



Newsletter

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November 25, 2022

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Update

NDRC Issued 17 Tasks to Support the Construction of International First-Class Business Environment in the Yangtze River Delta

On November 10, 2022, National Development and Reform Commission (“NDRC”) issued *Notice on Issuance of the Three-Year Action Plan on Construction of an International First-Class Business Environment in the Yangtze River Delta* (“Notice”).

The Notice emphasizes that it is necessary to further remove unreasonable restrictions such as regional division and local protection, continue to deepen the reform of policy of “Separating Permits from Business Licenses”, explore the establishment and implementation of enterprise dormancy system, the

forced quit system of market entities, the bankruptcy pre-reorganization system, etc., and establish a system for tax benefits and credit support for bankruptcy reorganization to maintain a fair competition order. In addition, it is significant to accelerate the establishment and improvement of credit rating-based supervision system in the fields of market supervision, tax administration, import and export, further implement the management system of pre-entry national treatment plus negative list for foreign investment, and deepen the “One-Stop Online Service” and “Cross-Provincial Services” in the Yangtze River Delta region as well as deepen market supervision integration. The government will also continue to optimize regular enterprise-related services and promote the electronification of the entire process of public resource transactions, taxation and real estate registration, etc.

MOHRSS Issued 20 Comments on Improving Negotiation and Mediation of Labor and Personnel Disputes

On November 16, 2022, Ministry of Human Resources and Social Security (“MOHRSS”) issued *Opinions on Further Improving Negotiation and Mediation of Labor and Personnel Disputes* (“Opinions”).

The Opinions focus on five aspects of enhancing source governance, strengthening consultation and settlement, adopting diverse mediation, improving linked work system and service. The Opinions clarifies the requirements of strengthening the guidance on the prevention of labor and personnel disputes, improving the democratic management system of employers, the mechanism of risk monitoring and early warning mechanism for labor and personnel disputes, as well as improving the hidden danger investigation and resolution of labor and personnel disputes. The Opinions also emphasizes that the government will clarify and guide the establishment of an internal labor and personnel dispute consultation mechanism, promote the construction of mediation organizations for grassroots labor and personnel disputes, and enhance the construction of mediator teams as well as the construction of intelligent negotiation and mediation system.

SPC Issued Provisions on Several Issues of Jurisdiction in Foreign-Related Civil and Commercial Cases

On November 15, 2022, the Supreme People’s Court (“SPC”) issued the *Provisions on Several Issues of Jurisdiction in Foreign-Related Civil and Commercial Cases* (“Provisions”), which will come into effect on January 1, 2023.

The Provisions clarifies that foreign-related civil and commercial cases shall be subject to the principle of is jurisdictional decentralization, and centralized jurisdiction shall be the exception. Non-significant foreign-related civil and commercial cases of the first instance shall, in principle, be under the jurisdiction of the basic people’s courts. As for the “large amount of subject matter of the dispute” in the conditions of the Intermediate Court’s jurisdiction, the applicable standard in Beijing, Tianjin, Shanghai, Jiangsu, Zhejiang, Fujian, Shandong, Guangdong and Chongqing is more than RMB 40 million (inclusive) , and the applicable standard in other regions is more than RMB 20 million (inclusive). The Higher People’s Court has jurisdiction over the first instance of foreign-related civil and commercial cases with the subject matter exceeding RMB 5 billion (inclusive) or other first instance foreign-related civil and commercial cases with significant impact in the jurisdiction.

Shanghai Municipal AMR Issued Management Measures on Promoting Special Funds In a Standardized Way

On November 14, 2022, Shanghai Municipal Administration for Market Regulation (“Shanghai AMR”) issued *Management Measures on Promoting Special Funds in a Standardized Way (draft for comments)* (“Measures”) and the deadline for feedback is December 14, 2022.

The special funds of Measures refer to the special funds arranged by the municipal financial budget to support the implementation of the city’s standardization strategy. The Measures clarifies that the special funds are mainly used to support the following standardization promotion projects: (i) revision of projects in a standardized way; (ii) standardization technology organization projects; (iii) standardization demonstration pilot projects; (iv) standardization activities. The Measures also includes rules of the support amount, support mode and declaration review and other related contents.

Five Departments Jointly Issued a Document to Carry Out the Third Batch of Intelligent Photovoltaic Pilot Demonstration Activities

On November 8, 2022, General Office of Ministry of Industry and Information Technology, Ministry of Housing and Urban-Rural Development, Ministry of Transport, Ministry of Agriculture and Rural Affairs and National Energy Administration Comprehensive Department (“Five Departments”) jointly issued *Notice on the Third Batch of Intelligent Photovoltaic Pilot Demonstration Activities* (“Notice”), which came into effect on the same day.

