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China Update

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Business News

China's biotech sector to exceed four percent of GDP by 2020

China's Ministry of Science and Technology issued a special plan for biotechnology innovation in the 13th Five-Year Plan which says that China's biotech sector will exceed four percent of GDP by 2020. According to the plan, China is to make some major achievements in biotechnology by 2020, which will promote its development in fields including medicine, agriculture, resources, and environmental protection. By 2020, China will build 10-20 science parks for biomedicine with a total output value surpassing RMB 10 billion (USD 1.45 billion).

China's central bank moves to tighten funds in the banking system

China's central bank has got off to a hawkish start on banking system liquidity on May, sending a clear signal that the days of monetary easing are over. After skipping open market operations on 2 May 2017, the People's Bank of China released RMB 140 billion (USD 20.3 billion) in additional liquidity in the interbank market on 3 May 2017 but did not renew the RMB 230 billion medium-term lending facility that matured the same day. That move is expected to further squeeze money for banks and push up short-term rates.

China's central bank has not changed its tactics but maintained a neutral monetary policy with a tightening bias. It is pursuing a steady deleveraging and will not rush for success.

BEIJING

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Partners and Associates in the MMLC Group are admitted to practice law in China, Australia and Europe (UK)

Australia's 'brewery of the year' to sell beer into China

One of Australia's most popular beer companies announced that their product will soon be sold into China. Little Creatures products brewed in Geelong, which is 75 km southwest of Melbourne will be exported into Asia in an attempt to harness the lucrative Chinese market. In addition to exporting their beer, the company also intends to open a series of bars in major cities such as Shanghai.

Research published in 2015 found that more than 25 billion litres of beer are consumed in China every year, more than double the amount consumed in the US. Little Creatures already has some market penetration in China, having launched a successful pop-up bar on Dagu Road in Shanghai in early 2017.

New foreign-invested enterprises growth

The State Administration for Industry and Commerce (SAIC) has confirmed, since the business system reform, new foreign-invested enterprises have continuously grown in the past three years.

The growth rate of foreign-invested enterprises had almost tripled since 2014, jumping from 5.8 percent three years ago to 13.9 percent in 2016. The annual growth rate for newly established foreign invested enterprises, however, has scaled in the opposite direction, plummeting from minus 11.1 percent in 2012 to minus 2.8 percent in 2013. The newly registered capital of foreign enterprises also reached USD 382.27 billion in 2016, having a 47.5 percent increase each year. From 2013 to 2016, there were 13 million new private enterprises registered in China, equating to 4.33 million registered on an annual basis. He said the figure was up 86.3 percent, compared to 2013.

In the past three years, the number of new private enterprises has made up 94.6 percent of the total amount of new enterprises. The rapid growth of privately operated enterprises also created a range of jobs, boosting the employment market in China. More than 78.4 million jobs have been offered, and created, by private enterprises in the past three years, employing 26.15 million people each year. The amount represented an increase of 61.2 percent since 2013.

Dow - Dupont merger gets conditional approval from China

China has decided to conditionally approve the merger of chemical giants Dow Chemical and DuPont after nearly a year of antitrust investigations.

The ministry believes the post-merger conglomerate will control nearly 40 percent of China's weed killer market, 75 percent for acid copolymers and 100 percent for ionomers. The proportions are similar globally. So China's conditions for approval include divesting Dupont's research and development department as well as assets related to pesticides and herbicides used in rice, such as metsulfuron-methyl, azimsulfuron, cyantraniliprole and chlorantraniliprole and indoxacarb.

China's non-manufacturing sector continued to expand in April

China's non-manufacturing sector continued to expand in April, the non-manufacturing purchasing managers' index came in at 54 in April and down from 55.1 in March, according to the National Bureau of Statistics (NBS).

However, China's manufacturing sector saw its expansion slowed in April, with the manufacturing purchasing managers' index (PMI) falling to 51.2 from 51.8 in March, according to NBS data.

Yili Scraps USD 667 Million Deal for Organic Milk Company

Inner Mongolia Yili Industrial Group Co. terminated a planned RMB 4.6 billion (USD 667 million) purchase of a stake in China Shengmu Organic Milk Ltd. because it didn't win regulatory approval from Chinese authorities. Shengmu shares dropped by the most since 2015. Besides, the termination also cancels Yili's offer to buy outstanding shares of Shengmu. Hong Kong-listed Shengmu fell as much as 14 percent, the biggest drop intraday since August 2015. Yili declined 3.4 percent in Shanghai.

