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European FDI Regulatory Framework and China

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Summary:

With little doubt, the 21st century will be remembered mainly for the role China plays in it. Decades of unprecedented economic growth has been an endless source of workers and later customers for investors all across the world. China is currently the second-largest economy in the world and has increasingly begun investing overseas itself. However, China is a single-party state, with a large state-owned sector dominating large parts of the economy. This has caused concern in the European Union about the influence China might gain through investing in European countries. Furthermore, China has been very protective of its domestic industries, which is seen as an unfair advantage for Chinese companies over their European competitors. This study focuses on the challenges that EU FDI regulation faces because of China.

The European FDI regulation has been created in a fundamentally different world, where all major investors are similar, free market based liberal democracies with rule of law. The emergence of a fundamentally different system on a massive scale, like China upsets this premise and forces strategic considerations to be taken into account when regulating FDIs. China is both a blessing and a curse for the EU. The Chinese markets are vital for European industry but at the same time, the EU fears China´s growing influence over its member states and of being taken advantage of by the comparably free access given to Chinese investors into the EU markets and the lack of transparency in Chinese investment activities.

Keywords: Chinese state, the EU, FDI regulation, International Commercial Law

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References

Bibliography

Allison, Graham. (2017). Destined for War: Can America and China Escape Thucydides's Trap? Houghton Mifflin Harcourt.

Fukuyama, Francis. (1992). *The End of History and the Last Man,* Free Press

Foreman-Peck, James. (1989) *Foreign Investment and Imperial Exploitation: Balance of Payments Reconstruction for Nineteenth-Century Britain and India.* The Economic History Review, vol. 42, no. 3, JSTOR, www.jstor.org/stable/2596438 Accessed 22 Feb. 2021.

Angell, Norman. (1909). *The Great Illusion, A Study of the Relation of Military Power to National Advantage.* eBook published by project Gutenberg https://www.gutenberg.org/files/38535/38535-h/38535-h.htm Accessed 18 February 2021

Kojima, Kiyoshi. (1973) *A Macroeconomic Approach to Foreign Direct Investment.* Hitotsubashi Journal of Economics, vol. 14, no. 1, 1973, pp. 1–21. *JSTOR*, www.jstor.org/stable/43295560

McGregor, Richard. (2010). The Party: The Secret World of China's Communist Rulers. Harper Perennial

Plafker, Ted. (2007) Doing Business In China: How to Profit in the World's Fastest Growing Market. Business Plus

Scott, David. (2008) China and the International System, 1840-1949: Power, Presence, and Perceptions in a Century of Humiliation. State University of New York Press

Walter, Carl; Howie Fraser. (2012) Red Capitalism: The Fragile Financial Foundation of China's Extraordinary Rise, Wiley

Publications and Articles

Brookings Papers on Economic Activity (2015) *Chang-Tai, Zheng Song. Grasp the Large, Let Go of the Small: The Transformation of the State Sector in China*

Jones Day. (2020). *Member State Implementation of the EU 5G Toolbox: Legal Issues Raised*

Arcesati, Rebecca; Hanemann, Thilo; Huotari, Mikko; Kratz, Agatha (2020). *Chinese FDI in Europe: 2019 Update A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS)*

Plamen Tonchev, Polyxeni Davarinou. (2017). *Chinese Investment in Greece and the Big Picture of Sino-Greek Relations.* *https://www.academia.edu/35390610/Chinese_Investment_in_Greece_and_the_Big_Picture_of_Sino_Greek_Relations.html*

Xu Sitao, Chen Lydia. Deloitte (2018) *Embracing the BRI Ecosystem in 2018 — Navigating pitfalls and seizing opportunities.* Accessed 21 February 2021. *https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/ser-soe-br/deloitte-cn-bri-embracing-the-bri-ecosystem-in-2018-en-180403.pdf*

Yan, Xiaojun, and Jie Huang. (2017) *Navigating Unknown Waters: The Chinese Communist Party's New Presence in the Private Sector."* China Review, vol. 17, no. 2, 2017, pp. 37–63. JSTOR, www.jstor.org/stable/44440170. Accessed 23 Feb. 2021

Zakic Katarina, Radisic Bojan, (2017) *The Results And Challenges Of Chinese "Go Global" Policy.* Available at: https://www.researchgate.net/publication/321625301_THE_RESULTS_AND_CHALLENGES_OF_CHINESE_GO_GLOBAL_POLICY

Kopra Sanna, Nojonen Matti, *The Elusive Norm of Climate Responsibility: The Belt and Road Initiative and COVID-19* 11 November 2020 https://lacris.ulapland.fi/ws/portalfiles/portal/6803413/1_Kopra.pdf

Sze Norman, Wu Flora, Deloitte, One Belt, One Road *The Internationalization of China's SOEs* *https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/about-deloitte/dttp/deloitte-cn-dttp-vol5-chapter2-en.pdf*

Rand Corporation

Lu, Hui, Charlene Rohr, Marco Hafner, and Anna Knack, (2018) *China Belt and Road Initiative: Measuring the impact of improving transportation connectivity on trade in the region. Accessed 20 February 2021* *https://www.rand.org/pubs/research_reports/RR2625.html*

Rhodium Group (RHG)

Baker McKenzie FenXun

China's Foreign Investment Law and related regulations mark a new era for foreign investment in China, (2020) *https://www.bakermckenzie.com/-/media/files/insight/publications/2020/01/client_alert__fil_implementing_regulations.pdf*

McKinsey & Company

Understanding social media in China, 1 April 2020, Accessed 20 July 2020 *https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/understanding-social-media-in-china#*

Mercator Institute for China Studies (MERICS)

Made in China 2025, The making of a high-tech superpower and consequences for industrial countries, December 2016, PDF available for download at: *https://merics.org/en/report/made-china-2025*

Europe's position in the US-China trade conflict: It's the exports, stupid; 25 May 2020 *https://merics.org/en/short-analysis/europes-position-us-china-trade-conflict-its-exports-stupid*

Belt and Road reality check: How to assess China's investment in Eastern Europe. 10 July 2018 *https://merics.org/en/analysis/belt-and-road-reality-check-how-assess-chinas-investment-eastern-europe*

Zenglein Max, Holzmann Anna, *Evolving Made in China 2025 China's industrial policy in the quest for global tech leadership. (2019),* *https://merics.org/sites/default/files/2020-04/MPOC%20Made%20%20in%20China%202025.pdf*

Grünberg Nis, Drinhausen Katja*, The Party leads on everything, MERICS, 24 September 2019. Accessed 23 February 2021* *https://merics.org/en/report/party-leads-everything*

Center for Strategic & International Studies

The Biggest But Not the Strongest: China's Place in the Fortune Global 500, Scott Kennedy, 18 August 2020. Accessed 23 February 2021 https://www.csis.org/blogs/trustee-china-hand/biggest-not-strongest-chinas-place-fortune-global-500

Clingendael Institute

Institute for Security & Development Policy. *Compatible Interests? The EU and China's Belt and Road Initiative*

International Conventions, Organisations and Treaties

World Trade Organisation

Agreement on Subsidies and Countervailing Measures;

General Agreement on Tariffs and Trade 1994

Organisation for Economic Co-operation and Development

Foreign Direct Investment Restrictions in OECD Countries http://www.oecd.org/economy/outlook/2956455.pdf.

Convention on the Organisation for Economic Co-operation and Development https://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm

China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf

Foreign Direct Investment Restrictions in OECD Countries (accessed 21 February 2021) https://www.oecd.org/economy/reform/2956455.pdf

Davies Ken, China Investment Policy, and update. OECD Working Papers on International Investment 2013/01 https://www.oecd.org/industry/inv/investment-policy/WP-2013_1.pdf

International Centre for Settlement of Investment Disputes Convention of 1966

The World Bank

The Belt and Road Initiative. Accessed 10 September 2020 *https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative*

Purchasing Power Parities and the Size of World Economies: Results from the 2017 International Comparison Program

Case Law

The Court of Justice of the European Union

Judgement of 6 October 2020, *La Quadrature du Net*, C-511/18, C-512/18 and C-520/18, EU:C:2020:791

Case C-66/18*, European Commission v Hungary,* 6 October 2020

News Agencies

Financial Times

The New York Times

South China Morning Post

BBC

Reuters

National Laws and Treaties

Bilateral Investment Treaty between the People's Republic of China and the Republic of Finland

Act on the Screening of Foreign Corporate Acquisitions (172/2012).

EU Law

Treaty on European Union

Treaty on the Functioning of the European Union

Official Sources

The Ministry of Economic Affairs and Employment of Finland

The Government of the Republic of Finland

The Ministry of Finance of the People's Republic of China

Foreign Investment Law of the People's Republic of China

The Ministry of Commerce of the People's Republic of China

European Parliament

Steer Davies Gleave, Bianca Cosentino, Dick Dunmore, Simon Ellis, Alberto Preti, Davide Ranghetti, Clémence Routaboul, *Research for TRAN Committee: The new Silk Route - opportunities and challenges for EU transport;*

Gisela Grieger*, China's foreign influence operations in Western liberal democracies: An emerging debate, European Parliament Research Services, Members' Research*

Service PE 621.875 – May 2018
https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/621875/EPRS_ATA(2018)621875_EN.pdf

Gisela Grieger, *Foreign direct investment screening. A debate in light of China-EU FDI flows European Parliament Research Services, Members' Research Service May 2017*
https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf

The European Commission

White Paper on levelling the playing field as regards foreign subsidies (2020);

Cybersecurity of 5G networks EU Toolbox of risk mitigating measure (2020);

EU-China Comprehensive Agreement on Investment;

Commission Staff Working Document on Foreign Direct Investment in The EU (2019)

European Commission, EU-China – A strategic outlook (2017)

Elements for a new EU strategy on China (2016)

Internet Sources

Nasdaq

Foreign Direct Investment vs. Foreign Portfolio Investment (Accessed 20 Februrary 2021) https://www.nasdaq.com/articles/foreign-direct-investment-vs-foreign-portfolio-investment-2016-03-22

Statistics Finland

Foreign Direct Investment. (in Finnish, accessed 20 February 2021) https://www.stat.fi/meta/kas/ulk_suora_sijoi_en.html

Abbreviations

ABC	Agricultural Bank of China
ASCM	Agreement on Subsidies and Countervailing Measures
BIT	Bilateral Investment Treaty
BOC	Bank of China
BRI	Belt and Road Initiative
CAI	Comprehensive Agreement on Investment
CCP	Chinese Communist Party
EU	European Union
FDI	Foreign Direct Investment
FIL	Foreign Investment Law (China)
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPA	WTO General Procurement Agreement
ICSID	International Centre for Settlement of Investment Disputes
OECD	Organisation for Economic Co-Development
OFDI	Outbound Foreign Direct Investment
PRC	People's Republic of China
SOE	State-Owned Enterprise
TEU	Treaty on European union
TFEU	Treaty on the functioning of the European Union
US	United States
WTO	World Trade Organisation

1. Research Methods

In this thesis, I study how the People's Republic of China becoming a global economic superpower affects the economic and political landscape in which the foreign direct investment regulation of Finland, and by extension the European Union, must operate, and what regulatory measures are being taken in response. Understanding the historical development, and the main political and economic features that make China special are important from the legal standpoint when considering the regulation of foreign investments. In the case of China, the political implications are inherently tied to the nature of its legal system as it is referred to as 法治 (Fǎzhì), which means "rule of law" but is usually translated to "rule by law" in English. Rule by law is defined as follows: "*Instead of being a supreme and objective standard in its own right, the law is an instrument to be wielded by the party and the government in exercise and preservation of the authority.*"[1]

The geopolitical confrontation between China and the United States revolves heavily around the legal treaty network that governs our modern world and legal study on the effects of the rise of China and the growth of its influence abroad, from a European perspective, is warranted. This is a study on how the rise of China's economic might affects the legal framework that constitutes the liberal and democratic principles of the European Union and what kind of legal measures the EU is adopting to counter the growing Chinese influence. To understand the complexity of the subject and the effects of China's economic power, China and the historical context behind global economic

[1] Plafker, Doing Business in China (2007), p. 51

order must be understood to some extent. I will start this thesis with a brief overlook of the relative developments from the 19th century onwards, progressively focusing on more recent developments.

The methodology of the thesis is pluralistic in nature and relies on legal positivism and legal realism. It is partly interdisciplinary as I take into account the underlying economic and political reasoning to gain a better understanding of the nature of the legal framework governing foreign direct investments. For that part, I use macroeconomic FDI theory and its modern geopolitical implications to scrutinise country-specific factors in both outbound FDI activities and the treatment of inward FDI.[2] I find this approach mandated as changes in international politics or economic turmoil may require quick alterations to the existing policies and a certain level of flexibility from the law, so it is more rapidly applicable in a new and changing environment.

I address the challenges posed to the lawmakers seeking to amend legislation to conform to the challenges of the changing global economic order. I map out the general legal basis for investment restrictions on foreign investors in general and how they can be specifically targeted towards a specific country and how this approach conforms with the protections granted by international treaties. I also note the main Chinese legislation in this field due it reciprocal nature and several other forms of investment activities in the European Union, especially those related to the Belt and Road Initiative. I will focus on the political and economic factors that shape the legal requirements of European FDI regulation and the foreseeable developments in this field. The scope of the thesis will include the different types of Chinese investments, the Comprehensive Agreement on Investment, which is being negotiated currently between the European Union and China,

[2] Kojima, Kiyoshi. A Macroeconomic Approach to Foreign Direct Investment (1973)

and the political and economic factors that shape the legal environment around foreign assets and free markets.

I will use standards and definitions from several international organisations, some of which China is not a member of, like the OECD, but since OECD is composed of most of the major economies in the world, it provides reliable data on the global economy and its statistics are useful to give scope for the subject of this study. I also focus on the "*de lege ferenda*" aspect regarding incoming investments from China into the European Union. I focus my study on the national legislation and treaty system of Finland, which includes the laws of the European Union. There is still a crossover between national jurisdiction and EU jurisdiction, even though the Lisbon Treaty assigns the sole competence over trade policy to the European Union. The main source of upcoming regulation is the Comprehensive Agreement on Investment and various EU directives regarding Foreign Direct Investments and foreign state subsidies.