The Notice clarifies the following pilot demonstration contents: (i) supporting the cultivation of a group of intelligent photovoltaic demonstration enterprises, including enterprises that can provide advanced, mature intelligent photovoltaic products, services, system platforms or overall solutions; (ii) supporting the construction of a group of intelligent photovoltaic demonstration projects, including the application of intelligent photovoltaic products, the integration of the use of 5G communications, big data, industrial Internet, artificial intelligence and other new generation information technology, to provide users with intelligent photovoltaic services. The Notice clears up that solar-storage fusion, transportation applications, agricultural applications, information technology, industry chain promotion, advanced technology products and applications are the priority direction, and clarifies the declaration conditions, organization & implementation, management and incentives, etc.

GACC Proposed to Introduce New Version of Customs Management Regulations on Declaration of Import and Export Goods

On November 4, 2022, General Administration of Customs China (“GACC”) issued *Customs Management Regulations on Declaration of Import and Export Goods (Draft for Comments)* (“Regulations”) and the deadline for feedback is December 3, 2022.

The Regulations is mainly based on the background of optimizing the business environment, deepening the integration of customs declaration and inspection, and regulating customs clearance procedure. The revisions on Regulations focus on three aspects: (i) integrating the goods declaration of Inspection

Regulations and optimizing time limit required for declaration of inspection and quarantine; (ii) integrating the modified contents of the certificate in Repair and Withdrawal Management Methods, and adjusting the time limit for revision and cancellation, clarifying the revision and withdrawal requirements for customs inspection, case-related customs declaration forms and entry-exit filing lists; (iii) adding four laws of customs inspection and quarantine as the legal basis, deleting “Enterprise Registration for Customs Declaration (inspection)” and other contents, and adding “Two-Step Declaration” and other business reform contents.

GACC Plans to Revise the Management Measures on Imported Automotive Commodities Inspection

On November 1, 2022, GACC issued the Notice on Public Comments on *Management Measures on Imported Automotive Commodities Inspection (draft for comments)* (“Measures”).

The Measures mainly clarifies the duties and scope of Customs in the inspection, and emphasizes dynamic adjustment of the inspection mode. It clearly focuses on safety, sanitation, health and environmental protection, and optimizes the specific items for inspection, adds “Non-Batch” supervision and inspection mode and conducts general item inspection and safety performance inspection by sampling batches. In addition, the Measures clarifies the responsibilities and obligations of enterprises, emphasizes that importers should bear main responsibility for the quality and safety of their imported automotives, and stipulates the obligation of enterprises to cooperate with Customs in implementing risk management on imported cars.

Shenzhen Deploys 25 Measures to Help Enterprises List and Develop with High Quality

On November 15, 2022, Shen Zhen Bureau of Industry and Information Technology issued *Several Measures of Shenzhen on Further Promoting High-Quality Development of Enterprise Listing (draft for comments)* (“Measures”), and the deadline for feedback is December 16, 2022.

The Measures consists of five parts, of which the first part sets the general goals, and the second to fifth parts propose 25 policy measures in terms of improving the working mechanism, expanding the back-up enterprises for listing, improving service levels, and supporting the development of excellence, strength and scale. In terms of expanding the back-up resources for listing of enterprises, it is proposed to actively pursue preferential tax policies for venture capital and equity investment in Qianhai, Hetao and other regions. As for improving the services of enterprises listing, it is proposed to compile and distribute the “Listing Tax Guide” and typical cases of tax-related business of listing enterprises, set up a special window for tax-related consulting services for listing of enterprises, and implement various preferential tax policies in accordance with laws and regulations.

Article(s)

App Store Operation by WFOEs

by *Ran An*

The Chinese government still takes a cautious measure towards foreign investment into value-added telecommunication business. In general, the proportion of foreign investment in telecom enterprises engaging in value-added services cannot exceed 50% according to *Provisions on the Administration of Foreign-funded Telecommunications Enterprises* (2022 Revision). However, there do exist certain exception such as special provisions on app store service providers. This article will discuss feasibility of operating an app store legally by a WFOE under current regulatory regime.

1. Applicable policies for app store service providers

Unlike common information service providers, there are preferential foreign investment access policies for telecom enterprises engaging in app store services. In accordance with *Special Management Measures (Negative List) for Access of Foreign Investment to China (Shanghai) Pilot Free Trade Zone* (“Shanghai Negative List”) issued in 2013 and *Opinions of the Ministry of Industry and Information Technology (“MIIT”) and the Shanghai Municipal People’s Government on Further Opening Up the Value-Added Telecommunication Services in China (Shanghai) Pilot Free Trade Zone* (“Shanghai Opinions”) issued in 2014, the 50% cap on foreign shareholding ratio of app store service providers registered in Shanghai Pilot Free Trade Zone (“FTZ”) has been abolished. Foreign investors can hold more than 50% shares in a Shanghai FTZ company operating app store. Shanghai FTZ was further expanded to include more areas than the original 28.8 square kilometers in 2014.

