



国家市场监督管理总局

State Administration for Market Regulation

Theory of Control for Concentration of Undertakings

State Administration for Market Regulation

Anti-Monopoly Bureau

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March 20, 2019



Outline

- Main provisions on control in the Anti-Monopoly Law of China and supporting policies
- How to understand control issues in the anti-monopoly review of concentrations of undertakings in China
- Quantitative test of control: Proposed control rules
- Acquisition of control by concentration of undertakings



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- According to Article 20 of the *Anti-Monopoly Law*, concentration of undertakings refers to the following cases:
 - (I) Merger of undertakings;
 - (II) Acquisition of control by one undertaking over other undertakings via acquisition of shares or assets;
 - (III) Acquisition of control by one undertaking over other undertakings on a contractual basis or in other ways, or the ability to exercise decisive influence over other undertakings.
- According to Article 4 of the *Guiding Opinions on the Notification of the Concentration of Undertakings*, if a new joint venture (JV) is jointly controlled by at least two undertakings, a concentration of undertakings arises; if the JV is solely controlled by one undertaking, without being controlled by other undertakings, a concentration of undertakings does not arise.



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- According to Article 5 of the *Measures on Notification of Concentration of Undertakings*, the turnover of an individual undertaking involved in concentration is the sum of turnover of the following undertakings:
- (I) Individual undertaking;
 - (II) Other undertakings directly or indirectly controlled by the undertaking referred to in sub-paragraph (I);
 - (III) Other undertakings directly or indirectly controlling the undertaking referred to in sub-paragraph (I);
 - (IV) Other undertakings directly or indirectly controlled by the undertaking referred to in sub-paragraph (III);
 - (V) Other undertakings jointly controlled by two or more undertakings among those referred to in sub-paragraphs (I) to (IV).
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I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- According to Note 2 in the *Notification Form for Anti-Monopoly Review of Concentrations of Undertakings*, the undertakings involved in concentration include:
 - (I) As for concentration of undertakings implemented in the way of a merger, all merged parties are undertakings involved in concentration;
 - (II) Under the circumstances that an undertaking acquires control over other undertakings via acquisition of shares or assets, or acquires control over other undertakings on a contractual basis or in other ways, or is able to exercise decisive influence over other undertakings, the undertaking that acquires control or is able to exercise decisive influence and the target undertakings are undertakings involved in concentration. If two or more undertakings acquire control or are able to exercise decisive influence after concentration, such undertakings are all undertakings involved in concentration.



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- (III) The parties jointly controlling the new JV are undertakings involved in concentration, while the JV is not.
- (IV) Provided that a JV is created on the basis of an existing enterprise that is solely controlled by one shareholder prior to the transaction, and the shareholder still retains control after the transaction, the shareholder and the new undertaking that has acquired control are undertakings involved in concentration, while the JV is not; provided that the shareholder loses control after the transaction, the undertaking that has acquired control and the JV are both undertakings involved in concentration.



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- According to Article 9 of the *Measures on Notification of Concentration of Undertakings*, with respect to the concentration of undertakings implemented by a merger, notification should be made by all parties involved in the merger; as for other concentrations of undertakings, the notification should be carried out by the undertakings that have acquired control or are able to exercise decisive influence, with the cooperation of the other undertakings.



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

- According to Article 3 of the *Guiding Opinions on the Notification of the Concentration of Undertakings*, the control referred to in the concentration of undertakings includes sole control and joint control.

Whether an undertaking acquires control over other undertakings via a transaction or is able to exercise decisive influence (control and decisive influence are hereinafter collectively referred to as "control") on other undertakings, depends on substantive de jure and de facto factors. The concentration agreements and the articles of association of the other undertakings serve as the critical judgment basis, rather than the sole basis. Although the acquisition of control cannot be judged on the basis of the concentration agreement and the articles of association, de facto control is in fact given to the trader due to the dispersion of shareholding and other reasons, and this also falls under the acquisition of control by the concentration of undertakings.



I. Main Provisions on Control in the Anti-Monopoly Law and Supporting Policies

Factors for judging whether an undertaking acquires control over other undertakings via transaction normally include, but is not limited to the following:

1. Purpose of transaction and future plan;
2. Shareholding structures of the other undertakings and the changes before and after the transaction;
3. Voting matters and voting mechanism of the shareholders' meetings of the other undertakings, past attendance rate, voting situation, etc.;
4. Composition of the boards of directors or the boards of supervisors and the voting mechanisms of the other undertakings;
5. Appointment and removal of top management of the other undertakings, etc.;
6. Relationships between shareholders and directors of the other undertakings, presence of entrusted voting rights and persons acting jointly, etc.;
7. Significant business relationships, cooperative agreements, etc. between the undertaking and the other undertakings.

Control can either be acquired directly by undertakings or indirectly acquired by the controlled undertakings thereof.



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- ❑ Ex ante mandatory notification / fail-to-notify system - decisive influence criteria
- ❑ Damage criteria: with or probably with influence on precluding and restricting competition - positive control or negative control
- ✓ Positive control: The undertaking can determine the business strategies of the other undertakings on its own without the cooperation of other shareholders;
- ✓ Negative control: The undertaking cannot determine the business strategies of the other undertakings on its own, but it can veto the business strategies of the other undertakings on its own.



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- ❑ De Jure Control and De Facto Control
- ✓ De jure control: Control can be recognised through the concentration agreements, articles of association or other legal documents of the other undertakings;
- ✓ De facto control: Although it is unable to determine who acquires control on the basis of the concentration agreements and the articles of association of the other undertakings, the undertaking is able to exercise de facto control over the other undertakings due to dispersed shareholding, failure of other shareholders to be involved in management, or a close relationship between the undertaking and certain shareholders, and other reasons.



