

DIGITALEUROPE's position on China Market Access Issues

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Introduction

DIGITALEUROPE is committed to improving the European Union-China relationship. Studies found that by this year around 90% of economic growth¹ will be generated outside Europe, with one third in China alone, now the world's largest economy as per PPP valuation. DIGITALEUROPE members recognize the strong potential of the Chinese market, as driven by recent government policies promoting the take-up and the integration of ICT and related technologies in everyday life in China.

We believe that a positive dialogue between China and the EU is a key condition to ensure and promote investment in technology development, innovation and deployment, which together would greatly benefit the ICT industry in both Europe and China. Boosting EU-China trade will provide a win-win situation for China and Europe. EU-China trade should be guided by reciprocity, such as offering a fair and open market access with no restrictions on foreign vendors.

With the formation of the new European Commission alongside the Chinese Government's launch of a reflection period around the next 13th 5 year plan, DIGITALEUROPE believes the upcoming 40 years anniversary of the EU-China relations and the next EU-China Summit will be an opportune moment for the European Commission to engage with their Chinese counterparts on the challenges which are further elaborated below.

Furthermore, the EU-China 2020 Strategic Agenda for Cooperation includes key objectives reviewed annually such as the opportunity of exploring joint research and innovation initiatives in ICT, by developing joint funding programs and promoting enhanced mutual participation of Chinese and EU researchers and innovators into respective programs².

We view positively initiatives aiming at improving trade and we support the bilateral investments negotiations ongoing. Over the past 30 years, China achieved tremendous economic success by attracting foreign direct investments (FDI) in many sectors. We hope China will continue opening new areas of investment and reduce existing restrictions on FDI, in all areas related to the ICT sector, including information security regulations, future networks, IOT and smart cities, mapping and navigation. Recognizing this aspect, leading European companies invested heavily in Chinese labor because of their highly skilled and innovative labor force and are strongly committed to continuing this process.

1 COM (2010)612, "Trade, Growth and World Affairs: Trade Policy as a core component of the EU's 2020 strategy", European Commission, http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf

2 EEAS Europa, EU-China 2020 Strategic Agenda for Cooperation (pg.9), http://eeas.europa.eu/china/docs/eu-china_2020_strategic_agenda_en.pdf

It is in our joint strategic interest to create a strong global ecosystem and to cooperate in the field of new technologies. Guaranteeing free market access, strong IP protection and sound, transparent regulatory enforcement in line with WTO obligations and the creation of a level playing field amongst all players would yield a number of benefits to the economy and industry as a whole. Openness and competition drive innovation, strengthening the industry position on global market and securing its place in global value chains. This is especially true in the ICT industry because of the global nature of technology markets.

We are confident that cooperation aiming at adoption of global rules will enable the progress of the ICT industry. DIGITALEUROPE would like to respectfully present areas which should be given continued consideration by European Union Institutions and EU Member States, in their regular dialogues with Chinese authorities, so as to enable a true level playing field while helping China achieve its objectives.

Cooperation to achieve global objectives and address challenges for the ICT industry

DIGITALEUROPE, echoing other industry bodies in Europe, Japan and the US (e.g. AMCHAM EU, ITI, JEITA, EUCCC) asks the European Commission to enhance its coordinated efforts with Member States and third countries partners, to advocate for transparent, consistent and non-discriminatory treatment, so as to avoid negative impacts not only for EU, US and Japanese companies, but equally for Chinese companies' competitiveness abroad. We strongly believe that cooperation mechanisms on the fringes of official high- and working level meetings between EU and Chinese officials must be encouraged in order to understand evolving Chinese policies.

DIGITALEUROPE would like to bring the following points to the attention of the EC as key issues to consider for future bilateral discussions, at technical or political level:

- **Expansion of the Information Technology Agreement (ITA II)**

DIGITALEUROPE asks all negotiators to exercise strong leadership, utilize long term perspective on the common list of products, pursue the negotiations for a positive and balanced agreement for all ITA participants, and therefore help restore the role of WTO as the central forum of world's multilateral trade system. The ICT industry and all other industries which are increasingly dependent on ICT are at a crucial stage of development and have a strong need for a new and extended ITA that would boost growth in the global economy. As China aspires to be a technology powerhouse by 2020 and a global technology leader by 2050, the country could achieve this objective by joining an ambitious ITA.

