

Shanghai Free Trade Zone

Opening-Up Policies of Value-added Telecom Services in Shanghai Free Trade Zone (II)

Release of Pilot Measures enables the Incorporation of Foreign-invested Telecom Enterprises in the FTZ

Following a framework regulation¹ regarding the opening-up of value-added telecom services (“VATS”) for foreign investments in Shanghai Free Trade Zone (“FTZ”) issued by the Ministry of Industry and Information Technology (“MIIT”) on January 6, 2014 (the “Opening-up Opinion”)², MIIT finally issued long-awaited implementing guidance on April 15, 2014, titled, “*Pilot Measures of Foreign-invested Value-added Telecom Services within the China (Shanghai) Pilot Free Trade Zone*” (the “Pilot Measures”).

The Opening-up Opinion has liberalized seven VATS sectors to foreign investors with five of them released for full foreign ownership, while kept silent on implementation-level provisions, such as, the qualifying criteria for a foreign investor to set up a foreign-invested enterprise (“FIE”) in the FTZ carrying out VATS business, and the related application/approval process that should be followed to apply for a VATS license. With the release of the Pilot Measures, a foreign investor should be able to initiate their actions to incorporate a foreign-invested telecom enterprise (“FITE”) and enter into the VATS sector through

such entity.

I. Highlights

(1) Similar Qualifying Criteria with Increased Attention to Network Security and Personal Information Protection

The Pilot Measures lay out the qualifying criteria for a FIE registered in the FTZ to engage in the VATS business, which are similar as those under the *Administrative Measures on Telecom Service Operation License* (the “Telecom License Measures”), the regulation governing all the telecom service providers in China, and the *Regulations on Administration of Foreign-invested Telecom Enterprises* (the “FITE Regulations”), the regulation governing all FITEs outside of the FTZ, with the following differences or additional requirements,

(i) Existing FIEs to apply for VATS license:

The Pilot Measures clearly provide that an application of the VATS license should be made by an existing FIE registered in the FTZ; while under the FITE Regulations, the application could be made after the FIE is in place or in parallel with the FIE establishment process.

(ii) Registered capital: Under the Telecom

¹ The regulation is titled as “*The Opinion on Further Opening-up of Value-added Telecom Services for Foreign Investment in the China (Shanghai) Pilot Free Trade Zone*”.

² For summary of and comment on the Opening-up Opinion, please refer to our legal bulletin titled “*Further Opening-up of Value-added Telecommunications Services in the FTZ*” released on January 13, 2014.

License Measures, the minimum requirement of the registered capital for a FITE should be RMB 1 million for VATS provided within provincial region and RMB 10 million for VATS provided nationwide. However, in the FTZ, the minimum amount of the registered capital for the FITE has dropped to RMB 1 million for VATS provided nationwide.

- (iii) Network security and personal information protection: In addition to the qualifying criteria provided same as those under the Telecom License Measures and the FITE Regulations, the Pilot Measures emphasize that a VATS license holder in the FTZ must establish necessary network security and personal information protection safeguarding system and measures, which reflect the stress that the Chinese government has put on in recent years.
- (iv) Facilities: Following the same provided in the Opening-up Opinion, the Pilot Measures continue to require the FITEs to base their service facilities in the FTZ. Nevertheless, in consideration of the technical complexity and increasing creation in the business model of VATS sector, we view that the scope of service facilities could be further discussed with the authorities where it is not entirely clear under a particular case.
- (v) Foreign investors' relevant experience: The Pilot Measures do not lay down any requirements for the business background of the foreign investors. However, taking into account the provisions of the Opening-up Opinion as well as the fact that the relevant requirement on foreign investors under the FITE Regulations is still valid, we view that the foreign investors applying for the VATS license in the FTZ must have good track record and experience of running business in the VATS sector.

(2) Simplified Approval Process with Delegation of Approval Authority

Compared with approval process under the FITE Regulation, it is encouraging under the Pilot Measures that the approval process for a VATS license has been simplified, with the delegation of approval authority from central level MIIT to its counterpart at Shanghai level.

- (i) Delegation of Approval Authority: Instead of MIIT, Shanghai Communications Administration (“SCA”), MIIT’s counterpart in Shanghai, will be responsible for review and approval of the VATS license application in the FTZ, even if the services in concern may be provided nationwide. Though the Pilot Measures require SCA to file with MIIT for projects it has approved at a later stage, the delegation of the approval authority will not only shorten the applicants’ waiting period but also facilitate the communication channel between the applicants and the approval authority.
 - (ii) Simplified Approval Process: The system applicable for the VATS license application outside of the FTZ under the FITE Regulations establishes two-phase approval process, i.e. pre-approval phase from MIIT or its counterpart at provincial level and final approval phase from MIIT system after an applicant going through the approval and registration formalities with competent branch of Ministry of Commerce and Administration for Industry and Commerce. Under the Pilot Measures, the approval process has been simplified in one phase dealing with SCA only and accordingly, the time limit for the authority to review each application has been shortened from the previous 90 days at central level MIIT to 60 days at Shanghai level only.
- ## **(3) “Pilot” VATS License with Annual Inspection System**

It is noticeable that the valid term of a VATS license issued to the FITE established in the FTZ will be temporarily fixed at 3 years. The Pilot Measures keep silent on what would happen or how to extend the term when the “pilot” 3-year period is expired.

