB took the conscious choice to sell the wagons at hand to ČD but not to RegioJet. It is apparent from these documents that ÖBB had several reasons for selling to ČD and not to RegioJet: first, because RegioJet was a threat and competitor of ČD in domestic Czechia (see above recital (181)). Second, because RegioJet could in the long term become a competitor of ÖBB (see above recital (181)). Third, because ČD offered to […] and may have quit the railjet negotiations in case of a sale to RegioJet (see above recital (182)).

5.3. The meeting of […] ČD and ÖBB in Vienna on […] 2012

5.3.1. *Summary*

(193) On […] 2012, a […] meeting took place in Vienna between […] ČD and ÖBB. The meeting took place in the […] from […] and was attended by ÖBB[…], […] and ČD's […].[190] The Commission is in the possession of several contemporaneous documents that were prepared in relation to this meeting. Amongst them is, first, a preparatory document which discusses the market entry of new private rail operators and their impact on the market position of ČD and ÖBB and which states that *"[...]"* to competitors of ČD and ÖBB[191], and, second, a power point presentation prepared for the meeting[192], reflecting the content and structure of this preparatory document.

(194) The Commission therefore finds that the Parties already had a gentlemen's agreement regarding the principles of the sale of non-essential passenger wagons in place prior to the […] meeting in Vienna on […] 2012.

185 […]
186 […]
187 […]
188 […]
189 […]
190 […]
191 […]
192 […]

5.3.2. Meetings and collusive contacts

5.3.2.1. The meeting of […] on […] 2012 and contemporaneous documents related to this meeting

(195) Various pieces of documentary evidence related to the […] meeting which took place on […] 2012 were found during the inspections at ČD's premises:

(a) A Czech version of a document which was drafted in preparation of the […] meeting which bears the title "*Common Challenges for Czech Railways and OBB*" (in the following the "*Common Challenges*" document). This document was attached as a Word document to a ČD-internal e-mail, sent by […] ([…][193]) to […] ([…]) on […] 2012 at […].[194]

(b) An English translation of the "*Common Challenges*" document was also found at ČD's premises as a Word document, with the date of the creation and last modification on […] 2012 at […].[195]

(c) A ČD-internal e-mail of […] 2012 at […] from […] ([…][196]) to […] and […] ([…][197]), with […] in copy, also contains, in the body of the e-mail, an English translation of the "*Common Challenges*" document.[198]

(d) A power point presentation in Czech with the title "[…]"[199] and the file name "*OBB prezentacia_FIN.ppt*" which […] sent by ČD-internal e-mail on […] 2012 at […], requesting a translation from Czech to English of the attached final power point presentation (in the following the "*Cooperation*" presentation) for the meeting with ÖBB on the same day *("attached for translation into EN is the presentation for today's meeting with ÖBB")*.[200] The Commission's file also contains the English translation of the *"Cooperation"* presentation in PDF format.[201]

(196) With regard to the contemporaneous documents mentioned above in recital (195)(a) and recital (195)(b), the Commission points out that both the Czech and the English version of the "*Common Challenges*" document have the file name (in Czech) "*Jednanie* […] *OBB*", meaning "*Meeting* […] *OBB*". Similarly, the ČD-internal email sent by […] to […] on […] 2012 at […] (see above recital (195)(a)) had as subject *"Jednanie* […] *OBB*". It is apparent from the circumstances that "[…]" in the file name and in the subject of the email is a typo and in fact means "[…]", the name of […].

5.3.2.1.1. The content of the "*Common Challenges*" document

(197) All versions of the "*Common Challenges*" document that are listed in recital (195) above are in substance identical: After the title *"Common challenges for ČD and*

193 […]
194 […]
195 […]
196 […]
197 […]
198 […]
199 The Czech original reads as follows: *"*[…]*"*.
200 […]
201 […]

OBB", the document […]
"[…][202] […]"[203]

(198) […].

(199) Concerning […].

(200) The fourth subsection of the "*Common Challenges*" document with the heading "[…]
"[…] [204] […][205]
[…].[206]

(201) The *"Common Challenges"* document concludes as follows: *"*[…].[207] […].

5.3.2.1.2. Conclusion related to the "*Common Challenges*" document

(202) The "*Common Challenges*" document states that ČD and ÖBB concluded an agreement "[…]*"*.

(203) Since all versions (all English versions and the Czech version, see recital (195)) of the "*Common Challenges*" […] in place prior to the […] meeting on […] 2012, for which the "*Common Challenges*" document was prepared.

(204) Besides, the Commission finds, based on the evidence presented in recitals (195) to (196) above, that the "*Common Challenges*" document was presented by ČD at the […] meeting. However, even if that had not been the case, this would not affect the conclusion that the Parties already had *"*[…]*"* in place prior to the […] meeting on […] 2012, for which the *"Common Challenges"* document was prepared.

5.3.2.1.3. The aftermath of the […] meeting of […] 2012: E-mail from ČD to ÖBB

(205) In an e-mail of […] 2012 from ČD's […] to […] ([…]), […] made clear that ČD would be willing […]. The email contains a proposal for cost savings in the operation of the railjet trains and reads as follows:

"[…]*"*[208]

(206) […], the "issue" […] refers to was the […] EUR […].[209] The Commission points out that […] had sent and received versions of the "*Common Challenges*" document prior to the […] meeting on […] 2012 in Vienna (see above recital (195)).

5.3.2.2. Conclusion

(207) Given the above, the Commission finds that the Parties already had a gentleman's agreement regarding the principles of the sale of non-essential passenger wagons in

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202 The word […]".

203 […]. Quoted text taken from the English document found at ČD's premises. The Czech version of this document is […]

204 […]

205 Before the time of the […] meeting, ÖBB had considered cooperating with RegioJet instead of ČD on the Prague-Vienna route. However, in Spring 2012, ÖBB decided to continue cooperating with ČD (see above Section 4.2).

206 […]. Quoted text taken from the English document found at ČD's premises. The Czech version of this document is […]

207 […]. Quoted text taken from the English document found at ČD's premises. The Czech version of this document is […]

208 […] Original in English.

209 […]

place prior to the […] meeting on […] 2012, for which the "*Common Challenges*" document was prepared.

5.3.3. Arguments raised by ČD and the Commission's assessment

5.3.3.1. ČD's awareness of a "[…]"[210]

(208) ČD argues that it does not know about the existence of a "[…]". […].[211]

(209) The Commission points out that the individuals that have exchanged the *"Common Challenges"* document (that is speaking in the past tense of the […]) are […] or – like […] – are closely attached to […] (see above recitals (195) and (195)(c)). Such […] must have been aware of the content of a document that had been exchanged between them several times with regard to a meeting of […] with […].

(210) That ČD's claim that it cannot recall having entered into a "[…]" […][212] […]

(211) The Commission further highlights that ČD's argumentation is largely based on written statements prepared in 2022 for the purpose of the reply to the Statement of Objections, which means that they are not capable of putting in question the credibility of the contemporaneous evidence on which the Commission bases its assessment. That ČD's employees do not recall having entered into any agreement is therefore not credible in view of the unequivocal wording of the *"Common Challenges"* document that […]*"*.

5.3.3.2. Discussion of the "*Common Challenges*" document at the […] meeting of […] 2012

(212) Moreover, ČD disagrees that the *"Common Challenges"* document was discussed at the […] meeting of […] 2012. It was rather a working material or draft within ČD that was only prepared in relation to that meeting but was not necessarily discussed there.[213]

(213) The Commission stresses that ČD acknowledges that the "*Common challenges*" document was preparatory material for the […] meeting.[214] In addition, there are several indications that the content of the document was indeed presented by ČD at the meeting: First, several English versions of the "*Common challenges*" document were drawn up prior to the meeting and were exchanged between ČD's […]. A purely ČD-internal working material whose content was not supposed to be discussed at the […] meeting would not have necessitated any translation into English. Second, the e-mail that was sent internally among […] containing the English version of the "*Common Challenges*" document in the body of the email (see above recital (195)(c)) had as subject *"Also like this, maybe it will be easier to read"*[215], suggesting that the content of the e-mail was to be read out at the […] meeting. All this suggests that the content of the "*Common Challenges*" document was presented by ČD at the […] meeting.

(214) The Commission further points out that ČD's arguments leave aside that the […]. Hence, even if the "*Common Challenges*" document had not been presented at all

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210 While the *"Common Challenges"* document speaks of a […] and will therefore be used in this Decision, except when the *"Common Challenges"* document is quoted.

211 […]

212 […]
The Czech original reads as follows: *"*[…]*"*

213 […]

214 […]

215 The Czech original reads as follows: "*Ještě takto, třeba se to bude lépe číst*"

during the […] meeting, or only a few topics of that document, what is decisive is that this […] at the time of the […] meeting.

(215) ČD further argues that the *"Cooperation"* presentation does not mention any […] at all. In ČD's view, this evidences that other issues were discussed at the […] meeting than the "*Common Challenges"* document.[216]

(216) The Commission underlines that the fact that the "*Cooperation*" presentation (see recital (195)(d) above) refers to several points also contained in the *"Common Challenges"* document but does not mention any "[…]" does not impinge on the credibility of the "*Common Challenges"* document as evidence of a preexisting […]. It should rather be stressed that the *"Cooperation"* presentation, while not including the full text of the "*Common challenges*" document, nevertheless follows closely the structure of the "*Common Challenges*" document and reflects its content, as laid out below:

(a) First, parts of the text of the […].

(b) Second, […].

(c) Third, […].

(217) It is reasonable that the Parties to an illicit collusion limit traces to a minimum and would not put evidence of their collusion on a Power point presentation, which – as shown by the contemporaneous evidence quoted in recital (195) above – was printed out several times and then handed out and whose further dissemination can therefore not be controlled. It is normal for the activities which anti-competitive practices and agreements entail to take place in a clandestine fashion, and for the associated documentation to be reduced to a minimum. [217]

5.3.4. Arguments raised by ÖBB and the Commission's assessment

(218) ÖBB puts forward that the Parties' anti-competitive conduct started not on […] 2012 but only in […] 2012, when, according to ÖBB "*the previously purely ÖBB-internal understanding that ÖBB-PV should prefer ČD over RegioJet in sales of used rolling stock and, if possible, not sell any wagons to RegioJet as a competitor of ČD, was communicated to ČD for the first time*".[218]

5.3.4.1. The content of the […] meeting on […] 2012

(219) ÖBB claims that the documentary evidence does not show that the avoidance of sales of used passenger wagons to RegioJet was discussed at the […] meeting on […] 2012, and no understanding or a "[…]" on the sale of used rolling stock was reached at the meeting. Neither the "*Cooperation*" presentation nor ÖBB's internal briefing for the meeting or […]'s (ÖBB) debriefing from the meeting, or the minutes from the following meetings mention sales of used wagons or the […].[219] Moreover, the

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216 […]

217 Judgment of the Court of Justice of 25 January 2007, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission,* joint cases C-403/04 P and C-405/04 P, ECLI:EU:C:2007:52, paragraph 51.
See also judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and Others v Commission*, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 55.

218 […]

219 […]

"*Common Challenges*" document originates from staff that was not present at the meeting.[220]

(220) First and foremost, ČD's claim (like ÖBB's similar argument) leaves aside that the "*Common Challenges*" document speaks of the conclusion in the past of a […]. Consequently, decisive is that this document confirms that a […] existed at the time of the […] meeting. While the exact point in time when the Parties concluded this […] is unknown, the "*Common Challenges*" document is a preparatory document for the […] meeting of […] 2012 and a credible source showing the existence of a […] prior to this […] meeting.

(221) That the *"Common Challenges"* […][221] […][222] […][223] […][224] […].

(222) In any case, the whole body of evidence presented above in section 5.3.2.1 suggests that the content of the "*Common Challenges*" document was presented by ČD […] meeting, given that the document […]

(223) The fact that the handwritten notes which ÖBB's […] wrote down when ÖBB's […] de-briefed […] about the […] meeting[225] do not mention sales of used wagons or the "[…]" does not contradict the fact that the "*Common Challenges*" document mentions a pre-existing […]. Similarly, the content of […]'s notes does not disprove that the "*Common Challenges*" document was presented by ČD at the […] meeting".

(224) The handwritten notes are very short (around 7 lines) and can therefore not give a comprehensive account of everything discussed at the […] meeting, which lasted 90 minutes (see above recital (193)). It is also unlikely that ÖBB[…] would have immediately informed […] about an existing anti-competitive arrangement or about the anti-competitive content of a discussion between the Parties' […], and it is even more unlikely that […] would have noted this down. The Commission in this regard points again to the case law quoted in recital (217) above on cartels' activities due to their illegal nature being secretive and therefore generally reducing the associated documentation to a minimum.

(225) In the same vein, the "*Cooperation*" presentation prepared by ČD or the official briefing that ÖBB had prepared for […] cannot be expected to contain a comprehensive account of an existing secret collusive arrangement (see above recital (215)).

(226) The Commission points also out that neither ČD nor ÖBB produced statements from the respective […] that participated in the meeting of […] 2012 ([…] for ČD, and […] and […] for ÖBB), but only produced written statements from personnel that were not present at the small circle […] meeting. The written statements produced by both ÖBB and ČD are therefore not apt to disprove the Commission's finding that the content of the *"Common Challenges"* document was presented by ČD at the […] meeting.

(227) In general, ÖBB's argumentation that the term "[…]" does not appear in any later communication or document from the Parties presupposes that […] and […] would

220 […]
221 […]
222 […]
223 […]
224 […]
225 […]

have informed […] about the illegal anticompetitive content of the discussion at the […] meeting. This is however neither realistic (see above recital (223)) nor necessary for establishing an anticompetitive agreement and/or concerted practice between the undertakings ÖBB and ČD. In addition, there is ample evidence from later on that the Parties collusively rigged wagon sales processes to avoid selling to RegioJet.

(228) Finally, the fact that the […] does not appear in later documents from ČD or ÖBB does not put into question that the Parties' colluded with the aim of impeding the market entry or expansion of the common competitor RegioJet. This collusion manifested itself at various occasions throughout the period of the infringement when the Parties rigged sales processes for used ÖBB wagons, to the detriment of their common competitor RegioJet.

5.3.4.2. Start of the infringement on a date before 9 May 2012

(229) ÖBB presents arguments describing why the "[…]" was not concluded at the meeting between ČD and ÖBB on […] 2012.[226]

(230) However, the Commission does not find in this Decision that the "[…]" was concluded on that day. The Commission merely finds that at an unknown point in time prior to the […] meeting on […] 2012 the Parties concluded an agreement "[…]*"*. This finding is based on the wording of the "*Common Challenges*" document which unequivocally refers to the conclusion of the agreement in the past: all the versions mention this in the past tense, see above recitals (197) and (198), and the Czech version even adds explicitly *"already in the past"* (see above recital (210)). Moreover, the fact that ÖBB was conducting negotiations with both ČD and RegioJet in 2011 and 2012[227] does not contradict that ÖBB and ČD have come to an agreement at some point prior to the meeting on […] 2012. These arguments by ÖBB do not have any bearing on the existence of the […] established in this Decision.

5.4. ÖBB's cancellation of an envisaged sale to ČD in 2012 to circumvent a right of first refusal of RegioJet

5.4.1. Summary

(231) As of May 2012, ÖBB was in negotiations with TCA (acting as an intermediary of RegioJet) and ČD about the sale of 10 wagons of the type Ampz 18-95. However, in September 2012, ÖBB cancelled the envisaged sale in order to avoid triggering RegioJet's right of first refusal.

(232) ÖBB, in agreement with ČD, treated ČD preferentially during this sale process and made efforts to restrict RegioJet's access to wagons. […] the agreement between ÖBB and ČD on […].[228]

5.4.2. Meetings and collusive contacts

(233) […] (see recital (234)), as well as internal documents (see recital (235)), show that ÖBB made efforts to avoid a sale of wagons to RegioJet.

(234) […], TCA (acting on behalf of RegioJet) had submitted a bid for 10 used passenger wagons of ÖBB of the type Ampz 18-95 in May 2012. This bid led to discussions within ÖBB due to the already ongoing negotiations with ČD regarding the railjet

226 […]
227 […]
228 […]

project. In this regard, ÖBB's […] noted in an internal e-mail of 25 May 2012 that ÖBB would prove itself to be a bad partner if these wagons were sold to RegioJet. Furthermore, he noted that RegioJet could use the purchased wagons between Prague and Brno in Czechia, and thereby on a section of the Prague – Vienna route that was to be jointly operated by ÖBB and ČD in the future.[229]

(235) This ÖBB-internal e-mail from […] to […] of 25 May 2012 shows that ÖBB considered any sales of wagons to RegioJet as inappropriate in light of ÖBB's cooperation with ČD, by stating as follows:

"*Here the protocol of 20 February which states that we will inform ČD in time in case we want to sell wagons. In addition, it would not be good to sell the wagons to RegioJet for the following reasons:*
- we would prove to be a bad negotiation partner
- it is not excluded that RegioJet deploys these wagons between Prague and Brno and thereby competes with the planned Railjet services Graz – Prague
- RegioJet needs these wagons for Prague – Hamburg and we would thereby enable the realization of this service (RegioJet has a contract with […] for the purchase for 50 wagons, 10 wagons they have recently acquired from […], with our 10 wagons they would have the necessary 70 wagons to operate this service)
- ČD is our cooperation partner (what would we say if ČD were to sell wagons to a competitor of us?)"[230]

(236) This was not an isolated opinion within ÖBB as […] replied on the same day that he "*fully agree*[s]".[231] ÖBB's internal documents show that both ČD and TCA (for RegioJet) have made bids for the wagons.[232] ČD's bid was to a large extent motivated by the willingness to avoid a sale to RegioJet. In this respect, […] wrote in a ČD-internal e-mail of 14 May 2012:

[…]"[233]

(237) ÖBB then cancelled the sale to avoid triggering RegioJet's right of first refusal, which it had been awarded in a contract for the purchase of used wagons concluded

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229 […]

230 […]
The German original reads as follows (spelling mistakes not corrected):
„hier ist das protokoll vom 20.2., hier steht drinnen, dass wir die CD zeitgerecht informieren, wenn wir wagen verkaufen. darüber hinaus wäre es aus folgenden gründen nicht gut regiojet die wagen zu verkaufen weil:
- wir uns damit als schlechte verhandlungspartner darstellen
- nicht auszuschließen ist, dass regiojet diese wagen zwischen prag und brünn einsetzen könnte und damit den geplanten rj-verkehren graz-prag konkurrenz machen
- regiojet die wagen für prag-hamburg braucht und wir damit das zustandkommen dieser verkehre ermöglichen (regiojet hat einen vertrag mit […] über den kauf von 50 wagen, 10 wagen haben sie nun […] abgekauft mit unseren 10 hätten sie die notwendigen 70 fahrzeuge für den verkehr) · die CD unser kooperationspartner sind (was würden wir sagen, wenn die CD unserem mitberwerber wagen verkauft?)

231 […]
The German original reads as follows (spelling mistakes not corrected):
„Bin ganz deiner meinung"

232 […]

233 […]
The Czech original reads as follows:
"[…]"

in 2011 (see above recital (171)) and which would have applied to this sale of 10 wagons in 2012.[234] After the conclusion of the cooperation agreement for the railjet cooperation in August 2012 (see above recital (150)), ÖBB informed ČD about its preference for selling the wagons to ČD. Consequently, on 5 September 2012, […] of ÖBB instructed another ÖBB employee, […], to cancel the envisaged sale of 10 wagons entirely, in order to avoid triggering the right of first refusal, which would have ultimately forced ÖBB to sell the wagons in question to RegioJet.[235]

(238) The sale was cancelled in early September 2012, and […] (ÖBB) sent the following email on 7 September 2012 to the interested parties TCA (for RegioJet) and ČD:

"*I was just told by the passenger transport department that the wagons of the type 18-95 originally foreseen for sale will not be sold.*

Reason for this is the own need of ÖBB-PV due to new demands in national and international transport and in the framework of improvements for our customers"[236]

(239) The Parties acted in close cooperation in order to prevent a sale of the wagons to RegioJet. ÖBB informed ČD about the actual reason why the sale had been cancelled. In an internal e-mail from ÖBB on the same day (7 September 2012) in the context of the cancellation, […] wrote to […]:

[…]!!!"[237]

(240) […], […] (ÖBB) replied internally:

"[…]*"*[238]

(241) Thus, […].[239] […], the agreement on favouring ČD and not selling (as far as possible) any used wagons to RegioJet as ČD's competitor was implemented on this occasion.[240]

(242) […] An ÖBB-internal e-mail exchange in late June/early July 2012 between […] and […] of ÖBB-TS shows that […] instructed ÖBB-TS to put on hold the sale of 10 wagons to RegioJet because of ongoing negotiations with ČD.

(243) In particular, by e-mail of 29 June 2012, […] wrote to […] (both ÖBB):

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234 […]

235 […]

236 […]
The German original reads as follows:
"Wie mir soeben seitens Personenverkehr mitgeteilt wurde, werden die Fahrzeuge der Type 1895, welche zur Veräußerung vorgesehen waren, nicht verkauft.
Grundlage dieser Entscheidung ist der Eigenbedarf der ÖBB PV AG aufgrund von neuen Anforderungen im internationalen und nationalen Verkehr und im Rahmen von Verbesserungen für unsere Kunden."

237 […]
The German original reads as follows:
„[…]*!"*

238 […]
The German original reads as follows:
„[…]*"*

239 […]

240 […]

"RegioJet has increased its offer for the purchase of 10 passenger transport wagons Type 1895 to […] *euros with immediate effect. [...] This offer is valid until Monday, July 2, 2012, 4:00 pm"*[241]

(244) […] replied to […] the same day:

"Internally for information: We cannot make a decision at the moment, as we are still in negotiations with ČD. Only when the negotiations are over will the decision be made - that should be in 14 days from now.
Please do NOT communicate this to RegioJet, officially only inform that the decision will be made in 14 days at the earliest."[242]

(245) […] replied to […] on 2 July 2012 confirming that he would not pass on the above information to RegioJet and further explaining that […] from […]. […].[243]

(246) Therefore, already before the cancellation of the sale in September 2012, ČD enjoyed a preferential treatment by ÖBB in respect of this sale. This is apparent from the fact that […] – […]

(247) Internal documents of ÖBB stemming from 11 July 2012 also further show how the ÖBB legal department informed […] (ÖBB) about the content of RegioJet's right of first refusal and that […] was trying to find ways to get around RegioJet's right of first refusal:

ÖBB legal department: "*The right of first refusal [….] appears to have been bindingly concluded. [….] RegioJet has to be notified of an (envisaged) sale.*"

[…]: "*Thanks, uh, here we have to think about how to proceed. […] is there a way to get out of this?*"[244]

(248) Furthermore, […] in early September 2012, i.e. only a few days after the conclusion of the Vienna – Prague railjet cooperation between ČD and ÖBB on 16 and 21 August 2012, […], the owner of RegioJet, requested a meeting with […], […] of ÖBB.

(249) In an ÖBB internal e-mail to […] and others, […] suggested to decline the meeting request:

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241 […]
The German original reads as follows:
„*Die Fa. RegioJet hat mit sofortiger Wirkung ihr Angebot zum Ankauf von 10 Stück RZW Type 1895 auf* […] *Euro erhöht. (...) Dieses Angebot gilt bis Montag, 2. Juli 2012 16:00 Uhr*."

242 […]
The German original reads as follows:
"*Intern zur Info: Wir können aktuell noch nicht entscheiden, da wir noch mit CD in Verhandlungen stehen. Erst wenn die Verhandlungen abgeschlossen sind, wird die Entscheidung fallen – das soll in 14 Tagen soweit sein. Bitte das aber NICHT an regiojet kommunizieren, offiziell nur weitergeben, dass die Entscheidung in frühestens 14 Tagen erfolgt."*

243 […]

244 […]
The German original reads as follows:
ÖBB legal department: *"Das Vorkaufsrecht dürfte [….] rechtswirksam vereinbart worden sein. [….] Regiojet muss (beabsichtigter) Verkauf bekanntgegeben werden.*
[…]: *„Danke, uh da müssen wir noch überlegen wie wir da vorgehen. [….]*
kommen wir da irgendwie raus ?"

"[…] *asked me for an appointment several times in the summer, but I refused due to the ongoing negotiations on cooperation with ČD. We have also decided not to sell to RegioJet the 1st class wagons suitable for long-distance passenger transport in which RegioJet is interested, because we don't want to support our strategic partner's direct competitor again (we already did that once when we sold regiojet the vehicles with which they now operate between Prague and Ostrava in competition with ČD). Moreover, we cannot exclude that regiojet will then operate a competing service to us between Prague and Vienna with our wagons. RegioJet has already indicated several times that it is interested in this. In my opinion, there is no room for a cooperation, about which* […] *would like to talk, I would not know where and why".*[245]

(250) This shows that ÖBB was aware that (1) RegioJet competes with ČD on the Prague – Ostrava route with the wagons purchased from ÖBB, (2) RegioJet needed more wagons and (3) ÖBB feared that RegioJet may become a competitor for its own services.

(251) ÖBB's […] finally decided to meet […] of RegioJet, however his assistant asked […] (ÖBB) to explain the meeting between […] and […] to ČD:

"[…] *keeps the RegioJet appointment because it is only a first visit, and it would be a small affront towards RegioJet to call off the meeting which was long time planned. Perhaps you could tell Czech railways that the visit would be limited to diplomatic relations and is otherwise meaningless*".[246]

(252) […] agreed to do so:

"OK understood. We inform ČD so that they are not upset!"[247]

5.4.3. Arguments raised by ČD and assessment by the Commission

(253) ČD puts forward the following arguments in relation to this sale.

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[245] […]
The German original reads as follows:
" […] *hat mehrfach im Sommer noch um einen Termin bei mir angefragt, was ich aber aufgrund der laufenden Verhandlungen zur Kooperation mit CD abgesagt habe. Außerdem haben wir uns entschieden, die im FV verwertbaren 1. Klasse Wagen, an denen regiojet Interesse hat, nicht an regiojet zu verkaufen, weil wir den direkten Wettbewerber unseres strategischen Partners nicht nochmal unterstützen wollen (das haben wir ohnehin schon einmal getan, als wir regiojet die Fahrzeuge, mit denen sie nun in Konkurrenz zur CD zwischen Prag und Ostrava fahren, verkauft haben). Außerdem können wir nicht ausschließen, dass regiojet dann mit unseren Wagen ein Konkurrenzangebot zwischen Prag und Wien zu uns fährt. Dass regiojet daran Interesse hat, haben sie auch schon mehrfach durchklingen lassen. Für eine Kooperation, über die* […] *gerne sprechen würde, ist meines Erachtens null Raum, ich wüsste nicht wo und warum."*

[246] […]
The German original reads as follows:
"den Termin Regiojet macht […] *nun doch, weil es nur ein Antrittsbesuch ist und es ggü. Regiojet ein kleiner Affront wäre, diesen nach so langer Planungszeit wieder abzublasen. Vielleicht könntet ihr ggf. der tschechischen Bahn erklären, dass der Besuch rein den diplomatischen Beziehungen dient und sonst bedeutungslos ist."*

[247] […]
The German original reads as follows:
"Ok verstanden. Wir informieren CD, damit es da zu keinen Verstimmungen kommt!"

5.4.3.1. The right of first refusal of RegioJet

(254) ČD submits that the right of first refusal awarded to RegioJet for wagons of ÖBB (see above recital (171)) was an exclusivity right favouring RegioJet, to the detriment of ČD.[248]

(255) However, contrary to what is claimed by ČD, the right of first refusal awarded to RegioJet is not tantamount to an exclusivity right for RegioJet. ČD's claim is contradicted by the original German and English wording of the clause in question in the purchase agreement of 25 January 2011 which does not speak of an exclusivity right but of a pre-emptive right to purchase coaches.

English: *"The seller accords the buyer for the enlargement of his vehicle fleet a pre-emptive right for coaches of the same technical specification".*
German: *Weiters gewährt die Verkäuferin dem Käufer zur Erweiterung seiner Fahrzeugflotte ein Vorkaufsrecht auf Wagen derselben technischen Spezifikation".*[249]

(256) Moreover and most importantly, the Parties' behaviour in this sales processthat shows that ÖBB and ČD collusively cancelled the sale of the wagons at hand, to the detriment of their common competitor RegioJet.

5.4.3.2. Legitimacy of the reasons and motivation for the cancellation of the sale

(257) ČD argues that ÖBB did not give preferential treatment to ČD and had financial motivations for stopping the sale[250]. Moreover, ÖBB did not want to antagonize its business partner ČD[251] and concerns that RegioJet would become a competitor to the Railjet project were not the main motivation of ÖBB[252].

(258) The Commission rejects ČD's arguments, as they are contradicted by the evidence in the Commission's file.

(259) Indeed, the ÖBB-internal documents referred to by ČD[253] do not show that ÖBB's motivation to circumvent the right of first refusal would be primarily financial: "*In the meantime, I have been able to clarify with our legal department that unfortunately RegioJet has actually a right of first refusal regarding these wagons until 24 January 2013. This means the following: if ČD makes us an offer and we want to accept it, we have to inform RegioJet about this offer. RegioJet then has three weeks to exercise the right of first refusal and to agree with us on a price. If RegioJet offers the same price as ČD, we have to sell to RegioJet. Or we wait until early 2013. I am going to check the approach with our* […]."[254] Similarly, it is apparent from the unequivocal wording of the ÖBB-internal contemporaneous

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[248] […]

[249] […] The purchase agreement was drawn up in both languages.

[250] […]

[251] […]

[252] […]

[253] […]

[254] ÖBB-internal email from […] to […]. […]. The German original reads as follows:
"Ich konnte mittlerweile mit unserer Rechtsabteilung klären, dass es leider tatsächlich so sein dürfte, dass regiojet noch bis 24.1.2013 ein Vorkaufsrecht hat betreffend diese Fahrzeuge hat. Das bedeutet Folgendes: wenn CD uns ein Angebot legt und wir dieses annehmen wollen, dann müssen wir dieses Angebot regiojet bekannt geben. Regiojet hat dann in weiterer Folge drei Wochen Zeit, um das Vorkaufsrecht auszuüben und sich mit uns auf einen Preis zu einigen. Bietet regiojet denselben Preis wie CD, müssen wir an regiojet verkaufen. Oder wir warten bis Anfang 2013.
Ich werde die Vorgehensweise noch mit […] *klären*."

document quoted in recital (249) above that the only reason why ÖBB did not want to sell to RegioJet was that "*we [=ÖBB] don't want to support our strategic partner's direct competitor again .... Moreover, we cannot exclude that regiojet will then operate a competing service to us between Prague and Vienna with our wagons"*.

(260) That the true reasons for cancelling the sale were not of financial nature, but simply to avoid that RegioJet could exercise its purchase right, contrary to ČD's claims, is also demonstrated about the ČD-internal email quoted in recital (272) below: "[…]" This contemporaneous document also shows that ČD was well aware about ÖBB's efforts to circumvent RegioJet's right of first refusal and has endorsed this course of action.

(261) […] ÖBB had on purpose cancelled the envisaged sale to ČD to avoid triggering RegioJet's right of first refusal. This statement is corroborated by the whole body of clear contemporaneous evidence quoted in section 5.4.2 above and especially in recitals (239) and (240). According to the constant case law, […] plus mutually corroborating contemporaneous evidence is sufficient for proving the Commission's allegations[255].

(262) Contrary to what is claimed by ČD, the Parties' main motivation for the cancellation of the sale was the concern that RegioJet would become a competitor to the Parties' railjet project, if it acquired the wagons in question. This is apparent from the clear wording of the contemporaneous document quoted in recital (235), where ÖBB's […] noted that ÖBB would prove itself to be a bad partner of ČD if these wagons were sold to RegioJet. Furthermore, he noted that RegioJet could use the purchased wagons on a section of the Prague – Vienna route that was to be jointly operated by ÖBB and ČD.

5.4.3.3. ČD's motivation to buy the wagons

(263) ČD argues that it merely wanted to purchase the wagons because it needed them, and not because it wanted to exclude RegioJet. The Commission should not rely on the […].[256]

(264) The Commission rejects this argument as not supported by the constant case law. The Court confirmed that for the application of Article 101 TFEU an "*action by a person who is authorised to act on behalf of the undertaking suffices*"[257]. The Court further stated that *"any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs, and that undertaking is, as a matter of principle, held liable for that conduct*"[258]. In the present case, the evidence in the Commission's file and quoted in this Decision (such as for example in recital (235)) shows that the Parties feared that RegioJet may use the wagons in question on the international Prague - Vienna route. […]'[…].

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255 Judgment of the General Court of 16 June 2011, *FMC Foret*, T-191/06, ECLI:EU:T:2011:277, paragraphs 125 and 126; Judgment of the General Court of 29 September 2021, *Nippon Chemi-Con*, T-363/18, ECLI:EU:T:2021:638, paragraphs 168 and 169.

256 […]

257 Judgment of the Court of Justice of 7 February 2013, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.*s., C-68/12, ECLI:EU:C:2013:71, paragraph 25; Judgment of the Court of Justice of 7 June 1983, *Musique Diffusion française and Others,* joined cases C-100/80 to C-103/80, ECLI:EU:C:1983:158, , paragraph 97; Judgment of the Court of First Instance of 20 March 2002, *Brugg Rohrsysteme*, T-15/99, ECLI:EU:T:2002:71, paragraph 58.

258 Judgment of the Court of Justice of 21 July 2016, *VM Remonts*, C-542/14, ECLI:EU:C:2016:578, paragraph 24.

5.4.3.4. ÖBB's sale of wagons in light of RegioJet's purchase right

(265) ČD argues that it remained absolutely in ÖBB's commercial discretion whether or not to sell the wagons (and thereby possibly trigger the Exclusivity Clause).[259]

(266) The Commission notes that it is not relevant whether ÖBB was or was not obliged to sell the wagons and to trigger RegioJet's purchase right. Decisive is the Parties' collusive rigging of the sales process at hand to the detriment of RegioJet, namely that ÖBB's cancellation of the sale only happened to avoid triggering RegioJet's right, and that there was a flow of information from ÖBB to ČD about the real purpose of the cancellation (see above recitals (239) and (240)). […] the contractual situation with RegioJet's right went far beyond what would have been necessary in a normal business relationship (for example, […] (241)).

5.4.3.5. Awareness of ČD of the reasons for cancelling the sale

(267) In ČD's view, the cancellation of the sale by ÖBB in order to circumvent a right of first refusal of RegioJet could not be a manifestation of some common agreement or understanding given that ČD was not aware of any reason for cancelling the sale prior to the cancellation and given that there was no action on the part of ČD, but only a unilateral decision of ÖBB[260].

(268) ČD's argument is not supported by the evidence in the Commission's file. The clear contemporaneous documents quoted above in recitals (239) and (240) ([…]: "[…] (see above recital (241)) demonstrate to the required standard of proof that ČD was aware about the fact that ÖBB only cancelled the envisaged sale of the wagons to circumvent RegioJet's right of first refusal and that ČD was fully informed and has endorsed this course of action.

(269) According to the case law, an action by ČD is not necessary. For a concerted practice to exist it suffices if one party discloses its intention to take an anti-competitive action together with the other party, and the other party is informed about this action and implicitly accepts this action by not distancing itself[261]. […][262] […]. This information exchange went beyond what was necessary in a standard business relationship and was part of the Parties' collusive rigging of the sales process to the detriment of RegioJet.

5.5. Sale of […] wagons to ČD on […] 2013

5.5.1. Summary

(270) The Parties delayed an upcoming sale of […].

(271) On […] 2013 ÖBB sold […].[263] […].[264]

---

259 […]

260 […]

261 Judgment of the Court of First Instance of 12 July 2001, *Tate & Lyle,* joined cases T-202/98, T-204/98 and T-207/98, ECLI:EU:T:2001:185, paragraph 54; Judgment of the General Court of 5 October 2020, *Casino*, T-249/17, ECLI:EU:T:2020:458, paragraph 257.

262 […]

263 […]

264 […]

5.5.2. Meetings and collusive contacts in the sales process

(272) ČD was aware of ÖBB's intention to launch the sale process only after the expiry of RegioJet's right of first refusal in order to prevent the sale to RegioJet. Indeed, on […] 2012, […]"[265]

(273) The Parties were also aware of the sensitivity of this issue as […] mentioned […][266] In the Commission's view, this demonstrates again the collusive character of the Parties' rigging of this sales process.

(274) Also in […] 2012, another ČD […], […], […].[267] In the course of the discussions, ÖBB's […] postponed the start of the sale process of these wagons for after […] 2013, which was the date of expiry of RegioJet's right of first refusal (see section 5.4).[268] This postponement again demonstrates the Parties' collusion in the rigging of this sales process in order to prevent sales of used wagons to RegioJet. In reaction to […]'s (ÖBB-TS) reference to RegioJet's right of first refusal, […] (ÖBB) wrote on 7 January 2013 to […] (ÖBB):

"*The right of first refusal ends on 14 January, meaning afterwards we can start. But obviously we have to wait for this.* […] *However, perhaps we better have a meeting with […] to be on the safe side – but better a few days after 14 January.*"[269]

(275) In accordance with the instructions of […], […] (ÖBB) sent two e-mails to the […][270] and […][271] on […] 2013, informing them about the available wagons.[272] […] that the timing of these e-mails […].[273] […]

(276) A draft ÖBB briefing dated 4 February 2013 for a meeting between ÖBB-PV[…] and RegioJet's CEO […][274] and an ÖBB briefing dated 2 September 2013 on the occasion of the baptism of ČD's first railjet locomotive[275] confirm ČD's and ÖBB's agreement, i.e. to favour ČD in the sales of wagons and to ideally avoid selling to RegioJet. As regards the sales of wagons to RegioJet, this document states the following:

"*(inofficially and only for internal use: sale of wagons to RegioJet ruled out since RegioJet is a competitor to ÖBB's strategic partner ČD.) RegioJet had a right of first refusal which expired 14.1.2013. Currently there are no wagons which could be sold*

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265 […]
The Czech original reads as follows
"[…]*"*

266 […]
The Czech original reads as follows
"[…]"

267 […]

268 […]

269 […]
The German original reads as follows (spelling mistakes not corrected):
" Das vorkaufsrecht endet am 14.1., dh danach können wir starten. Aber natürlich müssen wir das abwarten. […] Aber vielleicht hängen wir doch besser ein meeting dazu mit […] *ein, sicherheitshalber – dann aber besser ein paar tage nach dem 14.1….".*

270 […]

271 […]

272 Initially […] wagons, but finally […] wagons, […]

273 […]

274 […]

275 […]

to RegioJet. (internal info only: wagons shall be rented to strategic partner […] *and sold to ČD)*"[276]

(277) […].[277]

(278) An e-mail from […] to […] (both of ÖBB-PV) of 22 March 2013 further proves that the Parties' collusion was about rigging sales processes to the detriment of RegioJet, insisting that wagons have to be offered first to ÖBB's cooperation partners (i.e. ČD) and only in case of their refusal also to third parties (i.e. RegioJet):

"*as already discussed on the phone I would like to make you especially aware that all rolling stock that we may be able to sell or to rent to competitors of our cooperation partners have to be offered first to our cooperation partners, and only in case of their refusal they may be offered to other interested parties (*[…]"[278]

(279) ÖBB's […] offered the […].[279] […] [280] […][281]

(280) The sale was approved by the ÖBB-PV […][282] […][283] […][284] […].

(281) Moreover, had ÖBB sold the wagons to RegioJet instead to ČD, […] (see above recital (271)). This is apparent from an email of RegioJet's CEO […] to ÖBB's […] of 21 November 2012:

"*we are ready to buy directly from OBB* […]*. We are ready to pay* […]."[285]

(282) […] made the same statement also in a letter to ÖBB[…] of […] 2012 in which he asked […] that ÖBB sells […] wagons to RegioJet.[286] While *"type* […]*"* in both […]'s email to […] and in his letter to […] refer to […] wagons, the wording *"*[…]*"* shows that RegioJet would have also been willing to pay this price for other similar wagon types.

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276 The German original reads as follows:
"(Inoffiziell und nur intern: wurde ein Wagenverkauf an RegioJet ausgeschlossen, da Regiojet ein Konkurrent zum strategischen Partner der ÖBB, der CD, ist.) RegioJet hatte ein Vorkaufsrecht für FVWagen, welches jedoch mit 14.1.2013 ausgelaufen ist.
Derzeit ist kein überzähliger Fuhrpark vorhanden, der an RegioJet verkauft werden könnte. (Nur interne Info: Wagen sollen an strategischen Partner […] *vermietet und an CD verkauft werden)"*

277 […]

278 […]
The German original reads as follows (spelling mistakes not corrected):
"wie schon am telefon besprochen möchte ich insbesondere daaruf hinweisen, dass wir sämtliche fahrzeuge die wir an mitbewerber unerer kooperationspartner verkaufen bzw. vermieten könnten zunächst an unsere kooperationspartner anzubieten sind und erst bei einer ablehnung durch diese anderen interessenten angeboten werden dürfen (das gilt insbesondere für das unternehmen regiojet). […]*"*

279 […]

280 […]
The Czech original reads as follows:
"[…]"

281 […]

282 […]
The German original reads as follows:
"[…]".

283 […]

284 […]

285 […] Original in English (spelling mistakes not corrected).

286 […]

(283) On […] 2013, an employee of ČD sent an internal e-mail to another ČD employee, […]. In attachment of this e-mail was a draft letter of ČD's […] to ÖBB's […] dated 10 October 2013, thanking ÖBB and confirming the interest of ČD to acquire further wagons:

"[…]"[287]

(284) The Commission concludes that the Parties actively coordinated their actions and collusively rigged this sales process to the detriment of RegioJet. As apparent from the evidence, there was no commercial reason or otherwise reasonable cause for delaying the sales process. The only purpose of the delay that was coordinated between the Parties was to await the expiry of RegioJet's right of first refusal and thereby to avoid triggering this right (see for example ÖBB: "[…]). Moreover, ÖBB did not offer the wagons to other bidders than ČD and thereby did not even try to achieve a better acquisition price (see recital (280)) – the objective was simply to avoid a sale to RegioJet. […], its actions in the sale process were a result of the joint understanding between ČD and ÖBB, i.e. to favour ČD in the sales of rolling stock and to ideally avoid selling to RegioJet.[288] This understanding applied not only to this individual selling process, but to ÖBB's sales of used rolling stock in general.[289]

5.5.3. Arguments raised by ČD and assessment by the Commission

5.5.3.1. The difference between the wagons originally offered and ultimately sold and communications related to different wagons

(285) ČD argues that there is a difference in the types of wagons that had been initially offered and which ČD ultimately acquired. ČD claims that the Commission does not adequately address this difference in the SO, even though it is crucial in light of the Commission's argumentation.[290]

(286) First, it needs to be stressed that the present Decision lays out in recital (271) that the sales discussions started on […].[291]

(287) Second, the Commission notes that the fact that the object of the sale changed in the course of the sales process is immaterial for the assessment under Article 101 TFEU. Rather, decisive for the assessment of the Parties' behaviour at hand is that ČD was informed and aware that ÖBB purposefully launched the sale process only after the expiry of RegioJet's right of first refusal, in order to prevent the sale to RegioJet.

5.5.3.2. Postponement of the sale

(288) ČD claims that the communication (on the timing to avoid that RegioJet's right of first refusal kicks in) between […] and […] was only ÖBB-internal and never discussed with ČD, which did not initiate or participate in the alleged deferral of the initially discussed sale[292]. Moreover, the communications between […] (ÖBB) and

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287 […]
The Czech original reads as follows:
" […]"

288 […]

289 […]

290 […]

291 The same was also said in the SO, […]

292 […]

[…] (ÖBB) were rather driven by financial motives than by some alleged previous coordination with ČD.[293]

(289) The Commission disagrees with ČD's interpretation that ÖBB postponed the sale unilaterally. Rather, ÖBB's action was coordinated with ČD. The evidence presented in section 5.5.2 above shows that ČD was fully aware of ÖBB's action to defer the sale process until after the expiry of RegioJet's right of first refusal, in order to prevent a sale to RegioJet. This particularly […].

5.6. The offer of initially […], later […], wagons by ÖBB to ČD (partly uncompleted)

5.6.1. Summary

(290) Negotiations regarding an envisaged sale of (initially) […] wagons from ÖBB to ČD started in […] 2013. Both Parties were aware that in case a number of these wagons are sold to RegioJet, they would be used to compete against ČD. Therefore, in this sales process the Parties made efforts to ensure the sale of the wagons to ČD and to avoid them being sold to RegioJet. […] Through these contacts, the Parties then mutually confirmed their aim to prevent, hinder or restrict the access of RegioJet to used railway wagons for long-distance passenger transport in order to impede the market entry or expansion of the common competitor RegioJet.

(291) In respect of this sale, the number, as well as the series of wagons offered to sale by ÖBB changed several times. Ultimately, out of this package of initially […] wagons:

(a) 45 wagons were sold to RegioJet on 2 January 2014: On 2 January 2014 altogether 45 passenger wagons (12 type Ampz 18-91, 15 type Ampz 18-95, 11 type Bmz 28-91, 2 type ABmz 30-90, and 5 dining car type WRmz 88-90) were sold by ÖBB to TCA (acting as intermediary for RegioJet) for a total price of EUR […].[294] Among these 45 wagons were the 10 vehicles of the 18-95 Series whose sale had been stopped in 2012 in order to avoid triggering RegioJet's right of first refusal (see section 5.4).[295]

(b) […] wagons ([…] wagons and […] wagons) were sold to […] in […] 2014 (see section 5.7).

(292) […]

5.6.2. The sales process

(293) On […] 2013, by e-mail, […] of ÖBB informed ČD that from about […] 2013, ÖBB will be able to release […][296] On […] 2013, […] also sent ČD a list of available wagons for sale ([…]).[297]

(294) On […] 2013, […].[298]

(295) On […] 2013, by e-mail, ÖBB sent […].[299] […] [300]

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293 […]
294 […]
295 […]
296 […]
297 […], which includes the list of […] wagons offered by ÖBB. ([…]).
298 […]
299 […]
300 […]

(296) On […] 2013, by e-mail, ČD answered […] (see above section 5.5).

