Comparative study: Rule of Law, National Intelligence Laws, and the protection of secrecy of telecommunications in the European Union, Finland, Sweden and China

1. Executive Summary

This report compares the concept of rule of law and the protection of secrecy of telecommunications in the European Union (the "EU"), Finland, Sweden and China. It also compares national intelligence laws in Finland, Sweden and China.

As illustrated in Figure 1 under Section 5, the report concludes that:

- The question of whether a country's governance model is based on the rule of law is critical for assessing whether a country protects the confidentiality of telecommunications and how that country's national intelligence laws apply in practice.

- The rule of law, the separation of powers and the independence of the judiciary are strong features of the legal system in both Finland and Sweden. They are also fundamental to the legal order of the EU, which furthermore obliges its Member States to respect the rule of law. By contrast, in China, the governance model is based on rule by law, which entails that there is no clear separation of power, and that the judiciary is not independent or shielded from political influence.

- National foreign intelligence laws in Finland and Sweden have clear and narrow scope of application, which set clear limits, including geographical boundaries, for how and for what purposes national intelligence authorities may ask or use natural or legal persons to intercept communication. China's foreign intelligence law, by contrast, is very broad; it lacks geographical boundaries, and it may be used for a wide range of purposes, including economic purposes.

- There is accordingly a risk that Chinese technology suppliers to European critical infrastructure operators face conflicting laws. On the one hand, an obligation under Chinese law to cooperate with Chinese intelligence agencies, and, on the other, obligations stemming from EU law to respect privacy and secrecy of communications. Neither technology suppliers from Finland or Sweden, nor Finnish or Swedish nationals, do however risk facing such conflicting laws, due to the limited scope of Finnish and Swedish national intelligence laws.

- A natural or legal person in Finland, Sweden, or in another EU Member State, who wants to challenge an authority's request to cooperate in foreign intelligence collection, may rely on redress mechanisms, to ensure that the intelligence activities in question are within the scope of the law. However, because of the lack of rule of law and separation of powers in China, legal persons with Chinese headquarters, or natural persons with Chinese nationality, are not afforded the same type of protection, as they cannot rely on the Chinese legal system to shield themselves from the Chinese Communist Party ("CCP").

2. Scope

This report focuses on a comparison of national intelligence laws applicable to foreign intelligence gathering, i.e. when the state wishes to collect information on foreign targets. Moreover, it focuses on whether individuals or private entities that are subject to a country's jurisdiction are obliged to collaborate in that country's efforts to collect information on targets in foreign countries, i.e. if the laws have extraterritorial effect. The differences identified in this report as well as the conclusions, are illustrated in Figure 1, under Section 5.

To make a justified comparison between such laws, it is critical to also examine whether the respective countries adhere to the rule of law. At first glance, it may seem compelling to compare the wording of different national intelligence laws, and, based on the letter of law, interpret how they would apply in practice. However, such a comparison presupposes a high respect of the rule of law in the countries in question, for example that all persons, entities, organisations, authorities and politicians are equal before the law, and that no one is above the law.

However, other governance models exist, and many countries' governance models do not rest on the rule of law. Instead, decisions taken by governmental officials or state authorities, as well as judicial rulings by courts, can be based on the political interest of the government, rather than following the letter of the law. By consequence, the lack of rule of law means that the value and meaning of the written laws is undermined, as the law itself cannot provide legal certainty or predictability of rulings. It also means that written laws cannot protect against abuse of power that the rule of law otherwise ensures.

Therefore, when examining national intelligence laws, and their scope, the existence of the rule of law in the respective countries will be of crucial importance in evaluating if the letter of the law and judicial interpretation will be detached from the direction of the government.

3. Rule *of* Law vs. Rule *by* law

The following section compares the governance model of rule of law in the EU, Finland, and Sweden, and the governance model of the rule by law in China. The table below summarizes the comparison.

Table 1 Summary comparison of governance models in the EU, Finland, Sweden and China

	EU	**Finland**	**Sweden**	**China**
Rule of Law	Yes, enshrined in the Treaty on the European Union ("**TEU**") and the Treaty on the Functioning of the European Union ("**TFEU**").	Yes, part of the Finnish Constitution.	Yes, part of the Swedish Constitution (which is comprised of four laws, one of which being the Instrument of Government (Sw. *Regeringsformen*)).	No, powers to rule or adjudicate stem from the National People's Congress, and ultimately the CCP.
Separation of Powers	Yes, governmental powers are according to the TEU and the TFEU shared between the EU institutions.	Yes, comprised in the Constitution.	Yes, comprised in the Instrument of Government.	No, powers are centralized and stem from National People's Congress, and ultimately the CCP.
Independent Judiciary	Yes, the Court of Justice of the EU is independent from other EU institutions and the EU Member States.	Yes, as stated in the Constitution. If a rule is in evident conflict with the Constitution, the court must give primacy to the Constitution.	Yes, as stated in the Instrument of Government. Any court may conclude that a rule is against the Constitution, and refrain from applying it in a certain case.	No, the judiciary is subject to political scrutiny. Final arbiter is the Standing Committee of the National People's Congress, not the Courts and ultimately the CCP.
Fundamental Rights	Yes, enshrined in the Charter of Fundamental Rights of the European Union. Can be used to challenge actions taken by the EU	Yes, provisions on fundamental rights are included in the Constitution. All public authorities must guarantee the	Yes, part of the Instrument of Government. Can be used to challenge decisions from public authorities.	Very limited protection, which is also increasingly threatened.

	EU	Finland	Sweden	China
	institutions and national public authorities.	observance of fundamental rights.		

General

The rule of law is a fundamental principle for Western and in particular European democracies. The United Nations defines it as:

> *"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."* [1]

The principle rests on the confidence of individual citizens and entities that the laws will be enforced effectively and fairly. Such confidence is built on the presence of a particular infrastructure including judicial independence, fair hearings, effective implementation of decisions taken by a judiciary, and, most importantly, that the government and the legislature are not above the law.

