



Slovakia: The Supreme Court of the Slovak Republic upholds Antimonopoly Office's fine imposed on state-owned railway operator (ZSR)

The Supreme Court rejected an appeal and upheld the fine originally imposed by the AMO for the abusive practice of applying different conditions on the relevant market of rail freight services for bulk substances on medium- and long-distance rail tracks in Slovakia.

On 28 August 2012, the Supreme Court of the Slovak Republic (the “**Supreme Court**”) in its judgement No. 8Sžhpu/2/2011 rejected an appeal lodged by Zeleznice Slovenskej republiky (the “**ZSR**”) against judgment No. 1S 222/2007 of the Regional Court in Bratislava confirming decision No. 2007/DZ/R/2/051 taken by the Council of the Antimonopoly Office of the Slovak Republic (the “**AMO**”). In confirming the judgement of the Regional Court in Bratislava, the Supreme Court upheld the fine of EUR 368,037 originally imposed by the AMO for the abusive practice of applying different conditions to providers of the same or similar service on the relevant product market of rail freight services for bulk substances on medium- and long-distance rail tracks in Slovakia.

Summary of the Decision

Originally, ZSR was a state-owned company established by a separate act; it carried out all the functions of a single freight and passenger railway carrier in Slovakia. In 2002, a new company, Zeleznicna spolocnost, a.s., emerged from ZSR as a provider of traffic and business services. As a result, ZSR continued to function only as a railway infrastructure operator. The unbundling process was part of the Government’s efforts to meet the European Commission’s legislative requirements and continued in 2005, when Zeleznicna spolocnost, a.s., split into two separate companies – Zeleznicna spolocnost Slovensko, a.s. (passenger railway transport), and Zeleznicna spolocnost Cargo Slovakia, a.s. (freight railway transport).

ZSR was fined by the AMO for the abusive practice which it conducted between 1 May 2001 and 31 December 2001 (i.e. before the unbundling in 2002 ZSR began abusing its dominant position before 1 May 2001, but the statutory term for imposing a sanction in respect of such actions had expired under the previous competition legislation). The abuse of dominant position consisted of discrimination in the form of enforcing different conditions for identical or comparable performances. ZSR conducted price negotiations with four forwarding companies (Express, Express Slovakia, PROXAR and NAKURAIL AG); in these negotiations, ZSR offered these companies better terms than were offered to their competitors. Moreover, ZSR discriminated between these four undertakings by not charging them all the same prices ZSR was not able to explain this. The AMO pointed out that offering financial arrangements on an individual and non-transparent basis while not offering the same arrangements to other undertakings constituted an anticompetitive practice.

According to AMO’s findings, the services in question provided by ZSR to customers seeking to transport bulk masses of iron ore or coal over distances longer than 200 km were of an exclusive nature (i.e. at the time, only ZSR offered these services in Slovakia, so it enjoyed a de facto monopoly and thus a 100 per cent share of the relevant product market).

In its appeal to the Supreme Court, ZSR tried to argue that even before the unbundling in 2002, the economic activities in question (i.e. transport services) were, at the time of the abusive behaviour, legally and economically independent within ZSR. In other words, transport services constituted one of branches of economic activity that were operated within ZSR as separate units. The branch in question was later transferred to Zeleznicna spolocnost, a.s.. Thus, ZSR argued that it should not



have been liable to be sued as a party to the proceedings. In other words, ZSR tried to use the two-stage test of economic succession to shift liability for the alleged abusive behaviour away from ZSR, claiming that the internal structure of ZSR's activities had been changed well before the unbundling in 2002.

However, the Supreme Court rejected ZSR's interpretation of the test of economic succession, stating that the relevant test should be only applied when the infringing legal entity has ceased to exist (this was not so in the case of ZSR, which has been in existence since 1993). Therefore, the Supreme Court rejected the use of the test as such; as a result, liability remained with ZSR.

In response to ZSR's argument that its behaviour caused no harm or damage to the relevant market, the Supreme Court referred to AMO's findings – mainly the increased market share enjoyed by the four beneficiary entities within the relevant time period. This constituted, according to the Supreme Court, sufficiently serious harm suffered by other competitors on the relevant product market.

Comments

The Supreme Court decision is in line with its previous rulings in similar cases involving a test of economic succession. Interestingly, this was yet another decision taken in 2012 by which the Supreme Court upheld the AMO's decision on the abuse of dominant position within the railway sector. In February 2012, an EUR 2.5 million fine imposed on Zeleznicna Spolocnost Cargo Slovakia, a.s., (and the correct application of the test of economic succession by the AMO) were upheld by the Supreme Court.

Source: Michal Miko, Jakub Berthoty, The Supreme Court of the Slovak Republic upholds Antimonopoly Office's fine imposed on state-owned railway operator (ZSR), 28 August 2012, e-Competitions, N°50298, www.concurrences.com

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