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Up-to-date news about the IT cartels revealed by the GVH

Yesterday, on 15 April 2009 the decision of the Hungarian Competition Authority (GVH) made in September 2006 (the first public procurement procedure announced by Paks Nuclear Power Plant) became final. By this judgement three of the IT cartel cases revealed by the GVH became final.

In recent days the press has been occupied by the cartel cases of SAP Hungary. The information provided in connection with this case has contained some inaccuracy; therefore GVH deems it important to provide the public with exact and up-to-date information about the information technology cartels revealed by it, out of which three concerned SAP Hungary. (For a better understanding, the description of the four cartel cases is provided by separate numbers.)

Proceeding No. 1:

The Appeal Court of Budapest upheld the decision of the GVH by its final judgment made on 15 April 2009 in an IT cartel case. Based on the final judgement the GVH was right to find SAP Hungary and Synergon guilty of cartelling in the first public procurement procedure of Paks Nuclear Power Plant and to impose a fine on them.

On 27 April 2004 the Paks Nuclear Power Plant announced a one-round restricted public procurement procedure for “managing advisory and project management tasks in information technology projects for the realisation of the revision and upgrade of the SAP R/3 modules operating in production environment”.

According to the decision of the GVH, based on the evidence available mainly in e-mails, it could be established that Synergon and SAP had made an agreement in connection with the tendering that was capable of influencing its outcome. It could also be established that the two undertakings did not apply independent market practices, they concluded agreements on several occasions for influencing the outcome of the tender in favour of them. They entered into the agreements in order to win the tender, by sharing the market between each other. For this reason – as main contractors – they harmonised the technical content of their respective bids.

Therefore the GVH imposed a fine of HUF 14,6 million (cca EUR 49 thousand) on each of the two undertakings in September 2006. The two firms appealed the decision, however the Municipal Court of Budapest dismissed the appeal in the first instance in May.

The Appeal Court of Budapest proceeding pursuant to the appeal of the applicants upheld the decision of the Municipal Court of Budapest by its judgement announced on 15 April 2009, and thus stated by its final decision that the GVH was right to establish the infringement and to impose that amount of fine.

Proceeding No. 2:

In its decision published on 15 June 2006 the GVH stated that ISH, SAP Hungary and IBM Hungary coordinated their activity in an anti-competitive way in order to jointly win all of the public procurement procedures announced by five Hungarian universities concerning the management-control and hospital informatics systems.

The Financial and Technical Directorate of the Eötvös Lóránd University (ELTE), the Semmelweis University, the University of Szeged, the Technical Directorate of the University of Pécs and the Medical and Health Science Centre of the University of Debrecen announced public procurement tenders for the modernisation of their informatics systems in 2004. The five projects covered different volumes, but their aggregate value exceeded HUF 13 billion (cca EUR 43,3 million). Each of the five projects was won by the three undertakings but in the case of ELTE – as a consequence of a decision made by the Public Procurement Arbitration Board – finally another undertaking won the deal in a repeated tender.

The competition supervision proceeding revealed that these three considerable participants of the national informatics market – SAP Hungary, IBM Hungary and ISH – coordinated their offers in order to jointly win the university projects in the given year and a clandestine „teaming” agreement was concluded by them. In order to surely win the tenders they made an anticompetitive coordination of their conducts by

- submitting parallel bids which were suitable to increase their chance to win,
- they jointly influenced the conditions of the tenders announced by two universities and
- they had discussions aiming at excluding the more important competitors.

According to the GVH these three conducts were suitable to influence the competition for the tenders and these conducts did not have any efficiency gains or other advantages, with respect to which exemption could have been considered at all.

The decision does not mean that the legitimacy of the new product – MedSAOSol, owned by ISH – (the elaboration of which can be owed to the cooperation, according to the statement of the three undertakings) could be questioned. The new solution of this industry elaborated as a result of the cooperation could have been positive if it had been prepared under fair competitive conditions. In this particular case however through the conducts mentioned above the three undertakings aimed at further limitation of competition – which had been weakened by the teaming agreement – and they have managed to achieve this goal to a great extent.

