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Third-party platforms' liability in the Chinese "E-commerce Law" and the European Legislation

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INTRODUCTION

Since its initial diffusion, the Internet has radically changed not only the habits and the way of living and interacting of the entire world but has also redesigned the economy, introducing previously unimaginable and extremely innovative market dynamics.

Although, at first, legislative action was not considered necessary to regulate this phenomenon, its increasingly overbearing interference in social and economic dynamics prompted national legislators to embark on a course of legislation.

In the wake of the free market and a principle of *internet freedom,* however, there has been an attempt to limit legislative interventions to what is strictly necessary, restricting regulation to specific sectors.

This has led to the development of an uneven and often fragmented regulatory framework, in which old legal institutions are called upon to regulate similar yet radically different dynamics. If we look around Europe, countless directives and regulations govern the many aspects of economic relations between actors within the Union. Despite all these actions are directed towards the common goal of removing economic and legal barriers in order to create a single market, including an electronic one, the transposition of directives at the national level makes the process of legislative standardization cumbersome and sluggish.

By definition, the legislative process is slow and thoughtful to comprehensively analyse the phenomenon to be regulated and balance the public and private interests involved in the best possible way. This inherent characteristic has always meant that the law has invariably arrived well after a problem has arisen when it has such an impact that it is deemed necessary to regulate it.

Unfortunately, the economic processes that revolve around the Internet are evolving at speed unprecedented in human history, which means that not only are current laws inadequate, but more recent laws often reveal immediate criticalities because the economic dynamics have changed by the time they are drafted. For example, it is only in recent years that we have even begun to talk about the so-called *data economy*, i.e., the economy based on the purchase and

use of data. Although it is already having enormous repercussions across international markets guaranteeing substantial competitive advantages to those who hold more data and those who have greater computational power in processing the data themselves, it is a phenomenon that remains almost unregulated. These mechanisms often slip through the legislative net, and despite daily use, there is no unambiguous definition of *digital data.* Think again of how rapidly the food delivery sector has changed and how national legislations struggle to find a legal framework to ensure sufficient protection for workers. Alternatively, how the Italian legislator qualified Amazon as a postal operator.

The introduction of the 'E-commerce Law of the People's Republic of China' represents a milestone in internet regulation. It is the first law in the world to provide an organic and wide-ranging regulation of the subject.

However, to carry out this operation, it is necessary to analyse the Chinese economic panorama specifically, understanding its peculiarities, functioning, and dynamics, in order not to make false analogies.

Analysing the Chinese market means analysing what will be or what could be; we can analyse the problems that have emerged and use this an example, always analysing the solutions that have been adopted with a critical eye.

Therefore, this paper aims to analyse, at first, the functioning of the Chinese e-commerce market, also in the light of the recent covid pandemic. Once the economic premises have been identified, understand how they have been addressed by the very recent "E-commerce Law of the People's Republic of China", focusing on the predominant role played by e-commerce platforms, in particular regarding the limits and the type of liability that can be attributed to them, also in the light of the crucial driving role they play in the digital economy. Finally, in the light of the analyses carried out, the European approach to the same issues will be analysed to grasp the methodological differences.

CHAPTER I

ECONOMIC PANORAMA OF THE CHINESE ECONOMY AND THE DRAFTING PROCESS

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1. Economic panorama of the Chinese economy

1.1 History of the Chinese e-commerce

The Chinese e-commerce economy was born at the very end of the XX century, when the first pioneers companies saw an opportunity in the immature internet environment in China and started the first internet related businesses. A key role has always been played by the Chinese Government, both in creating an environment for E-commerce to thrive and as well as creating regulations and

policies. Based on its development, Chinese E-commerce can be divided in four stages: the initial stage, the accelerated development stage, the standardization stage, the globalization stage.[1]

The initial stage is the period that goes from 1996 to 2000 when the first Chinese E-commerce enterprises emerged, 5.2% of the current E-commerce platforms were established in these years[2]. It was in these days that Alibaba, the first and main C2C service website, was founded and shared the market with HC International, dominating respectively the south Chinese market and the north Chinese market. The recognition by the government of the establishment of the "China Electronic Commerce Association" on 21 June 2000 set a fundamental turning point in the introduction of the E-commerce in China, since it represented the official recognition of E-commerce as a specific industry and concludes the "initial stage".

The underdeveloped internet environment and the lack of technological deeply conditioned the development of e-commerce in this stage[3]. China could only count four million active internet users and there was a serious lack of both logistic and distribution network infrastructures. Moreover, there was a widespread lack of trust in the seller, in particular with regards to online payments and online purchasing[4].

From 2000 to 2007 China saw a drastic increase in the number of internet users, reaching 210 million people by December 2007, half of whom were actively using e-commerce services. The widespread use of the internet and the

[1] Hongfei Y., *National Report on E-commerce Development in China*, Inclusive and sustainable Industrial Development Working Paper series Wp 17 | 2017, p.1

[2] The first B2B E-commerce business in China was "Nanjing Focus technology Development Company", established in Southeast University in January 1996. The first vertical chemical website was launched October 1997, while the first E-commerce website providers followed in 1999. eBay also entered in China in 1999.

[3] Hongfei Y., *supra*, p.2

[4] The problem of trust is a peculiar problem of the Chinese market, the solution of this specific issue is what allowed the main platforms in China (Alibaba and Taobao) to get their popularity thanks to the introduction of Alipay.

expansion of business activities from enterprise services to personal services characterized the "accelerated development stage"[5].

The main internet companies started to invest in China: eBay entered the market in 2002, in 2003 Alibaba established Taobao to directly fight eBay, that later became the largest C2C platform in China. In August 2004 Alibaba bought Joyo Net and in the same year "Jingdong Multimedia Network" was established. In order to directly address the problem of the reliability of online payments, Alibaba launched Alipay, an online payment platform in October 2004. This ensured the transparency of the payment and it took on the risk of the transaction, tackling the main issue that was restraining people from relying on e-commerce. In 2005, Taobao signed a logistic supply agreement with YT Express, laying down the structure of the current e-commerce environment, definitively solving the lack of infrastructure problem that characterized the first stage.

During this period, new regulations came along to the business entities, relevant provisions such as the "Electronic Signature Law of the People's Republic of China", and the "Online trading platform for self-discipline norms" were introduced. The final act, that advanced E-commerce in China to the next phase, was the inclusion of E-commerce at the national policy level through the "E-commerce Development Five-Year Plan" issued by the state Council Information office jointly with the State Development and Reform Commission in 2007.

The third phase is the standardization stage, which goes from 2008 to 2014. After the E-commerce market found its stability and gradually grew thanks to a huge consumer market, a series of key policies were launched, culminating with the establishment of an E-commerce law drafting group and a timetable for China's E-commerce legislation by the NPC Financial and Economic Committee[6]. The rapid development of the market saw the flourishing of

[5] According to statistics from the China Internet Network Information Canter (CNNIC)

[6] Other relevant provisions issued during this period were respectively the "E-commerce model specification", the "Online Shopping standard" issued by the Ministry of Commerce and the "online commodity trading and relevant service behaviour management interim measures" in 2009. The "Guiding Options on the Development of E-commerce at the 12th Five-Year Plan", the "Guidance on Establishment of National E-commerce Demonstration Base", the "Third party E-commerce

numerous cross border E-commerce platforms during this period such as Ali Express allowing a great number of SMEs in China to participate in international trade.

After consolidating in the mainland, the "Globalization Stage" begun, where cross-border e-commerce started to implement and develop cross-border E-commerce strategies[7]. The expansion on a global scale is well represented by the Jumei, whose shares were traded on the New York Stock exchange and Alibaba's listing on the New York Stock Exchange on 19 September 2014 becoming the largest IPO in American history.

1.1 China E-commerce in 2020

In 2020 China is the biggest e-commerce market in the world, with an active user base of more than 900 million users[8]. New platforms are constantly emerging, increasing and diversifying e-commerce activities, such as Ant group by Alibaba that provides innovative financial services. The global pandemic only reinforced this trend, highlighting the relevance of e-commerce in balancing the economy when individuals were not allowed to go out and about. The Chinese e-commerce market is unique. It is composed of a particularly demanding young demographic[9] which has grown up in a developed internet environment. The approach toward internet is more intense and far more diversified when compared to western countries. The presence of omni app[10] like WeChat and their relevance for everyday life makes the e-commerce market constantly evolve, trying to adapt to a high-tech very demanding user

transactions Platform service specification" formulated by the State Council in 2011. In the same year, the People's Bank of China announced the first 27 enterprises granted permission for payment transactions.

[7] In 2014, nine provinces had international borders. As far as cross-border strategies are concerned, Zhengjiang Province established a cross-border E-commerce mechanism. Guangzhou Province created the first cross-border E-commerce model city in South China.

[8] According to the "E-commerce law" report released by the ministry of commerce in 2019

[9] According to the data of the Italian Trade agency more than 60% of the e-commerce app users age ranges between 19 and 35 years old

[10] For omni app refers to a mobile application that is used for a wide variety of purposes such as the above-mentioned WeChat, that can be used for messaging, posting, paying bills, buying train tickets and other activities.

base, making dynamism and rapidity crucial characteristics of Chinese e-commerce. In fact, e-commerce companies compete vigorously to offer the right product at the right time while offering an appealing user experience. New marketing approaches are constantly developed, from the introduction of a flawless shopping experience thanks to an extended Online to Offline (O2O) model, to the introduction of virtual and augmented reality, to a very subtle and sophisticated use of social networks and influencers for promoting products and services[11]. On the other hand, western e-commerce is less intrusive and demanding, focusing more on a straightforward and unified user experience due to differences in culture and lifestyle. The correct approach to the complex Chinese e-commerce market environment becomes a gold mine for opportunities and fast business development. Not taking into account its uniqueness may lead to catastrophic failures[12].

For our purposes it is helpful to analyse three main aspects of the Chinese E-commerce: the domestic market environment, that refers to the e-commerce activities that occur inside the territory of China; the cross-border e-commerce (CBEC), that refers to the e-commerce activities of products and services into and out of China; and the social commerce, that refers to the practice of implementing e-commerce in social media platform. This classification recalls the distinction made by the "Chinese E-commerce law" that distinguishes e-commerce activities inside and outside of China[13] and refers to operators that are "selling goods or provide services"[14] apparently not including social networks.

[11] For example, through the Gucci WeChat mini-app it is possible to use augmented reality to test lipstick colours via the phone camera
[12] The eBay experience in China is emblematic. Only two years after the Launch of Taobao by Alibaba the market share of eBay shrank from 90% to 7%. Keeping a business model based on subscription and a plain, non-personalized website dramatically failed when up against the customized user experience offered from Taobao.
[13] Art. 2 of the "E-commerce Law of the People's Republic of China"
[14] Art. 9 of the "E-commerce Law of the People's Republic of China"

A. Domestic E-commerce

The domestic e-commerce refers to the e-commerce activities, such as providing services and selling goods, that occur inside the territory of the PRC. These operations are carried out by several operators including e-commerce marketplaces, such as Alibaba or Amazon, and the users of the platforms: the sellers and the consumers. Among these three subjects a prominent role is played by the online marketplace platforms, thus in this paragraph we will analyse the role of the platforms operating inside PRC territory targeting Chinese users.

Domestic e-commerce is a growing sector with a huge potential for the Chinese economy and the government is well aware the relevance of e-commerce for competitive economic development. Before and during pandemics in the past ten years, policies were adopted in order to nourish this sector cutting legal and physical barriers. According to the "National report on E-commerce in China" of the "United Nations Industrial Development Organisation"[15] the Chinese government moved in five different directions to overcome e-commerce obstacles: infrastructure, tax reform, trust, security management and legal system.

Firstly, acknowledging the crucial relevance of internet infrastructure for an effective development of an e-commerce market, the government lowered the access threshold to support their construction, simplified procedures of capital registration, reducing barriers to access and cleaning up existing pre-approval issues[16]. The access to wideband has a direct effect on purchasing via the internet. Many parts of China, especially rural areas, still suffer from poor or absent bandwidth. According to the data of the "Italian Trade Agency" the number of online shoppers in China reached 610 million out of a population of 1.4 billion individuals compared with a penetration rate of online shopping of the 73.6%[17]. This means that half of China's population is still a potential e-

[15] Hongfei Y., *supra*
[16] *Ibidem*
[17] Italian trade agency p.29

commerce user and that among the already existing users there is still a significant number that can join the user base.

Secondly, it introduced a tax incentive reform program for high-tech SMEs to replace business tax with a value-added tax and a multi-channel financing mechanism to support e-commerce companies. It also encourages investments to support e-commerce start-ups.[18]

As mentioned in the first paragraph a constant problem of e-commerce has been the so-called "problem of trust". Even If the problem of online payments has been solved, a lot of issues still persist, such as fake reviews, counterfeits and product quality that still affect–the e-commerce experience. To counter this phenomenon, the Chinese government is strengthening the construction of an e-commerce credit system. Introduced in 2014, the corporate social credit system was planned to be fully implemented by the end of 2020[19] with the aim of providing a fully functioning system able of ranking all Chinese citizens and companies[20]. The government is also devoted to providing credit information regarding legal persons, trademarks and product quality of E-commerce companies to the public[21]. Other measures to establish a credit system include E-commerce network ID cards and a real name system, improving trustworthiness, credibility and security of e-commerce transactions[22].

Fourth, in order to build a reliable ecosystem, it is vital to build a system of e-commerce transaction security management to clarify the responsibilities and obligation of each partner in an e-commerce transaction. Thus, the government has promoted a cross recognition of digital certificates and built a standardized

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[18] Hongfei Y., *supra,* p.15

[19] "Planning Outline for the Construction of a Social Credit System (2014-2020)" State council, 14 June 2014.

[20] The social credit system for companies consists in the introduction of incentives and disincentives according to the company's rank. Incentives may include faster approval procedures or tax benefits, while disincentives may include the increase of taxation of the increase of interest rates on loans.

[21] https://nhglobalpartners.com/chinas-social-credit-system-explained/

[22] The importance of trust between sellers and buyers can be explained by the relevance of the concept of 关系 in Chinese culture. This term can be translated with/as "personal trust" and is a fundamental requisite to build personal relations and businesses; lack of trust can be the reason that prevents two people from doing business together. We must not be surprised that the raking and the social credit system is so important and well accepted in the population, as it directly tackles one of the most important aspect of Chinese culture.

management mechanism of electronic contracts. All enterprises are required to act in accordance with security protection regulations and technical standards[23]. Lastly the government is perfection the legal system to bring it into line with the e-commerce market characteristics by revising the "Advertising Law, Consumer's Interest Protection Law" and approving the "E-commerce Law of the People's Republic of China".

The recent pandemic was seen as an opportunity to further boost e-commerce policies and increase the volume of exchanges. The E-commerce market was considered a valid tool to maintain the domestic consumption during that period. In May, premier Li Keqiang led calls to enhance internet infrastructures, as a result more than 100 billion USD are expected to be invested in the sector[24].

The results of this constant e-commerce investments speak for themselves. Since 2013, China has been the biggest e-commerce market in the world and the trend is not changing direction. According to the "E-commerce in China 2019" report released by the ministry of commerce there were more than 900 million online shoppers in 2019. In the same year alone, the volume of this massive market exceeded 34 trillion RMB and the pandemic only increased the volume of exchanges.
In the first semester of 2020 e-commerce platforms significantly grew their user base. Alibaba users rose to 695 million in May (up 20%) while Pinduoduo, the second most popular e-commerce platform grew its user base by 40%, up to 471 million[25].

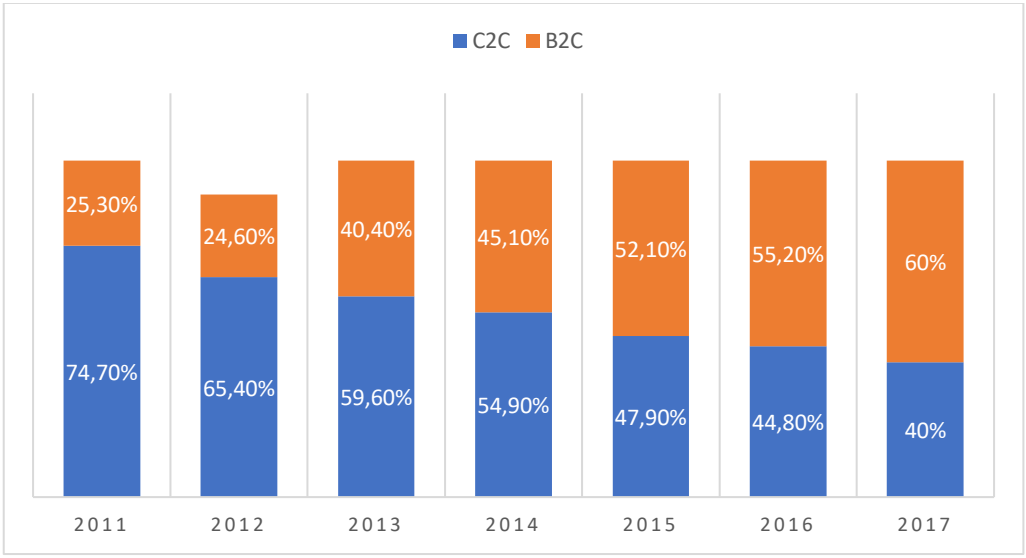
[23] *Supra,* https://nhglobalpartners.com/chinas-social-credit-system-explained/
[24] https://www.brookings.edu/articles/will-chinas-e-commerce-reshape-a-reopening-world/
[25] https://www.mfat.govt.nz/en/trade/mfat-market-reports/market-reports-asia/china-changing-trends-in-e-commerce-17-august-2020/

Marketplace platforms

As a general definition, a marketplace platform is an online platform whose objective is to connect sellers and buyers, offering consumers a wide choice of products and services[26].