2. Introduction

In the past four decades, the People's Republic of China has risen from extreme poverty and isolationism into being the second-largest economy in the world after the United States. Nobody expected such a spectacular rise from a nation that was on a verge of collapse after the death of Mao Zedong in 1976. China had just endured a gruelling decade of chaos and anarchy of the cultural revolution when the reformer faction led by Deng Xiaoping wrested the control of the Communist Party from the Gang of Four. In the subsequent decades of economic reform, China has come to rival the global influence of the United States both economically and geopolitically, therefore upsetting the post-cold

war balance of power in the world, which will constitute one of the major challenges of the 21st century.[3]

2.1. Brief History of Recent Globalisation

As globalisation has made the world economies more integrated and inter-dependent, and as large scale investments and assets in foreign countries give other countries a stake in the prosperity of other nations, the common argument goes that this makes the world much safer and less prone to aggressive competition between countries. This argument, however, omits the scope of influence that a large economy, such as China or the US, can wield over smaller economies by investing heavily in critical sectors of the economy. An analogy can be drawn to the late 19th-century practice of the European colonial powers, who often did not conquer their vast colonial empires by the sword, but gradually increased their influence through treaties with local populations followed by investing in infrastructure and natural resources and finally by gradually taking over the civilian and military control of the region, while justifying their actions by the need to protect such investments.[4]

Also, it is noteworthy to remember that by summer 1914 most of the world was divided under western spheres of influence and that the global economy was already heavily globalised and intertwined. In 1909 Norman Angell wrote his famous book, The Great

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[3] Allison, Destined for War: Can America and China Escape Thucydides's Trap?" (2017)

[4] Foreman-Peck, James. "Foreign Investment and Imperial Exploitation: Balance of Payments Reconstruction for Nineteenth-Century Britain and India." The Economic History Review, vol. 42, no. 3, 1989, pp. 354–374. JSTOR, www.jstor.org/stable/2596438. Accessed 20 Feb. 2021.

Illusion. In his book, he argues that the economic interdependence of the Great Powers is the real guarantor of the good behaviour of one state to another[5] and that the economic aspects make war between industrial nations irrational and impossible. While he was certainly correct on the irrationality of the ensuing first world war, he was sorely mistaken about its possibility as the first disastrous half of the 20th-century shows.

In the 19th and early 20th centuries, the British Empire exercised military interventions in numerous foreign countries for economic reasons under the "casus belli" of protecting British interests, such as British investments and other business interests abroad. The most famous example of these wars were the opium wars, which led to humiliating defeats for the Chinese, the cession of Hong Kong and the opening of numerous treaty ports across China, in which, under the guise of protecting their investments, the colonial powers were granted extraterritorial rights. This period of European supremacy is not forgotten in Chinese history but known by a rather thought-provoking term: "The Century of Humiliation".[6][7] The Chinese see their recent rise to the world's stage, not as anything new, but as a return to their historical position as the centre of the world. After all, before the industrial revolution, China had for centuries been economically the most prosperous region in the world.

The second world war had left Europe in ruins and the US single-handedly the largest economy on the planet accounting for almost half of the world's gross domestic product. After the war, the United States sought to create a free-market based trading system under its leadership. The old colonial powers of Europe were nearly bankrupt and heavily indebted to the US and were forced to dismantle their preferential trading blocs built

[5] Norman Angell, The Great Illusion. (1909) p. 303
[6] Scott, China and the International System, 1840-1949, (2008), p. 2
[7] The Century of Humiliation is usually seen to have lasted from the First Opium War in 1840 until the proclamation of the People´s Republic of China in 1949. -Scott

around their colonial empires as part of the terms for receiving financial aid from the United States in the form of the Marshall Plan. The beginning of this new western economic system can be placed in 1947 when 23 countries signed the General Agreement on Trade and Tariffs (GATT) in Geneva. GATT aims to promote free trade internationally by reducing tariffs and other trade barriers. The network of treaties that ensued culminating in the formation of the World Trade Organisation (WTO) aimed at creating a global trade system with integrated economies and common rules on international trade and movement of capital, leading to a more prosperous, peaceful and accountable economic world. Similarly, the founding of OECD, the economic co-operation organisation of the developed western countries has been instrumental in shaping the post-world war two global economy. China is not a member of the OECD but as its members command most of the global GDP, its policies have had a global influence.[8]

Thanks to its large industry, vast resources and sizeable population the US has greatly benefited from this system as it has opened more markets for US-manufactured goods. In addition to the aforementioned perks, its business culture and innovativeness has kept it ahead of everyone else and consecutively its economic power has made it the most influential country in world affairs, so it has been in the US' interest geopolitically to promote free trade and market-based economies world-wide. The US has not had any serious competition since the rivalling socialist treaty system fell in the late 1980s until China's unprecedented economic growth started challenging the US in the 21st century.[9]

[8] Non-Member Economies and The OECD Guidelines for Multinational Enterprises, OECD http://www.oecd.org/investment/mne/2542956.pdf
[9] Allison

The global economic integration created unprecedented growth in foreign investments. Corporations started outsourcing their production into countries with cheaper labour costs or their target markets to circumvent any remaining tariffs and to cut overseas export costs. Western businesses invested heavily in China when it started opening up by financing infrastructure projects and opening up factories in hopes of profiting from cheap Chinese labour and gaining access to massive Chinese markets.[10] Consequently, China grew richer and stronger and the Chinese gained massive amounts of excess capital, and they in turn started looking for investment opportunities around the world. Flourishing Chinese businesses bought out their competitors in the West, rich individuals invested in the booming housing markets of large European cities. Huge investments in European infrastructure, such as harbours help to integrate Europe deeper into Chinese export markets.[11]

2.2. Foreign Direct Investments in the Global Economy

After the end of the cold war, the US became the world's sole superpower and the booming technology industry in the Silicon Valley in the 1990s and early 2000's made it a global technology leader, a position which currently is challenged by emerging Chinese technology companies, most visibly by Huawei.[12] The US sees China as a threat to its global dominance across the board, from military to trade and technology and it has set

[10] Walter, Howe. Red Capitalism, p. 8-16

[11] Compatible Interests? The EU and China's Belt and Road Initiative, Svante E. Cornell, Niklas Swanström (Accessed 10 December 2020) https://isdp.eu/publication/compatible-interests-the-eu-and-chinas-belt-and-road-initiative/

[12] US-China trade war risks global technology split, Financial Times, 12 June 2019 (Accessed 18 February 2021) https://www.ft.com/content/0e6c322e-8c4e-11e9-a1c1-51bf8f989972

out to limit the increasing Chinese influence over the world. The European Union is traditionally closely aligned with the US and has also grown worried about ever-increasing Chinese influence within the Union primarily gained through economic ties and growing Chinese ownership in European industries. Chinese investments in some European countries during the euro crisis made Chinese investors large owners of crucial industries and major employers in countries like Greece and Portugal which in turn gives China political influence within the EU.[13]

The presidency of Donald Trump, the partial return of US isolationism and the trade war with China has caused a rift between the EU and the US, leaving the EU to seek a more independent course in the world. Prominent European leaders such as the French president Emmanuel Macron and the German chancellor Angela Merkel have both called for a greater independent role for the EU in international matters.[14] The European Union has always relied on trans-Atlantic partnership and with the US showing signs of withdrawing from it, many in the EU have turned to strengthen ties with China, although the attitudes towards China remain complex and politically volatile.

European and Finnish regulation is traditionally very open and welcoming towards foreign investment for its economy-boosting effect and consequently, it is a field that is very lightly regulated or limited. Recently European policymakers have scrambled to reinterpret laws and regulations so that they could use the existing legal framework to hamper unwanted investments from China and deny access to certain sectors of European markets form Chinese corporations. This includes giving a broader interpretation to such

[13] Plamen Tonchev, Polyxeni Davarinou, Chinese Investment in Greece and the Big Picture of Sino-Greek Relations, December 2017, p. 56

[14] Europe cannot rely on US and faces life without UK, says Merkel. Financial Times 28 May 2017 (Accessed 18 February 2021) https://www.ft.com/content/51ed8b90-43b9-11e7-8519-9f94ee97d996

terms as "national security" or "vital national interest", grounds on which local regulations and international treaties allow blocking foreign access to domestic markets.

The COVID-19 pandemic of 2020 has also raised concerns over over-reliance on the sustainability of global supply chains in crises, which has given a broader meaning for national security in regards to domestic production and foreign ownership. The Finnish Government intensified the screening of foreign acquisitions in the Finnish private health sector. The European Union has grown wary of foreign actors taking advantage of European crises and economic downturns. A report by Rhodium Group and the Mercator Institute for China Studies noted that Chinese investors targeted strategic commodities in European markets during previous economic crises in Europe.[15]

The European Union has also started adopting a stricter approach to China and inward investments from China. After decades of seduction by the ever more lucrative Chinese markets and warming relations, the EU labelled China as a "systemic rival" in March 2019[16] and accused it of using "*its model of state capitalism to achieve industrial and technological supremacy, all the while taking advantage of Europe's open market economy.*"[17] This change in policy towards China is a part of the larger geopolitical shift described earlier. The openness of the European Union, long heralded as one of the greatest achievements of the political union, has proved to be also one of its greatest weaknesses vulnerable to be exploited by outside state actors. This presents a major shift

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[15] A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS), Chinese FDI in Europe 2019 Update, April 2020, p. 14
https://merics.org/sites/default/files/2020-05/MERICSRhodium%20GroupCOFDIUpdate2020.pdf

[16] European Commission, EU-China – A strategic outlook, 17 March 2019
https://ec.europa.eu/info/sites/info/files/communication-eu-china-a-strategic-outlook.pdf

[17] Financial Times, EU curbs on Chinese state aid are overdue, 8 June 2020 (Accessed 10 July 2020)
https://www.ft.com/content/77ee8c92-a994-11ea-a766-7c300513fe47

to a more protectionist stance in the EU, a move that was almost unthinkable just a decade ago.

China has long been one of the largest recipients of FDI in the world thanks to its vast markets and huge labour pool. The Chinese market has become vital for many European companies, such as German carmakers and many fashion brands. This dependency has given China a huge influence in the West as angering the Communist Party might have severe economic consequences for local businesses operating in China, as can be seen in the case of Norway after a Chinese dissident was awarded the Nobel peace prize, which caused a six-year freeze in bilateral political relations with Norway and the PRC, and saw some decline in overall trade and investment activities between the countries.[18]

3. The Chinese Dilemma

China is fast developing its industry and high tech production capabilities are beginning to rival western industrial countries and this has been met with increasing concern over its potential consequences.[19] A prime example of success in this regard is Huawei, which's the market share of the emerging 5G technologies has raised alarm during the past few years. The US has grown concerned about China's rise to the world stage and recently this has manifested itself in how suspiciously the US treats Huawei. The US has

[18] Chinese Investment in Europe A Country-Level Approach, p.108, December 2017 https://www.ifri.org/sites/default/files/atoms/files/etnc_reports_2017_final_20dec2017.pdf

[19] MERICS, Made in China 2025, The making of a high-tech superpower and consequences for industrial countries, December 2016, p. 6-8, (Accessed 20 February 2021) https://merics.org/en/report/made-china-2025

issued sanctions on Huawei and has used its influence to make its allies within the European Union to follow suit. The escalating trade war and embargo on Huawei has put the EU on the fence between the US and China.[20]

In 2013 China launched its famous Belt and Road initiative, which ceremoniously is branded as the reopening of the ancient silk road. The Belt and Road initiative is a multi-trillion-dollar infrastructure development project across Eurasia and Africa. Besides its economic aspects, China sees the Belt and Road Initiative strategically imperative to ensure the protection of the vital sea routes, on which China depends upon, and by investing in overland infrastructure, to lessen its reliance on access to the sea. China sees itself at the mercy of the US as its navy and allies surround China's coast from all directions.[21] This has contributed to rising tensions and China's aggressive posturing in the region. In a possible conflict situation, China wants to avoid the fate of Germany in the First World War when the UK effectively shut Germany off from the rest of the world and starved it into submission. On the other hand, the Belt and Road Initiative might prove an opportunity for the EU to seize upon,[22] increasing mutually beneficial co-operation with China as infrastructure developments across Eurasia and subsequent economic development benefits the EU as well, and the transition from predominantly transatlantic world order back to more Eurasian centric and multipolar order might increase EU's relative influence in global affairs.

[20] MERICS, Europe's position in the US-China trade conflict: It's the exports, stupid, 25 May 2020, (Accessed 20 February 2021) https://merics.org/en/short-analysis/europes-position-us-china-trade-conflict-its-exports-stupid

[21] Rand Corporation (2018), China Belt and Road Initiative. Measuring the impact of improving transportation connectivity on trade in the region

[22] Compatible Interests? The EU and China's Belt and Road Initiative, Svante E. Cornell, Niklas Swanström (Accessed 10 December 2020) https://isdp.eu/publication/compatible-interests-the-eu-and-chinas-belt-and-road-initiative/

This system of global free-market liberalism relies on the rule of law. National governments have limited their sovereignty over private enterprise by international treaties and national laws by which they are bound. While the world has always been filled with authoritarian regimes, their influence has not been taken into account when constructing the legal framework around FDI's. The liberal democracies commanded most of the world's GDP and poor authoritarian countries did not pose a threat to this system as they could not afford to do so. Russia, the successor of the Soviet superpower has an economy smaller than Italy.[23] The trend of deregulation of international capital flows and FDI's has continued unaffected until now, when China, a country ruled by the all-powerful Communist Party, has become the second-largest economy in the world and the global market leader in many industries ranging from manufacturing to various technology sectors.

However, China has not adhered to the theory of inevitable democratisation as a result of economic prosperity.[24] The main purpose of the Communist Party of China is to stay in control and to maintain its rule over the country and as China lacks effective rule of law, many lawmakers in the West have grown concerned over the influence the Communist Party could wield over the Chinese companies operating overseas and foreign enterprises with Chinese ownership.[25] The fear is that through Chinese investments and ownership in Western countries, the Communist Party will gain the ability to interfere in the democratic processes of Western countries by using economic leverage. Simultaneously during the isolationist policies of the government of Donald Trump has undermined the

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[23] World Bank, Gross Domestic Product 2019 https://databank.worldbank.org/data/download/GDP.pdf

[24] Cai, Kevin G. "Why Does China Not Democratize Yet?" International Studies Review, vol. 12, no. 3, 2010, pp. 464–466. JSTOR, www.jstor.org/stable/40931121. Accessed 20 Feb. 2021.

