



澳門大學
UNIVERSIDADE DE MACAU
UNIVERSITY OF MACAU

硕士研究生学位论文

论反垄断法适用除外制度研究

A Study to the Exception System of Anti-monopoly Law

姓名：石蕊

学号：MA961067

院系：法学院

专业：中文法学硕士

研究方向：商法与经济法

导师姓名：范剑虹教授

二〇一一年五月

学位论文独创性声明

本人声明：所呈交的学位论文是本人在导师指导下进行的研究工作及取得的研究成果。除了文中特别加以标注和致谢的地方以外，本论文不包含其他个人或者集体已经发表或者撰写过的研究成果，也不包含为获得澳门大学或者其他教育机构的学位或者证书所使用过的材料。如有违反学术道德、学术规范的行为，本人愿意承担由此而产生的法律责任和法律后果。



声明人：

日期： 年 月 日

论反垄断法适用除外制度研究

摘要

反垄断法作为竞争法的支柱，在市场经济国家的经济法律制度中占有极其重要的地位，随着我国市场经济的不断发展，特别是在加入 WTO 后，企业竞争日趋激烈。反垄断法适用除外制度作为反垄断法中的一项基本制度，在各国反垄断立法中均得以确立。所谓反垄断法适用除外，亦称豁免，是指在某些特定行为或领域中法律允许一定的垄断状态及垄断行为存在，即对某些虽属限制竞争的特定协调、联合或单独行为，反垄断法不予追究的一项法律制度。

尽管各国法律存在差异，但在反垄断法中规定适用除外制度却反映出国际化与统一化的趋向。国家在特殊的情况下，根据特殊的需要，对部分关系到重大的国家利益和社会公共利益的企业和某些特定内容的垄断行为赋予法律适用上的豁免权，以实现社会整体效益和维护公共利益，这已经成为反垄断立法的一种合理的除外条款。本文通过对美国、德国、日本及欧共体关于反垄断法适用除外对象的比较分析，看出各国在适用除外对象方面规定的背景及对本国市场竞争的影响，从而为我国反垄断法适用除外制度提供有利的借鉴经验。

文章正文内容分为四个部分，本文采用了比较分析法、实证分析法和经济学角度的研究方法，首先在第一章中，从适用除外制度的理论框架展开，笔者从垄断及反垄断法的概念入手，分析垄断的利弊等内容，从而引出反垄断法适用除外制度的概念界定，在本章中分析反垄断法适用除外制度的理论基础、作用等方面了解到反垄断法适用除外制度是有条件的、相对的豁免，并非无条件的完全排除了垄断行为的非法性，而是针对某些部门、某些行业在特定时期或特重情况下的特定行为予以豁免。反垄断法适用除外制度同时又具有很强的政策性，与一国的政治、经济形势和国际关系密切相关。反垄断法适用除外制度的出台源于垄断具有一定的合理性，可以形成规模经济，提高效率。而过度竞争具有破坏性，会造成资源浪费，增加社会成本。垄断是竞争的必然结果，而垄断形成之后，在压抑竞争的同时也会引发更加激烈、更高层次的竞争，这就是垄断和竞争的统一。

第二章和第三章主要是对反垄断法适用除外对象的比较分析和国外反垄断

法适用除外制度的比较分析，通过对美国、日本、德国、欧共体等国家和地区在反垄断适用除外制度上的例举，从而发现，尽管各国法律存在差异，但在反垄断法中规定适用除外制度却反映出国际化与统一化的取向。国家在特殊的情况下，根据特殊的需要，对部分关系到重大的国家利益和社会公共利益的企业和某些特定内容的垄断行为赋予法律适用上的豁免权，实现社会整体效益和维护公共利益。对其他国家的分析总结后为我国反垄断法适用除外制度的建立提供借鉴。

在最后一章中，笔者通过谈到反垄断法适用除外制度的价值问题，以及从立法角度和运行实施角度考虑适合我国国情的借鉴经验。认识到适用除外制度可以弥补反垄断法立法技术不足，可以修补反垄断制度利益取舍单一的不足，避免过度竞争所造成的社会资源的巨大浪费，防止牺牲应有的规模经济效益。当某种限制竞争行为所带来的经济效益大于所造成的损害时，此行为就是有价值的，就应当适用豁免，由此经济效益就成为判断垄断或限制竞争行为合法与否的标准。但反垄断法适用除外制度作为反垄断法制度体系的组成部分，必然要体现反垄断法作为市场管理法所追求的目标。从立法角度考虑反垄断法适用除外制度应适用行政控制司法化的模式更适合我国目前的情况，再到分析别国对于适用除外制度运行机制的实施情况和约束机制以及救济制度，从而进一步提出有助于完善我国的反垄断适用除外制度的措施。