(297) Regarding the procurement procedure that governs ČD's acquisition processes (ČD is bound by Czech public procurement laws – see above section 4.1.2), […] (see above section 5.5), i.e. "[…][301]

(298) On 21 October 2013, […] (ÖBB) summarised the status of the bids for […] of ÖBB-PV in an ÖBB-internal e-mail and requested his approval for a sale to RegioJet's intermediary TCA, which submitted a bid for […] wagons.[302] As follows from the table in the e-mail sent by […], TCA and ČD had submitted the following bids:[303]

Table 1: […]

(299) As follows from **Table 1**, […]

(300) Moreover, […].[304]

(301) As the price offered by ČD […].

(302) In order to conclude the sale in a timely manner, ÖBB-PV would prepare two applications to the supervisory board: one for a sale to ČD and one for a sale to TCA.[305] In his e-mail to […] (ÖBB) of 21 October 2013, […] (ÖBB) stated:

"*The following further procedure has just been agreed with* […]:
The aim is to get the approval of the sale in the December meeting of the supervisory board.
That means the rest of the schedule is aligned on this:
- we will prepare two board requests (one for sale to TCA and one for ČD)
[…]
Communication that better offer is available.
- "Negotiating" the contracts with both potential buyers."[306]

(303) T[…] 2013.

(304) On […] 2013, by e-mail, […].[307]

(305) On […] 2013, by e-mail, […][308]

(306) On […] 2013, by e-mail, […][309]

---

301 […]
302 […]
303 […]
304 […]
305 […]
306 […]
The German original reads as follows (spelling mistakes not corrected):
"*Soeben mit* […] *folgende weitere Vorgehensweise festgelegt:*
Ziel ist im Dezember AR den Verkaufsbeschluss zu bekommen. D.h. der weitere Zeitplan wird danach ausgerichtet:
- Wir werden zwei VD Anträge vorbereiten (einmal für Verkauf an TCA und einmal für CD)
[…]
Kommunikation das besseres Angebot vorliegt.
- „Verhandlung" der Verträge mit beiden potentiellen Käufern."
307 […]
308 […]
309 […]

(307) On […] 2013, […] sent an ÖBB-internal e-mail to […]:

"[…]".[310]

(308) Nevertheless, on […] 2013, by e-mail, […] per wagon).[311]

(309) However, ÖBB finally decided to sell to TCA instead of ČD. In an e-mail of […] 2013, […] (ÖBB) summarised the reasons for ÖBB's decision to the executive assistant of ÖBB's board member […]. In […] e-mail, […] explained that it was important for ÖBB-PV for accounting reasons to conclude the sale still in 2013. Unlike TCA, […]. Thus, from the perspective of transaction security and timeliness, a sale to TCA was preferable. Moreover, […].[312]

(310) On […] 2013 […] of ÖBB informed […] [313] […]

5.6.3. Meetings and collusive conducts

5.6.3.1. The attempted coordination of ČD's bid

(311) ÖBB and ČD engaged in a series of meetings and contacts in the course of negotiations regarding the sale of initially […] wagons in the second half of 2013.

(312) A […]:

"[…]"[314]

(313) On […] 2013, a meeting between ČD and ÖBB took place in Brno, […], […], as well as […] were present. On ÖBB's side, […] and […] attended.[315] An ÖBB-internal briefing for this meeting was prepared, containing background information on a series of possible topics, including potential sales to ČD and the sale of wagons to RegioJet. This briefing shows that the Parties were aware that RegioJet needed used ÖBB wagons to operate its services in Czechia. For this reason, the Parties excluded wagon sales to RegioJet, pretending that ÖBB needs the wagons for itself, while in fact the wagons should be sold to ČD:

"*Sale of no longer needed* […] *wagons: There are currently* […] *wagons for sale. If we sell more wagons, we will offer them to our cooperation partners (including ČD) first.*
[…]
RegioJet - ÖBB: Wagon sales
In 2011, ÖBB sold a total of 40 wagons to RegioJet.
With these wagons (refurbished) RegioJet operates its long distance passenger transport in the Czech Republic.
In 2012 RegioJet again expressed interest in buying wagons. Officially, first an evaluation was made in 2012 as to whether wagons can be put for sale due to

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310 […]
The German original reads as follows:
"[…]"

311 […]

312 […]

313 […]

314 […]
The Czech original reads as follows:
"[…]"

315 […]

internal ÖBB projects on the fleet strategy (PEAK). (Unofficially and only internally: a wagon sale to RegioJet was excluded, as RegioJet is a competitor to the strategic partner of ÖBB, ČD.) RegioJet had a right of first refusal for wagons for long-distance passenger transport, which expired on January 14, 2013.

There is currently no surplus fleet that could be sold to RegioJet. (Only internal information: wagons are to be rented to strategic partner […] *and to be sold to ČD)*".[316]

(314) ČD confirms, in a reply to a request for information, […].[317] […] there were ultimately no discussions with ČD at the ceremony.[318] However, the content of an e-mail sent by ČD's […] to ÖBB's […] on […] 2013 […] 2013:

"[…]"[319]

(315) The e-mail in question was sent on […] 2013 and refers to discussions which apparently have taken place during a meeting in Brno "*last Wednesday*", i.e. on […] 2013.

(316) As described in recital (295), on […] 2013, […]. In his e-mail to ČD of […] 2013, while confirming the information provided to ČD on […] 2013, […] of ÖBB noted that:

"[…]"[320]

5.6.3.2. Meeting of […] 2013

(317) On […] 2013, a meeting took place at ČD's premises in Prague. On ČD's side, […] was to […].[321] […] (ÖBB) attended the meeting and the intended sale of […] wagons by ÖBB-PV was the main topic of this meeting.[322]

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316 […]
The German original reads as follows:
"Verkauf von nicht mehr benötigten […]*-Wagen: Derzeit stehen* […]*-Wagen zum Verkauf. Wenn wir weitere Wagen verkaufen, bieten wir sie jedenfalls zunächst unseren Kooperationspartnern (also auch der CD) an.*
[…]
RegioJet – ÖBB: Wagenverkauf
Seitens der ÖBB wurden im Jahr 2011 insgesamt 40 Wagen an RegioJet verkauft.
Mit diesen Wagen (refurbisht) fährt RegjoJet ihren FV in Tschechien.
2012 bekundete RegioJet nochmals Interesse an einem Wagenkauf. Aufgrund von ÖBB-internen Projekten zur Fuhrparkstrategie (PEAK) wurde 2012 aber offiziell erst evaluiert, ob Wagen zum Verkauf stehen. (Inoffiziell und nur intern: wurde ein Wagenverkauf an RegioJet ausgeschlossen, da Regiojet ein Konkurrent zum strategischen Partner der ÖBB, der CD, ist.) RegioJet hatte ein Vorkaufsrecht für FVWagen, welches jedoch mit 14.1.2013 ausgelaufen ist.
Derzeit ist kein überzähliger Fuhrpark vorhanden, der an RegioJet verkauft werden könnte. (Nur interne Info: Wagen sollen an strategischen Partner […] *vermietet und an CD verkauft werden).*

317 […]

318 […]

319 […] Original in English.

320 […] Original in German and in Czech (translation by ČD of ÖBB German wording).
The German original reads as follows (spelling mistakes not corrected):
"[…]"
The Czech original reads as follows:
"[…]"

321 […]

(318) ÖBB treated ČD preferentially […]

"[…]"[323]

(319) The sale in question was discussed at the meeting, […].[324]

5.6.3.3. The sale of wagons to RegioJet and […]

(320) On […] and […] 2013, by e-mail, […][325] […][326]

(321) On […] 2013, by e-mail to ÖBB's […], ČD's […]:

"[…]?"[327]

(322) On 9 December 2013, by e-mail, […] replied to […]:

"[…]"[328]

(323) As described in recital (310), on […] 2013, […] of […].

(324) On […] 2013, at […], […] commented on ÖBB's updated offer in a ČD-internal e-mail to […]:

"[…]"[329]

(325) On […] 2013, at […], […] replied to […], probably referring to […]'s (ÖBB) e-mail of […] 2013 (see recital (322)):

"[…]"[330]

(326) On […] 2013, at […], […] (ČD) replied to […] noting that ČD doesn't have that much time. […] also wrote:

"[…]"[331]

(327) On […] 2013, in the afternoon, […], […], sent a letter to […], […]:[332]

"[…]"[333]

---

322 […]

323 […]
The Czech original reads as follows:
"[…]"

324 […]

325 […]

326 […]

327 […] Original in English (spelling mistakes not corrected).

328 […] Original in English (spelling mistakes not corrected).

329 […]
The Czech original reads as follows:
"[…]"

330 […]
The Czech original reads as follows:
"[…]"

331 […]
The Czech original reads as follows:
"[…]"

332 […]

(328) On […] 2013, the […] of ČD, […], addressed the same letter to […], […] ÖBB.[334]

(329) On […] and […] 2013, […] and […] (both ČD) forwarded these […] at ÖBB-PV, […] and […]. […] wrote in the e-mail:

"[…]"[335]

(330) On […] 2013, ÖBB's […] informed […] in an ÖBB-internal e-mail […][336], […][337] and […][338]. On […] 2013, […] replied to […], copying […] (all ÖBB). […] wrote:

"*I want to give ČD preferential treatment now, to be honest, especially because of the embarrassment with the* […] *wagons, and because we are cooperating with them in December. Please also inform* […] *about this*".[339]

(331) On […] 2013, in the ÖBB-internal correspondence concerning the letter of […] (ČD) of […] 2013, […] informed […] (both ÖBB) that ČD was aware of the negotiations with RegioJet.[340] […] further wrote to […], referring to the number of 73 wagons RegioJet would need in order to operate a Prague – Berlin - Hamburg service:

"*I only hope that RegioJet now with the wagon purchases of TCA is not able to get the 73 wagons. TCA gets appr. 40 – 50 wagons from us and 20 A-wagons they have bought 1 year ago from […].*"[341]

(332) This correspondence demonstrates that ÖBB knew about the number of wagons RegioJet would need to be able to offer a certain service in competition with ČD.

(333) On […] 2013, […] wrote to […] (both ÖBB), referring to the letter of […] (ČD) to […] of […] 2013 (see above recital (327)) and justifying why ÖBB could not sell to ČD:

"[Below] *the mail with the non-binding offer (no procedure for tender yet) from ČD.*

---

333 […]
The German original reads as follows (spelling mistakes not corrected):
"[…]"

334 […]

335 […] Original in English.

336 […]

337 […]

338 […]

339 […]
The German original reads as follows (spelling mistakes not corrected):
"*ich würde CD nun schon bevorzugt bedienen wollen ehrlich gesagt, vor allem auch wegen der peinlichkeit mit den* […] *wagen, und weil wir nunmal im dezember mit ihnen die kooperieren. bitte sag das auch* […]. "

340 […]

341 […]
The German original reads as follows (spelling mistakes not corrected):
"ich hoffe nur, dass regio-jet mit den wagenkäufen von TCA jetzt nicht die 73 wagen zusammenbekommt. ca. 40-50 stück bekommt bekommt ja die TCA von uns und 20 A haben sie schon vor ca. 1 jahr von […] gekauft."

They have bid a maximum of € […]*, but the book value is €* […]. […] *The approval of the boards was also not yet available at this point in time.*"[342]

(334) On […] 2013, a […] between […] and […] of ČD and […] and […] of ÖBB took place in Vienna. The main topic of that meeting was to discuss past and future sales of wagons by ÖBB to ČD and future legal procedures. This included discussing the sale of […] wagons that ČD was previously interested in acquiring from ÖBB.[343] ČD confirms that the topics of the meeting included issues related to the number of wagons that ÖBB then offered for sale and the reasons for the number being lower than previously expected, their price, technical assessment, etc.[344]

(335) This information corroborates inspection documents showing that ÖBB told ČD that […] wagons originally offered to ČD were sold to another entity and subsequently purchased by RegioJet for the development of its activities in Czechia. Despite the fact that ÖBB ultimately sold the wagons to another undertaking, ÖBB granted ČD preferential treatment which it did not grant RegioJet's intermediary TCA. ÖBB always […] (see above recital (301) and recital (318)), which did not happen due to various failures on ČD's side. This is also apparent from a document copied at the inspections at ČD's premises in which ÖBB communicated to ČD the following reasons for selling the […] wagons to another entity:

(a) higher bid of the competing bidder ([…] EUR per wagon);

(b) sale of all wagons in […] package;

(c) ČD being very slow;

(d) […];

(e) high risk for ÖBB stemming from […] which would have to approve the transaction.[345]

(336) On […] 2013, […] (ČD) summarised the outcomes of the meeting in Vienna in a ČD-internal e-mail to […], touching upon the reasons for the failure of the sale to ČD:

"[…]"[346]

(337) In order to avoid sales to RegioJet in further processes for the sale of ÖBB's used wagons, the Parties agreed in the meeting of […] 2013 that all communication on behalf of ÖBB is handled by […] while […] would be responsible on ČD's side.[347] This is apparent from a ČD-internal document reporting about this meeting:

"[…]*2013 - a meeting* […][348] […] *took place. It was presented by ÖBB that* […]

---

342 […]
The German original reads as follows:
"Das Mail mit dem unverbindlichen Angebot (noch keine Ausschreibung) von CD. Sie haben maximal € […] *geboten, der Buchwert liegt aber bei €* […]. *[…] Die Genehmigung der Gremien lag zu diesem Zeitpunkt auch noch nicht vor.*

343 […]

344 […]

345 […]

346 […] Original in English (spelling mistakes not corrected).

347 […]

348 […]

cars […] *to ČD have been sold to another entity (intermediary, subsequently these cars were purchased by RegioJet for the development of its activities in the Czech Republic) [….]* […]*"*[349]

(338) The Commission finds that, while in this sales process the Parties were not successful in preventing a sale to RegioJet, the Parties took measures to avoid similar failures and misunderstandings in the future and to improve the internal communication within the cartel.

(339) The Parties' continued adherence to the agreed principle of avoiding sales of used wagons to RegioJet is also demonstrated by an e-mail of 14 […] 2014 in which […] to ÖBB's […]:

"[…]"[350]

(340) […] understood this reaction as […].[351]

(341) […] the principle agreed by the Parties, consisting in preventing, hindering or restricting RegioJet's access to used railway wagons remained in place. […] a manifestation of the mutually communicated joint understanding between ÖBB-PV and ČD concerning the sale of used wagons according to which ÖBB-PV was to favour ČD over RegioJet and, if possible, not sell any wagons to RegioJet, as ČD's competitor.[352]

5.6.4. Arguments raised by ČD and the Commission's assessment

5.6.4.1. The treatment of ČD in this sales process

(342) ČD claims that allocating an additional deadline for the improvement of a bid was a standard procedure at ÖBB, and ČD was not treated in any preferential way by ÖBB in this sales process. Providing information about other bidders and their bids is common in business in general and there is nothing anticompetitive in it.[353]

(343) The Commission however points out that […], which the competing bidder TCA (RegioJet's intermediary) did not enjoy in this sales process. This evidence shows that the sales process at hand was different from normal business processes and was characterised by the Parties' collusive efforts to prevent that the wagons end up at RegioJet and its intermediary TCA.

(344) First, the contemporaneous documents demonstrate that […]. Third, the preferential treatment that was only granted to ČD but not to anyone else is also in the contemporaneous email of ÖBB's […]'s where […] wrote that […] wants "*to give ČD preferential treatment now, to be honest, especially because of the embarrassment with the* […] *wagons, and because we are cooperating with them*" (see above recital (330)). […].[354]

---

349 […]
The Czech original reads as follows:
"[…]*2013 – proběhla schůzka na* […]. *Ze strany ÖBB bylo prezentováno, že došlo k odprodeji* […] *vozů* […] *ČD jinému subjektu (prostředníkovi, následně tyto vozy zakoupila společnost RegioJet pro rozvoj svých aktivit v rámci ČR) [….]* […]*".*

350 […]

351 […]

352 […]

353 […]

354 […]

5.6.4.2. Wagon purchases by RegioJet

(345) According to ČD, the Commission does not sufficiently take account of the important fact that that a significant part of the wagons initially offered were ultimately bought by RegioJet's intermediary TCA[355].

(346) The Commission explains in great detail in section 5.6.1, section 5.6.2 and section 5.6.3.3 above which number of wagons were acquired by TCA and for which reasons. Independently of this, ČD's arguments do not put into question the continued existence of an anti-competitive collusion since, according to the case law, failures to apply the cartel by the participants may occur[356]. Also, the fact that an agreement is not always implemented is immaterial to the existence of an agreement[357].

5.6.4.3. ČD's obligation to follow the public procurement rules

(347) ČD submits that the public procurement rules, to which it was bound, are not practical and flexible compared to standard business negotiations. ČD therefore was significantly limited in the sales process.[358]

(348) The Commission notes that this argument is not pertinent for assessing the legality of the Parties' behaviour at hand. An obligation to adhere to public procurement rules and a possible lack of flexibility derived from this obligation does not impinge on the general obligation of undertakings to act in compliance with competition law.

5.6.4.4. Motives of ČD and ÖBB

(349) ČD denies that ČD and ÖBB in this sales process acted with anti-competitive motives and wanted to restrict RegioJet's access to wagons. Rather, ČD wanted the wagons because it needed them for its operations, and ÖBB wanted to sell the wagons for the highest price.[359] The fact that […][360].

(350) The Commission however points out that a possible desire of ČD to buy the wagons for its own operations was not the main motive of ČD. ČD's predominant motive is apparent from the clear contemporaneous ČD-internal email showing that feared a purchase of the wagons by its competitor RegioJet: *"*[…]*"* (see above recital (312)).
It is also visible from the […]:
ČD-internal email: "[…]" (see above recital (326)).
Email of ČD's board member […] to ÖBB's […]: "[…]*"* (see above recital (339)).

(351) Moreover, even if - concurrently with […].

(352) Contrary to ČD's assertions, the upset reactions and complaints of ČD when it learned about ÖBB's sale of the wagons to RegioJet (see above section 5.6.3.3) where not due to a mere disappointment that ČD could not have purchased the

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355 […]

356 Judgment of the General Court of 13 September 2013, *Total Raffinage Marketing v Commission*, T-566/08, ECLI:EU:T:2013:423, paragraph 254.

357 Judgment of the General Court of 12 December 2014, *Eni*, T-558/08, ECLI:EU:T:2014:1080, paragraphs 132 and 133; Commission Decision of 29 September 2004 in case COMP/37750, *French Beer*, paragraph 64.

358 […]

359 […]

360 […]

wagons for itself. […][361] […][362] […] the ČD-internal email quoted in recital (326), where "[…]*"*.

5.6.4.5. Mechanisms to improve communication and functioning of the collusive arrangement

(353) ČD also disputes that, following this sale to RegioJet, the Parties established mechanisms aiming at a better adherence to the cartel[363]. For ČD, it is not clear upon what the Commission bases its allegation that, in order to improve the internal communication within the alleged cartel, the Parties agreed that all communication would be handled by […] for ÖBB and by […] for ČD[364].

(354) In this regard the Commission points to the unambiguous wording of the contemporaneous ČD-internal email quoted in recital (337) above which demonstrates that ČD and ÖBB recognised the "mistakes" in the conduct of this sale and took measures to avoid such "failures" in the future.

(355) Such measures and the conclusions the Parties have drawn to improve the functioning of the cartel can also be derived from a ČD-internal email of […] 2014, where ČD's employees referred to the "experience" of the present sale to RegioJet:

"[…] - […]*, possibly* […]*."*[365]

5.7. Sale of […] wagons ([…] wagons and […] wagons) to ČD in […] 2014

5.7.1. Summary

(356) The sale of […] wagons by ÖBB to ČD in […] 2014 is closely linked to the previous sale process from […] 2013 (see above section 5.6), in which ČD failed to acquire from ÖBB the package of wagons it was interested in. As described in detail in section 5.6, a significant part of this package was purchased by the intermediary TCA and ultimately acquired by RegioJet. In consequence, ÖBB could offer to ČD only the remaining wagons of this package, i.e. […] wagons in total. This offer resulted in the purchase by ČD of […] wagons in […] 2014.

(357) In this sales process the Parties again coordinated their course of action in order to ensure the sale of the wagons to ČD. ÖBB gave ČD a preferential treatment, and ČD left the price to be paid up to the consideration of the seller ÖBB. […].

5.7.2. The sales process

(358) Between […] 2013 and […] 2014, ÖBB was in sales talks with several potential buyers (amongst them ČD and RegioJet's intermediary TCA) for […] wagons of the […] series and […] of the […] series. One of the bids received […].[366]

(359) On […] 2013, […].[367]

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361 […]
362 […]
363 […]
364 […]
365 […]
"[…]"
366 […]
367 […]

(360) On […] 2014, ČD sent two letters to ÖBB, in which ČD announced to ÖBB, as the only approached interested party, its intention to award two public tenders without prior publication and invited it to negotiate. The tenders were called "*Purchase of* […] *passenger wagons of the type Bmz from ÖBB*"[368] and "*Purchase of* […] *from ÖBB*".[369]

(361) On […] 2014 […] of ÖBB sent an email to […] secretary which shows that, […].[370]

(362) The sale of […] wagons for EUR […] per wagon and of […] wagons for EUR […] per wagon to ČD was finally approved by […] ÖBB-PV on […] 2014. The draft agenda for the board meeting reads as follows:

"[…][371] […]"[372]

(363) Finally, the […] wagons were sold to ČD. As can be seen from the application of […] 2014 submitted to […] ÖBB-PV, ÖBB also received a bid from the company […]. However, this bid was not better than ČD's bid as far as the […] wagons were concerned, and did not include […] wagons.[373]

(364) ČD and ÖBB confirm that the purchase agreements for the […] wagons (meaning […] wagons and […] wagons) were signed on […] 2014.[374]

5.7.3. Meetings and collusive contacts

(365) On […] 2013, […] (ÖBB) informed […] in an ÖBB-internal e-mail that […] 2013, […] replied in an ÖBB-internal email to […], copying […] and stressing that ČD should be treated preferentially. […] wrote:

"*I want to give ČD preferential treatment now, to be honest, especially because of the embarrassment with the* […] *wagons, and because we are cooperating with them in December. Please also inform* […] *about this*"[375]

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368 The letter was sent in Czech and in German. […]
The Czech original reads as follows:
"Odkup […] *železničních vozůřady Bmz od OBB"*
[…]
The German Original reads as follows:
"Abkauf von […] *der Reihe Bmz von OBB"*

369 The letter was sent in Czech and in German. […]
The Czech original reads as follows:
„Odkup […] *vozů od OBB"*
[…]
The German original reads as follows:
"Abkauf von […] *von OBB".*

370 […]

371 […].

372 […]
The German original reads as follows:
"[…]"
The final agenda point for the board meeting together with the explanation why the wagons should be sold to ČD was sent by the assistant of the board on 21 February 2014 to the assistant of […]. […]

See also final agenda points as submitted to the board, […]

373 […]

374 […]

375 […]
The German original reads as follows (spelling mistakes not corrected):

(366) On […] 2013, a […] between ČD and ÖBB took place in Vienna.[376] In that meeting, […]

(367) ČD's […] handed to ÖBB's […] an invitation to tender for the sale of these wagons at the meeting in Vienna on […] 2013.[377]

(368) The Commission finds that it is apparent from the contacts between ÖBB and ČD that this sale was "tailored" in order to assure that ČD will acquire the wagons in question. In particular, ÖBB gave ČD "*preferential treatment*" (see above recital (365)), and ČD […], as shown by an e-mail from […] of ČD to […] of ÖBB of […] 2014:

"[…]
[…]
[…]"[378]

(369) Attached to this e-mail of […] 2014 was a letter from […], […][379] […].[380]

(370) On […]:

"[…]*"*[381]

(371) On […] 2014, […] forwarded this e-mail message internally within ČD stating:

"[…]"[382]

(372) On […] 2014, at […], […] (ÖBB) […]. […] explained in […] e-mail that:

"[…] *cars we were intending to sell are unfortunately no longer working or in any condition good enough to be sold - therefore we can only offer to sell you* […]."[383]

(373) In another e-mail of […] 2014, […] (ÖBB) […].[384]

(374) […] (ČD) replied, mentioning the previous acquisition of ex-ÖBB wagons by RegioJet and the "tension" this has caused in ČD's supervisory board:

"[…]".[385]

(375) On […] 2014, […] of ÖBB forwarded this e-mail internally to […] (ÖBB) noting:

"*ich würde CD nun schon bevorzugt bedienen wollen ehrlich gesagt, vor allem auch wegen der peinlichkeit mit den* […] *wagen, und weil wir nunmal im dezember mit ihnen die kooperieren. bitte sag das auch* […]."

376 […]

377 […]

378 […] Original in English (spelling mistakes not corrected).

379 […]

380 […]

381 […]

382 […]
The Czech original reads as follows:
"[…]"

383 […] Original in English. […]

384 […] Original in English (spelling mistakes not corrected).

385 […] Original in English (spelling mistakes not corrected).

"[…]"[386]

(376) On […]2014, […] (ÖBB) replied:

"[…]"[387]

(377) This shows that ÖBB was ready to offer ČD preferential treatment […] in this sales process.

(378) It is also apparent from the evidence that ÖBB wanted to avoid "*the appearance of further bidders*" in order to assure a smooth sale of the wagons to ČD. On […] 2014 […][388] received an enquiry from a journalist asking about the state of play of the sale of 80 wagons to ČD and about RegioJet allegedly having offered a higher price. […] was asked to provide input for ÖBB's reply to the question of the journalist and wrote in an ÖBB internal e-mail to […]:

"[…]"[389]

5.7.4. Arguments raised by ČD and the Commission's assessment

5.7.4.1. ÖBB's treatment of ČD

(379) ČD claims that in this sales process again ÖBB followed its own commercial interests and did not treat ČD preferably.[390] Moreover, ÖBB did not try to keep the sale secret but announced the sale to various interested parties.[391]

(380) These arguments are contradicted by the evidence in the Commission's possession and presented in this Decision. First, […] wrote in an ÖBB–internal email replying to information from […] ÖBB-colleagues that there are other interested buyers in this sales process *"I want to give ČD preferential treatment now"* (see above recital (365)). This shows ÖBB's preference for ČD, despite of the interest of and offers from other bidders. Second, that this preference resulted from the Parties' agreement and/or concerted practice to prevent wagon-sales to RegioJet is evidenced by the fact that the buyer ČD left the price it would pay to the consideration of the seller ÖBB (see above recital (368)). Third, while originally also other interested buyers were informed about the sale, the ÖBB-internal email quoted in recital (378) above clearly shows that ÖBB wanted to keep the ongoing sales process with ČD secret and did not want it to become known further because this *"[…]"*. Fourth, ÖBB contemplated to offer a *"[…]"* to ČD, thereby considering renouncing to a higher sales price (see above recital (375) and recital (376)). Fifth, […] the Parties' common understanding

386 […]
The German original reads as follows:
"[…]"

387 […]
The German original reads as follows:
"[…]"

388 […]

389 […]
The German original reads as follows (spelling mistakes not corrected):
"[…]"

390 […]

391 […]

to favour ČD in ÖBB's sales of used wagons and, if possible, not to sell any wagons to RegioJet also applied to this sales process[392].

5.7.4.2. ČD […]

(381) ČD claims that it bought the wagons in question […].[393]

(382) The Commission points out that it is not relevant from the legal perspective that the Parties' implementation of the cartel-arrangement turned out to be a less favourable deal than hoped for ČD. That ČD did not achieve the result it had expected from the arrangement does not put into question the existence of the arrangement as such, which is proven by the whole body of evidence presented in this Decision, and in particular regarding this sales process, in section 5.7.3 above.

5.8. The meeting between […] ČD and ÖBB on […] 2014

5.8.1. Summary

(383) On […] 2014, a […] meeting took place in Vienna between ČD's new […] and ÖBB[…]. In addition, on ÖBB's side (amongst others) […] and […] took part in the meeting, and on ČD's side […].[394] […].[395] According to ČD, the anticipated topics of the meeting included issues related to the railjet cooperation, as well as issues related to the sale of used passenger wagons by ÖBB to ČD, the EU's 4th Railway Package, and experience of ČD and ÖBB with the ongoing liberalisation of the railway market.[396]

(384) Preparations for this meeting in the form of briefings and the related briefing-requests mentioning the "[…]" sale (see section 5.6 above) and the […] that this non-respect of the agreement and/or concerted practice had caused at ČD, show that both Parties were conscious of the arrangement between them to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons. In addition, contemporaneous evidence stating that the Parties have *"[…]"* […] also demonstrates that the Parties continued to adhere to their arrangement. [397]

5.8.2. Meetings and collusive contacts

(385) On […] 2014, […] of ČD sent an e-mail to […] of ÖBB suggesting to put the following issues on the agenda of the meeting:

"[…]*:*
[…]
[…]."[398]

(386) In preparation of this meeting, ÖBB's […] asked […] (ÖBB) by e-mail on […] to prepare a briefing, with a specific request to clarify to ČD that ÖBB was doing its best regarding the sale of wagons, as well as ÖBB's perspective regarding the acquisition of ex-ÖBB wagons by RegioJet via the intermediary TCA, which was clearly seen as problematic. […] and […] (both ÖBB) were in copy:

392 […]
393 […]
394 […]
395 […]
396 […]
397 […]
398 […] Original in English. […]

"*Do you know when the meeting* […] *will take place? […] Could you please prepare a short briefing from our perspective? Please state as regards the wagons that we do our best.* […], *please let us know as soon as you have further info. And the wagon sale in* […] *2013 we should describe again from our perspective. It's history but I assume it will come up again.*"[399]

(387) As requested, the briefing contains background information as regards the sale of 45 wagons to TCA (see section 5.6).

"*Last year* […] *wagons were sold not to ČD but to an intermediary (TCA). TCA has in turn sold the wagons to a competitor of ČD (RegioJet), which ÖBB cannot prevent by contract.*
The reason for the sale[400] *to TCA and not to ČD was that TCA offered* […] *(letter from ČD to* […]*, followed by meeting* […]*).*
However, this has been discussed and solved. Therefore, presumably it will not be raised by ČD."[401]

(388) It is apparent from the meeting preparation (see above in recitals (386) and (387)) that the anti-competitive collusion between ČD and ÖBB was known to and took place with the participation of the Parties[…]. The fact that […] shows that both Parties were aware of the content of the arrangements that existed between them and that they intended to keep respecting them and solve emerging issues despite […].

(389) Also in preparation of the meeting […] (ÖBB) asked […] (ÖBB) for a list of wagons to be sold. The Commission finds that again ÖBB did not aim to achieve the highest possible price when ÖBB employees advocated to offer wagons to ČD not above book value:

"*Next week there is a meeting* […] *(*[…]*), the sale of further wagons will be topic. Do you already have a rough overview what will be available with the change of*

399 […]
The German original reads as follows (spelling mistakes not corrected):
"weißt du wann der termin […] *sein soll? […] kannst du dazu bitte eine kurze briefing unterlage vorbereiten aus unserer sicht? nimm wg der wagen auf, dass wir schauen was möglich ist, sobald du genauere infos hast* […] *gib uns bescheid bitte. und die geschichte des wagenverkaufs im* […] *2013 sollten wir aus unserer sicht auch nochmal darstellen, das gehört zwar der vergangenheit an kommt aber vermute ich nochmal...."*

400 The reason for the sale to TCA was phrased slightly different in a first draft of the briefing. […] *"This was because the intermediary offered a* […]. The German original reads as follows "*Grund dafür war, dass der Zwischenhändler* […]."

401 […]
The German original reads as follows:
„Im Vorjahr wurden […] *Wagen nicht an die ČD, sondern einen Zwischenhändler (TCA) verkauft. Die TCA hat die Fahrzeuge wiederum an einen Mitbewerber der ČD (regiojet) weiterverkauft, was die ÖBB aber nicht vertraglich verhindern kann.*
Grund für den Verkauf an die TCA und nicht an die ČD war, dass TCA […]. *Dass die Wagen beim Mitbewerber gelandet sind,* […] *(Brief von ČD an* […]*, darauf folgend Termin* […]*)*
Dies ist aber mittlerweile ausgesprochen und erledigt. Wird daher von CD vermutlich nicht thematisiert."

timetable (and at what prices/book values). I think it would be good if […] *could say something.* […]"[402]

(390) The meeting took place on […] 2014 at ÖBB's offices in Vienna. […][403] […], […]. However, the issue was allegedly not discussed extensively as it had not raised any problems.[404]

5.8.3. Arguments raised by ČD and the Commission's assessment

5.8.3.1. Content of the discussion at the meeting

(391) ČD claims that nothing suggests that there was an anti-competitive collusion which could have (even potentially) been discussed at this meeting[405]. The meeting concerned mainly the Railjet project, and the fact that ČD at the meeting wanted to discuss the "*further options of acquisition of older ÖBB coaches by ČD*" does not suggest any collusive contacts or intentions[406].

(392) The Commission rejects this argument and points to the contemporaneous evidence quoted in section 5.8.2 above. The briefings and the related briefing-requests (see above recitals (386) and (387)) mentioning the "[…]" sale (see section 5.6 above) and the […] that this breach of the agreement and/or concerted practice […], show that both Parties were conscious of the arrangement between them to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons. The contemporaneous evidence quoted in recital (387) that the Parties have *"*[…]*"* the issue of the "[…]" sale (and thereby ÖBB's non-respect of the agreement) also demonstrates that the Parties continued to adhere to their arrangement.

(393) In any case, what is decisive is that the preparatory documents for the meeting show the existence and content of the Parties' collusive arrangement, that it was ongoing and that the Parties continued to adhere to it.

5.8.3.2. Involvement of ÖBB's and ČD's […]

(394) ČD states that the meeting between the Parties[…] on […] 2014 in Vienna does not show that […] of ČD and ÖBB was involved in any detailed discussion regarding the sales of ÖBB's wagons.[407]

(395) ČD however omits […][408] […].

5.9. Sale of […] wagons and of […] wagons to ČD in […] 2014

5.9.1. Summary

(396) In the sales process of […] 2014, the Parties took measures to ensure the sale of the wagons to ČD on conditions acceptable for ÖBB. Competing bids were not taken

402 […]
The German original reads as follows (spelling mistakes not corrected):
"nächste woche gibt es ein treffen […] *(*[…]*), da wird der wagenverkauf von weiteren wagen ein thema sein. hab ihr schon eine grobe aufstellung welche wagen etwa zum fahrplanwechsel frei werden (und zu welchen preisen/buchwerten). Ich denke es wäre gut, wenn* […] *dazu etwas sagen könnte. idaelerweise sollten auch mind.* […]*"*

403 […]

404 […]

405 […]

406 […]

407 […]

408 […]

into consideration but were used only as “price indicators”. The wagons at hand were in fact reserved for ČD, which was allowed to match other bids, while any potential sale to RegioJet was avoided.

5.9.2. The offer of ÖBB and ČD's declaration of interest

(397) […] of ÖBB offered […] 2014.[409] […]

(398) On […] 2014, this offer circulated internally within ČD. In a follow-up e-mail, […] of ČD’s investment’s department mentioned the “[…]:

“[…]”[410]

(399) In his reply to […] of […] 2014, […] of ČD wrote:

“[…]”[411]

(400) It is apparent that the references to “[…]” in […]'s e-mail above or “[…] (see above section 5.6). This ČD-internal conversation shows that ČD viewed the sale […].

(401) On […] 2014 at […] of ČD replied to ÖBB's e-mail sent by […] on […] 2014 (see above recital (397)) and […][412]

(402) The Parties took measures to improve communication between them and agreed to solve problems related to the implementation of their arrangements directly at the management level.

(403) This is shown by the email of […] 2014 at […] in which […] of ČD wrote to […] of ÖBB expressing ČD's interest:

“[…]”[413]

(404) […]’s (ÖBB) reply:

“[…]”

5.9.3. Meetings and collusive contacts

(405) The contemporaneous evidence from this particular sales process, described in detail below in this section, shows that while initially the focus was on sidestepping RegioJet’s right of first refusal, later the priority was to ensure sales to ČD. Only for this reason, ÖBB was seemingly negotiating also with other potential bidders, while in fact the wagons were reserved for ČD, which was informed about other bids and was allowed to match them.

(406) The aforementioned e-mail exchange of […] 2014 between […] of ČD and […] of ÖBB led on […] 2014 to the following ÖBB-internal e-mail exchange between […] of ÖBB-PV and […] of ÖBB-TS.

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409 […]

410 […]
The Czech original reads as follows:
"Vzhledem k tomu, že proběhla různá jendání s OBB – tak předpokládám že […]"

411 […]
[…]

412 […]

413 […] Original in English. Spelling mistakes not corrected.

(407) […] at 13.06: *"I have offered the wagons to ČD; however, officially there are already also other interested parties.*
I think we should aim at the best price - or shall I look "differently" at ČD?"

(408) […] at 13.31: *"the wagons are reserved for ČD, please under all circumstances reserve for ČD! Should someone else offer a better price, forward this information to ČD and they should match this price."*

(409) […] at 14.23: *"[…] are also interested, and some others, too;*
(so that the result is not going to be too bad ;-)"

(410) […] at 16.07: "*;-)*".[414]

(411) Following […]' (ÖBB) offer of […] 2014 and […]'s (ČD) expression of interest on […] 2014 (see above recital (397) and (401)), […] wrote on […] 2014 at […] an […]. […] forwarded this e-mail to […] (both ÖBB) and wrote:

"*for your information.*
by the way, we also have other interested buyers with whom we talk to identify the market value. But the wagons stay reserved for ČD, so no worries, only in case something pops up at ČD!"[415]

(412) The aforementioned e-mail shows that the talks ÖBB had with other interested buyers were in fact not sincere, and that ÖBB only intended to sell to ČD.

(413) By e-mail to […], […] and […] (all ÖBB) of […] 2014, […] (ČD) […].*"*[416] The meeting, […] 2014 in Prague between […] from ÖBB and […] and […] from ČD.[417]

(414) […] (ČD) wrote on […] 2014 to […] (ÖBB):

"[…]*"*[418]

(415) On […] 2014, […] (ÖBB) replied to […] (ČD):

"[…]*"*[419]

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414 […]
The German original reads as follows:
[…]: *"ich habe ČD die Wagen angeboten; es sind jedoch auch andere Interessenten bereits offiziell da.*

Denke wir sollten hier den besten Preis erzielen – oder soll ich ČD „anders" betrachten"
[…]: *"die wagen sind reserviert für ČD, bitte unbedingt für ČD reservieren! wenn aber ein andere einen besseren preis bietet dann gib das weiter an ČD und sie sollen preislich gleichziehen."*
[…]: *" […] sind auch interessiert; und ein paar Andere auch*
(damit das Ergebnis nicht zu schlecht wird ;-)"
[…]: *";-)"*

415 […]
The German original reads as follows (spelling mistakes not corrected):
"zur info.
wir haben übrigens auch andere interessenten, mit denen wir reden un den marktwert zu ermitteln. aber die wagen bleiben für ČD reserviert, also keine sorge, nur falls da bei ČD etwas aufschlagen sollte!"

416 […] Original in English (spelling mistakes not corrected).

417 […]

418 […] (Original in English). This e-mail is also part of the […].

419 […]

(416) On […] 2014, […] (ČD) replied to […] (ÖBB):

"[…]*"*[420]

(417) On […] 2014 a working meeting (railjet cooperation) took place in Linz in the afternoon. In the morning […] and […] (both ÖBB) met on request of […] with […] and […] (both ČD) to discuss *"* […]"[421] […][422]

(418) An internal e-mail of […] 2014 from […] (ČD) to the […] of ČD, […], reported about […]:

"[…][423]*,* […]"[424]

(419) On the sidelines of the […][425] meeting on […] 2014 in […] the […] of ČD, […], talked to […] of ÖBB, […]. Directly afterwards […] sent an e-mail to […] enquiring on the state of play:

"*Just talked to* […]*,* […]"[426]

(420) ČD confirmed that a meeting between […] and […] likely took place on […] or […] 2014 in Berlin and that […].[427]

(421) On 23 September […] replied to […] (both ÖBB):

"We are currently conducting sales talks with ČD about other wagons that are required by ČD and that we will no longer need for use from mid-December 2014, so everything is already running.
However, we also have other interested parties for the fleet that we no longer need. In order to achieve the best price for ÖBB in the sales process, we negotiate with these other interested parties - and ČD knows that because we are acting with open cards here. Internally, however, I have a stipulation that ČD is our strategic partner and should therefore also receive the wagons. But ČD doesn't know that, hence their concern that we could give the wagons to someone else.
[…]
The plan is for us to conclude the negotiations in October. The lead is with […], who knows our guidelines and with whom I am in regular coordination. I will be happy to keep you informed about the further course of the negotiations.
The sale of the vehicles will be submitted to the [ÖBB-]*PV supervisory board for approval in December (ČD also knows about this approval requirement)."*[428]

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420 […]

421 […] (Original in English).

422 […]

423 […].

424 […]
The Czech original reads as follows:
"[…]".

425 […]

426 […]
The German original reads as follows:
"Habe gerade mit […]*,* […]*. Gibt es da eine aktuelle Entwicklung? Bitte um kurze Info."*

427 […]

428 […]
The German original reads as follows:

(422) Refering to the CER meeting, ČD's […] wrote the following e-mail on […] 2014 to ÖBB's […]:

"[…]"[429]

(423) It is evident from the contemporaneous documents in recitals (421) and (422) above that even if initially […] (as of […] 2014, see recital (421)), […] sell to Regiojet (on 29 September 2014, see recital (422)). […] (see below recital (431). Recital (422) also shows that ÖBB viewed the sale of 80 wagons in 2013 as a breach of the collusive arrangement with ČD not to sell any wagons to RegioJet if possible, and wanted to avoid similar failures in the future. […]

(424) Moreover, recitals (421) and (422) show the direct involvement of […] ČD and ÖBB in the anticompetitive collusion.

(425) An internal e-mail note of ČD of […] 2014 states that concerning the purchase of wagons from ÖBB, ČD would "[…]"[430]

(426) […] (ČD) and […] (ÖBB) […][431] […] 2014, demonstrating that he would give ČD preferential treatment:

"*I already take care of ČD 'very obligingly' – have a meeting with* […] *in Breclav*".[432]

(427) […] replied to this on […] 2014:

"[…]
I would really like to finalize this by the end of October [….] […]*, but especially*

"wir führen gerade Verkaufsgespräche mit der CD über weitere Wagen, die von der CD benötigt werden und die wir ab Mitte Dezember 2014 für den Einsatz nicht mehr benötigen, insoweit läuft alles bereits.
Wir haben für den Fuhrpark, den wir nicht mehr benötigen, allerdings auch andere Interessenten. Um im Verkaufsprozess den besten Preis für die ÖBB zu erzielen, verhandeln wir mit diesen anderen Interessenten auch - und das weiß CD, weil wir hier mit offenen Karten agieren. Intern gibt es allerdings die Vorgabe von mir, dass CD unser strategischer Partner ist und daher auch die Wagen bekommen soll. Aber das weiß die CD nicht, daher kommen ihre Bedenken, das wir die Wagen doch jemand anderem geben könnten.
[…]
Geplant ist, dass wir die Verhandlungen im Oktober abschließen. Die Federführung liegt bei […]*, der unsere Vorgaben kennt und mit dem ich in regelmäßiger Abstimmung bin. Ich werde Sie über den weiteren Verlauf der Verhandlungen gerne am Laufenden halten.*
Der Verkauf der Fahrzeuge wird im Dezember dem Aufsichtsrat der PV zur Genehmigung vorgelegt werden (auch über dieses Genehmigungserfordernis weiß die CD Bescheid), die Abwicklung erfolgt danach."

429 […] Original in English.

430 […]
The Czech original reads as follows:
"[…]"

431 […]

432 […]
The German original reads as follows:
"Ich betreue ČD ja schon „sehr zuvorkommend" – hab mit […] *ein Treffen in Breclav".*

because there is allegedly an imminent change in the ministry of transport, and I do not want that something blows up"[433]

(428) […], […] (ÖBB) and […] (ČD) met on […] 2014 in Breclav. ČD's […], and […] also informed ČD […].[434]

(429) As is apparent from the following e-mail of […] of ČD to […] of ÖBB of […] 2014, […] did as requested:

"[…]"[435]

(430) […] of ÖBB-PV then on […] 2014 forwarded this e-mail to […] of ÖBB-TS. This led to the following e-mail exchange (all on […] 2014):

[…]: "[…]"
[…]: "[…]"

[…]: "[…]" [436]

(431) Immediately after this ÖBB-internal e-mail exchange, […] of ÖBB wrote to […] of ČD on […] 2014:

"[…]*"*[437]

(432) […] then wrote back to […]:

"[…]"[438]

(433) […] on […] 2014 […]:

"[…]"[439]

(434) On […] 2014, […] urged […] (both ÖBB) to speed up the sale to ČD:

"[…] *just told me that you will not have decided by next week who should get the wagons because allegedly there would still be offers outstanding.*
Slowly we are running out of time –because for the sale we have to go to the advisory board in December […]

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433 […]
The German original reads as follows (spelling mistakes not corrected):
"[…]
Ich würde das dann ende oktober[….] wirklich […]*, aber vor allem weil ein wechsel im verkehrsministerium angeblich bevorsteht und ich möchte nicht dass dann noch irgendetwas platzt."*

434 […]

435 […] Original in English (spelling mistakes not corrected).

436 […]
The German original reads as follows (spelling mistakes not corrected):
[…]: "[…]"
[…]: "[…]"
[…]: "[…]"

437 […] Original in English. Spelling mistakes not corrected.

438 […] Original in English.

