



US-China Business Council Comments on The Draft Ecommerce Law

January 26, 2017

On behalf of the more than 200 members of the US-China Business Council (USCBC), we appreciate the opportunity to provide comments to the National People's Congress on the *Draft Ecommerce Law (Draft Law)*. USCBC and our members recognize that this law reflects the desire of the Chinese government to set rules for ecommerce transactions and support the development of a regulatory system for ecommerce. USCBC is pleased to offer comments on the draft law based on specific inputs received from our member companies. We encourage the National People's Congress to actively consider USCBC's comments while reviewing the *Draft Law*. Addressing these concerns in a comprehensive manner will help to improve the effectiveness of this law and clarify any misunderstandings. USCBC would like to offer the following recommendations.

The *Draft Law* demonstrates positive efforts to address a range of intellectual property concerns as relates to ecommerce, including counterfeiting and other illegal activities conducted through third-party platforms. Various measures in the *Draft Law* would increase platform operators' responsibilities and liabilities. Noteworthy examples are **Article 12's** seller identification requirements, and **Article 53's** requirement that third-party platform operators take "necessary measures" after becoming aware of IP infringement.

However, numerous areas of the *Draft Law* would benefit from clarification. These include key definitions for liability for third-party platforms and operators of ecommerce, as well as definitions regarding what types of data constitute "ecommerce data information."

Chapter I: General Principles

Article 3

USCBC recommends the second paragraph is revised as follows: "for transaction and services involving financial products, computer software or applications, use of telecom networks to broadcast audio and video programs and online publications and other aspects of the service content, this law is not applicable." We believe computer software or application transactions and services, financial products and services, as well as audio and video programs and web publishing service, have special properties and other relevant laws and regulations have made the corresponding specifications, and therefore should be expressly excluded from this draft.

Chapter 2: Ecommerce Operating Entities

Article 17

USCBC recommends defining the term "homepage," so as to clarify whether this refers to the home page of an operator's own corporate website, or the landing page of an operator's branded area on a third-party

January 26, 2017

Page 2

platform. USCBC recommends that “homepage” be defined as an operator’s own corporate website and exclude the landing page of an operator’s branded area on a third-party platform.

Article 19

The *Draft Law* requires third-party ecommerce platform operators to carry out administrative functions such as examining and registering information about ecommerce business operators applying to sell goods or provide services on their platforms. However, neither the *Draft Law* nor other existing laws empower third-party platform operators with the administrative authority to determine whether laws or regulations have been violated, or whether the proper licenses are held. Third-party platform operators have only contractual arrangements with operators of electronic commerce. To ensure compliance, USCBC recommends clearly defining the scope of the “necessary measures” third-party platform operators are expected to take, and specifying the legal grounds for platform operators to take such measures.

Article 22

USCBC recommends the third paragraph of this article is amended as: "to encourage third-party ecommerce platforms to establish a credit evaluation system, public credit evaluation rules in order to provide an objective, fair and reasonable credit evaluation." Such provisions have been included in the State Administration of Industry and Commerce in the January 26, 2014 release of the Network Transaction Management Measures to encourage, rather than mandate, a third-party trading platform to establish a credit evaluation system. Therefore, it is recommended that the drafters reference the relevant administrative regulations for legal consistency.

Article 23

USCBC recommends to clarify the compensation and the legal liabilities when the third-party ecommerce platform fails to follow this article. Since in practice the ecommerce operator has weak bargaining power with the third-party ecommerce platforms.

Article 24

USCBC recommends clarifying this article to ensure that third-party platforms which sell their own branded goods or services on their own platforms be subject to regulations governing operators of electronic commerce. We also recommend adding an additional sentence to Article 24: “Third-party ecommerce platforms that allow self-operated businesses on their own platforms shall be subject to regulations governing operators of electronic commerce stipulated in this Law.”

Article 25

USCBC suggests to amend this article to read: "The third-party ecommerce platform or the platform operators should record and keep records on the goods, services, and transactions and ensure that the information is true, complete and accurate." In practice, because of commercial confidentiality considerations, the third-party ecommerce platform and platform operators may have already entered into an agreement, such as special agreement for collecting, processing and storage by the operator of information about goods, services, transaction records, and other information. Therefore, we propose

including the platform operators as one of the key entities to save information, allowing the platform and the operators themselves to agree on who is responsible for the preservation of what information.

