
CHINA LAW UPDATE

THE FIRST-EVER E-COMMERCE LAW:
HOW WILL THE LAW IMPACT INDIVIDUALS
AND BUSINESSES?

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I. INTRODUCTION

After four rounds of debates, on August 31, 2018, the leading legislators of China passed *E-Commerce Law of the People's Republic of China* (hereinafter referred to as "ECL"). The law has become effective on January 1, 2019. ECL aimed at improving regulation of the flourishing online market, specifying various regulations concerning operators, contracts, dispute settlement and liabilities involved in e-commerce as well as the market development.¹ On the whole, ECL imposes relatively heavy obligations and responsibilities on e-commerce businesses, especially on platforms, and provides protection for the relatively disadvantaged e-commerce consumers. This note will introduce some key provisions of ECL, including those affecting the interests of Chinese individual *daigous*, those providing various protection for Chinese consumers, and those ruling the obligations of the e-commerce platforms.

II. CRACKDOWN ON INDIVIDUAL *DAIGOUS*

Under ECL, the legal definition of an "e-commerce operator" covers most online sellers², including e-commerce platforms such as Taobao and JD.com, any vendor on any of these platforms, as well as individual sellers. In particular, the law would have a great impact on individual purchasing agent, or "*daigou* (代购)", who purchase and deliver in person luxury goods and other commodities sold at a cheaper price overseas for domestic clients. From 2014 to 2017, the *daigou* merchants group grew from an estimated 7.52 million to 20.18

¹ Said Yin Zhongqing, one of the lawmakers, at a press conference held by the General Office of the NPC Standing Committee on August 31, 2018. See *China Focus: China Adopts E-Commerce Law to Improve Market Regulation*, XINHUA NET (Aug. 31, 2018), http://www.xinhuanet.com/english/2018-08/31/c_137434452.htm.

² *Dianzi Shangwu Fa* (电子商务法) [E-Commerce Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2018, effective on Jan. 1, 2019) art. 9 (Chinalawinfo).

million.³ These small-business operators buy products overseas, and sell products to mainland Chinese customers through e-commerce platforms or through social media apps such as WeChat. To these merchants, a major part of profits derives from the escaped tax.⁴ Yet the government is now coming down heavily on these merchants. Pursuant to ECL, *daigou* merchants are obligated to register and pay taxes.⁵ In fact, the government's harsh attitude towards *daigou* had previously been manifested. Since 2018, customs officers in China have started to carry out their inspection in a stricter manner.⁶ In August 2018, a Taobao *daigou* merchant from Guangzhou even received a ten-year sentence for committing the crime of smuggling goods.⁷ With the tightening regulation, some individual *daigous* would raise the product prices in compensation for the compliance costs; others might directly quit the business.

On the other hand, the enormous domestic demand for overseas goods continues to expedite the expansion of cross-border transaction platforms established by large corporate resellers. Recent decisions of Alibaba and NetEast to expand Tmall Global and Kaola, respectively, signify the steps to be taken by e-commerce magnates to make up for the shortfall from the imposition of taxes on *daigous*.⁸ The Moodie Davitt Research proprietary analysis of *daigou* activity in Korea suggests that portion of corporate *daigous'* reseller sales rose from 40% in 2018 to 60% in Q1 2019. The implied year-on-year growth

³ Ma Jing (马靖), *Dianshangfa Zhengshi Luodi, Geren Haiwai Daigoumen Hequ Hecong?* (电商法正式落地, 个人海外代购们何去何从?) [With E-Commerce Law Coming into Effective, How Will It Impact Individual Daigous?], XINHUA NET (Jan. 2, 2019), http://www.xinhuanet.com/fortune/2019-01/02/c_1123935069.htm.

⁴ Fan Xiangdong (范向东), *Dianshangfa Shishi Hou, Shiye Daigou De Chulu Zai Naer?* (电商法实施后, “失业”代购的出路在哪儿?) [After the Enforcement of E-Commerce Law, Where Should the Jobless Daigou Go?], HUXIU (Dec. 30, 2018), <https://www.huxiu.com/article/279102.html>.

⁵ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 10-12 (Chinalawinfo).

⁶ Wang Lianzhang, *What a New Law Could Mean for China's 'Daigou'*, SIXTH TONE (Dec. 30, 2018), <https://www.sixthtone.com/news/1003372/what-a-new-law-could-mean-for-chinas-daigou>.

