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INTELLECTUAL PROPERTY

CHINA'S IPR PROGRESS
Legal developments and enforcement challenges

THE END OF E-COMMERCE FREEDOM?
How a new law will affect IPR and online commerce in China

CHINA'S NEW ANTI-UNFAIR COMPETITION LAW
A new hope for brand owners on the unauthorised use of trademarks

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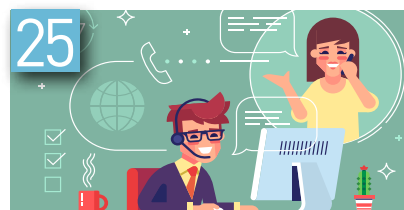
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European Chamber Chapters:

Chief Editor
Jace Gilmore

Art Director
Wenwen Gu

For European Chamber Membership:

National Member Relations Manager

Paula Mueller
Tel: +86 (21) 6385 2023
ext 114
pmueller@
eurochamber.com.cn

For advertising in EURObiz:

Advertising and Sponsorship Manager
Queenie Cheng

Tel: +86 (10) 6462 2066 ext 54
qcheng@eurochamber.com.cn

Beijing

Beijing Lufthansa Center,
Office C412
50 Liangmaqiao Road
Beijing, 100125, PR China
北京市朝阳区亮马桥路五十号
燕莎中心写字楼C-412室
Tel: +86 (10) 6462 2066
Fax: +86 (10) 6462 2067
euccc@eurochamber.com.cn

Nanjing

806, No.99 Zhongshan
Road, Xuanwu District,
Nanjing
南京市玄武区中山路99号
806室
Tel: +86 (25) 8362 7330 /
8362 7331
Fax: +86 (25) 8362 7332
nanjing@
eurochamber.com.cn

Shanghai

Unit 2204, Shui On Plaza
333 Huai Hai Zhong Road
Shanghai, 200021
PR China
上海市淮海中路333号
瑞安广场2204室
Tel: +86 (21) 6385 2023
Fax: +86 (21) 6385 2381
shanghai@
eurochamber.com.cn

Shenyang

Room 646, Sofitel
Shenyang Lido, 386
Qingnian Street, Heping
District, Shenyang, 110004
P.R. China
沈阳市和平区青年大街386号
丽都索菲特酒店646室
Tel: +86 (24) 6683 4376
Fax: +86 (24) 6683 4376
shenyang@
eurochamber.com.cn

South China - Guangzhou

Unit 2817, 28/F, Tower A,
China Shine Plaza
9 Linhe Xi Road
Tianhe District
Guangzhou, 510613 PR
China
广州市天河区林和西路9号
耀中广场A座2817室
Tel: +86 (20) 3801 0269
Fax: +86 (20) 3801 0275
southchina@
eurochamber.com.cn

South China - Shenzhen

Rm 308, 3/F Chinese
Overseas Scholars
Venture Bld
South District, Shenzhen
Hi-tech Industry Park
Shenzhen, 518057
PR China
深圳高新区南区
留学生创业大
厦3楼308室
Tel: +86 (755) 8632 9042
Fax: +86 (755) 8632 9785
southchina@
eurochamber.com.cn

Southwest - Chengdu

04-A, F16, Tower 1 Central
Plaza
8 Shuncheng Avenue
Jinjiang District, Chengdu
成都市锦江区顺城大街8号中
环广场1座16楼04-A
Tel: +86 (28) 8527 6517
Fax: +86 (28) 8529 3447
chengdu@
eurochamber.com.cn

Southwest - Chongqing

1-1, 23F, B4 Block,
Chongqing Foreign
Business District, 12 Yun
Shan Nan Lu, Yubei District,
Chongqing, China
中国重庆市渝北区云杉南路
12号重庆涉外商务区B4栋23
楼1-1室
Tel: +86 (23) 63085669
chongqing@
eurochamber.com.cn

Tianjin

41F, The Executive Center,
Tianjin World Financial
Center, 2 Dagubei Lu,
Heping District, Tianjin
300020, PR China
天津市和平区大沽北路2号天
津环球金融中心41层德事商
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tianjin@eurochamber.com.cn



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CLOSING THE GAP: ADDRESSING THE DIVIDE BETWEEN IPR REGULATIONS AND ENFORCEMENT



Mats Harborn
President of The European Union
Chamber of Commerce in China

A stylized, handwritten signature in black ink, likely belonging to Mats Harborn, positioned below his name and title.

Since the 19th Party Congress, there have been calls for innovation and expansion into advanced industries. New policies are continuously being launched to lay the groundwork for a number of different issues ranging from the rapidly developing new energy vehicle sector to new discoveries in pharmaceuticals. Newly emerging and traditional industries both share a common and long-held concern: that while the intellectual property rights (IPR) regime looks great on paper, it lacks the required follow-through. Without a thorough re-examination of the legal foundations and enforcement mechanisms that underpin the current IPR regime, companies in China will have to race to meet ambitious goals, while simultaneously navigating an overly complex IPR environment.

The crucial weakness in China's IPR regime is the disconnect between policy and enforcement. The European Chamber's *European Business in China Business Confidence Survey 2017* found that 58 per cent of members view China's IPR laws as adequate or excellent. However, only 29 per cent of members gave IPR enforcement a positive rating. While there are many factors that contribute to this gap, there are several major ones I would like to discuss.

First, is the disconnect between passing a national policy and enforcing it locally. Local governments need to properly enforce these regulations as they not only benefit foreign businesses but domestic ones as well. The success stories of local governments and courts faithfully enforcing IPR protections should be shared in order to embolden officials to follow through on the local level.

Second, there is a pressing need to advance IPR protection in a more permanent way. The current modus operandi for improving IPR enforcement is often through short-lived 'campaigns' or 'movements'. Noting this issue, members have consistently reported that local level improvements in IPR are only temporary. Establishing a more permanent IPR regime and

ensuring that local officials continually enforce IPR is of paramount importance.

Third, the Chinese Government should take advantage of European Union (EU) business experience and exchange best practices. Most EU member states have exceptionally high standards for IPR protection, and their enforcement mechanisms have helped pave the way for an innovative Europe with a dynamic economy. China does not have to develop strong IPR enforcement on its own, instead it can learn from the lessons the EU has already discovered in its own attempt at protecting intellectual property (IP). Holding IPR-focused dialogues and exchanges can expedite the evolution of the Chinese IPR system. Additionally, opening the Chinese legal system to European law firms would help train a generation of IP lawyers in best practices developed by European colleagues.

The current IPR regime is in serious need of improvement, but we must also give credit where credit is due. The IP courts have been hailed as successes in Beijing, Shanghai, and Guangzhou, with future expansion to Nanjing, Suzhou, Wuhan, and Chengdu. The European Chamber hopes that these courts will be properly staffed in order to handle the large number of cases that were previously dealt with in the general court system. In November 2017, Vice Premier Wang Yang gave the business community a pleasant surprise when he penned an article in the *People's Daily* that explicitly called for an end to the long-standing practice of forced technology transfers. Furthermore, the well received and highly significant *State Council Documents No. 5* and 39 have also called for significant improvements in IPR protection. Finally, the importance of the recently established comprehensive strategic partnership between the European Patent Office and the State Intellectual Property Office of the People's Republic of China cannot be overstated.

These are steps in the right direction, but more needs to be done to reduce IPR infringement. Foreign investment into China has drastically slowed in recent years. In 2017, European investment into China was only United States dollar (USD) 8 billion. There is an urgent need to improve the foreign business environment in order to boost inbound investment into China, and improving IPR protection is a critical step in doing so. This demand is shared by the many Chinese firms that continue to catch up with, and even surpass, their European competition. Furthermore, as domestic firms develop more indigenous IP, they will need a stronger IPR regime to resolve IP conflicts and create a business environment where companies feel safe to innovate.

This issue of *EURObiz* examines IPR and will cover a variety of related topics including customs proceedings, trade secret protection and dispute resolution in China. The European Chamber continues to advocate on behalf of members for an IPR regime that aligns with global standards. While we continue in our efforts, I implore members to stay up to date on the ever-changing IPR landscape and keep in touch with the European Chamber and EU-China IPR SME Helpdesk.



CHINA'S IPR PROGRESS

Legal developments and enforcement challenges

There were a number of important legal developments that took place in the world of IPR last year. In order to operate effectively in China, understanding the intellectual property rights (IPR) system is more important than ever before. **Ai-Leen Lim**, chief executive officer and principal counsel of the intellectual property (IP) section of **AWA Asia**, and **Lars-Åke Severin**, founder of **PSU China**, highlights China's IPR advances in 2017 and the remaining enforcement challenges that exist for IP holders.

In 2017, China launched a nationwide campaign to protect foreign companies' IPR and specialised IP courts expanded to second-tier cities. Past experience shows that courts have a more positive attitude towards evidence preservation and awarding significant damages to foreign companies when it comes to IPR.

Nationwide campaign

In August 2017, the State Council of the People's Republic of China published the notice titled, *State Council on Several Measures for Promoting Foreign Investment (State Council Document No. 39)*. This notice announced several measures China will undertake to ensure foreign investment growth. This entails creating an economic environment that is more law-based, internationalised and convenient for foreign investors. Additionally, this notice includes the improvement of IPR protection, with the Chinese Government recognising this as an effective incentive for encouraging foreign direct investment in China.

As of September 2017, 12 national departments including the State Intellectual Property Office of the People's Republic of China (SIPO) and the Ministry of Commerce of the People's Republic of China (MOFCOM) jointly formulated and launched the *Action Plan for the Protection of Intellectual Property Rights Owned by Foreign-invested Enterprises (Action Plan)*. This announcement marked the government's first nationwide campaign to protect foreign companies' IPR in China.

The *Action Plan* states that the government will, "severely crack down on violations and offenses such as the infringement of intellectual property rights owned by foreign-invested enterprises". The *Action Plan* called on 12 departments to lead the crack down on infringements in trade secrets, trademarks, patent rights and copyright from September to December 2017. It also tasked these departments with reducing the number of counterfeiting offences. Each department has been assigned tasks under the *Action Plan*, with MOFCOM being asked to actively publicise the *Action Plan's* achievements and showcase the strides being made by China in protecting IPR.

These recent governmental actions send a clear signal that China wants to improve its position on IPR protection in the eyes of foreign investors, and it will be interesting to see how the desired outcomes of the *Action Plan* are realised.

IP tribunals

Following the establishment of three specialised IP courts in Beijing, Shanghai and Guangzhou in 2014, China formed 10 IP tribunals in second-tier cities in 2017. These IP courts were designed to try cases involving patents, technical secrets, computer software and cases regarding recognition of well-known trademarks and antitrust issues. These courts have seen the successful increase of damages awarded to plaintiffs by lowering the burden of proof in court and promoting a positive attitude towards provisional measures like preliminary injunctions and evidence preservation.

The tribunals have a similar function to IP courts, but operate within the local-intermediate court system and are comprised of 12 to 15 judges with extensive IP litigation experience.

This recent expansion of the IP legal system shows that China wants to strengthen their jurisdiction over patent cases and improve the quality, efficiency and consistency of IP adjudications.

Under Armour victory

In August 2017, Under Armour, Inc won a major victory against the Chinese sportswear company Fujian Ting Fei Long Sports Products Co Ltd, which had used a similar logo to one used by Under Armour, Inc for its 'Uncle Martian' athletic footwear. The Higher People's Court of Fujian Province ruled in favour of Under Armour, Inc, finding that Fujian Ting Fei Long Sports Products Co Ltd's use of the logo constituted trademark infringement and awarded the plaintiff approximately renminbi-yuan (CNY) 2 million (United States dollar (USD) 300,000). This case was important because the preliminary injunction was awarded before the matter was tried in full.

The act of trademark squatting with sporting apparel and footwear has become a serious problem in China. Under Armour, Inc's victory shows the Chinese courts' determination in curbing this type of behaviour and preventing people from being able to imitate well-known international brands. A court issuing a preliminary injunction in an IP infringement case can be an effective method for IPR owners to prevent further irreparable harm by an infringer.

In this case, the higher court, before the case was decided, approved Under Armour, Inc's application for a preliminary injunction and ordered the defendant to immediately stop the manufacturing, selling or advertising of shoes and clothing using the contested logo. This case was yet another victory for brand owners that are concerned about protecting their brand value when they venture or expand further into the Chinese market.

Enforcement challenges

The IP community considers all of the above moves big, bold strides in the right direction, and is looking forward to continued progress in 2018. China has shown it recognises the importance foreign investors place on strong IPR protection. However, it is important to remember that despite recent legal developments, enforcement still remains challenging for IP holders, especially with the increasingly crowded trademarking space.

China's trademark applications exceeded 5.7 million in 2017, a 55.7 per cent year-on-year increase. At the end of 2017, China had 14.92 million qualified registered trademarks, more than any other country. These numbers pose practical issues for IP owners trying to secure registrations and successfully enforce their IPR. It also creates challenges for the courts and administrative authorities trying to keep pace with the resulting actions and cases. It is now

more important than ever before for brand owners to acknowledge that China's trademark regime operates on a first to file basis, which usually requires strong IPR (IP registrations in particular).

Across many industries, the number of IPR infringements in China are breathtaking in scale. Enforcing IP can appear daunting, even if legal predictability starts emerging in the Chinese court system.

The stereotype of China as being primarily a source of low-quality, cheap knock-offs like 'KFG Chicken' and 'HiPhones' may persist, however Chinese infringers are increasingly becoming more sophisticated in their operations.

Enforcement strategy

Enforcement strategies should reflect the increasingly organised and professional business-like operations of Chinese infringers. It is important to use all available means of enforcement including civil, administrative and criminal measures.

A business's initial steps should be similar to the process for gathering business or competitive intelligence. These businesses should attempt to identify infringement and the key players involved, while making an effort to map the supply chain. This will help businesses develop a strategy that is appropriate to the cost and time involved in IP enforcement.

