



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

20 June 2018*

(Competition — Administrative procedure — Decision ordering an inspection — Proportionality — Non-arbitrariness — Obligation to state reasons — Reasonable grounds — Legal certainty — Legitimate expectations — Right to respect for private life — Rights of the defence)

In Case T-325/16,

České dráhy a.s., established in Prague (Czech Republic), represented by K. Muzikář, J. Kindl and V. Kuča, lawyers,

applicant,

v

European Commission, represented by P. Rossi, A. Biolan, G. Meessen, P. Němečková and M. Šimerdová, acting as Agents,

defendant,

ACTION based on Article 263 TFEU and seeking annulment of Commission Decision C(2016) 2417 final of 18 April 2016, relating to a proceedings under Article 20(4) of Regulation No 1/2003, addressed to České dráhy and all companies directly or indirectly controlled by it, ordering them to submit to an inspection (Case AT.40156 — Falcon).

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, R. Barents and J. Passer (Rapporteur), Judges,

Registrar: L. Grzegorzczuk, Administrator,

having regard to the written part of the procedure and further to the hearing on 26 October 2017,

gives the following

* Language of the case: Czech.

Judgment

Background to the dispute

- 1 The applicant, České dráhy, a.s., is a public limited company. That company is the Czech national rail carrier and owned by the Czech State. It is the dominant undertaking, inter alia, on the markets for the provision of passenger transport services and the provision of rail infrastructure management services in the Czech Republic.

Procedure before the Czech competition authority

- 2 In 2011 and 2012, two other carriers, RegioJet, a.s., and LEO Express, a.s., began to offer rail passenger transport services on the route between Prague (Czech Republic) and Ostrava, a town situated in the north-east of the Czech Republic.
- 3 Since 2011, the behaviour of the applicant, suspected of abusing its dominant position by offering its rail passenger transport services at a loss, at predatory prices, on the Prague-Ostrava route, has been the subject of an investigation conducted by the Czech competition authority, the Úřad pro ochranu hospodářské soutěže (Office for the Protection of Competition, Czech Republic).
- 4 On 24 January 2012, following a preliminary investigation, the Czech competition authority opened an administrative procedure against the applicant, on the basis of Article 11(1) of the zákon č. 143/2001 Sb. o ochraně hospodářské soutěže (Law n° 143/2001 on the protection of competition).
- 5 On 25 January 2012, the Czech competition authority carried out an inspection at the applicant's premises.
- 6 The investigation conducted by the Czech competition authority was ongoing on the date of the adoption of the decision that is the subject of this action.

Proceedings before the Czech courts

- 7 On an unspecified date, the applicant's two competitors, RegioJet and LEO Express, brought actions against the applicant before the Czech courts for compensation for damage caused by the applicant's allegedly anti-competitive behaviour on the Prague-Ostrava route.
- 8 By judgment of 10 December 2015, the Městský soud v Praze (Prague City Court, Czech Republic) dismissed the action brought by LEO Express. The latter brought an appeal against that judgment before the Vrchní soud v Praze (High Court, Prague, Czech Republic). On the date of the adoption of the decision that is the subject of this action, those proceedings were still ongoing.
- 9 On the same date, the Městský soud v Praze (Prague City Court) had not yet ruled on the action brought by RegioJet.

The Commission's investigation

- 10 On 18 April 2016, the Commission adopted Decision C(2016) 2417 final relating to a proceeding under Article 20(4) of Regulation (EC) No 1/2003, addressed to the applicant and to all companies directly or indirectly controlled by it, ordering them to submit to an inspection (Case AT.40156 — Falcon) ('the contested decision').

11 Recitals 2 to 9 of the contested decision are worded as follows:

- ‘(2) According to the information at the disposal of the Commission, [the applicant] is the dominant undertaking, within the meaning of Article 102 of the Treaty, in the markets for inter alia provision of rail passenger transport services and rail infrastructure management services in the Czech Republic.
- (3) The Commission has indications that [the applicant] may have engaged in predatory pricing practices with regard to the provision of rail passenger transport services on certain railway routes, including, without limitation, the Prague-Ostrava route. Such practices may be part of an anti-competitive strategy of [the applicant] to protect its market position with regard to the provision of rail passenger transport services and to hamper competition on that market.
- (4) The Commission has indications that such alleged anti-competitive practices may have existed at least since 2011, when a private competitor entered the Prague-Ostrava route, if not before, and could still be ongoing.
- (5) If proved to exist, the above-mentioned practices would constitute one or more infringements of Article 102 of the Treaty.
- (6) According to the information at the disposal of the Commission, the suspected anti-competitive practices are likely to take place in secrecy. The existing documentation related to the suspected conduct is likely to be restricted to the absolute minimum and kept in places and maintained in a form which would facilitate its concealment, withholding or destruction in the event of a request for information or should an on-site inspection be announced.
- (7) In order to allow the Commission to establish all the relevant facts concerning the possible abusive conduct and its context, it is accordingly necessary to carry out an on-site inspection at the premises of [the applicant] pursuant to Article 20 of Regulation No 1/2003, and that the inspection is unannounced, in order to ensure its effectiveness.
- (8) It is therefore necessary to adopt a decision under Article 20(4) of Regulation No 1/2003 requiring [the applicant] to submit to an inspection; and to notify such decision immediately before the occurrence of the inspection.
- (9) The Commission is aware that the competent Czech competition authority — Úřad pro ochranu hospodářské soutěže (“ÚOHS”) — has been investigating the same conduct and conducted an inspection at the premises of [the applicant] in 2012. The Commission reviewed the relevant file of the ÚOHS.’

12 The first paragraph of Article 1 of the contested decision states:

‘[The applicant], together with all entities directly or indirectly controlled by it, is hereby required to submit to an inspection concerning the possible participation in anti-competitive conduct contrary to Article 102 of the Treaty in relation to the provision of rail passenger transport services in the Czech Republic. The alleged practices include predatory pricing that could foreclose third parties from the provision of rail passenger transport services, as well as any strategy to such effect.’

13 As set out in Article 2 of the contested decision, ‘[t]he inspection shall begin on 26 April 2016 or shortly thereafter’.

14 Article 3 of the contested decision states that ‘[t]his Decision is addressed to [the applicant], together with all entities directly or indirectly controlled by it. This Decision shall be notified to [the applicant] in accordance with Article 297(2) of the Treaty immediately before the inspection.’

15 The inspection took place from 26 to 29 April 2016.

Procedure and forms of order sought

16 By application lodged at the Court Registry on 24 June 2016, the applicant brought the present action.

17 In accordance with Article 89 of the Rules of Procedure, the General Court requested that the Commission produce certain documents. The Commission complied with that request within the time limit prescribed.

18 The applicant claims that the Court should:

- annul the contested decision;
- order the Commission to pay the costs.

19 The Commission contends that the Court should:

- dismiss the application;
- order the applicant to pay the costs.

Law

20 In support of its action, the applicant puts forward six pleas in law, alleging:

- that the contested decision and the inspection at issue are arbitrary or disproportionate (the first plea);
- a breach of the obligation to state reasons (the second plea);
- the lack of reasonable grounds warranting the adoption of the contested decision and the carrying out of the inspection (the third plea);
- the lack of effect on trade between Member States and that the applicant did not have a dominant position on the internal market or on a substantial part thereof (the fourth plea);
- infringement of the principles of legal certainty and the protection of legitimate expectations (the fifth plea);
- infringement of the rights guaranteed by Articles 7 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') and by Articles 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') (the sixth plea).