These platforms play a crucial role in the e-commerce economy, 95% of e-commerce transactions occurs in their ecosystem. The service provided by these platforms is alternative or complementary to the ownership of a personal platform. The advantage of availing of a marketplace platform is that of joining a high-volume extensive traffic but, the downside is that they are expensive and highly competitive and do not give the same flexibility as owning your own platform[27].

The retail market is divided in two main categories: Business to Consumer (B2C) market and the Consumer to Consumer (C2C) market. The C2C market is rapidly losing ground in favour of the B2C market: in 2011 it held the 74,7% of the total retail market while in 2017 it dropped to 40% and there is no sign that this trend is changing direction.



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[26] The "Chinese E-commerce Law" Art. 9.2 defines "e-commerce platform operators" as "legal persons or other unincorporated organizations that provide online business premises, transaction matching, information distribution and other services to two or more parties to an e-commerce transaction so that the parties may engage in independent transactions"

[27] https://tenbagroup.com/the-2020-china-cross-border-ecommerce-insights/

[28] Italian Trade Agency report: https://www.ice.it/it/sites/default/files/inline-files/e-commerce%20in%20China.pdf p.15

The rise of the middle class and a significant number of young Chinese hungry to show off their social status are some of the reasons for the trend shifting in favour of the B2C market. The demographic target is in fact characterised by young, digital-savvy customers with high-level educational backgrounds; almost 60% of the e-commerce app users, as of February 2018, are between 18 and 35 years old[29]. First hand and exclusive products and a personalised user experience are making the difference in the sector. This is the reason why Tmall has become the most popular B2C platform, since it grants high standards for authenticity. *Following this trend Tmall launched Tmall Global in 2014 and dived/split into CBEC*.

In terms of geographic distribution, the market is mainly focused on first tier cities[30] but, because the regional economic development and infrastructures are reaching a saturation point, the attention is shifting toward second and third tier cities with much higher potential growth[31]. According to data published by Morgan Stanley the spending power of consumers residing in China's lower-tier cities, is expected to grow to 6.9 trillion USD in 2030[32].

Finally, it is not possible to undermine the role of payment apps in the development of e-commerce. Majors operators such as Alipay, WeChat Pay and UnionPay work as glue throughout the entire ecosystem, acting as the middleman in the purchasing procedure, ensuring the security of the transaction. Alipay, launched by Alibaba in 2004 was the first payment app in China and is now closely followed by WeChat, owned by Tencent, which is exploiting its integration with the very popular messaging app WeChat. Thanks to these

[29] Italian Trade agency, *supra,* p.29

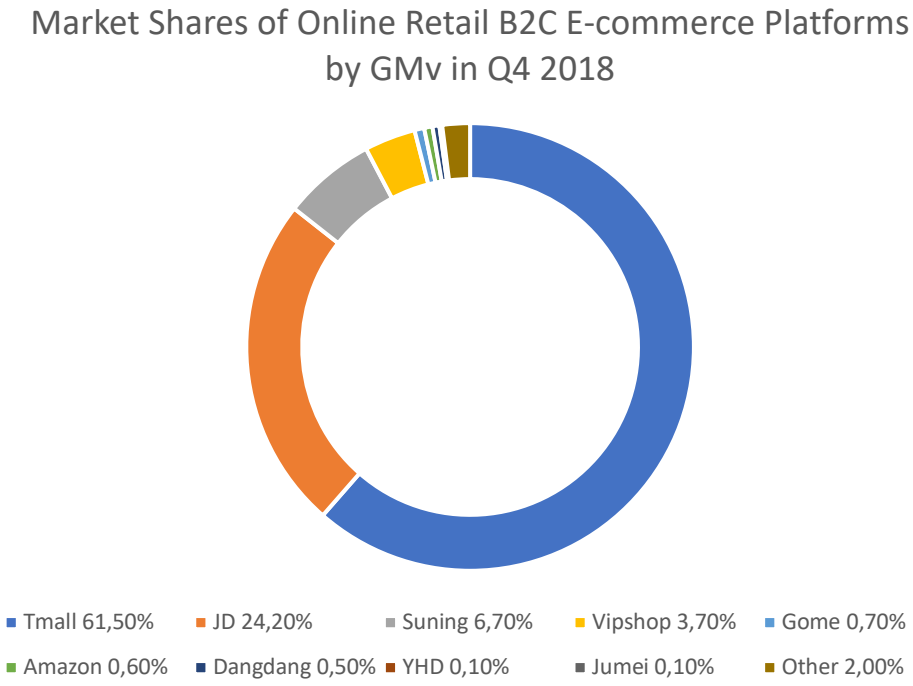
[30] China operates a tiered system to classify its cities according to several factors such as GPD, population, infrastructures development and political administration of the city. First-tier cities such as Beijing, Shanghai or Shenzhen are the biggest and more economically developed cities in China.

[31] As explained by Andrew Cameron, Senior Client Manager at the Silk Initiative "A coffee brand in Tier 1 city like Shanghai does not need to sell the idea of a coffee shop to consumers, as there is already a Starbucks store at every corner of the city. However, the same coffee shop entering a lower-tier city such as Urumqi, may be required to sell the product and the experience of consuming coffee, as well as the brand itself"

[32] https://www.morganstanley.com/ideas/china-lower-tier-cities

applications, more than 80% of smartphone users in China use mobile payments compared to 27% in the United States[33].

Here is an overview of the main operators in the current domestic e-commerce market. The market is actually dominated by two main platforms, Tmall and JD, accounting in total for more than 85% of the market share[34]. Suning and Vipshop are placed respectively in the third and fourth place with/together representing 11.4% of the market share.



Tmall

Llaunched in 2008 by Alibaba Group as Taobao Mall. Unlike Taobao, which is a C2C platform, it is an online B2C platform, targeting consumers in mainland China. It is the largest B2C retail in China with a gross merchandise volume of more than 360 million USD in 2019.

It is a high-end platform which set high standards for a seller to meet. The idea behind Tmall is that, allowing only quality sellers, when one is ordering from

[33] Tenba group

[34] https://www.chinainternetwatch.com/28169/b2c-ecommerce-q4-2018/

Tmall, there is no need to worry about counterfeits[35].It supports instant online customer service

JD

Founded in 1998, it is one of the biggest of Alibaba's competitors. It is the biggest B2C online retailer. It provides a fast delivery service and guaranteed product quality, but it does not support instant online service.

It also offers other services such as: JD.com store Setup, JD.com Design, JD products update, JD store management, Commissions, JD Promotions[36].

Suning

As one of the largest non-government retailers in China, it principally operates franchised shops of electronic appliances in China. It mainly offers colour televisions, audio and video players, disc players, refrigerators, washing machines, digital and information technologies products…[37]

Vip.com

This is an online retailer that focuses on discounts and flash sales. It partners with over 1,000 brands to bring certain number of items for consumers. It mainly focuses on clothing and electronic.

B. Cross border E-commerce (CBEC)

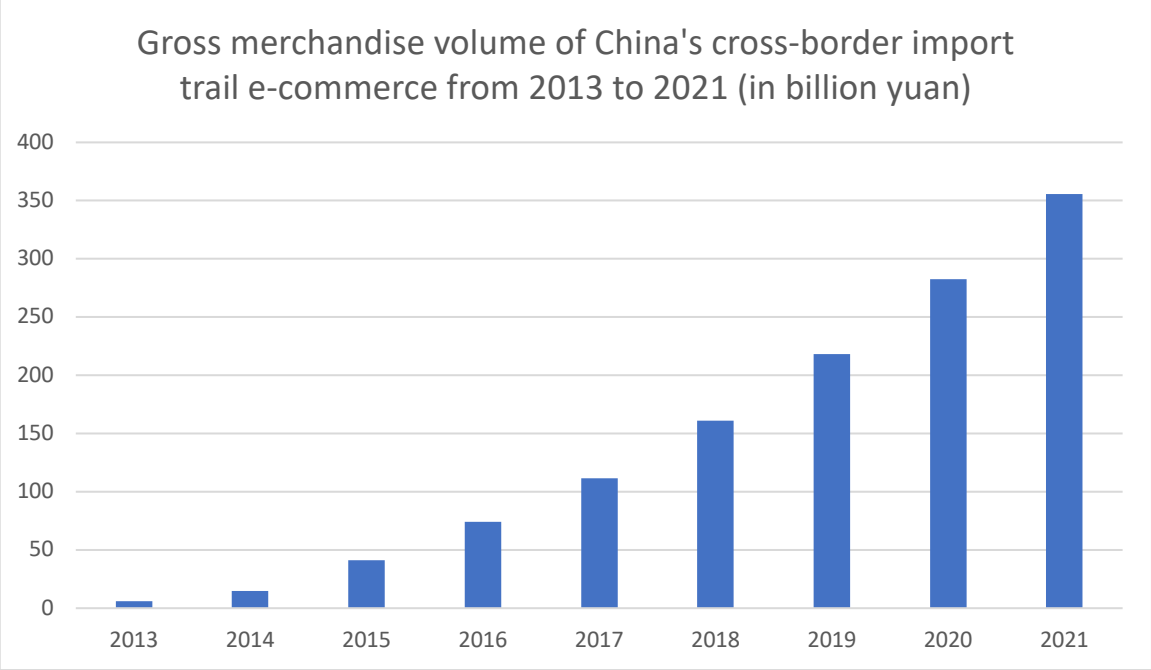
Generally speaking, Cross-Border E-commerce (CBEC) refers to "transactions, payments and logistics in different countries through E-commerce"[38]. These operations can be performed directly by two operators-via an intermediary such an e-commerce platform.

China has always played a major role in cross border e-commerce both in importing and exporting. Known as the "world's factory", in 2014 it exported

[35] https://ecommercechinaagency.com/great-chinese-online-marketplaces-for-e-commerce/
[36] https://ecommercechinaagency.com/great-chinese-online-marketplaces-for-e-commerce/
[37] *Ibidem*
[38] Hongfei Y., *supra,* p.10

goods with a total value of more than 2.3 trillion USD. In 2020 thanks to governmental policies such as "China manufacturing 2025[39]", the rise of second and third tier cities and a product hungry middle class, the imports are exceeding 183 billion USD whereas the exports are over 221 billion USD.[40] China is no longer the "world's factory" and has become an appealing market for foreign companies, for expanding businesses and exporting products.

The volume of gross merchandise cross-border import trail from e commerce is in fact constantly rising, thanks also to the emerging of CBEC platforms like Tmall Global in 2014. Most cross-border trades are carried out by companies from other Asian countries led by Japan and Korea, followed closely by the U.S.[41]



[42]

[39] In May 2015, Chinese state planners have launched "China Manufacturing 2025" a ten-year plan to promote and support the developing of advanced industries and technologies, to develop a modern technology based economy focusing on ten sectors, in order to escape the middle income trap. For further reading: http://www.cscc.it/upload/doc/china_manufacturing_2025_putting_industrial_policy_ahead_of_market_force%5Benglish-version%5D.pdf

[40] https://daxueconsulting.com/ecommerce-in-the-chinese-b2c-market/

[41] https://tenbagroup.com/the-2020-china-cross-border-ecommerce-insights/

[42] https://daxueconsulting.com/ecommerce-in-the-chinese-b2c-market/ Data source: Statista "Cross-border import retail e-commerce sector is gaining popularity in the B2C e-commerce in China"

Logistically speaking CBEC goods are imported into the free trade zones (FTZ[43]), from there they are shipped to mainland China. Unlike domestic commerce VAT, customs fees and delivery fees are costs that need to be calculated when determining the final retail price that will be later passed on to the customer.

There are two main international policy approaches to cross-border e-commerce: one is protectionism and the other one is a form of trade liberalization[44]. China is currently following the trade liberalization path simplifying custom clearance and increasing tax exemption quotas[45].

On June 2015, the general Office of the State Council issued the "Guidance on promoting the Healthy and Rapid development of Cross-border E-commerce" in order to promote supportive measures for CBEC specifically focusing on: optimizing customs supervision measures, improving inspection and quarantine regulatory measures, clarifying import and export tax policies, perfecting the management of E-commerce payments and settlement and providing financial support[46].

Because of the very nature of CBEC, the domestic regulations for e-commerce are not effective but customer segment remains as demanding as before. Although the Chinese government is trying to address CBEC problems with new laws and regulations, a traditional domestic approach is not adequate to resolve CBEC specific problematics, that make it a much more cumbersome, inefficient, but still very lucrative, sector.

According to the "National Report on E-commerce development in China" issued by the UN in 2017 the critical issues concerning CBEC in China that need to be solved are the following:

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[43] A Free Trade Zone (FTZ) is an economic zone where companies can operate under specially defined regulations. In particular, they offer preferential customs handling and initial import without paying duties. China additionally uses FTZs as a testing ground for new policies – tax, regulatory or foreign exchange for example. Introduction to a single, tightly controlled, region allows tests and development of such policies before considering nationwide expansion. Shanghai Free Trade Zone was the first in China, set up in September 2013.

[44] Hongfei Y., *supra,* p.17

[45] *Ibidem*
Full document: http://img.apec-ecba.org/file/20170324/14051490338867855.pdf

[46] *Ibidem*

- *Differences in cross-border product inspection standard*[47]

  There is no clear differentiation between basic key standards of domestic and foreign goods slowing down the custom clearance process. Plus, since there is no specific scheme for the tax and refund at custom clearance, these products cannot be cleared by customers. Individual and small products can hardly be tested since this would dramatically increase costs, a consequence the quality of cross-border e-commerce inspections would be affected.

- *Traditional "whole in and out" custom clearance mode cannot meet the "one by one in and out" of B2C*[48]

  Custom clearance is traditionally developed for B2B businesses that operate in huge bulk of single products with a single insurance policy and the "whole in and out" mode works perfectly. On the other hand, in the B2C model the orders are individual and fragmented and the opposite "one by one in and out" greatly increases the number of custom clearance inspections, work and costs.

- *The management and function of cross border payment agencies is not clear* [49]

  These agencies manage cross-border foreign exchange payments, but the management and orientation of such nonfinancial payment agencies are not clear, which is a serious cross-border E-commerce risk.

- *The cross-border disputes lack procedural regulation*[50]

  The CBEC trade lacks after-sales service and means of reporting transaction disputes. Basic customer protection often cannot be exercised.

- *Economic statistics conflict with the industry model* [51]

[47] Hongfei Y., *supra, p.22*
[48] *Iv.*
[49] *Iv.*
[50] *Iv.*
[51] *Iv.*

Current Chinese export statistics models are not tailored for CBEC and this leads to very imprecise statistics, new formats need to be developed.

- *Untimely consultation and implementation of policies and regulations from different departments*[52]

  Even though the Chinese government has introduced policies and regulation regarding E-commerce, it lacks systematic coordination and linkage between departments and policies are hard to harmonize.

Finally, there are several issues that are worthy of attention regarding incompatibility of current domestic regulations that need to be addressed[53].

In January 2019, the Chinese Ministry of Finance introduced new regulations that partially tackled some of these problems, the most relevant are[54]:

- The single-transaction amount increased from 2,000 RMB to 5,000 RMB;
- the annual amount of cross border purchases increased from 20,000 RMB to 26,000 RMB;
- 63 new item categories were added to the positive list for CBEC purchases;
- the cities included in the CBEC tax-rebate increased from 15 to 37 cities, including Beijing and Shanghai;
- the new regulation makes it harder for Daigou[55] to go about their business illegal business.

CBEC marketplace

[52] *Iv.*

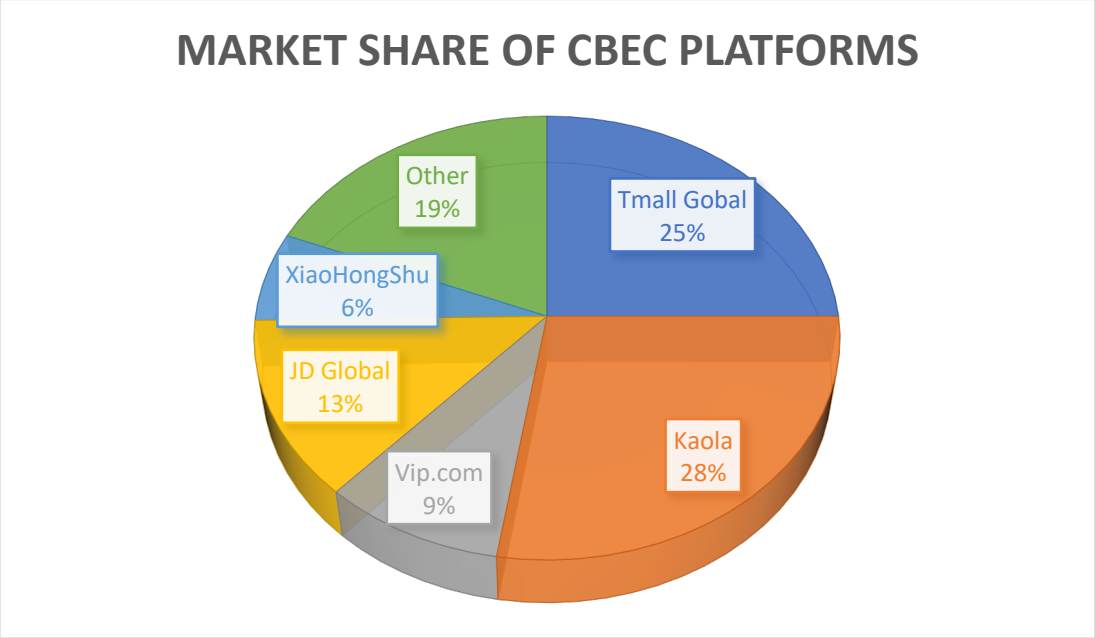
[53] For example, customers who purchase goods from overseas have acquired trademark right, but the mark may not be authorized in the consumer's country, therefore the business platform and merchants may not have the right to sell goods.