⁷ You Yan Zousi Putong Huopin Wupin An Ershen Xingshi Panjueshu (游燕走私普通货物、物品案二审刑事判决书) [You Yan (Smuggling Common Goods)] (Guangdong Sup. People's Ct. June 18, 2018, No. 697), <http://wenshu.court.gov.cn/content/content?DocID=9daa6f68-b2be-43ce-9d6c-a94d009c00d7&KeyWord=%E6%B8%B8%E7%87%95>.

⁸ Frank Ka-Ho Wong, *China's Crackdown on Daigou, New Cross-Border e-Commerce Policies*, CHINA BRIEFING (Jan. 10, 2019), <https://www.china-briefing.com/news/chinas-crackdown-daigou-cross-border-e-commerce-policies>.

rate of the corporate *daigou* the first quarter is close to 100% compared to a decline of 48% in individual *daigou*.⁹

In conclusion, the crackdown on individual *daigous* would lead to a diversion of business operators from individuals to corporations and e-commerce platforms. Moreover, Chinese consumers, while shouldering a higher cost, would benefit from the credibility of retailers and their products due to stricter management. To some extent, the policy is a manifestation of China's continuing shift from an investment-driven model to a consumption- and services-driven model.

III. PROTECTION OF CONSUMER RIGHTS

A. Prohibition of Price Discrimination

Pursuant to Article 18 of ECL (hereinafter referred to as "Article 18"), "when providing the results of search for commodities or services for a consumer based on the hobby, consumption habit, or any other traits thereof, the e-commerce business shall provide the consumer with options not targeting his/her identifiable traits".¹⁰

It may be seen from the wording that Article 18 attempts to save consumers from the so-called "information cocoon". Consumers in the e-commerce society are likely to be trapped in a "fabricated informational sphere built in a constant feedback loop around preferences voiced at an earlier time".¹¹ Were undifferentiated searching results provided, consumers will have more shopping choices.

However, as shown in the legislative history and some official reports¹², Article 18 is actually intended to fix another main concern in China: the so-called "big data killing (大数据杀熟, Dashuju Shashu)". Big data killing is a form of price discrimination. It means

⁹ Martin Moodie, *Exclusive Report: Chinese Daigou Traders in South Korea Adapt Fast to New Ecommerce Law* MOODIE DAVITT REP. (May 31, 2019), <https://www.moodiedavittreport.com/exclusive-report-chinese-daigou-traders-in-south-korea-adapt-fast-to-new-ecommerce-law>.

¹⁰ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 18 (Chinalawinfo).

* ¹¹ Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases and Shaping Preferences-The Dark Side of Personalized Transactions*, 86 U. CHI. L. REV. 581 (2019).

¹² Bai Ying (白瀛) et al., *Bimian Dashuju Shashu, Guifan Dashou Xingwei—Jujiao Dianshang Fa Sanshen Redian (避免大数据“杀熟” 规范搭售行为——聚焦电商法草案三审热点)* [Heated Spots During the Third Deliberation Of ECL: Avoiding Big Data Killing And Ruling Tie-in Sales], XINHUA NET (Jun. 19, 2018), http://www.xinhuanet.com/legal/2018-06/19/c_1123005798.htm.

that e-commerce businesses would use big data to remember and identify old users, and offer relatively higher price to them, especially those who are analyzed to be richer and more desiring. While no e-commerce platform in China publicly admits such a price strategy, a data programmer from Nokia China anonymously admitted that platforms do profile consumers and would offer lower prices to new consumers.¹³ In April 2018, an official newspaper in China, People's Daily, reported several cases of e-commerce price discrimination and called for regulations to be introduced. The report revealed that online car-hailing platforms were offering different prices in the same region to different consumers, and online travel agents were revealing different real-time room vacancies to different consumers. Similar situations are also reported to occur in online shopping, online ticket purchases, video websites, etc.¹⁴ As is said, "In the age of the Internet, fixed prices are a thing of the past".¹⁵

Nevertheless, it remains a dispute whether law should regulate price discrimination in e-commerce. Even though the word "discrimination" traditionally bears a negative connotation, some argue that the term "price discrimination" should be read neutrally as it constitutes a fundamental concept in economic theory.¹⁶

B. No more Automatic Tie-in Sales

A tie-in sale is a business practice whereby a seller encourages a buyer not only to buy the good or service of primary interest to him but to buy also, as part of the same transaction, some other related good or service. For example, when a consumer purchases an airline ticket online, the check box of value-added services would be selected by default.

