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China Issues E-commerce Law to Boost Quality Development of Online Business

By Xun Yang | Jianqi Yang

On 31 August 2018, the Standing Committee of the National People's Congress (the "**Standing Committee**") promulgated the long-awaited PRC E-commerce Law (the "**E-commerce Law**"). The promulgation of the E-commerce Law, which reflects the government's shift of focus from fast growth to quality development of online business, will become a milestone in the development of e-commerce business in China.

1. Overview of E-commerce Law

A historical review

The e-commerce business in China has achieved a rapid development during the last decade. This is at least partially attributable to the flexible legal environment for e-commerce business. The government intended to have the e-commerce business less regulated in order for e-commerce operators to enjoy more freedom to innovate and test new business models.

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Now, in terms of number of e-commerce operators and internet users as well as the value of online trading, China is leading the e-commerce business worldwide. However, side effect of fast development has appeared, such as poor consumer protections and weak protections of intellectual property rights. The government recognizes that these side effects will restrict further healthy development of the e-commerce business in China. This gives rise to the necessity to promulgation of a comprehensive law to regulate the e-commerce business.

The government issued the *Administrative Measures on Online Business* (the “**Online Business Measures**”) in 2014, which functions to regulate e-commerce transactions on the provisional basis, at a ministerial level. At the same time, the Economy and Finance Division of the Standing Committee has started the legislative process for the E-commerce Law.

It has been taken five years for the Standing Committee to finalize the E-commerce Law after public consultations for three times. During the public consultations, e-commerce companies, consumer protection organizations, as well as legal practitioners gave a large number of comments and suggestions, reflecting interest of different stakeholders in e-commerce business. As a result, the final version of the E-commerce Law still encourage the further development of e-commerce business in generally but sets out stricter compliance rules to create a fair competition environment and protect consumer interest better.

Scope of applications

The E-commerce Law has a wide application. It regulates all e-commerce activities in China.

From a geographic aspect, the E-commerce Law regulates e-commerce activities in China. All e-commerce operators which reside or incorporated in China will be subject to the E-commerce Law, regardless of whether the relevant e-commerce platforms are hosted in China.

From a business sector aspect, the E-commerce Law regulates online supply of goods and provisions of services as well as the operations of e-commerce platforms. However, the operations of financial business online and the publication of news, audio and video products, and other cultural products online are not subject to the E-commerce Law.

From a technology aspect, the E-commerce Law recognizes that e-commerce business can be operated on different networks, existing or in the future. It regulates business operated not only on internet, but on mobile networks, as well as all other possible public networks.

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The E-commerce Law regulates the behaviors of e-commerce operators, which are further divided into platform operators and online merchants. The former refers to the operators of e-commerce platforms and the latter refers to those conduct business on their own e-commerce platforms and on e-commerce platforms operated by third parties. The E-commerce Law realizes the strong market positions of platform operators and require them to take responsibilities to maintain fair competitions on their platforms and to protect consumer interest.

2. Key Development of E-commerce Law

The E-commerce Law significantly changes the current legal landscape for operating online businesses in China. It not only imposes new legal requirements but also strengthen the rules which exist in other legislations. The most important developments from the current e-commerce legal regimes include (i) protection of intellectual property rights, (ii) protection of consumer interest, and (iii) protection of cyber security of personal data.

Protections of Intellectual Property Rights

Recognizing that protection of intellectual property rights is critical to maintain fair competition environment, China government has been consistently making efforts to strengthen the protections of intellectual property rights. Despite of the efforts, infringements are still rampant in the online world. This is partially because most of the copycats are small players or individuals and they can hide themselves behind the internet: if one shop is shut down, they can just easily open another one on the same or another platform.

Both the *Regulations on Protection of Information Network Transmission Right* effective in 2006 and the *Tort Liability Law* effective in 2010 have provisions dealing with platform operators' responsibilities to protect intellectual properties. However, these legislations tend to rely only on a notice-and-take-down procedure to fight against infringement. However, this appears insufficient as platform operators tend to keep blinded against the infringement on their platforms and wait for right owners' notice.

The government realized this problem. August this year, the State Intellectual Property Office issued the *Notices of Further Intellectual Property Protection Works in E-commerce Business*, in which the office urge platform operators to formulate, adopt, and implement a procedure to proactively prevent counterfeiting activities and to proactively crackdown infringement, including to blacklist repeated infringers and to look into alert obviously suspicious offerings.

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In line with this trend, the E-commerce Law imposes detailed obligations on platform operators to protect intellectual property rights, including:

- to formulate and implement an intellectual property protection policy and, following such policy, to adopt necessary technical measures and managerial measures to protect intellectual property rights, such as deletion of infringing information, block access to infringing webpages, and termination of services to frequent infringers;
- to establish a practical ‘notice and take-down’ system, where both intellectual property rights owners and alleged infringers must have reasonable opportunities to put forward their argument, and to take active measures to deal with established infringement.

Consumer protections

E-commerce business develops fast in China under the protection from “technology neutral.” Platform operators pretend to be only providers of “technical solutions” and, thus, avoid burdens to protect consumer interest, despite that the operations of the platforms concern pretty much about consumer interest. Some platforms even keep eyes closed against suspicious crimes and do nothing to prevent repeated criminal offence. The typical example is that two young girls was raped and murdered one after another when they hire private cars on Didi platform but the platform did little to prevent the crimes after the first crime occurs.

