New Traffic Rules of the "E-Commerce Express Lane"
- A Briefing of the Online Transaction Supervision and Administration Measures

By
David Pan | Nigel Zhu | Susan Deng | Emily Hu | Shirley Liu

In recent years, with the development of e-commerce and online payment, online shopping has become an indispensable part of people's lives. The pandemic further boosts the development of e-commerce, and the booming of phenomenal business models such as livestreaming marketing gets into full swing. Lagging in legal systems has caused dilemmas in law enforcement, such as: how to determine new types of participants such as online streamers, how to allocate legal responsibilities of online platforms, how to exercise accommodative and prudential regulation, and how to protect consumer rights.

After five years of extensive supervision under the *Online Transaction Administrative Measures*, the *E-Commerce Law* came into effect on January 1, 2019. For various reasons, the *E-commerce Law* leaves some unresolved issues after having undergone four deliberations before promulgation. To facilitate law enforcement in past two years, the *Online Transaction Supervision and Administration Measures* (hereinafter referred to as the "Measures") were officially published on the eve of the "3.15 gala". As an important supporting rule of the *E-commerce Law*, the Measures articulate on business registration of operators, supervision of new business models, responsibilities of platform operators, protection of consumer rights and personal information protection and other critical issues. These detailed rules set a beacon for law enforcement activities of regulatory agencies, and draw a boundary for business undertakers.

如果您需要本出版物的中文本，请联系:

Publication@llinkslaw. com

For more Llinks publications, please contact:

Publication@llinkslaw.com

1. Regulating online social networking and livestreaming activities

Based on the definition of e-commerce, all sales of goods or services through the Internet are subject to the *E-commerce Law*. However, the *E-commerce Law* explicitly excludes its application on services that utilize online audio and video programs. For clarity, the Measures clearly bring e-commerce activities in online social networking, livestreaming and other scenarios into the supervision.

In a press conference, an official from the Network Supervision Department of the State Administration for Market Regulation (SAMR) stated that “a network operator will be recognized as an online transaction platform operator only if the platform provides all of the “online business site, product browsing, order placement and online payment” services and supports the entire online transaction process”. By this standard, WeChat and other similar platforms are less likely to be recognized as online transaction platforms because sellers on such platforms mainly use online communication to complete transactions, while browsing, ordering, and payment are not necessarily conducted on the same platform. Accordingly, it is difficult for regulatory authorities to recognize these sellers as operators on platforms.

2. Exempting small business operators from business registration obligations

The *E-commerce Law* requires e-commerce operators to complete business registration in accordance with law, but exempts small business operators from such registration, including individuals selling self-produced agricultural and sideline products and home-produced handicraft products, individuals engaged in convenience services and occasional small amount transactions that do not require a license, and other business operators who are not required by law for business registration. However, “convenience services” and “occasional small amount transactions” are not clearly defined by law.

Article 8 of the Measures gives a non-exhaustive list of common “convenience services”, such as cleaning, washing, sewing, haircutting, moving, key duplication, plumbing, and repairing household appliances and furniture. With regard to “occasional small amount transactions”, the Measures change the double standard of annual transaction amount and annual transaction frequency originally provided in the draft, and adopt a single standard of “cumulative annual transaction amount not exceeding RMB 100,000”. In addition, the Measures prohibit business operators from evading registration by taking both online platforms and operators on platforms into the scope, such as combining transaction volume of multiple online stores (Article 8), dynamic monitoring (Article 24) and publication of business registration status (Article 27).

3. Item-by-item consent when collecting sensitive personal information

Personal information protection is an important part of consumer right protection. In recent years, competition among online platforms and other business operators on user data is increasingly fierce, and the e-commerce industry becomes the hardest-hit area for operators’ unlawful collection and use of personal information. The Measures respond in this regard. Specifically, it reiterates the principles for collection and use of personal information in the *Cybersecurity Law* and the *Consumer Rights Protection*

Law, and refines and expands related regulations refer to the *Information Security Technology - Personal Information Security Specification* and the *Method for Identification of Illegal Collection and Use of Personal Information by Apps*. Business operators are advised to pay close attention to the requirement set out in paragraph 2 of Article 13, that is, consumers' consent must be obtained item by item when collecting and using sensitive information such as personal biometrics, medical health, financial accounts, personal whereabouts.

