

New Telecommunications Regulation in China

———— David Yu

In March 1998, the 9th National People's Congress announced the establishment of the Ministry of Information Industry (MII) in order to strengthen and administer China's telecommunications industry. This is deemed as a milestone in the development of China's telecommunications industry.

For the purpose of separating government administration and enterprise management, removing monopoly, encouraging competition and protecting the lawful rights and interests of telecommunications subscribers, MII has adopted a series of regulations and policies since its establishment. In 1999 the Chinese government decided to divide the China Telecom monopoly into three companies, thus introducing competition into the Chinese telecommunications market, one of the world's fastest-growing telecommunications markets.

This article offers an outline of China's current legal environment regarding the telecommunications industry, the relevant laws and regulations, and a focus on access to the telecommunications market and the approval procedure.

I. Promulgation of the Telecommunications Regulations

On September 25 2000, the State Council promulgated the PRC Telecommunications Regulations (the Regulations), China's first comprehensive law governing telecommunications business. The Regulations divides telecommunications business into two categories: basic telecommunications services and value-added telecommunications services. According to the Regulations, basic telecommunications services means provision of public network infrastructure, public data transmission and basic voice communications services, while value-added telecommunications services means the business of providing telecommunications and information services through the public network infrastructure.

Classification

The Regulations as well as its amendments and the supplementary provisions made by MII on June 11 2001 also prescribe the classification of telecommunications services. According to the current classification, the basic telecommunications business includes nine general categories as follows:

- (i) fixed-network domestic long-distance and local telephone services;
- (ii) mobile communications services;
- (iii) satellite communications services;
- (iv) internet and other data transmission services;
- (v) lease and sale of network elements;
- (vi) network access and trusteeship services;

(vii) international communications infrastructure and international telecommunications services;

(viii) radio paging services; and

(ix) resale of basic telecommunications services.

The value-added telecommunications business generally includes:

(i) value-added telecommunications services based on fixed-telephone-network;

(ii) value-added telecommunications services based on mobile-network;

(iii) value-added telecommunications services based on satellite-network;

(iv) internet value-added telecommunications services; and

(v) value-added telecommunications services based on other data-transmission network.

II. Access and Approval

Chinese regulations prior to promulgation of the Regulations prohibited foreign investment in telecommunication services, but the former regulations did not envision the many new types of enterprises and services currently available. Pursuant to the Regulations, the access conditions for telecommunications operators vary with different types of enterprises and services.

Conditions for Basic Telecommunications Services

To provide basic telecommunications services, an operator shall meet the following conditions:

(a) the operator's status as a duly established company which specializes in basic telecommunications services and in which the State's equity or shareholding is not less than 51%;

(b) availability of a feasibility study and a technical plan for formation of the network;

(c) availability of funds and specialized personnel commensurate with the intended business activities;

(d) availability of a site and adequate resources to carry out those business activities;

(e) the operator's reputation or capability for providing long-term service for its subscribers; and

(f) other conditions as specified by the State.

Conditions for Value-added Telecommunications Services

To provide value-added telecommunications services, an operator shall meet the following conditions:

(a) the operator must be a legally established company;

- (b) availability of funds and specialized personnel commensurate with the intended business activities;
- (c) the operator's reputation or capability for providing long-term service for its subscribers; and
- (d) other conditions as specified by the State.

Approval and Permits

As further required by the Regulations, the State implements a system of permits for operation of telecommunications business; a telecommunications service operating permit issued by the competent authority must be obtained prior to the launch of a telecommunications business. The operation of basic telecommunications services or value-added telecommunications services covering two or more provinces, autonomous regions and/or municipalities directly under the central government shall require examination and approval by the State Council's department in charge of the information industry as well as the obtaining of a Basic Telecommunications Service Operating Permit or a Cross-regional Value-added Telecommunications Service Operating Permit. The operation of value-added telecommunications services within one province, autonomous region or municipality directly under the central government shall require examination and approval by the provincial telecommunications administration authority as well as the obtaining of a Value-added Telecommunications Services Operating Permit.

Furthermore, the aforementioned permits shall not, in principle, be transferred, shared, or used by others. On July 26 2001, MII promulgated the Circular on the Issues Concerning Establishment of Domestic Joint Ventures by Telecommunications Operators to Engage in Telecommunications Business (the Circular). The Circular further regulates that a new joint venture with domestic investment (JV), of which 51% or more of the shares are directly held by a company holding a telecommunications-operating permit, shall also obtain a permit issued by a competent administrative department. Where the proportion of the shares of the JV directly held by one of its companies is equal to or less than 51%, the company shall not authorize the JV to operate any part of its business.

