



GVH's winning the motorway cartel case became final

By its judgement of 29 August 2007 the Appeal Court of Budapest (ACB) upheld the judgement of the Municipal Court of Budapest (MCB), rejecting the claim of the plaintiffs. The Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) had previously established that the undertakings – Betonút Rt., DEBMÚT Rt., EGÚT Rt., Hídépítő Rt., Strabag Rt. – which submitted tenders as a response to an invitation to tender issued in 2002 by Nemzeti Autópálya Rt. (National Motorway Corp. – NM) concluded an agreement infringing the Competition Act. The undertakings previously agreed between them about the identity of the tenderer acquiring the construction works contract for the particular motorway-sections. In some cases they even agreed that the winners would involve the others as subcontractors. Every large undertaking that could be expected to meet the conditions to be fulfilled by candidates set out in the invitation, was party to the cartel agreement. The total of the fines imposed amounted to HUF 7,043 billion (approx. EUR 27.7 million in January 2006) which have already been payed in by the infringers.

The GVH commenced an ex officio proceeding in February 2003 in order to establish whether the undertakings mentioned above colluded during the open procedure for the award of the public works contracts (with a qualitative preliminary selection of the candidates) of the NM in which the sections Balatonszárszó of the motorway M7, Becskehely-Letenye of M7-M70 and Görbeháza of M3 were put out to tender in August 2002. The proceeding was later extended to the restricted procedure in which the same works had been put out to tender in July 2002 but which was subsequently declared unsuccessful.

Based on the documents, statements and other proofs available to it the Competition Council established that the firms previously agreed between them about the identity of the tenderer acquiring the construction works contract for the particular motorway-sections and of the tenderer which the general contractor would involve as a subcontractor in the construction works which concerned, as a total, a length of 59.91 km and a growth value of HUF 160 billion (approx. EUR 630 million). After that the first procedure was declared unsuccessful, the concurrence of wills between the tenderers manifesting in price concertation and market allocation remained unchanged for the repeated procedure too.

According to established EU-practice, the most severe sanctions are imposed on cartels of this type for they distort directly and entirely the efficient allocation of resources and result in an increase of the prices.

The market distorting effect of the collusion was significant since every large undertaking that could be expected to meet the conditions to be fulfilled by candidates set out in the invitation participated in it. The prices which came into existence under non-competitive circumstances could influence for years the prices of motorway construction works in Hungary. The Competition Council, in compliance with its earlier decisions, took into consideration that the infringement concerned the utilisation of public means. Hence, its impact seriously harmed public interest.

All the fined undertakings appealed the Competition Council's decision at the MCB. In its judgement of 23 January 2006 the MCB dismissed the appeal of them.

The undertakings concerned also requested the suspension of the payment of fine, which was rejected by the Municipal Court of Budapest on 8 December 2005. The undertakings paid the fines imposed (in million HUF: on Betonút: 2212, DEBMÚT: 496, EGÚT: 496, Hídépítő: 1371, Strabag: 2468) during December 2005 and January 2006.

The judgment of the MCB was appealed by all the five undertakings.

The first trial of the ACB was held on 25 April 2007 when the undertakings proposed to the court to refer for a preliminary ruling to the European Court of Justice (ECJ). The ACB rejected the request. Afterwards, the Supreme Court also deemed unnecessary to refer to the ECJ the question of whether the interpretation of Article 65/A of the Competition Act according to which pieces of evidence obtained in the course of surprise inspections in a competition supervision proceeding which was initiated with a different purpose may be used to establish the responsibility under competition law of the undertaking concerned is compatible with the relevant EU rules. [“When taking an investigative measure within the meaning of this Article, the investigator shall be entitled to make copies of, or seize, means of proof, which are not relating to the subject of the investigation and are not covered by the authorisation of the court, but which are indicative of an infringement of Article 11 or 21 of this Act or of Article 81 or 82 of the EC Treaty. In respect of such means of proof, the authorisation of the court shall be obtained subsequently... Where a subsequent authorisation of the court was not obtained, the means of proof in question may not be used.”, Article 65/A (9) of the Competition Act provides for.] In the Supreme Court's view, the ECJ does not have jurisdiction over this question, since the facts of the case date back to the period before Hungary's EU-accession on the one hand, and the question is of procedural nature, on the other hand.

The ACB's judgement of 29 August 2007 upheld the judgement of the MCB and rejected the plaintiffs' claim.

As the ACB highlighted, in the absence of provisions to the contrary of the Competition Act or any other relevant legal act, the GVH lawfully used the evidence, which it obtained in another proceeding. It stressed that the documents specified in the GVH's decision clearly proved the infringement, and the undertakings' reference to any other explanation for these documents and for the behaviour of the undertakings was unfounded.

