
**Seminar Topic of the EU-China Competition Week -
Issues on Control in Concentrations of Business
Operators involving Platform Enterprises**

Case Reviewing Division 3

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I. Background and Significance

- In recent years, platform enterprises have been expanding in the Internet industrial chain by taking advantage of capital and by means of agreement structures, minority equity investments, etc., and the traditional theory of the general rules on control determination have encountered certain difficulties in dealing with minority equity investments by platform enterprises, which are common challenges faced by various Anti-Monopoly jurisdictions around the world, including China and the EU.
- In this topic, the Chinese side will introduce the general rules on the determination of control by platform enterprises in the review and investigation of concentrations of business operators, and exchange information on the difficulties and challenges in the determination of control in merger and acquisition cases involving certain platform enterprises, and through the exchange of information on the Chinese regulations, practices and problems encountered, learn from the practices and practical experience of the European side, so as to provide a reference for the future review and investigation practice of concentrations of business operators involving platform enterprises.

II. Provisions of China's Anti-Monopoly Law on the Issue of Control

- Article 20 of the Anti-Monopoly Law of the People's Republic of China, promulgated on August 30, 2007, stipulates that concentration of business operators refers to the following circumstances:
 - (i) Merger;
 - (ii) The business operator acquires control over the other business operator by means of acquiring equity or assets;
 - (iii) The business operator acquires control over the other business operator or is able to exert decisive influence on the other business operator through contracts and other means.

II. Provisions of China's Anti-Monopoly Law on the Issue of Control

- Article 4 of the Interim Provisions on Review of Concentrations of Business Operators, promulgated by the State Administration for Market Regulation on October 23, 2020, provides that the following factors shall be considered in determining whether a business operator has acquired control over the other business operator or is able to exert decisive influence on the other business operator through a transaction:
 - (i) The purpose of the transaction and future plans;
 - (ii) The shareholding structure of the other business operator before and after the transaction and the changes thereof;
 - (iii) Voting matters at shareholders' meetings of the other business operator and its voting mechanisms, as well as its historical attendance and voting status;
 - (iv) The composition of the board of directors or supervisory board of the other business operator and its voting mechanism;
 - (v) The appointment and removal of senior management of the other business operator, etc;
 - (vi) The relationship between the other business operator's shareholders and directors, the existence of exercise of voting rights by a proxy, the existence of persons acting in concert, etc.;
 - (vii) Whether the business operator and the other business operator have significant business relations, cooperation agreements, etc.
 - (viii) Other factors that shall be taken into account.

III. Experiences and Practices regarding the Determination of Control

- **(i) The Concept of Control**
- Control within the meaning of Article 20 of the Anti-Monopoly Law refers to the possibility that a business operator is able to exert significant influence on the business strategies of the other business operator based on its direct or indirect holdings of equity, assets or contractual arrangements, etc.
- Positive Rights
- Negative Rights

III. Experiences and Practices regarding the Determination of Control

- **(ii) Types of Control**
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- De jure control vs. de facto control;
- Sole control vs. joint control;
- Direct control vs. indirect control;

III. Experiences and Practices regarding the Determination of Control

- **(iii) Determination Thoughts on Control**
- A business operator is considered to be able to exert significant influence on and have control over business strategies when it has negative rights in one of the following aspects:
 - (i) Appointment and removal of key management personnel. Examples: general manager, vice presidents in charge of operation, or chief financial officer; (ii) financial budgets; (iii) business plans; (iv) significant investments (however, negative rights beyond the usual scale of investments may be considered as protective rights); and (v) other specific rights. For example, negative rights over R&D programs also constitute control in industries where technology plays a significant role.

III. Experiences and Practices regarding the Determination of Control

In determining the above factors, the following elements and materials involved in transactions are usually examined: (i) The concentration agreement and the articles of association of the other business operator; (ii) the purpose of the transaction and future plans; (iii) the shareholding structure of the other business operator and its changes before and after the transaction; (iv) the voting matters at the shareholders' meeting of the other business operator and its voting mechanisms, as well as its historical attendance and voting status, etc.; (v) the composition of the board of directors, supervisory board or similar decision-making bodies of the other business operator and their voting matters and voting mechanisms, as well as and their historical voting status, etc.; (vi) the relationship between shareholders and directors of the other business operator, and whether there are voting rights exercised by a proxy, as well as whether there are persons acting in concert, etc.; (vii) potential voting rights of the other business operator held by such business operator or other parties, such as convertible corporate bonds, exercisable warrants, etc.; (viii) whether there are significant business relations, cooperation agreements, etc., between such business operator and the other business operator.

In addition, generally, the business operator that has only protective rights is not considered to have control.

III. Experiences and Practices regarding the Determination of Control

(iv) Empirical Figures

50%: The business operator is presumed to have control.

30%: The business operator may be determined to have control.

10%: The business operator is not considered to have control.

IV. Case Study and Challenges

- In recent years, the innovation of technologies such as Internet, big data, cloud computing, artificial intelligence, blockchain, etc., have accelerated and the digital economy has developed rapidly in China, deeply affecting China's economic structure and market competition pattern.
- Leading platform enterprises have been expanding rapidly in the industrial chain of digital economy by taking advantage of capital. Some transactions with clearer control relations have been included in the anti-monopoly review of concentrations of business operators, such as the case of prohibiting the merger between HUYA Inc. and DouYu International Holdings Limited in accordance with the law.
- Some platform enterprises' equity acquisitions have been subject to administrative penalties for failure to notify the concentration of business operators in accordance with the law. On 2021 November 20, 43 cases involving platform enterprises that failed to notify the concentration of business operators in accordance with the law were announced. For example, the case that Alibaba (China) Network Technology Co., Ltd. and Tencent Holdings Ltd. acquired the equity of Yongyang Anfeng (Beijing) Technology Co., Ltd., and allegedly constituted the illegal implementation of the concentration of business operators without notification in accordance with the law.