[54] Tenba group: https://tenbagroup.com/the-2020-china-cross-border-e-commerce-insights/

[55] Daigou (代购) is a term for an emerging form of cross-border exporting in which an individual or a syndicated group of exporters outside China purchases commodities (mainly luxury goods, but sometimes also groceries such as infant formulas) for customers in China. Daigou shoppers typically purchase the desired goods in a region outside China, after which they post the goods to China or carry them in their luggage when they return to China. The goods are then sold for profit in China. Daigou activities can include illegally or legally using loopholes to circumvent import tariffs imposed on overseas goods.

As we previously discussed marketplaces play a crucial role in the E-commerce economy and CBEC is no exception. Existing platforms come with high-volume ongoing traffic, but they are expensive (deposit, commission, management fees, etc.) and highly competitive (often large brands with high marketing budgets).

The CBEC platform's market was very balanced before Alibaba Group bought Kaola in 2019, now owning both Tmall Global and Kaola it owns almost 50% of the market share alone. The other main competitors are JD global (13% of m.s.), Vip.com (9% m.s.) and Xia Hong Shu (6% m.s.).



Kaola

Originally founded by NetEase was purchased by Alibaba for 2 billion USD in 2019. It focuses on high-quality "western" products for middle class Chinese consumers. Brand awareness is essential for success in the market. Therefore, non-exclusive brands are advised to set aside a budget for marketing and brand building.

Tmall Global

Founded in 2014 it is the CBEC platform of the Alibaba Group from the world to China. It is competitively expensive and has a certain risk, as it may reject products that do not fit their strategy.
Since August 2019, Tmall Global offers TOF (Tmall Overseas fulfillment), a solution that allows brands to sell a small number of products on the Tmall Global platform. It is ideal for businesses, new to the Chinese market, to test their products and modify them to the tastes.

JD worldwide

As JD.com, that operated in China, JD worldwide first and foremost specializes in electronics. Since its major stakeholder is Tencent, the JD products are displayed on WeChat when searching for products. It also massively invests in high tech to realize drone delivery and delivery by autonomous trucks. It is cheaper compared to Tmall.

VipShop

Specializing in online discount sales, it is not well known outside China but is one of the world's fastest-growing retailers.

RED (Xiao Hong Shu)

It has over 85 million monthly active users, who post and share product reviews, travel blogs and lifestyle stories via short videos and photos

Pinduoduo

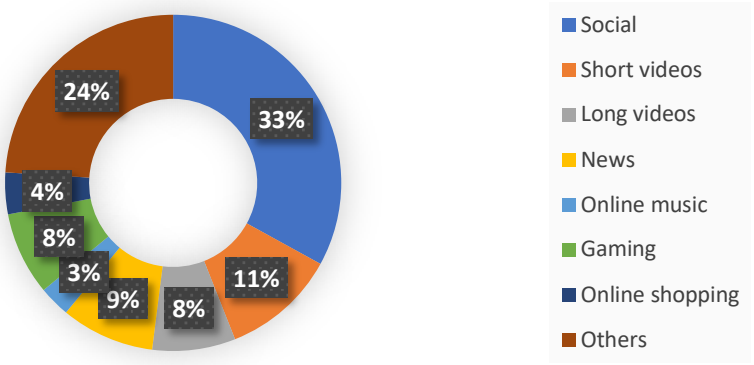
A popular channel for group-buying deals and a 2018 stock-hit in which Tencent invested. Collective buying enjoys great popularity in China. Amazon is currently in the process of opening a pop-up store on Pinduoduo. It is only a matter of time until collective buying arrives in Europe and America.

C. E-commerce trends: social commerce

Social commerce is indeed one of the new e-commerce trends in 2020. It is described as the use of networking websites as vehicles to promote and sell products and services[56]. The widespread use of mobile phones is being exploited by this phenomenon, which is trying to create a seamless experience of social networking and online shopping[57]. This kind of activity is being enacted in various and sophisticated ways. There is a huge and extremely diverse number of services that apparently work independently but come together, under the umbrella of the social network experience, from grocery shopping, to media consumption, to asking for a bank loan. The indirect aim is to create an integrated experience between social media and online shopping in a deeply connected ecosystem This is in part possible because the two main operators in social media and online shopping (Tencent and Alibaba) create an oligopoly in the social media, e-commerce and online payment markets. For example, all the companies operating in WeChat will benefit from WeChat social media coverage, WeChat mini programs that allow them to open a digital store and pay with WeChat pay[58], all within the same ecosystem.

Time spent online by digital consumers

Social media & content account for 2/3 of total online time spent



[59]

[56] https://www.investopedia.com/terms/s/social-commerce.asp
[57] https://tenbagroup.com/12-china-ecommerce-market-trends-2020/
[58] Alipay and WeChat pay together hold 92% of the market share https://www.paymentscardsandmobile.com/alipay-continues-mobile-payments-expansion-in-japan/
[59] https://www.chinainternetwatch.com/22664/social-ads-q2-2017/. According to the same statistic the average total time spent per day on internet by Chinese consumers is 358 min

The digital consumers spent most of their time on mobile phone browsing social networks, being able to integrate an e-commerce experience into the social network can undoubtedly improve sales for the sellers.

Social commerce is redefying not only the shopping experience, but the very personal relationship between the retailer and the consumer, with online companies investing more and more in h24 live chat services to provide a social interaction even when no purchase is made at all.[60]

More trends are rising, exploiting the peculiarities of this interconnected environment, we can now analyse some of the manifestations and consequences of the complex ecosystem of social commerce.

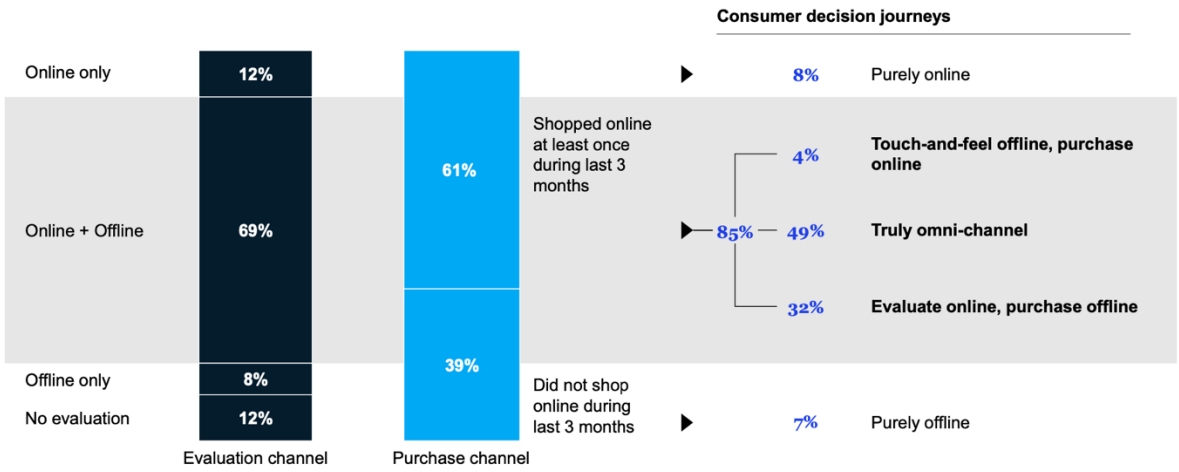
Omnichannel and O2O

The term omnichannel refers to the exploitation of the complete range of retail channels rather than focusing on a single one. According to a survey made by McKinsey and Company in 2019, more than 70% of consumers combine online research with visits to physical stores in the decision-making process[61]. Physical stores are now increasing their importance with brands developing the so-called Online to Offline (O2O) business that is meant to break the barriers between the online and offline shopping experience.[62] This process is also going in the opposite direction. According to the same survey more than 50% of consumers check their mobile phones for prices and product info while shopping in stores, making the integration of the offline and online store extremely important.

[60] Angela Wang, core member of the Boston Consulting Group. TedTalk https://www.youtube.com/watch?v=dOt4NkcmIUg&t=734s min. 11:20

[61] https://www.mckinsey.com/featured-insights/china/china-digital-consumer-trends-in-2019

[62] https://www.marketingtochina.com/future-chinese-ecommerce/#CHINESErsquoS_O2O_E-COMMERCE



SOURCE: McKinsey China Digital Consumer Trends 2019

Short videos and KOCs

Marketing strategies are shifting from involving Key Opinion Leaders (KOLs) to Key Opinion Customers (KOC) to promote their brand[63]. This tactic is put in place to increase the social engagement of customers. Involving a Key Opinion Leader is usually expensive and is a one-way communication. If on one hand it may be useful for brand positioning it may not be as effective in the buying process of the customer. Involving a KOC is a two-way communication peer to peer *communication* arousing in the buyer a sense of trust toward the product since it is promoted by a person they know and respect[64]. This is often done by popular short video applications, during the review of the product it is possible to buy the product itself via a link.

WeChat mini programs

One of the most innovative and important aspects of social e-commerce and omnichannel are WeChat mini programs. Mini programs are sub-apps launched by Tencent in 2017 that can turn individual accounts into platforms for e-commerce. Since their launch, they are having an exponential growth and

[63] https://coresight.com/research/retail-2020-10-trends-for-china-e-commerce/
[64] https://www.mckinsey.com/featured-insights/china/china-digital-consumer-trends-in-2019

according to Tencent in 2019 the e-commerce transactions on WeChat mini programs increased by 27 times. By the end of August 2019, the number of mini-programs available through WeChat reached 2.36 million, with a user base of more than 840 million and Tencent announced that its users spent 800 billion RMB through its various mini-programs [65]. Mini programs are the best representation of social commerce as they are shopping pages embedded inside the most popular Chinese social network guiding the consumer across the whole customer journey[66] including completion and purchase without ever having to leave the social media.

Consumer to Manufacturer

"The owner of a fashion company told me that he is so frustrated that his customers keep complaining that his products are not new enough, and the already increasing number of new collections didn't seem to work, so I told him -there is something more important than that, you have to give to your consumer exactly what they want, when they still want it-" This is how Angela Wang, core member of the Boston Consulting Group, was describing the importance for companies of quick response and delivery to market change during a TedTalk. However, since what the market asks changes at unprecedented speed even a perfect logistic seems not to be enough and the solution is to foresee the demands of the consumers. C2M model retailers and manufacturers collect data from customers and use big data to build a customer profile and create a production plan[67]. This shifts the discussion to the everyday biggest importance of data for developing a modern economy and the incredible competition advantage it can give. Thanks to the peculiarities of the Chinese market, big companies like Tencent hold a tremendous and extremely diversified amount of data, since apps like WeChat manage every aspect of the Chinese life, being able to classify the data with more than 3000 tags[68].

[65] https://melchers-china.com/wechat-mini-programs-a-rapidly-growing-trading-channel-in-china/
[66] Mckinsey consumer journey: Discovery, awareness, engagement, conversion, customer service
[67] https://coresight.com/research/retail-2020-10-trends-for-china-e-commerce/
[68] https://www.beyondsummits.com/blog/power-big-data-china-market

In conclusion, China's e-commerce environment is extremely diversified and is rapidly developing. Only ten years ago WeChat wasn't even released yet and today it affects Chinese life deeply from texting a friend to buying train tickets, Instagram had not yet been banned and modern Chinese social networks like Tik Tok were far away from being invented, while now they are shaping Chinese lives and economy. The introduction of so many innovations bring two important considerations to the fore. The first and main one is the importance of the deep connection between different sectors thanks to omni comprehensive apps, like WeChat, that allow communication and links between branches of the economy which are completely separated. The second one is the unforeseeable evolution of technological development and its implementation. This is a constant when dealing with the internet environment. Internet itself went way beyond the purposes of its invention. Amazon managers claimed that they never would have imagined the activities that they are involved in today.
This premise is a core consideration in this thesis. Legislating is a slow and delicate process that involves a backward looking phase of analysing the problem, its context and its manifestation and a forward process that consists in creating a set of rules based on some premises that are supposed to have a certain impact on the above-mentioned problem. Before a law enters into force and its effects are shown it requires time, the prediction of the effects is a crucial phase in law making. Predictions are logically based on premises, if the premise changes the output changes. This is what makes regulating the internet such a difficult task, the laws are asked to carry out an almost impossible task: to regulates the unforeseeable.

There are two approaches. The first one is to slow down the technology developing process in order to control it. This is, in practice very unlikely to happen since it would require to completely change the utilitarian approach to the economy. Since it has been proven that even a two-year lifespan may result in an ineffective regulation, the other possibility is to develop a fast-responsive legislative process that is focused on regulating what *will happen*, rather than on what *happened*. It is crucial that there is an active interdisciplinary study

between the legislator and experts. Even the extremely innovating "E-commerce law" has proven to have this flaw, from the moment the drafting process started in 2014 to its implementation in 2019 the internet environment drastically changed and now it is already irrelevant in some parts, such as in apparently not including social platforms under its application, since they were not meant to be e-commerce operators.

2. The relation between E-commerce Law and other relevant regulations

Now that the economic environment has been generally outlined, we can analyse the most relevant provisions of this sector, in order to dive into a deeper analysis of the "E-commerce law" in the next chapter.

2.1 Chinese Civil Code

The NPC adopted the Civil code on May 28, 2020 and entered into force on January 1, 2021. The code is a massive piece of legislation, its latest draft includes 1260 articles.

It is worth spending some words on the history of this code since it represents one, if not the most important, step in the history of the PRC. China's previous four attempts on codification were all unsuccessful. The first two attempts occurred in 1956 and 1962 but both were derailed due to political campaigns of the time.[69] The NPC Standing Committee started anew in 1979, after China had just launched market-oriented economic reforms. But the legislature dropped the project again, having concluded that the time was still immature[70], China's rapid social and economic transformations rendered the project unripe.

The fourth attempt in the early 2000s was halted for similar reasons.

Since the 1980s China has enacted a series of standalone civil laws in the hopes of codifying them in the future[71], including: Marriage Law (1980 amended in

[69] Bu Y. "The Chinese Civil Code – General Principles – " p.1
[70] *Ibidem*
[71] *Ibidem*

2001), Inheritance Law (1985), General Principles of the Civil Law (amended in 2009), Adoption Law (1991), Security law (1995), Contracts law (1999), Rights in Rem Law (2007), Tort Liability Law (2009).

The Central Committee of the Communist Party passed the resolution concerning the rule of law in China (中共中央关于中国法治的决议) making the codification of the Civil Code one of its milestones, designing a two-step project[72]. It would first adopt the Code's General Part, a set of general principles of civil law, which the NPC enacted as the General Provision of the Civil Law 民法总则 in 2017.The legislature would then draft the remainder of the Code, referred to as the separate Parts. In August 2018, all six Separate Parts were submitted to the NPCSC, which then reviewed each one at six separate sessions thereafter. Last December, it combined the general Par and the Separate Parts into a complete draft Code and submitted it to this year's NPC session for a final review[73].

The code would be China's first statute styled as a code, a symbol that China's legal system has come a long way in the past several decades. It would reduce the inconsistencies between the standalone civil statutes enacted over the years and would also settle some of the new legal issues that have since arisen.[74]

Relevant provisions on e-commerce

The civil code has 7 chapters and 1260 articles, of which 525 are regarding contracts. More than 300 have been revised on the basis of the current contract law, more than 150 articles have been substantially added to or revised, including the regulation of electronic transactions. Special rules for the conclusion and performance of electronic contract are provided, and specific provisions for appointment contracts have been added. [75]The code is integrating the discipline of the "E-commerce law", introducing provisions that gives a

[72] Bu Y, *supra,* p.3
[73] For a chronology of the legislative process of the Civil Code: https://npcobserver.com/legislation/civil-code/
[74] https://npcobserver.com/2020/05/21/2020-npc-session-a-guide-to-chinas-civil-code/
[75] https://zhuanlan.zhihu.com/p/146002859

solid general background for the application of special laws regarding e-commerce regulation.

Since the actual provisions of the Civil Code are going to replace the General Principles of Civil Law and the Contract Law it is important to compare them in order to understand the issues they were planned to solve.

General principles

Starting from the Generals Rules of Civil law art. 137 regulates on the expression of intent including the possibility of its expression via electronic data instead of orally providing two solutions. *"If a specific data system is designated, the objective rule of arrival applies, which means that the entering of the data into the system is its arrival."* Otherwise *"if no specific data system is designated, the subjective rule of arrival applies,*[76] *which means that the declaration of intention is required to have entered into the control sphere of the recipient and the addressee is able to notice it under normal circumstances*[77]*."* The parties can otherwise agree upon the moment in which the declaration of intention become effective, in this case, the party agreement shall prevail. The GRCL does not provide a rule governing the case where a specific data system is designated, but the data is sent to an information system of an addressee other than the designated one[78].

Special provisions

E-commerce provisions can also be found in the special provisions regarding contracts, in particular in the "Chapter II Formation of the contract" the Civil Code reconfirmed the nature of the written form of the electronic contract and determined the establishment time and place of the contract itself.

[76] Bu Y., *supra,* p.108
[77] *Ibidem*
[78] Bu Y., *supra,* p.108

Art. 469 of the C.C.C. regarding the conclusion of the contract affirms that the parties may conclude a contract in, writing, in oral form or in other forms. The true relevance of this article lies in sub.3 where electronic data exchanges are explicitly regarded as written form, expanding the actual definition of "written form" of art. 11 of the "Contract law"[79]. This specification is of crucial importance in an economy where the means of communication based on exchange of data are rapidly changing[80]. The relevance given to data grants relevantly more protection to online transactions and its inclusive definition makes *it a future proof prevision*. It was previously debated for example, whether an agreement reached via WeChat or email could be defined as a contract, since the old definition of written form was too strict. With this new definition even a chat on social media can be classified as a written contract and be protected by law[81].

Worthy of mention is Art. 471 that changed the closed provision of the "offer and promise" method of entering into a contract of art 13 of the "Contract Law" with the more comprehensive "offer, promise, and other methods" in order to include new means of proposal for electronic contract, facilitating e-commerce activities and promoting resolutions of e-commerce contracts disputes[82].

