

A Brief Analysis of the Declaration System for Concentration of Business Operators in the Anti-monopoly Law

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Abstract

As an important system design in the field of national anti-monopoly, the declaration of concentration of undertakings plays a positive role in promoting the market order of fair competition. Since 2021, a number of leading Internet companies have been punished by national anti-monopoly law enforcement agencies for failing to declare the concentration of operators in accordance with the law, and the disorderly expansion of capital has been effectively controlled. Commercial banks and their subsidiaries shall perform compliance review procedures in accordance with the provisions of the Anti-Monopoly Law when conducting equity investment, new joint ventures and other transactions, and assess whether the conditions for declaration of concentration of business operators are triggered in accordance with the law. Risk of regulatory penalties.

Keywords

Anti-monopoly Law; Concentration of Business Operators; Corporate Supervision.

1. Introduction

Case 1: Company A and Company B are both overseas companies controlled by Company C and operate online game live broadcast platforms in China; Company C is engaged in online game operation services in China. The original plan was for Company A to acquire all the shares of Company B, and it was banned after applying to the State Administration for Market Regulation (my country's anti-monopoly law enforcement agency, hereinafter referred to as the "SAMR"). Case 2: Company L and Bank M established a joint venture N in 2015, of which Bank M holds 70% of the shares. In 2021, the State Administration of Supervision will impose fines of 500,000 yuan on Company L and Bank M for failing to declare the concentration of business operators in accordance with the law[1].

Anti-monopoly law is a global law, and more than 120 countries and regions have stipulated the declaration system for concentration of undertakings. The above two cases are related to the declaration of concentration of undertakings in the anti-monopoly field. The concentration of business operators is a special term in the field of anti-monopoly, which refers to the merger of business operators with each other or the acquisition of control rights of other business operators by acquiring equity or signing contracts, etc., including three situations: (1) merger; (2) by acquiring equity or (3) Obtaining control over other operators or being able to exert decisive influence on other operators through contracts or other means. According to Article 20 of the Anti-Monopoly Law[2], if the concentration of business operators meets the reporting standards stipulated by the State Council, the business operators shall declare to the anti-monopoly law enforcement agency in advance, and the concentration shall not be implemented if the declaration is not made.

As the central government clearly pointed out "strengthen anti-monopoly law enforcement and prevent the disorderly expansion of capital", the concentration of operators has become a key focus area of the Municipal Supervision Bureau. Among the 118 anti-monopoly administrative penalty cases announced in 2021, 93 are related to "concentration of operators that have not

been declared in accordance with the law and have been illegally implemented"[3], involving a number of leading Internet companies. In this context, this paper focuses on the concentration of business operators, takes the case as the starting point to analyze the identification standards, reporting points and legal consequences of not reporting the concentration of business operators, etc., and proposes suggestions based on the actual development of commercial banks.

2. Legislative Purpose of the Declaration System for Concentration of Business Operators

The pre-declaration of the concentration of business operators, the prohibition of monopoly agreements, and the prohibition of the abuse of market dominance are known as the "three sharp swords" of anti-monopoly law enforcement, and are of great significance to maintaining a fair competition in the market order. Disorderly concentration of managers may increase the barriers for other companies to enter the relevant market, reduce consumers' choices, and then damage consumers' rights and interests. Therefore, prior declaration of the concentration of business operators can play a positive role of the government in promoting fair competition and preventing the monopoly of giants. Especially in the field of Internet platform economy, some industry giants have large scales, strong user stickiness, and widespread diversification. Once they illegally conduct centralized behaviors, they will often rely on their advantages in data, technology, capital, traffic, etc. to cause disorderly competition and consumers' rights and interests. damage has gradually become the focus of the Municipal Supervision Bureau[4].