IV. Case Study and Challenges

- Some platform enterprises have minority equity investments, but it is difficult to clearly determine the control, as shown in the following cases:
- **(i) Case Introduction**
- The case of platform enterprise A acquiring the equity of e-commerce company B. In 2018, A acquired 20% of the equity shares in B. A believes that it did not acquire control over B and therefore did not conduct the concentration notification. In 2021, A injected capital to Fund C and acquired 30% of the shares in Fund C as a limited partner, and C acquired 17% of the equity shares in B after that. The Anti-Monopoly Bureau received a report that the reporting party believed that through the above transaction, A acquired control over B. This transaction constituted the illegal implementation of the concentration of business operators without notification in accordance with the law.

IV. Case Study and Challenges

- **(ii) Control Analysis**
- 1. 2018 Transaction:
- A acquired 20% of the equity shares in B. The voting mechanism of B's shareholders' meeting was approval by 50% or more voting. There was a shareholder X with more than 50% of the equity shares in B, who was able to exercise sole control over B at the shareholders' meeting level, and A was not entitled to one veto.
- B's board of directors had 9 members, of which A occupied 2 seats. B's voting rule for the board of directors was approval by a simple majority voting. X occupied 4 seats on the board of directors. There were also 3 independent directors, and A was not entitled to one veto.
- In addition, there are no other facts or evidence that A can exert a decisive influence on B.
- Therefore, it is difficult to conclude that A acquired control over B through this transaction.

IV. Case Study and Challenges

2. 2021 Transaction:

- An injected capital to C as a limited partner, and held 30% of the shares in C, and 2 other limited partners each held 25% of the shares in C. The highest decision-making body of C was the partners' meeting of C, whose voting mechanism was approval by 1/2 of the shares, and A could not adopt or veto the voting matters at the partners' meeting of C alone. The day-to-day management of C was performed by the general partner, and A was not acting in concert with that general partner or the other limited partners. Therefore, it is difficult to determine that A acquired control over C.

Serial number	Partner Nature	Partner Name	Contribution Ratio
1	General Partner	H	5%
2	Limited Partner	A	30%
3	Limited Partners	1	20%
4	Limited Partners	2	20%
5	Other Limited Partner	3	5%
6	Other Limited Partner	4	5%
7	Other Limited Partner	5	5%
8	Other Limited Partner	6	5%
9	Other Limited Partner	7	5%

IV. Case Study and Challenges

After C acquired the equity shares of B, the shareholding structure of B was 22% owned by X, who was the former sole controller, 20% owned by A (unchanged), and 17% owned by C. The voting rule of B's shareholders' meeting remained unchanged and was still approval by a simple majority voting, and A could not individually adopt or veto B's shareholders' meeting matters; B's board of directors still had 9 seats, with A occupying 2 seats, C occupying 2 seats, X occupying 2 seats, and 3 independent directors, and its voting rules remained unchanged and was still approval by a simple majority voting, and A could not individually adopt or veto B's board of directors' matters, including the appointment and removal of senior management, financial budgets and business plans, etc.

Because it is difficult to determine that A acquired control over C, and thus it is impossible to calculate the proportion of equity shares and board seats held/occupied by A and C in B together, therefore, it is difficult to determine that A acquired control over B through C.

Serial number	Shareholder Name	Shareholding Ratio
1	Former Controlling Shareholder X	22%
2	A	20%
3	Fund C	17%
4	Others	5.59%

IV. Case Study and Challenges

- In addition, after the capital injection by C, the board of directors of B was reorganized and one of the two directors nominated by A was elected as the chairman of the board. The notifying party asserted that the election of the director nominated by A as the chairman of the board was the result of the joint election of all directors, and A had no control over the process and result of the election, which means there was uncertainty, so it can not be considered that A had the power to nominate and appoint the chairman of the board of B. The chairman of the board needed to exercise his authority according to the resolution of the board of directors, and A had no control over the board of directors of B, so it could not control the chairman of the board to exercise his/her authority. The party therefore argued that the fact that a director nominated by A was elected chairman of the board cannot be considered proof that A had acquired control over B.
- **It is not excluded that A may exert influence on B through the transaction.** First, A and B were direct competitors in the online retail market, and A had certain market power in this market, and A had motivation to exert influence on B through this transaction to further consolidate and enhance its market power; second, A previously held 20% of B, and after this transaction, it invested 30% of the shares of C, and C held 17% of B, which may allow A's influence on B further to be enhanced; third, the director nominated by A was appointed as the chairman of B, through which A may exert certain influence on B.

IV. Case Study and Challenges

- In order to accurately assess the issue of control in this transaction, the Anti-Monopoly Bureau held an expert discussion meeting to conduct a special study.
- This case is still under investigation, and further facts and evidence are needed to verify. Therefore, we would like to take this opportunity to learn the practices and experiences from our European counterparts on the issues of minority equity investment by platform enterprises and to hear your views on the determination of control in this case.

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- Thank you!