21 As a preliminary point, it should be noted that, while the measure contested by the present action is indeed the decision ordering the inspection at issue and while all of the pleas submitted by the applicant exclusively seek the annulment of that decision, certain remarks and certain arguments that it put forward in the written procedure relate to the inspection with which the Commission proceeded in implementation of that decision. That is demonstrated, moreover, by the manner in which the applicant has qualified the first and third pleas for annulment.

- 22 In that regard, it should/must be recalled that, under settled case-law, the way in which a decision ordering an inspection is applied has no bearing on the lawfulness of that decision (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 49 and the case-law cited); and that an undertaking cannot therefore plead unlawfulness of the investigation procedures to support claims for annulment of the measure on the basis of which the Commission carries out that investigation (see judgment of 17 September 2007, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 55 and the case-law cited).
- 23 However, the applicant stated at the hearing that it was not attempting to plead unlawfulness of the investigation procedures in support of its claims for annulment of the contested decision. It submitted that the remarks and arguments relating to the inspection at issue were intended solely to serve as ‘an aid to interpreting’ the underlying aim of the contested decision.
- 24 It is therefore from that perspective that those remarks and arguments must be assessed when examining the pleas for annulment of the contested decision.
- 25 Furthermore, that examination should begin with the second and third pleas, given that that analysis is likely to have an impact on the subsequent analysis of the other pleas.

The second and third pleas, alleging breach of the obligation to state reasons and the lack of reasonable grounds for suspecting infringement of the competition rules

- 26 By its third plea, the applicant first criticises the Commission for failing to refer, in the contested decision, to any evidence for suspecting infringement of the competition rules.
- 27 In any case, the applicant is convinced that, at the time of the adoption of the contested decision, the Commission could not have had serious evidence (even indirect) to suspect infringement of the competition rules. It claims that, on the contrary, the evidence gathered in the context of the procedure before the Czech competition authority, including the expert’s reports of M. Krabec dated 16 December and that of the Univerzita Pardubice (University of Pardubice, Czech Republic) of 25 August 2015, argues in favour of the absence of anti-competitive behaviour on the part of the applicant. It is argued, furthermore, that the same evidence demonstrates that the applicant’s prices have on average remained higher than those of its competitors and that its revenue on the Prague-Ostrava route has always been higher than the variable costs. The lack of reasonable grounds is, it is claimed, corroborated by developments in the situation on the Prague-Ostrava route, characterised by a high level of competition. It is therefore highly probable, according to the applicant, that the contested decision was based exclusively on a complaint, allegedly lodged by one of the competing carriers, and not on an appropriate investigation of the truth of the facts.
- 28 In that regard, the applicant requests that the General Court conduct a verification of the information that the Commission had on the date of the adoption of the contested decision, and assess the extent to which the Commission examined the Czech competition authority’s file.
- 29 By its second plea, the applicant claims that insufficient reasons were given in the contested decision, which defines the subject matter and purpose of the inspection too broadly, thus referring to practically all of the applicant’s behaviour in the rail passenger transport sector in the Czech Republic.
- 30 It is argued that the purpose of the inspection is defined too broadly from a territorial, temporal and substantive perspective. From a territorial perspective, recital 3 of the contested decision refers to a potential infringement committed in particular on the Prague-Ostrava route, but is not limited thereto. As regards the temporal definition, the wording used refers admittedly to the beginning of the behaviour investigated in 2011, but does not preclude the Commission also investigating earlier

periods together with any subsequent period. Substantively, Article 2 of the contested decision states that the alleged practices ‘include’ predatory pricing, thus also referring to any other form of infringement of Article 102 TFEU. Furthermore, it is argued that the Commission failed to identify the market in question.

- 31 In addition, the contested decision fails to describe in concrete terms the facts and presumptions that the Commission intended to verify, or state the grounds justifying the latter’s suspicions (as regards that latter complaint, see paragraph 26 above).
- 32 Thus the contested decision allowed the Commission to ‘fish for information’ and concern itself not only with the documents relating to the arrival of competing carriers on the Prague-Ostrava route but also with other documentation. It is claimed that it is on the basis of the documents seized during the inspection at issue (Falcon), but unrelated to the Prague-Ostrava route, that the Commission ordered a second inspection (Twins), which is the subject of Case T-621/16, *České dráhy v Commission*.
- 33 The Commission contends that those two pleas should be rejected.
- 34 As a preliminary point, it should be recalled that the need for protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, is recognised as a general principle of law of the European Union (see judgment of 25 November 2014, *Orange v Commission*, T-401/13, EU:T:2014:991, paragraph 83 and the case-law cited).
- 35 Consequently, with a view to observing that general principle, an inspection decision must be directed at gathering the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possesses certain information, constituting reasonable grounds for suspecting an infringement of the competition rules (see judgment of 25 November 2014, *Orange v Commission*, T-401/13, EU:T:2014:991, paragraph 84 and the case-law cited).
- 36 In other words, having reasonable grounds for suspecting infringement of the competition rules is a prerequisite for the Commission to order an inspection pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).
- 37 Likewise, also in accordance with that general principle, the terms of a decision ordering an inspection must not exceed the scope of the infringement which may be suspected on such grounds.
- 38 Admittedly, in principle, the Commission is not required to disclose to the addressee of such a decision all the information at its disposal concerning the presumed infringements, or to define precisely the market in question, or to make a precise legal analysis of those infringements, or indicate the period within which those infringements were allegedly committed (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 170 and the case-law cited).
- 39 By contrast, the Commission must state, as precisely as possible, the presumed facts that it wishes to investigate, namely, what it is looking for and the matters to which the inspection must relate. To that end, the Commission is also required to state, in a decision ordering an inspection, the essential features of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement in the infringement of the undertaking concerned, as well as the powers conferred on the European Union investigators (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 170 and 171 and the case-law cited).