439 […]
The Czech original reads as follows:
"[…]"

Hence, please finalise the sale to ČD until the end of next week. The other bidders had plenty of time for an offer, and the vehicles have to be away by the end of the year."[440]

(435) On […] 2014, ÖBB sent to ČD an indicative offer to purchase the […] wagons ([…], […], […], […]) for the total price of EUR […].[441]

(436) On […] 2014, the CEO of ČD, […], wrote to ÖBB's […] and declared formally the interest of ČD in the purchase of the […] used wagons of ÖBB for EUR […].[442]

(437) In a ČD-internal e-mail on […] 2014, […] of ČD mentioned this sale of […] ex-ÖBB wagons and asked for […] 2014.[443]

(438) […] of ÖBB-PV approved the sale to ČD at its meeting of […] 2014 and the final sales contract was concluded on […] 2014.[444] The board was also informed that TCA had offered EUR […] and another bidder EUR […] for these wagons and that it recommended to sell the […] wagons to ČD due to the higher sales revenue.[445]

(439) On 3 December 2014, […] (ÖBB) informed […] (ČD) in an e-mail:

"I just got the news from our supervisory board that the sale of the coaches to you has been approved by our supervisory board […] I will make sure the contract is signed by our management as soon as possible and then send it to you."[446]

(440) In an internal e-mail exchange, ČD's management commented RegioJet's reaction to this sale in the press (article: "[…]: ČD purchased Austrian coaches on disadvantageous terms so that I cannot obtain them") […][447] This also illustrates the Parties' efforts to keep the sale confidential in order to prevent RegioJet from bidding and to achieve the common goal of preventing, hindering or restricting RegioJet's access to wagons.

5.9.4. Arguments raised by ČD and the Commission's assessment

5.9.4.1. ÖBB's treatment of ČD

(441) ČD claims that the Parties conducted this sale without any irregularities. ÖBB was also negotiating with other interested buyers, aimed at receiving the highest bid, and

---

440 […]
The German original reads as follows:
"[…] *hat mir gerade erzählt, dass du bis Ende nächster Woche keine Entscheidung haben wirst, wer die Wagen bekommen soll, weil angeblich noch immer Angebote ausständig sind.*
Schön langsam läuft uns aber die Zeit davon – denn wir müssen mit dem Verkauf in den AR im Dezember gehen […].
Bitte bring den Verkauf daher an die ČD bis Ende nächster Woche zum Abschluss. Die anderen Bieter hatten lange genug Zeit für ein Angebot, und die Fahrzeuge müssen Ende des Jahres weg."

441 Apparent from […]

442 […]

443 […]

444 […]

445 See the draft items for the agenda: […]

446 […] Original in English (spelling mistakes not corrected).

447 […]
The Czech original reads as follows:
"[…]"

did not treat ČD preferentially[448]. Rather, ČD was constantly left in uncertainty to whom ÖBB would sell the wagons[449].

(442) ČD's arguments are contradicted by […] the various pieces of contemporaneous evidence presented in section 5.9.3 above, such as *"*[…]*"* (recital (408))*, "*[…]" (recital (411)), "[…]*"* (recital (422)), *"*[…]*"* (recital (427)).

(443) The Commission points out that ČD generally only speculates about other possible meanings the evidence may have, without however bringing forward contemporaneous evidence that would put into question the findings of the Commission established through […] the contemporaneous documents.

(444) As to ČD's view that ÖBB aimed at receiving the highest bid because the sale may be reviewed by the Austrian Court of Auditors, the Commission stresses the following: even if ÖBB may have aimed at obtaining a high price from ČD, this does not put into question the Parties' anti-competitive collusion, namely that the Parties collusively rigged sales processes for used wagons to prevent, hinder or restrict RegioJet's access to the wagons. Preventing, hindering or restricting a sale to RegioJet and receiving the highest bid from ČD can go hand in hand and do not exclude each other.

5.9.4.2. ÖBB's provision of "[…]" to ČD

(445) In ČD's view, ÖBB did not commit to not sell the wagons at hand to RegioJet[450]. […][451].

(446) The Commission notes that ČD tries to downplay the unambiguous incriminating contemporaneous evidence. For example, with regard to the declaration of ČD's […] to ÖBB's […] "[…]*"* (quoted above in recital (422)), ČD merely speculates on what exactly […] did or did not know and what was actually said during the […] meeting, while not bringing forward evidence that has the same evidential value as the contemporaneous email from ČD quoted by the Commission.

(447) Especially, the […] of […] produced in 2022 […] "[…]*"*[452] could apparently be motivated by […]'s attempt to downplay his own role and personal involvement in the infringement. […][453] […].

(448) With regard to ČD's view that by giving […], the Commission notes that this statement is not convincing. Nothing in the file indicates that ÖBB wanted to […]. If ÖBB had given ČD the […], […] (ČD) would have for sure understood this and would not have […] ÖBB […] (see above recital (432)).

5.9.4.3. Confidentiality of the sale

(449) ČD is of the view that ÖBB and ČD did not try to keep the sale at hand confidential in order to prevent a sale to RegioJet but to avoid that internal information of ČD

448 […]
449 […]
450 […]
451 […]
452 […]
453 Judgment of the General Court of 29 June 2012, T-360/09, *EON*, ECLI:EU:T:2012:332, paragraphs 201 and 211; judgment of the Court of First Instance of 27 September 2006, , *Archer Daniels Midland,* T-59/02, ECLI:EU:T:2006:272, paragraphs 272, 275, 277, 290; Judgment of the General Court of 5 October 2011, *Mindo,* T-19/06, , ECLI:EU:T:2011:561, paragraph 100.

could leak to a competing carrier and provide it with an unfair advantage in the bidding process[454].

(450) ČD bases its argument on […] prepared in 2022[455]. The Commission considers, in line with constant case-law, that a statement by a leniency applicant which is supported by contemporaneous documents prevails in its evidential value over […] and that documents created *in tempore suspecto* are less reliable[456]. In this sense, the contemporaneous ČD-internal email quoted in recital (440) above clearly illustrates the Parties' efforts to keep the sale confidential in order to prevent RegioJet from bidding and to achieve the common goal of preventing, hindering or restricting RegioJet's access to wagons.

5.10. The […]

5.10.1. Summary

(451) In […] 2015, […] is not directly related to the Parties' collusive rigging of sales processes for used wagons to the detriment of their common competitor RegioJet. However, the evidence shows that […]

5.10.2. Meetings and contacts

(452) On […] 2015, ČD received a letter […] 2015. […][457]

(453) In that letter […][458]

(454) In the following internal e-mail exchange, ČD noted that […].[459] On 13 March 2015, by e-mail, […] (ČD) stated:

"[…]"[460]

(455) On […] 2015, by ČD-internal e-mail, […] informed […] that:

"[…]"[461]

(456) On […] 2015, the following ČD-internal e-mail exchange took place between […] ([…][462]) and a […]:

(457) […] wrote at […]:

"[…]*"*[463]

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454 […]

455 […]

456 Judgment of the General Court of 29 June 2012, *EON,* T-360/09, ECLI:EU:T:2012:332, paragraphs 201 and 211; Judgment of the Court of First Instance of 27 September 2006, *Archer Daniels Midland,* T-59/02, ECLI:EU:T:2006:272, paragraphs 272, 275, 277, 290; Judgment of the General Court of 5 October 2011, *Mindo*, T-19/06, ECLI:EU:T:2011:561, paragraph 100.

457 […]

458 […]

459 […] The full sentence reads as follows: "[…]" The Czech original reads as follows: "[…]"

460 […]
The Czech original reads as follows:
"[…]"

461 […]
The Czech original reads as follows:
"[…]"

462 […]

(458) ČD’s […] replied at […]:

“[…]”[464]

(459) […] replied at 14.08:

“[…]”[465]

(460) ČD’s board member replied at […]:

“[…]”[466]

(461) By e-mail of […] 2015, […] (ČD) forwarded to […] (ÖBB) […]. […] wrote, referring to a meeting between the Parties on […] and […] 2015 at the Semmering mountain pass in Austria (see below recital (487) and following):

“[…]”[467]

(462) […] replied on […] 2015:

“[…]”[468]

(463) […] then forwarded […]'s e-mail and […] reply for information to […] (ÖBB). On […] 2015, […] of ČD confirmed in an internal e-mail that his team was asked to:

“[…]”[469]

(464) On […] 2015 ČD sent […]:

“[…]”[470]

(465) This reply was unsupported by facts, […].[471]

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463 […]
The Czech original reads as follows:
“[…]”

464 […]
The Czech original reads as follows:
“[…]”

465 […]
The Czech original reads as follows:
“[…]”

466 […]
The Czech original reads as follows:
“[…]”

467 […] Original in English (spelling mistakes not corrected).

468 […] Original in English (spelling mistakes not corrected).

469 […]
The Czech original reads as follows (spelling mistakes not corrected):
“[…]”

470 […]
The German original reads as follows (Grammatical errors and spelling mistakes not corrected):
“ […]:
“[…]”

471 […]

(466) […]:

"[…]"[472]

(467) An internal e-mail exchange within ČD which followed shows that ČD clearly did […]. On […] 2015, […] sent a ČD internal e-mail to […]:

"[…]"[473]

(468) On […] 2015, […] sent a ČD internal e-mail to […] stating:
"[…].[474]

(469) No further reply seems to have been sent to WESTBahn.[475]

(470) Another internal exchange of ČD shows that – […] its reply to WESTBahn of […] 2015 (see above recital (464)) – […]"[476]

(471) ČD confirms that in […] 2015, […].[477] […][478] […] (see above recital (468)).

(472) The behaviour of the Parties in this section is not directly related to their collusive rigging of sales processes for used wagons to the detriment of their common competitor RegioJet. However, the evidence shows that […] as quid pro quo and to thank ÖBB for its participation in the collusion that is the subject of the present Decision: "[…]" (ČD-internal e-mail, recital (454)); "[…]" (e-mail from ČD to ÖBB, recital (461)); "[…]" (e-mail from ÖBB to ČD, recital (462)); "[…]" (letter from ČD's CEO to ÖBB[…] recital (505)).

5.10.3. Arguments raised by ČD and assessment by the Commission

5.10.3.1.[…] and the scope of the proceedings

(473) ČD submits that […] in […] 2015 is outside of the subject-matter of the present proceedings[479].

(474) The Commission points out that the Parties' employees […] (see especially recitals (455), (461), (462), (467) and (468) above). The Commission therefore considers that […] is not outside of the subject-matter of the present proceedings, it is rather part of the context of the Parties' collusive arrangement.

5.10.3.2.ČD's reasons to […]

(475) Moreover, ČD claims that […][480].

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472 […]
The German original reads as follows:
„[…]"

473 […] The Czech original reads as follows:
"[…]"

474 […] The Czech original reads as follows:
"[…]"

475 […]

476 […]
The Czech original reads as follows:
"[…]"

477 […]

478 […]

479 […]

480 […]

(476) First, the Commission notes that the ČD-internal email exchange quoted above in recitals (457) - (460) as well as the […] (see above recital (463)).

(477) The evidence in the Commission's file also shows that […][481]. […] (see above recital (462)).

(478) Moreover, […] were prepared in 2022 for the purpose of ČD's reply to the Statement of Objections. According to the constant case law, they therefore have only a very limited evidential value and reliability[482].

5.11. Sale of […] ÖBB […] wagons on […] 2015 to […] and ÖBB's previous pledge not to sell them to RegioJet

5.11.1. Summary

(479) On 21 October 2015 ÖBB sold 14 couchette wagons of the type 59-70 to […][483] for the total price of EUR […].[484] […] purchased the 14 couchette wagons as the intermediary for RegioJet.

(480) The Parties in this sales process coordinated their course of action in order to avoid the sale of these wagons to RegioJet under any circumstances (even for a higher price), while a potential sale to a partner-company of the Slovak incumbent ZSSK was considered acceptable. Nevertheless, the Parties' efforts ultimately failed.

5.11.2. The initial offer of ÖBB and reactions from bidders

(481) On 25 November 2014, ÖBB's […] sent an e-mail to various potential buyers of rolling stock – amongst them TCA, but not ČD – offering for sale 14 couchette wagons of the type 59-70.[485] On 2 December 2014, […] of the company […][486] offered to buy 7 couchette wagons for EUR […] each, with an option for further wagons.[487]

(482) ÖBB offered the wagons to ČD […] 2015 by e-mail[488] from […] to […] and […] 2015 when […] contacted […] and […] by e-mail and […][489] (see below section 5.12). However, as ÖBB's […] had noted in an ÖBB-internal email, ČD was not interested in acquiring the wagons[490].

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481 […]

482 Judgment of the General Court of 29 June 2012, *EON,* T-360/09, ECLI:EU:T:2012:332, paragraphs 201 and 211; Judgment of the Court of First Instance of 27 September 2006, *Archer Daniels Midland,* T-59/02, ECLI:EU:T:2006:272, paragraphs 272, 275, 277, 290; Judgment of the General Court of 5 October 2011, *Mindo,* T-19/06, ECLI:EU:T:2011:561, paragraph 100; Judgment of the General Court of 8 September 2016, *Arrow Group*, T-467/13, ECLI:EU:T:2016:450, paragraph 136.

483 […]

484 […]

485 […] Besides the 14 couchette wagons of the type 59-70, the email offered a large number of historic / nostalgic rolling stock.

486 […] partner-company of the Slovak rail incumbent ZSSK.

487 […] However, by email of 17 March 2015 […] withdrew its offer due to the high renovation costs of the wagons.

488 […] Original in English (spelling mistakes not corrected).

489 […]

490 […]

5.11.3. Meetings and collusive contacts

(483) On […] 2015 […] of ČD sent an e-mail to […] of ÖBB […]:

"[…]"[491]

(484) […] forwarded […]'s e-mail to several people in ÖBB asking them if they knew about this sale and requesting further information.[492] […] from ÖBB-PV replied on 9 February 2015 that the wagons were relatively old and not needed any more. Therefore, ÖBB-PV would sell them via ÖBB-TS / […]. […] added: "*Please signal if something should be paid attention to*".[493]

(485) […] reacted by an ÖBB-internal e-mail of 9 February 2015:

"Please absolutely DO NOT sell to regiojet. I know that […] *has contacts with them but they are competitors of our partner ČD in Czechia.*
It would be great if you could issue this instruction."[494]

(486) The evidence presented in recitals (483) and in particular (485) clearly shows that there was a common understanding between the Parties aimed at preventing any sales of used ÖBB wagons to RegioJet. […] ÖBB immediately took the initiative in this respect with […] demanding […] colleagues within ÖBB to "*absolutely DO NOT sell to RegioJet*".

(487) […] 2015 at the Semmering mountain pass in Austria. The subject of wagon sales was not discussed at the technical meeting (which […] did not attend). […] 2015. […].[495]

(488) […], on […] 2015 at […] of ČD sent an e-mail to ÖBB's […], […]. This e-mail shows that the content of the arrangements consisting in preventing sales of wagons to RegioJet was again reiterated between the Parties. At the same time, a potential sale to […] seemed less problematic, illustrating that RegioJet was specifically targeted:

"[…]

Please let me know."[496]

(489) The next day (11 February 2015) at 11.45 […] (ÖBB) forwarded this e-mail to […] of ÖBB and again requested to avoid any sale of wagons to RegioJet (even indirectly via TCA). […] indicated as reason for this request that RegioJet is a "*really strong competitor to ČD*", which "*needs and searched wagon material*" and "*pushes again*

491 […] Original in English (spelling mistakes not corrected).

492 […] Original in English (spelling mistakes not corrected).

493 […]
The German original reads as follows:
"Sollte etwas zu beachten sein, bitte melden."

494 […]
The German original reads as follows (spelling mistakes not corrected):
"bitte absolut NICHT an regiojet verkaufen. ich weiß dass […] *kontakte zu ihnen hat, aber das sind konkurrenten unseres partners ČD in tschechien.*
das wär super wenn du diese vorgabe rausgeben könntest."
[…] is the first name of […] of ÖBB-TS.

495 […]

496 […] Original in English (spelling mistakes not corrected).

and again into the direction of Austria". Besides the content of the Parties' arrangements, this e-mail also shows that ÖBB was well aware of the importance of used wagons for RegioJet and of the danger of RegioJet's expansion for both Parties' market position. The e-mail reads as follows:

"*You would help ČD and therefore us a lot if you do not sell wagons to RegioJet, they have asked me for this again yesterday.*
RegioJet is not only a really strong competitor to ČD, but also pushes again and again into the direction of Austria and needs and searches wagon material for this. […] *They are furthermore a strong competitor with their student agency busses between Prague, Brno and Vienna.*
This maybe as motivation for you, we don't want to get additional competitors for us on the rail route to Prague. Westbahn would presumably immediately act as operating railway undertaking in Austria ☺
Please also do not sell to TCA […] *– RegioJet is behind them and it will be sold on immediately*".[497]

(490) […] did as requested and […] then verified with ČD […] This is apparent from an e-mail of […] (ÖBB) to […] (ČD) of […] 2015, at […]:

"[…]*?*"[498]

(491) […] replied to […] a few minutes later (on […] 2015, at […]):
"[…]*"*[499]

(492) In another e-mail of […] 2015 […] thanked […] again:

"[…]*"*[500]

(493) The evidence presented above in recitals (490) to (492) shows that the Parties wanted to avoid sales of used ÖBB wagons to RegioJet. It also shows that the primary objective was not to ensure that ČD will acquire those wagons, but rather to ensure that RegioJet will not acquire them, while a sale to […], a partner of the Slovak incumbent ZSSK, was considered acceptable.

(494) […]'s (ÖBB) efforts agreed with […] (ČD) to prevent the sale to RegioJet was a result of the agreement between ÖBB and ČD, according to which ÖBB was to

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497 […]
The German original reads as follows (spelling mistakes not corrected):
"Ihr würdet der ČD und damit uns sehr helfen, wenn wir keine wagen an regiojet verkaufen würden, sie haben mich gestern nochmals darum gebeten.
regiojet ist nicht nur wirklich starke konkurrenz für die ČD, sondern drängt auch immer wieder richtung österreich und benötigt und sucht dafür wagenmaterial. [….] Sie sind außerdem ernste konkurrenz mit ihren student agency bussen zwischen prag, brünn und wien.
Dies vielleicht als begründung für euch, wir wollen uns keine zusätzliche konkurrenz auf schiene richtung prag holen. Die westbahn würde vermutlich sofort als betriebsführendes EVU in österreich auftreten ☺
Bitte auch nicht an TCA ([…]*) verkaufen – hinter denen steht regiojet und da wird sofort weiterverkauft."*

498 […] Original in English (spelling mistakes not corrected).

499 […] Original in English (spelling mistakes not corrected). See also […], where […] added: "[…]"

500 […] Original in English.

favour ČD over RegioJet in wagon sales, and ideally not sell any wagons to RegioJet, as ČD's competitor.[501]

(495) On 18 February 2015, […] of ÖBB sent an e-mail to ČD's […] and […], with ÖBB's […], […] in copy, and asked whether ČD is interested in buying the 14 couchette wagons. He added that there were already several interested parties for these wagons.[502]

(496) On […], in an ČD-internal e-mail exchange discussing […], […] again […]: "[…]"[503]

(497) On […] 2015, […] of ČD sent an e-mail to […] of ÖBB with the title "*Summary from Semmering*" which summarised "[…] The e-mail reads as follows:

"[…]"[504]

(498) […], […]'s comment probably referred to the e-mail sent by […] (ÖBB) to […] and […] (both ČD) on […] 2015 (see above recital (495)), in which […] was canvassing interest in acquiring the […] wagons and […] wagons of the […] series, which were ultimately sold to […] (intermediary of RegioJet) and to […] (see section 5.12).[505]

(499) However, according to an ÖBB-internal report by […] of […] 2015, […].[506]

(500) ÖBB sold the […] wagons on […] 2015 to the […], which purchased them for RegioJet. […], […], was aware of this fact.[507]

(501) The indirect sale to RegioJet was discussed in the Czech press on […] 2015.[508] […] (on […] 2015) at a meeting concerning the Vienna-Prague route, […][509]

(502) In response, on […] 2015, ÖBB's […][510]

(503) On the same day, […] 2015, […] sent the link to the press article from the daily newspaper "*Dnes*" to […] (ÖBB) […] ([…] at ÖBB-PV) and stated:

"*ČD* […] *as the 'yellow'*[511] *becomes a competitor on night services between Praha and Kosice. We* […] *also talked about this at the fringes of yesterday's meeting in Praha and we confirmed (being asked) that the wagons were sold via an intermediary to RegioJet.*
As a matter of principle, we offer all our wagons that are for sale to our cooperation partners, but in the end we cannot prevent that they (may) also end up via detours at their cooperation partners [[…] meant competitors][512]. *RegioJet is a delicate issue at*

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501 […]
502 […] In this email […] also offered up to 26 passenger wagons of the type 21-90, see below sale process no. 7.
503 […]
The Czech original reads as follows:
"[…]"
504 […] Original in English. The same document was provided by […].
505 […]
506 […]
507 […]
508 […]
509 […]
510 […]
511 "Yellow" refers to the yellow corporate colour of RegioJet's wagons and locomotives.
512 "Cooperation partners" is a typographical error of […] and should say "competitors" instead.

ČD as without our wagons the company would not have succeeded in launching its operations in 2011, and at that time we had sold them directly to RegioJet without offering them to ČD"[513]

(504) In response to this e-mail, […] (ÖBB) wrote to […] (ÖBB) on […] 2015:

"[…]*, and we need to present our strategy when it comes to wagon sales (in accordance with the content of the 'Long-Distance Travel Internationalisation' paper), but also explain our room for manoeuvre."*[514]

(505) Nevertheless, the indirect sale to RegioJet led to another complaint from ČD. On […] 2015, […], […] of ČD, wrote to […], […] of ÖBB[…]. […] wrote:

"[…].[515]

(506) It follows from the evidence presented above in recitals (483), (485), (488), (489), (490), (491) and (492) that ÖBB and ČD collusively agreed to eliminate RegioJet from the sales process, in line with the Parties' arrangements consisting in preventing, hindering or restricting the access of RegioJet to used wagons. The fact that RegioJet was specifically targeted is apparent from the fact that a potential sale to […] was considered acceptable by the Parties (see recitals (490) and (491)).

(507) This sale process also shows that ÖBB aimed at avoiding sales to RegioJet not only because ČD is ÖBB's partner, but also because RegioJet "*pushes again and again into the direction of Austria and needs and searches wagon material for this*" (see recital (489)). It also shows that ÖBB was well aware of the importance of its used wagons for RegioJet, noting that "*without our wagons the company* [RegioJet] *would not have succeeded in launching its operations in 2011* (see recital (503)).

(508) The collusive nature of the Parties' behaviour is not put into question by the fact that RegioJet later, despite of the Parties' efforts, succeeded in acquiring the wagons through […]. […]

5.11.4. Arguments raised by ČD and the Commission's assessment

5.11.4.1. The sales process, its result and its circumstances

(509) ČD submits that this sales process and the related communications as well as the actual result of the sale, with the wagons in the end having been sold to RegioJet's intermediary[…], show that there was no agreement between ÖBB and ČD that

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513 […]
The German original reads as follows (spelling mistakes not corrected):
"die CD ist natürlich wenig begeistert, da der „gelbe" damit der im nachtverkehr praha-kosice konkurrenzmachen wird. wir […..] haben darüber auch am rande des gestrigen treffens in praha gesprochen und der (auf deren anfrage) bestätigt, dass die wagen an einen zwischenhändler an regi-jet verkauft wurden.
grundsätzlich bieten wir alle wagen, die wir verkaufen unseren kooperationspartnern an und können aber letztlich nicht verhindern, dass diese über umwege auch bei deren kooperationspartnern [meaning Wettbewerbern] *landen (können). regoi-jet ist bei der* [CD] *insofern sensibel, da dem unternehmen der start ohne unsere wagen im jahr 2011 so nicht gelungen wäre und damals hatten wir die wagen ohne sie der CD anzubieten direkt an regio-jet verkauft."*

514 […]
The German original reads as follows (spelling mistakes not corrected):
" […]*, auch besprechen und unser strategisches vorgehen bei wagenverkäufen (gem. aussagen paper internationalisierung fv), aber auch unseren handlungsspielraum darlegen."*

515 […] Original in English.

would correspond to the Commission's allegations[516]. Rather, ÖBB followed its own interests[517]. Moreover, the fact that ČD's […] asked ÖBB's […] to discuss the information that RegioJet was trying to purchase the couchette wagons as a "secret topic" does not mean that he wanted to conceal the existence of any anti-competitive agreement but only that […] considered the discussion he had with […] as a private and personal discussion[518].

(510) The Commission points out that the […] make it evident that ČD was not even interested in acquiring the wagons at stake but agreed with ÖBB that ÖBB should not sell them to RegioJet's intermediary. The Commission therefore regards the sale process at hand as a confirmation of its view laid out in this Decision that the content of the Parties' agreement and/or concerted practice was to prevent, hinder or restrict the access of RegioJet to used wagons for long-distance passenger transport, with the ultimate aim to impede RegioJet's market entry or expansion.

(511) The Commission also reiterates that the fact that the wagons were ultimately acquired by RegioJet does not put into question the existence of the Parties' anticompetitive arrangement. […]

(512) That the agreement was not implemented or was not adhered to by a particular participant (here ÖBB) is according to the constant case law immaterial to the existence of the agreement as such[519]. Indeed, it is common in cartels that cartel members deviate from the agreed arrangement out of self-interest.

(513) As to ČD's argument about the alleged private nature of the conversation between […] (ÖBB) and […] (ČD), the Commission stresses that at no occasion whatsoever in this conversation […] and […] discuss private issues. To the contrary, the emails exchanged between the two of them are solely about […]. It is therefore clear that […]'s […] (see above recital (483)) was only meant to conceal the anti-competitive nature of the arrangement.

5.11.4.2. The Parties' objective in the sale

(514) According to ČD, the sale at hand does not document that the Parties wanted to avoid wagon sales to RegioJet. It rather shows the Parties' aim to ensure a sale of used wagons to ČD in accordance with ČD's operational needs[520].

(515) The Commission rejects this view. ČD ignores the multiple incriminating contemporaneous evidence presented above in section 5.11.3. This evidence does not allow any other interpretation than that ÖBB and ČD agreed to prevent that the couchette wagons reach RegioJet. It is telling that ČD in its reply to the Statement of Objections does not try to explain and does not even mention such communications as […]'s ÖBB-internal email *"please absolutely DO NOT sell to regiojet"* (see above recital (485)) or […]'s email to […]: "[…]" (see above recital (492)).

516 […]

517 […]

518 […]

519 Judgment of the General Court of 12 December 2014, *Eni,* T-558/08, ECLI:EU:T:2014:1080, paragraphs 132 and 133; Judgment of the General Court of 13 September 2013, *Total,* T-566/08, ECLI:EU:T:2013:423, paragraph 254.

520 […]

(516) As […] (482)), the Commission fails to see how the actions of ČD and ÖBB in this sale process could have aimed at *"[…]"*, as stated by ČD[521]. That ČD did not want to buy the wagons clearly shows that operational needs did not exist.

5.12. Sale […] wagons to […] in […] 2016

5.12.1. Summary

(517) ČD enjoyed a preferential treatment in respect of a sale of […] wagons in […] 2016. ÖBB informed ČD about competing bids and the Parties exchanged information and coordinated their actions in order to ensure that the wagons were not acquired by RegioJet.

5.12.2. The initial offer of ÖBB

(518) On […] 2015, ÖBB's […] sent an offer to ČD's […] and […] concerning a sale of up to […] wagons of the type […] and asked whether ČD was interested. He added that there were already several interested parties for these wagons. In copy to this e-mail were – amongst other ÖBB employees – […] and […].[522]

5.12.3. Meetings and collusive contacts

(519) It is apparent from an e-mail of ČD's […] to ÖBB's […] of […] 2015 summarizing the Semmering meeting on […] that ČD had – already in that meeting (see above section 5.11) – expressed its interest in buying more ÖBB wagons:

"[…][523]

(520) In an e-mail exchange in […] 2015 between […] (ÖBB) and […] (ČD), the latter expressed […].

(521) […] wrote on […] 2015:

"[…]"[524]

(522) […] wrote on […] 2015:

"great to hear that you are interested in more coaches this year, […] will again be your contact person, and I am always in close contact with […] and I will take care everything runs smoothly again."[525]

(523) […] wrote on […] 2015:

"[…]"[526]

(524) […] wrote on […] 2015:

"[…]"[527]

---

521 […]

522 […]

523 […] Original in English (spelling mistakes not corrected).

524 […] Original in English (spelling mistakes not corrected).

525 […] Original in English (spelling mistakes not corrected).

526 […] Original in English (spelling mistakes not corrected).

527 […] Original in English (spelling mistakes not corrected).

(525) The statements presented above in recitals (523) and (524) illustrate the attitude of the Parties towards […] likely referring to the sales of […] and […] 2014 (see sections 5.7 and 5.9 above), in which ČD received a preferential treatment by ÖBB and any sales to RegioJet were to be avoided.

(526) Following the e-mail of […] of […] 2015 with the initial offer (see above section 5.12.2), a ČD-internal e-mail exchange included amongst others […], […], […], and […]. The question was raised by […]: "[…]"[528]

(527) A meeting between ÖBB and ČD ([…] meeting) took place on […] 2015 in Brno. According to ČD, the likely participants included – amongst others – […] and […] of ČD and […] and […] of ÖBB. ČD confirmed, in its reply to the Commission's request for information, that […].[529]

(528) The evening before, on […] 2015, […] and […] for ÖBB and […] and […] for ČD already met. Topics on the agenda for the meeting on […] 2015 were "[…]"[530]

(529) During the meeting on […] 2015 ČD enquired about […]"[531]

(530) As follows from the ČD-internal minutes of the meeting of […] 2015, the sale of used wagons was also discussed, and ČD […]:

"[…][532] […][533][…]"[534]

(531) On […] 2015, […] of ÖBB wrote an e-mail to […] of ČD announcing that […] wagons of the type […] are available for sale. […] attached a list of the wagons and indicates: "[…]"[535] According to ÖBB, this information was also sent to the other interested bidders.[536]

(532) The evidence presented in recitals (530) and (531) shows that in respect of this sale, […]

(533) On […] 2015, […] (ČD) wrote an e-mail to […] (ÖBB), referring to the aforementioned e-mail of […] (ÖBB).[537] In this e-mail, […] requested to agree on the […] also in this sale of used ÖBB wagons. The e-mail reads as follows:

"[…]"[538]

---

528 […]
The Czech original reads as follows:
"[…]"

529 […]

530 […] Original in English (spelling mistakes not corrected).

531 […]

532 […]

533 […]

534 […]
The Czech original reads as follows:
"[…]"

535 […]
The German original reads as follows:
"[…]".

536 […]

537 […]

538 […] Original in English (spelling mistakes not corrected).

(534) The letter of ČD's […] to ÖBB's […] dated […] 2015 mentioned (besides technical issues of missing documentation for the wagons previously acquired by ČD) […]:

"[…]"[539]

(535) On […] 2015 at […], […] sent the following reply to […], showing that there was […]:

"[…]"[540]

(536) In the course of the sales process, on […] 2015, […] asked […] (both ÖBB) to follow up with ČD. In […] e-mail […] wanted to ensure that […] (ÖBB) and […]:

"[…]"[541]

(537) On […] 2015, ČD's […] sent an e-mail to ÖBB's […] stating:

"[…]"[542]

(538) The Commission finds that the e-mail referred to in recital (537) above shows that (one of) the objective(s) of ČD's effort to ensure itself a preferential treatment in respect of this sale was again to prevent any sale of used wagons to RegioJet and that this objective was clearly communicated to ÖBB.

5.12.4. The sales process

(539) […] between July and September 2015 ÖBB had received various bids for the […] wagons, amongst others from TCA (acting for its client RegioJet), from ČD, from[…]. However, everytime ČD bid, ÖBB had already received better bids. Moreover, the bids made by other bidders were considerably higher than the bids made by ČD (for example, ČD's last bid was EUR […] per wagon, last bids of […] and of TCA was EUR […] per wagon).[543]

(540) […], TCA's client gave up its interest to acquire the wagons and withdrew its bid on 7 September 2015. After TCA had withdrawn its bid, there was no more danger of an acquisition by the Parties' competitor RegioJet. Also […] withdrew its bid on 9 September 2015. Accordingly, […] ÖBB-PV approved the sale of the […] wagons to […] as the highest bidder for EUR […] each on 18 December 2015. The sales contract with […] was concluded on 10 February 2016.[544]

(541) In light of the evidence, the Commission finds that also in relation to this sale the Parties aimed at preventing, hindering or restricting the access of RegioJet to used wagons by preferring ČD over other bidders through the exchange of information on

539 […] Original in English.
540 […] Original in English (spelling mistakes not corrected).
541 […]
The German original reads as follows:
"*zur info bitte schau dass CD sich meldet!*"
542 […]
The German original reads as follows:
"[…]"
543 […]
544 […]

the identity of the competing bidders and on the bids made by other bidders, in order to prevent that the wagons ended up with the competitor RegioJet.

5.12.5. *Arguments raised by ČD and the Commission's assessment*

5.12.5.1. ČD's objective and its treatment by ÖBB

(542) In ČD's view, the circumstances of the sale do not indicate any anticompetitive coordination. ČD was interested in purchasing the wagons and had to constantly repeat this to ÖBB[545] but was not treated anyhow preferentially by ÖBB[546].

(543) The Commission rejects these arguments. That ČD expressed its interest in purchasing the wagons from ÖBB does not in any way contradict or challenge the existence of the anti-competitive agreement and/or concerted practice that was reached between ČD and ÖBB. On the contrary, the reminders of ČD to ÖBB of the "[…]*"* (see recital (533)) evidence the existence of the cartel and of its continuation. These reminders also show that ČD was particularly keen on continuing and implementing the agreement and/or concerted practice.

(544) […][547]. […] instruction sent by email from […] (ÖBB) to […] (ÖBB) on 21 May 2015 that […] should *"please again as a priority have a talk with ČD"*[548].

(545) Taking into account […] the whole context of the present and the preceding sales processes, the email by ČD's […] to ÖBB's […] "[…]*"* (see above recital (533)) cannot be regarded as an innocent reminder of ČD's interest in the acquisition of the wagons, as ČD wishes to make believe. To the contrary, they are a hardly disguised reminder of the cartel arrangement and of the process that the Parties had successfully applied previously to prevent wagon sales to RegioJet and therefore as an act of anti-competitive collusion.

(546) That ÖBB picked up on these reminders is apparent from the reaction of ÖBB's […], […] "[…]*"* (see above recital (524)) and afterwards instructed […] (ÖBB) "*make sure that ČD is getting back"* (see above recital (536)).

(547) The Commission points in this regard also to ČD's email to ÖBB […] (see above recital (537)). ČD in its reply to the Statement of Objections omits to mention this email which does not allow any other interpretation than demonstrating the anti-competitive content of the Parties' agreements and / or concerted practices.

5.12.5.2. The organisation of the bidding process

(548) ČD further argues that in this sale process the principle of the highest bid applied. That ÖBB was informing ČD about other bids was not specific for ČD only. ÖBB regularly informed the bidders, including TCA (bidding for RegioJet), about other bids and the possible need to increase their bid. Also, ÖBB received various bids, and the wagons were ultimately sold to […] which had offered the highest bid[549].

(549) The Commission stresses that, in accordance with the Parties' arrangements, […].

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545 […]

546 […]

547 […]

548 […]
The German original reads as follows (spelling mistakes not corrected):
"bitte wieder vorrangig mit cd reden".

549 […]

5.13. The meeting of […] ČD and ÖBB in […] on […]

5.13.1. Summary

(550) The evidence presented in this section shows that at least some aspects of the Parties' arrangements aimed at restricting RegioJet's access to used wagons were discussed and implemented with the […].

5.13.2. Meetings and collusive contacts

(551) On […], […] (ČD) asked […] (ÖBB) about preparing a meeting of […] (ÖBB's […] and ČD's […]) in which also "[…]" should be discussed. On […] 2015, the assistant of […] replied to […]:

"[…] *is at the moment on holidays, but we would suggest to have a first meeting very soon. Maybe* […] *will be in* […] *for the* […] *on the* […]. *So we could have a first exchange of ideas and topics very soon and afterwards we can fix a follow up in October or November.*"[550]

(552) On […] 2015, ČD's […] sent a letter to ÖBB's […], […]:

"[…]"[551]

(553) On […] 2015, a ČD-internal e-mail from […] to […] and […] (with […] and a […] in copy) […]. This shows that ČD's […] was involved in discussions related to the content and implementation of the arrangements aimed at restricting RegioJet's access to used wagons. The e-mail reads as follows:

"[…]"[552]

(554) The meeting […] took indeed place on the sidelines of the […] meeting in […] on […] between […] and […].[553]

(555) A ČD-internal briefing last saved on […] 2015 for […] (to prepare for this meeting with […]) bears the heading "[…]".[554] […] (that […] had proposed in his e-mail of […]:

"[…]"[555]

(556) In light of the evidence presented above in recitals (553) and (555) about the meeting and its preparation, it is apparent that the Parties' arrangements to […] with the

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550 […] Original in English.

551 […]
The German original reads as follows (spelling mistakes not corrected):
" […]"

552 […]
The Czech original reads as follows:
"[…]"

553 […]

554 […]
The Czech original reads as follows:
"[…]*".*

555 […]
The Czech original reads as follows:
"[…].

participation of […] of the Parties. Emerging issues, such as ČD's […] were also discussed at the […].

5.13.3. Arguments raised by ČD and the Commission's assessment

(557) According to ČD, […], rules out any agreement. […] only asked ÖBB to be informed in time about wagon sales, but not about some preferential allocation of wagons. Moreover, there is no evidence of what was truly discussed between […] (ČD) and […] (ÖBB), let alone agreed to and implemented[556].

(558) The Commission disagrees with ČD's arguments and points in this respect to the […].

(559) The contemporaneous evidence also demonstrates that both the request and the […] (see above recital (555)). There is therefore no reason to assume that the discussion at the […].

5.14. The exchange of letters between […] ČD and ÖBB in […] 2015 […] 2016 and the respective reactions of the Parties

5.14.1. Summary

(560) In […] 2016 it was clarified within ÖBB that in future sales of wagons the preference should be given to the highest bidder. Consequently, ÖBB informed ČD […].

5.14.2. Letter from ČD to ÖBB of […]2015 […] and ÖBB's reply of […] 2016

(561) On […] 2015, a member of the […] requested […] and […] (both ČD) to write a letter to ÖBB expressing the […]:

"[…]"[557]

(562) […] responded to […] also on […] 2015:

"[…][558] […]"[559]

(563) On […] 2015, […] circulated an internal e-mail[560] to […] and ČD's […] with a Czech draft of the letter[561] to be sent from […] of ČD to […] of ÖBB. In the draft, […]. The draft letter reads as follows:

"[…]"

(564) On […] 2015, […], the […], sent the final version of this letter in English to […], […]. The final version is only slightly different from the draft and in particular mentions ČD's […]:

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556 […]

557 […]
The Czech original reads as follows:
″[…]"

558 […]

559 […]
The Czech original reads as follows:
"[…]"

560 […]

561 […]
The Czech original reads as follows:
"[…]″

"[…]"[562]

(565) Within ÖBB this letter was forwarded to the ÖBB legal department. The legal department concluded that ÖBB had to sell its used rolling stock to the best bidder and that arrangements in favour of or against individual bidders were problematic from the point of view of competition law.[563]

(566) Accordingly, […] responded to […] by letter of […] 2016 that […]:

"[…]"[564]

(567) In a ČD-internal e-mail of […] 2016, […] from ČD reacted to the statements of […] in his letter of […] 2016 by stating that the […] wagons mentioned in the letter above […]. […] however also mentions that ČD "[…]"[565]

This statement further illustrates the content of the Parties' arrangements consisting in avoiding sales of used wagons to the competitor RegioJet.

5.14.3. The meeting between ČD and ÖBB on […] 2016 and the subsequent reactions of the Parties

(568) Shortly after […]'s (ÖBB) letter of […] 2016, the […] was also a topic of discussion at a meeting between ČD and ÖBB on […] 2016 in Prague.[566] […], […], and […] of ČD as well as […], […] and […] of ÖBB attended the meeting. […][567] […].[568]

(569) It is apparent from the minutes of this meeting that ČD asked the ÖBB representatives to inform ČD in advance about envisaged sales of wagons:

"[…]"[569]

(570) In the meeting of […] 2016, ÖBB representatives agreed to […].[570]

(571) The contemporaneous ÖBB-internal briefing prepared by […] for […] under the heading "*sale of coaches*" contained similar information:

"*Over and over again ÖBB wagons reach ČD's competitor RegioJet through intermediaries.*
All available used wagons are also offered to ČD, they are finally sold to the highest bidder.
Recently [….] 16 couchette wagons (type 59-90.9) were sold to RegioJet via an intermediary, with these wagons RegioJet has begun building up a night train connection between Prague and Kosice.
[…] *To be clarified once again that we* ***have to*** *sell to the highest bidder and that it*

562 […] Original in English (spelling mistakes not corrected).
563 […]
564 […] Originals in English.
565 […]
The Czech original reads as follows:
"[…]"
566 […]
567 […]
568 […]
569 […] Originals in English.
570 […]

can never be excluded that wagons via intermediaries end up with RegioJet, but that we offer ***all*** *wagons also to ČD."* [emphasis in original][571]

(572) Referring to the meeting between ČD and ÖBB of […] 2016, […] in a ČD-internal e-mail of […] 2016 also stated that "[…]".[572]

(573) In light of the evidence, the Commission finds that ÖBB's intention to sell to the highest bidder (contrary to the previously agreed arrangements), first communicated to ČD in […]'s letter to […] of […] 2016 (see above recital (566)), was also confirmed to ČD in the meeting of […] 2016 (see above recitals (570) and (571)).

5.14.4. Arguments raised by the ČD and the Commission's assessment

5.14.4.1. ČD's role and attitude in the sales process

(574) ČD claims that it was displeased because it could not have bought the wagons itself and did not have the opportunity to fully participate in the bidding process. It therefore only […][573]. Thus, ČD merely asked for fair treatment and timely information about future sales, but not because it was displeased that the wagons were bought by RegioJet[574].

(575) The Commission stresses that with regard to the contemporaneous evidence quoted above in section 5.14.2 and section 5.14.3, ČD only comments on the parts of the contemporaneous evidence that seem to support its view but ČD completely ignores and omits to mention the documents or the parts of the documents that clearly prove the Parties' anticompetitive agreement and / or concerted practice at hand.

(576) For example, ČD tries to infer from the sentence "[…]" in recital (561) […]"

(577) Moreover, even for the part of the evidence ČD deals with, ČD's argumentation distorts the facts and the clear wording of the evidence at hand: This piece of evidence nowhere mentions that […], but the fact that ÖBB sold the wagons to RegioJet.

(578) Finally, ČD appears to use wrong facts in its argumentation: while ČD states[575] that […]: […] in an ČD-internal email mentions that […].

(579) In relation to the letter of ČD's […] to ÖBB[…] (quoted above in recital (564) ČD applies a similar approach of only commenting on selected parts of documents while

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571 […]
The German original reads as follows (spelling mistakes not corrected):
„Immer wieder gelangen auch ÖBB-Wagen über Zwischenhändler an den pivaten ČD-Mitbewerber „Regiojet".
Alle gebrauchten Fahrzeuge, die zur Disposition stehen werden auch ČD zum Kauf angeboten, verkauft werden sie letztlich an den Höchstbieter.
In letzter Zeit wurde [….] verkauft 16 Stk. Liegewagen (59-90.0) an Regiojet über einen Zwischenhändler, mit letzteren hat Regiojet begonnen, einen Nachtverkehr Praha-Košice aufzubauen. [….]
Nochmals darauf hinweisen, dass wir an Meistbietenden verkaufen ***müssen*** *und es nie auszuschließen ist, dass Wagen über Zwischenhändler bei Regiojet landen, wir aber* ***alle*** *Fahrzeuge auch ČD zum Kauf anbieten."*

572 […]
The Czech original reads as follows:
" […]"

573 […]

574 […]

575 […]

keeping silent about the sentence in the letter where […]. ČD's also omits to comment on the sentence where […].

5.14.4.2.ÖBB's reaction to ČD's letter

(580) ČD further submits that the reaction of ÖBB to ČD's letter of […] 2015 proves that there had not been any agreement. The response of ÖBB[…] of 21 January 2016 merely describes the long-lasting position of ÖBB of selling its wagons to the highest bidder. ÖBB could therefore not have acted based on some alleged agreement.

(581) The Commission disagrees with this view.

(582) First, the fact that the Parties had entered into an agreement and/or concerted practice to prevent, hinder or restrict the access of RegioJet to used wagons is shown by […]'s […].

(583) […][576].

(584) Third, […] the existence of the agreement and/or concerted practice before 21 January 2016 is corroborated by the contemporaneous evidence in the Commission's file. This evidence shows that ČD over the next months continued to […] (for details see section 5.14.3 above and section 5.15 below)

5.15. ÖBB's public sale announcement for various wagons and electric railcars of February 2016

5.15.1. Summary

(585) In February 2016, following an announcement of ÖBB to sell various wagons and railcars, there were still […], despite the fact that ÖBB informed ČD about its intention to sell to the highest bidder. Moreover, ÖBB employees internally expressed doubts as to envisaged sales of ÖBB wagons to RegioJet. However, […], the […] at ÖBB-PV, insisted on ÖBB's legal obligations to sell to the highest bidder only, and communicated this also to ČD. ÖBB's decision not to further adhere to the previously agreed arrangements regarding the sales of used wagons by ÖBB and to terminate the arrangements with ČD was thus confirmed.

