

# Market Access and National Treatment: the Challenges Ahead

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# An Unbalanced Story

- Difficulties in getting access to certain industries and markets in China and difficulty in getting “national treatment” after entering the market are on top of the “concerns” of EU investors in China.
- On contrary, Chinese investors in the EU complain mainly of difficulties in getting visas and work permits, dealing with EU labor laws, HR costs, cultural differences in management style. And operational difficulties due to high costs.
- Still, there is strong commitment from both sides to increase investments as survey after survey shows.

So, what can be done?

# Market Access - China

# Market Access

- **1998-2009: the golden age**

Entry to WTO (2001), more sectors opened up. Progressive increase of acquisitions and buy-outs.

- **2010-2013: the new strategy**

General slow down in inbound M&A. Tax preferential treatment lifted. First national security review rules adopted.

General rethinking about role of foreign investment in the economy. China not open to “any” type of foreign investment, but only those that are in sintony with its development strategy.

“National champions”

# The Gatekeepers

- Legal basis: Foreign Investment Catalog, National Economic Security Review, Anti-Monopoly Law, various NDRC guidelines, bilateral agreements
- MOFCOM: approves **all** FDI except for financial sector
- NDRC: approves fixed assets projects
- SASAC: involved if there are state-owned assets
- SAFE: monitors, reviews and approves capital inflows and outflows
- CIRC, CBRC, CSRC: approve foreign investments in financial sector

# Barriers at the Gate (1)

Examples of foreign ownership caps:

- Steel industry: no control for foreign investors
- Financial services
  - Banks: 19.9%
  - Insurance: 50% (life)
  - Fund Management Firms: 49%.
- Telecommunications: 49% (basic) – 50% (value-added)
- Postal services and domestic courier services: prohibited
- Retail: online sales, direct sale, mail order (restricted); distribution of audio-video products (JV)

## Barriers at the Gate (2)

- Mining: several restrictions, e.g. rare earths: prohibited
- Automotive industry: 50%
- Car components for New Energy Vehicles: 50% (but car components for normal vehicles 100%)
- Production of biofuel: 49%
- Construction and operation of power grids (restricted)
- Media (TV, radio, news organizations, publications of books, newspapers, etc.): prohibited
- Defense industry, traditional medicine industry: prohibited

## Barriers at the Gate (3)

- National Security Review
- Defense sectors: both majority and minority acquisitions
- Other sectors: actual control
  - Major agricultural products
  - Major energy sources and resources
  - Major infrastructure facilities
  - Major transportation services
  - Key technologies
  - Manufacture of major equipment
  - Other items with bearing on national security
- Unofficial list of 56 industries
- Review criteria very “broad”



## Other barriers (4)

- Less obvious restrictions (examples)
  - Real estate: foreign individuals can buy only one apartment for “self-use”
  - Foreign construction companies: must set up subsidiary (high capital requirements), difficult to get higher level construction licenses
  - Foreign law firms: not permitted to practice Chinese law and represent clients in court
  - Access to government contracts for foreign companies and subsidiaries

# Market Access - Italy

# The Gatekeepers

- Non-Italian entities may enjoy in Italy the same rights as those granted to Italian entities under condition of “**reciprocity**”, without prejudice to bilateral treaties.
- 1985 China / Italy Agreement for the “*Promotion and Protection of Investments*” (Bilateral Investment Treaty - BIT). Does not address market access.
- Restrictions apply to any entity wishing to invest in certain Italian SOE which operate in the following sectors:
  - Defense
  - Transportation
  - Telecommunications
  - Energy
  - Other public utilities
- So-called **golden share** of the Italian Ministry of Economy and Finance (MEF)
- **Invitalia** - Italian Agency for the attraction of [foreign] investments and business development - This is the inbound investment arm of MEF.
- **Desk Italia** - Desk for the attraction of foreign investments - This the inbound investment arm of the Ministry of Economic Development (MED).

