反垄断执法和解制度：国家干预契约化之滥觞

Settlement System of Antitrust Law Enforcement: Origination of State Intervention Contracting

殷继国 著

中国法制出版社
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序　言

刘大洪[①]

法律的生命在于实施，法律的权威在于执行。被誉为“经济宪法”的《反垄断法》自实施以来，被公众寄予厚望，以期发挥预防和制止违法垄断行为、维护市场竞争秩序、保护社会公共利益的功能。但我国反垄断法程序制度的规定较为粗糙，反垄断执法尚处于摸索阶段，执法机构经验不足，导致反垄断公共执法的案例屈指可数。因此，理论界对反垄断法的关注和研究重点需要从实体制度转向程序制度。

反垄断执法和解制度作为公共执法中的程序制

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度，已成为美国、英国、法国、德国、意大利、日本、韩国、巴西以及欧盟等国家和地区反垄断法中的关键制度。近五十年来，美国司法部主管的反垄断民事案件以和解结案的比例高达 90% 以上。其中不乏一些世界著名的公司纷纷与司法部和解，如美国铝业公司、柯达公司、美国电话电报公司、联合鞋业公司、通用汽车、英特尔、美国在线/时代华纳、IBM 公司等，影响最为深远的仍属于美国微软反垄断执法和解案。近十年来，欧盟以和解结案的反垄断案件的比例也高达 50%。虽然我国《反垄断法》第 45 条对反垄断执法和解制度做了规定，由于立法之前缺乏基本的理论储备，导致该制度在规定上仍存在诸多不足，公众对该制度也缺乏正确的理解，目前尚无一例真正的反垄断执法和解案例。正是在这样的背景之下，《反垄断执法和解制度：国家干预契约化之滥觞》一书的正式出版，对于正确认识反垄断执法和解制度、细化反垄断执法和解的规则以及顺利实现反垄断执法机构和涉嫌垄断经营者之间的和解等具有重要的理论价值和实践意义。

在我看来，本书在以下三个方面具有创新性：第一，研究视角具有创新性。从国家干预契约化这一全新的视角展开研究，并以其作为反垄断执法和解制度的重要理论基础。国家干预契约化的观点是作者在对公私权二元对立以及公私法二元划分的观点进行反思和超越的基础上提出来的，契约化国家干预模式强调调控主体与调控受体之间的协商合作，契合了当前合作治理的潮流以及协商合作、社会协同、公众参与的基本要求，是处理政府与市场关系的一种可行模式。第二，研究的内容具有新颖性。反垄断执法和解制度是反垄断法中最具特色的制度之一，也是西方国家运用最成熟的反垄断程序制度。但遗憾的是，国内学术界对反垄断法的研究主要集中在实体法和诉讼程序上，对反垄断执法和解这一执法程序一直缺乏系统的、有深度的剖析。本书在反垄断执法和解的界定、制度构成、我国反垄断执法和解制度的完善等方面展开了系统化的研究，拓展了国内外反垄断执法和解制度的研究内容。第三，研究观点具有创新性。本书提出了一些新的观点，比如提出反垄断执法和解制度开启了国家干预契约化的先河、

执法和解制度的价值取向是效率中心主义、反垄断执法和解程序属于正式的法律程序、我国反垄断执法应树立“宽严相济”的执法理念等富有创新性的观点。

反垄断执法具有很强的专业性和复杂性，相关市场的认定、滥用行为的认定、垄断协议尤其是默示共谋的认定以及反垄断证据的识别和调查、证明标准等重大问题一直困扰着国内外的理论界和实务界。因而本书不可避免地会存在一定的不足，比如关于国家干预契约化的论证有待进一步深化，关于契约化国家干预模式以及反垄断执法和解制度可能具有的缺陷也有待进一步的挖掘。但作为我国第一本研究反垄断执法和解制度的专著，采用了比较法的研究进路，运用多元化的研究方法，占有丰富的一手文献资料，注重理论与实践的有机结合，可以说是国内学术界研究反垄断法的又一力作。

