

# Study on the System of Restrictive Conditions Attached to Operator Concentration

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**Abstract:** Concentration will improve the production efficiency, but also effective in the market competition, there are two kinds of guard against the risk measures, attach restrictive conditions that prohibit concentration and concentration system, the former is relatively complete, equal to restore the original state, the latter is relatively mild, not only can improve the economic benefit, Can also effectively avoid the adverse impact of concentration on the market. Anti-monopoly law enforcement agencies should constantly strengthen the centralized examination of business operators, improve the examination system, improve the efficiency of the examination, and build the anti-monopoly examination system of business operators concentrated in accordance with the level of economic development in China. So how to use the anti-monopoly law to effectively promote the concentration of operators at the same time to reduce its negative impact on the economy, the concentration of operators with restrictive conditions system effective use will have long-term significance. Therefore, according to the existing problems of additional restrictive conditions of concentration of business.

**Keywords:** Concentration of Business Operators, Concentration of Business Operators with Restrictive Conditions, Principle of public.

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## 1. The Concentration of Operators Shall Be Subject to The Definition of Restrictive Conditions

### 1.1. The meaning of restrictive conditions attached to operator concentration

Business operators belong to the object of anti-monopoly regulation in economic law. According to the law, business operators are legal persons, citizens or other economic organizations engaged in commodity management or profit-making services. The core of the market is the price, and supply and demand determine the market price. In order to give full play to the position of price in the allocation of resources, it is necessary to let operators enjoy the main position of independently setting the price which belongs to the market regulation and pricing. The operator does not decide whether to be an independent subject, but whether to carry out legal or economic behavior in the market economic activities in an independent position.

Operator concentration means that more than two enterprises are merged, or all or part of other enterprises are completely or partially controlled by one or more people or enterprises, thus leading to long-term changes in the relationship between them. If the combination of operators in the order of competition has consequences, such as the economic strength is too concentrated, the exclusion of competition, then there will be monopoly, thus becoming the main body of the anti-monopoly law adjustment.

Operator concentration additional restrictive conditions, refers to the concentration of operators in the process of anti-monopoly review, in order to eliminate the concentration of some negative impact on the relevant market competition, by participating in the concentration of operators and law enforcement agencies jointly negotiate a solution to this problem, and in the review decision will negotiate effective

measures as additional conditions to the operator concentration approval. The International Competition Organization (IMO) put forward in the Guidelines for Merger Relief issued in 2016 that when the investigation of competition authorities shows that the concentration of operators may bring adverse effects on the relevant market, relief measures are needed to protect and stabilize market competition. Antitrust enforcers need to make sure the remedies are clear, effective and reasonable, and can be implemented on short notice. Some scholars hold this view, the additional restrictive conditions are the anti-monopoly regulatory authorities, in order to crack down on competition and reduce the external influence, when the probability of negative external benefits caused by the concentration of operators is high and the criteria for the decision to prohibit them are not reached. Compromise A method of regulating the concentration of business operators by imposing certain obligations or conditions.

### 1.2. Classification of operator concentration with additional restrictive conditions

The core of the structural condition is stripping. That is, the assets, business, equity, etc. of the parties concerned are stripped off and sold to third party with the corresponding ability and financial resources or other competitors in the relevant market. It can not only avoid the abuse of the dominant market position by the concentrated entities, but also create new competitors for the market and maintain the competitive order and vitality. Stripping assets is one of the most direct relief, the effect is obvious, with strong operability, can completely eliminate the anti-competitive effect. Additional structural conditions are common in cases of horizontal concentration, and such restrictive conditions will directly change the market structure. Therefore, if the determination of assets stripped is not rigorous and meticulous, resulting in the wrong selection of the scope of assets stripped, it will have a permanent impact on operators.

Structural restrictive conditions include the transaction of assets or businesses to an independent third party outside the relevant market to make it become a new market competitor, or the transaction of assets or businesses to existing competitors in the relevant market to increase its market share. These two situations are generally applicable in practice, but the implementation of the foregoing behavior has the effect of "one-time". There is no turning back. Therefore, the application of this condition must be serious and rigorous.

