

澳門大學
UNIVERSIDADE DE MACAU
UNIVERSITY OF MACAU

硕士研究生学位论文

题目：__中国并购控制中的附加限制性条件制度研究__

（Reasearch on China's System of Additional Strictive Conditions in Merger Control）

姓　　名：____杨闻嘉____

学　　号：___M-B1-5019-2___

院　　系：____法学院____

专　　业：___中文法学硕士___

研究方向：民法、民事诉讼法方向

导师姓名：_____范剑虹___

二０一三年八月

學位論文獨創性聲明

本人聲明：所呈交的學位論文是本人在導師指導下進行的研究工作及取得的研究成果。除了文中特別加以標注和致謝的地方以外，本論文不包含其他個人或者集體已經發表或者撰寫過的研究成果，也不包含爲獲得澳門大學或者其他教育機構的學位或者證書所使用過的材料。如有違反學術道德、學術規範的行爲，本人願意承擔由此而產生的法律責任和法律後果。

聲明人：杨闻嘉

日期：2013年 8月 8日

中国并购控制中的附加限制性条件制度研究

中文摘要

2008 年 8 月 1 日起正式施行的《中华人民共和国反垄断法》标志着我国竞争法律框架的基本成型。经营者集中附加限制性条件是反垄断法规制竞争者集中的重要手段。相对于美国、欧盟等西方国家和地区已经建立起较为成熟的经营者集中附限制性条件制度，并有丰富实践经验予以支撑而言，我国对该制度的立法与实践就显得相对薄弱了。本文通过比较国内外的相关制度，提出了我国目前在立法与执法上的不足，并提出了完善的建议，具体结构安排如下：

本文在第一章中阐述了附加限制性条件相关概念，并对相关概念进行梳理，首先辨析了企业合并与经营者集中，并说明了本文选择经营者集中称谓；其次，对英美法中的“合并”与“救济”的含义加以分析；最后对“附加限制性条件”与“反垄断豁免”加以区别。

在第二章中，笔者首先描述了我国附加限制性条件制度的立法现状；其次通过对 18 件案例的分析描述了结构性限制条件和非结构性限制条件的实践现状；接着在第三节分析了目前立法上的不足之处，包括不完整的附加限制性条件原则、限制性条件的分类不合理、缺失限制性条件有效性评估机制、缺失待剥离资产的确定机制、缺失对确定合格购买者时限的规定、不完善的剥离资产商业活力保障机制；第四节中分析了实践中的不足，包括执法信息公开程度不足、限制条件的选择与恢复市场竞争脱离、缺失对实施非结构性限制条件的指导。

在第三章中，笔者结合第二章分析的种种问题，提出了完善的建议，首先需要构建附加限制性条件原则，包括实施限制性条件的目的、限制条件的确定基础、限制性条件类型的适用、评估原则、相称性原则、成本控制原则；接着在第二节中，笔者对限制性条件的分类提出了自己的见解，并指出我国应当规定在选择限制性条件时需要考虑的各种因素，包括结构性限制条件的风险、非结构性限制条件的风险、影响限制性条件类型选择的因素；然后在第三节中提出了我国需要建立限制性条件有效性评估机制；在第四节至第六节中提出了如何完善我国结构性限制条件的实施，包括加入待剥离资产确定机制、加入确定合格购买者时限机制、完善剥离资产商业活力的保障机制；最后在第七节中提出了如何完善我国非结构性限制条件的实施，包括需要对非结构性限制条件的设计原则加以规定、加入保障尽责监督机制、加入争议的解决机制。

关键词：经营者集中，结构性限制条件，非结构性限制条件

Reasearch on China's system of Additional Strictive Conditions in Merger Control

Yang Wenjia (Master of Law in Chinese Language)

Directed by Fan Jianhong

Abstract

The Anti-monopoly Law of the People's Republic of China, formally implemented on August 1, 2008, marks the basic completion of our country's competitive legal framework. The main method of the Anti-monopoly Law to regulate competitors' concentration is to attach restrictive conditions to the concentration of business operators. Our country is weak in legislation and practice of this law, compared with western countries and regions like America and the EU, who have established relatively mature restrictive conditions to the concentration of business operators with rich practical experience as support. This paper has analyzed relevant systems from home and abroad, proposed shortages of the current situation of legislation and law enforcement in our country, and put forward suggestions that could improve such situation. The following is the structure of the paper.