Additionally, USCBC recommends adding language to this article requiring that operators' transaction information be made available to rights holders once their account is suspended for IPR infringement. This will allow companies to better assess damage to their brand and business, and to take necessary measures to protect their intellectual property rights.

Chapter III: Ecommerce Trade and Services

Article 27

USCBC recommends clarifying the responsibilities by revising Article 27 to read as: "The parties entering into an electronic contract in ecommerce activities shall be presumed to have full capacity based on the registration information provided by such parties on third-party platforms, and the declaration of will shall be substantiated by the information on goods or services, the party's electronic signature, the delivery of goods or services, and other electronic messages recorded by the third-party platform, unless other evidence proves the opposite to be true."

Article 28

This article states that where the information on goods or services issued by the ecommerce operator meets the requirements of an offer, and then submits an order, the contract shall be deemed as concluded. If the term "order" is based on general principles of contract law, this article has no directive function to daily ecommerce transactions. USCBC recommends revising this article to read: "Where the information on goods or services issued by an ecommerce operating entity meets the offer requirements set out in transaction rules of the platform, and the counterparty selects the goods or services and submits an order, the contract shall be deemed as concluded; unless otherwise agreed by the parties therein, the agreement shall therefore be observed."

USCBC also recommends that language regarding an offer be subject to certain prerequisites might be determined as an invitation to offer rather than an offer.

Article 30

USCBC recommends revising this article to allow both users and vendors to cancel transactions in the event of an error. In the event of an error that could allow for the dissolution of contract, both parties should be allowed to correct the errors, thereby preserving public order and avoiding fraud or undue profit for either party. This not only allows for users to correct mistakes, but also takes into consideration the development of ecommerce as an economic activity, which may be prone to mistakes.

USCBC recommends additional language outlining liability when errors occur during human-machine interaction. As a basic principal, the responsible party for instigating the error should be liable. We recommend additional language: "When errors occur during human-machine interaction, the party responsible for instigating the error should take responsibility. If it is a human input error, the person should take the responsibility; if it is a machine system error, the owner of the machine should indemnify the parties for losses due to system errors."

Article 31

In order to ensure coordination between the draft and the existing relevant laws and regulations, and to avoid ambiguity, USCBC proposes to add a definition of "electronic payment service providers" in order to further clarify the scope of electronic payment that the *Draft Law* covers. USCBC recommends adding the definition "'electronic payment service providers' as mentioned in the *Draft Law* refers to those who have legally obtained the Payment Operator Certification, approved to handle non-bank payment related to electronic payment services."

Article 39

The first paragraph of this article requires that express logistics service providers publish any amendments to service commitments. While USCBC understands the need to have a record of shipments and deliveries for ecommerce, it is important for logistics companies to also maintain customer privacy. For logistics companies, some changes to service commitments are customer-specific and do not generally affect all customers; these customer-specific service terms are confidential business information. The *Draft Law* should allow express logistics service providers to be able to notify such customers of those changes confidentially and privately.

The second paragraph requires express logistics services providers to maintain operational data for retrieval. The law should also establish a reasonable time period during which such data must be maintained, after which such data may be deleted. Current legislation can be used as an example, such as the Cybersecurity Law, which requires operators to keep logs for six month. The law should clearly define the scope and parties authorized to request that data.

Our members understand the need to hold parties accountable in the ecommerce customer delivery chain, but this article does not define what laws are applicable in this context. USCBC recommends clarifying what laws and regulations apply here.

Article 40

Article 40 requires express logistics services providers inspect packages to prevent the transfer of items that are prohibited or restricted by national laws. *The PRC Post Law* and other regulations do require inspection of express shipments, but existing laws and regulations do not clearly state requirements for how a shipment must be inspected. The *Post Law* requires sight inspection by the courier, although in practice authorities have enforced x-ray inspection without a clear legal basis. In order to facilitate efficient delivery of ecommerce products, ecommerce packages should be held to the same inspection requirements as applicable to other packages as defined under the *Post Law*.

Additionally, it is difficult to specify a single "receiving" period when accepting a package, especially for ecommerce platforms that sell goods or services on their own platforms. Therefore, USCBC recommends expanding the article to include the "receipt, shipping, and transfer" of goods in order to more thoroughly encompass the ecommerce shipping process.