Adopting the annual inspection system from the Telecom License Measures, the Pilot Measures require the FITEs in the FTZ to submit certain materials to SCA for an inspection on an annual basis in the first quarter of each year. Same as that under the Telecom License Measures, SCA will impose administrative sanctions to a FITE for any non-compliance of regulatory requirements exposed in the course of the annual inspection. Furthermore, SCA will publish the outcome of annual inspection and report same to the relevant Administration of Industry and Commerce.

II. Comments

The telecommunications sector has been highly regulated in China, and due to the sensitivity of this industry, foreign-funded market players have been restricted in this area for a long time. With the release of the Opening-up Opinion and the Pilot Measures, it is expected that China's government will open

its door in the VATS sector starting from the pilot program in the FTZ.

The relaxation of the foreign equity ownership restriction and simplification of the approval procedures will not only facilitate the entry of foreign investors in the VATS market, but also render it possible for certain VATS businesses that have been run via outsourcing or Variable Interest Entity (VIE) structure to be operated lawfully and economically from now on. More encouragingly, the opening-up policies in the FTZ enable the foreign investors to provide services nationwide, through their FITEs established in the FTZ.

Considering that the Opening-up Opinion and the Pilot Measures remain unclear at certain points, we will closely follow up the actual move and issuance of VATS licenses in the FTZ in next months, and further assess the implications and implementations of this "first-ever" opening-up policies.

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上海自贸区法律热点问题

上海自贸区增值电信业务开放政策（二）

《中国（上海）自由贸易试验区外商投资经营增值电信业务试点管理办法》 解读

一、背景介绍

自2014年1月6日，工业和信息化部（以下简称“工信部”）和上海市人民政府联合颁布《关于中国（上海）自由贸易试验区进一步对外开放增值电信业务的意见》（以下简称“**开放意见**”）以来，业界一直翘首以盼的《中国（上海）自由贸易试验区外商投资经营增值电信业务试点管理办法》（以下简称“**试点办法**”）亦于2014年4月15日正式颁布。

这只重量级的靴子落地以后，我们就一些问题咨询了相关政府部门的意见。现将我们对试点办法的解读及与其有关的研究成果向您介绍如下。

二、内容介绍

通读试点办法，我们认为其主要有如下“亮点”：

(1) 申请条件

我们注意到，试点办法的第三条规定了自贸区内外商投资企业申请增值电信业务的相关条件。试点办法关于申请条件的规定与《电信业务经营许可管理办法》（以下简称“**许可管理办法**”）非常类似，但试点办法与许可管理办法在如下方面又存在显著的不同：

(i) 注册资本

试点办法将注册资本金的最低限额规定为人民币100万元。而许可管理办法规定，在省级区域内经营的注册资本金的最低限额是人民币100万

元；但若要在全国或者跨省级区域范围经营的注册资本金的最低限额是人民币1,000万元。根据开放意见的规定，除因特网接入服务外，自贸区内其他增值电信业务可以向全国提供服务。故仅从试点办法现有规定来看，在自贸区内设立的注册资本不低于人民币100万元的外商投资企业，均可向全国提供增值电信业务服务（因特网接入服务除外）。

就以上问题，我们咨询了相关政府部门的意见，相关官员亦给出了肯定的答复。但相关官员并未解释自贸区内设立的外商投资增值电信业务企业在向全国提供增值电信业务服务时，为何无须适用许可管理办法规定的注册资本金的最低限额人民币1,000万元的理由。

(ii) 服务设施

试点办法再次强调了自贸区内设立的外商投资增值电信业务企业的服务设施须设在自贸区内。这一点是与开放意见中的规定一脉相承的。但考虑到增值电信业务领域的技术上的复杂性及商业上的新颖性，何为服务设施以及服务设施的外延范围如何界定，可能仍需根据每一类甚至每一个外商投资增值电信业务企业的具体情况，与相关政府部门进行沟通和确认。

(iii) 网络与信息安全

试点办法特别强调了外商投资增值电信业务企业须有必要的网络与信息安全保障制度和措施。这一点与中国政府近年来高度重视网络安全的态度是

密切相关的。众所周知，自斯诺登事件以来，中国政府高度重视网络安全，为此专门成立了中央网络安全和信息化领导小组，甚至由最高领导人担任该机构的负责人。因此，我们建议有志于在自贸区开展增值电信业务的客户，需要在网络及信息安全方面提供与所开展业务相适应的制度和措施。