¹³ Lü Xinwen (吕新文), *Yizhi Zai fei de Dashuju Shashu Cunzai Ma, Jishu shang Kexing Ma?* (一直在飞的"大数据杀熟"存在吗, 技术上可行吗?) [Does the "Big Data Killing" Exist? Is it possible in technology?], SINA (Oct. 24, 2018), <https://tech.sina.com.cn/i/2018-10-24/doc-ihmxrkzw1086592.shtml?source=cj&dv=1>.

¹⁴ Qi Zhiming (齐志明), *Shangwang Xiang Bianli, Xiaofei Fang Suanji* (上网享便利, 消费防算计) [When Enjoying the Convenience of Shopping Online, Consumers Shall Also Be Careful], RENMIN RIBAO (人民日报) [PEOPLE'S DAILY], Apr. 24, 2018, at 06, http://paper.people.com.cn/rmrb/html/2018-04/24/nw.D110000renmrb_20180424_1-06.htm.

¹⁵ Julia Angwin & Dana Mattioli, *Coming Soon: Toilet Paper Priced Like Airline Tickets*, WALL ST. J. (Sept. 5, 2012), www.wsj.com/articles/SB10000872396390444914904577617333130724846.

¹⁶ Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security & Consent*, 93 TEX. L. REV. 85 (2014).

Pursuant to Article 19 of ECL, if an e-commerce business performs tie-in sale of commodities or services, it shall request consumers to pay attention in a conspicuous manner, and shall not set the said tie-in sale as a default option.¹⁷ Article 19 is aimed at protecting a consumer's right of choice and fair-trade. It does not directly prohibit the tying conduct, but prevents deception against consumers or taking advantage of their negligence. Up until now, most primary online travel platforms in China, including Ctrip, Tuniu and Lvmama, have canceled default tying on their websites.

C. Protection of Personal Data

Pursuant to Article 23 of ECL, the collection and use of individual information shall observe the provisions on protection of individual information in the relevant laws and administrative regulations.¹⁸ Pursuant to Article 24, an e-commerce business shall expressly state the means of and procedures for search, correction or deletion of user information; when receiving an application for search, correction or deletion of user information, an e-commerce business shall, upon verification of identity, permit search, correction or deletion of user information in a timely manner.¹⁹ Such protection of personal data echoes China's progressive law-making process in respect of information privacy, e.g. the issued Cybersecurity Law of the PRC²⁰, and the under-drafting Personal Data Protection Act²¹.

Meanwhile, such protection also conforms to the global trend of stricter data regulation. The rights provided in Article 24 highly imitates the right to access, correct, and erase data provided in the General Data Protection Regulation (GDPR), proposed by the forerunner in data regulation, the European Union. Yet GDPR went steps further, as it rules upon consumers' rights regarding profiling. The term "profiling" under the GDPR is broadly defined. It consists

¹⁷ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 19 (Chinalawinfo).

¹⁸ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 23 (Chinalawinfo).

¹⁹ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 24 (Chinalawinfo).

²⁰ Wangluo Anquan Fa (网络安全法) [Cybersecurity Law] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 7, 2016, effective Jun. 1, 2017) (Chinalawinfo).

²¹ Zhu Ningning (朱宁宁), *Xiangguan Bumen Zheng Yanjiu Qicao Geren Xinxi Baohu Fa* (相关部门正研究起草个人信息保护法) [*Personal Data Protection Law Has Been On the Legislators' Agenda*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Mar. 5, 2019, at 01, <http://epaper.legaldaily.com.cn/fzrb/content/20190305/Article01008GN.htm>.

of three aspects: (1) any form of automated processing; (2) of personal data; and (3) with the aim of evaluating the personal aspects relating to a natural person, including personal preferences and interests. Article 21 of the GDPR states, “where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing, which includes profiling to the extent that it is related to such direct marketing”.²² In contrast with the GDPR, ECL only establishes consumers’ right to the individual information they submitted, but lacks right to control how the individual information can be profiled by the e-commerce businesses. It remains to be seen whether China’s under-drafting Personal Data Protection Act will include the latter right.

