

***Case No COMP/M.5096 -
RCA / MAV CARGO***

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**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(2) NON-OPPOSITION
Date: 25/11/2008

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EUROPEAN COMMISSION

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)b DECISION IN
CONJUNCTION WITH 6(2)

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.5096 - RCA/ MAV CARGO
Notification of RCA / MÁV Cargo pursuant to Article 4 of Council Regulation No 139/2004

1. On 25 August 2008, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004¹ ("EC Merger Regulation") by which the undertaking Rail Cargo Austria AG ("RCA", Austria) acquires within the meaning of Article 3(1)(b) of the EC Merger Regulation sole control of the whole of MÁV Cargo Árufuvarozási Zártkörűen Működő Részvénytársaság ("MÁV Cargo", Hungary) by way of purchase of shares. RCA concludes the acquisition within a consortium together with Raab-Ödenburg-Ebenfurter Eisenbahn Aktiengesellschaft ("GySEV", also called "Raaberbahn"). GySEV will acquire a non-controlling minority stake of MÁV Cargo at the closing of the transaction.

I. THE PARTIES and GySEV

2. **RCA** is a subsidiary of the state-owned Austrian-based railway company ÖBB Holding AG ("ÖBB") engaged in freight transport as well as freight forwarding. RCA is active, *inter alia* in Austria, Germany, Slovenia, Hungary and Slovakia.

¹ OJ L 24, 29.1.2004, p. 1.

3. **MÁV Cargo** is a subsidiary of the state-owned Magyar Államvasutak Zártkörűen Működő Részvénytársaság ("MÁV"). It was founded in 2005 and is the successor of the freight business of the Hungarian national rail incumbent (MÁV). MÁV Cargo is active in rail freight transport and freight forwarding mainly in Hungary and to a much lesser extent in other European countries.
4. **GySEV (Raaberbahn)** is an integrated rail and infrastructure company with its own rail network of 287 km located on the territory of both the Republic of Austria and the Republic of Hungary. It is active in rail transport of both passengers and freight in Austria and in Hungary, and focuses on rail freight cross-border transport between Austria and Hungary. GySEV is jointly controlled by the Republic of Hungary (61 % of the shares) and the Republic of Austria (33.3 % of the shares). RCA holds through a subsidiary a 5.7 % non-controlling share of GySEV.

II. CONCENTRATION

5. The notified transaction concerns the acquisition of MÁV Cargo by RCA in a consortium with GySEV and will be effected by a share purchase agreement for at least [90-100] % plus one share. RCA will acquire [80-90]% plus one share and GySEV [5-10] % of MÁV Cargo. The remaining shares should be allocated to the staff members of MÁV Cargo with the pre-emptive right for RCA and GySEV to buy the shares from the staff members if they intend to sell them. The transaction has to be seen in the context of the privatisation process of MÁV's cargo business. In an international tender for MÁV Cargo, RCA, together in a consortium with GySEV, outbid 12 other rivals and won the tender in November 2007. The share purchase agreement was signed in January 2008.
6. In the consortium contract between RCA and GySEV from October 2007, GySEV has the unilateral, non-transferrable and irrevocable right to acquire up to [20-30]% plus 1 share of MÁV Cargo from RCA after the closing of the transaction. Due to MÁV Cargo's corporate agreements, exerting this option will give GySEV certain veto rights in MÁV Cargo (e.g. business plan) which may be considered as giving it joint control over MÁV Cargo. GySEV had initially, during the early stage of the notification process, signalled that they intended to exercise the call option.
7. Procedurally, the exercise by GySEV of the call option has to be seen as separate from the proposed transaction as these are neither *de jure* nor *de facto*² inter-conditional. The validation of the proposed transaction is not in any way legally connected to GySEV executing its right to acquire the additional shares. Also from an economic standpoint, RCA explicitly said that it would have acquired MÁV Cargo even if GySEV would not exercise its option to acquire additional shares. Therefore, GySEV is not a party pursuant to Article 3 of the EC Merger Regulation in the notified transaction.

² This requires an economic assessment of whether each of the transactions necessarily depends on the conclusion of the other, see paragraph 43 of the Consolidated Jurisdictional Notice, OJ C 95, 16.4.2008, p.1.

8. Therefore, the proposed transaction is a concentration according to Article 3(1)(b) EC Merger Regulation whereby RCA acquires sole control of MÁV Cargo by way of purchase of shares.

III. COMMUNITY DIMENSION

9. The transaction has a Community dimension pursuant to Article 1(2) of the EC Merger Regulation. The parties have a combined aggregate worldwide turnover in excess of EUR 5 000 million (RCA EUR 4 641 million, MÁV Cargo EUR 382.7 million), and at least two have a Community-wide turnover in excess of EUR 250 million (RCA EUR [...] million, MÁV Cargo EUR [...] million).³ RCA achieves more than two thirds of its Community-wide turnover in Austria while MÁV Cargo achieves more than two thirds of its Community-wide turnover in Hungary.

IV. PROCEDURE

10. On 6 and 7 October 2008 new facts relating to the transaction were communicated to the Commission by the notifying party (RCA) and by the Republic of Hungary in the form of Declarations of the Austrian Minister of Transport, Innovation and Technology ("Austrian Minister of Transport") on behalf of the Republic of Austria and of the Hungarian Minister of Transport, Telecommunication and Energy ("Hungarian Minister of Transport") on behalf of the Republic of Hungary, respectively ("First Declarations").
11. The Commission considered that the First Declarations communicated to the Commission by the notifying party and by the Republic of Hungary constituted material changes in the facts contained in the notification coming to light subsequent to the notification. These changes in the factual record could have a significant effect on the appraisal of the concentration. In order to properly assess these changes in the factual record and their effect on the appraisal of the concentration, the Commission considered the notification pursuant to Article 5(3) of Commission Regulation (EC) No 802/2004⁴ (the "Merger Implementing Regulation") as becoming effective on the day it received all relevant information, namely on 7 October 2008.

V. RELEVANT MARKETS

12. The proposed transaction concerns rail freight services in Austria, Hungary and other neighbouring Member States.

³ Initially, the parties notified the case with the Austrian and Hungarian National Competition Authorities (NCAs) based on inaccurate calculations of their turnovers.

⁴ OJ L 133, 30.4.2004, p. 1.

A. SEPARATE MARKETS FOR FREIGHT FORWARDING AND FREIGHT TRANSPORT

13. The notifying party submits the following market definition: An **overall market for freight forwarding⁵ and freight transport** (including transport by all modes i.e. land, including rail, road, inland waterways and pipelines, sea and air).
14. The Commission has found in previous decisions that providers of freight forwarding services and of freight transport services do not directly compete with each other but that freight forwarding providers offer a service to customers which is often sub-contracted to the transport carrier.⁶
15. The market investigation has confirmed the position of the Commission in previous decisions. There are strong indications that freight transport and freight forwarding are not considered as substitutes but as separate product markets by customers and competitors, and that transport may be regarded as an input for freight forwarding⁷. Those freight forwarding companies that are not vertically integrated perceive that they are not directly competing with freight transport companies. Freight forwarders offer a bundle of transport-related services to their customers, while the actual transport service itself is often sub-contracted to the transport carrier.⁸

B. FREIGHT FORWARDING

1. Product Market Definition

16. The notifying party submits that freight forwarding might constitute a sub-segment of the overall market for freight forwarding and freight transport. This sub-segment, however, could not be further subdivided according to the mode of transport, since all segmentation criteria with reference to the transport itself would have no relevance from the point of view of the freight forwarder or the customer.⁹
17. Within freight forwarding services the Commission has distinguished in previous decisions (i) between domestic and international (i.e. cross-border) services and (ii) between freight forwarding by air, land and sea.¹⁰ The Commission considered but left

⁵ For the definition of freight forwarding, the notifying party refers to previous Commission decisions, according to which "*Freight forwarding can be defined as the organisation of transportation of items (possibly including ancillary activities such as customs clearance, warehousing, ground services etc.) on behalf of customers according to their needs. Air and sea freight forwarding services include land transportation to/from the port/airport when required by the customer.*" Case COMP/M.1794 *Deutsche Post/AEI*; COMP/M. 4045 *Deutsche Bahn/BAX Global*.

⁶ Case COMP/M.2905 *Deutsche Bahn/Stinnes*.

⁷ Replies from customers and competitors to Art 11 Request for information (RFI) of 28.8.2008.

⁸ Replies from customers and competitors to Art 11 RFI of 28.8.2008. See also Case COMP/M.2905 *Deutsche Bahn/Stinnes*.

⁹ RCA considers Commission's position of a possible sub-segmentation of freight forwarding into separate markets for freight forwarding by land, air, and sea, respectively. However, RCA considers any further subdivisions of the market for land freight forwarding services inappropriate, in particular any subdivisions into separate markets for rail and road freight forwarding.

¹⁰ Case COMP/M.4786 *Deutsche Bahn/Transfesa*, Case COMP/M.4746 *Deutsche Bahn/EWS*, Case COMP/M.4045 *DB/BAX Global*, Case COMP/M.3971 *Deutsche Post/Exel* and Case COMP/M.1794 *Deutsche Post/Air Express International*.

open a further subdivision of land freight forwarding according to the different modes of transport, in particular rail and road.¹¹ A segmentation of the freight forwarding market according to the type of goods has so far been considered inappropriate¹², except in the specific case of car logistics, where the question was left open¹³.

18. The market investigation tends in general to confirm previous Commission decisions. A subdivision of the market for land freight forwarding according to the different modes of transport which the freight forwarding providers subcontract for land freight transport (road/rail/inland waterways) was not considered relevant by the majority of respondents. The majority of freight forwarders provide or subcontract at least road and rail freight transport services. Only few respondents argued that a special knowledge of the market is necessary to provide rail freight forwarding services.
19. The exact product market definition can be left open in this case as under any plausible product market definition, the proposed transaction is unlikely to raise competition concerns.

2. Geographic Market Definition

20. The notifying party proposes to define the geographical market for freight forwarding as one single European (EEA-wide) market.
21. In its previous decisions, the Commission has so far left open whether this market or subsections thereof could still be considered as national due to language and regulatory barriers, or as larger in view of a trend by major competitors to create networks which are trans-national or even EEA-wide.¹⁴
22. The market investigation confirmed previous Commission decisions. However, the final geographic market definition can be left open in this case.

3. Conclusion

23. In this case, the exact market definition for freight forwarding can be left open, since under any plausible market definition no competition concerns arise.

C. FREIGHT TRANSPORT

1. Product Market Definition

24. The notifying party submits that freight transport might constitute a sub-segment of the overall market for freight forwarding and freight transport. This sub-segment, however, could not be further subdivided according to the type and volume of the transported

¹¹ Case COMP/M.4786 *Deutsche Bahn/Transfesa*. The market investigation in that case confirmed that at least a partial substitutability exists between freight forwarding services by *rail and road*.

¹² Case COMP/M.1794 *Deutsche Post/Air Express International*.

¹³ Case COMP/M.4786 *Deutsche Bahn/Transfesa*.

¹⁴ See Case COMP/M.4045 *DB/BAX Global*, Case COMP/M.3971 *Deutsche Post/Exel*, Case COMP/M.4786 *Deutsche Bahn/Transfesa* and Case COMP/M.1794 *Deutsche Post/Air Express International*. Especially with regard to contract logistic services, market investigations showed good reasons to assume an EEA-wide market, the Commission however left it open.

goods or the mode of transport, since all different modes of transport can be considered substitutable for the goods to be transported.

25. In previous cases, the Commission has considered that not all modes of freight transport could be considered as generally substitutable in view of the geographic situation of the customer as well as the specific characteristics of the goods to be transported.¹⁵ The market investigations in these cases indicated that a distinct market for the transport of goods by rail (rail freight services) could be distinguished, but the Commission did not take a final position.¹⁶ The Commission also indicated that a further segmentation according to the transported goods¹⁷ or a distinction between domestic and international services as well as between block trains and single-wagon trains might be necessary, but has to be assessed on a case-by-case basis¹⁸.