[25] China's foreign influence operations in Western liberal democracies: An emerging debate, European Parliamnet Research Services Gisela Grieger, Members' Research Service PE 621.875 – May 2018 https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/621875/EPRS_ATA(2018)621875_EN.pdf

global economic system and presented China an opportunity to establish itself as the provider of stability and the withdrawal of the United States has given China a stronger hand in its bilateral trade deals with other countries and therefore has given China more and more leverage to influence the rules of global trade and economic rules.

This kind of soft power in the hands of a non-liberal government is an unheard nightmare for most Western nations. This does not require any malicious intent from the Chinese. Simply the sheer economic interest China has within the EU puts China into European interest groups, Chinese investments are a lifeline for some member states while in others the Chinese investors are large employers and have such economic effect that the democratic process turns on itself and makes it politically dangerous to anger the Communist Party of China. The ultimate fear is some sort of Finlandization towards China. Besides the political influence the Kremlin held over Finland, the Finnish economy grew heavily dependent on the preferential trade, which turned into internal political pressure to align with the eastern neighbour.

In addition to Foreign Direct Investment, Chinese financing for European projects gives China a stake in them by binding them in the terms and conditions of the financing agreement. An example of the ramifications of growing Chinese influence through financing and contracting is the acquisition of the Hambantota Port in Sri Lanka by the Chinese Government in 2015. China Harbour Engineering Company built a major port in Sri Lanka under a contract for the Sri Lankan government. This massive construction project was financed through generous financing from Chinese banks, even though Sri Lanka was already heavily indebted, and the ports profitability was questionable from the start. In 2015 the Sri Lankan government defaulted on the debt to the Chinese lenders and

agreed to hand over the port and surrounding areas to China for 99 years.[26] An analogy can be drawn to history with the strategy employed by the British and the Dutch whose empires relied on the control of maritime trade and which were secured by a network of harbours and military ports, Hong Kong and Singapore to name a few.

The attitudes towards Chinese money in Europe are conflicting. On the other hand, Chinese investments are a blessing as they create jobs and have a positive effect on many stagnating economies in the EU and on the other hand they are feared as a curse and as the figurative Trojan Horse, which lets Chinese political influence creep into European decision making. As a large amount of Chinese foreign investments is funded through direct state aid or preferential state-backed financing, such as concessional loans, it has created suspicion within the EU about Chinese motivations. State aid is prohibited in the EU by European competition law, and some prominent European politicians have called to extend this prohibition to exterior parties and increased transparency on the funding of Chinese enterprises. At the same time, Chinese investments are welcomed by European economies and in the cases of Portugal and Greece, they have proved vital for their national economies. This has caused concern in the wider Union that sizeable Chinese owned assets in an EU Member State might give China unwanted influence over its government.[27] Chinese investments are protected by European legislation and the bilateral investment treaties the EU countries have with China. The EU has long complained that European investors are not given equal treatment in Chinese markets and on some unfair practices that have been imposed on foreign investors for access to Chinese markets. Many of these issues have been addressed by the new Investment Law

[26] How China Got Sri Lanka to Cough Up a Port, The New York Times, 25 June 2018 https://www.nytimes.com/2018/06/25/world/asia/china-sri-lanka-port.html

[27] Lisbon rebuffs claims Portugal is China's 'special friend' in EU, Financial Times, 20 January 2020, (Accessed 15 September 2020) https://www.ft.com/content/862c633e-393b-11ea-a6d3-9a26f8c3cba4

in China, at least on paper. The featuring lack of rule of law in China makes it yet to be seen how it affects the real situation in the country.

As China becomes more integrated into the global economy, its laws and policies will affect the European Union. The way technology or industry leader can extend their jurisdiction almost globally is well exemplified by the United States. The US authorities can enforce its policies globally by the threat of being shut out of the American markets or being prevented from doing business with US companies. As a response, there has been an increasing amount of arguments that the EU should take a more protectionist stance in its FDI policies to prevent critical reliance on foreign suppliers and technology to ensure healthy competition. However, the return to protectionist policies and economic isolationism run the risk of undoing much of the good that globalisation has brought, such as countries having an economic interest in the prosperity of others and more incentives to find mutually beneficial solutions to issues.

4. European Regulatory Framework

Article 207 of the Treaty on the Functioning of the European Union (TFEU) established foreign direct investment as an EU competence as a part of the common commercial policy. The bilateral investment treaties in force prior to the implementation of the Lisbon Treaty would stay in force upon authorisation by the European Commission until a bilateral investment treaty between the EU and the non-EU country in question comes in force.[28] The main change in EU-China investment relations is the upcoming

[28] Treaty on the Functioning of the European Union, Article 207

Comprehensive Agreement on Investment (CAI), which will replace the 26 existing bilateral investment treaties the EU Member States, including Finland, have with China.[29]

However, the Article 4 of the Treaty on European Union (TEU) states that national security remains the sole responsibility of each Member State.[30] This creates a conflict between the Union competence over commercial policy and Member State competence over national security as they are increasingly inseparable when it comes to regulating foreign investments. Regulating and screening FDI in the EU is therefore a burden shared by both the Union and its Member States. Mere fact that national security has been invoked cannot render EU law inapplicable.[31] Furthermore, as WTO provisions are an integral part of EU law,[32] Member States do not have reliable way to regulate FDI even on national security grounds as it still has to conform to WTO and EU law and as individual Member State may cause the whole EU to be in breach of WTO obligations, the responsibility over European FDI regulation and related security issues in reality falls mostly on the European Commission to navigate through and take a leading stance in common policy to ensure an unified approach.

Foreign Direct Investments are a major part of EU trade policy. According to the European Commission: "*Foreign direct investment stocks held in the rest of the world by investors resident in the EU amounted to EUR 8,750 billion at the end of 2018. Meanwhile, foreign direct investment stocks held by third-country investors in the EU*

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[29] Official website of the European Union, EU-China Comprehensive Agreement on Investment, 13 February 2020 https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115

[30] Treaty on European Union, Article 4(2)

[31] Judgement of 6 October 2020, *La Quadrature du Net,* C-511/18, C-520/18 and C-520/18, EU:C2020791, par. 99.

[32] Case C´66/18, *European Commission v Hungary,* 6 October 2020, para 69

amounted to EUR 7,197 billion at the end of 2018."[33] Negotiating Investment treaties are, therefore, a two way street for the Union, as European investors have a large interest in accessibility and protection in foreign countries. Imposing restrictions might lead to a deteriorating situation for European investors, which makes negotiated treaties the preferred solutions to one-sided policy changes to assess the perceived fairness, transparency and equality of treatment for investments in foreign markets.

4.1. Bilateral Investment Treaty Between China and Finland

Finland has signed a Bilateral Investment Treaty (BIT) with the People's Republic of China in 2006.[34] The BIT between Finland and China is a good example of how Chinese FDIs are currently regulated and necessary to be familiar with to understand the circumstances under which China has had access to European markets. Its focus clearly is more on attracting more investments and guaranteeing the investors rights rather than protecting against unwanted investment practices.

At the time of the signing of the treaty, the Finnish government recognised improving its economic-industrial relations with the Chinese government as of utmost importance for Finnish business. At the time many major Finnish corporations such as Nokia and Kone relied heavily on growing Chinese markets and over 50 Finnish enterprises had invested

[33] European Commission, Investment info page, 7 April 2020 (Accessed 15 November 2020) https://ec.europa.eu/trade/policy/accessing-markets/investment/
[34] Bilateral Investment Treaty between Finalnd and China (Sopimus Suomen tasavallan hallituksen ja Kiinan kansantasavallan hallituksen välillä sijoitusten edistämisestä ja vastavuoroisesta suojaamisesta), 87/2006 (In Finnish)

in industrial production in China. At the same time, Chinese investment in Finland was scarce, which the Finnish government hoped this treaty would change.[35]

In the Treaty, both parties agree to promote and protect investments from the other country. In the Treaty both Finland and China pledge to provide just and reasonable treatment to investors from the other signatory country, to protect their rights and to safeguard their investments. The Treaty provides protection against arbitrary expropriation of foreign assets and other actions by a signatory of the Treaty that may undermine the ownership or economic interest of an investor from the other signatory country. Expropriation is only allowed under specific circumstances and only when the following terms are fulfilled according to Article 4 of the Treaty:[36]

a) According to the public interest
b) In due process under the national law
c) Without discrimination
d) Against reimbursement, which corresponds to the reasonable market value of the assets

The Treaty also provides reimbursement for the Investors from the other Signatory Country, who suffer losses due to civil unrest or whose investments have been appropriated or damaged by actions from local authorities.

Article 6 guarantees free transfer of assets, such as profits or maintenance fees, which are tied to the investments and fall under the Treaty.[37] Investors must be allowed to move

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[35] Suomen ja Kiinan välinen uusi investointisuojasopimus allekirjoitettiin, 2004, Jukka Savolainen, Edilex-toimitus (In Finnish) (Accessed 10 July 2020)
[36] BIT Article 4
[37] BIT Article 6

said assets between the Signatory Countries freely and without obstacles. Articles 8 covers the dispute resolution between the Signatory Countries. The disputes between the Signatory Countries will primarily be solved through diplomatic negotiations, and should they fail, through a three-man arbitration, in which both of the signatory countries appoint a single arbitrator who will in turn jointly appoint the third arbitrator as the chairman of the arbitration. The chairman must be a national of such a third-party country that has diplomatic relations with both Signatory Countries. In case the court of arbitration has not been formed within four months then either Signatory Country may request the Chairman of the International Court of Justice to make the appointments, and in case the Chairman is disqualified the authority falls to the next most senior qualified member of the International Court of Justice.[38]

Article 9 covers dispute resolution between a Signatory Country and an Investor from the other Signatory Country. The article stipulates that any disputes should primarily be resolved in a conciliatory manner between the two parties in dispute, if possible. If a resolution is not reached in this manner within three months, then the Investor is given a choice of three further actions to resolve the dispute.[39]

Firstly, the Investor may bring the dispute to be resolved by a competent court of the country in which the investment has been made. The Investor also has the possibility to cancel the court proceedings and bring the dispute to be resolved by either of the two following arbitrations as long as the court has not given its verdict on the dispute. Secondly, the Investor may bring the dispute to be resolved through arbitration by the International Centre for Settlement of Investment Disputes (ICSID), formed under the

[38] BIT Article 8
[39] BIT Article 9

ICSID Convention of 1966.[40] Thirdly, the Investor may bring the dispute to be resolved by a temporary arbitration, formed under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), which will consist of three members who will resolve the issue under the national laws of the Signatory Country involved in the dispute. The norms of the international private law and international treaties in which both Signatory Countries are a party also apply. The parties of the dispute may also agree on some other means to resolve the dispute and the verdict given by an arbitration formed in accordance with this article of the Bilateral Investment Treaty is binding on the parties of the dispute and will be carried out in accordance to the national laws.

In short, the Treaty gives protection to the Chinese investors in Finland and makes it harder to impose restrictions targeted at China. Moreover, it protects access to Finland for the Chinese investors, who are to be treated no worse than investors from third countries and grants legal protection for the investor's assets. The dispute resolution clause gives protection to the investors over arbitrary policy changes of national governments. Possible restricting measures for Chinese companies operating in Finland, such as banning Huawei from 5G markets, may be in breach of this Treaty. The Bilateral Investment Treaty does not specify national interest or security reasons as exceptions for the investment protection therein agreed upon.

[40] ICSID convention, regulations and rules, ICSID/15 April 2006 https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf

The Treaty is to be superseded by the Comprehensive Agreement on Investment which is currently under negotiations by the EU and China, for which Finland, among the other EU Member States, have given a mandate to the European Commission.[41]

4.2. Comprehensive Agreement on Investment

The CAI recognises China and the EU as important and strategic markets for each other and aims to create equal grounds for bilateral investments. Through the agreement, the EU seeks to open up Chinese markets for European investors further from what China's commitments under the World Trade Organisation provide. The European Parliament describes the objectives of the agreement as: "*The CAI is intended to go far beyond traditional investment protection to also cover market access, investment-related sustainable development, and level playing field issues, such as transparency of subsidies, and rules on state-owned enterprises (SOEs) and forced technology transfer*"[42] This is done by increasing transparency within China, ensuring fair competition for European companies and eliminating discriminatory practices and restrictions on foreign ownership in China. The European Commission states on its website the primary objectives for the Agreement being: "*Transparency, predictability and legal certainty of the investment environment are equally important. The agreement should ensure that European companies in China have proper access to information affecting their businesses and the opportunity to comment on relevant laws and regulations. It is also important to ensure*

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[41] Comprehensive Agreement on Investment, Mandate from Member States, European Commission https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/139062.pdf
[42] EU–China Comprehensive Agreement on Investment, BRIEFING International Agreements in Progress, The European Parliament

clear, transparent and objective licensing and authorisation procedures and requirements, as well as to guarantee procedural fairness and due process."[43]

The EU sees the European markets to be more open for Chinese companies than the Chinese markets are for Europeans and aims to address this lack of balance by reaching an agreement with the Chinese government. The negotiations have been going on since 2014 and both sides have reached a conclusion that the agreement will go beyond a traditional investment protection agreement to cover market access for investment and several other important issues, including clear rules on dispute resolution. The EU seeks to achieve higher levels of legal protection for European companies operating within China by reflecting the EU's reformed approach to investor-to-state dispute settlement through, Investment Court System, while still maintaining the state's right to regulate.[44] Also, access to China's public procurement markets is highly important for European investors, but as it is being negotiated under the WTO framework it is not included within the scope of the CAI. However, the developments in the negotiations on China's inclusion in the GPA are closely connected to the outcome of the CAI negotiations.