本书是作者在其同名博士学位论文的基础上修改而成的，此部专著是他博士阶段三年学术生涯的心血结晶，更是他十年来以反垄断法为研究方向进行刻苦钻研的成果之一。我作为其硕士生和博士生导师，对本书的出版自然感到十分欣慰，我相信该书的出版将会对我国反垄断执法和解制度的完善以及反垄断执法机构与涉嫌垄断经营者之间的和解实践提供有益的指导，对相关学术研究工作也大有助益。

是为序。

2013 年 6 月

于江城汤逊湖畔

摘　要

市场调节机制与政府干预机制是配置资源和协调经济活动的两种主要机制，但两种机制均有可能出现失灵。如何降低两种机制尤其是政府干预机制的失灵几率一直是各国决策者和学者的研究课题。在欧美等发达国家和地区的政府干预机制中，出现了一种与传统的刚性干预不同的新型干预模式，即契约化国家干预，其核心内容是调制主体通过与调制受体缔结契约的方式来实现干预目标。这种相对柔性的干预模式重视调制受体的主体性和能动性，有利于创造相对和谐的干预氛围，能够在一定程度上破解当前困扰各国的“双失灵”难题。契约化国家干预模式产生于美国，并以反垄断执法和解作为国家干预契约化的开端。继美国之后，允许反垄断执法机构与涉嫌垄断的经营者和解开始成为许多国家的普遍做法。反垄断执法和解

制度的出现，既是公私权二元对立的消解以及公私法逐渐融合的必然结果，也是经济发展和经济法制演进的必然要求。此外，反垄断执法和解制度还具有深厚的哲学文化基础，符合市场经济发展要求的经济逻辑，也是克服反垄断法规则不确定性与反垄断执法困境的必然选择。

基于反垄断执法和解制度的正当性及其制度优势，我国《反垄断法》以欧盟的承诺制度为蓝本引入了该制度。目前，我国学术界关于反垄断执法和解制度的研究成果较少，《反垄断法》及其配套规定关于该制度的规定也存在诸多不足。此外，除经营者集中领域出现的少数附条件通过的案例外，其他反垄断领域并不存在执法和解的案例。为了进一步拓宽并丰富反垄断法程序制度的理论成果，健全我国的反垄断执法和解制度，提高和解制度的利用率以及政府干预的效率，服务于我国的市场经济建设，本书以国家干预契约化为视角，采用从理论到制度再到实践、从外国到中国的研究进路，主要运用了语义分析法、历史分析法、比较分析法、法经济学分析法、规范分析法等多种分析方法，对反垄断执法和解制度的概念、基本理论范畴、部分国家和地区的反垄断执法和解制度及其实践、反垄断执法和解的主要制度构成以及我国反垄断执法和解制度的立法及其完善等问题进行了较为深入的研究。

反垄断执法和解制度属于学理概念，其法律概念在不同的国家和地区有所不同，我国《反垄断法》称之为“经营者承诺制度”。所谓反垄断执法和解，是指在反垄断执法过程中，为达到有效制止涉嫌垄断的行为并消除该行为对市场竞争不利影响的目的，反垄断执法机构与涉嫌垄断的经营者相互让步并缔结和解契约，以快速解决反垄断争议的执法制度。反垄断执法和解制度的价值取向是效率中心主义，所谓效率中心主义，是指效率是反垄断执法和解制度第一位阶的价值，公平是第二位阶的价值。因此，反垄断执法和解制度的制度设计及其运行应在坚持效率中心主义价值取向的前提下，权衡效率与公平之间的关系。在效率中心主义价值取向的指引下，反垄断执法和解制度的构建及其运行应当坚持程序灵活简便原则、公共利益原则、利益平衡原则、诚信原则、意思自治原则和比例原则。当