China's dairy industry is still struggling to win back the trust of customers after a series of food safety scandals. That's increased competition between Yili and China Mengniu Dairy Co., for a premium organic segment that makes up just 1 percent of the country's milk consumption in a USD 55 billion Chinese dairy market.

China's first domestically produced passenger plane completes 'beautiful' maiden flight

The first Chinese-built passenger jet has taken to the skies for a politically charged maiden flight that authorities claimed would propel the country into a new era of aviation.

The C919, a twin-engine airliner designed to compete with the Airbus 320 and Boeing 737, took off from Shanghai's Pudong International airport just on 5 May 2017 and landed back there again 80 minutes later.

Several of the plane's key components are imported – the C919 features German landing gear, Franco-American engines and an Austrian interior.

Legal News

Intellectual Property

Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comment) issued for public comment

The Anti-Monopoly Committee of the State Council has issued the Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights (Draft for Comment) (the “Draft”) for public comment on 3 April 2017.

The Draft was prepared by the National Development & Reform Committee (“NDRC”), Ministry of Commerce (“MOFCOM”), State Administration of Industry and Commerce (“SAIC”) and the State Intellectual Property Office (“SIPO”). It covers five chapters with a total of 27 articles, covers the general issues, monopoly agreements relating to intellectual property rights (“IPRs”), abuse of dominant market position relating to IPRs, concentration of undertakings relating to IPRs and other circumstances involving IPRs.

The key issues for the draft summarized as follows:

● Article 4 of the Chapter 1 of the Draft provides that to analyze whether the exercise of IPRs eliminates or restricts competition, the following factors may be considered:

- (i) To assess the competition landscape in the relevant market, the factors to consider include:
 - Industry trends and market development;
 - Major competitors and their market share;
 - Market concentration;
 - The difficulty of market entry;
 - The relative market position of the transaction and the degree of dependence on the relevant intellectual property;
 - The related technology updates, development trends and research and development.

- (ii) To Analyze alleged conduct, the following factors are to be considered:
 - The competition between the operators;
 - The market share of the operators and their control of the market;
 - The time, scope and extent of the behavior that limits the production, the area, the consumer, etc.;
 - The possibility of setting up or raising the relevant market entry barriers Behavior;
 - The obstacles to technological innovation, communication and development;
 - The obstacles to the development of the industry;
 - The impact of behavior on potential competition.

● IP-related Monopoly Agreements

Chapter 2 of the Draft provides the provisions on joint research and development arrangements, cross-licensing, grant-backs, development of standards, safe harbor as well as other types of restrictions are addressed. The Draft acknowledges the pro-competitive effect of the above-mentioned conducts, in other word, generally, these conducts would not normally trigger any antitrust concerns. However, if an undertaking takes advantage of such conduct to eliminate or restrict competition in the relevant market, such conduct would be subject to the AML.

Besides, the Draft provides a safe harbor in Chapter 2. If the operator meets one of the following conditions, it usually does not enter into an agreement involving intellectual property rights as a monopoly agreement under Item 6, Paragraph 6, Article 13 and Paragraph 3, Article 14 of the AML:

- The market share of the operators with competitive relations in the relevant market does not exceed 20 percent;
- The market share of any operator who does not have a competitive relationship in any relevant market affected by an agreement involving intellectual property rights will not exceed 30 percent;
- If the operator's share in the relevant market is difficult to obtain, or the market share cannot accurately reflect the operator's market position, there are four or more replaceable technology to be obtained under reasonable cost that is independently controlled by other operators, in addition to the technology controlled by the parties in the relevant market.

- IP-related Abuse of Dominant Market Position

Except for predatory pricing, Chapter 3 of the Draft provides all other types of abuse behaviors including licensing IP at an unfairly high price, refusing to license IP, IP-related tying, imposing unreasonable IP-related trading conditions and IP-related discriminatory treatment.

- IP- related Concentration of Undertakings

The Chapter 4 of the Draft provides that an undertaking could acquire control or become capable of having decisive influence over another undertaking by virtue of transferring or sole licensing of IP and therefore trigger concentration of undertakings. To assess whether the aforementioned transfer or licensing of IP could be deemed a concentration of undertakings, the following factors are to be considered:

- Whether such IP constitutes an independent business;
- Whether such IP generated independent and calculable turnover in the preceding fiscal year;
- The term for sole licensing of such IP.

With regard to remedies, the Chapter 4 provides for structural remedies, behavioral remedies, and synthetic remedies.