The negotiations, which had been stalling for years reached a milestone in December 2020 as the EU agreed to the agreement "in principle" after China reportedly made significant concessions on several key issues.[45] Several commentators saw the

[43] Official website of the European Union, EU-China Comprehensive Agreement on Investment, 13 February 2020
https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115
[44] EU helps protect weak firms from foreign takeovers, BBC, 17 April 2020
https://www.bbc.com/news/business-52320435
[45] South China Morning Post, EU agrees 'in principle' to an investment agreement with China. 22 December 2020
https://www.scmp.com/news/china/diplomacy/article/3114414/eu-agrees-principle-investment-agreement-china

geopolitical implications of China's eagerness to reach an agreement before Joe Biden is sworn into office in the United States and the anticipated transatlantic rapprochement further complicates EU's relations with China. The EU seems to have also conceded in some of its original demands to reach an agreement, such as dropping the demand for the binding investor court system for settling investment disputes, which would have had jurisdiction over the Chinese government and settled on a looser arbitration clause.[46]

The concluded agreement heralds an end to joint venture requirements, caps on foreign equity, the FTTs, increases transparency regarding subsidies, China will provide equal access to standard-setting bodies for European companies and importantly, China agreed to enforcement and monitoring mechanisms that EU has insisted upon. CAI also brings the SOEs under mutually agreed scrutiny and allows the EU to request information necessary to assess the behaviour of the SOEs as well as opens up many previously closed industries for European Companies and levels the unfair competition experienced earlier by European firms.[47] The conclusion of the CAI will significantly affect the future of Chinese FDI in Europe as the EU has now committed itself to this agreement which reciprocally guarantees Chinese access to the EU markets.

4.3. Finnish Regulation Regarding Foreign Investment

The EU is a free-market area where private ownership and investments are relatively lightly regulated. Foreign investors are given equal protection, and any restrictions must be based on positive law. Foreign direct investments (FDI) are generally welcomed for

[46] Financial Times, What an EU-China investment treaty would mean for companies https://www.ft.com/content/add9a111-60cc-4b39-9349-3c7db71c7682
[47] Key elements of the EU-China Comprehensive Agreement on Investment, European Commission, 30 December 2020

their economy-boosting effects and foreign investments are more often promoted rather than restricted. In Finland, mainly national security aspects may restrict foreign parties from acquiring ownership in certain assets. The most obvious restrictions for foreign investment are indeed restrictions on foreign ownership.

The main piece of legislation in Finland to regulate foreign investments is the Act on the Screening of Foreign Corporate Acquisitions (172/2012).[48] The Act sets out the grounds on which foreign acquisitions may be restricted or blocked and how they are monitored by the Finnish authorities. The Act is currently being updated to conform to the requirements of new EU regulation.[49] The Act defines the screened object as a defence industrial corporation or other forms of business that is deemed to be critical for the vital functions of the society. Article 3 sets the Ministry of Economic Affairs and Employment as the supervising authority. The Ministry is responsible for handling and authorising foreign corporate acquisitions in case they fall under the restricted category.

Article 4 covers acquisitions of defence industrial corporations, for which a preliminary approval must be acquired from the Ministry. The Ministry must approve the acquisition unless it could cause a severe threat to national security interests. The foreign owner is responsible for delivering all necessary documentation to the Ministry for evaluation. Article 5 covers other than defence, or dual-purpose, industry acquisitions for which the foreign owner can at their own initiative seek authorisation from the Ministry of Economic Affairs and Employment in order to gain legal protection for carrying on the acquisition. The Ministry may also require the foreign owner to provide all necessary information and documents regarding the acquisition to the Ministry for evaluation and

[48] Laki ulkomaalaisten yritysostojen seurannasta (172/2012)
[49] Tuija Kaijalainen, DLA Piper, The Finnish Act on the Screening of Foreign Corporate Acquisitions to be updated, 17 March 2020
https://finland.dlapiper.com/en/news/finnish-act-screening-foreign-corporate-acquisitions-be-updated

subsequent approval. The Ministry is required to issue the formal request within three months from the moment the Ministry gained knowledge of the acquisition. The Ministry has to approve the acquisition unless the foreign acquisition might pose a security threat to a vital national interest.

Article 7 states that the Finnish Government may deny approval from a foreign acquisition only if it is necessary to protect a vital national interest. Article 8 regulates the consequences of denying approval for foreign acquisition. If the approval of acquisition regarding a limited liability company is denied, the foreign owner must relinquish a number of shares so that the number of votes they command no longer exceed 10 per cent of the total votes or some other percentile of votes approved by the Ministry by an earlier decree. After the authorisation has been denied, the foreign owner may only use the number of shares that will constitute the previously mentioned number of votes in corporate assemblies. In acquisitions of other than limited liability companies, the denying of the approval voids all contracts constituting the transfer of factual ownership of the business.

The amendments to the Act came into effect on 11 October 2020. The government proposal 103/2020[50] proposed to amend the Act on the Screening of Foreign Corporate Acquisition to include the new provisions of the EU Regulation 2019/452. In addition, several other changes are proposed for national reasons. The current Act is noticeably created for another time, as its main focus is protecting the defence industry from foreign interference and ambiguous “vital national interests”. Then again, this ambiguity offers certain flexibility in the application of the law that may come useful if the governments find itself in a situation where it wants to use the legislation to curtail growing Chinese influence in Finland, but this kind of seemingly arbitrary use of the law by the screening

[50] HE 103/2020

authorities affects the predictability of investing in Finland and might increase its perceived discriminatory nature.

5. World Trade Organisation

The World Trade Organisation (WTO) is an intergovernmental organisation that regulates international trade between nations. WTO superseded and replaced the General Agreement on Tariffs and Trade in 1995 after the Marrakesh Declaration signed by 123 countries. The General Agreement on Tariffs and Trade was the key agreement regulating the global economy. The first version was signed by 23 countries in 1947 and it has been succeeded by several upgraded versions latest of which came into effect in 1994 and saw the formation of the World Trade Organisation.[51] GATT was created in the aftermath of the second world war, partially influenced by the belief that more integrated economies are less likely to wage war against each other or engage in hostile competition, an idea which also influenced the formation European Coal and Steel Community, the starting point of European integration and predecessor to the European Union.

China joined the WTO as the 143rd member state on 11 December 2001 after extensive negotiations and completing several liberalising reforms on its economy, such as separating the military from economic activities.[52] The WTO is currently under renegotiations that also began in 2001. WTO's primary goal is to set out global trading

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[51] GENERAL AGREEMENT ON TARIFFS AND TRADE 1994
https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf
[52] WTO web page, China info sheet (Accessed 20 July 2020)
https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm

rules and to remove excess barriers on trade and remove unnecessary tariffs. WTO also adversely regulates the instances where tariffs or said trade barriers can be implemented.

Global trade has changed tremendously from the signing of the first version of GATT in 1947 as the global economy has consequently become deeply integrated. The unified rule system governing international trade and free markets led to the rise of multinational corporations, which realised that investing in their target markets and establishing a presence there is much more economically viable than exporting overseas from a single country. Production chains have become very decentralised and the design process and the production of parts for consumer goods may be happening in several different countries whereas at the time when the first GATT was signed, usually the whole production chain, barring perhaps raw materials, took place in a single country and under its jurisdiction. [53] Foreign investment has existed before GATT, but the post-world war two world has seen an unprecedented increase in FDI. The treaty system gives legal protection for foreign-owned property against arbitrary expropriations by national governments and has made investing in foreign countries a safer and more viable enterprise in numerous other ways.

In the 1990s after the end of the Cold War liberal democracy and the market economy had triumphed over authoritarianism and command economy. There was a wave of optimism in the West that economic growth and economic freedom would eventually result in universal adoption of liberal Western values and global democratisation. There was even a talk about the "*end of history*" as coined by Francis Fukuyama in his famous book "The End of History and the Last Man" from 1992 in which he argues that the

[53] WTO, History of the multilateral trading system https://www.wto.org/english/thewto_e/history_e/history_e.htm

Western liberal democracy and free-market economy are the ”*the end-point of mankind's ideological evolution*” and predicts the “*universalization of Western liberal democracy as the final form of human government.*”[54] This outlook was shared by many in the West and was met with a wave of privatisation and deregulation spearheaded by the ever-growing financial industry eager to capitalise on this new era of economic freedom. China’s liberal economic reforms were seen as a part of this trend and the democratic liberalisation of China was seen as an inevitable outcome as its population becomes more prosperous and middle-classed. American investment banks advised in the reorganisation and privatisation of the Chinese State-Owned Enterprises.[55]

The West based much of their foreign policy towards China on this proposition and many were eager to include China into their international organisations such as the WTO as it was thought to speed up the process of liberalisation in China. In the negotiations preceding the membership, China was granted many concessions that many Western politicians would arguably have thought about differently had they been given the power of hindsight at the time. The democratisation of China has seen so inevitable outcome of it accepting the free trade and liberal economic principles of the WTO that few people spared thoughts on what a resurgent China, an economic powerhouse under the firm grip of the CCP would look like.

WTO currently regulates state subsidies in international trade and divides them into prohibited subsidies and actionable subsidies.[56] They generally target unfair trade practices, where another country subsidises its exports to undermine the domestic production and competition in other countries. China’s state subsidies in foreign direct

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[54] The End of History and the Last Man, Francis Fukuyama, 1992
[55] Walter, Howe. Red Capitalism
[56] WTO, Subsidies and countervailing measures (Accessed 20 November 2020) https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

investments have prompted the EU, US and Japan to seek changes to WTO rules in this regard to cover FDI's as well. A closely related multilateral agreement within the WTO framework is the Agreement on Government Procurement (GPA) which aims to ensure transparency and fairer international competition in public procurements. China is currently undergoing negotiations with the other signatories to join GPA, which would open huge public procurement markets to foreign investors and would remove another qualm in investment relations with China.[57]

The European Union issued a proposal to the WTO on Investment Facilitation in February 2020.[58] In the proposal, the EU seeks to increase transparency and predictability of investment measures and to streamline administrative procedures and requirements in investment activities between WTO members. All of these issues are also a main concern for the European Union in its negotiations for the Comprehensive Investment Agreement with China. The WTO agreements provide the legal framework for international trade which is essential for keeping the global economy in motion as they provide security and confidence for businesses engaging in global trade against arbitrary policy changes and guards them against the whims of national governments. In short, WTO aims to make the global rules of commerce as transparent and predictable as they can be.[59]

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[57] WTO, China submits revised offer for joining government procurement pact (Accessed 20 November 2020)
https://www.wto.org/english/news_e/news19_e/gpro_23oct19_e.htm
[58] EU Proposal for WTO disciplines and commitments relating to investment facilitation for development.
https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158673.pdf
[59] WTO web page, who we are. (Accessed 15 September 2020)
https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm

6. Foreign Direct Investment

6.1. Overview

Foreign Direct Investment (FDI) is defined by Statistics Finland (*Tilastokeskus*) as "*A direct investment relationship exists between a resident enterprise in one economy (direct investor) and an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor when the direct investor has control (over 50% of the voting power) or influence (from 10% to 50%) over the direct investment enterprise.*"[60] This means that a foreign direct investment usually occurs when an entity from another country acquires substantial influence on an enterprise in another country, founds a new enterprise in another country or when it expands operations in a subsidiary it already controls in another country. FDI is distinct from foreign portfolio investment as the assumes a substantial level of control over the business instead of just passively owning equity in the company.[61]

Foreign Direct Investments are highly coveted as they bring in foreign capital, increase employment and have other economy-boosting effects and thereby many, especially developed economies with slowing economic growth and increasing indebtedness have sought to remove restrictions on FDIs to invigorate their national economies. Many countries compete with each other to acquire foreign investments by deregulating their

[60] Foreign direct investment, Statistics Finland (Accessed 6 July 2020) https://www.stat.fi/meta/kas/ulk_suora_sijoi_en.html
[61] Foreign Direct Investment vs. Foreign Portfolio Investment, Nasdaq (Accessed 20 February 2021) https://www.nasdaq.com/articles/foreign-direct-investment-vs-foreign-portfolio-investment-2016-03-22

markets and implementing lenient taxation policies or other economic incentives to attract foreign enterprises into investing in their countries. For example, one of the responsibilities of the Finnish Ministry of Economic Affairs and Employment and Business Finland is to promote foreign investments in Finland.[62] On the other hand, free capital movements have raised concerns about the loss of national sovereignty and other possible adverse consequences, as multinational corporations have become too powerful for regulatory authorities in smaller economies to have power over.

The European Commission published economic data on foreign investment in the EU and its impact in 2019 Commission Staff working document on FDI in the EU. According to the data, in 2016, 3% of European companies were owned or controlled by non-EU investors representing 35% of total assets and around 16 million jobs in the Single Market area.[63] The document divides the main sources of FDI into "traditional" main investors and new investors. Main investors consist of the old advanced economies or "first world countries" such as the US, Japan, Switzerland etc. and they control some 80% of all of the foreign-controlled assets in the EU. New investors consist of the other countries, that have begun investing in the EU in recent decades, of which China stands out as the largest and most rapidly growing its share in total FDI. Several industries in the EU have remarkably high levels of foreign ownership and there has been a substantial increase in foreign state ownership of European companies. The EU has grown worried about compromised national security due to foreign government gaining substantial influence in the Union or one of its Member States if its nationals or SOEs become dominant in some key industries. Special scrutiny is placed over new and developing industries in which a pioneering innovator may quickly achieve a dominant position. The EU is also

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[62] Boosting growth through foreign investments, Ministry of Economic Affairs and Employment https://tem.fi/en/foreign-investments

[63] COMMISSION STAFF WORKING DOCUMENT on FOREIGN DIRECT INVESTMENT IN THE EU

hard-pressed for responding to government-subsidised foreign competition outperforming European companies.

All the main “traditional” investors are OECD member countries, as still in 2012 OECD countries accounted for 77% of global FDI outflows.[64] Consequently, the FDI regulation has naturally been developing in an environment where the vast majority of cross-border investments occur between countries with relatively similar economic and political systems and a high level of existing co-operation and mutual interests. The OECD´s background influence over the regulatory framework and attitudes regarding FDI should be noted to understand how China presents a fundamental shift in this environment.

