

# LEGAL APPLICATION OF ANTITRUST FINES AND CONFISCATION OF ILLEGAL INCOME

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**Abstract:** According to Articles 46 and 47 of China's Anti-Monopoly Law, through analysis of many cases in which illegal monopoly operators were punished, it can be found that the problem of small anti-monopoly fines and the lack of application of "illegal confiscation" in law enforcement practice "Income" question often arises. This article combines the actual situation in China, analyzes the advanced experience of other countries and regions, and puts forward several suggestions for improving the current situation of antitrust penalties: implement the combination of "fines" and "confiscation of illegal gains"; learn from advanced overseas models, such as the introduction of collective Litigation mechanism; Adopt anti-monopoly administrative penalties based on "fines". Improve the antitrust penalty system from all aspects of legislation, law enforcement, and judiciary, and it can make China's Anti-Monopoly Law more operational and better prevent and curb illegal monopoly behaviors.

**Keywords:** Fine intensity; Confiscation of illegal gains; Illegal monopoly

## 1 CONTROVERSY OVER THE INTENSITY OF ANTITRUST PENALTIES

China's 2008 Anti-Monopoly Law has played an important role in preventing and stopping market monopoly behavior from an institutional perspective, and plays a vital role in maintaining a fair market environment and protecting the rights and interests of consumers. However, since the promulgation and implementation of the Anti-Monopoly Law, scholars have always been controversial about the application of Articles 46 and 47 in practice. Article 46 of the "Anti-Monopoly Law" stipulates: "If an operator violates the provisions of this law and reaches and implements a monopoly agreement, the anti-monopoly law enforcement agency shall order it to stop the illegal behavior, confiscate the illegal income, and impose a fine of more than 1% of the previous year's sales of 10 %"; Article 47 also provides this provision for "abuse of dominant market position". It can be seen that the legal provisions clearly stipulate that "fines" and "confiscation of illegal gains" are in a concurrent relationship. However, looking at the more than 60 typical cases in which operators implemented monopoly agreements and abused market dominance announced by the National Development and Reform Commission and the State Administration for Industry and Commerce from August 1, 2008 to January 15, 2018, few of them applied the "confiscation of illegal gains" "This requirement is met, and the fines are not strong enough to deter illegal operators, which to a certain extent reduces the social and practical value of the Anti-Monopoly Law. [1]

### 1.1 Current Status of Fines for Monopolistic Behavior

Since the Anti-Monopoly Law came into effect on January 1, 2008, relevant law enforcement agencies such as the National Development and Reform Commission and the State Administration for Industry and Commerce have strictly investigated and punished many operators with monopolistic behaviors, many of which have had significant impacts. For example, on February 23, 2013, Kweichow Moutai Group and Wuliangye Group both issued announcements admitting that they had been subject to antitrust administrative penalties. The law enforcement authorities determined that the subsidiaries of these two companies had violated the provisions of Article 14 of the Anti-Monopoly Law by "limiting the minimum price of liquor resold by trading counterparties to third parties." Therefore, the Guizhou Price Bureau and the Sichuan Development and Reform Commission respectively The two companies were fined 247 million yuan and 202 million yuan respectively. However, the fines only accounted for 1.34% and 1% of the two companies' 2011 sales respectively, and there was no penalty for "confiscation of illegal gains". Compared with the range of 1% to 10% expressly stipulated in Articles 46 and 47 of the Anti-Monopoly Law, this amount of fine is obviously miniscule. According to the antitrust department, there are generally three factors that affect the severity of penalties: first, the circumstances of the violation, second, the company's cooperation with the investigation, and third, the company's rectification status. It can be seen that whether an enterprise proactively cooperates with the investigation of law enforcement agencies is also a consideration when deciding penalties. [2] Compared with countries such as the United Kingdom and Australia, China's penalties for illegal monopoly behaviors and illegal monopoly operators are indeed relatively small. The National Development and Reform Commission and the State Administration for Industry and Commerce, as the most important anti-monopoly law enforcement agencies in China, in the various illegal monopoly cases they investigate and deal with, the fines are basically 1% or 2%, and only a few cases have fines ranging from 4% to 4%. Between 8% [3]. Even in the sensational and influential "Qualcomm case", the fine amount only accounted for 8% of the company's 2013 market sales. In some cases, the fine ratio was not even announced.