Evidence collection

While business intelligence informs strategy, evidence collection underlies enforcement. Provisions governing evidence are scattered throughout China's different laws. It is vital that enforcement efforts are in step with legal counsel. Chinese courts largely focus on written or physical evidence, thus following the correct investigative processes is central in building a case.

In many trademark and design patent litigation cases, evidence collection typically breaks down into the following components:

1. evidence supporting an infringer offering products for sale;
2. supporting evidence for an infringer selling products; and
3. supporting evidence that an infringer is manufacturing the products.

Online product listings, catalogues or materials sourced at trade fairs can be used as evidence to show offers for sale. Evidence that proves the sale of infringing products is commonly obtained via a carefully constructed 'test purchase process'.

Outsourcing investigations

If a third party is used to help with evidence gathering, due

diligence is a necessity. China's IP investigators have faced concerns with how they conduct onsite investigations at infringers' factories. One should aim to use investigators with a proven track record and prioritise those that come with references. The investigation process is overseen by the court and should be well planned and executed by experienced investigators.

Notarisation of evidence

To get evidence in front of the courts, notarisation remains key. For foreign companies with brand protection teams stationed in China, forging working relationships with local public notaries can be a huge bonus.


China's public notaries remain overburdened, inefficient and operate with archaic filing systems. Patience is required, but IP holders should also keep a close eye on the evidence transcription process.

Support from the courts

Courts also have the power to compel infringers to surrender evidence that is largely inaccessible to most foreign IP holders, which can include an infringer's financial and inventory records. This power has been exercised more frequently, with courts taking a more positive attitude towards evidence preservation.

Significant damages awarded to foreign companies in a number of recent high-profile cases is a welcome development. Noteworthy too is the possibility that IP holders cover the legal fees and investigation costs if damages are awarded.

A changing IPR landscape

There is no doubt that the IPR landscape in China is going through a series of encouraging legal developments. However, it remains a market where IP holders need to be vigilant. IP strategy and enforcement remains key to safeguarding a company's IPR. 

Ai-Leen Lim is the chief executive officer and principal counsel of **AWA Asia**. She heads up the firm's Asia offices and runs AWA Asia's wholly-owned Chinese IP consultancy in Beijing. This consultancy is also a licensed trademarking agency that allows AWA Asia to file trademarks directly in China on behalf of its clients.

Lars-Åke Severin founded **PSU China** in 2006 and is one of the leading foreign experts on security management and internal investigations in China. PSU China has the experience, insight and resources to help companies and organisations deal with security related issues. Mr Severin served in the Swedish armed forces and has a police background where he also founded the close protection team for Her Royal Highness the Crown Princess of Sweden.



ADAPTING YOUR IP STRATEGIES

The effects of China Manufacturing 2025...to 2049 – Part I

China Manufacturing 2025 (CM2025) will result in an increased intellectual property (IP) assertiveness by China, both domestically and internationally. In this article, **Elliot Papageorgiou**, national chair of the European Chamber's IPR Working Group and head of the greater China intellectual property practice at **Clyde & Co**, and **Gu Zhengquan**, IP litigator and partner at the Chinese law firm **WESTLINK**, outline how companies can 'recalibrate' their perception of China's IP. This includes dispelling pre-conceptions regarding China and explaining how businesses can adapt their global IP strategies.

In May 2015, the State Council of the People's Republic of China announced its CM2025 national initiative with the clear aim of making China a global manufacturing powerhouse in three stages: first, the central government will upgrade and improve the quality of its manufacturing sectors and master technologies in significant industries by 2025; second, by 2035 China will become a mid-ranking manufacturing nation by increasing its IP ownership and achieving key technological breakthroughs in significant sectors; and third, by 2049 China will become a global leader that drives innovation in high-end manufacturing. The plan is ambitious, however what it means for China's IP is even more significant.

Expectations in the IP environment

The most significant impact CM2025 will have on China's IP will no doubt be from the implementation of the nine strategic tasks to take place in the 10 priority sectors. What will the impact on IP look like? The following two sections break down CM2025's effect on China's IP.

Domestic effects in China

- Increased IP filing in the 10 priority sectors and a greater push for encouraging, recognising and rewarding indigenous innovation.
- Greater scrutiny of foreign IP filings in outlined priority sectors found in CM2025, and a continuing increase in the number of invalidations filed against foreign patents, utility models, and designs.
- Greater investment levels in government-encouraged sectors along with the consolidation and creation of 'national champions' in preparation for China to make its presence increasingly felt in the global market place.
- The further encouragement of Chinese technical experts and scientists to return to China. This could be accomplished by increasing the amount of funding and financing opportunities, along with preferential tax treatment for relevant tech ventures.
- An increase in the number of high and new technology enterprise applications by Chinese companies operating in CM2025 priority sectors.
- The continued growth of IP disputes. While the total number of disputes involving foreigners will remain relatively low (in 2016 and 2017 merely 1.2 per cent of IP disputes involved foreign parties), foreign companies should expect increased Chinese assertiveness. Expect an even higher number of IP disputes if the enacted version of China's fourth amendment to the *Patent Law of the People's Republic of China* (expected to be issued in late-2018) includes increased enforcement powers for the patent administration authorities.

Global effects from Chinese enterprises

- Increased out-bound IP filing by Chinese entities in CM2025's 10 priority sectors.
- In the trademark field, expect a greater push by Chinese brands to internationalise. Some movement in this direction is already visible. For example, Huawei has an international campaign with popular actress Scarlet Johansson as their brand ambassador, while Tencent has begun to offer its widely used social media platform, WeChat, in 22 languages.
- For patents, there will not only be greater levels of outbound filing, but a greater number of Chinese patents being validated internationally. In summation, expect a greater number of Chinese international patent filings to go 'triadic', meaning that those Chinese patents will be validated in arguably the three most important international jurisdictions, the United States (US), Europe and Japan.
- Expect more Chinese companies to be active in standard-setting bodies and processes. For a long time, many of the international standards the world complied with were dictated by the West. Expect CM2025 to bring a newfound assertiveness by reflecting Chinese interests in the setting of international standards.
- Expect greater levels of Chinese outbound direct investment (ODI). Even while the Chinese Government is scrutinising currency outflows, expect the 'green light' to continue to be given for Chinese companies to invest in overseas rivals and market leaders. However, it will not be completely smooth sailing for Chinese ODI as greater protectionism in the US, calls for a 'level playing field' and reciprocal investment rights by European countries (including Germany and France) will impact their ability to acquire applicable foreign IP.

Adapting to a changing IP environment

In order to maximise opportunities offered by CM2025 while minimising potential risks, IP strategies must be adapted. There are several ways that companies can accomplish this.

Branding and trademarks

Foreign companies should continue to develop strong Chinese brand identities and reinforce links to their international brands and services. This will allow them to differentiate themselves in the increasingly competitive Chinese marketplace. At the same time, these companies need to invest in innovation internationally.

These companies must also examine priority sectors listed by CM2025, and file trademarks for appropriate



products and services within, and adjacent to, those sectors. On the services side, for example, filings for services like “promotional activities...” (Class 35 in international classifications), “maintenance and repair of...” (Class 37) and “training in relation to...” (Class 41) should be considered.

Technology and patents

On the technology side, foreign companies need to rigorously search and monitor their competitors’ patent, utility model and registered design filings. Given the vast number of filings in 2017 (1,382,000 patent applications, 1,688,000 utility model applications and 629,000 design applications), monitoring by subject filed/subject matter, or international patent classification will not be practicable. Therefore, foreign companies may find they need to narrow the search to filings of known or suspected competitors. In other words, searching by ‘proprietor’ rather than by ‘technology’. While this carries certain risks, it may be the only way to stay up to date on the high number of filings in China.

Foreign companies active in the 10 priority sectors will need to upgrade their patent filing strategies and apply Chinese inventiveness standards (for both patents and utility models) to trigger their filing decision, rather than those from their country of origin. Additionally, irrespective of sector, they should be looking to file patents in the intersection between their technology and the fields of connectivity, software, and business methods. The State Intellectual Property Office of the People’s Republic of China signalled in 2017 that it would consider applying a similar patentability standard for software, and possibly business methods, to the one applied by the European Patent Office. This could result in a greater number of granted patents, an opportunity foreign companies cannot afford to miss.

Preparing for disputes

Foreign companies have previously been reluctant to commence or provoke IP disputes in China, preferring to let ‘sleeping dogs lie’. In light of China’s CM2025 initiative, companies will instead have to be more aggressive when it comes to defending and projecting

their IP in China. They must be prepared to proactively attack adverse patents, utility models and designs earlier and more frequently. If they fail to do so, they will increasingly find themselves on the defensive side of IP litigation.

Companies must also increasingly file pre-emptive patent litigations. Being a plaintiff in China puts you in the driver’s seat and carries procedural and often substantive advantages (such as choice of jurisdiction), which foreign companies should not surrender easily. By some measures, over 80 per cent of patent litigation is determined in favour of plaintiffs.

Besides going on the offensive, foreign companies must prepare a defensive strategy in the event they become targets of IP litigation. This includes building up a strong, defensive IP portfolio; evidence of prior use and prior publication (where applicable); and preparing clear instructions for local businesses that can be used when an IP dispute comes calling.

Having skin in the game

You cannot win if you do not play the game. Maintaining active levels of engagement, and positive participation in CM2025 will be key in determining how foreign companies fair under this wide-sweeping initiative. This means businesses should continue advocating and participating in rules setting; help shape outcomes for each of the stages outlined in CM2025; and most importantly, actively seek support, representation and advocacy from the European Union, their national governments, and various non-governmental organisations throughout the CM2025 process. [Eb](#)

*With over 2,500 staff across six continents, **Clyde & Co** is well known its expertise in emerging markets, international trade, and high profile and/or difficult dispute resolution work. It has a well-established IP practice in the Middle-East and North Africa, and launched its Greater China IP practice in 2017 centred around **Elliot Papageorgiou**. It’s core industrial sectors centre on industrial manufacturing, infrastructure, insurance, international trade, transportation and natural resources, with a fast-growing reputation in other industries as well.*



THE END OF E-COMMERCE FREEDOM?

How a new law will affect IPR and online commerce in China

The electronic commerce (e-commerce) market in China has been growing at an astonishing rate, however this market expansion has come at the expense of meaningful regulation. With an ever-increasing number of intellectual property infringements taking place, China is making an attempt to step up and reign in this industry. In this article, **Helen Gao**, legal analyst at **China Policy**, clarifies if this new law portends the end of 'freewheeling days' for e-commerce in China.

China's e-commerce market, totalling United States dollar (USD) 1.1 trillion in sales in 2017, is the world's largest. However, this market is improperly regulated with counterfeit goods, purchased positive reviews and inflated sales numbers found on retail platforms like Taobao. Furthermore, the absence of an effective tax scheme means the government is missing out on collecting billions of dollars in potential revenue.

The draft *E-commerce Law of the People's Republic of China (E-commerce Law)*, is currently in its second round of deliberation and is the first law dedicated to regulating online retail in China. The law is expected to be passed in March 2018, giving administrative agencies greater control over e-commerce activities

that will have far-reaching implications on all participants, including overseas businesses.

The end of anarchy in cross-border e-commerce

The *E-commerce Law* aims to tighten supervision over cross-border e-commerce. Foreign retailers will no longer be allowed to sell directly to Chinese customers. Instead, they will have to market to the Chinese audience by going through a Chinese-owned or controlled e-commerce platform with a government-issued internet content provider (ICP) licence.

Digital infrastructure will be put in place to ensure that e-commerce imports will follow the relevant Chi-

nese laws when it comes to declaring goods, paying taxes and going through inspection and quarantine procedures. E-commerce processing centres, operated by Chinese e-commerce platforms, will have to enforce these procedures before distributing their products. An example of an e-commerce processing centre is the Alibaba-controlled Hangzhou Cross-Border E-commerce Processing Pilot Area.

The law will lead to longer shipping times and higher prices for foreign products sold on the Chinese Internet, a disadvantage that could negatively impact the micro, small and medium-sized enterprises (MSMEs) that benefit most from the current 'inclusive trade' model.

Increased liability for e-commerce platform operators

The second draft of the *E-commerce Law* places the responsibility squarely on e-commerce platform operators when it comes to protecting consumer and intellectual property rights (IPR). For example, platform operators are required to investigate and punish IPR infringements brought to their attention and will be held accountable for any failure to act. Additionally, they are asked to verify the person's identity and the business's operating permits before granting access, while also taking punitive action against businesses that engage in illegal practices.

The measures being taken to strengthen IPR protection are expected to benefit foreign companies that have long seen their sales in China undermined by counterfeiting. The second draft of the *E-commerce Law* in particular requires businesses accused of infringing IPR to file non-infringement declarations and present evidence to prove their innocence in order for e-commerce platforms to lift their punishments.

Personal data security

The first draft of the *E-commerce Law* included concrete rules for collecting and using consumer information. However, the second draft dropped those provisions and e-commerce operators must now comply with the *Cybersecurity Law of the People's Republic of China* (Cybersecurity Law), which went into effect on 1st June 2017. The Cybersecurity Law requires foreign companies that are operating in China to store personal data locally. Any data sent across borders will be subject to stricter scrutiny for security-related reasons.

Foreign companies that are dependent on e-commerce sales in China, like Apple and Amazon, will be hit the hardest. Among other things, it will mean setting up local transaction processing and cloud storage centres, which will be costly and ineffectual at improving business efficiency and data security. Another worrying sign is that in the second draft of the *E-commerce Law*, a provision in the document allows commerce

and taxation ministries to access consumer data on e-commerce platforms, raising fears that the State may be given too much access to consumers' personal information.


Points under discussion

On the 4th November 2017, at the National People's Congress Standing Committee Meeting members proposed revising the law. Several delegates lobbied for the law to encompass WeChat business activities. Although WeChat is not considered an e-commerce platform, business transactions were projected to reach renminbi-yuan (CNY) 800 billion by the end of 2017. Anonymous and unlicensed sellers frequently reach out to potential consumers on the application, free from proper institutional supervision.

