

The Landscape of Shifting Alliance Theory in Merger Control

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I. Concept and its Practical Implications of Shifting Alliance

The concept of “shifting alliances” is derived from EU competition law. According to paragraph 80 of the *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01) (the “Notice”)*, *Where there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders (or a certain group thereof) will jointly control the undertaking¹. For example, in the case of an undertaking where three shareholders each own one-third of the share capital and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority.*

According to the above concept and example, it can be seen that shifting alliances should not be deemed a concentration of business operators, because there is no transfer of rights of control, or where the result is that the transaction parties do not have rights of control over the target company, and therefore no antitrust filing should be required. In this context, on the one hand, shareholders can save as much as possible on the time and cost that may be spent on the transaction and promote the transaction relatively quickly to a substantive stage; and on the

¹ Case IV/JV.12 — Ericsson/Nokia/Psion/Motorola of 22 December 1998

other hand, based on clear provisions, the shareholders and parties to the transaction need not bear any illegal consequences and adverse effects.

II The Shifting Alliances Theory in China

In theory, the essence of a concentration of business operators is to some extent the aggregation of the market power of the business operators, and the effect of this aggregation needs to be revealed through the controlling power of the transaction parties over the target company. As above, first of all, this could be where the proportion of shares held by the shifting alliance parties makes it impossible for any shareholder to exercise control over the target company based on their proportion of equity (equity percentage $\leq 50\%$), i.e. a “non-controlling minority interest”. Secondly, where in general the corporate governance structure and rules also make it impossible for any shareholder to achieve control over the target company. For example, where the shareholders directly or indirectly hold 50% or less of the voting rights in the target company, and cannot form a majority vote in the general meeting of shareholders; or where the shareholders directly or indirectly hold more than 50 percent of the voting rights or other similar interests of the target company, but cannot pass or deny the decisions of appointment and/or dismissal of the senior executives, financial budgets, business plans and other strategic operations decision. Under these circumstances, members of shifting alliance should not be deemed as having the effectiveness of market power aggregation in the context of China Anti-monopoly law (“AML”) because they cannot control or implement decisive influence on the target company.

However, in practice, according to current AML and its supporting regulations, the shifting alliances theory is not explicitly stipulated. In order to minimize the related legal risks or adverse effects on the reputation, the transacting parties may choose to be filing the transaction to the MOFCOM after Pre-Consultation or filing directly. This means that even

where it is essentially impossible for the counterparties to control a target company, the transaction parties, for maximum avoidance of relevant legal risks or adverse effects on corporate reputation, may still choose to have a Pre-Consultation with MOFCOM or directly file the transaction with MOFCOM. However, in certain relatively urgent transactions that are facing deadlines, such an approach may delay the progress of the transaction.

Therefore, in order to reduce the uncertainty of transactions, as well as to save on transaction costs and advance the progress of transactions, we suggest establishing and incorporating the shifting alliances theory into China's antitrust filing rules, so as to present filing parties with more explicit guidance.

III. Suggestion for Establishing and Adopting the Shifting Alliances Theory in China

1. Establishing and Adopting the Shifting Alliances Theory in China

On September 8, 2017, MOFCOM promulgated the "*Measures for the Review of Concentration of Business Operators* (revised Draft and consultation Draft) (the "Revised Draft"). However, there is still no provisions on "shifting alliances" in the Revised Draft. In this regard, we have noticed a number of professionals have made proposals for the Revised Draft that may hopefully help further clarify that under certain circumstances, the business operator may not be controlled by any shareholders, i.e., there is no single shareholder (whether alone or jointly) that meets the criteria for "control" or "decisive influence". Rather, the strategic decisions of the business operator may be covered by the "shifting alliances" under certain circumstances, which is consistent with the practice of other major antitrust jurisdictions.

Specifically, the “shifting alliances” could be subject to rules similar to the following: Where any shareholder of a business operator that does not have controlling rights under the AML and the Revised Draft, or cannot exert a decisive influence on the business operator as well as in the course of voting, where there is no one or several shareholders who can consistently obtain a majority; and each time the majority decision is made up from a random combination of shareholders, it can be presumed that these shareholders (or a group of specific shareholders) have no separate or joint control over the operator and no decisive influence on the business operator.

2. Tips and Suggestion

In view of the above-mentioned related introduction to “shifting alliances”, it can be seen that, whether the structure of a certain transaction in practice belongs to the “shifting alliance” cannot be judged simply. Article 8 of the *Measures for the Declaration of Concentration of Business Operators* stipulates that; “*Before the formal declaration, the business operators involved in the concentration may apply to the MOFCOM for Pre-Consultation of the issues relating to the declaration of concentration. The Pre-Consultation application shall be made in writing.*” and Article 9 of the *Guiding Opinions on the Declaration of Concentration of Business Operators* stipulates that; “*Before the Anti-monopoly Bureau decides to put any concentration of business operators on file for review, the business operators concerned may apply to the Anti-monopoly Bureau for Pre-Consultation regarding a transaction of concentration of business operators that has been reported or will be reported, in which case the Anti-monopoly Bureau shall provide guiding opinions on the issues of concern to the consultation applicants based on the information furnished thereby.*” The above two regulations may be the most effective way to solve the problem of whether the relevant transaction has a “shifting alliances” type structure, or even on whether the transaction needs to be filed. At the same time, if the transaction is relatively urgent, the transaction parties can

prepare the filing materials at the same time as preparing for the discussion in advance on whether MOFCOM would require the transaction to be filed following such a discussion.

In a nutshell, we also advise that the relevant AML enforcement agencies will encompass the “shifting alliances” theory in the future to further improve the “Revised Draft”. Putting this system into writing at the legal level, while minimizing the legal risk of uncertainty, will finally place China's antitrust system alongside the world's most advanced anti-monopoly jurisdictions.