## **1.2 Reasons and Effects of Weak Antitrust Penalties**

Many scholars believe that China's current antitrust penalties are too small and cannot effectively deter illegal operators. Small penalties will inevitably lead to the following situations: By paying a small amount of fines, companies can continue to carry out illegal monopoly behaviors unscrupulously, thereby obtaining higher profits. If the cost of violating the law is high but the income is meager or even no income, illegal operators will naturally be deterred.

The author believes that there are two main reasons for this problem: First, China's relevant systems are still not perfect enough and a highly operational system has not been formed. China's Anti-Monopoly Law has certainly played an important role since its implementation. However, its provisions on penalties for abuse of market dominance and monopoly agreements are too general, and law enforcement agencies have a wide range of discretion, and there is no unified application of fine ratios. Recognition standards. Second, setting the penalty base as "the company's sales in the previous year" may be too small. For China, "sales of the previous year" generally refers to the sales revenue of related domestic products; however, many Western countries and regions usually refer to the global sales revenue of products, and the recognition of "sales of the previous year" generally refers to the global sales revenue of products. Not limited to the territory of the country. For example, Articles 101 and 102 of the Treaty on the Functioning of the European Union stipulate that illegal monopolies that violate these provisions shall be fined up to 10% of the global turnover of the previous year; Germany has also determined fines in the "Procedure for Handling Cartel Violations" The Guidelines stipulate that illegal monopoly operators shall be fined 10% of the global turnover of the previous year. This ratio is the upper limit of antitrust fines. [4] Comparing the practice of overseas anti-monopoly legislation, China naturally cannot effectively exert the deterrent effect of the Anti-Monopoly Law when the base of fines is small.

Through comparative analysis, it can be seen that China's punishment of monopoly illegal operators is far from sufficient. On the one hand, from the perspective of legislative purposes, small penalties not only fail to achieve the purpose of punishing offenders, but also fail to achieve the purpose of preventing and curbing other market entities from committing illegal monopoly behaviors. When the cost of violating the law is small and the benefits are large, it cannot be ruled out that some companies will continue to engage in illegal monopoly behavior. On the other hand, the low cost of violating the law prevents leniency policies from functioning effectively. Under normal circumstances, offenders actively cooperate with investigations out of fear of being severely punished. If the cost of violating the law is small, how can the offenders actively cooperate with the investigation and punishment of law enforcement agencies? [5]

## **2. APPLICATION DEFICIENCIES OF "CONFISCATION OF ILLEGAL GAINS"**

### **2.1 Current Application Status of "Confiscation of Illegal Gains"**

Article 46, Paragraph 1 and Article 47 of China's Anti-Monopoly Law clearly stipulate that those who reach and implement a monopoly agreement or abuse their dominant market position shall be "ordered to cease illegal activities, their illegal gains shall be confiscated, and they shall be fined for sales in the previous year" A fine of not less than 1% but not more than 10% of the amount is imposed." Obviously, the law clearly stipulates that "fines" and "confiscation of illegal gains" are concurrently related. However, in law enforcement practice, the application of "confiscation of illegal gains" is often missing.

Among the above-mentioned penalties imposed on Kweichow Moutai and Wuliangye Group, not only were the fines relatively low, but neither company mentioned the "confiscation of illegal gains." According to survey statistics, since the implementation of the Anti-Monopoly Law in 2008, among the many price monopoly cases investigated and dealt with by the National Development and Reform Commission, only the 2011 Shandong Compound Reserpine Monopoly Case was in compliance with the provisions of China's Anti-Monopoly Law and was applicable The penalty of "confiscation of illegal gains". [3] In response to this situation, the National Development and Reform Commission promulgated the "Guidelines on Determining Illegal Income from Monopolistic Conduct of Operators and Determining Fines (Draft for Comments)" on June 17, 2016. Although the "Opinion Draft" further clarifies the scope of "illegal gains", it does not give clear instructions on how to use "fines" and "confiscation of illegal gains" in specific cases.

