

电子商务法律热点问题

《电子商务法》（草案三次审议稿）征求意见

2018年6月29日，《电子商务法》草案三次审议稿（以下简称“**三审稿**”）经提交第十三届全国人大常委会第三次常委会审议后，向社会公布并公开征求意见。虽然已完成《立法法》规定的三次常委会审议流程，三审稿正式出台尚无明确时间表。但出台后，《电子商务法》势必将对目前的电子商务实践产生较大影响。三审稿主要内容总结如下。

一、调整对象和适用范围

《电子商务法》适用于“中国境内的通过互联网等信息网络进行商品交易或者服务交易的经营活动”（以下简称“**电商活动**”），但金融类产品和服务，利用信息网络提供新闻信息、音视频节目、出版以及文化产品等内容方面的服务均不适用（**第二条**）。

二、电子商务经营者

电子商务经营者是指“通过互联网等信息网络从事销售商品或者提供服务的经营活动的自然人、法人和非法人组织”。

三审稿明确了电子商务经营者的三种类型，包括：（i）电子商务平台经营者；（ii）平台内经营者；以及（iii）通过自建网站、其他网络服务销售商品或者提供服务的电子商务经营者。其中电子商务平台经营者（以下简称“**平台经营者**”），是指在电子商务中为交易双方或者多方提

供虚拟经营场所、交易撮合、信息发布等服务，供交易双方或者多方独立开展交易活动的法人或者非法人组织（**第十条**）。

三、电子商务经营者的一般义务

根据三审稿，电子商务经营者在经营电商活动时应当遵守一系列一般性义务，主要包括：

1. 进行市场主体登记；
2. 获得必须的行政许可；
3. 对资质证照及其他重要信息进行公示，如自行终止电商活动应提前三十日进行公示；
4. 遵循相关法律法规规定的个人信息保护规则，明示用户信息查询、更正、删除以及用户注销的方式、程序，及时响应用户请求；
5. 全面、真实、准确地披露商品或者服务信息，保障消费者的知情权和选择权；
6. 承担商品运输中的风险和责任。

除此之外，三审稿针对近期热点问题，新增了一系列义务：

1. 针对“刷单”问题，规定电子商务经营者不得以虚构交易、编造用户评价等方式进行虚假或者引人误解的商业宣传，欺骗、误导消费者；

2. 针对“大数据杀熟”问题，规定电子商

务经营者根据消费者的兴趣爱好、消费习惯等特征向其推销商品或者服务，应当同时向该消费者提供不针对其个人特征的选项，尊重和公平保护消费者合法权益；

3. 针对“搭售”问题，规定电子商务经营者搭售商品或者服务，应当以显著方式提请消费者注意，不得将搭售商品或者服务作为默认同意的选项；

4. 针对押金收取及退还，规定电子商务经营者应当明示押金退还的方式、程序，不得对押金退还设置不合理条件、并及时退还；

5. 针对“平台经营者 2 选 1”问题，规定电子商务经营者因其技术优势、用户数量、对相关行业的控制能力以及其他经营者对该电子商务经营者在交易上的依赖程度等因素而具有市场支配地位的，不得滥用市场支配地位，排除、限制竞争。

四、电子商务平台经营者的特别规定

根据三审稿，平台经营者除需要遵守一般经营者的法律义务外，还需要遵守如下特别规定：

1. 履行对平台内经营者的核验和管理义务；
2. 履行对工商、税务等政府部门的信息报送义务；
3. 对商品和服务信息、交易信息记录、保存不少于三年；
4. 制定平台服务协议和交易规则，且在显著位置持续公示，修改服务协议和交易规则的需公开征求意见；
5. 公示对平台内经营者的处罚；
6. 区分自营和非自营业务；
7. 建立健全信用评价制度，不得删除消费者对其平台内销售的商品或者提供的服务的评价；
8. 对竞价排名的广告显著标明“广告”；
9. 建立知识产权保护规则，在规定的情况下采取删除、屏蔽、断开链接、终止交易和

