

# JUNHE SPECIAL REPORT



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## Research Report on the new Merger Control Review Rules in the Anti-Monopoly Law Amendment.

### The Revision of Legal Liabilities for Gun Jumping in the Anti-Monopoly Law Amendment

On October 23, 2021, the Standing Committee of the National People's Congress (**NPCSC**) released the *draft Amendment of the Anti-Monopoly Law* for public consultation and held the first deliberation on November 9, 2021. The second deliberation was held from June 21 to 24, 2022. The NPCSC announced the adoption of the *Amendment of the Anti-Monopoly Law* (the **New AML**) on June 24, 2022, and it came into force on August 1, 2022.

Article 58 of the New AML amends the legal liabilities for the illegal implementation of a concentration without making notifications subject to the law (so-called **gun jumping**) in Article 48 of the *Anti-Monopoly Law (2008)* (the **Old AML**). It significantly increases the penalties for gun jumping and categorizes the penalties and the maximum fines according to the nature of such gun jumping. In addition, the New AML adds Article 63, which outlines the illegal activities (including gun jumping) that are subject to aggravated punishment.

Since late 2020, antitrust enforcement agencies have shown increasingly strict

attitudes towards gun jumping, accompanied with an increase in awareness of antitrust compliance. The amendments in the New AML further strengthen the deterrent effect of legal liability of antitrust violations, which encourages undertakings to improve their internal antitrust compliance systems and reduce the legal risks of gun jumping.

#### **I. Gun Jumping Actions and Legal Liabilities**

The legal liabilities for gun-jumping were stipulated in Article 48 of the Old AML, while the New AML amends it to Article 58 and adds Article 63 which provides the scenarios for aggravated punishment.

Compared with the Old AML, the New AML categorizes the penalties for different types of gun jumping actions and significantly increases the overall penalties. The New AML categorizes the penalties according to the impact that the concentration may have on the relevant market. The New AML also significantly increases the maximum fines and expressly provides that the relevant

violations will be recorded in the enterprise credit record and be publicized. The specific amendments are as follows:

**Table: Comparison of the New AML and the Old AML regarding Gun Jumping Liabilities**

	<b>The Old AML</b>	<b>The New AML</b>
<b>Fine amount</b>	Not more than RMB 500,000	If the concentration does not have the effect of <u>excluding or restricting competition</u> : not more than RMB 5,000,000. If the concentration has or may have the effect of <u>excluding or restricting competition</u> : not more than 10% of the sales turnover of the previous year. If serious violations have major impacts and consequences, antitrust enforcement agencies can determine the specific amount of fines from more than two times but not more than five times the amount of the fine originally determined.
<b>Other penalties</b>	Cease the implementation of the concentration, dispose of the shares or assets, transfer the undertaking within a certain time frame, or take other necessary measures to restore to the status before the concentration	If the concentration does not have the effect of <u>excluding or restricting competition</u> : none. If the concentration has or may have the effect of <u>excluding or restricting competition</u> : cease the implementation of the concentration, dispose of the shares or assets, transfer the undertaking within a certain time frame, or take other necessary measures to restore to the status before the concentration.
	No explicit provisions The penalty decision will be publicized on the official website of the Anti-Monopoly Bureau	Where undertakings are subject to administrative penalties due to violations of the New AML, the violations shall be recorded in the credit record according to relevant regulations and made public.

The New AML adds the scenarios of aggravated punishment for violations including gun jumping actions, i.e., if violations occur that have serious impacts and consequences, antitrust enforcement agencies can determine the specific amount of fines from more than two times but not more than five times the amount of the fines originally determined.

## **II. The Impact of the New AML's Amendment of the Legal Liabilities of Gun Jumping**

The New AML categorizes the penalties for gun jumping and significantly increases the penalties, which increases the undertakings' cost for violations. Such amendments reflect the principle of proportionality of penalties and help to strengthen the deterrent effect of

the antitrust law and prompts undertakings to complete legal and compliant merger filing. The expansion of the penalty range gives antitrust enforcement agencies broader discretionary power. There are some issues in the New AML that need further clarification, including the penalties applied to historical gun jumping cases and the application of aggravated punishment. We expect that these issues will be clarified in the future enforcement.

### **1. The New AML reflects the principle of proportionality of penalties and strengthens the deterrent effect of legal liabilities for gun jumping**

According to the Old AML, regardless of whether the illegally implemented concentration impacted the relevant market or not, the antitrust enforcement agencies

could order the undertaking be restored to the status before the concentration and impose fines of not more than RMB 500,000, which is a small amount compared to the size of most undertakings meeting the notification thresholds. To a certain extent, in the Old AML, legal liabilities such as restoring the status before concentration were not applicable to most of the cases and thus existed in name only, while the limited amount of the fines did not have a sufficient deterrent effect.