In case 1, companies A and B together accounted for more than 70% of the market share of online game live broadcasting in China[5]. Although the two companies declared according to law before the concentration, they were declared by the State Administration of Supervision that "the concentration has or may have the effect of eliminating or restricting competition. "Concentration is prohibited, mainly for the following reasons: (1) Concentration will eliminate competition between companies A and B and reduce consumers' right to choose. After the concentration, entities may use their market power to reduce product quality, increase service prices, or reduce user experience and harm consumers' rights and interests. (2) Concentration may reduce the choice of anchor platforms, reduce the ability of anchor workers to meet prices, and damage the rights of practitioners. (3) Concentration will enable Company C to have strong market control both upstream and downstream, and have the ability and motivation to implement a two-way blockade of the downstream game live broadcast market and the upstream online game operation service market.

3. Reporting Standards for Concentration of Undertakings

According to the Anti-Monopoly Law and the relevant regulations of the State Council, the concentration of business operators shall be declared when the following two conditions are met.

3.1. The Operator has Implemented a Concentration Behavior

The main point of judgment of this condition is whether the relevant business operators "obtain the control rights of other business operators" through concentration. This "right of control" is different from the right of control in the Company Law[6], and refers to the right or status that an operator has or may have a decisive influence on the production and operation activities or major business decisions of other operators, including direct and indirect, independent and Common, active and passive control rights, also include control rights and factual states. The factors to be considered in judging "control" include 7 items: transaction purpose and plan; the shareholding structure and changes of other operators before and after the transaction; the

voting matters and mechanism of the shareholders' meeting of other operators; the composition and voting mechanism of the board of directors or supervisory committee of other operators[7]; The appointment and dismissal mechanism of senior management personnel of other operators; the relationship between shareholders and directors of other operators, whether there is entrusted exercise of voting rights, persons acting in concert, etc.; whether the operator has major business relations with other operators, cooperation agreements, etc. . If the concentration behaviors carried out by the operators involve more of the above factors, the more likely it is that the conclusion of "right of control" is established.

In practice, some enterprises have inaccurate grasp of "obtaining the control rights of other operators", resulting in failure to report when they should be reported. The author summarizes the following common situations.

(1) There is no need to declare for the acquisition of minority shares. The shareholding ratio is not the only criterion for judging whether to obtain control. The acquisition of minority equity does not necessarily constitute control, and there are many minority equity acquisition transactions in the announced, reportable and unreported penalty cases. For example, in the acquisition of Jiuxiaoer by Tencent and Sequoia Yuchen, after the transaction was completed, Tencent and Sequoia Yuchen only held 10% and 6% of the equity of Jiuxiaoer respectively, but they were both recognized by the Municipal Supervision Bureau as obtaining Jiuxiaoer control, triggering the reporting conditions. Therefore, if a minority stake is acquired but control is obtained, a concentration of business operators shall be declared[8].

(2) There is no need to declare a new joint venture. Some operators believe that "acquiring the control of other operators" is mainly aimed at acquisitions, especially the acquisition of control of the acquired enterprise or business, and the joint venture is a newly established enterprise, so no change of control is involved. However, in practice, the number of newly established joint ventures should be reported but not reported, resulting in a high proportion of cases being punished. For example, in Case 2, Bank M was punished accordingly. In essence, the newly established joint venture is a means for the joint venture parties to obtain a competitive advantage in a certain type of business or market through resource integration. The newly established enterprise undertakes the resources of the joint venture party and represents the strength of the joint venture parties in the relevant market. Therefore, the arrangement of the declaration system for concentration of undertakings is applicable. Combining legal provisions and law enforcement practices, for a newly established joint venture, if at least two operators jointly control the joint venture, it is a concentration; if only one operator controls the joint venture alone, the other operators have no right to control. , it does not constitute a concentration of undertakings.

(3) Fund investment projects do not need to be declared. Here, it is necessary to distinguish between the newly established fund/investment platform and the external investment of the fund/investment platform. The misunderstanding of the first situation is mainly that the limited partner, as the investor rather than the manager, does not have the right to control. If the limited partner actually participates in the investment plan, operation management, etc., it may also have control over the fund (see the aforementioned 7 factors for the judgment of "control"). In this case, the judgment can be made with reference to the newly established joint venture. The misunderstanding of the second situation is that the fund investment project is usually a financial investment, and the investor does not participate in the operation and management, so it does not have the right to control. In essence, in financial investment, it is not possible to generalize whether an investor obtains control, and it needs to be comprehensively judged by taking into account factors such as board seats, veto power, and the qualifications for appointing executives[9].