(i) Land freight transport

26. The market investigation confirmed that a distinction between the different modes of freight transport might be necessary. Each mode of freight transport has different characteristics in relation to prices and cost structures, timing and geographic availability. The majority of respondents to the market investigation consider land freight transport as a distinct sub-segment of the overall freight transport sector of activity¹⁹.

(ii) Rail freight transport

27. The market investigation found evidence for further distinctions based on the different modes of land freight transport (rail/road/inland waterways). It confirmed that the reasons for the use of different transport modes mainly consist in considering the volume/quantity of goods, the infrastructure of the customer, the geographic availability and the transport time²⁰. The inland waterways, here the Danube River, are only in a limited number of situations seen as a viable substitute for other modes of land freight transport.
28. However, at first sight, a significant number of respondents consider road and rail freight transport to a varied degree interchangeable. The responses to the market investigation indicate that freight forwarders and other rail freight transport customers routinely ask road freight transport companies for price quotes before consulting railway operators. Rail companies in turn appear to set their rates with a close eye on road freight transport prices. In practice, there exist few categories of goods which can not be transported also by road. A significant number of rail freight customers also

¹⁵ Case COMP/M.4294 *Arcelor/SNCF/CFL Cargo*, Case COMP/M.3150 *SNCF/Trenitalia*.

¹⁶ According to the Commission, a segmentation into a distinct market for rail freight services often has to be decided on a case-by-case basis depending on the type of transported goods, and other factors such as the volumes and weight transported, the distance to be transported etc. See Case COMP/M.3971 *Deutsche Post/Exel*, Case COMP/M.4746 *Deutsche Bahn/EWS*, Case COMP/M.4786 *Deutsche Bahn / Transfesa*.

¹⁷ Case COMP/M.2905 *Deutsche Bahn/Stinnes*.

¹⁸ Case COMP/M.4746 *Deutsche Bahn/EWS*.

¹⁹ Replies from customers and competitors to Art 11 RFI of 28.8.2008.

²⁰ Replies from customers and competitors to Art 11 RFI of 28.8.2008.

transport goods via road. Customers usually decide on the transport mode by comparing price and quality, i.e. factors like transport time, safety and punctuality.

29. The market investigation suggests that the above described responses on interchangeability can in this case be influenced by artificially high prices set by dominant railway firms. The substitutability of road and rail largely appears to depend on the type of transport undertaken, which suggests that a further subdivision of freight transport may have to be undertaken to identify the degree of substitutability.
30. Evidence from transport markets suggests that railway firms set their prices such that they are just able to beat competing offers from road freight transport, in particular when there is little competition between different railway operators. A possible reason is that a lack of competition between rail operators allows firms to set higher prices than the competitive rail price;²¹ prices are quite possibly increased up to the level where rail customers consider road freight transport a viable alternative even though they would not do so if there was more competition from other railway undertakings.²²
31. Since rail freight markets in Europe have been fully liberalised only in 2007, competition between railway companies is still in its infancy. As a result, one may expect efficiency gains from liberalisation to materialise in the rail transport sector in the coming years. It can be expected that the costs of rail freight transport might decrease relative to road transport in the future due to the achievement of efficiency gains via liberalisation.²³ Such efficiency gains would imply that customers who currently use rail freight transport would find road transport even less of an alternative than might be the case today.
32. The market investigation provided considerable evidence in this respect. For instance, according to a customer of the notifying party, on routes with strong rail competition it obtains prices which are [0-5] to [40-50]% lower than on routes with weak rail competition²⁴. In line with this observation, a rail freight transport company reported

²¹ Railroad incumbents typically have rail market shares beyond 90% in the European Union generally and in Austria and Hungary in particular.

²² This is commonly referred to as the "cellophane fallacy". Taking the possibility of a cellophane fallacy into account is particularly important in the case of mergers involving concerns regarding potential competition. In such mergers, current competitive constraints are sometimes weak, while possible future entry may provide them. If the possibility of a cellophane fallacy was not duly taken into account in potential competition cases, this may lead to overlooking the elimination of competitive constraints that could develop absent a merger.

²³ If the liberalisation of the rail freight market in the U.S. is of any guidance, then cost reductions could be very large. In the time since the liberalisation in the U.S., the operating costs of railway companies fell by 69%, while prices for rail freight transport fell by 65% (see Clifford Winston, "The Success of the Staggers Rail Act of 1980", Brookings Institution, 2005, p. 12 and 14). This allowed U.S. railroads to return to profitability and reverse the previous dramatic decline in modal split. Early developments in Europe are similar, displaying decreasing prices and increasing volumes of rail freight transport. For instance, the Commission's Communication on monitoring development of the rail market (18 October 2007, pp. 6 and 12) concluded that "the efforts to revitalise rail by developing a European Railway Area and increasing competition on the market are producing positive results. [...] After years of steady decline, rail freight performance stopped to decrease in 2003 [...]. Between 2000 and 2005 the EU witnessed a significant increase in rail freight performance in Member States where non-incumbent railway undertakings took the highest market shares."

²⁴ Reply by a respondent of 24.10.2008 to RFI.

that there were only moderate price increases on corridors where there is already competition between rail operators.²⁵ As an example the company reports that on a specific corridor during 2002-2008 the total price increase was exceptionally low at [5-10] % while punctuality was exceptionally high at [80-90] %. As a result, volumes on that corridor have been doubled over that period.²⁶

33. Several respondents to the Commission's market investigation provided detailed evidence suggesting that the liberalisation of rail markets has massively decreased rail prices in European rail markets where competition has already occurred. It is also expected that rail freight prices are going to develop relatively favourably due to generally increased transport volumes, road congestion and for environmental reasons. The parties' submissions further confirm this point and show that where customers have the ability to switch to other transport means it is an important element for the outcome of price negotiations. A number of concrete examples for international transport with third countries (to Italy, Germany, Eastern European countries) show that this competitive constraint was currently exerted by the presence of another rail competitor. All these elements are further evidence that, in markets where competition is still weak and where incumbent railway undertakings have a very significant share of the market, the actual substitutability of rail and road might be overestimated by applying a simple SSNIP test without any further qualification.
34. In the present case, there are further indications for a separate rail freight transport market. This results from the different cost structure of transport modes and specific customer needs. The market investigation showed that for certain types of freight transport, rail often has intrinsic advantages.
35. The result of the market investigation indicates that a further distinction may have to be undertaken with respect to different types of transported goods, different volumes and transport distance. Up to the overall capacity limit of a train, increasing the amount of goods is relatively cheap for rail transport. Additional quantities only require more wagons, but not an additional locomotive or additional crew. Also network usage charges do not tend to change significantly if more wagons are added to a particular train. For road freight transport, on the other hand, additional quantities require additional trucks and drivers. Also toll charges increase with the number of trucks used. Economies of scale are therefore much less pronounced in the case of road transport. In economic terms, rail freight transportation involves significant fixed costs but relatively moderate marginal costs. The transport costs per unit for rail therefore decrease significantly in comparison to road.²⁷
36. This is consistent with the parties' own description of the market. MÁV Cargo, for instance, submitted that price reductions are offered if a customer requests the transport of large volumes over a longer period of time, or when the customer can fill wagons in both directions.²⁸ Numerous customers pointed out that rail services are particularly

²⁵ Reply by a respondent of 17.10.2008 to RFI.

²⁶ Reply by a respondent of 17.10.2008 to RFI.

²⁷ Economies of scale in rail freight transport also apply with regard to distance. The transportation of freight over long distances may give railway transport a competitive advantage over road transport for many goods.

²⁸ MÁV Cargo's replies to RFI of 14.10.2008.

suitable for heavy or bulk goods. One private railway firm even considered that for mass goods like steel, coal, chemicals or unpackaged goods, road is on many routes not a serious competitor to rail anymore.²⁹

37. This view is supported by the Hungarian NCA. The latter has in its antitrust decision against MÁV (before the legal separation of MÁV Cargo) concluded that "[...] *the relevant downstream market comprises the Hungarian rail transport services for bulk goods.*"³⁰
38. Moreover, some customers have pointed to particular transport needs or access to infrastructure which would either require or considerably favour rail over road. First, for some products like certain chemicals and other potentially dangerous loads, road is not an option for safety reasons. Secondly, in cases of very large deliveries, capacity constraints arise for road transport, which make it necessary to use all available means of transport. Thirdly, rail is often favoured if the customer has already made large and sunk investments into the railway infrastructure at its industrial premises (i.e., direct access to a rail link and facilities for loading, unloading, transshipment facilities, own wagons etc.). Also, some freight forwarders have reported that, in response to the requests from their clients, for environmental reasons they would give priority to rail if in terms of price and quality, rail would be comparable to road.

(iii) Subdivision of rail freight transport

39. There are indications that rail freight transport services can also be subdivided into *block train* and *single-wagon train services*. Block trains are entire trains running from a single point of origin to a single point of destination. Single-wagon trains are assembled in a marshalling yard in the region of origin, transported to a marshalling yard in the region of destination and disassembled into single-wagon loads for transport to their final destination. According to the notifying party, the provision of single-wagon services requires a more complex organisational structure than the provision of block train services. It requires specific infrastructure such as marshalling yards to allow for the efficient assembly of the individual wagons. In previous decisions, the Commission has not excluded such a subdivision between single-wagon and block train services.³¹
40. The majority of customers and competitors perceive these two types of rail freight transport as not substitutable, and the choice thereof depending mainly on the quantity of goods to be transported.

(iv) Conclusion

41. The market investigation showed that there are strong indications that there is a separate market for rail freight transport and that this market could even be further subdivided into a market for single-wagon and a market for block trains.

²⁹ Similar, though less extreme, replies to RFI of 5.9.2008 were given by a large number of other rail customers.

³⁰ Decision of the Hungarian NCA (GVH) in case Vj-22/2005 of 10 July 2006 against MÁV, as confirmed also by the Metropolitan Court of Budapest (Judgement of 11 January 2008 in case 7.K.34364/2006/16, MÁV Zrt. versus GVH) as an appeal court.

³¹ Case COMP/M.4746 *Deutsche Bahn/EWS*.

42. However, since the transaction as modified by the commitments entered into by the notifying party, in light also of the Declarations of the Republic of Austria and of the Republic of Hungary, would under any alternative product market definition not raise serious doubts as to its compatibility with the common market, the exact market definition can be left open in this case.

2. Geographic Market Definition

43. The notifying party proposes to define the geographic market as one single European (EEA-wide) market.
44. For the geographic market definitions of rail freight services the Commission has previously held that in view of different technical and regulatory requirements the markets not only for domestic but also for international rail freight services tend to be national³², but could become international on certain routes which are part of a corridor³³. Market investigations on rail freight services which tested a possible O&D approach³⁴ distinguishing between short-haul (basically corresponding to national transport) and long-haul (basically corresponding to international transport based on co-operation) destinations rather confirmed that markets still tend to be national.³⁵ In certain situations the Commission also found that a corridor-based approach might best reflect the competitive situation.³⁶
45. The results of the market investigation in the present case are in line with previous Commission decisions. There are indications that the geographic market definition might be different for the different modes of transport. There are still valid reasons that at least the rail freight transport market is still national though it has to be underlined that a recent trend to an EEA-wide market can be observed. The geographic market definition has to be assessed in the light of the only recent market liberalisation in rail freight transport in 2007. Considerable barriers to entry still remain in the Austrian and Hungarian rail freight markets, e.g. Austria and Hungary both require safety licences which can only be obtained by making a significant investment in time and costs. The market investigation confirmed that the incumbents in the Austrian and Hungarian markets, RCA and MÁV Cargo, are currently only active in their respective home markets.
46. The respondents to the market investigation also indicated that there might be a distinct market for cross-border rail freight transport services between Austria and Hungary. Currently, solely GySEV provides cross-border rail services between Austria and

³² Case COMP/M.2905 *Deutsche Bahn/Stinnes*, Case COMP/M.4746 *Deutsche Bahn/EWS*.

