

# Research on the Improvement of the Fine System in the Context of the Revision of China's Anti-Monopoly Law

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## Abstract

As an essential component of implementing the Anti-monopoly Law, the fine system suffers from fundamental issues related to uncertainty and insufficient deterrence. These flaws give rise to significant weaknesses and arbitrary enforcement of the law. Even with the recent implementation of the amended Anti-monopoly Law, the fine system has undergone significant changes but is still unable to provide specific solutions to the inherent issues concerning fines under the Anti-monopoly Law. Given the above situation, there is an urgent need to focus on ways to improve the fines from a design perspective. This paper aims to explore various paths and strategies to enhance the fines system under the Anti-monopoly Law through a comprehensive examination of relevant factors. By doing so, it will be possible to identify the means to overcome the defects of the current fines system and restructure it in a way that is more efficient, transparent, and fair.

**Keywords:** Anti-monopoly Law, fines, insufficient deterrence, certainty, improvement path

## 1. Background and Problem Formulation

Anti-monopoly Law are essential legal tools that seek to promote fair competition in the market. They help prevent the abuse of market power by dominant firms, which can harm consumers via higher prices and reduced innovation. The Anti-monopoly Law can curtail these negative effects and promote the benefits of competition, including lower prices, better quality products, and increased innovation. In addition to protecting consumers, Anti-monopoly Law can also help prevent the concentration of economic power in the hands of just a few firms, which can have a significant impact on the overall economy's health. A concentration of economic power can limit the entry of new firms into the market, reducing opportunities for innovation and job creation. By promoting competition and limiting market dominance, Anti-monopoly Law encourage a more diverse, resilient, and stable economy. Overall, Anti-monopoly Law play a crucial role in promoting a competitive and fair marketplace, supporting consumer welfare, innovation, and broader economic growth. Their effective implementation and enforcement are essential for ensuring a level playing field for businesses and a healthy and prosperous economy.

Recently, State Administration for Market Regulation issued four supporting regulations of the Anti-monopoly Law, namely "Regulations on the Suppression of the Abuse of Administrative Power to Exclude and Restrict Competition", "Regulations on the Prohibition of Monopoly Agreements", "Regulations on the Prohibition of the Abuse of Dominant Market Positions" and "Regulations on the Review of Concentration of Undertakings", which will come into force from April 15, 2023. The fine system in the supporting regulations demonstrates the legislative spirit of the Draft Revision of the Anti-monopoly Law (Draft for Public Comments), and also improves to a certain extent the uncertainty in the design of the fine system and the inherent deficiency in the deterrent effect of the Anti-monopoly Law.

The above changes to the fine system were first introduced in the Draft Revision of the Anti-monopoly Law (Draft for Public Comments), which was published by State Administration for Market Regulation on January 2, 2020 for public consultation, and the Standing Committee of the National People's Congress voted on June 24, 2022 to adopt the Draft Revision of the Anti-monopoly Law of the People's Republic of China (Amendment) (Hereinafter referred to as the "Anti-monopoly Law (Amendment)"). The amended law focuses on the hot issues of market competition in recent years, such as the identification of the dominant market position of undertakings in the Internet field and the construction of a fair competition review system, etc.<sup>1</sup> At the same time, the Anti-monopoly Law (Amendment) improves the legal liability system in the old law, especially the fine system. Fines are the main way for the anti-monopoly enforcement authorities to punish the undertakings for monopolistic acts, and the emphasis on the construction of the fine system will be more conducive to the prevention and suppression of monopolistic acts, and also beneficial to the protection of fair competition in the market.

