

EU-China Investment Agreement: A Checklist

The importance of close economic ties of the German economy with international markets and the functioning of supply chains is being highlighted during the Corona crisis. Particular attention should now be paid to our relationship with China, which has been Germany's most important trading partner for the past four years. Many German companies are therefore still hopeful that the current negotiations for an [EU-China Comprehensive Agreement on Investment](#) (CAI), can take a decisive step forward this year. The German EU Council Presidency offers a good opportunity for this. In times of increasing global protectionism, which may be exacerbated by the Corona crisis, cooperation with China as an economic partner and competitor on an equal footing remains important. In recent years, China has initiated market liberalization previously promised: tariff cuts, steps to remove capital restrictions and steps to ease the financial sector. Nevertheless, some improvements are being thwarted by new measures, many reforms are still pending and a level playing field is a long way off. CAI negotiations have stalled for some time. An ambitious offer by China to reduce asymmetries in market access can change this. One thing is clear: The level of ambition must not be lowered when 26 bilateral investment protection agreements between EU States become one. A united EU stance and European foreign policy capacity is crucial in this respect.

On the investment agreement

The general principle applies: Quality before speed. The main objectives of the agreement are strengthening legal certainty and stable framework conditions for trade and investment, reducing barriers and asymmetries in market access, and protecting against discrimination, unlawful nationalisation, and unfair treatment. The agreement must be WTO-compatible. Managed trade provisions, which bring about the opposite of free trade, are therefore off limits. Only the successfully implemented CAI can pave the way to a comprehensive free trade agreement.

From the point of view of German business, a comprehensively good agreement with China means mutually:

- Comprehensive market access
- Equal access to public procurement
- Effective legal protection for investors
- Effective protection of intellectual property and know-how
- Reliable, enforceable regulatory environment
- Fair competition through level playing field
- Removal of localisation, joint venture and technology transfer constraints
- Free and secure cross-border data flows
- Sustainability in cooperation with third countries
- SME-friendly Agreement: Think Small First

Comprehensive market access

China has been a member of the World Trade Organisation since 2001. Yet, some of its accession commitments are still pending, for example in the areas of price controls, transparency, and notifications. German companies suffer from unequal competition due to non-transparent and anti-competitive subsidies from Chinese state-owned companies. These have also contributed to global steel overcapacity. For trade relations on an equal footing, it is essential to level this asymmetry in trading conditions. Particularly as regards Chinese industrial subsidies, transparency and a level playing field are needed. In addition, investment bans and investment ceilings must be reduced or removed. The Chinese government should draft a significantly reduced nationwide negative list. This list should only refer to industries that affect national security in a narrower sense and supply security. The list must not be an instrument of protectionism or of promoting national champions. This also applies to ensuring equal footing and protection of European investors against expropriation. It is important to guarantee full market access. According to a survey conducted in 2019 by the German Chamber of Commerce in China, around two-thirds of German companies in China complain about lacking market access. In addition, an increase in regulatory hurdles can be observed: Conventional trade barriers are often replaced by discriminatory licensing regulations. These are also partly implemented incoherently at the municipal and provincial level. Non-market prices for "compulsory licenses" and discriminatory Belt and Road Initiative tenders are another cause for great concern. Market access should focus particularly on manufacturing, information and communication technology, transport, health, financial services, and environmental and energy technologies.

Equal access to public procurement

EU business' access to public procurement in China should be improved and equal treatment ensured. Better market access offers European companies the chance to open up new export markets and additional business opportunities. The EU has one of the most open procurement markets in the world. Businesses need an equal level of transparency and access to all relevant information on public procurement in China. This also includes the basis for company valuation in the context of corporate social scoring. When joining the WTO, China committed itself to joining the WTO procurement agreement which is still due. A realistic Chinese offer should be presented soon. Beyond that, the CAI must be more ambitious than the envisaged WTO commitments.

Effective legal protection for investors

Agreeing on investment protection standards with a high level of protection and an effective dispute settlement mechanism is very important for business. At present, there are no other international regulations which provide more reliable protection for investors than investment protection agreements, with compliance being ensured by international arbitration tribunals in the event of a dispute. Protection against non-discrimination is particularly important in China. Also, protection of legitimate expectations and protection against expropriation must be guaranteed. German companies currently benefit from the high standard of protection provided by the German-Chinese investment agreement. The level of protection of the EU agreement should not be lowered. In addition, access to transparent arbitration procedures with independent judges should be guaranteed, without giving priority to national (commercial) arbitration courts or requiring prior exhaustion of national legal channels. In order to

eliminate unlawful arbitral awards, an appellate body is more effective than a permanent investment tribunal already at first instance. At the same time, it is necessary to ward off unjustified actions at an early stage. It is also important to have faster and, above all, more cost-effective proceedings, especially for SMEs.

Effective protection of intellectual property and know-how

The protection of intellectual property rights is of considerable importance for companies. This is true especially against the background of the experience with China as a major manufacturing country of pirated goods. For more than twenty years, Chinese goods origin have led the EU customs statistics in terms of border seizures and almost always average between 70 and 80 percent. The agreement should therefore provide for property rights, including the protection of know-how, to be given a better protection status. Enforcement of these rights should be strengthened, including through improving the evidence situation for European companies in infringement cases. In addition, forced technology transfer should be explicitly renounced. Patent applications should be fairly assessed and examined based on internationally comparable criteria. The agreement on the mutual protection of geographical indications between the EU and China in 2019 should be extended.

