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Secretariat of Competition Commission  
advises on notification obligation following  
changes of shareholder agreement

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**Introduction**

Under the Swiss Cartel Act, a notification of planned concentrations is required if the relevant turnover thresholds pursuant to article 9(1) of the Cartel Act are met. According to article 4(3) of the Cartel Act, a concentration is defined as:

- the merger of two or more previously independent undertakings;  
or
- any transaction, particularly the acquisition of an equity interest or the conclusion of an agreement, by which one or more undertakings acquire direct or indirect control of one or more previously independent undertakings or parts.

Consequently, a concentration only triggers a merger filing if the undertakings are independent from each other and leads to a permanent structural change.

In a recent consultation request, the Secretariat had to assess rather minor changes of a shareholder agreement between the shareholders A and B of company G-Holding (G) that have joint control over G,<sup>(1)</sup> affecting the competences of G's board of directors and the governance respectively.

**Secretariat consultation**

The Secretariat assessed whether the new shareholders agreement lead to a change of control and consequently triggered a merger filing.

The Secretariat first emphasised that a change of control would occur if, as a result of the amendments, either A or B would gain sole control over the G-group, instead of the current joint control.

The Secretariat found that, due to the existing ownership structure and according to the current shareholder agreement, A was ultimately capable of making decisions on its own on certain matters.

Nonetheless, as a multi-stage procedure had been implemented to reach a consensual solution in case of disagreement A and B continued to vest joint control despite the unequal ownership structure.

The Secretariat also found that the amendments to the shareholders agreement did not transfer single control to B, but rather granted additional powers to B in order to limit A's powers on certain matters compared to the previous shareholder agreement. Thus, even though B's co-control rights have been expanded this did not change joint control of A and B.

Consequently, the Secretariat notes that the amendments to the ASA do not constitute a change of control and that no notification is required.

### **Comment**

The Secretariat interprets article 4(3)(b) of the Cartel Act very broadly. However, the consultation request highlights structural key points the secretariat will assess and focuses on when determining whether a change of control rights in a jointly controlled JV needs to be notified.

The Secretariat will mainly focus whether or not the structural changes to a shareholder agreement swifts joint control to sole control.

However, joint control does not necessarily mean equal control of the jointly controlled shareholders. This opens the door for all sorts of structural changes of the shareholder agreement merely shifting the balance of the control distribution.

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### **Endnotes**

(1) The current consultation is related to a previous consultation request of the same parties in 2018 (RPW 2018, 3, page 505ff).