First of all, for monopoly agreements, the Anti-monopoly Law (Amendment) stipulates the rules for calculating fines when there are no sales in the previous year, and imposes a fine of up to five million yuan on undertakings in the above situation. 2008 Anti-monopoly Law made it impossible to impose corresponding fines on undertakings due to their lack of sales in the previous year, which made cases of undertakings evading penalties had actually occurred. 23 May 2019 The administrative penalty decision announced by the Zhejiang Provincial Administration for Market Regulation on the implementation of monopoly agreements for eight concrete enterprises in Quzhou City, numbered Zhejiang Market Regulation Case No. [2019] 8, mentions that "As the party concerned, Quzhou City Kai Long Building Materials Co., Ltd. did not go into production in 2017 and had no sales in the previous year, the Bureau decided to impose the following penalties on the party concerned: Order to stop illegal behavior. "2The appearance of zero penalty is obviously a defect caused by unfilled legal loopholes, and the remaining parties who reached and implemented the monopoly agreement together were all fined 1% of the previous year's sales. The Anti-monopoly Law (Amendment) Act is precisely the improvement of the rules to address this legal loophole. In addition, for undertakings who have not yet implemented a monopoly agreement, the Anti-monopoly Law (Amendment) also adjusts the maximum fine of 500,000 yuan under the old law to a maximum fine of 5 million yuan. It is worthy of further consideration that, although the penalty rules for undertakings with no sales in the previous year are provided, is there a sufficient basis for economic analysis to set a maximum fine of 5 million yuan? No sales in the previous year directly to a clear maximum fine amount of punishment whether to take into account the differences between different undertakings? Secondly, Article 58 of the new law provides for the legal liability of undertakings concentration, in which the rules on fines are redesigned, and the amount of fines faced by a concentration of undertakings in compliance with the statutory circumstances is modified from the original maximum 500,000 yuan to a fine of less than ten percent of the previous year's sales. Comparing with the penalty rules of Article 57 of the new law on the abuse of dominant market position by undertakings, it can be found that there is a lower limit of one percent of the previous year's sales for the abuse of dominant market position. Is there a need for such differentiated rule design? Again, is it too general to use the multiplier capping formula indiscriminately for different forms of violations such as failure to declare, implementation of concentration without approval after declaration, implementation of concentration in violation of the decision to attach restrictive conditions, and implementation of concentration in violation of the decision to prohibit? In addition, the new law specifies that the maximum fine is 3 million yuan when an undertaking of a trade association organization reaches a monopoly agreement, and the fine rules for undertakings reaching and implementing monopolistic acts are different. Should the fine rules for different subjects remain uniform or be designed differently?

This paper will analyze the possible defects of the fine rules in the light of the relevant provisions of the anti-monopoly fine system in China's Anti-monopoly Law (Amendment), and consider how to improve the design of the anti-monopoly fine system and enhance the deterrent effect of anti-monopoly fines on the basis of the implemented new law. Determining the position of the Anti-monopoly Law in the overall legal system (i.e., "positioning"), clarifying the direction of its improvement (i.e., "orientation"), and formulating specific and feasible rules (i.e., "setting rules") It is crucial for the revision of the Anti-monopoly Law. <sup>3</sup>As a key system for the implementation of the Anti-monopoly Law, the design of the rules on fines should be guided by the orientation of the Anti-monopoly Law in the legal system and the direction of the revision of the Anti-monopoly Law.

## 2. Deficiencies of the Fines Rule of the Anti-Monopoly Law (Amendment) and Dilemmas in Practice

As far as the fine system in the Anti-monopoly Law is concerned, there are eight types of fine setting methods and four types of fine combinations, including fixed numerical, fixed multiplier, numerical range, multiplier range, numerical capping, multiplier capping, numerical flooring, generalization, as well as the combination of several setting methods, options and reuse.<sup>4</sup> For example, the Anti-monopoly Law (Amendment) and the draft amendment both impose a fine of more than one percent of the previous year's sales on the undertakings who

enters into and implements a monopoly agreement or abuses a dominant position in the market. For the concentration of undertakings, the 2008 Anti-monopoly Law provides for a fine of up to RMB 500,000 if the statutory conditions are met, and the amount of fine is set by a numerical cap. The Anti-monopoly Law (Amendment) has modified the way of setting the fine for the concentration of undertakings that meet the statutory conditions to a multiplier distance type. In general, China's Anti-monopoly Law mainly adopts the multiplier data type to set the amount of fines, and only applies the numerical capping type to calculate the amount of fines under special circumstances, such as when the undertakings has no sales in the previous year or when the trade association organizes the undertakings to reach a monopoly agreement. The defects in the design of the fine rules in the Anti-

monopoly Law (Amendment) are still mainly manifested in the lack of certainty of anti-monopoly fines and insufficient or excessive deterrence of anti-monopoly fines.

