

Client Alert

June 13, 2013

China's MIIT Releases Long-Awaited Draft Amended Telecoms Catalogue for Public Comment

By Gordon Milner, Paul D. McKenzie, Sherry Yin and Jing Bu

The Chinese Ministry of Industry and Information Technology (“MIIT”) issued a draft new Catalogue of Telecommunications Services (《电信业务分类目录(2013版)》(征求意见稿); the “**Draft Catalogue**”) for public comment on May 23, 2013.

While the proposed changes are more evolutionary than revolutionary, the Draft Catalogue will have important implications for businesses operating in the China Internet and telecoms markets, particularly those involving e-commerce, content delivery and cloud computing.

The deadline for comments to MIIT is June 24, 2013.

BACKGROUND

The Catalogue of Telecommunications Services is at the heart of the Chinese telecommunications regulatory regime. It enumerates and classifies the types of services for which a license is required to operate in China. Services are broadly divided into two key categories: basic telecommunications services (“**BTS**”), which essentially relate to underlying infrastructure such as POTS, voice and leased-line data transmission; and value-added telecommunications services (“**VATS**”) which relate to services delivered via that infrastructure, including voicemail, call centers and many Internet-related services.

The current catalogue (“**Existing Catalogue**”) is somewhat antiquated. Issued in February 2003, it has not kept pace with the rapid evolution of communication technology and the introduction of novel Internet-based services over the subsequent decade. As such, the Existing Catalogue remains unhelpfully silent on large areas of modern telecommunications-related services such as 4G, cloud computing and e-commerce. This has led to a great deal of uncertainty for businesses and inconsistent regulatory treatment as MIIT officials have struggled to analyze new Internet business models by reference to the broad, vague and often outdated categories of services listed in the Existing Catalogue.

CHANGES TO BTS

The Draft Catalogue has introduced the following new types of BTS in order to take account of the evolution of communications technology since 2003:

- LTE (4G) digital cellular mobile communication services;
- wire access infrastructure services;
- satellite-based fixed communication services; and
- mobile telecommunications resale services.

The Draft Catalogue also drops four types of BTS that MIIT considers to have been rendered obsolete by technological and market evolution: (a) public telegraph and user telegraph services, (b) analog trunking

Client Alert

communication services, (c) wireless paging services, and (d) wireless data transmission services. No new BTS licenses will be issued for these services, but existing license-holders may continue to provide them.

CHANGES TO VATS

The Existing Catalogue does not adequately address key modern Internet services such as social networking, cloud computing, software-as-a-service and e-commerce. In practice, a category of VATS known as 'Internet Information Services' ("IIS") has been used in many cases as a "catch-all" licensing category for these various types of service. While the Existing Catalogue does define IIS in very broad terms (online services that "collect, develop or handle" information and provide it to end-users, including content, gaming and commercial information services), the position of MIIT and its provincial and local counterparts as to whether particular online service offerings require IIS licensing has been uncertain and inconsistent.

The Draft Catalogue aims to address the shortcomings of the Existing Catalogue in three key ways:

1. Introduction of New Types of VATS

The Draft Catalogue expands the scope of VATS with the introduction of three new types of VATS:

- **Internet resource collaboration services**
This class covers 'cloud' services utilizing remote datacenters such as storage, grid computing and software-as-a-service.
- **Content distribution network services**
This class covers edge-caching and other distributed network data distribution management services intended to promote availability and optimize latency.
- **Internet domain name resolution services**
This class covers the provision of authoritative and recursive DNS hosting and resolution services. More broadly, the definition also covers other 'code and protocol conversion' between user identifying codes (such as telephone numbers, domain names and Internet service numbers) between other networks and the Internet, or within the Internet

2. Clarification of IIS

In addition to the new types of VATS, the Draft Catalogue helpfully clarifies that the following common on-line services will be considered to be IIS:

- information publication services;
- search and query services;
- social network platform services;
- instant messaging and real time voice/video call services; and
- anti-virus and spam filtering services.

Each of these five sub-classes of IIS is defined in detail. It should be noted, however, that the sub-classes are illustrative and not exhaustive. It seems likely therefore that IIS will continue to be utilized for novel Internet services as the market evolves.

Client Alert

3. Express Regulation of e-Commerce Services

The e-commerce market in China and MIIT's views as to how that market should be regulated have evolved significantly during the decade since the Existing Catalogue was released. The current position is less than satisfactory. E-commerce is not addressed directly in the Existing Catalogue and regulatory views vary among different provincial branches of MIIT as to whether and what type of telecommunications license (if any) is required for the operation of an e-commerce business.

The position was clarified somewhat in a 2010 Note issued by the Ministry of Commerce that stated that direct sales e-commerce sites do not require a telecommunications license. However, the position remains uncertain for e-commerce marketplace platforms (i.e. those sites offering a platform for third parties to sell goods).

The prevailing view is that a telecommunications license covering online data processing and transaction processing services is not required under the Existing Catalogue, and most of the existing prominent online marketplace business websites only hold an IIS license (or no license at all).

The Draft Catalogue clarifies that an online data-processing and transaction-processing services license will be required for marketplace business. If the Draft Catalogue is brought into force in its current form, marketplace e-commerce websites, including group deal websites, which previously solely rely on telecommunications licenses covering information service to support their businesses, will need to apply for telecommunications licenses covering online data processing and transaction processing services.

It is worth noting that online data-processing and transaction-processing services have been reclassified in the Draft Catalogue from 'Category One' VATS to 'Category Two'. In technical terms, this simply reflects the reality that such services can be provided on a 'virtual basis' without extensive infrastructure. However, it may also indicate that, as a Category Two license, an online data processing and transaction processing services license will become easier to obtain.

IMPLICATIONS TO FOREIGN INVESTORS

Whether the Draft Catalogue will undergo substantive modifications before its final enactment remains to be seen. It is also premature to predict if the Draft Catalogue will be applied retroactively or an existing business which is only captured by the Draft Catalogue will be grandfathered. Accordingly, the legislative process is worth monitoring.

In addition, the Draft Catalogue is not the type of regulation that directly addresses what types of telecommunications service a foreign-invested enterprise ("FIE") may engage in. As such, the extensive restrictions on FIEs in respect of telecommunications services will probably remain unchanged. Whether a telecommunications license covering these newly introduced categories of telecommunications services will be off-limits to foreign investors in practice remains to be seen.

Contact:

Gordon A. Milner
+ 852 2585 0808
gmilner@mofocom.com

Paul D. McKenzie
+ 86 10 5909 3366
pmckenzie@mofocom.com

Sherry Xiaowei Yin
+ 86 10 5909 3566
syin@mofocom.com

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for nine straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.