In the long-term practice, it can be found that the application of structural conditions is very frequent and extensive, but the economic phenomenon is not invariable, structural conditions are not enough to solve all economic problems, therefore, behavioral conditions emerge. It mainly includes: open market commitment, termination of exclusivity agreement, firewall clause, non-discrimination clause and so on. Behavioral conditions are common in vertical concentration, and adopting flexible behavioral conditions to regulate them can effectively maintain market competition. Behavioral conditions apply mainly in longitudinal and sometimes in mixed concentrations. Due to its flexibility, it is difficult to determine the accurate application period, which sometimes leads to too long duration, increasing the implementation cost and great uncertainty of the effect. In the aspect of late supervision, enterprises will not provide convenience for the implementation of supervision, and the difficulty of implementing behavioral conditions is increased, which makes most people doubt its role. However, the current legislation of our country does not make a guiding analysis of the selection of restrictive conditions attached to the concentration of Internet business operators in the relevant laws and regulations to distinguish the industry. In addition, the extensibility of behavioral conditions is very easy to exploit loopholes, for example, in the firewall provisions, most of the provisions are prohibited content, in this case, some enterprises always try their best to carry out the behavior that is not allowed, which is difficult to prevent. The comprehensive condition itself does not belong to a type of condition, it is structural condition and behavioral condition in the content A mixture of Comprehensive conditions are often seen in mixed concentrated cases, which can effectively improve the above two conditions in regulation The shortcomings of the two, learn from each other, in practice more and more attention and application. Purely suitable for structural strips Both the behavioral condition and the case condition are far-fetched and not perfect, but the synthetic condition can take the advantages of both and combine them Its advantages to the fullest extent.

## **2. Current Situation and Existing Problems of Additional Restrictive Conditions of Operator Concentration**

### **2.1. Current situation of operators concentration attached restrictive conditions**

The general situation of the rules for the conditional licensing system of business operators' concentration At present, our country has initially formed a legal framework for the conditional licensing of business operators, by law enacted by the National People's Congress, Article 29 of the

Anti-monopoly Law, "To the prohibited concentration of business operators, The State Council anti-monopoly law enforcement agency may decide to attach restrictive conditions that reduce the adverse effect of concentration on competition. There are a series of corresponding administrative regulations issued by the Ministry of Commerce, the Ministry of Commerce issued in 2009 "Measures for the Examination of Business concentration" Article 11, 12, 13, 15 of the conditional permit procedures for business concentration made the principle provisions. The main contents include: first, the conditional conditions are put forward by the operators; Second, the attached conditions are divided into structural conditions, behavioral conditions and comprehensive conditions. Third, the restrictive conditions put forward by the operators participating in the concentration should be able to eliminate or reduce the effect of excluding and restricting competition that the concentration of operators has or may have, and have realistic operability; Fourth, in the process of examination, both the Ministry of Commerce and the operators participating in the concentration can put forward opinions and suggestions on the modification of the restrictive conditions; Fifth, business operators should report to the Ministry of Commerce to fulfill the conditions attached, and they should bear certain legal responsibilities for violating the conditions. In addition, in 2010, the Ministry of Commerce issued the Interim Provisions on the Implementation of the Divestiture of Centralized Assets or Businesses, which stipulated the implementation procedures of the divestiture conditions in more detail. In 2014, the Ministry of Commerce issued the Provisions on Additional Restrictive Conditions for the Concentration of Business Operators (for Trial Implementation), which improved the conditional licensing rules for the concentration of Business Operators, and abolished the Interim Provisions on the Implementation of Assets or Business Stripping of the Concentration of Business Operators. Relevant Provisions of the Anti-Monopoly Law The content of anti-monopoly regulation is mainly in the fourth chapter of the Anti-Monopoly Law, which stipulates the concept of the Anti-Monopoly Law, the declaration procedure, the examination procedure and other contents. But these are rules of principle. Article 29 of the Anti-monopoly Law is the guidance of the highest legal standard of the conditional permit system for business concentration. The requirements of this article are the concentration of business operators with the limitation and elimination of competition effect, which should be controlled in our country, and the adverse effects can be circumvented through the system of conditional permission. Article 30 of the "Anti-monopoly Law" is conditional on the concentration of operators since the implementation of the "Anti-monopoly Law" in 2008, timely on the website of the Ministry of Commerce and the State Administration for Market Regulation website to the public.