The performance of electronic contracts is disciplined by art. 482 of the Chinese Civil Code.
Particularly relevant is art. 491[83] of the Chinese Civil Code regarding the conclusion and performance of the electronic contract. It establishes that if the

[79] https://www.hfgip.com/zh/node/13633
[80] https://www.hfgip.com/zh/node/13633
[81] Art. 469 Chinese Civil Code: "The parties may enter into a contract in written, oral, or any other form."
"Written form" means a written contract, letter, telegram, telex, facsimile, or any other form that can tangibly express the contents thereof.
A data message that tangibly expresses the contents thereof by electronic data interchange, e-mail, or any other means and is readily available for access and inspection shall be treated as a written form. "
[82] http://www.hbgrb.net/news/weiquan/2020/118/201181914118IJB69F0AIB6DI892DF.html
[83] If a party enters into a joint request to sign a confirmation by way of letters, data messages, etc., the contract shall be established at the time of signing the confirmation.

goods or services published by one of the parties through the internet and other information networks meet the conditions of the offer, the contract is established when the other party selects the goods or services and submits the order successfully, unless agreed otherwise[84].

The art. 491 includes two clearly separated actions in order to conclude the contract: the first one is the selection of the product or service and the second one is the submission, only after these two steps is the contract established[85].

This article must be read in conjunction with the almost identical art. 49 of the "E-commerce law". The "E-commerce law" is a specific regulation and has a stricter field of application only applying to the "e-commerce operators" classified by the law itself, leaving the transaction between parties that are not "e-commerce operators" unregulated. Art 491 sub. 2 absorbed and expanded the provision of art. 49 of "E-commerce Law" to all parties who use the internet and other information networks to publish information about goods and services[86].

Art. 492[87] of the Chinese Civil Code tackles another issue arising from e-commerce contracts: the location where the contract is established. According to art. 492 sub. 2 where a contract is concluded in the form of a data message, the recipient's main business place is the place where the contract is established, unless parties agreed otherwise[88].

If the goods or services published by one of the parties through the Internet and other information networks meet the conditions of the offer, the contract shall be established when the other party selects the goods or services and submits the order successfully, unless otherwise agreed by the parties

[84] For example, establishing that the payment must be proceed in one hour after placing the order.

[85] http://www.hbgrb.net/news/weiquan/2020/118/2011819141181IJB69F0AIB6DI892DF.html http://www.zhonglun.com/Content/2020/06-02/1426169614.html

[86] This protection can be useful in some transactions regarding second-hand goods that are happening in social media chats. Thanks to the combined reading with art. 469 expanding the concept of "written form" it is now possible to have an effective classification in a much wider cases scenario.

[87] Art. 491 c.c.c.: "Where the parties enter into a contract by letter, data message, or any other form and require a written confirmation to be signed, the contract is formed when the written confirmation is signed.

If the information on goods or service released by one party on an information network such as the Internet meets the conditions for an offer, the contract is formed when the other party selects the goods or service and successfully submits the order, unless the parties agree otherwise"

[88] https://zhuanlan.zhihu.com/p/146002859

The final provision of the Chinese Civil Code regarding e-contracts is art 512[89] in the "Chapter IV: Contract Performance". The article distinguishes three main scenarios. If the subject matter of an electronic contract concluded through the Internet or other information networks is the delivery of goods and the delivery is carried out by express logistics, the time of receipt by the consignee is the delivery time. If the subject matter of the electronic contract is to provide services, the time specified in the generated electronic voucher or practical voucher is the service time. If the aforementioned voucher does not specify the time or the time is inconsistent with the actual service time, the actual service time prevails. Finally, if the subject matter of the electronic contract is delivered by online transmission, the delivery time is when the subject matter of the contract enters the specific system designated by the other party, and it can be retrieved and identified. Unless the parties agree otherwise on the method and time for delivering goods or providing services, such agreement shall prevail[90]. These provisions provide a general ecosystem regulating e-contracts from their formation to their execution and it is now possible to simulate a real-life scenario. Imagine going home late from work and ordering a home delivery meal for dinner. When the merchant and the meal are selected, the order is submitted, and the contract is created (art. 491 C.C.C.) and it has written validity (art. 469 C.C.C.). At the delivery of the meal the performance has been executed and all the contractual obligations have been fulfilled (art. 492 C.C.C.).[91]

On one hand, the great development of e-commerce transaction provides great convenience for people's work and life, but on the other hand poses new challenges for the traditional contract system, especially changing the way traditional contracts are concluded and performed.[92] "With the development of e-commerce, the (Civil Code) has made corresponding provisions for the conclusion and performance of electronic contracts in the network

[89] http://www.jypfw.cn/upload/202006/1pj3s4l5uirxp/中华人民共和国民法典.pdf
[90] http://www.npc.gov.cn/npc/c30834/202009/13d3ce4424044d4ab7766ba20cdb94b2.shtml
[91] https://www.hfgip.com/zh/node/13633
[92] http://www.npc.gov.cn/npc/c30834/202009/13d3ce4424044d4ab7766ba20cdb94b2.shtml

environment[93].” The Chinese Civil Code has unified and created a general set of provisions that organically touch on all the main aspects of electronic contract and established a solid basement for developing an e-commerce environment.
The provisions stipulated in the “Civil Code” do not stand alone and need to be applied in conjunction with other relevant special laws such as the “E-commerce law” and the “Electronic Signature Law”

2.2 E-signature law

The “Electronic Signature Law of the People’s Republic of China” was released in China in 2005 and amended in 2015 (“E-signature Law”) and it contains vital provisions in order to guarantee legal validity for electronic contracts. It was drafted right after the ratification of the United Nations Commission on International Trade Law (UNICITRAL)’s Model Law on Electronic Commerce of 1996[94] in 2004. At the time, the Contract Law recognized that an electronic message was equal to a written one, but it failed to identify the other two requirements requested by the UNICITRAL[95]: the same legal validity of electronic and written signature, as well as same legal status of electronic record and original record.
The promulgation of the law was closely followed by the boom of internet companies and the e-commerce sector. This is not a coincidence since the law removed the main obstacles for the development of e-commerce: the validity and enforceability of electronic contracts in court.

The “E-signature Law” was directly modelled on the UNICITRAL’s act. The law needed to satisfy three main functions of handwritten signature: identify the signatory, to provide evidence that the signatory intended the signature to be his

[93] Xie Huijia, director of the Internet Law Research Center of South China University of Technology
[94] https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf
[95] Blythe S., *China’s New Electronic Signature Law and Certification Authority Regulations: A Catalyst for Dramatic Future Growth of E-commerce,* Chicago-Kent Journal of Intellectual Property, 2007

or her signature and indicating the signatory acceptance of the content of the document[96]. These three functions are based on three assumptions:

A) Any handwritten signature or fixed seal corresponds to one unique signatory
B) It presumes that the signatory has acknowledged the content of the document
C) It presumes that, after the signature, the content of the document will not be subject to alteration [97].

Standard Electronic Signature

The E-signature law needs to ensure that in electronic contracts those three premises are guaranteed. To address this issue the law firstly refers in art. 2 to "Electronic Data" rather than "Electronic messages", without constraining the application of the law to the tool of communication but focusing on its content. This provision shows itself to be a forward-looking provision since it is not focusing on the mean of communication that can rapidly change in unpredictable ways[98].

The important definition of "data message" is given by the same article that classifies it as "*the information generated, dispatched, received or stored by electronic, optical, magnetic or similar means."* Again, this definition is focusses on the function of the signature rather than the form of the technology[99].

The decision of whether or not using the electronic signature rests with the parties who both have to agree (Art.3). The "E-signature law" remains silent as to whether the legal validity of a document with an electronic signature can be disputed by third parties[100]. The "E-signature law" only provides that data messages cannot be refused as evidence simply because their very own nature

[96] Srivastava A., Thomson S.B. "E-Business Law in China: Strengths and weaknesses" in *Electronic Markets*, May 2007
[97] https://www.chinalawinsight.com/2019/01/articles/intellectual-property/a-comprehensive-guide-to-electronic-signature-from-a-legal-perspective/
[98] https://www.chinalawinsight.com/2019/01/articles/intellectual-property/a-comprehensive-guide-to-electronic-signature-from-a-legal-perspective/
[99] Srivastava A., Thomson S.B., *supra,* p.127
[100] Srivastava A., Thomson S.B., *supra*, p.128

(art.7)[101], predisposing a list of factors that be taken in consideration to examine the validity of a data message (art.8). These requirements are also satisfied when the data message can reliably ensure that its contents have maintained their integrity without modification since its finalization (Article 5). The introduction of the "Civil Code" only strengthens the validity of electronic contracts equating them to the written form in art. 469.

As we previously discussed the law needs to provide the evidence that the signatory intended the signature to be his or her signature and indicating the signatory acceptance of the content of the document. Under this aspect art. 9 describes the three scenarios where the messages shall be deemed to be dispatched by the sender[102].

E-contract parties often involves big companies with more than one office, and it is often hard to identify which one specifically concluded the contract. To address this problem specifically, art.12 identifies the principal business place of an addresser, the place of dispatch of data messages and the principal business place of the receiver as the place of receipt of the data message.

Reliable electronic signature

The "E-signature law" disciplines another kind of electronic signature, the Reliable Electronic Signature (RES), modelled on the Article 6 of the UNICITRAL Model Law of Electronic Signature of 2001 and the term "advanced electronic signature" used in the European Union Directive 1999[103]. The main difference between the two signatures is their technology, with the RES providing a higher level of reliability and protection directly considered to have equal legal value as a handwritten signature or seal by art. 14. According

[101] No data messages to be used as evidence shall be rejected simply because they are generated, dispatched, received or stored by electronic, optical, magnetic or similar means.

[102] The three cases include: (1) the data message is dispatched with authorization of the addresser; (2) the data message is dispatched automatically by the information system of the addresser; and (3) verification of the data message made by the receiver in accordance with the method recognized by the addresser proves that the message is identical with the one dispatched. This means that the electronic signature can be used by authorized third parties on behalf of the owner without affecting the validity of the contract.

[103] Srivastava A., Thomson S.B., *supra,* p.129

to the UNICTRAL Model Law of Electronic Signature a RES shall satisfy four conditions:

1. At the time the electronic signature creation data are used for an electronic signature, the electronic signatory is proprietary to the electronic signature.
2. At the time of signing, the electronic signature creation data are controlled solely be/by the electronic signatory
3. Any change to the electronic signature after signing can be noticed
4. Any change to the content and form of the document after the signing can be noticed[104].

These are relevant conditions that need to be verified by the Electronic Verification Service Provider, the government certification authority in charge of releasing RES. The applicants who fail to provide correct information or false information to EVSP shall be liable for damages caused by their actions according to art. 27.

In conclusion, the "E-signature law" gives a uniform and comprehensive regulation for the application of electronic signatures, one developed with a "technology-neutral" nature that makes no amendments necessary in case of technology advances[105].

2.3 Consumer's Rights and Protection Law

Before the introduction of the "E-commerce Law" the consumer protection for online commerce was mainly regulated by the "Consumer Protection Law" of 1993, substantially amended twenty years later to ensure a more complete e-commerce protection.

[104] *Ibidem*
[105] Srivastava A., Thomson S.B, *supra,* p.130

According to art. 1 the eight articles of the law are aimed "to protect the legitimate rights and interest of consumers, maintain social and economic order, and promote the healthy development of the socialist market economy".
The CPL has always been criticized for its generic definition of "consumer"; this notion is in fact so vague that it can be difficult to apply in real life situations[106]. Even after the 2013 reform, the definition of consumer remained unaltered: "When a consumer purchases or uses goods or receives services for the needs of daily consumption, their rights and interests are protected by this Law"[107]. This kind of definition makes it unique if compared to the Europeans and U.S. classifications of consumers. Nonetheless the broad scope of this definition is very important for the purposes of the "Consumer Protection Law" because the law itself would apply only to whom is classified as "consumer", resulting with the disapplication of punitive damages under art. 55 if that condition is not fulfilled[108].
This issue was solved, as far as e-commerce is concerned, with the introduction of the "E-commerce Law" in 2019. A special law for e-commerce that gives new definitions of consumers, hence the "Consumer Protection Law" now only has a general broad of application when the special law cannot be applied or when certain aspects are not specifically regulated.

In trying to better protect consumers rights the Consumer Protection Law sets clear requirements for the use of standard contracts that: according to art. 26 can by no means restrict consumers' rights such as return policies according to art. 25 or exempt the online platform from liabilities.
Different set of provisions ensured transparency regulations for online sellers (art. 28) and protected e-commerce customers under several aspects, including

[106] Thomas K. "Analysing the notion of 'Consumer' in China's Consumer Protection Law". The Chinese Journal of Comparative Law 2018, vol.6 No.2 p. 294
[107] One of the main issues is that the customer is never referred to as a "person" rising questions whether legal persons such as small businesses may be categorized as consumers. Also, the range of the "daily consumption" is not clear.
[108] According to K. Thomas, this definition is the fruit of the Chinese socialist economy in transition that does not follow the same neo-classical principles as developed market economies.

the right to ask for compensation for the consumer whose lawful rights are harmed purchasing goods or services via an online platform (art. 44)[109].

We will not dig deeper into the content of the articles because they will be disapplied in favour of the "E-commerce Law", still it is important to understand the legislative background and protection of the general law. The introduction of these provisions with the reform of 2013 tried to put a heavy burden on the shoulder of e-commerce platforms, but the practice clearly pointed out that they were not enough. Two years later in 2015 Alibaba was in fact accused by the SAIC of not taking adequate measures to protect intellectual property on its platform, proving the ineffectiveness of the "Consumers Protection Law" sanctions and the need for a more effective regulation, the "E-commerce Law" drafting process had already started.

2.4 Cybersecurity Law

The "Cybersecurity law" is the last main regulation that is relevant for the purposes of the regulation of e-commerce. Entered in force on June 1, 2017 is a legislative effort to improve the protection and treatment of personal data, western researchers often compared it to the European GDPR[110]. This law is useful for our analysis because it introduces some relevant obligation towards internet operators, including internet platforms, that if not respected may lead to fines or even revoking of the business license. The fulfilment of these requirements protects the consumers' privacy rights on one side but, on the other side it translates into an increase of costs for the operators that may lead, according to some experts, to unfair advantages for domestic operators[111].

[109] https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn174en.pdf

[110] Qu Bo,Huo Changxu "*Research on the major issues of data flow and information privacy protection: a global watch from a Chinese perspective privacy, national security, and internet economy: an explanation of china's personal information protection legislation"* Frontiers of law in China, vol.15, no.3, p.349

[111] Israel Kanner and Doron Ella, *China's new cybersecurity law*, INSS Insight No. 912, April 3, 2017

Moreover, unclear provisions regarding the compliance of granting access to stored data upon request of governmental agencies are still debated.

Before the implementation of the "Cybersecurity law" China enacted several laws and regulation trying to respond to political, social, economic, military and social security threats from the internet without ever reaching a satisfying result[112]. The "Cybersecurity law" is now the main body of the China's strategies of cyberspace strategies.

Principles

The law must be read under the light of art. 1 that stipulates that its purpose is to protect certain principles proposed for many years in the political debate in China: network security and cyberspace sovereignty. Internet was already recognised as a critical infrastructure in a White Paper released by the government in June 2010. In 2014 president Xi himself delivered an opening speech to the First World Internet Conference, stating the importance of improving internet development cooperation and sovereignty. It was only one year later than this principle was clearly defined in art. 25 of the "National Security Law"[113]. Other purposes listed in the art. 1 are national security, public interest, legal rights and interests of citizens, corporations and other organizations and promoting the development of information technology in

[112] These laws and regulations include The NPC Standing Committee Decision on Maintaining Network Security (2000), Regulations on Computer Information System Security Protection (revised in 2011), The Decision on strengthening Network Information Security by the NPC Standing Committee (2012), Regulations Regarding Telecom and Internet Users' Personal Information Protection by the Ministry of Industry and Information Technology (2013), The National Security Law of the P.R.C. (2015), and The Anti-Terrorism Law of China (2015).

[113] Art. 25: "The State establishes a national network and information security safeguard system, raising the capacity to protect network and information security; increasing innovative research, development and use of network and information technologies; to bring about security core techniques and key infrastructure for networks and information, information systems in important fields, as well as data; increasing network management, preventing, stopping and lawfully punishing unlawful and criminal activity on networks such as network attacks, network intrusion, cyber theft, and dissemination of unlawful and harmful information; maintaining cyberspace sovereignty, security and development interests." Full text of the law available at:
http://eng.mod.gov.cn/publications/2017-03/03/content_4774229.htm
https://www.szse.cn/lawrules/rules/law/P020180528571756980392.pdf

economic and social sectors[114].We can see how the protection of rights and legal interests of the citizens is indeed one of the aims of the law, but it is inside a framework that is mostly directed towards the protection of the national interest.

Broad of application

This law applies to network operators broadly defined by art. 76 as the network owners, managers and network service providers. A very broad definition that includes not only e-commerce platforms but any kind of entities that sell products or provide services through the internet.
This law applies indistinctly to foreign founded and domestic founded network operators since the requisite for application, according to art. 2, is the operating in the territory of the PRC and they shall comply to the provision of law and administrative regulations according to art. 10 of the same law[115].

Obligations

After setting out the general provisions, the law includes a set of specific security obligations for network platforms. In particular art. 21 requires compliance to the so called "hierarchical system" as described in the Guidance for Classifying Protection Levels for Computer Information System" issued by the Ministry of Public Security in 1999, listing five levels of protection that need to be ensured for computer information systems[116].
To improve the overall security of internet products and services the law sets out clear rules on network products or service providers' security obligations.

[114] https://www.amchamchina.org/uploads/media/default/0001/05/b78e2db2b147c09b8430b6bd55f81bc8299ea50f.pdf
[115] Amin Qi, Guosong Shao, Wentong Zheng, *Assessing China's Cybersecurity Law,* Computer Law and Security Review 34 (2018) p.1347
[116] Specifically, according to art. 21 operators have the following obligations: establishing internal security management systems and operational procedures, ascertaining the responsible entities who are in charge of network security, taking technical measures to prevent computer viruses, network attack, network intrusion, and other forms of behavior that endanger network security; taking technical measures to monitor and record all network operating activities and cybersecurity incidents, preserving relevant weblogs for not less than six months as required, and taking measures to categorize, duplicate, and encrypt important data.