- **Development and promotion of mobile technologies for 5G; Cooperation on Smart Cities and Internet of Things**

5G development will enable the 50 billion connections required for example by the Internet of Things (IoT). 5G will be designed for use cases expanding from humans to machines requiring more of networks. 5G supports the huge growth of machine-to-machine type communication, also called Internet of Things, through flexibility, low costs and low consumption of energy. At the same time 5G will be reliable and quick enough for even mission-critical wireless control and automation tasks such as self-driving cars.

Therefore, we encourage a continued dialogue with global industry to define global 5G standards. Various 5G initiatives compete to lead the definition of 5G: the EU created 5G PPP (or 5G Public-Private-Partnership), the flagship initiative under Horizon 2020; and China has IMT-2020 (5G) Promotion Group. European industry stands ready to support Chinese efforts in the area of 5G should global players be invited to join IMT 2020 5G Promotion Group, in a similar way as the Chinese players are welcomed in the 5GPPP. It is in our joint interest to collaborate to make possible a globally harmonized definition and standard for 5G. DIGITALEUROPE members will be pleased to participate to the EU-China Policy Dialogue Support Facility.

China has specialized in manufacturing of mobile equipment and network infrastructure, while the European Union is at the forefront of the 5th Generation of mobile networks technology (5G). Together, both regions could leverage their unique technological and market assets collaboratively to establish a strategic cooperation to develop 5G technology. Indeed, the 5G technology is around one hundred times faster than 4G and abundant resources are being invested to develop it. It will significantly increase the speed, providing a better service for users in smart cities, health care, manufacturing or back home (smart home).

- **R&D collaboration**

The potential of the Chinese R&D market for the research community is growing. [OECD](#) predicts that China will outpace EU and US in R&D spending by 2019.

DIGITALEUROPE welcomes the progress made in adjusting application requirements for companies/ holdings for R&D programs such as the National High-Tech R&D Program (863 Program) and China's Mega Projects, both of which are now formally open for applications from foreign owned companies.

We hope that further to this administrative change, China will guarantee a level playing field for foreign owned and Chinese companies in accessing national R&D programs – in particular also the new programs that will succeed the 863 and 973 Programs – by ensuring transparent information and procedures including budget, selection of the projects, scope, requirements, evaluation process and results announcement and clear rules on IPR in line with global practice.

DIGITALEUROPE believes that further opening up Chinese national R&D programs and building synergies with the EU's Horizon 2020 is key to strengthening EU- China cooperation in the ICT sector. Joint collaboration in R&D would be beneficial not only for development of 5G, but the European and Chinese companies could also develop further improvements in 4G, cloud technology, and conduct research on how to improve security of networks. All of those topics could be considered for R&D support as the development in those areas would strengthen EU-China leadership in mobile technologies.

Finally, we would like to bring to your attention some additional topics that could be addressed during the dialogue to further strengthen the EU-China R&D collaboration in the ICT field:

- Further openness of the Internet would support developers' research of information relevant for their work (sample codes, technical documents) and also favor the integration of applications developed in China with social websites.
- Since the beginning of the year, European ICT companies also reported an issue with employing foreign student interns in their R&D centers in China and getting visa both for students coming for an internship from abroad, and for foreign students who are studying in China and want to do an internship. This new development could hamper academic collaborations and restricts access to global talents.

- We would like also to encourage the inclusion of the sustainability parameter in China's R&D policy by means of simplified processes and rules for foreign and Chinese companies alike to access Chinese public projects.
- Finally, we also recommend to consider international IPR practices and standards for new policies.

