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IPR

CELEBRATING 10 YEARS OF THE EU-CHINA IP DIALOGUE MECHANISM

What has it done and where is it going?

A QUESTION OF FAITH

Trademark protection in China

PUT YOURSELF ON THE MAP

The importance of registering geographical indications

PUT UP YOUR DUKES

European companies as defendants in IP cases

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THE AUDACITY TO CHANGE

Position Paper 2015/2016

INDUSTRY FOCUS

China's water treatment industry



European Chamber
中国欧盟商会





The POSCO Center

A building ‘for the people’

Beijing is making a concerted effort to transform itself into an international metropolis. As the city strives to meet the developmental goals required to achieve this status, more and more international enterprises based here are demanding modern, state-of-the-art office buildings to meet their requirements. These companies are no longer focused purely on hardware, location and facilities, they are also increasingly looking to invest in the concept behind a development.

Invested in and constructed by world-famous iron and steel company Pohang Iron and Steel Co Ltd, the POSCO Center, which completed in June 2015, is one such development. It aims to go beyond satisfying the basic requirements and promote its concept of providing a working space ‘for the people’ that are employed by the companies residing within its well-constructed confines.

In order to develop the building’s concept, during the preparation stage of the its construction Pohang Iron and Steel Co Ltd conducted close to a thousand interviews with Chinese and foreign employees to gain a better understanding of their expectations from office buildings. A marketing manager from Nike proposed the setting up of a clean, private environment for young mothers to nurse their babies; another interviewee recommended constructing a special entrance for employees who chooses to cycle to work; a further comment received during this process was that the building should make the most of natural light in order to enhance the mood of its inhabitants. This feedback helped

to develop the ‘for the people’ concept: the integration of the needs of enterprises and employees with the natural environment.

A comfortable and convenient working environment

Location

The POSCO Center is located in Wangjing, northeast Beijing, which conveniently nestles between the CBD area and Beijing Capital International Airport, alongside the fourth and fifth ring roads and the airport expressway. Subway lines 13, 14 and 15 (under construction) and about 20 bus lines run across this area, and there is a surfeit of banks, shops and restaurants, as well as other office buildings in the vicinity. It is an extremely convenient location for people to work in, and has the potential to become even more so.

Facilities

As companies and individuals are becoming increasingly aware of the need to reduce their carbon footprint, video conferencing provides an excellent alternative to long-distance travel. The center’s video conference suite is endowed with the most up-to-date, cutting-edge technology, providing the ultimate in convenience when ‘face-to-face’ meetings are required. The POSCO Center also has a large multi-media hall, capable of hosting conferences and exhibitions, and can even host weddings. There are additional supporting facilities such as restaurants (for



employees working in the center as well as friends, partners and associates visiting from outside), a fitness center, a medical center, a beauty salon and nursing room, car parking spaces with additional, convenient spaces for disabled drivers, and a bicycle park.

Property Management

A speed gate efficiently controls the flow of authorised persons in and out of the building. Internet connection is maintained through a high-speed LAN, which provides WIFI for the whole building. Security is tightly controlled through the employment of a network of both analogue and digital cameras, which ensures the safety of the building and all its residents. An automatic parking management system provides a convenient parking experience, and is run by a professional team who help to provide a safe backup for the employees working in the POSCO Center.

A natural working atmosphere

Design and materials

During the building's construction phase, the 3 Star Green Building System was adopted, which is China's highest level of green-building certification. The POSCO Center adopted the most advanced technology for its air and water purifying systems to provide clean air and water throughout the building. This includes the collection of rainwater for irrigation and flushing. These kind of features are particularly important these days, with people becoming increasingly aware of their responsibilities towards protecting the environment and the need to make the most of resources, in addition to the importance of having access to high quality air and water.

The design of a 'steel tree' lobby extends upwards through the first three floors, forming a three-storey mezzanine and creating a bright, airy and natural atmosphere. Panoramic views allow the maximum amount of natural light into the open, pillar-free office spaces to create a comfortable working atmosphere.

Surroundings

The designers of the POSCO Center placed a particular emphasis on providing a green and relaxing working environment, creating various different areas for people to relax in. The resting garden contains a large lotus pond; the sunken garden was designed with a contemporary twist, with water features fashioned from metal; and the outdoor garden has many different levels of seating where people can rest.

Through discussions with as many people as possible, the POSCO Center has endeavored to provide a working environment that matches the expectations of an international workforce, in terms of location, design, surroundings, building materials, facilities, working conditions and property management. In doing so it has become an office space 'for the people'.

That's just the starting point. Beyond that, it is hoped that the POSCO Center will contribute towards making the whole Wangjing area a more desirable place to conduct business, and to play its part in Beijing's journey towards becoming an international metropolis.

For more information, please contact at 010-84717777.

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Ethics – vital in the war for talent?

Respondents, especially millennials¹, say they will leave or refuse to join companies involved in bribery and corruption. This adds a new dimension to compliance. Getting it wrong will put retention and recruitment of top talent and growth strategies at risk.

Workforces highly aware of bribery and corruption

Bribery and corruption remain prevalent throughout APAC, with 6 out of 10 respondents agreeing that corruption happens widely in their countries. About half attribute this to tough economic times and competition. Perceptions of corruption vary by industry, with respondents from the life sciences sector (74%) and the extractive industries (69%) most likely to agree with this statement.



Supporting these findings, two out of three respondents say their colleagues are aware of fraudulent activities within their own organizations. Of these, 39% believe their colleagues report these activities. But 27% say that, even though their colleagues are aware of fraudulent activities, they do not report them.

Not surprisingly, therefore, almost a quarter of respondents do not have confidence in their organizations' internal procedures to detect and prevent fraud. In addition, more than a third of respondents are worried about the increasing risk of their organizations becoming a victim of fraud over the next few years. Whistleblower hotlines are consistently identified in surveys as one of the most effective sources of fraud detection and are, in our experience, an effective alert channel. In this context, the reluctance of many respondents to use whistleblower hotlines combined with an increased perceived risk of fraud, bribery and corruption is concerning.

“ Ethics are already high on the governance agenda, but the on-the-ground-execution of that top-down compliance message needs work, especially in local markets where regulation and enforcement trends are rapidly evolving. ”

Emmanuel Vignal
Greater China Leader
Fraud Investigation & Dispute Services

Respondents unwilling to work for companies involved in bribery and corruption

However, an even bigger issue for employers is that respondents say they do not want to work for organizations involved in bribery and corruption. When asked of their perceptions of an organization that has been involved in a major bribery or corruption case, 78% of our respondents said they would be unwilling to work for such an organization or would consider other employment opportunities. A further 16% would be willing to work for such employers, but would need reassurance about the organization's actions to address the problem. Only 5% of respondents say it would “make no difference to their willingness to work for them.”

Interestingly, the millennials – whose influx into the APAC workforce is already testing traditional HR strategies – feel most strongly about this issue. An overwhelming 86% of those respondents aged under 25 say they are unwilling to work for, or would leave, an organization involved in bribery or corruption. In contrast, around one in five respondents aged over 55 are willing to work for such a company.



of respondents say if an organization was involved in bribery and corruption, it would affect their willingness to work for that company

Ethical business key to talent retention

Two-thirds of respondents think that having a good reputation for ethical behavior is a commercial advantage. Our findings demonstrate that this advantage now includes talent retention, providing a new and powerful imperative for more robust compliance.

Compliance has always been about protecting value – avoiding financial loss and reputational risk. But now it also encompasses talent: the very core of an organization, essential for its survival. Retaining talent is about more than just competitive salaries and working conditions. Employees must also have confidence that their organization will act ethically.

This means not just having compliance programs in place, but management demonstrating decisive action. For example, having a whistleblower hotline is one component. But executives also need to be seen to react quickly to whistleblower reports and to conduct fair and objective investigations. Companies must also be seen to be more proactive in identifying corrupt conduct. This includes harnessing technological advances to better leverage corporate big data and the insights it can provide into unethical behavior.



respondents see commercial advantage in having a strong reputation for ethical behavior

About Fraud Investigation & Dispute Services

Companies that act with integrity in addressing fraud, bribery and corruption have an advantage with real business benefits. To that end, we help companies manage risk, investigate alleged misconduct and measure the financial implications of disputes.

When unusual financial activity is suspected, we can investigate, perform electronic evidence discovery, and review financial reports – all with the sensitivity and urgency required. And if necessary, we can provide expert witness testimony to explain our findings.

That's why some of the world's largest companies – and many of its best-known law firms – turn to EY.

Our areas of focus include: Anti-Fraud, Corporate Compliance, Dispute Services, Forensic Technology and Discovery Services, Fraud Investigations.

¹ Also known as the Millennial Generation or Generation Y, being those with birth years ranging from the early 1980s to the early 2000s

FIGHTING FOR YOUR RIGHTS



Jörg Wuttke
President of The European Union
Chamber of Commerce in China

A handwritten signature in blue ink, appearing to read 'J. Wuttke', written over a light blue horizontal line.

Just a month after the launch of our *European Business in China Position Paper 2015/2016*, a number of new reform statements were released by the Chinese leadership. While of course we are not going to try and take the credit for these pronouncements it is extremely encouraging that they are very much in line with some of the key issues on which we have been advocating on behalf of our members. It is the European Chamber's hope that, if properly implemented, major policy changes such as the reform of state-owned enterprises (SOEs) and a nationwide roll-out of the *Negative List* to regulate foreign investment—currently employed only in China's free trade zones—will bring China closer to realising a true, market-driven economy.

The European Chamber welcomed the *Guiding Opinions on Deepening the Reform of State-Owned Enterprises (SOE Opinions)* as a signal that the Chinese leadership is aware of the urgent need to guide SOEs towards market-based efficiency. However, it remains to be seen whether the *SOE Opinions*, or any subsequent SOE reform measures for that matter, will result in inefficient SOEs exiting the market in an orderly fashion; and whether or not private enterprises will be able to acquire SOE assets during that transition period remains moot.

If this new, Party-driven reform effort were to guarantee fair market access and a level playing field for foreign business, it would send an important signal to the ongoing negotiations for an EU-China Comprehensive Agreement on Investment (CAI). With the CAI, China can benefit from an agreement that takes the world's second biggest trade relationship to a new level. The Chinese leadership would have the opportunity to harness this momentum to drive through domestic reforms, many of which are still resisted by vested interest groups in many areas. It could be a WTO 2.0.

The Chamber recognises that many of the reforms that China has already made progress with have taken place in the field of intellectual property rights (IPR), the focus of this issue of *EURObiz*. The issue of IPR is a common thread that runs through every part of today's knowledge-intensive economy. A functioning IPR system is one of the most important building-blocks that China needs to successfully steer its economy onto a growth trajectory that will be lower, though built upon quality and driven through innovation and efficiency gains.

Although concerns over China's enforcement of IPR remain, China has at least made strong progress over the years with its *written* IPR system. Our members have attested to this in our annual *Business Confidence Survey*, in which a majority regularly state that China's written IPR laws are 'adequate' or even 'excellent'.

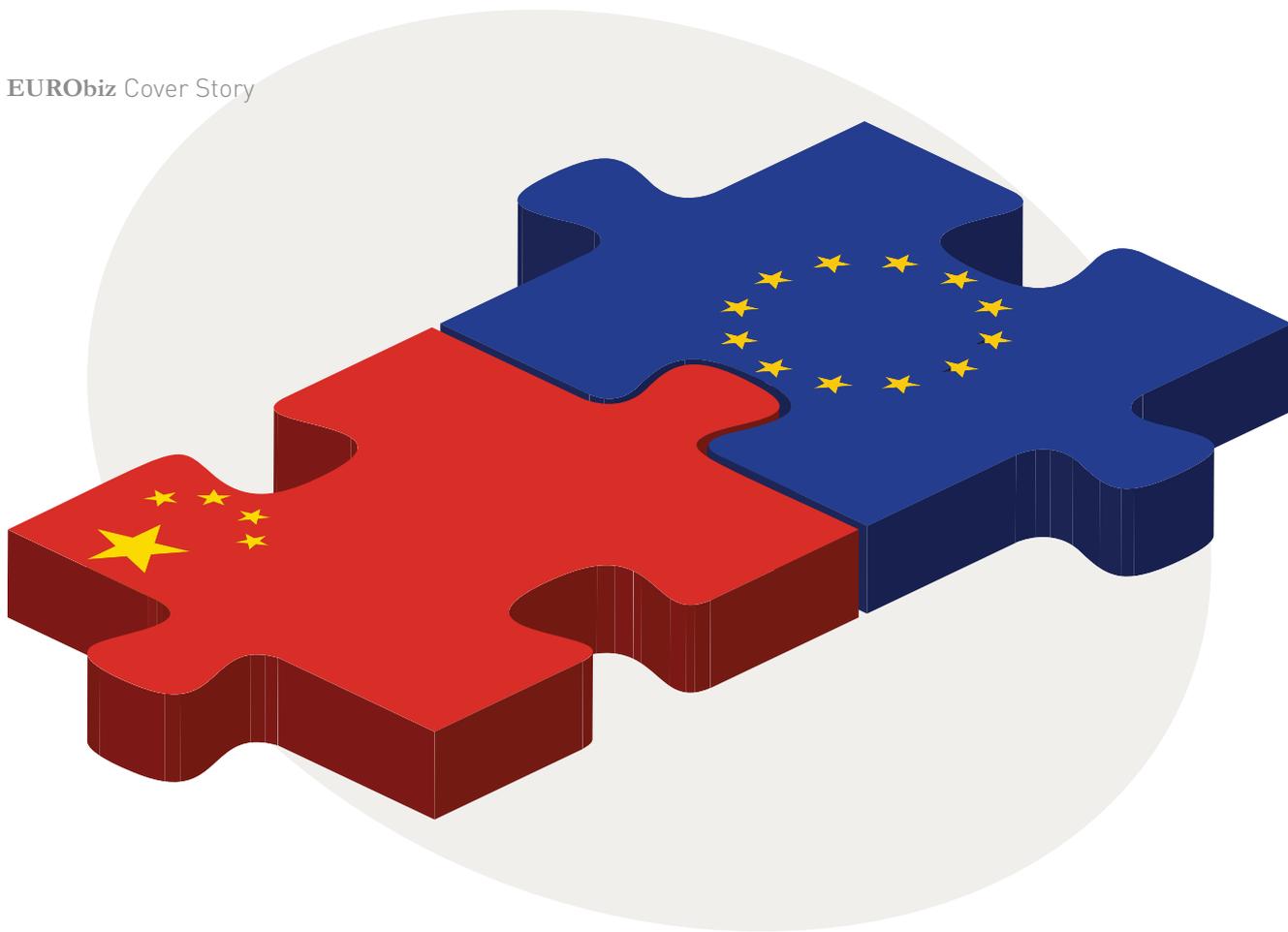
Instrumental to this has been the EU-China IP Dialogue Mechanism, now in its tenth year. The Chamber has been privileged to make ongoing contributions to this important bilateral exchange through our IPR Working Group, which is now active in our Beijing, Shanghai and South China chapters, as well as through the China IPR SME Helpdesk, a European Commission-funded initiative, of which we are an implementing partner.

