

# Legal Commentary

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## Brief Comments on China's Commitments on the Foreign Investment Access under the RCEP

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On November 15, 2020, the ten member states of ASEAN<sup>1</sup> and other countries including China, Japan, South Korea, Australia, and New Zealand formally signed the Regional Comprehensive Economic Partnership Agreement<sup>2</sup> (“**RCEP**”). RCEP establishes the world's largest free-trade zone, covering 30% of the world's population (2.2 billion people) and 30% of the global economy. RCEP is formulated based on existing “10+1” free trade agreements by and between the ten ASEAN member states and other contracting states, but the level of openness in RCEP is significantly greater than these preceding “10+1” agreements.

RCEP includes a preamble, 20 chapters, and 4 annexes, which cover terms such as trade in goods, trade in services, investment, intellectual property rights, movement of natural persons, and dispute resolution. In the chapters on trade in services and investment, the Chinese government commits for the first time to detailed market opening and reservation measures in a multilateral free-trade agreement. Aside from minor differences, these access commitments are generally in line with China's current policies on foreign investment access.

### RCEP Negative List vs. PRC Negative List: a comparison

In RCEP Annex III (Schedule of Reservations and Non-Conforming Measures for Investment (China)), China makes a special reservation statement<sup>3</sup> for the following sectors: manufacturing, agriculture, fishery, forestry and hunting, and mining and quarrying<sup>4</sup>. RCEP Annex III enumerates items generally found in the *Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2019)*

<sup>1</sup> Association of Southeast Asian Nations (“**ASEAN**”) currently comprises ten member states: Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Cambodia, Laos, Myanmar, and Vietnam.

<sup>2</sup> As for the RCEP, as the first country participating in RCEP negotiations, India announced its withdrawal from the RCEP at the third leaders' meeting for the Regional Comprehensive Economic Partnership Agreement in 2019.

<sup>3</sup> For the full text of the RCEP, please refer to the website of the “China Free Trade Zone Service Network” of the Ministry of Commerce: [http://fta.mofcom.gov.cn/rcep/rcep\\_new.shtml](http://fta.mofcom.gov.cn/rcep/rcep_new.shtml).

<sup>4</sup> According to the chapter and section settings of the RCEP, the commitments on commercial presence in the field of trade in services are stipulated in Chapter 8 (Trade in Services).

Edition)<sup>5</sup> (“**Negative List 2019**”)—the first time for China to do so in an international treaty or agreement. We notice that differences exist between RCEP Annex III and the current *Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2020 Edition)*<sup>6</sup> (“**Negative List 2020**”):

1. The scope of industries covered by the Negative List 2020 is broader than that in RCEP Annex III. The industries covered by the Negative List 2020 include 12 categories, that is, a total of 33 sub-industries, while RCEP Annex III only lists investment reservation measures for five sectors. In this regard, RCEP Annex III explains that non-conforming measures in the field of trade in services are listed in RCEP Annex II [Schedule of Specific Commitments for Services (China)]. We understand that this style follows the classification system in the WTO’s General Agreement on Trade in Services, and the concession commitments for commercial existence in the services sector are also classified as trade in services and placed in the relevant annexes to the General Agreement on Trade in Services.
2. China cites the Negative List 2019 as the primary legal authority for the non-conforming measures listed in List A of RCEP Annex III. The differences between the investment reservation measures in industries covered by RCEP Annex III and those under the Negative List 2020 are as follows:

Industry	RCEP Annex III	Negative List 2020	Comments
Seed industry	Investments by foreign investors in the selection and breeding of new varieties of wheat or corn and seed production of wheat or corn <b>require Chinese control.</b>	<b><u>The proportion of shares held by the Chinese investors</u></b> in the selection and breeding of new varieties of wheat and seed production of wheat <b><u>shall not be less than 34%</u></b>	The Negative List 2020 allows foreign investors to hold up to a 66% interest in wheat breeding and seed production.
Mining industry	Foreign investors may not invest in the exploration, exploitation or ore dressing of rare earth and tungsten.	Foreign investors may not invest in the exploration, exploitation or ore dressing of rare earth, radioactive minerals and tungsten	RCEP allows foreign investors to invest in the exploration and ore dressing of radioactive minerals
Automotive manufacture	Investments by foreign investors in the manufacture of complete automobiles, except for special purpose automobiles and new energy automobiles, require that the shareholding percentage of the Chinese party shall not be less than	Investments by foreign investors in the manufacture of complete automobiles, except for special purpose automobiles, new energy vehicles, and <b><u>commercial vehicles</u></b> , require that the shareholding percentage of the Chinese party shall not be	The Negative List 2020 allows vehicle manufacturing of wholly foreign-owned commercial vehicles

<sup>5</sup> 外商投资准入特别管理措施（负面清单）（2019年版）[Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2019 Edition)] (Nat’l Dev. Ref. Comm., Min. Com., Decree 25; promulgated June 30, 2019, effective July 30, 2019) 2019 ST. COUNCIL GAZ. 25.