5.15.2. Documentary evidence

5.15.2.1.ČD's reaction to the sale announcement of ÖBB

(586) Even after ÖBB informed ČD about its intention to sell to the highest bidder, […]. On 18 February 2016, […] of ÖBB sent an e-mail about the envisaged sale of various passenger wagons and electric railcars to a large number of potentially interested Austrian and international buyers, including […] of ČD.[577] In a ČD-internal e-mail to […] (with copy to […], […], […], and […]) […] (all ČD) also on […] 2016 commented on […]' (ÖBB) e-mail:

"[…]"[578]

(587) […], which should have arguably served as an argument to draw ÖBB back into respecting the previously agreed arrangements. […] reacted to […]' e-mail of […]

576 […]

577 […]

578 […]
The Czech original reads as follows:
"[…]"

2016 by writing on […] 2016 an e-mail to […], […] of ÖBB, referring to the meeting between ČD and ÖBB in Prague on […] 2016 (see above section 5.14.3):

"[…]"[579]

(588) ČD declared in relation to the last sentence of […]'s aforementioned e-mail: *"[…]"*[580] However, […][581]

5.15.2.2. Comments of ÖBB employees on the sale announcement of ÖBB

(589) Reacting to […]'s (ČD) e-mail of […] 2016 (see recital (587)) above, […] of ÖBB wrote in an e-mail to the ÖBB legal department of 22 February 2016 that he would like to inform ČD that ÖBB was obliged to sell to the highest bidder.[582] […] accidentally sent this e-mail also to […] and to another person at ČD.[583]

(590) Internal documents show that there were hesitations on the side of some ÖBB employees as to the need to sell the wagons to the highest bidder in view of the possible negative consequences for ÖBB in case of a sale to RegioJet. In this respect, […] (ÖBB) commented on […]'s (ČD) e-mail of […] 2016 as well as on […] accidental sending to ČD in an e-mail to […] (ÖBB) of 23 February 2016 as follows:

"*Was the email really intended for everybody?*
One consideration from my side on this. Do we really have to sell the wagons to the highest bidder, especially if we know that they are delivered to the competitor of ČD? In the end this may also lead to loss of revenue for us, if the competitor is able to take away passengers from ČD to RegioJet, which then in Austria use the student agency network and take the bus to Vienna instead of the train?
Thereby we would have a decrease in revenues and the sale to RegioJet would in fact not be the best commercial option for us?"[584]

(591) […] responded to […] (also on 23 February 2016):

"*No, obviously not. But* […]."[585]

579 […] Originals in English (spelling mistakes not corrected).
580 […]
581 […]
582 […]
583 […]
584 […]
The German original reads as follows (spelling mistakes not corrected):
"war die e-mailwirklich an alle gedacht?
ein gedanke meineerseits noch dazu. müssen wir die wagen wirklich an den meistbietenden verkaufen, insbesondere wenn wir wissen, dass es an den mitbewerber der ČD geht. das könnte uns letztlich auch einnahmenentfälle bringen, wenn er mit diesen wagen ahrgäste von der ČD zu regiojet bringt, die dann auch im verkehr nach österreich das student agency-netzwerk benutzen und statt dem zug den bus nach wien nehmen?
damit hätten auch wir einnahmenrückgänge und der verkauf an regiojet wäre doch nicht die beste wirtschaaftliche alternative für uns?"
585 […]
The German original reads as follows (spelling mistakes not corrected):
"Nein natürlich nicht.... […]*"*

(592) The e-mail of […] of 23 February 2016 (see recital (590) above) shows that the arrangements previously agreed between the Parties and consisting in restricting the access of RegioJet to used wagons were in ÖBB's strategic commercial interest ("*the sale to RegioJet would in fact not be the best commercial option for us*").

(593) From an ÖBB-internal e-mail of 7 April 2016 of […] to […] it is apparent that ÖBB never had the intention to sell the various wagons and electric railcars that […] had announced by e-mail of 18 February 2016 and "*that the announcement of sale was only published for purely formal reasons*."[586]

5.15.3. Arguments raised by ČD and the Commission's assessment

(594) ČD claims that the documents do not suggest that there was a turnaround in ÖBB's strategy and that there was no change how the sales proceeded before and after 21 January 2016. In ČD's view, there was rather a consistent behaviour showing the absence of any collusion between ČD and ÖBB. For example, […] (ÖBB) proceeded in the same way as he did prior to 21 January 2016 by announcing the sale to numerous potential buyers. Moreover, ÖBB's internal process manuals and directives governing the sales of wagons prove that the alleged collusive actions had been impossible because ÖBB had to adhere to the principle of selling at the highest available price[587].

(595) However, again the contemporaneous evidence stemming from ČD itself proves ČD's stance wrong. The Commission on this regard points to the fact that ČD again keeps silent about the ČD-internal email of […] "[…]" (see above recital (586)). This clear wording with the use of "[…]" shows that the aim of the Parties' arrangement in place before 21 January 2016 was to avoid that ÖBB's used wagons end up at the competitor RegioJet, and not, as ČD tries to make believe, that ČD is timely informed about ÖBB's upcoming wagon sales.

(596) Moreover, while ÖBB's […] in the present sales process indeed announced the sale to various potential bidders, contrary to ČD's arguments[588] such open announcement did not take place in all previous sales processes. Rather, as has been shown (see for example above section 5.5, section 5.7, section 5.9), at several occasions the Parties had no interest to attract other bidders.

(597) As to ČD's argument about the ÖBB-internal process guidelines[589], the Commission points to the fact that these guidelines as quoted by ČD do not stipulate that […].

(598) In any event, the Commission stresses that a possible breach of the rules of ÖBB's internal process manuals and directives by ÖBB personnel in no way excludes the existence of the anti-competitive agreement and/or concerted practice at hand. It is precisely the feature of anti-competitive conduct that it is unlawful and consequently regularly in breach of company-internal rules. However, the mere existence of company-internal rules - such as in the present case the ÖBB-internal process manuals and directives governing the sales of wagons - does not rule out that employees infringe these rules and enter into anti-competitive conduct.

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586 […]
The German original reads as follows (spelling mistakes not corrected):
"dass die verkaufsankündigung aus rein formalen gründen veröffentlicht wurde."

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6. APPLICATION OF ARTICLE 101 TFEU

6.1. Article 101(1) TFEU

(599) Article 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

6.1.1. Agreements and concerted practices

6.1.1.1. Principles

(600) Article 101(1) TFEU prohibits "*agreements between undertakings, decisions by associations of undertakings and concerted practices*".

(601) The Court stated that "*it is well established in the case law that for there to be an agreement within the meaning of Article [101(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".*[590]

(602) An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 101(1) TFEU, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 101(1) TFEU would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.[591]

(603) Although Article 101(1) TFEU draws a distinction between the concept of "*concerted practices*" and "*agreements between undertakings*", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[592]

(604) The criteria of co-ordination and co-operation laid down by the case law, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the internal market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves

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590 Judgment of the Court of First Instance of 20 April 1999, *Limburgse Vinyl Maatschappij N.V. and others v Commission ("PVC II")*, T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 715.

591 See Judgment of the Court of First Instance of 20 March 2002, *HFB v Commission,* T-9/99 ECLI:EU:T:2002:70, paragraphs 196, 199, 200 and 207; Judgment of the Court of Justice of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, ECLI:EU:C:2006:592, paragraphs 94 to 100, 110 to 113.

592 Judgment of the Court of Justice of 14 July 1972, *Imperial Chemical Industries v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[593]

(605) Thus, a conduct may fall under Article 101(1) TFEU as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.[594] Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(606) Although in terms of Article 101(1) TFEU the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 101(1) TFEU even in the absence of anti-competitive effects on the market.[595]

(607) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are not mutually exclusive and may overlap.[596] The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time.[597]

(608) The Court stated that *"[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for*

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593 Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and Others v Commission*, C-40/73 to C-48/73, C-50/73, C-54/73 to C-56/73, C-111/73, C-113/73 and C-114/73, ECLI:EU:C:1975:174, paragraphs 173 to 174.

594 Judgment of the Court of First Instance of 17 December 1991, *Hercules v Commission,* T-7/89, ECLI:EU:T:1991:75, paragraph 256.

595 Judgment of the Court of Justice of 8 July 1999, *Hüls v Commission*, C-199/92 P, ECLI:EU:C:1999:358, paragraphs 158 to 166.

596 See judgment of the Court of First Instance of 20 April 1999, *Limburgse Vinyl Maatschappij N.V. and others v Commission,* T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 696.

597 Cf. Judgment of the Court of First Instance of 17 December 1991, *Hercules v Commission,* T-7/89, ECLI:EU:T:1991:75, paragraph 264.

each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101 TFEU]".[598]

(609) An agreement for the purposes of Article 101(1) TFEU does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term "*agreement*" can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out it follows from the express terms of Article 101(1) TFEU that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[599]

6.1.1.2. Application in the present case

(610) In the present case, the infringement consisted of an agreement and/or a concerted practice. It is demonstrated by the events described in the factual part of this Decision (see above section 5) that for the whole period of the infringement there has been between the Parties a "*concurrence of wills on the very principle of a restriction of competition*"[600]. ČD and ÖBB had numerous direct contacts in which they discussed and coordinated their common approach to impede the market entry or expansion of RegioJet on the long-distance rail passenger transport markets in domestic Czechia and on the Prague – Vienna route, by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport. In particular, the Parties coordinated to conduct the sales processes for ÖBB's used wagons in such a manner to avoid, if possible, that these wagons would end up with RegioJet.

(611) […][601] […][602]

(612) […][603]

(613) The contemporaneous evidence relating to the Parties' collusive contacts shows that the Parties shared the common view that access to used wagons for long-distance passenger transport constitutes a key parameter of competition and that the purchase of such wagons was critical for the market entry and growth of RegioJet on the long-distance rail passenger transport markets both in domestic Czechia and on the Prague – Vienna route (see above recitals (181), (197), (235), (331), (418), (485), (488), (489), (503), (505), (537), (564), (571)). The Parties also had a common understanding that the emergence and expansion of the new entrant RegioJet posed a threat to their incumbent positions (see above recitals (181), (197), (201), (235), (418), (422), (489), (505), (523), (537), (564), (590)).

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598 See judgment of the Court of First Instance of 20 April 1999, *Limburgse Vinyl Maatschappij N.V. and others v Commission,* T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 696.

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

600 Judgment of the General Court of 29 February 2016, *UTiWorldwide and others v Commission*, T-264/12, ECLI:EU:T:2016:112, paragraph 29.

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(614) Therefore, at the latest on 9 May 2012 (see above section 5.3.1), the Parties entered into an agreement and/or a concerted practice to impede the market entry or expansion of RegioJet by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport, in order to maintain their position on the markets for long-distance rail passenger transport services in domestic Czechia as well as on the Prague-Vienna route. That is a "*concurrence of wills on the very principle of a restriction of competition*" in the sense of the case law.[604] On several occasions in the framework of sales processes for ÖBB's used wagons for long-distance passenger transport, the Parties expressly agreed to prevent the access of RegioJet to such wagons and that ÖBB would prefer ČD over other bidders in the sales processes. In the following are some examples from the contemporaneous evidence:

(a) ČD-internal email of […] 2014 (see above recital (418)): "[…]*"*.

(b) Email from ČD to ÖBB in […] 2014 (see above recital (422)): *"*[…]*"*

(c) Email-exchange between ÖBB and ČD in […] 2015 (see above recitals (488), (490), (492)). ČD: *"*[…]*"*. ÖBB: *"*[…]*"*.

(d) Email from ČD to ÖBB in […] 2015 (see above recital (537)).: "[…]*"*

(e) ČD-internal email of […] 2016 (see above recital (567)): *"*[…]*"*.

(615) As part of […] (see for example section 5.11 above where ÖBB and […] that ÖBB's couchette wagons - […]).

(616) Overall, instead of individually determining their respective response to the emergence and growth of RegioJet, the Parties colluded on the access to used wagons for long-distance passenger transport which they knew to be important for competitors' success on the long-distance rail passenger transport services markets (see above in recital (613) and in more detail below in recitals (746) - (758)).

(617) The collusion to rig sales processes for ÖBB's used wagons for long-distance passenger transport to the detriment of RegioJet manifested itself in e-mails, letters, phone calls and personal contacts. There was a "*concurrence of wills"* between the Parties, and the content of their agreement and/or concerted practice was repeatedly referred to and re-confirmed in communications between the Parties, […], see above recitals (197), (328), (386) - (389), (418) - (422), (505), (553) - (555), (564)).

(618) By these collusive actions to rig sales processes, the Parties maintained their common understanding that an important competitive factor for the provision of long-distance passenger transport services (namely access to ÖBB's used long-distance passenger transport wagons) should not be left to the free interplay of market forces but should rather be coordinated.

(619) The illegal nature of their common understanding is not put into question by the fact that for each case of sale in principle the final decision to whom to sell rested with the seller ÖBB because through their agreement and / or concerted practice the Parties restricted ÖBB's freedom to individually determine the buyer of its wagons.

(620) The illegal nature of their common understanding is not put into question either by the fact that there were some occasions (see the sales processes in sections 5.6 and

[604] Cf. Judgment of the General Court of 29 September 2021, *Nichicon Corporation v European Commission*, T-342/18, ECLI:EU:T:2021:635, paragraph 53.

5.11 above) when the agreement and/or concerted practice was not successfully implemented.[605]

(621) On the basis of the above considerations, the Commission finds that during the period of the infringement the arrangements between the Parties described in the factual part of this Decision (see above section 5) constitute an agreement and/or concerted practice in the sense of Article 101(1) TFEU.

6.1.1.3. Arguments raised by ČD and the Commission's assessment

(622) ČD claims that ČD and ÖBB did not enter into an anti-competitive agreement and / or concerted practice regarding the sale of used ÖBB wagons.

ČD's motivation and actions

(623) According to ČD, there is no evidence proving the existence of an anticompetitive agreement. Its actions were motivated by its urgent need to modernise its rolling stock.[606] ČD's focus on ÖBB as a seller was unrelated to RegioJet. For ČD it was […] to purchase used wagons […] from ÖBB […][607] ČD precises that that the wagons "*offered for sale by ÖBB were usually the so-called 'RIC' wagons [….] […]"*[608]

(624) ČD further brings forward that it had the right to attempt to purchase the wagons it needed and to try to influence ÖBB as their prospective supplier accordingly. According to ČD, competition law does not preclude undertakings from pursuing business interests of that nature. The Commission misinterprets as anti-competitive standard commercial practices of an undertaking that aimed to ensure supplies vital for its operations. The legitimacy of the communication between ČD and ÖBB is also supported by the particular context of the railjet cooperation, which makes some forthcoming treatment of ČD logical.[609]

(625) First of all, it has to be stressed that the Parties' collusive rigging of sales processes for ÖBB's used wagons to the detriment of RegioJet and the related flow of information from ÖBB to ČD about details of these processes went far beyond merely pursuing business interests and what would have been standard commercial practice.

(626) Moreover, the Commission points out that it has been confirmed by the Court on multiple occasions that an agreement can have an anti-competitive object even if it also pursues legitimate aims.[610] The evidence presented in this Decision shows the anti-competitive object of the Parties' agreement, namely to prevent the market entry

605 See e.g. Judgment of the General Court of 13 September 2013, *Total Raffinage Marketing v Commission*, T-566/08, ECLI:EU:T:2013:423, paragraph 254; Judgment of the General Court of 14 March 2013, *Dole Food Company, Inc. and Dole Germany OHG v European Commission*, T-588/08, ECLI:EU:T:2013:130, paragraph 484, and case-law cited therein, and Judgment of the Court of First Instance of 10 March 1992, *Imperial Chemical Industries v Commission*, T-13/89, ECLI:EU:T:1992:35, paragraph 293.

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610 Judgment of the Court of Justice of 8 July 1999, *Montecatini*,C-235/92 P, ECLI:EU:C:1999:362, paragraph 122; Judgment of the Court of Justice of 6 April 2006, *General Motors*, C-551/03 P, ECLI:EU:2006:229, paragraph 68; Judgment of the Court of Justice of 11 September 2014, *Cartes Bancaires*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 70.

or expansion of their common competitor RegioJet by preventing, hindering or restricting the sales of ÖBB's used wagons to RegioJet. […], such as in the case of the sale of the […] wagons described above in section 5.11.

(627) Furthermore, ČD mischaracterises the nature of the anti-competitive conduct as described by the Commission. The present Decision does not object to the legitimate objective that ČD wanted to buy ÖBB's used wagons to renew its overaged fleet and that ČD would like to influence ÖBB accordingly. The Decision finds that ČD and ÖBB agreed to prevent, hinder or restrict the access of RegioJet to used railway wagons for long-distance passenger transport. In practice this meant that the Parties rigged ÖBB's wagon sale procedures and - for those wagons that ČD did not want to buy - discussed and agreed who would be an appropriate buyer that would suit both Parties' interests.

(628) The latter also evidences that the agreement and / or concerted practice at hand was not – as ČD wants to make believe – an agreement to sell wagons only to ČD. The evidence about the Parties' communication in the Commission's file and presented in the factual part of this Decision (see above section 5) shows that it was an agreement and / or concerted practice to avoid, where possible, wagon sales to RegioJet. As a side-effect, this in fact meant agreeing to sell ÖBB's used wagons mostly to ČD, but sometimes to someone else, but not to RegioJet, in line with the Parties' intention.

ÖBB's sales to RegioJet and ČD's status of a state-owned undertaking

(629) ČD argues that RegioJet was in no way restricted in its access to the wagons of ÖBB and purchased them in large quantities, which rather shows a preferential treatment of RegioJet by ÖBB, but no agreement or concerted practice to the disadvantage of RegioJet.[611] ČD as a state-owned contracting authority however was significantly disadvantaged in the purchases. In particular, procedurally heavy public procurement rules limited ČD's negotiating abilities.[612]

(630) ČD again mischaracterises the content of the objections of the Commission's Decision. The present Decision does not find an agreement that ČD should get all the used wagons that ÖBB offers for sale. Rather, based on the various contemporaneous documents from both Parties […], the present Decision demonstrates that ÖBB and ČD took coordinated actions against their competitor RegioJet and collusively rigged sales processes for wagons to hinder, prevent or restrict the access of RegioJet to ÖBB's used long-distance rail passenger transport wagons, ultimately to distort competition on the rail passenger transport market.

(631) The Commission further points out that ČD's claim that RegioJet purchased almost half of the wagons offered by ÖBB[613] is based on a distortion of the relevant facts. ČD's calculation is based on figures stemming from both before and during the infringement period 9 May 2012 – 21 January 2016. That RegioJet was able to acquire some wagons from ÖBB before the start of the infringement does not put into question the finding of an infringement in this Decision.

(632) Moreover, as regards the […] sales to RegioJet during the infringement period (see above section 5.6 and section 5.11), the case-law says that the fact that an agreement is partially (or even never) implemented is immaterial to the existence of an

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agreement,[614] and sporadic cases of cheating or failure to apply the cartel by a particular participant may occur.[615] Section 5.6 and section 5.11 of this Decision explain in detail that also in these […] instances, where the wagons were ultimately sold to RegioJet, ÖBB and ČD collusively coordinated their conduct. […] sales do not put in question the continued existence of the Parties' agreement and / or concerted practice.

(633) During the whole infringement period, ČD acquired from ÖBB in total […] wagons in […] instances, while RegioJet acquired in total […] wagons in […] instances. In all of these […] instances, the […], but their efforts ultimately failed with regard to the latter […] instances. These facts are incompatible with ČD's argument that ÖBB engaged in a preferential treatment of RegioJet.

(634) As to ČD's argument that its wagons purchases were hampered by the public procurement rules[616], the Commission does not contest that ČD was bound by public procurement laws. This does however not have any bearing on the assessment of ČD's collusive conduct. The possible burdensomeness of legally binding procedures does not justify using anti-competitive actions against RegioJet to overcome possible burdens of public procurement law.

Existence of an agreement and / or concerted practice

(635) ČD also argues that an agreement and / or concerted practice cannot exist because there is no corresponding conduct by ČD, as it had no quality wagons for long-distance passenger transport, comparable to those of ÖBB, available for sale or lease.[617]

(636) The Commission does not dispute that ČD had no wagons comparable to the ones of ÖBB available for sale or lease. This is however not a precondition for the existence of an agreement and / or a concerted practice between ÖBB and ČD to collusively rig sales processes to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons for long-distance passenger transport. ČD's argument is therefore not relevant for the legal assessment of the Parties' conduct.

(637) ČD further puts forward that it never entered into any sort of an agreement with ÖBB in respect of wagon sales, whether anticompetitive or not. There has never been any meeting of minds or concurrence of wills that ČD should be granted preferred access to ÖBB's used wagons, to the detriment of RegioJet. The two instances which in the opinion of the Commission or ÖBB represent the entry into such an agreement, namely the "*Common Challenges*" of […] 2012 document and the telephone call by ÖBB to ČD of […] 2012, do not establish the existence of an anti-competitive agreement.[618]

614 Judgment of the General Court of 12 December 2014, *Eni*, T-558/08, ECLI:EU:T:2014:1080, paragraphs 132 and 133.

615 Judgment of the General Court of 13 September 2013, *Total,* T-566/08, ECLI:EU:T:2013:423, paragraph 254.

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(638) In addition, according to ČD, had there been an agreement or a concerted practice between the Parties, ČD would not have been always in state of uncertainty and in the need to repeatedly plead towards ÖBB concerning its used wagon sales.[619]

(639) The Commission refers to the evidence in section 5.3.2.1 above showing that the Parties already had an anti-competitive arrangement in place at the time of the […] meeting on […] 2012. In addition to that, the content of the *"Common Challenges"* document was discussed at the meeting […] on […] 2012. Even if only […] has introduced the content of the *"Common Challenges"* document into the […] meeting, the case law confirms that there can be also an agreement or a concerted practice if only one of the participants at a meeting reveals its intentions.[620]

(640) Moreover, according to the case law, the existence of an agreement may be inferred from the conduct of the Parties[621] and the surrounding circumstances[622], provided that the evidence is "sufficiently precise and consistent" that the undertakings have a joint intention to conduct themselves on the market in a specific way[623]. Consequently, the present Decision's finding of the […] from […] 2012 to […] 2016, and not only on the two instances referred to by ČD. This overall body of evidence is consistent with the existence of a *"*[…]*"* and shows that the Parties implemented this agreement later on in various instances. Since the Parties' actions during the period of the infringement are fully in line with what had been agreed between the Parties at the latest on […] 2012, there must indeed have been a meeting of minds as of […] 2012.

(641) The existence of an agreement and/or concerted practice between ÖBB and ČD is further […] (see for example above recitals (374), (422), (503), (505), (555), (564), (567), (587)). […] imply that a prior mutual consensus had been established on this matter between the Parties. In the Commission's view, these multiple reminders and complaints demonstrate particularly that […]: as internal conflicts and cheating do occur in cartels[624], uncertainty of the cartels' members is unavoidable.

Meaning of the […]

(642) ČD further believes that the Commission ascribes to the […] (see above section 5.3) a different meaning than what could have been possibly meant by it. Especially, according to ČD, the Commission misinterprets the meaning of the […] as an anticompetitive collusion. Rather, the […] could only have meant that […] (see above recital (190)).[625]

(643) The Commission disagrees with that view.

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620 Judgment of the Court of First Instance of 12 July 2001, *Tate & Lyle and others v Commission,* joined cases T-202/98, T-204/98 and T-207/98, ECLI:EU:T:2001:185, paragraph 54.

621 Judgment of the Court of Justice of 11 January 1990, *Sandoz,* C-277/87, ECLI:EU:C:1989:363,, paragraph 13.

622 Judgment of the Court of Justice of 20 June 1978, *Tepea*, C-28/77, ECLI:EU:C:1978:133, paragraphs 39 to 41 and 57.

623 Judgment of the Court of First Instance of 9 July 2009, *Automobiles Peugeot*, T-450/05, ECLI:EU:T:2009:262, paragraph 175 and the case law cited.

624 Judgment of the General Court of 13 September 2013, *Total,* T-566/08, ECLI:EU:T:2013:423, paragraph 254.

625 […]

(644) First, the clear wording and context of the *"Common Challenges"* document (see above section 5.3.2.1.1) does not allow to conclude that the agreement and/or concerted practice at hand had merely the "[…]: The *"Common Challenges"* document clearly links the conclusion of a […] (see above recital (197)) and the […] such as RegioJet, […] ÖBB wagons (see above recital (200)), with a threat for the market position of ČD and ÖBB coming from these private operators (see above recital (197): *"*[…]*"*). An agreement and/or concerted practice, whose content would have merely consisted in a timely information of upcoming wagon sales (as argued by ČD) could not solve the mentioned "[…]" posed by competitors (see above recital (201)).

(645) Second, had the concluded "[…]*"* only aimed at informing ČD on time about ÖBB's upcoming sales, the immediately following reference to sales of wagons *"*[…]*"* (see above recital (197)) would not have been needed. Rather, this reference shows that the agreement governed the principles of […]*"*.

(646) Likewise, had the Parties agreed that ÖBB informs […] 2012: *"*[…]*"*[626] ([…] 2012.

(647) Third, it is highly unusual to use the […]. This is supported by the fact that on several occasions the Parties kept their communication about the agreement and/or concerted practice secret (see examples of this behaviour above in recital (273) - *"*[…]*"*-). An […] to ČD would not have requested such secrecy and would thus not be referred to as a "[…]".

(648) Fourth, ČD's claim that the Commission misinterprets the meaning of the […] misses the point, because the mere title of the […] is not relevant. Rather, the content of the "*Common challenges*" document together with the evidence presented in section 5.3 above as well as the body of other evidence in the Commission's file demonstrate that the Parties entered into anti-competitive agreement and/or concerted practice aimed at impeding the market entry or expansion of their common competitor RegioJet by preventing, hindering or restricting the access of RegioJet to used railway wagons. In any case, it is well-established case law that a "[…]" can fall under the prohibition in Article 101(1) TFEU if it contains clauses restricting competition and its clauses amount to a faithful expression of the joint intention of the parties.[627] This is what happened in the present case.

(649) Fifth, the minutes that ČD quotes (and according to which indeed […] another meeting on […] 2012 and therefore […] earlier, but not from the meeting on […] 2012 for which the "*Common Challenges*" document was drawn up. […] in the *"Common Challenges"* document.

<u>*The position of ÖBB's and ČD's personnel to set up an agreement*</u>

(650) ČD further argues that the level of occupation of neither ČD's […] nor of ÖBB's […] were one of higher management, and they were both not related to sales or purchases of rolling stock. This therefore precluded the setting up of any sort of understanding or agreement of ÖBB and ČD as undertakings.[628]

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627 Judgment of the Court of 15 July 1970, *ACF Chemiefarma NV v Commission of the European Communities*, C-41/69, ECLI:EU:C:1970:71; Judgment of the Court of First Instance of 8 July 2008, *BPB plc v Commission of the European Communities*, T-53/03, ECLI:EU:T:2008:254.

628 […]

(651) ČD also suggests that within ÖBB the decisive power over the sales process rested with ÖBB-TS ([…]), but not with ÖBB-PV, as is apparent from the ÖBB-internal process guidelines; the Commission should therefore have obtained statements of […] on the events in question[629]. […] of ÖBB-PV were merely responsible for long-distance operations, and they could not have influenced ÖBB's selection of the buyer. Moreover, their conduct was driven by the effort of maintaining good working relationship with ČD. All this excludes that their actions and communications can be attributed to ÖBB as undertaking[630].

(652) However, ČD's argument is unfounded. An agreement in the sense of Article 101 TFEU can exist notwithstanding the fact that the individual who entered into the agreement did not have authority to do so[631]. It is also not necessary for the application of Article 101 TFEU that there is an action by (or even knowledge on the part of) the management of the undertaking concerned, an "*action by a person who is authorised to act on behalf of the undertaking suffices*"[632]. The Court further stated that *"any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs, and that undertaking is, as a matter of principle, held liable for that conduct*"[633].

(653) Consequently, which actual job positions were held by […] within ÖBB does not alter the assessment of the behaviour at hand as an agreement and/or concerted practice under Article 101 TFEU. Decisive is that […], as shown in the factual part of the present Decision, regularly took actions to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons, following what was agreed with ČD. That […] actions may also have been motivated by their possible desire to keep good working-relations with ČD in no way excludes the existence of the agreement and/or concerted practice but is fully reconcilable with it.

(654) In any event, ČD's stance that […] was not in charge of sales of wagons, that […] had no authority over the sales, and that the selection of the buyer was the task of […] of ÖBB-TS[634] is proven wrong by the evidence in the file.

(655) First, the long-distance passenger transport wagons that ÖBB put up for sale all belonged to ÖBB's passenger rail operator ÖBB-PV, not to ÖBB-TS. The latter was merely a supplier of ancillary rail services (for ÖBB's internal organisation, see above recital (27)). It is therefore logical that only the legal entity ÖBB-PV – where […] was […] and to which also […] belonged (see below recital (980) and (984)) – could ultimately decide over the sales of the wagons and the selection of the buyer.

(656) Second, consequently, sales of ÖBB wagons were only approved by […], with […] of ÖBB-PV[635].

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631 Judgment of the Court of First Instance of 8 July 2008, *BPB*, T-53/03, ECLI:EU:T:2008:254, , paragraph 360.

632 Judgment of the Court of Justice of 7 February 2013, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a*.s., C-68/12, ECLI:EU:C:2013:71, paragraph 25; Judgment of the Court of Justice of 7 June 1983, *Musique Diffusion française and Others*, joined cases C-100/80 to C-103/80, ECLI:EU:C:1983:158, paragraph 97; Judgment of the Court of First Instance of 20 march 2002, *Brugg Rohrsysteme*, T-15/99, ECLI:EU:T:2002:71, paragraph 58.

633 Judgment of the Court of Justice of 21 July 2016, *VM Remonts,* C-542/14, ECLI:EU:C:2016:578, paragraph 24.

634 […]

(657) Third, […] on ÖBB's side the staff that influenced the sales processes were personnel of ÖBB-PV, namely […] as […] at ÖBB-PV and […] as […] at ÖBB-PV[636].

(658) Fourth, […]'s pivotal role in ÖBB's sales of used long-distance wagons is also evident from the following facts:

(a) […] informed ÖBB-PV's board members […] in […] 2012 of the reasons why […] (see above recital (249));

(b) […] arranged that ČD would be granted a grace period to improve its offer for ÖBB's used wagons in […] 2013 (see above recital (302));

(c) it was […], and not […], that ÖBB's […] reached out to for an update on ÖBB's sales of used wagons when […] was approached by ČD's CEO […] in […] 2014 (see above recital (419));

(659) Fifth, ČD's arguments are not reconcilable with the behaviour of ČD's employees involved in the conduct at issue. […] counterparts at ČD must have understood that […] had authority over the sales of ÖBB's used wagons, otherwise […].

(660) Sixth, as to the ÖBB-internal process guidelines, contrary to ČD's assertion, they also demonstrate that within ÖBB the decisive power to make strategic decisions about the wagon sales laid clearly with ÖBB-PV, to which […] belonged. ÖBB-TS merely had an executory role and was being tasked with mechanical tasks (like handing over the vehicles, conducting the accounting for the sale etc.)[637]. This is already apparent from the process guidelines as quoted by ČD[638], which clearly state that ÖBB-TS "*acts on behalf of* [ÖBB-]*PV*". This is also obvious from a further sentence in the process guidelines (which however ČD does not mention in its reply to the SO): " […]"[639].

(661) Moreover, the fact that the ÖBB-internal process guidelines demonstrate that […], already invalidates ČD's claim that the Commission failed to obtain statements from ÖBB-TS' […]. According to the case-law, the Commission "*cannot be required to carry out further investigations where it considers that the preliminary investigation of the case has been sufficient*".[640] In this regard, the Commission maintains that its investigation is complete and sufficient, and that obtaining a statement from […] is not required.

<u>*Price of ÖBB's sold wagons*</u>

(662) ČD claims that ÖBB systematically invited other interested bidders (including RegioJet and its intermediary TCA) and always aimed to sell its wagons to the highest bidder and at the highest available price. This was also stipulated in the letter of ÖBB's […] of […] 2016. ČD therefore considers that ÖBB and ČD never established an agreement and/or concerted practice entailing a preference for ČD or restrictions against RegioJet.[641]

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635 See for example […]

636 […]

637 […]

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639 […]
The German original reads as follows: " […]"

640 Judgment of the Court of 15 December 2016, *Infineon*, T-758/14, EU:T:2016:737, paragraph 73.

641 […]

(663) ČD's claim is however not supported by the facts. In several sale processes ÖBB and […] (see above section 5.5 and section 5.6). Formally speaking, in such sale processes the wagons were indeed sold to the only and therefore highest bidder ČD. However, that the Parties in these sale processes avoided competing bids of others than ČD already disproves that ÖBB always aimed at achieving the highest price.

(664) In other sale processes ÖBB invited other bidders but shared […]. The fact that ÖBB in some circumstances also intended to advance its own financial interests does not exclude the long-standing and extensive collusion between the Parties to tweak and influence the wagon sales processes so that the wagons do not end up with RegioJet.

(665) Therefore, the Parties' agreement and/or concerted practice left some space for ÖBB to reconcile the cartel's objectives with its own financial interests, but this does not put into question the existence of the agreement and/or concerted practice as such. Both objectives were reconcilable, and ÖBB could have aimed at achieving an acceptable (or even the highest possible) price, while at the same time making sure that the wagons are not acquired by RegioJet.

(666) In general, the Parties' collusive rigging of sales processes for ÖBB's used wagons and the related flow of information from ÖBB to ČD about details of these processes went far beyond standard commercial practice to sell at the highest price.

(667) ČD further argues that ÖBB's internal process guidelines stipulate achieving the highest possible revenues from wagons sold, and that therefore the price achieved was the decisive criterion for ÖBB when deciding to whom to sell the wagons.[642] The Commission however notes that, first, ÖBB's internal process guidelines […]. Second, in any case, a possible infringement of the purely ÖBB-internal guidelines by ÖBB-employees does not put into question the existence of the agreement and/or concerted practice. It can exist despite the fact that the ÖBB employees involved in the collusion were in breach of these guidelines.

(668) Moreover, contrary to ČD's assertation[643], the fact that ÖBB's […] spelled out a "highest bidder" principle in its letter to ČD of […] 2016 (see above section 5.14.2) - which marks the end of the infringement - does not disprove the existence of an agreement and / or concerted practice but rather supports the case: That ÖBB felt the need to spell out the "highest bidder" principle suggests that it was not consistently applying this principle previously due to the existence of the agreement and/or concerted practice.

(669) Finally, ČD puts forward that it bought the wagons from ÖBB for a price that was, in its view, *"clearly sufficient"*.[644]

(670) The Commission however notes that the price actually paid by ČD for ÖBB's wagons is not a relevant factor under Article 101 TFEU for determining the existence of the Parties' agreement and/or concerted practice. Decisive for this assessment is rather the Parties' collusive conduct in the sales processes for ÖBB's used wagons during the period of the infringement.

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643 […]
644 […]

6.1.1.4. Arguments raised by ÖBB and the Commission's assessment

(671) […] ÖBB is however of the view that the infringement only began on 7 September 2012, and not at or before the […] meeting of […] 2012. In ÖBB's view, before 7 September 2012, there was only an ÖBB-internal understanding not to sell wagons to RegioJet. ÖBB insists that such understanding had however not been communicated to ČD.

(672) ÖBB's view, […], is however contradicted by the clear statement of ČD in the "*Common Challenges*" document that […] The Commission therefore considers that the understanding not to sell wagons to RegioJet was not unilateral at the time of the […] meeting.

(673) Moreover, ÖBB was aware of RegioJet's need for wagons for offering services that competed with ČD (which is apparent from the ÖBB-internal emails quoted above in recitals (172), (174), (181)). The reaching of an agreement either before the […] meeting on […] 2012 or, in any event, during that meeting is therefore reconcilable with ÖBB's statement as well as with the evidence from the ÖBB-internal emails.

6.1.2. Single and continuous infringement

6.1.2.1. Principles

(674) A complex agreement may properly be viewed as a single and continuous infringement for the time frame in which it existed. The Court points out that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[645] The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 101 TFEU.

(675) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.

(676) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. Internal conflicts and rivalries, or even cheating may even occur, but will not however prevent the arrangement from constituting agreements/concerted practices for the purposes of Article 101 TFEU where there is a single common and continuing objective.

(677) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which

[645] Judgment of the Court of First Instance of 15 March 2000, *Cimenteries CBR and Others v Commission*, T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECLI:EU:T:2000:77, paragraph 3699.

contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk.[646]

(678) In fact, as the Court of Justice stated in its judgment in Case *Commission v Anic Partecipazioni*[647], the agreements and concerted practices referred to in Article 101(1) TFEU necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the Court in the *Cement* cases, that an infringement of Article 101 TFEU may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 TFEU. When the different actions form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[648]

(679) When, as in the present case, the infringement involves an anticompetitive agreement and/or concerted practice, the Commission must, in particular, show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.[649]

6.1.2.2. Application in the present case

(680) In the present case, the Commission finds that the conduct in question constitutes a single and continuous infringement of Article 101(1) TFEU.

(681) For the period from 9 May 2012 to 21 January 2016, the evidence referred to in section 5 above shows the existence of a single and continuous collusion between ÖBB and ČD to prevent, hinder or restrict the access of the common competitor RegioJet to wagons for long-distance rail passenger transport aimed at impeding the market entry or expansion of RegioJet on the markets for rail passenger transport services in Czechia and on the Prague – Vienna route.

An overall plan pursuing a single anti-competitive aim

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646 Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 83.

647 Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 79.

648 Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland et al. v Commission,* joined cases C-204/00 P and others, ECLI:EU:C:2004:6, paragraph 258. See also Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, paragraphs 78 to 81, 83 to 85 and 203.

649 Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni SpA*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 87.

(682) As is apparent from the facts presented in sections 5.3 to 5.12, the Parties expressed their joint intention and adhered to a common plan to collusively rig ÖBB's wagon sales procedures in pursuit of a common objective and a single anti-competitive aim, namely to impede the market entry or expansion of RegioJet on the markets for rail passenger transport services in Czechia and on the Prague – Vienna route.

(683) ÖBB and ČD shared the common understanding that ÖBB's used long-distance passenger transport wagons constitute an important competitive parameter on the long-distance rail passenger transport services markets and that giving their competitor RegioJet access to such wagons supported the competitor and thus posed a threat to their incumbent positions (for example, see above recitals (181), (197), (201), (235), (331), (418), (422), (485), (488), (489), (503), (505), (523), (524), (537), (564), (571), (590)). The Parties tried to push back on the challenge from RegioJet on the long-distance rail passenger transport services markets by (where possible) preventing, hindering or restricting RegioJet's access to ÖBB's used long-distance rail passenger transport wagons (see in particular sections 5.2, 5.4, 5.5, 5.6, 5.7, 5.9, 5.11 and 5.12).

(684) […][650]

(685) The common plan to collusively rig ÖBB's wagon sales procedures, which ČD and ÖBB subscribed to, was developed and implemented over a period of almost four years, through numerous collusive actions, all being part of an overall agreement and/or concerted practice. This agreement and/or concerted practice laid down the Parties' lines of action and restricted their individual commercial conduct regarding the access of the competitor to used wagons for long-distance rail passenger transport.

(686) As the Parties were involved in each of the bilateral contacts during the period of the infringement, the Parties knew that their unlawful conduct not only concerned single sales processes for wagons for long-distance rail passenger transport but that it was part of an overall plan in pursuit of that common unlawful object and anti-competitive economic aim.

A consistent pattern of collusive conduct

(687) The existence of an overall plan pursuing a single anti-competitive aim is supported by the fact that the contacts showed a consistent pattern, that the same services, namely long-distance rail passenger transport services - for which ÖBB's used long-distance passenger transport wagons constitute an important parameter of competition - were concerned and that the participating undertakings were the same and that key individuals, notably at higher hierarchical levels, participated in the anti-competitive arrangements with a high degree of continuity, both personally and in terms of the decision-making positions they occupied. That there were several holders of the office of CEO at ČD throughout the period of the infringement (see below section 8.2.1) did not affect the behaviour of the Parties in the infringement.

(688) Most of the collusive conduct took the form of direct contacts between representatives of ÖBB and ČD through meetings, e-mails or phone calls. The Parties made use of their e-mail contacts and meetings related to the railjet cooperation on the Prague-Vienna-Graz route to also discuss their arrangements to

[650] […]

prevent, hinder or restrict the access of RegioJet to wagons for long-distance rail passenger transport (see above recitals (313), (417), (487) and (527)).

(689) Moreover, the persons involved in the anti-competitive contacts were […] (also see above in section 4.3.3): […], […], […] and […] for ÖBB and […], […], […] and […] for ČD. Each of the Parties involved personnel from […] ([…], […]), from […] ([…], […]) as well from of […] ([…], […], […], […]). This set-up and organisational structure were in place throughout the period of the infringement.

(690) The organisational stability over such a long period of time and the consistent pattern of contacts between an identical set of persons allowed the Parties to develop mutual trust and close cooperation.

Direct participation and intentional contribution

(691) The direct and active participation of both ÖBB and ČD in the face-to-face meetings, e-mails or phone calls that took place during the period of the infringement also shows that both ÖBB and ČD intended to contribute by their own conduct to the common objective of preventing, hindering or restricting the access of the common competitor RegioJet to used wagons for long-distance rail passenger transport (see in particular sections 5.3 to 5.12). It also shows that both Parties were extensively communicating on their respective actions and were aware of each other's conduct in pursuit of that common objective.

6.1.2.3. Arguments raised by ČD and the Commission's assessment

(692) In ČD's view, the conditions for establishing a single and continuous infringement have not been satisfied in the present case.

An overall common anti-competitive plan with identical object

(693) ČD claims that there has not been any anticompetitive overall plan with an identical object which would be common to both ČD and ÖBB. According to ČD, the Commission refers to various objectives of the infringement that cannot be true at the same time. This concerns, for instance, the objectives of hindering or restricting the access of RegioJet to wagons, of avoiding - if possible - that wagons end up at RegioJet, of securing a sale to ČD at conditions acceptable for ÖBB, or of preferably not selling to RegioJet.[651]

(694) The Commission rejects these arguments. As supported by the various pieces of evidence described in this Decision, the Parties' consistent overall objective was to impede or delay the market entry or expansion of RegioJet on the markets for rail passenger transport services in Czechia and on the Prague – Vienna route by rigging ÖBB's wagon sale procedures in order to prevent, hinder, or restrict the access of RegioJet to ÖBB's used wagons for long distance rail passenger transport. This common objective did not change over the period of the infringement. Only the Parties' specific collusive actions and the particular modalities of implementation of this common objective were subject to certain developments over time (for an overview, see the instances of collusive actions listed above in recital (161)).

Contribution by ČD and by ÖBB to the common objective

(695) ČD is of the view that neither ÖBB nor ČD contributed through their conduct to the alleged common objective. ÖBB did not adhere to the alleged objective on several

[651] […]

occasions by selling to RegioJet, which interrupted the alleged single and continuous infringement. And ČD cannot have contributed to the alleged common objective, as it had no comparable wagons for sale.[652]

(696) The Commission points out that the existence of a single and continuous infringement is not put into question by the fact that the arrangement was not always successfully implemented. When an anti-competitive arrangement is not successful in a particular instance, it merely shows that it was not implemented in that instance but not that it did not continue to exist.

(697) In the present case, the continued existence of the Parties' agreement and / or concerted practice even after the […] is apparent from the fact that […] (see for example above recitals (374), (422), (503), (505), (555), (564), (567), (587)). Moreover, […] – "[…] (see above recital (387)). The Parties' overall objective remained identical throughout the period of the infringement, despite the fact that the Parties were not always successful in achieving it.

(698) The Commission further points out that both ÖBB and ČD contributed to the infringement through their individual behaviour. That ČD was not selling used wagons comparable to those of ÖBB does not exclude the existence of a single and continuous infringement.

(699) ÖBB as the seller of wagons made the infringement possible by agreeing with ČD to prevent, hinder or restrict the sales of its used wagons to RegioJet. ÖBB thereby shared ČD's interest in restricting competition from ČD's competitor RegioJet in the Czech domestic market, in addition to ÖBB's own interest in restricting competition from RegioJet on the Prague – Vienna route.

(700) More specifically, ÖBB contributed to the collusion by cancelling and delaying some wagon sales to ensure that those wagons did not end up with RegioJet (see above sections 5.4 and 5.5), […] (see above sections 5.6 and 5.12), by rigging sales of wagons by publicly offering wagons for sale while actually intending to sell them to ČD, and reducing publicity around planned wagon sales in order not to attract bidders other than ČD (see above sections 5.7 and 5.9), and by informing ČD of other bidders' bids and the degree of interest of other bidders (see above recital (418) and recital (530)).

(701) ČD contributed to the collusion by […] (see above sections 5.6 and 5.11 and 5.12), […] (see above section 5.7), […] (see above section 5.12), […] (see above section 5.10).

(702) While the Parties' respective behaviours were not identical in nature, they both contributed to the collusion.

(703) Finally, through the frequent and regular anti-competitive contacts which the Parties have had throughout the infringement, both ÖBB and ČD were "*aware of the offending conduct planned or put into effect*" by the respective other Party "*in pursuit of the same objective*"[653]. This awareness is apparent from the Parties' contemporaneous correspondence […] and that issues should be discussed "*as a secret topic*" (see above recitals (273) and (483)).

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653 See judgment of the Court of Justice of 24 June 2015, *Fresh del Monte Produce vs Commission*, joined cases C-293/13 P and C-294/13, paragraph 157.

6.1.2.4. Interim conclusion

(704) In view of the above, the Commission finds that the collusive conduct of ÖBB and ČD in the period of the infringement to rig sales process for ÖBB's used wagons for long-distance rail passenger transport in order to prevent, hinder or restrict the access of the common competitor RegioJet to used wagons for long-distance rail passenger transport entailed various instances of collusive actions with the single anti-competitive aim of restricting competition for rail passenger transport services in domestic Czechia and on the Prague - Vienna route. The Parties' collusive conduct therefore constitutes a single and continuous infringement prohibited by Article 101(1) TFEU.

6.1.3. Restriction of competition

6.1.3.1. General principles

(705) Article 101(1) TFEU prohibits agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition.