On the occasion of this anniversary, we are delighted to have been entrusted by the European Commission with organising a special awards ceremony to recognise China's most 'IP-friendly' regions, which will take place in 2016. Awards will be given in the categories of transparency, efficiency, cooperation, deterrence and fairness.

While the Chamber would hope that these five qualities were ingrained in all policies and legislative measures coming out of China, certain recent developments—the promulgation of the National Security Law, the drafting of the Cyber Security Law and import substitution schemes with regard to the procurement of information technology in the banking sector—suggest that this is not yet the case. Disappointingly, these examples all reflect a tendency towards 'reform and closing up'.

As the recognised voice of European business in China, the European Chamber's task is to check these worrisome trends and try to secure a better outcome for our members: reform ought to be inclusive of foreign stakeholders and the current trend towards closing up in certain areas needs to be reversed. This is important not only for our member companies, but also for China. Open markets ensure that consumers have access to the best quality products at the most competitive prices, and these conditions would help to stimulate China's consumer economy.

So we now turn our attention towards the EU-China CAI, with the seventh round of negotiations having concluded around the time this issue of *EURObiz* goes to print. The European Chamber is proud to support the European Commission's efforts at the negotiating table, through our *Position Paper*, our advocacy trips to Brussels and by providing briefings to the CAI negotiation team and the High-Level Economic and Trade Dialogue, which is to be held in Beijing this month. We look forward with anticipation and remain committed to continuing to assist where we can to help secure a positive outcome for both the EU and China.



CELEBRATING 10 YEARS OF THE EU-CHINA IP DIALOGUE MECHANISM

The last 10 years have seen significant developments in the legal framework related to intellectual property (IP) in China. As its market opens up, China's IP system will need to continue to evolve if it is to support the needs of Chinese and international businesses operating in China and maintain a fair and competitive market environment. The EU-China IP Dialogue Mechanism has proved instrumental in helping to lay sound foundations for China's IP system and ease its convergence with global IP systems. The following article traces its development, outlining some of the numerous accomplishments and what the future holds for cooperation in EU-China IP matters.

On 30th October, 2003, EU Commissioner for Trade Pascal Lamy and Vice Minister Wei Jianguo, Ministry of Commerce, agreed the establishment of a structured EU-China dialogue on intellectual property rights (IPR). The intention was to create a platform where all issues related to the protection and enforcement of IP could be discussed, following many years of cooperation between the EU and China on IP matters.

An annual IP dialogue was officially launched in October 2004, during the 6th EU-China Summit. During this first meeting the European Commission proposed the formation of an IP Working Group, and a year later this working group convened for the first time to discuss the “specific problems the European industry and IP rights holders” were having in China.¹ This first meeting took place with the participation of the European Union Chamber of Commerce in China and its Pharmaceutical Working Group, with a particular focus on IP issues in the pharmaceutical industry.

As things progressed it became clear that the issues being discussed in this working group were not just significant to European industry, they were also hugely relevant to Chinese companies seeking to expand and protect their IP capabilities. Initially chaired just in Beijing, EU-China IP Working Group meetings in 2013 took place in Beijing, Shanghai and Guangzhou, indicating the increasing importance of IP issues outside of the capital. It was in these three cities that one year later the National People’s Congress Standing Committee announced that specialised IP courts would be established, representing another milestone in the progress of China’s IP landscape.

In support of China’s IP system

The EU-China IP Dialogue Mechanism has been complimented down the years by supporting projects such as the EU-China Trade Project (EUCTP) and the EU-China Project on the Protection of Intellectual Property Rights (IPR1, which promoted international standards of IPR protection in Chinese legislation; and IPR2, which covered cross-cutting areas—legal framework, capacity building, training, access to information—and specific areas, such as civil, administration and procedures, enforcement and support for rights holders). The most recent was the launch of the IP Key project in January 2013: implemented and co-financed by the Office

for Harmonisation in the Internal Market (OHIM), it is continuing to build on the success of previous EU-China cooperation on IP issues.

In addition, the EU appointed two dedicated, expert ‘IP attachés’ from the OHIM at the European Delegation in China, one from 2008–2011 and the second from 2013–2016. An ‘IP attaché’ from the European Patent Office was also appointed from 2008–2011. This important role is set to continue in the years to come.

Concrete actions

Some of the more significant contributions stemming from these projects have come from legislative exchanges, peer exchanges and comparative analysis, which have helped to increase knowledge and develop common understandings. These interventions have substantially contributed to the adjustment of China’s national IP legislation, which has gone a long way to strengthening economic relations between the EU and China.

The drafting process of China’s laws is a good example of how this has achieved a positive result. The process has allowed for extensive comments and suggestions to be submitted by European businesses, which has brought laws closer to international standards and helped Chinese policy-makers to understand the issues faced by owners of IP; this was particularly relevant in the drafting of China’s Copyright Law. Other revised or new laws and regulations that have been supported include those on patents, trademarks and internet-related rights.

Ongoing cooperation is taking place on amendments to the third revision of the Copyright Law, the fourth revision of the Patent Law, the *Regulation on Inventor Remuneration* and other areas such as anti-unfair competition and protection of trade secrets. There also exists a continuous sharing of best practices on how to police issues in cyberspace—encompassing privacy, security and copyright—which has been necessitated by the rapid technological advances of the last decade.

Another important development includes the 10 plus 10 project, run by the Directorate General for Agriculture and Rural Development (DG AGRI) and the General Administration for Quality Supervision, Inspection and Quarantine (AQSIQ). Under this project, 10 geographical indications from the EU and 10 from China were registered and protected in Europe. Not only does this safeguard consumer rights by preventing a proliferation of counterfeit

¹ *Intellectual Property: EU China IP Working Group*, European Commission, 27th March, 2006, viewed 25th August, 2015, <http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145770.pdf>



products from flooding the market, it also commits to future exports of foodstuffs between the EU and China and is an important step towards improving food safety.

Positive developments

The EU welcomed China's announcement at the end of 2014 that it would create three specialised IP courts in Beijing, Shanghai and Guangzhou. These courts will help to support IP right holders and modernise the Chinese judicial system, with both industry and government agencies closely monitoring and supporting their development.

In March 2014, the Trademark Office of the State Administration for Industry and Commerce (SAIC) joined the global classification tool TMclass, which offers users the opportunity to search and translate terms to and from Chinese, in addition to any of the other 27 available languages. In September 2015, the State Intellectual Property Office joined 34 other participating IP offices in the EU's Designview IP database, which provides access to more than 8.6 million industrial designs. The SAIC and the OHIM are now working on how to integrate China's trademark database with the international TMview IP database to help users, from pre-application tests to post registration monitoring, and to provide support to administrative and enforcement agencies worldwide, as well as the general public and enterprises – especially SMEs.

Future cooperation

While technical assistance provides obvious and immediately-tangible benefits, it is the forging of meaningful partnerships with China on IP-related issues that has perhaps been more instrumental in bringing about a convergence of China's IP system with the rest of the world. The creation of working networks among EU and Chinese agencies has led

to greater transparency, and some alignment has been achieved between the two systems. This, in turn, is creating a more predictable, transparent and coherent environment in line with the World Trade Organisation agreements.

This is precisely what the new strategic cooperation between the EU and China is developing. In 2015 alone, IP Key engaged a dozen Chinese IP partners in a large number of activities, covering all areas of IP. These included exchanges related to the reforms of the legal framework for a number of laws and regulations; the development of sustainable networks between EU and Chinese enforcement agencies and the exchange of best practices; information sessions on the EU's and China's respective IP systems; the development of databases and repositories of general and specialised IP knowledge; and even the implementation of joint IP tools.

These points were all noted in the memorandum of understanding (MOU) signed in June 2015, between Trade Commissioner Cecilia Malmström and Minister Gao Hucheng, Ministry of Commerce. The MOU announced the upgrading of the IP dialogue to vice-minister level, highlighting the value and importance both sides attach to this cooperation.

Other important aspects detailed in the MOU include joint initiatives on protecting IP rights—including trade secrets and the fight against counterfeiting and piracy in the digital environment—and cooperation between judicial bodies and universities in order to promote the exchange of experiences and practices in the area of IP and joint academic research.

These efforts will continue to contribute to the strengthening of Chinese, EU and other international IP protection practices, and this will ultimately benefit all IP rights holders wherever they reside. [Eb](#)

*The **IP Key** project is the European Commission's financial vehicle for the EU-China New Intellectual Property Cooperation, an agreement between the EU and China. Concluding in 2016, this three-year project is building on the long and productive history of EU-China cooperation on IP issues. IP Key focuses on facilitating the development of an IPR framework in China that is increasingly effective, fair, transparent and otherwise based upon international best practices. It is a platform for cooperation and acts as bridge between EU and Chinese agencies in order to create an IP landscape that benefits both Chinese and EU Industry operating in China.*



FROM COPYCAT CARS TO COPYCAT PARTS

IPR ISSUES IN CHINA'S AUTOMOTIVE INDUSTRY

Thirty or more years ago, motorised traffic on Beijing's roads consisted of little more than public trolley buses, 'liberation' trucks and the occasional 'red flag' sedan transporting government officials. Traffic noise was largely created by the shrill chorus of bicycle bells as China's urban population got about mostly on two wheels. Fast forward to the present, and these same thoroughfares are now jammed with cars, and the sound of bicycle bells has long since been drowned out by a cacophony of car horns.

In 2013, there were more than four million cars in Beijing alone, out of a national total of 93 million. This has led to other negative side effects beyond the obvious traffic congestion and major contributions towards a deterioration in air quality. **Ewen Turner** of **FTI Consulting**, looks at how the meteoric growth of China's automotive industry has also resulted in an increase of IPR violations.

The significance of China's rapidly expanding consumer class upgrading from two wheels to four has not been lost on either local or foreign automotive manufacturers. Annual growth in China passenger vehicle sales leapt from 6.7 million in 2008 to 19.7 million in 2014.¹

With this development so China automotive shows have become more prominent, both domestically and internationally. The Beijing and Shanghai automotive shows are now must-see events on the international circuit, and are increasingly being used as platforms for foreign companies to launch global as well as China/Asia-targeted vehicles. The 2015 Shanghai Auto Show saw over 1,300 vehicles on display to 928,000 visitors and 10,000 journalists; 109 of the vehicles were global launches.²

While eyebrows have been raised among Chinese government officials at the plethora of provocatively-attired 'car models' who are employed to promote new vehicles at these shows,³ it is the appearance of a rash of Chinese, domestically-produced cars that bear a striking resemblance to foreign-made models that is raising eyebrows among executives of foreign automotive manufacturers. During the 2015 Shanghai Auto Show, the Chinese Beijing Auto Group unveiled their BJ80C model, which closely resembled the Mercedes G-Wagen—produced by their foreign joint venture partner—to such an extent that it drew widespread comment.⁴ Similarly, at the 2014 Guangzhou Auto Show, Chinese automotive manufacturer Landwind debuted its in-the-style-of-a-Range-Rover model.⁵

International automotive manufacturers continue to be frustrated by some of their Chinese counterparts' copy-paste approaches to vehicle design, instead of developing their own designs and design capabilities. What also chafes is the perceived lack of effective legal remedies against what they perceive to be blatant copying.⁶

This phenomenon appeared to peak in the 2000s, with a newly-emerging and relatively unsophisticated market focused more on today's price than tomorrow's value. Many Chinese consumers enjoyed the idea of a vehicle with the same 'look' at half the price. This consumer attitude, combined with China's immature legal framework, offered copy-paste Chinese automakers an unfair advantage. While minimalising capital outlay in the research and development stage of product development and reducing the time-to-market, domestic automakers were, in some cases, able to more rapidly and profitably meet the then expanding consumer demand.⁷

Whether these same factors will guide customer decision making when it comes time to trade up to the next round of vehicle purchases some years down the track is another matter entirely.

The aftermarket aftersales counterfeit market

Counterfeiting within the automotive industry goes well beyond the (seemingly) endless parade of copycat vehicles, though. Routine maintenance during the lifetime of a vehicle requires an aftersales market for servicing and replacement parts. The development of China's automotive market has also had a significant impact on its important, and profitable, aftermarket.⁸

China's position as the 'world's factory', combined with the growing service expectations of its domestic consumers, provided ample incentive for manufacturers and distributors to boost profits by cutting corners. Now more than two decades old, China's counterfeit automotive parts industry has passed through many of the same developmental stages as the 'legitimate' market.

