

China Cracks Down on Anti-Competitive Practices of Major State-Owned Enterprises

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China's antitrust authorities are investigating—and taking significant action for the first time against—state-owned enterprises, using the powers granted them under the 2008 Anti-Monopoly Law.

A senior official of the National Development and Reform Commission (NDRC), one of China's most powerful antitrust enforcement agencies, has confirmed the commission is investigating China Telecom and China Unicom for abuse of their dominant market position in the broadband internet market. This is a significant development as it shows that, contrary to many foreign commentators views, the NDRC is prepared to take action against powerful state-owned enterprises (SOEs). Until now, it was assumed that because SOEs were so close to the government, no government agency would subject these companies to investigations or public criticism by the antitrust authorities. Clearly however, the NDRC has not taken this approach. The two telecom SOEs are being investigated for discriminatory pricing for access to their broadband network by charging competitors more than what they charge non-competitors. This development also shows that China's antitrust enforcement agencies are starting to take significant action using powers granted to them in 2008 under China's Anti-Monopoly Law.

The shift in emphasis, availability of resources and greater sophistication of the NDRC as an antitrust enforcement agency, is also reflected in recent changes to its internal organization. Under the umbrella of the newly named Price Supervision & Investigation and Anti-Monopoly Bureau, the NDRC now has three new divisions for enforcement, investigation and policy to fulfill its responsibilities under China's Anti-Monopoly Law.

In a November 9, 2011, interview by China Central TV Station with Ms. Li Qing, deputy director of the NDRC Price Supervision, Inspection and Anti-Monopoly Bureau, stated:

The main aspects of the investigation are whether China Telecom and China Unicom have used their dominant market position in the broadband connection and internet settlement markets, to hinder or restrict other business operators from entering the market, etc. Throughout the investigation, it has been clear, in essence, that for the internet connection market, China Telecom and China Unicom together have more than two-thirds market share, and so are sure to have a dominant market position. In such circumstances, China Telecom and China Unicom have

indeed used such dominant market position to charge higher prices for those competitors who are competitive with China Telecom and China Unicom while for non-competing enterprises; they will charge some preferential pricing. This conduct is defined as price discrimination from the viewpoint of [China's] Anti-Monopoly Laws. If the above circumstances can be verified, they will be subject to monetary penalties of 1 per cent to 10 per cent of their sales volume for the previous year

The relevant law referred to by Ms. Li Qing is Article 17.6 of the Anti-Monopoly Law, which provides that enterprises with dominant market positions, without justifiable reasons, may not apply differential prices or other discriminatory transaction terms with their trading parties. Fines of up to 10 per cent of annual revenue can be imposed for breach of the Anti-Monopoly Law. A similar rule is found in Article 14.5 of the Price Law and Article 4.2 of certain provisions implementing China's Price Law, that is, applying discriminatory prices to goods or services of the same kind offered by business operators under the same trading conditions. Under the Price Law, and its implementing rules, such behavior can be subject to an order to correct the illegal behavior; confiscation of illegal gains; a fine of not more than five times the illegal gains (if there are no illegal gains, a fine of between RMB 100,000 to 1 million); and, if the circumstances are serious, revocation of the business license.

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