



GAZDASÁGI
VERSENYHIVATAL

MÁV abused its dominant position on the rail freight transport market

MÁV applied various abusive practices in order to jeopardise the benefits of liberalization on the rail freight transport market and to defend its market position against new entrant private railway undertakings. A fine of HUF 1 billion was imposed on MÁV.

Gazdasági Versenyhivatal (hereinafter GVH; the Hungarian Competition Authority) investigated the conduct of earlier railway monopolist Magyar Államvasutak ZRt. (hereinafter MÁV; Hungarian State Railways) in the period just before and after market liberalization. The Competition Council established in its decision issued on 10 July 2006, that MÁV, a dominant undertaking on the railway market, infringed the provisions on the prohibition of abuse of a dominant position of both the Hungarian Competition Act and, after 1 May 2004, the EC Treaty.

The Competition Council found that MÁV, which had a dominant position not only on the upstream market of access to rail tracks but also on the downstream market of transporting bulk goods (freight transport market), had abused its dominant position,

1. firstly, by causing unreasonable additional costs to its competitors on the freight transport market, when it required bank guarantee as a precondition for the conclusion of the 2005 network access agreements;
2. second, by hindering, impeding and delaying access to non public industrial sidetracks; and
3. third, by concluding long term transport agreements, containing exclusivity clauses, with the most significant bulk-shippers, thereby foreclosing access of new entrants to a significant part of the freight transport market.

Therefore MÁV, by abusing its dominant position, endangered, in an unjustified manner, the market opening and the position on the railway freight market of new private railway entrants.

The conduct described in point 3, with regard to the period before the accession, infringed also Article 3 Title I of Act X of 2002 on the promulgation of Decision No 1/2002 of the Association Council replacing Decision No 2/96 of the Association Council on the implementation of the competition rules adopted under Article 62(3) of the Europe Agreement establishing an association between the Republic of Hungary, of the one part, and the European Communities and their Member States, of the other part.

The Competition Council fined MÁV HUF 1 billion (approx. EUR 4 million).

Undertakings involved

MÁV is the successor of the earlier state undertaking¹ Magyar Államvasutak. The sole proprietor of MÁV is the Hungarian State, the ownership rights are practiced by the Minister of Economy and Transport. The main activity of the undertaking is railway transport and in addition it pursues numerous other activities closely related to its core business.

As of 1 January 2003, the organizational structure of MÁV has been transformed with regard to the provisions of relevant community law. The particular core activities have been organized in separate business units (branches). MÁV Pályavasút Üzletág (track railway business, hereinafter MÁV PV) has been created for the management of the railway network and its accessories and for managing traffic on the track. MÁV Árufuvarozás Üzletág (rail freight business, hereinafter MÁV ÁFU) has been created to pursue the freight transport activities of the undertaking. Additional business units were established for passenger transport, engineering (traction) and real estate management.

As of 1 January 2006, freight transport has been transmitted to MÁV Cargo ZRt., an undertaking with separate legal entity (i.e. separate from MÁV). MÁV is a 90 per cent shareholder of MÁV Cargo, therefore it has direct control over the undertaking. MÁV Cargo owns or manages no industrial side-tracks formerly owned or managed by MÁV ÁFU, which were transmitted to MÁV PV. The ownership of industrial side-tracks will remain with MÁV and MÁV PV will manage these tracks.

Procedure

9 February 2005 the GVH initiated proceedings against MÁV based on complaints of private railway undertakings. In April 2005 the GVH extended the scope of the investigation to additional practices of MÁV. The GVH applied for the period before the accession the Hungarian Competition Act and the Implementing Rules of the Europe Agreement establishing an association between the European Communities and the Republic of Hungary. For the period after the accession the GVH applied the Competition Act and Article 82 of the EC Treaty.

Facts

The official liberalization of the railway markets was connected to the date of accession of Hungary to the European Union, that is 1 May 2004. Sector specific regulation makes it possible to maintain vertically integrated railway entities, provided the prescribed separation of accounts is ensured. Latter separation requires divided infrastructure management, passenger transport, freight transport, engineering (traction) and background service units.