After the implementation of the New AML, depending on the actual impact that the specific transaction may have on the relevant market, gun jumping of different transactions will lead to different legal liabilities. Transactions which have or may have the effect of excluding or restricting competition on the relevant market will face more severe penalties. The maximum fine imposed by antitrust enforcement agencies for gun jumping is significantly increased. For undertakings, the fines will constitute a substantial economic loss, and may even have a substantial impact on their daily business activities. The New AML also specifies that penalties will be recorded in the enterprise's credit record and be made public, which may have an impact on the enterprise's reputation. For violations including gun jumping, the New AML stipulates the provision of aggravated punishments, which may further increase the maximum amount of fines. Therefore, the legal liabilities in the New AML will have a stronger deterrent effect on undertakings and will prompt undertakings to raise antitrust compliance awareness and complete merger filing in accordance with the law.

## **2. The New AML expands the discretionary power of antitrust enforcement agencies**

The substantially increased maximum fines give antitrust enforcement agencies broader

discretionary power. The New AML provides that the nature, extent, duration and elimination of the consequences of the violation should be considered in determining the amount of the fines. Apart from that, the New AML does not provide clear criteria. Therefore, for antitrust enforcement agencies, the above provision lacks further guidance on the penalty standards and the specific penalties depend more on the actual situation of specific cases, which may give agencies overly broad discretionary powers. For undertakings, it may raise further difficulties to expect and assess the legal liabilities.

Secondly, the New AML does not clarify whether the penalties in the New AML or the Old AML should be applied in the investigation of historical gun jumping cases. However, according to the *Provisions on the Review of Concentration of Undertakings (Draft for Comments)* (the **Draft Review Provisions**), if undertakings take the initiative to report violations or eliminate or mitigate harmful consequences, the antitrust enforcement agencies shall impose lighter or mitigated penalties at their discretion in accordance with the *Administrative Penalty Law*. If the above provision is retained in the effective version of the Review Provisions, the principle will be clarified to a certain extent and the Old AML may be applied to the gun jumping transactions which were implemented before the New AML comes into effect and the control status continues after the New AML comes into effect. This principle will help undertakings to notify of historical transactions and to take the initiative to report and seek leniency.

Thirdly, Article 63 of the New AML stipulates aggravated punishment for serious violations. However, the New AML does not provide further guidance or standards for specific scenarios of violations that may apply to aggravated punishment, which may cause difficulty for antitrust enforcement agencies in applying Article 63 to specific cases.

Considering that aggravating scenarios or results of gun jumping are relatively low compared to other violations, it is still doubtful in practice whether such aggravated punishment can be applied.

### III. Conclusion

The *Amendment of the Anti-Monopoly Law* significantly increases the legal liabilities for the illegal implementation of a concentration without notification, which reflects China's growing emphasis on antitrust compliance. It provides a clearer basis and guidelines for antitrust agencies' future enforcements and helps promote undertakings to comply with antitrust rules, conduct notifications and

engage in investment and merger transactions in a lawful manner. Currently, the *Amendment of the Anti-Monopoly Law* is in effect, and the amendments to the subordinate regulations, such as the *Provisions on the Review of Concentration of Undertakings*, are in progress and are also expected to come into effect soon in conjunction with the *Amendment of the Anti-Monopoly Law*. They will provide better guidelines for the application of legal liabilities for the illegal implementation of a concentration without legal notification as well as other rules.

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## 《反垄断法》修正案下的研究报告：关于反垄断法修正案中的违法实施经营者集中法律责任的探讨

2021年10月23日，全国人民代表大会常务委员会发布《反垄断法（修正草案）》，向社会公开征求意见，并于2021年11月9日对该草案进行了第一次审议，于2022年6月21日至24日对该草案进行了第二次审议，并于2022年6月24日宣布修改决定通过，修改后的《反垄断法》（“**新法**”）已于2022年8月1日起正式施行。

新法第五十八条对原《反垄断法》（“**旧法**”）中第四十八条关于未依法申报违法实施经营者集中的法律责任进行了修改，大幅提升了对未依法申报违法实施经营者集中行为的处罚力度，同时根据违法实施的经营者集中性质区分了处罚内容和罚款金额上限。另外，新法新增第六十三条，规定了对包括违法实施经营者集中行为在内的加重处罚情形。