Article 41

Express logistics service providers are unable to verify all information on consignment notes or waybills. For example, authorities have been requiring verification of shipper's identification by express logistics service providers, which has been codified in the PRC's recently-passed *Antiterrorism Law*. In practice, however, the implementation of this identification requirement has been extremely difficult. In addition, couriers cannot always accurately verify that the contents of a package matches its description on a consignment note or waybill. It is beyond an express logistics service provider's reasonable ability and business responsibility to verify all information described on a waybill or consignment note.

Longstanding multilateral air law treaties such as the *Warsaw and Montreal Conventions* establish global standards that carriers are only responsible for the apparent information on a waybill as provided by the shipper or its agent. USCBC recommends these global standards be integrated into the *Draft Law*.

Article 42

This article requires express logistics service providers that provide cash on delivery services to have service agreements with ecommerce business entities. We understand that the draft law defines "ecommerce business entities" in practical terms as both any third-party platform that provides an online marketplace and any business that has online sales of commodities or services. However, it does not seem necessary for an express logistics service providers to have a contract with both entities. Additionally, an express logistics service provider are often unable to identify customers as ecommerce operating entities.

Chapter IV: Ecommerce Transaction Protections

Section 1: Ecommerce Data Information

As currently written, this section lacks supervision and management regulations for third-party ecommerce platforms to address unfair competition. USCBC recommends establishing management rules, inspection mechanisms, emergency measures, and complaint handling mechanisms for instances of unfair competition with the resulting information integrated into the credit evaluation system.

Article 46

The *Draft Law* does not distinguish between the rights of third-party platform operators and the rights of an operator of ecommerce in terms of collection of customer personal information. Both third-party platform operators and operator of ecommerce may be able to access a non-party's personal information, such as their postal information. The *Draft Law* does not clarify requirements for how an ecommerce operator should expressly indicate its terms and conditions to users in respect to information collection, processing, and utilization.

USCBC understands the need for ecommerce operators and third-party platforms to protect customer data. However, we recommend that Article 46 stipulate that the rights of third-party platform operators and the rights of an operator of ecommerce to use customer information be separated. In order to better protect customer data, USCBC recommends that customers be allowed to voluntarily disclose personal identification information (PII) to an operator of electronic commerce for necessary commercial purposes, under terms and conditions agreed to by both the provider and the user.

Additionally, Article 46 states that ecommerce operators are not allowed to refuse service as a means of forcing the customer to consent to the collection, processing, and use of their personal information. In practice, a certain amount of personal information is required to complete an online transaction; without such information, it is impossible to provide service. USCBC recommends changing this statement to read: “The main electronic commerce entities shall not refuse to provide services for users in order to force users to agree to the collection, processing, and use of personal information, except for personal information reasonably required for the completion of the transaction or to provide services.

Article 48

As written, this article allows customers to request an ecommerce operators to stop processing transactions and stop further use of his or her personal information as long as the customer believes that his use may infringe their legitimate rights, even if such use does not violate signed and agreed upon terms and conditions. These types of discretionary rights are overly burdensome to ecommerce operators, who would have to review and address complaints that could be considered as outside the scope their legal responsibility, and which would undermined legal service contracts may, USCBC recommends further clarifying preconditions to stop usage of personal information in this article.

Additionally, while Article 46 requires “consent” of the consumer when the ecommerce operator change terms of the agreement, Article 48 requires the operator to seek “express consent” from the users. These two items are inconsistent, and USCBC recommends clarifying the term of “express consent”.

Article 50

This article requires ecommerce operators to ensure that the source of data be made unidentifiable before processing or use. However, express logistics service providers are required to access this information to confirm a shipper’s identity. In particular, when transporting shipments from third-party ecommerce platforms, express logistics service providers must use online transaction data and its source for customs clearance and other compliance purposes. To ensure that normal business operations are not unintentionally impacted, USCBC recommends revising this language to read that anonymization of data should not extend to data that is necessary for routine logistical operations, and is instead should be limited to sensitive information which, if leaked, can lead to personal harm or injury.

Article 51

The *Draft Law* does not clearly define what types of data constitute “ecommerce data information”. This article also does not specify the rules for or purpose of sharing or transfer of ecommerce data with government bodies. Currently, depending on the industry, companies must provide data to multiple authorities, especially at local levels. For example, express logistics service providers may be required by law to share information with the State Post Bureau, Public Security Bureau, National Security Ministries and Customs. We recommend that the ecommerce law expressly identify which authorities are authorized to collect ecommerce related data from business entities and to establish a “single window” platform for doing so.

