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Electronic Commerce Law (Second Review Draft) For Public Comment to Strengthen Platform Operator Obligation Rules

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From October 30 to November 4, 2017, the 30th Session of the 12th NPC Standing Committee held a review of the second draft of *Electronic Commerce Law of the People's Republic of China* (Draft) (“**Second Draft**”). Compared with the first draft released in December 2016 (“**First Draft**”), the Second Draft simplifies and integrates the relevant provisions of the *Cybersecurity Law*, *Anti-Unfair Competition Law*, *Postal Law* and *Law on Protection of Consumer Rights and Interests* with respect to personal information protection, anti-unfair competition, express logistics and consumer protection based upon the principle of “highlighting key points and simplifying by removing duplication.” The Second Draft further regulates the conduct of e-commerce operators, especially platform operators, according to the characteristics and practices of e-commerce, and expands and strengthens the obligations and responsibilities of platform operators based on the nature and function of those platforms.

In this article, we will summarize and analyze the changes to the regulatory provisions over platform operators provided under the Second Draft, including in the following aspects:

Further strengthen the management responsibilities of platform operators

According to the First Draft, platform operators should undertake certain administrative responsibilities. For example, platform operators are obliged to examine the identity and administrative license information of the vendors who log onto the platform (“**Vendors**”). The Second Draft modifies this platform operator obligation by changing it from a duty to “examine” such information to instead “verify” it (Article 23), which will substantially relieve the examination obligations that would have otherwise been imposed. Although the Second Draft does not explicitly provide the specific methods for verification, generally speaking, the obligation to “verify” should be considered fulfilled if the platform operator conducts a formal check of the information provided (including examining the QR code information on the business license).

The Second Draft also increases the information reporting obligations of platform operators, who are required to report the identity and operating information of Vendors on the platform to the industry and commerce authorities and tax authorities in accordance with the relevant provisions (Article 23). However, the Second Draft only provides general principles of this obligation, and does not articulate the purpose (whether it is for general statistics or the investigation of illegal business activities or for other administrative purposes), scope (whether it only includes statistical or desensitized information, or also contains raw data involving personal privacy and trade secrets), conditions (whether the report is to be issued only on the basis of law and administrative regulations, or also under rules and local laws and regulations) and procedures (whether it is necessary to obtain the consent of the parties concerned, or it is necessary to give the concerned parties appropriate notice) of the reporting. According to the existing regulations, platform operators are required to report statistical market transaction information of the Vendors, or as a response to an investigation proceeding against suspected violations within the platform, to provide the registration information and transaction data of the suspected illegal Vendor. The Second Draft imposes broader information reporting obligations on platform operators. While these broadened obligations will increase the compliance burden on platforms, they will also render sensitive information to be circulated more widely, which may bring additional information security concerns for Vendors. We recommend that the follow-up drafts further clarify and limit the information reporting obligations of platform operators.

Improve platform operators' formulation of service agreements and rules of trade

As providers of e-commerce transaction platforms, platform operators need to sign relevant service agreements with Vendors that join the platform, and clarify trading rules and policies applicable to the transactions occurring on the platforms. Although such agreements and rules are regarded as internal policies developed by platforms, they have a significant effect on the health of the e-commerce ecosystem due to their wide-ranging application and the large transaction volumes involved.

According to the First Draft, platform operators are to develop service agreements and rules of trade based on the principles of openness, fairness and impartiality. Such rules should clearly specify rights and obligations of Vendors joining and exiting the platforms, the warranty of goods and services, the protection of consumer rights and personal information (Article 27). Platform operators are to display platform service agreements and rules of trade in a conspicuous manner and on continuous basis (Article 28). If the platform intends to revise the rules of trade, it should release an announcement for public comment for such revisions in a prominent location on the homepage, and the revised content is to be publicized 7 days before being implemented. If the Vendors refuse to accept the changes, they have the right to withdraw from the platform and assume relevant responsibilities in accordance with the

original rules (Article 29). The Second Review further improves the abovementioned provisions by requiring amendments to the platform service agreement to also go through public comment before being implemented (Article 29).