Pursuant directive 2001/14/EC the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure has to be performed by an allocating and charging body that is independent in its legal form, organisation and decision-making from any railway undertaking. For the allocation of public railway network Vasúti Pályakapacitás-elosztó Kft. (hereinafter VPE) has been established, which is a state-owned entity but independent from the railway companies. Access to industrial and other kind of side-tracks not part of the public railway network, including ancillary services remained still at

¹ State undertaking as not a commercial entity.

the discretion of MÁV ÁFU. This situation changed only from 1 January 2006, with the creation of MÁV Cargo, which will not own or manage any of these infrastructures.

Following market opening in 2004, four railways undertaking entered the market of rail freight transport: Floyd Kft. (hereinafter Floyd), Magyar Magánvasút Zrt. (hereinafter MMV), MÁV Hajdú Vasútépítő- Mélyépítő Kft. (hereinafter MÁV Hajdú) and Central-European Railway Rt. (hereinafter CER).

The two incumbent integrated railway undertakings are MÁV and GySEV ZRt., which are providing infrastructure access services to operators without own tracks on the one hand and rail freight transport services to shippers.

MÁV PV required from the above-mentioned four railway undertakings for the conclusion of the 2005 network access agreements the provision of an unconditional bank guarantee, in the height of 20 per cent of the annual network usage charge as a security deposit. Floyd found the requirement of the security unreasonable, therefore denounced its application for annual train line permission and applied for a case-by-case train line permission. The other three railway undertakings accepted the conditions of VPE for the access agreement however they also found it unreasonable. The bank guarantee burdened an additional cost of 1-1,5 per cent of the guaranteed amount on the railway undertakings and requires the blocking of the same amount.

MMV concluded a cooperation agreement with Mátrai Erőmű Rt. (hereinafter MERT; Mátra Powerplant) on 30 April 2004 on the transportation of lignite on the route Bükkábrány-Visonta. MMV applied for a train path on the public railway to VPE, then concluded the network access agreement with MÁV PV in October 2004. Concerning the industrial side-tracks leading to the premises of MERT, it should have been come to a separate agreement with MÁV ÁFU, however MÁV ÁFU refused to provide access on the grounds of its economic interests, and its exclusive agreement with MERT and its ownership over the industrial side-tracks of MERT.

On 28 February 2005, MMV ordered for 1 March the certified weighing of its 30 wagon train carrying coal-dust from Eperjeske-átrakó to Berente from the Záhony office of MÁV ÁFU. On 3 March 2005, MÁV ÁFU gave an offer, while stating that the acceptance of the offer would mean "that the ordered service is part of the daily operative duties, which can be carried out subject to the availability of free capacity." The bill for the service had to be paid on site in cash, due to the lack of a valid agreement between the parties.

On 6 March 2005, MMV transported 19 wagons of coal-dust from Eperjeske-átrakó to Berente, however servicing the train has been hindered due to the fact that the side-tracks for loading were in the management of MÁV ÁFU. On these side-tracks only the locomotives of MÁV ÁFU can run operated by the personnel of MÁV ÁFU. MMV did not get the permission to use its own locomotive, while for servicing the train it received an offer on 8 March 2005, again subject to on site cash payment.

Floyd concluded an agreement with Wiener Lokalbahnen (hereinafter WLB) for the operation of a container transporting train on the route Hegyeshalom-BILK2-Hegyeshalom. In its application for the line permission, Floyd indicated that it intended to acquire other services as well from the infrastructure manager at the station Soroksár-Terminál. This would have meant that Floyd wanted shunting and towing the train with its own locomotive to and from the sidetracks for loading. Latter was hindered by the fact that the sidetracks was in the

² Budapesti Ipari Logisztikai Központ Rt. (Industrial Logistics Center of Budapest)

management of MÁV ÁFU, therefore MÁV was only ready to perform any servicing activity through MÁV ÁFU, based on a separate agreement with MÁV ÁFU. Consequently on 22 March 2005 Floyd ordered the necessary services from MÁV ÁFU. The offer of MÁV ÁFU for shunting and towing the train was unacceptable for Floyd.