(706) In that regard, according to settled case law certain types of coordination between undertakings reveal a sufficient degree of harm to competition for the examination of their effects to be considered unnecessary.[654]

(707) That case law arises from the fact that some forms of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[655] These types of coordination are commonly labelled as restrictions "by object".

(708) The Court has also held that *"the fact that the Commission has not in the past considered that a certain type of agreement was a restriction by object does not prevent it from doing so in the future following an individual and detailed examination".*[656]

(709) It is settled case law that for the purpose of application of Article 101(1) TFEU there is no need to take into account the effects of an agreement or concerted practice when it has as its object the prevention, restriction or distortion of competition within the internal market.[657] Consequently, it is not necessary to show anti-competitive

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654 See Judgment of the Court of Justice of 30 June 1966, *Société Technique Minière*, 56/65, ECLI:EU:C:1966:38; Judgment of the Court of First Instance of 6 July 2000, *Volkswagen v Commission*, T-62/98, ECLI:EU:T:2000:180, paragraph 178; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraph 34; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 115, and the case-law cited; Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 434.

655 See Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 114, and the case-law cited; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraph 35.

656 Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 438.

657 Judgment of the Court of Justice of 20 January 2016, *Toshiba Corporation v Commission,* C-373/14 P, ECLI:EU:C:2016:26, paragraph 25; Judgment of the Court of Justice of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt., ING Bank NV Magyarországi Fióktelepe, OTP Bank Nyrt., Kereskedelmi és Hitelbank Zrt., Magyar Külkereskedelmi Bank Zrt., ERSTE Bank Hungary Zrt., Visa Europe Ltd, MasterCard Europe SA,* C-228/18, ECLI:EU:C:2020:265, paragraph 34; Judgment of the

effects, when the anti-competitive object of the conduct in question is already proven.[658]

(710) In order to establish the anticompetitive nature of an agreement or concerted practice and assess whether it reveals a sufficient degree of harm to competition that it may be considered a restriction of competition by object within the meaning of Article 101(1) TFEU, regard must be taken to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[659] Intention is not a necessary factor, but it may be taken into account as well.[660]

(711) Article 101(1) TFEU, similarly to the other competition rules of the TFEU, is designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus the competition as such.[661] Therefore, agreements or concerted practices may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. It is not possible based on the wording of Article 101(1) TFEU to conclude that only coordination which has a direct effect on the prices paid by end users is prohibited.[662]

6.1.3.2. Restriction of competition: Application to this case

(712) From the content, the objectives as well as from the legal and economic context, the Commission concludes that the Parties' agreement and/or concerted practice at hand had as its object the restriction of competition pursuant to Article 101(1) TFEU.

(713) This agreement and/or concerted practice to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons was the product of the concurrence of wills between ÖBB and ČD to restrict competition from RegioJet (see above section 6.1.1.2). The Parties' ultimate objective was to impede the market entry or expansion of their common competitor RegioJet on the long-distance rail passenger transport markets in

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Court of Justice of 30 January 2020, *Generics (UK) and others v Competition and Markets Authority,* C-307/18, ECLI:EU:C:2020:52, paragraph 64.

658 Judgment of the Court of First Instance of 6 July 2000, *Volkswagen AG v Commission,* T-62/98, ECLI:EU:T:2000:180, paragraph 178.

659 See judgment of the Court of Justice of 26 September 2018, *Infineon Technologies AG v Commission*, C-99/17 P, ECLI:EU:C:2018:773, paragraph 156; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 117; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13, ECLI:EU:C:2014:2204, paragraph 53; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraphs 36 to 37; Judgment of the Court of Justice of 16 July 2015, *ING Pensii,* C-172/14, ECLI:EU:C:2015:484, paragraphs 33 to 44.

660 See Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 118; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13, ECLI:EU:C:2014:2204, paragraph 54.

661 See Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and others,* C-8/08, ECLI:EU:C:2009:343, paragraph 38.

662 Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and others,* C-8/08, ECLI:EU:C:2009:343, paragraphs 36 to 39; Judgment of the Court of Justice of 19 March 2015, *Dole Food v Commission,* C-286/13 P, ECLI:EU:C:2015:184, paragraphs 123 to 125.

Czechia and on the Prague-Vienna route and to protect their position of rail incumbents on these markets.

(714) The Parties' objective was to be achieved by a series of collusive actions seeking to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons, an important input for the provision of long-distance rail passenger transport. By restricting RegioJet's access to this input, the Parties aimed at impeding the market entry or expansion of RegioJet. Thus, ultimately, the agreement and/or concerted practice had as its object the restriction of competition on the long-distance rail passenger transport markets in Czechia and on the Prague-Vienna route.

6.1.3.2.1. Content of the agreement and/or concerted practice

(715) The Commission finds that the content of the Parties' agreement and/or concerted practice was to prevent, hinder or restrict the access of RegioJet to used railway wagons for long-distance passenger transport. This content of the anti-competitive agreement and/or concerted practice is apparent from various contemporaneous documents in the Commission's file as well as from statements of the leniency applicant ÖBB.

The leniency statements of ÖBB

(716) […][663] […][664].

(717) […][665]

The contemporaneous documents

(718) The leniency statements by ÖBB are corroborated by the whole body of contemporaneous evidence stemming from the multiple meetings and contacts between ÖBB and ČD presented in the factual part of this Decision. These contemporaneous documents demonstrate that the content of the Parties' agreement and/or concerted practice was to prevent, hinder or restrict the access of RegioJet to ÖBB's used railway wagons for long-distance passenger transport by collusively rigging wagon sales to the detriment of RegioJet.

(719) The Parties' agreement and/or concerted practice is apparent throughout the whole period of the infringement and across the various sales of ÖBB's used wagons and manifested itself in a multitude of collusive actions related to these sales:

(a) In […] 2012, the *"Common Challenges"* […] (see above section 5.3, […].

(b) In September 2012, ÖBB cancelled an envisaged sale of used wagons for long-distance passenger transport in order to avoid triggering a previously agreed right of first refusal of RegioJet, expiring on 14 January 2013. By this action, ÖBB wanted to avoid the sale of the wagons to the common competitor RegioJet. At the same time, in line with the agreement and/or concerted practice, […], namely to sidestep RegioJet's right of first refusal (see section 5.4).

(c) In […] 2012 and […] 2013, the Parties actively coordinated their actions and collusively delayed another sales process with the only purpose of awaiting the

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expiry of RegioJet's right of first refusal and thereby to avoid triggering this right (see section 5.5).

(d) An internal communication of ÖBB from March 2013 proves that ÖBB acted in line with the agreement and/or concerted practice, explicitly noting that any rolling stock that ÖBB may be able to sell must be first offered to ČD and that it may be only offered to other parties if ČD was not interested in its acquisition (see above recital (278)).

(e) In […] 2013 and […] 2014, […] (see recital (374)). Moreover, […], see above recital (324). Previously, ÖBB had sold 45 wagons to RegioJet's intermediary TCA because in this sales process […] (see above section 5.6), so that ÖBB was forced to sell the wagons to TCA. In relation to this sale, ÖBB's employee […] expressed "*hope*" that the wagons sold to TCA would not be ultimately acquired by RegioJet (see above recital (331)). Later contemporaneous documents show that the Parties […] (see above recital (422)).

(f) In both the […] meetings between […] of ÖBB and […] of ČD in […] 2014 (see section 5.8) and in […] 2014 (see recitals (419) -(422)) as well as in the […] meeting between […] of ÖBB and […] of ČD in September 2015 (see section 5.13) one of the topics was […]. However, the contemporaneous documents suggest that a […], recital (387), […], recital (422)).

(g) Moreover, […] (see recital (553) and (555) and also (419), (422), (429), (533), (564), (567), (587)).

(h) In […] 2014, ČD and ÖBB entered into negotiations regarding another sale of ÖBB's wagons for long-distance passenger transport, at this occasion proceeding […] (see above section 5.7). As follows from the internal documents, […] (see recital (372)). Consequently, ČD, acknowledging to be party […] (see above recital (368)). Internal documents further show that ÖBB wanted to avoid offers from other interested bidders (see recital (378)). The purchase by ČD was concluded in […] 2015.

(i) A similar scenario repeated itself in the […] of 2014 in respect of yet another sale of ÖBB's wagons for long-distance passenger transport ([…] wagons and […] wagons, see above section 5.9). Also regarding this sale, ČD and ÖBB […] (see recital (398)). Thus, ÖBB made clear internally that "*the wagons are reserved for ČD … under all circumstances*" (see recital (408)). ÖBB entered in discussions with other interested parties only to determine the market value, without any intention to sell the wagons to a different party than ČD (see recital (411)). Therefore, also in this sales process case ČD and ÖBB colluded so that RegioJet would not acquire these wagons.

(j) In this context (see above section 5.9.3), in […] 2014 […] (see recital (422)). Consequently, in line with the agreement and/or concerted practice, ÖBB communicated to ČD the "*right price*" ČD had to "[…]" (see recitals (430), (431) and (433)).

(k) In various other instances, […] (see for example above sections 5.11, 5.12 and 5.13, […] (see recital (553), (555) and (556) and also (419), (421), (422), (429), (533), (564), (567), (587)).

(l) Another collusive action demonstrating the anticompetitive content of the agreement and/or concerted practice at hand took place in 2015 in respect of another sale of ÖBB's rolling stock (14 couchette wagons). ČD was […]

arranged at ÖBB, in fulfilment of the agreement and/or concerted practice (see above section 5.11). […] that the 14 wagons in question […], which was accepted by ÖBB (see recitals (483) to (492)). […] is consistent with the Parties' collusive understanding that was in place long before already. However, despite these joint efforts, the wagons were sold to […], which ultimately led to their acquisition by RegioJet, […] (see section 5.14).

(m) Reciprocally, in […] 2015, […] (see above section 5.10), […] (see recital (454)). […] (see recital (455)). […] (see recitals (461) and (462)). […][666] […] (see above section 5.14.2). The Commission finds that although this action to the […], it illustrates the content of the Parties' […]. Hence, this action is also useful to illustrate the overall spirit of the agreement and/or concerted practice between the Parties.

(720) The content of the agreement and/or concerted practice is also apparent from the fact that […] (see for example recitals (374), (422), (503), (505), (555), (564), (567), (587). The mere fact that […] demonstrates that the content of the Parties' agreement and/or concerted practice was to prevent, hinder or restrict the access of RegioJet to used railway wagons for long-distance passenger transport.

(721) Finally, the content of the Parties' agreement and/or concerted practice is also apparent from […]'s ČD-internal email of […] 2016 […] (see above recital (567)).

6.1.3.2.2. Objectives of the agreement and/or concerted practice

(722) The overall objective of the Parties' continuous series of collusive actions to rig sales processes for ÖBB's used long-distance passenger transport wagons and therefore of their agreement and/or concerted practice was to protect their position of rail incumbents on the long-distance rail passenger transport markets in Czechia and on the Prague-Vienna route and to impede the market entry or expansion of the common competitor RegioJet.

<u>The leniency statements of ÖBB</u>

(723) […][667]

(724) […][668]

(725) […][669]

<u>The contemporaneous documents</u>

(726) The objective of the agreement and/or concerted practice is also apparent from various contemporaneous documents in the Commission's file.

(727) Both incumbents ÖBB and ČD perceived the process of rail liberalisation and the market entry and expansion of the new entrant RegioJet in domestic Czechia and on the Prague – Vienna route as a direct threat for their market shares and revenues. As demonstrated above in the factual part of this Decision and especially in recitals (181), (197), (235), (418), (422), (489), (505), (523), (524), (537), (564), (590), the Parties regularly expressed that a purchase of ÖBB's wagons by RegioJet would promote RegioJet's expansion and thereby posed a threat to ÖBB and ČD. Therefore,

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the objective of the Parties' agreement and/or concerted practice was to mitigate these risks by reducing the ability of RegioJet to exercise competitive pressure on the incumbents. Some examples of contemporaneous evidence underlining the objective of the Parties' agreement and/or concerted practice are quoted below:

(728) An ÖBB-internal presentation of 28 February 2011 (see above recital (181)) stated:

RegioJet = competitor of ČD on the Czech domestic market
- Purchase of 5 ÖBB wagons
- Interest in further ÖBB wagons
- Plans to deploy the purchased wagons on the Prague – Ostrava route (Praha – Brno is not excluded in the long-term)
- Potential long-term competitor of ÖBB?

(729) ČD believed that rail incumbents, facing a "[…]" (see recital (197)).

(730) ÖBB stated in an internal e-mail of 25 May 2012 (see above recital (235)) "*it would not be good to sell the wagons to RegioJet for the following reasons: [….] it is not excluded that RegioJet deploys these wagons between Prague and Brno and thereby competes with the planned Railjet services Graz – Prague"* and in a further ÖBB-internal e-mail of 11 February 2015 (see above recital (489)):

"*You would help ČD and therefore us a lot if you do not sell wagons to RegioJet, they have asked me for this again yesterday. RegioJet is not only a really strong competitor to ČD, but also pushes again and again into the direction of Austria and needs and searches wagon material for this.* […] *This maybe as motivation for you, we don't want to get additional competitors for us on the rail route to Prague.*"

(731) In respect of potential sales of used railway wagons for long-distance passenger transport to RegioJet, ÖBB also considered on 23 February 2016 that "*this may also lead to loss of revenues* […] *if the competitor is able to take away passengers from ČD to RegioJet, which then in Austria uses the student agency* [RegioJet's bus subsidiary] *network and take the bus to Vienna instead of the train*" (see recital (590)).

(732) The Commission finds that the statements from ÖBB's internal contemporaneous documents of February 2015 and February 2016 cited in recitals (728), (730) and (731) also demonstrate ÖBB's long-term interest in restricting competition from RegioJet in general. These documents illustrate that the objective of the Parties' agreement and/or concerted practice was not limited to - as ÖBB claims, see recital (724) - impeding the market entry of RegioJet on the Prague – Vienna route): the objective was to impede the growth of the new entrant RegioJet in general, because in the long run RegioJet could become a threat for ÖBB also in Austria.

(733) ČD's interest to enter into the agreement and/or concerted practice is directly apparent from the fact that the incumbent ČD feared the further expansion of its direct competitor RegioJet in the Czech domestic market as well as market entry of RegioJet on the Prague – Vienna route.

(734) Accordingly, the risk that RegioJet would acquire used wagons for long-distance passenger transport appears on several occasions in ČD's internal communication. It follows from this internal communication that at least in respect of the sales of ÖBB's wagons in 2012 (see above section 5.4) and 2014 (see above section 5.7),

ČD's intention to buy the wagons was, at least partly, motivated by its will to ensure that RegioJet would not acquire them (e.g. "[…]", see recital (236)).

(735) Also in those cases in which ÖBB sold wagons to RegioJet or its intermediaries, ČD repeatedly manifested its disappointment about this support for RegioJet and complained about ÖBB not respecting the agreement and/or concerted practice (see for example recitals (374), (422), (503), (505), (555), (564), (567), (587)).

(736) It follows also from ČD's internal documents that the main reason for the agreement and/or concerted practice to restrict RegioJet's access to used railway wagons for long-distance passenger transport was for ČD and ÖBB to eliminate or reduce the danger of RegioJet's further expansion in Czechia as well as other international routes. In this respect, one of the ČD-internal documents of […] 2014 reporting about the outcome of a meeting with ÖBB notes: "[…]" (see recital (418)).

(737) In the same spirit, in […] 2015, […], a ČD […] sent an e-mail to ÖBB's […] stating "[…]" (see above recital (537)).

(738) Likewise, following a corresponding request from ČD, […] wrote in an ÖBB-internal e-mail *"please absolutely DO NOT sell to RegioJet ... they are competitors of our partner ČD in Czechia*" (see above recital (485)).

(739) In the same vein, ČD wrote to ÖBB on 30 […] 2014 (see above recital (422): *"*[…]*"*

(740) Thus, the Commission finds that the overall objective of the Parties' continuous series of collusive actions to rig sales processes for ÖBB's used long-distance passenger transport wagons and therefore of their agreement and/or concerted practice was to protect their position of rail incumbents on the long-distance rail passenger transport markets in Czechia and on the Prague-Vienna route (together "the markets relevant for the present proceedings") and to impede the market entry or expansion of the common competitor RegioJet. That objective was clearly anticompetitive.

6.1.3.2.3. Economic and legal context

(741) When determining the economic and legal context it is necessary to take into consideration the nature of the goods or services affected and the real conditions of the functioning and structure of the market(s) in question.

(742) During the period of the infringement, rail passenger transport in Austria and Czechia was legally liberalised (in detail see above section 2.2). In this period, in essence,

(a) open access competition in Austria could take place on all routes and was taking place on the Vienna-Salzburg route;

(b) open access competition could take place in Czechia on all routes and was taking place on various routes;

(c) international rail passenger transport services were fully liberalised.

(743) Despite this liberalisation, the rail passenger market is characterised by high barriers of entry.[670] This is mainly due to the necessary high investment costs for acquiring rolling stock and for complying with technical and regulatory requirements. Amongst

[670] See e.g. Independent Regulators' Group – Rail, Eighth Annual Market Monitoring Working Document, March 2020, section 8, […].

the most crucial needs for new market entrants is therefore the need for suitable rolling stock at an acceptable price.

(744) Rolling stock is subject to different national certification and approval procedures (in detail see above section 2.1.1.). Suitable rolling stock in this case relates to railway passenger wagons suitable for long-distance passenger transport and authorised for circulation on the Austrian and Czech railway networks.

(745) New market entrants face high upfront investments and difficulties in acquiring suitable rolling stock, while future margins are low and the market environment is uncertain.[671] Since rolling stock has a relatively long life-span of 30 to 40 years, new undertakings often purchase used rolling stock. That applies also at the time of the events laid out in this Decision.[672]

(746) RegioJet in the beginning of its operations exclusively owned used wagons and still does today to a predominant degree[673] (see above recital (142)). Due to the different national regulatory requirements and certification and approval procedures, the most suitable wagons would be those sold by companies providing long-distance rail passenger services in Austria and Czechia, in essence the incumbents ÖBB and ČD. Consequently, RegioJet relied on used ÖBB wagons for the majority of its wagon fleet[674] (see above recital (143).

(747) Also in ČD's view, used wagons for long-distance passenger transport of ÖBB are in demand.[675] They are of a good quality (for example, they are equipped with air-conditioning and vacuum toilets)[676] and – according to ČD – are "[…]".[677]

(748) The Commission therefore finds that used long-distance passenger wagons of ÖBB represented an important input for RegioJet.

(749) The Parties were also aware that by controlling whom to provide with used ÖBB wagons for long-distance rail passenger transport they were influencing the access to the long-distance rail passenger market in the markets relevant for the present proceedings. […][678]

(750) […][679]

(751) Various contemporaneous documents in the file corroborate that the Parties were aware of the number of wagons the competitor RegioJet needed to offer certain services and that the access to ÖBB's used wagons was crucial for RegioJet to operate and expand its offer.

(752) For example, ÖBB on 25 May 2012 conducted a detailed analysis of the number of wagons RegioJet would need for its envisaged joint operation with […] on the Hamburg – Prague route (see above recital (235)).

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671 See e.g. submission of the EU of 3 June 2013 to the OECD Competition Committee discussion "Recent Developments in Rail Transportation Services", p. 77.

672 See in this regard […]

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(753) Also, ÖBB knew in March 2011 that RegioJet needed 30 wagons to have enough trainsets to offer a certain service (see above recitals (181) and (182)).

(754) One of ČD's internal documents of September 2014 notes that "[…] (see recital (422)).

(755) Furthermore, […] of TCA, when enquiring about the possibility to purchase more wagons, told ÖBB that RegioJet urgently needs rolling stock for the "*further development of transport operations*".[680] By the same logic, […] (see above recitals (418) and (422)). […]

(756) The Parties' awareness of the importance of access to used wagons for long-distance rail passenger transport in order to compete and expand is further corroborated by ČD's statement in the *"Common Challenges*" document that […] (see above recital (200)).

(757) On ÖBB's side, internal documents confirm that ÖBB shared the opinion that access to ÖBB's used wagons is important to compete and expand on the rail transport markets, noting that RegioJet *"is not only a really strong competitor to ČD, but also pushes again and again into the direction of Austria and needs and searches wagon material for this"* (see recital (489)). In the context of internal discussions about potential sales of ÖBB's used wagons to RegioJet, ÖBB's internal documents further note that *"you would help ČD and therefore us a lot if you do not sell wagons to RegioJet […] we* [ÖBB] *don't want to get additional competitors […] on the rail route to Prague"* (see recital (489)).

(758) It follows from the foregoing that the parties were aware that used long-distance passenger wagons of ÖBB represented an important input for RegioJet for entering and expanding on the long-distance rail passenger transport markets in Czechia and on the international Prague – Vienna route. Therefore, the Parties' collusive rigging of ÖBB's wagon sales ultimately aimed at reducing or eliminating any risk of RegioJet threatening their incumbent positions on the relevant long-distance rail passenger transport markets, namely to protect ČD's market position in Czechia and to protect ČD's and ÖBB's market position on the Prague – Vienna route.

(759) In the Commission's view, by preventing, hindering or restricting RegioJet from acquiring ÖBB's used wagons for long-distance rail passenger transport, the Parties did not just deny support to a competitor in a generic way, but effectively restricted access to an important competitive input for the competitor's market entry or expansion on the relevant long-distance rail passenger transport markets. In view of its content, objectives and economic and legal context, their agreement and/or concerted practice therefore had as its object the restriction of competition.

6.1.3.2.4. Implementation

(760) Even though the Commission is not obliged to demonstrate implementation to find an infringement of Article 101(1) TFEU, the Commission considers that, on the basis of the elements put forward in this Decision, it has also been demonstrated that the agreement and/or concerted practice has been implemented by the Parties. This is notably so as concerns the instances of collusive actions during the period of the infringement and listed above in recital (161)). The fact that on two occasions -

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The German original reads as follows: *„RegioJet benötigt die Wagen dringend für den weiteren Aufbau der Verkehre."*

despite of the Parties' efforts - the wagons ended up at RegioJet (see above section 5.6 and section 5.11) does not put into question that the Parties generally implemented their agreement and / or concreted practice by taking collusive actions throughout the whole period of the infringement.

(761) […][681] […][682] […]

6.1.3.2.5. Arguments raised by ČD and assessment by the Commission

(762) ČD is of the view that the Parties' conduct in question does not represent a restriction of competition by-object and had no anti-competitive effects.

(763) Insofar as ČD argues that the vertical nature of the conduct excludes its qualification as by-object restriction[683] the Commission refers to section 6.2.1 below where it is demonstrated that the Parties' agreement and/or concerted practice is of horizontal nature.

<u>*The Parties' conduct and objectives*</u>

(764) With respect to the content of the Parties' agreement and / concerted practice and its objectives, ČD claims that the Commission wrongly interprets the facts.[684] More specifically, ČD puts forward that there were no anticompetitive arrangements between ČD and ÖBB[685], that alleged instances or efforts of collusive actions are misinterpreted by the Commission[686], […][687].

(765) In this regard, the Commission points out that its findings in this Decision as to the content of the Parties' agreement and / or concerted practice and its anti-competitive objectives is based on various contemporaneous documents stemming from both Parties and spanning the entire period of the infringement (see above section 5.3 to section 5.14, section 6.1.3.2.1 and section 6.1.3.2.2). This unequivocal and often explicit contemporaneous evidence, […], only allows the following conclusions:

(766) First, the content of the Parties' agreement and / or concerted practice was to prevent, hinder or restrict the access of RegioJet to used railway wagons for long-distance passenger transport.

(767) Second, the content of the Parties' agreement and / or concerted practice was not, as ČD tries to portray it, that ÖBB should sell its wagons predominantly or exclusively to ČD or that ČD should be timely informed about upcoming sales of ÖBB's wagons. Rather, the content was that RegioJet should not get ÖBB's wagons. This content is not only apparent from the Parties' contemporaneous email correspondence but is especially apparent when […].

(768) Third, the Parties' agreement and/or concerted practice had an anti-competitive objective, as it aimed at restricting competition on the long-distance rail passenger transport markets in Czechia and on the Prague-Vienna route.

(769) As concerns the finding of the anti-competitive objective of the Parties' agreement and/or concerted practice, the Commission further remarks that it follows from the

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whole body of evidence that the Parties' intention was to restrict the competition coming from RegioJet and to impede RegioJet's market entry and expansion. While the intention of the Parties is not an essential factor in determining whether an agreement and/or concerted practice is restrictive for competition, there is nothing to prevent the Commission from taking it into account.[688]

Assessment of the legal and economic context

(770) In ČD's view, the Commission failed to correctly assess the legal and economic context of the alleged conduct to the extent necessary for qualifying the conduct as a by-object restriction. Especially, ČD argues that the Commission failed to take into account the actual situation on the long-distance transport markets in Czechia and Austria and has only conducted a formal assessment that would be inadequate and incorrect.[689]

(771) The Commission disagrees and refers to the findings of the Court of Justice in the *EDP* case. In that case, the Court of Justice has recalled that both market sharing agreements and *"market exclusion agreements"* can fall within the category of restrictions by object, since they have in themselves an object restrictive of competition. For such agreements, the analysis of the economic and legal context may be limited to what it is strictly necessary to establish a restriction by object. The Court then highlighted that such anticompetitive object may be borne out by the fact that it occurred in the particular context of market liberalisation.[690]

(772) In the present case, the Parties' agreement and / or concerted practice to collusively rig wagon sales to the detriment of RegioJet aimed at impeding the market entry or expansion of RegioJet on the markets for rail passenger transport services in Czechia and on the Prague -Vienna route and can therefore be qualified as an agreement aimed at excluding a competitor in the sense of the aforementioned case law. Moreover, the Parties' collusion took place in a phase of market liberalisation, with RegioJet just having begun to offer its services and subsequently expanding them.

(773) Finally, the Commission points out that, while it is indeed required to take into account the legal and economic context (which has been done in section 6.1.3.2.3 above), the case law states that that analysis should not amount to a *de facto* effects analysis: "*In the economic and legal context of which the conduct in question forms a part …. it is not, however, necessary to examine nor, a fortiori, to prove the effects of that conduct on competition"*[691].

(774) ČD tries to give the impression[692] that assessing the legal and economic context (as a requirement for a "by object"-categorisation) equals showing potential or even actual effects. However, this is not supported by the case law quoted by ČD itself, which merely says that "*it is necessary to take into consideration the nature of the goods or*

[688] Judgment of the Court of Justice of 19 March 2015, *Dole Food*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 118; judgment of the Court of Justice of 11 September 2014, *Cartes Bancaires*, C-67/13 P, ECLI:EU:C:2014:2204,paragraph 54; Judgment of the Court of Justice of 4 June 2009, *T-Mobile,* C-8/08, ECLI:EU:C:2009:343 paragraph 27; Judgment of the Court of Justice of 6 October 2009, *GSK*, C-501/06 P, ECLI:EU:C:2009:610, paragraph 58.

[689] […]

[690] Judgment of the Court of Justice of 26 October 2023, *EDP vs Autoridade da Concorrencia*, Case C-331/21, ECLI:EU:C:2023:812, paragraphs 100 – 102.

[691] Judgment of the Court of 21 December 2023 in Case C-124/21 P, *International Skating Union v Commission*, ECLI:EU:C:2023:1012, paragraph 106.

[692] See especially […]

services affected, as well as the real conditions of the functioning and structure of the market or markets in question".[693] The exact scope of such analysis varies from case to case but should not amount to an effects analysis: *"The economic and legal context is there to assist the authority responsible for examining the alleged restriction by object to understand the economic function and the real significance of the agreement."*[694]

(775) Taking into account the economic and legal context therefore means that the agreement and/or concerted practice at issue must simply be capable, in the individual case at hand, of resulting in the prevention, restriction or distortion of competition within the common market.[695]

(776) In this respect, the present Decision clearly reaches the required legal threshold by showing that the Parties' conduct actually reduced (although not completely eliminated) RegioJet's access to ÖBB's used wagons for long-distance rail passenger transport (see above section 5), which, taking account of the legal and economic context (see above section 6.1.3.2.3), was indeed capable of at the very least slowing RegioJet's expansion and growth in terms of capacity or routes, and thus also capable of preventing, restricting or distorting competition.

(777) At the same time, the Parties were well aware of the importance of ÖBB's wagons for RegioJet (see above recitals (749) - (757)) and clearly engaged in the conduct with the objective of slowing RegioJet's expansion and protecting their own incumbent positions on the Prague – Vienna route and in domestic Czechia.

(778) The fact that RegioJet was still able to purchase some wagons from ÖBB (see above section 5.6 and section 5.11) or elsewhere (see above recitals (235) and (331)) only shows that its access to wagons was not "eliminated", but only "reduced".

(779) In this respect, the Commission points out that it is not necessary to show the elimination of all alternative purchase-options in order to be able to conclude that the Parties' conduct had the object of restricting competition. Indeed, this reduction as described above was already by its very nature capable of distorting competition on the market for long-distance rail passenger transport services in domestic Czechia and on the Prague – Vienna route. It is not necessary to show effects of the behaviour on the market, as by-object agreements and/or concerted practices do not require proof of an appreciable effect on competition.[696]

Effects analysis and definition of the relevant markets

(780) ČD puts forward that the Commission's qualification of the Parties' conduct as a by-object restriction of competition is wrong and that the Commission should have analysed the effects of the alleged conduct in detail. It should have concentrated on the effects that have already occurred (actual effects) because the arrangements have been allegedly implemented.[697] In ČD's view, its conduct had no anti-competitive

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693 Judgment of the Court of Justice of 30 January 2020, C-307/18, *Generics*, paragraph 68 and the case-law cited.

694 Opinion of AG Wathelet in case C-373/14 P, *Toshiba*, paragraphs 60 and 67.

695 Opinion of AG Kokott in case C-8/08, *T-Mobile Netherlands*, paragraph 46.

696 Judgment of the Court of Justice of 6 October 2009, *GSK*, C-501/06 P, ECLI:EU:C:2009:610, paragraphs 62 to 64; Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands*, C-8/08, ECLI:EU:C:2009:343, paragraph 39.

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effects and was also not capable of having such effects.[698] Moreover, in relation to its claim that the Parties' conduct cannot be classified as a restriction of competition by object but that an effects – analysis would required, ČD further submits that it is necessary to define the relevant markets affected by the conduct. However, in ČD's view, the Commission failed to do so.[699]

(781) The Commission reiterates that showing the effects is not required in a by-object case (see above recital (773)). In the recent *Valve* judgment, the Court held *"that undertakings which conclude an agreement whose object is to restrict competition cannot, in principle, escape the application of Article 101(1) TFEU by claiming that their agreement should not have an appreciable effect on competition. Article 101(1) TFEU draws a clear distinction between the concept of 'restriction by object' and that of 'restriction by effect', each being subject to different rules of evidence. As regards the practices categorised as 'restrictions by object', there is no need to investigate nor, a fortiori, to demonstrate their effects on competition in order to categorise them as a 'restriction of competition' within the meaning of Article 101(1) TFEU."*[700]

(782) Moreover, the Commission stresses that it is not required to show that the agreement and/or concerted practice was implemented.[701] Similarly, contrary to what ČD claims[702], a detailed market definition is not needed in by-object cases and cartels (see above recital (17). In any event, the Commission has carried out in this Decision a comprehensive analysis of all relevant factors, namely the nature of the products or services concerned, as well as the real conditions of the structure and functioning of the sector in question.

<u>*The Parties' railjet cooperation and the by-object restriction*</u>

(783) ČD further argues that *"even the SO implicitly agrees that the alleged conduct was made in the context of the cooperation of ČD and ÖBB on international lines, especially of the Railjet project"*. According to ČD, *"the impact of this cooperation also precludes the alleged conduct from being a by-object restriction of competition, as well as from having any anti-competitive effects"*.[703] ČD further claims that with a *"correct analysis .... of the legal and economic context .... it would not be possible to conclude that the alleged conduct was a by-object restriction of competition"*.[704]

(784) The Commission disagrees with this.

(785) First, the Commission recalls that for determining the legal and economic context of the Parties' conduct it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of

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700 Judgment of the General Court of 27 September 2023, *Valve Corporation*, Case T-172/21, ECLI:EU:T:2023:587, paragraph 223.

701 Commission Decision of 16 July 2008, COMP/38698*, CISAC*, paragraph 130, upheld by the judgment of the General Court of 12 April 2013, *CISAC*, T-442/08, ECLI:EU:T:2013:188, on this ground. Judgment of the General Court of 12 December 2014, *Eni*,T-558/08, ECLI:EU:T:2014:1080, paragraphs 132 and 133; Commission Decision of 29 September 2004 in case COMP/37750, *French Beer*, paragraph 64.

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the markets in question.[705] However, the Parties' conduct did not affect the rail transport services provided by the Parties in their railjet cooperation. Rather, the Parties' conduct affected RegioJet's ability to provide rail passenger transport services in Czechia and on the Prague – Vienna route, and therefore distorted the real conditions of the functioning and structure of the sector in question.

(786) Second, it should be underlined, that, contrary to what ČD alleges[706], the SO and the present Decision (see recitals (163), (164), (688)) merely state that the Parties used the existing personal relationships, trust, communication channels and meetings from the railjet cooperation to also discuss their actions to prevent, hinder or restrict the access of RegioJet to used ÖBB wagons. This therefore only shows that the Parties (ab-)used the framework of the railjet cooperation for their collusion. However, that the Parties' collusive conduct and communications took place in the framework of the railjet cooperation does in no way change the illegality of the Parties' conduct and communications.

(787) Third, that the railjet cooperation is not necessary for determining the economic context of the Parties' conduct is also demonstrated by the fact that the Parties' collusive rigging of wagons sales related to used long-distance passenger transport wagons, while the Parties had […][707][…] (see above section 4.2).

(788) Finally, as laid out further below in section 6.1.3.4, the Parties' agreement and / or concerted practice can also not have been an admissible ancillary restraint to the railjet cooperation.

RegioJet's access to wagons

(789) ČD argues that, had an effects-analysis been conducted, it would have revealed that the Parties' conduct did not have anti-competitive effects. According to ČD, the Commission disregards that RegioJet had other options than ÖBB to purchase used wagons. ČD further argues that RegioJet's access to suitable wagons was not reduced, and RegioJet was not limited in its wagon purchases by the alleged conduct and bought as many wagons from ÖBB and other sources as it had intended to.[708]

(790) First, the Commission points out that even […][709] […][710].

(791) Second, the Commission notes that the evidence presented in this Decision also disproves ČD's stance that RegioJet bought as many ÖBB wagons as it wanted: out of the five sales processes that took place during the period of the infringement, the Parties succeeded in avoiding a sale to RegioJet in three instances (see above sections 5.4, 5.5, 5.7, 5.9) corresponding to 85 wagons.

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705 See judgment of the Court of Justice of 26 September 2018, *Infineon Technologies AG v Commission*, C-99/17 P, ECLI:EU:C:2018:773, paragraph 156; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 117; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13, ECLI:EU:C:2014:2204, paragraph 53; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraphs 36 to 37; Judgment of the Court of Justice of 16 July 2015, *ING Pensii,* C-172/14, ECLI:EU:C:2015:484, paragraphs 33 to 44.

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(792) The Commission further underlines that the fact that the Parties were in some instances unsuccessful in blocking RegioJet's access to wagons does by no means put into question the finding of an infringement by-object.[711] That the Parties not always succeeded in restricting RegioJet's access to used ÖBB wagons does not take away the anti-competitive objective of their collusion.

(793) Third, to the extent that ČD argues that there may have been alternative possibilities for RegioJet to acquire used wagons and therefore its access to suitable wagons was not fully eliminated, the present Decision nevertheless shows that in any case RegioJet's access to wagons was reduced. Reducing the number of potential sellers of wagons that could sell wagons to RegioJet is, as such, capable of impeding RegioJet's expansion, as a lower number of sellers is likely to cause less supply and/or higher prices for wagons.

The impact of the conduct on RegioJet's ability to expand

(794) According to ČD, RegioJet was expanding according to its plan and would not have been able to expand more with additional wagons. RegioJet had a continuously growing number of customers, achieved excellent occupancy rates, expanded on a new route and announced further expansion plans.[712]

(795) The Commission underlines that ČD's argumentation again amounts to an effects analysis and/or the counterfactual. However, showing the effects and/or the counterfactual is not required in a by-object case.[713]

(796) In any case, RegioJet has underlined that the collusive arrangement of ČD and ÖBB significantly restricted its expansion on the market of rail passenger transport services and thus caused it significant damage. RegioJet considers that, if it had had a fair opportunity to acquire the respective second-hand rolling stock, it would have been able to enter the market on a significantly larger scale (e.g. operate longer train sets or much more lines) and generate better economic results. RegioJet adds that the limitation of its growth during the period under review was mainly due to the unavailability of cheap and good quality rolling stock from European state-owned carriers (mainly from ÖBB).[714]

(797) RegioJet's statement is confirmed by the contemporaneous evidence in the file showing that the Parties knew that by preventing, hindering or restricting RegioJet's

711 Judgment of the Court of Justice of 13 July 1966, *Consten and Grundig,* C-56/64 and C-58/64, , ECLI:EU:C:1966:41, page 342; Judgment of the Court of Justice of 26 November 2015, *Maxima Latvija,* C-345/14, ECLI:EU:C:2015:784, paragraph 20; Judgment of the General Court of 8 September 2016, *Lundbeck*,T-472/13, ECLI:EU:T:2016:449, paragraph 342; Judgment of the Court of Justice of 23 January 2018, *Hoffmann-La Roche and Others,* C-179/16, ECLI:EU:C:2018:25, paragraphs 78 and 79; Judgment of the Court of Justice of 30 January 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraph 67; Judgment of the Court of Justice of 25 March 2021, *Lundbeck*, C-591/16, ECLI:EU:C:2021:243, paragraph 112.

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713 Judgment of the Court of Justice of 13 July 1966, *Consten and Grundig*, C-56/64 and C-58/64, , ECLI:EU:C:1966:41, page 342; Judgment of the Court of Justice of 26 November 2015, *Maxima Latvija,* C-345/14, ECLI:EU:C:2015:784, paragraph 20; Judgment of the General Court of 8 September 2016, *Lundbeck*,T-472/13, ECLI:EU:T:2016:449, paragraph 342; Judgment of the Court of Justice of 23 January 2018, *Hoffmann-La Roche and Others,* C-179/16, ECLI:EU:C:2018:25, paragraphs 78 and 79; Judgment of the Court of Justice of 30 January 2020, *Generics (UK) and Others*, C-307/18, ECLI:EU:C:2020:52, paragraph 67; Judgment of the Court of Justice of 25 March 2021, *Lundbeck,* C-591/16, ECLI:EU:C:2021:243, paragraph 112.

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access to used ÖBB wagons for long-distance passenger transport they effectively impeded RegioJet's expansion. For example, an ÖBB-internal briefing of 6 May 2012 – and therefore long before RegioJet's actual entry in 2017 - states that RegioJet *"is well positioned in the Czech Republic and would like to enter the market for Vienna-Brno-Prague but does not have rolling stock at the moment"* (see above recital (750)). Similarly, an ÖBB-internal email of 25 May 2012 arguing against a sale of ÖBB's wagons to RegioJet says *"it is not excluded that RegioJet deploys these wagons* [i.e. the wagons RegioJet wanted to buy from ÖBB] *between Prague and Brno and thereby competes with the planned Railjet services Graz – Prague. RegioJet needs these wagons for Prague – Hamburg and we would thereby enable the realization of this service"* (see above recital (235)). Examples from ČD are a ČD-internal document of […] 2014 noting that "[…]" (see above recital (418)) or an email from ČD to ÖBB of […] 2015 "[…]" (see above recital (537)).

(798) ČD further argues that the alleged conduct could not have affected RegioJet's capability to expand into the PSO-market, as any change of the PSO operator would trigger the obligation under some conditions[715] to take-over ČD's rolling stock used for the affected PSO service. Hence, RegioJet could not have used wagons acquired from ÖBB.[716]

(799) The Commission rejects this argument. First, the obligation to take over the given rolling stock would only be triggered under the above referenced (see recital (798)) conditions. Second, even if RegioJet was obliged to take over ČD's rolling stock previously used by ČD under the PSO, nothing would prevent RegioJet from using newly acquired used wagons from ÖBB on the PSO-lines in question. Third, ČD itself repeatedly stressed the deplorable state, the high age and the insufficient quality of its outdated wagon fleet stemming largely from the communist era.[717] It would therefore have been only reasonable for RegioJet to scrap the wagons it was forced to take over from ČD and to use for its services under PSOs the newly acquired ones from ÖBB instead. Fourth, even the obligation to take over ČD's outdated rolling stock does not change the fact that RegioJet could have used the wagons acquired from ÖBB to provide commercial transport services in competition to ČD's PSO-services.

The impact of territorial restriction clauses agreed with ÖBB on RegioJet's expansion

(800) ČD remarks that there was a clause in the purchase contracts of January and February 2011 between ÖBB and RegioJet for in total 13 wagons (see above recital (168)) which prohibited the use of the 13 wagons in question in the territory of Austria (the "territorial restriction clause"). Therefore, RegioJet was not restricted from entering the Prague-Vienna route by the alleged conduct but (if anything) by territorial restriction clauses agreed with ÖBB without ČD's participation, restricting RegioJet's ability to use the acquired wagons in Austria.[718]

(801) The Commission rejects this argument and points to the following.

(802) First, the objective of the Parties' conduct as covered by this Decision was also to restrict competition from RegioJet against ČD on the Czech domestic market. This

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market however could not have been affected by the territorial restriction clause at all.

(803) Second, the territorial restriction clause only concerned 13 wagons. Hence, RegioJet could have used other wagons on the Prague – Vienna route and use the limited number of wagons affected by the territorial restriction clause elsewhere on the Czech domestic market.

(804) Third, using the wagons affected by the territorial restriction clause between Prague and Brno (so on Czech territory where the clause would not kick in) would put the Parties' under competitive pressure on the Prague – Vienna route, as the stretch between Prague - Brno represents the larger part of the Prague - Vienna route (257 km out of 406 km in total, see map in the Annex). Competition by RegioJet on Prague - Brno against the Parties' commonly operated railjet – trains between Prague and Vienna was explicitly mentioned in a contemporaneous document from a ČD-ÖBB meeting: "[…]*"* (see above recital (418)).

(805) Fourth, various contemporaneous e-mails of both ÖBB and ČD fearing market entry of RegioJet on the Prague - Vienna route (see above recitals (182), (235), (249), (418), (422), (489), (590)) with former ÖBB wagons show that the territorial restriction clause in practice did not have a dissuasive effect on RegioJet. Indeed, RegioJet actually started to operate on the Prague – Vienna route in December 2017.

(806) Fifth, the later purchase agreements with RegioJet's intermediary TCA (of January 2014, see above recital (291)) do not contain any such clause, suggesting that ÖBB has changed its policy in later contracts.

The effects of the Parties' agreement on competition and consumers

(807) ČD submits that the putting into service of the modern second-hand wagons from ÖBB *"significantly increase[d] the culture of travelling"* due to *"air-conditioned wagons, wagons with the closed toilet system, or wagons equipped with 230 V sockets"*. The wagons sold from ÖBB to ČD therefore "*served to the benefit of consumers as well as competition in the Czech Republic and on the cross-border lines"*. Hence, the effects of an alleged agreement and / or concerted practice between ČD and ÖBB regarding the sale of used wagons on competition and competitors were positive.[719]

(808) The case law indeed requires, where parties raise possible pro-competitive effects of an agreement, that those effects must be duly taken into account as elements of context for the purposes of categorising the agreement as a restriction by object, in so far as they are capable of calling into question the overall assessment of whether the agreement is sufficiently harmful to competition.[720]

(809) However, the case law also states that *"for these purposes, such pro-competitive effects should not only be demonstrated and relevant, but also specifically related to the agreement concerned"*.[721]

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720 Judgment of the Court of Justice of 30 January 2020, *Generics (UK),* C-307/18, ECLI:EU:C:2020:52, paragraph 103 and Judgment of the Court of Justice of 12 January 2023, *HSBC v Commission*, C-883/19 P, ECLI:EU:C:2023:11, paragraph 139.

721 Judgment of the Court of Justice of 30 January 2020, *Generics (UK)*, C-307/18, ECLI:EU:C:2020:52, paragraph 107.

(810) The Commission emphasises that ČD's argumentation is not at all about raising positive effects of the Parties` agreement as such. ČD only claims that the used wagons of ÖBB cause positive effects (in the sense of good quality and comfort level) for rail transport customers. However, these effects are not "*specifically related to the agreement concerned",* as required by the case law.

(811) In addition, these positive effects of the wagons providing a higher quality and comfort for customers can be achieved by anybody who acquires ÖBB's used wagons and operates them in Czechia, so by RegioJet and ČD alike. Without the Parties' agreement and / or concerted practice the wagons would have ended up at RegioJet, where their comfort level and quality would have served to the benefits of customers to a similar extent.

<u>*Appreciable restriction of competition*</u>

(812) ČD finally submits that the Parties' arrangement would not have appreciably restricted competition in the sense of the *de minimis* doctrine.[722]

(813) However, as stated in the Commission's De Minimis Notice[723] and the case law of the Court of Justice[724], the *de minimis* doctrine does not apply to restrictions by object. In any case, the Commission finds that the Parties' agreement and / or concreted practice has appreciably restricted competition.

6.1.3.3. Cartel

6.1.3.3.1. Cartel under point 1 of the Leniency Notice

(814) Point 1 of the Leniency notice qualifies as a cartel an *"agreement and/or concerted practice between two or more competitors aimed at ... influencing the relevant parameters of competition through practices such as ... anti-competitive actions against other competitors".*

(815) According to the case law, competition may be distorted not only by agreements and / or concerted practices which limit the competition between parties, but also by agreements and / or concerted practices which prevent or restrict the competition which might take place between them (or one of them) and third parties.[725]

(816) In the present case, as established in sections 6.1.1 and 6.1.3.2, the Parties' infringement consisted in an agreement and/or concerted practice aimed at impeding the market entry or expansion of the common competitor RegioJet by preventing, hindering or restricting the access of RegioJet to the important input of used railway wagons for long-distance passenger transport and thereby at influencing the relevant parameters of competition.