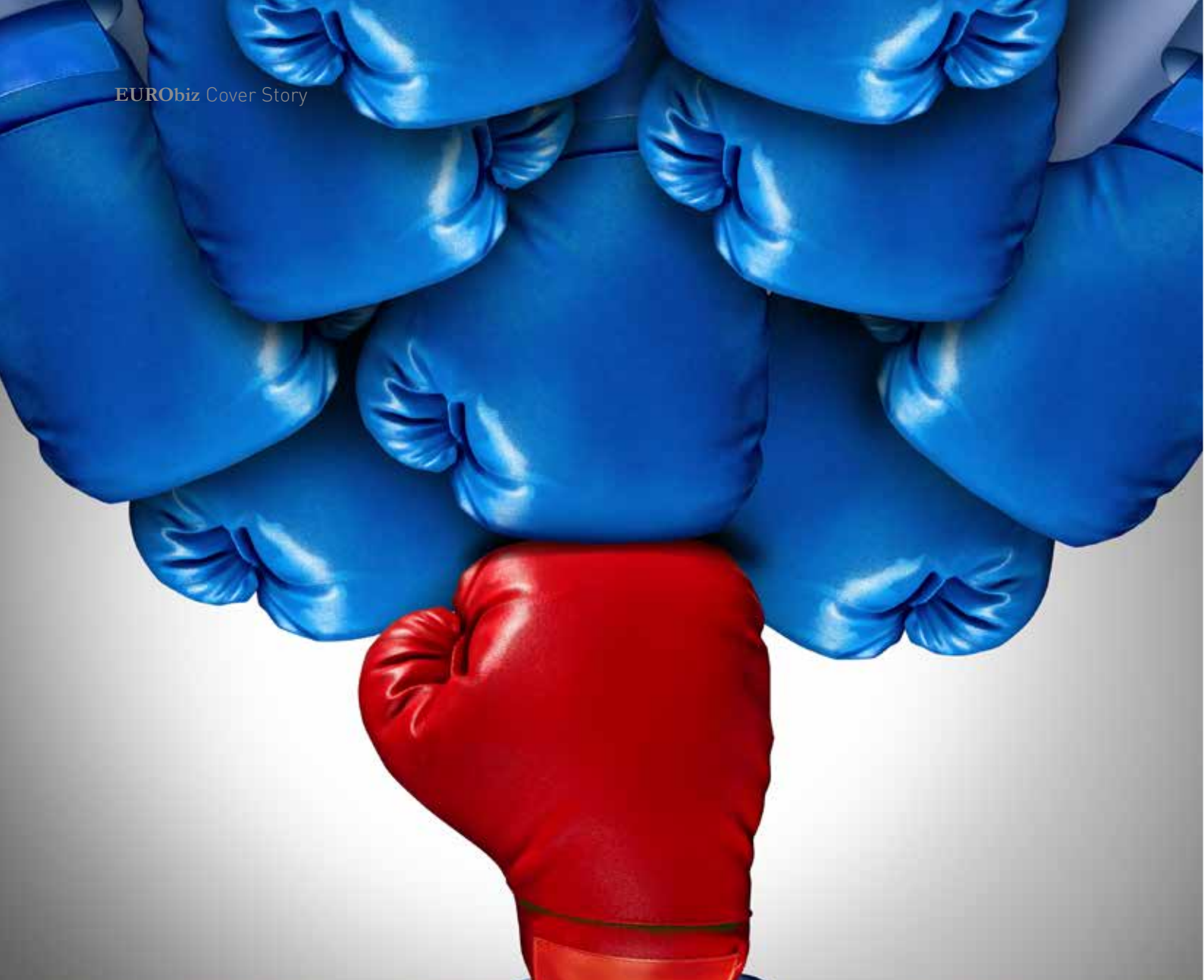
Regarding personal information safety, members argued that the *E-commerce Law* should be more specific about which government departments can request information from e-commerce operators. They proposed that the information should be provided in ways that do not disclose the identities of individual consumers, with exceptions being made for police investigations.

The *E-commerce Law* should delegate responsibilities to specific supervisory bodies in order to ensure its implementation, argues Yin Zhongqing, vice chair of the Financial and Economic Affairs Committee of the National People's Congress of the People's Republic of China. At the moment, the law talks about "relevant agencies" without adequately specifying who will carry out tasks such as overseeing financial transactions and maintaining basic digital infrastructure.

Indicator for the future

The *E-commerce Law* together with other recently passed policies, like the *Anti-unfair Competition Law of the People's Republic of China*, reflects what the central government considers to be at the top of its reform agenda. This includes tighter control over personal data, stronger IPR protection, and a more assertive policy stance when dealing with foreign businesses. As e-commerce's role in Chinese retail continues to grow, businesses will have to tread carefully. The key to drafting a good e-commerce law is to guarantee market fairness and efficiency without stifling innovation in one of China's most dynamic economic sectors. When the law is finally released during the National People's Congress plenary session in March, it will be closely watched by e-commerce participants as well as entrepreneurs in other industries as an indicator of what is to come. 

China Policy is a research and strategic advisory group based in Beijing, China. Working with clients at the leadership, executive and research levels, they deliver clear insight into China's policy world as it affects strategic and operational decision-making not only in China but around the world.



CHINA'S NEW ANTI-UNFAIR COMPETITION LAW

A new hope for brand owners on the unauthorised use of trademarks

Operating a business and registering intellectual property in China can be challenging. Brand owners have had a long-standing battle with the unauthorised use and registration of their trademarks as enterprise names or trade names in China. **Andrew Sim** and **Shirley Zhao**, from **Baker McKenzie**, explain how the new *Anti-unfair Competition Law* (AUCL) offers a potential solution to these intellectual property (IP) problems.

China's revised *Anti-unfair Competition Law* (AUCL) went into effect on 1st January 2018, bringing about important changes affecting intellectual property rights (IPR) owners. These changes have introduced new provisions that respond to recent instances of unfair competition in the marketplace, have removed provisions that overlapped or conflicted with other laws, and have imposed harsher penalties for unfair competition. In light of these changes, reviewing enforcement portfolios in China will be essential.

A problem commonly encountered by IPR owners is the unauthorised use and registration by another party of their trademarks as enterprise names or trade names in China. Free riding on the reputation of established or famous brands entails a business registering an enterprise name that is identical with, or similar to an already established product name or famous brand.

The AUCL prohibits a business entity from carrying out acts that are intended to confuse or mislead others into thinking that its products belong to another party, or there is an affiliation with another party. Some of these acts include:

1. using without permission, a trademark that is identical with or similar to another's product name, packaging or decoration that already has a certain degree of influence;
2. using without permission the name of an enterprise, social organisation or individual with a certain degree of influence;
3. using without permission, the main element of a domain name, website name or webpage that has a certain degree of influence; and
4. intentionally trying to mislead and confuse others into thinking that a product belongs to another party, or there is an affiliation with another party.

Another change is the replacement of "famous" with "a certain degree of influence". This is a welcomed change as it was onerous for brand owners to prove their trademark's fame.

If confusion has arisen, the local Administrations for Industry and Commerce (AICs) are empowered to impose a range of penalties, including the power to halt the illegal act and confiscate the infringing goods. A newly added provision also empowers AICs to investigate the infringer's bank accounts.


Additionally, AICs are now entitled to impose higher fines than before, with the severity of the fine still tied to the amount of illegal revenue a business can bring in. If there is no illegal revenue or their revenue is less than renminbi-yuan (CNY) 50,000 (approx-

mately United States dollar (USD) 8,000), AICs can impose a fine up to CNY 250,000 (approximately USD 38,000). When illegal revenue is over CNY 50,000, AICs can impose fines up to five times the amount illegally earned by a business. In serious circumstances, the business licence of the offender may be revoked.

The revised AUCL also allows AICs to replace an infringing trade name with the social credit number of the enterprise before their trade name is changed formally. Before the revised law, getting a business to refrain from using an infringing enterprise name had been one of the main obstacles to owners preventing IPR infringement. Typically, the business did not comply with the AICs' order to change its trade name, making favourable court judgments difficult to enforce in practice.

Current laws on the subject are unclear regarding the handling of trademark and trade name rights. The revised AUCL helps to clarify this issue since it forbids enterprises from using names that contain words that are identical or similar to the names of famous goods or services (this can arguably include trademarks).

To improve the use and registration of trade names and to reduce the number of conflicts between trademark and trade name rights, China has also promoted other legal reforms in order to supplement the AUCL. For example, the *Rules on Prohibited and Restricted Enterprise Names* came into effect on 31st July 2017, and prohibits a business from using another party's well-known trademark in the same industry as their enterprise name. This prohibition discourages a market player from selecting an infringing enterprise name. Additionally, proposed revisions to the *Regulations for the Administration of the Registration of Enterprise Names* were first released on 22nd September 2017 and are likely to be finalised in the first half of 2018. These proposed revisions require market players to use their enterprise names in good faith. In particular, no enterprise may use a name that is identical or similar to another party's famous business identifier, or use its registered enterprise name to damage the national interests, public interests or lawful interests of another party.

IP owners should monitor this area for any future developments and reconsider their IP enforcement strategies in order to combat unauthorised use and registration of their trademarks as someone else's enterprise name. 

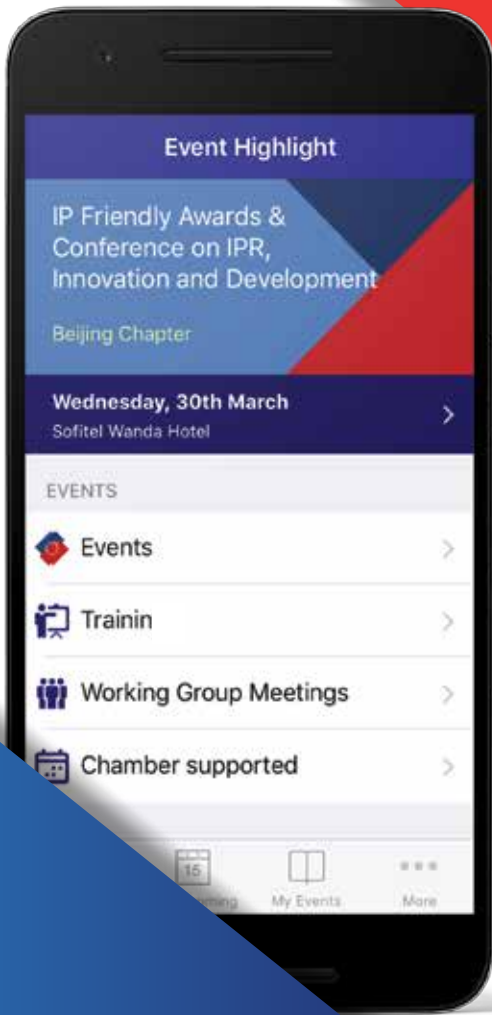
Andrew Sim is a partner of the Intellectual Property Group in the Beijing office of **Baker McKenzie**. His practice focuses primarily on intellectual property law in the People's Republic of China.

Shirley Zhao is an associate of the Intellectual Property Group in the Beijing office of **Baker McKenzie**. Her practice focuses on brand protection in China.

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DEFINING THE NEXT GENERATION OF IPR

An analysis on the New Balance Inc court case in China

The lawsuits regarding the disputed trademarks *bai lun* and *xin bai lun* between Zhou Lelun and the company Xin Bai Lun Trading (China) Co Ltd, the affiliated company of New Balance Athletics Inc, garnered a lot of attention in China. Safeguarding intellectual property (IP) has often been a complicated endeavour, resulting in foreign businesses being forced into surrendering their profits. Commonly referred to as 'the New Balance Case', **Jenny Chen** and **Charlotte Zhu** from **D'Andrea & Partners**, discuss the case and provide their opinion on what this court decision means for foreign enterprises and their IP decisions in China.



Background information

In July 2013, the plaintiff Zhou Lelun sued the defendant Xin Bai Lun Trading (China) Co Ltd (New Balance Athletics, Inc) for infringing his registered trademarks *bai lun* and *xin bai lun* in China. Initially the Guangzhou Intermediate People's Court held that New Balance Athletics, Inc committed trademark infringement and held that the company should pay renminbi-yuan (CNY) 98 million as indemnity to the plaintiff. The defendant subsequently filed an appeal with the Guangdong Higher People's Court.

After the appeal, the Guangdong Higher People's Court significantly reduced the amount of damages granted by the court, but still concluded that intentional infringement on the disputed trademarks had taken place and that the defendant should pay a reduced sum of CNY 5 million.

This ruling in favour of Zhou Lelun may seem strange as New Balance is considered a famous United States (US) brand with their shoes being widely distributed internationally. In contrast to the well-known shoe company, the plaintiff's shoe with the name *xin bai lun* is relatively unknown.

The facts

To better understand the court case, the following facts must be considered:

1. The defendant New Balance Athletics, Inc neglected to check for registered trademarks in China after entering the marketplace.

Xin Bai Lun Trading (China) Co Ltd was established in China in December 2006, with New Balance Athletics Inc registering the relevant trademarks in English on 1st November 2007.

Meanwhile, the Chinese characters *xin bai lun* were being used frequently on New Balance Athletics, Inc's official website and on e-commerce sites like Tmall.com. Despite the trademarks New Balance and NB being registered quite early in the US and in China, the Chinese trademarks *xin bai lun* and *bai lun* were never registered by the US company.

2. The plaintiff Zhou Lelun owned the rights to *xin bai lun* and *bai lun* in China.

A company called Chao Yang Shoes and Hats registered the trademark *bai lun* in August 1996, and the registered trademark was transferred to Zhou Lelun in April 2004. That same year, Zhou Lelun also registered *xin bai lun* in the Class 25 IP category, which includes shoes, clothes, hats and socks. In the hearing, Zhou Lelun successfully showed evidence to prove he owned the relevant trademarks and they were being used in good faith.

