Abstract: This paper provides an analysis on challenges to and two aspects of condition of existing telecoms regulatory regime, and addresses the question of why we should choose the independent regulatory agency for telecommunication. As to the critical issue of what "independence" actually means and what are the key attributes of independence, we put forward the basic requirements for an independent regulatory agency. Based on overall analysis we conclude that China should identify right regulation objective, enact competition law and telecommunications act and expedite the reform of property right institution. In particular, currently it is imperative to establish a transitional regulator.

Key words: Independent Regulatory Agency; Telecommunications in China; Competition Policy; Property Right Institution

1. INTRODUCTION

In 1998, two separate ministries serving as both regulator and player, the Ministry of Posts and Telecommunications (MPT) for the operators and the Ministry of Electronics Industry (MEI) for equipment manufacturers, merged to form the Ministry of Information Industry (MII), which is subject to State Council as the telecommunications regulator. Under the new regulatory regime, MII makes industrial policy and regulates the telecom services sector (through the Telecom Administration Bureau). It also allocates spectrum, licenses network access equipment and develops standards. Admittedly, the establishment of MII has primarily realized "separation of government from enterprise" and distinguished regulated entities from regulator, which

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guarantees a rapid development and vigorous reform of telecommunications. Although the telecommunications has been reformed to the largest extent in all industries, however, it is still a focus of people’s attention and the object of complaint, because of unreasonable charges, unstable quality of service, excessive competition and so on. In addition, rapid development of the industry and great changes in its environment including investment, technology, politics and the like, have come into being challenge to telecoms regulatory regime especially the regulatory agency. In this paper, we will focus only the issue of how to set up an independent regulatory agency in China.

The plan of the rest of the paper is as follows. In section 2, we discuss the challenges and problems that existing telecoms regulatory regime is confronted with. In section 3, we discuss the merits of independent regulator. Section 4 identifies the basic requirements for really independent regulator. Several advices are given in section 5.

2. CHALLENGES TO AND PROBLEMS OF EXISTING TLECOMS REGULATORY REGIME

2.1 Long Term Development Plan to Establish an Effective Market Competition Mechanism for Telecommunications

As China’s infrastructure development objectives are gradually achieved, it is likely that Chinese telecommunications policy will increasingly focus on competition policy. Such a change in focus is required by China’s basic telecommunications obligations under the WTO and is consistent with China’s long term economic plans. Indeed, the Chinese Government’s recent draft Long Term Development Plan to 2015 expressly contemplates the establishment of a fair, transparent and effective market competition mechanism for telecommunications.

2.2 Rapid Development and Intense Competition in Telecoms Market

Telecommunications service industry in China has enjoyed great growth in recent years. By October 2004, the total number of fixed subscribers has reached 311 million, while mobile users’ has reached 325 million, and total revenue has arrived at 431.68 billion RMB Yuan, which sharpens the inconsistency between the advancement in telecoms industry with lagged regulatory regime. For instance, many potential investors could not easily access the market mainly because of unseasonable regulatory regime. On the other hand, as competition in market becomes fierce, many problems such as interconnection and wrongful conduct become more serious, which need a fair, uniform and effective regulation.

2.3 Obvious Trends of Convergence of Three Networks

Along with the evolution of network technology, the trends of convergence of telecommunications network, Internet and cable television network is becoming more obvious. Digitization now allows many kinds of content to be delivered over different networks. For example, launching of data service especially new types of them such as network television and guessing game by SMS, greatly accelerates convergence of the three networks. As to cable television network, for instance, depending on broad transmitting channels, preponderant access network and abundant sources of program, it has turned into a new choice of broad-brand Internet access. Indeed, continuous technological innovation has overtaken the telecoms regulatory
regime. To resolve these problems it is the premise to set up uniform system so that telecommunications regulation authority can carry out the centralized function of supervising all fields of communications.

2.4 China’s WTO Commitment Regarding Independent Regulators

In its WTO accession negotiations, China has committed to separate relevant regulatory authorities from, and not make them accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

2.5 Favorable Conditions

In August 2001, China reestablished the State Informatization Leading Group headed by main leaders of our country. It has an executive body called State Council Informatization Office. Many see this group as the precursor to a super-powerful regulatory body that sits above individual ministries regulating the telecom and cable industries.

Institutional reform of State Council containing the evolvement of telecoms regulator provides a government basis for establishing an independent regulatory authority. We have set up China Securities Regulatory Commission, China Banking Regulatory Commission, China Insurance Regulatory Commission and State Electricity Regulatory Commission. These independent regulators for specific industry can provide a reference for establishment and operation of telecoms regulatory agency.

State-owned Assets Supervision and Administration Commission of the State Council set up in 2003 is delegated to perform investor function as a shareholder of state-owned enterprises, which to a certain extent lead to the decrease of intervention in telecoms regulation.