Floyd applied for a line permission on the Uzsabánya-Adony route, which was granted by a decision of VPE on 23 May 2005. However MÁV ÁFU informed Floyd and the capacity allocating body that Uzsabánya station has no public side-tracks for loading, all the tracks for this purpose are under the management of MÁV ÁFU. Consequently irrespective of the fact that Uzsabánya is registered as a station of the public railway network, loading is possible only by using the industrial side-tracks, which requires a separate agreement between Floyd and MÁV ÁFU. Basalt Középkő Kft., the undertaking operating the quarry of Uzsabánya and leasing the industrial side-tracks from MÁV for its loading purposes, gave its permission to Floyd for the usage of the tracks. At the same time Basalt Középkő informed MÁV ÁFU about this. On 26 May VPE altered decision concerning the line permission stating that should the applicant intend to use non public side-tracks as well, it has to arrange the necessary agreements itself. Finally, the transport could have been successfully commenced only on 1 June, based on the joint usage agreement with MÁV ÁFU for the sidetracks for loading, however there had been problems with the loading at Adony station. Loading could begin as a result of the subsequent measures undertaken by MÁV PV for remedying the situation.

At the begin of July 2005, MÁV ÁFU prepared a general offer with uniform conditions concerning all the industrial side-tracks in its management and the acquisition of ancillary services, in order to avoid the difficulties related to access demand and the conclusion of usage agreements. At first the private railway undertakings (Floyd, MMV, MÁV Hajdú and CER) found the offer unacceptable, nevertheless after several round of negotiations, on 22 July 2005, they concluded an agreement with MÁV on the access conditions of all industrial side-tracks in the ownership or management of MÁV and about the related services of MÁV.

Based on the agreement of 22 July, MÁV concluded on 1 August separately with all private railway undertakings, with the same content, framework servicing agreements on the access to industrial side-tracks and the related services, which remained valid until 31 December. With these framework agreements MÁV provides access to all the infrastructure in its ownership and management (industrial side-tracks, weighing and loading facilities, etc.) and it is not able to refuse access for reasons of its own business interests.

However when using a particular industrial sidetracks, the sequence of applications and usage has to be taken into account. The framework agreements settle the charges for servicing trains on industrial side-tracks, their shunting and weighing both for the case when the railway undertaking has its own locomotive and for that when it acquires services from MÁV. As to the location and time of the performance of the services, the framework agreements indicate the location and time of the line permission granted by the decision of VPE.

MÁV concluded long term framework agreements containing exclusivity clauses with several important shippers on the market.

On 23 March 2004, MÁV signed an agreement with BorsodChem Rt. (hereinafter BC; chemical company). Pursuant the terms of the agreement BC received "business policy reductions" (i.e. discount on fares) on all of its shipping activities. The framework agreement detailed all concerned products, their quantities and the relevant routes, in addition it fixed the percentage of discounts (mainly 20-50 per cent). The agreement had been valid from 23

March 2004 till 31 December 2006. The parties agreed not to terminate unilaterally the agreement on any condition, BC will not acquire transport services from other railway undertakings, not even in the case of a more favourable offer during the whole duration of the agreement. MÁV concluded a similar framework agreement with Magyar Alumínium Termelő és Kereskedelmi Rt. (hereinafter MAL; aluminium producing company) for its shipping activities on 13 December 2003, entering into force on 1 January 2004 for a 3+4 years duration. MERT's long term agreement was concluded on 8 January 2004 and covered the transport of lignite from the coalmine in Bükkábrány to the power plant in Visonta. The entry into force was 1 January 2004 and the duration was 3 years. Finally MOL (oil company) reached agreement with MÁV on 31 January 2005, with entry into force of 1 January 2005 for three years.

The above mentioned agreements contained exclusivity clauses and applied sanctions in any case where the undertaking was not shipping its goods with MÁV. With the exception of MAL all the parties' agreements contain so-called English clauses, which allow the acceptance of a rival's offer for the transport only when MÁV did not make a similar counteroffer. In the case of BC and MERT the parties had to reveal the identity of the company making the offer, while MÁV undertook only to renegotiate the conditions of the framework agreement but it was not obliged to make a counteroffer.

Legal assessment

The examined agreements and behaviour concerned the services on the upstream and downstream markets created by the liberalization of the railway market. The relevant upstream markets were a) access to the public national railway network, b) access to non public rail tracks (especially industrial side-tracks), other network elements and ancillary services.

