

## Telecommunications

### Pilot Program for Mobile Communications Resale Business

On May 17, 2013, the Ministry of Industry and Information Technology (“MIIT”) published the Notice of the Ministry of Industry and Information Technology on Launching the Pilot Program for Mobile Communications Resale Business (MIIT Notice No.[2013]191) (“**Notice**”) with two attachments, i.e., the Pilot Program for Mobile Communications Resale Business (“**Pilot Program**”) and the Application Documents and Examination Procedures with respect to the Pilot Program for Mobile Communication Resale Business (“**Examination Procedures**”). This heralds the formal launch of mobile communications resale, after soliciting public opinions for a period of four months.

#### Main Content of Pilot Program

##### 1. Definition and Classification of Mobile Communications Resale Business

As defined under the Pilot Program, Mobile communications resale business (“**Resale Business**”) refers to such business activities that a reseller purchases mobile communications services from a basic telecommunications business operator who owns a mobile network, repackages the services with its own brand and then sells same to end users. The Resale Business does not include the resale of mobile satellite communications service. Different from the basic telecommunications business operators, the mobile communications resale enterprises running the Resale Business (“**Resale Enterprises**”) do not build their own wireless networks, core networks, transmission networks and other mobile communications network infrastructures, instead they must build their customer service systems and may build their business management platforms as well as billing, accounting and other business supporting systems as needed.

The Resale Business is classified as Class II basic telecommunications business in the Pilot Program, and will be monitored by reference to the provisions on value-added telecommunications business.

##### 2. Qualifications for Resale Enterprises

Pursuant to the Pilot Program, the Resale Enterprises shall first meet the requirements for operating value-added telecommunications business set out in the Telecommunications Regulations of the People’s Republic of China and the Administrative Measures for Telecommunications Service Licensing. In addition, the Resale Enterprises also need to satisfy the following requirements: (1) the Resale Enterprises shall be privately-owned (as opposed to state-owned) enterprises established in accordance with laws. The registered capital contributed by private investors must account for not less than 50% of the total registered capital of such Resale Enterprises and

the single largest shareholder of each of such Resale Enterprises shall be a privately-owned enterprise (excluding foreign-invested enterprises as well as enterprises established by investors from Taiwan, Hong Kong and Macau. For a domestic privately-owned enterprise listed overseas, the percentage of equity held by the enterprise’s foreign investors shall be less than 10% and its single largest shareholder shall be a Chinese investor); (2) the Resale Enterprises shall have professional staff corresponding to their needs of the business operations; (3) the Resale Enterprises shall have the capacity to provide long-term services to users; (4) the Resale Enterprises shall have necessary premises and facilities; (5) the Resale Enterprises shall have the capability to ensure the security of their networks and information; (6) the Resale Enterprises shall enter into commercial contracts for the Resale Business with basic telecommunications business operators.

The Examination Procedures further specifies the detailed criteria of above requirements illustrated in the Pilot Program.

##### 3. Procedures of Application, Examination and Approval

Under the Pilot Program and the Examination Procedures, the application, examination and approval procedures for the Resale Business are substantially the same as those for the value-added telecommunications business. Specifically, the Resale Enterprises applying for cross-region Resale Business shall submit their applications to the MIIT and those applying for inner-province Resale Business shall submit their applications to provincial administrations of communications. The Resale Enterprises applying for cross-region Resale Business also need to complete filing procedures with local administrations of telecommunications located in all relevant regions before conducting their business in such region.

##### 4. Other Rules

In order to ensure the successful implementation of the Pilot Program, it also sets forth the following provisions for the Resale Enterprises, the basic telecommunications business operators and the MIIT:

(1) The Resale Enterprises shall satisfy certain requirements if they propose to conduct pre-paid Resale Business, and the period of the pre-paid fees shall be no more than two years. All service quality claims brought by the Resale Enterprises’ users as well as all business disputes between the Resale Enterprises and basic telecommunications business operators shall be resolved by telecommunication authorities or their affiliated agencies.

(2) A basic telecommunications business operator shall enter into cooperation agreements with more than two Resale

Enterprises in conducting the Resale Business, and such agreements shall not include any exclusivity clause. The quality of the services sold by basic telecommunications business operators to the Resale Enterprises may not be lower than the quality of their own business services. The wholesale prices of the services offered by a basic telecommunications business operator to the Resale Enterprises shall be lower than the lowest retail prices of the same types of service offered by such basic telecommunications business operator in the public market.

(3) The MIIT will determine and assign the range of telephone numbers to basic telecommunications business operators for use in the Resale Business, and will allocate short telephone number resources to the Resale Enterprises for their client service.

