



# Ecommerce Law of China— What Does This Mean to Hotel Groups

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The Ecommerce Law of China, i.e. the country's first comprehensive Ecommerce legislation, will take effect on 1st January 2019, which will apply to all Ecommerce activities in China and shall certainly bring impact on international hotel groups. Hence, it is advisable that operators should pay attention to and get prepared for the new law as soon as practical.

Under the new law, Ecommerce is defined as the "business activities of sale of products or provision of services via information network, e.g. internet", and Ecommerce operators are defined as the "individuals, legal entities and non-corporate organizations that are engaged in the business activities of sale of products and provision of services via information network, e.g. internet, including Ecommerce platform operators, merchants on Ecommerce platforms and the Ecommerce operators who sell products or provide services via their own websites or any other network services".

Depending on the business models of the hotel groups in China, the following activities may be subject to the new law:

- a. The hotel operators that provide the room booking and sale services and other services via e.g. their own websites and APPs will be treated as Ecommerce operators;
- b. Many hotel groups provide booking services for hotels under its brands on its official website, whereby the groups provide the network platforms, facilitate transactions and publish information to enable the customers/members and hotels to conclude transactions for accommodation and other products and services, which shall fall within the definition of Ecommerce platform operators under the new law;
- c. The official websites of some hotel groups serve as both self-operated website and Ecommerce platform;
- d. Where a hotel group arranges the hotels under its group to participate in the promotion or sale of rooms via its Ecommerce platform, e.g. OTA, the hotels, as merchants on Ecommerce platforms, will be subject to the new law.

Since the new law grants the market supervision authority the power to supervise the Ecommerce industry and impose penalties in a stringent manner, and a serious violation may result in a fine up to RMB2,000,000 and suspension of business, we suggest that the following measures be taken in advance:



## Pay Attention to Regulatory Compliance in Commercial Promotion

Sales and marketing are essential to the operational activities of a hotel group. Operators usually support their group hotels in such activities through their multi-layer marketing functions or outsource certain business or activities to a third party company. The new law, with a focus on protection of consumer rights and fair competition, provides the specific requirements on regulatory compliance with respect to the marketing activities of hotels and hotel management groups. For example,

- according to Article 15, an Ecommerce operator should continuously publish the information on its business license and administrative approval relating to its business, or the linkage of the above information; such information should be updated in the case of any change.
- According to Article 17, an Ecommerce operator should not conduct any false or misleading commercial promotion by fake transactions or customers' review to deceive or mislead the consumers.
- according to Article 39, an Ecommerce operator should provide a channel for customers' comments on the products or services sold or provided via the platform. In particular, an Ecommerce operator is not allowed to remove the comments from consumers on the products and services sold or provided via the platform.
- in case the internet platform of a hotel group is operated as both a self-operated website and an Ecommerce platform, the operator should distinguish the self-operated business from the business of other merchants of the platform explicitly and should not mislead consumers. An Ecommerce operator should be responsible for its self-operated business as the product seller or service provider.

In particular, the new law also fills in the legislative gaps with respect to the big-data-based analysis on "deceiving acquaintances". Article 18 provides that, when providing the search results for products or services for a consumer based on the hobby, consumption habit, or any other traits thereof, the Ecommerce operator shall at the same time provide the consumer with the options not targeting his/her identifiable traits and respect and equally protect the lawful rights and interests of consumers. According to Article 40, Ecommerce operators should provide the search results for products and services to consumers based on the price, sales volume, credit, etc., and any products or services subject to pay-per-click method should be labeled as "advertisement" at the conspicuous place.



## Cybersecurity and Personal Information Protection

Ecommerce has been connected with network since its birth. Thus the new law shares the spirit with the Cybersecurity Law and its supplementary regulations with respect to cybersecurity and personal information protection, also further detailing some articles. For instance,

- according to Article 24 of the new law, Ecommerce operators should expressly provide the methods and procedures for search, correction, removal and deregistration of user information, without any unreasonable conditions imposed thereon.
- regarding the Ecommerce platforms, the new law also provides that the operators should:
  1. take technical and other necessary measures to ensure the security and stability of the network, prevent any online criminal offences, cope with the cybersecurity incidents effectively and guarantee the security of Ecommerce transactions;
  2. formulate the cybersecurity incidents response plan. In the case of any cybersecurity incidents, such plan should be initiated immediately for remedies and reporting to the relevant authority;
  3. record and maintain the information of the products and services and transaction information published on the platforms, and ensure the integrity, confidentiality and accessibility of the same. Such information should be maintained for at least three years after completion of the transactions.

