

ASIA I AWS January 2019 Unsubscribe

E-Commerce Law: A Legal Endeavor to Keep Pace with China's **Booming E-Commerce Market**

E-commerce operators shall:

into force on the first day of 2019.

EXECUTIVE SUMMARY:

• obtain business license as well as relevant special licenses if requested and prominently display such information; fulfil tax obligations and provide invoices and receipts;

The E-Commerce law ("EC Law") adopted on August 31, 2018 and came

adopt appropriate measures if it knows or should have known of any IP

infringement occurring on its platforms;

• timely report IP rights infringement notification/statement, and take relevant necessary measures; explicitly instruct the way and procedure to customers to refund deposit;

• regularly examine credentials of merchants on the platform; adopt appropriate measures if it knows or should have known of activities failed to safeguard consumers' personal and property rights;

 clearly mark paid listing as "advertisement"; • expressly instruct all details for customers to consult, correct and delete personal information:

E-commerce operators shall not:

• record and preserve information of customers for no less than 3 years.

 adopt implied consent of "tie-in" sales; defraud frequent customers by using big data;

delete consumers' reviews.

Introduction It is estimated that in 2017 there were 42.5 million people directly or indirectly employed to

engage into e-commerce activities in China, ¹ accounting to 1/18 of Chinese population, and volume of business amounts to RMB 29.16 trillion, increasing at a year rate of 11.7%. The 2018 e-shopping festival November 11 (Single's Day) just curtained down, with Alibaba deals amounting to RMB 213.5 billion. Harder than customers finding out what deserves to buy, checking and balancing between protecting consumers rights and promoting e-commerce

Spending 5 years on 4 deliberations, the standing committee of National People's Congress adopted the final draft of the E-Commerce law ("EC Law") on August 31, 2018, which came into force on the first day of 2019. It is the first legislation in the realm of e-commerce, and comprises

renders the lawmaking process a tug of war.

2. Merchants on the platform

store").

ones:

Sales").

at least 30 days in advance;

use of smartphones.

of provisions interacting with commercial law, contract law, tort law, competition law, and administrative law. We hereby briefly interpret the relevant content of EC Law.

I. Who are the E-Commerce operators recognized by EC Law?

Though the Internet is borderless, EC Law is merely applied within China to the e-commerce activities, which were defined as products and/or services provided through the Internet by ecommerce operators; however, financial products or services, or services regarding news, audio or video programs, publications and culture products provided through information networks are

excluded from application. Entry to this definition, EC Law classifies e-commerce operators into three specific types³: 1. Platform operators Any legal persons or unincorporated organizations that provide a site for digital business, transaction matching, information release, as well as other services to facilitate other parties to conduct e-commerce trading activities independently. Good examples are Tmall, JD, and DIDI (Chinese biggest online ride-hailing platform).

3. Other online sellers Others who sell goods or offer services through their own websites or through other network channels are also included in EC Law. This is to take into consideration of some non-traditional

stores at other instant messaging apps such as WeChat, which is booming with the extensive

It refers to third party merchants that sell commodities or offer services on e-commerce platforms. A good example shall be a vendor operating an online store on Taobao ("Taobao

II. What are the general obligations for E-Commerce operators? Among all the general obligations stipulated in EC Law, the following are the most eye-catching

1. Registration of market entities 4 and obtaining required administrative license 5

Rules for merchants to open an online shop are stricter now as industry and commerce

Law. Consequently, all e-commerce operators shall perform corresponding registration

registration of market entities (e.g. obtaining a business license) is generally requested by EC

formalities at authorities to register them as a market subject. Nevertheless, EC Law still leaves a door open, for example, registration is not mandatorily requested for personal sales of selfproduced agricultural and sideline products, household handicrafts, certain labor activities taking personal skills for the convenience of people and occasional small-sum transactions ("Personal

2. Fulfilling information disclosure obligations 6 The e-commerce operators shall timely display all information in relation to the business

3. Fulfilling tax obligation and lawfully providing invoices and receipts 7

invoices shall have the same legal effect as physical ones.

III. Are IP rights better protected under EC Law?

The EC Law also clarifies the following liabilities of the platform operators:

infringement disputes under the following different scenario:

infringement occurring on its platforms.

and several liability with the infringing party.

mechanism

products, a Food Business License shall be obtained.