³³ Case COMP/M.4746 *Deutsche Bahn/EWS*, Case COMP/M.4786 *Deutsche Bahn / Transfesa*.

³⁴ The O&D approach consists in combining certain points of **O**rigin of transport services with the respective possible points of **D**estination, where each pair of O&D is considered a distinct market from the customers' point of view. See Case No. COMP IV/M.1305 *Eurostar*.

³⁵ Case COMP/M.4294 *Arcelor/SNCF/CFL Cargo*, Case COMP/M.4746 *Deutsche Bahn/EWS*.

³⁶ A corridor-based approach considers that transport services between certain regions are, due to mainly geographical or technical reasons, only offered on one certain route or corridor, where other possible routes are not equally feasible either economically or technically. In that case, each corridor has to be regarded as one distinct geographical market. See e.g. Case COMP/M.3150 *SNCF/Trenitalia* regarding the tunnel of Fréjus between France and Italy.

Hungary without co-operations. RCA and MÁV Cargo do not handle cross-border transport without cooperating with each other or with GySEV (see below VI. B. 3.).

47. Since the transaction as modified by the commitments entered into by the notifying party, in light also of the Declarations of the Republic of Austria and of the Republic of Hungary, would under any alternative geographic market definition not raise serious doubts as to its compatibility with the common market, the exact market definition can be left open in this case.

VI. COMPETITIVE ASSESSMENT

48. The liberalisation of the EEA rail freight market was completed on 1 January 2007. The current case should be seen in this context.
49. On the basis of wider market definitions as provided by the notifying party, i.e. including rail and freight forwarding services there would be only very limited horizontal overlaps but no affected markets.
50. With respect to vertical links between freight forwarding and freight transport, the notifying party submits that RCA is vertically integrated solely in Austria, where it is active both in freight forwarding and in freight transport. The same applies also to MÁV Cargo in the Hungarian market. In other countries, RCA and MÁV Cargo are not active in freight transport.

A. FREIGHT FORWARDING

51. In the freight forwarding market, RCA's main activities are in Austria. Through its subsidiaries, it is also active in Hungary, Slovenia and Slovakia. MÁV Cargo is nearly exclusively active in Hungary, and has very limited activities in Austria, Slovakia and Slovenia. The market share data below consider solely activities in the respective merchant markets, and do not include services provided internally.
52. With respect to the market for freight forwarding and its possible sub-segmentation into land freight forwarding as well as possible further sub-segmentation into national and international (land) freight forwarding, the combined market shares of the new entity would be low (below [0-5]%) considering an EEA-wide market, and below [10-20]% considering narrower national markets in all the respective Member States. It has to be noted that the parties' overlaps are very limited and except for Hungary, the increment due to MÁV Cargo's market share would be minimal less than [0-5%].
53. Only under a narrower market definition, in the submarket of rail freight forwarding on a national geographic scope, would the parties have a combined market share of 15 % or higher in Austria (combined [40-50]%, MÁV Cargo's increment [0-5]%), Slovakia (combined [40-50]%, MÁV Cargo's increment [0-5]%), Slovenia (combined [20-30]%, MÁV Cargo's increment [0-5]%) and Hungary (combined [30-40]%, MÁV Cargo's increment [10-20]%).³⁷ As explained above, MÁV Cargo is basically only active in

³⁷ According to the notifying party, the activities of RCA's subsidiary Raabersped Kft. in Hungary in rail freight forwarding are more developed (and include also orders carried out by MÁV Cargo) than the activities of the subsidiary of MÁV Cargo in this area. This is why the market share of RCA in Hungary is higher than the market share of MÁV Cargo in this sub-market.

Hungary, so the concentration would only lead to a relevant addition of market shares in Hungary.

54. If a further sub-segmentation is undertaken into national and international rail freight forwarding on a national geographic scope, there would be no overlap of the activities of the parties for national rail freight forwarding in the national markets, and, for international rail freight forwarding, the situation would be similar to the situation on the general rail freight forwarding market in the respective Member States. The combined market shares for the international rail freight forwarding markets would be the following: Austria [30-40]% (with MÁV Cargo's increment of [0-5]%), Slovakia [40-50]% (with MÁV Cargo's increment of [0-5]%), Slovenia [30-40]% (with MÁV Cargo's increment of [0-5]%), and Hungary [30-40]% (with MÁV Cargo's increment of [0-5]%).
55. The notifying party submits in this respect that pure rail freight forwarding services should not be considered as having a self-standing position in the market for freight forwarding services, but are a part of the overall freight forwarding services offered.
56. The vast majority of respondents to the market investigation did not express any concerns on the impact of the transaction on the freight forwarding markets. Only a few respondents complained about possible anti-competitive effect of the transaction.
57. The notifying party submits that on the markets for freight forwarding there is intensive competition, as there are a number of other strong national and international competitors both at the EEA level and in the respective Member States acting as competitive constraints. Moreover, according to the notifying party the market entry costs for freight forwarding is low. Large customers can easily develop their own internal freight forwarding departments, which can possibly expand also into the merchant market. The market investigation showed that the vast majority of respondents (both customers and competitors) are not concerned by the proposed merger with respect to freight forwarding. They do not see any significant market barriers to freight forwarding, and do not consider that there would be any specific products and/or routes for which switching would be particularly difficult.
58. In light of the above, any competition concerns in relation to the markets for freight forwarding can thus be excluded under any alternative product and geographic market definition.

B. FREIGHT TRANSPORT

59. MÁV Cargo offers rail freight transport only in Hungary, while RCA provides rail freight transport service only in Austria. Both parties are the respective incumbents with very high market shares in their national markets. For the time being, there seems to be no direct geographic overlap between the rail freight transport activities of the parties.³⁸ Competition concerns therefore possibly arise only with respect to elimination of potential competition. This is also in line with the recent liberalisation of

³⁸ On the basis of wider market definitions as provided by the parties, i.e. including rail and freight forwarding services it would seem that there would be only very limited horizontal overlaps but no affected markets.

the sector, which thus far has not resulted in large-scale entry of operators into each others' markets.

60. For a merger with a potential competitor to raise serious competition concerns, it is in principle necessary to show the following³⁹:

(i) A significant likelihood that the potential competitor would act currently as a significant competitive constraint or that, absent the merger, it would grow into an effective competitive force in the market at stake in the foreseeable future.

(ii) The absence of other potential competitors, having the potential for maintaining sufficient competitive pressure after the merger.

1. Elimination of potential competition in the Hungarian markets for rail freight transport

(i) RCA as potential competitor in the Hungarian markets for rail freight transport

61. Currently RCA is not active on the rail freight transport market in Hungary. As set out above in the market definition, rail freight services are generally provided in two areas: single-wagon train services and block train services.

Single-Wagon Train Services

62. The notifying party submits that RCA cannot be seen as a potential competitor in the area of single-wagon train services. It explains that only incumbents are able to run a comprehensive (nation-wide) single-wagon system for reasons of economies of scale, and that the previous entries into the Hungarian (and Austrian) market were all in the area of block train services.

63. The market for single-wagon services is in general declining across Europe (and often loss-making). The Commission has previously stated that only with regard to certain industrialised areas, it appears to be profitable for new entrants to offer limited single-wagon services.⁴⁰ No precise information on plans for setting up single-wagon services has been identified in the documents provided by RCA, nor did the market investigation show a clear picture thereon.

64. The results of the market investigation confirm the views of the parties that, RCA is currently not a significant competitive constraint for the single-wagon train services in Hungary and that RCA had no specific plans to develop as a competitive force in this market in the foreseeable future in the absence of the merger. For reasons explained below, it can however not be excluded that RCA would grow into an effective competitive force in the market if it were not party to the proposed transaction.

Block Train Services

65. For block train services, the notifying party submits that an entry by RCA into the Hungarian market would not be commercially reasonable. RCA's capacities would not

³⁹ See paragraph 60 of the Guidelines on the assessment of horizontal mergers, OJ 2004, C 31, 05.02.2004, p. 5.

⁴⁰ Case COMP/M.4746 *Deutsche Bahn/EWS*.

be sufficient, it would face additional costs, e.g., through the need for multilingual locomotive drivers and would risk not being able to provide sufficient quality of services. RCA argues that these factors would effectively hinder it from entering the market.

66. However, there are a number of reasons supporting the assumption that with significant likelihood RCA would have entered the Hungarian block train segment absent the merger. RCA has already taken a significant number of major steps necessary to provide cross-border rail freight services and to enter the Hungarian rail freight transport market in the area of block train services. Therefore, it should be considered a potential likely entrant on the Hungarian rail freight market, which would be eliminated through the proposed transaction.⁴¹ In that case the proposed transaction would dispose of a competitive constraint that might otherwise have existed.
67. RCA's strategic documents show its [confidential description of plans for Central and Southeastern Europe]. The fact that RCA is currently entering the Slovenian market (which is much smaller) shows that the claimed difficulties of entering Hungary appear not to be insurmountable.
68. While barriers to entry exist, RCA has already surmounted many if not all of them:
 - (i) RCA has obtained all the necessary licenses and safety certificates for the Hungarian market, for which it has incurred significant costs;
 - (ii) To obtain these certificates, RCA had to demonstrate that it has adequate rolling stock and an adequate number of Hungarian locomotive drivers;
 - (iii) RCA has acquired a significant number of locomotives which are equipped to run on the Hungarian network;
 - (iv) RCA has very successful freight forwarding activities in Hungary, through which it has direct access to a large rail freight customer base.
69. It also has to be noted that ÖBB is already successfully running passenger trains between Budapest and Vienna, apparently without facing any of the problems alleged by the notifying party.
70. The above shows that RCA would have entered the Hungarian block train segment with significant likelihood absent the proposed transaction. This view is also supported by the Hungarian NCA and by the respondents to the market investigation. A majority of the responding customers and freight forwarders have replied that – absent the merger – they consider it likely or very likely that RCA would enter the Hungarian rail freight market.
71. There are several factors which allow the conclusion that RCA would have been likely to become an effective competitive force on the Hungarian market on its own. This is based mainly on RCA's financial resources, the geographic proximity of Austria and Hungary, and the steps it has undertaken to enter other geographically neighbouring markets.

⁴¹ See paragraph 59, second sentence, of the Guidelines on the assessment of horizontal mergers, OJ 2004, C 31, 05.02.2004, p. 5.

72. In addition, the respondents to the market investigation expressed certain dissatisfaction with the quality and price of the services provided currently by MÁV Cargo. A significant number of respondents to the market investigation also believed that the proposed transaction would improve the operations of MÁV Cargo. In principle, the Commission does not exclude that such benefits could arise from the transaction. However, in this case more data would have been required and a more in-depth evaluation of potential efficiencies would have been necessary. RCA can therefore be considered as a potential competitor with a significant likelihood that it would grow into an effective competitive force in the rail freight transport market in the area of block train services in Hungary, absent the merger.

(ii) No other potential entries of third parties into the Hungarian rail freight markets

73. The notifying party submits that there are sufficient actual and potential competitors in the Hungarian rail freight market, and hence sufficient competition pressure. In the last 5 years, a very limited numbers of competitors entered the market. None of these companies have currently higher market shares than [0-5] to [0-5] %, and at least some of them are linked to the incumbent.

74. It has to be noted that according to the market investigation and the Hungarian NCA there is currently almost no competition on the Hungarian rail freight market. Although this situation and MÁV Cargo's reputation as a rather inefficient competitor might have posed an opportunity for an entrant to compete profitably with MÁV Cargo, there have not been any such plans announced by any potential third party entrants. To the knowledge of the Commission, no major European rail road company has planned to enter the Hungarian rail freight transport market so far or has taken the same steps to enter the Hungarian market as RCA has so far procured. GySEV is the only other significant competitor active in the Hungarian rail freight market which has, as explained below (VI. B. 4.), so far refrained from competing with the parties.

