Competition - Hungary

Danger of early closing in multinational agreements

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Many Hungarian competition lawyers will have dealt with questions from clients about whether a major multinational agreement can be closed - that is, consummated and implemented - before approval has been obtained from the Hungarian Competition Office. The assumption underlying the question is that the proposed agreement has been filed for merger clearance in Hungary in parallel with filings in other jurisdictions, but for some reason the parties cannot wait until the end of the Hungarian procedure and wish to close the acquisition before the procedure is completed. This issue generally arises as a result of the time-consuming Hungarian merger control procedure; this often leads to an uncomfortable situation in which a multinational transaction has already been approved in all other relevant jurisdictions, but Hungarian clearance is still outstanding.

The answer to the question under Hungarian competition law is not straightforward. EU competition law, in contrast, clearly provides that:

- consummation of a transaction before obtaining the necessary merger approval is prohibited (under Article 7(1) of the EU Merger Regulation (139/2004)); and
- the early closing of a merger that is subject to merger approval may result in heavy fines being imposed (under Article 14(2)(b)).

Taken together, these provisions constitute a prohibition against early closing - often referred to by the German term '*Vollzugsverbot*'.

Hungarian competition law does not expressly state that parties that have filed an agreement for merger clearance with the Competition Office may not implement such agreement unless and until clearance has been received; nor does it provide for a specific penalty for early implementation. However, a fair reading of the Competition Act seems to indicate an intention that the parties, having filed an agreement for merger clearance, should await approval before closing the agreement. This implied prohibition against early closing is reinforced by the Competition Office's 2008 decision in *Strabag/Cemex* (Vj-146/2008). The merger was approved subject to a commitment: the buyer was to ensure that one of the target's plants was sold to an unrelated third party. The Competition Office also stated that:

"*there [is] no reason to prescribe [in the decision] any behavioural obligation on the management of the affected... plant until its sale, since the condition is a precondition (ie, prior to its completion, the merger cannot be implemented).*"

This statement might appear superfluous, but it can be interpreted to mean that a merger which is subject to mandatory clearance in Hungary cannot be implemented without approval (or unless all relevant conditions for approval are met, as in the given case).

However, this raises another question: why is the Competition Office apparently so strict in concluding that the prohibition applies under Hungarian law when there is no such provision in Hungarian legislation?

The answer lies in the details of Hungarian law. Section 29 of the Competition Act provides that an agreement that is subject to merger control shall not "come into being" until the Competition Office's approval has been obtained. 'Coming into being', as a concept of Hungarian law, should not be confused with 'entering into effect': the first phrase relates to legal existence; the second to effectiveness. With respect to contract governed by Hungarian law, the theoretical distinction is clear: there are separate provisions in the Civil Code dealing with the coming into being of agreements (in Articles 211 to 215) and their entry into effect (in Article 228). Article 215 specifically mentions the case of an agreement requiring prior third-party or governmental approval.

It states that as long as such approval is necessary and outstanding, the agreement does not exist, although the parties are bound by its provisions until either:

- the third-party or government approval is obtained, in which case the agreement comes into being retroactively as of the date of its execution; or
- the deadline for obtaining approval expires without it having been obtained, in which case the agreement is deemed never to have come into being.

In such cases the rules governing the invalidity of an agreement apply. In short, as long as Competition Office approval is outstanding, there is no agreement between the parties, so they have nothing to close.

However, it is difficult to apply this relatively complex - and, for many foreign lawyers, potentially incongruous - conclusion to a multinational foreign agreement governed by a foreign law. Without entering into the issue of when a foreign agreement is valid or invalid, or how a foreign agreement may nevertheless have certain legal effects under Hungarian law, the only practical conclusion to draw is that conceptual difficulties can arise if the parties start performing or implementing (ie, closing) a multinational agreement before merger clearance has been obtained. When approval may be reasonably expected, the risk of early closing (in the absence of specific penalties from the Competition Office) may be acceptable. However, in cases where approval is uncertain, the risk is more serious, as it is far from clear how and to what extent a foreign agreement will be affected by a refusal from the Competition Office. Thus, although conceptually the Competition Office's conclusion in *Strabag/Cemex* is at least debatable, from a practical perspective it is correct.

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