By landing on the National Anti-monopoly Bureau website to view cases, on which Tencent merges Betta fish tiger teeth. Case in point: Tiger teeth and Betta fish must be familiar to game players. Huya is a game live streaming platform created by YY (YY), while Douyu was founded in 2014, formerly a live streaming channel of ACFUN, a quadratic website. Before the birth of short video and e-commerce live streaming, game live streaming is the most popular category in the domestic live streaming industry. Wang Sicong, a famous second-generation rich man, set up Panda Live in 2015, creating a sensation in the live gaming industry. In the

financing process of Douyu in 2016, Tencent led the investment twice and became the largest shareholder. At this time, Douyu has been infinitely close to Tencent. Then, in 2018, Huya also announced that it had received investment from Tencent. However, the two companies have been neck-and-neck all along, and the only way to end the neck-and-neck is through a merger. So there is no hiding Tencent's ambition to dominate the world. Because the Betta fish and the tiger's tooth both lose, Tencent cleverly drilled the empty. Prior to the merger, Tencent held 36.9 percent of Huya's shares, giving it more than half of the voting rights, according to the disclosure. In the Douyu company's equity, it is more than 39%, with 38% of the voting rights. According to the data of Mob Research, a third-party organization, Tencent's self-support and investment account for 4 of the five major game live streaming platforms in China. In fact, the failure of the merger of the two live streaming giants has long been a foregone conclusion. Once the merger is successful, the market share of the two platforms will reach 70%, and Tencent will have a high position in the whole game industry. Tencent's position in the overall gaming industry would be a good fit, and if the merger goes through, the two platforms could have a market share of up to 70%.

Tencent ranked first in the upstream online game operation service market with a share of more than 40%. Huya and Douyu ranked first and second in the market share of downstream game live broadcast exceeding 40% and 30%, respectively, with a total of more than 70%. Currently, Tencent has the sole control of Huya and the joint control of Douyu. If Huya and Douyu merge, Tencent will solely control the merged entity, further strengthen Tencent's dominant position in the market of live game broadcasting, and at the same time, Tencent will have the ability and motivation to implement closed-loop management and two-way vertical blockade in the upstream and downstream markets, which has or may have the effect of excluding and restricting competition, which is not conducive to fair competition in the market and may reduce the interests of consumers. It is also not conducive to the healthy and sustainable development of online games and game live broadcast market. After evaluation, the additional restrictive condition commitment scheme proposed by Tencent cannot effectively address the aforesaid competition concerns.

Although the case is prohibited from the concentration of operators, but not let the author on the concentration of operators with restrictions caused by the review process, the State Administration for Market Regulation will be the case has or may have the effect of excluding, restricting competition review opinions timely informed the applicant, and with the applicant on how to reduce the adverse impact of the concentration of operators on competition and other related issues for several rounds of discussion. The applicant submitted multiple rounds of commitment scheme with additional restrictive conditions (hereinafter referred to as commitment Scheme), and submitted the final commitment scheme on April 22, 2021. For the commitment plan submitted by the applicant, the State Administration for Market Regulation evaluated the effectiveness, feasibility and timeliness of the commitment plan in accordance with the Anti-Monopoly Law and the Interim Provisions on the Examination of the Concentration of Business Operators. After evaluation, the Administration for Market Regulation determined that the commitment plan submitted by the applicant could not effectively reduce the adverse impact of

concentration on the competition in the live game market and online game operation service market in China. It should be noted that in this process, the anti-monopoly Bureau informed the applicant of its opinions and conducted several rounds of negotiations. The applicant submitted several rounds of commitment plans with additional restrictive conditions, but the Anti-monopoly Bureau decided to prohibit the merger after an evaluation. Therefore, the system of operators' concentration with restrictions is applied here. This case is also the first case in which the merger of live broadcast platforms was banned by the anti-monopoly bureau.