75. Hence, no other significant potential entrants could be currently identified for the Hungarian rail freight market. RCA would therefore constitute the most likely entrant in this market, absent the merger.

(iii) Conclusion

76. In light of the above, competition concerns with respect to the removal of a potential competitor in the Hungarian rail freight transport market cannot be ruled out for single-wagon services, and have been identified for block train services. Therefore, the proposed transaction raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

2. Elimination of potential competition in the Austrian markets for rail freight transport

(i) MÁV Cargo as potential competitor in the Austrian markets for rail freight transport

77. Currently, MÁV Cargo is not active on the freight transport market in Austria. In contrast to RCA, MÁV Cargo has not yet taken the same major steps to enter the Austrian market.

Single-Wagon Train Services

78. With respect to single-wagon trains, the notifying party submits that it is very unlikely that MÁV Cargo would enter the market for single-wagon services in Austria due to the high costs of establishing such a network and MÁV Cargo's current financial situation.
79. The statements of the notifying party have been broadly confirmed by the market investigation.

Block Train Services

80. Concerning block train services, the notifying party explains that MÁV Cargo has not intended to enter into block train services in Austria and that MÁV Cargo's financial situation would make a market entry in the area of block train services unlikely.
81. There is no evidence of any concrete plans by MÁV Cargo to enter the Austrian market comparable to RCA's steps taken to grow in neighbouring markets, including Hungary. However, according to MÁV Cargo's own statements, the Austrian market is in the focus of its geographic extension plans and RCA is seen as its greatest rival.⁴² Strategy papers from RCA nevertheless raise a concern as regards the elimination of MÁV Cargo as a potential competitor for the Austrian market, absent the merger. Indeed, according to internal RCA documents, if RCA did not win the bid for MÁV Cargo, it would be likely that an alternative bidder would use MÁV Cargo to enter the Austrian market either directly or through a private railway undertaking in Austria. In fact, RCA even evaluated this danger financially and increased its bid for MÁV Cargo by the corresponding amount in order to prevent the entry in Austria via MÁV Cargo. RCA's own assessment therefore appears to be that entry in Austria would be likely absent the merger via another bidder taking over MÁV Cargo.
82. Although the results of the market investigation seem to confirm the notifying party's statement that currently MÁV Cargo is not in a very likely position to enter the Austrian market, the Austrian NCA, when initially notified with the same transaction, could not exclude serious competition concerns with regard to the elimination of potential competition either and requested an in-depth investigation⁴³.
83. Although a potential entry of MÁV Cargo on its own into the Austrian block train rail freight market segment appears rather unlikely, such potential entry cannot be excluded, should MÁV Cargo be acquired by another European railway company than RCA. In the context of this case, MÁV Cargo can therefore be considered as a potential entrant into the Austrian market.

(ii) No other potential entries of third parties into the Austrian rail freight markets

84. The notifying party submits that there are sufficient actual and potential competitors in the Austrian rail freight market, and hence sufficient competition pressure. According

⁴² http://www.mavcargo.hu/en/mav_cargo/philosophy_2.html as of 17.11.2008.

⁴³ See Annex 0.01/16 to the Form CO, Antrag auf Prüfung BWB of 12.02.2008. However, the procedure before the Austrian NCA had to be stopped due to lack of jurisdiction.

to the notifying party, in the last 5 years, several new competitors with current individual market shares of not more than [0-5] % entered the Austrian market.

85. It has to be noted that there is currently almost no competition on the Austrian rail freight market. While this might pose an opportunity for an entrant to compete profitably with RCA, no entry plans by potential third party entrants could be identified either.
86. GySEV is the only significant potential competitor for the Austrian rail freight market which has, as explained in VI. B. 4. below, so far refrained from competing with the parties. No other potential entrants could be currently identified for the Austrian rail freight market.

(iii) Conclusion

87. In light of the above, competition concerns with respect to the removal of a potential competitor in the Austrian rail freight transport market in the area of block train services have been identified.

3. Competition for cross-border rail freight transport

88. Both RCA and MÁV Cargo provide cross-border rail freight services from Austria to Hungary and vice versa only by cooperating with each other or with GySEV. Such co-operation includes capacity and revenue sharing and basically prevents any competition.
89. Within the co-operation for cross-border rail freight services, each party delivers the transported cargo to the border where the other party takes over the transport.⁴⁴ When cooperating with GySEV, the parties bring the transported cargo to the border of GySEV's rail network, and GySEV brings the cargo within its rail network over the border between Austria and Hungary, and delivers it either to the customer or to the other party for further transport. On its own network GySEV also provides its own cross-border freight transport services. To a limited extent, GySEV may therefore be considered to compete with the two incumbents on cross-border services.
90. The incumbents' co-operation for cross-border rail freight services results from the times when such services were not liberalised in the EU. However, the EU rail freight market was completely opened in 2007. It may therefore be expected that the system of consecutive transportation will be used to a lesser extent as international competition among railway undertakings increases.
91. Absent the proposed transaction and considering the conclusion above on potential competition in the Austrian and the Hungarian markets, both parties appear likely to

⁴⁴ According to the notifying party, the majority of cross-border rail freight transport services in Europe, including Austria and Hungary is organised in the so-called subsequent carrier model, where each involved carrier transports the goods on his domestic rail network and, at the international border, hands it over to the next carrier, who thereby enters into the contract with the customer. All subsequent carriers are thus equal contracting partners of the customer, responsible for the proper carrying out of the entire transport. In the main carrier model, on the contrary, only one provider contracts directly with the customer and subcontracts certain parts of the transport to other carriers. For further detail, see Annex B of the Convention concerning International Carriage by Rail (COTIF), Article 26.

enter also the market for cross-border rail freight transport services between Hungary and Austria.

4. The Role of GySEV

92. GySEV is currently the only rail company providing cross-border rail freight services between Austria and Hungary without co-operation with other rail companies, as it operates within its own cross-border rail network. GySEV is jointly controlled by the Republic of Austria and the Republic of Hungary, which are also the current respective ultimate parents of RCA and MAV Cargo respectively. GySEV strongly focuses (over [90-100] % of the overall activity) on cross-border rail freight transport between Austria and Hungary as it was historically founded to facilitate the cross-border rail transport in the Dual Monarchy of Austria-Hungary. Currently, [60-70]% of the cross-border rail transport between Austria and Hungary is handled by GySEV. In Sopron, GySEV operates a logistics centre with a marshalling yard and a handling terminal and offers all logistics services in relation to freight transport (e.g. warehousing, shipment and transshipment from road to rail traffic, customs clearance, and arrangements for transport) primarily from Western to Eastern and South-Eastern Europe. It is not active in the sector of freight forwarding. GySEV is a bilingual company with all the necessary technical, legal and administrative means to operate both in the Hungarian and in the Austrian markets outside its own rail network. In the past, has it already operated outside of its own rail network (using MÁV's rail network).
93. According to the Hungarian NCA, GySEV has the necessary market knowledge and assets to be a serious competitor to MÁV Cargo in the Hungarian market not only providing block train services but also in the more investment intensive single-wagon services. Also for the Austrian rail freight market, GySEV is seen by the Austrian NCA as the second most important rail freight transport company after RCA with regard to the volume transported⁴⁵.
94. The following structural and contractual links have been identified between RCA/MÁV Cargo and GySEV:
- (i) Participation of GySEV in the acquisition of MÁV Cargo by RCA (including the acquisition of [5-10]% of MÁV Cargo at the closing of the transaction, and a call option for up to [20-30]% plus one share post closing of the transaction)
 - (ii) RCA holds via its 100% subsidiary Spedition Holding GmbH a non-controlling minority shareholding of 5.7% in GySEV.
 - (iii) GySEV has co-operation agreements with the parties⁴⁶ and is essentially not competing outside of its infrastructure with RCA or MÁV Cargo. There were only two exceptions when GySEV used on its own the network of MÁV, the parent company of MÁV Cargo. This underlines the fact that GySEV already has the possibilities to compete in the Hungarian transport market
 - (iv) GySEV and RCA are shareholders of Raabersped Speditionsgesellschaft mbH, and GySEV, RCA and MÁV Cargo hold shareholdings in the following same freight

⁴⁵ See Annex 0.01/16 to the Form CO, Antrag auf Prüfung BWB of 12.02.2008.

⁴⁶ See Annex B8.13 and B8.14 Form CO.

forwarding companies Intercontainer Austria GmbH, Hungarokombi Kft, and Hungaria Intermodal Kft.

(v) GySEV is jointly controlled by the Republic of Austria (33.3% of the shares) and the Republic of Hungary (61 % of the shares), the ultimate parents of RCA and MÁV Cargo respectively. Post-transaction, a strong structural link would remain between the new entity and GySEV via the Republic of Austria as ultimate shareholder in both companies. Moreover, following a capital increase due to infrastructure investments, the shareholding of the Republic of Austria might increase to approximately [30-40]%.

95. Notwithstanding the fact that GySEV would acquire only a [5-10]% non-controlling stake in MÁV Cargo (with a call option to acquire up to [20-30]% plus one share⁴⁷), the transaction still raises competition concerns as it will strengthen GySEV's already strong structural links to both parties, which would further induce GySEV not to act against their interests. The current low interest in competing with the parties due to the existing structural and contractual links might disappear completely after the originally proposed transaction.
96. During the market investigation a number of other competitors raised concerns about the role of GySEV in the proposed transaction. One respondent submitted that if GySEV, with its important terminal in Sopron, would be included in the transaction, the overall economic area of South East Europe would be cut off from Western Europe. It was further submitted that other competitors would have to depend more strongly on GySEV for their transit freight transport through Austria and Hungary. If GySEV would be included in the transaction, even with a minority stake, it would further limit the ability of other European players to enter into the market. Also, the Hungarian NCA expressed concerns about the role of GySEV in the transaction.
97. In light of the above, GySEV cannot be seen as a viable competitor pre-merger and its incentive to compete with the merged entity in the Hungarian, Austrian as well as in the Hungarian and Austrian cross-border markets, would be further diminished post-merger. The proposed transaction might also lead to competition concerns in a market for cross-border transport between Austria and Hungary, as not only would the proposed transaction reduce the number of possible entrants, but it would also strengthen the already strong links between the new entity and GySEV as the only active actual market participant. Therefore, the proposed transaction raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

5. Foreclosure

98. Some respondents to the market investigation have raised concerns that the merged entity would own a number of essential facilities (terminals, border controls, wagon facilities). In addition, the Austrian rail network is owned by RCA's parent company. Concerns have been raised that this may lead to foreclosure of competitors of the merged entity.

⁴⁷ As indicated in paragraph 6 above, exerting the option would give GySEV certain veto rights which could be considered as giving it joint control over MAV Cargo.

99. It is not obvious why these concerns would be transaction-specific, as MÁV Cargo and RCA own these facilities already now; and it is not clear that their incentive to foreclose would be affected by the transaction.