### *2.1 Lack of Certainty of Anti-Monopoly Fines*

China's anti-monopoly fines lack certainty, and in practice they often face uncertainty about the amount of fines and uncertainty about their discretion. The lack of certainty in China's Anti-monopoly Law is a significant issue that undermines the effectiveness of these laws. In practice, the uncertainty surrounding the amount of fines and the discretion of fines creates an environment where companies are unsure how to conduct themselves on the market and what penalties they may face.

The lack of clarity regarding the amount of fines is a particular concern. Companies need to know the potential penalties they may face for violating Anti-monopoly Law, as this helps ensure they comply with the regulations. However, in China, the fines for companies that violate Anti-monopoly Law may remain vague. This approach has generally given regulators significant latitude in determining fines' amount, but it has also generated concerns regarding the fairness and consistency of judgments, with some arguing that this vagueness may lead to arbitrary enforcement. In addition to the lack of clarity in the amount of fines, the discretion in the fines' imposition is also problematic. Regulators have been granted broad discretion to determine the amount of fines, which may lead to inconsistencies in enforcement between different sectors and different regions. For instance, some regions' regulators may have different criteria and considerations in setting fines than others, causing confusion and uncertainty for companies.

More specifically, from the perspective of the amount of fines, the design of Anti-monopoly Law fines rules has repeatedly used the undertakings' sales in the previous year as the benchmark for calculating the amount of fines. The way of setting the benchmark of fines has largely caused uncertainty in the amount of fines. In practice, there are two problems with "sales in the previous year". First, is there uncertainty in the determination of the "previous year"? Second, is there any uncertainty in the determination of "sales"? The "previous year" as stipulated in the relevant Anti-monopoly Law and regulations can be interpreted as the previous year when the monopoly agreement was reached, the previous year when the monopoly agreement was implemented, or even the previous year when the anti-monopoly investigation started or the anti-monopoly penalty was imposed. The "previous year" cannot be interpreted as the previous year when the anti-monopoly agreement was made. This uncertainty is an important factor in the lack of certainty as to the amount of fines, as the "previous year" does not provide clear enforcement guidance as to the basis for setting anti-monopoly fines. The determination of "sales" also lacks certainty. For companies doing business not only in China, it is clear that China sales and global sales are two different figures. From the perspective of a group of companies, the uncertainty of fines in anti-monopoly enforcement is also reflected in whether the sales are only the sales of the parent company or the subsidiaries, or the total sales of the parent company and the subsidiaries.

From the perspective of discretionary fines, in the case of a monopoly agreement, the theoretical minimum amount of penalty is only one-tenth of the maximum amount in the case where the previous year's sales have already been determined, and the flexibility of fines is large. The excessive discretionary power of fines is likely to cause a lack of certainty in anti-monopoly fines in practice. In contrast, other countries have formulated some specific implementation rules for the enforcement agencies in determining the amount of fines, requiring the enforcement agencies to take into account factors such as the size and profitability of the industry in which the offender is located, as well as the extent and duration of the damage to market competition caused by the offending conduct. Although the above provisions limit the discretion of the anti-monopoly enforcement agencies, the judgment of the above relevant factors still relies on the judgment and analysis of the anti-monopoly enforcement agencies in individual cases, and in essence, on the discretion of the enforcement agencies, which makes the uncertainty of the anti-monopoly fines not further resolved. Some people are supportive of the uncertainty of the penalty consequences of violations, arguing that when the penalty consequences are certain, the violator is more inclined to commit its maximum tolerable violation. Conversely, when the penalty consequences are uncertain the violator cannot judge the penalty consequences of the violation committed, which makes the violator choose the less harmful violation as much as possible. However, more

certain and transparent penalty consequences do not necessarily encourage offenders to commit the most tolerable violations. On the contrary, when the violators face uncertain penalty rules, the enforcers have more power over the discretion of fines, which makes them prone to power-seeking and other power corruption.