Production and distribution of counterfeit products, including automotive spare parts and accessories, has never been an independent phenomenon operating outside of the 'other' automotive industry. Manufacturing capabilities for automotive parts initially developed in key locations along the eastern seaboard provinces of Zhejiang, Fujian and Guangdong. Both the quality of the counterfeit parts and the brands being counterfeited also had a geographical relation. For example, a customer sourcing counterfeit automotive filters might go to Rui'an, Zhejiang Province, if they needed higher

¹ <http://www.statista.com/statistics/281169/china-passenger-car-sales-by-model/>

² <http://www.autoblog.com/2012/04/24/beijing-motor-show-is-further-proof-of-chinas-automotive-import/>

<http://www.autoshanghai.org/en/news/zhanhui/news/2015-04-30/254.html>

³ <http://blogs.wsj.com/chinarealtime/2015/01/09/china-auto-show-looks-to-cover-up-models/>

<http://www.reuters.com/article/2015/01/09/us-china-autoshow-models-idUSKBN0K11F20150109>

<http://www.drive.com.au/motor-news/crackdown-on-show-girls-20120911-25p8w.html>
<http://www.autoblog.com/2015/01/13/shanghai-motor-show-female-model-ban/>

⁴ http://www.autonews.com/article/20150428/BLOG06/150429814/mercedes-g-wagen-latest-victim-in-chinas-clone-wars?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+autonews%2FAutomakerNews+%28Automotive+News+Automaker+News+Feed%29

⁵ <http://www.dailymail.co.uk/news/article-2846676/Fury-China-unveils-14-000-copy-Range-Rover-British-company-legal-action-little-known-manufacturer-launches-brazen-copy-roader.html>

⁶ <http://www.autocar.co.uk/car-news/guangzhou-motor-show/land-rover-complain-about-chinese-copy-range-rover-evoque>

⁷ <http://www.reuters.com/article/2012/09/18/us-china-cars-idUSBRE8861DQ20120918>

⁸ <http://www.automotive-logistics-magazine.com/news/counterfeit-service-parts-in-china-on-the-rise>



grade counterfeits of an international brand, or alternatively to Qinghe, Hebei Province, if they were looking to source lower price/quality counterfeits of low-end, domestic brands.

Early on, many of the larger-scale manufacturers investigated for producing counterfeit parts were simultaneously developing their own brands. Once their own brands were sufficiently established these companies moved away from counterfeiting activities. Ironically, these former domestic pirate enterprises found that, once they had achieved a sufficient level of market penetration, they too would often become victims of counterfeiting by less-established rivals.

Increased attention by rights-holders and growing IP awareness and enforcement by relevant enforcement bodies targeting trademark and other infringement has continuously affected the counterfeiting landscape. Responding to increased localised enforcement and increased economic pressures—like rising labour costs—in these same areas, counterfeiting centres have migrated. Both legitimate and counterfeit parts manufacturers have leveraged incentives offered by local governments to boost their economies. Individual counterfeit automotive parts manufacturers in well-known locations such as Wenzhou in Zhejiang have established ‘branch factories’ in cities in Anhui or Jiangxi that were keen to establish their own local automotive parts industry.

The wholesale distribution of automotive parts, including counterfeits, originally focused on servicing domestic demand, conducted through large-scale ‘auto parts cities’. Foreign buyers made a yearly visit to China, usually in association with an industry event like the Canton Export Fair, and arranged orders via follow-on factory visits through a local trading contact. Nowadays, China’s automotive parts distributors directly target the export market. Foreign buyers have

established bases in key trade cities including Yiwu and Guangzhou.

At the same time Chinese entities have also established their own overseas presence. One investigation by a rights-holder found that a single Chinese automotive parts trading company had expanded its business scope over time, established its own manufacturing entity and set up sales offices in Dubai’s free trade ports to facilitate wider regional distribution and business development.

Infringement of IP within China continually evolves in response to a changing business and regulatory environment, and has embraced globalisation. Counterfeiters readily adapt to opportunities offered by the internet and online business. Over time, they tend to move away from manufacturing 100 per cent counterfeits towards the manufacturing of ‘look-alikes’ and other bad faith trademark and trade dress infringements that pose a much greater enforcement challenge to rights-holders. Rights-holders are strongly advised to constantly appraise their own IPR strategies and take advantage of emerging enforcement opportunities in order to protect their legitimate IP rights. [Eb](#)

FTI Consulting is a leading global business advisory firm dedicated to helping organisations protect and enhance enterprise value in an increasingly complex legal, regulatory and economic environment providing advice on issues in the areas of risk, governance, commercial investigations, compliance and liability, finance, and restructuring.

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A QUESTION OF FAITH

TRADEMARK PROTECTION IN CHINA

When China joined the World Trade Organisation (WTO) and revised its Trademark Law in 2001, the unconditional opening of the right to file a trademark by any person resulted in a flood of applications for existing trademarks. These applications included trademarks known both inside and outside China, but applied mainly to those outside. This trend, combined with China's first-to-file system, created a major problem for people who were looking to protect their trademarks in China only to discover that they had been beaten to the punch, and led to a spate of complaints about 'bad faith registrations'.

China is fully aware of the situation and has taken measures that are progressively taking effect, a development welcomed by the European Chamber's Intellectual Property Rights (IPR) Working Group. **Paul Ranjard**, Counsel at **Wan Hui Da Intellectual Property Agency & Law Firm**, and co-chair of the IPR Working Group, looks into the history of this widely-discussed issue.



Upon its accession to the WTO, China revised its IPR laws in order to meet the requirements of the Agreement on Trade Related Aspects of Intellectual Property Rights. The revision of the Trademark Law took place on 27th October, 2001. One of the many amendments dealt with the right to file an application for a trademark: in the previous law, this right was restricted to “any enterprise, institution or individual producer”; the revised law opened this right up to “any citizen, legal person or other organisation”.

This apparently minor change had unexpected consequences. Over the ensuing years, filing applications for trademarks turned into a business, and a nuisance. More and more individuals were filing trademark applications in large numbers, running sometimes to hundreds. These trademarks were often a carbon copy of foreign trademarks, the owners of which had yet to file for registration in China. When it eventually came to trying to protect their trademark, foreign holders came up against obstacles created by these pre-emptive, ‘bad faith’ trademark applications. The ‘bad faith’ applicants had merely been waiting for an opportunity to make money – threaten to sue and negotiate a price.

This phenomenon did not go unnoticed by China’s Trademark Office. On 29th July, 2005, an internal notice was circulated to the examiners: they were to refuse trademark applications filed by individuals if the applicant could not prove he/she had the means to manufacture the designated products or provide the designated services. Pre-emptive ‘bad faith’ applications continued, however.

It became fairly obvious that the existent Trademark

Law was ill suited to combating such situations. After all, the governing principle was—and still is—the first-to-file principle: whoever files first owns the exclusive right to use the trademark. There were exceptions to this principle, but they were difficult to apply. The well-known status, stipulated in Article 13, was extremely challenging to establish, particularly for a foreign trademark. Proving sufficient prior use to demonstrate a “certain influence”, as provided for in Article 31, was slightly easier but such influence needed to be based on use in China, which constituted an additional difficulty. The only ‘easy’ case was where the pre-emptive application had been filed by the agent of the foreign trademark owner (Article 15). This was later extended by the Supreme Court to the distributor of the foreign trademark owner.

Another way of alleging bad faith was to cite Article 41.1 (re-numbered 44 in the new law). This article provides for the invalidation of trademarks that do not conform with the “absolute grounds of refusal” (Article 10.1.12), or which have been registered by “improper means”. The advantage of such an article is that it does not contain a time limit (the five years provided for the invalidation of a registered trademark, based on a prior right). However, the Supreme People’s Court set a limit to such argumentation (interpretation of April 2010) when it specified that “improper means”, as per Article 41.1, only refers to the concept of public order and cannot be used when the invalidation action is only based on relative grounds.

It was clear that the law had to be changed.

In the period leading up to the third revision of the Trademark Law (adopted on 3rd August, 2013 and



effective on 1st May, 2014), no less than three seminars were organised—in 2009, 2010 and 2014—on the subject of ‘bad faith’ / ‘good faith’ through the EU China IPR Cooperation Programme (IPR 2).

The revised law contains new provisions, which represent significant progress. First, the principle of ‘good faith’ is clearly stipulated in Article 7: “trademarks must be filed and used in good faith”. Yet this principle cannot be used on its own in an application for opposition or invalidation. It cannot constitute the single legal ground of an action; other specific articles of the law need to be cited. Although many commentators initially expressed disappointment, it now seems that, after all, this article serves as more than just a vague backdrop: the People’s Courts draw inspiration from it in their interpretations of the law, as does the Trademark Office.

Also of significance is the new Article 15.2, which is no longer restricted to prohibiting the agent (or distributor) to file, in its own name, the trademark of its principal. The concept has broadened to include all business relationships or geographical circumstances which establish that the applicant knows, or should definitely know, the existence of the still-unregistered trademark.

Though definitely an improvement there are still many cases where ‘bad faith’ may be apparent, even in the absence of a business relationship. For example, when the trademark applicant is found to be a ‘serial trademark applicant’.

This phenomenon is now fairly well understood by the Trademark Office and the People’s Courts who have

found in Article 7 of the law the ‘weapon’ they need. In a recent case involving Victoria’s Secret against a ‘serial trademark applicant’, the Trademark Office officially cited Article 7 to dismiss the applicant’s claim.

The courts are also revising their restrictive interpretation of Article 44 (ex 41), considering that the act of filing large numbers of trademarks may be considered “improper means”, and that this is against public order.

The most advanced judicial interpretation of the ‘good faith’ concept can be found in the Ellassay case of August 2014, where the Supreme People’s Court decided to dismiss a trademark owner’s infringement claim against the user of its registered trademark, on the basis of the ‘bad faith’ shown by the plaintiff when he had filed its trademark. What is important in this case is not so much that the court recognised the existence of ‘bad faith’ (such a decision is circumstantial), but the fact that the court accepted to rule on the case on the basis of good/bad faith, and to dismiss the complaint without waiting for a decision on the validity of the trademark. [Eb](#)

*Established in 1999, **Wan Hui Da Law Firm & Intellectual Property Agency** has more than 15 years of experience in the field of IP. With a staff of more than 300 and an office presence in Beijing, Shanghai, Guangzhou, Ningbo, Suzhou, Taizhou, Tianjin, Chongqing, Shenzhen and Hong Kong, Wan Hui Da is a full intellectual property service provider, offering clients a comprehensive range of legal advice and services in all areas of trademarks, patents, domain names and copyright, as well as building and maintaining IP portfolios, and surveying, investigating and monitoring the enforcement of IP rights.*

PUT YOURSELF ON THE MAP

PROTECTION OF GEOGRAPHICAL INDICATIONS IN CHINA

Geographical indications (GIs) can act as a stamp of quality for products. This is particularly important in a market such as China's where there is a need to bolster confidence in food and beverage products among an increasingly savvy consumer base that have concerns over food safety. These new consumers are more willing to spend a little extra for genuine, safe products, and a GI can also provide an indication of authenticity, a highly desirable quality. **Reinout van Malenstein**, IP Expert at the **China IPR SME Helpdesk**, explains the importance of GIs, and how they can, and should, be registered in China.

Stilton cheese: If it isn't made in the counties of either Leicestershire, Derbyshire or Nottinghamshire in the UK, then it can't be called Stilton.

Champagne, Parma ham and Stilton cheese are all examples of products desired by both culinary experts and regular consumers. They have a certain quality, reputation or other characteristic influenced by the environmental or cultural conditions of the regions where they are produced. Therefore, their origins are usually stated on the product label. Such specific origins that create an association with a product's quality, reputation or other characteristics are called geographical indications (GIs).

Geographical indications are protected by World Trade Organisation members, including all 28 European Union (EU) Member States and China. This protection is designed to avoid misleading consumers and to prevent unfair competition. Because a GI represents a product's specific quality, reputation and consistent method of production many consumers prefer and are even willing to pay more for products with GIs.

The market for imported foods in China is already large and continues to grow. China is now the world's fourth largest importer of food, and the food and grocery retail market is set to grow by 15 per cent every year. Along with this growth an increasing number of Chinese domestic consumers have concerns over food safety and the quality and origin of ingredients. If you intend to export products that come from a specific geographical region to China, obtaining a GI registration can provide the necessary proof of the product's origin and can increase trust from domestic consumers. To take advantage of this, the following steps have to be taken:

- Contact your GI organisation.
- Urge your GI organisation to register the GI as a certification mark or as a collective mark in China.
- Register for GI protection in China at the General

Administration of Quality Supervision, Inspection and Quarantine (AQSIQ).

- Enforce your rights.

How to Register a GI in China

In China GIs can be protected as an intellectual property right (IPR) under the Chinese Trademark Law as a collective or certificate mark, which provides the same level of legal and economic protection as for any other logo, name or mark registered as a trademark.

Alternatively, and in addition, the GI can be registered at the AQSIQ which monitors and manages the quality and standard of products offered in the Chinese market. Dual registration can ensure the GI is both protected as an IPR and acts as an indication of a certain level of quality assurance to the public.

Step 1 – Contact your GI organisation

Your GI organisation regulates your specific GI. For example, if your product is Bordeaux wine, you can contact the Bordeaux Wine Council. Check with your specific GI organisation if the GI that you use for your product is already registered in China. In case your GI is already protected in China, you can apply for a user permit at the GI organisation for your product. If not, proceed to Step 2.

Step 2 - Urge your GI organisation to register the GI as a certification mark or as a collective mark in China

Under the Chinese Trademark Law, GIs can be registered as certification marks or collective marks by the GI organisation of that region at the China Trademark Office (CTMO). As the Chinese Trademark Law only protects your GI if it is registered as a certification mark





or as a collective mark, urge your GI organisation to register this mark as soon as possible. Registration gives you the best protection against copycat products that can mislead consumers.

Names or marks that can be registered as collective or certification marks include the name of the region of origin, or any other visual sign indicating that the goods originate from the region. However, if the chosen name or sign resembles country names, national or regional flags or national emblems, consent needs to be given by the relevant country's government. It is also important to create a Chinese translation of your GI as this will be more acceptable and understandable to the Chinese domestic consumer. You can either choose a Chinese name which sounds like the original mark or one that has a similar meaning to the original mark.