## 5. Time Schedule for Pilot Program

As provided under the Notice, the candidates of the Pilot Program may apply to participate in the pilot business during May 17, 2013 to July 1, 2014, and the Pilot Program will end at December 31, 2015.

### Brief Comments on Pilot Program

#### 1. Facilitate Emergence of Chinese Virtual Operators

The launch of the Pilot Program changes the MIIT's long-time held negative attitude toward virtual operators. The Resale Business is actually not a new concept. It was initially appeared in the Telecommunications Regulations of the People's Republic of China issued in 2000 and many foreign countries have established a mature business model for virtual operators. However, the Resale Business was deleted from the Classified Catalogue of Telecommunications Business revised in 2003, which meant that the telecommunication business operators cannot apply to conduct the Resale Business. Therefore, before the issuance of the Pilot Program, the virtual operators did not have a legitimate status to conduct the Resale Business.

The Pilot Program provides virtual operators with legitimate market status. Pursuant to the Pilot Program, the Resale Enterprises only purchase relevant mobile communication service from basic telecommunication business operators. They do not actually operate any mobile communication service or possess any basic network facilities and infrastructures such as wireless networks, core networks and transmission networks. Therefore, the Pilot Program is actually a pilot arrangement for virtual operators and provides a good opportunity for the emergence of Chinese virtual operators. It is predictable that the MIIT may open more resale business relating to other types of telecommunication business in the future and benefited from this, the business of Chinese virtual

operators will be further developed and expanded.

#### 2. Promoting Marketing Competition but Its Actual Effect Remains to be Seen

It is well-known that the mobile communication business is currently monopolized by three largest basic telecommunications operators, namely China Mobile, China Unicom and China Telecom. The Pilot Program allows the Resale Enterprises to participate in the operation of mobile communications business as virtual operators, which apparently encourages the competition in the mobile telecommunications market. Although the Pilot Program sets forth some mandatory regulations on the cooperation between basic telecommunications operators and the Resale Enterprises, the eventual market effect of the Pilot Program still depend on the details of the resale contracts entered into between the Resale Enterprises and basic telecommunications operators. Currently, the attitude of the three largest basic telecommunications operators toward the Pilot Program is still unclear. Therefore, the potential market effect coming from the entry of privately-owned enterprises into mobile telecommunications market still remains to be seen.

#### 3. Foreign Investors' Participation Subject to Limitations

Although the Pilot Program classifies the Resale Business as the Class II basic telecommunications business which will be monitored by reference to the provisions on value-added telecommunications business, foreign investors' participation into the Resale Business is still subject to limitations due to the qualification requirements for the enterprises applying to conduct the pilot business set forth in the Pilot Program. As required by the Pilot Program, a qualified Resale Enterprises shall be privately-owned enterprise of which not less than 50% of the registered capital is contributed by private investors. In addition, the single largest shareholder of each of such Resale Enterprises shall be a privately-owned enterprise funded by private investors, and both foreign-invested enterprises and enterprises established by investors from Taiwan, Hong Kong and Macau are generally excluded. For privately-owned enterprises listed overseas, the percentage of equity held by their foreign investors must be less than 10%. It can be seen that the MIIT currently does not allow any foreign investor to directly invest in enterprises conducting the Resale Business. What is unclear is whether the MIIT shall put the same strict limitations on foreign investors' indirect participation in the Resale Business such as via VIE. Answering this question requires further analysis on the background of those approved Resale Enterprises.

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## 电信法律热点问题

### 移动通信转售业务试点方案

2013年5月17日，工业和信息化部（“工信部”）发布了《工业和信息化部关于开展移动通信转售业务试点工作的通告》（工信部通[2013]191号）（“《通告》”），随通告一起下发了《移动通信转售业务试点方案》（“《试点方案》”）及《移动通信转售业务试点申请材料及审查说明》（“《审查说明》”）。至此，《试点方案》经过四个多月的意见征求后正式出台，移动通信转售业务试点工作正式启动。

#### 试点方案的主要内容

##### 1. 移动通信转售业务定义及业务分类

根据《试点方案》规定，移动通信转售业务（“转售业务”）是指从拥有移动通信网络的基础电信业务经营者购买移动通信服务，重新包装成自有品牌并销售给最终用户的移动通信服务，但不包括卫星移动通信业务的转售。与基础电信运营商相区别，经营转售业务的移动通信转售企业（“转售企业”）不自建无线网、核心网、传输网等移动通信网络基础设施，但必须建立客服系统，可依据需要建立业务管理平台以及计费、营账等业务支撑系统。