On the other hand, under *Announcement of the MIIT on Issues concerning the Provision of Telecommunication Services in the Mainland by Service Providers from Hong Kong and Macao* promulgated in 2016, Hong Kong and Macao investors under *Closer Economic Partnership Arrangement (“CEPA Investors”)* have no shareholding limitation when investing in a Shanghai FTZ company operating app store.

2. App store operating qualification

In accordance with *Provisions on the Administration of Information Services of Mobile Internet Apps* (2022 Revision), an app store belongs to the category of application distribution platforms. Operators of app stores make profits from app distribution services such as app publication and download on the Internet. The above service content belongs to the Internet B25 information service business in Category II Value-added Telecommunications Services stipulated by the *Telecommunication Business Classification Catalogue* (2015 Edition). As Chinese authority implements a licensing system for commercial Internet information services, the B25 information service providers are required to obtain an Internet Content Provider (ICP) License prior to launching operation.

The ownership structure of ICP license applicants needs to comply with China’s legal restrictions on foreign shareholding proportion in telecom companies. Based on provisions of the aforesaid Shanghai Negative List and Shanghai Opinions, foreign investors may hold more than 50% of the shares of an

information service business (app stores only) whose business registration places and service facilities are in Shanghai FTZ. However, the regulations do not specify that foreign ownership can reach 100%. Therefore, it is necessary to confirm the implementation standards of regulatory authorities in practice on a case-by-case basis.

Consultations with industry officials confirm that currently foreign investors can apply for a FTZ ICP license to operate the app store business as a wholly foreign-owned enterprise registered in the Hainan Pilot Free Trade Zone or the original area (28.8 square kilometers) of the Shanghai FTZ. In addition, telecom companies that operate application distribution platforms and are 100% owned by CEPA investors can also apply for an ICP license no matter where they are registered in China.

Obviously, under the current foreign investment access policies, WFOEs have considerable scope of activities in the application distribution platform business sector. The MIIT has permitted WFOEs to provide information services within specified scope after gaining ICP licenses as qualification certification. However, in practice, there are also examples of application distribution service providers operating app stores without an ICP license.

3. App Store Operating Models

App Store is a typical application store service provider, mainly providing users with the download and use of applications developed by Apple Company itself or by third-party application developers. Users can acquire free or paid content on the platform's services and the process is referred to as "transaction" by Apple Media Services Terms and Conditions. But each transaction only grants the user a license to access the content and not provides a traditional product. A user acquires apps, subscriptions or in-app services for a charge on App Store, which is obtaining the corresponding content on the condition of paying the consideration. The operator of Apple's App Store also obtains revenues from this.

Under this mode of operation, the application distribution platform, the App Store, obtains benefits by providing users with paid content or by recommending rankings, advertisements, etc. These processes provide users with commercial internet information services and therefore the platform's operator should have an ICP license. In practice, all of Apple's business entities in China are WFOEs. As the most significant one of them, Apple Electronic Products Trading (Beijing) Co., Ltd. conducts online business in China under its main website www.apple.com.cn, with only an ICP filing and without an ICP license.

The service content on the App Store is mainly provided by Apple Distribution International Ltd. When a user desires to obtain paid content developed by Apple or a third-party developer ("App provider") in the App Store, he or she needs to complete the payment through the channels provided by the platform operator, and the license for the corresponding content is also obtained from Apple Distribution International Ltd., the platform service provider. Hence, Apple Distribution International Ltd. is not only a merchant in the App Store, but also a substantial provider of App Store services. Although Apple established and placed some services facilities and data storage facilities in China, its Chinese operating entities are only responsible for the review of the content provided by the App Store (mainly in terms of copyright), and do not participate in substantive operations and management conducted by Apple Distribution International Ltd. which is the *de facto* operator established in 2013 and registered in Ireland.

Telecommunication Regulation (2016 Revision) and *Administrative Measures for Internet Information Services* (2011 Revision) clarified that application store service providers in China shall obtain an ICP license as a precondition for operating compliantly. For example, Huawei Software Technology Co., Ltd. as the operating entity of Huawei AppGallery has obtained an ICP license for the relevant business scope. In general, the applicant for an ICP license must be a domestic registered business entity in China. This requirement essentially limits the scope of the entity of value-added telecommunications services and prevents overseas telecom companies to provide domestic users with business information services through the internet. Apple's operation of the domestic app store business in China as an overseas entity is essentially taking advantage of regulatory loopholes. Although it uses its own domestic network service facilities to provide services, there is still a lot of uncertainty in terms of compliance. Therefore, this model only has limited reference value for foreign investors intending to develop app store business in China.

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