## **2.2. The problem of attaching restrictive conditions to the concentration of business operators**

The classification of restrictive conditions in the Measures for Centralized Examination of Business Operators is not reasonable. For example, the specific types of behavioral conditions that apply more widely in the Internet industry are not comprehensive. However, other behavioral conditions, such as firewall provisions, anti-retaliation provisions, non-rehiring provisions, maximum price restrictions, supply commitments and so on, are ignored by the regulations of relevant departments. In practice, the Ministry of Commerce has to choose part of the case when dealing with the concentration of operators in the Internet and other innovative industries. The current laws and regulations in our country lack the guiding provisions of specific application of various conditions. As some scholars have pointed out, it is necessary to make relevant provisions from the Angle of different concentration type, the characteristics of different industries and the restriction of regulations. Lack of legislation combining industry factors analysis of the selection of restrictive conditions provides that our country's anti-monopoly review of the Internet business combination, especially involving transnational corporations, can not be copied from foreign review decisions, the basic principle and specific rules of the system of the concentration of business operators should be approved with conditional conditions, drawing lessons from foreign advanced practice. Combined with the specific situation of the Internet industry in our country, the review decision is made in favor of the healthy and fast development of the Internet industry in our country.

Lack of supervision mechanism in our country, the most serious on trustee rules, in theory, trustee have supervision trustee, management trustee, peel trustee. However, no matter what kind of trustee, we only stipulate that the supervising trustee and the divestiture trustee should be independent from the oblige of divestiture and the buyer of divestiture business, but we do not specify the way to guarantee the independence. In addition, there is no specific regulation on the source of the trustee. The stripping trustee, the holding manager and the supervising trustee should be professional, and their knowledge reserve, business ability and experience should be specified. However, Chinese laws and regulations do not require the sources of trustees. For example, according to the experience of anti-monopoly law enforcement agencies, investment banks act as the separation of trustees in many cases, and it is relatively appropriate, some countries stress that consulting companies and auditors as supervision trustees is particularly suitable. Unfortunately, our laws and regulations do not provide for this. The duty setting of stripping trustee and supervising trustee is partly improper.

In our country, the regulations stipulate that the supervision duties of the trustee for divestiture and the trustee for divestiture are almost the same, and the regulations only show that the supervisor and the trustee for divestiture should supervise the process of the buyer's candidate selection, this regulation is insufficient, and should be distinguished in the expression. On the "operator concentration additional restrictive conditions provisions (trial)" Article 4, stipulates that the supervision of the trustee is limited to the scope of self-stripping, but does not include the whole trustee stripping stage. This does not guarantee that there will be no undue competition in the process of divestiture, which still needs to be considered. These are the provisions about the trustee rules. In terms of enforcement supervision, our country has not made clear the specific supervision departments of the Ministry of Commerce and the supervision of industry management organs, nor the internal supervision problems of the specific implementer, except the supervision by the trustee and the supervision by market subjects by means of reports. The negative improper encroachment on the market runs through the case involving the concentration of operators from beginning to end. Therefore, it is inevitable that the anti-monopoly supervision department should make public and disclose the results of the case.

By summarizing and analyzing the disputes involved in the concentration of operators so far, it can be concluded that: after the above-mentioned disputes have been adjudicated or disposed of, whether the regulatory body will make the results of each dispute public, its treatment methods are not necessarily the same, that is, the transparency of the results of dispute settlement is not uniform enough, and even too low. Thus, after the conditional approval, the regulatory authorities should follow up, observe, supervise and guide the subsequent conditional implementation process. In the search of the cases of conditional approval in recent years, except the cases of the removal of additional restrictive conditions, no other disputes have been disclosed on the websites of the Ministry of Commerce or the State Administration for Market Regulation about the implementation and progress of conditional conditions and whether there are negative external benefits to the relevant market. The regulatory authorities have not made a formal statement about the disclosure of follow-up information for each dispute. In some cases, enterprises focus on approval with additional conditions, then the regulatory agency will monitor the implementation of the restrictive condition obligations accompanying the collective cooperation. Anti-monopoly law enforcement agencies shall, after the concentration of enterprises, release important information to the public on major matters that are contrary to other restrictive conditions, such as changes in business activities, share selling, asset stripping, etc. This method can produce specific restriction and maintenance system in the corresponding category, on the other hand, it can also guide the citizens' spontaneous enthusiasm for supervision.