《试点方案》将试点的转售业务归类为第二类基础电信业务，比照增值电信业务管理。

##### 2. 转售企业需满足的资质条件

根据《试点方案》的规定，转售企业首先应满足《中华人民共和国电信条例》和《电信业务经营许可管理办法》所规定的经营增值电信业务的条件。除此之外，转售企业还应满足以下条件：（1）应为依法设立的民营企业，其民间资本占公司资本比例不低于50%，且单一最大股东是民间资本的公司（不含外商及台港澳商投资。境内民营企业境外上市的，其外资股权比例应低于10%且单一最大股东为中方投资者）；（2）有与开展经营活动相适应的专业人员；（3）有为用户提供长期服务的能力；（4）有必要的场地及设施；（5）具备网络与信息安全保障能力；（6）具备与基础电信运营商签订的转售业务商业合同。

《审查说明》对《试点方案》所规定的上述条件进行了进一步的细化。

##### 3. 申请及审批流程

根据《试点方案》和《审查说明》的规定，转售业务试点的申请和审批流程与申请经营增值电信业务基本相同，申请跨地区转售业务试点的转售企业应向工信部提交申请，申请省内转售业务试点的转售企业应向省通信管理局提交申请。其中，跨地区转售业务试点的转售企业在开展业务前，还应到相关试点具体地区的电信管理机构办理备案手续。

##### 4. 其他试点规定

为了保障试点方案的顺利实施，《试点方案》对转售企业、基础电信运营商及工信部还作出了如下进一步的保障性规定：

（1）转售企业采用预付费方式开展转售业务需满足一定前提，且预付费时期最长不超过2年；对于转售企业与用户之间发生的服务质量问题以及与基础电信业务经营者在业务合作方面的争议，均由电信管理机构或其附属机构进行解决。

（2）基础电信运营商应与2家以上转售企业签署合作协议及开展合作；其与转售企业签订的协议不得含有排他性条款；其向转售企业提供的业务接入质量不得低于自营业务的接入质量，批发给转售企业的业务价格应低于其公开同类业务的最低零售价格。

（3）工信部将规划并向基础电信业务经营者分配统一号段用于转售业务，并为转售企业开展客户服务规划相应的短号码资源。

##### 5. 试点时间安排

根据《通告》的规定，试点申请受理时间为2013年5月17日起至2014年7月1日，试点截止时间为2015年12月31日。

#### 试点方案简评

##### 1. 促进国内虚拟运营商的形成和发展

《试点方案》的出台打破了长期以来工信部对虚拟运营商的排斥态度。转售业务并非新生事物，早在2000年颁布的《中华人民共和国电信条例》中就已涉及，在国外也早已形成了成熟的虚拟运营商产业模式。然而，在2003年重新修改的《电信业务分类目录》中，转售业务这一业务形态却被删除了，这意味着电信业务经营者不能申请从事转售业务。因此，在《试点方案》出台前，虚拟运营商并不具有合法的市场地位。

《试点方案》的出台赋予了虚拟运营商合法的市场地位。根据《试点方案》，转售企业仅从基础电信运营商处购买相关的移动通信业务，并不实际对移动通信业务进行运营，也无需拥有无线网、核心网、传输网等移动通信网络基础设施。因此，《试点方案》在实质上是虚拟运营商的试点，其出台为国内虚拟运营商的形成和发展提供了契机。可以预见，工信部在未来还可能开放除移动通信业务之外其他电信业务的转售业务，国内虚拟运营商产业也将进一步发展和壮大。

##### 2. 有利于市场的充分竞争，但市场效应有待观察

众所周知，移动通信业务目前主要由移动、联通和电信三大基础电信运营商垄断。《试点方案》引入了转售企业作为虚拟运营商参与移动通信业务市场的

经营，显然有利于移动通信业务市场的充分竞争。虽然《试点方案》对基础电信运营商与转售企业的合作进行了一些强制性的规定，但《试点方案》的最终市场效应仍取决于转售企业与基础运营商所签订的转售合同细节。目前，三大基础电信运营商对转售试点的态度尚不明朗。因此，民营资本企业进入移动通信业务市场后对市场的影响还有待进一步观察。

### 3. 外资进入转售业务试点仍受到限制

虽然《试点方案》将转售业务列为比照增值电信业务管理的第二类基础电信业务，但从《试点方案》对申请试点企业的条件上看，外资从事转售业务仍

受限制。根据《试点方案》的规定，申请试点的企业应为民间资本占公司资本比例不低于 50%，且单一最大股东是民间资本的民营公司，不包含外商及台港澳商投资。即使对于境外上市的民营企业而言，其外资股权比例仍应低于 10%。由此可见，工信部目前尚不允许外国投资者直接投资经营转售业务的公司。关于工信部是否会对外国投资者通过 VIE 结构等间接方式进行转售业务进行严格的限制，目前尚不确定，有待于对已获审批的转售企业背景情况进行进一步分析。

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