4. Enumeration of unfair competition activities

The Measures expand the unfair competition activities listed in the *E-commerce Law*, and provide for the most common Internet-specific false or misleading business promotion activities in practice, including fabricated transactions and consumer reviews, misleading display of consumer reviews, false marketing, fictitious user traffic data and transaction interaction data, which are all within the scope of "faking orders and reviews to boost reputation". Besides, the Measures also emphasize on the expansion of unfair competition activities from offline to online. For example, confusion in the online context is mainly in the form of confusion of corporate logos, online store names, self-media names or logos, and App names or icons, while commercial slander is that consumers are induced or misled by business operators to make negative reviews.

5. Management of consumer reviews

In order to improve consumer review channels and credit systems, Article 39 of the *E-commerce Law* explicitly bars e-commerce platforms from deleting consumer reviews on the platforms. The entire prohibition on deletion of consumer reviews of Article 39 is relatively demanding, which is difficult to apply in light of the complexity of the network environment, and may hinder the regulation of e-commerce activities and market order. The Measures further supplement and explain such regulation on prohibition of deleting reviews and Article 15 stipulates that "online transaction platform operators may lawfully use technical means to manage consumer reviews if they contain information that is prohibited by law from being published or transmitted". Considering the consistency between laws of different hierarchy, we understand that the "technical means" should be interpreted as measures other than "deletion", including hiding or masking such reviews. However, this provision may render the penalty clause on "unauthorized consumer review deletion" in the *E-Commerce Law* toothless, and the correlation between provisions is yet to be verified in practice.

6. Protection of consumers' right to choice

Article 17 of the *E-commerce Law* provides for the protection of consumers' right to knowledge and choice. The Measures not only in its Article 19 reiterate these rights, but also elaborate on the right to choice in Articles 17 and 18. Specifically, online transaction operators should (1) specifically draw consumers' attention to clauses of tying sale of goods/services and not set these clauses as the default choice; (2) not presume consumer choices in previous transactions as their default choice; (3) for automatically renewed services, draw consumers' attention in a "conspicuous manner" five days before expiration, and provide consumers with "obvious and simple" cancellation and change options during the service period, and not charge unreasonable fees.

7. Refinement on boilerplate clauses

Articles 496 to 498 of the *Civil Code* stipulate the identification and validity of boilerplate clauses. Boilerplate clauses are void if "the party providing the boilerplate clauses unreasonably exempts or reduces its liability, aggravates the other party's liability, restricts and excludes the main rights of the other party". The *E-Commerce Law* emphasizes that in the field of e-commerce, when a boilerplate clause stipulates that the contract is not concluded upon a consumer's payment, such a clause is void. Given that in practice the circumstances of invalidating boilerplate clauses are limited, the Measures further refines on this:

1) It exempts or partial exempts online transaction operators from their responsibilities for repairs, remakes, replacements, returns, replenishment of the quantity of goods, refunds of payment and service fees, compensation for losses, etc., for the goods or services they provide;
2) It excludes or restricts the rights of consumers to request repairs, replacements, returns, compensation for losses, as well as liquidated damages and other reasonable compensation;
3) It excludes or restricts the rights of consumers to complain, report, request mediation, apply for arbitration, and file lawsuits in accordance with law;
4) It excludes or restricts the rights of consumers to change or terminate the contract in accordance with law;
5) It provides that online transaction operators unilaterally or finally enjoy the right of interpretation;
6) It provides other clauses that are unfair and unreasonable to consumers.

In addition, the *Civil Code* particularly emphasizes the obligation of reminding and explanation based on the principle of fairness, that is, taking a reasonable method to call attention on clauses concerning the other party's material interests, such as a clause exempts or alleviates the liability of the drafting party, and to give explanations in accordance with the other party's requirements. Otherwise, it will be excluded from the contract. Article 21 of the Measures reiterates this provision, and requires online transaction operators "to draw consumers' attention to clauses concerning consumers' material interests in a significant way, and to explain as required by consumers". If online transaction operators fail to perform this obligation, the related clauses will be directly excluded and whether it is valid will not be considered.

8. Articulation of platforms' obligations and responsibilities

1) Information reporting

In terms of information reporting to market regulation authorities, based on the *E-commerce Law,* the Measures provide specific requirements from two perspectives, one is the identity information of the operators on the platform submitted by the online transaction platform operator, and the other is the information such as the price, sales volume, and revenue of certain goods or services during a specific period in a specific area.