In particular art. 22 stipulates the mandatory compliance of network products and services to international standards, obliging the providers to adopt necessary measures when vulnerabilities are discovered and promptly inform the users and report to the competent authorities. Art. 23 also provides that critical network equipment and cybersecurity products shall comply with the national standards and be inspected and certified by a qualified institution. [117]

The companies are required to assist governmental agencies involved in national and public security[118]. This obligation embedded in art. 28 allows governmental agencies to collect the personal data of the users for general reasons of public safety without any legal possibility for the operator to refuse its consent. The vague wording of the provision was harshly criticized[119] because it can easily lend itself to abuse by the authorities.
Combined with the *real name system* of art. 24 of "Cybersecurity law", art.28 sounds even more ambiguous. With the official purpose of fighting cybercrimes internet compan~~y~~ networks, operators handling network access and domain registration services for users, operators handling stationary or mobile phone network access, and operators providing users with information, publication or instant messaging services, shall require users to provide real identity information when signing agreements with users or confirming provision of services[120]. Despite potential abuses the real name system is an effective strategy when fighting cybercrimes, since no operations can be carried out under anonymous accounts and the identification of the subjects is easier and faster.
A general obligation of cooperation is prescribed by art. 49 as far as routine checks and supervisions are concerned

[117] Amin Q., Shao G., Zheng Z., *supra,* p.1347
[118] Art. 27 of "Cybersecurity law"
[119] Israel Kanner and Doron Ella "China's new cybersecurity law" INSS Insight No. 912, April 3, 2017 p.2
[120] Amin Qi, Guosong Shao, Wentong Zheng, *supra,* p.1347

Sanctions

The sanctions for infringement or non-compliance with the law are particularly severe. Fines up to one million RMB can be issued. Art. 75 specifically provides details for foreign companies when they engage in illegal cyber activity that endanger essential Chinese information infrastructure and national security, the competent authorities are entitled to freeze their assets and take any necessary measures. In particular, the expansive meaning of "any necessary measures" rises some concerns on the broad discretionarily of its application[121].

In conclusion, this provision, with the purpose of raising the level of control and protection of cyberspace by the Chinese government, directly affects the business activities in the territory in favour of domestic companies. In fact, foreign companies need to change their internal organization in order to comply to/with the Chinese regulations, even if this means moving their servers into the territory of China.

3. The drafting process of the "E-commerce Law"

3.1 Premises and the first draft

The drafting of the Chinese e-commerce law was presented in the XII Legislative plan in 2013[122] when the relevance of e-commerce in the future economic and technologic development of the country was clearly acknowledged. Yesterday as today, e-commerce was growing exponentially with an average annual growth of 30%, accounting for 10.8% of the total retail sales of consumer goods and employing 26.9 million people[123]. In December 2013, the Finance and Economic Committee of the National People's Congress took the lead in developing the e-commerce legislation and established the e-

[121] Israel Kanner and Doron Ella "China's new cybersecurity law" INSS Insight No. 912, April 3, 2017 p.2
[122] https://zh.wikisource.org/wiki/User:NPCObserver/12thNPCSCLegislativePlan
[123] http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-08/31/content_2060159.htm

commerce law drafting group with the participation of twelve departments under the state party. The drafting process focused hard on involving a meaningful communication, negotiation and compromise. The same drafting group was very diversified including eight agencies, one university and one association[124]. The drafting process consisted of a joint collaboration between the drafting group and a plurality of counterparts: e-commerce related departments, industry associations, universities, local departments, municipalities etc. It was a process characterised by extensive listening of comments and critics from different areas and by a dialogue with experts and the parties affected by the law,[125] learning from the experience and practices of international organizations and major countries[126].

The drafting process can be divided in three main phases: the formation of the preliminary draft, followed by the internal agency opinion solicitation and a period for broader internal and closed outsider opinion solicitation from January 2015 to May 2015[127] that ended on July 19, 2016 when the Finance and Economic Committee of the NPC held a meeting to deliberate and pass the draft.

The first draft

The first draft introduced the leading principles of the ideology and the leading principles of the law that were deeply/fundamentally inspired by the 18th National Congress of the Communist Party when it came to establish/set about establishing an open, shared, honest and safe e-commerce environment, promoting economic restructuring and realizing economic transformation[128].

Following these principles, in drafting the law the commission followed three main directives:

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[124] Jinting Deng & Pinxin Liu (2017) *Consultative Authoritarianism: The Drafting of China's Internet Security Law and E-Commerce Law*, Journal of Contemporary China, 26:107, 679-695, DOI: 10.1080/10670564.2017.1305488 *p.682.* See also http://www.npc.gov.cn/npc/xinwen/tpbd/2013-12/30/content_1822039.htm for more specific information

[125] Jinting Deng & Pinxin Liu, *supra*, p.682

[126] *Ibidem*

[127] Deng J. & Liu P. *supra p.681*

[128] http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-08/31/content_2060159.htm

1. Promotion of development, where development as to be intended as heathy and sustainable in particular by:
    - Protecting the rights and interests of all parties and clarifying obligations and responsibilities
    - Encouraging innovation by encouraging a social co-governance model of enterprise autonomy and industry self-discipline under government supervision
    - Promoting standardised development

2. Following a problem-oriented approach, with a particular focus on:
    - improving the legal and business rules
    - Regulating market order and improving the trading environment
    - Strengthening of transaction security

3. Standardization of business behaviour of e-commerce business entities, paying attention to strengthening the protection of e-commerce customers and laying institutional foundations for future developments[129].

The first draft consisted in 94 articles and has a very different structure compared to the final version. The first draft is divided into eight chapters: general provisions, e-commerce business entities, e-commerce transactions and services, e-commerce transaction guarantees, cross-border e-commerce, supervision and management, legal responsibilities and supplementary provisions. Not only is the name of the chapters very different from the final version, but one of them was even removed. In the original project, cross border e-commerce was included in a specific chapter of the law and no limitation to the national territory was prescribed[130], just to be removed later during the

[129] http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-08/31/content_2060159.htm
[130] It will be later added in art. 2

drafting process. The very subjects of the law were much/very different to/too, since the law was referring to "E-commerce entities" rather than "E-commerce operators" with a dissimilar internal distinction.

Definition of e-commerce

Specifically, the first chapter focused on the determination of the object and scope of e-commerce law. One of the most prominent accomplishments of the first draft is laying down the definition of "e-commerce" described as the "Business activities of sale of goods or provision of services through the internet or other information networks such as the internet", a definition that will remain almost unchanged[131]. The legislative records clarify the terminology providing examples for "information networks", including the Internet, mobile internet etc.; "commodity transactions" include tangible product transactions and intangible product transactions; "service transactions" referring to service product transactions and "Business activities" referring to commercial activities for profit.

E-commerce subjects and obligations

The second chapter, on the subject, is different not only in name but also in the internal classification. It is referring to "E-commerce business Entities", distinguishing between general e-commerce business operators and "e-commerce third-party's platforms". Despite this distinction being changed at a later date, the core subject of the "e-commerce platforms" remain the same. The draft lays down their main obligations that consist in reviewing the operators and providing stable and safe services; secondly, they should set out transparent and open transaction rules, follow requirements for important information disclosure and transaction preservation and finally lay down the requirements for withdrawal.

[131] The specification "such as the internet" is not present in the actual law

One important remark is art. 12, that introduces one of the requirements for operating an online business since the original version *was much more articulated*[132].

On e-commerce transactions

The scope of the third and fourth chapter was very different and more extensive. They were disciplining respectively the "E-commerce transactions and services" and the "E-commerce transaction guarantee". Neither of these two chapter ended up in the law and their content is mainly spread across the Chapter II and III[133]of the "Chinese e-commerce Law".

The chapter III of the draft regulated the electronic contracts, electronic payments and express logistic. Chapter IV, on the other hand focussed on different topics:

- The development, utilization and protection of users' data
- Market order and fair competition, which included intellectual property protection and credit evaluation rules
- Protection of consumers' rights
- Dispute resolutions

Cross border e-commerce

The CBEC chapter was developed in the wake of the China's new opening-up initiative "Belt and Road"[134]. Special provisions were included regarding the central role of the state in the developing of CBEC, the establishment of a

[132] Article 12 of the first draft stipulates: "E-commerce business entities shall apply for industrial and commercial registration in accordance with the law. However, the provision of labor services with personal skills, cottage industry, self-produced and self-sold agricultural products and self-produced and sold agricultural products do not require a license in accordance with the law. Except for industrial and commercial registration. The specific measures shall be prescribed by the State Council." According to the legislative records, this provision was the result of trying to exempt some small-scale operators from registration taking into account the country's national conditions and the level of e-commerce development.

[133] Chapter II of the "E-commerce law" is entitled "E-commerce operators" and chapter III "Conclusion and performance of e-commerce contract".

[134] http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-08/31/content_2060159.htm

supervision and management system that meets the needs of CBEC activities and the promotion of digitization of custom clearance, taxation and inspections. The idea was later dropped in favour of focusing on a more effective domestic regulation.

There was a specific chapter, "Supervision and management and social governance", promoting and strengthening the industry self-discipline and social governance with a guidance role played by the state authorities.

3.2 October 31, 2017: Second round of deliberation

The first deliberation of the draft was followed by its distribution to all provinces, autonomous regions, relevant central departments, some enterprises and institutions to receive comments.
The main guidelines that have been followed on the analysis and the implementation of the comments have followed the aim of reducing complexity and simplifying the recommendations. In particular, the commission focused on regulating e-commerce operators and removing redundant provisions with other laws. It was on October 17 that the Legal Committee held a meeting for deliberating the draft amendments.

Amendments on the subjects: from "entities" to "operators"

Art. 11 required some specification since the terminology "e-commerce business entities" was too vague and the first draft didn't clarify its classification and meaning. Thus, the wording changed to "e-commerce business operators", including e-commerce operators, e-commerce platform operators, and e-commerce operators within the platform[135].
The broadness of art. 12 was still debated. On one side, the exemptions were considered too narrow not encouraging the development of e-commerce, on the

[135] https://npcobserver.com/wp-content/uploads/2017/11/e-commerce-law-2nd-draft.pdf

other side they were consistent with the regulation on the investigation and punishment *of unlicensed and unlicensed operations* issued and implemented by the State Council. The committee reworded the article trying to make the exemptions a little bit broader[136].

Amendments on obligations: on collecting and use of information and terms of service

Some changes also regarded the obliges on e-commerce platforms on collecting information on the operators applying for access to the platform. This provision affected art.19 (now art.28) now requiring more detailed identity and business information of the operators on the platform[137].
Moreover, a stronger cooperation obligation is added in paragraph 2, obliging e-commerce platforms to provide support for operator who are required to commercial or industrial registration.

It was during this second revision that relevant provisions on increasing the obligations of e-commerce operators and strengthening the protection of consumer rights were added, in particular concerning information and delivery, that will later be located in Chapter II section II on E-commerce platform operators. These operators must not infringe customers' right to know by false propaganda, fictitious transactions and fabricated user reviews. They should display search results in a variety of ways[138] and clearly indicate the procedures of user logout without setting unreasonable conditions. Finally, e-commerce operators now bear the risk and responsibilities in the transportation of goods and should deliver in accordance with the premises set out or agreed method with the consumer.

[136] According to the new art. 12 e-commerce operators shall go through industrial and commercial registration according to law. However, sales of self-produced agricultural and sideline products, sales of cottage industry products, individuals using their own skills to engage in convenient labor activities that do not require licenses in accordance with the law, and those that do not require business registration in accordance with laws and administrative regulations are exceptions."
[137] It was formerly requested to only review and register the identity and the administrative licence of the operators.
[138] Such as price, sales volume and credit levels of goods or services.

One of the key elements in online commerce are the general service agreements and transaction rules. These long agreements were often abused by companies to change the general terms and conditions of the contracts in their favour, leveraging upon the complexity of the document, resulting in unfavourable conditions for the customer. Thus, after the suggestion of some members of the Standing Committee, companies and experts, art. 23 was modified to include an obligation for e-commerce operators on publicly solicit opinions when modifying the platform service agreement and publicize the amendments in advance in order to avoid under-the-counter operations.
A general obligation was then added in art. 55 of the draft that forbids platform operators from using service agreements and transaction rules to impose unreasonable restrictions or *additions*.

Intellectual property protection enhancement

One of the most relevant amendments were adopted in the field of intellectual property liability of the platforms introducing the so called "Notice and takedown" approach that will be studied later. Some members of the Standing Committee, departments, enterprises and experts suggested that the art. 53 on IP protection should be further strengthened. The old provision had a very simple structure: if an e-commerce platform "knows" that an operator on the platform is infringing IP rights, it shall take the "necessary measures" such as deletion according to the law. It was a provision composed of two elements: the knowledge of the infringement and general consequent necessary measures to be adopted.
The law committee drastically increased the obligation on the head of platform operators specifying more measures that needs to be adopted in case of IP violation[139] and broadening the liability of the platform providing a joint and several liability with the seller for the damage caused if it didn't respond in a

[139] Such as deleting, blocking, disconnecting and terminating transactions and services

timely manner. They also broadened the element of the "knowledge" by including "should have known" about the infringement, implying that e-commerce operators should actively and adequately monitor and chase IP infringement on the platform.

Introduction of a "dispute resolution chapter"

The introduction of a chapter regarding the "E-commerce dispute resolution" was an important implementation of the second draft since it will be part of the final version of the law. The necessity of a specific chapter was brought up by some members of the Standing Committee, local governments, experts and the public pointing out the consumers' complaints and the difficulties in obtaining evidence in practice. This led to the introduction of a specific obligation on the platform operators of establishing a suitable and effective complaint and report mechanism and to disclose the information on the report methods, also providing the original contracts and transaction records in handling e-commerce disputes.

In the implementation of "Internet +" some members of the Standing Committee and localities, departments and enterprises suggested that measures to promote the development of e-commerce should be enhanced, leading to the introduction of a whole new chapter on "E-commerce promotion", specifically focusing on promotion of internet technology in agricultural production, processing and circulation. This amendment was maintained until the final version of the law.

3.3 June 19, 2018: The third round of deliberation

After the second revision the draft was distributed again and published to solicit opinion from the public. In the process of reviewing and revising the draft, the law committee paid attention to the same guiding principles: innovation as a driving force for development, the idea of equalizing standardization of

operation and promotion of development focusing on e-commerce operators, encouraging innovation tolerance and prudence and properly handle the relationship with the relevant civil laws and administrative management laws.

On the basis of those ideas, the new draft included *six* new main contents. First, it clarified the scope and application of the law limiting it to e-commerce activities within China, it then further divided the e-commerce operators and clarified exemptions. Second, it tried to implement new obligations for e-commerce operators in view of the characteristics of e-commerce, such as the introduction of the real-name system. Third, it established rules for the conclusion and performance of e-contracts. Fourth, further refinements are/were made on the basis of the relevant provisions of the Tort Liability Law and the Consumer Rights Protection Law. Fifth, a chapter dedicated to the promotion of e-commerce was included, as prescribed in the last deliberation. Sixth, it stipulated the method of resolving e-commerce disputes.
This round of modification was very deep and profoundly shaped the internal content of the law, modelling it into a more uniform structure, very close to the final deliberation.
The draft also passed, on June 12, under the revision of the Constitution Committee that gave an important contribution to the introduction of provisions.

On e-commerce operators and the real name system

As above-mentioned, the e-commerce operators' provisions were reshaped and specified. E-commerce operators were further divided including e-commerce platform operators, operators on platforms and self-built website operators. At the same time, the exemptions were classified according to the particularities according to industry and fields, including financial products and services, broadcasting and information, online publishing and internet cultural products.

The definition of the former art.10 of "e-commerce operators" was changed too, since it was not including non-business activities such as personal transfer of

second-hand goods for personal use. The original text was wording that the term "e-commerce operators" refers to natural persons, legal persons and unincorporated organizations that sell goods or provide services through information networks such as the Internet, including self-built websites, e-commerce operators, e-commerce platform operators, and e-commerce operators within the platform. The Constitutional committee proposed to change "sell goods and provide services" into a broader "engage in business activities" and generally reformulated the wording of the whole definition[140].

This round of revision also introduced the implementation of the real name system, that e-commerce operators need to provide to the e-commerce platform[141]. The Constitutional committee proposed to amend art. 23 par.2 of the second draft[142] including the submission of relevant information to the administrative departments for industry and commerce and taxation departments in accordance with regulation. However, since some of this information can be sensitive such as trade secrets, it was specified that the scope of the submission has to limited.

On consumers' protection

A series of amendments were included in order to improve the consumers' awareness and protection. The e-commerce operators should not abuse the profiling and should also provide consumers with information not specific to their personal characteristics. When a deposit is collected the operator needs to indicate the methods and procedure of deposit refund and shall not set unreasonable conditions. Finally, the invalidity of the clause that stipulates that the contract will not be established after the consumer pays the price.

[140] The e-commerce operators in this law refer to natural persons, legal persons and unincorporated organizations that engage in business activities of selling goods or providing services through information networks such as the Internet, Business platform operators, operators on the platform, and e-commerce operators who sell goods or provide services through self-built websites and other network services.
[141] Art. 27 of ECL
[142] Now art. 27

Antitrust provisions

The issue of the abuse of market dominance was brought up by some members of the Standing Committee, localities, departments and the general public. The Constitution and Law committee proposed the introduction of an antitrust provision prohibiting the e-commerce operators who have a dominant market position depending on several factors that will be specified later, must not abuse their position to exclude or restrict the competition.
The second proposal was to amend former art. 30 in prohibiting the e-commerce platform operators from using service agreements and transaction rules, technology and other factors to put unreasonable restrictions, conditions or fees on the operator of the platform.