自2020年下半年以来，反垄断执法机构对违法实施经营者集中行为表现出日趋严格的执法态度，企业的反垄断合规意识也逐步提升。新法的上述修改进一步强化了反垄断法违法责任的震慑力，有助于推动经营者完善内部反垄断合规制度，降低其因违法实施经营者集中而产生的法律风险。

### 一、违法实施经营者集中行为及法律责任简介

未依法申报违法实施经营者集中，是指对于达到法律规定的申报标准，或因可能存在排除、限制竞争效果而经反垄断执法机构要求需要申报的经

营者集中，参与集中的经营者未申报即实施，或申报后未取得批准即实施经营者集中的行为。在中国，对于经营者违法实施经营者集中的行为，反垄断执法机构可责令经营者停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，并处以一定数额的罚款。

#### 1. 境外司法辖区制度中未依法申报即实施并购交易的法律责任

美国和欧盟的并购申报审查制度比中国的经营者集中申报制度的确立时间更早，其中同样对未依法申报即实施的并购交易应承担的法律责任进行了规定。

就美国而言，在并购前未依法进行申报或是在取得批准前即实施交易的行为将承担民事责任和行政责任。民事责任的罚款数额根据违法行为持续的天数计算，罚款基数会进行年度调整。2022年的罚款上限数额为46,517美元/天。上述行为同样可能导致禁令救济（如撤销交易）和公平救济（如返还非法所得）。<sup>1</sup>

就欧盟而言，根据2004年出台的《关于控制企业集中的（EC）第139/2004号理事会条例》（“《**欧盟并购条例**》”）第14条第2款和第3款的规定<sup>2</sup>，对于在并购前未依法进行申报，或是在取得批准前即实施交易的行为，欧盟委员会可对于获得控制权的个人、企业或企业协会处以不超过其上一年度营

<sup>1</sup> 请见 <https://uk.practicallaw.thomsonreuters.com/5-501-2849?contextData=%28sc.Default%29&transitionType=Default>。

<sup>2</sup> 《欧盟并购条例》第14条第2款规定：“...获得控制权的个人、企业或企业协会故意或过失实施下列行为的，委员会可以做出决定，对之

处以不超过根据第5条所计算的总营业额10%的罚款：(a) ...在并购实施前未依第4条和第22条进行事先申报；(b) 违反第7条暂停并购的规定实施并购的；...”；第3款规定：“在确定罚款金额时，应当考虑违法行为的性质、严重程度及时间长短。”

业额 10%的罚款。在确定罚款金额时，应考虑其违法行为的性质、严重程度及时间长短。

另外，在欧盟委员会的执法实践中，未依法申报即实施的并购交易，可能因同时违反依法申报义务以及在取得批准前未暂停交易而被处以双重罚款。例如，在美威水产收购墨泊公司案<sup>3</sup>中，欧盟委员会认为美威水产同时存在违反申报义务（即公司有义务在实施并购交易之前向欧盟委员会进行反垄断并购控制申报）以及等待义务（即公司在反垄断审查期间不得实施交易）两项违法行为，并对两项违法行为分别处以一千万欧元罚款，合计处以两千万欧元罚款。对于美威水产提起的上诉，欧盟最

高法院（European Court of Justice）于 2020 年 3 月作出判决<sup>4</sup>，对于被处罚的两项违法行为实际上是否只是一次违反欧盟并购控制法律的行为这一争议焦点，欧盟最高法院支持了欧盟委员会的立场，允许其对实质上基本相同的抢跑行为处以“双重”罚款<sup>5</sup>。

## 2. 新法与旧法关于违法实施经营者集中法律责任的对比

在中国的反垄断法制度下，旧法中关于违法实施经营者集中的法律责任规定在第四十八条，新法中则修改为第五十八条，同时新增了第六十三条规定的加重处罚情形。

表：新法与旧法的法律责任对比

	旧法	新法
<b>罚款金额</b>	五十万元以下	<u>不具有排除、限制竞争效果：五百万元以下</u> <u>具有或可能具有排除、限制竞争效果：上一年度销售额百分之十以下</u> 情节特别严重、影响特别恶劣、造成特别严重后果的，可以在上述罚款数额的二倍以上五倍以下确定具体罚款数额
<b>其他处罚措施</b>	停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态	<u>不具有排除、限制竞争效果：无</u> <u>具有或可能具有排除、限制竞争效果：停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态</u>
	无明文规定 处罚决定会在反垄断局官网公示	经营者因违反反垄断法规定受到行政处罚的，按照国家有关规定记入信用记录，并向社会公示