- **State support for state owned enterprises (SOEs)**

A level playing field is the prerequisite for the success of global ICT firms, but also to SMEs. Next to regulatory hurdles and non-tariff barriers, uneven competition appears still often, due to China's policy to artificially establish "national champions" of global reach. These backed by the State enterprises benefit from important state support for both their domestic and their global operations, including market partitioning and support from Chinese regulatory intervention into competitors, as well as favorable export financing conditions which do not meet OECD consensus rules. To produce SOEs that are world-class and globally competitive, SOE reform must stop the preferential treatment given to SOEs and open them up to full and fair competition. SOEs will only truly improve efficiencies and invest in productivity-enhancing innovations if competition pressures them to innovate. We suggest the EU should encourage China to adhere to the OECD export credit rules, thereby establishing a level playing field. In this context, it would also be important for China to join the WTO Public Procurement Agreement.

- **China Indigenous Innovation Policy:**

DIGITALEUROPE welcomes the efforts undertaken by the Chinese authorities to address concerns around the implementation of the CIIP. However, we are still concerned with the fact that the application of the measures addressed within this policy, particularly if combined with other regulatory measures (public procurement, standards regulations, implementation of the China Patent law and the Anti-Monopoly Law (AML), could lead to additional discrimination against foreign players. Origin-based innovation policy goes counter to China's long term goal of building innovation based economy, due to the opportunity missed while locally researching and implementing globally available solutions. At the same time, we would like to offer our cooperation in establishing the right framework for developing indigenous innovation capacity (e.g. competencies in the fast application and novel deployment of latest technologies). Innovating on top of latest platforms creates true added-value and strong opportunities for deployment. The success requires modern globally compatible IPR policies, laws and regulations. Directing Chinese research and IPR creation into global standards would help China gain share of the global IPR revenues.

- **Market Access**

- Certification procedures: nationally unique regulations, standards, testing and certification procedures greatly impact trade in digital technology when they create unnecessary obstacles to trade. The EU and China should work together towards solutions that ensure the least disruption of trade while providing for a good level of protection for consumers by adopting global standards and best practices. DIGITALEUROPE believes that a product compliance scheme based on Supplier's Declarations of Conformity (SDoC) should be preferred as conformity assessments for electronics; redundant testing and certification should be avoided as it increases costs, limits choice, and delays market entry. We also recommend to allow more

independent labs and centers to conduct testing. We strongly discourage requirements to disclose sensitive IP when applying for certificates.

- e-labelling: We encourage the EU and China to exchange best practices and work towards global solutions that will simplify market access, favour compliance and facilitate trade, such as e-labelling.

- **Unfair Antitrust enforcement in China**

DIGITALEUROPE echoes the recent position papers adopted by the European Chambers of Commerce in China (EUCCC) referring to the current enforcement of the Chinese AML³. As such, DIGITALEUROPE observes the increase of high-profile investigations carried out against foreign companies in China, combined with public statements fuelled partially by the focus on domestic innovation and the proclaimed goal of achieving homegrown technology leadership. It appears that international legal best practices are not fully embraced, and we can still observe that administrative law enforcement in China is not always carried out in an impartial, transparent and consistent way, taking due account of due process elements, such as the liberty to present counter-arguments, full hearings, the ability to have legal representation and as a basis guaranteeing the right to know who is complaining and the reasons for a complaint. Despite assurances in the law and in public statements, numerous reports highlight that administrative practices run counter to due process principles, involving intimidation tactics used to impel companies to accept ‘punishments’ and remedies⁴. Merger control process is used to order conditions that fall outside the scope of what has been international practice and legally defined scope. DIGITALEUROPE stresses that it is important for competition policy and enforcement to be based on sound anti-trust principles with a focus on negative effects on competition and not be used as an administrative instrument to target companies or serve industrial policy aims. As suggested by the EUCC, we also recommend to implement the AML in a transparent, impartial and consistent manner in order for it to be beneficial for consumers and fair for businesses, and to consider the procedural framework of the European Commission as a model for how to conduct antitrust-related proceedings.