3.4 Final revision and latest adjustments

Some days after the fourth meeting of the Standing committee the draft was considered generally mature, but some members of the committee proposed some final amendments. The Constitution and Law Committee proposed thereof the following amendments:

- The introduction of the "environmental protection requirements" on art. 13
- The connection with the relevant provisions of the Advertising Law of the People's Republic of China in art. 18 in order to further strengthen consumer protection.
- Increase of the punitive damage for malicious notification in IP protection provisions

After the last modifications were implemented, the "E-commerce Law of the People's Republic of China" was adopted by the fifth meeting of National People's congress of the People's Republic of China on August 31, 2018 entering into force on January 1st, 2019.

CHAPTER II

E-COMMERCE LAW

4. Guiding principles

4.1 The purpose of the law: art. 1

4.2 The scope of the law: art. 2

4.3 Promotion of E-commerce: art. 3

4.4 Non-discriminatory principle: art. 4

4.5 Characteristics of e-commerce environment: art. 5

5. Subjects of the “E-commerce Law”

5.1 E-commerce operators

5.1.1 Data treatment

5.1.2 Deposit

5.1.3 Other regulations

5.2 E-commerce platform operators

5.2.1 Definition

5.2.2 Collection of information

5.2.3 Monitoring obligation

6. Liability

6.1 Liability of third-party platforms

6.2 Criteria for liability

6.3 Intellectual property protection under the “Chinese E-commerce Law”

6.3.1 Regulation of IP through ToS

6.3.2 IP infringement remedies: Notice and Takedown

6.4 Notice and Takedown mechanism in the Chinese legal framework

(a) Copyright Law

(b) Tort Law

(c) E-commerce Law

4. Guiding principles

The drafting of the law followed the spirit of the 18th and 19th National congress of the Communist Party, implementing the principles of coordinated, green, open and shared development, in accordance with the improvement of the socialist market economy[143].

The final version of the "E-commerce Law of the People's Republic of China" is divided into seven chapters: I. Guiding Principles, II. E-commerce Operators, III. Conclusion and Performance of E-commerce Contract, IV. E-commerce Dispute Resolution, V. E-commerce Promotion, VI. Legal liabilities, VII. Supplementary provisions.

4.1 The purpose of the law (Art. 1)

The provision is opened by presenting the purposes of the law:

"The law is enacted for safeguarding the lawful rights and interests of all parties to e-commerce, regulating e-commerce conduct, maintaining the market order, and promoting the sustainable and sound development of e-commerce[144]."

As clearly shown, the law's overall purpose is an essential and comprehensive regulation of e-commerce activities, spacing from the subject's regulation to provide direction and guidelines for regulating the market and its development. It is possible from this first look to catch a glimpse of the priorities of the law. The first element that prominently emerges is the protection of the "lawful rights and interests of all parties to e-commerce." The provision is generally referring to "all the parties", with the rapid development of technology and e-commerce is undoubtedly the arduousness of predicting new business models and

[143] Drafting Group of the "E-commerce law", "interpretation of the articles of the E-commerce Law" 电子商务法去起草组, "电子商务法条文释义", Law Press China, 2019, p. 14

[144] *See* art.1 *"E-commerce Law of the People's Republic of China"*

operators[145]. Thus, the law's extension is not limited to the consumer, but to all the electronic commerce entities, natural or legal persons that can embody both the businesses and the consumers[146]. On the one hand, categorizing the consumers' protection may seem a simple undertaking; internet frauds, fake advertisements, and personal data treatment is something that we can easily experience[147]. On the other hand, businesses need to be protected by the law, first and foremost by being equally treated, ensuring fair competition in the e-commerce environment. In order to achieve these ambitious objectives, several aspects need to be regulated, such as providing a dispute resolution mechanism, providing obligations for the platforms, and including an effective IP protection mechanism[148].

The second principle aims to regulate e-commerce conduct and maintain the market order. The lack of a comprehensive e-commerce law has caused several legal gaps and loopholes that have been exploited to enact behaviours that drift into a grey area of law damaging consumers' rights. The law aims to provide a set of provisions that create a safe environment for consumers standardising e-commerce behaviour, including electronic contracts, electronic payments, express logistics, and digital product delivery[149].

The third principle is targeted toward promoting the sustainable and healthy development of e-commerce based on the report of the 19th National Congress of the Communist Party of China[150] that introduced the concepts of "adherence to the people-centred development." The development must be a scientific development with an economic and social programmatic leading nature. Therefore, these new developments should be sustainable and healthy, enabling

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145 http://snamr.shaanxi.gov.cn:7121/web/Info!show.action?id=402881cb71c5cd5701731392621e08d8

146 电子商务法去起草组, *Above*, p.15

147 电子商务法去起草组, *Above*, p.16

148 电子商务法去起草组, *Above*, p.16

149 电子商务法去起草组, *Above*, p.15

150 http://www.xinhuanet.com/english/special/2017-11/03/c_136725942.htm

people to fully enjoy the convenience and benefits brought by the internet and e-commerce[151].

4.2 The scope of application: art. 2

2.2 For the purpose of this Law, "e-commerce" means the business activities of selling commodities or providing services through the Internet or any other information network.

2.3 If any other law or administrative regulation provides for the sale of commodities or provision of services, such other law or administrative regulation shall apply. This Law shall not apply to financial products and services and news information, audio and video programs, publication, cultural products, and other content services provided via information networks.

Article 2 is significant for two reasons. It shapes the burden of the law, both geographically and theoretically, and defines "e-commerce" [152].

The "E-commerce Law" drafting group helps identify the meaning behind the wording of this article, providing useful definitions. The word "e-commerce" refers to the *electronic information network technology* applied to *commerce*[153]. Two main aspects need to be described. The first one is the *electronic information network technology;* it has a technological nature and can be interpreted extensively by including various forms of electronic information technologies such as local area networks or reductively, including only the Internet. The word *commerce* was also subject to different interpretations. The debate was concerning if it had to be interpreted broadly, in order to include all matters arising from a relationship of commercial nature, whether contractual

[151] 电子商务法去起草组, *above*, p. 15
[152] WTO defines e-commerce as “production, distribution, marketing, sale or delivery of goods and services by electronic means” *see* https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm
[153] 电子商务法去起草组, *above*, p. 17

or non-contractual[154], or narrowly only referring to the transaction of tangible and intangible goods[155]. Thus, some scholars have interpreted the word "e-commerce" in a narrow sense, referring to any commercial activity carried out by the parties on the Internet, while others in a broader sense, only considering the purchasing of goods and services through the Internet[156]. More context is indeed helpful to clarify the scope of application of this law.

When we focus on the definition of e-commerce related to business activities there are once more, two interpretations. It can be intended broadly as any aspect related to the business activity; it can be otherwise be interpreted narrowly, limiting it to the transactions of tangible[157] and intangible goods[158]. Business activities mean that they are profit-oriented, and its definition aims to distinguish between *e-commerce activities* and other *network activities*. This aspect has been debated during the drafting of the law deeming it more appropriate to adopt the narrower interpretation of "e-commerce activities" to align with the leading international provisions[159].

The legal attribute of "business activities" can determine whether relevant behaviours fall within the application of this law. The law does not apply to natural persons who use the Internet to sporadically trade second-hand or idle items because they are not business-oriented; therefore, the contract law and other civil and commercial laws will apply in this case[160]. Nor will Internal company management activities (such as quality control or HR management) be considered business activities in the legal sense[161]. The drafting group pointed out that whether an activity is classified as a business activity is a more challenging task than it may seem, and there are no objective rules that can be applied to distinguish each case. The different manifestations of new businesses

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[154] Some scholars pushed the broadness of the definition even further by including e-government and e-military affairs.

[155] 崔聪聪, “论电子商务法的调整对象与适用范围”, 中国分类号:D922 文献标识码:A 文章编号:1001-4403(2019)01-0079-07 收稿日期:2018-12-20, p.80

[156] *Ibidem*

[157] For tangible goods, the law refers to the physical products, while for intangible goods it refers to the services provided online, such as Didi taxi and online renting.

[158] 电子商务法去起草组, *above*, p. 17

[159] 电子商务法去起草组, *above*, p. 21

[160] http://www.huiyelaw.com/news-1265.html

[161] 电子商务法去起草组, *above*, p.20

may not be so clear, and the object of the law should be adjusted case by case, rather than affirming or denying that a whole type of business domain belongs to the application of the law. The scope of application of the law should start from reality and analyse the specific issues in detail to avoid legal blanks.
Considering its forward-looking perspective and the principle of neutrality previously analysed, the law is not focusing on the technology but on its content, without constraining its application only to the "use of internet" but including "any other information network[162]". This provision makes the "e-commerce law" flexible and easy to adapt to new emerging technologies.[163]

Geographical application

Art. 2.1 This Law shall apply to e-commerce activities in the territory of the People's Republic of China[164].

The first paragraph of article 2 describes the geographical application of the law. There is no doubt that domestic companies fall into the scope of art. 2 but, due to the cross-regional and cross-temporal characteristics of e-commerce, it is harder to define whether the law also applies to foreign companies. It can be indeed useful to distinguish different kinds of situations.

There is no doubt that the "E-commerce law" applies to *e-commerce operators* described in art. 9. Those operators are registered in the territory of China and, according to art. 14 of the "Law on the Application of Law for Foreign-related Civil Relations of the People's Republic of China[165]", the law governing a company and its branches is the one referring to their place of registration[166]. So they are indeed operating into the territory of China according to the law. The "E-commerce law" also applies to Chinese e-businesses

[162] As previously discussed, the real topic is the "data message". *Above* p. 39
[163] 电子商务法去起草组, *Above*, p.20
[164] *See* art. 2.1 of "E-commerce Law of the People's Republic of China"
[165] *See* https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn173en.pdf
[166] https://asadip.files.wordpress.com/2010/11/law-of-the-application-of-law-for-foreign-of-china-2010.pdf

operators that engage in cross-border e-commerce since art. 26 of the "E-commerce law [167] " requires that companies engaging in cross-border e-commerce shall abide by relevant national laws and regulations[168].

From 1 January 2020, with the introduction of the new "Foreign Investment Law" the wholly foreign-owned enterprises and joint ventures were abolished, and they are registered as limited liability companies or partnerships. [169] According to the "Foreign Investment Law" these kinds of companies shall all be considered operating inside China's territory [170] . The new "Foreign Investment Law" stipulates that cooperative enterprises that meet Chinese law requirements on legal person conditions shall obtain Chinese legal person status by the law. In short, the e-commerce activities carried out between foreign-funded enterprises (such as Amazon and its subsidiaries) and Chinese citizens, legal persons, and other organizations belong to "e-commerce activities".

Extension of the application caused by e-commerce platforms.

E-commerce platforms account for more than 95% of the whole transactions on the internet[171].

Although the platform operators carry out trading activities independently, they must abide by the platform and other media trading rules and use the platform to provide the visual information system to enter into transactions. Operators of e-commerce platforms in China should obtain the relevant subject registration and website license in accordance with the law. As a result, the location of the platform determines the place where e-commerce activities are launched. Even if foreign legal persons or unincorporated organizations established under

[167] Art. 26: "*When engaging in cross-border e-commerce, e-commerce operators shall comply with the laws, administrative regulations and relevant rules of the State on import and export supervision and administration."*

[168] Including chapter 5 of the "Electronic Commerce Promotion" of the "General Rules of Electronic Commerce provides for national systems and measures to promote cross-border electronic commerce".

[169] *See:* https://www.uschina.org/sites/default/files/foreign_investment_law_of_the_peoples_republic_of_china_-_unofficial_translation.pdf

[170] 电子商务法去起草组, *Above*, p.23

[171] *Supra* n.27

foreign law, not registered as a market subject in China and without the website licenses, use a Chinese e-commerce platform service to engage in business activities, it should still be subject to the "E-commerce law" Jurisdiction[172]. The party can otherwise exclude the application of the "E-commerce law" through a contractual agreement, but they may not under any circumstances exclude the application of public norms such as the registration of the market subjects[173].
On the other hand, when both parties are Chinese legal persons or unincorporated organizations and carry out a transaction on a foreign e-commerce platform, they shall be subject to China's electronic commerce law[174].

Extensions to protect Chinese customers

The application of the Chinese E-commerce law may depend also on the consumer's nationality[175].
The law is, in fact, also applied to the case where an overseas operator establishes a website abroad to sell goods or provide services to a natural or legal person or unincorporated organization in China. According to art. 42 of the "Law on the Application of Foreign-related Civil Legal Relations" when the buyer or the service recipient is a consumer, the law of the buyer or the service recipient shall apply, thus if the recipient is a Chinese natural or legal person, the Chinese "E-commerce law" applies[176]. According to the same article, the consumer can otherwise exclude the application of its national law in favour of the law of the place where the goods or services are provided.
However, cross border e-commerce business operators may have an international audience without directly targeting Chinese consumers. The drafting commission clarified circumstances when the E-commerce law applies undoubtedly: if all the aspects of the transaction such as the currency of payment and the mode of delivery are unequivocally directed to Chinese consumers, they

[172] 电子商务法去起草组, *Above*, p.24
[173] 崔聪聪, *Above,* p.85
[174] 电子商务法去起草组, *Above*, p.28
[175] 崔聪聪, *Above,* p.85
[176] *Supra n.169*

shall be deemed to be directed towards consumers in China who are engaged in related electronic commerce activities[177].

It is worth mentioning that any international treaty or agreement between China and any other countries that provide for the use of the Chinese “E-commerce law” implies the application of the “China's Law on the Application of Foreign-related Civil Legal Relations” thanks to art. 26 of the "E-commerce law", thus all the rules on the application of the law previously discussed[178].

On exclusions

During the legislative process, there were different views on the reasonableness and appropriateness of the above-mentioned exclusionary provisions. The exclusionary circumstances provided for in Article 2, paragraph 3 of the Electronic Commerce Law should be judged in light of the specific circumstances and should not be excessively subordinated.

4.3 Promotion of E-commerce: art. 3

The State encourages activities that develop new forms of e-commerce, innovate business models, promote technological R&D and application of e-commerce, facilitate credibility system construction of e-commerce, create a market environment favourable for the innovative development of e-commerce, and give full play to the important role of e-commerce in boosting quality development, satisfying the ever growing desire of the people for good life and building an open economy. [179]

[177] 电子商务法去起草组, *above*, p. 24
[178] 崔聪聪, *above,* p.85
[179] *Art. 3 of the “E-commerce Law of the People’s Republic of China”*

The e-commerce environment is dynamic and rapidly changing; new types of businesses and industries are rising in the internet market from unprecedented combinations of their internal and external value chain[180].

New sectors such as the Internet of things (IoT), big data, cloud computing, artificial intelligence are rising, and the business model has been rapidly moulded to exploit this technology better.

Art. 3 is clearly describing the approach that the public entities shall take toward these innovations. It further strengthens the government's endeavours to become an active promoter and encourager of the development of these new business types and technology. The advancements in these sectors are, in fact, only possible through the active promotion of e-commerce technologies by the public entities[181]. Thus, it is recognizing the pivotal roles of e-businesses that drive the future of the economy and the need that they are backed up by national law[182].

The inclusion of the promotion of the e-commerce inside of the "E-commerce law" is only one of the many steps of the process that the Chinese legislator is creating in order to create a modern digital economy, starting back in 2007 with the "E-commerce development five years plan" issued by the State Council[183].

According to the drafting commission, to create a suitable business environment, it is required to adopt different approaches. First of all, it is necessary to ensure the cyberspace system's security, preventing abuse of personal information and other practices that can undermine the consumer's trust and confidence[184]. Therefore, the government policies should be focused on guaranteeing both the operators' and the consumers' integrity, ensuring the quality of the products and services preventing fraudulent behaviours. The government is adopting a liberal approach to meet the requirements of the "Resolution of the Central Committee of the Communist Party of China on Certain Major Issues of comprehensive

[180] The value chain describes the different activities conducted to deliver an end product or service to a customer. These activities can be conducted within one company – the internal value chain - or activities conducted by other companies, the external value chain.

[181] 电子商务法去起草组, *above,* p. 32

[182] *Ibidem*

[183] 电子商务法去起草组, *Supra p.7*

[184] 电子商务法去起草组*, above* p.32

subdivision reform".[185] The government's role is to ensure safety, remedy market failures, and not regulate intermediaries' transactions, especially those who cannot take advantage of their power to dominate the market[186].

From a global perspective, China's e-business industry has undergone ten years of development. After more than a decade of development, China's e-business has gone from "lagging behind" to "running behind". After more than a decade of development, e-business has moved to the stage of "sticking together". In order to do that, the government must scientifically and effectively utilize economic means and resources to create a better environment for the full development of e-commerce and human exploitation[187].

4.4 Non-discriminatory principle: art. 4

The State shall accord equal treatment of online and offline commercial activities and promote their integrated development. People's governments of various levels and relevant authorities shall not adopt discriminatory policies or measures, or abuse their administrative power to eliminate or restrict market competition.

Until this moment, the relevant government departments have applied similar regulatory models to traditional and online business activities ignoring the fundamental differences embedded in the two systems. This article wants to guide the future direction of the regulation of e-commerce towards a more thoughtful and differentiated approach. According to the "Nineteenth Day Report of the Communist Party of China", the drafting group highlighted that it is necessary to transform the government's functions, which include the decentralization of power and supervision, strengthening the credibility and

[185] 电子商务法去起草组, *above* p.32
[186] *Ibidem*
[187] *Ibidem*

enforcement of the government, building a service-oriented government that satisfies people[188].