服务等必要措施。

除上述义务以外，三审稿中特别规定了平台经营者应承担连带责任的三种情形：

1. 知道或者应当知道平台内经营者销售的商品或者提供的服务不符合保障人身、财产安全的要求，或者有其他侵害消费者合法权益行为，未采取必要措施的；

2. 对平台内经营者的资质资格未尽到审核义务，或者对消费者未尽到安全保障义务，造成消费者损害的；以及

3. 知道或者应当知道平台内经营者侵犯知识产权，未采取必要措施的。

五、电子商务合同的订立及履行

三审稿对使用自动信息系统订立或者履行合同的法律效力，电子商务合同成立条件、交付时间进行了明确约定，并对电子商务中的物流服务、电子支付服务进行了原则性规范。

特别地，三审稿中对电子支付服务提供者在信息保存、处置非授权的支付和举证责任方面提出了新的要求：

1. 电子支付服务提供者应当向用户免费提供对账服务以及最近三年的交易记录；

2. 用户电子支付服务提供者发现支付指令未经授权，或者收到用户支付指令未经授权的通知时，应当立即采取措施防止损失扩大，因未及时采取措施导致损失扩大的，电子支付服务提供者对损失扩大部分承担责任。

3. 未经授权的支付造成的损失，由电子支付服务提供者承担；电子支付服务提供者能够证明未授权支付是因用户的过错造成的，不承担责任。

六、电子商务争议解决

对于争议解决，三审稿值得关注的是规定了电子商务经营者的举证责任，即：

1. 在电子商务争议处理中，电子商务经营者应当提供原始合同和交易记录；

2. 因电子商务经营者丢失、伪造、篡改、销毁、隐匿或者拒绝提供上述资料，致使人民法院、仲裁机构或者有关机关无法查明事实的，电子商务经营者应当承担相应的法律责任。

七、简评

《电子商务法》如正式通过，将成为我国电子商务领域首部综合性立法，内容涵盖消费者权益保护、经营主体义务、电子商务合同、电子支付、网络安全、个人信息保护、反不正当竞争、

知识产权保护等各方面。可以预见，电子商务经营者，特别是平台经营者，需要根据新法重新审视自身的规则设置、内部机制是否能够满足新法项下强化的消费者保护义务及监管责任。同时，亦可以预见，由于涵盖内容相当广泛，如何与相关领域的现有规定衔接和补充、实践之中如何理解和适用原则性条款和要求、以及如何适应目前不断变化的业务模式，必然存在相当的不确定性和政策空间。我们将密切关注《电子商务法》未来立法进展、及对企业的影响。

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E-commerce Law

Opinions Sought on the E-commerce Law (Draft for Third Review)

The E-commerce Law (Draft for Third Review) (the “**Third Draft**”), deliberated at the 3rd session of the Standing Committee of the 13th National People's Congress of the People's Republic of China, was published for public consultation on June 29, 2018. Despite having been deliberated three times as required by the PRC Legislation Law, there is as yet no clear schedule regarding the introduction of the Third Draft. When it is eventually introduced, the E-commerce Law is likely to have a significant impact on current e-commerce practices. The key content of the Third Draft is summarized below.

I.Adjustment to Target and Scope of Application

The E-commerce Law applies to “business activities for the transaction of goods and services that take place through the Internet or other information networks within the territory of the People’s Republic of China” (“**e-commerce activities**”). However, it does not apply to financial products and services, news information provided through information networks, services that broadcast audio or video programs, and content services such as publications and cultural products (Article 2).

II.E-commerce Operators

E-commerce operators refers to “natural persons, legal persons, and unincorporated organizations that engage in the sale of goods and the provision of services through the Internet or other information networks.”

Three types of e-commerce operators are defined in the Third Draft, namely (i) e-commerce platform operators; (ii) operators on the platform; and (iii) e-commerce platform operators that sell goods or provide services through their own websites or other network services. E-commerce platform operators (“**platform operators**”) refers to legal persons and unincorporated organizations that provide virtual business premises, transaction matching, information dissemination and other services to transaction parties (Article 10).

III.General Obligations of E-commerce Operators

According to the Third Draft, e-commerce operators should abide by a series of general obligations when they undertake e-commerce activities, they being primarily:

- i. Registration of business entities;
- ii. Obtaining any required administrative license;
- iii. Publishing details of licenses and other important information. If the e-commerce

activity is terminated on its own initiative, this information should be published at least 30 days in advance;

- iv. Following the rules to protect personal information as stipulated by relevant laws and regulations, providing clear details about user information, inquiry, correction, deletion and user cancellation, and responding to the user request in time;
- v. Disclosing information about goods or services in a comprehensive, truthful and accurate manner, in order to protect consumers' right to know and right to choose;
- vi. Taking responsibility for any risks in the transportation of goods.