6. Conclusion

100. Competition concerns have been identified with respect to the removal of the respective most likely new entrant in each of the parties' domestic rail freight markets through the proposed transaction as well as with respect to GySEV's involvement in the transaction, which is likely to weaken any incentive GySEV might have had prior to the transaction to effectively compete with the new entity. Therefore, in light of the above, the proposed transaction raises serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

VII. FACTS CONTAINED IN THE DECLARATIONS OF THE REPUBLIC OF AUSTRIA AND OF THE REPUBLIC OF HUNGARY

101. On 4 November 2008 Declarations of the Austrian Minister of Transport on behalf of the Republic of Austria and of the Hungarian Minister of Transport on behalf of the Republic of Hungary, respectively, were communicated to the Commission ("Final Declarations"). These Final Declarations contain: the facts included in the above mentioned Declarations of 6 and 7 October 2008 as well as amendments to these facts.
102. The facts included in the Final Declarations are based on the joint firm intentions of both countries as the ultimate shareholders of the parties to the transaction and of GySEV, and relate to the following issues:
- (i) Changing the ownership structure in the merged entity in such a way that GySEV will no longer acquire any shares in MÁV Cargo;
 - (ii) Procuring a review and, if necessary, modification of the co-operation agreements between RCA/MÁV Cargo and GySEV;
 - (iii) Procuring the acquisition by RCA of GySEV's shareholdings in 6 freight forwarding and rail terminal companies with common shareholdings of RCA and/or MÁV Cargo and GySEV;
 - (iv) Diminishing the influence of the Republic of Austria over GySEV's cargo business via (a) amendment of the Articles of Association and the current Syndicate Agreement in such a way that the voting rights of the Republic of Austria with respect to GySEV's cargo operations would not go beyond the statutory minority rights of a minority shareholder in GySEV under Hungarian law; and (b) the re-organisation of GySEV's cargo business as a separate legal entity, in which the Republic of Austria is not represented by board members.
103. In addition, the Republic of Austria declares two further facts: (a) it will use its shareholders rights to procure that RCA sells its minority shareholding in GySEV; and (b) it will not extend its existing shareholding in GySEV beyond a minority shareholding of more than [30-40]% for as long as GySEV or any of its subsidiaries carry out cargo activities.
104. Together with the commitments described in Section VIII below, the measures declared by the Republic of Austria and by the Republic of Hungary address the structural and contractual links identified above, except for the indirect structural link via the Republic of

Austria as ultimate shareholder of RCA and GySEV, which will remain and will increase to approximately [30-40]%.

105. The Commission has taken note of these Final Declarations, which form an integral part of the factual elements taken into account in its assessment and of the commitments offered by RCA.

VIII. COMMITMENTS

A. COMMITMENTS OF 22 SEPTEMBER 2008

106. In order to remove potential competition concerns arising from the proposed transaction, RCA has submitted commitments under Article 6(2) of the EC Merger Regulation on 22 September 2008.
107. These commitments consisted in the divestment of RCA's non-controlling [5-10]% stake in GySEV. In addition, RCA committed to use its best endeavours to procure that GySEV agrees to:
- (i) sell its [5-10]% shareholding in MÁV Cargo at the completion of the transaction;
 - (ii) to sell all shares transferred as a result of employee share offering; and
 - (iii) not to acquire any further shares in MÁV Cargo for a period of [...] years following the decision.
108. The evaluation of the proposed commitments, in the light of the First Declarations of 6 and 7 October 2008 showed that they would not address all the competition concerns identified in connection with the structural and contractual links of the new entity to GySEV. Therefore, no market test of these commitments was carried out.

B. COMMITMENTS OF 4 NOVEMBER 2008

109. On 4 November 2008, the final version of the commitments was submitted to the Commission⁴⁸. With these commitments, the notifying party aims to remove the serious doubts which the merger would otherwise raise. The commitments shall be considered in the light of the above outlined Final Declarations of the Republic of Austria and the Republic of Hungary of 4 November 2008. These final commitments were market tested in the context of the Final Declarations. The detailed text of the commitments is annexed to the present decision and forms an integral part of thereof.

1. Description of the Commitments

110. The commitments are designed to strengthen GySEV as a potential competitive constraint on the merged entity by removing structural and contractual links between GySEV and the merged entity.
111. RCA proposes the following commitments:

⁴⁸ The commitments were slightly refined in respect of the reporting procedure by the notifying party's submission from 20.11.2008.

- (i) Divest its 5.7% minority shareholding held by its subsidiary Speditions Holding in GySEV;
 - (ii) Procure that GySEV exits from the acquisition transaction of MÁV Cargo (This includes (a) selling to RCA the [5-10]% interest GySEV would acquire in MÁV Cargo at closing of the transaction; (b) selling any shares in MÁV Cargo transferred to GySEV as a result of the employee share offering; and (c) not acquiring any further shares in MÁV Cargo.);
 - (iii) Review and, if necessary, modify co-operation agreements between RCA/MÁV Cargo and GySEV; and
 - (iv) Acquire GySEV's shareholdings in the 6 freight forwarding and terminal companies with common shareholdings of RCA and/or MÁV Cargo and GySEV.
112. The commitments (i) and (iii) shall be carried out within the divestiture period. The two remaining commitments, (ii) and (iv), have to be fulfilled prior to the closing of the MÁV Cargo transaction. In addition, RCA commits not to acquire control over MÁV Cargo prior to the amendment to the Articles of Association of GySEV by the Republic of Austria and the Republic of Hungary in their capacity as GySEV's shareholders, as described in their final Declarations.

2. Assessment of the Commitments

113. As explained in the Commission notice on remedies⁴⁹, the Commission assesses whether the commitments submitted by the notifying party resolve the competition concerns raised by the transaction. In assessing whether or not the commitments will restore effective competition, the Commission considers the type, scale and scope of the commitments by reference to the structure and particular characteristics of the market in which competition concerns arise.
114. The commitment package as submitted by RCA on 4 November 2008 addressed, together with the Declarations of the Republic of Austria and the Republic of Hungary of the same day, the competition concerns identified with respect to the structural and contractual links between RCA/MÁV Cargo and their potential competitor GySEV. In order to ensure that GySEV will in the future operate independently from the parties and effectively compete with them, the following commitments are – in light of the facts declared by the Republic of Austria and of the Republic of Hungary – considered necessary:

(i) Divestiture of RCA minority shareholding in GySEV

115. Through the divestiture of its 5.7% shareholding in GySEV, RCA's direct link (via its subsidiary Speditions Holding GmbH) to GySEV will be removed as one of the structural links between RCA/MÁV Cargo and GySEV. The market test confirmed that this commitment is necessary for the removal of the competition concerns identified. The divestiture of this minority shareholding is suitable as part of the remedy for the concerns identified which are caused by the current structural links. GySEV also sees

⁴⁹ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("2008 Remedy Notice"), OJ C 267, 22.10.2008, p. 1.

this commitment as necessary to establish GySEV as an independent competitor and to make GySEV attractive for other strategic investors⁵⁰.

(ii) Procurement of GySEV's exit from the MÁV Cargo acquisition transaction

116. The complete exit of GySEV from the MÁV Cargo acquisition transaction will remove another structural link between RCA/MÁV Cargo and GySEV. The exit will enable GySEV to start its own strategy for its independent future development as a competitive constraint on the merged entity. This has been confirmed by the majority of respondents (including GySEV) to the market test. Hence, this commitment is suitable for the removal of the competition concerns identified in this respect.

(iii) Review of co-operation agreements

117. The current co-operation agreements have been *prima facie* reviewed by the Commission for any elements (a) going beyond what would be reasonably necessary for the provision of seamless rail freight transport; and (b) being more advantageous terms than in equivalent agreements concluded by RCA with other undertakings in the ordinary course of dealing. In this review, certain joint administrative services (e.g. joint billing, joint marketing) have been identified as potential areas of competition concern.

118. GySEV confirmed that joint marketing and billing is carried out for cross-border transport, which these companies are providing jointly (GySEV with RCA or MÁV Cargo). This procedure would correspond to the standard procedures used for cross-border transport as set out in the international conventions⁵¹ regulating this area. GySEV further explained that it could do itself the billing and marketing for transport services provided without the participation of RCA or MÁV Cargo, as they are not dependent upon RCA and MÁV Cargo in this respect.

119. Therefore, an obligation has been included in the current commitments that the co-operation agreements between RCA/MÁV Cargo and GySEV shall in particular not include any provisions with respect to invoicing and administrative services to GySEV for rail freight transport services when RCA/MÁV Cargo is not partner for these services, or where they provide solely ancillary services (e.g. terminal services) to rail freight transport.

120. No further concerns have been identified in this *prima facie* review. However, a close scrutiny of the co-operation agreements by the notifying party to identify any elements listed above (going beyond provisions necessary for seamless cross-border rail freight transport, or including more advantageous terms than in other comparable agreements) shall still be carried out as set out in both the commitments and the Declarations.

121. The respondents to the market test indicated that they consider the review and potential modification of the co-operation agreements as a remedy addressing the identified

⁵⁰ GySEV's replies to RFI of 6.11.2008.

⁵¹ For further detail, see Annex B of the Convention concerning International Carriage by Rail (COTIF), Article 26.

potential competition concerns consisting in the contractual links between RCA/MÁV Cargo and GySEV.

122. This commitment can therefore be considered as suitable for the removal of the potential competition concerns identified in this respect.

(iv) Acquisition of GySEV's shareholdings in 6 freight forwarding and rail terminal companies

123. The acquisition by RCA/MÁV Cargo of GySEV's shareholdings in 4 freight forwarding and in 2 rail terminal companies, in which both RCA and/or MÁV Cargo and GySEV have shareholdings, will remove another structural link between RCA/MÁV Cargo and GySEV. The respondents to the market test consider this commitment as necessary for the removal of the competition concerns identified. GySEV itself states that it considers the divestures of its minority shareholdings not only necessary to sever another structural link with RCA and/or MÁV Cargo but also as economically and strategically reasonable in order to have the means to make necessary investments⁵². This commitment can be considered suitable for the removal of this structural link between RCA/MÁV Cargo and GySEV.

(v) Not closing before a change of the Articles of Association of GySEV

124. While keeping shareholdings in GySEV, the Republic of Austria and the Republic of Hungary have declared to amend the Articles of Association of GySEV in such a way that they will prevent the Republic of Austria from having more than only the statutory minority rights over GySEV's cargo operations which will be subsequently organised as a separate legal entity in which the Republic of Austria shall not appoint any representatives to the board. RCA has committed not to close the notified transaction before this declaration takes actual effect. In the specific circumstances of this case, this measure is sufficient to ensure GySEV's independence from the merging parties. While minority shareholdings in general create links which have a tendency to reduce competitive incentives between the companies in question, it should be noted that in this case the link between the parties is created by a state. In line with the Commission's constant practice, such companies – even if controlled by the same state – would only under specific circumstances be considered as one group which shows that this link has to be regarded as weaker than would be the case, for example, for a direct cross-shareholding between the merged entity and GySEV. The limitation of the Republic of Austria's rights in GySEV and the separation of GySEV's cargo business therefore ensure that GySEV and RCA will operate as distinct economic units and allow for an effective dissolution of the only remaining link between the merging parties and GySEV.

3. Conclusion

125. The Commission has assessed the revised commitments and considers that they are suitable to remove all competition concerns identified. The market test of the commitments showed that the respondents consider the commitments as a whole sufficient to eliminate the potential competition concerns identified, and that through the removal of the structural and contractual links, GySEV will have the ability and

⁵² GySEV's replies to RFI of 6.11.2008.

incentive to develop as an independent entity and a competitive constraint on the new entity.

126. The fulfilment of these commitments is partly depending on the behaviour of third parties. The above stated up-front solutions allow the Commission to conclude with the requisite degree of certainty that the commitments will be implemented, as such a solution creates greater incentives for the parties to fulfil the commitments in order to complete their proposed transaction⁵³.
127. The Commission therefore concludes that the final commitments as submitted on 4 November 2008, in light also of the Final Declarations of the Republic of Austria and the Republic of Hungary, are suitable to remove the serious doubts on the compatibility of the proposed transaction with the common market and the EEA Agreement, which have been established in the previous sections of this Decision.

C. CONDITIONS AND OBLIGATIONS

128. Under the first sentence of the second subparagraph of Article 6(2) of the EC Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
129. The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's Decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance Decision in accordance with Article 6(3) of the EC Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the EC Merger Regulation. In accordance with the basic distinction described above, the Decision in this case is conditioned on the full compliance with the Sections B (except sub-sections III to VIII), C (except paragraph 16), E and F of the commitments submitted by the notifying party on 4 November 2008.
130. The remaining requirements set out in the other Sections of the Commitments submitted by the notifying party on 4 November 2008 constitute obligations.