In order to achieve this objective, a "technology-neutral principle"[189] should be applied. Hence, businesses shall not be evaluated due to the technology they implement, instead on their activities.[190] The "non-discrimination" principles introduced in this article mean that the state establishes laws, policies, and standards that treat all technologies equally, leaving the choice of which technology to use to the business operators.[191] Of course, this behaviour is meant to encourage technological development since the operator will opt for the most suitable tool for its business, being incentivized to invent new technologies.[192]

4.5 Characteristics of the E-commerce environment: art. 5

E-commerce operators shall, in their business activities, abide by the principles of voluntariness, equality, impartiality and integrity, and adhere to laws and business ethics, fairly take part in market competition, perform such obligations as protection of consumers' interests, environmental protection, intellectual property protection, network safety and personal information protection, assume liability for product and service quality and accept supervision by governments and society.

E-commerce is profoundly different from physical commerce. The vendor and the buyer, in fact, often never meet or see the product; thus, the buyer needs to

[188] 电子商务法去起草组, *above,* p.34

[189] Technological neutrality aims to regulate behaviour rather than technology. It tries to promote statute longevity, presuming that law untethered to specific technologies will be less influenced by technological improvements. Moreover, it forced the law to treat things like, avoiding older technology to be discriminated simply because it existed before the law was enacted. For more *see* Brad. A Greenberg "Rethinking Technology Neutrality", Minnesota Law review issue 4 - April 2016

[190] An example of this application can be seen in the electronic contract's equivalence to the written form previously studied in the Civil Code.

[191] This is also conformed to the UNICTRAL Model Law on Electronic Commerce, where in art. 5 establishes that the validity or enforceability of an item of information or a data message shall not be denied on the sole ground that it is in the form of a data message.

[192] 电子商务法去起草组, *above,* p.35

rely uniquely on the information provided by the seller. The clearness and the trustworthiness of information and the fairness of the seller's information are crucial for constructing a reliable internet sales system as described in the "Internet plus" program. The provisions of art. 5 are therefore included to ensure honest conduct in e-business activities. The article provides that the companies shall abide the principles of voluntariness, equality, equity and good faith, observe the law and the business ethics, fairly participate in market competition, perform obligation in aspects including protection of consumer right and interests, environment, intellectual property rights, cybersecurity and individual information, assume responsibility for quality of products or services, and accept the supervision by the government and the public.

Art. 6

The relevant departments of the State Council shall, according to the division of labour based on the duties, be responsible for the promotion of development, supervision, and administration of other work on e-commerce. Local people's governments at or above the county level may, based on the local actual circumstances, determine the division of duties for departments with respects to e-commerce in their respective administrative regions.

The abovementioned article highlights the relevance of the regulatory system and the importance of the institution that needs to issue regulations in order to perfect the regulation of e-commerce[193]. The main national institutions involved are[194]:

[193] Currently, the central government departments involved in the regulation of e-commerce are the Ministry of Industry and Information Technology (MIIT), the Ministry of Public Security (MPS), the Ministry of Finance (MOF), the Ministry of Transport (MOT), the Ministry of Commerce (MOF), the Ministry of Culture and Tourism (MCT), and the Ministry of Public Security (MPS). The Ministry of Commerce, Ministry of Culture and Tourism. The People's Bank of China, the State Administration of Market Supervision, the National Internet Information Office, the State Administration of Taxation, the General Administration of Customs, and the National Post Office.

[194] 电子商务法去起草组, *above,* p.39

- the National Development and Reform Commission, responsible for formulating industrial policies, coordinating major issues in the development of the e-commerce industry, balancing relevant public development plans and major decisions, and formulating strategies for developing the modern logistics industry.
- The Ministry of industry and information Technology, responsible for formulating and organizing industry plans, plans and industrial policies for the construction and communications industries.
- The Ministry of commerce is responsible for promoting the restructuring of the distribution industry, the standardization of distribution and the chain operation of commercial franchising, logistics and distribution. The Ministry of Commerce is responsible for promoting the development of modern modes of distribution such as e-commerce, taking the lead in coordinating the adjustment and regulation of the economic order of the market, formulating policies to regulate the orderly operation of the market, promoting credit building in the business field, guiding commercial credit sales, establishing public services for the market's trustworthy people, and promoting the development of the market's economy.
- The People's Bank of China: to draft relevant laws and administrative rules and regulations. It is also responsible for organizing and coordinating the organization and management of financial standardization, guiding the information security of the financial industry, and formulating national laws and regulations.[195]
- National General Administration of Market Supervision and Administration: responsible for the comprehensive supervision and management of the market, the regulation and maintenance of market order, and the operation of a market environment of honesty and trustworthiness.

[195] *Above* 电子商务法去起草组, p. 40

5. Subjects of the "E-commerce Law"

The internet is a vast and dynamic environment, and the activities revolving around it are countless, as for the players involved. Activities may regard entertainment, education, socialization, shopping, and the more technology progresses, the newer functionalities emerge. As we previously analysed in the social commerce, these activities are often entangled together, making it hard for the legislator to regulate the phenomena.

It is tough to find a standard definition of internet operators. If we look at the European landscape, the definition varies between each country. However, a common denominator can be found in the Regulation (EU) 2019/1150 that talks about the *Providers of Online Intermediation services*, as those who provides *online intermediation services* that "allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concludes"[196]. This definition includes a great variety of subjects, from individual sellers, to e-commerce platforms (such as Amazon) and search engines (such as Google). Other definitions in the western world are still revolving around a very broad category of subjects such as "Information Society Services" in the European E-commerce directive[197] or the "Online Service providers" in the Digital Millennium Copyright Act (herein after DMCA).[198]

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[196] *See* "Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019" art. 2

[197] *See* "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000" recital 17: "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service"
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031

[198] *See* 17 U.S.C. §512(k)(1)(A): *"an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received."*
https://www.copyright.gov/legislation/dmca.pdf

On the other hand, the Chinese E-commerce law still has very similar aims as far as the purpose of the law is concerned, but it uses a more specific approach specifically targeting three subjects: "E-commerce operators", "E-commerce platform operators" and "Operators on platform"[199]. All these categories in fact fall under the broader range of the European definition of Internet Service Providers[200]. The reason of this choice are clearly stated by the drafting group that highlights that the average electronic business operator differs from traditional operators, mainly in the medium through which they perform their business activities. Moreover, they do not have the ability or knowledge to set up a competitive website to sell goods or provide services. Thus, they heavily rely on e-commerce platforms[201] that, in fact, are responsible for 95% of the transactions on the internet[202]. This is why the law is divided into two main sections: one regarding the e-commerce operator and the other regarding the platform, which is the main focus of the regulation itself according to the commission.

If we want to understand more deeply the difference between the European and the Chinese approach it may be useful to recall the analysis made by Riordan[203] in considering the liability of the platforms. According to his opinion, it is necessary to consider the layered structure of the internet, which takes a "physical", "network" and "application" layer.[204] ISP operates in the "network" layer while the websites that display the content created by their users are located in the "application" layer[205]. In this case, both the ISP definition of the Regulation (EU) 1150 and the E-commerce directive include entities that are both in the "network" and the "application" layer while the Chinese law only includes operators inside the application layer which, according to the author

[199] *See* art. 9 of "E-commerce Law of The People's Republic of China"
[200] *See* E-commerce Directive including E-commerce platforms into the scope of application of art. 2
[201] 电子商务法去起草组, *above,* p.47
[202] *Supra* n.27
[203] J Riordan, The liability of Internet Intermediaries (oxford University Press 2016)
[204] Riordan, *above,* p.36
[205] *Ibidem*

are ‘closer to end users and exercise the most direct control over application content’[206] subsequently arising a higher degree of liability.

Finally, unlike the Directives that need to be implemented in every country, the “E-commerce law” is a special law that derogates the traditional consumer protection law when the subjects mentioned above are involved, granting a higher degree of protection towards the consumers with ad hoc provision for the problems revolving around the cyberspace.

5.1 E-commerce operators

As we previously discussed, the e-commerce operators are, together with the e-commerce platform operators, one of the main subjects of E-commerce law.
Defining e-commerce operators is the first step in developing an effective online consumer protection regulation since it identifies the subjects that operate in the e-commerce markets and need to comply with consumer protection and market order obligations.
Art.9 of the e-commerce law introduces and describes these subjects as:

“the natural persons, legal persons or unincorporated organizations that engage in the operational activities of selling goods or providing service through Internet and other information network, including e-commerce platform operators, operators on platform and e-commerce operators selling goods or providing service via their self-built websites or other web service[207]*.”*

They are regarded as the weak part of the relationship with the e-commerce platforms due to their lack of contractual power and high dependence on the platform. Even though bigger brands often sell online products, they can rely on their website's sales thanks to the widespread brand knowledge toward customers. On the other hand, SMEs are more likely to need protection and

[206] Riordan, *above,* p.340
[207] Art. 9.1 of the “E-commerce Law of the People’s Republic of China”

assistance when engaging in a contractual relationship with a platform operator since their online business can heavily depend on the platform's sales, thus leading to a minor contractual power.

Since the regulation is very recent, it can be useful to interpret it with the help of the drafting group's comments. Given the broad formulation of the art. 9.1, the "e-commerce platform operators" (introduced in the next paragraph of the same article) falls under the definition of "e-commerce operators". According to the commission, the main difference between the two categories is that the platforms have a specific and pivotal role in the e-commerce market, that provides an online business venue, transaction reporting and dissemination of information between two or more parties in an e-commerce transaction; thus, they need special regulation.[208] E-commerce operators need a further division from the "operators on the platform" as described in art. 9.3. The main difference between these two operators is the presence of a stand-alone website that allows customers to purchase products or services. The different market position of these two kinds of operators requires different regulation and different kinds of obligations, since the customer protection warranties of the platforms do not apply.
As profoundly analysed in the previous paragraph, the medium through which these subjects operate is the internet intended in a broad sense in order to utilize a technology neutral approach. It does not only refer to the internet but also to "*other information network"* that means, in general, that the information is exchanged and interacted within networked medium[209].

Sixteen articles, from 10 to 26, are committed to provide regulations for e-commerce operators. The majority of the dispositions are regarding the relationship with the consumers in order to protect their legitimate interests and rights, regulating the clarity of the information of the product or services and the safety of the latter, providing norms on personal data treatment, and ensuring

[208] 电子商务法去起草组, *above,* p.48
[209] 电子商务法去起草组, *above,* p.48

the transparency of the market with the requirement of obtaining and publicize the business license, providing clear information on the product and services and complying with the local regulations.

The Chinese policies have always pushed toward a transparent cyberspace and the E-commerce law is not changing direction. E-commerce operators shall go through market registration according to law.[210] The drafting commission clarifies that the main purpose of this norm is mainly the subject identification and information disclosure[211], rather than a pure administrative requirement. They are not adding a new registration requirement for online operators, rather they are asking operators to obtain the same license required for operating offline[212]. In other words, an operator already in possession of the license can operate online as long as it fulfils the obligation provided in art. 15 concerning the *publicity* of the license and other business information[213]. The publication of the basic information of the counterpart avoids the exploitation of anonymity allowing easier identification in the event of a dispute[214]. Art. 10 provides an exemption for some subjects, in particular those who provides labour services using their skills that do not require a license under the law and odd and petty transaction[215] activities of an individual[216].

The criteria behind these choices are following the principle of consistency between online and offline and do not consider e-commerce activities as a special industry that requires a special permit[217].

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[210] Art. 10 of the "E-commerce Law of the People's Republic of China"

[211] 电子商务法去起草组, *above,* p.52

[212] Some categories have been excluded, in particular according to art. 10 "the preceding sentence shall not apply to the sale of self-produced agricultural products and/or cottage craft by individuals, labour services using his skills that require no license under the laws and odd and petty transaction activities of an individual, or those not subject to industrial and commercial registration as provided by laws and administrative regulations. "

[213] The license and other relevant business information shall be displayed on the homepage of the website and in case there is any modification to that information, it should be promptly updated.

[214] *Above* 电子商务法去起草组, p.56

[215] Small amount transactions are not easy to grasp in practice. The drafting group suggests using the standard of small taxpayers, that is 30,000 yuan monthly. Moreover, they state that also the term "sporadic" needs to be clarified by further regulations.

[216] Other exemptions are provided by the same article regarding the sale of self- produced agricultural products and/or cottage craft by individuals and those not subject to industrial and commercial registration as provided by laws and administrative regulations.

[217] 电子商务法去起草组, *above,* p.55

Equal treatment between offline and online businesses

Following the criteria of equal treatment of offline and online businesses art. 11 deals with taxation issues. The taxation of e-business operators has been receiving a lot of attention. The legislator followed the principles of fairness, which affirms that e-commerce operators should pay the same tax as traditional offline operators in order to avoid competitive advantages.[218] The article is in line with the provision of article 10, distinguishing e-commerce operators who are not required to register as a market entity. In this case, not being required to register as a market entity does not necessarily mean that no tax obligation arises[219].

The "consistency between online and offline" is also reflected on the side of the customer. Electronic commerce is not a "face to face" transaction and the consumer can only obtain information about goods or services through the operator on the internet. Art. 17 provides that e-business operators shall comprehensively, accurately, truly, and timely disclose information about goods and services, and they shall not deceive customers through false or misleading commercial promotion[220].

For the same principle according to art. 13 the goods and services provided shall be in compliance with the requirements for safeguarding personal and property safety and for environmental protection and the e-commerce operators shall issue proof of purchase or service voucher for goods sold or services provided according to law[221].

[218] 电子商务法去起草组, *above,* p.59
[219] *Ibidem*
[220] This provision is specifically targeting practices such as fictitious sales or fake reviews that can alter the perception of the product or service from the consumer perspective.
[221] Art. 13 of E-commerce law

5.1.1 Data treatment

A particularly interesting provision is embedded in art.18, which regulates the issues that arise in targeted marketing regarding consumer profiling. Big data analysis is undoubtfully bringing significant benefits to both businesses and consumers. On one side, they allow the production of goods that can be easily placed on the market. On the other side, they grant a personalized shopping experience. In some cases, however, this approach can be disadvantageous to the consumers[222], the ranking mechanism can be exploited, and the right of choice and information of the consumer can be jeopardized. Thus, the article requires e-commerce operators to provide an additional option when providing search results that are not personalized and natural; in this way, the consumer's right to information and choice is protected[223]. The law recognizes the value of the data and empowers the consumers when it comes to the control that the companies have over them[224]. The e-commerce operator shall clarify the manner and procedure for correction, deletion, notification and user's deregistration. Those procedures shall be regulated by Art. 11 of the Personal Information Protection Act and, more importantly, that e-commerce operators shall not set unreasonable conditions for the above-mentioned operations[225].
As far as personal data is concerned, the law provides a general obligation for e-commerce operators to respect the law and regulations on personal information protection[226].

The last relevant provision concerning data is art. 25 of the "E-commerce law". It allows the relevant public authorities to access the data stored by e-commerce operators according to law and administrative regulations[227]. This disposition is

[222] *Above* 电子商务法去起草组, p. 72
[223] *Ibidem*
[224] 电子商务法去起草组, *above,* p.87
[225] The article recalls further regulations that discipline more specifically the right of access and the right to delete. For further information: *above* 电子商务法去起草组 p. 87-90
[226] Art. 23 of the "E-commerce Law of the People's Republic of China"
[227] Including the: "National Development and Reform Commission", the "Ministry of Finance", the "Ministry of Communications and Transport", the "Ministry of Commerce", the "ministry of Culture

particularly relevant since it follows a different approach than most Western countries. It has become famous for Apple's rejection of providing information to the FBI concerning the information contained in the iPhone of one of the shooters in a December 2015 terrorist attack in San Bernardino. Some concerns arise when this article is read in conjunction with the art. 9 of the "Cybersecurity Law" that provides that network operators carrying out businesses or services shall accept the government and public's supervision[228]. The cases in which the supervision power can be exercised are not clearly specified, and some observers raised some doubts on the exploitation of this disposition for other purposes.

5.1.2 Deposit policies

The law also gives space to the deposit refund policies. This need was evident in 2017 when, in the case of bike-sharing, several users faced a troublesome procedure for the return of their deposit that was often exceeding the vehicles' total value[229]. In August of the same year, The Ministry of Transportation and Communication issued the “Guidance on Encouraging and Regulating the Development of Internet Leased Bicycles” and made special regulations on the deposit issue. Now art. 21 of the E-commerce law shall expressly specify the methods and procedures for deposit refund and proceed to the refund when the conditions are satisfied[230].

5.1.3 Other regulations

The law contains other provision for the protection of the consumer, in particular forbidding the “tie-in sale” as a default option in (art.19) and provides

and Tourism”, the “People’s Bank of China”, the “State Administration of Market Supervision”, the “State Internet Information Office” and other departments.

[228] Art. 9: “Network operators carrying out business and service activities must follow laws and administrative regulations, respect social morality, abide by commercial ethics, be honest and credible, perform obligations to protect cybersecurity, accept supervision from the government and public, and bear social responsibility.”

[229] *Above* 电子商务法去起草组, p.75

[230] Art. 21 of the “E-commerce Law of the People’s Republic of China”

that the liability for the delivery of the goods are upon the business operator unless the consumer select another logistic service provider (art. 20)

This is not the place to discuss this topic, but it is worth mentioning that the law also provides an antitrust provision in art. 22. The norm is mainly directed towards the e-commerce platform operators[231].

5.2 E-commerce platform operators

The main protagonists of the Chinese "E-commerce Law" are undoubtedly the "E-commerce platform operators". As we previously analysed, they are introduced as a subcategory of the e-commerce operators in art. 9 of the "E-commerce law".

The Chinese approach has been different from the European one. The main dispositions regarding these subjects are condensed inside one law, from the B2B relationship, the consumer's protection and the data treatment, while in Europe, several regulations and directives explicitly target these topics. After all, the uniqueness of this law is, in fact, the comprehensive overview regarding e-commerce regulations.

