Competition - Hungary

Merger control: calculating turnover of state-owned entities

Contributed by **Bán S Szabó & Partners**

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The Competition Office recently approved the creation of a joint venture between Hungarian Post, the Hungarian Electricity Works and MFB Invest, a subsidiary of the Hungarian Development Bank. The joint venture, called MPVI Mobil Zrt, aims to enter the Hungarian mobile telephone services sector as the fourth mobile telephone operator with a fixed network on the Hungarian market.

Background

As regards the creation of joint ventures, Hungary's merger control rules are conceptually equivalent to those of the European Union. In essence, the creation of a full-function joint venture by unrelated shareholders is subject to prior merger clearance if:

- there are at least two affected groups of undertakings with a net turnover in excess of Ft500 million (approximately $2 million) each; and
- the aggregate net turnover of all affected groups of undertakings for the previous business year is more than Ft15 billion (approximately $61 million).

The peculiarity of this case is that all of MPVI Mobil's shareholders are state-owned companies. It could be argued that as long as all shareholders of a newly created, full-function joint venture are state-owned undertakings, they cannot be treated as unrelated entities, and that therefore the normal mandatory merger clearance does not apply. However, this is not the case. According to Section 15(3) of the Competition Law, state-owned undertakings are treated as unrelated to each other if they have the autonomy to govern their own market behaviour without influence from other parties. Thus, the net turnover of state-owned undertakings (and of all possible subsidiaries under their control) that enjoy this form of market autonomy must be calculated separately for merger control purposes. The rule seems clear, but it raised questions that had never been resolved in practice.

Analysis

In this case the Competition Office sought to shed light on the practical implementation of the rule. Its first task was to assess whether the three founding shareholders had sufficient market autonomy to be treated as unrelated parties. It identified three theoretical sets of management or control rights, encompassing different levels and means of control, as the conceptual basis of its assessment:

- The first set involves rights and powers to amend the constituting documents of the state-owned undertaking (eg, in respect of capital increases and reductions) and to initiate voluntary dissolution, liquidation or bankruptcy proceedings.
- The second set involves rights and powers to designate the strategic market conduct of the state-owned undertaking, in particular by approving its business plan.
- The third set includes rights and powers to govern the day-to-day management of the state-owned undertaking.

Of the three sets, the Competition Office excluded the first from its assessment, reasoning that the rights and powers within the group in question primarily relate to general corporate matters which, in principle, are unconnected with the market behaviour of the state-owned undertaking.

Of the remaining two sets, the Competition Office found the second to be primarily decisive in determining whether the state-owned entity enjoys the required level of autonomy. The Competition Office drew the general conclusion that a state-owned undertaking has no market autonomy if the approval of its business plan falls within the competence of shareholders that represent the Hungarian state. Therefore, it interpreted the rule so as to treat state-owned undertakings as belonging to separate groups of undertakings if their strategic business conduct is ultimately governed by different organs of the Hungarian state.

In applying its interpretation, the Competition Office concluded that Hungarian Post and the Hungarian Electricity Works are under the sole control of Hungarian Asset Management Holding, which has the ultimate right to determine their business plans. Hungarian Asset Management Holding is controlled by the minister of national development. MFB Invest is wholly owned by the Hungarian Development Bank, which is under sole control of the same minister. Thus, all three founder entities are under the same ultimate, sole ministerial control - which at first sight raised questions about their independence, even in view of the interpretation put forward by the Competition Office.

The Competition Office looked more closely at the controlling relations of the three founder undertakings, especially the rights and powers to approve their business plans. It found that the board of directors of the Hungarian Development Bank has exclusive competence to approve its own business plans and those of its subsidiaries. The boards of Hungarian Post and Hungarian Electricity Works do not enjoy the same freedom, as those entities' business plans are approved by Hungarian Asset Management Holding. In the Competition Office's opinion, this difference was sufficient to treat the Hungarian Development Bank and its subsidiary MFB Invest as being unrelated to the other two entities. The Competition Office therefore identified two affected and unrelated groups of undertakings whose turnovers met the merger control thresholds. As it was clear that MPVI Mobil had all the necessary characteristics of a full-function joint venture and no competitive concerns were revealed, the Competition Office approved the creation of the joint venture unconditionally.

Comment

Technically, the Competition Office's interpretation is clear and sound. It remains uncertain whether there is any practical sense in controlling mergers among state-controlled enterprises. However, this is a question for the legislature.

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