- 40 Moreover, overly succinct, vague and generic and, in certain respects, ambiguous reasons cannot fulfil the requirements to give reasons set down by Article 18(3) of Regulation No 1/2003, to justify a request for information made more than two years after the initial inspections, when the Commission had already addressed several requests for information to undertakings suspected of involvement in an infringement, several months after the decision to initiate the procedure; the decision at issue was therefore adopted on a date when the Commission already had at its disposal information that would have allowed it to present more precisely the suspicions of infringement by the companies involved (see, to that effect, judgment of 10 March 2016, *HeidelbergCement v Commission*, C-247/14 P, EU:C:2016:149, paragraph 39).
- 41 In any case, inasmuch as the statement of reasons for that decision circumscribes the powers conferred on the Commission's agents (see, to that effect, judgment of 18 June 2015, *Deutsche Bahn and Others v Commission*, C-583/13 P, EU:C:2015:404, paragraph 60), the general principle mentioned in paragraph 34 above precludes wordings, in inspection decisions, that would extend the scope of those powers beyond that arises from the reasonable grounds which the Commission has at its disposal on the date of adoption of such a decision.
- 42 It is in application of that general principle that the General Court annulled the decision at issue in the case that gave rise to the judgment of 14 November 2012, *Nexans France and Nexans v Commission* (T-135/09, EU:T:2012:596), in so far as that decision concerned power cables other than high-voltage submarine and underground power cables and the material associated with those other cables, having found that if, on the date of adoption of that decision, the Commission had at its disposal reasonable grounds for ordering an inspection relating to high-voltage submarine and underground power cables and the material associated with those cables, it did not, however, have reasonable grounds for ordering an inspection relating to all the power cables and the material associated with those cables (see, to that effect, judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraphs 91 to 94).
- 43 In the present case, it should consequently be determined whether (i) the Commission had reasonable grounds to suspect an infringement of the competition rules by the applicant; and (ii) the inspection powers circumscribed by the contested decision were restricted to the infringement that the Commission could suspect on those grounds.
- 44 In that regard, above all, the applicant criticises the Commission for failing to set out, in the contested decision, any concrete evidence serving to establish the suspicion of anti-competitive conduct of which the applicant is accused.
- 45 If, however, in order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 172 and the case-law cited), at the preliminary investigation stage, it cannot be required to indicate, besides the putative infringements that it intends to investigate, the evidence, that is to say, the indicia leading it to consider that Article 102 TFEU has possibly been infringed. Such an obligation would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned (see judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 81).
- 46 First, the starting point for the preliminary investigation stage is the date on which the Commission, in exercise of the powers conferred on it by Articles 18 and 20 of Regulation No 1/2003, takes measures which involve the allegation of an infringement and have major repercussions on the situation of the undertakings under suspicion. Second, it is not until the beginning of the inter partes administrative stage that the undertaking concerned is informed, by means of the notification of the statement of

objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after the statement of objections has been issued that the undertaking concerned can rely in full on its rights of defence. If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it (see judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 78 and the case-law cited).

- 47 Consequently, the Commission cannot be criticised for having simply stated, in the contested decision, that it had information suggesting 'that [the applicant] may have engaged in predatory pricing practices with regard to the provision of rail passenger transport services on certain railway routes, including, without limitation, the Prague-Ostrava route' and that 'such alleged anti-competitive practices may have existed at least since 2011, when a private competitor entered the Prague-Ostrava route, if not before, and could still be ongoing'.
- 48 However, when the Courts of the European Union are called upon, as in the present case, to review an inspection decision for the purposes of ensuring that it is in no way arbitrary, they must satisfy themselves that there are reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned (see, to that effect, judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraph 43 and the case-law cited).
- 49 In that regard, it is apparent from the case-law that, at least when undertakings which are the recipients of a decision taken under Article 20(4) of Regulation No 1/2003 produce some evidence casting doubt on whether the Commission had reasonable grounds for adopting such a decision, the Courts of the European Union must examine those grounds and determine whether they are reasonable (judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraph 72).
- 50 However, the determination whether the Commission had reasonable grounds for suspecting an infringement of the competition rules before the adoption of an inspection decision is not the only means by which the Court can ensure that inspection decisions are not arbitrary (judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 87).
- 51 The review of the statement of reasons on which a decision is based also allows the courts to ensure that the principle of protection against arbitrary and disproportionate intervention is respected, in so far as the statement of reasons makes it possible to show that the intervention envisaged on the premises of the undertakings concerned is justified (see judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 89 and the case-law cited). The General Court may conclude that an inspection decision was not arbitrary, without it being necessary to check substantively the content of the indicia in the Commission's possession at the date of adoption of the decision, if the Court takes the view that the presumed facts which the Commission wishes to investigate and the matters to which the inspection must relate are defined sufficiently precisely (judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 91).
- 52 In the present case, the Commission stated in the contested decision that:
- first, it was in possession of 'indications that [the applicant] may have engaged in predatory pricing practices [...] on certain railway routes, including, without limitation, the Prague-Ostrava route' (recital 3 of the contested decision);

- secondly, it had received ‘indications that such alleged anti-competitive practices may have existed at least since 2011, when a private competitor entered the Prague-Ostrava route, if not before’ (recital 4 of the contested decision);
- thirdly, that the infringement of Article 102 TFEU referred to in the contested decision ‘include[d] predatory pricing that could foreclose third parties from the provision of rail passenger transport services’ (Article 1 of the contested decision).

53 Thus, the contested decision includes within the scope of the inspection at issue not only a possible infringement of Article 102 TFEU, consisting in predatory pricing practices on the Prague-Ostrava route since 2011, but also other forms of infringement of Article 102 TFEU, routes in the Czech Republic other than the Prague-Ostrava route, and the period prior to 2011.

54 The reasons stated in the contested decision alone do not make it possible to presume that, on the date of adoption of that decision, the Commission did indeed have reasonable grounds to suspect an infringement of Article 102 TFEU, as described in paragraph 53 above.

55 In those circumstances, it should be examined, first and in the light of other relevant evidence, whether, on the date of adoption of the contested decision, the Commission had reasonable grounds to suspect an infringement of Article 102 TFEU, consisting in predatory pricing practices on the Prague-Ostrava route since 2011.

56 Secondly, it should be examined whether, on the same date, the Commission also had reasonable grounds relating to other forms of infringement of Article 102 TFEU, on other routes and over the period prior to 2011.

The alleged predatory pricing practices on the Prague-Ostrava route since 2011

57 In its reply, the Commission identified three sets of information that, it argues, led it to adopt the contested decision: information received from the complainant; information obtained from publicly accessible sources; and the Czech competition authority’s file, including the expert report from the University of Pardubice.

58 As regards the third set of information, the Commission cited, in particular, points 128 to 130 and 155 to 157 of the expert report from the University of Pardubice. It is claimed that in those points, the expert found, inter alia, that the information provided (see point 3 of the report) did not make it possible to conclude that the figures relating to the costs concerned accurately reflected the situation. It is further claimed that the expert report also highlighted the possibility of distortion of the data furnished by the applicant.

59 So far as concerns the points contained in the expert report from the University of Pardubice, cited by the Commission, the applicant maintains that the reservations contained therein are only minor. They are commonly used wordings by means of which experts habitually ensure that their expert opinion will not be contested and that their potential liability will not be incurred.

60 As a preliminary point, it should be noted that it is apparent from the case file that the Czech competition authority has been investigating possible predatory pricing practices by the applicant, on the Prague-Ostrava route, since 2011, namely the same behaviour as that to which the contested decision primarily relates.

61 It is also apparent from the same file that, over the course of that investigation, the Czech competition authority has collected thousands of pages of evidence, obtained primarily from the applicant and the competing carriers (RegioJet and LEO Express).

