

CPI's Asia Column Presents:

Personal Liabilities of Senior Management under AML: A Comparative Approach

By Ken Dai & Jet Deng

(Partners, Dentons China)

June 2016



Copyright ©2016

Competition Policy International, Inc. for more information visit CompetitionPolicyInternational.com

In the last few years, a number of cases including several world-renowned cases have been effectively investigated and punished by Chinese antitrust enforcement authorities, which has aroused concerns among the business world.² Although many companies and employees might be aware of the liability of an undertaking for participating in any anti-competitive conduct, they may not be aware that antitrust violations may create personal liability of senior management and other related employees who engages in such violation.

This article provides an overview of personal liabilities of senior management under antitrust law both at home and abroad, stresses the demand of a sounder regime under the PRC Anti-monopoly Law (the “AML”) as well as discusses the trend of the Chinese regime, in order to serve as a stark reminder about the personal risks of senior management in China.

I. Personal Liabilities of Senior Management under the AML: Limited Criminal Liabilities

Technically speaking, it is difficult to pursue culpable senior management for their anti-competitive conduct under the AML, since the AML has not set up any personal liability on the part of employees, either senior management or legal representatives, even though they may be alleged for having involved in the monopolistic conduct of the undertaking concerned.

The violation for antitrust investigation procedures, however in certain situation, can trigger criminal liability of employees under the AML, especially the senior managements who directly deal with the investigation by the antitrust authorities and act on behalf of the company in such investigations. Articles 42 and Article 52 of the AML³ and the of NDRC’s *Regulations of Administrative Enforcement Procedures for Anti-price-related Monopolistic Conducts* specify obligations for both companies and individuals to cooperate in investigations conducted by antitrust enforcement agencies. Under such provisions, any employee who breaches the

² In 2015, there came the first judgment as regards administrative monopoly since promulgation of Anti-Monopoly Law of PRC (“AML”) six years before. It was the first time that an administrative monopoly case went into substantive lawsuit. Also in 2015, the National Development and Reform Commission (“NDRC”) fined Qualcomm for CNY 6.088b, which was the largest fine ever and more than three times the fine of anti-monopoly conducts for 2014 (CNY 1.7b) in total. In the end of 2015, NDRC imposed a combined CNY 407m on eight roll-on/roll-off shipping companies, including Nippon Yusen Kabushiki Kaisha (NYK Line) and Kawasaki Kisen Kaisha Ltd (K-Line), for reaching and implementing a price monopoly agreement concerning bid rigging. It helped maintain competition order in the market of import and export. In 2015, NDRC together with price bureaus at provincial level dealt with 10 anti-monopoly cases and imposed a fine of CNY 6.605b, which is much more than that in 2014 (CNY 1.8b). By September 2015, 55 cases had been officially investigated and concluded by NDRC and 54 cases by SAIC.

³ Article 42 of the AML provides “The undertakings under investigation, the interested parties or other relevant units or individuals shall cooperate with the authority for enforcement of the Anti-Monopoly Law in performing their duties in accordance with law, and they shall not refuse to submit to or hinder the investigation conducted by the authority for enforcement of the Anti-Monopoly Law.” Also, Article 52 of the AML provides “Where, during the review and investigation conducted by the authority for enforcement of the Anti-monopoly Law, a unit or individual refuses to provide relevant materials or information, or provides false materials or information, or conceals, or destroys, or transfers evidence, or refuses to submit to or obstructs investigation in any other manner, the authority for enforcement of the Anti-monopoly Law shall instruct it/him to rectify, and a fine of not more than CNY 20,000 shall be imposed on the individual and not more than CNY 200,000 on the unit; if the circumstances are serious, a fine of not less than CNY 20,000 but not more than CNY 100,000 shall be imposed on the individual and not less than CNY 200,000 but not more than CNY one million on the unit; and if a crime is constituted, criminal liability shall be investigated for in accordance with law.”

procedure of investigation shall bear administrative and criminal liabilities not only for their companies but also for themselves. The AML impose fines up to CNY 100,000 on individuals. More seriously, if a crime is constituted, criminal liability can be imposed according to the relevant regulations.