3. The defendant was ruled against under the reasoning that the use of the trademark was made in bad faith.

The first court hearing ruled that the plaintiff's trademark *bai lun* was well-known enough that the defendant should have been aware of it, especially since the trademark was registered in 1996. New Balance Athletics, Inc filed an opposition with the court against the trademarking of *xin bai lun* in 2007, which was ultimately not accepted by China's



Trademark Office. Available information led the court to believe the defendant was advertising their products by using the trademarked *bai lun* and *xin bai lun*, and were fully aware that these trademarks were registered by another party. Even after the defendant became aware of the disputed trademarks, they insisted on using the disputed trademarks for advertisement and promotional purposes.

4. The main point of contention in this case was the use of the disputed trademarks and whether it ended up confusing the average consumer and lead them to mistake the actual source of the provided goods.

As previously mentioned, the court held that the defendant should pay CNY 98 million to the plaintiff as indemnity. In the first hearing, the defendant's attorney failed to point out their use of *bai lun* and *xin bai lun* would create confusion for an average consumer on who the actual manufacturer of the product was. Since the plaintiff could not prove the defendant misled consumers with their trademark infringement the indemnity amount, based on the profits accrued from using the trademark, was unreasonable.


The outcome

After revisiting the case, the Guangdong Higher People's Court held that any profit earned by the defendant during the alleged period of trademark infringement was not solely due to the infringement on the plaintiff's trademarks. Since the indemnity was no longer calculated based on the total amount of profit made during the span of time the trademark was used, the amount of money the court

asked from the defendant was reduced from CNY 98 million to CNY 5 million.

The main takeaway

Foreign enterprises that are considering entering the Chinese market should do well to examine this court case. A foreign business should not ignore the registration of a Chinese trademark and rely solely on its own country's intellectual property rights. Trademarks registered by others should not be used without the owner's consent. For the registration of a trademark in Chinese, it is suggested to register both the transliterated version of the Chinese trademark as well as the translation in order to prevent potential infringement.

Finally, any evidence that can prove a business has a well-established "good reputation" in the Chinese market should be collected and preserved in case a foreign enterprise must go to court in order to safeguard its IPR. 

D'Andrea & Partners is an international law firm and point of reference for companies that want to enter the global market and be successful. Established by its founding partner, Carlo Diego D'Andrea, attorney at law and pioneer in Italian and European law in China, today the firm is made up of professionals coming from different countries around the world. Besides the main operational headquarters in Shanghai, D'Andrea & Partners has a number of branches in China and outside the country in Italy, India, Vietnam and Russia. The firm's clients include large industrial groups, plus medium-sized Italian, European, Chinese and global enterprises.

EUROPEAN CHAMBER LOBBYING HIGHLIGHTS

Advocating for R&D Development to Beijing Municipal Government Officials

On 14th December, Mats Harborn, president of the European Chamber, together with over 40 European Chamber members attended a joint meeting with officials from the Beijing Municipal Government led by Chen Jining, acting mayor of the Beijing Municipal Government, and Cheng Hong, a vice mayor of the Beijing Municipal Government.

At the joint meeting, President Harborn raised some challenges faced by members, including internet speed and intellectual property rights (IPR) concerns, and then provided recommendations on making Beijing a city that is friendly towards research and development (R&D). Mayor Chen concluded the meeting by stating that more effort would be put into reforming the service sector and towards creating a competitive investment environment for foreign-invested enterprises (FIEs).

Following up with NDRC on State Council Documents No. 5 and 39

On 17th January, Adam Dunnnett, secretary general of the European Chamber, met with Yuan Feng, director of the department of Foreign Capital and Overseas Investment of the National Development and Reform Commission of the People's Republic of China (NDRC), to discuss *State Council Documents No. 5 and 39*.

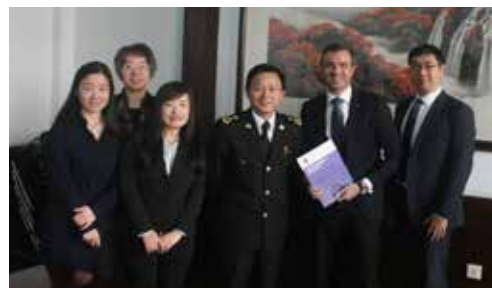
Director Yuan shared his experience drafting *State Council Document No. 5* and reiterated how important the document is for ensuring an equal playing field between FIEs and domestic businesses. In response, the European Chamber raised questions on the two documents' time table, coordination, enforcement and compatibility with the national negative list. Director Yuan responded to these questions and explained that the effects of increased market access will take time to be seen. Towards the end of the meeting, Secretary General Dunnnett briefed Deputy Director General Ye on the recent release of the European Chamber's *Shenyang Position Paper 2017/2018*.



Chamber Presents National Position Paper to Shanghai's Customs Authorities

On 13th December, Carlo D'Andrea, vice president of the European Chamber and chairman of the European Chamber's Shanghai Chapter, accompanied a European Chamber delegation and met with Shanghai's customs authorities to present the *European Business in China Position Paper 2017/2018*.

The paper's executive summary and relevant recommendations were discussed after a brief introduction was given by the Chamber's Logistics Working Group and International Liner Shipping Sub-working Group. After listening to the presentation, Gao Rongkun, director general of Shanghai Customs, discussed ways to improve customs supervision practices for businesses.



SMEs Take Centre Stage at South China Event

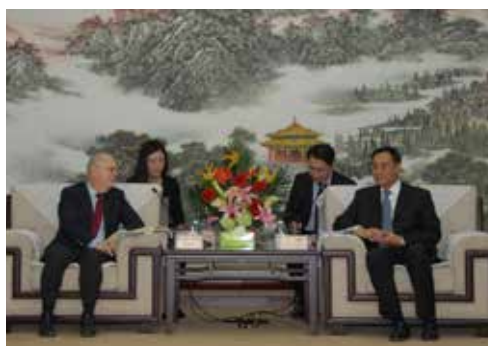
On 9th November, Zhang Feng, chief engineer of the Ministry of Industry and Information Technology of the People's Republic of China, and Kristin Schreiber, director of the Competitiveness of Enterprises and Small and Medium-sized Enterprises Programme of the Directorate-general of Internal Market, Industry, Entrepreneurship and SMEs, joined the 8th EU-China SME Policy Dialogue to update one another on small and medium-sized enterprise (SME) policy developments in both Europe and China. The EU SME Centre kicked-off the event by discussing the challenges European SMEs face while doing business in China.



European Chamber Presents Shenyang Position Paper 2017/2018 to Shenyang Municipal Government

On 10th January, Mats Harborn, president of the European Chamber, led a delegation comprised of the European Chamber Shenyang Chapter's board and local members to the Shenyang Municipal Government where they presented the *Shenyang Position Paper 2017/2018*.

President Harborn and the delegation informed the local government of the main concerns expressed by foreign businesses operating in Shenyang and outlined several areas for future cooperation. Wanting to improve the local business environment, Zhang Jinghui, a vice mayor of the Shenyang Municipal Government, indicated they would take into consideration the key recommendations proposed in the Chamber's local position paper. Vice Mayor Zhang then proposed a dialogue mechanism where the local government would regularly inform the European Chamber of relevant policy changes.





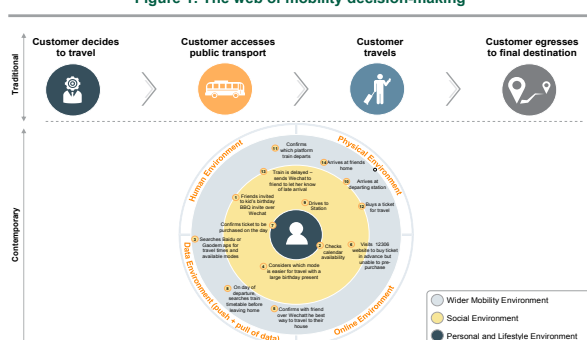
MOBILITY AS A SERVICE

A Chinese perspective on the next transportation disruption

Sparked by the rise of ride-sharing services, electric cars and eventually autonomous vehicles, the transportation ecosystem is increasingly looking like a complex web that will merge transportation services and infrastructure with mobile technology and big data (Figure 1). This complex web, called MaaS has brought together transportation businesses, and the services they provide, by using applications (apps) that do a variety of things. Using MaaS could mean ordering a taxi or rideshare to the airport, arranging air travel, purchasing a train ticket, and even booking a hotel through a series of mobile apps.

Less often thought about, but just as important, is the opportunity for governments to work with private transportation providers to create or foster MaaS platforms. These platforms can be used to increase the use, productivity and efficiency of public and private forms of transportation by coordinating and integrating multiple modes of travel.

Figure 1: The web of mobility decision-making



As traffic congestion worsens, the current use of private cars for door-to-door journeys is looking to be an unsustainable solution, especially when one takes into account cost, travel time and other related factors. However, MaaS could help reverse this trend. This new transportation platform will eventually be able to predict demand, suggesting the right service at the right time to consumers while giving providers the opportunity to plan ahead and meet customer demand.

The benefits for customers and transport providers

This new transportation concept puts the customer experience first by increasing convenience, effectiveness and customer satisfaction. It also enables people to share and personalise their travel experiences through real-time connectivity. Information on provided services for bicycle hires, ridesharing, car-sharing, road tolling and public transportation can be brought together under one user account and paid for with a single tap to a mobile device's screen.

This requires a real-time exchange of information between the consumer and transportation service provider. If successful, it allows for a customer's needs, preferences and willingness to pay to be more appropriately matched to a relevant service provider.

There are a wide range of additional advantages to MaaS, including:

- improved quality and convenience of travelling (i.e. on-demand, personalised and seamless journeys);
- the ability to help travellers select the most efficient means of transportation when taking into consideration the trip's cost;
- improved transportation networks;
- improved monitoring, management and planning of mobility services;
- less traffic congestion and environmental problems stemming from transportation;
- reduced mobility cost due to having a wider range and increasingly accessible number of suppliers;
- revenue growth for transportation service providers; and
- increased regional responsiveness to the emergence of new transportation services.

Key attributes of MaaS

The MaaS delivery model has eight key attributes (Figure 4). Half are related to the customer experience and the other half to enabling technologies and processes. These attributes have a variety of different functions; take for example pricing under MaaS. Pricing could start with a stand-alone pricing structure and evolve into something that is more integrated with customer lifestyle choices and is subscription based (Figure 5).

In an environment where MaaS is possible, traditional ways of thinking about transportation infrastructure (e.g. car, bus or train), is no longer be considered best practice. Planning needs to evolve and embrace the possibility of delivering an integrated solution that addresses what the modern consumer needs and expects from transportation.

Figure 4: MaaS key attributes

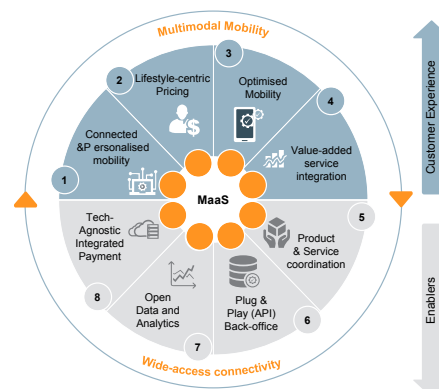
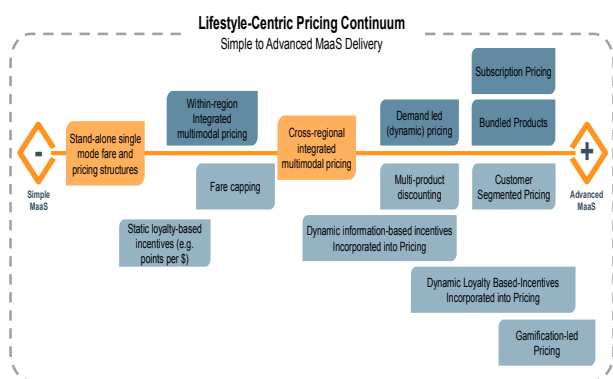


Figure 5: The evolution of pricing



When is MaaS coming to China?

The commercial development of MaaS encompasses both single-mode and multimodal journeys; value-added services; innovative products and pricing models; and real-time, on-demand service planning. The problems with current MaaS offerings in China is the lack of an integrated payment system and the absence of door-to-door planning for multimodal journeys. Government participation in the MaaS ecosystem will be key to overcoming these limitations.

To date, Chinese regional public transportation authorities have not overtly participated in commercial MaaS offerings, although public transportation service data has been recently used in commercial mobility journey-planning platforms, such as Baidu maps.

While some suspect that MaaS is a fad, big businesses have invested heavily in mobility and have procured the apps necessary for making it happen. Companies have already presented business models that contain groundbreaking product offerings that have gone on to influence consumer decision-making and expectations.

On the one hand, personalised on-demand travel services such as ride- and car-sharing could cut into public transportation's market share and reduce its ability to recoup operating costs from collecting ride fares. On the other hand, this disruption to the market could present an opportunity to find new markets for various modes of transportation, improve cost-efficiency, reduce people's reliance on private vehicle ownership, decrease road congestion and increase public transportation use.

So far, transportation authorities have approached the evolution of transportation in a piecemeal way by creating apps that facilitate the use of public transportation (e.g. journey-planning apps) or developing innovative but standalone payment systems. Creating an open and standardised platform to bring transportation suppliers together in one marketplace allows customers to access mobility in a way that is more streamlined and unified.

International MaaS success stories such as Helsinki

and Turku in Finland (Figure 6) demonstrate that a frictionless experience, strong branding and customer trust are crucial aspects of MaaS delivery.