Article 28 of the *E-commerce Law* simply stipulates the obligation of online transaction platform operators to submit identity information of operators on the platform. The Measures further require that platform operators should submit the information in January and July each year, and specify the content of "identity information", which includes: (1) the name, unified social credit code, actual business address, contact information, online store name and URL link and other information of the operator on the platform that has completed business registration; (2) the name, ID number, actual business address, contact information, online store name and URL link of the unregistered operator on the platform, and the self-declaration and other information of operators who are not required for business registration according to the law; particularly, the operators whose revenue exceeds RMB 100,000 should be specifically marked.

In addition to the reporting of identity information, the Measures also stipulate the submission of other data and information by online transaction operators. In order to prevent improper discretion in administrative power, the legislator limits the authorities empowered to order submissions, which are the SAMR and its authorized provincial organs, rather than the market regulation authorities of all levels/regions.

2) Platform information verification

Apart from information reporting, the *E-Commerce Law* also regulates e-commerce upper stream. That is, the law requires platform operators to verify information of operators to be admitted in the platform and regularly review and update information. The Measures set six months as the minimum frequency for regular reviews and updates, and strengthens the review obligations of platforms, which can effectively curb fraudulent use of identity and false qualifications in online transactions.

3) Platform's information retention and cooperation obligation

Article 31 of the *E-Commerce Law* requires e-commerce platform operators to record and retain the product information posted on the platform and transaction records for at least three years. The Measures specify that such information includes product and service information, payment records, and information of delivery, return and change, and after-sales services. Besides, for livestreaming service providers, the Measures specifically require retention obligations, accordingly, live videos of online transaction activities should be retained for no less than three years.

In addition to information retention, the Measures stipulate the obligations of online transaction platforms to cooperate with supervision. In Article 34, it requires online transaction platform operators to provide regulatory authorities with information on the identity of the operators on the platform and goods or services for the investigation, and technically monitor and take measures to stop illegal acts together with the regulatory authorities.

9. Restriction on monopolistic activities of large platforms

Article 35 of the *E-Commerce Law* forbids e-commerce platform operators from using technical means to impose unreasonable restrictions or conditions on transactions, transaction prices, and transactions with other operators on the platform of the operators on the platform, or charging unreasonable fees from operators on the platform. The law intends to prevent platforms from abusing its dominant position to interfere with the autonomous operation of the operators on the platform. The harm of "my way or the high way" of e-commerce platforms is obvious that the e-commerce platforms use their advantaged position to improperly restrict the business autonomy of operators on the platform and force exclusive operations to squeeze out competitors. Previously, based on the freedom of contract, the validity of exclusive business cooperation under fair negotiation was recognized in the draft of the Measures. However, in the Measures, this was removed due to the disparity between platforms and business operators on the platforms and inequality of bargaining positions resulted from the characteristics of e-commerce. Besides, it is useless to prohibit such method only because the methods for the platform to force operators are inexhaustible and the difficulties in obtaining evidence also make the provisions in the draft impracticable.

In conclusion, the Measures refine the *E-Commerce Law* regulations comprehensively, enhance the practicability of its provisions, and based on the characteristics of law enforcement and online transactions, provide innovative governance requirements and supervision methods. As a leader in e-commerce industry worldwide, China faces new challenges to e-commerce legislation. Lack of supervision may cause chaos, rampant capital and oligarchs, and infringement on consumers' rights; however, excessive supervision may restrict the development of the entire industry. For the development and supervision of online transaction, interests of all parties involved should be balanced and the best way of checks and balances is yet to be explored in practice.

If you would like to know more information about the subjects covered in this publication, please contact:

David Pan
+86 21 3135 8701
david.pan@llinkslaw.com

SHANGHAI

19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
T: +86 21 3135 8666
F: +86 21 3135 8600

BEIJING

4F, China Resources Building
8 Jianguomenbei Avenue
Beijing 100005 P.R.China
T: +86 10 8519 2266
F: +86 10 8519 2929

SHENZHEN

18F, China Resources Tower
2666 Keyuan South Road, Nanshan District
Shenzhen 518063 P.R.China
T: +86 755 3391 7666
F: +86 755 3391 7668

HONG KONG

Room 3201, 32/F, Alexandra House
18 Chater Road
Central, Hong Kong
T: +852 2592 1978
F: +852 2868 0883

LONDON

1/F, 3 More London Riverside
London SE1 2RE
United Kingdom
T: +44 (0)20 3283 4337
D: +44 (0)20 3283 4323

www.llinkslaw.com

Wechat: LlinksLaw

WE LINK LOCAL LEGAL INTELLIGENCE WITH THE WORLD

This publication represents only the opinions of the authors and should not in any way be considered as legal opinions or advice given by Llinks. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

© Llinks Law Offices 2021