Competition - Hungary

State-owned rail cargo operators fined for price fixing

Contributed by **Bán S Szabó & Partners**

September 13 2012

Author

Álmos Papp

In a recent decision the Competition Office concluded that three major rail cargo companies had participated in a price-fixing and market-sharing arrangement in the Hungarian rail cargo market between 2004 and 2009. As a result of the infringement, the Competition Office imposed substantial fines amounting to Ft1.25 billion (approximately €4.5 million). All three infringers were state-owned undertakings:

- MÁV Zrt, the state-owned incumbent railway operator in Hungary;
- Rail Cargo Hungaria Zrt, which is indirectly owned by the Austrian government; and
- GySEV Zrt, a local railway operator under the joint control of the Hungarian and Austrian governments that is engaged in cross-border railway cargo and passenger services in northwest Hungary and east Austria.

According to evidence gathered by the Competition Office, MÁV and GySEV applied fully uniform price systems in 2004 and 2005 in respect of rail cargo services in their respective territories. In addition, the parties offered joint rail cargo services for joint tariffs to customers, which ultimately secured the parties' exclusivity over their respective railway infrastructures.

In 2005 MÁV's rail cargo division was transferred to Rail Cargo Hungaria, a wholly owned subsidiary of MÁV established for the sole purpose of facilitating the privatisation of MÁV's rail cargo business. In 2007 MÁV sold its entire stake in Rail Cargo Hungaria to RCA, the Austrian state-owned incumbent railway operator.

As the rail cargo business was transferred from MÁV to Rail Cargo Hungaria, GySEV and Rail Cargo Hungaria (formerly the rail cargo division of MÁV) entered into a complex frame agreement on January 1 2006. The frame agreement largely followed the principles agreed upon by MÁV and GySEV in 2004 and 2005 in respect of uniform rail cargo tariffs and jointly offered services. However, the frame agreement went further and brought the parties' cooperation to a more sophisticated level.

The major goals of the frame agreement, pursuant to its recitals, were to preserve the market shares of the parties and provide for a smooth transition in respect of the liberalisation of the rail cargo market in Hungary that started in 2005. Further, the frame agreement set forth various terms and conditions governing the joint sale of the parties' services to third parties. In addition, the parties undertook to make full disclosure of all future rail cargo agreements that they individually entered into with customers.

At first, the frame agreement appeared to constitute a comprehensive cooperation arrangement that, through the combination of each other's assets (with particular regard to cross-border railways), facilitated the provision of better services over a wider geographical area.

However, in the course of implementing the frame agreement, the parties set up a uniform price system not only for jointly offered services, but for all of their cargo services, in the same manner as MÁV did with GySEV in 2004 and 2005. The Competition Office held that this price uniformity went beyond the limits of the parties' cooperation under the frame agreement. In addition, the Competition Office concluded that each of the parties was capable of solely offering the jointly offered services, since in the liberalised market (from 2005), each was required to grant access to the other in respect of its own railway infrastructure. Therefore, the Competition Office concluded that after 2005, there was no legal or technical barrier to hinder them from individually offering cross-border rail cargo services. This raised questions regarding the frame agreement, as there seemed to be no valid reason to maintain it.

Therefore, in the assessment of the Competition Office, the frame agreement was not cooperation, but more of a market sharing arrangement, which was intended to preserve the pre-liberalisation system in which each party solely operated its own railway network without giving access to competitors.

The investigated parties claimed that the uniformity in their prices was a result of government compulsion, as all of their tariffs (including cargo tariffs) were subject to approval by the Hungarian Railway Authority, a body administered by the Ministry of Transport. The Competition Office dismissed this claim on the grounds that the Hungarian Railway Authority did not determine such tariffs, and that its power was limited to approving or rejecting the undertakings' tariffs. In practice, the authority never rejected the approval – that is, the approval was more of a formal exercise than a substantive review.

For further information on this topic please contact Álmos Papp at Bán S Szabó & Partners by telephone (+36 1 266 3522), fax (+36 1 266 3523) or email (apapp@bansszabo.hu).