



国家市场监督管理总局

State Administration for Market Regulation

Failure to Legally Make the Notification of Concentration of Business Operators - Legislation And Enforcement Practice

**Anti-monopoly Enforcement
Directorate 2, State Administration for
Market Regulation**

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Make the Notification of Concentration
of Business Operators

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I. Relevant Provisions

Relevant Provisions in the Anti-monopoly Law

Article 21: Where the concentration of business operators reaches the notification threshold set by the State Council, the business operators shall make a notification to the anti-monopoly enforcement agency of the State Council, and no concentration shall be conducted without such notification.

Article 24: If the documents and information submitted by the business operators are inadequate, the business operators shall submit supplementary documents and information within the period specified by the anti-monopoly enforcement agency of the State Council. If the business operators fail to submit the supplementary documents and information within the period, the business operators shall be deemed to have failed to make such notification.

Article 25: The anti-monopoly enforcement agency of the State Council shall, within thirty days from the date of receipt of the documents and information in compliance with the provisions of Article 23 of this Law submitted by the business operators, conduct a preliminary review of the notified concentration of business operators, then make a decision on whether to conduct further review, and notify the business operators in writing of such decision. Before the anti-monopoly enforcement agency of the State Council makes a decision, the business operators shall not conduct the concentration.

Article 26: Where the anti-monopoly enforcement agency of the State Council decides to conduct a further review, it shall complete the review within ninety days from the date of the decision, then make a decision on whether to prohibit the concentration of business operators, and notify the business operators in writing of such decision. Where the anti-monopoly enforcement agency of the State Council makes a decision to prohibit the concentration of business operators, it shall state the reasons. During the review period, the business operators shall not conduct the concentration.



I. Relevant Provisions

Investigation Procedures

Subject of Investigation: State Administration for Market Regulation

Article 2 of the Interim Provisions on Concentration Review of Business Operators provides that "the State Administration for Market Regulation (hereinafter referred to as SAMR) is responsible for the anti-monopoly review of the concentration of business operators as well as investigating and handling the concentration of business operators conducted in violation of the law. "



I. Relevant Provisions

Investigation Procedures

Verification before Officially Filing the Case

Clue Sources: Reporting, Self-confession, Findings in the Review

- Any entity and individual has the right to report the suspected illegal concentration of business operators to enforcement agencies. The forms of reporting are various, including telephone reporting, in-person reporting, written reporting, etc. For written reporting, if the reporter can provide the basic information about the reporter and reportee, the facts and evidence related to the suspected illegal concentration of business operators, the SAMR shall carry out the necessary verification.
- Business operators can take the initiative to report their illegal concentration of business operators to the SAMR and confess the suspected violation.
- The SAMR can get clues related to the suspected illegal concentration from other means such as concentration review. In the process of the notification of concentration of business operators, the business operators need to truthfully fill related information on "the concentrations of business operators conducted by the business operators and their associated entities in the relevant market in the past three years" in the Notification Form of Concentration of Business Operators, from which the SAMR may find past concentrations that have met the notification criteria but have not been notified. In the process of the notification of concentration of business operators, the reviewers may find some circumstances related to the transaction such as changes in registration or the circumstance where a business license has been issued. If the concentration has been conducted without approval, the concentration review of business operators will be terminated, and an investigation of suspected illegal concentration of business operators will be launched for such transaction.



I. Relevant Provisions

Investigation Procedures

Preliminary Investigation: Determining whether It Constitutes An Illegal Concentration of business operators (30 Days)

- If there are preliminary facts and evidence proving that the suspected illegal concentration of business operators exists, the ASMR shall file the case and notify in writing the business operators under investigation. The SAMR will issue a Filing and Investigation Notice of Suspected Illegal Concentration of Business Operators to the business operators under investigation and formally launch the preliminary investigation.
- The business operators under investigation are required, in accordance with the requirements of the Filing and Investigation Notice, to submit documents and information related to whether the transaction under investigation is a concentration of business operators, whether it meets the notification criteria, whether it has been conducted but not yet notified, etc. to the SAMR within 30 days from the date of service of the Filing and Investigation Notice and in accordance with the Anti-monopoly Law, Provisions of the State Council on the Notification Criteria for Concentration of Business Operators and Interim Provisions on Concentration Review of Business Operators.
- The SAMR shall, within 30 days from the date of receipt of the above-mentioned documents and information submitted by the business operators under investigation, complete preliminary investigation on whether the transaction under investigation is an illegal concentration of business operators.
- During the preliminary investigation, the SAMR needs to complete the determination of whether the transaction constitutes an illegal concentration of business operators.