Government Procedure

The general governmental procedures for establishment of a telecommunications service enterprise are as follows:

I to submit an application for the establishment to the competent department accompanied by the relevant certificates and documents that fulfil the requirements of the operator; and

I upon examination and approval by the competent department, to handle the registration with the enterprise registration authority.

Furthermore, the telecommunications services for some special industries shall also require pre-examination by the relevant administrative department. In accordance with the Measures of Internet Information Service (the Measures) promulgated by the State Council on September 25 2000, operators wishing to engage in the internet information service for news reporting, publishing, education, health

promotion, medicine and medical instruments, etc, shall obtain approval from the relevant authorities according to the laws and regulations before it applies for the telecommunications services permit or undertakes the filing formalities. For example, the Provisional Regulations for Administration of Internet Pharmaceutical Information Services (the Provisional Regulations), which was adopted by the State Drug Administration on December 4 2000, was promulgated on January 11 2001 and came into force on February 1 2001, sets forth that If a party intends to provide internet pharmaceutical information services or online pharmaceutical purchase and sale services, it shall submit a special application separately to the State Drug Administration in accordance with the relevant regulations. The Provisional Regulations also includes interim provisions for the existing services.

III. Foreign Investment

Currently, China only allows foreign investment in the telecommunications equipment manufacturing and distribution sector. It shall be noted that any foreign investor planning to engage in telecommunications services in China shall also be regulated by the relevant laws and regulations on foreign investment enterprises. According to the Catalogue Guide for Foreign Investment Industries jointly promulgated on December 29 1997 by the former State Planning Commission, the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation and its amendments, management of post and telecommunications business falls into a category from which foreign investment industries are prohibited. Thus, foreign investors' access to the Chinese telecommunications service market is not yet free from a number of legal obstacles. For this obvious reason, we cannot yet definitely conclude that the Regulations has altered the conditions of access to the Chinese telecommunications service market.

Although the Chinese telecommunications market has evolved from the former monopoly by China Telecom to the present competitive market for which non-state-owned domestic enterprises are also qualified, the market has not yet been opened to foreign investors.

Notwithstanding the above, Wu Jichuan, Minister of MII, delivered a speech at a press conference on September 14 2000, reiterating that foreign investment in the areas of the internet is not permitted by the PRC laws, but that the PRC government intends to invalidate or revise the outmoded regulations. Furthermore, he said, both an internet content provider (ICP) and an internet service provider (ISP) are value-added telecommunications businesses, which are not yet open to foreign investment.

Furthermore, the well-known case of invalidation of China Unicom's "China-China-foreign" model indicates that such a cooperation model for foreign investment to evade the restrictions set by the laws and regulations is practically impossible.

In practice, however, a number of foreign investment enterprises (FIEs) in the form of equity joint ventures have obtained telecommunications business permits from the local departments under MII. These FIEs are limited to operation in ICP businesses, with further restrictions that prohibit them from setting up websites in their own names or engaging in e-commerce. Perhaps the listing of China Mobile in Hong Kong indicates another way in which foreign capital can get involved in the Chinese telecommunications market. Foreign venture capital has been a crucial source of funding available to

China's fledgling internet companies. But until now, China has only permitted ICPs to absorb foreign capital in the form of loans.

IV Interconnection of Telecommunications Networks

On September 9 1999, MII issued new rules on interconnection, the Administration of the Interconnection between Telecommunications Networks Interim Provisions (the Provisions). Also, Section Two, Part Two of the Regulations prescribes the conditions and procedure for interconnection of telecommunications networks. The Provisions and the Regulations have laid a foundation for expanding interconnection possibilities.

Significance of Interconnection

Interconnection is the integration of networks to enable a customer of one operator's network to communicate with a customer of another operator's network. In those places where there is a legacy network, regulators have typically required the incumbent operator to interconnect with new entrants. This allows new competitors to enter the market in an efficient and timely manner and gives consumers alternative access.

Interconnection Obligation

Pursuant to the Regulations, leading telecommunications business operators shall not refuse interconnection requests from other telecommunications business operators and dedicated network operators.

The term "leading telecommunications business operators" means operators that control vital telecommunications infrastructure, have a relatively major share of the telecommunications market and may materially influence the entry of other telecommunications business operators into the telecommunications market.

