



CHINA

# STUDY ON TRADE SECRETS

Tim Smith & August Zhang | Beijing | [15 December 2020]

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## INTRODUCTIONS



### Tim Smith

Principal, Rouse  
Consultancy, Rouse  
Network

Tim leads the technology consultancy practice at Rouse Consultancy. With over 20 years experience as an IP lawyer, with almost six years living and working in Beijing, Tim has undertaken multiple projects and engagements in China for IP Key and other NGOs and governments.

### August Zhang

Managing Partner,  
Lusheng Law Firm, Rouse  
Network

August has wide experience in IP litigation and enforcement in China especially in the areas of trade mark, copyright, trade secret and unfair competition. He is frequently ranked among China's leading IP lawyers.



## STUDY PURPOSE

- This project was an update to the IP Key 2017 comparative study which used the EU Trade Secret Directive 2016/943 as its baseline.
- The project explored key questions on how the Chinese trade secret system is functioning today, following the implementation of the amended Anti-Unfair Competition Law in 2019, and how it might be improved.
- The work was done in three parts:
  1. A review of the changes made to the trade secret law and practice in China since 2017
  2. An analysis of how the changes are working in practice
  3. An examination of how the law and its enforcement could be improved



## STUDY METHODOLOGY

### CHINA RESEARCH

- **Desk-based research:**
  - Analysis of the **law, official interpretations and guidance**
  - Analysis of available **case law**
  - Analysis of existing **literature** and **EUCCC Position Papers**

### • Market based research

- circulated a **questionnaire** to more than 200 key stakeholders
- requested **interviews** with 15 in-house IP counsel from MNCs

### EUROPEAN RESEARCH

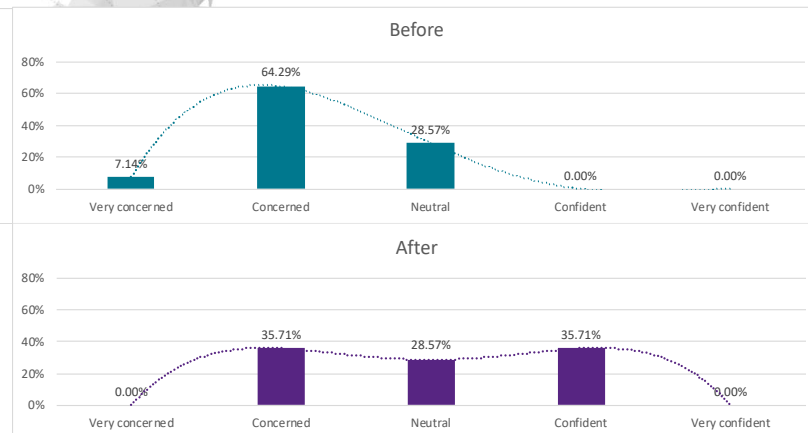
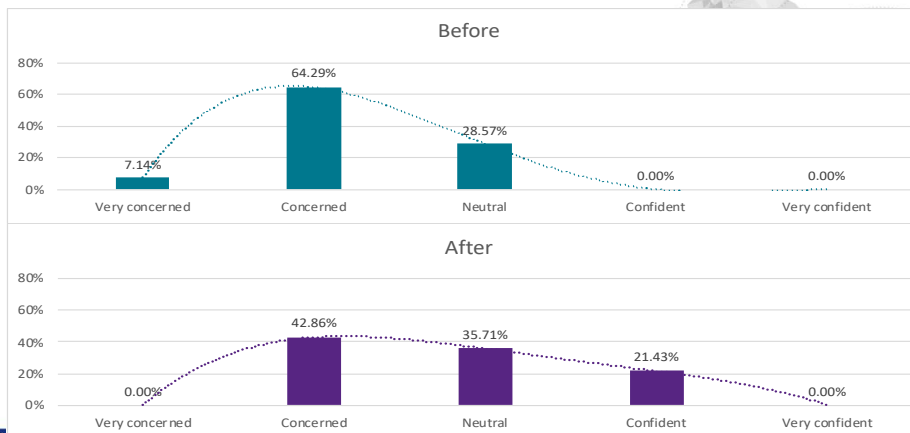
- **Engagement with DG GROW**
  - Perspectives from specialists on implementation of the EU Trade Secret Directive