### *2.2 Insufficient or Excessive Deterrence of Anti-Monopoly Fines*

The practice of Anti-monopoly Law also shows that the uncertainty of fines causes the problem of insufficient or excessive deterrence of Anti-monopoly Law. Deterrence is a commonly mentioned concept in competition law, and the pursuit of an effective deterrence system to prevent or stop monopolistic behavior is the goal of anti-monopoly legislation. Scholars have made a side-by-side comparison of anti-monopoly fines in China with those in the European Union and the United States over the past ten years, and the anti-monopoly fines in China are much smaller than those in the European Union and the United States.<sup>5</sup> The size of anti-monopoly fines can be used to measure the effect of anti-monopoly deterrence, and based on the above comparison, it can be seen that there is a lack of deterrence in China's anti-monopoly fines. The lack of deterrent effect is the main shortcoming of the current anti-monopoly fines in practice.<sup>6</sup>

The Anti-monopoly Law (Amendment) provides that a fine of up to \$3 million may be imposed on a trade association for organizing undertakings in its own industry to enter into a monopoly agreement. Although its deterrent effect has been greatly enhanced compared to the maximum fine of \$500,000 imposed on a trade association for organizing undertakings to enter into a monopoly agreement under the old law in 2008, it still lacks deterrent effect for the amount involved in the monopoly agreement. Although the deterrent effect of the fine system in the Anti-monopoly Law (Amendment) still needs to be improved, there are also some noteworthy improvements, and the deterrent effect of the provisions on concentration of undertakings in the 2008 Anti-monopoly Law has been greatly improved compared to the Anti-monopoly Law (Amendment). On December 14, 2020, the State Administration of Market Supervision made administrative penalty decisions on three cases of unlawful implementation of undertakings concentration, including Alibaba Investment's acquisition of stake in Xinli Media and Honeycomb Network's acquisition of shares of China Post Smart Delivery, which were not declared in accordance with the law. The anti-monopoly enforcement agency imposed a maximum fine of RMB 500,000 yuan on each of the three companies for implementing the undertakings concentration. All three cases involved equity transactions. In the case of Alibaba Investment's acquisition of Yintai Commercial, Alibaba Investment acquired 73.79% of Yintai Commercial and became the controlling shareholder of Yintai Commercial. ReadWrite Group and Honeycomb Network, on the other hand, both acquired 100% of the counterparty's equity. Compared to the acquisition of equity in the amount of hundreds of millions of dollars, the maximum fine of 500,000 yuan is a minimal price to pay for the above-mentioned companies that have implemented the concentration of undertakings. In order to achieve the deterrent effect of the Anti-monopoly Law, the expected proceeds of the offender engaging in the illegal conduct should be lower than the amount of the fine determined by the fine rule. The redesign of the fine system for undertakings concentration in the Anti-monopoly (Amendment) Act has greatly enhanced the deterrent effect. In the above three cases, the undertakings' failure to declare the implementation of the concentration in accordance with the law may cause the enterprises to form monopolies by means of mergers and acquisitions, or stifle potential competitors by acquiring small and medium-sized enterprises, etc. The illegal income is high but the cost of violation is extremely low, and the amount of fines under the old law cannot play an effective deterrent role. The fines under the old law lack deterrent effect, and enterprises that should have declared the concentration of undertakings in accordance with the law are more likely to choose not to declare and implement the concentration after weighing the time and money saved by the maximum fine of 500,000 yuan and not declaring the concentration of undertakings. However, the sales under the Anti-monopoly Law (Amendment) are on the other hand, the design of the fine rule of the Anti-monopoly Law also has the disadvantage of excessive deterrence. If an undertaking reaches and implements a monopoly agreement or will be fined from one to ten percent of the previous year's sales. This is a heavy burden for companies in industries with low profitability and small overall markets, even if the penalty is a minimum of one percent of the previous year's sales, i.e., the fines under the Anti-monopoly Law may be an excessive deterrent to undertakings in such cases.

## **3. The Improvement Path and Way of Anti-Monopoly Fines**

The defects of the design of the anti-monopoly fine system are mainly reflected in the lack of certainty of fines and the inability of anti-monopoly fines to achieve the desired deterrent effect. How to improve the anti-monopoly fine rules from the perspective of institutional design?

