MOFCOM Merger Workshop

The Notion of Control
Case Studies

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I. Concept of Control

Art. 3 (2) EU Merger Regulation:

Possibility of effectively excercising decisive influence on an undertaking on a lasting basis => rights, contracts, other means

Art. 37 (1) No. 2 German Act:

Same criteria as EU Merger Regulation – synonymous use important for jurisdictional matters

II. Sole Control on a De Facto Basis

Sole Control de Jure:

- Majority of voting rights => Positive Control
- Minority shareholding with formal veto rights => Negative Control

Sole Control de Facto:

- Minority shareholding without formal veto rights but de facto majority influence

I. Sole Control on a De Facto Basis

Example 1: Comp/M.5469 Renova/Sulzer

- Renova acquired 31,1 % of Sulzer`s capital
- Horizontal overlaps in metal surface treatment
- Presence rate at annual general meeting from 2001 – 2008 continually around or below 40 %
- **Exception 2009 – 62,5 %**
- One other shareholder with 4,88 %, rest widely dispersed

II. Sole Control on a De Facto Basis

Example 1: Comp/M.5469 Renova/Sulzer

- Expectation that future attendance rates will return to lower level
  - special circumstances 2009 – public announcement of Renova to remove President of the Board of Directors – public discussion and call on shareholders to attend
  - even high attendance didn`t prevent Renova from reaching it`s aim
- Continous majority for Renova in shareholders meeting to be expected – ability to appoint majority of the Board

=> Acquisition of control of Renova over Sulzer

II. Sole Control on a De Facto Basis

Example 2:

- A acquires 32 % of the shares of X, both are on the same market (A is a strategic investor)
- B and C are financial investors and hold 10 % each of X – purely financial interest, follow the strategic investor A
- rest of the shares dispersed
- shareholder presence in the last 3 years < 80 % in each year, no increase expected

=> Control of A over X very likely

III. Sole Control by Other Means

Example:

Comp IV/M.794 Coca Cola/Amalgamated Beverages

- Question of control of The Coca-Cola Company (TCCC) over Coca-Cola Enterprises (CCE)
- TCCC owned 45 % of CCE shares, no additional formal rights attached
- 8 % CEO, 9 % employees of CCE, 28 % institutional investors (no more than 5 % each), 10 % public
- TCCC only very short of majority in annual general meetings in three consecutive years

III. Sole Control by Other Means

Example:

Comp IV/M.794 Coca Cola/Amalgamated Beverages

- 90 % of CCE sales worldwide derived from sale of TCCC products, 100 % in Europe
- CCE is highly dependent on TCCC, inconceivable that CCE shareholders will act <u>united</u> against TCCC
- TCCC could easily buy the missing 2 % on the market – fact that is has not done so is proof of already excercised control

=> TCCC excercised control over CCE

IV. Joint Control with Asymmetric Shares

Case Comp. IV/M.553 RTL/Veronica/Endemol:

- Newly created company HMG – broadcasting of tv and radio programmes to NL and L
- RTL holds 51 % of the shares
- Veronica and Endemol hold – through VMG – 49 % of the shares
- RTL has acquired 20 % in subsidiary of Veronica and 24,99 % in Endemol

IV. Joint Control with Asymmetric Shares

Case Comp. IV/M.553 RTL/Veronica/Endemol:

- RTL, Veronica and Endemol were independent producers of tv and radio content => transferred activities to HMG
- RTL has a casting vote if reconciliation of interests is not possible
- Each party brings in vital part to the JV – TV channels and broadcasting rights (RTL), Commercial Channel (Veronica) and programme production (Endemol)

IV. Joint Control with Asymmetric Shares

Case Comp. IV/M.553 RTL/Veronica/Endemol:

- Each parties contribution is crucial to operation of HMG

⇒ mutual agreement on important strategic decisions necessary for successful operation of HMG

⇒ Use of casting vote limited to unusual situations

⇒ Joint control

V. Indirect Control

1. A wanted to acquire majority in B, both active as direct competitors on local newspaper market
2. Acquisition was prohibited by Bundeskartellamt
3. Natural Person Mr. C bought majority stake in B
   - ⇒ Mr. C was a retired former high level employee of A
   - ⇒ Mr. C was given a substantive loan by A to finance the purchase of B
   - ⇒ A had a call option on the shares owned by Mr. C
   - ⇒ Mr. C was the godfather of a son of the owner of A

⇒ Merger control proceedings were initiated

⇒ Mr. C was found to be acting as a front man for A

=> (Indirect) Control was attributed to A => Prohibition

Questions?

Thank you for your attention!

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