Figure 6: MaaS progress in key cities

Scheme and Location	Description	Degree of MaaS Customer Experience Integration				
		Ticketing	Payment	Pricing	Value-added mobility services	Non public transport modes included
Smile: Vienna, Austria	Door to door integrated transport planner, book ticket and pay	Integrated	Integrated	Integrated	Not offered	Not offered
Hannovermobi 120: Hannover, Germany	€10 subscription to a digital, one-stop mobility shop, with integrated mobile phone billings and discounted pricing	Integrated	Integrated	Integrated	Not offered	Not offered
UbiGo: Gothenburg, Sweden	Monthly subscription starting at €150 per month, delivered via an app, enabling access to a range of transport modes, single monthly invoice	Integrated	Integrated	Integrated	Not offered	Not offered
Whire: Helsinki, Finland	Subscription to public transport service model tailored to customer segments	Integrated	Integrated	Integrated	Not offered	Not offered
Fäh: Turku, Finland	An app which allows customers to real time plan, ticket and pay; customers can be invoiced, paying by debit/credit card or through mobile phone operator billing	Integrated	Integrated	Integrated	Not offered	Not offered
Emma Connect: Montpellier, France	Single-key access to 30- or 365-day subscriptions to integrated transport packages	Integrated	Integrated	Integrated	Not offered	Not offered


Source: L.E.K. analysis; Department for Transport, 2015; Feasibility Study for "Mobility as a Service" concept in London

Dialogue and teamwork

Providing end-to-end mobility for customers requires the involvement of infrastructure providers, all levels of government, and businesses. It also requires a system-wide perspective that improves transportation ecosystems and benefits customers both socially and economically. To promote public and private opportunities, governments should consider what industry incentives can be offered to support the ongoing development of MaaS.

Having MaaS represents a significant opportunity for all participants in the mobility ecosystem. Mobility suppliers will benefit from MaaS by using it to identify new market opportunities, hone their service offerings and optimise their spending.

Governments will also benefit. The data platforms underpinning MaaS can be leveraged for city planning, to keep people moving efficiently and avoid building expensive and unnecessary infrastructure by improving the utilisation of existing assets.

To maximise the benefits that MaaS could deliver within the next decade, both businesses and governments would do well to begin thinking about, and acting towards, creating a single platform that offers consumers one-touch access to journeys that can span all the way from their front door to the skies and shores of distant lands. 

L.E.K. Consulting is a world leading management consulting firm founded in Europe in 1983 and started doing business in China in 1998. L.E.K. Consulting now has 20 offices in Europe, the United States, Asia and Australia, with over 1,200 employees and over 100 partners.



HOW TO PROVIDE ONLINE SERVICES IN CHINA

The necessary regulatory steps and framework to make it possible

Understanding the online environment can be tricky in China as telecommunications has rapidly changed in the past few years. By examining information technology from the legal perspective, foreign businesses can gain a more realistic understanding of China's value-added telecommunications services (VATS). **Helen Ju**, legal advisor at the **EU SME Centre**, explains the opening of China's VATS to foreign investment under the country's World Trade Organization (WTO) commitments and what they mean for European Union (EU) small and medium-sized enterprises (SMEs) in China.

Online service provisions are very popular in China.¹ The EU SME Centre, often receives questions such as:

1. Can we provide online games to Chinese customers by setting up a Chinese website?
2. We want to set up a website in China to provide online sports trainings. There will be coaches who can remotely review and instruct Chinese customers. What requirements does our company have to comply with?
3. Can we publish a book online on 'X' topic in China?

With the development of information technology (IT), many of those questions can be answered in the affirmative. However, are all of those things possible from a legal perspective? The WTO has outlined four modes of delivering service: cross-border supply, consumption abroad, commercial presence and presence of a natural person. When looking at it from a legal perspective, it is important to understand why setting up a website in China is considered to be establishing a commercial presence and how China's VATS fall under China's WTO commitments.

VATS classifications

According to the recently revised *Classification Catalogue of Telecommunications Services*, VATS are currently divided into 10 categories² each of which is further divided into several sub-categories. For example, category B25 on information services includes: sub-categories on information publishing and delivery services, information search services, information community platform services, instant information exchange services, and information security and processing services.

Many foreign investors have the impression that VATS businesses are highly regulated in China and mistakenly think that the proposed service does not touch on sensitive areas for the Chinese Government. However, in many circumstances this is not the case.

China's WTO commitments related to VATS

Legally speaking, when acceding to the WTO, China only committed to opening a select number of VATS to foreign investors, which includes categories B21, B23, B26 and part of B25. Foreign investment is further limited as foreign businesses may hold no more than 50 per cent of the equity in VATS.

VATS and its WTO commitment breakthroughs

With recent economic development and the need to bring in more outside investment, China has gone on to further open up VATS to foreign investors by issuing several recent regulations.

1. The Ministry of Industry and Information Technology of the People's Republic of China (MIIT) announced that the limitation on foreign equity in a foreign-invested enterprise (FIE) that does online data processing (limited to for-profit e-commerce websites) would be removed. This means that foreign investors are now allowed to set up wholly foreign-owned enterprises (WFOE) that operate third party e-commerce platforms.
2. In 21 pilot project cities,³ foreign investors may now establish offshore call centres with no limitation on the amount of owned equity.
3. More VATS are also open to foreign investment in the Shanghai Free Trade Zone (Shanghai FTZ):
 - App stores that operate under B25 information services, B24 call centres, B22 domestic multi-party communications services, B14 internet access services (ones that are limited to providing internet access services to users), and B13 domestic internet protocol virtual private network services are open to foreign investment in the Shanghai FTZ, with no limitations on foreign equity percentage;
 - Limitations on foreign equity for FIEs engaged in B23 storage and forwarding have been removed.
4. Breakthroughs based on the Closer Economic Partnership Arrangement (CEPA) allow qualified Hong Kong and Macau service providers to invest in more China-based VATS.
 - Some EU SMEs may wonder if they can invest in VATS by purchasing the equity of a qualified Hong Kong or Macau service provider. While there is no explicit legal provision on this, in practice, MIIT and its local branches may ask the Hong Kong and Macao investor to submit the equity structure on which the decision for the licence approval will be based. Since there is no legal foundation for why MIIT does this, it is possible that MIIT may halt this practice. Prior consultation with MIIT and its local branches is suggested for specific cases.

Potential approaches by EU SME investors

When an EU SME would like to establish an FIE and create a website in order to provide an online service in China, it may do the following:

1. An important first step is to check what it wants to do against the revised *Classification Catalogue*

¹ For the purpose of this article "China" refers to mainland China as Hong Kong and Macao have different legal systems.

² B11, B12, B13, B14, B21, B22, B23, B24, B25 and B26.

³ The 21 pilot cities include Beijing, Tianjin, Shanghai, Chongqing, Dalian, Shenzhen, Guangzhou, Wuhan, Harbin, Chengdu, Nanjing, Xi'an, Jinan, Hangzhou, Hefei, Nanchang, Changsha, Daqing, Suzhou, Wuxi, Xiamen.



of *Telecommunications Services* to see if the proposed online service falls within the scope of VATS.

2. If a proposed service is categorised as a VATS, further analysis should be undertaken to see what specific VATS it is and what VATS licence should be obtained.
 3. After the SME clarifies that the proposed service is considered a VATS, it should check the *Catalogue Guiding Foreign Investment in Industry* to see if that service area is open to foreign investment, in accordance with China's commitments to the WTO.
 4. If it is not open to foreign investment, check the industry specific exceptions such as offshore call centre services and for-profit e-commerce websites.
 5. Last but not least, for some online services provided in China, besides VATS licensing requirements, there are additional requirements to be met or prohibitions/limitations on foreign investment.
- Foreign investors are prohibited from investing in internet culture services, with the exception of music. Not only MIIT but also the Ministry of Education of the People's Republic of China have expressly required Hong Kong and Macau investors to submit their equity structures to ensure there is no foreign investment occurring. So far, there is no channel for EU SME investors to invest in FIEs that engage in online gaming operations in China, either directly or indirectly.

In addition to the already discussed issues with VATS in China, there are other issues regarding foreign investment in China. Additional information on e-commerce in China needs to be provided, along with clarification on the sale of goods and services.

Problems related to operational performance by foreign investors and the requirements for registered capital in FIEs also needs to be taken into account. **Eb**

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What do revised measures mean for the future of Chinese Internet?

The Chinese Government recently passed new measures on domain-name registration in an attempt at fixing regulatory problems plaguing the system. While it has fixed some internet issues others still remain. In this article, **Ailin Zhou**, intellectual property assistant at **Taylor Wessing**, shines a light on the history of the Chinese domain-name industry and the impact recent developments have made on the Internet in China.

The Order of the Ministry of Information Industry of the People's Republic of China, also known as the revised *Measures for the Administration of Internet Domain Names of China (Revised Measures)*, was released by the Ministry of Industry and Information Technology of the People's Republic of China (MIIT) on 24th August 2017 and went into effect on 1st November 2017.¹ The *Revised Measures*, according to the MIIT, are meant to standardise the administration and registration of Chinese internet domain names. This echoes the goal outlined in China's 13th Five-Year Plan, which is for the Chinese Internet to develop in a healthy and sustainable manner.

A brief history of the Chinese domain-name industry

Prior to 1998

In 1997, the first version of the *Revised Measures* was issued and the China Internet Network Information Centre (CNNIC) was established. At that time, the domain-name industry in China consisted of the administration, the domain name registry and the domain name registrar.²

1999–2008

Statistically speaking, there was a huge increase in the total number of domain name registrations during this period. Using the suffix '.cn' in domain names increased from 18,396 in 1998 to 122,099 by 2000. In 2002, the *CNNIC Domain Name Dispute Resolution Policy* and the *CNNIC Rules for Implementation of Domain Name Registration* were issued. This was a remarkable achievement, as the aforementioned policy and rules simplified the process for registering a domain name. At the end of 2008, the total number of domain names with the suffix '.cn' exceeded 13,500,000.³

2009–2011

There was an adjustment phase from 2009 to 2011, after the Chinese Government adopted a real-name registration system.⁴

2012–present day

Thanks to the use of new, generic top-level domains (gTLDs), the industry continues to expand the number of new domain names in use. According to the 39th

Statistical Report on Internet Development in China, by December 2016, the total number of domain names used in China had increased to 42.28 million, up 36.3 per cent annually. Additionally, that same year the number of .cn domain names reached 20.61 million, an increase of 25.9 per cent. This increase accounted for 48.7 per cent of all domain names in China, while '.com' domain names totalled 14.35 million and made up only 33.9 per cent.

Although the statistics on domain name registrations have not yet been released by the CNNIC, it is anticipated that the number of names being registered will continue to rapidly increase. Due to the rapidity of its growth, the industry needs to be appropriately regulated.

Five key improvements

According to MIIT, there are five major improvements that resulted from enacting the *Revised Measures*.⁵ The recently realised domain name benefits include:

1. Clarified duties for MIIT and provincial level communications administrations.

Domain name registries and domain name registrars are supervised by MIIT. A provincial-level communications administration is entitled to administer domain names and authorise local domain name registrars. There are no regulations which govern the entire region. In other words, local communications administrations and MIIT are now consistent with how they enforce domain name registration.

2. Newly standardised domain name registrars.

Similar to the 2004 version of the *Measures for the Administration of Internet Domain Names of China (Old Measures)*, domain name registrars must be licensed by MIIT. In the *Revised Measures* there were a number of noteworthy changes, such as:

- Removal of the requirement that root server operators and domain name registries/registrars must be legal entities established in China.
- Removal of the requirement that registrars must have capital of no less than renminbi-yuan (CNY) 1 million.
- Additionally, one applying to be an MIIT-approved registrar must have a good credit record and the ability to safeguard the registrant's personal information. According to the *Revised Measures*, there is no need to immediately transfer the domain to a Chinese registrar selected by MIIT if one's current internet content provider (ICP) licence or ICP filing is valid.

1 The *Measures for the Administration of Internet Domain Names of China*, Ministry of Industry and Information Technology of the People's Republic of China, 2017, viewed 1st December 2017, < <http://www.miit.gov.cn/n1146285/n1146352/n3054355/n3057254/n3057264/c577855/content.html> >, (in Chinese).

2 Xu, Y.W., & Su, Y., 2017, *History of Chinese Domain Name Industry*. Journal of The Internet Economy, vol. 22, pp.90-97.

3 Xu, Y.W., & Su, Y., 2017, *History of Chinese Domain Name Industry*. Journal of The Internet Economy, vol. 22, pp.90-97.

4 Ibid.

5 *Opinions of MIIT on The Measures for the Administration of Internet Domain Names of China*, 2017, viewed 1st December 2017, < <http://www.miit.gov.cn/newweb/n1146295/n1652855/n1653018/c5778697/content.html> >, (in Chinese).

3. Advanced institutionalisation of domain name registration services.

More detailed regulations were outlined in Chapter 3 of the *Revised Measures*. This was so the domain name registrars could ensure that domain names were acquired properly. Compared to the *Old Measures*, the *Revised Measures* emphasised the following four points.

1. The domain name reserved list shall be revised.
2. Domain names acquired by fraud, duress or any other improper means shall be void.
3. It is illegal that one maliciously directs its domain name to another person's internet protocol (IP) address.
4. Providers of internet information services must not use domain names for unlawful activities. Domain name registrars are required to take action against unlawfully used domain names, by either cancelling or disabling them.

4. Enhanced protection for the registrant's information.

Since some registrants that try and acquire a domain name by improper means or for improper purposes tend to use incorrect personal information when registering, the *Revised Measures* emphasise that the registrant should submit accurate and complete information. Additionally, the *Revised Measures* require strict scrutiny when it comes to evaluating applications for registering domain names. The *Revised Measures* also attach more importance to data protection than the old registration policy did.

5. Enhanced supervision of the domain name registrars.

Registrars will now be supervised on a regular basis. However, the *Revised Measures* do not explain what is meant by "regular basis". Despite the vagueness on this issue, it is reasonable to expect that there will be a certain period of time set aside for the local communications administration to supervise the domain name registrars.

The 'who' and 'how' behind the Revised Measures

In 2016, the draft *Revised Measures* was published.⁶ In the draft version of the document, Article 37 stood out. It stated that any domain name whose website was hosted in China must be registered with a Chinese domain name registrar; otherwise internet access was to be cut off by Chinese internet access service providers. Although the disputed Article 37 was deleted in the finalised *Revised Measures*, the public still has concerns

regarding the following questions:

- Can domains still be resolved in the Chinese mainland if existing domains are hosted outside China?
- Can domains be resolved in the Chinese mainland after the *Revised Measures* are implemented if the newly registered domains are hosted outside China?
- Is it necessary for existing domains to transfer to a Chinese registrar with the relevant permit?
- What are the things new registrants need to pay attention to if their domains are to be hosted on the Chinese mainland?