关键词：垄断 反垄断法 适用除外制度

A Study to the Exception System of Anti-monopoly Law

Abstract

As a pillar of the competition law, anti-monopoly law is extremely important in the economic law system of market economy countries. Along with the continuous development of China's market economy, especially after the access to WTO, competition among enterprises becomes increasingly fierce. As a basic system in the anti-monopoly law, the exception system of anti-monopoly law has been established in the anti-monopoly legislation of the countries. The exception of anti-monopoly law, also known as exemption from anti-monopoly law, refer to that certain monopoly situations and monopolistic practices existing in certain specific practices or fields are permitted by the laws, i.e. the legal system under which certain coordinative, joint or separate practices which are restricted competition will not be inquired into by anti-monopoly law.

Despite of the differences in the laws of the countries, the exception system provided in anti-monopoly law reflects the trend of internationalization and unification. Under special circumstances and according to special demands, the countries may grant legally applicable exemptions to some enterprises relating to the vital national interests and social public interests, and monopolistic practices with specific contents, to achieve overall social efficiency and maintain public interests, which has become a reasonable exception clause of the anti-monopoly legislation. Based on comparative analysis over the subjects of exception of anti-monopoly law of the United States, Germany, Japan and the European Community in this paper, it shows the backgrounds of the provisions on the subjects of exception of the countries and the impact on the native market competition, to provide favorable experience to the exception system of anti-monopoly law of China.

The text of this paper consists of four parts. Comparative analysis method, empirical analysis method, and economics research method have been applied in this paper. Firstly, in Chapter 1, starting from the theoretical framework of the exception system, the author analyzes the advantages and disadvantages of monopoly from the concepts of monopoly and anti-monopoly laws, leading to the definition of the concept of the exception system of anti-monopoly law. Through the analysis over the theoretical basis and the role of the exception system of anti-monopoly law in Chapter 1, it is learned that the exception system of anti-monopoly law is conditional and relative, and not unconditional and complete exclusion of the illegality of monopolistic practices, but grants exemptions to specific practices of certain departments and industries during specific period or under special circumstances. The exception system of anti-monopoly law also has a strong nature of policy, and is closely bound up with a country's political and economic situations and international relationships. The promulgation of the exception system of anti-monopoly law roots in certain reasonableness of the monopoly, and the capability in forming economies of scale and improving the efficiency. And excessive competition will be destructive and result in waste of resources and increase in social costs. Monopoly is an inevitable result of competition, but after the formation of monopoly, it will give rise of more fierce and higher level of competition while suppressing the competition, which is the unification of monopoly and competition.

Comparative analysis over the subjects of exception of anti-monopoly law and the exception system of anti-monopoly law of foreign countries are made in Chapter 2 and 3. By giving examples of the exception system of anti-monopoly law of the countries and regions like the United States, Japan, Germany, and the European Community, etc., it is found that, despite of the differences in the laws of the countries, the provision of the exception system in anti-monopoly law reflects the orientation of internationalization and unification. Under special circumstances and according to special demands, the countries may grant legally applicable exemptions to some enterprises relating to the vital national interests and social public interests, and monopolistic practices with specific contents, to achieve overall social efficiency and

maintain public interests. The analysis and summarization over other countries provide a reference for the establishment of the exception system of anti-monopoly law of China.

In the last chapter, by discussing the value of the exception system of anti-monopoly law, the author considers the experience suitable for the situation of China from the angles of legislation, operation and implementation. The author comes to know that the exception system can fill up the deficiency of the anti-monopoly legislation technique, make up the deficiency of single interest choice of the anti-monopoly system, avoid huge waste of social resources due to excessive competition, and prevent sacrificing the due benefits from economies of scale. When economic benefits brought by a practice restricting the competition are greater than the damages resulting therefore, such practice shall be valuable, and the exception shall apply. Therefore, the economic benefits become a standard for judging whether the monopoly or the practice restricting the competition is legal. However, as an integral part of the anti-monopoly law system, the exception system of anti-monopoly law is bound to reflect the objectives pursued by the anti-monopoly law as a market management law. From the angle of legislation, the application of the mode of administrative control judicialization to the exception system of anti-monopoly law is more suitable for the current situation of China. And then, by analyzing the implementation of the operation mechanism of the exception system, the restrictive mechanism and the remedy system of other countries, the author further brings forward the measures for perfecting the exception system of anti-monopoly law of China.