### **2.2 Reasons and Effects of the Lack of Application of "Confiscation of Illegal Gains"**

In most cases, the lack of application of "confiscation of illegal gains" is mainly due to the following reasons: First, the base and period for determining the amount of illegal gains are unclear. In the Anti-Monopoly Law, the basis for determining the amount of fines is the company's sales in the previous year, but there is no clear provision for the basis for determining the amount of illegal income. At this time, we cannot completely equate the concept of "illegal gains" with sales, sales revenue or simple corporate profits, but should be defined as profits obtained from illegal activities. However, in law enforcement practice it is often difficult to accurately distinguish legal gains from illegal gains. In addition, the Anti-Monopoly Law does not clearly stipulate the period for determining "confiscation of illegal gains" in the same way as the period for determining the amount of fines. This will cause a question: What should be done when determining illegal gains? Should the illegal gains of the previous year be confiscated, or should all illegal gains during the duration of the illegal conduct be confiscated? Second, the definition of the scope of punishment is a difficult problem. It is generally believed that "confiscation of illegal gains" or "fines" should be within the scope of the entire

business operations of the company in all operating regions. However, in practice, companies that form monopolies are often not only strong, but also operate across multiple regions, or There are numerous subsidiaries or branches, which undoubtedly increases the difficulties for law enforcement agencies.

In law enforcement practice, various reasons lead to difficulties in the application of "confiscation of illegal gains". However, the purpose of anti-monopoly legislation is to prevent and punish various complex illegal monopoly behaviors and effectively solve the shortcomings caused by the lack of previous legislation.. Only by imposing severe penalties on illegal monopoly operators to scare them away can the Anti-Monopoly Law truly realize its value. However, the current lack of application of "confiscation of illegal gains" has greatly weakened the deterrent effect of the Anti-Monopoly Law, preventing monopolistic violations from being punished as they should be, and making the severity of the monopoly behavior seriously inconsistent with the punishment it deserves. The reason why many countries and regions outside the region do not set up "confiscation of illegal income" is because they generally impose administrative penalties on illegal monopolies, and the fines are very high. When China's antitrust fine ratio is low, it does not also impose "confiscation of illegal gains", which obviously fails to achieve the legislative purpose of preventing and curbing monopolistic behavior.

In addition, "fines" and "confiscation of illegal gains" respectively have their own irreplaceable functions. "Fine" is usually punitive in nature and aims to punish offenders; "confiscation of illegal gains" is often in the nature of compensation and is intended to return part of the interests of the offended consumers in order to create a fair and healthy market environment. The two complement and reinforce each other, [6] and the repeated lack of application of "confiscation of illegal income" has invisibly damaged the rights and interests of consumers. Especially in the context that China does not have a class action method, consumers cannot protect their legitimate interests through better channels.

### **3 SOME SUGGESTIONS FOR IMPROVING THE CURRENT SITUATION OF ANTITRUST PENALTIES**

#### **3.1 Implement the Combination of “Fines” and “Confiscation of Illegal Gains”**

Based on the different nature and functional positioning of "fines" and "confiscation of illegal gains", the author believes that for China , the combination of the two can maximize the effectiveness of the Anti-Monopoly Law and realize the market in both form and substance. fair.

First of all, the reason why the Anti-Monopoly Law stipulates the simultaneous imposition of "fines" and "confiscation of illegal gains" is based on China's national conditions and judicial status quo. The United States mostly uses class actions to resolve illegal monopoly issues, which to a certain extent provides consumers and other market entities with legal rights protection channels; China does not have a class action method, so compensation needs to be added to the "fines" nature of "confiscating illegal gains" to safeguard the interests of consumers. The reason why the EU does not set up "confiscation of illegal income" is because the EU's penalty base and penalty ratio for calculating the amount of fines are higher than those of China. For China's anti-monopoly activities, when the proportion and base of fines are low, only by cooperating with "confiscation of illegal gains" can the purpose of curbing monopolistic behavior be achieved. Secondly, as mentioned above, "fines" and "confiscation of illegal gains" have respective irreplaceable functions. The purpose of "fines" is to punish illegal acts and achieve a form of fairness; while "confiscation of illegal gains" The purpose is to compensate for the losses suffered by consumers due to monopolistic behavior, and to achieve substantial fairness. The two complement each other and take into account the interests of consumers while effectively regulating the market environment. If the application of "confiscation of illegal gains" is repeatedly lacking in law enforcement practice, and there are no channels such as class actions to protect the interests of consumers, then who will protect the losses of consumers? Furthermore, monopolistic behavior not only brings harm to consumers and other Market entities have adverse effects and are also disrupting market order, which will cause serious damage to the market environment. Based on such serious consequences, violators should be made to bear their due legal responsibilities and all illegal gains of violators should be confiscated.