	Both the Chinese and the Non-Chinese	
Existing Domains -Hosted outside of China	NO IMPACT	
	Domains can stay with a non-Chinese registrar domain and resolved in the Chinese mainland	
Existing Domains -Hosted in mainland China	With current valid ICP Licence or ICP Filing	Upon renewal of ICP
	No need to transfer the domain to a Chinese registrar immediately	May be required to transfer the domain to an MIIT-approved Chinese registrar
New Registrations (after implementation) -Hosted outside of China	NO IMPACT	
	Domains can be registered with any registrar domain and could still be resolved in the Chinese mainland	
New Registrations (after implementation) -To be hosted in mainland China	IMPACTED	
	New registration must follow ICP licensing regulations and must be registered and managed by an MIIT-approved Chinese registrar	

Conclusion and Outlook

For now, it seems that websites hosted on foreign servers will not be affected by the *Revised Measures*. However, it is anticipated that relevant Chinese Government authorities could modify a number of other regulations when implementing the *Revised Measures*. [Eb](#)

Taylor Wessing is a leading full-service law firm with over 1,200 lawyers in 33 offices around the world. Their China Group members are based in Shanghai, Beijing, Hong Kong, Munich, Frankfurt, Düsseldorf, Hamburg, Vienna, Paris, London and Singapore. Besides all areas of business law relevant to business transactions in China, they are also well known for their advice to Chinese companies investing overseas. For more information, please visit their website.

⁶ The Measures for the Administration of Internet Domain Names of China (Draft), Ministry of Industry and Information Technology of the People's Republic of China, 2016, viewed 1st December 2017, < <http://www.ic123.net/laws/2016-03-28/284770.html> >, [in Chinese]



CHAMBER ANNUAL CONFERENCE: CHINA'S RISE AND THE NEW CONTRADICTION

Held on 14th December, the Chamber's annual conference, *China's Rise: The New Contradiction*, was an exciting event. Speakers that included ambassadors, business leaders, economists and academics guided attendees through the complex recent political developments and presented some possible outcomes. Over the course of the day one thing became apparent – the recent announcement of the 'new contradiction' by President Xi Jinping at the 19th Party Congress, ensures that the economic environment will continue to rapidly evolve for the foreseeable future.

As the conference panels were conducted under the Chatham House rule, the following summarises some of the key discussion points and does not represent the complete views of any of the panellists who participated.

Keynote speeches

In his opening speech, Mats Harborn, president of the European Chamber, discussed the contradiction inherent in China's "rules-based regime" - how there is a lack of economic reciprocity and fairness. He stressed that reform would be beneficial to China and that failing to open up would be a blow to the country's economic development. So far, investment in China has been lacklustre with the European Union (EU) having only invested United States dollar (USD) 8 billion in 2017. President Harborn pointed out, that if one were to look at the investment ratio in reverse, how much China invests in Europe, one would expect Europe to be investing close to USD 120 billion.

Expanding on the EU-China trade relationship, President Harborn reminded the audience of Europe's "promise fatigue" and asked for clarification on the Communist Party of China's (CPC) role in the economy. This lack of clarity has resulted in domestic state-owned enterprises (SOEs) jokingly being referred to as opaquely-owned enterprises (OOEs), due to their lack of operational transparency. Despite these setbacks, the European Chamber has had a number of successes in 2017, with its publication on CM2025 and its impact on the future rollout of a comprehensive negative access list.

Also delivering a speech, HE Hans-Dietmar Schweisgut, EU ambassador to the People's Republic of China and Mongolia, emphasised the recent economic developments taking place in Europe. According to Ambassador Schweisgut, there is a general feeling that Europe's interconnected economy is getting stronger. The EU has seen 2.4 per cent economic growth in 2017, exceeding that of the United States (US) for a second year in a row. There have been 8 million new jobs and the quality of economic growth in Europe has continued to improve. Contributing to this improvement in quality has been the Juncker Fund, which has led to euros (EUR) 250 billion of investment.

While the EU has seen phenomenal growth from openness, the role of the market as it was outlined in the recent 19th Party Congress was decidedly different. The Chinese Government is tightening party control over joint-ventures (JVs) and is strengthening SOEs. Ambassador Schweisgut noted that in the *European Business in China Business Confidence Survey 2017* 56 per cent of businesses said they would invest more if the government were more transparent and foreign-invested enterprises (FIEs) received more market access. He went on to say, that despite recent concerning government policies being implemented there are still many possible areas of cooperation with China, including on *State Council*

Document No. 39 and a comprehensive agreement on investment.

The keynote speech was given by Zhang Xiaoliang, former vice chairman of the National Development and Reform Commission of the People's Republic of China (NDRC) and executive vice chairman of the China Centre for International Economic Exchanges (CCIEE). Executive Vice Chairman Zhang detailed the economic setbacks in trade the world suffered last year. However, he highlighted how China's foreign trade might increase to the point that the country becomes the world's number one trader. China's consumption levels have stabilised and sales are up in certain sectors of the economy, like the automotive and telecoms industry. Executive Vice Chairman Zhang emphasised that China is entering a new era and if it stays on its current trajectory it will achieve modernity by 2035. He acknowledged Europe's requests for economic reciprocity but stated that China could not at this time offer reciprocal market access as "China is currently the student and Europe the master". The executive vice chairman called for Europe and China to "overcome their misunderstandings" and work together in the global economy.

Panel 1: Perceptions from the 19th Party Congress

Xi Jinping Thought was enshrined in the CPC constitution during the 19th Party Congress. Over the course of the meeting it became apparent that President Xi was now the unchallenged leader of a national party that is stronger than ever before. No heir apparent emerged during the national meeting and even though he does not appear to be as strong as Deng Xiaoping was in the late 80's/early 90's, the panelists were in agreement that President Xi will at least remain in power for another 5 to 10 years. This is important, as the CPC currently governs everything and is moving away from the more technocratic future outlined under former President Hu Jintao.

The management of China's economy has broken with tradition since President Xi has taken power, as the Party is increasingly being told to play a larger role in the day-to-day operations of the economy. This has resulted in a series of mixed outcomes. For example, one of China's leading tech firms was told by the government to invest in China Telecom, resulting in recent growth in the telecommunications industry. However, the central government also forced parts of the country to prematurely transition to natural gas, resulting in people suffering from the cold due to coal production being prematurely shut off. Greater party involvement in domestic industries has also meant Chinese overseas direct investment (ODI) being seen as suspect. Western

countries have increasingly called for greater investment screening and have resisted Chinese businesses' attempts to make purchases in sensitive areas of their economies.

Recent developments in China's economy may seem confusing or overwhelming. Foreign governments and companies must grapple with this recent change in China's domestic environment and consider the 'political risk' of doing business on the mainland. In China, FIEs must tread carefully, a lesson foreign governments have already taken to heart when considering massive international projects like the Belt and Road Initiative. Tighter security for cross-border transfers has made international companies wary and if this trend continues, domestic Chinese businesses might also become fearful that reciprocal action may be undertaken, preventing them from going international.

Panel 2: China Inc's outbound ambition

China's ODI rapidly increased in the late 1990s and continued through the early-to-mid 2000s. Every country aims to have foreign influence and China is no different. Most SOE outbound investments in China's early days were in natural resources. However, China has evolved and is now acquiring foreign companies in order to gain access to Western industries and improve its domestic operability. These recent acquisitions have raised concerns in Europe due to their lack of transparency and level of state involvement.

Despite foreign government concerns regarding the level of Chinese ODI, in 2017, investments declined by approximately 40 per cent. The Chinese Government reacted to foreign suspicion and domestic concerns, regarding high-risk financing and large capital outflows, by limiting the average deal size and restricting the number of overseas investments. After the 19th Party Congress, central government pressure on capital outflows does not look to be relaxed anytime soon.

Responding to China's ODI, Western governments and businesses have increasingly called for increased reciprocity. China has consistently claimed that full reciprocity might not be possible since national governments and economic controls are fundamentally different.


While that may be the case, it has still not stopped foreign businesses from asking the Chinese Government for more to be done. The country's *Negative List for Foreign Investment* does not seem comprehensive enough to many FIEs, and with the recent strengthening of party committee power in

private enterprises and the recently implemented *Cybersecurity Law*, foreign companies are becoming increasingly wary of doing business in China. Overall, there is a perception of China opening its market but doing so at a glacial pace.

Panel 3: Discussion on China's economic outlook in Xi's new era

There has been a lack of clarification coming out of the 19th Party Congress on what economic development should look like and what the growth benchmarks should be. Despite risk management being a prominent economic issue, there was no mention of it. This is important, as the vagueness concerning China's growth levels could potentially be seen as the Chinese Government moving away from gross domestic product (GDP) targeting.

The central government may be moving towards valuing growth quality instead of quantity. A growth adjustment might take place relatively soon and having a hard target in place that the country must meet might be "poisonous" politically. If China wishes to grow sustainably, it must continue to focus on increasing household income. It is a leap to say that China has become less credit dependent, as the government still derives most of its debt from credit, hurting the economy in the long run. Instead, the government should reduce its debt by shifting it to household income. This shift moves China's debt into a place that can be more easily monitored.

China is not really a market economy and if there is a major problem the government can restructure and limit the impact of any potential economic bust. Even though China has that capability, it is still dangerous for the economy to remain this unbalanced, with its household consumption percentage of GDP being extremely low. The country must rebalance the economy in order to reduce the amount of debt it has. It can go about rebalancing in one of two ways. It can transition into a more mature and slower-growth economy like Japan or suffer a financial crisis. While a financial collapse might result in a better economic outcome in the long term, the country is much more likely to do a longer adjustment with slower overall growth. This restructuring must happen, as a country cannot grow its way out of debt. Instead, China must deleverage. 



THE FIRST LINE OF DEFENCE

Using customs to protect your IPR in China

While many European businesses suspect they know the ins and outs of customs, there are important differences with how authorities treat exports and imports in China. Understanding the nuances of intellectual property (IP) recordal can be vital to a foreign business's success. The **China IPR SME Helpdesk** outlines the importance of filing your IP with China's customs authorities.

Businesses in Europe have benefited from customs authorities preventing counterfeit products from entering their countries. The seizure of products that infringe on intellectual property rights (IPR) regularly makes the news in Europe. Not many businesses realise that unlike most countries, Chinese customs authorities not only have the power to examine and seize criminal imports, but exports as well. Chinese customs has the authority to protect IPR by confiscating goods that infringe on a company's IPR and impose fines on infringers. However, if customs authorities discover a criminal offence has taken place they will hand the case over to the public security authorities for criminal proceedings.

Customs' IP regulations state that IPR can be filed with Beijing's General Administration of Customs (GAC). Although it is not compulsory to file with the GAC in order to apply for local customs enforcement proceedings, it is beneficial for a company that moves goods in and out of China. If the company's IPR is registered with the customs authorities, then they have the power to detain at will anyone suspected of infringing their goods. Additionally, local customs offices are more proactive when IP rights are recorded with the GAC, mainly because filing provides customs officials with easy access to internal IP databases and makes it easier for them to determine whether goods passing through customs are genuine or counterfeit. If an IP holder has registered their IP with customs, then customs can easily start the investigation process and decide what action needs to be taken. This can include imposing fines, destroying goods or handing the case to the public authorities.

Given that the recordal of IP rights with the GAC is free and straightforward, recording with the GAC is recommended by China IPR SME Helpdesk experts.

Recordal of IPR with the GAC

The types of IPR that can be recorded with the GAC are trademarks, patents and copyrights. Separate applications must be filed for separate IPR. In the case of trademarks, holders must submit a separate application for customs recordal on each trademark in each legally outlined IP class. At present, there are no fees associated with IP registration. To file IP with the appropriate customs authorities, you must submit:

- a copy of your business registration certificate (including a Chinese translation);
- a copy of the trademark certificate (having been registered in China);
- any information pertaining to related licences (customs do not want to withhold goods if they

are legitimate); and

- if one is used, something showing power of attorney with the name of the agent responsible for the registration process.

Information on infringers, that may have been collected independently, can also be recorded. This can include people's names, company names and contact details. If your business has knowledge of a particular delivery and can inform the customs authorities of its arrival then they can examine the delivery in question.

Decision

Within 30 days of receiving all the relevant documents, the GAC will make a decision on whether to record the requested IPR. If the GAC approves the submission, the recordal of IPR will be valid for the duration of the IPR, or for a maximum period of 10 years. Renewal of customs recordal can be filed six months prior to expiration.

Customs enforcement proceedings

There are generally two ways customs enforcement proceedings begin. If you suspect that infringing goods are about to pass through customs, you may file an application with the local customs office where the infringing goods are entering or exiting the country. You must provide the local customs office with a deposit to cover any potential losses suffered by the consignee or consignor, and/or costs incurred by customs for warehousing or destroying any infringing goods. This payment is usually made in the form of bank transfer or cash payment. According to the *Announcement on Accepting the General Guarantee for the Customs Protection of Intellectual Property*, blanket securities in the form of bank guarantees are now acceptable upon prior approval from the GAC. This option is available to those who have not already registered with customs, despite the process being quicker, easier and successful if registered.

If customs suspect that certain goods infringe someone's IPR, they will request that the consignee or consignor make a declaration regarding the status of such goods and the IPR in question. If not declared, customs will stop the disputed goods from being released and will immediately notify the IP owner. You must act within three days of being notified in order to file an application to detain the goods, commence customs enforcement proceedings and provide the necessary deposit to the local customs office. Given the short amount of time allowed to accomplish these tasks, if a guarantee is made by bank transfer from an overseas account the local customs authorities will usually accept an advanced copy of the bank transfer slip as preliminary evidence of submission within the allotted amount of time. This ex officio action by customs is only possible if you have registered with customs.