In light of the significant effect that service agreements and rules of trade have on the e-commerce ecosystem, the Second Draft further stipulates that platform operators may not impose unreasonable restrictions or impose unreasonable conditions to the transactions that occur on their platforms via services agreements or rules of trade, and platform operators may not charge Vendors unreasonable fees (Article 30). To some extent, this requirement echoes the provisions of the *Anti-Unfair Competition Law* that prohibits the “abuse of market dominant position.” However, under the *Anti-Unfair Competition Law*, if Vendors claim that the platform has committed any act of abuse of market dominant position, they initially need to define the relevant market, and then prove that the platform occupies a dominant position in the relevant market and that the platform has committed acts of abusing that dominant position. This directly leads to uncertainty in practice when establishing whether a platform operator has committed any acts of abuse of market dominant position, although some of the platforms with advantageous position in the market have committed some obviously unfair behaviors. In contrast, the Second Draft is tailored to online transactions by providing more simplified and practical protections for Vendors. According to the Second Draft, Vendors only need to prove that the platform has imposed some unreasonable restrictions or conditions on them, and the Vendors will then be deemed to have fulfilled their burden of proof. This will help to further regulate conduct of platforms and to establish a fairer market environment.

Strengthen the obligations of platform operators to protect consumer rights and interests

Platforms do not directly enter into sales or service contracts with consumers. If the goods or services sold on the platform damage the rights and interests of consumers, the consumers would initially raise claims against the manufacturer or seller of the goods or the provider of services. However, as the provider of the transaction platform, the platform also undertakes certain duties to consumers, including upholding consumers’ right to information, right of choice, right to fair trade and right to compensation for damages. The Second Draft supplements and improves the relevant provisions in this regard.

To protect consumers’ right to information and the right of choice, the First Draft required that platform operators establish and improve the evaluation system and publicize evaluation rules (Article 33). Based on this provision, the Second Draft specifies that platform operators are to provide consumers with a means of making comments regarding the products or services purchased on the platform; platform operators may not delete the consumers’ comments other than those containing insulting, defamatory or clearly false information (Article 33). In addition, the Second Draft also requires platform operators to display search results for products or

services in various ways such as by price, sales volume and credit level, and mark paid product rankings as “advertisements” prominently (Article 34). According to the *Interim Measures for the Administration of Internet Advertising* promulgated by SAIC in 2016, online paid ranking is deemed to be advertising and shall be clearly identified as an “advertisement”. The Second Draft clarifies that in the context of e-commerce, paid ranking is also a type of advisement and shall be marked prominently, which will help consumers to assess search results in a more informed manner. Since platform operators engaging in paid rankings are regarded as engaging in advertising, the platform, as an advertisement distributor, must comply with the laws and regulations related to advertising, including the obligation to review the qualifications of advertisers and the content of advertisements.

With respect to consumers’ right to compensation for damages, the Second Draft incorporates certain provisions of the *Law on Protection of Consumers’ Rights and Interests*, by providing that if the consumers require the platform operators to pay compensation in advance, the relevant provisions of the *Law on Protection of Consumers’ Rights and Interests* shall apply (Article 51). According to Article 44 of the *Law on Protection of Consumers’ Rights and Interests*, “Consumers whose legitimate rights and interests are infringed via an online trading platform shall have the right to claim compensation from the vendor of the goods or the provider of the services. Where the operator of the online trading platform cannot provide the true name, address and effective contact information of the vendor or service provider, the consumers shall have the right to claim compensation from the operator of the online trading platform. Where the operator of the online trading platform has made commitments on more favorable terms to consumers, the operator is required to perform those commitments. After compensating the consumers, the operator of the online trading platform is entailed to claim compensation from the vendor or service provider.” Therefore, the platform is obligated to review on qualifications of Vendors on the platform and should actively assist consumers in safeguarding their rights. Otherwise, the platform may be required to compensate consumers for any loss incurred. In addition, if the platform makes, inter alia, “advance compensation” or “rapid refund” commitments, consumers may also request the platform to perform such commitments.