<sup>6</sup> 外商投资准入特别管理措施（负面清单）（2020年版）[Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2020 Edition)] (Nat’l Dev. Ref. Comm., Min. Com., Decree 25; promulgated June 30, 2019, effective July 30, 2019) 2019 ST. COUNCIL GAZ. 32; promulgated June 23, 2020, effective July 23, 2020) 2020 ST. COUNCIL GAZ. 22.

Industry	RCEP Annex III	Negative List 2020	Comments
	50 per cent, and one foreign investor may establish up to two equity joint ventures that manufacture complete automobiles of the same category (passenger cars, commercial cars) within the territory of China.	less than 50 per cent, and one foreign investor may establish up to two equity joint ventures that manufacture complete automobiles of the same category within the territory of China.	

3. RCEP Annex III contains a catch-all provision (RCEP Annex III, List A, Item 9) which specifies that the Chinese government will not grant licenses, enterprise registrations, or any other relevant matters to a foreign investor who proposes to invest in a negative-listed industry not in conformity with the currently effective negative list, i.e., the Negative List 2020. In this regard, we understand that RCEP Annex III does not exceed the level of openness to foreign investment under the Negative List 2020—for industries listed in RCEP Annex III, investments from RCEP contracting states will be implemented in conformity with the investment restrictions listed in RCEP Annex III, unless more favorable treatment currently exists under domestic law. For other sectors not listed in RCEP Annex III, investors from contracting states and non-contracting states should make investments in conformity with the Negative List 2020.

### China’s financial openness reflected at the highest level for foreign investment

As mentioned above, Chapter 8 (Trade in Services) of the RCEP contains service-related market access and national treatment, and the specific opening commitments of each contracting state may be listed in the form of a separate annex for each state. These annexes follow the style of WTO’s Schedule of Specific Concession Commitments for Trade in Services and provide for each sector or sub-sector market access restrictions, national treatment restrictions, and other commitments in respect of the four methods for providing services (i.e., cross-border delivery, overseas consumption, commercial presence, and movement of natural persons). Among them, China lists opening commitments for 122 sectors in the form of a positive list. Compared with the 100 sectors for which commitments are made in the positive list of the WTO’s Schedule of Specific Concession Commitments for Trade in Services, China has added 22 sectors such as R&D, management consulting, manufacturing-related services, and air transportation, which also reflect China’s commitment to further opening up after its entry to WTO. In addition, the RCEP chapter regarding trade in services has three separate annexes for financial services, telecommunications services, and professional services.

Among the opening commitments related to trade in services, a highlight of RCEP is China’s commitments in the field of financial services. In Annex II, Schedule of Specific Commitments for Services (China), China stipulates the detailed content of commitments in fields such as insurance, banking, transfers of financial information and data processing, investigations and analysis of financial-related information and credit, and securities services. Among them, the restrictions on the proportion of shares held by foreign investors are relaxed for insurance companies, securities companies, futures companies, fund management companies, financial information transfer and data processing companies, etc., and foreign

investors are allowed to establish the above-mentioned types of companies as the sole investor, which echoes provisions of the *Opinions of the State Council on Further Fulfilling the Work of Using Foreign Capital* on fully abolishing the four major restrictions on foreign investment in the financial sector (i.e., business scope, access conditions, scope of shareholders, and shareholding ratio) and the special access administrative measures under the Negative List 2020<sup>7</sup>. At the same time, the RCEP also specifies that “criteria for authorization to deal in China’s financial services sector are solely prudential (i.e., contain no economic needs test or quantitative limits on licenses),” which conforms to China’s regulatory commitments for access to the financial service industry in the WTO’s Schedule of Specific Concession Commitments.

In addition, the innovative commitments in Annex 8A (Financial Services) to RCEP regarding new financial services, financial information transfer and processing, and transparency in financial supervision reflect the positive attitude of the Chinese government toward financial opening up and facilitate the increase of investors’ confidence in China’s policies, attract overseas financial institutions to China, and inject new blood into the domestic financial market.