For business activities subject to special license, the e-commerce operators shall follow all formalities to obtain all requested license. For example, to conduct business in relation to food

registration and required licenses in the prominent position on their homepages. If violating such provision, penalties will be imposed. For example, if a Taobao store fails to publish its business license and requested license, the market authorities shall order it to make corrections and may additionally impose a fine up to RMB 10,000. In addition, if the e-commerce activity is to be terminated on the e-commerce operator's own initiative, relevant information shall be published

business registration, when the tax obligation arises for the first time, it shall also apply for the handling of the tax registration, declare and pay the tax due truthfully. This means EC Law makes it mandatory for a "Daigou" who using e-commerce platform to register and pay taxes. It is also noteworthy that for a "Daigou" who is evading a relatively large amount of tax payable, he or she will also be regarded as smuggling goods and will be sentenced pursuant to PRC Criminal Law. For example, a recent Chinese "Daigou" get sentenced ten years and RMB 5.5 million fines for evading RMB 3 million tax.9 In addition, e-commerce operators shall issue purchase vouchers or service documentation, such as physical or electronic invoices for selling commodities or providing services. Electronic

The drafted clauses of EC law regarding Intellectual property (IP) protection grasp most attention and remains a major concern for both Chinese and foreign businesses. Some major reforms of IP protection are established in EC Law which request the platform operators to legally handle IP

Scenario 1: Platform operators "should have known" or "know" the IP infringement 10

According to Chinese Tort law 11, the platform operators shall take necessary measures when it knows of an infringing act on the platform. EC Law, for the first time, formally adds the concept of "should have known" which seems to be stricter to the platform operators. Specifically, a platform operator is obliged to adopt appropriate measures such as deleting, blocking and disconnecting hyperlinks, and terminating transactions and services if it knows or should have known of any IP

China has a strong incentive for bringing the e-commerce industry within the scope of its tax regulation. EC Law clearly requires all e-commerce operators to fulfill their tax obligations. Also, even for an e-commerce operator engaging in Personal Sales that is not required to perform the

(2) Administrative liability: platform operators failing to take appropriate measures might be ordered to an administrative fine up to RMB 2 million subject to the severity of the circumstances. Scenario 2: Platform operators who are unaware of the IP infringement 12 A platform operator who is unaware of the infringement has the obligation to timely transfer

infringement notifications and non-infringement statements between IP rights holder and the merchant on its platform as well as to take appropriate necessary measures. To be specific:

1. "Notice and take-down" mechanism replacing "notice, review and take-down"

practice, the platform operators may evaluate the likelihood of the existence of such infringement. Pursuant to EC Law, upon receipt of the notification specifying prima facie evidence (preliminary evidence) of the alleged infringement by an IP right owner, a platform operator is required to take necessary measures in a timely manner, such as deleting, blocking

"Notice and take-down" mechanism gets strengthened in EC Law, as previously, in tort law

and disconnecting hyperlinks, terminating transactions and services, and to forward such

notification to merchants on its platform. "Review" by the platform operator was deleted in order

(1) Civil liability: the platform operator that fails to take appropriate measures shall assume a joint

(1) Civil liabilities: Platform operators that fail to take such measures will be held jointly and severally liable with the merchants for the increased part of the damage.

RMB 2 million subject to the severity of the circumstances.

3. Non-infringement statements and 15 days suspension

4. Malicious notification facing punitive compensation

(2) Administrative liabilities:

lift all measures that it has taken.

(1) Tie-in sales 13

the circumstances.

(2) Collection and refund deposit 14

to speed up the procedure so as to protect the IP rights efficiently.

2. Civil and administrative liabilities of platform operators

The above regulations caused heated discussions on whether law makes bend over backwards as the IP owners could possibly abuse their rights. EC Law further regulates that if the merchants on the platform believe that no infringement has occurred, they may submit a statement and preliminary evidence to the platform operators, denying such an infringement. The platform operator is obliged to forward the non-infringement statement to the IP rights holders. In addition, if the IP owner did not bring the case to the administrative regulator or to the court

within 15 days of delivery of the non-infringement statement, the platform operator is required to

EC Law in the meanwhile provides remedies against malicious notifications filed in bad faith. Specifically, if notification issued is unreal and thus causes damage to the merchants on the platform, civil liability shall be borne accordingly. In addition, if unreal notification is issued

If the platform operators fail to take necessary measures timely, they will face penalties of up to

Tie-in sales refer to selling one product or service as a mandatory addition to the purchase of a

commodities/service shall be warned prominently and shall not be set as a default option. Failure to do so will face an administrative fine amounting up to RMB 500,000 subject to the severity of

different commodity or service. Normally only one commodity or service is critical to the

maliciously, which causes losses to the merchants on the platform, more compensation shall be

To solve the difficulty of obtaining deposit refunds in the emerging sharing economy (e.g. the shared bicycle Bluegogo, with its iconic blue bikes, have drawn disapproval as users are having difficulty in getting deposit refunds.), EC Law sets out that when collecting deposit, the operator shall explicitly instruct the way and procedure to refund such deposit without unjustifiable

IV. How EC Law better protect consumer's interest?

1. Establishing e-commerce operator's obligations to ensure fair dealings

customer, and the other one is less necessary. EC Law clarifies that tie-in sales

EC Law also stresses that platform operators are obligated to record and preserve information released on its platform about commodities and service and transaction, and to ensure the integrity, confidentiality and availability of such information. Such information shall be kept for no less than 3 years from the date on which transactions are completed; Otherwise, platform

Sanctions

500,000).