### *3.1 Limiting the Discretionary Power of Law Enforcement Agencies to Overcome Uncertainty*

The uncertainty of the Anti-monopoly Law largely stems from the discretionary power of the anti-monopoly enforcement agencies, and limiting the discretionary power of the enforcement agencies will enhance the certainty of the anti-monopoly fines. The usual ways of limiting the discretion of anti-monopoly enforcement agencies include restraining the exercise of discretionary power through the formulation of fining guidelines or

through judicial review by the courts. <sup>7</sup>The formulation of specific and feasible fining guidelines is more effective in guiding the anti-monopoly enforcement agencies to impose definitive fines than judicial review by the courts. The reason is that the issue of discretionary anti-monopoly fines is highly specialized, and judges do not necessarily have the relevant professional and practical experience in reviewing discretionary anti-monopoly fines. Even if a judge has the expertise and practical experience to review anti-monopoly fines, the court may not choose to review the anti-monopoly enforcement agency's fines out of respect for the anti-monopoly enforcement agency. In contrast to judicial review by the courts, the effectiveness of anti-monopoly fines can be more effectively enhanced through the development of appropriate fine guidelines by the enforcement agencies. The fine guidelines are usually the guiding documents of the state in the process of monopoly regulation on the application of the rules of anti-monopoly fines, including the detailed rules on the determination of fines, the calculation method and the severity of the monopoly conduct. In Germany and the United Kingdom, for example, there are provisions in their domestic competition laws on the formulation of guidelines for fines. In addition, "Fair Competition Law" in Taiwan Region also provides that the "Fair Competition Commission" may set specific fines.<sup>8</sup>

### *3.2 Causes of Inadequate Anti-Monopoly Deterrence and the Way to Improve the System*

The problem of insufficient anti-monopoly deterrence is particularly prominent in practice. The exclusive use of fines, the limitation of fines and the loopholes of fines are the three major institutional causes of the lack of deterrence.<sup>9</sup>

The design of the fine system under the Anti-monopoly Law is to prevent the monopolistic actor from profiting from the monopolistic act, and the design of the penalty rules under the Anti-monopoly Law also provides for the "confiscation of illegal income" for the enterprise that implements a monopolistic agreement or abuses its dominant position in the market, i.e., the confiscation of illegal income and the imposition of a fine on the offending enterprise. The design of this "two-penalty" rule makes it theoretically impossible for the offending enterprise to obtain benefits from the monopolistic act, which has a good deterrent effect. However, in practice, there is no unified standard for the calculation of illegal income, so there are often cases where a separate fine is imposed. One of the paths to improve the deficiency of anti-monopoly deterrence is to enhance the status of the fine system in the way of anti-monopoly administrative punishment. The current exclusive use of fines is often after the exclusion of illegal income, and even for enterprises that confiscate illegal income and impose fines together, the amount of fines is far less than the amount of confiscated illegal income. If the status of the fine system can be further enhanced and made the center of the anti-monopoly administrative punishment measures, imposing fines in combination with the nature and extent of the enterprise's violations instead of mechanically applying fines will further improve the current dilemma of the exclusive use of fines without deterrent effect. At the same time, the lack of certainty and foreseeability of the illegal income is only a supplementary measure after the imposition of fines, rather than being applied before the fines to greatly avoid the uncertainty and unpredictability faced by the determination of the illegal income.

The limitation of fines is another institutional cause of insufficient deterrence. In practice, the determination of sales is often faced with the dilemma of whether the sales refer to the sales of the product in question or the total sales. It takes more time and effort for the anti-monopoly enforcement agency to investigate and determine the total sales, and in practice, the agency often prefers to determine the sales in the fine rule as the sales of the products involved rather than the total sales. This practice further makes anti-monopoly fines less deterrent. A possible way to improve this is to refine and explain the determination of sales in the fine guidelines, and to expand the interpretation of sales to include all sales of the enterprise worldwide.