Article 54

The first section of this Article states that “the intellectual property rights holders shall bear the civil liability for any losses incurred by the operators therein due to any notice mistakes made by the intellectual property rights holders.” This statement unnecessarily burdens the intellectual property rights holder and does not support goals to further enforce intellectual property rights protection in the *Draft Law*.

Currently, third-party platform operators have little incentive to suspend or terminate operators that are not engaged in infringement, as they make money from sales through their platform. Third-party platforms may already have comprehensive processes to allow rights holders to submit notice of infringement, resulting in suspension or termination. However, the counter-notice provision of this law interferes with terms of service and well-developed best practices of third-party platforms, which do not allow unsubstantiated counter-notices to freeze efforts to stop sales of infringing products. This provision encourages meritless counter-notices, forcing rights holders into costly and time-consuming litigation and prolonging the crisis of infringing sales through ecommerce platforms.

USCBC recommends revising this section of Article 54 to read: “The third-party platforms of ecommerce that receive notices sent out by intellectual property rights holders informing the tort of intellectual property by the operators in the platforms shall forward the notice to the operators therein concerned promptly with necessary measures. The intellectual property rights holders shall bear the civil liability for the actual losses incurred by the operators therein due to any abuse of notice rights made by the intellectual property rights holders.”

Article 55 and 56

The applicable object of the prohibitive regulations in Article 55 and Article 56 article is unclear. USCBC recommends clearly indicating the liable parties of each of the six items included in this article. Drafters should ensure claims of harm to “business reputation” are not used as a shield to deter otherwise meritorious claims of infringement.

In Article 55 the term “electronic signs” is unclear. USCBC recommends deleting the term “electronic” to properly consider the misuse of government ministry or social organization signs in any form. Article 56 does not allow ecommerce operators to alter or selectively disclose their credit rating; other than information required by law to be disclosed, ecommerce operators should have the right to selectively disclose consumer reviews or comments when advertising their products or services. We recommend deleting “selectively disclose” from this article.

Article 60

USCBC believes provisions in this article are not workable in practice. In regular business, rules and template contracts must often be changed for numerous reasons. If there is language requiring feedback from consumers and consumer organizations, it is overly burdensome and disruptive to regular business transactions. This requirement to require feedback from should be removed. In addition, although this article should solicit the views of consumers and consumer organizations, it does not specify how to deal

January 26, 2017

Page 8

implementation and collection after the seeking feedback, and the amendment does not provide a clear recommendation.

Therefore, we suggest to delete this article, or change wording "should be" to "encourage", both to avoid bringing a heavy burden on operators, but also to provide a new way for operators, consumers, and consumer organizations to communicate.

Article 61

USCBC recommends to specify compensation for the ecommerce business operators and include guiding principles and legal liability of third-party ecommerce platforms should they fail to comply with this article. Rules of insurance for consumers' rights protection are usually made by the third-party ecommerce platforms unilaterally in practice, and it will impose more obligations to the operators.

Article 63

Article 63 is purely confirmatory replication of general legal principle without providing substantive new rules. USCBC recommends deleting Article 63 from the *Draft Law*.

Chapter V: Cross-Border Ecommerce

Article 71

Language in the second paragraph should clarify the scope and limitations of relevant government authorities' control and power over such data storage, transfer and protection. A functioning cross-border ecommerce eco-system is reliant on the immediate transfer of data and payments across multiple entities and jurisdictions.

Chapter VI: Oversight and Management

Article 75 and 76

We support the central government's role in establishing standards and policies for regulatory frameworks. USCBC encourages relevant standards and policies be open to 30-day public comment periods.

Article 88

The range of penalties set by this article are not sufficiently high to serve as a deterrent for serious infringement of intellectual property rights. USCBC recommends increasing penalties in order to deter intellectual property infringement by increasing the penalties substantially, and if the circumstances of the infringement are serious, apart from cancellation of the infringer's business license, a fine from RMB 100,000 to the higher of four times the illegal earnings. The cap of four times the illegal earnings is derived from the article 63 of the draft patent law.

CONCLUSION

USCBC thanks the National People's Congress for providing this opportunity to comment on the draft regulations. We hope that these comments are constructive and useful to the National People's Congress

US-China Business Council Submission

January 26, 2017

Page 9

Legislative Affairs Commission as it reviews the draft measures. We would appreciate the opportunity for further dialogue on these issues and are happy to follow up as appropriate.

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