Administrative lability

within the required time limit;

 a fine up to RMB 10,000 (for platform operators, RMB

· order to make corrections

· order to make corrections

a fine up to RMB 500,000.

 order to make corrections within the required time limit;

a fine up to RMB 500,000.

· order to make corrections

 suspension of business; a fine up to RMB 500,000.

order to make corrections

· suspension of business;

a fine up to RMB 500,000.

· order to make corrections within the required time limit;

· suspension of business;

· a fine up to RMB 2 million.

within the required time limit;

within the required time limit;

within the required time limit; · confiscation of illegal gains;

services that failed to safeguard personal or property safety. Platform operators fail to adopt Joint and · order to make corrections within the required time limit; appropriate measures when they know or several should have known of any IP liability; · a fine up to RMB 2 million. infringement occurring on their platforms. Platform operators fail to take measures Joint and order to make corrections such as deleting, blocking and several within the required time limit; disconnecting hyperlinks and so forth liability (for a fine up to RMB 2 million. and to report IP rights infringement the additional notifications/statements increased part of the damage)

In addition to all the aforesaid civil and administrative liabilities, the EC Law also has a general clause linked to PRC Criminal Law. 25 It stipulates that if any act performed by the E-Commerce operator constitutes a crime, the violator shall be subject to criminal liability in accordance with

corresponding

liabilities

Joint and

several

liability

(23) Article 31 and article 80 of EC Law; (24) Article 21 of PRC Cyber Security Law; (25) Article 88 of EC Law.

(21) A young man died without receiving correct treatment due to an "Advertisement" hospital:

conditions. Failure to do so will face an administrative fine amounting up to RMB 500,000 subject to the severity of the circumstances. (3) Defrauding frequent customers by using big data 15 It is noteworthy that EC Law has responded an ever-concerned issue: abuse of big data, for example, when promoting commodities/service according to consumer's shopping habits or personal hobby, e-commerce operators shall also provide consumers with options that are not specific to their personal characteristics and shall respect and protect the legitimate rights and interests of all consumers equally to avoid price discrimination. For example, some ticket booking platforms will grant unreasonable higher price for the frequent customers than the new customers on the same ticket. Moreover, defrauding frequent customers by using big data will face an administrative fine amounting up to RMB 500,000 subject to the severity of the circumstances. 2. Establishing obligations specifically for platform operators (1) Examination obligations - "corresponding liabilities" 16 EC Law increases the burden of platform operators by stipulating their examination obligations. Basically, platform operators shall require merchants on the platform to submit truthful information, including the identity, address, contact, license as well as shall regularly verify, register and update such information. Failure to examine the credentials of merchants on the platform which results in damages to consumers shall bear "corresponding liabilities". When the draft of EC Law was open for social comments there were loud voices that the "joint and several liability" is too harsh to optimize the e-commerce business. Then, the fourth draft revised to "complementary liability", indicating the injured consumer cannot sue the platform operators unless the merchant could not indemnify the damage. However, it is criticized as turning back the clock, giving platforms much margin to pass the buck. Following the overwhelming debate on this issue, especially upon occurrence of the "DIDI Yueqing Murder" 17, the final wording changed into "corresponding liabilities" with an administrative fine amounting up to RMB 500,000 and suspension of business subject to the severity of violation. (2) Obligations to protect the consumers' personal and property rights - "joint and several liability"18 To protect customers, "joint and several liability" will be applied on platform operations under certain situation as well. According to EC Law, a platform operator will be held jointly liable with merchant on its platform if the merchant fails to take appropriate measures when it knows or should have known the fact that merchant was selling commodities or offering services that failed to safeguard personal or property safety. An administrative penalty amounting up to RMB 500,000 might be imposed as well for failure to do. (3) Banning from deleting consumers reviews 19 EC Law further stipulates that the platform operators shall establish and improve a comprehensive credit evaluation system and shall not delete any consumers' comments made on any commodity sold or service provided on its platform; Platform operators arbitrarily removing consumer's comments might be ordered to pay an administrative penalty up to RMB 500,000 subject to the severity of the circumstances. (4) Labeling "Advertisement" clearly if any 20 "Death of Wei Zexi" occurred during the EC Law making process; upon heated discussion on the e-commerce search services, EC Law requests platform operators to display search results in various ways in terms of price, sales volumes, and credit level. Commodities or services ranked under competitive bidding shall be noticeably labeled with the word "Advertisement", and EC Law further stipulates that platform operators fail to do that shall be punished according to the PRC Advertisement Law. 3. Strengthening protection on consumer's personal information (1) Ease of procedures for consumers to consult, correct and delete their own information²² Following the rules for protection of personal information as stipulated by relevant laws and