By March 2016, in only two released cases companies were fined for their non-cooperative attitude with investigations, while no personal liability had been pursued. In September 2015, Sunyard System Engineering Co., Ltd received a fine of CNY 200,000 for its refusal to cooperate with the antitrust investigation by Anhui Provincial Administration for Industry and Commerce, in particular for the refusal to provide relevant materials in the investigation.⁴ In an earlier case regarding price monopoly agreement, two tourism stores were also fined for not cooperating.⁵ In both cases, no penalty on individuals was imposed eventually. However, the senior management, who may ignore the good preparation for an investigation, shall take note of such risk for violating procedure provisions and take a cautious attitude towards the investigations.

Since senior executives do not have to burden criminal or administrative liabilities for the anti-competitive conduct of their companies under the AML, their personal liability may only be sought under other laws such as the Criminal Law. Bid-rigging, for example, is a typical form of price monopoly under the AML. In particular, bid-rigging between bidders would be regarded as a hard-core cartel, which has been proved by several cases released.⁶ Senior executives, as decision makers in most of the bidding cases, would bear the liability under Article 223⁷ of Criminal Law, which expressly laid out the individual sanction, including imprisonment up to 3 years and fines.

Some other articles under the Criminal Law lays out the legal consequence of an individual for conducting anti-monopoly conduct as well. Article 226⁸ stipulates the liability of imposing trades by intimidation. In the Rice Noodle case investigated by the National Development and Reform Commission (“NDRC”) in 2010⁹, 5 related individuals had been under criminal

⁴ See http://www.saic.gov.cn/fldyfbzdjz/qjil/201511/t20151104_163605.html.

⁵ See http://jjs.ndrc.gov.cn/gzdt/201304/t20130410_536469.html?from=groupmessage&isappinstalled=1.

⁶ The most recent case is the case regarding horizontal monopoly agreement between 8 roll-on/roll-off shipping companies, in which a total fine of CNY 400 million were imposed. See *Supra* note 1 or http://jjs.ndrc.gov.cn/gzdt/201512/t20151228_769084.html.

⁷ Article 223 of the Criminal Law provides “Bidders who act in collusion with each other in offering bidding prices and thus jeopardize the interests of bid-inviter or of other bidders, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined. If a bidder and bid-inviter act in collusion with each other in bidding and thus jeopardize the lawful interests of the State, the collective or citizens, they shall be punished according to the provisions of the preceding paragraph.”

⁸ Article 226 of the Criminal Law provides “Whoever commits any of the following acts by violence or intimidation, if the circumstances are grave, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and be concurrently or separately fined. In the case of especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and be concurrently fined: (1) Buying or selling commodities by violence and intimidation; (2) Compelling another person to provide or receive services; (3) Compelling another person to participate in or withdraw from bidding or auction; (4) Compelling another person to transfer or acquire shares, bonds or other assets of a company or enterprise; or (5) Compelling another person to participate in or withdraw from specific business activities.”

⁹ See http://www.sdpc.gov.cn/fzgggz/jgdyfld/fjgld/201402/t20140228_588558.html.

prosecution for compelling trades under the aforesaid Article 226. No penalty has been released thereafter, but it also signals a heightened risk of criminal liability of individuals participating in the monopoly agreement.

In parallel, some civil liabilities of senior management might be sought by their companies. Article 147 of Company Law¹⁰ provides the fiduciary duty and the duty of diligence, while Article 149 of the Company Law¹¹ provides companies a remedy for their loss due to the fault of senior management. For example, pursuant to Article 149, an executive who participates in a bid-rigging and consequently be penalized under the PRC Criminal Law, might also be claimed to compensate for the fine suffered by the company. However, such civil liabilities shall normally be based on effective administration penalty decisions and it takes the companies a long time going through complicated legal procedures, thus making it difficult to seek in practice.