Reliable, enforceable regulatory environment

It must be ensured that European companies investing in China enjoy the same entrepreneurial rights and freedom of action as Chinese investors in Europe. A level playing field for public and private companies must be created, for example by reforming state-owned enterprises and clarifying the minimum percentage of state participation. Where international agreements exist, e.g. regarding international export control regimes, no additional national regulations or re-export controls should be created beyond this. Keeping track of these issues means with almost insurmountable challenges particularly for small and medium-sized enterprises. The following applies in both analogue and digital terms: Discrimination must be countered with effective notification mechanisms and comprehensive state transparency obligations. Especially with new technological developments such as algorithms and decisions made by artificial intelligence, these must always be made comprehensible and contestable.

Fair competition through level playing field

The prerequisite for closer economic relations with China is a level playing field to ensure negotiations on an equal footing for free and fair competition. Transparency is essential for this, both regarding existing subsidies and state involvement. Subsidies that distort competition should be completely eliminated in the course of the negotiations. The EU, the USA, Japan, and other partners have come forward with proposals to strengthen state transparency obligations and ban competition-distorting subsidies, especially in industry. These proposals should be implemented for the benefit of a global level playing field. This would make more economic sense than subsidy competition. This includes modern global rules that guarantee private companies fair conditions in competition with state-subsidized and state-owned enterprises. Changes in global competition must also be considered when applying EU competition law. A level playing field must apply to private and state-owned companies. A level playing field is particularly important in the areas of competition, investment, state aid law, taxation and environmental, food, consumer, data protection and industry standards, but also with a view to future regulatory areas.

Removal of localisation, joint venture and technology transfer constraints

The risk of involuntary technology transfer hampers foreign companies' use of the latest technologies in value creation in China or to conduct even more research and development in China. It must therefore be ensured that no involuntary technology transfer occurs in public contracts, investment permits, product certification, IT infrastructure and encryption or in the context of joint ventures. Article 22 of the Foreign Investment Law (FIL), which came into force on January 1, 2020, prohibits forced technology transfer. This is an important step towards improving the legal framework conditions in the interest of companies. This must now be implemented.

Free and secure cross-border data flows

Cross-border data transfer is essential for e-commerce and today's modern management of global value chains. Future-proof rules on digital commerce should aim at ensuring the cross-border flow of data, protecting corporate data and intellectual property and harmonising standards and norms for digital commerce where possible. Within a company, a fully secured VPN data transfer must be possible, both for branch offices and for business travellers. European achievements such as data protection must be secured. Modern trade rules are necessary for the proportion of services used in the production of physical goods ("Mode 5").

Sustainability in cooperation with third countries

Both sides should agree to manage their cooperation with third countries, such as the Belt and Road Initiative, in a manner that contributes to sustainable development. It should also build on their multilateral commitments in the areas of labour and environment. In this context, non-discriminatory and transparent access for all companies to Belt and Road Initiative tenders should be ensured.

SME-Friendly Agreement: Think Small First

Trade barriers affect SMEs disproportionately, as they lack staff and resources. The agreement should therefore include a separate SME chapter to address SME-specific trade challenges. Especially SMEs can benefit from increased transparency, the reduction of technical barriers to trade and simplified customs and visa procedures. Both sides should commit themselves to establish SME contact points responsible for the implementation of the SME-relevant parts of the agreement.

Main obstacles for German companies doing business with China:

- Corona trade barriers (eg. Travel bans, administrative hurdles concerning access to stimulus packages and export restrictions on various goods)
- Unclear regulatory environment
- Customs regulations (e.g. regionally different procedures for import customs clearance)
- Restricted internet access
- Insufficient protection of intellectual property and know-how
- Cross-border data transfer
- Capital controls and cross-border payments
- Preferred treatment of Chinese companies, especially in public procurement
- Non-transparent and complex certification regulations and product approvals, especially in the areas of medical devices, cosmetics, pharmaceutical products, food
- Standards and conformity assessment, including the compulsory certification system (CCC)
- Cyber security measures as well as uncertainty and intransparency as regards criteria of the Social Scoring System
- Restrictions on foreign investment
- Forced technology transfer

Economic relations between China and Germany

China has been the most important trading partner for the German economy since 2016. The trade volume in 2019 was 206 billion euros, of which 96 billion euros were German exports and 110 billion euros imports. More than 5,000 German companies with over one million jobs are represented in China. Between 2000 and 2019 China's share of German exports more than quadrupled. In 2019 China's share of German imports was just under 10%. Germany is the fifth most important supplier country for China. In 2017 Germany had direct investment stocks in China worth 87 billion euros. The investment portfolios of Chinese investors in Germany amounted to 4.1 billion euros in 2017.

German Chamber of Commerce in China

Contact for German companies in China is the [German Chamber of Commerce in China](#). With more than 2,300 companies, it is the official member organization of German companies in China. It helps its members in China to successfully conduct their business via current market information and practice-oriented business information. The Chamber provides a platform for the German-Chinese business community and represents the interests of its members to stakeholders such as politics and the public.