# QUESTIONNAIRE RESULTS – SPECIFIC QUESTIONS – TRADE SECRET OWNERS

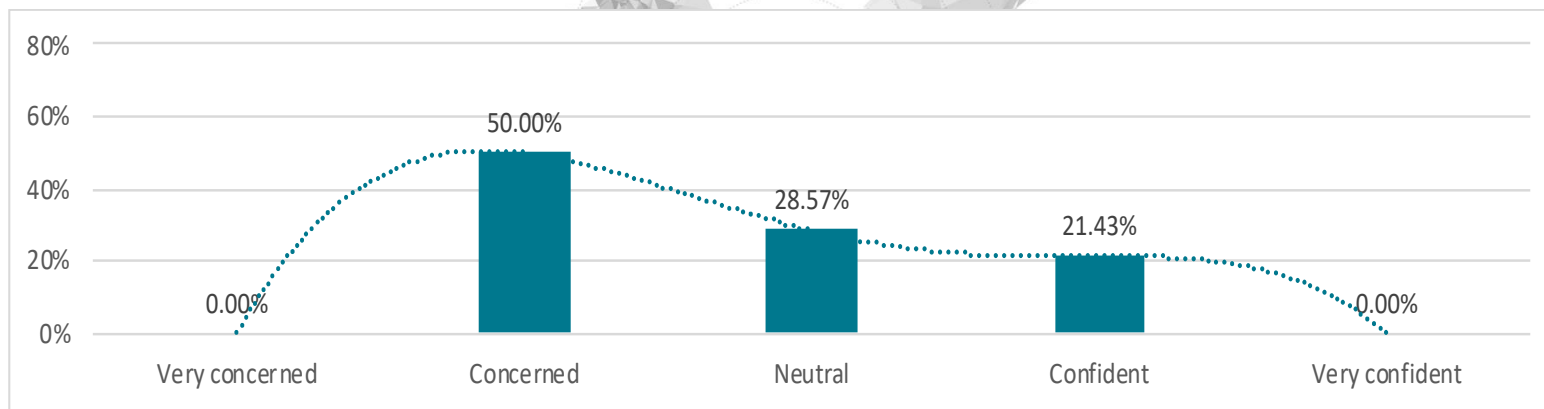
How concerned or confident were you about **evidential requirements and the burden of proof for demonstrating the trade secret has been misappropriated** before and after the amendment to the AUCL?

How concerned or confident were you that there are **adequate and effective remedies for misappropriation** before and after the amendment to the AUCL?



**QUESTIONNAIRE RESULTS – OVERALL CONFIDENCE – TRADE SECRET OWNERS****TRADE SECRET OWNERS**

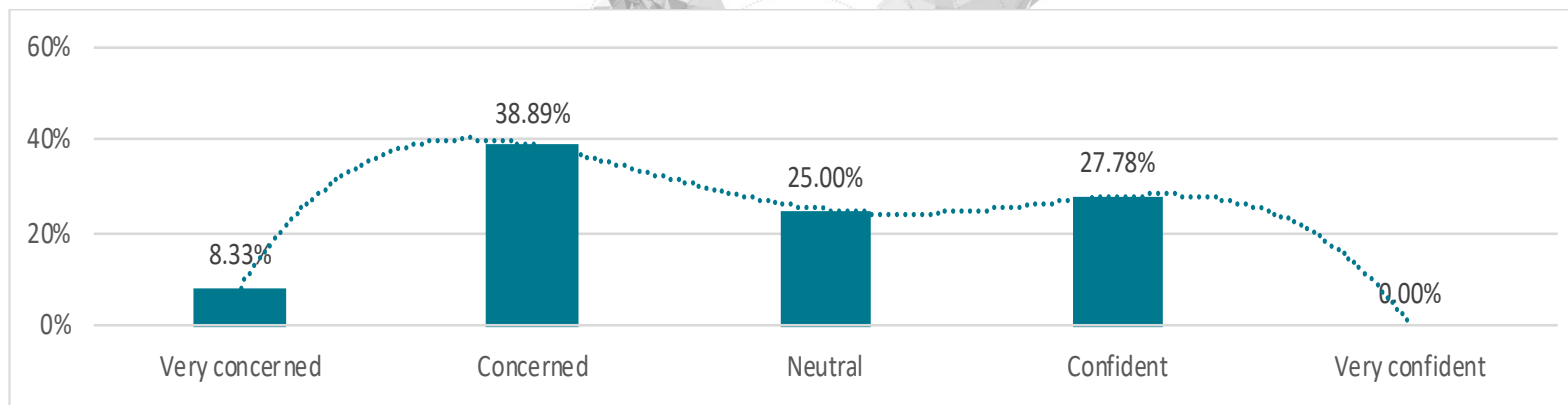
How concerned or confident are you that the laws in China today protect your business in a case of trade secret theft?