由上表可知，与旧法相比，新法细化了对不同类型的违法实施集中交易的不同处罚规则，同时整体大幅提升了对违法实施经营者集中行为的处罚力度，具体包括如下修改内容：

一方面，新法根据违法实施的经营者集中对相关市场可能造成的影响大小区分了不同的法律责任。与旧法对所有类型的经营者集中适用相同的法律责任不同，新法规定，具有或可能具有排除、限制竞争效果的经营者集中不仅将会被处以上一年度销售额 10%以下的罚款，还可能被要求采取必要措施恢复到集中前的状态，而不具有排除、限制竞争效果的经营者集中将仅会被处以五百万元以下

的罚款，而无需采取措施恢复集中前的状态。

另一方面，与旧法相比，新法也大幅提升了对违法实施经营者集中行为的罚款上限。在旧法中，所有违法实施经营者集中的罚款上限均为五十万元人民币。而在新法中，具有排除、限制竞争效果的经营者集中大幅提升至上一年度销售额的 10% 以下，与欧盟的罚款金额上限相一致。即使是不具有排除、限制竞争效果的经营者集中，罚款金额的上限也提升至五百万元，与旧法相比存在大幅提升。此外，新法还明文规定了相关违法行为将被记入企业征信记录并向社会公示。

此外，在新法中，还新增了对包括违法实施经

<sup>3</sup> 案件编号 COMP/M.7184 – Marine Harvest/Morpol。

<sup>4</sup> 案件编号 C-10/18 P – Mowi ASA v European Commission。

<sup>5</sup> 请见 <https://www.lexology.com/library/detail.aspx?g=5fef7163-9b45-44be-8fc1-8d09fc05c5c6>。

营者集中在内的违法行为可能适用的加重处罚情形，即对于情节特别严重、影响特别恶劣、造成特别严重后果的违法行为，可以在原本确定的罚款数额的二倍以上五倍以下确定具体罚款数额。

## 二、新法修改违法实施经营者集中行为法律责任的影 响

由于新法细化了违法实施经营者集中行为的处罚规则，且大幅提升了对违法实施经营者集中行为的处罚力度，导致经营者的违法成本显著提高。该等修改体现了罚责相适应的原则，同时也有助于增加反垄断法震慑力、促使经营者完成合法合规的经营者集中申报。与此同时，处罚金额区间的扩大也进一步赋予了反垄断执法机构更加宽泛的自由裁量权。另外，新法中仍存在一些尚待进一步明确的问题，包括历史违法实施集中案件的处罚规则、加重情节的适用等，我们期待这些问题将在未来的执法案例中得到进一步明确。

### 1. 新法规定体现了罚责相适应的原则，增加了违法实施经营者集中行为法律责任的震慑力

如上所述，在旧法中，无论违法实施的经营者集中是否会对相关市场产生影响，反垄断执法机构均有权责令经营者恢复集中前状态并对其处以罚款。一方面，对于实质上并不会对相关市场造成影响的交易，保留责令其恢复集中前状态的处罚内容可能造成反垄断执法机构对经营者课以过重的处罚；另一方面，在旧法生效期间，尽管法条中存在除罚款外的其他要求经营者恢复到集中前状态的规定，但在 2021 年前的执法实践中，并未出现过执法机构作出除罚款外其他处罚的情况。且旧法中规定的违法实施经营者集中的罚款上限为五十万元，与多数达到申报标准的经营者规模相比，这一罚款数额较低。就上述法律责任的规定而言，一方面，责令经营者恢复集中前状态等法律责任由于难以适用于多数违法实施集中交易而形同虚设，另一方面，较低的罚款金额上限也导致该等罚款无法对经营者造成足够的震慑力。因此，旧法规定的法律责任与经营者实施的违法行为之间并未形成较为合理的罚责平衡，且违法实施经营者集中的法律责任对于经营者的震慑作用较为有限。在实践中，对于

一些明显不会对相关市场造成实质性影响、且交易时间表较为紧张的交易而言，交易方可能认为进行合规经营者集中申报的时间成本较高，且可能造成无法按时交割的风险，从而对其造成比承担未依法申报的法律后果更加严重的损失。在这一商业风险的衡量标准下，相关经营者可能会倾向于选择承担未依法申报的风险，从而不进行经营者集中申报。

