

Competition - Hungary

Highest-ever fine for railway construction cartel

Contributed by **Bán S Szabó & Partners**

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After almost three years the Competition Office has closed its investigation into the railway construction sector, concluding that it has sufficient evidence to prove that five companies participated in a series of bid-rigging arrangements on railway construction projects in 2004 and 2005. The Competition Office has imposed fines totalling Ft7.1 billion (around €25.5 million) - the largest aggregate fine in a single case in the regulator's history. The fine will be shared between three companies belonging to different multinational construction groups:

- Szentesi Vasútépítő Kft, one of Strabag's Hungarian subsidiaries, has been fined Ft3.4 billion (around €12.2 million);
- Swietelsky's Hungarian railway affiliate, Mávécsele Kft, has been fined Ft2.1 billion (around €7.5 million); and
- Colas Hungary, part of French group Colas, has been fined Ft1.5 billion (around €5.3 million).

A fine of Ft178 million (around €64,000) was imposed on MÁV-MTM Kft, a company formerly owned by the Hungarian railways which is undergoing liquidation and has conducted virtually no business in the past year. No fine was imposed on the Wiebe Group's Hungarian subsidiary, Vasútépítők Kft, which volunteered its cooperation under the Competition Office's leniency programme.

According to the evidence supplied by Wiebe, the participants entered into a major market-sharing arrangement in a secret meeting held in November 29 2004. They intended to allocate the work on forthcoming railway reconstruction projects in Hungary on a *pro rata* basis. The key evidence on which the Competition Office based its decision was an extract of an email, submitted by Wiebe, which explained the details of the project allocation mechanism to which the participants agreed.

The Competition Office has never before granted full anonymity to an undercover witness in exchange for his or her testimony in support of charges. The decision to fine each participant more than the equivalent of its net turnover for the preceding year is also unprecedented. However, the participants cannot challenge the decision on this basis, as Hungarian competition legislation sets the ceiling for a fine at 10% of the aggregate net turnover of the corporate group to which the infringer belongs - this criterion has been met. The high fines signal the Competition Office's determination to intensify deterrence in respect of high-value public procurement cartels. In addition, the Competition Office cited Strabag's previous infringements as an aggravating factor in determining the fine, although it did not apply this approach in the case of Swietelsky or Colas.

The decision is subject to court review, but such a challenge does not automatically suspend a fine. The participants have the right to request a suspension. In addition, the participants may face indemnity claims under a 2009 amendment if the tender issuer (ie, the Hungarian state) suffered damage. As a result of the cartel, it is presumed by law that damage amounts to at least 10% of the contract prices applied by the infringers. This presumption is automatic - unless the infringers can prove otherwise, the indemnity is payable to the plaintiff.

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