(817) The conduct at hand aimed at depriving RegioJet of an input important for competing on the rail transport service markets, which shows the cartel pertained to a form of boycott organised against RegioJet. In fact, the Parties took anti-competitive actions

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723 Communication from the Commission - Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30.8.2014, page 1 – 4.

724 Judgment of the Court of Justice of 12 December 2012, *Expedia v Commission,* C-226/11, ECLI:EU:C:2012:795, paragraphs 37, 38.

725 Judgment of the Court of Justice of 13 July 1966, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, 56/54 and 58/64, ECLI:EU:C:1966:41, p. 339, and Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97-118, paragraphs 15-16.

against their common competitor RegioJet and agreed on measures to prevent, hinder or restrict RegioJet's access to such wagons to impede RegioJet's expansion in Czechia and on the Prague-Vienna route. In addition, the anticompetitive conduct was not undertaken unilaterally by ÖBB, but it was based on bilateral collusion between both Parties. That only one party supplied the boycott-input does not put into question the finding that the arrangement pertains to a form of boycott.

6.1.3.3.2. Qualification of the Parties as potential competitors

(818) The Commission finds that ČD and ÖBB are (i) potential competitors on the market for the provision of international rail passenger transport services on the Prague – Vienna route and (ii) potential competitors on the market for the provision of domestic long-distance rail passenger transport services in Czechia.

(819) ČD and ÖBB are already active in the sector for the provision of rail passenger transport services. When determining the existence of potential competition between the Parties in such circumstance, it must be established that the potential entrant does not face insurmountable barriers to entry. Specifically for recently liberalised markets, the Court in the *Portugal Telecom* case has explicitly stated that the absence of insurmountable barriers is the appropriate test for determining an undertaking's ability to enter the market in question: "*In that regard, the case-law shows, in particular, that, where the relevant market has been liberalised, as in the present case, the Commission is not required to analyse the structure of the market and the question whether entry to that market would correspond to a viable economic strategy for each of the parties (see, to that effect, judgment in E.ON Ruhrgas and E.ON v Commission, EU:T:2012:332, paragraphs 89 to 93), but that it is required to examine whether there are insurmountable barriers to entry to the market that would rule out any potential competition (see, to that effect, judgment in Toshiba v Commission, EU:T:2014:263, paragraph 230)*."[726] The Commission notes that the *Portugal Telecom* case concerned the telecommunications markets which were just liberalised, similarly to the rail markets in Austria and Czechia in the present case.

ÖBB and ČD as potential competitors on the market for the provision of international rail passenger services on the Prague – Vienna route

(820) International rail passenger transport services between Austria and Czechia in the period of the infringement were conducted based on a so-called "regime with change of operator".[727] This means that two partner-operators cooperate and each of them is responsible for the operation of the train on its respective home territory. The operating personnel (train driver, train supervisor, conductors) is changed at the border station, and only the rolling stock is handed over to the other operator at the border station. The commercial risk, the responsibility for the operating licence, the organisation of ticket sales and the determination of ticket prices rests autonomously with each of the partners for its respective territory.[728]

(821) In the Commission's view, ČD and ÖBB are potential competitors on the market for the provision of international rail passenger services on the Prague – Vienna route for the following reasons.

726 Judgment of the General Court of 28 June 2016, *Portugal Telecom*, T-208/13, ECLI:EU:T:2016:368, paragraph 181, as confirmed by judgment of the General Court of 2 October 2024, *Pharol,* T-181/22, ECLI:EU:T:2024:668, paragraph 83.

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(822) First, both ČD and ÖBB have the ability to provide international rail passenger services on the Prague – Vienna route. International rail passenger services have been opened up for competition in the European Union since 2010 (see section 2.2.1). Therefore, from a regulatory perspective, each of the Parties would be able to offer services on this route independently.

(823) Although ČD does not possess a part B safety certificate within the meaning of the Railway Safety Directive 2004/49/EC for Austria, this is not an unsurmountable obstacle for potential competition by ČD on the Prague – Vienna route. For example, in March 2022, RegioJet has been granted a licence allowing it to operate passenger trains in Austria.[729] Moreover, alternatively, ČD could cooperate with local railway undertakings that provide suitable personnel and possess the certificate[730] for Austria, such as WESTBahn or […].[731] In fact, RegioJet has been previously operating its trains in Austria based on the certificates of […] and WESTBahn.[732]

(824) Also, the fact that the passenger rail operator ÖBB-PV […] in the Commission's view also does not pose an unsurmountable obstacle for potential competition by ÖBB on the Prague-Vienna route. […][733] In addition, another option for ÖBB could be to team up with local railway undertakings that provide suitable personnel and […][734] for Czech territory, such as Leo Express and RegioJet.

(825) Indeed, according to information provided by ČD, railway undertakings can make use of the license, the locomotive driver and the train supervisor of a local railway undertaking already active in another country to also offer services in this country. ČD states that RegioJet has made use of this possibility and cooperates with the Austrian rail undertakings WESTBahn and […] to offer its services on Austrian territory[735] (which RegioJet started in 2017, see above recital (31)).

(826) Second, the fact that (i) WESTBahn entered the Austrian domestic market in 2011, (ii) RegioJet entered the Czech domestic market in 2011, (iii) Leo Express entered the Czech domestic market in 2012, (iv) Arriva entered the Czech domestic market in 2013, and (v) RegioJet has since December 2017 also offered international rail passenger transport services on the Vienna – Prague route (see above section 2.4) demonstrates that entry was feasible and economically viable in both Member States. This especially holds true since market entry for a new entrant constitutes a bigger challenge and a higher risk than for incumbents such as ČD or ÖBB.

(827) Third, the feasibility and viability of market entry for both ČD and ÖBB is further underpinned by the fact that before the conclusion of the cooperation agreement with ČD in August 2012 (see above section 4.2), ÖBB had contemplated in 2011 and 2012 to […][736] (see also recital (147)). In this regard, […] ÖBB qualifies as a

729 *RegioJet awarded Austrian operating licence*, International Railway Journal (IRJ), 17 March 2022, last visited 24 May 2022, […].
730 ČD states that such cooperation is possible and viable. […]
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734 ČD states that such cooperation is possible and viable. […]
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potential competitor of ČD on the Prague – Vienna route.[737] […] ÖBB in 2011 and 2012 has considered […] (see above recital (147)).[738]

(828) The Commission finds that in view of the above-mentioned facts both ČD's and ÖBB's market entry on the Prague – Vienna route could have taken place sufficiently quickly and that the Parties were potential competitors on the market for the provision of international rail passenger services on the Prague – Vienna route.

ÖBB as potential competitor on the market for the provision of domestic long-distance rail passenger transport services in Czechia

(829) In the Commission's view, ÖBB is at least a potential competitor of ČD and RegioJet for the provision of domestic long-distance rail passenger transport services in Czechia, be it in the form of open access competition or in competition for PSO contracts awarded by public bodies (see recital (18)).

(830) First, from a regulatory perspective, ÖBB is able to provide domestic long-distance rail passenger transport services in Czechia. As laid out above in section 2.2.3, the Czech domestic market for long-distance rail passenger transport was open to competition during the whole period of the infringement.

(831) Second, during the period of the infringement, the Czech domestic long-distance rail passenger transport market was to a large extent subject to public ordering by the Czech Ministry of Transport[739] ("MoT") through PSO contracts that were directly awarded to ČD. The "Framework agreement" of 2 December 2009 concluded between the MoT as the contracting authority and ČD as the providing railway undertaking set the contractual framework under which the services subject to a public service obligation ("PSO") have been provided from 1 January 2010 to 14 December 2019.[740]

(832) The original contract of 2 December 2009 awarded to ČD covered most long-distance lines in Czechia.[741] However, after the market entry of RegioJet on the Prague-Ostrava route in September 2011 (see recital (31)), the segment of the Ex1 line between Prague and Ostrava was excluded from the scope of the Framework agreement from 11 December 2011. The MoT justified the exclusion of this segment by the presence of a new entrant.[742] This meant that ČD did not any more receive compensation from the Czech state for this segment of this most important line in the country. […][743] […][744]

(833) In the Commission's view, the Framework agreement neither excluded competition from the Czech domestic long-distance rail passenger transport market, nor provided ČD with unlimited protection against negative impacts of potential or actual market

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739 Acting on behalf of the Czech state.

740 Contract on the public service obligation in rail passenger transport in the public interest to ensure the transport needs of the state for the period from 1 January 2010 until the end of the timetable for the period 2018/19 ("Framework agreement"), […]

741 […] Framework agreement, Annexes 1 and 2, […]

742 *Plán dopravní obsluhy území vlaky celostátní dopravy, zásady objednávky dálkové dopravy pro období 2012-2016*, available online at: https://www.mdcr.cz/getattachment/Dokumenty/Verejna-doprava/Financni-ucast-statu/Plan-dopravni-obsluhy-uzemi-vlaky-celostatni-dopra/plan-dopravni-obsluhy.pdf.aspx, page 26.

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entries. In particular, the Framework Agreement allowed the MoT to […]. Thus, the Czech PSO market remained at least potentially open for competitors.

(834) Third, interested railway undertakings were able to operate commercially in "open access" mode on lines where ČD operated its trains under PSO, subject to technical and regulatory requirements. For example, RegioJet has been operating in "open access" mode in parallel to ČD's trains under the PSO on the Ex3 line (Prague-Brno) since December 2016. […]

6.1.3.3.3. Arguments raised by ČD with respect to the qualification of the Parties as potential competitors and assessment by the Commission

(835) ČD contests that ÖBB and ČD were potential competitors on the market for the provision of international rail passenger services on the Prague – Vienna route and on the market for long-distance rail passenger transport services in Czechia.

(836) The Commission emphasises upfront that the finding of potential competition is only relevant for the qualification of the Parties' behaviour as a cartel and thus for the application of the Leniency Notice. Indeed, whether there is potential competition between ÖBB and ČD is not relevant for the finding of an infringement of Article 101(1) TFEU. Therefore, even in the absence of potential competition (and of the cartel-label), the conduct would still amount to an infringement of Article 101(1) TFEU.

ÖBB and ČD as cooperation partners on the Prague – Vienna route

(837) ČD submits that the Parties' relationship on the Prague – Vienna route was not one of potential competitors but one of cooperation partners in international rail passenger transport. Any competition between ÖBB and ČD would have interfered with the fulfilment of the Parties' contractual obligations in the railjet cooperation agreement about the common operation of trains on the Prague-Vienna route (see above section 4.2). This mutually binding agreement had a duration […]. Any competition between ČD and ÖBB on those lines was therefore, in ČD's view, pure speculation.[745]

(838) First, the Commission points out that the fact that the Parties operate on the Prague – Vienna route under a cooperation agreement does not exclude that there can be competition between them. Otherwise, the cooperation agreement would be tantamount to an illegal anticompetitive "non-aggression" agreement to not enter each other's territory. Indeed, the Parties' railjet cooperation agreement[746] does not […]. Moreover, the Parties could have amended or prematurely terminated the railjet cooperation agreement […].[747]

(839) In any case, the present Decision finds that the Parties were potential but not actual competitors on the Prague-Vienna route. Therefore, ČD's argument in recital (837) above cannot stand, as being potential competitors does not interfere with the cooperation agreement, only becoming actual competitors would interfere with this agreement.

Public interest in the railjet cooperation

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(840) ČD further submits that the operation of a high-quality rail transport link between Austria and Czechia on the Prague and Vienna route is an important part of the countries' relationship and is a prerequisite for the functioning of the Internal Market. Therefore, the operation of the Prague – Vienna route in cooperation between ČD and ÖBB, instead of in competition, is in the public interest, as demonstrated by a letter and a report of the Czech Ministry of Transport.[748]

(841) First, the Commission does not deny the importance of a high-quality rail transport link between Austria and Czechia. However, this matter does not relate to the question of potential competition at stake. That the Parties voluntarily and with support from the Czech Ministry of Transport decided to cooperate instead of competing does not put into question that both ÖBB and ČD were potential competitors on the Prague - Vienna route in the period of the infringement.

(842) Second, it should be stressed that neither the letter nor the report of the Czech Ministry of Transport as quoted by ČD exclude competition between ÖBB and ČD on the Prague – Vienna route.

Degree of liberalisation of the rail passenger transport market

(843) ČD argues, based on resolutions of the European Parliament and Commission reports, that the actual state of liberalisation of the long-distance rail passenger transport market as well as the factual situation in Czechia did not allow ÖBB to enter the Czech domestic market and to set up operations which could have realistically competed with the services offered by ČD.[749]

(844) In the first place, the Commission stresses that ČD's arguments only relate to the conditions for competition on the Czech domestic rail passenger market and have therefore no bearing for the question of potential competition on the international Prague – Vienna route, as international rail passenger transport services have been fully liberalised and opened up for competition since 2010 (see above section 2.2.1).

(845) In any case, ČD's arguments are unfounded also for the Czech domestic long-distance rail passenger transport market.

(846) First, the resolutions of the European Parliament that ČD mentions stem from 2007 and 2010 and therefore before the period of the infringement.

(847) Second, both the resolutions and reports listed by ČD merely show that new entrants met difficulties when entering markets and faced higher obstacles compared to existing operators. However, the documents as quoted by ČD do not say that there were insurmountable barriers to entry that precluded potential competition. As shown above in section 2.2.3, Czech national law allows open access competition on all routes in the country, and the various market entries in Czechia since 2011 demonstrate that it was perfectly possible for other railway undertakings to overcome difficulties and obstacles and to compete with ČD in domestic Czechia.

Barriers to entry for becoming an established operator

(848) ČD puts forward that ČD and ÖBB were not potential competitors on the Prague – Vienna route and in Czechia because it was not possible for ÖBB and ČD to operate

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in each other's country in a short period of time due to unsurmountable legal, technical, operational and other barriers to entry.[750]

(849) The Commission stresses that ČD merely lists the conditions that every rail operator has to fulfil for providing rail transport services in a certain country, and that the conditions for Czechia are in substance not different from the conditions in other Member States. However, ČD does not show that fulfilling these conditions would have constituted an insurmountable barrier to entry, as required by the case law for excluding potential competition (see above recital (819)).

(850) ČD merely claims that fulfilling the requirements for operating rail transport services is burdensome and time consuming. While this may indeed be the case, it does not put into question the Commission's findings on potential competition between the Parties on the Prague – Vienna route and in domestic Czechia, as will be shown in more detail in the following recitals.

(851) First, ČD is of the view that cooperation with a local operator (see above recital (824) and (825)) would not make ČD or ÖBB potential competitors of the respective other party in domestic Czechia or on the Prague-Vienna route.[751] However, contrary to ČD's view, a cooperation of ÖBB or ČD with local operators where the latter would act as contractors for traction services (locomotive, personnel, licenses etc) would not have as consequence that the local operators appear as competitors on the markets for rail passenger transport services. Rather, the local operators would only provide upstream input services while ÖBB or ČD respectively would be present on the markets for rail passenger transport services in Czechia and on the Prague – Vienna route. The fact that under this scenario the "technical" operator on the foreign territory is a different entity does not matter, as the commercial perspective is the relevant one for assessing competition.

(852) The Commission in this respect refers to the example brought forward by ČD itself (see above recital (825)): according to ČD, RegioJet makes use of the license, the locomotive drivers and the train supervisors of the local Austrian railway undertakings WESTBahn and […] to offer its services on the Austrian section of the Prague – Vienna route[752] (where RegioJet started operating in 2017, see above recital (31)).

(853) Second, insofar as ČD claims that railway capacity on certain routes in Czechia was insufficient,[753] it should be stressed that scarce capacity does however not mean that new operators would not have access to train paths used by the incumbent and would thus be precluded from entering into competition with an already established undertaking. It rather means that the rail infrastructure manager has to resolve conflicting access requests from several rail undertakings (incumbents or new entrants alike) and to allocate train paths on a non-discriminatory basis, treating incumbents and new entrants equally. This was however not an issue, as ČD itself admits that rail path allocation was *"in the Relevant Period based on EU legislation and included rather detailed conditions for capacity allocation*".[754]

ČD's resources to start operating abroad

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(854) ČD […].[755]

(855) One part of ČD's argumentation claims that the […].[756] However, the […].

(856) The other part of ČD's argumentation is based on the premise that in order for qualifying as potential competitor, ČD would need to […].[757] In the Commission's view, this is however not a correct premise. Holding […] is not a condition foreseen for being a potential competitor according to the case law.

Ability to overcome the barriers to entry in a short period of time

(857) ČD further argues that there was no potential competition because a market entry of ÖBB in the Czech Republic or of ČD in Austria could not have happened sufficiently quickly and in an adequately short period of time, as required by the case law. In ČD's view, the relevant time frame should not be longer than one year, as specified in the then applicable Commission's Guidelines on Vertical Restraints[758] (the "Vertical Guidelines"[759]).

(858) First of all, as is further explained in section 6.2.1 below, the Commission points out that the Vertical Guidelines are not applicable to the present infringement. For this reason alone, ČD's argument must be rejected.

(859) In any case, the Vertical Guidelines set out that a company can be regarded as potential competitor if it *"within a short period of time normally not longer than one year would undertake the necessary additional investments or other necessary switching costs to enter the relevant market*."[760] Hence, the Vertical Guidelines do not request that the actual market entry takes place within one year, but only that the company makes the necessary investments for the market entry.

(860) Moreover, the Vertical Guidelines say that the time frame should *"normally"* not be longer than one year. Indeed, the Court has ruled that the "*essential factor is the need for the potential entry to take place with sufficient speed to form a constraint on market participants, the period of one year being illustrative only*."[761]

(861) ČD also presents various examples of market entries in the rail sector in Czechia, Austria and other countries that all have taken several years from the announcement until the actual start of operations.[762]

(862) The Commission is of the opinion that the rail transport sector has specific features that distinguish it from other sectors. This includes, for example, the need to reserve train paths several years in advance, the time necessary for obtaining regulatory approvals, and the long lead time for the procurement or adaptation of rolling stock. These specificities need to be taken into account for assessing whether a market entry can take place sufficiently quickly for potential competition to exist.[763] The

755 […] ČD's argumentation that […] will be dealt with later, together with ÖBB's similar argumentation.
756 […]
757 […]
758 […]
759 OJ C 130, 19.5.2010, page 1 – 46.
760 Paragraph 27 Vertical Guidelines.
761 Judgment of the General Court of 14 April 2011, *Visa Europe and Visa International Service v Commission,* T-461/07, ECLI:EU:T:2011:181, paragraph 189.
762 […]
763 Judgment of the General Court of 29 June 2012, *E.ON Ruhrgas and E.ON vs Commission*, T-360/09, ECLI:EU:T:2012:332, paragraphs 106, 113, and 114.

assessment of potential competition in the railway sector therefore has to take into consideration a longer time period until the actual happening of market entry than in other markets.

(863) In view of the above, the Commission finds that, in light of the structure of the relevant markets in Austria and Czechia and the Parties' abilities (see above section 6.1.3.3.2), taking into account the sector's specificities mentioned in the previous recital, there were no insurmountable barriers for the Parties to enter the Prague – Vienna route or domestic Czechia and to make the necessary investments to be able to compete with the respective other Party within a short period of time.

Commercial viability of market entry

(864) ČD alleges that the Commission failed to analyse the commercial viability of a market entry in domestic Czechia or the Prague – Vienna route. ČD is of the view that there was no commercially viable prospect for both ÖBB and ČD to enter these markets. Especially, it made no commercial sense to compete with trains under PSO contracts which covered almost all of Austria and Czechia in the period relevant for the present proceedings. The only routes without PSO contracts in Austria and Czechia between 2012 and 2016 were the Prague – Ostrava route and the Vienna – Salzburg route. Both routes were however not commercially attractive for market entry due to the fact that that several rail undertakings were already active there.[764]

(865) With regard to the PSO-routes, ČD further argues that the PSO-market (that means the market for the award of PSO contracts by public bodies, see above recital (18)) in Czechia was not to a relevant extent open to competition, as the operation of the PSOs was guaranteed for ČD during the period of the infringement.[765]

(866) First of all, as concerns ČD's argument that the Commission failed to analyse the commercial viability of a market entry, the Commission stresses that for finding potential competition it is not required to analyse whether entering a certain market would amount to an economically viable strategy but only whether there are insurmountable barriers to enter this market[766], which it has done in the present Decision for the markets relevant for the present proceedings.

ÖBB's and ČD's […]

(867) ČD puts forward that the absence of potential competition also follows from the fact that […].[767]

(868) However, according to the case law[768], […] is not a necessary element for being a potential competitor.

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766 Judgment of the General Court of 28 June 2016, *Portugal Telecom*, T-208/13, ECLI:EU:T:2016:368, paragraph 181; judgment of the General Court of 21 May 2014, *Toshiba v Commission*, T-519/09, ECLI:EU:T:2014:263, paragraph 230.

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768 Judgment of the General Court of 14 April 2011, *Visa Europe and Visa International Service v Commission*, T-461/07, ECR, ECLI:EU:T:2011:181, paragraph […].

6.1.3.3.4. Arguments raised by ÖBB with respect to the qualification of the Parties as potential competitors and assessment by the Commission

(869) ÖBB argues that it does not fulfil the conditions for being regarded a potential competitor of ČD for Czech domestic long-distance rail passenger transport services[769].

ÖBB's intention to enter the Czech domestic market

(870) ÖBB stresses that it had neither before nor during the infringement seriously considered entering the Czech market and has also not taken any preparatory measures. ÖBB further contends that an alleged intention on its side to enter the Czech domestic market would also be inconsistent with the fact that ÖBB has sold a substantial number of used long-distance wagons to rail undertakings active in Czechia.[770]

(871) The Commission reminds that intention or the taking of preparatory steps for market entry is not a prerequisite for being a potential competitor.[771] Insofar as ÖBB bases its argumentation on the *Merck* and *Generics* judgments[772], the Commission points out that these judgments concern the specific circumstances in the sector of generic medicines (intellectual property rights, patents, regulatory constraints) which are however not present in the case at hand. The *Merck* and *Generics* judgments did not change the established case law that intention is not a prerequisite for potential competition to exist.[773]

Perception of ÖBB as a potential competitor by ČD or RegioJet

(872) ÖBB further argues that the established rail undertakings in Czechia (ČD, RegioJet) did not perceive ÖBB as a potential competitor.[774]

(873) Again, ÖBB bases its view on the *Generics* judgment which is not applicable to the situation at hand (see above recital (871)). In addition, even for the sector of generic medicines, the Court held that "*the perception of the undertaking present on the market **may be** taken into account in order to assess whether other undertakings are*

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771 Judgment of the General Court of 14 April 2011, *Visa Europe and Visa International Service v Commission*, T-461/07, ECR, ECLI:EU:T:2011:181, paragraph 169; judgment of the Court of Justice of 26 October 2023, *EDP vs Autoridade da Concorrencia*, C-331/21, ECLI:EU:C:2023:812, paragraph 75.

772 Judgment of the Court of Justice of 25 March 2021, *Merck*, C-614/16, ECLI:EU:C:2021:246; Judgment of the Court of Justice of 30 January 2020, *Generics (UK),* C-307/18, ECLI:EU:C:2020:52.

773 Judgment of the General Court of 29 June 2012, *E.ON Ruhrgas and E.ON v Commission*, T-360/09, ECR, ECLI:EU:T:2012:332, paragraph 87.
Judgment of the General Court of 14 April 2011, *Visa Europe and Visa International Service v Commission,* T-461/07, ECR, ECLI:EU:T:2011:181, paragraphs 168 and 169: "*While the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor in that market, nonetheless the essential factor on which such a description must be based is whether it has the ability to enter that market.*
It should, in that regard, be recalled that whether potential competition – which may be no more than the existence of an undertaking outside that market – is restricted cannot depend on whether it can be demonstrated that that undertaking intends to enter that market in the near future. The mere fact of its existence may give rise to competitive pressure on the undertakings currently operating in that market."

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potential competitors"[775] (emphasis added), but the Court has not made this a condition for potential competition.

Ability of ÖBB to enter the Czech market given the legal barriers

(874) Similar to ČD, ÖBB argues that it could not have entered the Czech domestic long-distance passenger transport market due to legal barriers, namely the requirement to set up a Czech legal entity and the requirement to obtain the […].[776] In particular, ÖBB argues that before the actual operation of the train-service begins, it would take around 24 to 36 months for taking the necessary preparatory steps to obtain the necessary certificates and fulfil the other legal conditions for market entry.[777]

(875) The Commission reiterates its view that these conditions for market entry do not constitute unsurmountable barriers to entry. As mentioned in recital (863), in light of the structure of the relevant markets in Austria and Czechia, the Parties' abilities (see above section 6.1.3.3.2), and the rail sector's specificities (see above recital (862)), the Commission finds that the legal barriers for market entry could be overcome sufficiently quickly in order for ÖBB to make the necessary investments to be able to compete with ČD within a short period of time and thereby to be considered a potential competitor of ČD in domestic Czechia.

Ability of ÖBB to enter the Czech market given the technical barriers

(876) ÖBB concedes that it possesses sufficient wagons that are suitable and authorised for long-distance passenger transport in Czechia.[778] However, both ÖBB and ČD are of the view that ÖBB does not hold a sufficient number of suitable locomotives authorised and able to run on the Czech rail network in order to be regarded as a potential competitor of ČD for long-distance passenger transport in Czechia.[779]

(877) More specifically, both ÖBB and ČD argue that during the period of the infringement ÖBB only possessed […] locomotives that were authorised and able to circulate on the Czech rail network without major restrictions, namely the series 1216 "Taurus" locomotives, which were however already deployed on other trans-border passenger and freight transport services.

(878) First, the Commission emphasises that the fact that the […] series 1216 "Taurus" locomotives are in ÖBB's service elsewhere is not a relevant aspect for denying potential competition. These locomotives are not "bound" to certain lines but can be re-shuffled following a commercial decision (see above recital (855)).

(879) Second, both ÖBB and ČD create the impression that […] locomotives authorised and able to run on the Czech rail network are a too low number of locomotives for ÖBB to be regarded as potential competitor of ČD on the Czech rail market. The Commission stresses that RegioJet in 2017 (and therefore 6 years after its market entry in 2011) also only possessed […] locomotives.[780] Nevertheless, it is undisputed that RegioJet with these "only" […] locomotives is a strong (if not the strongest) competitor of ČD in Czechia. This puts into perspective the number of […] series

775 Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 104.

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1216 "Taurus" locomotives that ÖBB possessed and that were authorised and able to circulate on the Czech rail network. It also corroborates the Commission's findings that ÖBB possessed the necessary technical means to be regarded a potential competitor of ČD in domestic Czechia.

(880) Moreover, it is not necessary for being a potential competitor in a given market that the undertaking possesses the necessary technical means to enter the whole market. Competitive pressure can also be exercised by being able to enter certain lines within the market. As demonstrated by RegioJet's presence in Czechia, several main lines in the country can be served and considerable competitive pressure on the incumbent ČD can be exercised with only […] locomotives.

ÖBB's ability to enter the Czech PSO contract market

(881) ÖBB is of the view that ÖBB cannot be regarded as potential competitor on the market for the award of PSO contracts for long-distance rail passenger transport services in Czechia.[781] More specifically, ÖBB argues that potential competition on the PSO contract market presupposes that PSO-lines are tendered by the competent public bodies. However, the Czech state has concluded a framework agreement with ČD covering the years 2010 – 2019 and has for the most part awarded PSO contracts directly to ČD. Only for one long-distance line a tender was organised following the conclusion of this framework agreement.[782]

(882) The Commission notes that the fact that during the period of the infringement the MoT actually hardly organised tenders does not exclude potential competition on the Czech PSO market. In the present case only potential competition is at stake, and therefore the actual organisation of tenders is not relevant. Whether there were insurmountable barriers for market entry has to be assessed from the ex-ante perspective in the years 2012 – 2016. In this regard, the Commission stresses that the Framework agreement (which the MoT concluded with ČD in 2009 for the period 2010 – 2019, see above recital (831)), […]

(883) First, pursuant to […], *"[…]"* Furthermore, pursuant to its […] "[…] "[783]

(884) It follows that the extent of the transport performance that the Czech state has ordered from ČD was […] of validity of the Framework agreement but […].[784]

(885) While the Framework agreement is silent about the reasons that can trigger the […]. The MoT decided to […].[785] […].[786]

(886) Second, pursuant to […], up to […]. However, based on […].[787] […].

(887) Furthermore, the scope of any such […].[788] However, nothing prevented the MoT from organising […].

(888) Moreover, the Commission points out that Deutsche Bahn's subsidiary Arriva, following its participation in tendering procedures for PSO contracts, has started to operate several PSO lines in Czechia as of December 2019 (see above recital (22)).

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782 […]
783 This also corroborates with ČD's explanations […]
784 […]
785 […]
786 […]
787 Framework agreement, Annex 10, […]
788 […]

While Arriva's actual start of operations is outside of the temporal scope of the present case, the long time that is needed in the rail sector for actually taking up of services (see above recital (862)) shows that there was potential competition on the Czech PSO market already during the period of the infringement. In addition, it has to be stressed that the regulatory and technical framework in Czechia did not change between 2016 and 2019 and that the Czech state unveiled its plans to partly open the PSO market in its 2011 '*Plan of transport services in the area of national railway service, order policy in long-distance transport for the period 2012-2016*'[789].

(889) ÖBB further argues that the possibility to award further PSO services was hardly used by the Czech MoT. To ÖBB's knowledge, there was only one tender by the Czech MoT (on the R25 Plzeň – Most line) and that the MoT did not issue any further notices pursuant to Article 7(2) of EU Regulation 1370/2007. ÖBB thus considers that the Czech MoT did not make any significant efforts to carry out tenders in the long-distance passenger rail service sector ordered for ČD until 2019.[790]

(890) The Commission rejects this argument. According to the plan of the MoT referred to above, in the period between 2010 and 2016, ten publications in the Official Journal of the EU (OJ) of market opening were scheduled, of which on five operation was expected to start before the end of the period of the infringement. For example, for the opening of lines Ex 2 and R 18, the publication in the OJ was scheduled in 2011, with an expected start of operation in 2015/2016. Additional Ex and R lines were scheduled for opening with publication after the period of the infringement. In addition, the MoT later published in the OJ market openings that did not appear in the above-mentioned plan, such as the provision of passenger rail services between Brno, Břeclav and Olomouc (OJ S 192/2014, 07/10/2014, Tenders Electronic Daily, Supplement to the Official Journal of the EU, notice number 338151-2014)[791]. It can therefore not be claimed that the Czech MoT did not make efforts to carry out tenders in the long-distance passenger rail service sector.

(891) ÖBB is also of the view that the possibilities for the adjustment of the Framework agreement (see above recitals (883) to (887)) were not known to it. ÖBB also adds that the Commission has not shown that ÖBB has ever taken these possibilities into account in its strategic reflections.[792]

(892) The Commission rejects these arguments. A contemporaneous document in the Commission's file and stemming from ÖBB itself demonstrates that ÖBB was aware that the MoT contemplated organising tenders for PSO contract routes: In an ÖBB-internal email of 3 March 2011, […] described that the MoT may award PSO contracts to RegioJet: "*Already now RegioJet is lobbying the Czech ministry of transport that it as railway undertaking could purchase cheaper rolling stock than ČD (railjets) could do to ensure the transport offer in Czechia. As the Czech state*

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789 Available through https://www.mdcr.cz/getattachment/Dokumenty/Verejna-doprava/Financni-ucast-statu/Plan-dopravni-obsluhy-uzemi-vlaky-celostatni-dopra/plan-dopravni-obsluhy.pdf.aspx at the time of the adoption of the SO and through https://www.mdcr.cz/getattachment/Dokumenty/Verejna-doprava/Financni-ucast-statu/Plan-dopravni-obsluhy-uzemi-vlaky-celostatni-dopra/Plan-dopravni-obsluhy-uzemi-vlaky-celostatni-dopravy-2012-2016.pdf.aspx at the time of this decision. Filed as […]

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791 Available through https://ted.europa.eu/en/search/result?publication-number=338151-2014&search-scope=ALL at the time of this decision. Filed as […]

792 […]

would co-finance the railjet investment, such lobbying activities and as a consequence the real putting into service of the wagons by RegioJet could have negative repercussions on our railjet options, if the transport ministry decides against the railjet purchase"[793] (see above recital (182). That this contemporaneous document related to PSO contracts (and not to commercial services) follows from the fact that the Czech Ministry of Transport is the public transport commissioning body and purchaser of long-distance transport PSO-services in Czechia[794] and that the railjet trains on the Prague - Vienna route belonged between Prague and Břeclav to the Czech domestic line Ex3 which was under a PSO-contract assigned to ČD during the period of the infringement.[795]

(893) Finally, a public Commission document of 2013 on which ÖBB relies in its reply to the SO mentions with regard to Czechia that *"existing* [PSO-] *contracts also contain clauses whereby passenger transport can be gradually provided by another operator chosen by the authority before the end of the contract*"[796].

(894) Insofar as ÖBB argues that Annex 4 of the Commission's impact assessment for the 4th Railway Package would qualify 96% of the Czech domestic passenger rail transport as de facto closed for competition[797], the Commission notes that ÖBB applies selective reading. The table containing the figure of 96% reflects the situation of 2010 and is preceded by the following sentence: "*The table hereunder reflects the Czech rail market structure. Yet, it is important to underline that the recent policies of the Czech government (open access and competitive tenders) are likely to profoundly affect these figures."*[798] Moreover, ÖBB further omits the sentence already quoted in the recital above that *"existing* [PSO-] *contracts also contain clauses whereby passenger transport can be gradually provided by another operator chosen by the authority before the end of the contract*"[799].

(895) Finally, ÖBB claims that in the period of the infringement there was no market entry in Czechia on a commercial basis in parallel to ČD's trains operated under PSO contracts. The Commission has thus not shown that operating long-distance rail passenger transport services on a commercial basis in competition to services under PSO would amount to a viable economically strategy.[800]

(896) However, the Commission is not required to show that such market entry would amount to a viable economic strategy; it suffices to demonstrate that there were no insurmountable barriers for entry (see above recital (819)). Moreover, as laid out above in recital (834), interested railway undertakings were able to operate commercially in "open access" mode on lines where ČD operated its trains under PSO, subject to technical and regulatory requirements. RegioJet (in addition to its market entry on the Prague-Ostrava route in September 2011) in 2015 opened a new long-distance train connection in Czechia on the route Prague – Olomouc – Přerov – Otrokovice - Staré Město u Uherského Hradiště[801] on a commercial basis in

793 […]
794 […]
795 See […] and the map in the Annex; see […].
796 Commission SWD (2013) 10 final of 30.1.2013, part 4, page 12.
797 […]
798 Commission SWD (2013) 10 final of 30.1.2013, part 4, page 14.
799 Commission SWD (2013) 10 final of 30.1.2013, part 4, page 12.
800 […]
801 RegioJet, Annual Report 2015, […] page 11.

competition to ČD's PSO-trains. While the actual market entry of RegioJet on the Prague – Brno route happened in December 2016 and thus shortly after the end of the infringement, this however does not put into question potential competition on the Czech PSO-market in the period of the infringement due to the long time needed in the rail sector for the actual taking up of services (see above recital (862)).

(897) To conclude, ÖBB's argumentation does not put into question that ÖBB in the period of the infringement was a potential competitor for the award of PSO contracts for long-distance rail passenger transport services in Czechia.

6.1.3.3.5. Other arguments raised by ČD with respect to the qualification of the infringement as a cartel and assessment of the Commission

(898) ČD argues that the necessary legal elements of a cartel between the Parties, which require cartel members to reduce competition and rivalry between themselves, are not fulfilled. Moreover, in ČD's view, the conduct at hand could not constitute a cartel, because ČD itself did not sell wagons.[802]

(899) The Commission notes that reducing competition <u>between</u> cartel members is not a legal condition of the cartel label. As shown by the definition in point 1 of the Leniency Notice, agreements and / or concerted practices between competitors aimed at harming a third party are also regarded as cartels: "*Cartels are agreements [...] between two or more competitors aimed at [...] influencing the relevant parameters of competition through practices such as [...] anti-competitive actions against other competitors"*.

(900) Insofar as ČD argues that the infringement presented in the Statement of Objections does not fulfil the conditions of a collective boycott as laid out in the legal and economic literature, it should be recalled that there is no binding definition of the term "collective boycott" from which specific consequences would follow under EU competition law when a specific set of conditions is fulfilled. The Statement of Objections set out, in the same way as this Decision, that the Parties engaged in a series of collusive actions seeking to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons for long-distance rail passenger transport (see e.g. paragraphs 500, 519, 521, 522, 536, 552 and 553 of the Statement of Objections). Paragraph 561 of the Statement of Objections calls this form of coordination in light of statements in the Commission Staff Working Document on *"Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the De Minimis Notice"* a *"form of a collective boycott"*. The Commission points out that the facts, their legal characterisation and, in particular, the assessment of the restriction of competition emerging from the cartel conduct in question as presented in this Decision and in paragraphs 498-553 of the Statement of Objections does not change irrespective of whether the label *"collective boycott"* is in addition affixed to it or not. In fact, it should be reiterated that, on the one hand, the anticompetitive conduct was not undertaken unilaterally by ÖBB, but it was based on bilateral collusion between both Parties. On the other hand, the anticompetitive conduct aimed at depriving the Parties' common competitor RegioJet of an input important for competing on the rail passenger transport service markets in Czechia and on the Prague-Vienna route (see also paragraph 553 of the Statement of Objections).

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[802] [...]

(901) Indeed, the adjective "collective" as used in paragraph 561 of the Statement of Objections merely expresses that the boycott against RegioJet was agreed by the two Parties, to draw a distinction from unilateral boycott behaviour which is not present in the case at hand. However, the term "collective" used in that sense does not mean that both Parties need to be active in the supply of the boycott-input. While it is true that the case-law quoted in section 6.3.4. of the Statement of Objections concerned scenarios of "collective boycott" where at least two undertakings were active in the supply of the boycott-input, nothing in that case-law indicates that the term "collective boycott" can only be used for cases in which all parties to an agreement actually stopped supplying the boycott-input.

(902) As regards the factual situation in the present case, the Commission does not dispute that ČD has not been selling wagons comparable to the ones sold by ÖBB. However, that ČD itself does not sell wagons does not change the qualification of the Parties' conduct as a cartel. What is decisive for this qualification is that ÖBB and ČD collusively rigged wagon sales procedures for ÖBB's used wagons to prevent, hinder or restrict the access of RegioJet to an important input for competing on the rail passenger transport markets relevant for the present proceedings on which RegioJet was in competition with both ČD and ÖBB (see above in recital (31) and below in recital (926)) In this respect, the Commission refers to the case law that has confirmed that a cartel member does not have to be active on the same relevant market as the other cartel member, but that in such a situation the Commission merely has "*to show that the undertaking ... has actively contributed to a restriction of competition*"[803].

(903) In the present case, ČD and ÖBB collusively rigged sales processes for used ÖBB wagons. Even though ČD did not sell the used wagons, the rigging of the sales processes could only be implemented with ČD's participation, because only ČD's participation in the rigging enabled ÖBB to sell its used wagons while at the same time avoiding as far as possible that these wagons reached RegioJet. Therefore, ČD's actions were part of the Parties' joint effort to prevent, hinder or restrict RegioJet's access to used wagons for long-distance rail passenger transport in order to restrict competition on the market for long-distance rail passenger transport services in Czechia and on the international Prague – Vienna route.

(904) More specifically, ČD has contributed to the restriction of competition through the following examples of collusive actions: by regularly urging ÖBB to not sell wagons to RegioJet (see above sections 5.6 and 5.11 and 5.12), […] (see above section 5.12), […] (see above section 5.10), […] (see for example above recitals (374), (422), (503), (505), (555), (564), (567), (587)).

6.1.3.4. Ancillary restraint

(905) ČD claims that the Parties' agreement and / or concerted practice is an ancillary restraint to the Parties' legal railjet cooperation, and the compatibility of the conduct with Article 101(1) TFEU and its potential anti-competitive effects should be assessed in conjunction with the railjet cooperation as a whole[804]. In ČD's view, the communications between ÖBB and ČD regarding ÖBB's wagon sales took place within the Parties' railjet cooperation which would make some more forthcoming

803 Judgment of the General Court of 16 September 2013, *Keramag Keramische Werke and Others v Commission*, joined cases T-379/10 and T-381/10, ECLI:EU:T:2013:457, paragraph 91.

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treatment of ČD in the sales of the wagons logical but would not be in breach of Article 101(1) TFEU[805]. ČD concludes that it was implicit in the Parties' cooperation for the joint operation of their railjet trains on the Prague – Vienna route that the Parties should not support competitors to their joint project, which would be commercially legitimate and understandable as well.[806]

(906) The Commission rejects this claim as the conditions for an ancillary restraint are not fulfilled.

6.1.3.4.1. Objective necessity

(907) Pursuant to established case-law, for an anti-competitive restriction to qualify as a restraint that is ancillary to a main operation that is not anti-competitive in nature, it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. The fact that this main operation is simply more difficult to implement or even less profitable without the restriction concerned cannot be deemed to give that restriction the 'objective necessity' required in order for it to be classified as ancillary.[807]

(908) The Commission points out that the Parties' collusive rigging of wagon sales to the detriment of RegioJet was not objectively necessary for implementing the railjet cooperation (for the scope and means of operation of the railjet cooperation see above section 4.2). Rather, the Parties (ab-)used the existing communication channels and the relationship built up between them through the railjet cooperation to facilitate their collusion. In particular, the Parties' railjet cooperation would not have been impossible to carry out without the anticompetitive behaviour in the present case, which consisted in impeding the market entry or expansion of RegioJet in the markets for the provision of domestic long-distance rail passenger transport services in Czechia as well as for the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport.

(909) Moreover, the conduct assessed in this Decision can also not have been objectively necessary for the Parties' railjet cooperation because the collusive rigging of sales processes for ÖBB's used wagons was unrelated to the means of operation of the railjet cooperation: for their railjet cooperation on the Prague-Vienna route, the Parties […].

6.1.3.4.2. Proportionality

(910) In any case, the Parties' conduct at stake, namely the collusive rigging of ÖBB's wagon sales procedures to the detriment of RegioJet, is not proportionate to attaining the alleged benefits of the railjet cooperation.

(911) ČD is of the view that the operation of the modern and comfortable railjet trains on the Prague – Vienna route brought significant benefits for customers in the form of high-quality regular and interconnected transport services[808]. However, the Commission considers that such benefits could equally have been achieved if the

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807 See Judgment of the Court of Justice of 11 September 2014, *Mastercard v Commission*, Case C-382/12 P, ECLI:EU:C:2014:2201, paragraphs 89 to 91.

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Parties had competed with RegioJet on the merits. Therefore, contrary to ČD's view, the commercial success of the railjet cooperation could have been ensured through less restrictive means than by a collusion to the detriment of RegioJet.

(912) In addition, ensuring the commercial success of the railjet cooperation was rather a motivation for the Parties in their anticompetitive actions. As shown by the evidence (see above recitals (235), (249), (418), (422), (489), (590)), both Parties feared competition from RegioJet to their railjet trains, so through their collusion in rigging ÖBB's wagon sales procedures they wanted to make sure that RegioJet would not use ÖBB's wagons to compete against the railjet trains of ČD and ÖBB on the Prague-Vienna route.

6.1.4. *Capability to affect trade between EU Member States*

6.1.4.1. Principles

(913) Article 101(1) TFEU is aimed at agreements or concerted practices "which may affect trade between Member States".

(914) The European Courts have consistently held that, *"in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States*".[809] In any event, whilst Article 101 TFEU does not require that agreements or concerted practices referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements or concerted practices are capable of having that effect.[810]

6.1.4.2. Application to this case

(915) There is a considerable amount of cross border rail passenger transport services between Austria and Czechia. Both ÖBB and ČD have a long history of providing international long-distance rail passenger transport services between the two countries.

(916) Between 2011 and 2016 the Parties operated 7 daily EuroCity or railjet train-pairs (i.e. 14 connections in total, with 7 trains in each direction) in cooperation on the Prague – Vienna route, plus several other train-pairs on other international routes between Austria and Czechia.[811] Similarly, RegioJet has been offering 4 daily train-pairs on the Prague-Vienna route since December 2017.[812]

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809 See Judgment of the Court of Justice of 30 June 1966, *Société Technique Minière v Maschinenbau Ulm*, C-56/65, ECLI :EU:C:1966:38, paragraph 7; Judgment of the Court of Justice of 11 July 1985, *Remia BV and Others v Commission*, C-42/84, ECLI :EU:C:1985:327, paragraph 22; Judgment of the Court of First Instance of 15 March 2000, *Cimenteries CBR and others v Commission*, Joined Cases T-25/95, T-26/95, T-30/95, T-31/95, T-32/95, T-34/95, T-35/95, T-36/95, T-37/95, T-38/95, T-39/95, T-42/95, T-43/95, T-44/95, T-45/95, T-46/95, T-48/95, T-50/95, T-51/95, T-52/95, T-53/95, T-54/95, T-55/95, T-56/95, T-57/95, T-58/95, T-59/95, T-60/95, T-61/95, T-62/95, T-63/95, T-64/95, T-65/95, T-68/95, T-69/95, T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECLI :EU:T:2000:77; Judgment of the Court of Justice of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA (YSLP)*, C-306/96, ECLI :EU:C:1998:173, paragraph 16.

810 See Judgment of the Court of Justice of 17 July 1997, *Ferriere Nord v Commission*, C-219/95 P ECLI:EU:C:1997:375, paragraph 19.

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(917) The application of Article 101 TFEU to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[813].