Chapter One illustrates and sorts out relevant concepts of additional restrictive conditions. First, it analyzes business merger and concentrations of business operators, and introduces that this paper has chosen the call of concentrations of business operators. Second, it analyzes meanings of merger and relief in English, American and Chinese laws respectively. At last, it makes differences between additional restrictive conditions and anti-monopoly exemption.

In Chapter Two, it describes the current situation of legislation of additional restrictive condition system in our country at first. Then it analyzes and describes the practice situations of structural restrictive conditions and non-structural restrictive conditions through analysis of 18 cases. In the third paragraph,it analyzes shortages of current legislation, including incomplete principles of additional restrictive conditions, unreasonable classification of restrictive conditions, lack of the assessment

mechanisms of effectiveness of restrictive conditions, lack of the determination mechanisms of the to-be-divested assets, lack of regulations of confirming time limit of qualified buyers, and imperfect mechanisms of guaranteeing business energy of divested assets. In the fourth paragraph,it analyzes shortages in practices, including lack of public disclosure of law enforcement information, separation of the choice of restrictive conditions with restoration of market competition, and lack of directions of carrying out non-structural restrictive conditions.

In Chapter Three, the author gives suggestions to improve such shortages specific to problems in Chapter Two. First, principles of additional restrictive conditions should be established, including goals of carrying out restrictive conditions, determination basis of restrictive conditions, application situations of different types of restrictive conditions, assessment principles, principle of proportionality, and principles of cost control. In the second paragraph, the author gives his own opinions on classification of restrictive conditions. Then,the author points out that various factors should be considered to be regulated in our country in choosing restrictive conditions, including risks of structural restrictive conditions, risks of non-structural restrictive conditions, and influential factors in choosing types of restrictive conditions. In the three paragraph, the author puts forward that an assessment mechanism of effectiveness of restrictive conditions should be built in our nation. From fourth to sixth paragraphs, the author proposes methods to improve the implementation of structural restrictive conditions, including adding the determination mechanisms of the to-be-divested assets, adding regulations of confirming time limit of qualified buyers, and improving mechanisms of guaranteeing business energy of divested assets. At last, in seven paragraph, the author puts forward methods to improve the implementation of non-structural restrictive conditions, including regulation of design principles of non-structural restrictive conditions, adding supervisory mechanism to guarantee responsibility fulfillment, and adding settlement mechanisms of disputes.

Key words:concentration,structural conditions,non-structural conditions

目录

导论 1
一、问题的由来与选题目的 1
二、选题意义 1
三、研究现状 2
四、研究方法 5
第一章 附加限制性条件概念的厘清 6
一、“企业合并”与“经营者集中” 6
二、“merger”的内涵扩张 7
三、关于“remedy” 8
四、“合并救济”与“反垄断豁免” 9
第二章 我国附加限制性条件的现状与不足 10
第一节 立法现状 10
第二节 执法现状 12
一、概况 12
二、执法特征 12
三、限制性条件的实施 15
第三节 立法上存在的不足 15
一、不完整的附加限制性条件原则 16
二、限制性条件的分类不合理 16
三、缺失限制性条件的有效性评估机制 17
四、资产剥离相关机制的缺失 17
五、缺失对实施行为性限制条件的指导 18
第四节 实践中存在的问题 19
一、信息公开 19
二、限制条件的选择与恢复市场竞争脱离 19
第三章 针对现状的理论分析与完善 20
第一节 构建我国附加限制性条件原则 20
一、实施限制性条件的目的应当符合竞争原理 20
二、明确限制条件的确定基础 21
三、指导限制性条件的选择 22
四、加入相称性原则 24
五、加入成本控制原则 25

第二节 完善我国限制性条件的分类与选择 25
一、完善我国限制条件的分类 25
二、完善我国限制性条件的确定 27
第三节 完善我国限制性条件的评估机制 33
一、评估标准 34
二、评估方法 36
三、建议 36
第四节 明确我国待剥离资产的范围 36
一、明确待剥离资产的属性 37
二、指导待剥离资产的选择 37
第五节 完善我国适格购买人的确定时限 40
一、Up-front buyer 40
二、Fix-it-first 41
第六节 完善我国剥离资产商业活力保障机制 43
一、对资产分持义务的补充 43
二、缺失出卖方不得回购义务 44
第七节 完善我国非结构性限制条件的监督机制 45
一、非结构性限制条件的设计原则 45
二、保障尽责监督机制 45
三、争议的解决 50
第四章 结语 52