Rail freight transport services are acquired mainly by shippers of bulk goods. Bulk goods are generally transported in bulk, in a regular manner, in huge quantities, without any packaging. From a physical appearance point of view bulk goods can be grainy, lumpy, liquid or gas. In practice bulk products can be agricultural or food industry products, industrial base and raw materials, chemical products, etc. (e.g. grain, sugar-beet, coal, sand, bauxite, olefins, polymers, crude oil, gasoline, gravel, crushed gravel, iron ore). Bulk products are generally shipped to long distances. The relevant downstream markets encompass therefore the rail transport services of bulk products in Hungary.

VPE's decision on a particular line permission is not sufficient in itself for the usage of the railway network. Based on the decision of the capacity allocating body, the integrated railway company (MÁV, GySEV) and the railway undertaking asking for access has to conclude a network access agreement, the terms of which are partly governed by law. Because of this MÁV PV has actually monopoly, therefore a dominant position on the market of access services to the public railway network. The number of MÁV owned industrial side-tracks is multiple when compared with the number industrial side-tracks not owned by MÁV, therefore the vast majority of Hungarian industrial side-tracks are either in the ownership of or under the management of MÁV. Industrial side-tracks leading to the premises of shippers using railways and bulk shippers, giving around half of the Hungarian rail freight transport market, are at least partly owned or managed by MÁV ÁFU. Consequently MÁV ÁFU practices property rights over the majority of industrial side-tracks both in terms of their numbers and in terms of the cargo volume shipped on them. Industrial side-tracks in the ownership of the user of the industrial sidetracks are also mainly managed by MÁV ÁFU. Therefore it can be

established that MÁV ÁFU has a dominant position on the market of access services to non public rail tracks necessary for the rail freight transport.

The rail transport of lignite between Bükkábrány and Visonta has no real alternative. MERT contracted with both MÁV and CER for the transport. 90 per cent is performed by MÁV, while CER carries the remaining 10 per cent. In the case of BC's shippings, alternative transport modes are available only to a limited extent, while dangerous goods can be transported exclusively with rail. Should the customer of the company ask for rail transport, BC also does not have an alternative. Given the enormous quantities and long shipping distance rail transport is an unavoidable transport option. It is only MÁV who performs rail transport services for BC. The shippings of MAL make rail transport also an unavoidable option, since there is no road transport quota to some countries, while the company transports bulk products to long distances in huge quantities. The loading and unloading technologies required and already installed at MAL's premises make also rail transport prevailing over other modes. It is only MÁV who performs rail transport services for MAL. In the case of MOL's shippings it can be established again that rail transport is enormously important, an unavoidable option and with regard to certain products even exclusively available. Reasons for it provide the physical/chemical characteristics of the materials, the transported quantities, the regularity and length of shipments and the already installed rail infrastructure. It is only MÁV which performs rail transport services for MOL.

The rest of the main shippers acquire also mainly MÁV's transport services. Newly entered private railway undertakings were not able to perform significant transport tasks since the opening of the market. By the end of September 2005 MMV transported 12 000 tonnes of cargo, while the capacity of its starting rolling stock would have enabled 6-700 000 tonnes per annum. CER transported 400 000 tonnes by the end of September, while the same data for Floyd was 240 000 tonnes. MÁV Hajdú delivered 15 000 by the end of April 2005. Based on the above mentioned data we can establish that the total volume shipped by private railway undertakings did not exceed 1 million tonnes following the 1,5 year period after market opening.

On the other hand the performance of MÁV ÁFU remained nearly constant over the last few years. It carried 42 940 000 tonnes in 2003, 45 567 000 tonnes in 2004, while the expected amount is 46 530 000 for the year 2005. Nevertheless not all of this amount can be attributed to the transport of bulk products. However, the majority of MÁV ÁFU's customers are bulk shippers. The amount of MÁV ÁFU's bulk good transports cannot be lower than 20.5-21 million tonnes. The performance of GySEV is 1/9 of MÁV's transports, therefore approximately 2.3 million tonnes. Should we calculate with 1 million tonnes from the private railway undertakings and 3 million from GySEV, then MÁV ÁFU would have an at least 88 per cent market share, while the actual market share can only be higher.

