

PANEL 2: “The impact of disclosure on civil procedure”
Experiences in national EU civil law procedures
(case C-57/21, RegioJet)



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PROCEEDINGS**

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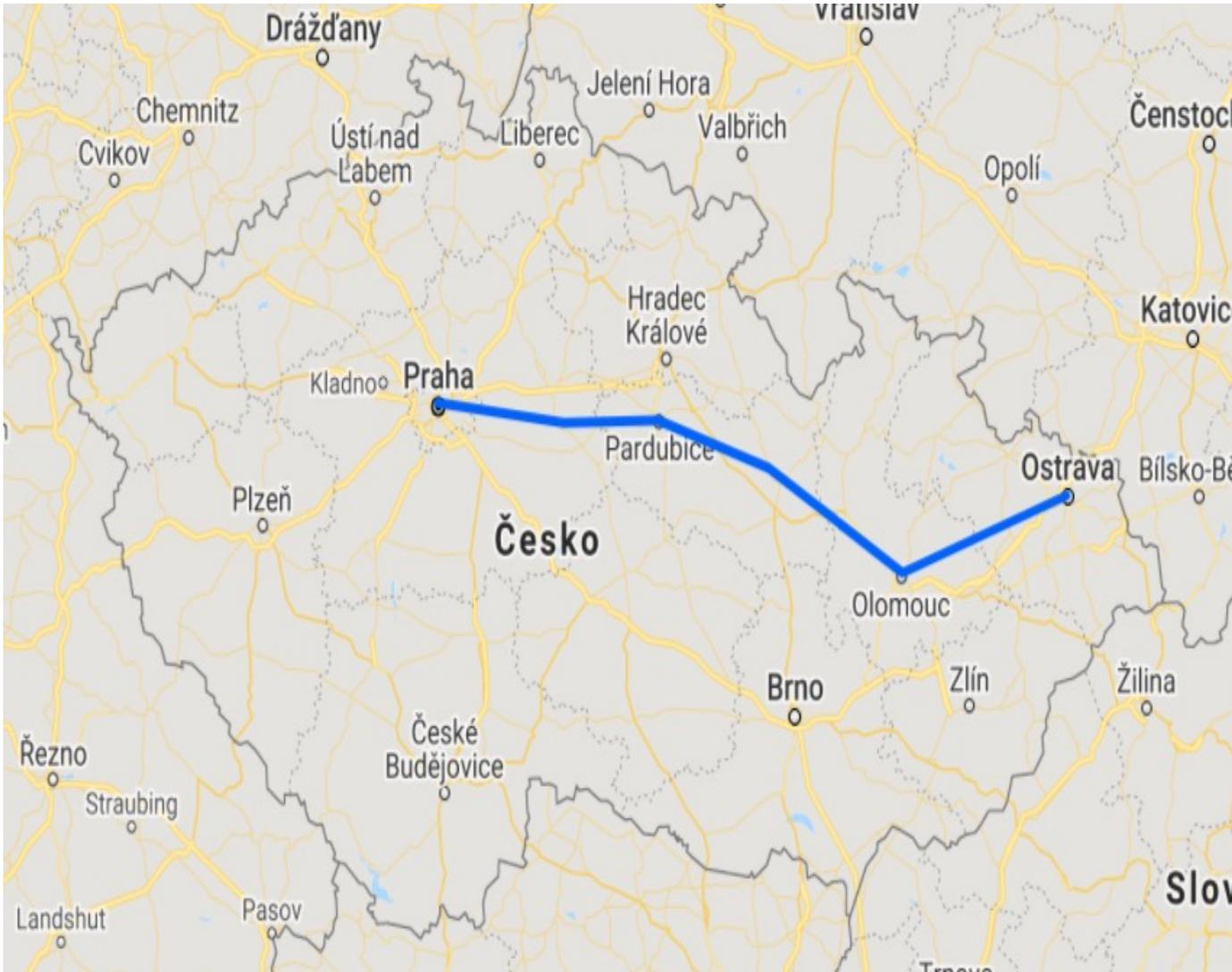
Description of facts and main events relating to the case C-57/21, RegioJet