Step 3 – Register for GI protection in China at the AQSIQ

In addition to registering as a trademark (collective or certificate), GIs can be registered at the AQSIQ by your GI organisation to provide an extra layer of protection with regards to the quality and standards of the product. Although it is not necessary to perform both registrations, this double approach will ensure that your GI will have the maximum possible protection in China.

We advise you to urge your GI organisation to try and register the GI with recommendations and supporting documents from your country's ministry of agriculture and/or local government at the AQSIQ. Further information and a list of the documents required can be found in Article 10 of the *Provisions for the Protection of Products of Geographical Indication*.

Protection offered and enforcement of rights

Following registration, you can seek support for protection for your GI-covered products in China

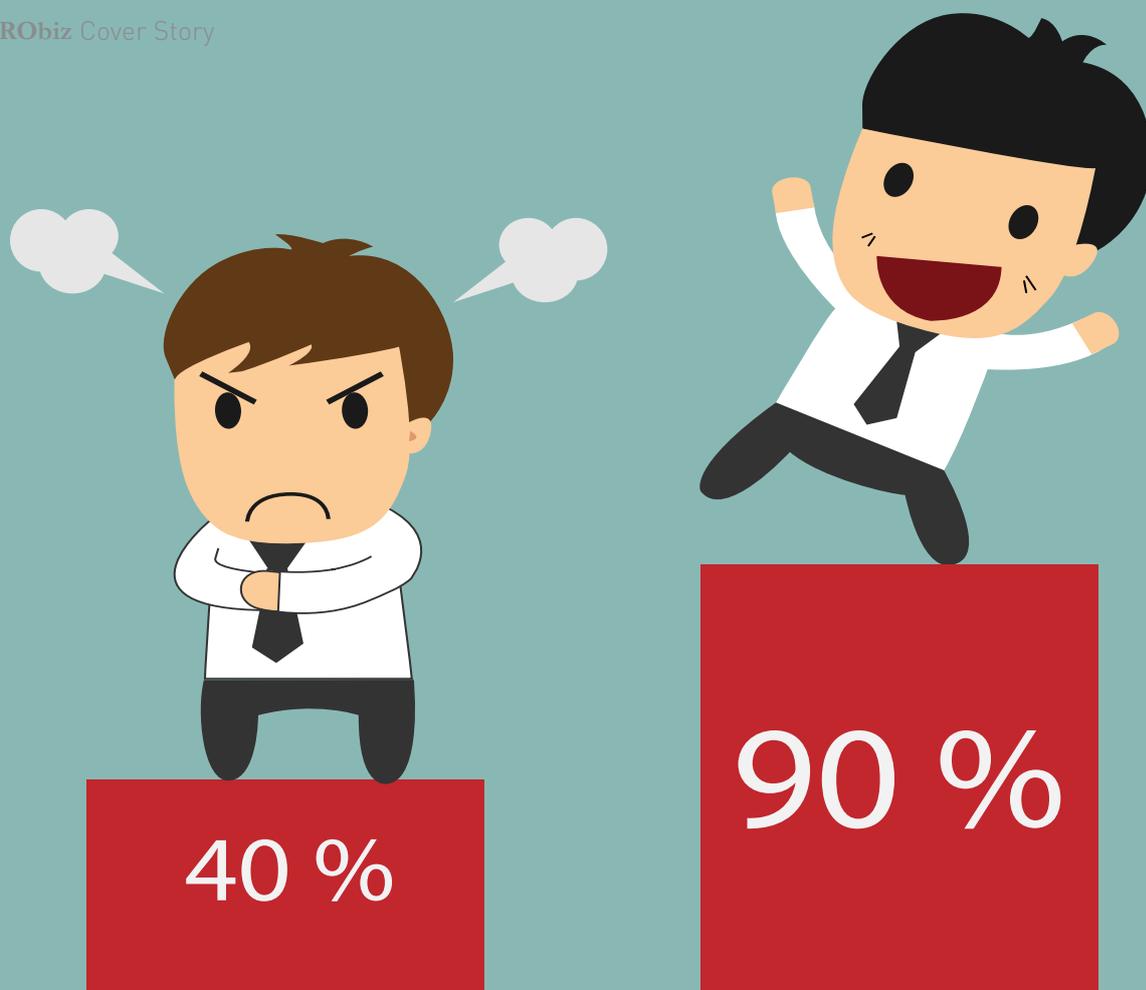
against illegitimate use of the mark including: acts of unauthorised use or forgery; use of the GI which violates the regulated standards of the GI-protected products; and, use of words or logos that could lead consumers to mistake other products for those of a registered GI. Once you have identified an infringement of your rights, you can seek administrative enforcement support via the Administration of Industry and Commerce (AIC), the General Administration of Customs and other administrations, or you can enforce your rights through the China courts.

Enforcement of rights

Keep a close eye on the market. If you discover any illegitimate use of the GI inform your registering organisation as soon as possible. The first step in enforcement is to obtain notarised evidence of the infringement. Administrative measures can help stop the ongoing infringement of a GI and litigation can result in compensation. The plaintiff of a GI case must be the registrant of the GI mark or the certificate holder of the GI. Therefore the registering organisation must act on your behalf and in the interests of the whole organisation. 

The **China IPR SME Helpdesk** is a European Union co-funded project that provides free, practical, business advice relating to China IPR to European SMEs. To learn about any aspect of intellectual property rights in China, visit our online portal at www.china-iprhelpdesk.eu. For free expert advice on China IPR for your business, e-mail your questions to: question@china-iprhelpdesk.eu. You will receive a reply from one of the Helpdesk experts within three working days.





ELIMINATING UNFAIR COMPETITION

GUIDELINES ON IP-RELATED ANTI-MONOPOLY ISSUES

In March 2015, Xu Kunlun, director of the National Development and Reform Commission's (NDRC's) Price Supervision and Anti-Monopoly Bureau, stated that antitrust enforcement would focus on IP-related issues. Soon after, the State Administration of Industry and Commerce (SAIC) published *Provisions on Prohibiting Abuse of IP Rights to Eliminate or Restrict Competition (Provisions)*. The *Provisions* echo Article 55 of the Anti-Monopoly Law (AML) in trying to set the boundaries between the legitimate exercising of IPR and abuse of IPR that eliminates or restricts competition. In this article **Georgia Chiu**, Counsel at **Hogan Lovells** and vice chair of the Chamber's IPR Working Group in Shanghai, and **Ting Xiao**, associate, Hogan Lovells, lay out the legal framework governing some commonly encountered IP-related competition issues.

Standard Essential Patents (SEPs)

The *Provisions* define SEPs as patents that are essential for the implementation of a standard. Business operators are prohibited from committing any of the following actions to eliminate or restrict competition in the course of developing and implementing standards (including the compulsory requirements from national technical specifications), without any justification:

- Intentionally failing to disclose patents or explicitly waiving its rights when participating in the development of standards, but later asserting its patent rights against the implementer of the standard after its patent is adopted into the standard. This conduct is also known as ‘patent ambush’.
- Abusing its dominant market position (such as refusing to license, product tying or imposing unreasonable restrictions) in violation of the principle of fairness, reasonableness and non-discrimination (FRAND), after its patent becomes a SEP.

Huawei versus InterDigital Communications (2013) became the first case to interpret the FRAND principle in China. The Guangdong Higher People’s Court held that under the FRAND principle, the patentee of the SEPs shall not refuse to license the implementer of a standard who is willing to pay reasonable royalties. The court emphasised that the core of the FRAND principle is the *reasonableness* of the royalties.

Compulsory licensing

Article 7 of the *Provisions* provides another mechanism of compulsory licensing outside the context of SEPs. Specifically, any business operator in a dominant market position shall not, without any justification, refuse to license its IP on reasonable terms that eliminate or restrict competition *if the IP right is part of the necessary facilities for production and operation*. The following conditions are relevant here:

- The IP rights involved cannot be reasonably substituted in the relevant market and the IP right is necessary for other businesses to compete in the relevant market.
- The refusal to license will cause an adverse impact among the competition or on innovation in the relevant market and harm consumers’ interests or the interests of the public at large.
- Licensing of the IPR will not cause unreasonable harm to the business operator.

Intellectual property owners are concerned about the SAIC’s broad power to require them to enter into licensing arrangements that may be against their will.

Unreasonable contractual conditions

Operators that hold a dominant market position are prohibited from attaching the following unreasonable conditions that eliminate or restrict competition, without any justification:

- Requiring the other party to exclusively grant back the technologies that they have improved.
- Prohibiting the other party from questioning the validity of the operator’s IP rights.
- Restricting the other party from using competing technologies or products after the expiration of the operator’s IP rights.
- Requiring the other party to continue to pay royalties for expired or invalidated IP rights.
- Prohibiting the other party from trading with any third party.

Some of the restrictions imposed by the *Provisions* differ from those imposed by the *Regulations on Administration of Import or Export of Technologies* and the Supreme People’s Court’s *Interpretations on Certain Issues on Application of Law in the Trial of Technologies Contract Disputes* in technology licensing agreements. For example, under normal circumstances, a licensor may require the licensee to grant back improvements exclusively as long as there is reciprocity. However, in a situation where the licensor enjoys a dominant market position, it seems that it will not be permitted to require the licensee to grant back improvements exclusively, even if there has been adequate consideration paid for such grant-back.

Tie-in

When exercising IPR, business operators that enjoy a dominant market position shall not, without any justification, conduct a tie-in sale that meets all of the following conditions that eliminate or restrict competition:

- The tie-in or package sale of different commodities is in violation of trading practices or consumption habits, or disregards the different functions of the commodities.
- The tie-in sale extends the operator’s dominant position in the tying product market to the market of the tied product and eliminates or restricts the competition in the tied product market or tying product market.

In the recent, well-documented Qualcomm case, the NDRC found Qualcomm licensed its Wireless SEPs in bundle with non-Wireless SEPs in the form of a licence package, without any justification.

Patent pool

The *Provisions* defines a ‘patent pool’ as a contractual arrangement where two or more patentees jointly license the patents owned by them individually to a third party. On one hand, a patent pool may reduce transactional costs and promote licensing activities; on the other, such an arrangement may eliminate or restrict competition. A patent pool management organisation that has a dominant market position is prohibited from committing any of the following acts that eliminate or restrict competition, without any justification:

- Restricting a patent pool member from licensing any patent as an independent licensor outside the patent pool.
- Restricting a patent pool member or a licensee from, independently or in conjunction with a third party, developing any technology competing with a patent in the pool.
- Compelling a licensee to exclusively grant back any technology improved or developed by the latter to the patent pool management organisation or a patent pool member.
- Prohibiting a licensee from questioning the validity of a patent in the pool.
- Applying differential treatment in trading conditions to patent pool members of the same conditions or to licensees in the same relevant market.
- Any other conduct that constitutes abuse of its dominant market position, as determined by the SAIC.

Safe harbour for monopolistic agreements

Monopolistic agreements include both horizontal and vertical agreements. Horizontal agreements are concluded between business competitors whereas vertical agreements are concluded between business partners of a same supply chain. IP right owners shall not enter into vertical agreements that fix the resale price or impose restrictions on the minimum resale price.

The *Provisions* provide the following safe harbour to IP owners who enter into such horizontal and vertical agreements:

- The aggregate market share of the competing operators in the relevant market is less than 20%

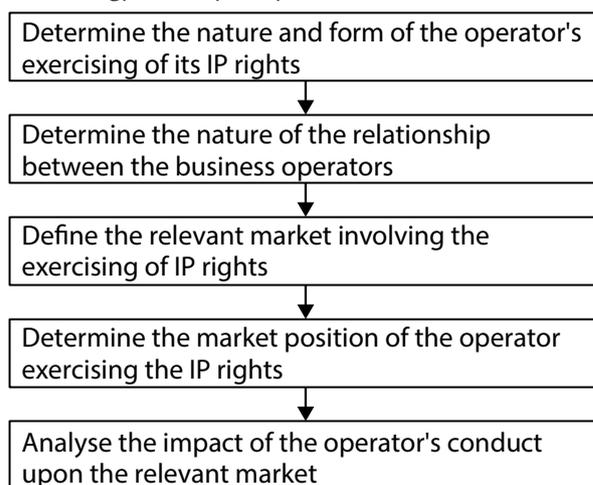
or at least four other interchangeable technologies subject to independent control can be obtained at a reasonable cost in the relevant market.

- The aggregate market share of the operator and its transaction counterparty in the relevant market is less than 30% or at least two other interchangeable technologies subject to independent control can be obtained at reasonable costs in the relevant market.

The AML fails to provide such safe harbour for regular business operators and therefore this provision is a breakthrough for IP owners or users.

The common issue for various problems outlined above is whether the conduct eliminates or restricts competition, i.e. the impact of the operator’s conduct upon the relevant market. This may involve extensive economic analysis.

Please see below for a flowchart showing the methodology of analysis by the SAIC:



Finally, it should be noted that the *Provisions* are enacted and implemented by the SAIC at the ministerial level under the AML. They do not have a binding effect on courts and the courts may well interpret the AML quite differently on any specific issues. This is perhaps more so since we have seen the increase of judicial power due to the recent reforms of the judiciary. That said, the *Provisions* serve well as a guideline for IP owners when exercising IPR in China. [Eb](#)

Hogan Lovells is a global legal practice with over 2,800 lawyers in more than 40 offices including three offices in Greater China, five offices in the rest of Asia and 17 offices in Europe. The Beijing, Shanghai and Hong Kong offices provide a full range of services covering antitrust/completion law, intellectual property, media and technology, banking and finance, corporate and contracts, dispute resolution, government and regulatory, projects, engineering and construction, real estate, and restructuring and insolvency.

IPR 4 ICT

While some IPR issues are common to all types of European companies doing business in China, others are specific to the information and communication technology industry (ICT) industry. In the following article the **China IPR SME Helpdesk** outlines appropriate patent and trade secret strategies, the type of patents particularly relevant to ICT companies and suitable IPR enforcement measures.

Developing a patent and trade secret strategy

Patent protection

China has three types of patents: invention patents, utility model patents and design patents. For a hardware invention all three should be considered, as each will help to protect your product in different ways.