You will also have to confirm whether or not the goods in question are counterfeit. Customs authorities will make a final decision as to whether the goods infringe IPR within a six-month period. They then will decide whether to detain or destroy the goods, or fine



the consignee/consignor. If the customs authorities suspect a crime, they will hand the case over to the public security authorities after it is discovered.

Customs authorities will inform you of its decision and return any payment made after deducting expenses (such as warehousing, destruction of the goods in question, or for losses incurred by the consignee or consignor).

Points to bear in mind

The purpose of recording your IPR at China's customs is to prevent counterfeit versions of your goods from entering the international market. Recordal gives customs authorities the ability to intercede autonomously if they believe this might be happening.

Recordal of IPR has, in the past, produced encouraging results. However, in order for customs authorities to make quick decisions when checking goods passing across the border, you should maintain close contact with the authorities. It is particularly important that you provide customs with a comprehensive description of your products, including pictures and samples, so they can easily recognise if goods have been counterfeited. Customs authorities are generally willing to attend 'training' meetings with you or your representatives in order to limit the number of infringing products that enter China.

In the *Implementing Rules of Regulations on Customs Protection of Intellectual Property Rights* (effective 1st July 2009), you must provide customs with as much information as possible. For example, if there is any

change to the information made in the recordal application, customs must be notified within 30 days. Failing to meet your recordal obligations can lead to the recordal being cancelled, so take time to be familiar with the customs process. [Eb](#)

*The **China IPR SME Helpdesk** supports small and medium-sized enterprises (SMEs) from European Union (EU) member states to protect and enforce their IPR in or relating to China, Hong Kong, Macao and Taiwan, through the provision of free information and services. The helpdesk provides jargon-free, first-line, confidential advice on intellectual property and related issues, along with training events, materials and online resources. Individual SMEs and SME intermediaries can submit their IPR queries via email (question@china-iprhelpdesk.eu) and gain access to a panel of experts, in order to receive **free and confidential first-line advice** within **three working days**.*

The China IPR SME Helpdesk is co-funded by the European Union.

To learn more about the China IPR SME Helpdesk and any aspect of intellectual property rights in China, please visit our online portal at <http://www.ipr-hub.eu/>.



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THE STING OF A THOUSAND CUTS

A new era of environmental enforcement in China

China's rapid development has caused a number of environmental issues the central government is attempting to address. Since the 19th Party Congress, the country has begun to publicly recognise the threat a lack of environmental enforcement has on humanity's future. In this article, **Peter Corne**, vice chair of the European Chamber's Energy Working Group and office head at **Dorsey & Whitney LLP** Shanghai, and **Johnny Browaeys**, director of corporate services at **GREENMENT ENVIRONMENT**, outline the steps China is taking to save its environment.

The thousand cuts

On 19th October 2017, President Xi Jinping, in a three and a half hour speech to the National Party Congress, emphasised that constructing an ecological civilisation is necessary for the continued development of China. President Xi chose his words carefully, saying:

“The damage that humanity does to nature will ultimately harm humanity itself – this is an unavoidable rule.”

This pronouncement—together with the latest in a series of central environmental inspections covering 30 provincial regions—has ushered in an era, in which the environment is at the forefront of enforcement actions. In a centrally-led, far-reaching enforcement campaign, over 5,700 officials have been arrested and over 30,000 companies have been sanctioned. The campaign was a large-scale, coordinated effort between central inspection teams and local government authorities. The central government has stated its commitment to conducting inspections on a biennial basis and to target air pollution in the Jingjinji Metropolitan Region.

The campaign would not have the impact it does, on local government officials and corporations, if not for the new tools given to inspectors from recent amendments to existing environmental laws, rules and regulations.

Deliberate steps....

Few people at the time fully appreciated Premier Li Keqiang's declaration of war against pollution following the 'airpocalypse' experience in Beijing several years ago. However, it set in motion a series of measures that reversed the sense of helplessness and apathy associated with environmental protection in China. The central government's increased environmental targeting these past few years has resulted in several highly-specific environmental policy action statements—the *Air Ten*, the *Water Ten*, and most recently the *Soil Ten*—along with the issuance of long-awaited laws and regulations.

However, the amended *Environmental Protection Law of the People's Republic of China* (*Environmental Law*), which came into effect in 2015, promised to change the status quo that favoured “growth at any cost”. It did so by providing enforcement authorities with an enhanced set of tools they could use not only against environmental infringers, but corporate senior managers and regulators as well. The most potent of these measures changed the process of fining infringers from a ‘per event’ basis to a daily basis, drastically altering the ‘pollute vs comply’ cost equation. Responsible senior managers could be thrown into administrative detention up to 15 days at a time from repeated infringements made by their company. Government officials' career advancement was made contingent on environmental performance. To round out these changes, freed from the need to demonstrate some sort of loss or damage, a number of non-governmental organisations (NGOs) became qualified to bring environmental lawsuits.

These NGOs pushed for compliance with other meth-

ods. On 13th October, the Corporate Information Transparency Index (CITI) was released at the 2017 China Green Supply Chain Forum by the Institute of Public and Environmental Affairs (IPE) – China's most reputable environmental NGO. The IPE gave CITI performance/scores to approximately 260 brand-name companies. These new regulations meant more challenges for supply chain management. Some companies shared the countermeasures they devised with others, however these businesses admitted that they lacked both experience and resources to make their supply chains compliant.

Prior to the amended *Environmental Law*, environmental authorities focused on up-front approvals, with environmental impact assessments and construction approvals taking most of their attention. Now the emphasis is on corporate operational compliance and operations-based emissions under government oversight.

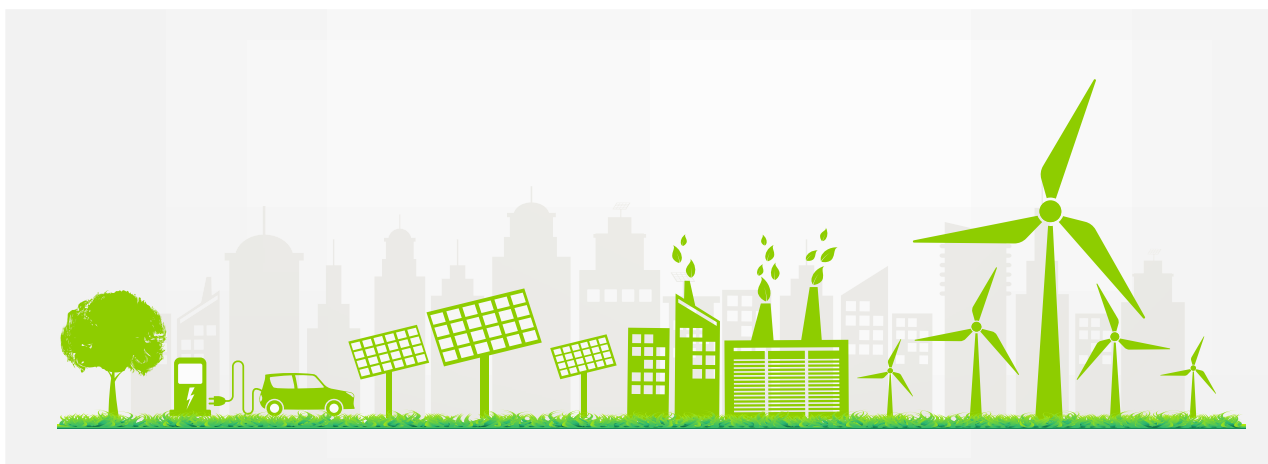
The law now provides enforcement tools, but without underlying and unequivocal policy support, it struggles to be an instrument of social change. It has now become clear, in a succession of policy initiatives, that environmental enforcement is here to stay, having been put on par with anti-corruption as a government priority. What we are therefore seeing is an elusive convergence of two critical factors—enforcement tools and underlying policy—underpinning implementation. Other issues that have factored into the implementation of the *Environmental Law* include the number of employees comprising China's environmental authorities and the proliferation of specialist environmental tribunals within the court system.

Skeptics charge that environmental compliance often lapses as soon as central inspectors return to Beijing, and localities go back to a ‘growth at all costs’ approach. Recognising that risk, another law has just come into effect that enforces environmental compliance. The *Environmental Protection Tax Law of the People's Republic of China* turns discharge fees into a form of taxation, and takes monitoring and collection out of the hands of local authorities and puts it into the hands of joint platforms established by tax and environmental bureaus. This means that local governments face consequences if they continue skirting around environmental law by waiving or subsidising discharge fees issued by favoured local companies.

Supply chain compliance – a hard nut to crack

On 19th September, Dr Zhang Yilin, the chief executive officer of Schaeffler Group Greater China, sent a note to the governments of Pudong and Jiading asking for them to allow their steel wire supplier to continue operating another three months. They estimated that without any alternative suppliers, the financial damage arising from the shutdown of this supplier and subsequent companies in the value chain could amount to a loss of renminbi-yuan (CNY) 300 billion.

Corporations that proactively engage their supply chain to enhance awareness and compliance have been able to weather the environmental storm more effectively.



Soil remediation - the next frontier

Most efforts to date have been to reduce air and water pollution, with soil and groundwater contamination generally considered too tough to tackle. Several years ago, a leaked survey detailing the extent of soil contamination in China brought the issue to the public's attention. The central government eventually issued the *Soil Ten* policy action plan, which culminated in the enactment of the *Soil Pollution Prevention and Control Law of the People's Republic of China (Soil Law)*, an attempt to eliminate the issues that resulted from fragmented regulation.

The *Soil Law* is on track to be promulgated next year, and in advance of that, temporary rules that allow authorities to test parts of the law have been issued. These rules titled, the *Measures on Soil Environmental Management for Contaminated Sites*, were announced by the Ministry of Environmental Protection of the People's Republic of China on 31st December 2016, and went into effect starting 1st July 2017. They mandated the sealing off or remediation of government targeted sites that were at the highest risk of environmental contamination.

A more systematic approach to surveys and enforcement promises to help address some of these concerns regarding the quality of locally-sourced food and water.

What you should do to manage risk?

Companies, with their environmental assessors and legal counsel, should audit themselves to guard against the following issues that could be flagged in an investigatory visit by environmental officials:

- missing or incomplete environmental health and safety permits
- non-compliance with land use or industrial policy
- inadequate environmental protection facilities
- hazardous waste disposal with unlicensed parties
- soil or ground water contamination
- noxious odours including volatile organic com-

pounds

- outstanding fees or fines
- disputes with neighboring residents or facilities
- occupational health or safety compensation issues
- media or NGO exposure from non-compliance

Proactive self-assessment with periodic follow ups, combined with a strong compliance policy, is the best way to both guard against nasty surprises and to have a ready defence when one is accused of environmental non-compliance.

Conclusion

China may not be able to save the world, but there is still time for China to save its own environment. By initiating an era in which environmental enforcement is the new normal, China will be making a massive contribution to improving ecosystems far beyond its own borders in the years to come. Western companies will weather the inconvenience and emerge from the initial investigatory shock in a stronger market position. As the costs to pollute increase and issues with intellectual property protection are addressed, compliant Western companies will be better placed to compete and prosper. [Eb](#)

Dorsey & Whitney LLP has locations across the United States, Canada, Europe and the Asia-Pacific region. Dorsey & Whitney LLP represent a number of the world's most successful companies that hail from a wide range of industries, including leaders in the banking, energy, food and agribusiness, health care, mining and natural resources, and public-private project development sectors, along with major non-profit and government entities.

GREENMENT ENVIRONMENT is the largest and fastest growing independent Chinese environmental consultancy operating in accordance with international standards. GREENMENT ENVIRONMENT helps companies and their supply chains keep up with fast changing environmental regulations and engage with site operators to create self-motivated compliance through enhanced environmental awareness.



CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABLE DEVELOPMENT

Goals for protecting the planet

Corporate social responsibility (CSR) has become increasingly important as economic globalisation has taken off. As businesses grow, it is more important than ever before that they consider their impact on a country's domestic populace. In this article, **Dr Julie Broussard**, country programme manager for the **United Nations Women in China Office**, and **Chia-Lin Coispeau**, co-founder of **Maverlinn Impact Innovation**, discuss the role corporations can plan in improving their local environment.

Responsibility and profitability

Corporations play a major role in the economic system. By generating profits, corporations create value that can be re-invested to create economic development that can positively impact society at large.

“Corporate social responsibility is not simply limited to charitable donations, but is closely related to corporate values, employment mechanisms, business models... CSR has to be integrated into the company's core values and business models.”

—Jack Ma
Founder, Alibaba, China

The concept of CSR has more than one definition and evolves according to the geography and maturity of the market. For some, it is defined as philanthropy with mechanisms for donating when used in times of disaster. For others, CSR is a central pillar of corporate values and strategy.

“An enterprise exists and lasts only because it creates value for society as a whole ... The ‘raison d’être’ of the enterprise lies in its social usefulness. It is to serve society and mankind, in the everyday lives of men and women, through the products, services, employment or even the dividends it provides”.

—Franck Riboud
Former Chairman, Danone, Europe

A business engaging in CSR should not be considered a luxury that one might or might not be able to afford. Corporations that practice CSR and sustainable development need to operate in ways that are respectful to the general population and their surrounding environment. Doing these things successfully requires businesses to pay special attention to product quality and the impact their activities might be having on their community, something that might initially be considered a simple operational cost. However, not all costs are equal and some corporations have learned that by acting responsibly, they can become more innovative, increase their revenue by producing higher quality products, and reduce costs by making smarter business decisions.

CSR and the Sustainable Development Goals

Having been the orchestrator of the many challenges humanity now faces, countries around the world are now responsible for finding solutions to these global issues. The Sustainable Development Goals, adopted by the United Nations (UN) General Assembly in September 2015, contained 17 global goals, such as “no poverty, zero hunger, good health and well-being, quality education, gender equality, clean water and


sanitation, and affordable and clean energy”. Collective efforts to address these issues can be triggered by individuals with innovative ideas and the support of the private and/or public sector.