Rule of law in the EU

The rule of law is one of the founding principles of the EU, as enshrined in article 2 of the Treaty on the European Union ("TEU"). The TEU, the Treaty on the Functioning of the European Union ("TFEU"), and the Charter of Fundamental Rights of the European Union ("Charter") (jointly referred to as

[1] See https://www.un.org/ruleoflaw/what-is-the-rule-of-law/.

"the Treaties") constitute the fundamental documents of the Union.[2] The norms they set out have the highest normative value within the EU legal order, so-called *primary EU law*. All other EU law, so-called *secondary EU law*, are thus based on the Treaties. Both primary and secondary EU law have supremacy over all national law.[3] This means that the components of the rule of law enshrined in the treaties and the Charter must be upheld in all Member States.
The Treaties provide that the EU institutions must adopt legal acts in order to exercise their competences.[4] The procedure by which such acts are adopted is also regulated by the treaties.[5] The institutions may only act within their respective limits of powers conferred on them in the Treaties (*institutional balance*), and only in conformity with the procedures, conditions, and objectives set out therein.[6] The Court of Justice of the EU ("CJEU"), composed of the Court of Justice ("ECJ"), the General Court, and specialized courts, is required by the Treaties to ensure that the EU institutions and Member States observe the law and do not go beyond their mandate.[7]
The Treaties regulate the separation of powers between the EU institutions by vesting legislative, executive and judicial authority in different institutions.[8] The Treaties moreover create a system of checks and balances by distributing each governmental function to more than one institution.[9] The separation of powers applies also vertically, between the institutions and the Member States.[10] For example, the principle of direct effect enables national courts to apply EU law directly.[11] However, the ECJ is the ultimate interpreter of EU

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[2] By the TEU and the TFEU, the EU Member States conferred legislative, executive, and judicial powers to the Union. See article 1 of the TEU. Article 6 of the TEU declares that the Charter has the same legal value as the treaties.
[3] As established in *Case 6/64 Costa v. ENEL [1964] ECR*, 15 July 1964; and *Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel [1970] ECR*, 17 December 1970.
[4] Article 288 of the TFEU.
[5] Article 289(3) of the TFEU.
[6] Article 13(2) of the TEU.
[7] Article 19(1) of the TEU.
[8] The competences of each EU institution are enumerated in articles 14-19 of the TEU.
[9] See Schutze, Robert, "Constitutionalism and the European Union", in (eds. Barnard, Catherine, and Peers, Steve) *European Union Law* (2017), p. 87f.
[10] Many legal acts issued by the EU institutions confer to Member States to adopt more specific regulations, and Member States are the main enforcers and administrators of EU law. This is in accordance with the *principle of subsidiarity*, enshrined in article 5 of the TEU, which means that the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at a national level.
[11] The principle of direct effect was first enshrined in *Case 26/62 Van Gen den Loos EU:C:1963:1*, 5 February 1963.

law,[12] and Member States must abide by its rulings. The ECJ has the power to through an infringement proceeding condemn individual Member States for failure to comply with primary or secondary EU law, including for breaching the principles and fundamental rights enshrined in the Charter.[13] This recently happened in the case of *European Commission v. Republic of Poland*, where the ECJ found that Poland had failed to fulfil its obligation to provide an effective judicial remedy.[14]

The principle of effective judicial protection of individuals' rights is a general principle of EU law and reaffirmed by the Charter, which in article 47(2) states that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal…"[15] In the case of *European Commission v. Republic of Poland*, mentioned above, the ECJ declared that, for Member States to fulfil its obligations to ensure effective legal protection, they must ensure judicial independence be maintained. Poland had breached that by lowering the retirement age of judges of the Supreme Court and thereby breaching the principle of the irremovability of judges.[16]

The judicial independence of the CJEU is guaranteed by the separation of powers between, on the one hand, the CJEU and the other EU institutions, and, on the other, the EU institutions and the Member States, as well as by the powers vested in the Court.[17] The treaties state that judges may only be elected to serve on the CJEU, if their "independence [is] beyond doubt.[18] Although the Member States appoint one judge each, to avoid the risk of political influence, the nominated judges are scrutinized through a treaty-based panel procedure, consisting of former CJEU judges, members of

[12] Compare *C-416/17 European Commission v. French Republic*, 4 October 2018, paras. 106-109.

[13] See article 258-260 TFEU. Article 260(2) TFEU states that a Member State that has not complied with a judgment regarding failure to fulfil an obligation under the Treaties, may be subject to penalties imposed by the ECJ. See also article 267 and *Case 6/64 Costa v. ENEL [1964] ECR, 15 July 1964* regarding the obligation for Member States to abide by a preliminary ruling by the ECJ.

[14] *C-619/18, European Commission v. Republic of Poland*, 24 June 2019.

[15] See article 6(3) of the TEU, and article 47 of the Charter.

[16] *C-619/18, European Commission v. Republic of Poland*, 24 June 2019.

[17] The CJEU has authority to *inter alia* impose sanctions on a Member State for its failure to abide by a judgment of the Court following a finding that it has failed to fulfil an obligation under the treaties, and it may declare an act of another EU institution to be void. See articles 260(2) and 264(1) of the TFEU.

[18] Articles 253-254 of the TFEU.

national supreme courts, and lawyers of recognised competence, one of whom is proposed by the European Parliament.[19]

Fundamental rights are enshrined in the Charter and constitute a general source of EU law.[20] The EU institutions, as well as Member States when applying EU law, must ensure they do not violate the fundamental rights set forth in the Charter.[21] The competence of the CJEU to ensure the law is observed and of Member States to provide remedies sufficient to ensure effective legal protection apply also in relation to the fundamental rights. This means *inter alia* that an individual may invoke a Charter right before a national court, provided that it is sufficiently precise and unconditional (i.e. that it has so-called *direct effect*),[22] and that a Member State that has violated fundamental rights may be brought before the CJEU (in a so-called *infringement proceeding*) as well as, ultimately, be subject to the imposition of a fine by the CJEU.[23]

Rule of law in Finland

The concept of rule of law is a fundamental principle and a cornerstone of the Finnish legal system.[24] The Finnish understanding of the rule of law can be described as being democratic, participatory, transparent, egalitarian, just and social.[25] The concept is defined in the Constitution of Finland. The fundamental provisions of the Constitution, such as a provision on democracy and rule of law, are set out in its Chapter 1. Section 2 of the Constitution states that the exercise of public powers shall be based on law, and that the law must be strictly observed in all public activity. Thus, all public powers must be in accordance with legal norms enacted by the Parliament, as well as with statutes of lower degree based on an Act.[26]

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[19] Article 19(2) of the TEU and articles 253-255 of the TFEU. The Panel's opinion is not binding but it has a "preventive role in that Member States would be more reluctant to propose a candidate whom the Panel might be less likely to find suitable. Secondly, an adverse opinion by the Panel may lead Member States to refuse to give their common accord on appointment." Tridimas, Takis, "The Court of Justice in the European Union", in (eds. Schutze, Robert, and Tridimas, Takis) Oxford Principles of European Union Law, Volume 1: The European Union Legal Order (2018), p. 587.