- **Intellectual Property and competition issues**

DIGITALEUROPE welcomes China’s efforts to implement the WTO/TRIPS rules. Its review of the patent legislation and moves towards higher patent quality are encouraging, as are efforts to increase transparency and consistency in its standards system including the implementation of the WTO Agreement on Technical Barriers to Trade (TBT) and the TBT Code of Good Practice. DIGITALEUROPE is however concerned with the actual implementation of these frameworks and with regards to the institutions in charge of interpreting and applying these and urges the European Commission to continue its engagement with the various Chinese administrations involved:

- Role of different judicial enforcement mechanisms and in particular of the Supreme People’s Court (SPC) in interpreting legal provisions. Particular attention should be given to the interpretation of the different provisions and the further impact of these principles of law across jurisdictions. In addition, it is not clear what respective roles the Chinese National Development and Reform Commission and the State Administration for Industry and Commerce have when it comes to the interpretation of patents and the

3 Publication of the European Chamber of Commerce in China on the Anti-Monopoly Law: <http://www.europeanchamber.com.cn/cms/page/en/anti-monopoly-law/172>

4 US Chamber of Commerce report “Competing Interests in China’s Competition Law enforcement” after 5 years implementation of the AML: https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf

assessment of standards, in particular ones that are being declared as “standards of national interest” by the said administrations. We would welcome more clarity regarding the roles of respective bodies and authorities, and the interpretation of existing rules and policies.

- Legal mechanisms to be applied to state owned enterprises and administrative monopolies (fear of distorting market access rules for foreign companies) need to be clarified and these players should not benefit from exceptions.
- Forced Intellectual Property (IP) transfers, provisions⁵ on compulsory licensing, etc., occurring via either testing or certification requirements or in the case of national standards, via administrative or legal decisions should be avoided/forbidden.
- Interaction between AML and Patent Law needs to be clarified, along with the power of interpretation conferred to the Supreme People Court, given the uncertainty created by the references to IP in the AML.

- **ICT Standard Setting:**

DIGITALEUROPE advocates a clear statement in trade agreements that when governments regulate, they should prefer Global Standards/Specifications. Global Standards/Specifications must be developed based on the principles recognized by the World Trade Organisation (WTO) in the field of standardization as fully endorsed by the European Union (Regulation (EU) 1025/2012 on European standardisation), namely coherence, transparency, openness, consensus, voluntary application, independence from special interests and efficiency (‘the founding principles’).

When such standards are not available, governments should use Conforming Standards/Specifications that are consistent with the following principles, which are based on the WTO TBT Committee Decision: openness; transparency; non-discrimination; consensus; avoidance of unjustified conflict or duplication with Global Standards/Specifications; relevance; impartiality; and due process.

Further development and implementation of Information Security related regulations in China: An increasing number of overly prescriptive information security regulations are a growing threat to innovation in ICT. DIGITALEUROPE advocates for sound, transparent and non-discriminatory measures, reflecting international best practices and international standards when it comes to implementation. Forced technology transfers, e.g. source code disclosure, unfettered audit or mandatory implementation, should be strongly pushed against. In the same vein, public procurement procedures, containing special information security requirements ought to be transparent and non-discriminatory towards foreign companies.

Key Recommendations are:

- Revised commercial encryption regulations which foresee open and non- discriminatory market access also for non-Chinese enterprises should be released after meaningful consultation with relevant stakeholders.
- Domestic standards including cryptographic algorithms should be aligned with international norms and standards. Interested parties should be allowed to participate in security related technical and standardization committees.

5 See more details in the USTR 2014 Special 301 Report (pg 31, 34 & 35): <http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>

- Discriminatory procurement restrictions such as those included in the Multi-Level-Protection-Scheme (MLPS) should be removed. The definition of critical infrastructure and national security should be limited to a reasonable minimum and orientated at international best practices.
- Consider joining the WTO Government Procurement Agreement (GPA).
- Allow independent (not backed by the State) labs and centers in and outside China to conduct testing and certification and ensure protection and non-disclosure of intellectual property (IP). Likewise, allow acceptance of the existing international standards including standards for testing performed by independent labs.
- Engage in a structured dialogue and workshops between relevant Chinese and European authorities and institutions with the goal of cooperation and mutual recognition in the field of information security.