Corporations need to take action to improve the economy, society as a whole, and the environment. The way to do so is to innovate. Innovation can uncover new ways to foster societal progress and when it comes to innovation, the private sector has a crucial role by engaging in CSR.

The private sector also has a largely unrecognised role to play in advancing gender equality. Without female empowerment, the world cannot fully eradicate poverty or attain zero hunger. As employers, the private sector can potentially empower millions of female employees and consumers, who often prioritise the well-being of their families. Additionally, multiple studies have unequivocally demonstrated that companies with a more gender-equal workforce, and women in more leadership positions, are more profitable on average. In their CSR efforts, companies should not only promote gender equality, but consider the role they can play in promoting all 17 Sustainable Development Goals.

Protecting the planet

In 2016, China's 13th Five-Year Plan confirmed sustainable development as the model for China's economic growth. In July 2017, Prime Minister Li Keqiang, reaffirmed that “once a certain economic development level is reached, we do need to encourage green growth”.

China is well aware of the environmental challenges it faces, as illustrated by what Li Ganjie, the minister of Environmental Protection, said during the 19th Party Congress: “We understand that air quality in China is not at the level expected by the Chinese people, however, you will need to be patient, as it will take much time to solve a challenge of this magnitude.” In the spirit of what the Environmental Protection minister has said, China has started to do green financing and innovation. In 2017, China supported the development of green financing in five pilot zones (Guangdong, Guizhou, Jiangxi, Zhejiang and Xinjiang). Furthermore, as a signatory to the 2015 *Paris Agreement under the UN Framework Convention on Climate Change*, China also participated at the One Planet Summit in 2017. These are all important steps in fostering a more sustainable model of economic development. 

*Echoing the importance of CSR in China, the **2017 EUCCC CSR awards** allowed voices of corporations, not-for-profit organisations, and social entrepreneurs that wholeheartedly invest in CSR to be heard. We would like to thank the organisers, judges, applicants, winners and sponsors for their important role in promoting societal and economic progress in China.*

EUROPEAN CHAMBER IN THE MEDIA

European Chamber releases press statement on VPN restrictions

With the virtual private network (VPN) issue once again one of the hottest topics discussed by the media, the European Chamber received requests from the *Wall Street Journal*, *Nikkei*, and *FAZ*. These media outlets wished to understand how the Chinese Government's crackdown on VPNs is affecting European businesses. The following quotation from European Chamber President Mats Harborn was provided to the media:

"Access to the worldwide web has become a major frustration for companies operating in China. The solutions provided by the government are not working."

"We are aware that there are government-approved options, but they are simply not good enough. A VPN service that is subject to restrictions at a moment's notice, as we have experienced, is not a workable solution. Furthermore, the alternative of dedicated lines is too expensive, particularly for small and medium-sized enterprises."

"The uncertainty that we are facing today is the most frustrating aspect. Connectivity is core to our work."

"Poor internet connectivity damages China's efforts to portray itself as an innovative society and impacts overall productivity. Our members have said that it restricts their ability to exchange information with their headquarters, partners and customers, and makes it impossible to carry out effective research. Some reported losses of more than 20 per cent of their annual revenue as a result."

WORLD / ASIA

China's VPN Crackdown May Aid Government Surveillance

It threatens to make emails and data transmissions by foreign companies more vulnerable, security analysts say.

By Lisa Lin in Shanghai and Yoko Kubota in Beijing

Updated Jan. 17, 2018 11:56 a.m. ET

China's clampdown on the cyber tunnels used to burrow through its Great Firewall may do more than further restrict internet access—it also threatens to make emails and data transmissions by foreign companies more vulnerable to government surveillance, security analysts say.

January 18, 2018 8:39 pm JST

Beijing's Marriott web ban sends warning to multinationals

China's message to fall in line or risk profit loss put foreign businesses on edge

NIKKI SUN, Nikkei staff writer

Indeed, the imposition of the so-called "Great Firewall" has led to a more difficult business environment in China, according to half of the respondents surveyed by the European Union Chamber of Commerce in 2017. The body said in an email that a significant number of European companies in recent years have reported reduced productivity in the office, difficulties exchanging data with headquarters and customers, and the inability to carry out research effectively.

"Access to the worldwide web has become a major frustration for companies operating in China. The solutions provided by the government are not working," said Mats Harborn, president at the chamber, referring to the provision of government-approved virtual private networks.

Shenyang Position Paper 2017/2018 launch in Shenyang

On 10th January 2018, the European Chamber Shenyang Chapter held an event to launch the *Shenyang Position Paper 2017/2018* following a meeting with the Shenyang Municipal Government. The *Shenyang Position Paper 2017/2018* launch event had a number of guests including the Liaoning Provincial Department of Commerce, the Municipal Bureau of Foreign Trade and Economic Cooperation, multiple foreign consulates and member companies. Local media, such as the *Shenyang Daily*, *Shenyang News* and *Xinhua News Agency - Shenyang* attended the launch. European Chamber President Harborn was in attendance and was interviewed by the *Shenyang Daily*. President Harborn discussed his expectations for Shenyang and commented on the state of the economy and overall level of development.

热议沈阳营商环境改善 欧盟商会2017年年会在沈举行

时间：2018年01月11日 信息来源：沈阳日报【李伟：大中小】

"每一个生活在沈阳的外国朋友都感受到空气质量的日益改善，这让他们看到继续留在沈阳生活的信心。"何里德建议，未来，沈阳市政府可以通过出台相应的标准来严格控制高污染企业的继续生产和运营，通过淘汰和关停污染企业提高当地经济实现绿色、可持续发展。

得知欧盟启动三方评估平台，采用了国际通用的世界银行评价指标之后，何里德主席表示肯定。他感谢的告诉记者，目前，为了进一步做好中欧之间的信息沟通，沈阳市政府已经将欧盟商会沈阳分会主席孔海德先生聘为沈阳营商环境监督员，同时，沈阳市营商环境办公室还与欧盟商会建立长效对话机制，由厚有的一年一次到每季度进行一次对话，借此机制，来自欧盟的企业代表可就生产生活中遇到的难题、困难与当地政府进行沟通、洽谈。



3rd Green and Clean Forum and 4th CSR Awards in Nanjing

On 7th December 2017, the 3rd Green and Clean Forum and 4th CSR Awards, organised by the European Chamber Nanjing Chapter, were held. In total, over 200 representatives from local government, media and businesses were in attendance.

A total of 15 journalists from 14 media outlets were at the event, with 12 original reports published and two mentions on television news shows – *Jiangsu TV's Hello* and the *Nanjing Broadcasting Channel*. During one interview, Bernhard Weber, chair of the European Chamber Nanjing Chapter board, shared his insights and experiences on water preservation and corporate social responsibility (CSR).



Vice President Carlo Diego D'Andrea's interview with Wirtschaftswoche

European Chamber Vice President Carlo Diego D'Andrea commented on this week's World Economic Forum in Davos to *Wirtschaftswoche*, outlining what has happened since President Xi Jinping gave his remarkable speech on China becoming the champion of economic globalisation.

Wirtschaftsgipfel in Davos

22. Januar 2018

Wieso von Chinas Ruf nach freien Märkten wenig übrig ist

Die Liste ist nicht nur lang – sie wird auch noch länger. Das weiß auch Carlo Diego D'Andrea von der Europäischen Handelskammer in Shanghai. Seit Jahren fordert der europäische Lobbyverein, dass den chinesischen Versprechen von Reformen auch Taten folgen. „Auch vergangenes Jahr haben wir keine wirklichen Reformen gesehen“, so D'Andreas nüchterne Bilanz. „Die Ankündigungen haben sich nicht erfüllt.“

European Chamber issues stance on China's Central Economic Work Conference

The European Chamber gave its official stance on the economic work conference that took place after the 19th Party Congress to Spanish news agency *EFE*.

“In the opinion of the European Union Chamber of Commerce in China, it would be ‘surprising’ if there were no ‘significant changes’ this year compared to previous years, as this will be the first economic conference to be held after the 19th Party Congress.”

“Specifically, this organisation explained to *EFE* that they hope ‘a more concrete direction will be taken for the new era’ and that ‘China will focus on their excessive debt level, which has become a source of concern for many’.”

China inicia mañana la cumbre secreta que decidirá su rumbo económico en 2018

- La economía china creció un 6,9% en el tercer trimestre
- La Ruta de la Seda: un 'Plan Marshall' para impulsar a China

En opinión de la Cámara de Comercio Europea en China, sería "sorprendente" que este año no hubiera "cambios significativos" respecto a las ediciones anteriores, al tratarse de la primera conferencia económica que se celebra tras el XIX Congreso.

En concreto, esta organización explicó a *Efe* que esperan que "se establezca una dirección más concreta para la nueva era" y que "se centren fundamentalmente en el excesivo nivel de deuda de China, que se ha convertido en la principal fuente de preocupación para muchos".

European Chamber Re-emphasises Trade Reciprocity Between EU and China

During his national visit to Beijing, French President Emmanuel Macron highlighted the importance of reciprocity. In response to the visit, the key message from the *European Chamber's European Business in China Position Paper 2017/2018* about increased market access and trade reciprocity was quoted by *Europe1*.

“But obstacles of all kinds remain numerous, according to a report of the European Chamber of Commerce in Beijing published last September. Chinese legislation remains very restrictive for European companies, forcing them to join a joint venture with a local partner or simply barring them from access to certain sectors. ‘The numbers speak for themselves’, said Mats Harborn, president of the China-based European Chamber of Commerce, ‘Chinese investment in Europe soared by 77% [in 2016] while EU investment in China plummeted by a quarter’.”

En Chine, Emmanuel Macron ouvre le chapitre asiatique de sa politique étrangère

En janvier 2017, pourtant, Xi Jinping avait promis de “garder ses portes grandes ouvertes” pour les investissements étrangers. Mais les obstacles en tous genres restent très nombreux, selon un rapport de la Chambre de commerce européenne à Pékin publié en septembre dernier. La législation chinoise reste très restrictive pour les entreprises européennes, les obligeant à s’associer en coentreprise avec un partenaire local ou leur interdisant purement et simplement l’accès à certains secteurs. “Les chiffres parlent d’eux-mêmes”, soupire Mats Harborn, le président de la Chambre de commerce européenne basée en Chine à l’automne. “Les investissements chinois en Europe se sont envolés de 77% [en 2016] tandis que les investissements de l’UE en Chine s’effondraient d’un quart. Aucune amélioration n’a été constatée au premier semestre 2017, avec une nouvelle baisse de 23%.”

EUROPEAN CHAMBER EVENTS GALLERY

BEIJING CHAPTER



1
Cybersecurity Conference 2017: Staying Compliant in China's Cyber Sovereignty Era (1)

On 14th November, the Chamber hosted a conference on cybersecurity where recent cyberspace developments were discussed. We would like to thank our sponsors SAP and Control Risks, for their commitment.



2
Human Capital Conference 2017: The Entrepreneurial Spirit (2)

On 16th November, the Chamber's Beijing Chapter held its 13th Human Capital Conference which focused on how to hire and retain talent. We would like to thank our sponsors SAP Capgemini, Cornerstone, YCIS Beijing, Beijing Aier Intech Eye Hospital, Beijing United Family Hospital Co Ltd and Blueair.



3
Exclusive Dialogue with SAIC: Revised Anti-unfair Competition Law (3)

On 30th November, the Chamber played host to Yang Hongcan, director general of the Antimonopoly and Anti-unfair Competition Enforcement Bureau of the State Administration for Industry and Commerce, and discussed the revised *Anti-unfair Competition Law*.



4
European Chamber Annual Conference 2017 | China's Rise: The New Contradiction (4)

The Chamber's Annual Conference took place on 14th December, with more than 150 people in attendance. The event had high-level speakers that engaged in in-depth discussions on the 'new contradiction' in Chinese society.

NANJING CHAPTER



1
3rd Green and Clean Forum: Practices and Policies in Water Protection (1&2)

On 7th December, the Nanjing Chapter held its 3rd Green and Clean Forum, which included presentations on how to protect strategic natural resources and develop environmentally sound practices.



2

SHANGHAI CHAPTER


Innovation Conference: Driving the Transition to a Zero Carbon Economy (1)

On 9th November, the Shanghai Chapter hosted its annual Innovation Conference. Experts discussed how China could transition to a zero-carbon economy and what technologies could help them achieve this goal.


Artificial Intelligence Conference (2)

On 16th November, the Chamber organised its first Artificial Intelligence Conference in Shanghai. At this conference, speakers from government, academia and industry discussed recent industry trends and research being done on the subject.


China Outlook: What's in Store for China in 2018? (3)

On 12th December, the Shanghai Chapter held its annual China Outlook Conference.

TIANJIN CHAPTER


Dinner Discussion on Manufacturing Issues (1&2)

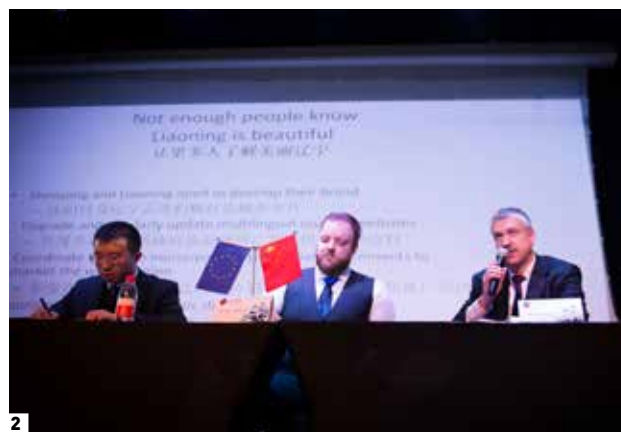
On 18th January, the Tianjin Chapter with the support of SIP Project Management and its partners held a dinner event with representatives from more than 40 manufacturing companies.



TIANJIN CHAPTER


Shenyang Position Paper 2017/2018 Launch Event (1&2)

The *Shenyang Position Paper 2017/2018* was launched in Shenyang on 10th January.



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