3.2. The Turnover of the Operators Participating in the Concentration Meets the Reporting Standards

The specific criteria for this condition are: the total global turnover of all operators participating in the concentration in the previous fiscal year exceeds RMB 10 billion, or the total turnover in China in the previous fiscal year exceeds RMB 2 billion; and At least two of them had a turnover in China of more than 400 million yuan in the previous fiscal year. The calculation of the turnover of banking financial institutions shall follow the provisions of the "Measures for the Calculation of Turnover from the Concentrated Declaration of Financial Business Operators", that is, $\text{turnover} = (\text{accumulation of turnover elements} - \text{business tax and surcharge}) \times 10\%$, of which the turnover elements include net interest. Income, net fee and commission income, investment income, gains from changes in fair value, foreign exchange gains and other business income.

It is worth noting that the turnover here does not only refer to the turnover of the operator participating in the concentration, but the sum of the turnover of all operators that have direct or indirect control relationships with the operator. For example, in the case of CCB Chenyue Equity Investment Fund's acquisition of Zekang Medical Management's equity, the fund's executive partner was a wholly-owned subsidiary of CCB Trust, and CCB Trust was a financial institution controlled by CCB, so CCB Chenyue For CCB's ultimate control of the enterprise, the turnover of CCB in the previous fiscal year is included in the calculation of turnover.

4. Legal Consequences of Failing to Declare in Accordance with the Law

If an operator conducts concentration without reporting, the SAMR may order it to stop the concentration, dispose of shares or assets within a time limit, transfer business within a time limit, and take other necessary measures to restore the state before the concentration, and may impose a fine of less than 500,000 yuan. . It can be seen from Case 2 that even if the concentration does not have the effect of eliminating or restricting competition, as long as the operators participating in the concentration trigger the reporting conditions and fail to report, they will be punished[10]. If the concentration behavior may have the effect of excluding or restricting competition, the SAMR will further make a decision prohibiting the concentration or other restrictive measures. For example, in the case of Tencent's acquisition of China Music Group, the Municipal Supervision Bureau ordered Tencent to take measures including "not to reach an exclusive copyright agreement with upstream copyright owners or in a disguised form" to restore the relevant market competition, so that it tried to acquire the relevant market through acquisitions. The plan to monopolize the online music broadcasting platform fell through.

5. Suggestions on Commercial Banks' Declaration of Concentration of Business Operators in Accordance with the Law

The work conference of the China Banking and Insurance Regulatory Commission held in January 2022 pointed out that it is necessary to resolutely prevent the disorderly expansion of capital in the financial field, and strengthen financial anti-monopoly and anti-unfair competition. Commercial banks and their subsidiaries should pay attention to anti-monopoly compliance review in transactions such as mergers and acquisitions, equity investment, establishment of funds and other investment platforms, and newly established joint ventures, accurately determine whether the conditions for declaration of concentration of undertakings are triggered, and complete declarations in a timely manner in accordance with the law to ensure transactions. and follow-up operations to proceed smoothly, avoiding the risk of regulatory penalties, as well as negative impacts such as economic and reputation losses.

5.1. Strengthening Pre-examination and Fulfilling Reporting Obligations

Before a commercial bank conducts a concentration of business operators, it should conduct an anti-monopoly compliance review, and introduce anti-monopoly compliance managers or professional lawyers in the early stage of the transaction to make professional judgments on whether the transaction triggers the conditions for declaration of the concentration of business operators[11]. In the process of transaction promotion, comprehensive consideration should be given to the transaction structure (including shareholding ratio, change of control rights, etc.), relevant contract terms (including shareholder rights, voting mechanism, etc.) Plan and prepare application materials. In order to ensure smooth approval, it is also possible to consult the regulatory authorities on the transaction to be declared before the formal declaration, and consider whether it is necessary to change the terms of the transaction or take other measures to make the transaction conducive to market order.

