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DG Comp clears rail cargo merger

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The European Commission has cleared Rail Cargo Austria's acquisition of Hungary's state-owned MÁV Cargo, subject to conditions.

The deal, approved yesterday, will create Europe's third-largest rail cargo provider after Deutsche Bahn's Railion and France's SNCF.

Both companies provide rail freight transport in Austria, Germany, Slovenia, Hungary and Slovakia.

The commission was concerned that the deal could lead to a reduction in competition in the freight rail markets in Austria and Hungary. It says the markets are characterised by "limited competition and strong incumbents cooperating for cross-border rail freight transport."

For the commission to clear the deal, Rail Cargo - part of Austrian state-owned railway ÖBB - agreed to remove its structural links and to review contractual links with Gysev, which provides passenger and freight rail transport in Austria and Hungary. The commission hopes these remedies will strengthen Gysev's position as a competitor to the newly merged company.

The commission also required "declarations" by the Austrian and Hungarian states that the conditions would be met.

"I am aware that this deal is seen by the companies as important to improve their ability to develop these freight markets," says competition commissioner Neelie Kroes. "I welcome any positive developments for consumers, and I am very pleased that we have managed to address quickly the competition concerns that we had in this case."

The clearance was issued following an extended phase I review of the deal.

Michael Rosenthal, partner at Hunton & Williams LLP and co-counsel to Rail Cargo with Dieter Thalhammer of Eisenberger & Herzog, says the case was time-sensitive and raised numerous substantive and procedural issues.

"For the first time under EC merger rules, the commission used article 5(3) of the implementing regulation to rewind the clock," he says. "Under this procedural rule, the commission decided that the notification - originally filed on 25 August - should be treated as effective from 7 October, which was when new material facts concerning the deal were received by the authority. Interestingly, the commission used this article instead of the traditional stop-the-clock approach in order to avoid a phase II review." Rosenthal adds that in the past, the stop-the-clock approach was criticised as lacking a legal basis and watering down the statutory deadlines under EU merger control.

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