IX. CONCLUSION

131. The Commission concludes that the revised commitments are sufficient to address the competition concerns raised by the present transaction. Therefore, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) and Article 6(2) of Council Regulation (EC) No 139/2004

⁵³ Compare paragraph 54 of the 2008 Remedy Notice, OJ C 267, 22.10.2008, p. 1.

For the Commission
(Signed)

Neelie KROES
Member of the Commission

20 November, 2008

By fax: 00 32 2 296 4301

Contains Business Secrets

European Commission
DG Competition
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Case COMP/M.5096 – RCA/MÁV CARGO

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), RCA hereby provides the following commitments (“**Commitments**”) in order to enable the European Commission (“**Commission**”) to declare the acquisition of [90-100]% of the shares plus one share in MÁV Cargo by RCA in Phase I (the “**Transaction**”) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the “**Decision**”).

These Commitments shall take effect on the date of adoption of the Decision.

This text shall be interpreted in light of the Decision to the extent that the Commitments are attached as conditions and/or obligations, in particular in light of: the Merger Regulation; the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98; and the general framework of Community law.

Section A

Definitions

For the purpose of these Commitments, the following terms shall have the following meanings:

Affiliated Undertakings: undertakings controlled by the Parties and/or the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3, Merger Regulation, and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

Closing: the closing of the Transaction (i.e. transfer of legal title of [90-100]% of the shares plus one share in MÁV Cargo to RCA).

Commitments: all obligations, conditions and duties assumed in this document.

Consortium Agreement: the agreement in relation to the Transaction concluded on 18 October, 2007, between RCA and GySEV/Raaberbahn (Annex 1.01 of the notification).

Declaration of Austria: the declarations of the Republic of Austria attached as Annex A.

Declaration of Hungary: the declaration of the Republic of Hungary attached as Annex B.

Divestment Business: means the Minority Interest that the Parties commit to divest.

Divestiture Trustee(s): one or more natural or legal persons, independent of RCA, MÁV Cargo and their Affiliated Undertakings, such person(s) being, pursuant to the qualifications set out below: appointed by RCA and approved by the Commission; and having received from RCA the exclusive Trustee Mandate to sell the Minority Interest to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: the period of [...] months beginning on the Effective Date.

Freight Forwarding Acquisition Interests: shall mean GySEV/Raaberbahn's interest in

- (a) Raabersped Speditionsgesellschaft m.b.H., Wohllebengasse 18, 1040 Vienna, amounting to 25% plus one share of the total capital; and
- (b) Intercontainer Austria GmbH, Wohllebengasse 18, 1040 Vienna, amounting to [10-20]% of the total shares; and
- (c) Hungarokombi Kft, Népfürdő u 22, HU – 1138 Budapest, amounting to [10-20]% of the total capital; and
- (d) Hungaria Intermodal Kft, Europa u 4, HU – 1239 Budapest, amounting to 10 % of the total capital; and
- (e) Logisztár Kft., Vásárhelyi út 7, HU-8000 Székesfehérvár amounting to [10-20]% of the total capital;
- (f) Bilk Kombiterminal Zrt, Európa u. 4, HU-1239 Budapest amounting to [10-20]% of the total capital.

GySEV/Raaberbahn: Győr-Sopron-Ebenfurti-Vasút Zrt, incorporated under the laws of Hungary with its registered seat at 9400 Sopron, Mátyás király u. 19, Hungary, registered under registration number Cg. 08-10-001787, including all undertakings under its control.

GySEV Interest: the [...] shares in MÁV Cargo that GySEV/Raaberbahn is to acquire upon Closing pursuant to the terms and conditions of the Share Purchase Agreement.

Hold Separate Manager: the person appointed by RCA to manage the Divestiture Business under the supervision of the Monitoring Trustee.

Indemnified Party: shall have the meaning given in Section 38.

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business.

MÁV Cargo: MÁV Cargo Árufuvarozási Zártkörűen Működő Részvénytársaság, incorporated under the laws of Hungary with its registered seat at Váci út 92, 1133 Budapest, Hungary, registered under registration number Cg. 01-10-045318, including all undertakings under its control.

Minority Interest: The entire shareholding held by Speditions Holding in GySEV/Raaberbahn at the Effective Date (consisting of [...] shares in GySEV/Raaberbahn and a corresponding share capital in the amount of [...] translating into approximately [5-10]% of the entire share capital of GySEV/Raaberbahn) that the Parties commit to divest.

Monitoring Trustee(s): one or more natural or legal persons, independent of RCA, MÁV Cargo and their Affiliated Undertakings, such person(s) being, pursuant to the qualifications set out below: appointed by RCA; approved by the Commission; and under a duty to monitor the compliance of the Parties with these Commitments.

Parties: RCA and MÁV Cargo.

Personnel: all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business and shared personnel.

Pre-Emption Rights: [Description of pre-emption rights to the Minority Interest]

Purchaser(s): the entity/ies approved by the Commission as acquirer(s) of the Divestment Business in accordance with the criteria set out in paragraph 13.

Purchaser Requirements: shall have the meaning given in paragraph 13.

RCA: Rail Cargo Austria AG, incorporated under the laws of Austria, with its registered office at Erdberger Lände 40-48, 1030 Wien, Österreich, and registered with the commercial court of Vienna under FN 248731g, including all undertakings under its control. For the avoidance of doubt, upon Closing this shall include all undertakings that come under the control of RCA upon Closing. For the purposes of this definition the notion of control shall be interpreted pursuant to Article 3, Merger Regulation, and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

Second Share Purchase Agreement: a share purchase agreement to be concluded between RCA and GySEV/Raaberbahn, according to which

- RCA purchases from GySEV/Raaberbahn the GySEV Interest in MÁV Cargo for the same purchase price to be paid by GySEV/Raaberbahn under the Share Purchase Agreement;
- the Consortium Agreement, containing, inter alia, the call option of GySEV/Raaberbahn to acquire up to [20-30]% of the shares in MÁV Cargo plus one share shall be deemed terminated;
- GySEV/Raaberbahn shall not acquire any further shares in MÁV Cargo or RCA, if any, for a period of [...] years following the Effective Date and shall not, at any time, exercise any shareholder rights in MÁV Cargo;

Share Purchase Agreement: the agreement for the sale and purchase of [90-100]% of the shares in MÁV Cargo plus one share in MÁV Cargo, concluded on 2 January, 2008, among MÁV Magyar Államvasutak Zártkörűen Működő Részvénytársaság, MÁV Vagyonkezelő Zártkörűen Működő Részvénytársaság, RCA and GySEV/Raaberbahn.

Speditions Holding: Speditions Holding GmbH, a wholly-owned subsidiary of RCA, incorporated under the laws of Austria, with its registered office at Wohllebengasse 18, 1040 Vienna, Austria, registered with the commercial court of Vienna under FN 178940.

Trustee(s): the Monitoring Trustee(s) and the Divestiture Trustee(s).

Trustee Divestiture Period: the period of [...] months beginning with the expiry of the First Divestiture Period.

Section B

Commitments relating to the divestiture by RCA of the Minority Interest

I. Commitment to divest

1. In order to restore effective competition, RCA commits to divest, or procure the divestiture of the Minority Interest by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 14. To carry out the divestiture, RCA commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Minority Interest within the First Divestiture Period.
2. If RCA has not entered into such an agreement at the end of the First Divestiture Period, RCA shall grant the Divestiture Trustee an exclusive mandate to sell the Minority Interest in the Trustee Divestiture Period in accordance with the procedure described in paragraph 34 [Description of pre-emption rights to the Minority Interest].
3. RCA shall be deemed to have complied with this commitment if:
 - (a) by the end of the Trustee Divestiture Period, RCA has entered into a final, binding sale and purchase agreement; *and*
 - (b) the Commission approves the proposed purchaser and the terms of such agreement in accordance with the procedure described in paragraph 14; *and*
 - (c) the closing of the sale of the Minority Interest takes place within [...] months of the approval of the purchaser and the terms of sale by the Commission.
4. In order to maintain the structural effect of the Commitments, RCA shall, for a period of [...] years after the Effective Date, not acquire direct or indirect influence over the whole or part of GySEV/Raaberbahn, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over GySEV/Raaberbahn is no longer necessary to render the Transaction compatible with the common market.

II. Structure and definition of the Minority Interest

5. The Minority Interest consists of the entire shareholding held by Speditions Holding in GySEV/Raaberbahn at the Effective Date (consisting of [...] shares in GySEV/Raaberbahn and a corresponding share capital in the amount of [...] translating into approximately [5-10]% of the entire share capital).

III. Preservation of Viability, Marketability and Competitiveness

6. From the Effective Date until the closing of the divestiture of the Minority Interest, RCA shall, as far as possible, preserve the economic viability, marketability and competitiveness of GySEV/Raaberbahn, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of GySEV/Raaberbahn. In particular RCA undertakes, as far as possible:
 - (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of GySEV/Raaberbahn or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of GySEV/Raaberbahn;
 - (b) to make available sufficient resources for the development of GySEV/Raaberbahn, on the basis and continuation of the existing business plans;
 - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with GySEV/Raaberbahn.

IV. Hold-separate obligations

7. RCA commits, from the Effective Date until closing of the divestiture of the Minority Interest, to keep the Minority Interest separate from the businesses it is retaining and to ensure that Key Personnel of GySEV/Raaberbahn have no involvement in any business retained by RCA and vice versa. RCA shall also ensure that the Personnel does not report to RCA.
8. Until closing of the divestiture of the Minority Interest, RCA shall assist the Monitoring Trustee in ensuring that the Minority Interest is managed as a distinct and saleable asset separate from the businesses retained by the Parties. RCA shall appoint a Hold Separate Manager who shall be responsible for the management of

the Minority Interest, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Minority Interest independently and in the best interest of GySEV/Raaberbahn with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

9. To ensure that GySEV/Raaberbahn is held and managed as a separate entity the Monitoring Trustee shall exercise RCA's rights as shareholder in GySEV/Raaberbahn (except for its rights for dividends that are due before closing of the divestiture of the Minority Interest), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling RCA's obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or the directors of the board of directors, who have been appointed on behalf of RCA. Upon request of the Monitoring Trustee, RCA shall cause such members of the boards to resign.

V. Ring-fencing

10. RCA shall implement all necessary measures to ensure that it does not, after the Effective Date, obtain any business secrets, know-how, commercial information or any other information of a confidential or proprietary nature relating to GySEV/Raaberbahn. In particular, the participation of GySEV/Raaberbahn in a central information technology network shall be severed to the extent possible, without compromising the viability of GySEV/Raaberbahn, RCA may obtain information relating to GySEV/Raaberbahn which is reasonably necessary for the divestiture of the Minority Interest or whose disclosure to RCA is required by law.

VI. Non-solicitation clause

11. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel of GySEV/Raaberbahn for a period of [...] months after Closing.

VII. Due Diligence

12. In order to enable potential purchasers to carry out a reasonable due diligence of the Minority Interest, RCA shall, as far as possible, subject to customary confidentiality assurances and dependent on the stage of the divestiture process
 - (a) provide to potential purchasers sufficient information as regards the Minority Interest;

- (b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

VIII. Purchaser

- 13. In order to ensure the immediate restoration of effective competition, the Purchaser(s) of the Minority Interest, in order to be approved by the Commission, must:
 - (a) be one or more of the holders of the Pre-Emption Rights other than [...]; or
 - (b)
 - (i) be independent of and unconnected to the Parties;
 - (ii) have the financial resources, proven expertise and incentive to maintain and develop GySEV/Raaberbahn as a viable and active competitive force in competition with the Parties and other competitors; and
 - (iii) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals (if any) from the relevant regulatory authorities for the acquisition of the Minority Interest.