[20] Articles 6(1) and 6(3) of the TEU.

[21] Article 51 of the Charter.

[22] See *Case 26/62 Van Gen den Loos EU:C:1963:1*, 5 February 1963.

[23] Articles 258, 259 and 260 of the TFEU.

[24] See Länsineva, P., "Fundamental Principles of the Constitution of Finland", in (eds. K., Nuotio, S., Melander, M., Huomo-Kettunen) *Introduction to Finnish Law and Legal Culture* (2012), p. 122.

[25] Länsineva (2012), p. 122.

[26] Länsineva (2012), p. 122.

Further, the rule of law requires that the laws are interpreted and applied in such manner that the respect for fundamental rights and human dignity is guaranteed.[27] It is expressly stated in the Constitution that all public authorities must guarantee the observance of fundamental rights and liberties as well as human rights.[28] Fundamental human right set forth in the Constitution are based on the European Convention on Human Rights ("**ECHR**") and other international treaties binding on Finland.
As the Constitution has primacy in relation to other norms, a norm that conflicts with the Constitution must not be applied. Therefore, if the application of an Act or a norm would be in an evident conflict with the Constitution, the court must give primacy to the provision of the Constitution.[29] Further, in order to ensure that all legislation is in accordance with the Constitution, the Parliament's Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters that are brought for its consideration.[30]
In Finland, the powers of the State are vested in the people, represented by the Parliament. Further, the principle of separation of powers under the Constitution divides the powers into legislative, executive and judicial powers. The legislative powers are exercised by the Parliament, whereas the governmental powers are vested in the President of the Republic and the Government. The judicial powers are exercised by independent courts of law. The courts are independent in the sense that no external factors can influence their decision-making.

Rule of law in Sweden

The Swedish Constitution,[31] consists of four so-called basic laws (Sw. *Grundlagar*). One of these is the Instrument of Government, which *inter alia* incorporates the parameters of the rule of law.
The first chapter of the Instrument of Government sets out the main principles for Sweden's system of government. The principle of separation of powers is implicit in the wording of the Instrument of Government,[32] as all public power shall be exercised under the law and stem from the people, through the

[27] Länsineva (2012), p. 122.
[28] Chapter 2, section 22 of the Finnish Constitution.
[29] Chapter 10, section 106 of the Finnish Constitution.
[30] Chapter 6, section 74 of the Finnish Constitution.
[31] The Instrument of Government (1974:152), the Act of Succession (1810:0926), the Freedom of the Press Act (1949:105), and the Fundamental Law on Freedom of Expression (1991:1469).
[32] Bogdan, Michael, *Swedish Law in the New Millennium* (2000), p. 67.

parliament.[33] The government is accountable to the parliament.[34] In addition, the Instrument of Government stipulates local and regional self-government,[35] public administration by administrative authorities,[36] and courts for the administration of justice.[37]

The second chapter contains a so-called *Bill of Rights* (Sw. *rättighetskatalogen*); a list of fundamental human rights. It also includes a direct reference to ECHR.[38] The Constitution thus guarantees fundamental rights, such as the right to a fair trial.[39]

In the Swedish legal system, the Constitution has superior value.[40] By consequence, no other law may contradict it. Laws with less normative value must thus align with the Swedish rules on separation of powers, as well as with fundamental human rights as enshrined in the Bill of Rights, and by reference, in the ECHR.

The Instrument of Government regulates the independence of the judiciary: "Neither the [government], nor a public authority, may determine how a court of law shall adjudicate an individual case or otherwise apply a rule of law in a particular case".[41] The independence of judges is, furthermore, ensured by very strict rules on how to remove a judge from his or her employment.[42] Any court in Sweden may declare a rule in conflict with the Constitution.[43] In that case the court must decide to not apply the rule even if the rule as such remains in force. The same independence from political influence applies for administrative authorities.[44]

Rule *by* law in China

China has historically considered law as an instrument used by the rulers to guide and control the population.[45] The law as such has no inherent value in itself (as opposed to the Western view) but is only used as a means to maintain

[33] Chapter 1, articles 1 and 4 of the Instrument of Government.
[34] Chapter 1, article 6 of the Instrument of Government.
[35] Chapter 1, article 7 of the Instrument of Government.
[36] Chapter 1, article 8 of the Instrument of Government.
[37] Chapter 1, article 8 of the Instrument of Government.
[38] Chapter 2 of the Instrument of Government.
[39] Chapter 2, article 9 – 11 of the Instrument of Government.
[40] Bogdan, Michael, *Swedish Legal System* (2011), p. 20 – 21.
[41] Chapter 11, article 3 of the Instrument of Government.
[42] Chapter 11, article 7 – 9 of the Instrument of Government.
[43] Chapter 11, article 14 of the Instrument of Government.
[44] Chapter 12, article 2 – 3 of the Instrument of Government.
[45] Chen, G. George, *Le Droit, C'est Moi: Xi Jinping's New Rule-By-Law Approach*, 26 July 2017, available at: http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/

social hierarchy and order.[46] In China, the concept of "rule by law" more accurately describes China's understanding towards the law. The concept was codified when the term "governing the country by law" was written into the Chinese constitution in 1999.[47] There is however a fundamental difference between the Chinese rule by law and the rule *of* law, as the CCP stands above the law.[48]