- 62 So far as concerns the expert report from the University of Pardubice, first, it should be noted that points 128 to 130 of that report, relied upon by the Commission and featured under the heading ‘Transfer of costs between the various principals of public rail transport’, state the following:
- ‘[confidential]’,
 - ‘[confidential]’,
 - ‘[confidential]’.
- 63 Secondly, points 155 to 157 of the expert report from the University of Pardubice, also relied upon by the Commission and which appear under the heading ‘Identification of certain contradictions in [the applicant’s] observations’ state the following:
- ‘[confidential]’,
 - ‘[confidential]’; in that regard, the expert report reproduces the following quote: ‘[confidential]’.
- 64 Thirdly, points 158 to 161 of the expert report from the University of Pardubice, featured under the heading ‘Contradictions in [the applicant’s] observations relating to the proportion of variable and fixed costs’, state that ‘[confidential]’ and that ‘[confidential]’.
- 65 It is clear that the observations above, contrary to the claim made by the applicant that they are commonly used wordings by means of which experts aim to ensure that their expert opinion will be not contested and that their potential liability will not be incurred, demonstrate, albeit indirectly, that the Commission had valid reasons to suspect an infringement of Article 102 TFEU on the part of the applicant and that it was consequently entitled to order the inspection at issue.
- 66 In that regard, it should be noted that in order to justify inspections, it is not necessary for the information in the Commission’s possession to be of such a kind as to establish beyond reasonable doubt the existence of the infringement found in the contested decision. That standard of proof is required for Commission decisions in which it finds the existence of an infringement and imposes fines. By contrast, in order to adopt an inspection decision within the meaning of Article 20(4) of Regulation No 1/2003, it is sufficient that it is in possession of information and evidence providing reasonable grounds for suspecting an infringement (see, to that effect, judgments of 14 March 2014, *Cementos Portland Valderrivas v Commission*, T-296/11, EU:T:2014:121, paragraph 43, and of 29 February 2016, *EGL and Others v Commission*, T-251/12, not published, EU:T:2016:114, paragraph 149).
- 67 In light of the elements noted above, it is apparent that the Commission had such grounds.
- 68 Furthermore, even if the applicant’s argument that the evidence gathered by the Czech competition authority demonstrates that its revenue on the Prague-Ostrava route has always been higher than the variable costs were valid, it is sufficient to recall that, according to the case-law, prices below average total costs, which include fixed costs plus variable costs, but above average variable costs, are also contrary to Article 102 TFEU if they are determined as part of a plan for eliminating a competitor (see, to that effect, judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 72).
- 69 Lastly, as regards the applicant’s argument that the lack of reasonable grounds is also corroborated by the developments in the situation on the Prague-Ostrava route, characterised by a high level of competition, the Commission rightly points out that the fact that the strategy of the dominant undertaking has not met with the success anticipated does not mean that the predatory conduct has not resulted in a distortion in competition.

- 70 In the light of the foregoing, the complaint alleging the lack of reasonable grounds to suspect an infringement of Article 102 TFEU by the applicant, consisting in predatory pricing practices on the Prague-Ostrava route since 2011, must be rejected.
- 71 However, inasmuch as the investigation conducted by the Czech competition authority relates only to the alleged predatory pricing practices on the Prague-Ostrava route since 2011, that finding cannot be transposed, on that sole basis, to other forms of infringement of Article 102 TFEU, to routes other than the Prague-Ostrava route or to the period prior to 2011.
- 72 Consequently, it is now necessary to examine the evidence on which the Commission relied in that regard, taking into account its response to the measures of organisation of procedure.

Other forms of infringement of Article 102 TFEU, routes other than the Prague-Ostrava route and the period prior to 2011

– Other forms of infringement of Article 102 TFEU

- 73 First, the Commission admits, in its response to the measures of organisation of procedure mentioned above, that it had no evidence allowing it to suspect other forms of infringement of Article 102 TFEU.
- 74 Secondly, it points out that, according to settled case-law, when it applies Article 102 TFEU, it is bound to examine the business strategy of the undertaking under investigation, which may reveal the existence of an intention or plan to eliminate competition.
- 75 In its observations on the Commission's response to the measure of organisation of procedure, the applicant contests the latter line of argument. The fact that the Commission is bound to examine the applicant's business strategy cannot in any case justify extending the purpose of the inspection at issue to forms of infringement of the competition rules for which the Commission had no reasonable grounds.
- 76 In that regard, it is apparent from the case-law that, in order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, in principle, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (see judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 41 and the case-law cited).
- 77 Equally, it is apparent from the case-law that prices below average total costs, which include fixed costs plus variable costs, but above average variable costs, are also contrary to Article 102 TFEU if they are determined as part of a plan for eliminating a competitor (judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paragraph 72).
- 78 Consequently, where the Commission has reasonable grounds to suspect an infringement of Article 102 TFEU consisting in predatory pricing practices, its investigation can cover the strategy of the undertaking concerned. Moreover, at the end of the first paragraph of Article 1 of the contested decision, the Commission follows that line of reasoning by indicating that, in addition to the predatory pricing practices that could foreclose third parties from the provision of rail passenger transport services, the inspection would also include 'any strategy to that effect'. That aspect has never been disputed by the applicant.
- 79 By contrast, the applicant rightly claims that that line of reasoning cannot constitute a valid reason for extending the purpose of the inspection at issue to other forms of infringement.

80 Taking account in particular of the general principle mentioned in paragraph 34 above, that same reasoning cannot justify the terms of Article 1 of the contested decision, under which the infringement ‘includes’ predatory pricing practices, which may include within the scope of the inspection at issue any other form of infringement of Article 102 TFEU, when the Commission had no evidence in that regard.

– *On routes other than the Prague-Ostrava route*

81 In that regard, the Commission produced, in its response to the measures of organisation of procedure adopted by the General Court, two complaints, dated 17 October 2014 and 1 March 2016, which LEO Express had allegedly lodged with it.

82 It was claimed that the two complaints contained evidence relating to the route between Prague and Košice, a city situated in the eastern part of the Slovak Republic. Furthermore, the complaint of 1 March 2016 contained evidence relating to two other domestic routes, Ostrava-Kolín and Olomouc-Kolín.

83 Moreover, the Commission stressed the fact that useful evidence could also be drawn from the documents not relating to the Prague-Ostrava route in order to investigate the existence of anti-competitive practices concerning the latter route, as they concern the question of costs on other railway routes and, as a result, constitute a standard for the usual cost distribution between the various routes.

84 In its observations on the Commission’s response to the measures of organisation of procedure, the applicant challenged that evidence. It claims that the documents produced by the Commission contain no evidence for suspecting anti-competitive behaviour on its part on the Prague-Košice route. So far as concerns the Ostrava-Kolín and Olomouc-Kolín routes, the applicant claims that these are actually an integral part of the Prague-Ostrava route.

85 First, it should be noted that, while the two complaints contain information relating to the Prague-Košice route, that information does not constitute reasonable grounds to suspect predatory pricing practices on that route as well. It is merely stated in those complaints that the applicant abused its dominant position in deciding to reintroduce its SC Pendolino trains on that route, in response to similar intentions on the part of LEO Express, when it had ceased to operate those trains on the same route owing to their limited use by passengers.

86 In that regard, it should be recalled that the Commission admitted that it had grounds only to suspect an infringement consisting in predatory pricing practices.

87 Even if the information in question were indirectly to signal predatory pricing practices on the Prague-Košice route as well, to include that route in the Falcon inspection would, in any case, be incompatible with Article 1 of the contested decision, which limits the scope to the territory of the Czech Republic.