Invention patents cover products that provide solutions to technological problems – they are more ‘inventive’ than utility model patents, which essentially provide protection for technological upgrades. Companies developing software inventions should consider filing for protection under an invention patent. The Chinese patentability standards for software inventions are similar to those in Europe so a software invention that is patentable in Europe should generally be patentable in China, although the patents should also be registered separately in China. Since the duration of a utility model patent is only ten years and the ‘novelty threshold’ for utility model patents is lower than that for invention patents, utility model patents are suitable for incremental inventions and technologies with a shorter life span. An invention patent lasts twenty years and should be used to protect inventions with a relatively long life.

Since Chinese companies can freely access patent information in Europe and the USA, companies are advised to register their invention and utility model patents in China before their inventions are released anywhere in the world. If your invention or utility model is disclosed to the public before it has been patented (i.e. it is no longer ‘novel’), it is no longer possible to apply for a patent.

In the EU, designs are automatically protected for three years. This is different in China, where if you do not register your design patent before you disclose it to the public in any way (anywhere in the world), it can no longer be protected by a design patent.

Trade secret protection

Trade secrets include confidential business information that may provide your company with a competitive advantage over others. Unbeknown to many, trade secrets can be extremely valuable IP. However, since they are not registerable rights, protection strategies adopted by EU SMEs should be considered carefully.

Trade secrets can include a myriad of technologies, including source codes (to the extent that they cannot be reverse engineered).

A trade secret is defined as:

1. technical and business information that is unknown to the public;
2. information that has economic value and practical utility; and
3. information that the trade secret owner has palpably protected – the owner should have undertaken (demonstrable) measures to ensure its confidentiality.

Although trade secrets can be protected by a confidentiality agreement—as in Europe—it is also recommended that recipients of confidential information should sign an acknowledgement prior to receiving such information. If it later becomes necessary to file a misappropriation action, a trade secret owner must provide appropriate evidence to show that the trade secret meets the abovementioned definition, in addition to proving there has been misappropriation of the trade secret by a wrongdoer or a third party.

Although prevention is the best strategy in the case of trade secrets, companies that take enforcement actions can, and have, received positive outcomes from Chinese courts.

FRAND: Interface of standards and patents

While in the past it was viable to obtain patents according to industry standards, recent developments in the law on standard essential patents (SEPs) have changed this. A SEP is a patent that claims that an invention must comply with a technical standard.

Standards for different industries are set by regional organisations, such as The European Telecommunications Standards Institute (ETSI), which, among other standards, covers wireless communications. Due to inter-operability requirements of this technology certain ETSI standards are adopted in China.

Generally the ETSI does not determine whether a particular patent is essential to a standard. Rather, it provides a mechanism by which the patent owner themselves can make a declaration of essentiality, coupled with a commitment to license any SEPs on fair, reasonable and non-discriminatory (FRAND) terms and conditions. Therefore, where a European patent is declared by the patent owner as essential to an ETSI standard, the Chinese patent corresponding to the European patent is also considered essential in

China and thus FRAND terms and conditions will also apply.

If a patentee engages in standard-setting or agrees that a patent should be incorporated into a national, industrial or local standard, this permits others to exploit the patent for implementation purposes. Those using the patented technology to implement the standard may be charged royalties by the patentee for use of the patent, but are not deemed to be committing an infringement.

SEPs versus implementation patents

Implementation patents refer to patents that are not incorporated into a standard but facilitate the implementation of the standard. For example, although a patent on a new form of touch-screen glass is not essential to the 5G wireless standard, if the innovation was considered superior to the extent that all 5G phones incorporated it such a patent would be invaluable.

As implementation patents are not incorporated into standards they are not subject to FRAND obligations, so customary infringement damages and injunctive relief are available. Therefore, due to the lower royalties available due to FRAND conditions, implementation patents are often more valuable to EU SMEs.

Enforcement

China is the most litigious country for IP disputes in the world in absolute terms. There were 87,419 IP suits filed in Chinese courts in 2012. However, out of these only about 1,400 foreign companies were involved, which is less than two per cent of the total.

The reluctance of foreign companies to enforce their IPR in China is largely due to the perception that China does not protect IPR and that foreign companies won't get fair treatment. However, such reluctance is misplaced: evidence suggests that case outcomes are not affected by litigants' nationalities.

Enforcement cases concerning ICT technology in China can be very complex, though, given the consideration of individual IPR and industry standards that is often required. Therefore, it is beneficial for an ICT company that deals predominantly with incremental technology development to consider their rights and how they may conflict with certain competitive market laws.

IP lessons and key take-aways

- FRAND is not an essential patent holder's friend.
- Software inventions can be protected in China, as in Europe.
- Utility model patents can play an important role in your Chinese patent portfolio.
- Implementation patents are much more valuable than standard essential patents.
- Trade secret protection should be complimented by additional confidentiality measures that require signed acknowledgements.
- IP enforcement in China is improving, though cumbersome evidence rules make it difficult to enforce.

For more detailed information on the topic, please see the China IPR SME Helpdesk guide *China IPR Considerations for the European businesses in the ICT industries*, which is downloadable at http://www.china-iprhelpdesk.eu/docs/publications/China_HD_Guide-China_IPR_Considerations_for_the_ICT_business.pdf. 

The **China IPR SME Helpdesk** is a European Union co-funded project that provides free, practical, business advice relating to China IPR to European SMEs. To learn about any aspect of intellectual property rights in China, including Hong Kong, Taiwan and Macao, visit our online portal at www.china-iprhelpdesk.eu. For free expert advice on China IPR for your business, e-mail your questions to: question@china-iprhelpdesk.eu. You will receive a reply from one of the Helpdesk experts within three working days. The China IPR SME Helpdesk is jointly implemented by DEVELOPMENT Solutions, the European Union Chamber of Commerce in China and European Business Network (EBN).





EXHIBIT A

HOW TO PROTECT YOUR IPR DURING EXHIBITIONS

For many foreign companies looking to enter the Chinese market, attending exhibitions and trade shows here is often their first step. Unfortunately, infringement of IPR is all too common during these kind of events, so it's important to ensure that your IPR is properly protected before attending them. **Daniel Albrecht** of **Starke Consulting** explains more.



Despite huge advances in China's IPR system over the past few years it is unfortunate that when foreign brands attend exhibitions or trade shows in China—especially reputable brands—the chances of them being imitated or copied are still quite high, due to a prevailing general lack of awareness of and respect for IP protection in China's business environment.

As China operates a system of registration, only registered patents are protected here. Differences in the legal system oblige foreign companies to obtain sufficient registration and protection of their trademarks and patents in China.

Another problem that can arise is that if your trademarks and patents are not registered in China, it is possible that they may infringe upon other's trademarks and patents. If this happens you may land yourself in legal trouble and, even worse, be driven out of the Chinese market.

It is therefore highly advisable to take the following measures to protect your IPR in China if you are planning on exhibiting here.

Pre-assessment of risk

Before a foreign company enters the Chinese market, it is sensible to assess the risk of infringement when selling your products in China, by taking precautionary measures such as searching the respective patent and trademark databases. It is also a good idea to pay attention to competitors' strategies and their usage of patents and trademarks, and to formulate your competition strategy accordingly.

Timely filing/registration

For trademark registration China strictly follows the first-to-file system: the first applicant who files a certain China trademark application—as opposed to the first to actually use the trademark—will be awarded the trademark registration in China.

Under the current system, some Chinese entrepreneurs and companies have successfully registered famous brand names and, later, attempted to sell the China trademark to the brand owner at a vastly inflated price – so-called 'trademark squatters'. In order to reduce this risk, it is advisable to file a China trademark application as soon as possible. Trademarks can include product marks, service marks, certification marks and collective marks that contain prominent characteristics. Certain words, however, including country names, official symbols and generic names, may not be registered as trademarks. China's Trademark Office currently issues trademarks within 12-14 months.

Well-known trademarks

Foreign companies should obtain recognition of well-known marks for their primary brands in China – a well-known mark may even enjoy expanded legal protection and commercial benefits. However, since the criteria for being recognised as a well-known trademark are quite strict, challenges to a prior-registered trademark on the basis of it being unregistered but well-known does not occur frequently.

Customs registration

Trademarks should also be registered with China's General Administration of Customs (GAC), which takes three to five months. In theory Chinese customs officials should check every outgoing shipment for trademark infringement against the China Trademark Office database; in practice they often only check against their own customs database. If you register your China trademark with the GAC, customs officials will contact you if they discover a shipment of potentially-infringing goods and provide you with three working days to request their seizure. Assuming you request seizure (and post a bond), customs will inspect the goods. Registration with the GAC will be valid for ten years (or as long as the relevant IPR is valid), but may be renewed for additional ten-year periods. The GAC also allows the registration of copyrights.

Copyright

As China is a member of the Berne Convention, any copyright hailing from countries that are also signatories to this agreement will be automatically protected in China. However, before direct IPR enforcement can be based on copyright at exhibitions, a recordal of the copyright is necessary. In China, this process takes about one month.

Conducting patent analysis

It is advisable to apply for registration of your patents in China before you explore the market. The process for registering a design patent takes less than one year; registration of a utility model patent takes approximately two years; invention patents take approximately two to three years.

When you become aware of any infringing activity involving your trademarks and patents you may claim your rights to stop the infringing and counterfeiting activities via administrative and judicial means, or warning letters.

During the Exhibition



The PRC *Measures Regarding Intellectual Property Rights Protection at Exhibitions and Trade Fairs* covers exhibitions, trade fairs and conventions operating within the realm of trade and technology. On the basis of these regulations, any exhibition that lasts longer than three days is obliged to set up an IP complaints office. This office should consist of personnel from the exhibition organiser, the administrative department of the exhibition centre and the local IPR administrative department,¹ and should perform functions and duties of IP protection including reviewing IPR complaints, investigating accused infringing products and exhibitors, and taking necessary actions to prevent infringement activities during the exhibition.

If it is believed that infringement has occurred office staff can immediately obtain samples of suspected goods as evidence. Complaints received by the office must be passed to the relevant local IP authorities within 24 hours of reporting. The authorities are then required to issue a decision and promptly bring it to the attention of the parties as well as the exhibition organisers. Cases not finalised during the exhibition can be transferred to the relevant authorities for further investigation. Punishment decisions include orders to cease infringing activities, confiscating or destroying the infringing goods and advertising materials, or imposing fines. Exhibitors that commit infringements twice will be banned from all future exhibitions in China.

In order to register complaints legitimate certificates of IPR ownership must be submitted along with basic information about the party or parties suspected of

committing the infringement and relevant power of attorney (notarised and legalised, which can take a couple of weeks). All documentation should also be provided in Chinese. If you are not personally present at the exhibition, you can entrust an agent with the submission of complaints.

Patent infringement

A patented product that is exhibited by an unauthorised party constitutes infringement through an offer to sell, which, under Chinese patent regulations, entitles the right holder to file a lawsuit. In these situations, the infringed company should secure a notarised statement through an attorney before lodging a formal complaint, to hedge against the possibility of the infringer taking vigilant action that could result in a failure to collect evidence.

An offer to sell is defined as where someone seeks to profit from a product through advertisements, window displays or exhibiting the goods at a show. This violation results in direct losses to the patentee but will also not have any benefit for the infringing party; for this reason courts can only set compensation after consideration of the matter in a lawsuit. 

Starke Consulting Co Ltd was founded by **Daniel Albrecht**, a German attorney at law. Starke operates in Beijing and in six cities in Germany through cooperation with its partner, Jordan Fuhr Meyer. Core competencies are legal advisory and IP. Starke is a Trademark Agent licensed by the State Administration and Commerce. With several years of experience in Asia Starke customises their advisory activities to the requirements of international companies and individuals who require advice on corporate, IP, contract and labour issues.

¹ Made up of the local State Intellectual Property Office (SIPO), which is only in charge of patent law; the local AIC, which is only in charge of trademark protection; and members of the local IPR office, connected to the local government and responsible for trademarks and copyright.

PUT UP YOUR DUKES

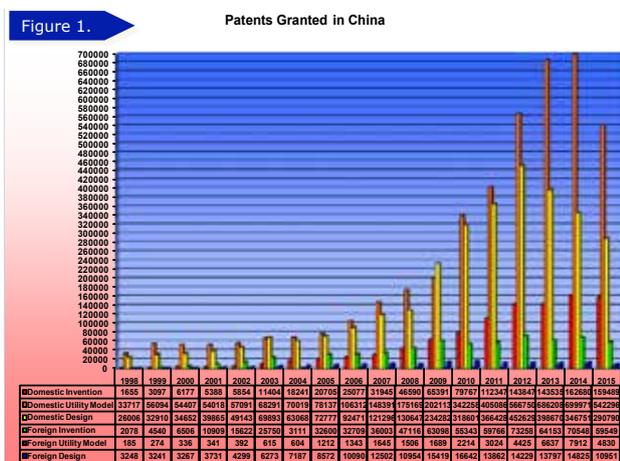
EUROPEAN COMPANIES AS DEFENDANTS IN IP CASES

There has been a recent rise in the number of IP infringement cases filed by domestic plaintiffs against foreign defendants. These cases are often initiated as a part of a strategy for domestic companies to corner a market and eliminate foreign competition. At best, being on the wrong end of an IP lawsuit is a distraction; at worst, it can result in financial losses and reputational damage and could even force you out of the game altogether. **Elliot Papageorgiou**, chair of the Chamber's IPR Working Group and Executive and Partner at **Rouse**, expands on the reasons behind this trend and provides advice on minimising risks and how best to defend yourself if you find yourself defending in a litigation battle.

What's behind the increase of Chinese IP plaintiffs?