前，欧美等国家和地区反垄断执法和解的基本模式主要有行政模式与司法模式、一元模式与多元模式。从总体上看，行政模式和一元模式的效率要高于司法模式和多元模式，但司法模式相较于行政模式更能兼顾公平，多元模式相对于一元模式而言更具针对性。由于上述和解模式均有优劣，采用何种模式来构建反垄断执法和解制度均无好坏之分，只需要与本国的法律文化、执法传统等国情相适应即可。关于反垄断执法和解程序的法律性质，当前国内学术界将其定性为非正式程序，是对正式程序与非正式程序的区分标准缺乏足够的认识所致，也是对反垄断执法和解程序的误读。正确的理解应当是，反垄断执法和解程序在性质上是一项正式的执法程序。作为反垄断执法和解制度本质与核心的和解契约在性质上属于公私法混合契约，这一性质决定了我们在规范反垄断执法和解制度及和解契约时，应注意公法规则与私法规则的结合。此外，反垄断执法和解节约了执法资源，提高了违法垄断行为的发现概率，进而提升了反垄断法的整体威慑力度，即和解契约的运用与反垄断法的威慑功能并不存在冲突。而且，理想的反垄断执法应该是“刚柔并济”、“宽严相济”，只有将刚性反垄断执法与柔性反垄断执法和解结合起来，才能真正提升反垄断法的威慑水平。

美国是世界上最早规定反垄断执法和解制度并开展执法和解实践的国家；欧盟属于区域性国际组织，其反垄断执法和解制度移植自美国，而我国的经营者承诺制度被认为是以欧盟的承诺制度为蓝本引进的；我国台湾地区与大陆地区同宗同源，有相同的法律文化传统，相近的法治环境和反垄断执法理念。因此，考察上述国家和地区的反垄断执法和解制度及其实践对健全我国大陆地区的反垄断执法和解制度意义重大。从制度内容来看，当前各国的反垄断执法和解制度框架包括实体内容和程序内容两大部分。实体内容主要包括适用范围、适用条件、和解双方的权利义务、和解决定的内容等；程序内容主要包括和解契约的订立程序、增强和解程序透明度与保护相关利益的程序制度（如竞争影响评估报告制度、执法和解说明制度、公众评议制度、和解咨询制度与司法审查制度）、和解决定的执行程序（如和解决定的执行体制、和解决定的变更制度、和解决定的终止

与恢复调查制度）等。从执法和解的实践活动来看，美国反垄断执法机构对执法和解程序的依赖程度非常高，以至于和解制度成为反垄断执法领域中的关键制度；欧盟的反垄断执法和解实践具有和解案例较少、执法经验较缺乏、所受关注度和引发的争议也不如美国那样多等特点；我国台湾地区的反垄断执法和解案例更少，均涉及新兴产业和高科技产业，且在和解程序透明度和公开性方面存在不足。更为关键的是，上述国家和地区均对微软公司展开了反垄断调查，最终都以和解结案。但反垄断执法机构的做法以及微软公司的态度存在一定的差异，和解过程中表现出来的经验教训值得我们学习和借鉴。

我国《反垄断法》第45条以及国家工商行政管理总局、国家发展与改革委员会所制定的一系列反垄断执法的程序规定都对经营者承诺制度作出了规定。但相对于发达国家和地区而言，我国的反垄断执法和解制度立法及其运作存在以下问题。第一，立法技术的不成熟导致反垄断执法和解制度存在诸多缺陷，比如关于执法和解的适用范围规定不明、关于启动期间与启动主体的规定过于狭隘、对和解双方权利义务的规定较为简单、关于和解决定执行及其法律后果的规定过于粗糙。此外，我国的反垄断执法和解制度没有对适用条件、利害关系人与社会公众的权利、和解决定的变更作出规定，也缺乏一整套增强和解程序透明度与保护利害关系人利益及公共利益的机制。第二，公权契约化观念上的障碍阻碍了反垄断执法和解制度的有效运作。第三，反垄断执法和解制度的运作存在较大风险，主要包括执法机构被俘虏的风险、道德风险以及和解程序过度利用的风险。第四，利益失衡因素可能引发“和解悖论”。第五，反垄断执法本身的落后抑制了执法和解制度优势的发挥。

因此，在借鉴美国、欧盟以及我国台湾地区反垄断执法和解制度先进立法经验的基础上，结合我国的国情，首先应从立法模式的选择、实体制度的重构、程序制度的重构三个方面健全我国的反垄断执法和解制度。其次，我们还应当采取措施优化反垄断执法和解制度有效运作所需要的内外部环境。具体措施是：第一，反垄断执法机构、涉嫌垄断的经营者、社会