- The case relates to an allegation that Czech Railways (the Czech railway incumbent) abused its dominant position by applying allegedly predatory prices in response and in the wake of entry of competing railway undertakings on the Prague-Ostrava line (incl. **RegioJet**) at the **end of 2011**.
- The Czech competition authority—the Office for the Protection of Competition (**'Office'**) started to investigate the case in 2011 on the basis of the Czech Competition Act. At the beginning of **2012** it conducted a 'dawn-raid' at the premises of Czech Railways and initiated formal administrative proceedings against Czech Railways.
- In **2016**, the European Commission conducted its own 'dawn-raid' at the premises of Czech Railways for a suspicion of Art. 102 TFEU infringement and started its own formal proceedings (Case No AT.40156 – Czech Rail) thereby effectively taking over the case from the Czech authority, which suspended its proceedings.

Facts of the case (2)



Facts of the case (3)



The Prague-Ostrava route is **356 km** long and it takes cca **3-3,5 hours** of travel by train.

It connects some of the largest Czech cities.

Those cities are not connected by a direct highway which is a big advantage for rail transport.

Facts of the case (4)



Source: http://loko.kx.cz/fotky/151_36.jpg



Source: <https://www.regiojet.cz/o-nas/galerie/vlaky-regiojet.html?id=12>



Facts of the case (5)

- In **2015**, RegioJet, a private Czech provider of passenger rail and bus transport, lodged a claim with the **Municipal Court in Prague ('MCP')** seeking damages from Czech Railways, which were allegedly incurred by an abuse of the dominant position.
- In **2017**, RegioJet lodged an application seeking the disclosure of documents pursuant to Sections 10 *et seq.* and Section 18 of Act on compensation for damage in the sphere of competition Act No 262/2017 Coll. which implements Directive 2014/104/EU.
- RegioJet sought disclosure of itemized reports and accounting documents from Czech Railways and the Ministry of Transportation of the Czech Republic.
- In March **2018**, the **MCP ordered partial disclosure of some documents**, including some that were concurrently in the file of the Office. **The Court denied the application as regards numerous other documents.** The Court ordered the ministry to present some statistical data.
- As mentioned above, after the EC initiated formal proceedings in 2016. In **December 2018**, the **MCP suspended the main proceedings concerning damages until the end of the proceedings before the Commission.**

Facts of the case (6)

- The MCP decision partially ordering disclosure and partially denying it was **appealed by both parties**. Czech Railways argued that no disclosure should have been ordered. RegioJet wanted the disclosure to have been more extensive.
- The **High Court in Prague** ('HCP') confirmed the MCP decision in November 2019 ('HCP decision'). In addition, in order to ensure protection for the disclosed evidence, it took some precautionary measures.
- Czech Railways challenged the HCP decision before the **Supreme Court** ('SC'). Czech Railways argued that HCP had been wrong to confirm the partial disclosure. The main proceedings were suspended and, hence, no decisions should have been taken within those proceedings. Furthermore, even the partial disclosure was not mandated and was excessive. Czech Railways also requested SC to postpone the effects of the HCP decision.
- In February 2020, SC granted the postponement of the effects of HCP decision until it decides about the extraordinary appeal.
- In December 2020, SC came to the view that in order to decide the case it needed to refer the case on various points to the **Court of Justice** of the EU ('CJEU')

Questions put to the Court of Justice in the preliminary reference proceedings

- Whether a disclosure of documents pursuant to Article 5(1) of Directive 2014/104/EU and corresponding provisions of the Czech Act No 262/2017 could be ordered when the main proceedings for damages before a national court ('MCP') were suspended until the end of the proceedings before the Commission?
- Pursuant to Articles 6(5)(a) and 6(9) of Directive 2014/104/EU, already existing information ('white list' documents) could not be considered to fall under confidential information not to be disclosed until the end of proceedings before a competition authority ('grey list' documents) even if they were collected for and submitted to a competition authority. The question was whether the Czech legislation, namely Section 2(2)c) of Act No 262/2017, which was different from Directive 2014/104/EU in the sense that it granted the provisional protection from disclosure not only to documents 'prepared' for the competition authority but also to documents 'submitted' to it, was contrary to it and how it should be handled by a national court.