In connection with the protection of consumers’ supervision rights, the Second Draft requires that e-commerce operators, including platform operators, establish a convenient and effective complaint and reporting mechanism, publicize complaint and reporting methods, and accept and handle complaints and reporting in a prompt manner (Article 52).

Strengthen the intellectual property rights protection responsibilities of platform operators

In terms of intellectual property protection, the Second Draft improves the application of the “notice - remove” rule in the e-commerce sector based on the Internet infringement provisions

specified in the *Tort Liability Law*. According to the Second Draft, if a platform fails to take necessary measures in a timely manner after receiving a notice of infringement from an intellectual property rights owner, the platform will bear joint and several liability with the infringing party on the platform for the expanded part of the loss (Article 36). The platform must take proper measures if the platform operator knows or should have known that Vendors on the platform are violating other parties' intellectual property rights. If no such necessary measures are taken, the platform is also subject to joint and several liability with the infringing party on the platform (Article 39). Compared with the First Draft that requires platform operators to take measures only if they "receive an infringement notice" or "know of the existence of infringement," the Second Draft further requires that platform operators also take measures when they "should have known" the existence of infringement. This means that the platform cannot claim to be exempt from the liability for infringement on the grounds that it has not received an infringement notice. As such, the Second Draft places a higher standard of duty of care on platforms with respect to intellectual property rights protection. If the platform has fulfilled its duty of care but still fails to detect the infringing behaviors, the platform can be exempt from liability for such infringement; otherwise, the platform will assume joint and several liabilities for the infringement. In general, a platform's duty of care should be commensurate with its business model, scale of operation and technology and management capabilities. In order to comply with this new standard under the Second Draft, we recommend that platforms establish a proactive monitoring system to ensure that an alarm can be raised immediately the moment any obvious or easily identifiable infringement is detected so that the platform can take necessary measures in a timely manner.

Corporate compliance suggestions

In general, draft legislation undergoes three rounds of review by the NPC Standing Committee before it is submitted for a vote. Considering the Second Draft sees significant changes compared to the First Draft, we expect that opinions among the various parties are still diverse with respect to the draft content and more revisions can be expected in the future. Having said that, based on the contents of the Second Draft, we suggest that the platform operators can improve their compliance efforts in the following aspects:

- a. Improve platform service agreements, strengthen management and control of Vendors through contract arrangements. Establish and implement Vendor information disclosure and verification systems; require Vendors to provide truthful information and update in a timely manner; require Vendors to cooperate with information verification work implemented by the platform as the platform requires.
- b. Improve the process for modifying rules of trade and service agreements, modify relevant documents according to the procedure and manner required by law, change the practice

having modification immediately take effect upon notice via system emails or messages, and seek public comment for changes before those changes are implemented.

- c. Mark paid product and service rankings in a prominent manner, establish and implement a system for advertisement engagements, the examination of the qualifications of advertisers and the advertising content in accordance with the *Advertising Law* and other regulations.
- d. Establish and implement an intellectual property rights monitoring and control system based on the platform's business model, scale of operation and technical capabilities; try to detect and control infringing behaviors in a timely manner by supervising and analyzing any irregularities in product prices, sales volumes, credit ratings and market opinion and reception.
- e. Improve the complaint and reporting system, ensure the effectiveness of complaint and reporting channels to ensure the platform can notice and deal with the infringing behaviors in a timely manner. and clearances, and liability for damages from product defects. CMO Contracts and drug quality agreements complement and are indispensable to each other in a manner similar to the relationship between GMP operating procedures and process specifications.

● **Important Announcement**

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