88 Secondly, so far as concerns the Ostrava-Kolín and Olomouc-Kolín routes, it is sufficient to find, as claimed by the applicant, that they are an integral part of the Prague-Ostrava route. The cities of Kolín and Olomouc are situated on the Prague-Ostrava route, between the latter two cities. It follows that the Ostrava-Kolín and Olomouc-Kolín routes are already covered by the terms of the contested decision, which explicitly refer to the Prague-Ostrava route.

89 It must therefore be concluded that the Commission did not have reasonable grounds to suspect that the applicant engaged in predatory pricing practices on routes other than the Prague-Ostrava route.

90 Furthermore, the Commission itself confirms that conclusion, at least implicitly, when it stresses the importance of the information concerning other routes in examining the case of the Prague-Ostrava route.

91 In any case, even if the latter line of reasoning were valid, it does not allow the Commission to assert, in the contested decision, that it had information suggesting that the applicant engaged in predatory pricing practices ‘on certain railway routes, including, without limitation, the Prague-Ostrava route’, when it had reasonable grounds solely with regard to the latter route.

– *The period prior to 2011*

92 In that regard, it is clear from the case file that the applicant’s main competitor, RegioJet, began operating on the Prague-Ostrava route only in September 2011, and that it is from that date only that the Czech competition authority has been investigating the applicant’s allegedly abusive conduct on that route.

93 Nevertheless, in its response to the measures of organisation of procedure adopted by the General Court, the Commission produced a document dated 4 October 2010.

94 According to the applicant, that document, namely a complaint lodged by RegioJet, contains no relevant information and is mere speculation on the latter’s part.

95 It must be noted, however, that while the document produced by the Commission is only a complaint lodged by a competitor, it is worded in a coherent manner and refers, for the period prior to 2011, to the same conduct as that for which the Commission had reasonable grounds in respect of the period from 2011 onwards.

96 Furthermore, whilst it is true that the applicant’s main competitor, RegioJet, only began operating on the Prague-Ostrava route in 2011 and the second, LEO Express, in 2012, that does not preclude in itself the possibility of abusive conduct on the part of the applicant prior to that date. It may in fact be reasonably presumed that, in response to new competitors, a dominant undertaking would not wait for the entry of competitive operation on the market at issue but would act, prior to that entry, to prevent or make it difficult.

97 In those circumstances, the Commission was entitled to rely, in the contested decision, on the period ‘at least since 2011’ as the likely period of the suspected infringement.

– *Interim conclusion*

98 In the light of the foregoing, it must be concluded that, on the date of the adoption of the contested decision, the Commission did not have reasonable grounds to suspect an infringement of Article 102 TFEU by the applicant which, it was claimed, consisted in forms other than the alleged predatory pricing practices or concerned routes/lines other than the Prague-Ostrava route. However, the Commission was entitled to use the period ‘at least since 2011’ as the likely period of the infringement at issue.

Conclusion on the second and third pleas in law

99 In those circumstances, the second and third pleas in the present action should be upheld in part, and the contested decision annulled, inasmuch as it concerns the alleged infringement of Article 102 TFEU on routes other than the Prague-Ostrava route and forms of infringement other than the alleged predatory pricing practices.

100 It is in the light of that conclusion that the other pleas in the action should be examined.

The first plea, alleging that the contested decision is arbitrary or disproportionate

101 The applicant maintains that the contested decision constitutes an arbitrary or disproportionate intervention.

102 In that regard, first, the applicant notes that the Commission had at its disposal several thousands of pages of evidence arising out of the procedure before the Czech competition authority. In addition, the latter has already conducted a surprise inspection at the applicant's registered offices. Moreover, the applicant claims that it cooperated fully with that authority throughout the administrative procedure that it has been conducting. Consequently, the decisive factual situation for the investigation conducted by the Commission was recorded in detail in the authority's case file, and the Commission could not hope to obtain further relevant evidence in the course of the inspection at issue.

103 Next, the applicant takes the view that it was possible to achieve the same outcome by less invasive methods, for example by means of a request for information.

104 Furthermore, the applicant points out that the conduct at issue is already the subject of two sets of legal proceedings brought by the two competitors, RegioJet and LEO Express.

105 Lastly, it is argued that the contested decision breaches the principle of proportionality, in so far as the purpose of the inspection was worded too broadly.

106 The Commission contends that this plea should be rejected.

107 The first part of this plea, alleging that the contested decision was arbitrary, must be rejected at the outset.

108 It is apparent from the case-law that an inspection decision is arbitrary only when it has been adopted in the absence of any facts capable of justifying an inspection. That is not the case where it is aimed at collecting the documentation necessary to check the actual existence and scope of a specific factual and legal situation in respect of which the Commission already has reasonable grounds to suspect an infringement of the competition rules by the undertaking concerned (see, to that effect, judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraph 43 and the case-law cited).

109 It follows from the examination of the second and third pleas that (i) the Commission had reasonable grounds to suspect an infringement of Article 102 TFEU consisting in predatory pricing practices on the Prague-Ostrava route since at least 2011; and (ii) the contested decision must be annulled in so far as it concerns other forms of infringement of Article 102 TFEU and other routes, given the absence of reasonable grounds in that regard.

110 In those circumstances, the contested decision is not arbitrary.

111 The first part of the first plea in law must therefore be dismissed.

112 So far as concerns the second part of the first plea, alleging that the contested decision is disproportionate, it should be recalled that, pursuant to the principle of proportionality, the content and form of Union action is not to exceed what is necessary to achieve the objectives of the Treaties (Article 5(4) TFEU).

- 113 Thus, that principle requires that acts of Union institutions should not exceed the limits of what is appropriate and necessary to attain the aim pursued, and when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 192 and the case-law cited).
- 114 However, the Commission's choice between, on the one hand, an inspection by straightforward authorisation or a request for information, and, on the other hand, an inspection ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore, where an inspection decision is intended solely to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 193 and the case-law cited).
- 115 It is, in principle, for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules and even if it already has some indicia, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 194 and the case-law cited).
- 116 The applicant's argument that, in complying with the principle of proportionality, the Commission should have resorted to less invasive means, such as a request for information under Article 18 of Regulation No 1/2003, cannot be accepted and all the more so given the fact that, in the circumstances of the present case, the assessment of the applicant's behaviour is based, clearly, on information that would certainly not have been disclosed voluntarily to the Commission and therefore could not have come into the latter's possession other than by means of an inspection (see, to that effect, judgments of 8 March 2007, *France Télécom v Commission*, T-340/04, EU:T:2007:81, paragraphs 150 and 153, and of 12 July 2007, *CB v Commission*, T-266/03, not published, EU:T:2007:223, paragraph 65).
- 117 Furthermore, inasmuch as the contested decision is based, in part, on the information contained in the file of the Czech competition authority, which is investigating the same conduct on the part of the applicant and, it is claimed, has issued several requests for information, it is probable that the file of that authority already contained all the information that could be obtained by such means.
- 118 In the light of the case-law cited, in particular in paragraph 115 above, the applicant's argument that the Commission should have been satisfied with the information contained in the file of the Czech competition authority cannot, moreover, be accepted.
- 119 So far as concerns the argument that the same behaviour on the part of the applicant is already the subject of an administrative investigation and two sets of legal proceedings at the national level, it is sufficient to recall that, according to the case-law, it cannot be inferred from the provisions of Regulation No 1/2003 that, where a national competition authority has begun an investigation into particular facts, the Commission is immediately prevented from taking action in the case or taking a preliminary interest therein. On the contrary, both those authorities may, at least in the preliminary stages such as investigations, work in parallel and the Commission retains the option of initiating proceedings with a view to adopting a decision even where a national authority is already acting in the matter. A fortiori, the Commission must also be able to carry out an inspection, as a decision ordering an inspection is a step that is merely preparatory to dealing with the substance of the case, and does

not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003 (see, to that effect, judgment of 8 March 2007, *France Télécom v Commission*, T-340/04, EU:T:2007:81, paragraph 129 and the case-law cited). That principle has been recognised in cases where the national competition authority applies Articles 101 or 102 TFEU. It applies all the more so in cases where the investigation conducted by the national competition authority is based solely on national law. That is precisely the situation here.