而在新法实施后，一方面，根据具体交易可能对相关市场产生的实际影响的不同，经营者违法实施的集中行为将导致不同的法律后果，对相关市场存在或可能存在排除、限制竞争影响的交易将面临更为严厉的处罚；另一方面，反垄断执法机构对违法实施经营者集中行为的罚款数额上限大幅提升，即使是不会对相关市场造成排除、限制竞争影响的经营者集中，也将被处以最高五百万元的罚款，而可能对相关市场造成排除、限制竞争影响的经营者集中则不仅可能被要求恢复集中前的状态，还可能被处以上一年度销售额 10% 以下的罚款。对于经营者而言，该等数额的罚款将构成实质性的经济损失，甚至可能对其日常经营活动造成实质性影响。同时，新法中也明确规定了相关处罚记录将会记入企业的信用记录并向社会公示，从而可能对企业的信誉造成影响。另外，对于包括违法实施经营者集中行为在内的违法行为，新法中还规定了加重处罚的情形，从而保留了罚款金额上限进一步提高的可能性。因此，新法中的法律责任对于经营者而言具有更强的震慑力，能够促使企业提高反垄断合规意识，依法完成经营者集中申报。

### 2. 新法规定扩大了反垄断执法机构的自由裁量权

#### (1) 未依法申报法律责任的罚款上限大幅提高

大幅提高的罚款上限同样为反垄断执法机构赋予了更加宽泛的自由裁量权。如上所述，对于不会对市场造成影响的违法实施集中的罚款数额上限由五十万元提高至五百万元，而对于具有或可能具有影响市场效果的集中的罚款数额更是提高到了上一年度销售额的 10% 以下（即使以刚刚达到申报标准的数额进行计算也达到了四千万）。但新法中除了规定在确定罚款数额时应当考虑违法行

为的性质、程度、持续时间和消除违法行为后果的情况等因素外，并未对罚款数额的确定提供明确标准。因此，对于反垄断执法机构而言，该等规定缺乏对于处罚标准的进一步指引，处罚金额可能较多地取决于具体案件的实际情况，而这则可能赋予其过宽的自由裁量权，而对于经营者而言则进一步提高了其对法律责任的预期和评估难度。

## **(2) 历史违法行为的法律适用规则较为模糊**

根据目前的特殊行业的执法实践，由于相关行业中可能存在大量历史未依法申报交易的情况，该等案件的调查适用新法还是旧法进行处罚并未在新法中得到明确。但根据目前尚未正式出台的《经营者集中审查规定（征求意见稿）》，当事人主动报告反垄断执法机构尚未掌握的违法行为，或主动消除或者减轻违法行为危害后果的，反垄断执法机构应当依据《行政处罚法》对其酌情从轻或减轻处罚。如果该规定的正式生效版本保留了这一规定，则相当于在一定程度上明确了在新法生效前已实施、且控制状态存续至新法生效后的未依法申报经营者集中，可酌情适用旧法的原则，这将有助于因历史原因存在未依法申报历史交易风险的经营者优先主动报告相关情况，争取宽大处理。

## **(3) 加重情节的适用条件较为模糊**

如上所述，除新法第五十八条中就违法实施经营者集中的法律责任作出的特别规定外，新法第六十三条还规定了严重违法行为的加重处罚标准，即情节特别严重、影响特别恶劣、造成特别严重后果

的，可以在原本确定的罚款数额的二倍以上五倍以下确定具体罚款数额。然而，新法中对于何种违法情形属于“情节特别严重、影响特别恶劣、造成特别严重后果”并无进一步指引或标准说明，这可能造成反垄断执法机构在特定情形下的法律适用困难。且考虑到未依法申报违法实施集中本身与其他垄断行为相比，出现加重情节或严重后果的可能性相对较低，该等加重处罚标准是否能够在实践中得到适用目前仍存在疑问。

由于新法出台后，反垄断执法机构尚未公开发布任何适用新法作出的未依法申报处罚决定，反垄断执法机构将如何适用提高处罚上限后的法律责任规定，以及是否适用、如何适用减轻或加重处罚的规定，尚需在未来的执法案例中得到进一步明确。

## **三、结语**

《反垄断法》修正案中对未依法申报违法实施经营者集中行为法律责任的大幅提升体现了我国对于反垄断合规日益重视的态度，该等规则的修改为反垄断执法机构的执法活动提供了更加明确的依据和指引，同时有助于促使经营者遵守反垄断法、依法进行经营者集中申报、合法合规从事投资并购等交易。目前，《反垄断法》修正案已正式生效，审查规定等下位法规的配套修订也在进行之中，预计将很快与《反垄断法》修正案配套生效施行，从而为包括未依法申报违法实施经营者集中行为为法律责任在内的规则适用提供更加完善的指引。

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