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Competition - Hungary

Outsourcing as merger: a shift away from EU practice

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The Competition Office recently concluded that under Hungarian law, a 'plain vanilla' outsourcing arrangement amounts to a merger.(1) The case concerned a transaction whereby E.ON GmbH, a German-based multinational energy group, agreed to outsource its internal IT services to Hewlett-Packard in 14 countries, including Hungary. The transaction envisaged the transfer of assets, employees and service contracts to Hewlett-Packard so that it could provide various IT services to E.ON which the latter had previously sourced in-house.

As the E.ON/Hewlett-Packard transaction technically involved a change of control over part of an undertaking, it appeared to meet the necessary conditions to be caught as a merger. However, the underlying purpose of all true outsourcing arrangements is for a professional supplier to provide a service to the customer that was previously performed by the customer itself, resulting in cost savings for the customer and lucrative business for the supplier. It is usually necessary for the supplier to take over certain assets and employees from the customer in order to provide the service without interruption or material change. True outsourcing arrangements do not normally result in a change in the market because the supplier uses the acquired assets, rights and employees exclusively to provide a service to the customer in question. Similarly, the outsourced services in question are purchased exclusively by the customer (which previously provided them to itself). This was the case in the E.ON/Hewlett-Packard transaction. Following these principles, the European Commission's Consolidated Jurisdictional Notice treats true outsourcing arrangements as akin to service contracts, which do not qualify as mergers and need not be filed for clearance, even if the relevant thresholds are met.(2)

This rationale has now been overturned by the Competition Office, which has deviated surprisingly from EU practice. It expressly stated that it is irrelevant under Hungarian competition law whether the supplier provides a service exclusively to the customer through the acquired assets and employees. Rather, the Competition Office considers that such a transaction constitutes a merger if the acquired assets and employees, considered together, constitute a business (ie, 'part of an undertaking') with market turnover. On this basis the Competition Office accepted the transaction as a merger and, in the absence of competitive concerns, approved it without conditions. In its decision the Competition Office emphasised the importance of preventing potential uncertainties in applying the Hungarian merger control regime to outsourcing deals.

The Competition Office rightly referred to the formal inapplicability of the Consolidated Jurisdictional Notice in enforcing Hungarian merger control rules. It is also true that merger control, as a separate legal field, is not covered by EU Regulation 1/2003 - thus, the national competition authorities of EU member states enjoy significant freedom in applying their own merger control rules.

Nevertheless, the decision to disregard the Consolidated Jurisdictional Notice represents a significant shift in practice. Hungarian competition law, including its merger control rules, was enacted on the basis of the principles of EU competition law; as such, it is unsurprising that the Competition Office has specifically referred to 'soft' EU law - and even the practical application of the EU merger rules - in many of its merger cases. In doing so, the Competition Office ensured consistent legal practice and avoided conflicting interpretations in respect of similar transactions. This basic principle could be cast into doubt by the recent E.ON/Hewlett-Packard merger decision, even though the Competition Office merely intended to provide clarity on outsourcing in terms of Hungarian merger control.

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Endnotes

(1) Vj-30/2011.

(2) 2008/C 95/01, Sections 24 to 27.

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