## QUESTIONNAIRE RESULTS – OVERALL CONFIDENCE - PRACTITIONERS

### PRACTITIONERS

How concerned or confident are you that the laws in China today protect your client's business in a case of trade secret theft?





## CONCLUSIONS – HOW THE LAW HAS DEVELOPED

### POSITIVE IMPROVEMENTS

- The new civil laws – the amended Anti-Unfair Competition Law, the amended Civil Code and the SPC Civil Trade Secret Judicial Interpretation - together are:
  - positive
  - materially improve protection
  - increase confidence
- The broader scope of acts of trade secret misappropriation and the actors that may be liable is welcomed
- The new civil laws provide a better balance of the burden between plaintiff and defendant
- The increase in levels of statutory compensation and the addition of the possibility of punitive compensation awards are very positive



## CONCLUSIONS - HOW THE CHANGES ARE WORKING IN PRACTICE

- The provisions regarding the shift in burden are essential but require more detail to be fully effective
- The availability of preliminary injunctions remains a material concern
- There is no notion of infringing products
- When assessing compensation, the plaintiff's R&D costs should be considered
- Criminal monetary thresholds remain too high



## CONCLUSIONS - HOW THE CHANGES ARE WORKING IN PRACTICE

- The SPC Civil Trade Secret Judicial Interpretation should be beneficial in improving consistency going forward
  - There are differing interpretations of the meaning of ‘not known to the public’
  - There are differing interpretation of reasonable protective measures
  - There is regional variation in interpretation
  - The balance between trade secret owners and employees may not favour trade secret owners
  - Confidence in enforcement lags behind perceived improvements in the law itself
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## RECOMMENDATIONS – HIGH LEVEL RECOMMENDATIONS

1. The European Union should support the development in China of a discrete trade secret code
2. It would be beneficial if the scope of cases heard by IP Courts and IP Tribunals was expanded to cover all trade secret cases, not just technical cases
3. Given the amendment to the Anti-Unfair Competition Law only came into force in 2019 and given further developments more recently with the JIs etc, it is recommended that further study be conducted to review the application of the law, no earlier than 2022



## RECOMMENDATIONS – DETAILED RECOMMENDATIONS

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1. It is suggested further detail and guidance be given on the application of the shift in the burden of proof
  2. It is suggested the Courts provide greater transparency and guidance on the issuance of preliminary injunctions
  3. It is suggested the law be amended to introduce the notion of infringing products in the context of trade secret infringement
  4. It is suggested the Courts provide guidance and publish guiding cases to allow R&D costs to be considered when assessing compensation
  5. It is suggested the Courts provide further guidance and publish guiding cases:
    - regarding the interpretation of ‘*not known to the public*’
    - regarding the interpretation of ‘*reasonable protective measures*’



## RECOMMENDATIONS – DETAILED RECOMMENDATIONS

6. It is suggested the SPC publish more guiding cases to drive consistency in interpretation nationally
  7. It is suggested the SPC publish more guiding cases to drive consistency in interpretation of the balance between trade secret owners and employees
  8. It is suggested the criminal thresholds should be reduced further
  9. It is suggested the SPP and MPS publish guidance and guiding cases on the assessment of ‘serious loss’ as the threshold for criminal cases
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| <b>Approved by owner</b> | -                |
| <b>Authors</b>           | -                |
| <b>Contributors</b>      | -                |



**Revision history**

| Version | Date       | Author | Description |
|---------|------------|--------|-------------|
| 0.1     | DD/MM/YYYY |        |             |
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# THANK YOU