(2) 开放领域和外资背景要求

我们注意到，试点办法并未对市场广泛关注的外资开发领域和外资背景要求方面进行更为明确的规定。但我们理解，通读试点办法以及其相关的法律、法规、规章及规范性文件，我们还是可以对此有一定的了解。

(i) 开放领域

事实上，试点办法作为自贸区内外商投资增值电信业务政府管理方面的规定，其侧重点更多的是站在政府部门的立场从程序性角度对相关问题进行规定。对自贸区内外商投资增值电信业务开放领域的规定，包括但不限于具体开放增值电信业务及外方出资比例的实体性规定，更多的应参照开放意见的规定。试点办法只是强调了对开放增值电信业务及外方出资比例的确定权由工信部行使。若需要了解开放意见的规定，可以参考我们 2014 年 1 月 13 日发布的相关研究简讯。

(ii) 外资背景要求

试点办法中并未对外方投资者的从业背景提出要求。但我们注意到，根据开放意见的规定，在自贸区内暂停实施《外商投资电信企业管理规定》（以下简称“**外资电信规定**”），再进一步核对《关于在中国（上海）自由贸易自贸区内暂时调整有关行政法规和国务院文件规定的行政审批或者准入特别管理措施的决定》（以下简称“**调整审批决定**”）的规定，可以发现外资电信规定中关于外方投资者从业背景的规定在实践中仍在实施，即，根据外资电信规定第十条的规定，在自贸区内拟设立外商投资增值电信业务的外方主要投资者应具有经营增值电信业务的良好业绩和运营经验。

就此，我们也咨询了相关政府部门的意见，据相关官员介绍，上海市通讯管理局（以下简称“**通管局**”）将会对拟在自贸区内设立外商增值电信业务的外方主要投资者的背景仍进行审查。且我们注意到，试验办法在所提供的资料中也特别强调了外方主要投资者需提供：基本情况介绍、经会计师事务所审计的最近财务会计报告、资信证明。我们理解这些文件均是证明该外方主要投资者经营增值电信业务的良好业绩和运营经验的重要材料。

(3) 权限下放

我们注意到试点办法规定，由通管局负责中国（上海）自贸区内外商投资增值电信业务的行业审批和监管。从而解决了以往外商投资增值电信业务审批实践中，必须由工信部负责审批的难点。

根据试点办法，通管局有权审批自贸区内外商投资增值电信业务，只是需要事后向工信部报备。工信部除前述备案权外，亦保留对自贸区内外商投资增值电信业务试点情况进行评估的权力。

试点办法同时亦规定，通管局对自贸区内的外商投资增值电信企业实行年检制度。

(4) 程序简化

根据外资电信规定的规定，设立外资增值电信企业，需先向电信管理机构申请审批¹；在取得《外商投资经营电信业务审定意见书》后再向商务主管部门申请外资审批；在取得《外商投资企业批准证书》后，再到工信部申领《电信业务经营许可证》；最后，方可凭《电信业务经营许可证》向工商行政管理机关办理注册登记。实践中，很多企业为完成前述审批，需要花费大量的时间和精力，甚至从一定程度上成为阻碍外商投资增值电信企业发展的重要障碍之一。

而新颁布的试点办法，则规定可先设立外商投资企业，待取得营业执照之后，再向通管局申请外商投资增值电信业务审批。若外商投资企业符合相关条件的，则在 60 日内即可取得有效期为 3 年的《中国（上海）自由贸易试验区外商投资经营增值电信业务试点批复》。

三、有待明确

除上文所述的注册资本金、外方背景要求等领域外，我们认为就如下方面仍有待相关政府主管部门进一步的澄清，例如：有效期为 3 年的《中国（上海）自由贸易试验区外商投资经营增值电信业务试点批复》在期满后如何处理？是延期还是换发《电信业务经营许可证》？

四、未来展望

随着试点办法、开放意见等规定的先后颁布，自贸区内的外商投资增值电信业务的开放将会迎来新的机遇。特别是在外资比例放开、审批程序简化后，不仅有利于新的外国投资者进入中国的增值电信市场，而且对原有的一些以外包、VIE 等方式

¹ 其投资项目需要经国务院发展改革部门核准的应先由国务院发展改革部门核准。

运营的增值电信业务，也有望可以低成本且合法合规的方式进行。但考虑到新政对外方背景仍有要求，我们建议，有志于在中国开展增值电信业务的外方投资者，现在就可以着手遴选或寻找合适的境

外从事增值电信业务的公司，以便在合适的时机，按照新政的规定，申请设立外商投资增值电信企业。

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