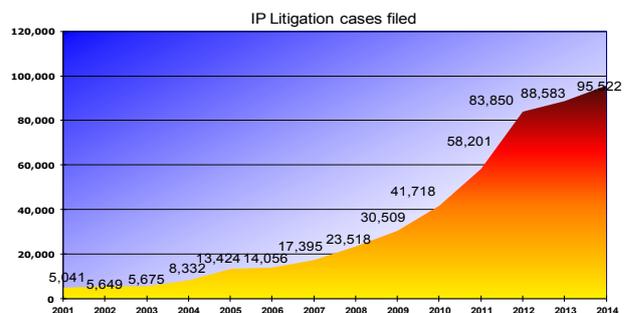
Over the last five years there has been a tremendous growth in the number of Chinese IP plaintiffs. The reasons for this phenomenon include:

- a greater number of Chinese IP rights being registered by Chinese companies, especially invention patents and utility model patents;



- the emergence of a litigation culture—and especially IP litigation—in China, to the point where in 2014, over 95,000 new IP litigations were filed;

Figure 2.



- Chinese companies learning from hard, and often expensive, overseas experiences where they have often been IP-defendants; and
- the Chinese market simultaneously being exposed to greater internal competition and slowing growth, along with an increase in labour costs – meaning that ‘competitive space’ needs

to be created through other means, including through enforcement of IP rights.

Irrespective of its causes, the increased levels of IP-assertiveness of domestic companies, poses a significant risk to European companies' business-models, market-access and their 'freedom to operate' in China. The question is, how to minimise such risk?

Minimising risk

The first step for European companies looking to minimise the risk of becoming IP defendants in China is to not underestimate the Chinese market, the sophistication and innovativeness of local companies and the general levels of IP awareness that now pervades China. More specifically, as would be the case in any market (whether a home or export market), European companies need to conduct IP due diligence for any products they introduce into the Chinese market. It is no longer enough to assume that because a European company had conceived a particular product that it was necessarily the first to do so.

Second, and following on from above, it is essential for European companies to secure their own IP rights as soon as possible and carefully monitor the competitive landscape in China. Specifically, they should treat Chinese companies in the same market as genuine (or at least future potential) competitors and vigilantly search and track their IP portfolios and filing strategies.

Third, as is the case in other competitive markets like the United States, European companies should regularly conduct litigation due diligence, to gauge their exposure to potential litigation, for example, by reason of rapid business success, market-growth at the expense of domestic competitors and weakness in their China IP portfolio.

Finally, European companies should see China IP litigation as inevitable and prepare for it accordingly. Without providing an exhaustive list, there are some important 'do's and don'ts' that European companies should observe to minimise risk and maximise readiness for when the inevitable occurs.

Do's and Don'ts

European companies SHOULD:

- Always seek and register their own IP rights

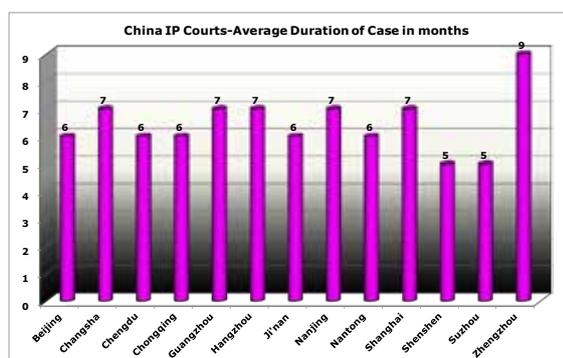
in China – the system of IP registration is such that 'urban myths' of IP rights reaching competitors via Chinese IP authorities, are entirely unsubstantiated;

- Search for competitor's rights – conducting a search of the filings of competitors (even imitators) is essential as various subsidies in China have resulted in a veritable explosion of local filing – a competitor without IP rights is now the exception;
- Proactively invalidate competitors' IP rights which pose a *genuine* risk – European companies should not wait and let sleeping dogs lie. These proverbial dogs will only sleep until they have the IP-strength to bite you where it hurts;
- Be prepared to defend enforcement actions at trade fairs [please see the article on page 26 for more information] – in this competitive climate, Chinese companies are prepared to be more 'disruptive' at Chinese trade fairs and exhibitions;
- File non-infringement declaration actions if they have received 'on-notice' / 'please explain' / warning letters. In these proceedings for declaratory judgements the applicant becomes the 'plaintiff' and the jurisdiction for such claims is the location where the warning letters were sent from – both factors giving control over proceedings to the former potential defendant European company;
- Prepare for injunctions and evidence preservation orders if litigation is coming – China's new IP courts (in Beijing, Shanghai and Guangdong) provide an as-yet-incalculable opportunity for plaintiffs to secure such orders;
- Seek to contest jurisdiction and seek to optimise the 'forum' where litigation occurs to reduce the plaintiffs' home advantage;
- Look for opportunities to file counter-claims and counter-actions for patent infringement (assuming they have patents), or unfair competition where appropriate; and
- Manage business expectations as to litigation outcomes – even if European companies successfully defend IP litigation actions, or if the actions turn out to be entirely spurious and unfounded, the level of restitution will be modest.

European companies should NOT:

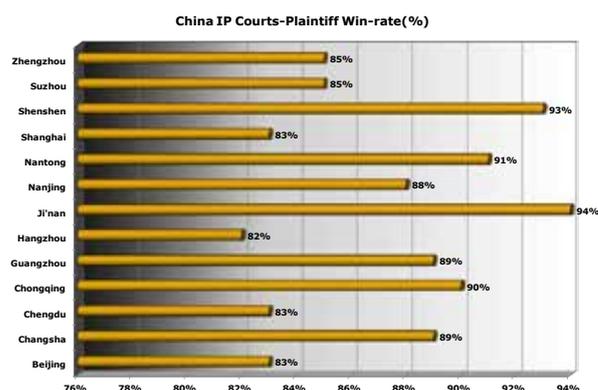
- Forget to register IP rights in China, even if China is neither an original equipment manufacturing location nor presently a market for their products or services;
- Underestimate Chinese competitors, their innovation and especially the impact and enforceability of utility models, which, under the right preconditions, are just as enforceable as patents, with similar bases for compensation;
- Ignore ‘on-notice’ and warning letters coming from Chinese companies – any and all such mailings should be escalated within the business promptly;
- Forget that Chinese defendants have a home advantage, which they will exhaust to the fullest potential;
- When not yet threatened, invalidate Chinese IP rights where there is doubt as to the success of such invalidation, as to do so will merely confirm the portion of the rights not invalidated – in effect confirming their validity and making them easier to enforce in future;
- Refuse court-recommended mediation – Chinese judges performance assessment includes showing an ability to facilitate a ‘harmonious solution’. As a result Chinese judges will often ask the parties whether they are prepared to mediate at various stages of the litigation process. As the timeline in Chinese litigation is often quite tight (many courts seek to conclude cases in much less than a year) especially for foreign defendants who may have to spend additional time to formalise documents, evidence and materials overseas, any steps which may extend the timeline may be helpful;

Figure 3. Source: CIELA Litigation Database 2015 – www.ciela.cn



- Underestimate the levels of compensation awarded against foreigners. While the win-rate in IP litigation between foreigners and local companies is about the same (in the leading IP jurisdictions in China, generally plaintiffs, whether Chinese or foreign, have a greater than 80% chance of prevailing), the compensation awards against foreign companies are substantially higher. This is because foreign companies have fewer opportunities to ‘engineer’ margins and profit levels than local companies do, so the bases on which compensation for infringement are calculated by courts are generally higher; and

Figure 4. Source: CIELA Litigation Database 2015 – www.ciela.cn



- Finally, and most importantly—and perhaps patently obvious—if at all possible, European companies should do all they can to **not become defendants in an IP litigation**.

This brings us full circle to the most important point of both the do’s and don’ts: make sure you have IP rights you can rely on – they give you the best opportunity to counterclaim, negotiate a settlement or indeed maintain your ‘freedom to operate’ in such a way as to reduce the chances of lawsuits in the first place. This can only be a good thing for everyone ... except perhaps for us IP lawyers. 

As Executive and Partner at **Rouse & Co International LLP**, **Elliot Papageorgiou** represents international companies in IP disputes, especially patent and utility model infringement disputes. His current practice increasingly focuses defending European companies against intellectual property infringement lawsuits brought by Chinese competitors. Please turn to the next page to read an interview with Elliot on his work with the IPR Working Group.



A CHAIR WITH A VIEW

Elliot Papageorgiou arrived in China in 2004, and, after stints in Beijing and Guangzhou, settled in Shanghai in 2008. He has been an active contributor to the Chamber's Intellectual Property Rights Working Group since his arrival, serving as vice chair in 2012, acting chair in 2013, and finally chair in 2014. During the day, Elliot is a lawyer and executive and partner with the international IP specialist firm **Rouse**.

When and why did you decide to run for chair of the Shanghai Chapter's IPR Working Group?

The then head of Bayer's IP department introduced me to the working group soon after my arrival in China. Bayer had always been, and continues to be, an active supporter of the IPR Working Group, and the IP head recognised that the European companies I was advising on China IP matters needed both a first port of call and 'advocate' for their China IPR concerns, and that the IPR Working

Group would fit that role perfectly. When I moved to Shanghai I realised just how active and effective the Chamber and its working groups were in advocating for the interests of European companies, and how important such a role was for many European companies that face a, shall we say, not-entirely level playing field. From then on I was sold on the working group.

What do you feel are the main differences in China's IP-climate now compared to

when you first came to China?

The ability and methods for protecting and enforcing IP rights in China have grown tremendously over the past 10 or so years. The courts and judiciary have become more specialised and adept regarding IP issues. When I first arrived in China, courts in second- and third-tier cities had little or no IP exposure, patent cases were rare and running a case often involved introducing the judges to concepts they may have read about but had no practical exposure to. Now, China is one of the biggest patent filers worldwide, it has one of the most prolific IP Bars and in the second part of 2014 introduced specialist IP courts in Beijing, Shanghai and Guangzhou/Guangdong. However the most significant change has been the rise of the Chinese 'IP culture', with the government seeking to support innovation through encouraging local IP filing, and at the same time Chinese companies increasingly using IP as a 'weapon' to secure and maintain their competitive advantage – especially against foreign competitors.

Have there been any occasions when you feel the IPR Working Group has had a real impact on the advancement of IPR protection in China?

The Chamber and the working group now have the opportunity to voice the views of European companies for each and every IP legislative draft and proposed regulatory amendment relevant to IP and have contributed to many positive outcomes.

The working group has been instrumental in securing changes to China's Patent Law, for example by successfully advocating the implementation of the International Novelty Standard in its third amendment. Likewise, it led the debate on whether the concept of 'good faith' should be specified in the new Trademark Law, which it now has been.

It has also been continuously advocating the establishment of specialist IP courts, and three such courts were eventually established in the second half of 2014, first in Beijing, then in Shanghai and by the end of the year in Guangzhou.

From the very beginning of the EU-MOFCOM Intellectual Property Dialogue, the working group has supported the EU Government and the EU Delegation by representing the interests of European industry, drafting IP status reports and amicus briefs for the EU negotiators on behalf of European industry, and by attending the meetings to directly advocate for the interests of European industry.

There has also been positive cooperation with and

support for the EU Commission's IPR and IPR2 projects, and the working group continues to support the IP Key Project, all of which raise the awareness of IP and, through cooperation, share IP experiences and values with Chinese regulatory counterparts.

Perhaps the most important achievement of the working group has been its ongoing role of running interventions and unashamedly advocating the interests of European companies with Chinese authorities and the judiciary, both on a macro level and in specific/individual cases. The working group has in several cases been able to level the playing field, or, at the very least tilt it back a little in favour of European companies in China.

What, in your opinion, are the greatest risks faced by European companies seeking to protect their IPR and innovation in China?

The greatest challenge faced by European Companies in the IP and innovation field is that they risk missing the boat when it comes to acquiring relevant and sufficient IP rights in China. While this risk concerns all IPR, I am most directly concerned with the impending 'patent storm', which will be faced by European companies who fail to adapt to the Chinese utility model system by securing *prior art* evidence, keeping a watch on competitors portfolios, increasing their own filings and invalidating 'imi-novations' – i.e. patent and utility model filings with little merit.

What would you like to see done to further improve the IP protection system in China so that it can support China's innovation drive?

Over the last decade or so, Chinese authorities have clearly achieved remarkable results in raising IP awareness, encouraging levels of filing, enforcement and IP exploitation. In order to make China's IP protection system even better and more effective in supporting innovation, I would encourage the authorities to continue to raise the levels of IP expertise of the administrative authorities, including the Administration of Industry and Commerce, the Technical Supervision Bureau and the Public Security Bureau, as well as the judiciary. However, perhaps even more importantly, the Chinese authorities should work on ensuring the consistency of IP expertise and protection/enforcement decisions, so that the high standards evidenced in first-tier cities like Shanghai, Beijing and Guangzhou are consistently mirrored in second- and third-tier jurisdictions. This will benefit not only European enterprises, but *all* companies that have a stake in China's IP system and in encouraging the growth of innovation in China. This will only be possible with a robust IP system. 

EUROPEAN CHAMBER LOBBYING HIGHLIGHTS



Eduardo Morcillo and HE Manuel Valencia Alonso

Position Paper Presentation to Spanish Ambassador

On 9th September, States' Representative at the European Chamber's Executive Committee, Eduardo Morcillo, met with HE Manuel Valencia Alonso and presented the *European Business in China Position Paper 2015/2016*. They discussed China's reform progress, the expectations of European businesses regarding the EU-China Comprehensive Agreement on Investment (CAI), recent developments related to trends in outbound and inbound investment, China's stock exchange and RMB devaluation.



European Chamber President Jörg Wuttke

Chamber President Presents Position Paper on TV

From 7th– 8th September, European Chamber President Jörg Wuttke gave a few embargoed interviews on the Chamber's *Position Paper 2015/2016* to several selected television media, including Bloomberg Television, China's CCTV and German ARD. The interviews were aired several times following the official launch of the European Chamber's press conference on 8th September and were prominently featured in related news broadcasts.

Meeting with EU-China CAI Chief Negotiator

On 14th September, a large European Chamber delegation met with European Commission Director Rupert Schlegelmilch, the EU's chief negotiator for the EU-China Comprehensive Agreement on Investment (CAI). The delegation was led by President Jörg Wuttke and Vice President Sara Marchetta and included chairs and senior representatives from a host of different Chamber working groups.