For this most serious violation of competition law the three undertakings were fined: SAP Hungary had to pay HUF 690 million (cca EUR 2,3 million), IBM Hungary had to pay the same amount and ISH was obliged to pay HUF 130 million (cca EUR 433 thousand).

Calculating the amounts of the fines the GVH considered the value of the five tenders, the seriousness of the violation and the approach of the undertakings to the violation was also taken into account. The reason of the relatively smaller amount of the fine imposed on ISH was that the GVH used the legal maximum of the fine which – according to the Competition Act may not exceed 10 per cent of the total of the net turnover in the preceding year of the undertaking. The relative difference of the fines imposed represents, that in certain situations the deterrence from the violation of the relatively larger undertaking may justify the imposition of a relatively higher fine.

The decision of the GVH was challenged at court. In its judgement published on 20 February 2007 the Municipal Court of Budapest – to some extent changing the decision of the GVH – stated that there was a market sharing agreement among the undertakings. At the same time the Municipal Court did not find it proved that the three undertakings would have coordinated their behaviours in order to exclude Synergon from the market, that is why the amounts of the fines were decreased by 10 per cent. Accordingly fines were imposed on the undertakings as follows: ISH HUF 117 million (cca EUR 390 thousand), SAP Hungary HUF 620 million (cca EUR 2,1 million), IBM Hungary HUF 620 million (cca EUR 2,1 million).

In its judgement published on 28 November 2007 the Appeal Court of Budapest quashed the judgement made by the Municipal Court of Budapest, referred the case back and ordered the initiation of a new proceeding, since it assessed that the Municipal Court of Budapest did not discover the facts of the case to a sufficient extent.

In its repeated proceeding the Municipal Court of Budapest dismissed the appeal, this way the decision of the GVH was fully upheld. Thus the Court agreed with the GVH that there was an agreement between the parties aiming at market sharing (secret teaming agreement), which is the most serious infringement of competition law and the Court affirmed the fines imposed by the GVH. Consequently, at the moment the fines are as follows: HUF 690 million (cca EUR 2,3 million) for SAP Hungary, the same amount for IBM Hungary and HUF 130 million (cca EUR 433 thousand) for ISH.

The claimants appealed to the **Appeal Court of Budapest** which will hold its trial on **17 June 2009**.

Proceeding No. 3:

On 25 June 2003 the local government of the city Győr announced a negotiated public procurement procedure concerning the installation of an integrated financial and economic system.

According to the GVH, based on the evidence available it can be established that the undertakings exchanged information suitable to influence the result of the procedure, agreed on the technical content of their bids and agreed that in its final offer Synergon will determine a price 10-15% less than SAP, in order to win the tender.

In its decision of September 2006 the GVH established that the undertakings concluded an agreement restricting competition, which could be considered as a hardcore restrictive agreement and imposed a fine of HUF 7.2 million (cca EUR 24 thousand) on both undertakings.

In its final decision of November 2008 the Appeal Court of Budapest upheld the decision of the GVH, thus the Court agreed with the GVH both on the establishment of the infringement and the amount of the fines, consequently the judgement became final.

Proceeding No. 4:

On 27 April 2004 the Paks Nuclear Power Plant announced a one-round restricted public procurement procedure for “managing advisory and project management tasks for the realisation of revision and upgrade of Oracle Applications’ human resources and payroll calculation system modules functioning in a production environment, and for the realisation of other application upgrades – that belong to the functioning of the system – concerning human resources management”.

According to the GVH, based on the evidence available mainly in e-mails, it could be established that Synergon and Albacomp had made an agreement in connection with the

bidding that was capable of influencing its outcome. The GVH claimed that the undertakings exchanged information considered to be business secrets and agreed that Albacomp was supposed to win the basic tender and Synergon, submitting a “defeated” bid to the basic tender, would win an option.

In its decision of September 2006 the GVH found that the undertakings made a restrictive agreement in order to win the tender and imposed a fine of HUF 10 million (cca EUR 33 thousand) on both undertakings.

In its final decision of November 2008 the Appeal Court of Budapest upheld the decision of the GVH, thus the Court agreed with the GVH both on the establishment of the infringement and the amount of the fines, consequently the judgement became final.

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