China has never developed a concept of separation of powers. Historically, traditional Chinese local government held absolute powers regarding the enactment of rules (legislative power), the execution of rules (executive power), and the resolution of disputes (judicial power). The official China is sceptical of the concept of "separation of powers" and the political danger it is seen as posing to the rule of CCP. In a speech to legal officials in Beijing in January 2017, Chief Justice Zhou Qiang, China's top judicial official, made the following illustrating remark: "*[W]e should resolutely resist erroneous influence from the West: 'constitutional democracy,' 'separation of powers' and 'independence of the judiciary'*".[49]

According to Chinese law, judges shall adjudicate cases without interference by administrative organs, social organisations or individuals.[50] However, this is difficult to ensure in practice. The Constitution provides that the final arbiter of legal interpretation is not the judiciary but the Standing Committee of the National People's Congress, which is the central legislative committee and the highest body of government.[51] Judges are appointed and can be removed at any time by legislative committees,[52] and the vast majority of the elite officials at all levels of courts and governments, as well as the delegates

[46] Xiangming, Zhang, *On Two Ancient Chinese Administrative Ideas*, The Culture Mandala: Bulletin of the Centre for East-West Cultural and Economic Studies 5 (1), 2002, available at: http://www.international-relations.com/wbcm5-1/wbrule.htm

[47] Chen, G. George, Le Droit, C'est Moi: Xi Jinping's New Rule-By-Law Approach, 26 July 2017, available at: http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/.

[48] Just Security, *China and the Rule of Law: A Cautionary Tale for the International Community*, 28 June 2018, available at: https://www.justsecurity.org/58544/china-rule-law-cautionary-tale-international-community/

[49] Forsythe, Michael, *China's Chief Justice rejects an Independent Judiciary, and Reformers Wince, New York Times,* New York Times, 18 January 2017, available at: https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html.

[50] Article 131 of the Constitution and article 8 (2) of the Judges Law of the People's Republic of China

[51] Article 67 (4) of the Chinese Constitution.

[52] Chapter 5 of the Judges Law of the People's Republic of China

to the National People's Congress, are CCP members.[53] The Chinese judiciary is thus not independent from political influence. On the contrary, government is based on the *unity* of executive, legislative and judicial powers.[54]

Legal and natural persons have a legal right to appeal to the court against an administrative decision.[55] The unity of the executive and the judiciary however lowers the likelihood that a judge would issue a ruling which contradicts the will or instructions of the administration.[56] In addition to the lack of fair trial and due procedure, NGOs such as Amnesty International and Human Rights Watch, as well as foreign governmental institutions regularly present evidence regarding China's violation of the freedoms of speech, movement, and religion etc. of its citizens and of others within its jurisdiction.[57]

4. National intelligence laws and the protection of secrecy of telecommunications

The following section compares national intelligence laws in Finland, Sweden and China. The EU does not have competence to legislate in the field of national intelligence; its Member States have sole responsibility for safeguarding their internal security. However, as EU law takes primacy over the laws of the Member States, the national intelligence laws of the latter must not violate EU law, such as the fundamental rights enshrined in the Charter. Therefore, this section also describes how EU law impacts national law in the field of national intelligence law, through protection of secrecy of telecommunications.

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[53] As mentioned on the websites of Chinese government and courts, more than 95% of the leaders of the governments of county level or above are CCP members; more than 99% of judges are CCP members. See also Statistics published by the National People's Congress in 2000 reveals that 71.5% of its delegates are CCP members. See http://www.npc.gov.cn/npc/rdgl/rdzd/2000-11/30/content_8643.htm (in Chinese).

[54] Sheehy, Benedict, *Fundamentally Conflicting Views of the Rule of Law in China and the West & (and) Implications for Commercial Disputes*, Northwestern Journal of International Law & Business, 2006. Available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1622&context=njilb

[55] The Administrative Review Law of the People's Republic of China.

[56] Chapter 5 of the Judges Law of the People's Republic of China.

[57] See, for example, general overviews on China published on the websites of Human Rights Watch https://www.hrw.org/world-report/2019/country-chapters/china-and-tibet and Amnesty International https://www.amnesty.org/en/countries/asia-and-the-pacific/china/

The comparison of national intelligence laws is summarised in the below table:

Table 2 Summary comparison of foreign intelligence laws in Finland, Sweden and China

Comparison Foreign Intelligence Laws	Finland	Sweden	China
Legal basis	Specific basis in amendment made to the right to privacy of communications as set forth in the Constitution.	General basis in chapter 8 of the Swedish Instrument of Government.	Chinese Constitution.
Purpose limitation	Yes, the scope is clear and limited to certain intelligence activities stated in the law, not including economic justifications.	Yes, the scope is clear and limited to certain intelligence activities stated in the law, not including economic justifications.	Yes, but the purposes are broadly stated, including economic justifications.
Authorisation procedure	Yes, signal intelligence requires court authorisation.	Yes, signal intelligence requires court authorisation.	No, actions are authorised by the law.
Separate authorities for domestic and foreign intelligence	Yes, the mandate of the Finnish Security Intelligence Service under the Civilian Intelligence Act is limited to foreign intelligence.	Yes, the Swedish Armed Forces, Military Intelligence and Security Agency, and the National Defence Radio Establishment is limited to foreign intelligence.	Likely same authority.
Applicability: operators	Yes.	Yes.	Yes.
Applicability: suppliers	No.	No.	Yes.
Applicability: natural persons	No.	No.	Yes.
Explicit obligation to cooperate	Yes, to the extent stated in the law and subject to judicial control/authorisations.	Yes, to the extent stated in the law and subject to judicial control/authorisations.	Yes.
Redress mechanism	Complaint mechanism and parliamentary control.	Complaint mechanism and parliamentary control.	Complaint allowed for misuse of power.
Separation of powers / preventing political interference in decisions	Yes, powers are separated.	Yes, powers are separated.	No.