I. Relevant Provisions

Investigation Procedures

Further Investigation: Assessing whether the Concentration of Business Operators Has the Effect of Excluding or Restricting Competition (120 Days)

- After the preliminary investigation, if it is found that the concentration of business operators is illegal, the SAMR shall conduct further investigation and notify the business operators under investigation in writing. The business operators shall suspend conducting the concentration of business operators.
- If the concentration of business operators is not illegal, the SAMR shall make a decision not to conduct further investigation, and notify the business operators under investigation in writing.
- If the SAMR decides to conduct further investigation, it shall, in accordance with the Anti-monopoly Law, Provisions of the State Council on the Notification Criteria for Concentration of Business Operators and Interim Provisions on Concentration Review of Business Operators, issue a Further Investigation Notice of Suspected Illegal Concentration of Business Operators to the business operators under investigation, and the business operators under investigation shall, within 30 days from the date of receipt of the written notice, submit relevant documents and information to the SAMR in accordance with the provisions of the Measures for the Notification of Concentration of Business Operators.
- The SAMR shall, within 120 days from the date of receipt of documents and information submitted by the business operators under investigation in accordance with the provisions of the preceding paragraph, complete the further investigation.
- During the further investigation, the ASMR shall, in accordance with the relevant provisions of the Antimonopoly Law, Interim Provisions on Concentration Review of Business Operators and other provisions, assess whether the transaction under investigation has or may have the effect of excluding or restricting competition.



I. Relevant Provisions

Legal Liability

Legal Provisions

Article 48 of the Antimonopoly Law provides that "where business operators conduct the concentration in violation of the provisions of this Law, the anti-monopoly enforcement agency of the State Council shall order them to stop the concentration, to dispose of shares or assets, transfer the business or adopt other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan."

Article 57 of the Interim Provisions on Concentration Review of Business Operators provides that "the business operators who conduct the concentration in violation of the provisions of the Anti-monopoly Law shall be punished in accordance with the provisions of Article 48 of the Antimonopoly Law."



I. Relevant Provisions

Legal Liability

Fines

According to Article 48 of the Antimonopoly Law, the business operators under investigation can be fined up to RMB 500,000.

- When the SAMR penalizes for the illegal concentration of business operators, it shall consider the nature, extent and duration of the illegal concentration, the assessment results of the effect on the competition and other factors.
- The maximum penalty under the current law is 500,000 RMB, which has a limited deterrent, so the upper limit of the penalty as set forth in the Anti-monopoly Law needs to be raised.



I. Relevant Provisions

Legal Liability

Disposing of Shares or Assets, Transferring the Business or Adopt Other Necessary Measures to Restore the Market Situation before the Concentration within A Time Limit

The above measures can restore the situation of the relevant market before the concentration and eliminate the damage on the competition caused by the concentration.

- The cost for restoration after the transaction is conducted is very high, which will make a strong impact on the parties



II. Factors for Determination and Types

Constitutive Elements

Concentration of Business Operators

- (1) Merger of business operators
- (2) A business operator obtains control over other business operators by means of acquisition of equity or assets
- (3) A business operator obtains control over other business operators or is able to exert a decisive influence on other business operators through contracts and by other means

Meeting the Notification Criteria

- (1) The total global turnover of all business operators participating in the operation for the previous fiscal year exceeds 10 billion yuan, and at least two of them had a turnover of more than 400 million yuan in China for the previous fiscal year
- (2) Total global turnover of all business operators participating in the concentration for the previous fiscal year exceeds 2 billion yuan, and at least two of them had a turnover of more than 400 million yuan in China for the previous fiscal year
- (3) Provisions on the calculation of the turnover for the notification of concentration of business operators in the financial industry

Conducting the Concentration without legally making the notification

- (1) Should be notified but was not
- (2) Notified after conducting the concentration
- (3) Failing to submit the supplementary documents and information accordingly after the concentration notification, but conducting the concentration
- (4) Conducting the concentration after the concentration notification but without approval



II. Factors for Determination and Types

Examples of Specific Situations

1. Determination of whether the concentration of business operators exists;

For example: Establishment of joint ventures, acquisition of common control, etc.

Key question: Determination of whether the control exists, and whether the control needs to be actually exercised

For example: Failure to legally make the notification of concentration of business operators in the event that joint venture parties jointly control the joint venture

The case that Linde Gas (H.K.) Limited and Shanghai Huayi Energy Chemical Co., Ltd. established a joint venture without legally making a notification

The joint venture agreement was signed on September 8, 2012, with both parties holding 60.1% and 39.9% of the shares, respectively. The joint venture obtained the business license on October 11, 2012.



II. Factors for Determination and Types

Examples of Specific Situations

2. Determination of whether the turnover has reached the notification threshold

How to determine the business operators participating in the concentration

How to calculate turnover

At which point in time to determine the turnover

For example: In case of acquiring multiple target companies, the turnover of target companies shall be included in the calculation, thus the notification criteria is met.