- 120 Likewise, it is apparent from settled case-law that, in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 101(1) and 102 TFEU. The Commission is therefore entitled to adopt at any time individual decisions under Articles 101 and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision (see judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 200 and the case-law cited).
- 121 Consequently, nor can the ongoing proceedings before the Czech courts prevent the Commission from conducting a surprise inspection, such as that ordered in the contested decision.
- 122 In addition, so far as concerns the decision of the Městský soud v Praze (Prague City Court) of 10 December 2015, mentioned in paragraph 8 above, it should be noted that the contested decision does not conflict with that decision. By its decision, the Městský soud v Praze (Prague City Court) dismissed the action for compensation brought by LEO Express against the applicant, on the ground that LEO Express had failed to establish the causal link between the damage suffered and the allegedly anti-competitive behaviour on the part of the applicant. However, following that finding, it was no longer necessary to rule on whether the latter's conduct was anti-competitive and, consequently, the Městský soud v Praze (Prague City Court) did not do so.
- 123 As regards the applicant's argument based on the judgment of 25 November 2014, *Orange v Commission* (T-402/13, EU:T:2014:991), in which the General Court found that an examination of the file in the national competition authority's possession was not an alternative to an inspection, since that authority had not carried out any inspection at the premises of the undertaking concerned and its decision has therefore been taken on the sole basis of the information provided voluntarily by that undertaking, it should be noted that the General Court reached such a finding in order to overcome the fact that, in that case, the Commission had opted for an inspection without checking beforehand the information that the national competition authority had been able to obtain with regard to similar behaviour (see, to that effect, judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraphs 55 and 56). In the present case, the Court finds that the Commission consulted the file of the Czech competition authority and adopted the contested decision only following that consultation.
- 124 Lastly, so far as concerns the complaint alleging that the purpose of the inspection at issue was worded too broadly in the contested decision, it should be noted that that complaint has already been examined in the second and third pleas in law and that, following that examination, it was found that the contested decision should be annulled in so far as it concerned any route other than the Prague-Ostrava route and in so far as it referred to any behaviour other than the alleged predatory pricing practices.
- 125 By contrast, as regards the terms of the contested decision which state the period during which the infringement was allegedly committed, 'at least since 2011', the Court has found, also in the context of the second and third pleas, that the Commission had evidence relating not only to the period from 2011 onwards, but also to the period prior to 2011.

- 126 Furthermore, it is clear from the case-law that the Commission is not bound to specify the period during which the suspected infringement was committed (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 170 and the case-law cited).
- 127 In those circumstances, the contested decision cannot be regarded as disproportionate on the ground that the purpose of the inspection was worded too broadly therein.
- 128 Consequently, it is necessary to reject also the second part of the first plea and, therefore, that plea in law as a whole.

The fourth plea in law, alleging lack of effect on trade between Member States and that the applicant did not have a dominant position on the internal market or a substantial part thereof

- 129 According to the applicant, the Commission was not competent to adopt the contested decision and conduct the inspection. Since the Prague-Ostrava route is 356 kilometres long and negligible in terms of the European railway network, the applicant's allegedly anti-competitive behaviour is not capable of affecting trade appreciably between Member States. Moreover, the applicant claims that it does not have a dominant position in the internal market or a substantial part thereof. In view of its minor importance at the European level, rail transport on the Prague-Ostrava route cannot be considered a substantial part of the internal market.
- 130 The applicant adds that this plea supplements the second plea and vice-versa, particularly so far as concerns the geographical scope of the inspection at issue.
- 131 The Commission contends that this plea should be rejected.
- 132 Article 102 TFEU provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is to be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
- 133 In that regard, as a preliminary point, it should be recalled that the condition that an anti-competitive agreement or practice is prohibited inasmuch as trade between Member States is likely to be affected is intended to determine the scope of EU law in relation to that of the Member States. It is in so far as the agreement or practice may affect trade between Member States that the interference with competition caused by that agreement or practice comes within the scope of EU law, where it otherwise escapes that prohibition (see, to that effect, judgment of 13 July 1966, *Consten and Grundig v Commission*, 56/64 and 58/64, EU:C:1966:41, p. 301)
- 134 More specifically, the actual title of Regulation No 1/2003 shows that the purpose of the powers conferred on the Commission by that regulation is the implementation of the competition rules laid down in Articles 101 and 102 TFEU. Those two provisions prohibit certain conduct on the part of undertakings in so far as it may affect trade between Member States and in so far as it has as its object or effect the prevention, restriction or distortion of competition within the internal market. Accordingly, the Commission can use its powers of inspection only for the purposes of detecting such conduct (judgment of 14 November 2012, *Nexans France and Nexans v Commission*, T-135/09, EU:T:2012:596, paragraph 99).
- 135 In the light of that case-law, the Commission is wrong to contend that the condition that an anti-competitive agreement or practice is prohibited in so far as trade between Member States is likely to be affected relates solely to the substance, namely to the assessment of the lawfulness of a possible final decision of the Commission, and that it therefore does not come within the scope of the judicial review of the contested decision.