Protection of the secrecy of telecommunications in the EU

The ePrivacy Directive

Fundamental rights for the respect for private life and for the protection of personal data are enshrined in Articles 7 and 8 of the Charter. The CJEU has held that the rights protected by the Charter apply also to legal persons.[58] The rights in the Charter apply in relation to all Member States in their application of EU law.[59]

With regard to electronic communications, these rights are implemented in secondary law through in particular the so-called ePrivacy Directive,[60] which *inter alia* obliges Member States to ensure the confidentiality of communications by prohibiting different kinds of surveillance or interception of communications without the consent of the user of the communications.[61]

The Directive permits Member States to infringe on the principle of confidential communication, by permitting them to conduct surveillance or interception in certain limited situations only. Member States may thus adopt legislative measures allowing for surveillance when it is necessary, appropriate, and proportional within a democratic society to safeguard aims specifically enumerated in the Directive, such as national or public security.[62]

The ePrivacy Directive attributes rights for a natural or a legal person, whose right to *inter alia* not be subject to interception has been infringed, to lodge a complaint with a supervisory authority and to an effective

[58] See *C-450/06 Varec SA v. Belgian State*, 14 February 2008, para. 48.
[59] Article 51 of the Charter.
[60] In 2017, the European Commission proposed to replace the Directive with an ePrivacy Regulation, which reaffirms the principle of confidentiality. See European Commission, Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), 10 January 2017 (ePrivacy Regulation).
[61] Article 5 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communication) as amended by Directive 2006/24/EC and directive 2009/136/EC (ePrivacy Directive).
[62] Article 15(1) of the ePrivacy Directive.

judicial remedy against a legally binding decision such authority has issued.[63]

European Electronic Communications Code

The European Electronic Communications Code (the "Code"), adopted in December 2018 and to be implemented in all Member States by December 2020, regulates European telecommunications. The Directive establishing the Code allows for Member States to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security, and to permit the investigation, detection and prosecution of criminal offences.[64] However, it specifically spells out that such measures must be provided for by law and respect the essence of the fundamental rights in the Charter,[65] which, as noted, also apply to legal persons.[66] Moreover, the Code states that measures regarding end-users' use of electronic communications networks liable to limit fundamental rights shall be imposed only if it is provided for by law and respects those rights, is proportionate, necessary, and genuinely meets general interest objectives recognised by Union law or the need to protect the rights of others.[67]

Finland

Protection of the secrecy of telecommunications

The right to privacy is one of the fundamental rights enshrined in Chapter 2 of the Constitution of Finland. Under the Constitution, everyone's private life, honour and sanctity of the home are guaranteed.[68] The right to privacy covers the secrecy of correspondence, telephony and other confidential communications. The provision on the right to privacy states that more detailed provisions on the protection of personal data are laid down by an Act. The Constitution is supplemented with national data protection legislation, including the Data Protection Act (1050/2018), the Act on Electronic Communications Services (917/2014) and the Act on the Protection of Privacy in Working Life (759/2004).

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[63] Article 15(2) of the ePrivacy Directive, referring to Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the GDPR).
[64] Recital 6 of the Code.
[65] Recital 6 of the Code.
[66] See *C-450/06 Varec SA v. Belgian State*, 14 February 2008, para. 48.
[67] Article 100 of the Code.
[68] Chapter 2, section 10 of the Finnish Constitution.

In Finland, the privacy of communications may only be limited in certain exceptional cases. Section 10 of the Constitution states that limitations of the secrecy of communications may be imposed by an Act if they are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, during deprivation of liberty, and for the purpose of obtaining information on military activities or other such activities that pose a serious threat to national security.

This exception to the main rule was added to the Constitution in 2018 and made it possible for the Parliament to proceed with the government proposition relating to the new civilian and military intelligence legislation.[69] The new Act on Telecommunication Intelligence in Civilian Intelligence ("Civilian Intelligence Act", 582/2019) and the Act on Military Intelligence (590/2019) entered into force in June 2019. In this particular legislation process, certain Acts, such as the Police Act (872/2011), were subject to amendments due to the new legal framework. Only civilian intelligence is examined in this report.

Domestic national intelligence law and separation of powers

As mentioned above, civilian intelligence activities are subject to the provisions of the Civilian Intelligence Act and the Police Act.[70] Civilian intelligence activities are exercised by the Finnish Security Intelligence Service (Fi. *Suojelupoliisi*). The mandate of the Finnish Security Service is based on the definition of civilian investigation provided in the Police Act[71] according to which civilian investigation is carried out by the Security Intelligence Service.[72] The technical implementation of intelligence activities is carried out by the Defence Intelligence Agency of the Finnish Defence Forces (Fi. *Puolustusvoimat*).[73]

For the purposes of this report, it should be noted that the mandate referred to above apply to cross-border communication of both Finnish and foreign

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[69] See M., Lohse, M., Viitanen, *Johdatus tiedusteluun* (2019), p. 20. See also preparatory work for the Civilian Intelligence Act (HE 202/2017) p. 272.

[70] The main goal of the Act is to improve Finland's national security and to provide a legal basis for intelligence activities. Further, the new legislation aims to improve Finland's ability to protect the State from the most serious threats to national security. In the legislative procedure, efforts were made to limit the interference with fundamental rights to the minimum to the extent possible for ensuring the efficiency and effectiveness of intelligence activities. (The preparatory work for the Civilian Intelligence Act (HE 202, 2017) p. 1.)

[71] Chapter 5a, section 1 of the Police Act.

[72] See Lohse, M, Viitanen, M, Johdatus tiedusteluun, p. 38.

[73] Civilian Intelligence Act, Section 10.

targets, as the powers are not differentiated with regard to nationalities. The geographical scope is described in further detail below.
The scope of the Civilian Intelligence Act is limited to civilian intelligence activities[74], i.e. gathering and use of information by the Security Intelligence Service for the purpose of protecting national security, supporting the decision-making of the state leaders and for other security-related tasks carried out by other authorities.
Further, conducting of intelligence activities requires that a permission to such activities is provided by the court. The authorisation procedure is described in further detail below.
Thus, the separation of powers is present in the context of civilian intelligence activities: (i) the intelligence operations are governed by the laws as described above; (ii) such activities are solely carried out by the Finnish Security Intelligence Service; (iii) and a prior authorisation for such activities is given by the court.