- Other IP Related Conduct

The Chapter 5 of the Draft provides the provisions about patent pool, injunctive relief and relevant issues relating to copyright collective administration organization.

Patent Pool

The Draft provides that exercise of IP in a patent pool may involve both monopoly agreements and the abuse of dominance. To analyze whether a patent pool has an anti-competitive effect, the following factors are to be considered:

- The market share of the operator in the relevant market and its control over the market;
- whether the patent in the joint venture involves a technology with an alternative relationship;
- whether it restricts the granting of patent or R & D technology separately by associates;

- whether the operator exchanges information such as commodity price and output through joint venture;
- whether the operator rejects the technology with the alternative relationship through the association and hinders the entry of other operators into the relevant market;
- whether the operator conducts cross-licensing or exclusive repatriation through association, makes no doubt about the terms and other restrictions;
- whether the operator through the joint venture to unfairly price concessions, tying, additional unreasonable terms of trade or the implementation of differential treatment.

Injunctive Relief

The draft provides that injunctive relief means that a patent owner requests the judicial authorities or quasi-judicial bodies to issue an order restricting the use of a certain patent, which is in nature a reflection of cessation of infringement liability. To analyze whether seeking an injunction by a SEP owner will eliminate or restrict competition, the following factors are to be considered:

- The performance of the parties during negotiation and their genuine intention;
- The commitments of injunctive relief assumed by the relevant SEP;
- The licensing conditions proposed by the parties during negotiation;
- The impact of seeking an injunction on the licensing negotiations;
- The impact of seeking an injunction on the competition of the relevant downstream markets and consumers' interests.

Beijing High People' Court published new Guidelines for Patent Infringement Determination

The Beijing High People's Court issued new Guidelines for Patent Infringement Determination ("the Guidelines") on 20 April 2017, the Guidelines is the revision of Guidelines for Patent Infringement Determination issued in 2013.

The key issues addressed in the Guidelines as follows:

- Determination of Protection Scope

For Invention or Utility Model

Article 2 and Article 4 of the Guidelines provides, the contents ineligible for patent protection include: a technical solution containing a technical defect to be overcome by the patent; and a technical solution which, in its entirety, belongs to the prior art, technical solutions incapable of solving the technical problem of the patent or realizing the technical effect of the patent.

For Design Patent

Article 65 provides, the protection scope of a design patent shall be determined by the design incorporated in the patented product illustrated in the drawings or photographs, and the brief description and essential features of the design, as well as observations filed by the patentee in the procedure of invalidation and the procedure of litigation thereof, may be used for understanding the protection scope of the patent for design.

The real patented product provided by the party concerned in the litigation may serve as a reference for helping understanding the design, but not as a basis for determining the protection scope of the design.

- Determination of Infringement

For Invention and Utility Model

Article 38 stipulates the meaning of identical infringement - the accused technical solution comprises corresponding technical features that are identical to all the technical features stated in an entire technical solution of the claim, literal infringement will be found, namely infringement in literal sense.

Articles 45 stipulates the meaning of equivalent infringement - the accused technical solution shall be determined to fall within the protection scope of the patent and equivalent infringement shall be found, when one or more technical feature(s) in the accused technical solution, though different in literal sense from the corresponding technical feature(s) in the claim, belong(s) to equivalent feature(s) of the latter.

Equivalent features refer to those which achieve substantially the same function and generate substantially the same effect by the means substantially the same as the technical features stated in the claim and can be envisaged by a person with ordinary skills in the art without making inventive effort.

In the judgment on equivalent features, the means is the technical content of the technical feature per se and the function and effect are the external characteristics of the technical feature, and the function and effect of the technical feature are decided by the means of the technical feature.

For Design Patent

Article 74 provides, a design identical or similar to the patented design is incorporated in the product of the same or similar category of the product incorporating the patented design, the accused design shall be deemed to have fallen within the protection scope of the design patent.

Besides, Article 78 provides that whether the products belong to the same or similar category shall be determined on the basis of the function, purpose of use and use condition of the product incorporating the design.

- Determination of Acts of Joint Patent Infringement

Article 117 provides that an entrusting party, clearly knowing that another party's act constitutes patent infringement as provided for in Article 11 of the Patent Law, entrusts the another party to make the product or mark "supervision" on the product or involves similar participative behaviors, the acts of both the entrusting party and the entrusted party constitute joint infringement.