公众都必须破除公权契约化观念上的障碍，实现观念上的更新；第二，反垄断执法机构应当对其在和解过程中担任的执法者角色和契约当事人角色进行准确定位，避免角色的混淆；第三，应从原则控制、规则和程序控制、司法审查控制三个方面对和解过程中反垄断执法机构的自由裁量权进行适当控制；第四，反垄断执法和解实践之时间成本控制，应当在和解程序启动时间与和解契约缔约时间的选择、和解期限的确定等方面做出理性的选择，在追求自身利益最大化的同时实现反垄断执法和解制度的效率价值；第五，反垄断执法机构应当采取积极有效的措施提高反垄断执法的能力，并提升反垄断执法和解的水平。

关键词：反垄断法；执法和解；经营者承诺制度；国家干预契约化；微软案；重构

Abstract

Market adjustment and state intervention are the two main mechanisms in the allocation of resources and coordination of economic activity, but they are possible failure. Policy makers and scholars always study the problem that how to reduce the failure probability of two mechanisms, especially state intervention mechanism. In the western state intervention mechanisms, there is a new intervention model that different from traditional rigid intervention, namely contracting state intervention. Its core content is that controlling and regulating subject contract with controlling and regulating receptors to achieve intervention tasks. This relative flexible intervention attaches importance to the subjectivity and activism of the receptors, it can create intervention atmosphere of relative harmony, and to some de-

gree it also can solve the problem of "double failures" which puzzles every countries. Contracting state intervention originated from America, settlement system of antitrust law enforcement became the beginning of the new model. After America, allowing the law enforcement agencies and alleged monopoly operators to settle the dispute becomes a common practice in many countries. The appearance of settlement system of antitrust law enforcement, is an inevitable outcome that public-private rights counteract opposition and public-private law gradual integration, but also is an inevitable requirement for economic development and evolution of economic legal system. In addition, the system has profound philosophical and cultural bases, accords with the economic logic of economic development; it also is the inevitable choice to overcome the uncertainty of antitrust rules and difficulties of antitrust law enforcement.

Because of legitimates and advantages, China's "Antitrust law" has introduced the system basing on EU's commitment system. At present, the research findings about settlement system of antitrust law enforcement are very little in our academic circle, there are many deficiencies in the provisions of "Antitrust Law" and it's implementing rules. Furthermore, it does not exit any case of enforcement settlement besides Concentration of Undertakings. In order to broaden and enrich the theoretical findings about antitrust procedure system, improve settlement system of antitrust law enforcement, and enhance the utilization rate of the system and efficiency of government intervention. From the angle of state intervention contracting, this article adopts the access from theory to practice, and from foreign countries to our country, then uses semantic analysis, historical analysis, comparative analysis, law and economics analysis, and normative analysis to study the problems about settlement system, such as the concept, the basic theoretical categories, the systems and practices in some countries and regions, the main constitution of the settlement, the legislation actuality and improvement in our country, and etc.

Settlement system of antitrust law enforcement is a theoretical concept; the legal concepts are different in different countries and regions, our "Antitrust Law" call it as operator commitment system. The settlement system of antitrust law enforcement is the system that enforcement agencies and alleged monopolistic operator make a concession each other and then conclude a contract to stop the alleged monopolistic behavior, eliminate the negative impact and solve the dispute quickly. Its value is efficiency centralism, the so-called efficiency centralism, is that the efficiency is the first stage value and the fair value is the second. Therefore, system design and its operation should balance the relationship between efficiency and fair on the premise of the efficiency centralism. Under the guidance of efficiency centralism, the construction and operation of settlement system should adhere to the principles of flexibility and convenience, the public interest principle, the principle of balance of interests, good faith principle, the principle of autonomy of will and proportionality principle. The basic models of Europe and America settlement system have administrative and judicial models, unitary and plurality models. Overall, the efficiency of administrative and unitary models excels judicial and plurality models, but judicial model can take into account fairer, and plurality model has more pertinence. Owing to above models have advantages and disadvantages, there is no good or bad to adopt any model in construction of settlement system, it is only adapt to national conditions, such as legal culture, the tradition of law enforcement, etc. Concerning the legal nature of settlement proceeding, most scholar think it is an informal proceeding, I consider above comprehension confound the dipartite standard of formal and informal proceedings, but also misread the settlement proceeding of antitrust law enforcement. The correct comprehension is that it is a formal enforcement proceeding. The nature of settlement contract is a public-private mixed contract, so we should integrate the public rules and private rules when we regulate the settlement system and settlement contract. In addition, the settlement of antitrust law enforce-

ment saves enforcement sources, increases the discovery probability of illegal monopolistic behaviors, and thus enhances overall deterrence effect of antitrust law, in other words, the use of settlement contract is not conflict with deterrent function of antitrust law. Moreover, the ideal antitrust law enforcement should be "combining hardness with softness" and "tempering justice with mercy", that is, we should combine the rigid and flexible antitrust law enforcement, only this way, and we can really enhance the deterrence level of antitrust law.