### **In the field of e-commerce: why does the access threshold for members as the contracting states rise instead of being lowered?**

RCEP provides for market access and national treatment restrictions related to value-added telecommunications services in the chapter on the trade in services (Chapter 8) and in another chapter separately lists the technical rules related to e-commerce transactions (such as electronic authentication and electronic signature, online consumer protection, and personal information protection). This contrasts with current relevant domestic law, the *Telecommunication Services Classification Catalog (2015)*, which considers e-commerce to be a part of value-added telecommunications under Category B21. This standalone treatment of e-commerce in RCEP may reflect the importance contracting states have attached to the promotion of inter-regional e-commerce development and regional cooperation.

In Annex II [Schedule of Specific Commitments for Services (China)] of RCEP, China’s commitment to foreign investment market access under RCEP does not provide more liberalizations than those set forth in current domestic law for value-added telecommunication services. Foreign ownership cannot exceed 50% for e-mail, voice mail, online information and database retrieval, electronic data interchange, enhanced or value-added facsimile services (including store and forward, store and retrieve), code and protocol conversion, online information or data processing (including transaction processing) and several other categories of service sectors. China has made no other specific commitments under RCEP for other categories of telecommunications services. However, for online data processing and transaction processing business (operating e-commerce), the Ministry of Industry and Information Technology had already loosened restrictions on the proportion of shares held by foreign investors since 2015. For companies operating e-commerce business, the proportion of shares held by foreign investors can reach

<sup>7</sup> In the Negative List 2019, the proportion of shares held by the foreign investors in securities companies, securities investment fund management companies, futures companies, and life insurance companies is limited to be 51%, while such limitations are cancelled in the Negative List 2020.

100%<sup>8</sup>. Obviously, the current opening commitments under the RCEP for online transaction processing business (e-commerce) are lower than those under the existing domestic regulations. Should investors from one of the RCEP contracting states be governed by the RCEP or the domestic laws which are more favorable to such investors when they enter the Chinese e-commerce market? This issue still needs further interpretation or clarification by the Ministry of Commerce. Investors will need to understand the operating coverage of local commercial departments in specific cases.

Value-added telecommunications services have always been an industry restricted to foreign investment in China. With the development trends of globalization and “Internet +”, the market potential brought about by inter-regional linkages has made investors more interested in investing and participating in value-added telecommunications services, especially cross-border e-commerce. Correspondingly, China is gradually relaxing restrictions on foreign investment access in value-added telecommunications services. Several days ago, Liu Liehong, an official of the Ministry of Industry and Information Technology, mentioned at a forum on November 11 that China would open up the value-added telecommunications (including data center IDC business, cloud services, and other business) in an orderly manner, and first do so in Shanghai, Hainan, and other pilot free trade zones<sup>9</sup>. It can be foreseen that with the gradual relaxing of restrictions on foreign investment in value-added telecommunications services, the content of the relevant schedules of specific commitments for services under the RCEP may also be updated, while the regulations for domestic telecommunications regulatory field may also need to be adjusted accordingly so as to implement technical commitments such as regulatory methods, pipeline and pipe network access, international mobile roaming, and flexibility in selecting technologies as listed in the annex to the RCEP for telecommunications services.

## Conclusions

In view of the foregoing, the opening commitments under the RCEP on the foreign investment access are basically consistent with China's current domestic laws on the foreign investment access, but the opening commitments for individual industries are different from those in the latest Negative List for Foreign Investment or the regulations of the competent authorities, and even in industries such as e-commerce, wheat seed breeding and production, and commercial vehicle manufacturing, the opening level prescribed by the latest domestic laws is higher than the commitments listed in the RCEP. We expect China to introduce relevant policies for interpretations or make regulatory adjustments on the commitments on RCEP-related market access and commitments on service levels, regulatory transparency, etc., so that the RCEP can be connected and echoed with the current domestic system for the foreign investment access and regulatory system, and we will further share the achievements of China's opening the foreign investment access with the other 14 RCEP contracting states.

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<sup>8</sup> 《关于放开在线数据处理与交易处理业务（经营类电子商务）外资股比限制的通告》 Notice on Relaxing Restrictions on the Proportion of Shares Held by Foreign Investors in the Online Data Processing and Transaction Processing Business (E-commerce Operations) (Min. Indus. Info. Tech.; promulgated and effective June 19, 2015).

<sup>9</sup> For “Economic Recovery and International Cooperation in the Post-COVID-19 Era” at China Development High-level Forum of 2020 on November 11, 2020, please refer to <https://dy.163.com/article/FRBD77JR0511D6RL.html> for details.

## ***Important Announcement***

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