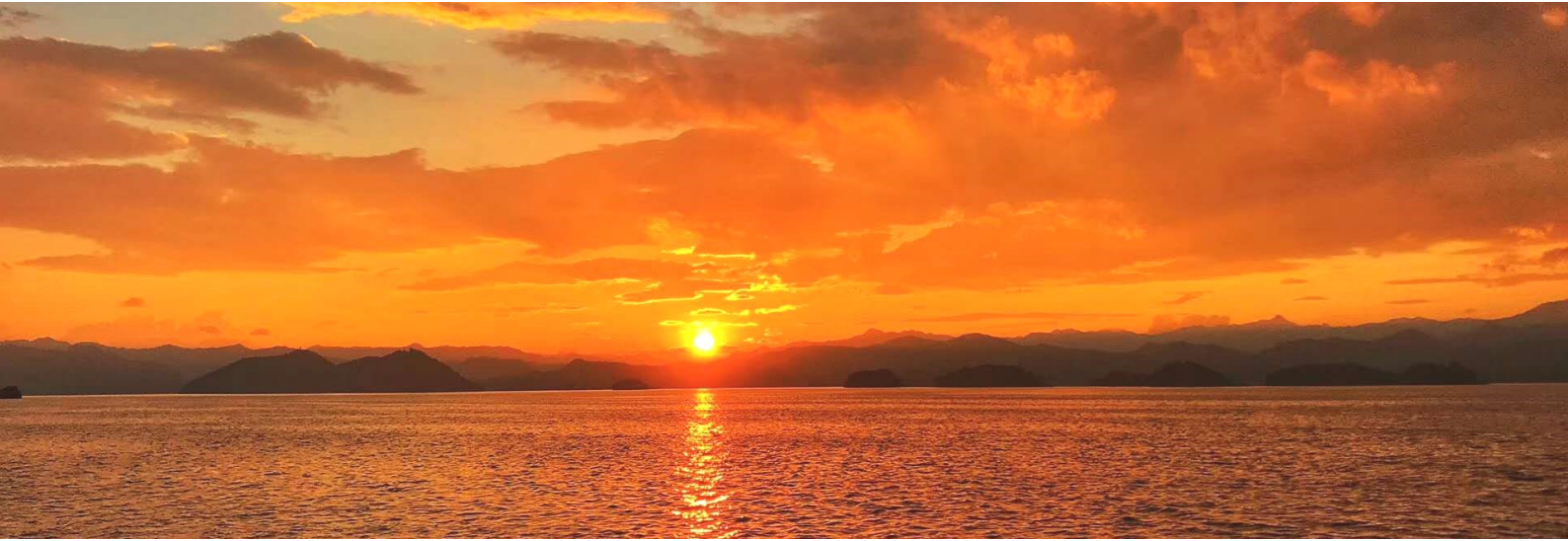


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## ANTI-MONOPOLY / 反垄断

### First Antitrust Filing Case Involving VIE Structure Was Unconditionally Approved 首例涉VIE架构的反垄断申报获无条件批准

2020年7月16日，国家市场监督管理总局反垄断局（“反垄断局”）无条件批准了“上海明察哲刚管理咨询有限公司与环胜信息技术（上海）有限公司新设合营企业案”（“明察哲刚/环胜案”）。该案引发了业界广泛关注和讨论，主要是因为其被认为是首例由反垄断局正式受理并无条件批准的涉及VIE结构的经营者集中案件（根据公开信息，作为合营方之一的明察哲刚基于一系列协议安排由一家开曼公司实际控制）。该案自以简易案件形式公示至最终获批，历经了近三个月的审查时间，明显高于实践中简易案件平均约30日的审查时限。

由于相关交易主体需要在经营者集中申报时对交易的合规性以及集中各方在中国境内的合规性予以说明，而一直以来，VIE结构（尤其是在外资监管体系下）的合规性问题都处于灰色地带，因此我国反垄断执法机构对涉及VIE结构的申报案件一向持有非常谨慎的态度。自2012年商务部附条件批准沃尔玛收购1号店案以来，我国反垄断执法机构再无受理涉及VIE结构的经营者集中案件的先例，业界对反垄断执法机构的该等行为通常解读为其回避对VIE结构的合规性进行表态。实践中涉VIE结构的经营者集中交易也往往采取不申报的策略，虽然尚未出现相关处罚案例，但VIE结构并非我国反垄断法下豁免申报的法定情形，因此该等不予申报的做法仍然存在着法律风险。