2.6 Adverse Conditions

Currently, MII regulates the telecom and IT manufacturing industry, while the State Administration of Radio, Film and Television (SARFT) regulate cable TV networks. Conflicts have arisen between MII and the SARFT over who should have jurisdiction to regulate telecommunications and broadcasting cable operators. In addition, the State Development and Reform Commission sets prices and grants market access for large foreign-invested projects. As to local telecoms industry, both MII and local government are the administrative body, which has a negative impact on exertion of local Telecom Administration Bureau. Therefore establishment of independent regulatory agency requires reform of the whole economic regime, which will be a long and arduous process accompanied by reform of political regime.

In the absence of a telecom law, the main instrument of regulation in the telecom areas is the Telecom Regulations, promulgated by the State Council in September 2000, and a series of decrees issued by MII, the industry’s watchdog for now. However, “independent regulator” was not mentioned in the Telecom Regulations, although “separation of government from enterprise” came close. Moreover, according to Chinese legislative procedures, MII is responsible drafting the future telecoms law, which will go against setting up an independent regulator.

The challenge for China is how to introduce greater competition principles into its overall regulatory regime while gradually reducing government intervention. China’s generic competition legislation is not comprehensive and fails to address many issues of concern relating
to telecommunications competition, which implies a request for drawing an integrated competition law to identify the exact scope of responsibilities of telecoms regulator.

3. TRAITS OF AN INDEPENDENT TELECOMMUNICATIONS REGULATOR

As OECD claimed, one of the most widespread institutions of modern regulatory governance is the so-called independent regulator. Establishing separate telecom regulator has become a global trend in the reform of telecoms. In the past, there have been government departments or ministries with responsibility for telecommunications. Recently, the trend is to establish separate regulatory agencies for telecommunications. In 1990 there were only 12 telecom regulatory agencies in the world. The number of regulatory agencies has reached 122 by December 2003. Figure 1 shows the growth in the establishment of separate regulators.

Regulatory independence is critical to the effective development of long-term competition. Generally, the greater the independence of the regulatory agency, the more effective the regulator will be at ensuring fairness to market entrants, and the more effective the subsequent development of competition will be.

Attracting private investment requires a stable environment and credible assurances against outright or administrative expropriation. Making the regulatory process independent is one way to reduce the risk of telecommunications investment. Heavy investment is important in order for telecommunications services to develop and adopt advanced technologies. Telecommunications is extremely capital intensive and usually yields a positive return on investment only many years after the initial investment and dependent heavily on regulation rules. As a result of these two factors, investments in the telecommunications industry are subject to a high degree of regulatory risk. For investors, a regulatory regime independent from political vagaries is a key to providing a predictable investment climate.

In its relationships with the regulated entities, the independent regulator can ensure a level playing field for all the players in the field. It is extremely important that the regulator is not perceived to be biased in favor of or against any particular entity.

For consumers, a regulatory regime independent from the industry is important as an advocate, their voice in the state. In the telecommunications field, firms are more concentrated than consumers, and it is easier for firms to organize and represent their interests to the state than for consumers.

These regulatory bodies consist of experts who are given decision authority over complex
technical and economic matters as set forth in the telecommunications laws. And decisions of the regulatory body are final and are not subject to approval by other parts of government. Thus, because final decision authority of the regulatory body rests with three or more expert commissioners, regulator is easily given authority to provide answers and stability, maintain norms and order, which also insures regulator against unfairness and inefficiency.

4. BASIC REQUIREMENTS FOR INDEPENDENT REGULATORY AGENCY

The independent regulator acts with a mandate by law and is free from interference by enterprises and policy-makers; its mandate is to execute state laws and policies, regulate the telecom market, create conditions for effective competition between operators, settle disputes arising from market operations and competition, follow industry developments, and advise on policy-making.

Regulatory independence in this context has several meanings:

1) The regulatory body should be independent of the companies that are being regulated. This ensures that the decisions of the regulatory body are not biased toward one company or another. His ability to win the confidence of all the entities in the field will go a long way in the success of the reform process. A mechanism for periodic meetings with the regulated entities would help it to better understand their problems and concerns.

2) The regulatory body should be independent of government or its ministries. This ensures that changes in government or changes in Ministers do not lead to abrupt changes in regulatory policies.

3) Decision authority within the regulatory body should posses of sufficient power independent of any single individual. This ensures more possibility and stability in the regulatory process.

As to consumers, a fair price for the services and a commensurate quality of them must be guaranteed and their demand for unreasonably low prices should not be met. The regulator needs to setting up a mechanism for the consumers to express their opinions to him in an honest and free manner. In order to acquire very useful feedback for a better-informed discharge of its duties, organizing consumer forums and periodic interactions with consumers is a good option.

A regulator's independence is usually safeguarded by the manner in which he is appointed. The independent regulator's job is to apply the law. He should not have to take into account other considerations such as the security of his job as a result of the various decisions he makes.