- 136 Accordingly, it is necessary to examine whether that condition ('the first condition') is met with regard to the suspected infringement, in view of the finding made in the examination of the second and third pleas that the Commission did not have reasonable grounds to suspect an infringement of the competition rules on routes other than the Prague-Ostrava route.
- 137 Furthermore, in the light of the fact that the infringement suspected by the Commission in the present case is an infringement of Article 102 TFEU, it is necessary also to examine the condition that any abuse of a dominant position within the internal market or a substantial part thereof is prohibited ('the second condition').
- 138 So far as concerns the first condition, it should be recalled as a preliminary point that, while it is true that behaviour the effects of which are confined to the territory of a single Member State is governed by the national legal order and not by EU law (see, to that effect, judgment of 31 May 1979, *Hugin Kassaregister and Hugin Cash Registers v Commission*, 22/78, EU:C:1979:138, paragraph 17), the fact remains that, when an undertaking in a dominant position obstructs access to the market by competitors, it makes no difference whether such conduct is confined to a single Member State as long as it is capable of affecting patterns of trade and competition on the internal market (judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 103).
- 139 Moreover, Article 102 TFEU does not require it to be proved that the abusive conduct has in fact appreciably affected trade between Member States but that it is capable of having that effect (judgment of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 104).
- 140 For an agreement, decision or practice to be capable of affecting 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 of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States (see judgment of 16 April 2015, *Prezes Urzędu Komunikacji Elektronicznej and Telefonia Dialog, C-3/14*, EU:C:2015:232, paragraph 51 and the case-law cited).
- 141 In the present case, it is common ground between the parties, first, that the Prague-Ostrava route is considered to be one of the main routes in the Czech Republic, particularly on account of the fact that there is no direct motorway between Prague and Ostrava, a town situated approximately ten kilometres away from the Polish border and tens of kilometres away from the Slovak border; secondly, that the competing carriers active on the Prague-Ostrava route also operate in other Member States, in particular the Slovak Republic; and, thirdly, that the Prague-Ostrava route is among the routes operated by competing carriers, particularly to the latter Member State.
- 142 It must be stated that, in such a context, anti-competitive behaviour such as that suspected by the Commission in the present case is, clearly, capable of affecting patterns of trade and competition on the internal market. Such abusive practices are of such a nature as to affect the economic position of competing carriers, active in several Member States, and therefore capable of affecting competition not only on the Prague-Ostrava route and in the Czech Republic, but, at least indirectly, on the broader scale of Central Europe, particularly in Slovakia.
- 143 Admittedly, if the suspected infringement was, as suggested by the applicant, limited to the section connecting Chocẽň (Czech Republic) to Brandýs nad Orlicí (Czech Republic), which section is 5 kilometres long and part of the Prague-Ostrava route, its effect on trade between Member States would probably be infinitesimal. However, the suspected infringement is not limited to that section. It covers the Prague-Ostrava route as a whole, which is 356 kilometres long.

144 It follows that the first condition is met.

145 So far as concerns the second condition, it is sufficient to note that it is common ground between the parties that the applicant is in a dominant position within the meaning of Article 102 TFEU, particularly on the markets for the provision of passenger transport services and the provision of rail infrastructure management services in the Czech Republic (recital 2 of the contested decision).

146 In the case-law, the second condition is deemed to have been met even in cases where the dominant position of the undertaking concerned is limited to a region within a Member State (see, to that effect, judgment of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 38), or even to a port (see, to that effect, judgment of 10 December 1991, *Merci convenzionali porto di Genova*, C-179/90, EU:C:1991:464, paragraph 15).

147 A fortiori, that condition must be deemed to have been met in the case where the dominant position of the undertaking concerned covers the territory of a Member State as a whole, such as the Czech Republic.

148 Moreover, the applicant is mistaken when it starts from the premiss that it is rail transport on the Prague-Ostrava route that must make up a substantial part of the internal market. For Article 102 TFEU to apply, two separate conditions must be met cumulatively. The abusive conduct must be capable of affecting trade between Member States. Moreover, the perpetrator of the abusive conduct must occupy a dominant position on the internal market or a substantial part thereof. It follows that Article 102 TFEU applies even in the case where an undertaking which occupies a dominant position on the internal market or a substantial part thereof abuses that dominant position only within a market segment which does not alone constitute a substantial part of the internal market, on condition however that such abuse is capable of affecting trade between Member States. It follows from the foregoing that the latter condition has been met in the present case.

149 The second condition is therefore also met.

150 Accordingly, the fourth plea in law must be rejected.

The fifth plea, alleging infringement of the principles of legal certainty and the protection of legitimate expectations

151 The applicant argues that the fact that the Czech competition authority has been investigating the same behaviour since 2011 has given rise, on the part of the applicant, to a legitimate expectation that the investigation would be conducted only by that authority.

152 That legitimate expectation, it is claimed, was strengthened by the terms of the Commission Notice on Cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) and by the fact that the Commission was completely inactive between 2013, when it received the complaint that led it to adopt the contested decision, and 2016, when it conducted the inspection at issue.

153 The Commission takes issue with those arguments.

154 In that regard, it cannot be inferred from the provisions of Regulation No 1/2003 that, where a national competition authority has begun an investigation into particular facts, the Commission is immediately prevented from taking action in the case or taking a preliminary interest therein. On the contrary, both those authorities may, at least in the preliminary stages such as investigations, work in parallel and the Commission retains the option of initiating proceedings with a view to adopting a decision even where a national authority is already acting in the matter. A fortiori, the Commission must also be able to carry out an inspection, as a decision ordering an inspection is a step that is

merely preparatory to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003 (see, to that effect, judgment of 8 March 2007, *France Télécom v Commission*, T-340/04, EU:T:2007:81, paragraph 129 and the case-law cited).

155 Moreover, it is settled case-law that, in principle, the Commission cannot be bound by a decision given by a national court or authority, pursuant to Article 101(1) TFEU and Article 102 TFEU. The Commission is therefore entitled to adopt at any time individual decisions under Articles 101 and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision (see judgment of 25 November 2014, *Orange v Commission*, T-402/13, EU:T:2014:991, paragraph 27 and the case-law cited).

156 Consequently, the inspection conducted by the Czech competition authority could not, in any case, give rise to the legitimate expectation, on the part of the applicant, that the Commission would refrain from intervening in the case.

157 Furthermore, it should be noted that the Czech competition authority is conducting its investigation on the basis of national, rather than EU, law.

158 As to the fact that the Commission allegedly adopted the contested decision only in 2016, when the Czech competition authority has been conducting its investigation since 2011, and that the Commission had received a complaint concerning the same conduct on the part of the application in 2013, this does not render invalid the conclusion that the applicant cannot rely on a legitimate expectation in the present case.

159 In that regard, it is sufficient to note that the Commission is entitled to give differing degrees of priority to the complaints brought before it (see judgment of 14 September 2016, *Trajektna luka Split v Commission*, T-57/15, not published, EU:T:2016:470, paragraph 66 and the case-law cited).

160 So far as concerns the Commission Notice on Cooperation within the Network of Competition Authorities, the Court agrees with the Commission that that notice applies only in circumstances where the national competition authority has applied Articles 101 or 102 TFEU. That is not the case here. Accordingly, that notice was not capable of giving rise to a legitimate expectation on the part of the applicant.

161 It follows that the fifth plea must be rejected.

The sixth plea in law, alleging infringement of the right to respect for private life and the rights of the defence

162 According to the applicant, the interference in the right guaranteed by Article 7 of the Charter and Article 8 of the ECHR, as contained in the contested decision, fails to fulfil any of the three conditions for it to be considered justified. Thus, the applicant claims that it is not provided for by law; does not pursue a legitimate aim, in particular on account of the lack of reasonable grounds to suspect an infringement of the competition rules by the applicant; and is not necessary in a democratic society, particularly in the light of the investigation conducted by the Czech competition authority and the two ongoing sets of legal proceedings.

163 It is argued, furthermore, that the contested decision infringes the right guaranteed by Article 48 of the Charter and Article 6 of the ECHR, specifically the right of the applicant to be informed in detail of the nature and cause of the accusation made against it. So far as concerns the nature of the accusation, it is claimed that the contested decision is worded too broadly and, so far as concerns the cause of the accusation, does not contain any specific material.

164 The Commission contends that this plea should be rejected.

The first part of the sixth plea, alleging infringement of Article 7 of the Charter and Article 8 of the ECHR

165 Under Article 7 of the Charter, everyone has the right to respect for his or her private and family life, home and communications.

