

Available online at [www.sciencedirect.com](http://www.sciencedirect.com)

ScienceDirect

[www.compseconline.com/publications/prodclaw.htm](http://www.compseconline.com/publications/prodclaw.htm)


---



---

**Computer Law  
&  
Security Review**


---



---



# When competition law meets telecom regulation: the Chinese context

Liyang Hou \*

KoGuan Law School, Shanghai Jiao Tong University, Shanghai, China

## A B S T R A C T

### Keywords:

Competition law  
Regulation  
Conflict  
China

The liberalized telecom sector propagates a dynamic ecosystem mixed prominently with three forces: the market mechanism, sector-specific regulation and competition rules. While the tension between the market force and sector-specific regulation has been well studied, the conflicts between sector-specific regulation and competition rules have attracted less attention in particular in China. The 2012 *China Telecom/China Unicom* case indicates that such conflicts are not moot issues any more. This leads to a question whether it is better to let the two instruments compete or complement. The comparative study on the different practices of the EU and the US suggests that China may better apply the US case-by-case approach, i.e. to evaluate whether antitrust intervention can bring added value to effective competition. Subsequently, a substantive analysis based on the US approach arrives at a conclusion that the EU outcome is nonetheless better suited for the Chinese context, namely to establish the supremacy of competition rules over sector-specific regulation and to allow the former to intervene in the latter whenever necessary.

© 2015 Liyang Hou. Published by Elsevier Ltd. All rights reserved.

## 1. Introduction

The liberalization of the Chinese telecom sector was initiated more or less two decades ago, at the beginning of 1990s. A significant number of reforms on sector-specific regulation (SSR) have been rolled out since then. Previous research focuses substantially on the role of SSR in promoting competition. For example, Gao and Lyytinen evaluated the first telecom reform in 1994–1998, and praised the historic move to start the telecom liberalization in China, though to a limited extent.<sup>1</sup>

Zhang investigated the second wave of reform starting from 1998 due to the urgency to join the World Trade Organization (WTO), and pinpointed its significance to the further development of Chinese economy.<sup>2</sup> Chang et al. examined the regulatory environment for international investors.<sup>3</sup> Fu and Mou, after studying the latest reform in 2008, criticized the incompleteness of the current liberalization, such as non-transparent policy-making and the state-monopolized market structure.<sup>4</sup>

However, less has been so far touched upon the role of another important instrument in the process of

\* KoGuan Law School, Shanghai Jiao Tong University, Huashan Road 1954, Shanghai 200030, China.

E-mail address: [liyang.hou@sjtu.edu.cn](mailto:liyang.hou@sjtu.edu.cn).

<sup>1</sup> P. Gao and K. Lyytinen, “Transformation of China’s telecommunications sector: a macro perspective” [2000] 8–9 *Telecommunications Policy* 719.

<sup>2</sup> B. Zhang, “Understanding China’s telecommunications policymaking and reforms: a tale of transition toward liberalization” [2002] 4 *Telematics and Informatics* 331.

<sup>3</sup> J. Chang, X. Fang and D. Yen, “China’s telecommunication market for international investors: opportunities, challenges, and strategies” [2005] 1 *Technology in Society* 105.

<sup>4</sup> H. Fu and Y. Mou, “An assessment of the 2008 telecommunications restructuring in China” [2010] 10 *Telecommunications Policy* 649. <http://dx.doi.org/10.1016/j.clsr.2015.07.007>

**Table 1 – Categories of telecom services.**

| Basic (Category I)  | Basic (Category II)                                       | Value-added (Category I)            | Value-added (Category II)   |
|---|---|-------------------------------------|-----------------------------|
| Fixed telephony (*)   | Cluster communications                                    | Online data exchange and E-commerce | Data storage and forwarding |
| Mobile telephony (*)  | Paging  | Domestic multi-party communications | Call center                 |
| Satellite communications and international leased lines (*) | Satellite facilities (*)                                  | IP-VPN                              | Internet access             |
| Data transmission and international data transit (*)        | VSAT services   | Internet data center                | Information services        |
|   | Intranet data transmission and wireless data transmission |                                     |                             |
|   | Wireless access   |                                     |                             |
|   | Customer premises network                                 |                                     |                             |
|   | Telecom facilities  |                                     |                             |
|   | Collocation   |                                     |                             |