It is noted, however, independence of regulator is relative great, not absolute, and an independent regulatory body should be accountable to the highest levels of state power and court, which ensure that the regulatory body is performing its work in accordance with the law. This lack of absolute independence is considerably desirable because it ensures that the regulator doesn’t simply follow a personal agenda. On the other hand, a regulator should enjoy high degree of freedom to effectively discharge his duties under the statute. The survival of the regulator should not be dependent upon the pleasure of the executive and his autonomy and authority have to be guaranteed by legislation. Independence of the regulator would have to be tied in with an appropriate measure of public accountability. Clear rules, an open and transparent regulatory process, and reasoned decisions alone can ensure this.
Another consideration is the manner of financing. Source of financing will have some control over the regulator, so some form of independent financing protects the regulator's position.

Furthermore, to minimize the chances of any challenge to the regulator's actions, there should be a clear framework of duties and powers laid down for the regulator. Sector-specific regulators have a comparative advantage in obtaining and analyzing the cost data needed for economic regulation and for some aspects of access regulation, while competition agencies have a comparative advantage when it comes to antitrust analysis ensuring that anti-competitive conducts and merger review process do not undo the benefits from introducing greater competition into regulated sectors. Therefore the division of tasks between competition agencies and regulators becomes necessary. There are four tasks deserving careful attention during and after the transition from rigorous regulation to the competition regime:

1) “Technical regulation” - setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns;
2) “Economic regulation” - adopting cost based measures to control monopoly pricing.
3) “Access regulation” - ensuring non-discriminatory access to necessary inputs, especially network infrastructures;
4) “Competition protection” - controlling anti-competitive conduct and mergers.

Because technical regulation and economic regulation require on-going monitoring and application of sector-specific expertise, having little relevance to competition questions, they seem to be better placed in sector-specific regulators. Competition protection should be conferred on a single competition agency so as to better protect competition from anti-competitive behaviors and to review mergers sometimes across different industries. As to access regulation, we need a comprehensive analysis. Generally, ensuring a level playing field requires processing a large volume of cost data in order to set access terms, and then following up with continuous monitoring to ensure compliance with those terms, which are functions that seem more in tune with what sector-specific regulators normally do.

5. CONCLUSIONS AND RECOMMENDATIONS

Based on the overall analysis above, six key recommendations can be made:

Recommendation 1: We should choose maximization of social welfare as the ultimate objective of regulation. Unlike the prevailing goal just mentioned, we have been aimed at improving the benefit of state, which inevitably lead to government intervention in telecoms regulation.

Recommendation 2: We should establish our independent telecoms regulator following FCC. Federal Communications Commission has been regarded as the most successful regulator in the world up to now. The FCC is an independent United States government agency, directly responsible to Congress. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. It licenses radio and television broadcast stations, assigns radio frequencies, and enforces regulations designed to ensure that cable rates are reasonable. The FCC regulates common carriers, such as telephone and telegraph companies, as well as wireless
telecommunications service providers. The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. None of them can have a financial interest in any Commission-related business. Having suffered intersected function across several ministries and thereby inefficiency, so we’d better chooses the most independent regulation mode like FCC.

**Recommendation 3:** We should expedite the reform of property right institution. Soft constraints of budget and insufficiency of incentives of state-owned enterprises’ managers lead to excessive competition in telecoms market. Continued turf warfare is reputed to continue to impair the efficiency of Chinese telecommunications sector regulation. There are two solutions to this, one is more effective incentive regulation, which will be distorted to a high degree, and other is further privatization, which has been proved a very efficient tool. Creation of independent regulators is indivisible from the process of privatization. When what became the regulated private sector industries were in state ownership, regulation occurred as part of the intricate relationship between state-owned industry and government ministers and officials, which can not ensure the independence of regulator.

**Recommendation 4:** We should enact telecommunications act as soon as possible. Without regulatory legitimacy, a regulator is unlikely to perform the core functions effectively. Accordingly, a newly created telecommunications regulator will generally lack autonomy from the relevant ministry and from the incumbent operator, which is likely to lead to arbitrary policy changes, sectarian decision-making, regulatory uncertainty for consumers and service providers, and mistrust on the part of investors.

**Recommendation 5:** Competition law should be enacted to provide an institutional environment for independent regulator. Today, more than a hundred countries around the world have implemented national competition laws. There is sufficient theoretical and empirical support to motivate the implementation of competition policy. The most important element of effective competition policy is institutional effectiveness which highlights the importance of independence (from pressure groups), transparency and effectiveness of appeals.

**Recommendation 6:** At the present stage, according to above analysis, we should establish a transitional independent body. Ultimately, it will be directly be accountable to the NPC. However, now creating an independent body under the State Council is a more viable option. Moreover, establishment of an independent regulator needs adjustment of existing telecoms regulatory functions, and involves redistribution of regulatory right and conflict of interests among different departments, which makes it impossible to perform the reform of regulation by a relevant ministry, so State Council will be the best choice.

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