These criteria are hereafter referred to as the “**Purchaser Requirements**”.

- 14. The final and binding sale and purchase agreement shall be conditional on the Commission’s approval. When RCA has reached an agreement with a proposed purchaser(s), it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. RCA must be able to demonstrate to the Commission that the purchaser(s) meet(s) the Purchaser Requirements and that the Minority Interest is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser(s) fulfil(s) the Purchaser Requirements and that the Minority Interest is being sold in a manner consistent with the Commitments.
- 15. The Commission may approve the sale of the Minority Interest to more than one purchaser if the sale is otherwise consistent with these Commitments.

Section C

Commitments relating to the GySEV Interest in MÁV Cargo

16. According to the Declaration of Austria and the Declaration of Hungary, each of the Republic of Hungary and the Republic of Austria committed, in order to enable the Commission to declare the Transaction compatible with the common market and the EEA Agreement by the Decision, to exercise its shareholder rights in GySEV/Raaberbahn and the Republic of Austria committed to exercise its shareholder rights as sole indirect owner of RCA such that GySEV/Raaberbahn and RCA shall conclude the Second Share Purchase Agreement according to which
- (a) RCA purchases from GySEV/Raaberbahn the GySEV Interest in MÁV Cargo for the same purchase price to be paid by GySEV/Raaberbahn under the Share Purchase Agreement;
 - (b) the Consortium Agreement, containing, inter alia, the call option of GySEV/Raaberbahn to acquire [20-30]% of the shares in MÁV Cargo plus one share shall be terminated; and
 - (c) GySEV shall not acquire any further shares in MÁV Cargo or RCA for a period of [...] years following the date of the Decision and shall not, at any time, exercise any shareholder rights in MÁV Cargo.
17. RCA commits to procure that GySEV/Raaberbahn
- (a) divests its shareholdings in MÁV Cargo; and
 - (b) cancels its call option to acquire up to [20-30]% of the shares in MÁV Cargo plus one share

within [...] months as of the Effective Date as set out in the Declaration of Hungary and the Declaration of Austria. For this purpose, RCA commits to conclude within [...] months as of the Effective Date the Second Share Purchase Agreement in order to buy the shares that GySEV/Raaberbahn holds in MÁV Cargo and will, corresponding to the Declarations of Austria and The Declaration of Hungary, sell to RCA.

18. RCA commits not to acquire control over MÁV Cargo prior to the fulfilment of the following parts of the Declaration of Austria and the Declaration of Hungary:
- (i) the conclusion of a binding sales and purchase agreement by which RCA purchases from GySEV for the same purchase price to be paid by GySEV as part of the Transaction the entire interest of GySEV in MÁV Cargo; the closing of such [5-10]% divestment should take place within the indicated [...] months; and
 - (ii) the conclusion of a binding agreement between RCA and GySEV terminating the Consortium Agreement which contains the call option of GySEV to acquire up to [20-30]% plus one share in MAV Cargo.

Section D

Commitments relating to cooperation agreements

19. RCA commits that it shall, for a period of [...] years beginning on the Effective Date, conclude with GySEV/Raaberbahn no agreement relating to cooperation in rail freight transport between RCA and GySEV/Raaberbahn except to the extent that such agreements are:
- (a) reasonably necessary to ensure the provision of seamless rail freight transport; *and*
 - (b) concluded on terms no more advantageous than such agreements of equivalent scope and purpose as are routinely concluded by RCA with other undertakings - including, in particular and where applicable, privately-owned undertakings - in the ordinary course of dealing.
20. RCA commits that during the First Divestiture Period it shall amend, or procure the amendment of, all agreements relating to cooperation in rail freight between RCA and GySEV/Raaberbahn, such that upon the expiry of the First Divestiture Period RCA shall be a party to no such agreements except to the extent that such agreements:
- (a) are reasonably necessary to ensure the provision of seamless rail freight transport; and

- (b) are concluded on terms no more advantageous than such agreements of equivalent scope and purpose as are routinely concluded by RCA with other undertakings - including, in particular and where applicable, privately-owned undertakings - in the ordinary course of dealing; and

- (c) in particular, do not provide for any invoicing and administrative services to GySEV/Raaberbahn for rail freight transport services when RCA/MÁV Cargo is not partner in the provision of the rail freight transport services, or where RCA/MÁV Cargo solely provide ancillary services (e.g. terminal services) to rail freight transport.

In case that GySEV/Raaberbahn does not accept such amendment within [...] months as of the Effective Date, RCA commits to terminate the relevant contracts at the earliest possible date provided for under such agreements.

Section E

Commitments relating to RCA's acquisition of the Freight Forwarding Acquisition Interests

21. RCA commits to sign binding sale and purchase agreements to acquire or procure the acquisition of, the Freight Forwarding Acquisition Interests within [...] months as of the Effective Date for the fair purchase price already agreed by RCA and GySEV/Raaberbahn subject to the existing pre-emption rights in relation to such companies.
22. RCA commits not to acquire control over MÁV Cargo prior to the fulfilment of the commitment under clause 21.

Section F

Further upfront commitment of RCA

23. In addition to its above upfront commitments
- (i) under section 18 pursuant to which RCA commits not to acquire control over MÁV Cargo prior to the fulfilment of the following parts of the Declaration of Austria and the Declaration of Hungary:
 - (a) the conclusion of a binding sales and purchase agreement by which RCA purchases from GySEV for the same purchase price to be paid by GySEV/Raaberbahn as part of the Transaction the entire interest of GySEV in MÁV Cargo; the closing of such [5-10]% divestment should take place within [...] months as of the Effective Date; and
 - (b) the conclusion of a binding agreement between RCA and GySEV terminating the Consortium Agreement which contains the call option of GySEV to acquire up to [20-30]% plus one share in MÁV Cargo; and
 - (ii) under section 22 pursuant to which RCA commits not to acquire control over MÁV Cargo before having signed a binding sale and purchase agreements to acquire or procure the acquisition of, the Freight Forwarding Acquisition Interests within [...] months as of the Effective Date for the fair purchase price already agreed by the RCA and GySEV/Raaberbahn subject to the existing pre-emption rights in relation to such companies;

RCA commits not to acquire control over MÁV Cargo for as long as section B.2 of the Declaration of the Republic of Austria and section 4.a) of the Republic of Hungary is not implemented as follows: the respective shareholder resolution of GySEV/Raaberbahn to amend the articles of association accordingly has been passed and filed with the commercial register in Hungary.

Section G

Trustees

I. Reporting

24. RCA shall submit written reports in German on the fulfilment and/or the progress of the Commitments provided for herein to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
25. In particular, the Parties shall inform the Commission and the Monitoring Trustee on the progress of the divestiture process (including information regarding potential purchasers of the Minority Interest and/or developments in negotiations with such potential purchasers), the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

II. Appointment Procedure

26. RCA shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee. If RCA has not entered into a binding sale and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by RCA at that time or thereafter, RCA shall appoint a Divestiture Trustee to carry out the functions specified in these Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Trustee Divestiture Period.
27. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by RCA in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

28. No later than two weeks after the Effective Date, RCA shall submit a list of one or more persons whom RCA proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, RCA shall submit a list of one or more persons whom RCA proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 27 and shall include:
- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
 - (b) the outline of a work plan which describes how the proposed Trustee intends to carry out its assigned tasks;
 - (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

29. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, RCA shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, RCA shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by the Parties

30. If all the proposed Trustees are rejected, RCA shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 26 and 29.

Trustee nominated by the Commission

31. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom RCA shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

32. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or RCA, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

33. The Monitoring Trustee shall:
 - (a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
 - (b) as far as possible oversee the on-going management of the Divestment Business with a view to ensuring GySEV/Raaberbahn's continued economic viability, marketability and competitiveness and monitor compliance by RCA with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall, as far as possible:
 - (i) monitor the preservation of the economic viability, marketability and competitiveness of GySEV/Raaberbahn, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 6 and 7 of the Commitments;
 - (ii) supervise the management of GySEV as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
 - (iii) (aa) in consultation with RCA, determine all necessary measures to ensure that RCA does not after the Effective Date obtain any business

secrets, knowhow, commercial information, or any other information of a confidential or proprietary nature relating to GySEV/Raaberbahn, in particular strive for the severing of GySEV/Raaberbahn's participation in a central information technology network to the extent possible, without compromising the viability of GySEV/Raaberbahn, and (bb) decide whether such information may be disclosed to RCA as the disclosure is reasonably necessary to allow RCA to carry out the divestiture or as the disclosure is required by law.

- (iv) monitor the splitting, if any, of assets and the allocation of Personnel between GySEV/Raaberbahn and RCA or Affiliated Undertakings;
- (c) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (d) propose to RCA such measures as the Monitoring Trustee considers necessary to ensure RCA's compliance with the conditions and obligations attached to the Decision, in particular the non-disclosure of competitively sensitive information;
- (e) propose to RCA such measures as the Monitoring Trustee considers necessary to ensure RCA's compliance with the conditions and obligations attached to the Decision, in particular and as far as possible the maintenance of the full economic viability, marketability or competitiveness of GySEV/Raaberbahn, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- (f) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, potential purchasers receive sufficient information relating to the Divestment Business in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process;
- (g) provide to the Commission, sending RCA a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall allow the Commission to assess the compliance with the Commitments provided for herein, in particular whether the Minority Interest is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the

Commission, sending RCA a non-confidential copy at the same time, if it concludes on reasonable grounds that RCA is failing to comply with these Commitments;

- (h) within one week after receipt of the documented proposal referred to above, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of GySEV/Raaberbahn after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision.

Duties and obligations of the Divestiture Trustee

- 34. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 14. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the relevant sale and purchase agreement(s) such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of RCA, subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 35. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in German on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

- 36. RCA shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of RCA's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and RCA shall provide the Trustee upon request with copies of any document in RCA's possession. RCA shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

37. RCA shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. RCA shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers. RCA shall in particular give the Monitoring Trustee access to all data room documentation, if any, and all other information granted to potential purchasers in the due diligence procedure, if any. RCA shall inform the Monitoring Trustee of the status of the divestiture process and of the potential purchasers of the Divestment Business, shall submit to the Monitoring Trustee a list of potential purchasers, and shall keep the Monitoring Trustee informed of all developments in the divestiture process.
38. RCA shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the closing of the divestiture of the Divestment Business and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the closing of the divestiture of the Divestment Business, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, RCA shall cause the documents required for effecting the sale and the closing of the divestiture of the relevant Divestment Business to be duly executed.
39. RCA shall indemnify the Trustee and its employees and agents (each an “**Indemnified Party**”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to, RCA for any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
40. At the expense of RCA, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to RCA's approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should RCA refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard RCA. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 39 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served RCA during the First Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

IV. Replacement, discharge and reappointment of the Trustee

41. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
- (a) the Commission may, after hearing the Trustee, require RCA to replace the Trustee; or
 - (b) RCA, with the prior approval of the Commission, may replace the Trustee.
42. If the Trustee is removed according to paragraph 41, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full handover of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 26 to 31.
43. Beside the removal according to paragraph 41 above, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

Section G

The Review Clause and Miscellaneous

44. The Commission may, where appropriate, in response to a request from RCA showing good cause and accompanied by a report from the Monitoring Trustee:
- (a) grant an extension of the time periods foreseen in the Commitments, or
 - (b) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where RCA seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall RCA be entitled to request an extension within the last month of any period.

Brussels, 20 November, 2008

Duly authorized by and on behalf of RCA

Dr. Dieter Thalhammer
for
Eisenberger & Herzog
Rechtsanwalts GmbH

Dr. Michael Rosenthal
for
Hunton & Williams LLP

Annex A Declaration of the Republic of Austria

Annex B Declaration of the Republic of Hungary

**Letterhead of the
Austrian Ministry of Transportation**

By fax: 00 32 2 296 4301

Contains Business Secrets

European Commission
DG Competition
Rue Joseph II 70 Jozef-II straat
B-1000 Brussels

04 November 2008

**Case COMP/M.5096 – RCA/MÁV CARGO
DECLARATION OF THE REPUBLIC OF AUSTRIA**

In the abovementioned proceedings, it is the firm intent of the Republic of Austria to close the proceedings in Phase I.