• **Promotion of Foreign Investment**

Compliance with Chinese national standards that deviate from international norms and which require explicit certification produces a significant drain of financial resources upon investing companies. These costs are in turn passed on to the consumers. Combined with the complexity and lack of transparency around the development of standards and of certification procedures, one of the effects would be to deter foreign investments into China. More so, this would be exacerbated in case the same burdensome methods are not being applied to national Chinese champions and would potentially lead to the adoption of parallel counter-measures towards Chinese companies abroad. A simplification of national certification procedures, such as those for Network Access License (NAL) and China Compulsory Certification (CCC), would produce a more favorable environment for foreign investment in China. Adhering to international standards and alignment with international certification procedures would alleviate the financial costs of standardization in China and ultimately would allow Chinese companies to also get a better understanding of international standardization bodies and mechanisms, thus providing an opportunity for China to further grow and implement successfully its 12th Five Years Plan, while elaborating sound targets for the 13th.

Furthermore, DIGITALEUROPE very much supports the ongoing negotiations for a EU-China Bilateral Investment Treaty (BIT) to facilitate access of European companies to the Chinese market. The BIT should be a mechanism that the both countries could use for creating a better business environment. In this regard, we encourage the EU to include an Investor-State Dispute Settlement (ISDS) clause in the agreement.

• **Supply chain dialogue with third countries**

On 5 March 2014 the European Commission and the European External Action Service released a proposal for a Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum, tungsten and gold originating from conflict affected and high-risk areas. DIGITALEUROPE supports the three goals of the EU integrated approach to responsible sourcing, notably⁶:

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http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=750&PortalId=0&TabId=353

- Breaking the link between minerals extraction, trading and the financing of armed conflict
- Supporting a market in the EU for responsible traded minerals that originate in conflict regions
- Improving the ability of EU operators throughout the supply chain to comply with existing due diligence measures.

In order to achieve a greater level of transparency across the minerals supply chain, we believe that involvement of all actors is required, including participation of the conflict affected regions and that of regions where many of the smelters and refiners are located. To this effect, we very much support the EU proposal to engage with many smelters and refiners, notably China, and to use raw materials dialogues as a way to further pursue responsible sourcing. Smelter identification efforts undertaken by e.g. the Conflict Free Sourcing Initiative (CSFI)⁷ have shown that the majority of the smelters / refiners are located in Asia. Which is why we welcome the EU's diplomatic and foreign policy actions as a means to increasing smelter / refiner engagement.

We also commend as a good step in the right direction the recent conclusion of a Memorandum of Understanding on responsible business conduct, due diligence and responsible minerals supply chain between the Chinese Chamber of Commerce and the OECD⁸.

Conclusion

In response to the challenges mentioned above, DIGITALEUROPE hopes that the next EU – China IPR, Trade and ICT dialogues, as well as high level policy dialogues, such as the next HLED to take place in autumn 2015 will be constructive and cooperative, ultimately resulting in a level playing field essential for the growth of the EU and Chinese industry alike.

We wish you plenty of success for the upcoming EU – China Summit 2015 and we would be very pleased to be part of the trade discussions.

⁷ <http://www.conflictreesourcing.org>

⁸ <http://www.oecd.org/daf/inv/mne/MoU-CCCMC-OECD.pdf>

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 58 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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National Trade Associations

Belarus: INFOPARK

Belgium: AGORIA

Bulgaria: BAIT

Cyprus: CITEA

Denmark: DI ITEK, IT-BRANCHEN

Estonia: ITL

Finland: FTTI

France: AFDEL, Force Numérique, SIMAVELEC

Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: ICT IRELAND

Italy: ANITEC

Lithuania: INFOBALT

Netherlands: Nederland ICT, FIAR

Norway: IKT NORGE

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Portugal: AGEFE

Romania: ANIS, APDETIC

Slovakia: ITAS

Slovenia: GZS

Spain: AMETIC

Sweden: Foreningen

Teknikföretagen,

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Switzerland: SWICO

Turkey: ECID, TESID, TUBISAD

Ukraine: IT UKRAINE

United Kingdom: techUK