In view of the current situation of anti-monopoly law enforcement practice, if we want to combine "fines" and "confiscation of illegal gains" more effectively, we must first strictly implement the legislative intention of coexistence of the two, so that the legislative purpose can be realized in practice. Under normal circumstances, we must recognize the social evil of monopoly violations and strictly implement the original intention of legislators. We must not only impose severe penalties on illegal operators, but also ensure that consumers' losses are compensated to a certain extent. In some special circumstances, there may be a certain amount of flexibility. For example, illegal monopoly behavior has caused certain losses to consumers and society, but the offender has made no profits or very little profits, or it is difficult for law enforcement agencies to verify their illegal gains. , a single "fine" can be imposed on it, and the proportion of the fine can be appropriately increased based on the original fine amount to show the substantive fairness of the Anti-Monopoly Law. Secondly, in the context of considering China's judicial practice and law enforcement status, the discretion of law enforcement agencies in deciding penalty proportions should be appropriately restricted or intervened, and penalty gradients should be divided according to the specific circumstances of illegal enterprises committing illegal acts, so as to provide anti-monopoly administrative penalties and " The application of "confiscation of illegal gains" provides a more specific and operational legislative basis.

### 3.2 Learn from Advanced Overseas Models

On the road to antitrust law enforcement practice, we can learn from advanced and effective foreign experience in antitrust practice, such as introducing a class action system based on China's actual conditions. [6] A class action lawsuit refers to a situation where most members have common interests, but because there are too many members to litigate as a whole, one or more of them sues or responds for the common interests. It originated in England but is widely used in the United States. For China, in the absence of "confiscation of illegal gains", the interests of consumers cannot be effectively safeguarded. If class actions are introduced into antitrust practice and administrative law enforcement and judicial litigation are combined, consumers can be encouraged to proactively report the situation to antitrust law enforcement agencies and cooperate with investigations, and it can also create a certain deterrent to illegal monopolies. force, virtually increasing the illegal costs of illegal enterprises and deterring offenders.

### 3.3 Adopt Anti-Monopoly Administrative Penalties Based on "Fines"

If there are difficulties in the actual application of "confiscation of illegal gains", or difficulties in defining the amount of illegal gains, we can also cancel the penalty method of "confiscation of illegal gains", impose a single "fine", and adjust the proportion of fines or magnitude. Currently, there are three typical models of administrative penalties for antitrust in the world: First, the fine-centrism that integrates the function of "confiscation of illegal gains" into "fines". Typical countries include the United Kingdom, the European Union, Australia, New Zealand, etc.; The second is the model of "confiscation of illegal gains" and "fines", which is the same as China's current legislative status; the third is the levy system represented by Japan, whose original intention is to confiscate the illegal gains of monopolies. [6] After years of practice, the superiority of fine-centrism has gradually emerged, and it has increasingly become the mainstream of anti-monopoly administrative penalties. There are two main reasons why this model has advantages: On the one hand, the method of "fines" is easier to operate in law enforcement practice, the procedure is simple and can be applied repeatedly and many times, and it is almost the simplest and easiest way to regulate the market economy. Intuitive means of punishment. In addition, the "fines" method has almost no other negative impact except economic losses for illegal operators, and will not cause market disorder. On the other hand, "fines" directly deprive offenders of their economic benefits, so they can produce the most direct punishment effect. Especially in recent years, countries have generally increased the proportion or amount of fines, which has fundamentally increased the illegal costs of illegal monopolies. Under the high amount of fines, illegal operators have to weigh the benefits and requirements of monopolistic behavior. Risk of legal liability.