The Ministry for Transport, Innovation and Technology, also exercising the shareholders rights on behalf of the Republic of Austria in RCA and/or GySEV, declares, in order to allow for the merger approval by the European Commission (the **Decision**) for the contemplated acquisition of [90-100]% of the shares plus one share in MÁV Cargo by RCA (the **Transaction**) in Phase I,

A. to exercise its shareholders rights in RCA and/or GySEV so that:

1. GySEV shall not be part of the Transaction and therefore:

- a) the entire interest of GySEV in MÁV Cargo shall be sold and transferred to RCA for the same purchase price to be paid by GySEV as part of the Transaction at the latest on the same day as the closing of the Transaction (the **Closing Date**);
 - b) the Consortium Agreement between RCA and GySEV, containing, *inter alia*, the call option of GySEV to acquire up to [20-30]% of the shares in MÁV Cargo plus one share shall be terminated at the latest as of the Closing Date; and
 - c) GySEV shall not acquire any further shares in MÁV Cargo or RCA, if any, for a period of [...] years following the date of the Decision and shall not, at any time, exercise any shareholder rights in MÁV Cargo;
2. there shall be no present or future agreements relating to cooperation in rail freight transport between RCA/MÁV Cargo and GySEV except to the extent that such agreements are (a) reasonably necessary to ensure the provision of seamless rail freight transport, and (b) concluded on terms no more advantageous than such agreements of equivalent scope and purpose as are routinely concluded by RCA/MÁV Cargo with other undertakings; to the extent any such existing agreements are to be amended such amendments shall be implemented within [...] months as of the Closing Date;
 3. RCA shall sell its entire (indirect) shareholding in GySEV within a time period to be agreed between RCA and the European Commission. The Republic of Austria has already waived its pre-emption right in relation to such sale and declared not to purchase said shareholding (see Annex);
 4. RCA and/or MÁV Cargo shall within a time period to be agreed between RCA and the European Commission acquire GySEV's shareholdings in Raabersped Speditionsgesellschaft m.b.H, Intercontainer Austria GmbH, Hungarokombi Kft., Hungaria Intermodal Kft, Logisztár Kft. and Bilk Kombiterminal Zrt. for the fair purchase price already agreed by the RCA and GySEV subject to the existing pre-emption rights in relation to such companies;

B. that, as far as the cargo business of GySEV is concerned, the Republic of Austria shall

1. not extend its existing shareholding in GySEV beyond a minority shareholding in excess of about [30-40]% of the shares, for as long as GySEV or any of its subsidiaries carries cargo activities;
2. not exercise its voting rights in GySEV to the extent such voting rights would go beyond the statutory minority rights of a minority shareholder in GySEV under Hungarian law and to exercise its voting rights to amend the articles of association and the current syndicate agreement among the shareholders of GySEV accordingly; and
3. in order to avoid any influence of the Republic of Austria in the corporate governance of GySEV's cargo business, ensure that the members of the management board and supervisory board of GySEV that are appointed by the Republic of Austria shall, for as

long as the cargo business of GySEV is not organized as a separate legal entity act only in accordance with their statutory duties without reporting to, exchanging information with or accepting any instructions from the Republic of Austria. The Republic of Austria declares that the cargo business of GySEV shall be re-organized as a separate legal entity in which the Republic of Austria is not represented by board members, in a period of [...] months as of the Decision. Such period can be extended by further [...] months upon joint reasoned request made by the shareholders of GySEV.

Vienna, 04 November 2008

Republic of Austria

represented by

the Ministry for Transport, Innovation and Technology

Annex

**A Közlekedési, Hírközlési és Energiaügyi Minisztérium
fejléces papírján**

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Case COMP/M.5096 – RCA/MÁV CARGO

DECLARATION OF THE REPUBLIC OF HUNGARY / A Magyar Köztársaság Nyilatkozata

In the abovementioned proceedings, it is the firm intent of the Republic of Hungary to close the proceedings in Phase I. The Ministry of Transport, Telecommunication and Energy, exercising the shareholders rights on behalf of the Republic of Hungary in GySEV, under the agreement concluded with the Hungarian National Asset Management Private Company Limited by Shares, declares, in order to allow for the merger approval by the Commission (the **Decision**) for the contemplated acquisition of [90-100]% of the shares plus one share in MÁV Cargo by RCA (the **Transaction**) in Phase I, to exercise its shareholders rights in GySEV so that

A fenti tárgyban az Európai Bizottság előtt indult fúziós eljárásban a Magyar Államnak határozott érdeke és szándéka, hogy az eljárás az I. fázisban lezárásra kerüljön. Annak érdekében, hogy az Európai Bizottság döntésével az I. fázisban jóváhagyja (a "**Döntés**") a tervezett tranzakciót, amelynek során az RCA megszerzi a MÁV Cargo Zrt. részvényeinek [90-100]%-át plusz egy részvényt (a "**Tranzakció**"), a GySEV Zrt. tulajdonosi jogait a Magyar Állam képviseletében a Magyar Nemzeti Vagyonkezelő Zrt.-vel kötött megállapodás alapján gyakorló Közlekedési, Hírközlési és Energiaügyi Minisztérium kijelenti, hogy részvényesi jogait a GySEV Zrt.-ben úgy gyakorolja, hogy

1. GySEV shall not be part of the Transaction and therefore:

- d) the entire interest of GySEV in MÁV Cargo shall be offered for sale to RCA for the same purchase price to be paid by GySEV as part of the Transaction at the latest on the same day as the closing of the Transaction (the "**Closing Date**");

1. a GySEV Zrt. ne vegyen részt a Tranzakcióban, és így:

- a) a GySEV Zrt. MÁV Cargo Zrt.-ben fennálló teljes tulajdonrészét a Tranzakció során a GySEV Zrt. által fizetendő vételár ellenében legkésőbb a Tranzakció zárásának napján (a "**Zárás Napja**") megvételre felajánlja az RCA

- e) the Consortium Agreement (as defined in RCA's commitment) between RCA and GySEV, containing, *inter alia*, the call option of GySEV to acquire up to [20-30]% of the shares in MÁV Cargo plus one share shall be terminated at the latest as of the Closing Date; and
- f) GySEV shall not acquire any further shares in MÁV Cargo or RCA, if any, for a period of [...] years following the date of the Decision and shall not, at any time, exercise any shareholder rights in MÁV Cargo.

2. there shall be no present or future agreements relating to cooperation in rail freight transport between RCA/MÁV Cargo and GySEV except to the extent that such agreements are (a) reasonably necessary to ensure the provision of seamless rail freight transport, and (b) concluded on terms no more advantageous than such agreements of equivalent scope and purpose as are routinely concluded by RCA/MÁV Cargo with other undertakings; to the extent any such existing agreements are to be amended such amendments shall be implemented within [...] months as of the Closing Date;

3. GySEV shall sell its interest in Hungarokombi Kft., Hungária Intermodál Kft., Raabersped Speditionsgesellschaft m.b.H., Intercontainer GmbH, Logisztár Kft. and BILK Kombiterminal Zrt. for RCA and/or MÁV Cargo for the fair purchase price already agreed by RCA and GySEV subject to the existing pre-emption rights in relation to such companies within [...] months of the Decision of the Commission on the approval of the Transaction in Phase I.

4. as far as the cargo business of GySEV is concerned,

részére;

- b) a GySEV Zrt. és az RCA által megkötött Konzorciumi Szerződés (amint az az RCA kötelezettségvállalásában meghatározásra került), amely többek között tartalmazza a GySEV Zrt. vételi jogát arra, hogy a MÁV Cargo Zrt. részvényeinek legfeljebb [20-30]%-át plusz egy részvényt megszerezzen, legkésőbb a Zárás Napján megszűnjön; és
- c) a GySEV Zrt. a Döntés napjától számított [...] éven belül ne szerezzen további részvényeket a MÁV Cargo Zrt.-ben vagy az RCA-ban, és ne gyakoroljon a MÁV Cargo Zrt.-ben részvényesi jogokat.

2. az RCA/MÁV Cargo Zrt. és a GySEV Zrt. nem tart fenn és nem köt a jövőben a vasúti áruszállításra vonatkozó együttműködési megállapodást, kivéve az olyan megállapodásokat, amelyek (a) ésszerűen szükségesek a zavartalan vasúti áruszállítás lebonyolítása érdekében; és (ii) nem tartalmaznak kedvezőbb feltételeket azoknál az azonos tárgyú és célú megállapodásoknál, amelyeket az RCA/MÁV Cargo Zrt. szokásosan köt más vállalkozásokkal. Amennyiben a jelenleg hatályos szerződéseket módosítani szükséges, azt a Zárás Napját követő [...] hónapon belül végre kell hajtani.

3. a GySEV Zrt. az Európai Bizottság Tranzakciót I. fázisban jóváhagyó Döntését követő [...] hónapon belül az RCA és/vagy a MÁV Cargo Zrt. részére értékesíti a Hungarokombi Kft.-ben, a Hungária Intermodál Kft.-ben, a Raabersped Speditionsgesellschaft m.b.H.-ban, az Intercontainer GmbH-ban, a Logisztár Kft.-ben és a BILK Kombiterminal Zrt.-ben meglévő tulajdonrészét azon a tisztességes vételáron, amelyben a GySEV Zrt. és az RCA már megállapodtak, a fenti társaságok tekintetében fennálló elővásárlási jogok gyakorlásával.

4. a GySEV Zrt. áruszállítási üzletága

tekintetében

a) the articles of association and the current syndicate agreement among the shareholders of GySEV shall be amended so that the Austrian State can not exercise its voting rights in GySEV to the extent that such voting rights would go beyond the statutory minority rights of a minority shareholder in GySEV under Hungarian law; the shareholders resolution amending the articles of association shall be filed with the competent court of registration by the Closing Date;

b) in a period of [...] months within the Decision, the cargo business of GySEV shall be reorganized as a separate legal entity in which the Republic of Austria is not represented by board members. Such period can be extended by further [...] months upon joined reasoned request made by the shareholders of GySEV.

The effectiveness of the above declaration is subject to the approval Decision of the Commission for the Transaction in Phase I pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

Budapest, 4 November 2008

DR. Pál Szabó

Minister

The Ministry of Transport,
Telecommunication and Energy representing
the Republic of Hungary

a) a GySEV Zrt. alapszabálya és a GySEV Zrt. részvényesei által megkötött jelenlegi szindikátusi megállapodás úgy módosul, hogy az Osztrák Állam nem gyakorolhat a GySEV Zrt.-ben a kisebbségi részvényt a magyar jog szerint megillető kisebbségi (szavazati) jogokon felüli (szavazati) jogot; az alapszabályt módosító közgyűlési határozat a Zárás Napjáig beadásra kerül az illetékes cégbírósághoz;

b) A Döntést követő [...] hónapon belül a GySEV áruszállítási üzletága külön jogi személyként működik tovább, amelynek igazgatóságába az Osztrák Állam nem jelölhet tagokat. A fenti [...] hónapos határidő a GySEV részvényeseinek együttes indokolt kérelmére további [...] hónappal meghosszabbítható.

A fenti nyilatkozat hatályának feltétele, hogy az Európai Bizottság a Tranzakciót jóváhagyó Döntését a Tanács vállalkozások közötti összefonódások ellenőrzéséről szóló 139/2004/EK Rendelete (2004. január 20.) szerinti I. fázisban meghozza.

Budapest, 2008. november 4.

Dr. Szabó Pál

Miniszter

A Közlekedési, Hírközlési és Energiaügyi
Minisztériuma a Magyar Állam képviseletében