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- ❑ Sole Control and Joint Control
- ✓ Sole control: Only one undertaking acquires control, which can be either positive or negative.
- ✓ Joint control: Two or more undertakings acquire control.
- For example: Shifting alliance does not constitute joint control. In case A, B, C and D hold 25% of a JV's shares respectively, and over 70% is required to pass a resolution according to the decision making mechanism, then the JV is not jointly controlled by these parties. However, if over 80% is required to pass a resolution after a change in the decision making mechanism, then A, B, C and D acquire joint control over the JV.



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- Direct Control and Indirect Control:
 - ✓ Direct control: The undertaking is entitled to control the other undertakings on its own;
 - ✓ Indirect control: The undertaking is unable to directly control the other undertakings, but its own rights and interests as well as the rights and interests of the undertakings it controls allow it to control the other undertakings.



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- Under normal circumstances, an undertaking is considered to acquire control if it has positive or negative rights in one of the following cases:
 1. Appointment and removal of critical management (e.g. appointment and removal of the General Manager)
 2. Financial budget
 3. Business plan
 4. Major investment
 5. Other market specific rights (e.g. R&D plan)



II. How to Understand Control Issues in the Anti-Monopoly Review of Concentrations of Undertakings in China

- Protective rights to protect the investment interests of an undertaking, without the power to decide other business activities of the undertaking, are not the rights of control. Veto rights over the following matters generally belong to protective rights:
 1. Amendment to the articles of association;
 2. Increase or decrease in the registered capital of the enterprise;
 3. Merger or division of the enterprise;
 4. Suspension, dissolution or change of enterprise form.



III. Quantitative Test of Control: Proposed Control Rules

- Hypothetical Cases of Acquisition of Control:
 - Directly or indirectly holding more than 50% (including 50%) of shares or assets with voting rights of the other undertakings.
 - Directly or indirectly holding less than 50% of shares or assets with voting rights, but in one of the following cases:
 1. Able to control more than half of the voting rights via agreements with other voting right holders;
 2. Entitled to directly or indirectly appoint half of the members of the board of directors or similar decision making bodies of the undertaking;
 3. Capable of ensuring that nominees acquire more than half of the seats of the board of directors or similar decision making bodies of the undertaking.



III. Quantitative Test of Control: Proposed Control Rules

- Unless sufficient evidence is provided to prove failure in acquisition of control by the undertaking, an undertaking is considered to have acquired control under the following circumstances:
 - It directly or indirectly holds more than 25% of the shares or assets with voting rights of the other undertakings, making it the largest shareholder of the other undertakings;
 - It directly or indirectly holds more than one third of the shares or assets with voting rights of the other undertakings.



III. Quantitative Test of Control: Proposed Control Rules

- An undertaking, directly or indirectly holding less than one third of shares or assets with voting rights, is generally considered to have acquired control in one of the following cases:
 1. It is able to control more than one third of the voting rights via agreements with other voting right holders;
 2. It is entitled to directly or indirectly appoint one third of the members of the board of directors or similar decision making bodies of the undertaking;
 3. It is capable of ensuring that its own nominees acquire more than one third of the seats of the board of directors or similar decision-making bodies of the undertaking.



III. Quantitative Test of Control: Proposed Control Rules

- An undertaking, directly or indirectly holding less than 15% of the shares or assets with voting rights of the other undertakings, is normally not considered to have acquired control, unless sufficient evidence is provided to prove the acquisition of control by the undertaking.

- The premise of the acquisition of control is the possibility to exercise control. If there is no possibility to exercise control, even if the shareholding ratio is rather high, the undertaking shall not be considered to have acquired control; for example, the undertaking promises to give up exercising control.



IV. Acquisition of Control by Concentration of Undertakings

- The acquisition of control normally incorporates the following cases:
 1. Prior to the transaction, the target undertaking does not have any controller, or it has a sole controller or multiple joint controllers, and the undertaking enjoys sole control after the transaction.
- For example: the acquisition of new sole control, or change from joint control to sole control



IV. Acquisition of Control by Concentration of Undertakings

2. Prior to the transaction, the target undertaking has no controller, or it has a sole controller or two or more joint controllers, and the undertaking acquires joint control after the transaction whether or not the previous controllers retain joint control.
- For example: the acquisition of new joint control, change from sole control to joint control, or increase or replacement of a joint controller



IV. Acquisition of Control by Concentration of Undertakings

- Cases in which control is acquired passively: If an undertaking has not performed any transaction, but acquires control over other undertakings due to other transactions, this is a case of the acquisition of control.
- For example: A is the second largest shareholder of C, without the acquisition of control. If the largest shareholder B suffers a decrease in its shareholding, and A becomes the largest shareholder, this is a case of the acquisition of control.



IV. Acquisition of Control by Concentration of Undertakings

- Cases in which control is not acquired:
 1. Change from de facto control to de jure control
 2. Change from indirect control to direct control
 3. Change in the shareholding ratio or rights and interests of joint controllers, but without any change in the joint controllers



V. Issues Worthy of Discussion

- Does a concentration of undertakings arise in case of change from negative sole control to positive sole control?
- Does a concentration of undertakings arise provided that joint control by multiple undertakings is changed to joint control by a few undertakings, and the undertakings that acquire control after the transaction already enjoy the rights of control before the transaction?
- How should we understand and grasp the change of control on a lasting basis?



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Thanks!

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