Legal basis and purpose limitation

The legal basis for the legal framework subject to this report derives directly from the Constitution. As mentioned above, limitations of the secrecy of communications may be imposed by an Act only in specific cases, where necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, during deprivation of liberty, and for the purpose of obtaining information on military activities or other such activities that pose a serious threat to national security. This exception, explicitly stated in the Constitution, legitimates the national intelligence legislation in Finland. However, only intelligence activities that are strictly within the scope of the Act are considered lawful. All other intelligence activities are outside the scope and the exception at hand. Consequently, such activities are subject to the main rule set out in the Constitution and such unwarranted intelligence activity is illegal since it limits the privacy of communications.
The above shows that the hierarchy of norms is strictly present in the context of intelligence legislation. The hierarchy of legal norms is provided in the Constitution. Accordingly, the Constitution has the highest status in the hierarchy, after which comes the laws and thereafter statutes.[75]

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[74] The definition of civilian intelligence used in Section 1 of the Civilian Intelligence Act refers to the definition provided in Chapter 5 a ("Civilian Intelligence") of the Police Act. These two pieces of legislation form together the body of law that primarily governs civilian intelligence in Finland.
[75] See the Constitution, Chapter 10, Section 106 ("Primacy of the Constitution") and Section 107 ("Subordination of lower-level statutes").

The Civilian Intelligence Act sets out an exhaustive list of objects and purposes for which the intelligence is lawful. As described above, the privacy of communications is exceptionally strict in Finland and enjoys the protection of the Constitution. Further, the right to privacy, including privacy of communications, may only be limited by way of an Act. Therefore, if the purpose of intelligence activities is not explicitly stated in law, such activities, limiting the fundamental right to privacy of communications, shall not be carried out. For example, the intelligence laws in Finland do not provide any legal ground for espionage, economic matters or similar.
As to the geographical scope, the Civilian Intelligence Act applies to cross-border telecommunications only.[76] Therefore, the mandate of the Finnish Security Service does not cover telecommunication within the borders of Finland and between persons in Finland, regardless of their nationality. Neither has the authority a mandate to carry out intelligence activities regarding telecommunication outside Finland. As described below, certain entities that are within Finland's jurisdiction are obliged to provide necessary information regarding such cross-border communication subject to intelligence gathering. Even such entities are not, however, required to provide information on private individuals or entities outside Finland.

Authorisation procedure

A prior authorisation is required for any civilian intelligence subject to the Civilian Intelligence Act.[77] The authorisation is issued by the District Court of Helsinki. A request for an authorisation is made by the Security Intelligence Service and the formal requirements for such request are set out in Section 7 of the Civilian Intelligence Act, including, among others, the facts, the object and the justification for such activities. The authorisation procedure of the court is set out in further detail in the Police Act.[78]

Explicit obligation to cooperate

Telecommunications operators within Finland’s jurisdiction are, according to law, subject to an explicit obligation to assist in civilian intelligence by providing certain information.[79] Telecommunications operators must, without undue delay, make the telecommunications network connections required for telecommunications interception and traffic data monitoring. Further, such operators must make available to the intelligence authorities the information, equipment and personnel necessary for conducting the

[76] Chapter 1, section 2 of the Civilian Intelligence Act.
[77] Chapter 1, section 7 of the Civilian Intelligence Act.
[78] Chapter 5a, section 35 of the Police Act
[79] Chapter 5a, section 51 and Chapter 5, section 61 of the Police Act.

telecommunications interception. The same applies to situations in which telecommunications interception or traffic data monitoring is performed by the intelligence authorities using a technical device. In addition, telecommunications operators are obliged to make available to a police officer with the power of arrest, the information in their possession that is necessary for carrying out technical tracking.
Besides the above, there is no explicit obligation for other private entities to provide information for intelligence purposes. However, under certain conditions specified in the Police Act, the Finnish Security Intelligence Service has the right to obtain information for specified intelligence purposes from a private organisation or person bound by a secrecy obligation.[80]

Redress mechanism

The Intelligence Ombudsman is the supervisory authority in the context of civilian intelligence in accordance with the Act on the Oversight of Intelligence Gathering (121/2019). The Intelligence Ombudsman supervises the legality of civilian intelligence activities.[81] Further, the Parliament's Intelligence Oversight Committee exercises the parliamentary supervision of intelligence activities.[82]
Authorisations issued by the court as described above are not subject to judicial appeal.[83]
However, any person who considers that his or her rights have been violated in connection with intelligence activities or that other illegal actions have been taken may file a complaint with the Intelligence Ombudsman.[84] The right to file a complaint is a general right and can be used by any person, including both natural and legal persons.[85]
The right to file a complaint is supplemented with the right to do an investigation request.[86] A person that has been subject to intelligence gathering or suspects to have been subject to intelligence gathering has the right to ask the Intelligence Ombudsman to investigate the lawfulness of the used intelligence gathering methods.[87]

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[80] Chapter 5a, section 50 of the Police Act.
[81] Chapter 1, section 2, and Chapter 3 of the Act on the Oversight of Intelligence Gathering.
[82] Chapter 1, section 2, and Chapter 2 of the Act on the Oversight of Intelligence Gathering.
[83] Chapter 5 a, section 35 of the Police Act.
[84] Chapter 3, Section 11 of the Act on the Oversight of Intelligence Gathering.. See also the website of the Intelligence Ombudsman https://tiedusteluvalvonta.fi/en/complaints.
[85] Preparatory work for the Act on the Oversight of Intelligence Gathering (HE 199/2017), p. 54.
[86] Act on the Oversight of Intelligence Gathering, Chapter 3, Section 11. See also preparatory work for the Act on the Oversight of Intelligence Gathering, p. 54.
[87] Chapter 3, section 12 of the Act on the Oversight of Intelligence Gathering.

Consequently, the Intelligence Ombudsman takes the measures necessary and required in relation to the intelligence activities.[88] The Intelligence Ombudsman may, for example, order that the intelligence gathering methods must be suspended or terminated, or provide the entity subject to supervision with a remark.[89]

Further, natural and legal persons may file a complaint with the Parliamentary Ombudsman in accordance with the Parliamentary Ombudsman Act (197/2002).[90] A complaint may also be filed with the Chancellor of Justice as stated in the Chancellor of Justice Act (193/2000).