The United States is the first country which has prescribed the settlement system and has launched the settlement practices; the European Union is a regional international organization, its settlement system has been transplanted from America; our country's settlement system has been introduced from European Union; Taiwan area and Mainland area have the same root and legal cultural traditions, the similar environment of rule of law and idea of antitrust law enforcement. Therefore, the study of the settlement system and its practices in above countries and regions is of great significance for perfecting our settlement system. From the content point of view, the settlement system of antitrust law enforcement includes entitative contents and procedural contents. The entitative contents mainly include applicable scopes and conditions, rights and obligations of both parties, the content of settlement decision; the procedural contents mainly include conclude procedure of settlement contract, the procedures of increasing the transparency and protecting the relatives' interests (such as competitive impact statement system, settlement of law enforcement explanation system, public evaluation system, settlement advisory system and judicial review system), implementation of the decision procedure (such as implementation structure, alteration system, termination and restoration investigation system) and so on. From the practice point of view, the U. S. antitrust enforcement agencies depend on the settlement procedure highly, so that the settlement system has become the key system in antitrust law; the EU's practices have the unique characteristic, for in-

stance fewer cases, deficiency of enforcement, fewer concerns and controversy; the cases in our Taiwan area are least, also relate to the emergent industries and high-technology industry, there are some limitations on transparency and openness. What's more important is that above countries and regions have launched antitrust investigations on the Microsoft Corporation, eventually closed with settlement. However, there are some differences in the practice of antitrust law enforcement agencies as well as Microsoft's attitude; the lessons which manifested during settlement should be learned by us.

Article 45 of our "Antitrust Law" and the provisions of the antitrust enforcement procedure which prescribed by National Development & Reform Commission and State Administration for Industry & Commerce have prescribed the operator commitment system. Comparing to developed countries and regions, there are some problems in China's antitrust legislation and enforcement. First, the immature of legislation technology led to many defects of settlement system, for example, the scope of settlement system is unknown, and the provisions of launch period and subjects are narrow, and the provisions of the rights and obligations are briefness, and the provisions about implementation of decision and legal consequence are roughness. In addition, our settlement system did not prescribe applied conditions, the rights of interested party and social public, alteration system, and a complete set of increasing the transparency and protecting the relatives' interests. Second, idealistic obstacle of public right contracting hinders the effective operation of the settlement system of antitrust law enforcement. Third, there are some risks of settlement system, including captured risk, moral risk and excessive use risk of reconciliation procedures. Fourth, moral hazard and interest unbalance and other factors may initiate "settlement paradox". Fifth, the backward antitrust law enforcements are restraining the advantages of settlement.

Thus, on the basis of advanced experience from the United States, European Union and our Taiwan area, combined with China's conditions, we should

perfect the settlement system of antitrust law enforcement from the choice of legislative model, reconstruction of entitative systems and procedural systems. On the other hand, we should take measures to optimize the internal and external environment of the settlement system. Specific measures are as follows. Firstly, antitrust law enforcement agencies, alleged monopolistic operator and public must get rid of the obstacle of public right contracting and achieve conceptual update. Secondly, antitrust law enforcement agencies should orient accurately the contracting party and law enforcement roles during the settlement, and avoid confusion of roles. Thirdly, we should properly control the discretionary power of settlement of antitrust law enforcement agencies from principle control, rules and procedure control, and judicial review control. Lastly, antitrust law enforcement agencies should take effective measures to improve the ability of antitrust law enforcement, and enhance the level of settlement.

Key Words: Antitrust Law; Settlement of Law Enforcement; Operator Commitment System; State Intervention Contracting; Microsoft Corporation Case; Reconstruction