II. Personal Liabilities of Senior Management in Other Jurisdictions: A Sound Regime including Imprisonment and Fines under Antitrust Law

In U.S., any employee who violates Article 1 or Article 2 of Sherman Anti-Trust Act shall be penalized for a fine up to USD 1 million or a maximum jail term of 10 years, or both.¹² Apart from the criminal penalties for violations specified in Sections 1 and 2 of the Sherman Act, individuals engaged in antitrust violations may also be subject to greater sanctions under the Federal Criminal Fine Enforcement Act,¹³ which provides that individuals convicted of an antitrust violation, may be fined the higher of: (1) \$1 million under Sections 1 and 2 of the Sherman Act; or (2) twice the gross amount gained by the individual from the violation, or twice the gross amount of the loss suffered by the victims.

It has been well noted that there is a trend for U.S. to punish individuals (including senior executives and employees) more seriously in recent years. There has been an increase in the number of individuals sentenced to prison and the length of prison terms faced by such individuals in the last several years.¹⁴ Such trend has been indicated by much statics, including that the Antitrust Division is now sending approximately twice as many culpable individuals to prison as it did in the 1990s.¹⁵

In EU, such personal liability shall be considered at two levels, i.e. at the level of EU as a whole and at the level of every individual member state. At EU level, the European Commission is

¹⁰ Article 147 of the Company Law provides “The directors, supervisors and senior management personnel of a company shall abide by laws, administrative regulations and the company’s articles of association. They shall be faithful and diligent to the company...”

¹¹ Article 149 of the Company Law provides “Where any director, supervisor or senior management person of a company violates laws, administrative regulations or the company’s articles of association during the performance of duties, he shall be liable for compensation if any loss is caused to the company.”

¹² 15 U.S.Code § 1.

¹³ Kathleen T. Alt & Mary Sue (2014), “Greenleaf Criminal Enforcement of State and Federal Antitrust Laws”, The Colorado Lawyer: Vol. 43, No. 10.

¹⁴ DOJ Antitrust Division of U.S, “Antitrust Division 2013 Criminal Enforcement Update,” See www.justice.gov/atr/public/division-update/2013/criminal-program.html.

¹⁵ Kathleen T. Alt & Mary Sue (2014), *supra* note 12.

only entitled to sanction undertakings, instead of imposing fines or criminal liabilities on any individual.

Senior executives engaging in anti-competitive conducts regulated by EU, however at the level of individual member state, increasingly run the risk of being sanctioned, since there have been 19 member states adopting personal antitrust liabilities, 14 of which have criminal sanction system and administrative fines system in parallel.¹⁶ For instance, individuals involved in bid-riggings may face fines up to €1 million in Germany, while in Dutch the fines may be up to €450,000. An increasing number of member states have started to take personal liability seriously.

A sounder regime was in UK that individuals who participate in anti-competitive conducts may face up to five years' imprisonment and even unlimited fines. Furthermore, the Competition and Market Authority¹⁷ could also apply to the court to disqualify certain directors.¹⁸ Such decisions may be regarded as civil remedies, in order to limit the qualification of a director for as long as 15 years.

The shift to pursuing more directly on the individuals engaging in antitrust violations under antitrust or competition law, not only in U.S and UK, but also Japan and Australia, is creating greater risks and will raise more attention. Such regime often consists of imprisonment, fines and other civil consequences such as disqualifications.¹⁹

III. Expected More Personal Risks of Senior Management under Chinese Regime

In view of the legislation and enforcement practice in the international world, it might be concluded that criminal sanctions and fines on senior management who participate in the anti-competitive conduct has been established and enhanced in recent years. Thus, the absence of criminal sanction under the AML has long been criticized by many domestic scholars since it did not consistent with the trend of the international world.²⁰ Some scholars also emphasized that administrative penalties are unable to constitute deterrence for many

¹⁶ Marco Slotboom (2013), "Individual Liability for Cartel Infringements in the EU: An Increasingly Dangerous Minefield", Kluwer Competition Law Blog, See <http://kluwercompetitionlawblog.com/2013/04/25/individual-liability-for-cartel-infringements-in-the-eu-an-increasingly-dangerous-minefield/>.