Sweden

Domestic national intelligence law and separation of powers

Several agencies in Sweden are authorized to conduct intelligence gathering activities. For the purpose of this report, the following two agencies are relevant as they focus on intelligence gathering in relation to foreign targets:

- the Swedish Armed Forces, Military Intelligence and Security Agency (Sw. *Militära underrättelse- och säkerhetstjänsten,* "**MUST**"),[91] and

- the National Defence Radio Establishment (Sw. *Försvarets radioanstalt,* "**FRA**"*).*[92]

Both MUST and FRA have a mandate to exercise intelligence gathering regarding foreign activities and targets.[93] The FRA's scope is limited to signal intelligence activities, i.e. interception of telecommunications.[94] Both MUST and FRA may only gather intelligence for purposes enumerated in relevant laws, including mapping foreign military threats to the country.

In accordance with the principle of separation of powers, the three elements of the Swedish signal intelligence (the law, the actual intelligence conducted

[88] See https://tiedusteluvalvonta.fi/en/complaints.
[89] Chapter 3, section 15 and section 17 of the Act on the Oversight of Intelligence Gathering.
[90] Such complaint may be filed by anyone who thinks a subject has acted unlawfully or neglected a duty in the performance of their task. See Chapter 1, section 2 (1) of the Parliamentary Ombudsman Act.
[91] Sections 3 and 3b of the Statute (2007:1266) for the Swedish Armed Forces (Sw. *Förordning (2007:1266) med instruktion för Försvarsmakten*).
[92] Section 1 of the Statute (2007:937) for the National Defence Radio Establishment (Sw. *Förordning (2007:937) med instruktion för Försvarets radioanstalt*),
[93] Section 1 of the Law (2000:130) on Armed Forces Intelligence Activities (Sw. *Lag (2000:130) om försvarsunderrättelseverksamhet*).
[94] Section 1 of the Statute (2007:937) for the National Defence Radio Establishment.

by authorities, and the authorisation to conduct signal intelligence given by a court), are separated between three independent parties.

Legal basis, purpose limitation

The law provides an exhaustive list of purposes for signal intelligence to be permitted.[95] Purposes that are not specified in the law, such as economic matters or espionage, are not permitted. The Swedish laws and statutes mentioned in this report derive their authority from the Constitution.[96] Laws are enacted by the parliament, while statutes are enacted by the government. The laws have a higher status in the legal hierarchy, but are still subordinate to the Constitution.[97]

Authorisation procedure

Before signal intelligence may be conducted, the Swedish Foreign Intelligence Court (Sw. *Försvarsunderrättelsedomstolen*)[98] must authorize it.[99] For authorization, several formal requirements must be fulfilled, the most important being the specification of the exact mission for which the signal intelligence is to be conducted, and the justification for the specific action to be undertaken.[100]

Explicit obligation to cooperate

The FRA's mandate to conduct signal intelligence is complemented by the Electronic Communications Act ("LEK") (Sw. *Lag (2003:389) om elektronisk kommunikation*). LEK is the sole law in Sweden which contains the an obligation for private entities to cooperate in national intelligence gathering. More specifically, it obliges telecommunications operators owning wire for communication across Swedish borders to assist in making signal intelligence activities technically possible for the FRA.[101] The obligation does not apply to operators with no connection to Swedish territory.

LEK does not suggest that the obligation to cooperate also applies to suppliers to telecommunications operators. As the obligation targets owners of wire, it most likely does not cover natural persons.[102]

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[95] Section 1(2) of the Law (2008:717) on Signal Intelligence in Armed Forces Intelligence Activities ("**Law on Armed Forces Signal Intelligence**") (Sw. *Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet*).

[96] Chapter 8 of the Instrument of Government.

[97] Chapter 8 of the Instrument of Government.

[98] Information about the court on the court's website available at: http://www.undom.se/

[99] Sections 1 and 4a of the Law on Armed Forces Signal Intelligence.

[100] Section 4a of the Law on Armed Forces Signal Intelligence.

[101] Chapter 6, section 19a of LEK.

[102] For the purposes of this report, we assume that natural persons do not own wires.

An operator failing to comply with the obligation to cooperate in LEK faces the risk of an order for rectification coupled with penalties or withdrawal of an authorisation to exercise telecommunication.[103]

Redress mechanism

A decision by the Swedish Foreign Intelligence Court to authorize signal intelligence cannot be subject to judicial appeal.[104] There are, however, three other redress mechanisms available, for natural and legal persons alike.
Ongoing intelligence activities may be challenged or stopped through the filing of a complaint with a specific authority (Sw. *Statens inspektion för försvarsunderrättelseverksamhet*, "SIUN").[105] A complaint may also be filed with either the Parliamentary Ombudsmen (*Justitieombudsmannen*, "JO"), or the Chancellor of Justice (*Justitiekanslern*, "JK"), both of which have a mandate to supervise the Swedish Foreign Intelligence Court. Neither JO nor JK can alter a judgment or a decision in a specific case,[106] but their decisions may impact how similar issues will be dealt with in the future.

China

Domestic national intelligence law and separation of powers

The Chinese law relevant for the purpose of this report is the National Intelligence Law ("**NIL**"), which focuses on national security and protection of national interests.[107] As demonstrated above, there is no principle of separation of powers in China separating the judicial system from the government, and the courts are accordingly not independent.[108]

Legal basis and purpose limitation

The purpose of NIL is to provide intelligence information to the state. The purposes for which such intelligence gathering is permitted are broad, ranging from the taking of major decisions, the dispelling of risks threatening national security, and the "*uphold[ing] the country's regime, sovereignty, unity and*

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[103] Chapter 7, sections 4 – 5 of LEK.
[104] Section 13 of the Law on Armed Forces Signal Intelligence.
[105] Section 10 of the Law on Armed Forces Signal Intelligence. See further information in Swedish at: http://www.undom.se/default.html
[106] For information on the JO, and the JK respectively, see https://www.jo.se/en/How-to-complain/ and https://www.jk.se/tillsyn/
[107] See article 1 of NIL.
[108] See media reports according to which Chinese judges reject the notion of separation of powers: https://www.reuters.com/article/us-china-policy-law-idUSKBN14Z07B.

territorial integrity, well-being of the people, sustainable economic and social development, and other important interests of the State."[109]

NIL obliges all organizations and citizens to provide support and assistance to and to cooperate with state intelligence work, and to be confidential about the State intelligence work they know of.[110] Unlike other Chinese security laws, such as the National Security Law[111] or the Cyber Security Law[112], NIL does not contain any language delimiting the application of the law geographically to, for example, citizens residing in China, companies established in China, or activities performed on Chinese territory. It can therefore be assumed that the NIL has extra-territorial application.