(918) In the present case, the cartel consisted of an agreement and/or concerted practice between ČD and ÖBB aimed at impeding the market entry or expansion of the common competitor RegioJet by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport. The cartel covered the domestic long-distance rail passenger transport in Czechia as well as the international rail passenger transport between Prague and Vienna. Moreover, there are instances of collusive actions where the Parties restricted the access of RegioJet to wagons that could have been used also in other Member States (in particular Slovakia and Germany, see above recital (235) and section 5.11).

(919) The Commission finds that the existence of the Parties' agreement and/or concerted practice was likely to result in the automatic diversion of trade patterns from the course they would otherwise have followed.[814] In the context of cross-border rail transport, an anti-competitive conduct is clearly capable of affecting competition not only on the domestic market, but also on the broader internal market. It is, at least indirectly, capable of affecting trade between EU Member States.[815] Therefore, the agreement and/or concerted practice at hand was capable of having an appreciable effect upon trade between EU Member States.

6.1.5. Conclusion

(920) For the reasons set out above, the Commission finds that the Parties' agreement and/or concerted practice at hand had as its object the restriction of competition pursuant to Article 101(1) TFEU. This agreement and/or concerted practice took place between potential competitors on the markets relevant for the present proceedings and can thus be qualified as a cartel. The Parties' agreement and/or concerted practice in the form of a single and continuous infringement aimed to restrict competition on the markets relevant for the present proceedings by denying the common competitor RegioJet access to an important competitive input.

6.2. Application of Article 101(3) TFEU

(921) The Commission finds, on the basis of the facts in the Commission's file, that the conditions of Article 101(3) TFEU are not fulfilled in the present case.

6.2.1. The infringement and the scope of the VBER

(922) ČD submits that the Parties' agreement/concerted practice would qualify as a vertical arrangement as defined in Article 1(1)(a) of the Vertical Block Exemption Regulation that was in force during the Relevant Period[816] ("VBER"), considering

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813 See Judgment of the Court of First Instance of 10 March 1992, *Imperial Chemical Industries v Commission*, T-13/89, ECLI:EU:T:1992:35, paragraph 304.

814 See Judgment of the Court of Justice of 29 October 1980, *Heintz van Landewyck SARL and Others v Commission*, Joined Cases C-209-215/78 and C-218/78, ECLI:EU:C:1980:248, paragraph 170.

815 Judgment of the Court of Justice of 30 January 2020, *České dráhy a.s. v Commission,* Joined Cases C-538/18 and C-539/18, ECLI:EU:C:2020:53, paragraph 18.

816 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23.4.2010, p. 1–7.

that it related to sales of wagons where ÖBB was the seller and ČD the buyer of the wagons. According to ČD, ÖBB and ČD operated "*at a different level of the production or distribution chain*", with ÖBB having provided the input and ČD having bought that input. The agreement and/or concerted practice would therefore have to be considered vertical and not horizontal.[817]

(923) ČD further submits that the Parties' arrangement related to a quasi-exclusive buyer – seller relationship that the seller ÖBB should sell its wagons to ČD and that therefore the Parties' conduct is exempted under the VBER as a restriction of the supplier's sales.[818]

(924) The Commission disputes that the agreement and/or concerned practice covered by the present Decision would qualify as a vertical arrangement and thereby that it would fall under the scope of the VBER.

(925) First, ČD mischaracterises the anti-competitive conduct. The evidence in the Commission's file does not support ČD's view that the Parties' conduct merely related to an arrangement that the seller ÖBB should sell its wagons to ČD. Rather, the centre of gravity of the Parties' conduct, and the conduct which is the subject of the present Decision, are the Parties' collusive actions to prevent, hinder or restrict the access of RegioJet to ÖBB's used wagons for long-distance passenger transport aimed at impeding the market entry or expansion of RegioJet in the markets for the provision of domestic long-distance rail passenger transport services in Czechia as well as for the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route. As access to such wagons is an important competitive parameter on the passenger transport services markets, ČD and ÖBB collusively rigged wagon sales processes to the detriment of RegioJet who (actually or potentially) competed with the Parties on a horizontal level.

(926) Indeed, it is undisputed by the Parties that during the period of the infringement RegioJet was an actual competitor of ČD in domestic Czechia, where it has been providing long-distance rail passenger transport services in competition to ČD since 2011 (see above paragraph (31)).[819] It is also undisputed by the Parties that during the period of the infringement RegioJet has been a potential competitor of both ÖBB and ČD on the Prague – Vienna route where it has been offering international passenger services in competition to the Parties since 2017 (see above paragraph (31)).[820] The various pieces of contemporaneous evidence presented in section 5 above also clearly show that the Parties regarded RegioJet as actual competitor of ČD in domestic Czechia and as a potential competitor of both ÖBB and ČD on the Prague – Vienna route.

(927) In this regard, it was demonstrated in section 6.1 above that the Parties took anti-competitive actions against their common competitor RegioJet and agreed on measures to prevent, hinder or restrict RegioJet's access to such wagons, in pursuit of ČD's and ÖBB's broader objective to impede RegioJet's expansion in Czechia and on the Prague-Vienna route, where both ČD and ÖBB viewed RegioJet as an actual or potential threat to their incumbent positions.

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(928) For their core business, namely the provision of rail passenger transport services, the Parties operated at the same level of the supply chain. The new entrant RegioJet posed a competitive threat to both of them at this level. This led the Parties to take joint efforts against RegioJet to mitigate the threat from the market entry and expansion of RegioJet and created the overarching rationale for the collusion.

(929) Consequently, the Commission finds that the Parties' agreement and/or concerted practice to take anti-competitive actions against RegioJet and to collusively rig sales procedures for ÖBB's wagons is of horizontal nature.

(930) This is also apparent from the evidence presented in sections 5.3 - 5.14 above, that shows the clear and often explicit efforts of the Parties to avoid that used wagons reach RegioJet. Numerous pieces of contemporaneous evidence spanning throughout the whole period of the infringement and statements from the leniency applicant ÖBB show that the Parties' agreement in relation to the sales of ÖBB's wagons was aimed to impede RegioJet's expansion as actual competitor of ČD in Czechia and as potential competitor of both Parties on the Prague-Vienna route.

(931) The following are some examples of such contemporaneous evidence:

(a) ÖBB-internal email in May 2012 (see above recital (235)): *"it would not be good to sell the wagons to RegioJet [...] it is not excluded that RegioJet deploys these wagons between Prague and Brno and thereby competes with the planned Railjet services Graz – Prague"*.

(b) ÖBB-internal email in September 2012 (see above recital (249)): *"We have also decided not to sell to RegioJet the 1st class wagons suitable for long-distance passenger transport in which RegioJet is interested, because we don't want to support our strategic partner's direct competitor again"*.

(c) ÖBB-internal briefing in […] 2013 (see above recital (313)): *"A wagon sale to RegioJet was excluded, as RegioJet is a competitor to the strategic partner of ÖBB, ČD."*

(d) ČD-internal email of […] 2014 (see above recital (418)): "[…]*"*.

(e) Email from ČD to ÖBB in […] 2014 (see above recital (422)): "[…]*"*

(f) ÖBB-internal email of […] 2015 (see above recital (485)): *"*[…]*"*

(g) Email-exchange between ÖBB and ČD in […] 2015 (see above recitals (488), (490), (492)). ČD: *"*[…]*"*.

(h) Email from ČD to ÖBB in […] 2015 (see above recital (537)).: "[…]*"*

(i) ČD-internal email of […] 2016 (see above recital (567)): *"*[…]*"*.

(932) <u>Second</u>, ČD's argument ignores the fact that the sales of ÖBB's wagons to ČD (instead of to RegioJet) chronologically *followed* the Parties' horizontal collusive rigging of ÖBB's wagon sales processes. These sales were therefore not an objective on their own, but, to the contrary, a Parties' means to implement their agreement and/or concerted practice aimed at preventing, hindering or restricting RegioJet's access to used wagons as an important competitive parameter and thereby at hindering its expansion.

(933) <u>Third</u>, the fact that the anti-competitive conduct which gave rise to the present Decision cannot have been a vertical agreement is also apparent from the definition in the VBER. Article 1(1)(a) of the version of the VBER that was in force during the

Relevant Period defines a vertical agreement as *"an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services"*. The definition of vertical agreement has been left practically unchanged also in the current version of the VBER.[821] Therefore, regardless of the version of the VBER taken into consideration, the definition of vertical agreement presupposes that the undertakings operate "*for the purposes of the agreement or the concerted practice at a different level of the production or distribution chain"*. However, for the purpose of the agreement and / or concerted practice in the present case, namely the Parties' anti-competitive collusion to rig wagon sales procedures in order to impede RegioJet's market entry and expansion, ÖBB and ČD operate on the same level of the production chain, namely all as providers of rail passenger transport services.

(934) Furthermore, the Parties' anti-competitive coordination to impede RegioJet's market entry and expansion as a competing provider of rail passenger transport services in Czechia and on the Prague – Vienna route clearly does not relate to "*the conditions under which the parties may purchase, sell or resell certain goods or services*", as required by the definition for vertical agreements in Article 1(1)(a) of the version of the VBER that was in force during the Relevant Period.

(935) Fourth, the contemporaneous evidence in the Commission's file also contradicts ČD's view that the Parties' arrangement was a vertical quasi-exclusive buyer – seller relationship between the seller ÖBB and the buyer ÖBB. More particularly, ČD's arguments in its RSO cannot explain the sale process described above in section 5.11. This sales process concerned […] wagons in which […]. Nevertheless, ÖBB and ČD […]. Such agreement is not reconcilable with an alleged vertical nature of the conduct.

(936) Finally, ČD's argument that it had no wagons corresponding to the quality of ÖBB's wagons for sale and was therefore not active as seller of wagons suitable for long-distance passenger transport is not relevant for the qualification of the Parties' conduct as a horizontal agreement and / or concerted practice. As shown by the *AC-Treuhand* case-law[822], it is not necessary for the participant of a horizontal agreement to be active on the market on which the collusive behaviour appeared. Similarly, in case *Gütermann and Zwicky* the General Court held that it is sufficient for the coordination between undertakings to restrict competition on a specific relevant market within the EU, without each undertaking having to be active on that market[823]. In the *Keramag* cartel case the General Court also confirmed that a cartel

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[821] Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VBER), Article 1(1)(a): "*'vertical agreement' means an agreement or concerted practice between two or more undertakings, each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services*".

[822] Judgment of the Court of First Instance of 8 July 2008, *AC-Treuhand AG*, T-99/04, paragraphs […]; Judgment of the Court of Justice of 22 October 2015, *AC-Treuhand AG*, C-194/14 P, paragraphs […]; Judgment of the General Court of 10 November 2017*, Icap and Others v Commision*, T-180/15, ECLI:EU:T:2017:795, paragraphs […].

[823] Judgment of the General Court of 28 April 2010, *Gütermann and Zwicky*, T-456/05 and 457/05, ECLI:EU:T:2010:168, paragraph […].

member does not have to be present in the same relevant market as the other cartel members but that in such a situation *"the Commission is [...] obliged to show that the undertaking [...] has actively contributed to a restriction of competition*."[824]

(937) ČD contributed to the collusion by regularly urging ÖBB - including […] - to not sell wagons to RegioJet (see above sections 5.6 and 5.11 and 5.12), […] (see above section 5.12), […] (see above section 5.10), […] (see for example above recitals (374), (422), (503), (505), (555), (564), (567), (587)).

6.2.2. Interim conclusion

(938) In view of the foregoing, the Commission concludes that the agreement and / or concerted practice covered by the present Decision does not qualify as a vertical agreement and does not fall under the scope of the VBER.

7. DURATION OF THE INFRINGEMENT

7.1. Start of the infringement

(939) The Commission finds that the infringement started on […] 2012.

(940) On that day there was a […] meeting between ÖBB and ČD in Vienna that was attended, inter alia, by […] of ÖBB […] and the […] of ČD […]. The *"Common Challenges"* document was prepared for this meeting and it states that […] at an unknown moment prior to the meeting (see above section 5.3).

(941) The Commission therefore finds that the Parties already had an anti-competitive agreement in place prior to the […] meeting on […] 2012 and that the date of this meeting marks the start of the infringement. At the latest on that day, ÖBB and ČD entered into an agreement and/or a concerted practice aimed at impeding the market entry or expansion of the common competitor RegioJet by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport.

7.2. End of the infringement

(942) The Commission finds that the end date of the infringement is 21 January 2016.

(943) On that day, ÖBB's […] wrote a letter to ČD's […] stating that ÖBB as a publicly owned enterprise has to sell used wagons to the highest bidder (see above recital (566)).

(944) With this letter to ČD, ÖBB ended its participation in the agreement and/or concerted practice. The Commission therefore considers the cartel to have ended on 21 January 2016.

(945) […][825] […][826]

7.3. Arguments raised by ÖBB regarding the start of the infringement and assessment by the Commission

(946) ÖBB puts forward that the Parties' anti-competitive conduct started not on 9 May 2012 but only on […] 2012.[827] In section 5.3.4 above the Commission has already

824 Judgment of the General Court of 16 September 2013, *Keramag*, T-379/10, ECLI:EU:T:2013:457, paragraphs […].

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rebutted ÖBB's argument that the meeting […] on […] 2012 was not the start of the infringement.

(947) Further arguments of ÖBB about the start date of the infringement are rebutted below.

7.3.1. The behaviour of ÖBB's and ČD's employees after 9 May 2012 in relation to an understanding being reached in May 2012

(948) ÖBB submits that the behaviour of ÖBB's and ČD's employees after the […] meeting of […] 2012, especially internal discussions within ÖBB on 25 May 2012 and 11 June 2012 elaborating why a sale to RegioJet would not be desirable, speaks against a common understanding or an agreement having been reached at the […] meeting on […] 2012.[828]

(949) The Commission points out that the "*Common Challenges*" document states that "[…]" (see section 5.3). Agreeing on principles of sales does not equal agreeing that under no circumstances ÖBB would sell any wagons to RegioJet, or that it would always sell its wagons to ČD. ÖBB-internal discussions about the disadvantages of a sale to RegioJet therefore in no way exclude the existence of an agreement and/or concerted practice to impede the market entry or expansion of RegioJet by preventing, hindering or restricting the access of RegioJet to used ÖBB wagons as of 9 May 2012.

(950) Also, […] the collusion rather consisted in a common understanding that sales to RegioJet should be avoided <u>as far as possible</u>.[829] It is therefore reasonable that a certain level of uncertainty requiring internal discussions remained, especially amongst the ÖBB personnel that was not present at the […] meeting of […] 2012.

(951) ÖBB also considers that two e-mails (one ČD-internal e-mail sent on […] 2012 - see above recital (236) - and one sent by ČD to ÖBB on […] 2012 - see above recital (205)) demonstrate that there had been no agreement between ČD and ÖBB before 7 September 2012. ÖBB considers that these e-mails suggest […].[830]

(952) Contrary to ÖBB's assertion, the ČD-internal email of […] 2012 is not incompatible with the existence of a common understanding or an agreement that has been concluded at the latest on 9 May 2012. The email only shows that the author of the email […].

(953) The e-mail from ČD's […] to ÖBB's […] of […] 2012 is also not incompatible with the existence of a common understanding or an agreement concluded at the latest on 9 May 2012. First, as confirmed by the case law […] - due to its technical content - would be further forwarded within ÖBB (which indeed happened[831]). Second, […].

7.3.2. Compatibility of ÖBB's and ČD's conduct in 2011/2012 with the […]

(954) ÖBB claims that its conduct in September / October 2011, when it rejected both RegioJet's and ČD's requests for selling wagons, and its conduct in the railjet negotiations with ČD in early 2012 are incompatible with the existence of a common understanding between ČD and ÖBB to not sell wagons to RegioJet already as of 9

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831 It was forwarded to at least 5 persons in ÖBB, […]

May 2012.[832] ÖBB rather used the possibility of a cooperation with RegioJet on the route between Prague and Vienna to build up pressure on ČD during the railjet negotiations.[833] ÖBB therefore concludes that the relevant common understanding began only on 7 September 2012.[834]

(955) The Commission disagrees with this view. ÖBB's conduct in September / October 2011 is too long before the starting date of the present infringement to be indicative for determining whether the Parties entered into an agreement and 7 or a concerted practice in May 2012.

(956) Moreover, contrary to ÖBB's stance, its conduct towards RegioJet in March 2012, when ÖBB's […] informed […] of RegioJet by e-mail of 27 March 2012 (and therefore only 6 weeks before the […] meeting of […] 2012) that ÖBB would not sell used wagons to RegioJet ("*due to a change in our strategy we are currently not able to sell you any coaches"*[835]) rather points to the existence of a common understanding between ÖBB and ČD.

8. ADDRESSEES OF THE PRESENT PROCEEDINGS

8.1. General principles

(957) EU competition law refers to the activities of undertakings. The concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[836]

(958) When such an entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. The conduct of a subsidiary can be imputed to its parent where the parent exercises a decisive influence over it, namely where that subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company. In effect, as the controlling company in the undertaking, the parent is deemed to have itself committed the infringement of Article 101 TFEU.[837]

(959) The Commission cannot merely find that a legal entity is able to exert decisive influence over another legal entity, without checking whether that influence was actually exerted. On the contrary, it is, as a rule, for the Commission to demonstrate

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835 […]

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

837 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, paragraph 61; Judgment of the Court of Justice of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, ECLI:EU:C:2011:620, paragraphs 57 and 63; Judgment of the Court of Justice of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others,* C-628/10 P and C-14/11 P, ECLI:EU:C:2012:479, paragraphs 43 and 46; Judgment of the Court of Justice of 8 May 2013, *ENI* v *Commission*, C-508/11 P, ECLI:EU:C:2013:289, paragraph 47; Judgment of the Court of Justice of 16 November 2000, *Stora Kopparbergs Bergslags v Commission*, C-286/98 P, ECLI:EU:C:2000:630, paragraph 29; Judgment of the General Court of 23 January 2014, *Evonik Degussa et AlzChem v Commission*, T-391/09, ECLI:EU:T:2014:22, paragraph 77; Judgment of the Court of Justice of 11 July 2013, *Commission v Stichting Administratiekantoor Portielje*, C-440/11 P, ECLI:EU:C:2013:514, paragraph 41.

such decisive influence on the basis of factual evidence, including, in particular, any management power one of the legal entities may have over the other.[838]

(960) However, in particular in those cases where one parent holds all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company in fact does exercise a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.[839]

(961) Attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking for the purposes of the Union rules on competition[840] and does not require proof of the parent's participation in or awareness of the infringement, either as regards its organisation or implementation.

(962) Once the Commission has determined that an undertaking composed of the parent and one or more subsidiaries implicated in the infringement exists, it has discretion in deciding which entities are to be held accountable for the infringement. It is established case-law that the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period[841], or both.

(963) Where several legal entities may be held liable for the participation in an infringement of one and the same undertaking, they can be regarded as jointly and severally liable for that infringement.[842]

8.2. Application to this case

8.2.1. České dráhy, a.s.

(964) For the whole period from 9 May 2012 to 21 January 2016 the legal entity České dráhy, a.s. directly participated in the infringement described in this Decision in particular through its employees and / or members of corporate bodies […] as well as through other employees of České dráhy, a.s. that were involved in the anti-competitive contacts established in sections 5.3 - 5.14 of this Decision.

(965) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016):[843]

(a) […]

(b) […]

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

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

840 See judgment of the Court of First Instance of 15 June 2005, *Tokai Carbon* v *Commission*, T-71/03, T-74/03, T-87/03, and T-91/03, ECLI:EU:T:2005:220, paragraph 54.

841 See judgment of the Court of First Instance of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, ECLI:EU:T:2006:396, paragraph 331 and the case-law referred to therein, confirmed by the judgment of the Court of Justice in *Erste Group Bank and Others*, C-125/07 P, paragraphs 81 and 82. See also judgment of the General Court of 29 February 2016, *Deutsche Bahn AG, Schenker AG, and Others* v *Commission*, T-267/12, ECLI:EU:T:2016:110, paragraphs 129-130 and 138.

842 Judgment of the General Court of 12 July 2011, *Fuji Electric Co. Ltd v Commission,* Case T-132/07, ECLI:EU:T:2011:344, paragraph 59.

843 […]

(966) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016):[844]

(a) […]

(b) […]

(c) […]

(d) […]

(e) […]

(967) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016):[845]

(a) […]

(b) […]

(c) […]

(d) […]

(e) […]

(968) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[846]:

(a) […]

(b) […]

(c) […]

(969) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[847]:

(a) […]

(b) […]

(c) […]

(d) […]

(970) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[848]:

(a) […]

(b) […]

(c) […]

(d) […]

(e) […]

---

844 […]
845 […]
846 […]
847 […]
848 […]

(971) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[849]:

(a) […]

(b) […]

(c) […]

(972) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[850]:

(a) […]

(b) […]

(973) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[851]:

(a) […]

(b) […]

(c) […]

(974) […] held the following functions within the legal entity České dráhy, a.s. in the time period of the infringement (9 May 2012 until 21 January 2016)[852]:

(a) […]

(b) […]

(c) […]

(975) Each of these ten individuals […] at the time he was involved in the anti-competitive contacts outlined in sections 5.3 - 5.14 of this Decision.

(976) The Commission therefore holds the legal entity České dráhy, a.s. liable for its direct participation in the infringement of Article 101 TFEU found in this Decision for the period from 9 May 2012 to 21 January 2016.

8.2.2. ÖBB

8.2.2.1. ÖBB-Personenverkehr AG

(977) For the whole period from 9 May 2012 to 21 January 2016 the legal entity ÖBB-Personenverkehr AG directly participated in the infringement described in this Decision in particular through its […] and […] as well as through other […] of ÖBB-Personenverkehr AG that were involved in the anti-competitive contacts established in sections 5.3 - 5.14 of this Decision.

(978) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[853]:

- […]

849 […]
850 […]
851 […]
852 […]
853 […]

(979) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[854]:

- […]

(980) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[855]:

- […]

(981) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[856]:

- […]

(982) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[857]:

- […]

(983) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[858]:

- […]

(984) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[859]:

- […]

(985) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[860]:

- […]

(986) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[861]:

- […]

(987) […] held the following functions within the legal entity ÖBB-Personenverkehr AG in the time period of the infringement (9 May 2012 until 21 January 2016)[862]:

- […]

854 […]
855 […]
856 […]
857 […]
858 […]
859 […]
860 […]
861 […]
862 […]

(988) The Commission therefore holds ÖBB-Personenverkehr AG liable for its direct participation in the infringement of Article 101 TFEU found in this Decision for the period from 9 May 2012 to 21 January 2016.

8.2.2.2. ÖBB-Technische Services GmbH

(989) For the period from 31 July 2013 to 21 January 2016 the legal entity ÖBB-Technische Services GmbH directly participated in the infringement described in this Decision through its employee […].

(990) […] held the following functions within the legal entity ÖBB-Technische Services GmbH[863]:

- […].

(991) The Commission therefore holds ÖBB-Technische Services GmbH liable for its direct participation in the infringement of Article 101 TFEU found in this Decision for the period from 31 July 2013 to 21 January 2016.

8.2.2.3. ÖBB-Holding AG

Direct participation

(992) For the whole period from 9 May 2012 to 21 January 2016 the legal entity ÖBB-Holding AG directly participated in the infringement described in this Decision through its […].

(993) […] held the following functions within the legal entity ÖBB-Holding AG in the time period of the infringement (9 May 2012 until 21 January 2016)[864]:

- […]

(994) The Commission therefore holds ÖBB-Holding AG liable for its direct participation in the infringement of Article 101 TFEU found in this Decision for the period from 9 May 2012 to 21 January 2016.

Parental liability through exercise of decisive influence on ÖBB-PV

(995) Moreover, for the whole period from 9 May 2012 to 21 January 2016 ÖBB-Holding Aktiengesellschaft AG was the direct 100% shareholder[865] of the directly infringing entity ÖBB-PV and is therefore presumed to have exercised decisive influence over the latter.[866]

(996) The Commission therefore holds ÖBB-Holding AG jointly and severally liable for the conduct of its wholly owned subsidiary ÖBB-Personenverkehr AG during the whole the period of the infringement of Article 101 TFEU from 9 May 2012 to 21 January 2016.

Parental liability through exercise of decisive influence on ÖBB-TS

(997) Moreover, for the period from 31 July 2013 to 21 January 2016 ÖBB-Holding AG was (indirectly via its fully owned subsidiaries ÖBB-PV and Rail Cargo Austria AG)

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863 […]
864 […]
865 […]
866 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel v Commission*, C-97/08, ECLI:EU:C:2009:536, paragraph 60, citing further case-law.

the sole shareholder[867] of the directly infringing entity ÖBB-TS and is therefore presumed to have exercised decisive influence over the latter.

(998) The Commission therefore holds ÖBB-Holding AG jointly and severally liable for the conduct of its indirectly fully owned subsidiary ÖBB-Technische Services GmbH during the period of the infringement of Article 101 TFEU from 31 July 2013 to 21 January 2016.

8.2.2.4. Arguments raised by ÖBB and assessment by the Commission

(999) ÖBB claims that the infringement was implemented and supported solely by staff of its subsidiary responsible for long-distance rail passenger services, ÖBB-PV. Sales of rolling stock were never discussed in depth at […].[868]

(1000) The Commission disagrees with ÖBB's view. Examples from the evidence show a direct involvement of ÖBB[…] in the anti-competitive conduct.

(1001) First, the ÖBB-internal briefing for ÖBB[…] for a meeting between the Parties[…] on […] 2014 in Vienna (see above section 5.8) mentions that […]: "[…] *(letter from ČD to* […]*, followed by meeting* […]*). However, this has been discussed and solved"* (see above recital (387)).

(1002) Second, the contemporaneous evidence also shows that on 22 September 2014 […] enquired on the state of play of a sale of used wagons and contacted directly ÖBB's […] to that end: "[…]*"* (see above recital (419)) In the related reply, […] informed […] as follows: *"*[…]*"* (see above recital (421)).

(1003) Third, […] also reassured ČD's […] in a meeting on […] 2014 by declaring *"*[…]*"* (see above recital (422)).

(1004) Therefore, the Commission finds that […] has been directly involved in the infringement.

(1005) In any event, for the purpose of establishing liability the Commission is not required to show the direct participation of ÖBB's […] in the collusive conduct. The liability of ÖBB-Holding AG - of which […] was the […] - is sufficiently established through the presumption of ÖBB-Holding AG exercising decisive influence on the directly infringing subsidiaries ÖBB-PV and ÖBB-TS which ÖBB does not contest.

8.2.2.5. Conclusion on liability for ÖBB

(1006) Based on the foregoing, it has been established that the following legal entities have directly participated in the infringement of Article 101 TFEU, or bear liability thereof, for the respective periods as follows:

- ÖBB-Personenverkehr AG for the period from 9 May 2012 to 21 January 2016
- ÖBB-Technische Services GmbH for the period from 31 July 2013 to 21 January 2016
- ÖBB-Holding AG for the period from 9 May 2012 to 21 January 2016.

(1007) ÖBB-Holding AG together with ÖBB-Personenverkehr AG and ÖBB-Technische Services GmbH constitute one economic unit. The Commission therefore holds ÖBB-Holding AG and ÖBB-Personenverkehr AG jointly and severally liable for the infringement of Art 101 TFEU for the period from 9 May 2012 to 21 January 2016.

[867] […]
[868] […]

The Commission also holds ÖBB-Holding AG and ÖBB-Technische Services GmbH jointly and severally liable for the infringement of Art 101 TFEU for the period from 31 July 2013 to 21 January 2016.

9. REMEDIES

9.1. Article 7 of Regulation No 1/2003

(1008) Where the Commission finds that there is an infringement of Article 101 TFEU it may by decision require the undertakings concerned to bring the infringement effectively to an end in accordance with Article 7 of Regulation No 1/2003.

(1009) The Commission considers that it cannot be excluded that a practice similar to the infringement addressed in this Decision is ongoing. The Commission requires the undertakings to which this Decision is addressed to bring the infringement to an end (in so far as they have not already done so) and to refrain from any agreement, concerted practice or decision of an association of undertakings which may have the same or a similar object or effect.

9.2. Fines under Article 23 of Regulation No 1/2003

(1010) Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 TFEU. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(1011) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation 1/2003, regard shall be had to all relevant circumstances and particularly the gravity and duration of the infringement.

(1012) The Commission sets the fines in accordance with its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (the "Guidelines on fines").[869]

9.2.1. Intentional or negligent infringement

(1013) In this case, the Commission considers that, based on the facts described in this Decision, both Parties have committed the infringement intentionally or at least negligently. The Parties, in order to impede RegioJet's market entry and expansion, rigged ÖBB's wagons sales procedures over a period of more than 4 years. Their collusive efforts included: cancelling and delaying some wagon sales to ensure that those wagons did not end up with RegioJet (see above sections 5.4 and 5.5); ÖBB informing ČD of the upcoming wagons sales and giving ČD extra time to improve its bid (see above sections 5.6); publicly offering wagons for sale while actually intending to sell them to ČD, and reducing publicity around planned wagon sales in order not to attract bidders other than ČD (see above sections 5.7 and 5.9); exchanging information about other bidders' bids and the degree of interest of other bidders (see above sections 5.9 and 5.12); ČD leaving the price it offers for ÖBB's wagons up to the consideration of the seller ÖBB (see above section 5.7); ČD contacting ÖBB in order to agree on a final price for wagons to avoid being outbid by other bidders (see above section 5.12); both Parties having contacts at top

869 OJ C 210, 1.9.2006, p. 2. According to point 37 of the Guidelines on fines the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in their point 21.

management level in order to prevent wagon sales to RegioJet (see above sections 5.6, 5.11 and 5.12). Moreover, the Parties stressed the secrecy of their arrangements (see for example above in recital (272), (440) and (483)). Fines should therefore be imposed on the undertakings to which this Decision is addressed.

9.2.2. *Arguments raised by ČD and assessment by the Commission*

(1014) ČD claims that finding an infringement of Article 101 TFEU in this case would be a novelty in EU competition law. For ČD, a prohibition decision was unforeseeable and therefore ČD could not have committed the infringement intentionally or negligently. The imposition of a fine would, according to ČD, breach the principle of legal certainty and the principle *nulla poena sine lege certa praevia.* Moreover, ČD alleges that the Commission has not analysed ČD's *mens rea* properly. In ČD's view, intent as one of the forms of *mens rea* requires much more than only the alleged 'awareness' about the anticompetitive nature of the conduct – it needs to be identified in relation to all elements of the challenged infringement.[870]

(1015) The Commission stresses that the condition of an intentional or negligent infringement is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty.[871] An infringement is committed intentionally when an undertaking could not have been unaware that its conduct had as its object to restrict competition.[872] An infringement is committed negligently when an undertaking's conduct is "*highly anti-competitive"*[873] or the anti-competitive nature of that conduct was reasonably foreseeable[874]. As demonstrated by the evidence presented in sections 5.3 to 5.14 above, the conditions for an intentional or at least negligent commitment of the infringement in the present case are fulfilled for both Parties.

(1016) ČD also argues with the novelty of the present case, so that a prohibition decision would have been unforeseeable for ČD. First, it should be noted that ČD's argument about the alleged unforeseeability is based on a different interpretation of the legal qualification of the Parties' conduct. A different view of the applicable legal qualification for a certain conduct however does not render a prohibition decision for

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870 […]

871 Judgment of the Court of Justice of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, ECLI:EU:C:1996:436,paragraph 48; Judgment of the General Court of 29 March 2012, *Telefónica and Teléfonica de España v Commission*, T-336/07, ECLI:EU:T:2012:172, paragraph 362; Judgment of the Court of Justice of 18 June 2013, *Schenker & Co. and Others*, C-681/11, ECLI:EU:C:2013:404, paragraph 37; Judgment of the General Court of 8 September 2016, *Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission*, T-460/13, ECLI:EU:T:2016:453, paragraph 306; Judgment of the General Court of 26 October 2017, *Marine Harvest v Commission*, T-704/14, ECLI:EU:T:2017:753, paragraph 237.

872 Judgment of the Court of Justice of 1 February 1978, *Miller International Schallplatten GmbH*, C-19/77, ECLI:EU:C:1978:19, paragraph 18; Judgment of the General Court of 12 December 2012, *Novácke chemické závody v Commission*, T-352/09, ECLI:EU:T:2012:673, paragraph 85; Judgment of the General Court of 14 May 2014, *Donau Chemie v Commission*, T-406/09, ECLI:EU:T:2014:254, paragraph 171; Judgment of the General Court of 8 September 2016, *Generics (UK) v Commission*, T-469/13, ECLI:EU:T:2016:454, paragraph 413.

873 Judgment of the Court of Justice of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, ECLI:EU:C:2012:770, paragraph 164; Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraphs 782 to 783.

874 Judgment of the General Court of 8 September 2016, *Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission*, T-460/13, ECLI:EU:T:2016:453, paragraphs 304 to 313.

such conduct unforeseeable. Second, the principle that offences and penalties must be defined by law requires the law to give a clear definition of offences and the penalties which they attract. That requirement is satisfied where the individual concerned is in a position to ascertain from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable. If necessary, the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. Such persons can therefore be expected to take special care in evaluating the risk that such an activity entails.[875]

(1017) Even assuming that, at the time of the infringement, the Union courts not yet had the opportunity to rule specifically on the conduct such as the one of ČD in this case, that undertaking should have expected, if necessary after taking appropriate legal advice, its conduct to be declared incompatible with the EU competition rules.

(1018) In addition, insofar as ČD claims that the Commission's analysis of its *mens rea* would require more than only the awareness about the anticompetitive nature of the conduct and that "*it needs to be identified in relation to all elements of the challenged infringement*"[876], as shown above, the case-law requires awareness of the anti-competitive nature of the conduct. That ČD could not have been unaware of the anti-competitive nature of its conduct is already apparent from the Parties' correspondence which they wanted to be kept secret (see examples above in recital (273) - *"*[…] (440) - *"*[…]*"*- and recital (483) - *"*[…]*"*).

(1019) ČD was therefore aware that its conduct was illegal, and ČD acted intentionally, or at least negligently. Furthermore, the Parties' conduct in question followed the objective of impeding RegioJet's market entry and expansion by the means of preventing, hindering or restricting RegioJet's acess to used ÖBB wagons, as documented by the numerous contemporaneous documents stemming from both ÖBB and ČD. Such conduct was highly anti-competitive, and its anti-competitive nature was reasonably foreseeable. ČD's argument thus cannot stand.

9.3. Fines under the Guidelines on fines

(1020) The Guidelines on fines provide that a two-step methodology should be used.[877] First, the Commission determines a basic amount of the fine for each undertaking.[878] Second, the Commission adjusts the basic amount on the basis of an overall assessment which takes account of all the relevant circumstances.[879] The basic amount can be increased or reduced if either aggravating or mitigating circumstances are found.[880]

(1021) The Commission sets the fines at a level sufficient to ensure deterrence.[881] Although the Guidelines on fines present the general methodology for the setting of fines, the

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[875] Judgment of the Court of Justice of 22 October 2015, Case C-194/14 P, *AC Treuhand v Commission*, paragraphs 40-43.

[876] […]

[877] Point 9 of the Guidelines on fines.

[878] Point 10 of the Guidelines on fines.

[879] Point 27 of the Guidelines on fines.

[880] Points 28 and 29 of the Guidelines on fines.

[881] Point 30 of the Guidelines on fines.

particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology.[882]

(1022) Finally, the Commission takes into account the legal maximum of the fine that may be imposed[883] and the Leniency Notice[884]. The Commission will use rounded figures when setting fines.[885]

9.4. The basic amount of the fine

(1023) The basic amount results from the addition of a variable amount and an additional amount.[886] Both components of the basic amount are determined on the basis of the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area in the EEA.[887]

9.4.1. Value of Sales

(1024) The basic amount will be set by reference to the value of sales.[888]

9.4.1.1. Relevant year for the calculation of the value of sales

(1025) The Commission normally uses the value of the sales made during the last full business year of each undertaking's participation in the infringement.[889] If the sales achieved by the undertakings during that year are not sufficiently representative of their annual sales achieved during the infringement period, the Commission may take into account other years as a proxy for the determination of the relevant value of sales.

(1026) In the present case, the last full year of the Parties' participation in the infringement is 2015. The Parties' relevant revenues in 2015 are representative and show no severe deviations from the other years. Therefore, there is no reason to depart from the general rule of the Guidelines on fines to use the last full year of the Parties' participation in the infringement. The Commission therefore takes the year 2015 as reference year for determining the Parties' value of sales.

9.4.1.2. Revenues from rail passenger transport

(1027) The present Decision concerns a cartel between ÖBB and ČD aimed at impeding the market entry or expansion of the common competitor RegioJet by preventing, hindering or restricting the access of RegioJet to used railway wagons for long-distance passenger transport, this is to say for the provision of long-distance domestic rail passenger transport services in Czechia and for the provision of international rail passenger transport services on the Prague – Vienna route. The Parties' collusion aimed at distorting competition for the provision of rail passenger transport services, and the Parties' anti-competitive actions taken against RegioJet in relation to the sales of ÖBB's used wagons were their means of implementation to achieve the cartel's aim.

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882 Point 37 of the Guidelines on fines.
883 Points 32 and 33 of the Guidelines on fines.
884 Point 34 of the Guidelines on fines.
885 Point 26 of the Guidelines on fines.
886 Point 25 of the Guidelines on fines.
887 Point 13 of the Guidelines on fines.
888 Point 12 of the Guidelines on fines.
889 Point 13 of the Guidelines on fines.

(1028) As required by point 13 of the Guidelines on fines, the infringement therefore directly or indirectly relates to the provision of long-distance rail passenger transport services, where the Parties' agreement and / or concerted practice intended to protect their revenues and incumbent positions.

(1029) Consequently, the Commission considers that it is most appropriate for the determination of the value of sales in the sense of point 13 of the Guidelines on fines to use the Parties' value of sales from rail passenger transport services – concretely from the provision of long-distance domestic rail passenger transport services in Czechia, and from the provision of international rail passenger transport services on the Prague – Vienna route – rather than the value of sales from the sales of the used wagons.

(1030) ČD argues that the value of sales should be determined based on the value of the sales of the used wagons which is what – in ČD' s view - the anticompetitive conduct relates to.[890] The Commission however rejects this claim because the logic of the infringement in the present case was different: it had as its goal to restrict competition on the markets for the provision of long-distance rail passenger transport services in Czechia and of international rail passenger transport services on the Prague – Vienna route and impede the entry and expansion of the Parties' common competitor, RegioJet. The Parties' collusive rigging of sales processes for ÖBB's used long-distance passenger transport wagons was just a means to achieve this goal (see above section 6.2.1).

9.4.1.3. Relevant geographic area for the determination of the revenue

(1031) The infringement covered the whole territory of Czechia as well as the international Prague – Vienna route. The relevant geographic area for the determination of the Parties' value of sales from the provision of rail long-distance passenger transport services is consequently the Parties' revenues in domestic Czechia and on the Prague – Vienna route.

9.4.1.4. Revenues from long-distance domestic rail passenger transport services in Czechia and from international rail passenger transport services on the Prague – Vienna route

(1032) For the purpose of determining the value of sales in the present case the Commission only takes into account the Parties' revenues stemming from long-distance domestic rail passenger transport services in Czechia and from international rail passenger transport services on the Prague – Vienna route.

(1033) The Commission excludes revenues from regional passenger transport services because the cartel affected the long-distance rail passenger transport market as the Parties' common competitor RegioJet was not active in regional transport during the time period of the infringement.

(1034) It is also apparent from the contemporaneous evidence in the file that the Parties aimed at distorting competition for the provision of long-distance and international rail passenger transport services because the Parties' communications always mentioned international or long-distance lines as areas where RegioJet was already or could potentially be active with the cartelised wagons. This also demonstrates that the infringement related to long distance passenger transport services.

[890] […]

(1035) Moreover, the wagons to which the Parties restricted RegioJet's access through their anti-competitive actions were wagons for long-distance transport. Indeed, regional and long-distance wagons have different features (see above recital (9)).

9.4.1.4.1. Arguments raised by ČD and assessment by the Commission

(1036) ČD submits that the value of sales must not be calculated based on ČD's revenues from long distance rail passenger transport in Czechia or from the Czech part of the Prague – Vienna route. According to ČD, the Commission errs in including such revenues because ÖBB was not an actual or potential competitor of ČD. In ČD's view, the Commission can only base the fine on revenues from lines where ÖBB was at least a potential competitor of ČD, and this condition was actually not satisfied on all lines where either of the Parties operated in the period of the infringement. ČD concludes that therefore no fine can be imposed.[891]

(1037) ČD bases its argumentation on the judgment in the *Lundbeck* case and submits that according to this judgment *"sales by the infringer on a market which is not open to competition" "or sales made by one of the parties to a cartel on markets on which the other parties to that cartel are not present and cannot be regarded as potential competitors" "must be excluded from the value of sales that are the subject of an infringement"*.[892]

(1038) However, the Commission stresses that the findings of the Court of Justice in the *Lundbeck* case cannot be applied to the case at hand because of different factual circumstances in both cases.

(1039) The *Lundbeck* case related solely to a pay-for-delay agreement: an agreement between a company holding a patent for a pharmaceutical drug and a generic company to delay the market entry of the generic medicine in return for payments. The *Lundbeck* judgment therefore concerns the scenario where the agreement between two parties aimed at excluding competition between themselves.

(1040) In such scenario, which is present in market-sharing and pay-for-delay cases alike, the Court requires at least potential competition to exist between the parties to the agreement, the reason being that otherwise there can be no competition that can be restricted by the parties' agreement. Consequently, in such scenario potential competition is also a condition for the imposition of a fine on the parties to the agreement.

(1041) The scenario in a cartel case like the present one is however different: in the present case, the Parties' agreement and / or concerted practice is aimed at excluding competition from a third party because the agreement and / or concerted practice is directed against the Parties' common competitor RegioJet. Hence, the Commission does not impose a fine on the Parties because they restricted competition between themselves. Rather, the Commission imposes a fine on the Parties because the Commission finds that the Parties restricted competition from a third party, and for this reason potential competition between the Parties is not relevant.

(1042) In any case, the Commission underlines that taking the Parties' revenues from long-distance rail passenger transport services in Czechia and from international rail passenger transport services on the Prague – Vienna route for determining the value

[891] […]

[892] […], referring to the judgment of the Court of Justice of 25 March 2021, *Lundbeck v Commission*, C-591/16 P, ECLI:EU:C:2021:243, paragraph 188.

of sales is also in line with point 13 of the Guidelines on fines, because the infringement related to long distance rail passenger transport services in Czechia and to international rail passenger transport services on the Prague – Vienna route.

9.4.1.4.2. Arguments raised by ÖBB and assessment by the Commission

(1043) ÖBB argues that couchette wagons were not covered by the infringement and that the value of sales should not comprise the Parties' revenues from night train services in the relevant geographic area.[893]

(1044) The Commission rejects this. The Commission points to the fact that couchette wagons are per definition long-distance wagons. Moreover, there is ample evidence in the Commission's file that the Parties included sales of couchette wagons in their anti-competitive actions and therefore regarded them as covered by the cartel. At two occasions the Parties even colluded explicitly about the sale processes for couchette wagons (see above sections 5.7 and 5.11) to avoid that such wagons ended up at RegioJet. This demonstrates that the Parties through their anti-competitive actions also aimed at restricting competition for the provision of night train transport services. The Commission therefore includes revenues from the provision of night train services in the value of sales.

(1045) That RegioJet may have converted couchette wagons into normal seating wagons, as alleged by ÖBB[894], is not supported by evidence. Moreover, it is contradicted by a contemporaneous document stemming from ÖBB itself that refers to RegioJet's use of former ÖBB couchette wagons for night train services, in competition to ČD (see above recital (503)). In any case, a (possible) later change of the features of the couchette wagons does not put into question their features present at the time when they were sold.

9.4.1.4.3. Interim conclusion

(1046) For the purpose of determining the value of sales in the present case the Commission therefore takes into account the Parties' revenues stemming from long-distance domestic rail passenger transport services in Czechia and from international rail passenger transport services on the Prague – Vienna route (in the latter case, for each undertaking, the revenues generated on their own territory).

9.4.1.5. Amount of the relevant revenues

(1047) Table 2 shows the revenues generated by ÖBB in relation to international passengers[895] on the Prague-Vienna route (on the segment on Austrian territory) and its revenues stemming from long-distance domestic rail passenger transport services in Czechia, and the revenues generated by ČD in relation to international passengers on the Prague-Vienna route (on the segment on Czech territory) and its revenues stemming from long-distance domestic rail passenger transport services in Czechia.[896]

Table 2: Revenues related to the long-distance domestic rail passenger transport services in Czechia and to international rail passenger transport services on the Prague-Vienna route in 2015

893 […]
894 […]
895 These are passengers travelling on cross-border connections.
896 As explained below, only revenues generated on […] are taken into account.

Undertaking	Revenues from domestic CZ transport (ths EUR)	Revenues from Prague – Vienna international transport (ths EUR)
ÖBB	0	[…]
ČD	[…]	[…]

9.4.1.6. Attribution of part of ČD's revenues from long-distance domestic rail passenger transport services in Czechia also to ÖBB

(1048) As laid out above in section 9.4.1.3 and 9.4.1.4, the relevant value of sales is taken from (a) the Parties' revenues from rail passenger transport services provided on the international Prague-Vienna route, and (b) the Parties' revenues from the long-distance domestic rail passenger transport services provided in Czechia.

(1049) As to the international Prague-Vienna route, the Commission uses each Party's turnover on this route as the basis for its respective value of sales.

(1050) As to the long-distance domestic rail passenger transport services in Czechia, the Commission notes that at no point during the period of the infringement ÖBB has generated revenues in Czechia.

(1051) Hence, using only ÖBB's revenues on the Prague – Vienna route as basis for the determination of ÖBB's value of sales would mean that the fine for ÖBB would not appropriately mirror ÖBB's contribution to and involvement in the Parties' collusion, would not properly reflect the gravity of ÖBB's infringement, and would also have no deterrent effect, as explained thereafter.