¹⁷ The official website of the UK Competition and Market Authority, see <https://www.gov.uk/government/organisations/competition-and-markets-authority>.

¹⁸ s.9A, the Company Directors Disqualification Act 1986. For more details about disqualification of directors, please visit <http://uk.practicallaw.com/5-107-4530>.

¹⁹ In Japan, senior executives who conduct monopoly agreement or abuse dominant market position may be subject to a maximum 5-year imprisonment or a fine up to JPY 5 million. In recent years, the government further realized the importance of criminal liability, therefore paid more attention. See Dai Long (2014), "Studies on the Japanese Antitrust Law", China University of Political Science and Law Press, at 231. In Australia, Contravention of Australian Competition and Consumer Act 2010 would attract individual liabilities, such as (criminal) fines, (civil) pecuniary penalties, imprisonment for as long as ten years and disqualification of directors, etc. See <https://www.accc.gov.au/business/business-rights-protections/fines-penalties>.

²⁰ Dai Long (2014), "Studies on the Japanese Antitrust Law", China University of Political Science and Law Press, at 230.

companies, especially state-owned enterprises and public enterprises, while criminal liabilities for antitrust violations under the Criminal Law is quite limited.

Furthermore, there is no provision concerning the disqualification for senior executive under the AML. Article 146 of Company Law of PRC (“**Company Law**”) lists five conditions under which an individual is not qualified for director, supervisor or senior manager.²¹ However, all these conditions are unlikely to be applied to monopoly conducts, making that competition authorities cannot count on them to disqualify a senior executive.

Compared with that in other jurisdictions, monopolistic conducts would not constitute crimes, and senior management do not have to bear criminal liabilities, except in the situation that senior executives hinder investigation procedure of anti-monopoly enforcement authorities. They may only be pursued under the Criminal Law for quite limited reasons. Up to now, the investigation and punishment on individuals seems not to be aggressive enough for individuals for the reason that the released cases indicates that few individuals finally burden the legal consequence for their breach of the investigation procedure. Also, disqualification seems to be impossible under the Company Law and the further civil liability only can be sought by the company after it is investigated and punished.

China, as one of the major antitrust enforcement jurisdictions, therefore shall reconsider its penalty system on individuals for the AML violation, in order to benefit enforcement situations on two grounds. On the first ground, imprisonment and personal fines provided under the AML may effectively deter senior executives, who normally make important business decisions for companies, from concluding any hard-core cartel or other kinds of anti-competitive conducts, since they are aware of the legal consequences - not only a huge fine and long-term imprisonment but also an eroding reputation due to disqualifications. On the second ground, personal liability makes it easier to investigate and reveal antitrust conduct and therefore help the authorities make justifiable administrative decisions. Development even can be made in the introduction of immunity on individuals, and such topic is worth being discussed in a further article.

Antitrust enforcement agencies in all jurisdictions have long been exploring a stubble balance between the deterrence function and the punishment function when making decisions and improving their penalty system. Just as the Antitrust Division of DOJ articulated that “holding culpable individuals accountable is the most effective way to deter and punish cartel activity”²², following the international trend, China is now expecting a punishment regime which involves both corporate fines and necessary personal sanctions, including fines, imprisonment, civil compensation and/or disqualification of senior management under the AML. Senior management in China, who play an essential role in the business decisions, shall take note of any risk of violating the AML either by their companies or by themselves, since they will be unlikely to stay out when their companies were involved in such claims.

²¹ Article 146 of the Company Law

²² DOJ Antitrust Division, *supra* note 13.