The supporting regulations of the Cybersecurity Law has yet to come. Thus hotel operators may be still paying constant attention to the development with respect to cybersecurity assessment, privacy policy and cross-border transfer of information. The Ecommerce Law will no doubt provide a legal reference for the industry in this respect.

## Conclusion of Electronic Contracts

The new law requires the PRC law to be adopted as the governing law for conclusion and fulfillment of the contract between the Ecommerce parties, and also the followings:

- Ecommerce operators should inform the users of the procedures of contract conclusion, precautions, download methods, etc. in a clear, comprehensive and explicit manner, and ensure convenient and complete review and download by users.
- Ecommerce platform operators should follow the principles of openness, fairness and equity, formulate the platform service agreement and transaction rules, define the rights and obligations in connection with log-in and log-out of the platform, quality guarantee of the products and services, protection of consumer rights, and the linkage for the said information should be provided continuously at a conspicuous place on the homepage for convenient and complete download by operators and consumers.
- Ecommerce platform operators should publish the changes to the platform service agreement and transaction rules for comments at a conspicuous place on the homepage. Reasonable measures should be taken to ensure that all the relevant parties can fully express their views in a timely manner. Any changes should be published at least 7 days before enforcement.

Regarding the commonly-used electronic payment, the new law requires Ecommerce operators to ensure that the users are well informed of the function, method of use, the relevant risks and fee schedules of electronic payment, and no unreasonable conditions are allowed.

Hence, hotel groups should update the service procedures, agreement, rules and other legal documents of the platforms to adapt to the new laws and the relevant supporting regulations.

## Intellectual Property Protection

Regarding the controversial application of "Safe Harbor Rule" to infringement of intellectual property rights, the new law on the one hand, provides that the measures of removal, block, disconnection, termination of transactions and services should be taken if the platform operator is aware or should be aware of infringement of intellectual property rights by any merchant of the platform, failing which the Ecommerce platform operator should be held jointly liable with such merchant; on the other hand, such requirement also provides details on application of the international commonly-used "Safe Harbor Rule" in Ecommerce activities:

- in case any IP right owner notices infringement of the IP rights, the owner should have the right to inform the Ecommerce platform operator to remove, block, disconnect, terminate the transactions and services, along with the prima facie evidence.
- After receipt of the said notice, the Ecommerce platform operator should take necessary measures in a timely manner and deliver the notice to the merchant of the platform. The Ecommerce platform operator will be held jointly liable with the merchant for the additional losses due to its failure to take the timely measures.
- After receipt of the notice, the merchant of the platform may submit a statement for non-infringement, together with the prima facie evidence for non-infringement.
- After receipt of the said statement, the Ecommerce platform operator should deliver the same to the IP right owner and inform the latter of the right to complain to the relevant authority or litigate at court. In case the Ecommerce platform operator does not receive any notice of complaint or litigation filed by the IP right owner within 15 days after the statement is delivered, the measures that have been taken should be terminated immediately.
- Ecommerce platform operators should publish the above notice, statement and result in a timely manner.

Therefore, the new law defines clearly the duty of due diligence of the IP right owners, platform operators and merchants of platforms (i.e. the suspected infringers) and their respective rights and obligations by adopting the rules of "Notice + Removal". On top of the supervision on the platform operators, the new law also intent to refrain the adoption of "Safe Harbor Rule" by applying the civil liability for "wrong notice" and the double compensation in the case of "malicious wrong notice".

Brands are the most important assets for operation of hotels, where disputes may arise from time to time. Hotel groups, whether as the owner, Ecommerce platform operator or a merchant of the platform, are advisable to set up response mechanism relevant to such disputes according to the new law.

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