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organisation that focuses on establishing international standards for improving economic performance and a wide range of other aspects focusing on improving international co-operation and policies.[65] The OECD is somewhat of a more exclusive version of the WTO as its members mainly consist of advanced Western economies and as a consequence, its work is much more focused on advancing the shared interests of the said countries. Due to its members commanding most of the world GDP[66] its policies have a global effect and even though China is not a member, the organisation studies and publishes data in Chinese economic integration into the global free-market system. The OECD acts as a forum for its members to discuss common policy, to seek

[64] OECD, FDI IN FIGURES, April 2013 (Accessed 20 February 2021) https://www.oecd.org/daf/inv/FDI%20in%20figures.pdf
[65] Articles 1-3 of the Convention on the Organisation for Economic Co-operation and Development
[66] Purchasing Power Parities and the Size of World Economies, Results from the 2017 International Comparison Program, World Bank (2020)

answers for common issues and the organisation publishes statistics and other economic studies and coordinates its members' efforts to stimulate economic progress.

The OECD maintains a Foreign Direct Investment Regulatory Restriction Index in which it evaluates the restrictiveness of a country's FDI rules by focusing on four main parameters, which are:[67]

- Foreign equity limitations
- Screening or approval mechanisms
- Restrictions on the employment of foreigners as key personnel
- Operational restrictions, e.g. restrictions on branching and on capital repatriation or on land ownership

Finland has a score of 0.019 and implements limited foreign equity limitations and screening mechanisms for foreign acquisitions under the Act on the Screening of Foreign Corporate Acquisitions (172/2012). China scores much higher in the index at 0.281 as it has traditionally wielded many forms of FDI restrictions, notably forced technology transfers and joint venture requirements with local Chinese enterprises, even though China has gradually been removing many of these restrictions.[68] These OECD statistics help conceptualise the "uneven" playing field the EU has long been concerned over in its relations with China.

[67] FDI Regulatory Restrictiveness Index, Organisation for Economic Co-operation and Development (accessed on 8 September 2020) https://www.oecd.org/investment/fdiindex.htm

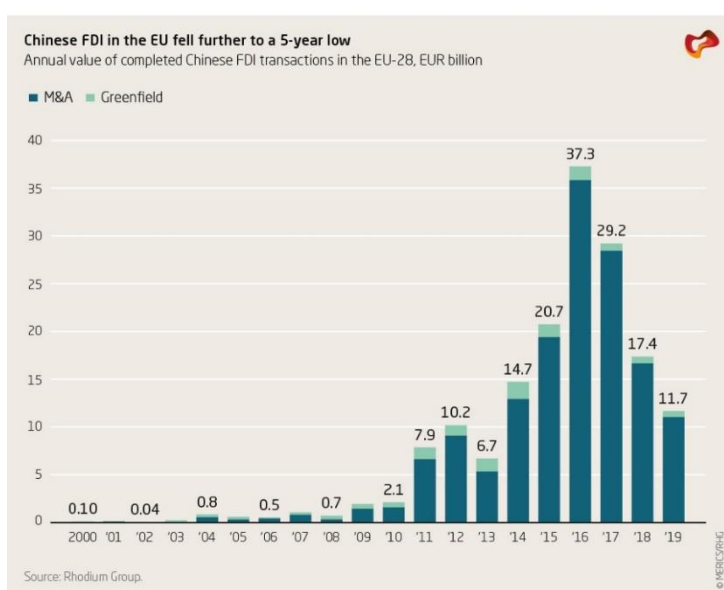
[68] OECD FDI Regulatory Restrictiveness Index, (accessed on 8 September 2020) https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX

Reasons for maintaining and implementing FDI restrictions alongside national security concerns include economic protectionism by keeping key sectors of the economy under national control and wishing to maintain the survivability of certain domestic industries from global competition.[69] A key strategy, especially for technology giants, has been to nip their competition in the bud by buying out promising start-ups and smaller competitors. Globalisation and international markets have led to a situation where the economics of the scale favour the existing companies and some countries aspiring to nurture their prospecting companies in the industry seek to protect them from foreign acquisitions.

[69] Foreign Direct Investment Restrictions in OECD Countries p. 1 (accessed 21 February 2021) https://www.oecd.org/economy/reform/2956455.pdf

6.2. Chinese Foreign Direct Investment in the EU

Chinese FDI into the European Union has been increasing the past decade and especially since 2010, and although the overall levels of FDI have been decreasing the past few years, the figure still remains considerable, as show in the following graph:[70]



Whereas the EU generally welcomes inward FDI, the large volume of FDI's coming from China and its concentration on critical infrastructure has raised concerns of foreign influence within the Union and calls for reforms to tackle security concerns whilst keeping the European markets open.[71] For decades, China has been one of the largest recipients of FDI and contributed little outward FDI until quite recently. As China opened

[70] MERICS & RHG, Chinese FDI in Europe: 2019 Update
[71] Chinese Direct Investment in Europe – Challenges for EU FDI Policy, Frank Bickenbach and Wan-Hsin Liu, 2018 https://www.econstor.eu/bitstream/10419/199017/1/CESifo-Forum-2018-4-p15-22.pdf

up, its vast markets and cheap labour attracted foreign companies to cut their production costs by moving their production to China. At the time, many European companies were in a hurry to capitalise on these reforms and subsequently, investment treaties generally were more focused on protecting and promoting western investment in China. This also gave the Chinese negotiators a somewhat better position, where they could issue limitations, such as joint venture requirements, equity caps and quantitative restrictions, on foreign investors. Now that many Chinese tech companies are seemingly taking over their western competitors, one of the biggest issues has been the common requirement of technology sharing as a price of doing business in China.[72] Besides periodic complaints, the western companies and the EU accepted this as a price of doing business in China, but as China has developed this attitude has changed and the EU has begun to demand equal access and equal treatment more firmly.

As Chinese investors have been acquiring a lot of European companies and invested in infrastructure in recent years, in some places turning Chinese investors into major employers and stakeholders within the EU. European lawmakers have increasingly raised concern about the growing Chinese influence in the EU especially after Chinese investors acquired majority ownership in several large European harbours and began buying into some vital industries of several major EU countries. Chinese technology companies, previously accused of copyright violations, have bought out their western competitors and their R&D, a homegrown example being the Finnish company Supercell, in which Tencent acquired an 84% stake in 2016.[73]

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[72] How China Obtains American Trade Secrets, The New York Times, January 2020 (accessed 10 Oct. 2020)
https://www.nytimes.com/2020/01/15/business/china-technology-transfer.html

[73] Tencent buys stake in 'Clash of Clans' maker Supercell for $8.6bn, Financial Times 2016
https://www.ft.com/content/e8f75f32-3791-11e6-a780-b48ed7b6126f

The European Union is currently reforming itself in order to bring FDI's under its clear jurisdiction and control on the single-market area. The Comprehensive Agreement on Investment is one of the key elements of this reform in regard to China. One issue that the EU has with China is the unevenness of the playing field, where Chinese investors have relatively more open access to European markets than the European investors, who are barred from owning or ownership heavily limited in many industries in China.

One of the main features the EU is pursuing in the negotiations for the Comprehensive Agreement on Investment is to make Chinese markets as open to European investors as the European markets are to the Chinese.[74] Calls have been made within the Union to increase restrictions on Chinese ownership if the Chinese are reluctant to grant correlative access to the Europeans. The key piece of regulation regarding Chinese investments in the European Union will be the Comprehensive Agreement on Investment once its negotiations will be finished.

The Chinese SOEs have been the largest outward investors in China contributing more than 70% of total Chinese FDI in the EU.[75] One of the best-known examples of the Growth of Chinese influence in Europe through investments has been the previously mentioned acquisition of a majority stake in the Piraeus Harbour and the subsequent plans to enlarge it. This has had a significant impact on Greece's troubled economy and made COSCO a major economic actor in Greece. It has been speculated that Greek economic dependence on Chinese investments might make Greek policymakers inclined to protect the interests of the Chinese government both domestically and in its foreign policy, thus

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[74] EU-China Comprehensive Agreement on Investment, 7 July 2020 (Accessed 20 July 2020) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115

[75] MERICS & RHG, Chinese FDI in Europe: 2019 Update

potentially granting the Chinese government leverage on EU decision making.[76] Chinese State-Owned Enterprises were especially active in European acquisitions during 2015-2017 when their acquisitions totalled over 48 billion euros in value.[77]

The main purpose of Chinese FDI into the EU is to promote Chinese businesses operating within the Union and to increase Chinese exports into the EU. Other reasons include buying out competitors, acquiring research and development work of European tech firms and generally expanding their portfolios. The largest investments have been made towards infrastructure projects and acquisitions as China seeks to increase its trade connections throughout Europe, Asia and Africa. Chinese State-Owned Enterprises have also shown an apt sense of opportunities as they have taken advantage of economic disturbances such as the financial crisis of 2008 and the Euro crisis of 2012 by acquiring strategic assets on discount.[78] The EU has grown wary and has taken steps to protect European assets from these kinds of foreign actions.

The peak year of Chinese FDI in the EU was 2016 and it has been decreased since. Also, the share of the Chinese State-Owned Enterprises in total FDI into the EU has declined over the past three years remarkably while private Chinese companies have increased their role in European investments. Chinese SOEs [79] Measured by cumulative value, most of the Chinese FDI in EU during this century has been directed at the developed western

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[76] European seaports and Chinese strategic influence, Frans-Paul van der Putten, Clingendael Report December 2019
https://www.clingendael.org/sites/default/files/2019-12/Report_European_ports_and_Chinese_influence_December_2019.pdf
[77] MERICS Rhodium Group COFDI Update, p. 12
[78] MERICS Rhodium Group COFDI Update, p. 14
[79] MERICS Rhodium Group COFDI Update, p. 9 and 12

European countries, especially the UK,[80] and also notably Finland, which has received almost as much Chinese FDI as France or Italy, thanks to several high-value acquisitions such as that of Supercell Oy and Amer sports Oyj.[81]

6.3. The Belt and Road Initiative

The Belt and Road Initiative (BRI) is the most ambitious infrastructure development project of this century. It includes investments in more than 70 economies across Eurasia in an effort to revolutionise the economic landscape of "the old world". It is the most recent, and the current flagship project of China´s internationalisation,[82] which it has used as a framework to create new international institutions and organisations that may come to rival some of the exiting ones.

The BRI includes a third of global trade and GDP and more than 60% of the world's population.[83] The BRI has immense implications on the future of the global economy, geopolitics and balance of power. It marks the decline of the global hegemony of the US and a shift from the contemporary transatlantic world order to a more multipolar order, increasing China's influence in global affairs. The BRI is organised through numerous institutions such as political steering agencies, multilateral cooperation mechanisms, funding institutions, platforms, think tanks and relevant state-owned enterprises. The

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[81] MERICS Rhodium Group COFDI Update, p. 11-13
[82] Kopra Sanna, Nojonen Matti, *The Elusive Norm of Climate Responsibility: The Belt and Road Initiative and COVID-19* p. 3 11 November 2020
[83] World Bank, Belt and Road Initiative Overview, 29 March 2018 (Accessed 20 November 2020) https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative

main agency overseeing the initiative is the National Development and Reform Commission (NDRC) of the State Council and it operates in close coordination with the Ministry of Foreign Affairs, the Ministry of Commerce and the Development Research Centre od the State Council.[84] The NDRC is the highest economic management agency in China, with broad authority over the economy.

China seeks to invest in both overland infrastructure and connections between Europe and Asia, which is the "Road" part of the plan and in maritime infrastructure in South-Eastern Asia and in the coastal economies of the Indian Ocean and the Mediterranean, which is the "Belt" part. The objectives of the Belt and Road Initiative was summarised by Chinese president Xi Jinping in 2017 as follows: *"China will actively promote international co-operation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international co-operation to create new drivers of shared development"*[85]

While the BRI focuses mostly on economic development, the OECD breaks its motivations down to promoting connectivity, openness, innovation, sustainable development motivations, energy and food security, more balanced regional development and improving overall economic efficiency.[86] The connectivity is arguably the most important of these in regards to the EU, as it is the main trading partner of China alongside the US. The BRI also carries substantial geopolitical implications as it ties the participating countries economically more closely to China. The BRI is divided into six economic corridors, three of which directly connect to Europe, and their main focus is to

[84] OECD, China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape (2018)
[85] OECD, China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape (2018) p. 4
[86] China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape

increase rail and harbour connectivity. Large Chinese investments in major European ports and other infrastructure projects are a part of this plan. These projects will have a major economic impact on the countries they are located in and will have a profound effect on the European Union as they pose a major shift in the geostrategic connectivity and balance towards more southern and eastern parts of the Union.[87]

Chinese acquisitions in the European harbour infrastructure are probably the most well-publicised BRI related projects in Europe. More importantly, the 17+1 has been at the centrepiece of China's future infrastructure investment strategy in Europe. The 17+1 refers to an initiative by the Chinese Ministry of Foreign Affairs to promote relations and increase investments between China and 17 Central and Eastern European countries.[88] Critics have raised concern that the 17+1 and growing Chinese influence is harming the European integration and threatens to internally divide the EU as many of the Eastern EU members that are part of the format are still in the process of integration and are economically generally less developed than majority of the older members. The format also includes several non-EU countries in the Balkans.

The European Commission has been critical of this type of bilateral co-operation with China and in 2016 issued a joint communication to the European Parliament where it voiced its concern about the format as follows: "*When Member States conduct their bilateral relations with China – whether one-on-one or as groups of countries such as the 16+1 format – they should cooperate with the Commission, the EEAS and the other Member States to help ensure that aspects relevant to the EU are in line with EU law, rules and policies and that the overall outcome is beneficial for the EU as a whole.*"[89]

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[87] DIRECTORATE-GENERAL FOR INTERNAL POLICIES, European Parliament, The new Silk Route - opportunities and challenges for EU transport

[88] 17+1 was previously known as 16+1 before Greece joined in 2019

[89] Elements for a new EU strategy on China, European Commission 2016

Other than investing in corporate acquisitions and funding their expansion and development, a typical BRI infrastructure development project is often organised through a contractual arrangement that involves funding in a form of a concessional loan from a Chinese state-owned bank to the recipient government and awarded the execution of the development project to a Chinese SOE, which generally uses Chinese labour and materiel and often include tax exemptions for the contracting company.[90] This type of arrangement might offer lesser impact on employment and direct economic impact on the recipient country, and especially in the case of smaller economies the large debt financing may result in substantial increase in national debt and affect financial sustainability. Also, there are increased concerns for transparency as the whole operation is executed by Chinese state-owned actors. Sustainable European participation in the BRI requires the realisation of the Comprehensive Investment Agreement to ensure the transparency and compliance with international standards. On the other hand, according to data published by the Ministry of Commerce of the PRC, Chinese enterprises abroad paid USD 56 billion in taxes and employed over 2 million foreign employees in 2019, which corresponds to roughly 60% of total employees in Chinese companies outside of China.[91] While the proportion of local employees remain relatively low in comparison to typical Western OFDI statistics, the positive economic impact is considerable for the recipient countries, as infrastructure development stimulates the local economy.