Recognizing that platform operators have grown to a stage where they are standing on a strong position to manage the online merchants which use their platform, the E-commerce Law impose higher requirements on platform operators to protect consumer interest and will hold them liable if they fail to meet these requirements. These requirements include:

- e-commerce operators must timely disclose all the information relating to its goods or services completely, and grant customers meaningful freedom and sufficient information to select goods or services;
- platform operators must formulate comprehensive consumer protection policies, which must be available to view and download in a convenient manner, with any amendment of such policies to be published at least 7 days before its effectiveness;

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- platform operators must adopt technical measures to distinguish the goods and services provided by itself and those provided by third party online merchants;
- platform operators must adopt protective measures in the event that they have actual or constructive knowledge about defective goods or services provided on their platforms that may infringe legitimate rights and interest of consumers;
- in relation to goods or services which are relevant to consumers' personal health or lives, platform operators must verify the qualifications of the online merchants which provide such goods or services; and
- operators are required to establish a "credit assessment system," by which consumers are able to remark goods or services they received, which operators must not erase.

Cyber security and personal data protection

Since 2017 when the PRC Cyber Security Law was promulgated, cyber security and personal data protection has become an important issue in relation to online business. Not surprisingly, the E-commerce Law gives details to e-commerce operators' obligations to protect cyber security and personal data, including:

- to seek data subjects' informed consents to collect their personal data and to protect these personal data during the operation of their e-commerce business;
- to formulate personal data inquiry policies, by which data subjects will have accesses to and channels to amend or delete their personal data without unreasonable restrictions;
- to report to competent government agencies any illegal information found or any cyber incident occurred during the operation of their e-commerce business, as well to adopt necessary technical measures to prevent the spread of the illegal information and to mitigate the losses from the cyber incident;
- to maintain the security of the network systems and to take proper technical and managerial measures to prevent malicious code or cyber-attacks; and

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- to formulate contingency plans and, following such plans, to back up data during normal operation of business and to mitigate adverse impact from cyber incidents.

3. The Impact of the E-commerce Law on Businesses

The promulgation of the E-commerce Law will have significant impact on various business sectors, both online business and traditional business.

Impact on e-commerce business

The promulgation of the E-commerce Law sends out a clear signal that the government will make effort to mitigate negative effects of online businesses, especially those which may have a significant impact on the personal safety and property safety.

Firstly, e-commerce operators are required to formulate quite a number of managerial policies such as intellectual property protection policies, personal information policies, and contingency plans. They are also required to implement certain procedures required by the laws such as the ‘notice and take-down’ procedure and real name verification procedure. This means that e-commerce operators must revisit their business and make up these policies and procedures before the effectiveness of the E-commerce Law if they do not have them.

Secondly, penalties and liabilities under the E-commerce Law are increased. The penalties for violation of the Online Business Measures range from RMB 1 to RMB 30,000. The penalties for violation of the E-commerce Law can reach RMB 2,000,000, almost 70 times that under the Online Business Measures. Besides, serious violation of the E-commerce Law will be recorded as a “credit defect,” which may affect the goodwill and may affect the creditworthiness.

Thirdly, given the increased burden to protect intellectual property rights, consumer interest and cyber security, the compliance cost will raise. This only means that e-commerce operators must invest more on compliance works, but also means that those operators which achieve fast development by operating in a non-complaint or less-compliant manner cannot survive.

Lastly, the e-commerce business market will be directed from a “fast development” to a quality development in the near future. In the past two decades, the main task for the e-commerce operators in China is to grow as fast as they can. Now, considering that a significant proportion of Chinese have already gone online, the operators must be more responsible for provisions of better quality services. They must not only consider economic interest but need to take into account their social responsibilities.

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Brand business and designer business

The E-commerce Law is definitely a good news for those brand companies or designers. Internet giants in China have long been criticized for their weak protection for intellectual property rights. With the promulgation of the E-commerce Law, these e-commerce operators are required to respect and protect intellectual property rights much seriously than ever before.

“Notice and take-down” systems will be more robust than before to allow intellectual property right owners to protect their interest. Although most platform operators have already established “notice and take-down” systems, some operators make their systems difficult to be implemented (e.g., creating difficulties to report infringement) and do not meet the requirements under the E-commerce Law. The E-commerce Law will obligate them to amend the system to create a more “friendly” procedure, which could become an important channel for intellectual property owners to protect their rights.

Moreover, the E-commerce Law requires platform operators to establish and implement intellectual property policies to proactively protect intellectual properties, including to suspend services to frequent infringers. This will drive away online merchants who conduct business primarily by infringing others’ intellectual property rights and help create a business environment which respect intellectual property rights.

International trade

The E-commerce Law will create a more friendly environment to foreign goods to be imported into China. Firstly, as discussed below, the E-commerce Law aims to strengthen the protections of intellectual property rights. The online sales of counterfeiting goods, including those copying from foreign brands will likely be less rampant. As a result, genuine goods manufactured outside of China will have better market positions in China.

Secondly, the E-commerce Law for the first time recognizes that e-commerce operators are allowed to engage in import and export business. Following the E-commerce Law, the government will make implementation rules regarding the customs clearance, tax, inspection and quarantine, and foreign exchange settlement, so as to regulate online import and export business. Given the strong online shopping culture, this means that more foreign goods can be imported to end users in China through legitimate channels

Thirdly, under the E-commerce Law, the government will be working towards cooperation with different countries is establishing a “friendly” cross-border e-commerce environment in terms of electronic signatures and identity authentications. Such environment, when it is established, will facilitate foreign goods to be imported into China.

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