5.2. Comply with the Declaration Procedure and Avoid Preemptive Behavior

Under the pre-declaration model, in addition to the need to declare the concentration of undertakings in accordance with the law, attention should also be paid to avoiding the concentration (commonly known as "preemption") before the anti-monopoly law enforcement agency makes an approval decision. The key to judging whether it constitutes a "preemption" is also whether the operator has carried out in advance the behavior equivalent to the substantial acquisition of control. Therefore, before obtaining the approval of the SAMR, commercial banks should try their best to avoid any behaviors that may be identified as substantially gaining control, such as appointing managers, participating in daily business decisions, and engaging in negotiations in the name of newly established entities.

5.3. Pay Attention to Overseas Compliance and Ensure Due Reporting

When commercial banks conduct global transactions such as overseas investment, mergers and acquisitions, new joint ventures, etc., they must not only declare the concentration of business operators within the territory of my country according to the law, but also abide by the territorial declaration rules. According to the "Overseas Anti-Monopoly Guidelines for Enterprises" issued by the State Administration of Supervision, different jurisdictions have different criteria for judging whether a concentration constitutes a concentration and whether it should or can be declared. For example, the EU mainly examines lasting changes in the control of operators, and believes that the acquisition of individual or joint control over other operators through transactions constitutes concentration, and sets reporting standards based on turnover; the United States sets transaction scale, transaction party assets, Multiple indicators such as turnover determine whether the reporting standards are triggered. In addition, there are also differences in the criteria for whether the establishment of a joint venture constitutes the concentration of operators in different countries, and needs to be analyzed according to the regulations of the relevant countries.

References

- [1] Lyu Shuping, Buts Caroline, Jegers Marc. Economic Analysis Methodologies Applied in Merger Investigations in the EU and China: Comparative Case Studies[J]. Asian Journal of Law and Economics, 2022, 13(1).
- [2] Xin Zi. Analysis on the Determination of Internet Platform Abuse of Market Dominance-- Based on Alibaba's "Two-Choice" Anti-monopoly Law Enforcement Case[J]. Scientific Journal Of Humanities and Social Sciences, 2021, 3(11).
- [3] Minggui Yu, Yujing Huang, Huijie Zhong, Qing Zhang. Monopoly and corporate innovation: evidence from antitrust law[J]. Nankai Business Review International, 2021, 13(1).

- [4] Biggar Darryl, Heimler Alberto. Is protecting sunk investments an economic rationale for antitrust law? [J]. Journal of Antitrust Enforcement, 2021, 9(2).
- [5] Persch Johannes. The role of fundamental rights in antitrust law – a special responsibility for undertakings with regulatory power under Art. 102 TFEU? [J]. European Competition Journal, 2021, 17 (3).
- [6] Mary Catherine Lucey. In the absence of global antitrust law: looking to “bricks and mortar” institutions and agency networks[J]. Journal of International Trade Law and Policy, 2021, 20(3).
- [7] Paldor Ittai. Antitrust Law's Harm to Competition: A New Understanding of Exclusivity[J]. BUFFALO LAW REVIEW, 2021, 69(4).
- [8] Koga Dailey C. TEAMWORK OR COLLUSION? CHANGING ANTITRUST LAW TO PERMIT CORPORATE ACTION ON CLIMATE CHANGE[J]. WASHINGTON LAW REVIEW, 2020, 95(4).
- [9] Gu Zongwen. Anti-Monopoly Regulation of Internet Enterprise Merger -Under the View of Rule of Law [J]. Academic Journal of Humanities & Social Sciences, 2020, 3(1).
- [10] Butorac Malnar Vlatka, Pecotić Kaufman Jasminka. Assessment of concentrations of undertakings applying a failing firm defence in times of recession[J]. Collected Papers of Zagreb Law Faculty, 2011, 61 (4).
- [11] Bachrack, Matthew, Huang, Cunzhen, Modrall, Jay. Merger Control under China's Antimonopoly Law: The First Year[J]. The China Business Review, 2009, 36(4).