Meeting with Shanghai Entry-Exit Inspection and Quarantine Bureau

On 17th August, a delegation from the Chamber's Shanghai Chapter met with Ms Wang Zhenyu, Vice Director of the Division for Supervision on Food Safety of the Shanghai Entry-Exit Inspection and Quarantine Bureau. Ms Wang gave an introduction to the amended Food Safety Law and agreed to provide a series of events on the interpretation and impact evaluation of the new law for Chamber member companies.

Exclusive Dialogue with CSPFTZ and Pudong Government

On 26th August, the European Chamber organised an Exclusive Dialogue event with Mr Jian Danian, Deputy Governor of the Shanghai Pudong New Area People's Government and Deputy Director-General of the China (Shanghai) Pilot Free Trade Zone (CSPFTZ) Administration, along with a group of officials from various departments of the CSPFTZ. They provided Chamber members with first-hand information about the CSPFTZ. Deputy Governor Jian delivered a keynote speech on the CSPFTZ's latest developments. Mr Sun Yongqiang, deputy director of the Business Council of Shanghai Pudong New Area People's Government, gave a presentation on the investment policies in Pudong.

Chamber members engaged with representatives from the Pudong New Area Financial Services Bureau, the Management Department of Shanghai Pudong New Area Science and Technology Committee, the Investment Promotion Management Department, the Business Council of Shanghai Pudong New Area People's Government, Pudong Customs, the Import and Export Inspection and the Quarantine Office and the Exit-Entry Administration Office of Pudong Public Security Bureau.

Meeting with Invest Guangzhou

On 11th August, chairman of the European Chamber's South China Chapter, Alberto Vettoretti, met with Mr Wuyi, Director General of Invest Guangzhou, and presented the *South China Position Paper 2014/2015*. During the meeting representatives of Invest Guangzhou introduced the latest developments in Guangzhou's business environment and promoted the Nansha Free Trade Zone. They also proposed the signing of an MOU with the European Chamber to facilitate regular communication and exchange of knowledge and the promotion of both high- and working-level meetings with the local government.

Through the European Chamber, local government is hoping to further promote and attract investment in Guangzhou city. Mr Vettoretti was invited to continue acting as an advisor to Invest Guangzhou on behalf of the European Chamber.

Exclusive Dialogue with MOST

On 16th September, Deputy Director General Yu Jian from the Department of Innovation and Development, Ministry of Science and Technology (MOST), spoke to Chamber members on the *Considerations on Scientific and Technological Innovation in China's 13th Five-Year Plan*. The meeting was chaired by Pascal Metivier, chair of the Chamber's Research and Development (R&D) Working Group.

Mr Yu introduced some of the more important research projects that China has conducted, the context for drafting the *13th Five-Year Plan*—including the general principles and the major tasks involved—and considerations for the next steps.

China has made tremendous progress in R&D throughout the lifetime of the *12th Five-Year Plan*, but is still lagging behind some developed countries in certain areas. China is aiming to bridge this gap and ensure that R&D makes up 2.5 per cent of its GDP by 2020.

THE AUDACITY TO CHANGE

On 8th September, the European Chamber launched our **European Business in China Position Paper 2015/2016** (*Position Paper*). The morning launch event was attended by 80 Chinese and foreign media, with 69 original reports being filed by major international media outlets such as the *Financial Times*, *Wall Street Journal*, *Bloomberg*, *Washington Post* and *Reuters*. The *Position Paper* was also reported on by Chinese domestic media, such as *Caijing*, *Xinhua*, *Caixin* and *Sohu*, and related stories were disseminated via all major newswires.

This year's paper includes clear policy recommendations to the Chinese Government on how they can effectively launch China's next wave of productivity, a 'reality check' of the Third Plenum's reform agenda and proposals from European business to the European Commission as to what they want to be included in the ongoing EU-China Comprehensive Agreement on Investment negotiations. What follows is the *Position Paper Executive Summary*.

Executive Summary

The Chinese economy is faced with the onset of a permanent slowdown. To mitigate its adverse effects the Chinese Government needs to change its old ways.

Foreign business hailed the promulgation of the Third Plenum's *Decision*,¹ China's reform vision until 2020. Two years on, it is now clear that some reform momentum has been lost and the hopes of foreign business have given way to a more subdued optimism in an emerging political-economic environment that can be described as one of 'reform and closing up'.

The Chinese Government must avoid giving in to the protectionist tendencies that are continuing to curtail legitimate market access, whether on the grounds of national security or other concerns. Its most pressing issue now is how to forge ahead with the reforms that will help to bring about the rebalancing of the economy. China needs to employ a 'new toolbox' capable of successfully delivering an economic model that the European Chamber defines as:

"An economic model in which market forces decide the allocation of resources in the economy under the auspices of rule of law; consumption holds a significantly larger share of GDP; there exists no discrimination between domestic and foreign investment; there is harmonisation with global standards and supply chains; and the state plays a reduced role in the economy, acting solely as regulator and enforcer. An economy in which—due to a more sophisticated regulatory environment—the services sector has become the dominant engine of growth, supported by an education system and a flexible and open labour market that endow China's workforce with the required skillset. An economic model that will result in greater innovative capacity and a higher quality of life for the individual."

In order to get there, China will need to address a number of key challenges.

1. The Reality Check

1.1 The Chinese Economic Slowdown

China's gross domestic product (GDP) growth dropped to seven per cent in the first half of 2015,² the lowest level since 2009. Financial leverage is precipitously high, with total debt having ballooned to 282 per cent of GDP

in 2014.³ China's total trade declined by 6.9 per cent in the first half of 2015,⁴ and aggregate productivity of China's economy is also at a significant low.⁵ European companies have reported for the third year in a row that their earnings before interest and tax (EBIT) margins are more likely to be greater outside of China than they are inside China.⁶ The four successive interest rate cuts from November 2014 to mid-2015, and the volatility and sharp declines in the Chinese stock market in 2015, point towards increasing misgivings over whether China actually retains the capacity to meet its projected economic growth targets.

1.2 Towards the 'New Normal'

In brief, the 'new normal' will be an era characterised by lower, but more qualitative economic growth.

1.3 Third Plenum Reality Check

European business fully subscribes to the principle that China has to "let the market play the decisive role in allocating resources and let the government play its functions better."⁷ However, European business is now witnessing the government's reform agenda seemingly occupying opposite ends of the spectrum: both improvements and deteriorations are taking place to varying degrees.

2. The 'New Toolbox'

2.1 Accelerating Reform of the Financial System

China's financial system needs to become more efficient in allocating capital if the economy is to grow more sustainably. This has to be at the core of the government's reform drive and will require some fundamental reforms to ensure that funds are being lent on a more viable basis.

2.2 Limiting State Engagement in the Economy

Over the last few decades, the state loomed large in the Chinese economy. It has been dominated by strong state-owned enterprises (SOEs), to which the government

¹ The Third Plenum of the 18th National Congress of the Communist Party of China Central Committee was held in November 2013, and concluded with a decision laying out new economic and policy initiatives – the *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (Decision)*.

² *China Surprises With 7% Growth in Second Quarter*, *Wall Street Journal*, 15th July, 2015, viewed 20th July, 2015, <<http://www.cnbc.com/2015/07/14/>>

³ *Debt and (not much) deleveraging*, McKinsey, February 2015, viewed 29th June, 2015, <http://www.mckinsey.com/insights/economic_studies/debt_and_not_much_deleveraging>

⁴ *China trade slumps in first half of year, dealing blow to global economy*, *The Guardian*, 13th July, 2015, viewed 21st July, 2015, <<http://www.theguardian.com/business/2015/jul/13/china-trade-slumps-first-half-year-blow-global-economy>>

⁵ Hoffman, D., Polk, A., *The Long Soft Fall in Chinese Growth: Business Realities, Risks and Opportunities*, The Conference Board, 2014, viewed 16th July, 2015, <<https://www.conference-board.org/retrievefile.cfm?filename=KBI-FY15---China-Slowdown---Final-Draftv2.pdf&type=subsite>>

⁶ *European Business in China Business Confidence Survey 2015*, European Union Chamber of Commerce in China, June 2015, page 50, <<http://www.eurochamber.com.cn/en/publications-business-confidence-survey>>

⁷ *The Decision*.



President Wuttke presents the *Executive Position Paper*

channelled the population's savings in order to develop large-scale projects on the back of clearly defined industrial policies. This approach has been costly and inefficient, and has to be abandoned now if the market is to play a decisive role in the economy.

2.3 Increasing Market Access for the Private Sector, Including Foreign Business

One of the greatest policy tools that is still at the Chinese Government's disposal—unlike many governments in developed economies—is the possibility of allowing the private sector to fully play out within the economy and to harness the substantial gains this will bring. China needs to establish an open market economy in order to unlock the substantial potential of private companies. This was clearly recognised in the *Decision*, but uncertainty remains over whether it will be forthcoming.

2.4 Committing to the Rule of Law

Greater implementation of rule of law is undoubtedly the most important tool in the box and will be the top driver for China's economic development in the coming years.⁸ Transparency, legal certainty and public consultation are all central elements of rule of law that will ensure the proper functioning of an economy. However, China needs to do more to increase investors' trust in its judicial

⁸ *European Business in China Business Confidence Survey 2015*, European Union Chamber of Commerce in China, June 2015, page 39, <<http://www.europeanchamber.com.cn/en/publications-business-confidence-survey>>

system.

2.5 Abolishing the Foreign Investment Catalogues and Committing to a Nationwide Roll-out of the Negative List

The continued adherence to the *Foreign Investment Industry Guidance Catalogue* falls short of the Chinese Government's stated ambition to give full play to the market. Instead, China should proceed with a nationwide roll-out of the 'negative-list' approach.

2.6 Fostering an Innovative Environment

Innovation is one of the most important drivers of economic growth. In order for China to successfully create the right conditions for it to take place it must, first and foremost, guarantee a competitive market that is open to all companies, regardless of nationality. China also needs to have an education system and a flexible and open labour market in place, that is capable of continually improving its workforce.

3. China and the World

3.1 National Security Concerns

In 2015, several Chinese government agencies have issued a number of laws that make reference to national security. The definitions included in these laws are very vague, which creates a great deal of uncertainty



More than 80 members of the press gathered for the launch.

for business and is detrimental to the credibility of the Chinese marketplace.

3.2 China's New International Institutions

China is swiftly and resolutely moving ahead with developing its own set of international institutions and development agendas – this could profoundly shape the future of the global trading system.

European business welcomes these developments, but thinks that China should prioritise taking a greater leadership role in the established global trading system, with the World Trade Organisation (WTO) at its centre.

3.3 Taking a Leading Role in Global Affairs

China has benefitted immensely from its entry into the WTO some 15 years ago, and now has the opportunity to shape and ensure the success of future development rounds by, among other things, lobbying for progress with the Doha Development Agenda and making a more compelling, revised offer to join the Government Procurement Agreement.⁹

4. Expectations of the European Union

The European Chamber believes the European Union's (EU's) economic and trade relations with China should be prioritised. Despite its challenging business environment, China still offers significant potential

to European companies, including small and medium-sized enterprises. As such, European business views the ongoing negotiations for an EU-China Comprehensive Agreement on Investment as the biggest opportunity to reset EU-China relations and boost the fledgling growth of both economic blocs.

5. The Audacity to Change

The Chinese leadership is faced with the considerable challenge of successfully navigating the adverse effects of permanently lower economic growth. A large part of the solution will be the successful transition to the 'new normal', an era in which China will embrace an economic model that can deliver sustainable, qualitative growth. This is well within the Chinese Government's reach if it can have the courage of its convictions and stick to the bold reform pledges made in the *Decision*.

A successful rebalancing of the Chinese economy will require an adroit sequencing of macroeconomic policies; it will require the ability to let go of the impulse to micro-manage the domestic economy; and it will require the courage to follow through with overdue, but critical, structural reforms. In short, it will require the audacity to change. **Eb**

To download a copy of the Position Paper please go to <http://www.eurochamber.com.cn/en/publications-position-paper>



TURNING ON THE WATERWORKS

GROWTH STRATEGIES TO CREATE A BEST-IN-CLASS WATER TREATMENT COMPANY IN CHINA

From 2006 to 2013, China increased its municipal waste water volume treatment rate from approximately 45 to 80 per cent. In the process, many players have gone public and shown strong top-line growth. However, this rapid expansion of municipal wastewater treatment has led to declining net profit margins and a reduction of greenfield opportunities for companies that mainly operate treatment facilities. In the following article, **Michel Brekelmans** and **Steve Cao from L.E.K. Consulting Shanghai** explore winning strategies that can help to improve performance and create leaders in China's water treatment industry.



We recently witnessed a renewed interest in China's cleantech sectors following the initial surge of five to six years ago. Although water treatment doesn't have the same 'sex appeal' as solar energy or battery-powered vehicles, the development of the Chinese water treatment industry has nonetheless been spectacular in terms of growth and the opportunities created by industry champions.

However, the industry has reached an inflection point – the easy growth route is getting harder and harder to follow. Non-organic growth approaches and an improvement in organisational performance may be necessary for further value creation as the market environment is less compelling than before:

- The market is expected to grow only moderately going forward: further penetration growth is expected to be limited after the rapid growth of previous decades.
- The industry is fragmented, though most of the more than 400 companies have established a certain geographical focus with relatively high entry barriers due to deep local government involvement.
- In general, waste water treatment plants operate at low margins under the current tariff regime and therefore rely heavily on government subsidies.

Of the more than 400 companies serving the industry, 27 listed companies contribute approximately 28 per cent of the total revenue. These players grew on average between 30 to 60 per cent per year between 2010 and 2014, but net profit margins declined around one and half percentage points per year over the same period.