The case that Yunnan Metropolitan Real Estate Development Co., Ltd. (a company listed on the SSE) acquired Tianjin Yinrun and other 7 companies but failed to legally make a notification. On November 28, 2016, Yunnan Metropolitan Real Estate Development Co., Ltd signed equity transfer agreements with China Yintai Holdings Co., Ltd. and other 3 companies, to acquire equity interests in eight companies for RMB 1.863 billion. The equity transfer transaction was completed at the end of 2016. The announcement was made on December 30, 2016. The notification was made after the transaction had been completed. Yunnan Metropolitan Real Estate Development Co., Ltd. had a turnover of RMB 4.01 billion in China in 2016 and the target companies had a total turnover of RMB 1.05 billion in China in 2016, which meets the notification criteria.



II. Factors for Determination and Types

Examples of Specific Situations

3. Determination of whether conducted

Multiple transactions or steps constitute one or more concentrations

Point in time to make the notification (after the agreement being signed - before the concentration being conducted)

For example: Closing of a portion of the equity acquisition

The Case that Shanghai Fosun Pharmaceutical Industrial Development Co., Ltd. acquired 35% of the equity of Suzhou Erye Pharmaceutical Co., Ltd.

Shanghai Fosun Pharmaceutical Group planned to acquire 65% of the equity interest in Erye Pharmaceutical, of which 30% of the equity interest would be acquired by the foreign shareholder(s) of its overseas subsidiary and 35% of the equity interest would be acquired by the domestic shareholder(s) of its domestic subsidiary Shanghai Fosun Pharmaceutical Industrial Development Co., Ltd. A 35% equity acquisition had been completed while the Group was in the process of negotiating the 65% equity acquisition.



II. Factors for Determination and Types

Comments

1. The investigation on the notification of concentration of business operators has led to a significant increase in the awareness of business operators to legally make the notification

2. Some M&A transactions tend to become more complex and more difficult to determine

For example: High proportional equity acquisition but circumventing control issues at the corporate governance level

Designing multi-step transactions to separate the acquisition of control from other transactional actions

Leveraging third parties who do not meet the notification criteria to acquire equity or assets first and exercise control

Separating the acquired business and calculating the turnover separately

Principles of determination: Urging business operators to make the notification in advance; case-by-case analysis



III. Typical Cases

The case that Tencent Holdings Limited acquired the equity interest in China Music Corporation

On July 12, 2016, Tencent invested in China Music Corporate with its QQ Music business and others, having acquired 61.64% of the equity interest in China Music Corporate and obtained sole control over China Music Corporate. In December 2016, China Music Corporate changed its name to Tencent Music Entertainment Group. On December 6, 2017, the registration of the change of shareholding was completed. Since the SAMR was not notified of the transaction before that, the failure to legally make the notification of concentration of business operators is confirmative.

Tencent gained more market share in the online music platform market in the PRC through this concentration, which may give it the ability to induce upstream copyright owners to license exclusive copyrights to it or provide it with terms superior to those for its competitors, and may also give Tencent the ability to raise market entry barriers through, for example, the payment of high upfront fees, which has or may have the effect of excluding or restricting the competition in the relevant market.

Based on the above investigation and assessment findings, Tencent and its affiliates were ordered to take the following measures to restore the relevant market competition status, and a fine of RMB 500,000 was imposed.

- Not to reach (or reach in a disguise form) exclusive rights agreements with upstream copyright owners
- Without justifiable reasons, not to require (or reach in a disguise form) upstream copyright owners to give the party better conditions than other competitors
- Not to drive up the costs of competitors through high upfront fee payments or by other means, to exclude and restrict the competition.



III. Typical Cases

The case that Canon acquired Toshiba Medical

In March 2016, Canon announced the acquisition of Toshiba Medical, a subsidiary of Toshiba. In order to resolve Toshiba's financial difficulties as quickly as possible, the parties designed a series of transactional steps to circumvent the notification obligation, including: (1) A special-purpose company was established through three independent natural persons; (2) Toshiba converted all of Toshiba Medical's outstanding common shares into new voting shares, sole non-voting shares and options convertible into common shares; (3) Toshiba transferred Toshiba Medical's voting shares to the special-purpose company for a certain consideration; (4) Toshiba transferred Toshiba Medical's non-voting shares and options to Canon for a certain consideration; and (5) Canon exercised the options after obtaining the anti-monopoly approval for the concentration of business operators in each jurisdiction. Canon has implemented the first four steps before notifying Chinese anti-monopoly enforcement agency.

Although the transaction was divided into several steps, each step was closely related and was an integral part of Canon's acquisition of the entire equity interest in Toshiba Medical, which constitutes the concentration of business operators. Although the conduction of the concentration had not yet been completed, it had been started before the notification, which violates Article 21 of the Anti-monopoly Law and constitutes the failure to legally make the notification of concentration of business operators. It was assessed that the concentration of business operators would not have the effect of excluding or restricting competition, and in December 2016, an administrative penalty of RMB 300,000 was imposed on Canon. In 2019, the US and EU imposed high fines on the parties.



Thank you!