IV. OBLIGATIONS OF E-COMMERCE PLATFORM BUSINESSES

A. Obligation of Platforms to protect consumers

Prior to promulgation of ECL, e-commerce platforms’ obligations to protect the rights and interests of consumers were regulated in separate laws, including Tort Law, Food Safety Law, and Law on the Protection of Consumer Rights and Interests, etc. ECL gathered them together. Pursuant to Article 38 of ECL, an e-commerce platform business has three main obligations.

The first is **the obligation to take necessary measures to prevent illegal acts**. According to Article 38, when a platform business “knows or should have known that an in-platform business sells commodities, or provides services, inconsistent with the requirements for guaranteeing personal and property safety, or commits any other conduct of infringing upon the lawful rights and interests of consumers”²³, the platform business shall be jointly and severally liable. To be “jointly and severally liable” means that an infringed customer is entitled to require some of the platform to assume the liability. Such an obligation corresponds with Article 36 of the Tort Law, Article 44 of the Law on the Protection of Consumer Rights and Interests, and Article 62 of the Food Safety Law, which provides respectively that a network service provider, the provider of an online

²² Commission Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L 199) 1, art. 21.

²³ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 38 (Chinalawinfo).

trading platform, and the provider of a third-party online food trading platform shall take necessary measures when they discover that any in-platform trader conducts illegal act. To be more specific, a network service provider shall take measures as deletion, block or disconnection²⁴; the provider of an online trading platform shall provide the true names and addresses and valid contact methods of the sellers as required²⁵; the provider of a third-party online food trading platform shall stop the violation act in a timely manner, and immediately file a report with the food safety supervision and administration department of the local people's government at the county level, or even immediately stop providing online trading platform services if the illegal act is serious.²⁶

The second is **the obligation of reviewing the qualifications of an in-platform business**. Such an obligation corresponds with Article 62 of the Food Safety Law, which provides that the provider of a third-party online food trading platform shall register the legal names of food traders admitted to the platform and define their food safety management responsibilities; and check the permits of those that are required to obtain permits.²⁷

The third is **the obligation of guaranteeing the safety of consumers**. From the wording, such an obligation corresponds with Article 37 of the Tort Law. However, Article 37 of the Tort Law only governs the manager of a public venue such as hotel, shopping center, bank, station or entertainment place or the organizer of a mass activity.²⁸ By adding such an obligation to Article 38 of ECL, the lawmakers are actually expanding the obligation of guaranteeing consumer safety, from physical conditions to online ones.

As to the second and third obligations, pursuant to Article 38, in respect of commodities or services relative to the life and health of consumers, if an e-commerce platform business causes damage to a

²⁴ Qinquan Zeren Fa (侵权责任法) [Tort Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective Jul. 1, 2010) art. 36 (Chinalawinfo).

²⁵ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on the Protection of Consumer Rights and Interests] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 25, 2013, effective Mar. 15, 2014) art. 36 (Chinalawinfo).

²⁶ Shipin Anquan Fa (食品安全法) [Food Safety Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2009, effective Dec. 29, 2010) art. 62 (Chinalawinfo).

²⁷ Shipin Anquan Fa (食品安全法) [Food Safety Law] art. 62 (Chinalawinfo).

²⁸ Xiaofeizhe Quanyi Baohu Fa (消费者权益保护法) [Law on the Protection of Consumer Rights and Interests] art. 37 (Chinalawinfo).

consumer by its failure to perform such obligations, the platform shall be “correspondingly liable in accordance with the law”. This indicates that ECL neither adopts the traditional “joint and several liability” nor “complementary liability”.

During the drafting process, lawmakers conducted heated discussions over whether the platform businesses shall shoulder “joint and several liability” or “complementary liability” in violating obligations.²⁹ “Complementary liability” means that an infringed customer can sought compensation from the platform business only after he or she has asked the in-platform business to assume liability and has yet been fully compensated. “Joint and several liability”, compared with “complementary liability”, is a heavier burden for e-commerce platform businesses.