Implementing Interconnection

Leading telecommunications business operators shall formulate interconnection rules that include such details as the procedure and time limit for interconnection and a list of unbundled network elements. These interconnection rules shall be approved by MII and shall be binding on all leading telecommunications business operators.

Interconnections between public telecommunications networks or between public telecommunications networks and dedicated telecommunications networks require consultations and an agreement on network interconnection between the parties to the connection. If the consultations between the parties fail to produce a network interconnection agreement, either party may apply to MII or the provincial telecommunications administration authority, depending on the area covered by the network interconnection, for mediation within 60 days from the date a party made the interconnection request. The authority receiving the application shall mediate on the principles of technical feasibility, economic fairness, impartiality and mutual complementation in order to bring about an agreement between the

parties. If the parties are unable to reach an agreement within 45 days from the date either party or both parties applied for mediation, the mediating authority shall randomly invite telecommunications technology experts and other experts to conduct an open discussion and put forward a network interconnection proposal. The mediating authority shall render a decision based on the conclusions of the experts and their proposal, and enforce the interconnection. The parties to the network interconnection shall effectuate the interconnection within the time limit specified in the agreement or decision.

Discrimination Provisions

The customers of other telecommunications business operators shall be provided with services on terms that are no less favourable than those on which the leading telecommunications operator provides services for its own customers.

V. Telecommunication Charges

Telecommunication charges are divided into those regulated by the market, those guided by the government and those fixed by the government. Charges for telecommunications services involving sufficient market competition shall be regulated by the market.

When setting telecommunication service charge rates that are to be fixed or guided by the government, the opinions of telecommunication business operators, telecommunications subscribers and other relevant parties shall be solicited through public hearings.

VI. Telecommunication Services

Telecommunications subscribers have the right to select, at their own discretion, from the various types of legally operated telecommunications service. In the course of operation, a telecommunications business operator shall not carry out any of the following acts: (1) using any method to limit a telecommunications subscriber's right to select telecommunications services legally provided by other telecommunications business providers; (2) unreasonably cross-subsidizing other businesses it operates; (3) engaging in unfair competition by providing telecommunications business or services below the cost to squeeze out competitors. While providing telecommunications services, a telecommunications business operator shall not carry out any of the following acts: (1) limiting, by any means, a telecommunication subscriber's right to use the telecommunications services it has designated; (2) limiting a telecommunications subscriber's right to use the telecommunication terminal equipment it has designated.

Obviously, all the aforementioned regulations aim to promote fair competition in the telecommunications market.

VII. The Future

Notwithstanding the invalidation of the "China-China-foreign" model, the listing of China Unicom in the stock exchanges in Hong Kong and New York has paved a way for foreign funds to enter China's telecommunications market. The new structure of China Unicom is to raise foreign funds through

issuance of H shares by its listed company, a subsidiary of China Unicom established under the PRC law. China Mobile is the other company raising capital in overseas stock markets. Different from that of China Unicom, its financing structure is to list a Hong Kong company holding major shares in the affiliates of China Mobile in the Hong Kong Stock Exchange. Both models indicate that, at present, cooperation between a company limited by shares and a qualified telecommunications operator is a practical way for foreign investment in China.

Upon its accession to the WTO, China will comply with the WTO Reference Paper on Regulatory Principles for Basic Telecommunications Services, one of the key documents in the WTO's telecommunications framework. Under the bilateral agreement with the US, China has agreed to allow up to 49% of foreign ownership in telecommunications enterprises that provide value-added telecommunication services. Furthermore, two years after China's entry into the WTO, the proportion of foreign ownership in telecommunications enterprises providing value-added telecommunications services will be allowed to increase to 50%. In addition, the European Union has reached an agreement with China that foreign mobile telephone operators may have up to 25% equity ownership in mobile telephone networks upon China's joining the WTO, and the proportion will rise to 35% after one year and to 49% after three years.

In conclusion, various sources have recently indicated that legislation permitting foreign investment in telecommunications services will soon be finalized in order to open the telecommunications market to greater domestic competition and limited foreign participation. Two key pieces of legislation recently drafted by MII towards this aim are the Rules of the PRC on Telecommunications Administration and the related Regulations on Foreign Invested Telecommunications Enterprises. The two drafts indicate that both the basic and value-added telecommunications business will permit foreign participation in the form of a joint venture with majority control held by the Chinese partner.