明察哲刚/环胜案在一定程度上打破了上述反垄断申报僵局，但鉴于该交易具有一定的特殊性：*(i)* 该案为新设合营企业，作为交易标的的合营企业本身并未搭建VIE架构，而是合营一方涉及VIE结构；及*(ii)* 仅从相关主体的经营范围等公开信息来看，尚无法确定明察哲刚采用VIE结构是否存在规避外资准入政策的情况，因此该案是仅具有个案偶然性还是表明了反垄断局对涉及VIE结构的申报案件的审查立场已发生了实质性变化，尚具有一定的不确定性。因此相关申报案件中涉及的VIE结构（尤其是存在相关交易方通过VIE结构取得交易标的控制权、或某一交易方搭建VIE结构的目的是为了规避我国外资准入政策的情形的）在未来是否不再构成经营者集中申报的障碍，也待进一步观察。但无论如何，明察哲刚/环胜案仍值得有关交易方引起重视，其可能预示了涉VIE结构的反垄断申报和审查将逐步常态化。特别是今年年初公布的《反垄断法（修订草案）》中又大幅提升了对应报未报的经营者集中交易的处罚力度（罚款金额从现行规定的人民币50万元提高至经营者上一年度集团销售额的10%），涉及VIE结构的交易相关方应提高反垄断合规意识，充分考虑与评估VIE结构对反垄断申报与审查及拟定交易的影响，并据此妥善安排交易时间节点，或调整相关交易结构，以防范遭受重大处罚的风险。

On July 16, 2020, the Anti-Monopoly Bureau of the *State Administration for Market Regulation* (“Anti-Monopoly Bureau”) unconditionally approved the establishment of a new joint venture by Shanghai Mingcha Zhegang Management Consulting Co., Ltd. (“Mingcha Zhegang”) and Huansheng Information Technology (Shanghai) Co., Ltd. (the “Transaction”). The Transaction was officially accepted and publicized according to the summary or fast-track procedure, and was finally approved after a nearly three-month review process (*an ordinary summary procedure takes 30 days on average*). This is the first business concentration case involving the variable interest entities or VIE structure (*Mingcha Zhegang, one party of the new joint venture, is controlled by a Cayman company via a series of VIE agreements*) that was unconditionally approved by the Anti-Monopoly Bureau and thus attracted widespread market attention.

As a general requirement under the PRC laws regarding the antitrust review, a merger or acquisition (*together with parties involved*) should comply with the applicable PRC laws, while the VIE structure has a compliance “gray area” legacy (*though it is commonly seen in practice especially in a situation that involves foreign investment restrictions*). The Anti-Monopoly Bureau had in the history held a cautious attitude towards merger-control filings related to the VIE structure. Except for Walmart’s acquisition of Yihaodian/1号店 which was *conditionally* approved by the Ministry of Commerce (*the then-effective agency in charge of business concentration reviews*) in 2012, there were no other VIE-related antitrust filings officially accepted by the Anti-Monopoly Bureau before the Transaction. It has long been speculated that the Anti-Monopoly Bureau, together with other government agencies in China, would prefer not to air its opinions on the VIE related compliance issue until a more clear conclusion can be agreed. As a result, parties engaging in mergers and acquisitions involving the VIE structure are often left with dilemmatic alternatives to either sacrifice a control right or choose not to make antitrust filings. There has no publicly available information of any punishment precedent due to non-filed business concentration transactions involving the VIE structure yet, but transactions parties should be aware of a more strengthened tendency of government administration in this respect (*for example, the Anti-Monopoly Law (Revised Draft for Comment) released earlier this year proposed to significantly raise the fine for the failure of filings from a cap of RMB500,000 under the current law to up to 10% of the target group’s revenue in the previous year*).

This Transaction has provided some notable and generally positive developments. Indeed this Transaction has certain peculiarities that may limit its application in a wider context, such as that it is the joint venture party instead of the newly established joint venture itself that has adopted the VIE structure. Further, it is not clear from publicly available information that whether the VIE structure was adopted to circumvent foreign investment access restrictions. It is yet to be seen whether the Transaction is a random incident or otherwise signals a more substantial shift of the Anti-Monopoly Bureau’s views towards the VIE structure.