In the case of the present customers of MÁV ÁFU, from the circle CER, Floyd, MÁV Hajdú, MMV and GySEV, only GySEV can be treated as a potential entrant. Nevertheless given the fact that GySEV is in 61 per cent state ownership, chances are little for this to happen. The entry capabilities of private railway undertakings, at their present stage of development, are limited. By the end of April 2005 MMV and CER had no own locomotive, while Floyd and MÁV Hajdú had two each. In contrast, according to 31 December 2004 data MÁV had 1356, GySEV 42. In October 2005 Floyd had a few own and mainly leased wagons, MMV had 40, CER had 58, MÁV Hajdú had 12 and GySEV had 95 wagons, where as MÁV ÁFU owned 8889 wagons by the end of 2004.

The acquisition of new rolling stock is extremely expensive for a private railway undertaking. Used wagons can be obtained for HUF 5-10 million, while their new price is at least HUF 25-30 million. Moreover an undertaking would need as a minimum 10-20 pieces of them for a start. For these reason newly entered railway companies generally lease their rolling stock. In addition state railways often rather weed out their surplus wagons instead of disposing them on the secondary market. Another barrier to entry is presented by the need of recruiting the necessary, well trained personnel and by their continuous further training.

As a barrier to entry, particular shippers require a complex service for the whole of their transport needs. A reason for this might be that picking out individual profitable routes and giving them to other transport operators could cause an increase in prices for the remaining part of the shipping network. Therefore new entrant should offer prices so much lower than the incumbent, which could cover the price increase on other routes for the shipper.

Under the present circumstance foreign railway undertakings cannot be regarded as potential entrants as well.

Based on the above reasoning MÁV ÁFU has a dominant position on the Hungarian transport markets of bulk products.

The bank guarantee required by MÁV PV represents additional costs for the private railway undertakings. On the one hand banks charge a one-time fee of 1-1.5 per cent of the guaranteed amount, on the other hand they require a deposit for security in the same amount. For this purpose the bank separates the required amount from the monetary assets of the railway undertakings and restricts its usability. Although the deposited money is not an actual expense, it lowers the liquidity of the undertakings monetary assets. Limiting money in the amount of the equivalent of 2.5 months' portion of the annual network usage charge (20 per cent of the annual charge) is a significant financial burden on the new entrants, especially if orders increase extensively. Liquidity difficulties can be added to the additional financial burdens caused by increased orders if the private railway undertakings use credits for covering their other financial obligations.

According to the Competition Council the requiring of the bank guarantee meant an indirect increase of the network usage charge, which worsened the economic position of new entrants and was suitable for restricting competition on the rail freight transport markets, therefore qualified as an abuse of dominance. The Competition Council also examined the reasonability of the bank guarantee. MÁV explained the bank guarantee by the need to cover arrearances of bankrupt users of the railway network. It would validate the bank guarantee only if the contracting partner would be in breach of the network access agreement and would not pay the access charge. The amount of bank guarantee was calculated on the basis of the expected access charge and the amount of risk MÁV PV took on should the railway undertaking delay or refuse to pay the charge.

The Competition Council did not accept this reasoning. Railway undertakings receive their operating licence only if they fulfil the conditions of financial capability besides good reputations and professional competence. During 2004 new entrant and MÁV PV concluded several individual and annual network access agreements, which did not contain any stipulations for the non-payment of access charges. Since during this period there has been no payment difficulties, MÁV PV could not refer to any experience, which would have indicated any increasing risk on its side. The operating licence was in itself a guarantee for the undertakings ability to pay their financial obligations, consequently there was no reason for requiring any additional guarantees by MÁV PV.

MÁV ÁFU refused to grant access to its industrial sidetrack at Bükkábrány when this was requested by MMV. It referred to the fact that the usage and service of these tracks were governed by the framework agreement in force at that time, and concluded between MERT and MÁV. According to these rules the industrial sidetrack was exclusively serviced by MÁV ÁFU. The conduct of MÁV ÁFU was the consequence of the above mentioned framework agreement, since it intended to comply with the agreement, nevertheless it qualified as a separate infringement of the competition rules. A party to a civil law contract cannot force the other party to comply with the agreement by using otherwise available measures that were not included in the agreement, it cannot limit the other party's capability to breach the contract unless using methods allowed by the agreement. The framework agreement of MERT and MÁV ÁFU did not include any provisions on limiting access to the industrial side-tracks for private railway undertakings, therefore the competition law appraisal of such conduct had to be separated from the assessment of the framework agreement itself. These are two different infringements.