166 In that regard, Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In addition, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

167 So far as concerns Article 8 of the ECHR, Article 52(3) of the Charter states that '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention'.

168 Equally, the explanations relating to the Charter (OJ 2007 C 303, p. 17), so far as concerns Article 7 of the Charter, read as follows:

'In accordance with Article 52(3) [of the Charter], the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR: '... 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

169 Consequently, in so far as it is apparent from the case-law that the exercise of the powers of inspection conferred on the Commission by Article 20(4) of Regulation No 1/2003 vis-à-vis an undertaking constitutes a clear interference with the latter's right to respect for its privacy, private premises and correspondence (judgment of 6 September 2013, *Deutsche Bahn and Others v Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 65), it is necessary to examine whether the contested decision meets the conditions laid down in Article 52(1) of the Charter and Article 8(2) of the ECHR.

170 According to those conditions, the limitation must first be provided for by law. The measure in question must therefore have a legal basis (see, by analogy, judgment of 28 May 2013, *Trabelsi and Others v Council*, T-187/11, EU:T:2013:273, paragraph 79 and the case-law cited).

171 In the present case, it follows from the citations of the contested decision that it has been adopted on the basis of Article 20(4) of Regulation No 1/2003, which provides for the Commission's competence to order, by decision, inspections to which undertakings and associations of undertakings are required to submit.

- 172 The condition that any interference with the right to respect for private life must be ‘provided for by law’ is therefore met.
- 173 Next, so far as concerns the condition that, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others, it is apparent from the case-law that the powers conferred on the Commission by Article 20 of Regulation No 1/2003 are intended to allow the latter to carry out its duty under the Treaties of ensuring compliance with the competition rules in the internal market. The function of those rules is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of the powers given to the Commission by Regulation No 1/2003 contributes to the maintenance of the system of competition intended by the Treaties, which undertakings have an absolute duty to comply with. In those circumstances, it is therefore not apparent that Regulation No 1/2003, in conferring on the Commission the powers to carry out investigations without prior notification, infringes the right provided for by Article 7 of the Charter and Article 8 of the ECHR (see, to that effect, judgment of 26 June 1980, *National Panasonic v Commission*, 136/79, EU:C:1980:169, paragraph 20).
- 174 Consequently, in the light of the analysis of the other pleas in the present action, to which the applicant refers in that context, the contested decision, which was adopted on the basis of Regulation No 1/2003, also meets objectives of general interest recognised by the European Union.
- 175 Lastly, as regards whether the contested decision exceeds what is necessary to achieve the objective mentioned in paragraph 173 above, it is sufficient to recall that the same issue has already been analysed in the examination of the first plea. Following that assessment, it was concluded that, in view of the outcome of the examination of the second and third pleas, the contested decision had indeed been adopted in compliance with the principle of proportionality.
- 176 In those circumstances, the first part of the sixth plea, alleging infringement of Article 7 of the Charter and Article 8 of the ECHR, must be rejected.

The second part of the sixth plea: infringement of Article 48 of the Charter and Article 6 of the ECHR

- 177 Under Article 48(2) of the Charter, ‘respect for the rights of the defence of anyone who has been charged shall be guaranteed’.
- 178 So far as concerns Article 6 of the ECHR, the explanations relating to the Charter state the following:
- ‘Article 48 is the same as Article 6(2) and (3) of the ECHR ... In accordance with Article 52(3), this right has the same meaning and scope as the right guaranteed by the ECHR.’
- 179 In that regard, it should be pointed out that the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two separate, successive stages, each having its own internal logic, namely a preliminary investigation stage and an inter partes stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 1/2003 and which covers the period up to notification of the statement of objections, is intended to enable the Commission to gather all the relevant information tending to prove or disprove the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and on how it is to proceed. By contrast, the inter partes stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the alleged infringement (see judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 47 and the case-law cited).

180 First, as regards the preliminary investigation stage, the Court of Justice has stated that the starting point is the date on which the Commission, in exercise of the powers conferred on it by Articles 18 and 20 of Regulation No 1/2003, takes measures which involve the allegation of an infringement and have major repercussions on the situation of the undertakings under suspicion. Second, it is apparent from the case-law of the Court of Justice that it is not until the beginning of the inter partes administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after the statement of objections has been issued that the undertaking concerned can rely in full on its rights of defence. If those rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it (see judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 48 and the case-law cited).

181 Admittedly, the measures of inquiry adopted by the Commission during the preliminary investigation stage, in particular, the investigation measures and the requests for information made under Articles 18 and 20 of Regulation No 1/2003, suggest, by their very nature, that an infringement has been committed and may have major repercussions on the situation of the undertakings under suspicion (judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 50). Even though, in formal terms, the undertaking concerned does not have the status of 'a person charged' during the preliminary investigation stage, the initiation of the investigation in its regard, by the adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct for the purposes of the case-law cited in paragraph 48 above, which justifies the adoption of that measure (judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 52). Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 51 and the case-law cited). It follows that, when the first measure is taken in respect of an undertaking, the Commission is required to inform the undertaking concerned of the subject matter and purpose of the investigation underway. In that respect, that reasoning must, however, enable the undertaking to understand the purpose and the subject matter of that investigation, which means that the putative infringements must be specified and, in that context, the fact that the undertaking may be faced with allegations related to that possible infringement, so that it can take the measures which it deems useful for its exoneration and, thus, prepare its defence at the inter partes stage of the administrative procedure (judgment of 8 July 2008, *AC-Treuhand v Commission*, T-99/04, EU:T:2008:256, paragraph 56).

182 Taking into account the examination of the second and third pleas, following which it was concluded that the contested decision must be annulled in so far as it concerned routes other than the Prague-Ostrava route and in so far as it referred to conduct other than the alleged predatory pricing practices, it must be stated that, as to the remainder, the reasons given for the contested decision meet the requirements which follow from Regulation No 1/2003 and the case-law.

183 In those circumstances, the contested decision, which is part of the preliminary investigation stage of the administrative procedure provided for by Regulation No 1/2003, must be considered to have been adopted in compliance with the applicant's rights of defence.

184 The second part of the sixth plea, alleging infringement of Article 48 of the Charter and Article 6 of the ECHR, must therefore also be rejected.

185 The sixth plea must therefore be rejected.

186 It follows from the foregoing that, first, the contested decision must be annulled in so far as it concerns routes other than the Prague-Ostrava route and conduct other than the suspected predatory pricing practices; and, secondly, the action must be dismissed as to the remainder.

Costs

187 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

188 In the present case, in so far as the contested decision must be annulled in part, the Court considers that it is appropriate to order each party to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

- 1. Annuls Commission Decision C(2016) 2417 final of 18 April 2016, relating to a proceeding under Article 20(4) of Regulation No 1/2003, addressed to České dráhy and all companies directly or indirectly controlled by it, ordering them to submit to an inspection (Case AT.40156 — Falcon), in so far as it concerns routes other than the Prague-Ostrava route and conduct other than the alleged predatory pricing practices;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders each party to bear its own costs.**

Collins

Barents

Passer

Delivered in open court in Luxembourg on 20 June 2018.

[Signatures]