In addition, a series of obligations have been added to the Third Draft in response to various recent trends:

- i. In response to the problem of "Click Farming" , e-commerce operators are not allowed to publish false or misleading commercial propaganda by means of fictitious transactions or user reviews and thereby deceive or mislead consumers;
- ii. Regarding "price discrimination using big data", it is stipulated that, when marketing goods or services to consumers according to their interests, hobbies and consumption habits, 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;
- iii. Consumers shall be made aware of any tying (i.e. the practice of selling one product or service as a mandatory addition to the purchase of a different product or service) by e-commerce operators, and the tying of goods or services shall not be the default option for consent;

- iv. Regarding the collection and refund of deposits, e-commerce operators shall clearly explain the procedures to refund a deposit, shall not impose unreasonable conditions for refunds, and shall promptly provide refunds;
- v. Regarding the issue of e-commerce platform operators prohibiting e-shops from promoting on more than one platform (for the purpose of maximizing profit for its own platform), it is stipulated that any e-commerce operator with market dominance due to factors such as technological advantage, the number of users, the ability to control related industries, and other operators' dependence on its transactions, is prohibited from abusing its position of dominance to exclude or restrict competition.

IV.Special Rules for E-commerce Platform Operators

According to the Third Draft, in addition to the legal obligations applicable to general operators, e-commerce platform operators are required to observe the following special rules:

- i. Assess and manage operators on their platform;
- ii. Submit the required information to government departments, such as industry and commerce, tax, etc.;
- iii. Record and retain goods and services information and transaction records for a minimum of three years;
- iv. Develop service contracts and transaction rules for their platform and keep these prominently displayed. Any changes to these service contracts and transactions rules should be open to public comment;
- v. Publicize any penalties imposed on operators on the platform;
- vi. Distinguish between its own transactions

and its clients' transactions;

- vii. Establish a comprehensive credit evaluation system and refrain from deleting customer reviews of goods and services on the platform;
- viii. Identify any paid listings as such;
- ix. Establish rules to protect intellectual property rights. Adopt appropriate measures for deleting, screening, disconnecting, and ending transactions and services in prescribed situations.

In addition to the above duties, the Third Draft also specifically prescribes three situations in which the platform operator shall share liability:

- i. Failing to adopt necessary measures when they know or should have known that the goods sold or services provided by operators on the platform do not meet the personal or property safety standards, or that there are other actions that infringe the legal rights of the customers;
- ii. Causing damage to consumers because the platform operator did not undertake their duty to check the qualifications of platform operators, or their duty to protect consumer safety;
- iii. Failing to adopt necessary measures when they know or should have known the operators on the platform have infringed intellectual property rights.

V.The Formation and Execution of E-contracts

The Third Draft clearly establishes the validity and execution of contracts drawn up via automated decision-making systems, the conditions for establishing an e-contract, the time frame for transactions, and adopts principles regarding the logistics services and e-commerce payment services in e-commerce.

In particular, the Third Draft introduces the following new requirements relating to

information preservation, the disposal of unauthorised payments and the burden of proof, for e-commerce payment service providers:

- i. E-commerce payment service providers should provide users with free account verification services and transaction records for the past three years;
- ii. They should immediately take steps to minimize losses if they find or are notified of any unauthorized payment instruction. If steps are not taken to minimize losses, and there is a subsequent increase in losses, the e-commerce service provider will be liable for any additional losses;
- iii. Any loss arising from unauthorized payment shall be borne by the e-commerce payment service provider; if the unauthorized payment is found to be caused by the user, the e-commerce service provider will not be responsible for damages.

VI.Dispute Resolution in E-commerce

The Third Draft provides some useful guidance as to the burden of proof for e-commerce operators:

- i. When dealing with e-commerce disputes, e-commerce operators should provide the original contract and transaction history;
- ii. If the e-commerce operator loses, forges, tampers with, destroys, conceals or refuses to provide the aforementioned information, with the result that the People's Court, arbitration centres or other relevant organizations are unable to secure the necessary facts or information, the e-commerce operator shall bear the corresponding legal liability.

VII.Our Observations

If the E-commerce Law is passed, it will become the first ever comprehensive legislation in the field of e-commerce in China to cover areas including the protection of consumer rights, the

obligations of businesses, e-contracts, electronic payments, cybersecurity, the protection of personal information, anti-competitive activity, and the protection of intellectual property rights. It is highly likely that e-commerce operators, and in particular platform operators, will need to reevaluate the ability of their own internal regulatory systems to satisfy the strengthened consumer protections and regulatory responsibilities proposed under the new law.

At the same time, the broad range of subjects

covered by the E-commerce Law suggests there will likely be considerable ongoing uncertainty and space to maneuver. Some of the questions arising include how the E-commerce Law connects with and supplements current regulations, how we should interpret and apply the stated principles and requirements in practice, and how they adapt to the ever-changing business models and technological developments. We will continue to pay close attention to future developments of the E-commerce Law, as well as its influence on the industry and provide updates accordingly.

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