MÁV ÁFU had no reasons acceptable under competition law for the refusal. Access cannot be denied simply by the fact that this would be detrimental for the undertaking in economic terms. It is also not acceptable to refer to property rights over the industrial side-tracks, since competition law should prevail against ownership rights in the case of essential facilities.³ Of course the owner, manager or main user of the essential facility can claim the economically reasonable and under the relevant regulation acceptable costs of granting the access. Should regulation fail to determine this amount, then the parties have to come to an agreement on it, as happened in other cases investigated in this procedure. If the parties cannot agree, then it can be investigated from a competition law point of view whether the dominant undertaking has any responsibility for this outcome. In the case of the Bükkábrány industrial side-tracks it is not necessary to make this exercise, since MÁV ÁFU refused to grant access without giving any prior conditions, consequently MÁV ÁFU obviously has a responsibility under the competition rules.

With regard to the request for access to side-tracks at Eperjeske-átrakó and Berente stations (28 February 2005), including the servicing of the trains, MÁV already did not refuse but "asked for patience" to make an appropriate decision. It referred to the not clarified internal decision-making competences concerning Eperjeske. MÁV cannot use as a defence with relation to third parties that its internal competences are not clarified. Thereby MÁV unduly delayed the performance of MMV's transport services. MMV was not granted access to the side-tracks for loading, only to the servicing services, which meant that it was MÁV who shunt the wagons to and from the siding although MMV had its on locomotive.

MÁV ÁFU explained its behaviour with similar reasons as in the case of Bükkábrány, therefore those are unreasonable under the same argumentation as applied there. The circumstances were aggravated by the fact that MMV practically did not object to the fees MÁV offered for the services, consequently it was solely MÁV ÁFU's attitude, which hindered the agreement. Refusing access to the side-tracks for loading qualified as a competition law infringement, even if MMV's transport contract was finally not terminated because of the delay. In the absence of any regulation to the contrary, MÁV ÁFU cannot pick from the access to industrial side-tracks and the ancillary services some services to provide. The obligation to grant access under competition law encompasses the whole service package related to industrial side-tracks.

³ See the decision of the Competition Council in case Vj-10/2002, or the judgement of the CFI in case T-63/98.

With regard to its request for access at BILK connecting services (including towing), Floyd found the one-time offer from MÁV ÁFU too high, therefore initiated negotiations in order to arrange that it can use the own locomotive for shunting the train on the terminal, while using only the crew of MÁV ÁFU. MÁV PV did not refuse this possibility by saying that servicing trains is possible without the involvement of MÁV ÁFU. Although MÁV PV promised, it did not make an offer in the period before the 22 July agreement between the private railway undertakings and MÁV ÁFU. Negotiations between MÁV ÁFU and Floyd had been remained unsuccessful before this agreement reached.

Based on the above mentioned facts it can be established that a solution for the access held possible by one of the business units of MÁV (MÁV PV) was hindered by the behaviour of another business unit, MÁV ÁFU. Floyd concluded the agreement with WLB for continuous transports, therefore the conduct of MÁV ÁFU could not impede the transaction however it made the performance of it more difficult. There is no acceptable reason for this behaviour under competition law, therefore it qualifies as an infringement.

It could be established that the access to the industrial sidetrack at Uzabánya station was partly delayed by the inaccurate registry of VPE, since the station had no public tracks for loading, consequently the available side-tracks were all industrial side-tracks. Following the modification of VPE's decision, MÁV ÁFU informed Floyd that only they have a valid servicing agreement with Basalt-Középkő for the side-tracks for loading, therefore anybody else intending to use these facilities have to agree with MÁV ÁFU concerning the joint usage. According to the findings of the investigation, although the transports began on 1 June 2005, due to the loading difficulties at Adony station, problems were solved only after the intervention of MÁV PV. Practically MÁV ÁFU's conduct aimed and served here as well the delay of the access of a competitor, therefore qualifies as an abuse of dominant position.