Some lawmakers’ clinging to “joint and several liability” is greatly influenced by the then striking social news concerning Didi, China’s largest car-hailing service provider. The fourth drafting meeting was scheduled on August 31, 2018. On August 24, the police confirmed that a driver for Didi service raped and killed a woman passenger in Wenzhou, China. In the past four years, about 53 female passengers accused Didi drivers of sexual assault and harassment.³⁰ Proponents of “joint and several liability” emphasize that platforms like Didi shall be more careful and responsible. Yet Opponents claimed that such strict liability would curb the vigorous development of e-commerce platform businesses³¹. The argument ended with a blurred wording of “correspondingly liable”³², which left discretion to judges and courts. Although some critics blamed the arrangement to be irresponsible, such flexibility does keep a balance between protecting the right of consumers and safeguarding the development of e-commerce platforms.

²⁹ Zhou Dongxu (周东旭), *Dianzi Shangwu Fa Pingtai Zeren Mohu Chuli Nengfou Pingxi Zhengyi* (电子商务法平台责任模糊处理能否平息争议) [Whether The Blurred Provisions on E-Commerce Platform Liabilities Can Settle Disputes], CAIXIN (Aug. 30, 2018), <http://opinion.caixin.com/2018-08-30/101320744.html>.

³⁰ Alice Zhang, *Over 50 Sexual Assaults and 2 Murders in 4 Years, How Can Didi Better Protect its Passengers?*, PANDAILY (May 29, 2018), <https://pandaily.com/over-50-sexual-assaults-and-2-murders-in-4-years-how-can-didi-better-protect-its-passengers>.

³¹ Shan Yuxiao et al., *Chinese Legislators Worry New E-Commerce Law Could Hurt Consumer Safety*, CAIXIN (Aug. 30, 2018), <https://www.caixinglobal.com/2018-08-30/legislators-worry-new-e-commerce-law-could-hurt-consumer-safety-101320652.html>.

³² Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 38 (Chinalawinfo).

B. Obligation of Platforms to Protect Intellectual Property (IP)

On Chinese B2C transaction platforms, counterfeit goods have long been a serious problem. In 2018, the problem became even worse with the rise of Pinduoduo.com, China's third-largest e-commerce platform where 60% of the users are in third-tier cities or below.³³ While cutting prices to such a low level that the platform is not expected to be profitable in the near future, Pinduoduo has long faced allegations that some products on its platform are fake. In April 2019, The United States added Pinduoduo to its list of 'notorious markets' for violations of intellectual property rights and kept China on its priority watch list for piracy and counterfeiting concerns.

Articles 41 to 45 of ECL provide a framework for IP protection in e-commerce transaction. Articles 42-44 provide a "notice and take-down" procedure, in which an IP holder can notify the platform of certain IP infringement, and the platform is obligated to take timely and necessary measures; meanwhile, the vendor, upon receipt of the notice, is entitled to give a declaration.³⁴ Article 45 specifically provides that an e-commerce platform operator will have to take joint and several liability along with the vendors, where a platform should know that a vendor has violated intellectual property rights and failed to take the necessary action in removing the infringing goods from the platform. This is a piece of good news for IP holders, as previously it has been difficult to obtain payment from smaller infringing parties.

V. CONCLUSION

As the e-commerce industry has become one of the backbones of the development of digital economy in China, it is vitally important to build the e-commerce rule of law in the country. ECL establishes a basic legal framework for e-commerce regulation. It clearly rules the scope of market subjects as well as their rights and obligations. It provides mechanisms through which consumers can claim protection and supervision departments can exert penalties. Some of the rules are

³³ Paul Armstrong & Yue Wang, *Pinduoduo: The \$1.5B Startup Challenging E-Commerce Giant Alibaba in China's Towns and Villages*, FORBES (Apr. 6, 2018), <https://www.forbes.com/sites/ywang/2018/04/06/pinduoduo-the-1-5b-startup-challenging-e-commerce-giant-alibaba-in-chinas-towns-and-villages/#7dc33b344d7f>.

³⁴ Dianzi Shangwu Fa (电子商务法) [E-Commerce Law] art. 42-44 (Chinalawinfo).

novel. Some are a unification of existing rules catering to the context of e-commerce. Small businesses might be dissuaded from entering the e-commerce market because of higher entry cost. Big businesses shall make efforts to ensure that their systems are compliant with the new regime. Still, it remains to be seen to what extent will ECL be activated or executed.