Article 118 provides, a person who clearly knows that another party's act constitutes patent infringement as provided for in Article 11 of the Patent Law, and abets or assists the another party in committing the act of patent infringement, is the joint infringer with the another party, and both parties shall be liable jointly and severally.

- Defense of Patent Infringement

Article 124 stipulates the accused party provides evidence and proves that the patent in suit has not been valid, has expired, or has been invalidated, the court may dismiss the case.

Article 125 stipulates in patent infringement litigation, the accused party defends on the grounds that the patent does not meet the requirement for grant and shall be invalidated, a request for invalidation shall be filed with the PRB.

BMW wins trademark case in China

The Beijing High Court rendered judgment holding to the case BMW AG claiming a Chinese company was infringing its trademark rights.

Background

BMW AG registered its trademark ‘BMW’, ‘BMW and device’ as well as the Chinese transliteration ‘宝马’. Shenzhen Red Dragonfly Clothing Trading Co., Ltd. later filed the application of trademarks ‘Paul BMW’ and its Chinese transliteration ‘保罗宝马’ under classification 25 and then approved by CTO in 2012. The trademark was transferred to Wenzhou City Kaluochi Shoes Co., Ltd.

In 2014, BMW AG brought a lawsuit to the TRAB and claimed that the Chinese trademark was a copycat and that BMW had an international reputation in China. However, the TRAB ruled against the German company pointing out Paul BMW was registered under the classification 25 which covers clothing while BMW was registered under the classification 12 meant for vehicles. The TRAB considered the products were not similar and added BMW reputation was built in vehicle industry, not in clothing. Consequently, Paul BMW’s registration did not bring confusion to the public and hence, did not harm BMW AG’s interests. Unsatisfied with the ruling, BMW AG brought the case to the Beijing Intellectual Property Court.

Decision

Beijing Intellectual Property Court held that firstly Kaluochi’s trademark was composed of BMW AG’s trademark ‘BMW’; secondly, both plaintiff and defendant products were similar under the classification of which they were registered. At this point, according to the Court, BMW AG’s international reputation was no longer necessary. Therefore the Court ordered Kaluochi to stop selling products under Paul BMW trademark.

Kaluochi later appealed to the Beijing High Court, and Beijing High Court upheld the decision and ruled in favor of BMW.

About 18,000 convicted for IP piracy and counterfeiting in China in 2016

Around 18,000 people were convicted on charges of intellectual property piracy and producing counterfeit products in 2006 last year. More than 200,000 cases involving IP piracy and counterfeiting, and 22,000 suspects has been seized.

Besides, authorities closed more than 200,000 accounts that were facilitating IP piracy and counterfeiting on the internet, and handled about 2,000 websites to guarantee the market’s proper operation

In 2017, Chinese government planned to tighten online supervision and investigate the source of production. A special operation to prevent the trade of counterfeit products will be launched, in which cross-border trade along the Belt and Road Initiative will be under tight scrutiny. In addition, Supervision of rural markets will be enhanced, and computer software will be another

priority. Moreover, the government will promulgate relevant laws and regulations and establish a credit system to raise the cost of breaches.

Tax

Value-added tax on agricultural products to be reduced

On 3 May 2017, the Ministry of Finance expressed that value-added tax on agricultural products and some other goods will be reduced starting in July.

The online announcement published by the Ministry states that the value-added tax rate faced by companies to import or sell agricultural products will be reduced from 13 percent to 11 percent. Besides, companies that import or sell forage products, vegetable oil, natural gas and books will also receive the same level of tax cut benefits. After the measures are implemented in July, the value-added tax regime will be simplified by combining four tax rates into three, with the 13 percent tax rate being eliminated and keeping the 17, 11 and 6 percent tax rates.

Competition

China's NDRC Seeks Comments on Draft Guidelines for Price-Related Behavior of Industry Associations

On 24 March 2017, NDRC issued draft Guidelines for Price-Related Behavior of Industry Associations ("the Guidelines"). The Guidelines encourage industry associations in the People's Republic of China to engage in price-related behavior that benefits industry development, market competition and consumers' legal interests; outline the legal risks that may be involved in various price-related behavior by industry associations; and provide guidance for industry associations to assess whether price-related behavior poses legal risk.