With profits waning, industry participants and investors alike would be right to look for new opportunities in companies that either play across subsectors of the water treatment industry or play in a single, high-value section of the industry value chain. Wastewater treatment operations are becoming increasingly commoditised and inefficient state run operations are becoming harder to justify. In order to combat declining margins, companies will need to think more carefully on how to maintain and grow profit margins in this industry.

This prompts the questions: *what will drive future profits and shareholder value?* For companies that continue to succeed in the industry, *what allows them to perform better than their peers?* *What factors go into creating a successful company in this industry?*

Based on our analysis of the major players in China, the main levers for future growth/value creation

include continued capacity expansion at lower-level cities/counties, cost efficiency through operational improvement and vertical integration along the value chain.

- County-level projects are considered to be a growth area; however, companies need to run different operation models to enter this market segment as these projects are often remotely located and have much smaller scale in terms of treatment capacity. Mergers and acquisitions (M&A) might be required if there is no pre-existing know-how/experience in successfully handling these types of projects.
- As electricity, chemicals and maintenance constitute the majority of running costs, operational improvement opportunities exist through cost reduction, particularly for stated-owned players.
- Sizable synergies can be generated through vertical integration into other parts of the value chain such as engineering, procurement and construction (EPC), water management equipment manufacturing, treatment consumable production and servicing. International companies like Veolia and GDF Suez have successfully moved down this path.
- Other options include expansion into adjacency business such as water supply or M&A to create scale synergies.

In China, emerging leaders are appearing that are pursuing developments along each of these strategy levers. For example, Heilongjiang Interchina Water Treatment has managed to generate above-average profitability by meeting many of the above criteria. Although it built much of its earlier growth on larger water projects, it is now turning to smaller cities in more rural areas to grow. In addition to acting as an operator, it provides EPC consulting throughout the value chain. It also stated in its 2014 financial report that it plans on engaging in M&A opportunities in order to enter new markets. It also has various levels of cooperation with foreign, water-treatment technology companies that provide high quality, modern equipment.

Below is a list of questions that are designed to help executives of and investors in water treatment companies in China determine whether they are pursuing these strategies in the right way:

Core business expansion

How has the company typically won tenders from municipal governments? What are the key success factors? How will this help the company continue to win future business from those governments? Does



the company get regional exclusivity for future waste water treatment capacity as a result of increasing water consumption under the current contracts?

Penetration into lower-tier cities and counties

As the growth rate of waste water treatment in lower-tier cities and counties is expected to be faster than that in larger cities, how should a company best position itself to enter these markets? What government connections does it have to improve its chances of winning new business?

Vertically integrate across the value chain

How should a company expand into others parts of the water treatment value chain, such as EPC, flow control system engineering, treatment consumables or value added services? Has the target company entered into deep processing business including recycling water supplier for industrial use/non-drinkable residential use or sludge management?

Horizontally integrate into adjacent areas

How can a company make a lateral move into other types of water treatment like commercial or residential? What sort of regulatory hurdles exist? Can the target company tap into its existing resources to expand horizontally into water supply and other water management (e.g., flow control, smart meter) business?

Executing a roll-up strategy to dominate regional markets

Is the company in a position to grow through acquisition if necessary? How can it grow the bottom line by taking

advantage of synergies between new acquisitions and the existing business?

Organisational excellence to drive profitability

What corporate structure supports the business model and current levels of growth? What project development techniques or new technologies allow it to perform better than the competition? Does the company have successful track record in build-operate-transfer (BOT) projects? How strong are the relationships with the local authorities and are tariffs set at a level that will generate attractive returns?

Companies that successfully pursue these strategies are generally better positioned than those who don't. The different strategies are not mutually exclusive – each factor is just as important as the other, and by combining them an even stronger company can be built. The challenge is not only to identify and select the right set of strategies, but also to build organisational capabilities and resources to ensure the plan is successfully executed and profitability is restored to a higher level. This will be the key factor in becoming an industry leader in China's waste water industry. 

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FACILITATING CHINA'S E-COMMERCE MARKET

While China's booming e-commerce market has ushered in exciting opportunities, it also comes with its fair share of risks. **Peter Chen**, Vice General Manager of **TÜV Rheinland Greater China System Division** takes a closer look at the risks and the measures being taken to improve China's e-commerce environment.

According to iResearch, China's 2014 e-commerce gross merchandise volume (GMV) was CNY 12.3 trillion, up 21.3 per cent on the previous year. Online shopping increased 48.7 per cent in the same year, achieving 10 per cent of total consumer goods retail sales for the first time. Business-to-business (B2B) is currently driving China's e-commerce market, making up 70 per cent of overall sales, 50 per cent of which are coming via small- and medium-sized enterprises (SMEs).

Shaping the future of e-commerce in China

While the e-commerce boom continues unabated, challenges remain, such as unregulated competition, lack of integrity, unreliable quality, and after-sales and safe-payment problems. Nevertheless, e-commerce is a stated priority for the Chinese Government.

On 4th May, 2015, the State Council of China issued the *Opinions on Vigorous Development of E-Commerce to Accelerate the Cultivation of a New Driving Force in the Economy (Opinions)*, aimed at encouraging intensive development of the e-commerce market and exploring ways to establish a quality-supervision system for e-commerce products.¹ The *Opinions* not only point to existing problems, such as inappropriate management modes, an inadequate credit system and market irregularities, but also explicitly targets structural and institutional obstacles to the establishment of a large-scale e-commerce market that operates along both domestic and global rules.

Quality tracking

China's big e-commerce players are well aware of the need to establish a robust quality-tracking system. Complying with the State Council's call to regulate e-commerce and provide product-quality guarantees, e-commerce platforms have been developing long-term partnerships with independent third-party testing organisations – for example, Alibaba and GlobalMarket.com have launched Assessed Supplier certification and the Global Manufacturer Certificate (GMC)

standards with TÜV Rheinland to improve the quality of manufacturers selling online.

Addressing persisting cross-border e-commerce issues, e-commerce partnering testing organisations are cooperating with the industry's quality-traceability leaders and insurance agencies to solve the problem of customer confidence in products at the earliest phases. The aim is to ensure qualified products, production compliance and legitimate business practices via three procedures:

- *Incoming Quality Control*: inspecting the main raw materials of a manufacturer or verifying the existing testing reports.
- *Outgoing Quality Control*: providing pre-shipment inspection services for the finished products of a manufacturer in accordance with the acceptable quality limit (AQL) standard.
- *Continued Quality Control*: conducting market sampling surveys on products, based on a specified proportion, and giving an annual validity assessment of quality-traceability systems to the manufacturer on the basis of the sampling results.

With more such quality-driven measures, e-commerce players are expecting to tap into a burgeoning market, but success is not easy and certainly not a given. Despite China's e-commerce growth, businesses first need to develop a strategy that encompasses a thorough understanding of the target market, understand how consumers evaluate and purchase products and understand best how to influence and direct their online purchases. 

TÜV Rheinland is a leading provider of technical services worldwide. Since our foundation in 1872, we have been providing safe and sustainable solutions for the challenges arising from the interaction between man, the environment and technology. As an independent, neutral and professional organisation, we are committed to working towards a future that can fulfil the needs of both mankind and the environment in the long-term.

¹ *E-commerce liberalization in China: State Council and MIIT push forward*, Lexology, 30th June, 2015, viewed 27th August, 2015, <<http://www.lexology.com/library/detail.aspx?g=2cdec2e3-3234-4568-bd70-4268e85428db>>

FROM FARM TO CHOPSTICK

CHANGES TO CHINA'S FOOD SAFETY LAW

Although China's food and beverage industry continues to grow, food safety remains an ongoing concern among its citizens. In order to try and address these concerns, over the past two years the Chinese Government has been restructuring the mechanisms that supervise food production and distribution. **Dr Martina Gerst**, Standards and Conformity Assessment Advisor at the **EU SME Centre**, looks at some of the changes and how they may affect SMEs.

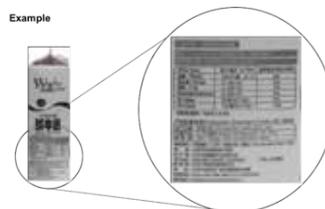
Entered into force on 1st October, 2015, the amended Food Safety Law (FSL) is considered to be the most stringent FSL ever passed in China. It will substantially revise the existing law, including:

- a tightening of scrutiny over additives and raw food materials, importation, sourcing and sales tracking requirements;
- more detailed recall procedures; and
- an increase in catering service providers' obligations, packaging and labelling requirements, and third party liabilities (for example, online food retailers).

How will EU SMEs be affected by these revisions? What follows is a summary of key changes concerning two of the most asked about topics: packing/labelling and online retailing of food and beverage products.

Packaging/labelling

Besides detailing what is required to ensure compliance with mandatory standards for food, additives and food packaging for pre-packed food, the new FSL also clarifies exactly what should be marked on labelling for non-prepacked and pre-packaged food.



Let's take labelling for dairy products as an example. China is a major importer of dairy products with an annual growth of about 16 per cent, but the dairy sector has also witnessed constant changes in regulations and implementation. Under the new law, the supervision of

dairy will be strengthened, including the management of labelling for dairy products.

Here is a list of the minimum requirements that must be displayed in packaging, as indicated in China's *Food Safety National Standards General Rules for Labelling of Pre-packaged Foods* (GB 7718-2011):

- Product name
- Place and country of origin
- Establishment number
- Production date
- Expiration date or best before date
- Storage temperature and conditions
- Net weight (English) – minimum font height is 2mm for a package under 50 ml/gr
- Producer name and address (English)
- Production Lot number (as defined by exporter)
- Ingredients list
- Must be in normal Chinese characters (except for registered trademarks)
- Minimum size of the words, symbols and numerals in the mandatory labelling information shall not be less than 1.8 mm in height

Labels and user instructions are required to be, at the very least, in Chinese with certain statutory content, otherwise the food will be prohibited from importation into China. Accordingly, importers will be obliged to inspect such labels and instructions before import.

The penalty for non-compliance will be a fine of 5–10 times the total value of the goods and/or revocation of the business licence.

New rules for online food retailers

Online shopping for food has become a major trend in China, one which necessitated changes to the FSL.

New provisions adopted for online retailers of food products include the obligation for them to:

- register genuine contact information, such as name and ID; and
- carry out due diligence on their vendors and food distributors and ensure that they have obtained all relevant licences where required.

Online food retailers will be held liable if they are unable to provide this type of information. To ensure compliance

with these requirements, they now have to set up new systems, revise registration procedures and carry out due diligence. In addition, online retailers now have to report to the China Food and Drug Administration (CFDA) any illegal activities suppliers commit on the platform and act accordingly.

All these changes to the FSL in China are clearly a move in the right direction to strengthen food safety of Chinese consumers.

To learn more details of the new law and how you could better adapt to the changes, contact one of the Centre's experts at <http://www.eusmecentre.org.cn/expert>.

For the latest overview of the food and beverage market in China, download our sector report from <http://www.eusmecentre.org.cn/report/food-beverage-market-china>. To learn more about the specific labelling requirements for food and beverage products in China, download the guideline from <http://www.eusmecentre.org.cn/guideline/food-and-beverages-technical-requirements-and-labelling>. 

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EUROPEAN CHAMBER EVENTS GALLERY

BEIJING CHAPTER



1



2



3



4

Exclusive Dialogue with CSPFTZ and Pudong Government (1)

On 26th August the Chamber held an Exclusive Dialogue event with senior officials from the Pudong Development Zone Government, Shanghai Pudong New Area People’s Government and the Shanghai Pudong New Area Science and Technology Committee, to obtain first-hand information about the CSPFTZ.

Position Paper Launch 2015/2016 (2)

On 8th September, the Chamber officially launched our *Position Paper*

China’s Environment: Big Issues, Accelerating Effort, Ample Opportunities (3)

On 15th September the Chamber hosted a seminar presenting the findings of the Goldman Sachs report *China’s Environment*.

Exclusive Dialogue with MOST (4)

On 16th September, the Chamber held an Exclusive Dialogue with China’s Ministry of Science and Technology, on *Considerations on Scientific and Technological Innovation in China’s 13th Five-Year Plan*.

NANJING CHAPTER



1

CHINA MANUFACTURING 2025 VS. INDUSTRY 4.0 (1)

This seminar took place on 2nd September with the participation of the Chamber’s Sourcing Forum.

SHANGHAI CHAPTER



1



2

Position Paper 2015/2016 Launch (1)

Dr Stefan Sack, vice president and chairman of the Shanghai Chapter, delivered a presentation on the *Position Paper 2015/2016* on 8th September, 2015.

China's Age of Anxiety: Stock Market Crisis and Falling RMB (2)

On 10th September, the Shanghai Chapter held a seminar on the topic of the recent stock market crisis and currency devaluation in China.

SOUTH CHINA CHAPTER



1



2

Position Paper 2015/2016 Launch (1&2)

On 15th and 16th September, the South China Chapter hosted consecutive launch events for the *Position Paper 2015/2016* in Guangzhou and Shenzhen respectively.

SOUTHWEST CHINA CHAPTER



1



2

Business Confidence Survey 2015 Launch (1&2)

The *Business Confidence Survey 2015* was launched in Chongqing on the 20th August. Chamber Secretary General Adam Dunnett gave the presentation before joining a panel discussion with Ulrich O.Birch, chairman of Southwest Chapter, Massimo Bagnasco, States' Representative to the Chamber's Executive Committee, and Professor Xin Liu, Chongqing University.

TIANJIN CHAPTER



1

Lessons in Crisis Management (1)

Following the recent fire and series of explosions in the Binhai Port area, Tianjin, the Tianjin Chapter invited member companies to a seminar on 16th September, to take part in a debrief and share information on how to effectively handle crisis situations.

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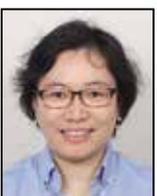


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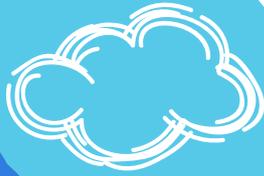
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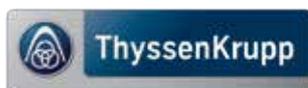
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