\* These services are only licensed to the three SOEs. Source: *Directory of Telecom Services, MIIT Dian [2003] 73 (in Chinese)*.

liberalization, i.e. competition rules.<sup>5</sup> Scholars, such as Li<sup>6</sup> and Li,<sup>7</sup> even cast doubt on the applicability of the newly adopted competition rules in China to the state-owned telecom monopolies. Nevertheless, a non-deniable fact is that after more than twenty-year development, competition, though far from satisfactory, has emerged in at least part of the telecom sector in China. This firstly gives a possibility for competition rules to engage. Secondly, in 2012 the National Development and Reform Commission (NDRC), a Chinese competition agency, enforced Chinese competition rules against two state-owned telecom incumbents that were at the same time subject to regulatory obligations. This case does not only officially enunciate the involvement of competition rules in the liberalization process, but also raise an interesting issue in relation to the institutional conflicts between competition rules and SSR. Moreover, it implies that behavior of state-owned enterprises (SOEs), even directly governed by SSR, may also infringe competition rules. This results into a dilemma that in order to fulfill the requirement of competition rules regulated operators must necessarily disobey regulatory rules, or vice versa. Consequently, China began to be confronted with the institutional conflicts between the two legal instruments, a challenge already experienced in other jurisdictions, e.g. the European Union (EU) and the United States (US).

This article aims to shed some light on the institutional conflicts between competition rules and SSR within the Chinese context. In order to do so, the next part gives a brief introduction to the regulatory environment as well as the current market situations in China's telecom sector. Subsequently, the third part switches its view to antitrust enforcement in China, and discusses the aforementioned case that exposes intense institutional conflicts between the two legal instruments. Following the concern that the current Chinese legislature is not able to mitigate those conflicts, the fourth part carries out a comparative study on the related practices in the EU

and the US. The international practices suggest that the US approach may offer a useful tool to examine the Chinese circumstance. Therefore, the fifth part, in accordance with the US methodology, evaluates whether it is value-added in China to allow competition rules to intervene into regulated matters. The result surprisingly turns out to be consistent with the EU outcome. Finally, the last part concludes with some suggestions.

## 2. Chinese telecom industry

### 2.1. Telecom regulation

The two-decade long liberalization in Chinese telecom industry has witnessed both progress and compromises. While a substantial number of private operators have entered the sector, a full liberalization is still not achieved until now. Telecom networks, or Category I of basic telecom services (Table 1), have always been controlled solely by the SOEs. The difference from more than twenty years ago is that they are now owned by not one but three SOEs, namely China Telecommunications Corporation (China Telecom), China United Network Communications Group (China Unicom) and China Mobile Communications Corporation (China Mobile). Private operators are only allowed to offer Category II of basic telecom services (except satellite facilities) and value-added services (Table 1).

The Telecom Regulation, adopted in 2000, is mainly comprised of two substantial chapters for the purpose of promoting competition, i.e. market entry and regulatory obligations.<sup>8</sup> As far as market entry is concerned, a two-layer authorization mechanism is established based firstly on services and secondly on geographic coverage. In terms of services, Category I of basic telecom services and satellite facilities (Category II of basic telecom services) are exclusively licensed by the Ministry of Industry and Information Technology (MIIT),<sup>9</sup> and are so far only awarded to the three SOEs. With regard to other telecom services, intra-provincial operation licenses are

<sup>5</sup> In the following competition law, antitrust law and anti-monopoly law are used synonymously.

<sup>6</sup> G. Li, "Can the PRC's new anti-monopoly law stop monopolistic activities: Let the PRC's telecommunications industry tell you the answer" [2009] 7 Telecommunications Policy 360.

<sup>7</sup> Y. Li, "The competitive landscape of China's telecommunications industry: Is there a need for further regulatory reform?" [2011] 3 Utilities Policy 125.

<sup>8</sup> Telecom Regulation, State Council of China [2000] 291 (in Chinese).

<sup>9</sup> *ibid*, Art. 11.

Download English Version:

<https://daneshyari.com/en/article/466419>

Download Persian Version:

<https://daneshyari.com/article/466419>

[Daneshyari.com](https://daneshyari.com)