The final judgement of the ACB has very great importance. It creates a possibility for the application of the following provision of Act CXXIX of 2003 on Public Procurement. „The party inviting tenders may provide in the tender invitation that any person who, ... within the preceding five years, has been found guilty of and fined for an infringement of Article 11 of Act VII of 1996 on the Prohibition of Unfair and

Restrictive Market Practices or Article 81 of the Treaty establishing the European Community, which was committed in the course of a bidding procedure and has been established by a competition supervision decision which is final and enforceable or, for the case that the competition supervision decision has been reviewed by a court, by the decision which is final and enforceable of that court; or who in his/her capacity as a tenderer, within the preceding five years, has been found guilty of and fined for such an infringement by a final decision of another competition authority or court, ...is excluded from participation in the procedure as a tenderer or as a subcontractor proposed to be contracted for a value exceeding ten per cent of the contract value." [Point b) of Article 61 (1) of the Act] On the other side, with this judgement in the background, the chance of the state-owned company (the contracting party) of getting a compensation for the harm caused by the cartel behaviour has become much better if it lodges a claim for damages.

As the GVH informed the public several times before, injured parties may lodge claims for damages to civil courts in order to get compensation for the harm caused by cartel behaviour. The GVH considers these suits very important, since – as it has been shown by international experience – these actions may have serious deterrent effect on infringers.

Facts and figures

I. Invitation to the tender of July 2002

1. Time of invitation: July 2002
2. Invited undertakings:
 - a) Strabag Rt.,
 - b) Hídépítő Rt.,
 - c) Betonút Rt., and
 - d) EGÚT Rt.
3. Opening date of bids: 22 July 2002
4. Bids:

Table 1: M3 (Polgár-Görbeháza)

Candidate	Consortia	Bid/ million HUF/ net	Winne r
M3 Görbeháza 2002 Konzorcium	EGÚT- D-Profil Kft.	15.854	x
Bihar Konzorcium	Strabag-Hoffman Rt.	16.952	
Tiszántúli Autópálya Építő Konzorcium	Betonút- Kutas BB Kft.	18.111	

Table 2: M7 (Balatonszárszó)

Candidate	Consortia	Bid/ million	Winne r

		HUF/ net	
M7 Balaton Konzorcium	Hídépítő-Strabag-Penta Kft.	54.650	x
M7 Balaton 2002 Konzorcium	EGÚT- D-Profil Kft.	59.996	
Balatoni Autópálya Építő Konzorcium	Betonút- MÁV Hídépítő	62.971	

Table: M7 (Becsehely)

Candidate	Consortia	Bid/ million HUF/ net	Winner
Adria Autópálya Építő Konzorcium	Betonút- Kutas BB. Kft	14.549	x
M7 Zala Konzorcium	Strabag-Kaiser Rt.	15.142	
M7 Határ Konzorcium	Hídépítő-Penta-Viadom	15.000	

Table 4: M70

Candidate	Consortia	Bid/ million HUF/ net	Winner
M70 Mura Konzorcium	Strabag-Hídépítő-Hoffman	24.355.112	x
Zalai Autópálya Építő Konzorcium	Betonút-Mélyépítő Bp.	25.115	
M70 Letenye 2002 Konzorcium	EGÚT-D-Profil	26.310	

5. Date of declaring unsuccessful: 23 July 2002

II. Open procedure with a qualitative preliminary selection of the candidates, August 2002

1. Date of announcement: 26 August 2002

2. Candidates:

- a.) Strabag (all sections),
- b.) Hídépítő- Betonút konzorcium (all sections),
- c.) Egút-Debmút (all sections),
- d.) Betonút¹ (by oneself M3, M7-M70 sections),
- e.) Hódút² (M3 section)

¹ Had not been prequalified, because of the lack of reference

² Had not been prequalified, because of the lack of reference

3. Bids received:

Table 1: M7-M70

Candidate	Undertakings	Bid (million HUF – net)	Winner
Országhatár Konzorcium	Hídépítő – Betonút	47.240	
M7–M70 Közös Vállalkozás	EGÚT– DEBMÚT	47.533	
Strabag		44.880	x

Table 2: M7 Balatonszárszó

Candidate	Undertakings	Bid (million HUF – net)	Winner
Szárszó Konzorcium	Hídépítő – Betonút	65.159	x
M7 Balaton Közös Vállalkozás	EGÚT– DEBMÚT	70.701	
Strabag		69.114	

Table 3: M3 Görbeháza

Candidate	Undertakings	Bid (million HUF – net)	Winner
M3 Görbeháza 2002 Közös Vállalkozás	EGÚT-DEBMÚT	18.055	x
M3 Konzorcium	Hídépítő-Betonút	18.666	
Strabag		18.977	

Case number: **Vj-27/2003.**

Budapest, 30 August 2007

Further information:

(Mr) András Mihálovits

Gazdasági Versenyhivatal
 1054 Budapest, V. Alkotmány u. 5.
 1245 Budapest 5. POB 1036
 tel: (+36-30) 618-6618

e-mail: Mihalovits.Andras@gvh.hu

<http://www.gvh.hu>