## CAPITAL MARKET / 资本市场

### China Issued Refinancing Rules for STAR Market 科创板再融资相关规定出台

2020年7月3日，中国证券监督管理委员会（“证监会”）正式发布了《科创板上市公司证券发行注册管理办法（试行）》等文件，对科创板上市公司再融资的发行条件、发行程序、信息披露等要求以及相关的法律责任进行了规定。同日，上海证券交易所（“上交所”）也集中公布了一系列科创板再融资的配套规则，对相关发行承销、审核规则等进行了具体的规定。证监会和上交所发布的上述规定及细则（统称为“科创板再融资规定”）均自公布之日起施行。

科创板再融资规定与创业板近期推出的再融资规定相比，核心内容（如定价方式、锁定期等）基本一致，在程序上则都体现了注册制的特点，但在增发条件、信息披露要求等方面仍略有不同；与主板再融资规定相比，则由于注册制和核准制的本质差异，在证券品种范围、发行条件和程序、信息披露要求等方面都存在一定区别。具体而言，科创板再融资规定主要包括如下几方面的内容：

1. **明确再融资品种范围。**科创板再融资可发行的证券品种为股票、可转债、存托凭证，同时以“证监会认可的其他品种”进行兜底约定，为新的证券品种预留了空间。
2. **明确各类证券品种的发行条件。**区分向特定对象和不特定对象发行，差异化设置各类证券的发行条件。与主板和创业板相比，也进一步精简优化了相关发行条件（如，与创业板相比，科创板在增发股票条件方面删除了最近两年盈利的要求；与主板相比，除盈利要求外，也不再有近三年现金利润分配、平均净资产收益率等财务性条件）。
3. **优化发行上市审核和注册程序。**一般情况下，交易所审核期限为二个月，证监会注册期限为十五个工作日；对于“小额快速”融资（即，向特定对象发行融资总额不超过人民币3亿元且不超过最近一年末净资产20%的股票或存托凭证）则设置了简易程序，即交易所在二个工作日内受理，三个工作日内作出审核意见，证监会在三个工作日内作出是否注册的决定。

除上述内容外，科创板再融资规定还明确了科创板战略投资者的定义和红筹企业再融资的规则适用，并针对科创板的特点确定了科创板再融资在发行承销、信息披露、监管管理及法律责任等方面的规则，其完善了科创板发行制度，将进一步丰富科创板上市公司融资渠道。

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On July 3, 2020, the *China Securities Regulatory Commission* (“CSRC”) officially issued the *Administrative Measures for Registration of Issuance of Securities by Listed Companies on the STAR Market (for Trial)* and other relevant documents, setting out refinancing rules of companies listed on the *Science and Technology Innovation Board* (the “STAR Market”), including, the issuance requirements, procedures, information disclosure and related legal responsibilities, among others. On the same day, the *Shanghai Stock Exchange* (“SSE”) also released a series of implementation rules in this respect. Such regulations and rules (collectively, the “Rules”) became effective from the date of issuance.

The Rules share quite some common provisions with the refinancing regulations recently adopted by the ChiNext board (the “ChiNext Board”), in terms of the registration procedures, pricing methods and lock-up periods, among others, while the refinancing criteria and information disclosure requirements are of slight differences. Compared with the counterpart rules applicable by the main boards of both the Shanghai and Shenzhen stock exchanges, however, these provisions are more distinct (*mainly because the two boards adopted different securities issuance systems, i.e. approval vs. registration*). Highlights from the Rules include:

- a. **Defined the scope of applicable securities.** The types of securities that can be issued for the refinancing on the STAR Market include stocks, convertible bonds, depository receipts, and “other types of securities recognized by CSRC” (a catch-all clause providing flexibility for other new security products).
- b. **Clarified the issuance requirements for various securities.** The Rules set forth respective issuance requirements for different types of securities respectively for public and private offerings. The issuance requirements are generally more simplified and straightforward compared with their counterparts for the main boards and the ChiNext Board (for example, the profit requirement for the proceeding two years required for the ChiNext Board and financial criteria involving profit distribution and return on net assets for the main boards were not applicable to the STAR Market).
- c. **Optimized the review and registration procedures for issuance and listing.** SSE and CSRC are expected to conclude the review and registration process within two months and 15 working days, respectively. The Rules further provide a summary procedure for private offerings of stocks or depository receipts with the total financing amount of no more than RMB300 million and 20% of the issuer’s previous year’s net assets (*whichever is higher*), under which SSE and CSRC each should complete review and registration in only 3 working days.

In addition, the Rules also specified the definition of “strategic investors” for the STAR Market (*who will be qualified for lower issuance price with longer lock-up period*) as well as the refinancing rules applying to the so-called *red-chip* enterprises. The Rules also introduced regulations with respect to issuance, underwriting, information disclosure, supervision and management and legal responsibilities, among others.