Reasons for taking ČD's revenues in Czechia as basis for the value of sales of ÖBB

(1052) Point 37 of the Guidelines on fines expressly states that "*although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology*".

(1053) In view of the particularities of the present case with ÖBB achieving no revenues in Czechia, fines should be set at a level that properly reflects ÖBB's relative weight in the infringement and achieves deterrence. This is achieved by taking ČD's revenues from long-distance domestic rail passenger transport services in Czechia as basis for the value of sales of ÖBB, and by splitting these revenues generated by ČD evenly between the Parties.[897]

(1054) One of the objectives of both ÖBB and ČD – next to the objective of protecting both Parties' revenues on the Prague – Vienna route – was to protect the revenues of ČD in Czechia and to distort competition for long-distance rail passenger transport services in Czechia.

(1055) That ÖBB shared ČD's interest in protecting ČD's market position and revenues in Czechia appears regularly throughout the whole period of the infringement. There are several contemporaneous emails from ÖBB showing that ÖBB regarded possible sales of wagons to RegioJet as an undesirable support of a direct competitor in

[897] […]

domestic Czechia of its strategic partner ČD and that such sales had to be prevented (see above recital (249) "*we have also decided not to sell to RegioJet the 1st class wagons …. , because we don't want to support our strategic partner's direct competitor again"*; recital (276): *"sale of wagons to RegioJet ruled out since RegioJet is a competitor to ÖBB's strategic partner ČD*"; recital (313) *"a wagon sale to RegioJet was excluded, as RegioJet is a competitor to ÖBB's strategic partner ČD"*; recital (485): *"Please absolutely DO NOT sell to RegioJet …. they are competitors of our partner ČD in Czechia")*.

(1056) Moreover, ÖBB-internal emails and other contemporaneous documents demonstrate ÖBB's awareness of the competitive situation in Czechia with RegioJet being a strong competitor for ČD (see above recitals (172), (173), (181), (182), (387), (489), (571) and (590)). They also show ÖBB's awareness of RegioJet's need of wagons to be able to further expand its services, and that by selling its used long-distance passenger transport wagons ÖBB would directly support ČD's competitor in Czechia (see for example above recital (235) *"it would not be good to sell the wagons to RegioJet ….it is not excluded that RegioJet deploys these wagons between Prague and Brno… RegioJet needs these wagons for Prague – Hamburg… ČD is our cooperation partner (what would we say if ČD were to sell wagons to a competitor of us?"* and recital (489) *"you would help ČD and therefore us a lot if you do not sell wagons to RegioJet, …. RegioJet is …. a really strong competitor to ČD"*).

(1057) Moreover, a specific objective of ÖBB in the cartel was to keep up the good working relationship with ČD that would have been endangered by sales of wagons to ČD's strongest competitor RegioJet[898].

(1058) There are also contemporaneous documents in the file suggesting that ÖBB saw its own benefit of the collusion as a more long-term one: not wanting to favour the growth of a new entrant, which may then team up with another direct competitor of ÖBB, namely the Austrian new entrant WESTBahn.

(1059) There are several examples of such contemporaneous documents. An ÖBB-internal email of 11 February 2015 states: "*You would help ČD and therefore us a lot if you do not sell wagons to RegioJet [….] RegioJet is not only a really strong competitor to ČD, but also pushes again and again into the direction of Austria and needs and searches wagon material for this.* […] *They are furthermore a strong competitor with their student agency busses between Prague, Brno and Vienna. This maybe as motivation for you, we don't want to get additional competitors for us on the rail route to Prague. Westbahn would presumably immediately act as operating railway undertaking in Austria"* (see above recital (489)).

(1060) Another example showing that ÖBB was aware that RegioJet was not only a competitor of ČD on the Czech domestic market but may, in the long term, become a competitor of ÖBB is an ÖBB-internal presentation of 28 February 2011 (see above recital (181)): "*RegioJet = competitor of ČD on the Czech domestic market. [….] Potential long-term competitor of ÖBB?"*.

(1061) Furthermore, an ÖBB-internal email of 23 February 2016 asks concerning a planned sale of wagons: *"Do we really have to sell the wagons to the highest bidder, especially if we know that they are delivered to the competitor of ČD? In the end this may also lead to loss of revenue for us, if the competitor is able to take away*

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passengers from ČD to RegioJet, which then in Austria use the student agency network and take the bus to Vienna instead of the train? Thereby we would have a decrease in revenues" (see above recital (590)).

(1062) The examples of evidence quoted above underline that ÖBB perceived RegioJet as a long-term threat and wanted to prevent the growth of RegioJet, which in the long term may have been able to compete with ÖBB. Hence, it was logical for ÖBB to keep RegioJet's market position in domestic Czechia weak to avoid its expansion. ÖBB therefore also had a strong interest in restricting competition from RegioJet in domestic Czechia, beyond the motive of willing to keep up the cooperation with ČD on the Prague-Vienna route. Consequently, taking ČD's revenues in Czechia as basis for the value of sales of ÖBB is justified.

<u>Reasons for splitting ČD's revenues in Czechia evenly between the Parties</u>

(1063) ČD's revenues in Czechia are split 50 – 50 between the Parties, i.e. each Party is attributed 50% of ČD's revenues in Czechia, to determine each Party's individual value of sales on the long-distance rail passenger transport market in domestic Czechia.

(1064) The Commission considers that such even allocation of ČD's revenues from long-distance rail passenger transport services in Czechia between ÖBB and ČD adequately reflects each of the Parties' role, participation and interest in the infringement as well as each Party's individual contribution to it. Both ÖBB and ČD contributed to the infringement through their behaviour, and while their respective behaviours were not identical in nature, they both contributed equally to the implementation of the cartel.

(1065) ČD's interest in impeding the market entry or expansion of RegioJet on the Czech domestic market is apparent: ČD as incumbent in Czechia was directly concerned by RegioJet's presence and looming expansion. ČD therefore had more direct and short-term gains from the cartel. Moreover, […].

(1066) However, ÖBB also had a strong interest in the cartel and in restricting competition in domestic Czechia: ÖBB, by entering into the cartel, wanted on the one hand to preserve the cooperation with ČD on the Prague-Vienna route (see above recital (1057)) as well as, on the other hand, to limit or prevent the growth of a new entrant that would in the long term be able to compete with ÖBB (see above recitals (1058) - (1061)). Both motivations are not exclusive but go hand in hand.

(1067) Moreover, it should be stressed that the Parties' collusive arrangement would not have been possible without the contribution of ÖBB as the provider and seller of the used wagons: By agreeing with ČD to prevent, hinder or restrict the sales of its used wagons to RegioJet, while being aware that such sales would directly support ČD's competitor RegioJet, ÖBB made the cartel possible in the first place.

(1068) ÖBB thereby shared ČD's interest to restrict competition from RegioJet in the long-distance domestic rail passenger transport market in Czechia and should consequently be evenly fined.

(1069) For each Party, the value of sales therefore consists of

(a) the Parties' revenues related to long-distance rail passenger transport on the Prague-Vienna route, each Party being attributed its respective revenues on this international route.

(b) ČD's revenues related to long-distance rail passenger transport in domestic Czechia, each Party being attributed 50% of ČD's revenues on this market.

Arguments raised by ÖBB and assessment by the Commission

(1070) In relation to the use of ČD's revenues from the provision of long-distance passenger transport services in Czechia also as a basis for the value of sales of ÖBB, ÖBB raises several arguments.

(1071) First, ÖBB is of the view that there is no legal basis for the allocation of ČD's revenues to ÖBB and that the Commission deviates from its own enforcement practice and its own Guidelines on fines without proper reasoning. By allocating 50% of ČD's domestic turnover also to ÖBB, ÖBB's value of sales would increase by 500% to 1000% compared with the turnover that ÖBB achieves on the international Prague - Vienna route.[899]

(1072) As to the legal basis, the Statement of Objections (in its recitals 630 and 656) already stated that the Commission may depart from the general methodology for the setting of fines and may rely on point 37 of the Guidelines on fines where this is justified by the particularities of a given case or the need to achieve deterrence. In addition, it follows from the content of paragraphs 642 - 647 of the Statement of Objections that the Commission envisaged to deviate in this case from the methodology set out in the Guidelines on fines.

(1073) Moreover, the Commission refers to the detailed analysis in recitals (1048) - (1069) above and reiterates that using only ÖBB's revenues on the Prague - Vienna route for determining ÖBB's value of sales would not mirror ÖBB's contribution to and involvement in the Parties' collusion, would not properly reflect the gravity of ÖBB's infringement and would also have no deterrent effect.

(1074) The Commission further points out that the fact that the attribution of 50% of ČD's sales in Czechia also to ÖBB leads to a significant increase of the value of sales compared to ÖBB's revenues in the other geographic area affected by the cartel (i.e., the Prague – Vienna route) is a logical consequence of the fact that the Parties collusion also related to the Czech domestic market. For deterrence reasons, the fine for ÖBB must reflect this aspect.

(1075) Second, ÖBB is of the view that the attribution of 50% of ČD's domestic turnover to ÖBB is not possible because the Commission has not established that ÖBB and ČD were potential competitors for long-distance rail passenger transport in Czechia.[900]

(1076) The Commission in this respect refers to the detailed analysis section 6.1.3.3.2 above that demonstrates that during the period of the infringement ÖBB was a potential competitor of ČD for long-distance rail passenger transport services in Czechia.

(1077) In any case, beyond the findings on potential competition between the Parties in section 6.1.3.3.2 above, the Commission underlines that the allocation of ČD's revenue in domestic Czechia to ÖBB is not conditional upon the existence of potential competition between ÖBB and ČD in Czechia. In other words, the Commission can determine ÖBB's value of sales also based on ČD's turnover in domestic Czechia even if ÖBB were not a potential competitor of ČD in domestic

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Czechia since the Parties' goal was to restrict competition from a third common competitor (see in this regard also the argumentation above in recital (1041)).

(1078) The attribution of 50% of ČD's turnover also to ÖBB derives from the fact that both Parties contributed equally – albeit with different means - to the cartel and that ÖBB, by agreeing with ČD to restrict the sales of its used wagons to RegioJet while being aware that such sales would directly support RegioJet as ČD's main competitor, shared ČD's interest to restrict competition for long-distance passenger transport services in domestic Czechia.

(1079) Third, ÖBB submits that splitting the revenue generated by ČD from Czech domestic long-distance transport evenly between the Parties would not adequately reflect the different roles and interests of both Parties in the agreement. According to ÖBB, as demonstrated by various statements of ČD, it was not ÖBB that was the driving force of the infringement, as the profits from hindering RegioJet's expansion would be realised only by ČD.[901] Moreover, ÖBB's role was different than ČD's, because ÖBB sold a considerable amount of used wagons to RegioJet and thereby facilitated RegioJet's market entry and further expansion.[902] While ČD's objective would have been to hinder RegioJet's operations in Czechia, ÖBB is of the view that its objective was to ensure a good relationship between ÖBB and ČD. ÖBB concludes that by treating different situations equally without an objective justification, the Commission would breach the principle of equal treatment and non-discrimination.[903]

(1080) The Commission rejects this argument and refers to the detailed analysis carried out above in recitals (1064) to (1068) of ÖBB's and ČD's respective roles, participations and interests in the infringement as well as each Party's individual contribution to it.

(1081) Contrary to what ÖBB suggests, the Commission does not claim that ÖBB was the driving force of the infringement. Yet, ÖBB did not play a passive role in the infringement, as claimed by ÖBB.[904] Such alleged passive role is already excluded by the fact that ÖBB was the owner and seller of the used wagons and therefore enabled the agreement and / or concerted practice in the first place. That ČD as incumbent in Czechia may have had a stronger immediate benefit from the cartel should not prevail over the fact that ÖBB made the cartel possible.

(1082) That ÖBB sometimes did not comply with the cartel arrangement and sold wagons to RegioJet does in the Commission's view not change ÖBB's general role and participation in the infringement and ÖBB's contribution to it. The Commission in this regard points to the case law of the Court that – albeit stemming from a judgment about a market sharing agreement – can be applied also to the case at hand and to the assessment of ÖBB's role and participation in the infringement: "*The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which despite colluding with its competitors follows a more or less*

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independent policy on the market may simply be trying to exploit the cartel for its own benefit."[905]

(1083) The Commission further points out that there is ample evidence in the Commission's file that ÖBB's objective for entering into the cartel went clearly beyond merely ensuring a good relationship between ÖBB and ČD (see above section 6.1.3.2.2 as well as recitals (1054) - (1062) and (1066) - (1068). In any event, the legitimate objective of ensuring a good relationship between the Parties […] must not be pursued with illegitimate means, such as the rigging of sales processes for used wagons in the present case.

(1084) Fourth, ÖBB requests that ČD's revenues from the domestic section of cross-border connections (e.g. to Germany, Austria, Poland, Slovakia) should be disregarded at all from the Parties' revenues stemming from long-distance rail passenger transport services in domestic Czechia given that they were achieved neither in domestic Czech long-distance services nor in services on the Vienna-Prague route.[906]

(1085) The Commission stresses that it agrees with ÖBB's position and has specifically requested ČD to provide revenues for international passengers, that means for passengers travelling from or to a station located outside the territory of Czechia.[907] For determining the value of sales, the Commission then deducted these revenues from ČD's revenues from long-distance rail passenger transport in domestic Czechia.

Interim conclusion

(1086) The Commission concludes that the splitting of ČD's revenues from long-distance rail passenger transport in Czechia equally between ÖBB and ČD correctly reflects on the one hand the geographic area where the competition was affected by the infringement (= Czechia) but also on the other hand the Parties' participation in the cartel.

9.4.1.7. Revenues from long-distance domestic rail passenger transport in Czechia

(1087) As regards the revenues stemming from the provision of long-distance domestic rail passenger transport services in Czechia, for the further determination of the Parties' value of sales, the Commission only takes into account the Parties' revenues on Ex lines (concretely line Ex1, line Ex2, line Ex3, line Ex4 and line SCP) because Ex lines is the category of lines where RegioJet was active during the period of the infringement or where it became active shortly thereafter (see paragraph (31)).

Arguments raised by the Parties and assessment by the Commission

(1088) The Parties submit that in the period of the infringement RegioJet was only active on the Prague - Ostrava route, and only this route could have actually been affected by the Parties' behaviour. Accordingly, only the corresponding turnover on the Prague - Ostrava route should be taken into account in determining ČD's relevant turnover in the domestic Czechia, while turnover on other routes or sections should be excluded.[908]

905 Judgment of the Court of First Instance of 14 May 1998, *Cascades SA v Commission of the European Communities*, T-308/94, ECLI:EU:T:1998:90, paragraph 230.

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(1089) The Commission disagrees with the Parties' view and points out that the value of sales is determined by the value of the undertakings' sales of services to which the infringement relates, i.e. the markets that the Parties aimed to protect by their collusive conduct. By preventing, hindering or restricting the access of RegioJet to used ÖBB wagons, the Parties not merely aimed at protecting those lines where RegioJet was already active. In fact, RegioJet needed those wagons for an entry on lines where it had not been present yet, and to expand its capacity on lines that it had already entered. As shown by the contemporaneous evidence, the Parties were fully aware of this fact (see above section 6.1.3.2.3). From this perspective, it is appropriate to include revenues on all Ex lines in Czechia in the value of sales, because on those lines RegioJet was a potential or actual competitor, as evidenced by the entries of RegioJet in the years 2016 and 2017 (see above recital (31)).

9.4.1.8. Revenues from long-distance domestic rail passenger transport services in Czechia comprise revenues from ticket sales and PSO revenues

(1090) The revenues of ČD generated in relation to long-distance domestic rail transport passenger services within Czechia are composed of (i) fare revenues, (ii) other sales from transport (i.e. other revenues related to transportation of passengers, for example revenues from seat reservations), (iii) other income (such as surcharges to fares, […] and (iv) reimbursement. The reimbursement under (iv) comprises reimbursement of student fare loss, and "reimbursement of evidenced loss", i.e. PSO reimbursement provided by the MoT. [909]

(1091) ČD has explained that revenues are allocated […].[910]

(1092) For the first three components of the revenues mentioned in recital (1090), revenues from international passengers[911] are not taken into account for the value of sales calculation; indeed, only domestic passenger transport services are to be taken into account. Reimbursement of PSO revenues […].[912]

(1093) […], for the calculation of value of sales these revenues also have to be attributed to the Ex lines.[913] According to ČD, the methodology applied to do this works with accounting data for the relevant period. […].[914]

(1094) […].[915]

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(1095) A breakdown of these revenues in 2015 related to Ex lines is shown in Table 3.

Table 3: Breakdown of ČD's revenues related to the domestic long-distance rail passenger transport services on Czech Ex lines in 2015

Revenue type	***(ths EUR)***
1 Commercial revenues	[…]
1.1 Fare revenues	[…]
1.2. Other sales from transport	[…]
1.3. Other income […]	[…]
2. Reimbursement	[…]
2.1 Reimbursement of student fare loss	[…]
2.2 PSO reimbursement	[…]
TOTAL REVENUE	[…]

(1096) For the purpose of determining the value of sales, the Commission takes into account the total revenue shown in Table 3.

(1097) Including revenues generated from long-distance PSOs into the value of sales is justified because the infringement related (in the sense of point 13 of the Guidelines on fines) not only to the provision of long-distance domestic rail passenger transport services to the end customer, but it also related to the provision of rail passenger transport services under PSOs from the Czech state (for the distinction between commercially operated services and PSO services see above recital (18)).

(1098) Through their anticompetitive actions, the Parties prevented, hindered or restricted the access of their common competitor RegioJet to suitable wagons for long distance rail passenger transport. The Parties thereby impeded RegioJet's entry and expansion not only in relation to the provision of rail passenger transport services to end customers, but also in relation to the provision of rail passenger transport services under PSO contracts concluded with public bodies, for which these wagons could have been used, too. The Parties' collusive conduct therefore also aimed at protecting ČD's incumbent position and revenues also on the PSO market in domestic Czechia.

(1099) This follows from the fact that the use of the wagons to which the Parties restricted RegioJet's access is not limited to commercial services. Rather, these wagons could have been used by RegioJet to also apply for tenders for long-distance PSO lines, in competition to ČD.

(1100) The Parties also themselves recognised that with used ÖBB wagons RegioJet would become a competitor of ČD for the award of PSO contracts from the state. This is apparent from the contemporaneous documents quoted above in recitals (182) and (197).

(1101) In any case, even if RegioJet were not to use the wagons to which its access was restricted to apply for operations under PSO contracts, with these wagons RegioJet could offer commercial services in competition to PSO services. Indeed, already in 2012 RegioJet informed ÖBB that it successfully offered services on the Prague – Ostrava route in competition to ČD's PSO services and announced its intention to further expand to other lines.[916] This market entry by RegioJet on lines already operated by ČD under PSO contracts may induce the Czech state to reduce the scope of ČD's PSO contracts. That such market entry of RegioJet on a commercial basis in parallel to PSO-trains was a real danger for ČD's PSO-revenues is apparent from the fact that under the Framework agreement (which ČD had concluded with the Czech MoT (see above recital (831)) it was, according to ČD, […] and that […].[917]

9.4.1.8.1. Arguments raised by the Parties and the Commission's assessment

The inclusion of PSO-revenues

(1102) ÖBB submits that ČD's revenues from PSOs should not be included in the relevant revenues of ČD in domestic Czechia because RegioJet intended to use second-hand wagons only on the commercially operated rail passenger transport market. Moreover, contracts for PSOs were not accessible to other operators than ČD throughout the period of the infringement as these PSOs were awarded by means of a direct award to ČD, and the framework contract between the MoT and ČD had a term of 10 years[918]. ČD concurs with ÖBB that ČD's PSO-revenues should not be included in the revenues of ČD in domestic Czechia relevant for the determination of the value of sales because RegioJet could not have entered the PSO market, as this market was not open to competition to any relevant extent.[919]

(1103) The Commission points out that ÖBB's allegation that RegioJet only intended to use the acquired wagons on the commercially operated market[920] is a mere assumption and not supported by any evidence. Rather, the Commission's file contains contemporaneous documents from ÖBB itself showing that ÖBB was aware that RegioJet could also enter the Czech PSO market with the wagons acquired from ÖBB (see above recital (182): *"the sale of the old wagons is de facto a support of their* [= ČD's] *competitor …. Already now RegioJet is lobbying the Czech ministry of transport that it as railway undertaking could purchase cheaper rolling stock than ČD (railjets) could do to ensure the transport offer in Czechia"*. Restricting the access of the common competitor RegioJet to suitable long-distance wagons therefore impeded RegioJet's entry and expansion also on the PSO market.

(1104) As to the Parties' argument that PSO contracts were not accessible and that therefore the Parties' behaviour could anyway not have affected RegioJet's ability to enter the PSO market, so that PSO-revenues should not be included in the value of sales[921], the Commission points to the provisions of the Framework agreement discussed above in recitals (883) - (887) […]. That this was not a mere hypothetical possibility is shown by the fact that the MoT published market openings (see above recital (890)). Besides, RegioJet could participate in the open tendering procedures for PSO

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contracts for services to be provided as of December 2019 (see above recital (888)). The Parties' argument therefore cannot stand.

(1105) The Commission further stresses that PSO-revenues are not only included in the value of sales because with the cartelised wagons RegioJet can also apply to tenders for PSO lines. PSO-revenues are also regarded as part of the revenues related to long-distance passenger transport in domestic Czechia and therefore as part of the value of sales because with the used ÖBB wagons, to which the Parties restricted RegioJet's access, RegioJet could also offer commercial services in parallel and in competition with PSO-services operated by ČD. As laid out above in recitals (1101) and (1106), this then presented a danger for ČD's PSO revenues, as the state was entitled to reduce the scope of ČD's performance ordered under the PSO-framework contract that ČD had concluded with the MoT. ČD itself admitted this in paragraph 695 of its RSO: "*The Ministry of Transport has been continuously evaluating whether or not transport needs can be sufficiently provided by commercial offer. Should that happened, it could have taken steps to reduce the ordered performance (however, only to the extent enabled by the PSO contracts effective at the given times)*".[922]

(1106) In fact, in December 2011 on the line Ex 1 between Prague and Ostrava the Czech state, following RegioJet's market entry in 2011, excluded the line Ex 1 between Prague and Ostrava from the scope of the PSO awarded to ČD (see above recital (832)). In relation to this exclusion of the line Ex 1 between Prague and Ostrava from the scope of the PSO, ČD remarks that a consequence of this exclusion was a […].[923] In the Commission's view, this demonstrates that a commercial market entry of RegioJet in parallel and in competition to ČD's PSO-services also endangered ČD's PSO-revenues.

(1107) The Commission further points out that such commercial market entry of RegioJet in parallel to PSO-lines operated by ČD not only happened on the line Ex 1 but also took place on the line Ex 3 between Prague and Brno where RegioJet since 2016 operates in parallel and in competition with ČD's PSO-funded trains (see above recital (31)). Moreover, RegioJet's commercial offer on the Prague – Ostrava route since 2011 was in fact also a market entry in parallel to a large part of ČD's PSO services on the line Ex 2 because the by far biggest part of line Ex 2 between Prague and Olomouc (see map in Annex) is also covered by RegioJet's commercial offer between Prague and Ostrava.

(1108) Consequently, the PSO Framework agreement concluded between the Czech state and ČD […]. ČD's revenues on the PSO-market were therefore "contestable" by RegioJet and are consequently also part of the sales of *"services to which the infringement directly or indirectly relates"* in the sense of Point 13 of the Guidelines on fines.

(1109) Moreover, as to ČD's PSO-revenues, ÖBB argues that […].[924] […]. In ÖBBs view, taking into account PSO-payments under a gross public service contract in the relevant turnover for the determination of the value of sales would then result in the same fine being imposed, regardless of the foreclosure potential of the infringement. According to ÖBB, this result is not appropriate, as the fine should reflect the risk

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posed by the infringement and the profit that the undertakings concerned could derive from it.[925]

(1110) The Commission rejects this argumentation and points out that the […].

(1111) First, the documents in the file show that, despite the formulation in the Framework agreement that […]. […][926]

(1112) It follows from this that the market entry or expansion of RegioJet, which the Parties aimed at impeding through their collusive arrangement, actually posed a risk to ČD's overall revenues, because the PSO-reimbursement from the state would not necessarily be increased retroactively should ČD's actual fare revenue decrease as a consequence of RegioJet's market entry or expansion.

(1113) In this context, ČD has confirmed that, […].[927]

(1114) Second, even following ÖBB's argumentation and assuming that a drop in ČD's ticket sales and fare revenues as a consequence of a successful market entry of a competitor on a given line would be compensated by a corresponding increase in public service revenues for ČD, ÖBB's argumentation leaves out the fact that in such case of market entry there would still be the danger that the Czech MoT makes use of the possibility foreseen in […] (see above recital (1106)). As this has actually happened on the line Ex 1 between Prague and Ostrava in December 2011, such danger is not a mere theoretical possibility.

(1115) The above demonstrates, contrary to the Parties' stance, that, first, the PSO market was not closed to competition and, second, that ČD's PSO revenues were also protected by the Parties' collusion. PSO revenues were therefore also affected by the infringement and should consequently also be taken into account for the purpose of the determination of the value of sales.

(1116) This approach, that reflects in the fine the danger to their revenues that the Parties aimed at protecting by their collusive arrangement, is also apparent in the *Lundbeck* judgment. Here the Court points out that the Commission is not required to show that the sales that form the basis of the value of sales are <u>actually</u> affected by the cartel: "*While the concept of the 'value of sales' referred to in point 13 of* [the Guidelines on fines] *admittedly cannot extend to encompassing sales made by the undertaking in question which do not come within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel.*"[928]

(1117) Finally, it must be reiterated that all long-distance lines in Czechia were open to competition (see above recital (22)), and that RegioJet's expansion and market entry on further Czech domestic lines was not a purely hypothetical possibility (see above recital (1107)). Nevertheless, ČD had a competitive advantage by receiving the PSO compensation from the Czech state which made it all the more serious that the Parties prevented their competitor RegioJet from entering or expanding through rigging sales processes for ÖBB's used wagons.

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928 Judgment of the Court of Justice of 25 March 2021, *Lundbeck v Commission*, C-591/16 P, ECLI:EU:C:2021:243, paragraph 188.

The calculation of PSO-revenues

(1118) Another argument of ÖBB concerns the way in which ČD […][929]; however, ÖBB pointed out that the provisions of the Framework agreement […]. Therefore, ÖBB questioned ČD's explanations.[930]

(1119) In relation to this, ČD explained in its RFI reply of […] 2024[931] […].

(1120) ÖBB also expressed its reservations about the correctness or reliability of the […] of PSO reimbursement explained by ČD in its RFI reply of […] 2021, especially with respect to the […]. ÖBB argued that high-turnover lines should not benefit from high allocation of public service funds.[932]

(1121) The Commission has also questioned the correctness of the […].[933]

(1122) With respect to the allocation […], ČD explained in its RFI reply of […] 2024[934] that "[…] [i.e. in ČD's RFI – reply of […] 2021, […]] […] which formed part of its RFI reply of […] 2021 (see recital (1093)).

(1123) According to this […]. Therefore, the Commission does not accept ÖBB's argument.

(1124) The Commission accepts the methodology described in recital (1093) and considers that ÖBB's criticism in relation to the attribution of PSO reimbursement among individual lines has been addressed by these explanations.

(1125) With respect to the allocation […], the Commission understands from the RFI reply of […] 2024 that the […].[935] […]

(1126) Therefore, the Commission considers that ČD […] in its RFI reply of […] 2021[936]. As a result, the Commission considers that the value of sales data in the RFI reply of […] 2021 can be accepted.

PSO revenues related to international passengers

(1127) Finally, ÖBB argues that trains run under the PSO are also used by international passengers and it is therefore […]. ÖBB's reasoning is that given that approximately […].[937] The Commission notes that this would lead to a VoS of EUR […] instead of EUR […].

(1128) The Commission rejects this argument. For determining the value of sales in this case, it does not make a difference whether a train run under the PSO […]. Instead, what is relevant is the scope of the PSO as agreed between the MoT and ČD. In this respect, […][938] […].[939] […].

(1129) ČD has also confirmed that PSO revenues are […].[940]

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(1130) The Commission therefore considers that it is appropriate to include […].

9.4.1.9. Conclusion on the value of sales

(1131) The value of sales is determined based on the Parties' revenues on the markets that the Parties aimed to protect by their collusive conduct, including the PSO revenues.

(1132) It follows from the considerations in sections 9.4.1.2 to 9.4.1.8 above that the value of sales for each of the Parties consists of:

- the revenues stemming from the provision of international rail passenger transport services on the Prague-Vienna route (i.e. revenues stemming from international passengers on this route) in 2015, each party being attributed revenues generated on its territory, and

- the revenues stemming from the provision of long-distance domestic rail passenger transport services on line Ex1, line Ex2, line Ex3, line Ex4 and line SCP within the territory of Czechia (i.e. revenues stemming from those passengers for whom both the origin and destination are in Czechia), including revenues from PSOs, in 2015, each party being attributed 50% of ČD's revenues on this market.

(1133) These two components of the value of sales are shown in Table 4 for each of the Parties, as well as their totals.

Table 4: Value of sales

Undertaking	50% of ČD's revenues on long-distance domestic CZ transport on line Ex1, line Ex2, line Ex3, line Ex4 and line SCP (ths EUR)	Each undertaking's revenues on international Prague – Vienna transport (ths EUR)	**Value of sales (ths EUR)**
ÖBB	[…]	[…]	[…]
ČD	[…]	[…]	[…]

9.4.2. Further determination of the basic amount

(1134) The basic amount consists of an amount of up to 30% of an undertaking's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of an undertaking's relevant sales, irrespective of duration.[941]

9.4.2.1. Gravity

(1135) It should be recalled that, in fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003, regard shall be had both to the gravity and to the duration of the infringement. Consequently, the Guidelines on fines provide that the basic amount of the fine will be set to a proportion of the value of sales, in function

941 Points 19 to 26 of the Guidelines on fines.

of the degree of gravity of the infringement, multiplied by the number of years of the infringement.[942]

(1136) The Guidelines on fines provide as a general rule that the proportion of the value of sales taken into account for gravity must be set at a level up to 30% of the value of sales for the variable amount.[943] In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and/or whether or not the infringement has been implemented.[944]

(1137) In its assessment of the gravity in the present case, the Commission takes into account, amongst others, the facts as described and assessed above, and in particular the following circumstances:

(a) A cartel is by its very nature a serious violation of Article 101 TFEU.

(b) The Parties set up a secret and institutionalised scheme designed to prevent, hinder or restrict RegioJet's access to used wagons for long-distance rail passenger transport, an important input for operating on the relevant rail passenger transport markets. The Parties' ultimate objective was to impede the market entry or expansion of their common competitor RegioJet on the market for long-distance domestic rail passenger transport services in Czechia and on the international Prague – Vienna route and to restrict competition on these markets.

(c) The cartel was conceived, directed and encouraged at […] (see section 8.2 above).

(1138) Therefore, the Commission sets the proportion of the value of sales to be taken into account for calculating the basic amount of the fine in this case at […]%.

Arguments raised by ČD and assessment by the Commission

(1139) ČD argues that the Commission wrongly assesses the gravity of the alleged infringement. In ČD's view, the Parties did not participate in a by-object horizontal cartel. ČD further claims that, had the Commission correctly taken into account all the factors stated in point 22 of the Guidelines on fines, such as that – according to ČD – the infringement had never been implemented, the Commission would have arrived at a minor gravity of the infringement.[945]

(1140) The Commission rejects this argument. The nature and the geographic scope of the infringement have been taken into account. As to the *"combined market share of all the undertakings concerned"*, the Commission is of the view that this factor is not apt for determining the gravity percentage in the particular circumstances of the present case, because ÖBB is not present on the market for long-distance domestic rail passenger transport services in Czechia. Indeed, the Court has confirmed that *"regard must be had to a large number of factors, the nature and importance of*

[942] Point 19 of the Guidelines on fines.
[943] Points 21 and 25 of the Guidelines on fines.
[944] Point 22 of the Guidelines on fines.
[945] […]

which vary according to the type of infringement in question and the particular circumstances of the case".[946]

(1141) Insofar as ČD argues that it should be taken into account for setting the gravity that the infringement has not been implemented[947], the Commission points out that it has been demonstrated in section 6.1.3.2.4 above that the infringement has been implemented. This fact therefore rather speaks for the seriousness of the infringement at hand and a s factor to be taken into account for the gravity percentage.

(1142) Even if the Parties' collusive arrangement were not qualified as a cartel (as ČD argues[948]), this would not lessen the gravity of this arrangement whereby the Parties collusively rigged sales processes of used wagons to the detriment of a competitor, and the proportion of the value of sales to be taken into account for calculating the basic amount of the fine would remain unchanged due to the serious nature of the horizontal collusion, i.e. […]%.

9.4.3. Duration

(1143) The Commission takes into account the duration of the infringement by multiplying the applicable proxy of the value of sales by the number of years of each party's participation in the infringement. The multipliers for duration are calculated on the basis of the number of full months of participation in the infringement.

(1144) Accordingly, as the Commission considers that for both Parties the starting date of the infringement is 9 May 2012 and the end date is 21 January 2016 (see section 6.1.2.2), the duration multiplier for both Parties is 3.7 years.

9.4.4. Determination of the additional amount

(1145) According to point 25 of the Guidelines on fines, irrespective of the duration of the undertakings' participation in the infringement, the Commission may include in the basic amount a sum between 15 and 25% of the value of sales in order to deter undertakings. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred to in point 22 of the Guidelines on fines (see above section 9.4.2.1).

(1146) While an additional amount is imposed *"in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements"*, Point 25 of the Guidelines on fines allows the Commission to "*also apply such an additional amount in the case of other infringements*".

(1147) Due to the serious nature of the infringement at hand (horizontal by-object infringement of Article 101 TFEU in the form of collusive rigging of sales processes for ÖBB's used long-distance passenger transport wagons), the Commission applies an additional amount in the present case. Based on the criteria explained in section 9.4.2.1 above, the additional amount for the addressees that are subject to a fine is set at […]%.

Arguments raised by ČD and assessment by the Commission

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[946] Judgment of the Court of Justice of 26 January 2017, *Zucchetti Rubinetteria v Commission*, C-618/13P, ECLI:EU:C:2017:48, paragraph 42.

[947] […]

[948] […]

(1148) ČD argues that there are no grounds for the application of the additional amount.[949]

(1149) The Commission disagrees and stresses that the cartel in the present case is of similarly serious nature as horizontal price-fixing, market-sharing and output-limitation agreements explicitly mentioned in the first sentence of Point 25 of the Guidelines on fines. It is therefore appropriate that the Commission also applies an additional amount in the present case in order to deter undertakings from even entering into agreements and / or concreted practice similar to the one in the present case.

9.4.5. Conclusion on the basic amount of the fine

(1150) Based on the criteria explained above, the basic amount of the fine for each party is presented in Table 5 below.

Table 5: Basic amounts of the fine

Undertaking	Basic amount (in EUR)
ÖBB	[…]
ČD	31 940 000

9.5. Adjustment of the basic amount

(1151) In relation to each undertaking, the Commission may reflect in the fine imposed any aggravating and/or mitigating circumstances, such as the ones listed, in a non-exhaustive way, in Points 28 and 29 of the Guidelines on fines.

(1152) The Commission considers that in the case at hand there are neither for ÖBB nor for ČD any aggravating or mitigating circumstances present.

<u>*Arguments raised by ČD and assessment by the Commission*</u>

(1153) ČD argues that the Commission should take into account, at least as mitigating circumstance, the inadequate length of the investigation which infringed ČD's rights of defence as it made it difficult for ČD to ascertain and document what had happened, also due to the leaving of employees.[950]

(1154) The Commission disagrees with this. The duration of the investigation in the present case was not disproportionate. Insofar as there were delays in the investigation, the Commission points to the fact that considerable delays in the proceedings were caused by ČD, that repeatedly asked for extension of deadlines (up to 3 months) for replies to requests for information (see above section 3), frequently alluding to recurrent changes in ČD's management[951] or holiday periods to justify its extension requests[952]. Moreover, ČD submitted replies to such requests that contained inconsistencies (see the Commission's RFI of 13 March 2024[953] pointing to such inconsistencies in ČD's previous RFI-replies on turnover figures).

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(1155) Insofar as ČD submits that the passage of time made it difficult for ČD to ascertain and document what had happened, the Commission points out that ČD was informed about the subject-matter of the Commission's investigation at the latest by the Commission's inspection decision of June 2016, i.e. around six months after the end of the period of the infringement. From that moment, ČD knew that it was under investigation and was therefore under the obligation to "*to act with greater diligence and to take all appropriate measures in order to preserve such evidence as might reasonably be available to them*".[954] ČD's spontaneous submission of September 2016[955] shows that ČD had a rather precise picture of the scope of the investigation quite early in the proceedings and thus should have acted accordingly with respect to the preservation of evidence.

(1156) Moreover, ČD is of the view that the Commission overlooked further mitigating circumstances, like ČD's cooperation in the proceedings, ČD's limited involvement, and that the conduct had been terminated before the Commission's intervention.[956]

(1157) The Commission rejects this, as the criteria listed in Point 29 of the fines Guidelines are not fulfilled. ČD has not been particularly cooperative in the proceedings. Concerning ČD's involvement in the cartel, the concept of *"substantially limited involvement"* in Point 29 of the Guidelines on fines generally applies to an exclusively passive role, which was certainly not ČD's case, as is already apparent from the […] (see above in recitals (374), (422), (503), (505), (555), (564), (567), (587)). Finally, termination is considered as mitigating circumstance only when there is a causal link between the interventions of the Commission and the termination of its infringement[957] and moreover is not available in case of secret agreements, in particular cartels; these circumstances are not present in the case.

9.5.1. Specific increase for deterrence

(1158) The Commission sets fines at a level which is sufficient to ensure deterrence. In so doing, the Commission may increase the fine on undertakings that have a particularly large turnover beyond the sales of goods or services to which the infringement relates (Point 30 of the Guidelines on fines).

(1159) No deterrence multiplier is considered necessary in the present case.

9.6. Application of the 10% turnover limit

(1160) In the present case, for none of the Parties the fine exceeds 10% of its total turnover in the business year preceding the date of the adoption of this Decision (Article 23(2) of Regulation 1/2003).

9.7. Application of the Leniency Notice

(1161) […]

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954 Judgment of the Court of Justice of 28 January 2021, *Qualcomm and Qualcomm Europe v Commission*, C-466/19, ECLI:EU:C:2021:76, paragraph 114.

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957 Judgment of the Court of Justice of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, ECLI:EU:C:2013:606, paragraph 80; Judgment of the General Court of 17 December 2015, *Orange Polska v Commission*, T-486/11, ECLI:EU:T:2015:1002, paragraph 213.

(1162) ČD claims ÖBB's leniency application was made in bad faith and unduly induced by the Commission and can therefore not be relied upon.[958] The Commission rejects these allegations as entirely unsubstantiated.

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(1171) […]

(1172) Overall, ÖBB cooperated fully, on a continuous basis and expeditiously. Considering the timing and extent of added value provided by ÖBB, the Commission sets the percentage of the reduction of fine for ÖBB at 45%.

9.8. Inability to pay

(1173) According to point 35 of the Guidelines on fines, "*In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.*"

(1174) ČD argues that imposing a fine on it would have severe financial consequences for ČD so that point 35 of the Guidelines on fines should apply.[959]

(1175) However, at the time of the adoption of this Decision, there are no indications that the conditions of point 35 of the Guidelines on fines could be met. ČD has not shown, on the basis of objective evidence, that the fine would irretrievably jeopardise its economic viability and cause ČD's assets to lose all their value.

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9.9. Conclusion: final amount of individual fines

(1176) The fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 are as follows:

Table 6: Final amount of fines

Undertaking	Fine (EUR)
ÖBB	16 712 000
ČD	31 940 000

HAS ADOPTED THIS DECISION:

Article 1

České dráhy, a.s., Österreichische Bundesbahnen -Holding Aktiengesellschaft, ÖBB-Personenverkehr Aktiengesellschaft, and ÖBB-Technische Services-Gesellschaft mbH have infringed Article 101(1) of the Treaty by preventing, hindering or restricting the access of RegioJet a.s. to used railway wagons for long-distance passenger transport in the markets for the provision of domestic long-distance rail passenger transport services in Czechia as well as for the provision of international long-distance rail passenger transport services between Austria and Czechia on the Prague - Vienna route.

The duration of the infringement was from 9 May 2012 until 21 January 2016.

Article 2

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

(a) České dráhy, a.s.: EUR 31 940 000

(b) Österreichische Bundesbahnen-Holding Aktiengesellschaft, ÖBB-Personenverkehr Aktiengesellschaft, and ÖBB-Technische Services-Gesellschaft mbH, jointly and severally: EUR 16 712 000

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

BANQUE CENTRALE DU LUXEMBOURG
2, Boulevard Royal
L-2983 Luxembourg

IBAN: LU27 9990 0001 1400 100E
BIC: BCLXLULL
Ref.: EC/BUFI/AT.40401

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

Where an action pursuant to Article 263 of the Treaty is brought before the Court of Justice of the European Union against this Decision, the fine shall be covered by its due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council[960].

Article 3

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

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

Article 4

This Decision is addressed to

– České dráhy, a.s., Nábřeží L. Svobody 1222, 11015 Praha 1, Czechia,

– Österreichische Bundesbahnen-Holding Aktiengesellschaft, Am Hauptbahnhof 2, 1100 Vienna, Austria,

– ÖBB-Personenverkehr Aktiengesellschaft, Am Hauptbahnhof 2, 1100 Vienna, Austria,

– ÖBB-Technische Services-Gesellschaft mbH, Am Hauptbahnhof 2, 1100 Vienna, Austria.

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

Done at Brussels, 23.10.2024

For the Commission

(Signed)

Margrethe VESTAGER
Executive Vice-President

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[960] Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast) (OJ L, 2024/2509, 26.9.2024).

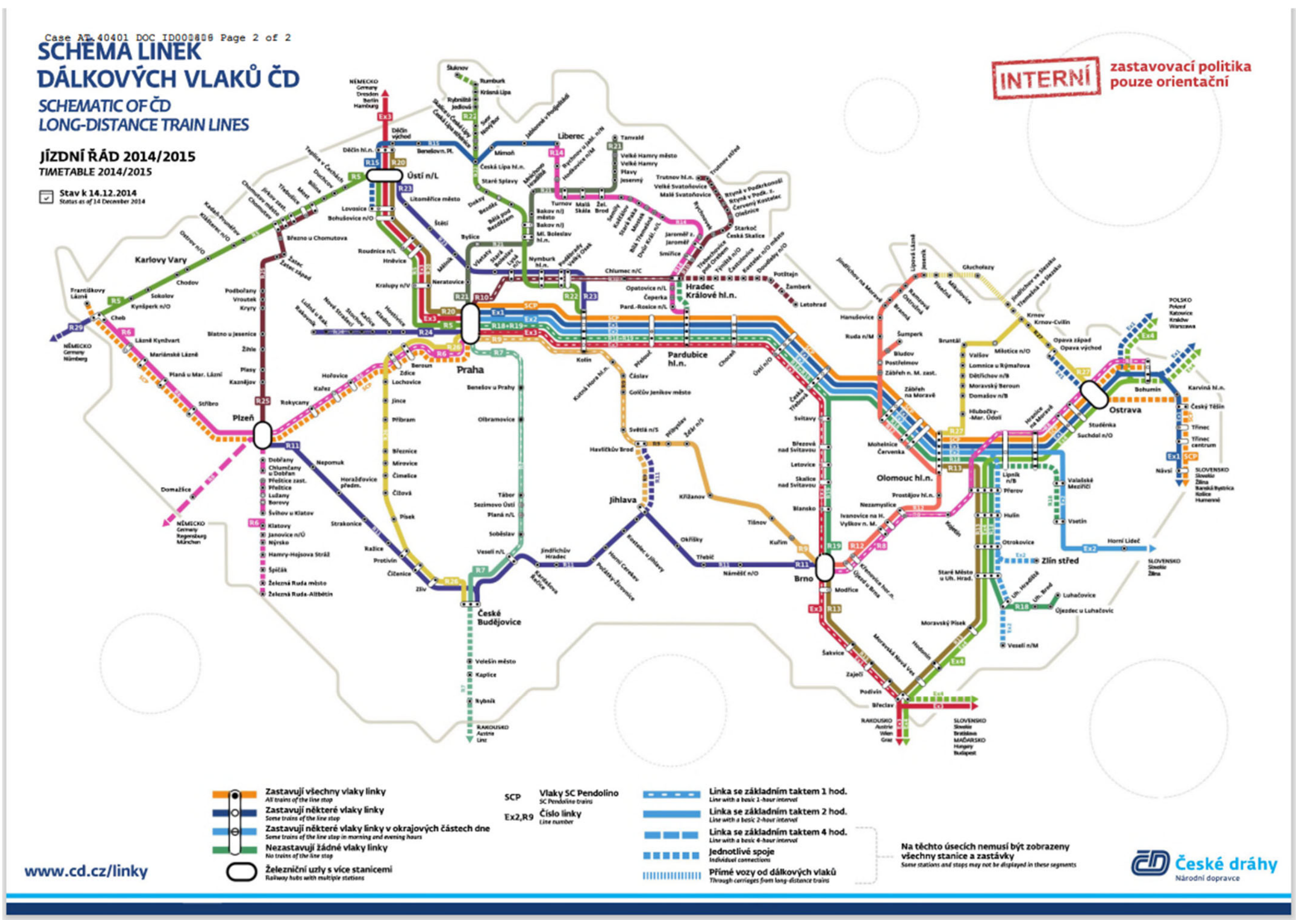
ANNEX

to the

COMMISSION DECISION

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union
(AT.40401 - Second-hand Rolling Stock)

Map of long-distance lines in Czechia (timetable 2014/2015)[961]



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961 […]