administrative penalty amounting up to RMB 10,000 might be imposed for e-commerce operator's failure to do so (For platform operators, EC Law provides with a higher amount of (2) Information preservation no less than three years 23

some regulations still need further clarification. To adapt to the ever-shifting e-commerce business models, detailed interpretations is under legislative consideration. We will keep an eye on future developments for you. (1) See Chinese E-commerce Annual Report 2017, initiated by the Ministry of Commerce, available at http://images.mofcom.gov.cn/dzsws/201807/20180704151703283.pdf (2) Article 2 of the EC Law; (3) Article 9 of the EC Law;

(8) A Daigou is usually an individual (a middleman) who shops for foreign products overseas for consumers on the Chinese mainland. Generally, this sort of trade helps consumers to save on

import duties since it happens on a one-to-one level based on personal acquaintances.

(17) During the deliberations of drafts, there occurred a severe murder in Yue Qing City, Zhejiang Province, conducting by a hitch-ride driver of DIDI, the biggest online ride-hailing

platform. DIDI fails to verify the background of the driver, see http://www.xinhuanet.com/politics/2018-08/26/c_1123330322.htm

http://www.newsgd.com/news/2016-05/10/content_147427958.htm

(9) http://finance.sina.com.cn/roll/2018-11-09/doc-ihnprhzw6351225.shtml

EC Law comes as a Chinese legal endeavor to tackle emerging issues occurred in the e-

commerce business. As a first comprehensive legislation addressing the e-commerce business,

Read this article on our website Should you need any assistance in this regard, and/or have inquiries regarding the EC Law, please do not hesitate to contact us at asiallians@asiallians.com.

Network of

www.asiallians.com

Lawyers

In cooperation with

European and Asian

🖙 Wang Jing & Co.

Paris • Bruxelles • Beijing • Tianjin • Qingdao • Shanghai • Fuzhou • Xiamen • Guangzhou • Nansha • Shenzhen • Taipei• Hong Kong

If you do not wish to receive our newsletter, click here. Send to a friend. Subscribe to our newsletter.

wnw WTW Taipei Commercial Law Firm

regulations, EC Law also demands all e-commerce operators to expressly instruct all details (methods and procedures) for customers to consult, correct and delete their own information without unreasonable conditions as well as to promptly respond to consumers' requests. An sanction which amounts up to RMB 500,000). operators may face an administrative fine amounting up to RMB 500,000 subject to the severity of the circumstances. It is noteworthy that three years expressly requested in EC Law is longer than the six months regulated in the PRC Cyber Security Law. 24 **Summary of infringements and sanctions** Infringements Civil liability E-commerce operators fail to display their business license and requested licenses E-commerce operators fail to expressly instruct all details (methods and procedures) for customers to consult, correct and delete their own information E-commerce operators fail to warn prominently for tie-in sales commodities/ service

E-commerce operators defraud frequent customers by using big data E-commerce operators fail to instruct explicitly the way and procedure to refund deposit Platform operators arbitrarily delete consumers' comments Platform operators fail to examine the credentials of merchants on the platform which results in damages to consumers

Platform operators fail to record and

preserve information released on their

and transaction, and fail to ensure the

Platform operators fails to take

such information.

the PRC Criminal Law.

(4) Article 10 of EC Law;

(5) Article 12 and article 15 of EC Law;

(6) Article 16 and article 76 of EC Law;

(7) Article 11 and 14 of EC Law;

platforms about commodities and service

integrity, confidentiality and availability of

appropriate measures when they know or

should have known that the merchant

was selling commodities or offering

(10) Article 45 and article 84 of EC Law; (11) Article 36 of PRC Tort Law; (12) Article 42, 43, 44, 45 and 84 of EC Law; (13) Article 19 and article 77 of EC Law; (14) Article 21 and 78 of EC Law; (15) Article 18 and article 77 of EC Law; (16) Article 27, article 38 and article 80 of EC Law;

(18) Article 38 and article 83 of EC Law;

(19) Article 39 and article 81 of EC Law;

(20) Article 40 and article 81 of EC Law;

(22) Article 24 and article 76 of EC Law;

An Integrated