MÁV concluded framework agreements for three years with three major customers of the bulk shipping market (BC, MAL, MERT) within six month preceding market opening, and with a fourth undertaking (MOL) seven months after liberalization. Quantities concerned by these agreements give on average 30-40 per cent of the annual volume of this market. MÁV intended and to negotiate similar agreements with further undertakings as well.

MÁV's agreements had restrictive effects for the following reasons:

- The agreements were concluded with bulk shippers for whom railway is an unavoidable transport mode, therefore they would obviously consider the offers of new entrants. These shippers would be the prime targets of new entrants as well.
- The framework agreements covered a significant part of the market, they were concluded with the biggest shippers.
- The English clauses worsened the situation of new entrants, since the use of them revealed latter's sensitive business information.
- The framework agreements had a duration of at least 3 years, thereby foreclosing a significant part of the market, in a period particularly important for new entrants, namely when they should establish them on the market.
- Shipping with another company as MÁV qualified as a quasi breach of agreement in this period.
- The framework agreements could not be terminated with ordinary termination. Termination of the agreement and breach of agreement were sanctioned seriously, including the withdrawal of fee discounts.

Based on the above mentioned circumstances, the framework agreements had a cumulative effect of foreclosing the rail freight transport market from new entrant, private railway undertakings for 2.5-3 years following market opening. This qualified as a serious restriction of competition due to the 90 per cent market share of MÁV ÁFU, especially since MÁV intended to conclude additional agreements with further important market players. MÁV had no acceptable defence for this behaviour. MÁV prepared its railroad schedule on an annual basis, therefore from a planning point of view it was unreasonable to determine a longer termination period than one year.

The exclusivity clauses were not justified even with the significant discounts on fees, although they can reason it economically. The significant fee discounts can serve the interest of the shipper as well. This seemed to contradict with the fact that MERT, after signing a three year framework agreement with MÁV in January 2004, concluded another framework agreement with MMV although no transports were realized based upon it, and finally in 2005 shipped with CER. This suggested that private undertakings could offer more favourable prices to MERT than the ones negotiated in the MERT-MÁV agreement.

MÁV failed to come up with any objective justification for the exclusivity clauses or the English clauses. Although the Competition Council acknowledges the right of dominant undertakings to compete on the merits and defend the own commercial interests when attacked, as mentioned by the CFI, this has to be based on criteria of economic efficiency and consistent with the interests of consumers. MÁV failed to prove any consumer specific investments that were mentioned during the hearings. Moreover shipping agreements from the earlier years were always concluded on an annual basis and never contained any exclusivity or English clauses or any reference to investments.

The agreements of BC, MERT and MOL all contained the so-called English clause, which in theory could reduce the restrictive effect of exclusivity clauses nevertheless that was not to be determined in the present case. The English clause covers generally a provision, which allows the acceptance of a rival's offer only when the dominant undertaking does not make a better counteroffer. However the English clauses in the agreements investigated provided only that in case of a better offer from a rival, MÁV had to renegotiate the terms of the agreements. Should on the other hand negotiations fail, the original terms of the agreements remain in force for BC and MERT, which practically pre-empts the English clause. Moreover BC and MERT had to reveal of the identity of the rival making the better offer. MOL's agreement did not contain the latter two type of provisions (renegotiations, naming the rival offer), however in the case of a similar counteroffer it had to choose MÁV.

The English clauses weakened the competitive positions of competitors. In the case of BC and MERT, MÁV was able to get know the rival's offer, besides knowing the identity of the rival, without the need to make a counteroffer. The obligation to make a counteroffer existed only in the case of MOL. Consequently MÁV acquired such information without the pressure of competition concerning the capacity and reserves of its rivals that it would otherwise get only through real competition.

According to the Competition Council the only plausible reason for the conclusion of the long term agreements was market liberalisation and the willingness to impede, delay or make more difficult the entry of more efficient competitors. The examined framework agreements, having regard to their foreclosing effect, effectuated an abuse of dominant position.

The described behaviours by rendering more difficult the market entry of competitors arriving from other Member States, and making more difficult the transport of rail freight to and from other Member States had an appreciable effect on trade between Member States. Effect on

trade was also shown by the fact that MÁV had a dominant position in the whole territory of a Member State (Hungary) and its conduct could be classified as exclusionary with foreclosing effects.