At its face, NIL provides that state intelligence work shall be conducted according to the law, as well as ensure respect for and assurance of human rights, and efforts should be taken to safeguard the legitimate rights and interests of individuals and organisations.[113]

Authorisation procedure

There is no authorisation procedure provided for by NIL. A public authority thus does not need judicial permission in order to request or demand cooperation of a private entity. It appears instead as if the law as such provides a general authorisation of intelligence work for broad purposes, including, as mentioned, the upholding of sustainable economic and social development.

Explicit obligation to cooperate

NIL explicitly requires that all organisations and citizens cooperate in state intelligence work. This means that telecommunication suppliers and operators as well as employees of such organisations are obliged to cooperate. There are no restrictions on what actions the obligation to cooperate may entail.

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[109] See article 2 of NIL.

[110] Article 7 of NIL.

[111] Article 11 of the National Security Law reads: "Citizens of the People's Republic of China, all state organs and armed forces, all political parties and mass organizations, enterprises, institutions and other social organizations shall have duties and obligations to safeguard state security."

[112] Article 2 of the Cyber Security Law reads: "The Law shall apply to the construction, operation, maintenance and use of the network as well as the supervision and administration of the cyber security within the territory of the People's Republic of China."

[113] Article 4 of NIL.

Redress mechanism
NIL contains a right to inform about or launch a complaint against agencies or functionaries of the state who overstep or misuse their authority. Neither overstepping nor misuse of authority is defined by NIL.

5. Practical implications

Main differences

As a consequence of the principle of the rule of law, both Finland's and Sweden's national intelligence laws have a narrow scope of application, which clearly limits the purposes for which intelligence may be gathered and which restricts the obligation to cooperate (so-called *purpose limitation*). The Chinese law on national intelligence, on the other hand, has a broad scope. Intelligence may be gathered for a number of purposes, including upholding the country's sustainable economic development.

The national intelligence laws in both Sweden and Finland have set authorisation procedures whereby one governmental institution checks and monitors the actions of the other; a court decision is required before relevant authorities may engage in intelligence gathering. They also provide for redress mechanisms, to which legal and natural persons may have resort to challenge an order to cooperate in intercepting communication.

Consequences

Objectively, based on a simple reading of the Chinese legal text, Chinese companies, including technology suppliers and Chinese nationals employed by Chinese technology suppliers, acting outside of China, may be faced with two conflicting laws; those of the Chinese NIL, and those of the host state. This is however not the case for technology suppliers from Finland or Sweden, as the obligation to cooperate set out in the intelligence laws apply only to telecommunications operators providing wire across the borders of the respective country.

This difference may have legal consequences for telecommunications operators, in particular if a supplier of technology acts in a way that leads to a breach of the law and the operator acted negligently regarding such breach. The liability for the violation would rest with the operator.

Conflict of law for Chinese suppliers

The conflict of law for Chinese suppliers of technology and the consequences for European procurers of such technology may be illustrated by the following example from the telecommunication sector, which is a critical infrastructure.

A Chinese supplier of telecommunication equipment supplies software or equipment to an operator in an EU Member State. The supplier of a Chinese national employed by the supplier may be obliged to cooperate with a Chinese intelligence authority to intercept communication of a target in Europe by recording communications of that target on the operator's network. The obligation to cooperate with the Chinese authorities would be in sharp conflict with the supplier's or employee's obligation under EU law to protect privacy and secrecy of communication. Even if a supplier or an employee were to consider that the request to cooperate is beyond what NIL allows, due to NIL's extraterritorial effect, broad scope and the lack of rule of law in China, the Chinese entity or employee will have difficulties in successfully challenging the request to collaborate with the Chinese intelligence authority.

No conflict for Swedish or Finnish suppliers

In contrast, as illustrated in Figure 1 below, a Finnish or a Swedish legal system do not entail a comparable conflict. This is because of three fundamental differences between, on the one hand, the Finnish and Swedish legal systems, and, on the other, the Chinese system.

First, in contrast to the broad scope of the Chinese law, Finnish and Swedish national intelligence laws do not apply to technology providers. Second, the Finnish and Swedish laws bother have clear and narrow purpose limitations. For example, the laws do not allow signal intelligence for economic purposes. Third, the laws do not have extraterritorial application. Thus, Swedish or Finnish persons and entities operating in another EU country would not be faced with a potential conflict of interests or laws.

Nevertheless, if a supplier of equipment were presented with a request by the foreign intelligence authority in Sweden or Finland, the supplier would have good chances of successfully challenging that request. This is because the rule of law in Sweden and Finland and the available redress mechanisms would entail a review based on law, without regard to political interests.

Conclusion

In sum, at the heart of the problem with NIL lies the fact that the Chinese legal system and its judges and courts are subordinate to the direction and interpretation of the CCP.

With this in mind, it is questionable whether a Chinese supplier would be willing to object, by formal means or in practice, to a request to cooperate by intercepting communication on foreign territory that comes from a Chinese intelligence authority. In reality therefore, it can be inferred that Chinese technology suppliers to EU critical infrastructure providers, including

telecommunication operators, cannot be legally detached from the will of Chinese authorities and the CCP.
EU telecommunication operators therefore face an inherent risk of liability, for actions that a Chinese supplier or national undertakes if and when they were to comply with a request to cooperate with Chinese foreign intelligence authority.

Figure 1 Finnish, Swedish and Chinese foreign intelligence requests implications for European critical infrastructure operators illustrated by the example of telecommunications operators