The advantages of fine-centrism are currently mainly reflected in the following aspects: First, more and more countries and regions have brought the compensatory function of "confiscation of illegal income" to the sanction method of "fine", and Gradually increase the amount and severity of fines. For example, the upper limit of fine proportion implemented by the European Union is 30%, and the calculation period of the fine base is not one year, but the duration of the entire illegal monopoly behavior. The fine ratio of Japan's levy system is also being adjusted. The adjustment process gradually integrates the compensatory function of "confiscation of illegal income" into "fines". It can be seen that under the premise of imposing a single "fine", if the "fine" only plays a punitive role without taking into account the compensation for the interests of consumers, the essential meaning of fine-centrism will be lost. Secondly, in the practice of anti-monopoly law enforcement, countries around the world are using "fines" with increasing frequency, and it has even become a common punishment method globally. Years of law enforcement practice have proven that "fines" are the most direct and effective form of antitrust punishment.

## 4 CONCLUSION

China's "Anti-Monopoly Law" clearly stipulates that "fines" and "confiscation of illegal gains" are concurrently related, but the application in the actual law enforcement process is unsatisfactory. The original intention of the legislator is to use the two together to achieve the legislative purpose of preventing, curbing and punishing illegal monopolies to the greatest extent. However, the actual situation in law enforcement practice is that the fines are too small to cause any consequences to illegal monopolies. Actual deterrence; Either the "confiscation of illegal gains" has not been applied, and the illegal enterprises only pay a small fine and no other penalties. At the same time, the losses suffered by consumers due to monopolistic behavior cannot be compensated, and their legitimate rights and interests cannot be compensated. Effective protection. In addition to the fact that law enforcement agencies may lack a correct understanding of the concurrent relationship between the two, there are also some inherent reasons, such as: China's 1% to 10% fine range gives law enforcement agencies greater discretion; the proportion of fines It is difficult to accurately define; it is difficult to calculate the amount of illegal income; the definition of legal income and illegal income is vague; there is a lack of effective and operational law enforcement guidelines, etc. Once the reasons are clarified, we can put forward some feasible suggestions in a targeted manner. First of all, from a legislative perspective, given that China still lacks a more specific, flexible and feasible method for determining the amount of fines and calculating the amount of illegal gains, the country should further issue relevant guidelines to cooperate with the implementation and enforcement of the Anti-Monopoly Law. Secondly, from a law enforcement perspective, law enforcement agencies should strictly implement the principle of imposing both "fines" and "confiscation of illegal

gains". On this basis, they can refer to the antitrust penalty models of other countries or regions and actively seek other better solutions. Advanced and more effective handling methods have effectively realized the legislative intent of severely punishing monopolistic behavior. Finally, from a judicial perspective, collective litigation channels can be opened up so that consumers and other relevant market entities can become powerful entities in supervising monopolistic behavior while safeguarding their own rights and interests. This will virtually increase the illegal costs of illegal monopoly operators and strengthen the strength of various market entities. awareness of legal responsibilities and social awareness. China's Anti-Monopoly Law provides an important guarantee for the normal operation of the market economy, and years of law enforcement practice have also confirmed the important role of the Anti-Monopoly Law. Combining the Chinese background, drawing on the effective experience of various countries and regions, and issuing more operational implementation guidelines as soon as possible, China 's anti-monopoly legislation, law enforcement, and judicial systems will be more complete.

## COMPETING INTERESTS

The authors have no relevant financial or non-financial interests to disclose.

## REFERENCES

- [1] Wang Jian, Fang Xiang. Realistic dilemmas and solutions to the application of anti-monopoly confiscation of illegal gains. *Competition Policy Research*, 2018(1): 20-37.
- [2] Zhang Haiying. The intensity of antitrust penalties can be further increased. *China Business Daily*, 2016-12-14(01).
- [3] Jiang Yanbo, Xiao Xiujuan. Research on the legal application of administrative penalties in the allopurinol tablets monopoly agreement case-a normative analysis based on Article 46 of the Anti-Monopoly Law. *Journal of Jiangxi University of Finance and Economics*, 2017(3): 119-130.
- [4] Lin Qin. Research on the issue of concurrent fines and confiscation of illegal gains under anti-monopoly law. *Journal of Yichun University*, 2017(8): 39-44, 79.
- [5] Hu Tie. Research on the intensity of anti-monopoly administrative penalties and countermeasures and suggestions-taking the Lianyungang ready-mixed concrete case as an example. *Price Theory and Practice*, 2011 (2): 48-49.
- [6] Feng Bo. The combination of confiscation of illegal gains and fines is applicable in antitrust enforcement. *Law and Business Research*, 2018(3): 137-147.