- It was unclear whether a suspension of the proceedings before a national competition authority due to the initiation of proceedings in the same matter by the European Commission represented the closure of proceedings before a national competition authority 'otherwise' than by issuing a decision within the meaning of Article 6(5) of Directive 2014/104/EU. Accordingly, it was unclear whether the information in the national competition authority's file was protected from the disclosure. CJEU was asked to clarify that issue.
- It was unclear whether a national court could have ordered the defendant to submit categories of evidence within the meaning of Article 6(5) of Directive 2014/104/EU ('grey list' documents) to the court prior to the end of the proceedings before a competition authority and only subsequently verified whether the respective information or documents indeed fell under Article 6(5)(a) of Directive 2014/104/EU.
- In this connection, it was unclear what kind of proof the court could have requested from the defendant to prove that the information sought to be disclosed fell under Article 6(5)(a) of Directive 2014/104/EU and what kind of protective measures to ensure confidential nature of the information the court could have ordered. Hence, CJEU was asked to clarify that issue.

Answers given by the Court of Justice

**JUDGMENT OF THE COURT (Second Chamber) of 12 January
2023 in Case C-57/01, *RegioJet a.s. v České dráhy a.s.*
ECLI:EU:C:2023:6**

- Article 5(1) of Directive 2014/104/EU must be interpreted as **not precluding a national court from ordering the disclosure of evidence for the purpose of national proceedings brought before that court which concern an action for damages relating to an infringement of competition law, even though proceedings in respect of that infringement are pending before the European Commission** with a view to the adoption of a decision pursuant to Chapter III of Council Regulation (EC) No 1/2003, which have led to the national court staying the proceedings pending before it. It is, however, **for the national court to ensure that the disclosure of the evidence requested at that stage of the proceedings**, which must fulfil the conditions laid down in Articles 5 and 6 of Directive 2014/104, **does not go beyond what is necessary** in the light of the claim for damages brought before it.
- Article 6(5) of Directive 2014/104 must be interpreted as meaning that the **staying by a national competition authority of administrative proceedings that it has initiated, on the ground that the European Commission has opened proceedings, cannot be equated to a closing of those administrative proceedings** by that authority ‘by adopting a decision or otherwise’, within the meaning of that provision.

- Article 5(8) and Article 6(5)(a) and (9) of Directive 2014/104 must be interpreted as **precluding national legislation which temporarily restricts, under Article 6(5) of that directive, not only the disclosure of information ‘prepared’ specifically for the proceedings of the competition authority, but also that of all information ‘submitted’ for that purpose.**
- Article 5(1) of Directive 2014/104, read in conjunction with Article 6(5)(a) thereof must be interpreted as meaning that those provisions **do not preclude a national court, pursuant to a procedural instrument of national law, from ruling on the disclosure of evidence and ordering that evidence to be placed under sequestration, while postponing the examination of whether that evidence contains ‘information that was prepared by a natural or legal person specifically for the proceedings of a competition authority’, within the meaning of the latter provision, to a time when that court has access to that evidence.** The use of such an instrument must, however, comply with the requirements arising from the **principle of proportionality**, as set out in Article 5(3) and Article 6(4) of Directive 2014/104.

- Article 6(5)(a) of Directive 2014/104 must be interpreted as meaning that **where a national court, pursuant to a procedural instrument of national law, postpones the examination of whether the evidence whose disclosure has been requested contains ‘information that was prepared by a natural or legal person specifically for the proceedings of a competition authority’, that court must ensure that the claimant or other parties to the proceedings and their representatives do not have access to that evidence** before it has completed that review, where the evidence falls within the white list or, where that evidence falls within the grey list, before the competent competition authority has closed its proceedings.

Impact beyond – what happens next?



- In September 2022, the **Commission closed its predatory pricing investigation** into Czech Railways stating: *“Following a careful assessment of all relevant evidence, including information received from ČD, the Commission concluded that the evidence did not confirm its initial concerns and has therefore decided to close its investigation.”*



- The Czech Office resumed its proceedings and in February 2023 issued its decision that **no infringement of the Czech Competition Act was established.**

- **The proceedings before the Czech Supreme Court are still pending.**
- The question is how the courts shall take into account the new situation caused by the fact that the competition authorities did not find an abuse of dominant position. Could under such circumstances be the disclosure justifiable and proportionate?

THANK YOU FOR YOUR ATTENTION

If you have any questions, don't hesitate to ask