BRI projects are not however tied to any specific investment and project development arrangements are made individually for each project. Countries with more strategic importance in the scope of the BRI and stronger economies have better leverage on the negotiations and better ability to look after their overall interest, which makes it important

[90] Eder, S. Thomas, Mardell, Jacob, Belt and Road reality check: How to assess China's investment in Eastern Europe, 10 July 2018
https://merics.org/en/analysis/belt-and-road-reality-check-how-assess-chinas-investment-eastern-europe
[91] Ministry Of Commerce People's Republic Of China, Jointly Issue the Annual Statistical Communiqué of China's Outward Foreign Direct Investment, 18 September 2020

to have a clear Union-wide framework and common agenda for Member States engaging in the BRI.

6.4. Huawei and 5G

5G is a term for the next stage of development of mobile networks based on wireless high-frequency radio waves that are said to fully enable the Internet of Things and automatisation on a grand scale.[92] 5G is expected to be "the next big thing" in telecommunications, and once implemented, to have similar revolutionary effects on society as smartphones and the internet had. The largest provider and developer of 5G solutions and infrastructure is the Chinese telecommunications giant Huawei and the geopolitical implications of China becoming the future technology leader has led to the US and several other western countries taking a hard stance on Huawei by restricting its access to their markets and lobbying other western countries to follow suit. The European Union has long had unresolved issues on Chinese practices towards incoming FDI. 5G is a good example of how international politics and old fashioned strategic security considerations play a large role[93] in the global regulatory network regarding trade and investment, even if the world has been seemingly moving towards a more open and globalised free-market environment, where politics is more detached from the privatised economy.

[92] Qualcomm website, What is 5G? (Accessed 28 September 2020) https://www.qualcomm.com/invention/5g/what-is-5g
[93] The Economist, America's war on Huawei nears its endgame 18 July 2018. Accessed 23 February 2021 https://www.economist.com/briefing/2020/07/16/americas-war-on-huawei-nears-its-endgame

A common practice, especially in the past was to force western companies to form joint ventures and to share technology with Chinese corporations in order to gain access to Chinese markets and labour pool.[94] While this was previously accepted as the price of doing business in China, many Chinese companies are now overtaking their western competitors has increased pressure to call out these practices and seek some more satisfying resolution for the Western companies. Restricting Chinses technology and telecommunications companies access to western markets can partly be seen as a negotiation tool or a method to apply pressure on the Chinese government to concede to better treatment for European companies in China, which is one of the main objectives of the EU in its foreign relations with China.[95]

The official concern for the US and its allies in Europe is that if the 5G infrastructure is built by Huawei, it might allegedly enable Chinese state espionage through technical backdoors and other built-in surveillance capabilities,[96] an accusation that the company has denied. Furthermore, the more likely reason is that the US does not want to become path dependent on a system architecture under the control of its main geopolitical rival in such a vital field of technology. It is also a question of international competition law, Huawei is already the world's largest producer of mobile network solutions and as the example of US technology giants such as Google or Microsoft shows that technology companies that seize the initial markets for new technology have a natural tendency to snuff out their subsequent competition by their sheer size an through "buy and kill"

[94] Red Capitalism, Walter, Howe, 2010 p.12
[95] European Commission, Trade Policy, China. Accessed 23 February 2021
https://ec.europa.eu/trade/policy/countries-and-regions/countries/china/
[96] Financial Times, Is Huawei compelled by Chinese law to help with espionage? 5 March 2019 (Accessed 23 February 2021)
https://www.ft.com/content/282f8ca0-3be6-11e9-b72b-2c7f526ca5d0

tactics.[97] The dominance of Huawei in mobile networks is a concern for the Western countries as they would become reliant on Chinese technology in a critical sector of the society, and that could give China immense ability to influence the direction to which the industry moves, forcing other countries to follow suit, giving China an effective political monopoly over the industry, much like the US has been able to do due to it presiding over the tech giants from Silicon Valley.

Huawei is an entirely Chinese owned company with its headquarters in Shenzhen, China, with the Finnish Nokia and Swedish Ericsson being its main competitors on the 5G development. The United States sees Huawei's market share on emerging 5G markets as a threat to its national security and similar concerns have been raised amongst the US allies within the European Union. Huawei serves as a prime example of the geopolitical implications of the US being afraid that the Chinese will start dominating in global technology markets.[98] Noteworthy here is that the US' position as the world's technology leader has given it the ability to issue industry standards and regulate the markets. Huawei's rise is threatening to give an edge to the Chinese. The US has already banned Huawei from building 5G networks within the United States based on national security concerns and espionage accusations.[99] Many European countries are currently considering similar actions against Huawei.

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[97] Financial Times Big Tech's 'buy and kill' tactics come under scrutiny 13 February 2020 (Accessed 23 February 2021)
https://www.ft.com/content/39b5c3a8-4e1a-11ea-95a0-43d18ec715f5

[98] The Wall Street Journal, The Great U.S.-China Tech Divide, 20 January 2020. (Accessed 23 February 2021)
https://www.wsj.com/articles/the-great-u-s-china-tech-divide-11579542441

[99] Huawei and ZTE classified as security threat to US
https://www.ft.com/content/943f8c85-58f7-467b-b774-9963dfaa91b5

On 14 July 2020, British Prime Minister Boris Johnson announced a ban on Huawei 5G networks in the United Kingdom and will remove all Huawei hardware from its 5G infrastructure by 2027.[100] Although the United Kingdom is no longer an EU member state, its decision increases the pressure on the EU member states to show unity and adhere to the hard-line policies of the US and the UK in regards to Huawei and undoubtedly towards other Chinese companies in the future. Several EU member-states have also implemented or contemplate limitations on Huawei hardware in their 5G infrastructures. The European Commission has sought to form a Union-wide policy towards 5G. In contrast to the British approach, which includes removing Huawei infrastructure and infringed on Huawei's investment protection, the French ban focuses more narrowly on certain sectors of the infrastructure network deemed to be of vital national security interest, this is more in line with the existing treaty regulations with China and is a more reserved approach to curtailing increasing Chinese influence.[101]

While the restrictions imposed on Huawei primarily focus on their 5G infrastructure implementation, they are not strictly focused on imposing restrictions on FDI's in the telecommunications sector but they severely affect Huawei's current assets within the EU, such as local Huawei subsidiaries and potential future investments in their operations on the European market. Denying access to the markets makes expansion in said jurisdiction rather undesirable. The sanctions on Huawei displays the fears Western countries have about China becoming a technology leader in such a critical industry. Although suspicion about potential espionage, a far more consequential would be the Chinese power to extend its jurisdiction over everyone who relies on Huawei's products

[100] UK orders ban of new Huawei equipment from end of year, Financial Times (Accessed 23 February 2021)
https://www.ft.com/content/997da795-e088-467e-aa54-74f76c321a75
[101] Huawei will not be prevented from investing in France: Le Maire
https://www.reuters.com/article/us-france-huawei-idUSKCN24M0S6

or technology by the way of sanctions in a very similar fashion to how the US is currently trying to curb Huawei.

In January 2020, the European Commission endorsed the joint toolbox of risk-mitigating measures agreed by the Member States of the European Union to address security risks related to the rollout of 5G mobile networks.[102] The Toolbox is a response to 5G network security concerns in the European Union, in particular regard to suspected ties between Huawei and the Chinese government, although not explicitly mentioned. The Toolbox includes FDI screening framework to protect the European 5G supply chain and some of the strategic measured have raised legal concerns regarding their implementation and possible contradictions to key EU principles and international law and states: "*Specifically, a ban that is de facto based on the supplier's country of origin would violate the Most-Favoured Nation principle and National Treatment principle (Article III:4 of the GATT), which are key principles under World Trade Organization ("WTO") law (Article I:1 and Article III:4 of the GATT) and Bilateral Investment Treaties ("BITs").*"[103]

The legal evaluation of the actual security risks posed by Huawei's 5G infrastructure is crucial as adhering to the rule of law, the ban must be legally justifiable As the existing legislation and the BITs protect Huawei's right to invest and to have legal protection for their investments, the limitations imposed must be based on verifiable security risks. Also, the scope of the limitations comes into question, whether it is sufficient to issue

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[102] Secure 5G networks: Commission endorses EU toolbox and sets out next steps, EU Commission Press release
https://ec.europa.eu/commission/presscorner/detail/en/ip_20_123
[103] Jones Day, Member State Implementation of the EU 5G Toolbox: Legal Issues Raised (2020)

limitations to the segments of the infrastructure that could compromise national security or is a nation-wide blanket ban legally justifiable.

7. The Party, State and Government Entities

The Chinese state is very bureaucratic and consists of a huge number of various agencies in multiple levels of hierarchy, tasked with overseeing and regulating their appropriated domains. The CCP is officially a separate entity from the state but is deeply integrated with all government agencies, State-Owned Enterprises and larger private enterprises.[104] The CCP maintains political control over the state to such an extent that the lines between the Party and the state often gets blurred. The State Council of the PRC is the central government of China, headed by the premier, Li Keqiang. The State Council consists of 26 departments, which include all the ministries, a few commissions, the National Audit Office and the People's Bank of China, China's central bank.[105]

[104] Grünberg Nis, Drinhausen Katja, The Party leads on everything, MERICS, 24 September 2019. Accessed 23 February 2021 https://merics.org/en/report/party-leads-everything

[105] China's State Organizational Structure, Congressional-Executive Commission on China (accessed on 15 February 2021) https://www.cecc.gov/chinas-state-organizational-structure

7.1. State-Owned Enterprises and National Champions

Chinese State-Owned Enterprises or SOEs are a dominating feature in the Chinese economy. To an extent that China has been said to practice state-capitalism. SOEs have played a critical role in China´s globalisation and have been major overseas investors in the past two decades.[106]

The two great reformers of the Chinese economy Zhu Rongji and Jiang Zemin adopted the policy of "grasping the large and letting the small go" [107] regarding the country's vast and unproductive state industries. China dismantled its old socialist command economy by market reforms and privatisation of many large, uncompetitive SOEs while still maintaining control over those sectors deemed necessary for the CCP to maintain control over the Chinese economy. The SOEs operate on multiple levels in China's economy and are roughly divided into central, nationwide massive SOEs, and smaller, provincial local SOEs. [108]

Those SOEs that remained in state-ownership were reorganised and reformed into competitive entities along lines of international accounting, legal and financial requirements with the help of western legal and financial advisors and Investment banks in the 1990's.[109] In addition to the business administration reorganisation, these reforms

[106] Chinese FDI In Europe: 2019 Update, A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS)
[107] Hsieh, Chang-Tai, and Zheng Song. "Grasp the Large, Let Go of the Small: The Transformation of the State Sector in China." *Brookings Papers on Economic Activity*, 2015, pp. 299. *JSTOR*, www.jstor.org/stable/43684105. Accessed 19 Feb. 2021
[108] Hsieh, Chang-Tai, and Zheng Song. p. 295-319
[109] Walter, Howe, Red Capitalism p. 10

included partial privatisations and listings in both domestic and foreign stock exchanges, all the while the CCP retained a varying level of control over them through various methods ranging from full ownership to minority shareholder status with voting majority. The SOEs have since grown into dominant actors in many sectors of the global economy with 91 out of 124 total Chinese companies listed in the fortune 500 being under state ownership.[110] Many of them can credit their status for being legal or effective monopolies in the second-largest economy in the world. The SOEs have also played a dominant role in Chinese outbound FDI (OFDI), and by the end of 2019, China's total OFDI stock amounted to USD2.2 trillion, third-largest after the United States and the Netherlands, 40% of which is held by local SOEs.[111]

Most of the SOEs are administered by the State-Owned Assets Supervision and Administration Commission of the ruling State Council, or SASAC, which is a ministerial-level government institution under the direction of the State Council and Central Committee of the CCP.[112] The SOEs have a common business structure and their administration is mostly tasked with ordinary business administration as in making a profit for the shareholders and conducting a sensible business on somewhat market terms. SASAC appoints the members of the board and the top brass and supervises that the governmental interests are taken into account in the conduct of the business.

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[110] The Biggest But Not the Strongest: China's Place in the Fortune Global 500, Scott Kennedy, 18 August 2020 https://www.csis.org/blogs/trustee-china-hand/biggest-not-strongest-chinas-place-fortune-global-500

[111] MINISTRY OF COMMERCEPEOPLE'S REPUBLIC OF CHINA, MOFCOM, SAFE, NBS Jointly Issue the Annual Statistical Communiqué of China's Outward Foreign Direct Investment. 18 September 2020

[112] State-owned Assets Supervision and Administration Commission of the State Council, What we do? http://en.sasac.gov.cn/aboutus.html

The Chinese banking sector is also largely state-controlled. China's largest banks and the main financiers of Chinese companies, the big four, are all state-owned or at least controlled by the central government.[113] The Bank of China, Industrial and Commercial Bank of China, Agricultural Bank of China, China Construction Bank and the Bank of Communications constitute a major share of China's total credit intermediation. These state-owned banks do not operate strictly on market terms but act as an inexpensive source of credit for government-sanctioned projects and businesses. The banks are managed by the sovereign wealth fund of China, China Investment Corporation, which reports directly to the State Council and the Ministry of Finance. China only recently in 2020 opened its securities markets for foreign competition,[114] but as the massive banks have already cemented their position in the Chinese lending markets, it is unlikely to change the situation drastically.