### **3. To the Concentration of Business Operators Attached Restriction Condition System Perfect Way**

#### **3.1. The application of additional restrictive conditions is preferred**

The type of restrictive conditions is clearly stipulated in our

"Regulations for Implementation", but it is not clearly stated in which circumstances which restrictive conditions are preferentially applied. There are three types of restrictive conditions in our country. From the relevant legislation of our country, the legislation of structural conditions is more perfect. However, the three types of applicable standards, behavioral conditions and rules for the application of comprehensive conditions have not been clearly regulated. Structural conditions can directly deprive applicants of all the elements of effective competition and transfer the elements to the other party, so as to cultivate the other party's competitors and maintain the competitive structure of the market. As a result, structural conditions remain the preferred choice of antitrust enforcers. However, according to the rich experience of the European Union and the United States, structural conditions can quickly end the threat of applicants to the competition order, but at the same time, the problems of enterprise operation and low efficiency of examination should not be ignored. In some cases, improving structural conditions must be complemented by behavioral conditions. Therefore, the legislative classification, application, implementation, supervision and other details of behavioral norms should be specialized. First of all, participate in the centralized operator's independent choice setting. Because the audit with additional restrictive conditions needs the support of professional knowledge and key data, its review procedures are more complicated and the review time is longer. Therefore, in the preferential application of restrictive conditions, it is suggested to encourage the centralized operators to choose the type of conditions independently, and to voluntarily submit additional restrictive conditions at the same time or 1-2 months after the declaration of centralized operator review. Encouraging operators to declare independently can relatively reduce the review time, while ensuring the smooth implementation of restrictive clauses in the later period of the premise possibility. Secondly, law enforcement agencies should, on the basis of fully respecting the independent choice of operators, introduce professional institutions and expert evaluation opinions according to scientific market analysis, evaluate the restrictive condition scheme independently proposed by operators, and finally determine whether to pass or modify it. In this process, the law enforcement agencies should communicate and negotiate with the operators in a timely manner, and hold a discussion meeting when necessary to modify or finally confirm the plan.

#### **3.2. Establish the principle of appropriate disclosure**

The value of arbitration confidentiality lies in the maintenance of the commercial reputation of the parties and the avoidance of the risk of similar disputes. However, if the confidentiality principle is completely adopted in the implementation dispute of behavioral conditions, it will face the following problems: first, if the supervising trustee cannot timely understand the arbitration progress and relevant materials, it will hinder the realization of its functions; Second, the lack of information on the arbitration clause or award by the third party and other competitors in the relevant market will reduce their judgment on the performance of the behavioral conditions of the centralized party. In order to make up for the negative impact of arbitration confidentiality on the information acquisition of supervisory trustees and other market participants, the principle of appropriate disclosure can be established and the specific scope of

disclosure can be regulated: disclosure to supervisory trustees. In order to facilitate the supervision of the performance of duties by the trustee, it shall include the whole process from the start to the end of the arbitration procedure; Disclosure of potential interests to third parties. It is mainly limited to the content of arbitration clauses and focuses on the obligation of informing the function of arbitration clauses when disputes occur. Openness to other competitors and the public. It is mainly the final adjudication result, so that its supervision focuses on the performance of the behavioral conditions of the enterprise.

### 3.3. Improve the speed of the program

The dynamic market environment determines the efficiency of the implementation of the dispute award under behavioral conditions, so it is particularly necessary to make full use of the flexibility of the arbitration procedure to further shorten the time limit of the award. We should give full play to the mediation role of the supervisory trustee in summary cases, learn from the experience of the European Union, and take the mediation of the supervisory trustee as the procedural premise for the initiation of the arbitration mechanism when necessary. The problem that the mediation of supervised trustee is not enforceable can be solved by limiting the mediation period, for example, setting the mediation period of supervised trustee to no more than 15 working days. In addition, the implementation of the dispute award with behavioral conditions can make full use of the stipulation in Article 55 of the Arbitration Law that arbitration disputes with some facts already clear can be awarded first, and the arbitration stage can be divided into preliminary award and final award. In the event of a dispute between a third party and a centralized party over the right to use the open facility, the arbitration institution shall make a preliminary ruling on the third party's qualification for use within a certain period

of time, and then make a comprehensive assessment and review of the opening.

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