Key words: monopoly, anti-monopoly law, exception system

目 录

摘要.....	3
Abstract.....	5
引言.....	12
第一章 反垄断法适用除外制度概述.....	14
一、垄断及反垄断法的意涵.....	14
(一) 垄断的概念及与竞争的关系.....	14
1. 垄断的含义.....	14
2. 垄断和竞争的关系及垄断之利弊分析.....	15
(1) 垄断和竞争的关系.....	15
(2) 垄断的利弊分析.....	16
(二) 反垄断法的概念.....	18
二、反垄断法适用除外的概念界定及其制度内涵.....	20
(一) 有关反垄断法的适用除外与豁免之争论.....	20
(二) 对反垄断法适用除外制度内涵的理解.....	21
三、反垄断法适用除外制度的理论基础.....	23
(一) 经济学理论基础分析.....	23
(二) 法学理论基础分析.....	24
四、反垄断法适用除外制度的作用.....	26
第二章 反垄断法适用除外对象之研究.....	28
一、特定行业的适用除外.....	28
(一) 自然垄断行业.....	29
1. 自然垄断现象解析.....	29
2. 自然垄断获得适用除外的原因.....	30
3. 自然垄断的特征.....	31
4. 关于自然垄断行业的规制.....	32
5. 国外关于自然垄断的不同规定.....	34
(二) 银行业和保险业.....	35
1. 美国.....	35
2. 德国.....	37
(三) 农业领域.....	38
(四) 特定组织和人员.....	40
1. 特定组织.....	40

2. 特定人员	40
二、限制竞争协议的适用除外	41
(一) 美国	42
(二) 日本	43
(三) 欧共体	43
1. 类型豁免	44
2. 个别豁免	45
(四) 德国	46
三、知识产权领域	48
(一) 对知识产权实行垄断豁免的原因	48
(二) 对知识产权实行垄断豁免的含义及范围	49
(三) 知识产权法与反垄断法的关系	50
(四) 各国知识产权行使豁免研究	52
1. 美国	52
2. 德国	54
3. 欧共体	54
4. 日本	55
四、对外贸易领域	56
第三章 国外反垄断法适用除外制度之比较	60
一、美、德、日三国适用除外制度立法形式之比较	60
(一) 混同立法模式	60
(二) 制定单行的反垄断法的适用除外制度	61
(三) 在其他单行的法规和条例中规定适用除外条款的立法形式	61
二、美、德、日三国适用除外制度执行机构及程序之比较	62
(一) 美、德、日三国适用除外制度执行机构及程序之概述	62
1. 美国	62
2. 德国	62
3. 日本	64
(二) 美、德、日三国适用除外制度执行机构及程序比较分析	64
第四章 对中国内地反垄断法适用除外制度的思考	66
一、反垄断法适用除外制度价值体系研究	66
(一) 价值多元化的冲突与协调	66
1. 价值理论的不同观点	66
2. 价值多元论的基本内容	67

(二) 反垄断法豁免与多元价值	69
1. 社会公益价值	70
2. 公平正义价值	71
3. 经济效率价值	72
二、反垄断法豁免的立法模式选择	73
(一) 行政控制模式和司法控制模式	73
1. 司法控制模式	74
2. 行政控制模式及其司法化	76
(1) 行政控制模式的形成与发展	76
(2) 行政控制模式的司法化	77
(二) 反垄断法豁免基本模式选择	79
1. 行政控制模式的优势	79
(1) 人员构成	79
(2) 信息收集	79
(3) 风险防范	79
2. 行政控制模式与中国反垄断法律制度	79
三、反垄断法适用除外制度程序运行研究	82
(一) 适用除外制度的运行条件	82
1. 反垄断法适用除外制度运行时需考量的因素	82
2. 中国反垄断法适用除外制度所需要的环境	85
(二) 国外豁免授予程序的考察	86
1. 德国	86
2. 欧共体	87
3. 美国	88
(三) 反垄断法适用除外的约束机制与救济机制	89
1. 约束机制	89
(1) 授予程序的约束: 建立公开听证制度	89
(2) 豁免对象的约束: 豁免的条件	91
2. 救济机制	93
(1) 关于当事人权利的救济机制: 调查阶段	93
(2) 关于当事人权利的救济: 豁免裁决后的行政诉讼救济制 度	95
结论	97
参考文献	99

致谢	108
----------	-----