The loopholes in the fines themselves are also an important constraint on the deterrent effect of Anti-monopoly Law. In the market competition, the monopolistic behavior of an enterprise group is often carried out through its branches in a certain region, or through the monopolization of the group's subsidiaries or even grandchildren. It can also be seen from the penalty results that the anti-monopoly enforcement authorities often impose fines on branches or subsidiaries or even grandchildren. The reason for this tendency is that the branches, subsidiaries and grandchildren of an enterprise group are an integral part of the business activities of the enterprise group as a whole, and the strategic decisions of the enterprise group are usually global in nature. This may even provide an opportunity for the parent company to take advantage of the monopolistic acts committed by its subsidiaries and grandchildren to circumvent the penalty rules. The key to overcoming the loopholes of fines is to establish a more global and holistic awareness when regulating anti-monopoly acts, and the anti-monopoly enforcement agency should avoid limiting its perspective to a particular undertakings and consider whether the undertakings belongs to an enterprise group, whether its monopoly acts are based on the overall strategy of the enterprise, and whether the undertakings collaborates with other enterprises within the group in the process of monopoly acts. The court should consider whether the undertakings belong to an enterprise group, whether its monopolistic behavior is based on the overall strategy of the enterprise, and whether there is collaboration between the

undertakings and other enterprises within the group in the process of monopolistic behavior. Take the monopoly case of the packaging company Tetra Pak as an example, the parties to the case include six enterprises of the Tetra Pak Group, among which Tetra Pak International Ltd. was formally incorporated and registered in Switzerland, which is also the global operating headquarters of the Tetra Pak Group, operating and managing the global business of the Tetra Pak Group in a unified manner; Tetra Pak Group China Ltd. was established and registered in Hong Kong, China in 2004, which is also the operating headquarters of the Tetra Pak Group in Greater China. Tetra Pak China Ltd. was established and registered in Hong Kong, China in 2004, and is also the operating headquarters of the Tetra Pak Group in Greater China, responsible for the overall supervision of the Tetra Pak Group's business in China; Tetra Pak Packaging (Kunshan, China) Co. Tetra Pak Packaging (China Hohhot) Co.<sup>10</sup> The case includes its parent company, Tetra Pak International, as the target of the fine, and is no longer limited to the subsidiaries or grandchildren that committed specific monopolistic acts. It shows that the Anti-monopoly Law is gradually changing from a subsidiary or a grandchild to a group of enterprises to other undertakings, but there is still much room for improvement. Drawing on the parent company liability system in the EU regulations, the German Anti-restriction of Competition Act explicitly provides for parent company liability, i.e., the parent company shall be jointly and severally liable for fines for monopolistic acts committed by subsidiaries.<sup>11</sup> This system is designed to be a good deterrent for the parent company in the enterprise group, and it is a good remedy for the loopholes of the current anti-monopoly fine system in China itself. If this system is added to the Anti-monopoly Law, the parent company should be liable for the fines of its subsidiaries even if it does not participate in or commit monopolistic acts. This system will make the parent company, the strategy maker and top leader of the conglomerate, pay more attention to the compliance issues within the conglomerate, strengthen the supervision of the monopolistic behavior of the subsidiaries and reduce the business decisions that may cause monopoly.

The Anti-monopoly Law remains the cornerstone for promoting fair competition in the market, regulating the market order and protecting the rights and interests of consumers. And the anti-monopoly fine system is one of the important means to enforce the Anti-monopoly Law. Only by improving the relevant legal system can we more effectively curb market monopolies and maintain a fair competitive market order. In today's rapidly developing market economy, monopolistic behavior occurs from time to time. Effective regulation of monopolistic behavior is of irreplaceable value to promote fair competition in the market and active innovation of undertakings. As a key part of anti-monopoly punishment, whether anti-monopoly fines can enhance their certainty and overcome the shortcomings of deterrence is related to the realization of the legislative objectives of Anti-monopoly Law. Therefore, it is one of the important tasks to improve the Anti-monopoly Law in the context of the revision of the Anti-monopoly Law to build a penalty system with a more refined system, a clearer scope of application and a stronger penalty. Legislators need to strengthen their understanding and awareness of the Anti-monopoly Law, further promote the improvement of the legal framework of the anti-monopoly fine system, increase the intensity of fines, and rely on the tripartite power of the market, the government and the public to promote the effective implementation and optimization of the anti-monopoly fine system. Ultimately, a better balance between anti-monopoly regulation and market competition is achieved.

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