The SOEs and the state-owned banks have a critical role[115] in the ambitious Belt and Road Initiative by which China seeks to reorganise global trade by recreating the old silk road by investing in massive infrastructure development projects across Eurasia.[116] The SOEs are heavily involved in these projects and many of the large acquisitions made in the EU past decade have been part of this initiative. A good example is the acquisition of the Greek port of Piraeus by the Chinese State-owned shipping and harbour giant Chinese

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[113] Walter, Howe, Red Capitalism p.27-56

[114] China to allow foreign ownership of securities companies in 2020, Financial Times 2019 https://www.ft.com/content/802bf52e-9c7b-11e9-9c06-a4640c9feebb

[115] Sze Norman, Wu Flora, Deloitte, *One Belt, One Road" The Internationalization of China's SOEs* https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/about-deloitte/dttp/deloitte-cn-dttp-vol5-chapter2-en.pdf

[116] Xu Sitao, Chen Lydia. (2018) Embracing the BRI Ecosystem in 2018 —Navigating pitfalls and seizing opportunities. https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/ser-soe-br/deloitte-cn-bri-embracing-the-bri-ecosystem-in-2018-en-180403.pdf

Ocean Shipping Company, or COSCO in 2016. The Chinese government plans to turn the harbour into the main destination of Chinese produced goods destined to the European markets and has announced large investments in the harbour facilities and infrastructure in the Balkans.[117]

Despite the large state-control over the economy, China's economy is very regionalised with the state sector dominant in most of the provinces. This is in sharp contrast to the rich coastal provinces, namely Shanghai, Jiangsu, and Guangdong, which house the majority of China's private financial and technological industries. The Chinese state-controlled sector is often called an economy within an economy, nurtured in a cocoon safe from threatening competition,[118] and while its share of China's total economy has shrunk, it still maintains a predominant position in China. The role of the SOEs in the Chinese economy has decreased substantially over time as has their status over the private sector, accordingly, resulting in the fast growth of the latter. Nevertheless, the CCP is facing a dilemma of further opening up the economy or maintaining control over it through the SOEs that dominate the vital sectors of the economy.[119] Partly in response to this, the CCP has adopted the practice of elevating several private enterprises to the status of National Champion.

The National Champions are private Chinese enterprises that are given preferential status by the CCP in the form of advantageous policies and access to cheap state-controlled

[117] Reuters, China, Greece agree to push ahead with COSCO's Piraeus Port investment, 11 November 2019 https://www.reuters.com/article/us-greece-china/china-greece-agree-to-push-ahead-with-coscos-piraeus-port-investment-idUSKBN1XL1KC

[118] Walter, Howe, Red Capitalism p. 82-93

[119] McGregor, The Party

credit in return for supporting the political ambitions of the government and advancing the interests of the Communist Party in the Chinese society and allegedly,[120] abroad. These National Champions include such Chinese giants as Huawei, Alibaba and Tencent.[121] National Champions are a useful tool for the CCP to advance Chinese influence across the globe without the direct participation of the government. Recently many Westerners have become worried about the influence the CCP might wield through the National Champions if they are allowed to establish themselves firmly into the Western economies and infrastructures. The CCP exerts influence over the private sector through various means. Good relations with the Party have traditionally been very beneficial, if not necessary for private business in China and their relationship has been sometimes described as symbiotic.[122] Private business owners have been increasingly recruited into the Party after the turn of the century and majority of Chinese private enterprises have official Party branches in them.[123] From the western point of view, the CCP presence in Chinese private enterprises raises questions about the level of state control over their investment activities abroad and blurs the line between the state-owned and private investors.[124] A private company, especially one with the status of a National Champion often presents similar concerns as a SOE.

[120] Chinese telecommunications products and software have been under accusations by US administration for alleged espionage and other security concerns

[121] McGregor, The Party

[122] Yan, Xiaojun, and Jie Huang. (2017) Navigating Unknown Waters: The Chinese Communist Party's New Presence in the Private Sector." China Review, vol. 17, no. 2, p. 40. JSTOR, www.jstor.org/stable/44440170. Accessed 23 Feb. 2021

[123] Yan, Xiaojun, and Jie Huang. p. 38-44

[124] Chinese Communist party asserts greater control over private enterprise, 29 September 2020, Financial Times. Accessed 23 February 2021 https://www.ft.com/content/582411f6-fc3b-4e4d-9916-c30a29ad010e

8. China's Integration into the Global Economy

8.1. Thirty Years of Reform

By the 1980s the West's technological superiority over the socialist countries had become unmistakable. Booming microchip and telecommunications industries in Japan and the US made the technological and economic gap between them apparent. This wasn't lost on the Chinese Communist Party and they approached their issues with the stagnated economy mainly by implementing market reforms and focusing on liberalising the economy. China started liberalising its economy in the aftermath of the cultural revolution, but Deng Xiaoping's southern tour in 1992 can be seen as a tipping point in China's transformation from a socialist command economy into what is called a socialist market economy.[125] Contrary to popular belief, China did not embrace western liberal values or even liberal economic principles in their entirety. Chinese leadership realised the need for liberal market reforms but sought to implement them in a way that would not threaten the authority of the Communist Party of China.[126]

By adopting the policy that was coined by the former Chinese premier, Zhu Rongji as "grasping the large and letting the small go",[127] the Communist Party gradually allowed more private enterprise while maintaining control over industries it sees vital for

[125] Walter, Howe. Red Capitalism p. 23
[126] Walter, Howe, Red Capitalism p. 8
[127] Hsieh, Chang-Tai, and Zheng Song. "Grasp the Large, Let Go of the Small: The Transformation of the State Sector in China." *Brookings Papers on Economic Activity*, 2015, pp. 299. *JSTOR*, www.jstor.org/stable/43684105. Accessed 19 Feb. 2021

maintaining control. While some western observers initially saw this as gradual abandonment of communism, the more truthful insight came from the former director of the China Development Bank, Chen Yuan who famously said to an American political scientist that “We are the Communist Party and we decide what communism is.”[128] That reflects the main principle on which the CCP operates. Its first and foremost objective is to maintain the Party’s control over Chinese society and the leadership of the Party is required by the first article of the Constitution of the People’s Republic of China.[129]

China´s globalisation was a two-way street. It opened the world for the Chinese and China for the rest of the world. In addition to the WTO membership, the reform period saw China joining several major international organisations and conventions regulation global commerce and developed its domestic regulation to conform to the rules of these international organisations. Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention[130] in 1987[131] was a major step in China´s integration into the global economy. Recognising foreign arbitration awards was a key issue for attracting foreign investors and creating predictability in international commerce with China.

China´s integration into the global economy is a continuing process, most recently China signed a new trade agreement with Asia-pacific countries called the Regional

[128] McGregor, The Party p. 60
[129] The Constitution of the People’s Republic of China http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml
[130] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
[131] New York Arbitration Convention, Contracting States, China. Accessed 23 February 2021 https://www.newyorkconvention.org/countries

Comprehensive Economic Partnership[132] and the Comprehensive Agreement on Investment with the EU.

8.2. Foreign Investment Law of China

Treatment of foreign investments in China is relevant for the European regulatory context as investment protection is increasingly becoming reciprocal and the level of European access to Chinese markets affect directly the investment treaty negotiations and changes in the European regulatory field, regarding the Chinese. Bilateral investment access is heavily political and inherently transactional in nature. Understanding the legal framework in which European investors have to operate in China is necessary for a comprehensive view of the developments in the respective field of law in Europe.

China used to regulate inward FDI through “Foreign Investment Catalogues” published by the Ministry of Commerce of the PRC. In the Catalogue, the Ministry classified different industries to be “encouraged,” “restricted,” or “prohibited” for purposes of access to foreign investments. Since then, China has moved using a “Negative List” where prohibited or restricted industries are included. In 2019 this list included 40 industries, where foreign ownership was limited or prohibited altogether.[133] On 1 January 2020, The Foreign Investment Law of China came into effect.[134] The New law embeds the Negative List into law and the Ministry of Commerce is currently revising the list to conform to

[132] Regional Comprehensive Economic Partnership Agreement, Accessed 23 February 2021 https://rcepsec.org/legal-text/
[133] K&L Gates, CHINA’S ‘NEW’ FOREIGN INVESTMENT LAW, 16 March 2020 https://www.klgates.com/The-New-Foreign-Investment-Law-of-China-03-16-2020
[134] Foreign Investment Law of the People's Republic of China, MOFCOM http://mg2.mofcom.gov.cn/article/policy/China/201909/20190902898870.shtml

the new requirements of the law. This brings the List under the supervision and approval of the State Council of PRC, instead of the earlier, ministerial-level oversight.

The Negative List has steadily shrunk in size, as China steadily opens up more of its industries to foreign investors, but China still maintains foreign equity limitations and complete bans on foreign ownership in several key industries in the country, one of which is the telecommunications industry, where foreign ownership was limited to 50% still in 2017.[135] Removing these restrictions is a major issue for the EU and US in their trade and investment treaty negotiations with China, and this has arguably led to easing of restrictions in many sectors, the latest of which being in securities, futures and fund management firms,[136] it still maintains many restrictive measures to keep foreign influence and acquisitions away from the industries in which China seeks to promote their domestic enterprises.

Notably, within China the foreign equity restrictions vary, especially in the Free Trade Zones and Special Economic Areas, such as Shanghai, where consequently most of Foreign Investment is located. This is combined with many restrictions on foreign companies, especially in the technology industry, to operate at all in China. None of the American internet giants is allowed to operate in China, partly for security reasons, such as maintaining control over China's internet, and, allegedly, partly for keeping out the foreign competition from Chinese companies in their vast domestic markets. This has

[135] China to boost foreign direct investment – Limits on foreign equity stakes in Chinese enterprises to be lifted. KPMG, China Tax Alert- Issue 23 (2017) Accessed 23 February 2021 https://home.kpmg/cn/en/home/insights/2017/08/china-tax-alert-23.html

[136]South China Morning Post, China to scrap foreign ownership limits in securities, futures and fund management firms next year in apparent trade-war concession, 11 October 2019 https://www.scmp.com/business/companies/article/3032612/china-scrap-foreign-ownership-limits-securities-futures-and-fund

undoubtedly been a successful strategy in ensuring the evolution of the domestic technology industry, as can be seen in the rise of Chinese social media giants, like Weibo and TikTok.[137]

The Foreign Investment Law will replace existing laws on completely foreign-owned enterprises, Chinese-foreign contractual joint ventures, and Chinese-foreign equity joint ventures.[138] The law was rushed through in three months since it was brought to the agenda by Chinese legislators, which is remarkable. The new law is a move towards a more open and foreigner-friendly investment environment in China as it addresses many of the earlier complaints made by western companies and governments. It provides equal treatment of foreign investment, grants foreign investors equal protections, raises them on a more level playground with domestic investors.

Foreign businesses and government have long complained about intellectual property rights protection, forced technology transfers and the treatment of foreign companies in public procurements in China The new law tackles all these issues, and seemingly puts a complete ban on forced technology transfers.[139] The new law may help to create a better legal environment for foreign investments and investor protection by making legal remedies and access to justice more attainable. Above all, the new, unified law

[137] McKinsey & Company, Understanding social media in China, 1 April 2020 https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/understanding-social-media-in-china#

[138] China's Foreign Investment Law and related regulations mark a new era for foreign investment in China, Baker McKenzie FenXun, (2020) https://www.bakermckenzie.com/-/media/files/insight/publications/2020/01/client_alert__fil_implementing_regulations.pdf

[139] ibid.

streamlines Chinese regulation on foreign investments and makes it easier to understand, thereby making doing business in China easier and more predictable.[140]

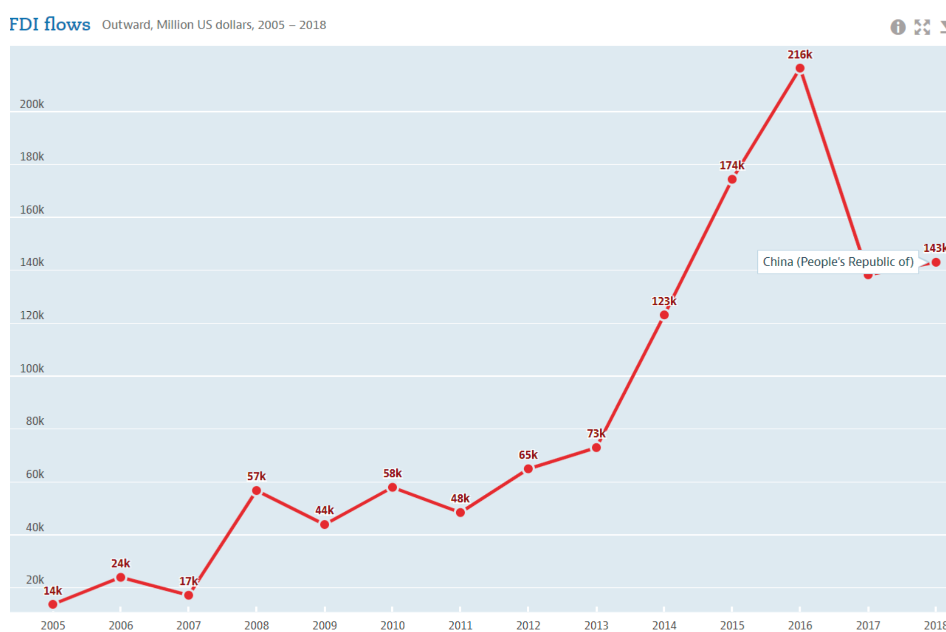
As a critique to the new law, western observers point out the general nature and the ambiguousness of the new law, and the fact that it was rushed through the legislative process in three months, implying that it was made for political purposes and to act as a detente in the current US-China trade war and that its wording is too vague to grant the advertised improvements to the overall situation. As Stephen McDonell commented on the new law on BBC: "*Many in the business community in China see this law as a kind of sweeping set of intentions rather than a specific, enforceable set of rules, he says. They fear it could be open to different and changing forms of interpretation.*"[141]

[140] China's New Foreign Investment Law: A Backgrounder, Qian Zhou, 17 October 2019 (Accessed 15 November 2020) https://www.china-briefing.com/news/china-new-foreign-investment-law-backgrounder/

[141] China foreign investment law: Bill aims to ease global concerns, BBC, 15 March 2019 (Accessed 15 November 2020) https://www.bbc.com/news/business-47578883

8.3. The Go Out Policy

The Go Out, or Go Global, policy is a strategy adopted by the Chinese government under the supervision of MOFCOM in 2000 to encourage Chinese enterprises to investment abroad at the turn of the century. Like most other new policies, this was also spearheaded by the SOEs, which were given the first opportunities to invest overseas.[142] Private enterprises were given the permission to invest abroad in 2003.[143] The following chart shows the growth of Chinese OFDI since 2005:[144]



[142] Zakic Katarina, Radisic Bojan, (2017) The Results And Challenges Of Chinese "Go Global" Policy p. available at: https://www.researchgate.net/publication/321625301_THE_RESULTS_AND_CHALLENGES_OF_CHINESE_GO_GLOBAL_POLICY

[143] Zakic Katarina, Radisic Bojan, p. 38

[144] OECD FDI flows data, Source: Benchmark definition, 4th edition (BMD4): Foreign direct investment: financial flows, main aggregates https://data.oecd.org/pinboard/4vrL

The Go Out policy has been a continuing project ever since its inception. Premier Wen Jiabao summarised its aims in the annual report to the National People´s Congress on 15 March 2011: *"We will accelerate the implementation of the 'go global' strategy, improve relevant support policies, simplify examination and approval procedures, and provide assistance for qualified enterprises and individuals to invest overseas. We will encourage enterprises to operate internationally in an active yet orderly manner. We will strengthen macro guidance over overseas investments, improve the mechanisms for stimulating and protecting them, and guard against investment risks."*[145] The policy is a concentrated effort by the central government to encourage SOE and private investments abroad and it has been supported by active diplomacy by the government to facilitate access to foreign markets.[146] The Go Out policy goes out to demonstrate how the economy is firmly under state guidance and it has been pivotal in China´s growing investments in Europe.

