



GAZDASÁGI
VERSENYHIVATAL

Court confirms that state railways “chose the wrong track”

Gazdasági Versenyhivatal (GVH) obtained a favourable judgement from the Municipal Court of Budapest against Magyar Államvasutak Zrt. (hereinafter MÁV). The Municipal Court upheld for the most part the decision of the GVH, which established an abuse of dominant position by the state railways company. The court found however MÁV subjecting the conclusion of the 2005 network access agreements to the obtainment of bank guarantees not to be an abuse of dominance. As a consequence it reduced the amount of fine from HUF 1 billion to HUF 700 million.

In Hungary, as a result of the liberalisation in rail freight markets connected to the date of accession of Hungary to the European Union, newly established railway undertakings had the possibility of entering the market. Based on the sector specific regulation, MÁV has to provide non-discriminatory access to the public railway network and its accessories, to enable the operation of the new railway undertakings, which have no own network. Immediately after the market opening, in 2004 already four new railway undertakings entered the market with the aim of obtaining some of the shippers' contracts. The GVH received several complaints from new competitors concerning the allegedly infringing practice of MÁV as far as the conclusion of network access agreements and the access conditions were concerned.

The GVH initiated a proceeding on 9 February 2005 to examine whether the financial conditions applied by MÁV in the access agreements could hinder the entry and operation of new undertakings, which needed the conclusion of those agreements. The GVH found the measure of MÁV by which MÁV subjected the conclusion of network access agreements to the obtainment of bank guarantees the value of which was equal to the 2.5-month part of the annual network usage charge to be unjustified. This measure resulted in 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 it qualified as an abuse of dominance. In April 2005 the GVH extended the scope of the investigation to additional practices of MÁV, namely to the treatment of access requests to non public tracks (industrial side-tracks) operated or managed by MÁV and to the conclusion by MÁV of exclusive long term framework agreements with key shippers.

The GVH came to the same conclusion with regard to the assessment of the latter two practices. As to non-public (i.e. not publicly owned) tracks, MÁV ÁFU (the freight transport division of MÁV) serviced the industrial sidetracks owned or managed by MÁV, which placed it in a position where it could decide about the access requests of its direct competitors on the rail freight market. This situation, prone to produce abuses, had lead actually to several abusive events, where MÁV hindered private railway undertakings from performing, or made

it more difficult for them to perform, their transport duties vis-à-vis shippers using industrial sidetracks. As to the long-term framework agreements, MÁV concluded these contracts immediately before and shortly after market opening with four of its key shippers (MOL, MAL, MERT, Borsodchem). According to the agreements, during the contract period the four shippers may not transport with competing private railway undertakings, not even in the case if they offered better conditions.

In its final decision the GVH imposed a fine of HUF 1 billion on MÁV. When determining the amount of the fine, it took into consideration the size of MÁV's freight transport division, as well as the gravity and duration of the infringement. The amount of the fine imposed also expresses the condemnation by the GVH of any private conduct that hinders market opening decided by state authorities. The abusive behaviour of MÁV affected new entrant private railway undertakings in an especially vulnerable status and period of time, thereby jeopardising the success of market opening. Incumbent former monopolists bear an increased responsibility for competition law infringements, if their market conduct restricts the business opportunities of new entrants in an unreasonable and illegal manner.

In determining the fine, the GVH found it as a mitigating circumstance that from May 2006, MÁV refrained from the application of the exclusivity clauses in the long-term contracts. Moreover due to internal restructurings, MÁV removed the incentives to make network access difficult for competitors of MÁV. The freight transport division of MÁV has been reorganised as a separate entity named MÁV Cargo, and it obtained no ownership or management rights of industrial sidetracks.

MÁV filed an appeal against the decision of the GVH to the Municipal Court of Budapest. The court in its judgement of 11 January 2008 upheld for the most part the decision of the GVH, only the infringement in relation to bank guarantees was assessed differently. The court accepted the argument made by MÁV in support of MÁV requesting bank guarantee in its network access agreements with private undertakings. Since the court found the application of bank guarantees lawful, it reduced the amount of fine from HUF 1 billion to HUF 700 million.

Case-number: **Vj-22/2005**

Budapest, 16 January 2008

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