## Barriers at the Gate – Golden share

- MEF may exercise one or more of the following “special powers” in Italian strategic SOE:
  - a. Power to object to acquisitions of  $\geq 5\%$  of voting shares (or  $\geq 3\%$  for certain companies such as ENI, ENEL, Finmeccanica, Telecom Italia);
  - b. Power to object to the entering into of shareholders’ agreements concerning  $\geq 5\%$  of voting shares (or  $\geq 3\%$  for certain companies such as ENI and Finmeccanica);
  - c. Power to veto certain resolutions
  - d. Power to appoint a non-voting Director.
- MEF may exercise the “special powers” in (a), (b), and (c) in case of “*harm to the vital interests of the State*”.

# New Italian Golden Share (1/3)

## Prime Minister's special powers in the defense and homeland security sectors (Law Decree 21/2012, effective as of 15 May 2012)

- EU pressure against Old Golden Share.
- Acquisition to be notified to the Prime Minister (PM). For listed companies, notification to be effected if purchaser ends up holding >2% of the corporate capital.
- PM may exercise special powers in case of “*threat of a serious harm to the essential interests of the national defense and homeland security*”, that is:
  - imposition of specific conditions for the security of procurements, safety of information, transfers of technology, in case of purchase of shares in relevant companies;
  - veto right on shareholders' or board resolutions to be passed in relation to mergers, spin off, transfers of assets, transfer of corporate seats abroad, winding up, relevant changes in the Articles, transfers of ownership or utilization rights concerning tangibles or intangibles; and
  - right to object to the purchase of participations by a non SOE if the purchaser ends up holding a participation that could jeopardize the said “*essential interests*”.
- **PM Decree 253/2012** (Nov 2012 - Feb 2013) identifies strategic activities for the **national defense and homeland security system**.

# New Italian Golden Share (2/3)

## Prime Minister's special powers in other sectors (Law Decree 21/2012, effective as of 15 May 2012)

- Identification of networks, equipment, assets, relationships of strategic importance for Italian interests in:
  - Energy
  - Transportation
  - Communications
- Any resolution, deed or transaction approved by a company holding said assets and resulting into a change of ownership, or of control / use of same assets as well as certain other corporate resolutions must be notified to the PM within 10 days and, in any event, before implementation.
- The PM may veto the transaction if it results into “*an exceptional situation [...] of threat of a serious harm to the public interests concerning the security and the functioning of networks, equipment and continued procurement*”.
- When will the new law start to apply?
- Most of the Italian SOE's Articles still with the Old Golden Share provisions?
- Draft implementation decree in the last few days of the previous Government...

# Barriers at the Gate: Examples of Other Approvals

## Banking

- Acquisitions of (i) participations resulting into control/significant influence or (ii)  $\geq 10\%$  (or  $\geq 20\%$ ,  $\geq 30\%$  or  $\geq 50\%$ ) participation need prior approval of the Bank of Italy (BoI).
- “Significant influence” through contractual or by-laws provisions.
- BoI notifies MEF of acquisitions by non-EU entities w/o reciprocity.
  - Upon MEF’s proposal, PM may stop BoI authorization.

## Insurance

- Acquisitions of (i) participations resulting into control/significant influence or (ii)  $\geq 10\%$  (or  $\geq 20\%$ ,  $\geq 30\%$  or  $\geq 50\%$ ) participation need prior approval of the Insurance Regulator (IVASS).
- “Significant influence” through contractual or by-laws provisions.
- IVASS notifies MED of acquisitions by non-EU entities w/o reciprocity.
  - Upon MED’s proposal, PM may stop IVASS authorization.

## Aviation

- Acquisition, by non-EU entities, of “control” over an Italian airline → may affect the operational license of the airline.

## How to move ahead

- Reciprocity: always applied? Who monitors? e.g. real estate sector/retail sector?
- Investments through interposed vehicles (Luxembourg, UK), how to monitor?
- Different definition of “national economic security”. How to reconcile?
- Italy should support EU’s efforts in negotiating bilateral investment agreement with China.



# Grazie/谢谢



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