9. Recent Developments

9.1. Made in China 2025

Made in China 2025 is a strategic plan by the NDRC to transform China's manufacturing industry from the world's factory into global technology leader. The plan seeks to upgrade several prioritized sectors of the Chinese industry by improving its manufacturing efficiency and promoting Chinese brands by 2025. Unlike China's previous plans to enhance its manufacturing sector, Made in China 2025 focuses primarily on intellectual

[145] Davies Ken, China Investment Policy, and update. OECD Working Papers on International Investment 2013/01 p. 35 https://www.oecd.org/industry/inv/investment-policy/WP-2013_1.pdf

[146] ibid. p. 36

property, and investing in research and development. The other aspect of Made in China 2025 is to make China less reliant on foreign technology. That reliance has become all too apparent in 2020 as US banned exports to Huawei and China's largest semiconductor manufacturer Semiconductor Manufacturing International Corporation (SMIC) in 2020. China has a large domestic semiconductor industry, but it is reliant on American software, manufacturing equipment and more sophisticated chipsets.[147] US dominance in global semiconductor industry is a good example on how a technology or industry leader can extend its jurisdiction over foreign countries, as non-US companies, even European and domestic Chinese companies, risk being cut off from technology or material that is indispensable for their business and have to adhere to US policies and laws.

Made in China 2025 is a fundamental challenge in China´s industrial strategy and it has profound impact on future Chinese investment activities in Europe. China is becoming more directly challenging the corner stones of European economies with its rapidly growing car manufacturing sector and other domestic high complexity production capabilities. The strategy specifically targets acquiring foreign R&D to boost domestic industry in China.[148]

As a part of this plan, China has implemented measures to attract foreign investment in these sectors but Chinese investors have also made large investments overseas, from acquiring smaller companies for their immaterial property to simply buying the existing industry leader in the field. The SOEs have been at the core of these overseas acquisitions

[147] Financial Times, China's biggest chipmaker SMIC hit by US sanctions, 27 September 2020 https://www.ft.com/content/7325dcea-e327-4054-9b24-7a12a6a2cac6

[148] Zenglein Max, Holzmann Anna, Evolving Made in China 2025 China's industrial policy in the quest for global tech leadership. (2019), MERICS https://merics.org/sites/default/files/2020-04/MPOC%20Made%20%20in%20China%202025.pdf

such as when China National Chemical Corporation acquired a 95% stake in the Swiss agricultural technology company Syngenta for a record $43 billion.[149]

Made in China 2025 is relevant for this study as it presents the culmination of the West´s fears. Chinese dominance in technology. Guaranteeing fair terms and a level playing field for European investors in key in preventing the Chinese companies from gaining an unfair competitive advantage over their western counterparts by requiring forced technology transfers for access to Chinese markets or having free access to enter European markets while being protected domestically.

9.2. COVID-19 Pandemic

China reacted quickly and recovered fast from the initial COVID-19 outbreak in Wuhan and has suffered much lesser economic impact from the pandemic than the European Union. European lawmakers quickly became worried about Chinese state-backed investors taking advantage of the economic downturn and using it to acquire strategic European assets on a discount,[150] as studies have shown has happened during earlier economic crises in Europe.[151] The EU member states increased their screening especially on the foreign acquisitions in the health sector.[152] The real effects of COVID-19 cannot be yet fully determined but will without a doubt leave a significant impact on the world.

[149] Financial Times, ChemChina edges closer to sealing Syngenta deal, 31 May 2017 https://www.ft.com/content/2dc58756-45dd-11e7-8519-9f94ee97d996
[150] Chinese FDI In Europe: 2019 Update, A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS)
[151] MERICS & RHG
[152] Finnish Ministry of Economic Affairs and Employment

There is an ongoing debate whether this will lead to less open world, which would seriously impact China´s ambitions.[153]

In the White Paper released by The European Commission regarding foreign subsidies facilitating acquisitions, the COVID-19 is acknowledged to have major, but yet uncertain effects on the FDI inflow to the EU.[154] The global pandemic has seen the Chinese economy fare much better than that of the EU. One reason for the 750-billion-euro EU recovery package for COVID-19 is reported to be to protect weakened European firms from foreign acquisitions during this economic downturn.[155] New FDI screening measures were adopted Union-wide in March 2020 and came into force in October. According to the White Paper, the scope of application of the FDI Screening Regulation is to "*determine the likely impact of foreign direct investment on security and public order by considering its effects, amongst others, on critical infrastructure, critical technologies, critical inputs, and it does not specifically tackle the issue of distortions caused by foreign subsidies*." The White Paper also expands the factors to be taken into consideration under the FDI screening regulation to include whether the investor is directly or indirectly controlled by a foreign government[156], which based on the prevalence of SOEs in Chinese FDI inflows to Europe has potentially significant implications for them.

[153] Kopra Sanna, Nojonen Matti, *The Elusive Norm of Climate Responsibility: The Belt and Road Initiative and COVID-19* 11 November 2020
[154] White paper on levelling the playing field as regards foreign subsidies, European Commission, 17 June 2020
https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf
[155] The Finnish Government, Press release, European Council reaches agreement on EU recovery package, 21 July 2020 (Accessed 1 August 2020)
https://valtioneuvosto.fi/en/-/10616/european-council-reaches-agreement-on-eu-recovery-package
[156] White Paper p.42

10. FDI State Subsidies

State-aid is generally prohibited within the European Single Market. This also applies to state aid financing OFDI by European enterprises, as overseas investments tend to indirectly strengthen the investors' domestic position against its competition.[157] The EU cites mostly security concerns in its newfound approach to protect European companies from foreign acquisitions carried out "*in order to take control of key technologies, infrastructure or expertise*"[158] In international trade state aid and subsidies are subject to the WTO Agreement on Subsidies and Countervailing Measures (ASCM) but its scope is limited to trade in goods.[159]

The White Paper on levelling the playing field as regards foreign subsidies adopted by the European Commission in June 2020 explore the lack of sufficient regulatory oversight and control over some of the distortive effects caused by foreign subsidies in the Single Market.[160] According to the White Paper, "*Subsidies granted by non-EU governments to companies in the EU appear to have an increasingly negative impact on competition in the Single Market but fall outside EU State aid control.*" The key issue under the current legislation is that the foreign subsidies must cause direct or indirect distortions to the European Single Market and the Commission gives the following definition for foreign subsidies that fall under new legal instruments:

(i) foreign subsidies granted directly to undertakings established in the EU;

[157] Facing the challenges of globalisation: aid to outward foreign direct investment projects (cases Cordex, Orfama and Djebel), Graça Da Costa, 2007.
[158] EU helps protect weak firms from foreign takeovers, BBC https://www.bbc.com/news/business-52320435
[159] WTO Agreement on Subsidies and Countervailing Measures
[160] WHITE PAPER on levelling the playing field as regards foreign subsidies, European Commission, 17 June 2020

(ii) foreign subsidies granted to an undertaking established in a third country where such subsidy is used by a related party established in the EU; and

(iii) foreign subsidies granted to an undertaking established in a third country where such a subsidy is used to facilitate an acquisition of an EU undertaking or participate in public procurement procedures.

10.1. Chinese State Subsidies in Foreign Direct Investments

Granting government subsidies and state-aid by EU member states for acquisitions and other forms of investments taking place within the EU is generally prohibited by the Treaty on the Functioning of the European Union, Article 107. However, this rule does not apply to non-member states. The EU seeks to address the issues regarding the source of funding for Chinese acquisitions and the behaviour of SOEs in the Comprehensive Agreement on Investment. The EU also adopted a White Paper on foreign subsidies in the Single Market on 17 June 2020, which arguably is mostly a response to an increased involvement of China's vast state-owned sector.[161]

Chinese investments in the European Union have long been criticised for being funded by the Chinese state through direct state-aid or beneficial loans from state-controlled banks.[162] The involvement of the Chinese government in outgoing investments has raised concerns within the EU about the growing influence of the Chinese government in EU member states. The Chinese government subsidies and related transparency is a major agenda of the Comprehensive Investment Agreement between the EU and PRC.

[161] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM (2020) 253 final, 17 June 2020

[162] Financial Times, Brussels ramps up criticism of China's investment strategy in EU, March 2019 https://www.ft.com/content/0693f57c-44d3-11e9-b168-96a37d002cd3

However, as previously mentioned the negotiations have dragged on for years, in summer of 2020 EU begun adopting single-sided measures against such state-assisted investments on basis of protecting national security interests in the Member States and assuring fair competition between EU and Chinese companies, in absence of a negotiated reciprocal answer to this concern. China generally denies the accusations about state aid when it comes to large FDI projects in Europe, but the general lack of transparency and state control over both the investors and financiers makes ascertaining this hard.

11. Conclusions

As a final conclusion, a distinct shift in policy towards national security issues regarding inward FDI can be observed in the EU. New global challenges have caused the EU to adopt these measures and they can clearly be said to be an answer to the rise of China's economic influence. This also serves to increase the role of EU law in cross-border investment regulation in the Member States.

Chinese economic development and increased foreign investments have also led to increased pressure on the Chinese to equate the playing field for foreign investors. Developments in FDI restrictions rely heavily on which direction other large economies, such as China or the US take in their respective jurisdictions. The future of European FDI regulation depends heavily on diplomatic relations between China and the EU and global political developments. A key issue is whether the Comprehensive Agreement on Investment can be finalised or will the EU rely more on unilateral decisions. Currently, both China and the EU both seek deeper economic ties and more open trade, but it will be seen will the protectionist political developments that have taken root in the UK and the US spread to European decision making as well. China relies so heavily on foreign

trade for its plans for the future but the rise of populist governments in Europe might see the EU abandoning its traditional economic openness in favour of protectionism.

The global economic and technological field is changing at an ever-increasing pace. The European FDI policy needs to be dynamic to balance the benefits gained from a free-market economy and capital inflows while maintaining the security and political integrity of Europe. Highly functioning regulatory framework and screening methods are at the centre of this and at the same time the regulation must not become the sort of red tape that stagnated technological and economic advancement but at the same time delivers effective protection to vital national security aspects and European economic interests from foreign competition exploiting structural weaknesses against European companies and to ensure healthy competition. Current regulation allows for restricting FDIs if it poses threat to national security, but the definition is a bit vague. Could Chinese leadership in some critical fields of technology be a vital security risk in itself and warrant a protectionist stance towards domestic industry? Is it within the vital national interests of the EU to restrict foreign investments in critical areas where it might outcompete domestic enterprises and how EU competition and state aid regulation contradict this?

The new regulation and policies the EU is adopting FDI rules on foreign subsidies will distinctly change the flow of inward FDI from China, which has for the past decade been dominated mostly by the SOEs. Limiting the number of Chinese state subsidies and bringing the SOEs and real beneficiaries behind foreign companies under effective screening is imperative for future European regulatory changes and maintaining the competitiveness of European companies in increasingly globalised markets. While the attitudes and policies towards liberalisation of international capital flows have been subject to considerable controversy, a too rigid and hostile approach will be detrimental to both global stability and European economies. Unified European regulation regarding FDI, instead of delegating the responsibility to the individual Member States and having

stronger EU authorities supervise inward capital flows give better protection from foreign entities and large multinational corporations, over which domestic authorities in the individual Member States might have little power.

China poses a challenge to the integrity of the European Single Market as it pursues bilateral treaties with the individual Member States instead of dealing with the Union as a bloc, like for example in the 17+1 co-operation. The EU faces a challenge to get its members to agree on a more unified strategy when it comes to international investment and business co-operation to remain a viable economic union for its members in the future. The Made in China 2025 poses also an interesting dilemma for European lawmakers: the free market legalisation has inarguably helped China, which the EU has called a systemic rival, in its path to becoming the future technology leader. This position could make Europe path dependent on Chinese technology and would to some extent have to accept Chinese political and legal decisions in their regard. On the other hand, adopting extensive protectionist legislation would have disastrous consequences. The current objective for the EU and its main legislative challenges are to maintain a unified stance towards China amongst its member states and to ensure reciprocity in its trade and investment relations with China.

As trade policy is under exclusive EU competence and as EU law generally may be applied to restrictions of trade and investment even if a Member Sate uses national security reasons to limit these, And individual Member States may cause the EU to be in violation of WTO obligations all investment restrictions related to third countries such as China should be coordinated at the EU level to ensure unified approach.