The key point of the Guidelines as follows:

- Encourage industry associations to educate their members regarding pricing and antitrust-related laws and regulations, to protect their members' pricing-related rights and interests, to implement industry self-regulation, to support enterprises' effort in exploring overseas markets, and to participate in mediation of price-related disputes between members or with a consumer.
- Explain that legal risks exist when an industry association announces price information to its members or within the industry, which may lead to price collusion, or when an industry association announces price information to the public, which may affect the public's expectations and have negative effects on the market.
- List other activities that involve significant risks, including activities that may be deemed to have obvious effects of eliminating or restricting competition, or activities that seriously disturb market prices.
- Prohibit an industry association that undertakes industry administration functions according to law, or performs certain industry functions authorized by administrative authorities, from abusing its role.
- Provide that industry associations are subject to legal liability according to pricing or antitrust-related laws, industry regulations, and social organization-related administrative regulations.

The public comments accepting by NDRC was expired on April 24, 2017.

Customs

China's national customs to support new free trade zones

China's national customs authority unveiled a slew of measures in support of seven new free trade zones (FTZs) that opened On April 2017.

To bolster the development of FTZs in the provinces of Liaoning, Zhejiang, Henan, Hubei, Sichuan and Shaanxi as well as Chongqing municipality, China will find new ways to facilitate foreign trade, the General Administration of Customs said in a statement.

Customs authorities will promote internet-based customs services, seek integrated customs clearance and build "single windows" for foreign trade procedures, according to the statement. Chinese customs will also tap the role of new types of foreign trade in sustaining growth and restructuring, including cultural trade, cross-border e-commerce and service outsourcing.

Moreover, China will also create a law-based business environment and safeguard fair trade order, such as protecting intellectual property rights according to law.

Investment

New China Supreme Court decision on VIEs

Generally, Variable Interest Entities (or "VIEs") are used as a vehicle to facilitate foreign participation in Chinese industries subject to restrictions on foreign investment. However, a recent case appears to provide little comfort to investors in VIE structures.

Background

Changsha Yaxing Property Development Company Limited (Yaxing) brought a suit to Hunan Higher People's Court against Beijing Shida Ambow Education Technology Co., Ltd. ("Beijing Ambow"), to terminate an agreement on sale of two elementary and middle schools to Beijing Ambow consummated in 2009 (the "Transaction"). Yaxing claimed that the VIE could not make Ambow legally own the school.

The Hunan Higher People's Court held in favor of the defendant Ambow, later Yangxing appealed to the Supreme People's Court.

Decision

The Supreme People's Court finally upheld the original judgment, ruling that the VIE was a Chinese corporation and there was no basis to void a completed contract between two Chinese corporations. The court did ask the Ministry of Education about the nature of the arrangement, and while the Ministry of Education acknowledged it was a conventional VIE arrangement.

Comments

The Supreme People's Court's decision for the above mentioned case indicates that whether the commercial transactions of a VIE are valid, do not depend on whether the VIE is operating within

the bounds of the foreign investment restrictions. The decision does not relate to the validity of the VIE contracts between Ambow's VIE and Ambow's wholly foreign owned enterprise (WFOE).

Internet

China to launch new security reviews on foreign and domestic technology suppliers in June

China is said to be planning to launch new security reviews of foreign and domestic technology suppliers from June 1, which implements a key element of its new cybersecurity law conducted to tighten state control over technology and information.

The review will apply to companies that provide network products and services and will also apply to foreign companies providing hardware or services to Chinese companies in sectors including energy, transportation and finance, as well as those selling to government agencies, public services and other "critical infrastructure". Those suppliers will have to submit their products and services for review to a new committee administered by China's internet regulator - the Cyberspace Administration of China.

Besides, the review stipulates that product security will be evaluated by benchmarks including vulnerability to tampering, supply-chain risks and customer-information protection. The committee can also turn down a product for unspecified risks to national security.

China's Draft Cyber Law Requires Annual Security Assessment for Data-Exporting Firms

On 18 April 2017, Cyberspace Administration of China (CAC) released the draft regulation as part of its efforts to introduce safeguards against terrorism and hacking.

According to the proposed law, any business transferring data of over 1,000 gigabytes or affecting over 500,000 users will be assessed on its security measures and on the potential of the data to harm national interests. The said law also bans outbound data could potentially pose a threat to security or any other public interests.

The law will also mandate companies to get users' consent whenever data is transmitted abroad. Furthermore, the rules require sensitive geographic data, including information concerned with marine environments, to undergo scrutiny from the country's cyber watchdog.

The draft will be open for public comment until May 11.

This update is aimed at keeping our clients and partners informed as to the latest legal and business developments in the Greater China region. Whilst every care has been taken to ensure the accuracy of the information contained in this update, it should not be relied upon for any purpose prior to formal legal advice being obtained.