While in Europe, the E-commerce platform falls under the definition of "Provider of online intermediation services which includes all the categories of subjects performing the activities included in art. 2 par. 2 of the Regulation (EU)

[231] The criteria to market dominance are determined by the antitrust law and are respectively: 1) the market share of the operator in the relevant market and the competitive situation in the relevant market; 2) The operator's control over the sales market; 3) The ability of the operator to control the sales market or the market for the purchase of raw materials; 4) the ability and technical condition of the operator; 5) the degree of dependence of other operators; 6) The ease of entry of other operators into the relevant market;
An operator is presumed to have market dominance if one of the following circumstances exists: 1) if the market share of one operator in the relevant market reaches one-half; 2) if the market share of two operators in the relevant market reaches two-thirds; 3) if the combined market share of three operators in the relevant market reaches three-quarters.
When talking about the market of e-commerce platforms some peculiar aspects need to be taken into consideration, in particular the fact that unlike traditional markets, because of the network effect, this market is extremely dynamic and innovative, making the market power of a *spring* company not only dependant on the market share and market concentration. For this reason, it is necessary to analyse the "technological advantage".

2019/1150 of the European Parliament and of the Council[232], in China the definition is much narrower.

There are several reasons why Internet Service providers (hereinafter "ISP") and E-commerce platforms are the main objects of the regulation when it comes to e-commerce regulation and consumer protection. From the business's point of view, ISP "acts as the gateway through which material is upload or downloaded by the end-users[233]." They offer access to new markets and commercial opportunities and are key enablers of entrepreneurship and new business models[234] and their "middle-man" position makes their services crucial for the commercial success of those whose use that services to reach consumers[235]. The platform is a single entity that interacts with multiple operators through service agreements[236]; it is *one ring to rule them all*.

They are easy to identify, and the majority of the claims are directed toward the service providers[237]. This is the consequence of the fact that E-commerce platforms are often international entities operating in different markets. They have intrinsic cross-border potential[238], and the business operators may fall outside the legislation of the compliant. All this considered, it is clear that the legislator tends to regulate the platform providers because they simply play "a bigger role than any seller or buyer on the platform[239]."

Regulating ISP has four main beneficiaries:

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[232] Online intermediation services are the services which meet all of the following requirements: a) They constitute information society services within the meaning of point (b) of article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council; b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers

[233] B. Fitzgerald, *Internet and E-commerce Law: Technology, Law and Policy,* (Lawbook Co 2011), p.9. See also, GS Takach, Computer Law (2nd end, Irwin Law Inc 2003), 32.

[234] Regulation (EU) 2019/1150 recital 1

[235] Regulation (EU) 2019/1150 recital 2

[236] 电子商务法去起草, *above,* p.50

[237] See *Google vs. Luis Vuitton*, *Playboy v. Frena*, *Whilson v. Yahoo!* More cases reported on *Internet intermediaries and trade mark rights,* by Althaf Marsoof, Routledge Research in Intellectual Property

[238] *Supra* Regulation (EU) 2019/1150 recital 6

[239] Xue Hong, "Regulation of e-commerce intermediaries: an international perspective" p.365

a) The business operators on the platform. They heavily rely on the platforms to run their business, but they have small contractual power. Regulating the platforms can grant a series of protections in their favour granting fairness and transparent principles in the redaction process of the terms of services, to protection from credit assessment mechanism, to the rules on liability.
b) The consumers who will indirectly benefit from a transparent and safe internet environment and fully exploit the benefits of the online platform economy[240]. They will also benefit from the protection of the Chinese "E-commerce law" provisions that directly target the consumer. In the Chinese scenario, the protection is even broader because the notion of consumer does not only refer to natural persons[241] but also to legal persons as long as they operate in China's territory[242].
c) The e-commerce platform operators themselves. In fact, it is undoubtful that a liberalized approach aims to encourage business development rather than supressing it. The law-making process of the "E-commerce law" often remarked on this aspect, involving the major players in drafting the law[243].

d) The market and the economy. The marketplace platforms are the major player in the online market. Most of the provisions are developed to encourage business activities and the economy, creating a sustainable and fair market environment encouraging innovation under the government's supervision.

5.2.1 Definition

"For the purpose of this law, 'e-commerce platform operators' mean legal persons or other unincorporated organizations that provide online business

[240] *Supra* Regulation (EU) 2019/1150 recital 1
[241] Art. 2 of Regulation (EU) 1150/2019 considers only natural persons as "consumers".
[242] *Supra* pag. 64
[243] *Supra* "The drafting process", p.43

premises, transaction matching, information distribution and other services to two or more parties to an e- commerce transaction so that the parties may engage in independent transactions[244]*."*

The Chinese legislator has chosen specifically to regulate "e-commerce platform operators" between the different kinds of internet service providers. The first draft referred to "third party e-commerce platform operators"[245] to emphasize their neutrality. However, the expression was later removed since the term "platform" inherently included the aspect of tertiarity[246], and the concept is emphasized by the "independent transaction" that the platform creates. The platform's neutrality to its user is their most outstanding characteristic [247] and many countries provide for legal consequences when the platform compromises its neutrality[248], the "E-commerce law" is not an exception. For example, article 37 states that e-commerce platforms operators that carry out a business on their own platform need to distinguish their own business from the business carried out by operators on the platform in a remarkable way[249].

The operations carried out by the platform described in the article are not mandatory and do not need to be satisfied simultaneously[250]. Some operations are exemplified by the article to stress the fact that they must have a stable presence of e-commerce operators as "in-platform operators" and a stable connection with them through service agreements. If these conditions are met, it can be identified as an "e-commerce platform operator".
However, the boundaries between e-commerce platform providers and other internet intermediaries are becoming more and more narrow, and some concerns emerged under the question "should social networks be included in the

[244] Art. 9 "E-commerce Law of the People's Republic of China"
[245] *Supra* pag. 46
[246] 电子商务法去起草, *above,* p. 50
[247] Xue Hong, *Regulation of e-commerce intermediaries: an international perspective*, p.367
[248] *Such as* Art. 7 of Regulation (EU) 1150/2019 *and* SAIC "Regulation on Network Transactions"
[249] Art. 37 "E-commerce Law"
[250]电子商务法去起草, *above,* p. 50

definition of EPOs?" As Weijun Huang and Xiaoqiu Li pointed out, social networks lack the object of *profit-making*, from providing transactions between third parties since their primary purpose is communication. Thus, EPOs dispositions should not be applied[251]. This opinion was not entirely availed of by the drafting group that confirmed that the primary purpose of social media platforms is social interaction and that it is not possible to consider them as facilitators for transactions between stable third parties as described in article 9[252]. However, if the social media platform engages in similar operations that allow business operators to carry out stable economic activities on the platform, social media can be considered an e-commerce platform operator[253]. The interpretation of the extent of article 9 is a crucial aspect of the law. In the previous chapter, we examined the relevance of social commerce and WeChat mini-programs that would fall outside the range of e-commerce platform operators even if they were responsible for exponentially increasing online transactions[254].

A final word can be spent on APPs since they fall under the same logic and can be considered marketplaces when the above conditions are fulfilled.

5.2.2 Collection of Information

From the operators to the platform

A gatekeeper role has been given to the e-commerce platform operators inside the "E-commerce law" (hereinafter ECL). Their middle-man position inside the market makes them suitable for operating as a filter, collecting relevant information and providing them to the relevant authorities when required by law. This function is made possible thanks to the provisions embedded in

[251] Weijun Huang, Xiaoqiu Li "The E-commerce Law of the People's Republic of China: E-commerce platform operators' liability for third-party patent infringement" computer law & security review 35 (2019) 105347

[252] 电子商务法去起草, *above,* p. 50

[253] 电子商务法去起草, *above,* p. 51

[254] *supra* "social commerce" p. 24

articles 10, 11, and 12 of ECL. Those dispositions lay down the ground for EPOs to collect and store relevant and reliable information concerning the operators on the platform. They require that e-commerce operators shall go through market registration according to the law[255] and obtain the relevant administrative license when required by law[256].

When art. 27[257] ask EPOs to require an operator entering the platform to provide its general information, it is in synergy with the above-mentioned provisions. Since the operators are required to go through the necessary registration, they will need to upload that information to the platform.

In this way, the consumer can promptly identify the counterparty to a transaction on EPOs in case of a dispute[258]. According to art. 44 of the "Consumer's protection law"[259] the consumer whose rights or legitimate interests have been harmed on a platform can ask for compensation and, if the platform is unable to provide the true name, address, or valid contact information of the seller or the service provider, the EPO should bear joint liability and the seller may request compensation[260].

The EPOs shall also be responsible for the authenticity of the business operators' information, meaning that they are also subject to the obligation of periodic verification and update.

It is worth clarifying the term "non-operating" subjects toward whom the obligation is extended according to paragraph 2 of art.27. The drafting group

[255] Art. 11 of the "E-commerce Law of the People's Republic of China"
[256] Art. 12 of the "E-commerce Law of the People's Republic of China"
[257] Art. 27 of the "E-commerce Law of the People's Republic of China": *An e-commerce platform operator shall require an operator that applies for entering the platform to sell goods or provide services to provide its identity, address, contact information, administrative license and other real information, and verify and register the same, establish a registration file, and make regularly verification and update thereto.*
[258] Art. 44 of the "E-commerce Law of the People's Republic of China"
[259] "Law of the People's Republic of China on Protection of Consumer Rights and Interests" art. 44: *Business operators shall, if the commodities or services they supply have caused damage to the properties of consumers, bear civil liabilities by repair, remanufacture, replacement, return of goods, make-up for the short commodity, return of payment for goods and services, or compensation for losses and so on as demanded by consumers. If consumers and business operators have otherwise agreed upon, such agreements shall be fulfilled.*
[260] Due to the high number of businesses EPOs often carry out this kind of operations via automated means. It is worth mention that the drafting commission affirms that the liability of the platform cannot be reduced just because the activities on the platforms are carried out by non-operating users.

distinguishes "operating" users and "non-operating" users, based mainly on whether they engage in continuous business conduct[261].

From the platform to the authorities

Once the platform has collected the information, it shall be submitted to market regulation authorities according to regulations according to art. 28 paragraph 1 of the "E-commerce law". Data are the most critical feature of the e-commerce economy, and they are indispensable for the performance of the supervision duties of the market authorities'[262]. This provision emphasizes the active role of collaboration between EPOs and authorities in order to pursue public interests[263]. In this process of collecting information, EPOs may collect important operational data, the disclosure of which can cause serious harm to the business operators. Thus, when the authorities collect this kind of information, they must keep them confidential and limit its use to the extent necessary for the administrative purpose[264].

Between the data that has to be collected according to art. 28, the law pays particular attention to the "taxation related information of the operators on the platform[265]." This provision is consistent with art. 11 that creates a compelling obligation for the platforms to submit the business operators' taxation-related information to the tax authorities. By doing so, the disclosure of tax information became a requirement for operating on the platform, and they are not managed by the business users but by the platform, which is a third party that faces direct consequences if this obligation is not fulfilled. However, the information reporting obligation of EPOs is limited to this specific purpose. Any data and

[261] 电子商务法去起, *above,* p.96
[262] 电子商务法去起, *above,* p.98
[263] Art. 28 paragraph 1 of the "E-commerce law of the People's Republic of China"
[264] 电子商务法去起, *above,* p.98
[265] Art. 28 paragraph 2 states: "E-commerce platform operators shall submit the identity information and taxation-related information of the operators on platform to taxation bureaus according to laws and regulations on taxation administration and remind those e-commerce operators without the need of market entity registration per Article 11 herein to make taxation registration according to Paragraph 2, Article 11 hereof"

information beyond the scope of this purpose' is not required to be reported by the platform operator without the express provision and authorization of the law[266].

According to the law, the last necessary clarification needed concerns the operators that are not required to register with the market entity. The lack of registration does not mean that the corresponding operators are not required to register with the tax authorities, and the failure to comply with this obligation will entail legal liability[267].

5.2.3 Monitoring obligation

The platforms have a primary role in coordinating and controlling e-commerce activities. During the drafting process questions arose as to whether a private platform should assume a "managerial" function under the law, giving EPOs *de facto* powers and freedom over a pivotal aspect of the e-commerce market[268]. The debate ended up in art. 29 of ECL that recognizes, in fact, this power with the obligation of both *taking necessary handling measures* and reporting in case of any breach of art. 12 and 13 by e-commerce business operators[269]. The platforms have to actively monitor the requirement asking online operators questions or for information concerning the safety and legality of the services or products and the presence of requested licenses. Online operators should satisfy these obligations even if they were operating alone outside the platform. Giving the platform liability for *not taking necessary measures* adds another layer of protection for the consumer. Such responsibility has been put upon platforms because they actually built and managed the space where businesses operate, so it is reasonable to ask EPOs the corresponding management functions[270].

[266]电子商务法去起, *above,* p. 99
[267] *Ibidem*
[268]电子商务法去起, *above,* p.100
[269] Art. 29 of the "Chinese E-commerce Law of the People's Republic of China"
[270]电子商务法去起, *above,* p. 100

Of course, we need to clarify the meaning of the term *any necessary measures.* The broadness and scope of this term should be judged proportionally by the platform operator's existing technical conditions and capabilities[271]. The commission gives some examples of these measures such as to take down illegal products or services, suspend the licenses, disconnect the links etc[272]. The measures need, of course, to be proportional to the seriousness of the violations[273].

Between the information collected, the platform shall ensure that the ones regarding information of goods, services, and transactions shall be preserved for no less than three years[274], ensuring their completeness, confidentiality and availability[275]. EPOs need to ensure security and confidentiality of these operations between the general security provisions of art. 30 of ECL.

In conclusion, even though the EPOs maintain their structure's managing function, the law intervenes in defining obligations and liability, tracing the general direction toward which the activities need to be conducted.

6. Liability

Internet intermediaries, Internet Service Providers (ISP)[276], Online Service Providers (OSP)[277], E-commerce platform operators[278] are all terms used between different legislations that have slightly different meanings.

For example, the "Information Society Services" indicated in the E-commerce Directive[279] refers to 'a person providing an information society service' that means 'any service normally provided for remuneration, at distance, by electronic means and at the individual request of a recipient of services'[280].

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[271] *Ibidem*
[272] *Ibidem*
[273] *Ibidem*
[274] This is a long period if compared, for example, to the 24 months required by the directive 2006/24/EC for the storing of data for phone providers
[275] Art. 31 of the "E-commerce law of the People's Republic of China"
[276] Regulation EU 1150/2019
[277] DMCA
[278] Art. 9 of the "E-commerce law of the People's Republic of China"
[279] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031
[280] *See* E-commerce Directive, recital 17.

However, it is applied differently across Europe depending on the implementation of the directive at a national level.
In order to define the liability for these subjects, it is important to investigate their role and nature.

The "Organization for Economic and Co-operation and Development" (OECD), in a 2010 report, defines the internet intermediaries as the services to bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties[281]. Maarsof identifies three types of internet intermediaries:[282] ISP, hosts and navigation providers[283]. ISP 'Acts as the gateway through which material is upload or downloaded by the end-users'[284], "host" provides digital storage spaces on the internet[285] while navigation providers identify search engines such as Google.
Recalling the previous analysis provided by Riordan,[286] it is necessary to understand their position in the structure of the Internet in order to determine intermediary liability. The above-mentioned subjects are part of the middle layer called "network" layer; hence, they have a linking function between two parties.
Another characteristic of internet intermediaries is "neutrality". For example, E-commerce platforms facilitate their users' transactions, but they are not involved as a contractual party, *per se*, in the transaction[287]. A platform neutral status to its users is their key characteristic[288], and in some countries, it is actively

[281] "The Economic and Social Role of Internet Intermediaries" OECD (DSTI/ICCP (2009) 9/FINAL.), at www.oecd.org/internet/ieconomy/44949023.pdf
[282] A. Marsoof, *above,* chapter "The internet, intermediaries and trademarks infiringment", p.
[283] *Above,* B. Fitzgerald, p.32.
[284] *Ibidem*
[285] GHJ Smith, Internet Law and Regulation (4th end, Sweet & Maxwell 2007), p.9
[286] *Supra* pag.73
[287] Xue Hong, *above,* p.367
[288] Xue Hong, *above,* p.369

protected, providing legal consequences for the platforms that perform actions that affect their neutrality[289].

Considering all the attributes above, the law's principal bodies where the liability of internet intermediaries has been addressed are copyright law, trademark law, defamation law, and piracy law[290].

From the moment that intermediaries have a neutral position in the transaction, it should not raise legal consequences. The reason behind the liability of internet intermediaries lies between the law and economic literature that suggest that liability for any wrongdoing must lie with the lowest cost avoider[291]. As Maarsof correctly points out, several reasons which avail of this theory that shifts the attention from the individuals to the intermediaries:

- the identity of the subjects operating on the platform is often anonymous, while the identity of the ISP is clear;
- the internet architecture enables intermediaries to detect and deter infringements at a lower cost since every wrongdoer must go through an intermediary;
- they always have a certain degree of control over the platform[292];
- holding intermediaries liable has a ripple effect on the wrongdoers;
- wrongdoers may be residing in a jurisdiction where the law does not regulate this kind of conduct;
- even where the 'bad actor is identified but is found outside the jurisdiction, sovereign governments have developed methods for

[289] SAIC "Regulations on Network Transactions" (January 26, 2014) require that a third-party transactional platform provider differentiate and mark up, in a distinguishable way, its own direct transactional business offered on the platform to avoid consumer confusion. *Or* "Chinese E-commerce Law" art. 37, that requires platforms that carry out self-operated businesses in their own platform to remarkably distinguish their own business from the one carried out by the platform operators.
[290] *Cf.* Sea Sheperd v Fish & Fish [2015] UKSC 10 at [40] (Lord Sumption dissenting).
[291] Marsoof, *above,* chapter "The internet, intermediaries and trademarks infringement".
[292] "Service providers control the gateway through which internet pests enter and renter the system. As such, service providers can help to stop these pests before they spread and to identify the individuals who originate them in the first place." D. Lichtman and E. Posner, 'Holding Internet Service Providers Accountable' (2006) 14 Supreme Court Economic Review p.225.

resolving disputes to permit the direct extraterritorial application of domestic law[293];

- even if the wrongdoers are identifiable and within reach of the law, they may not have the assets to compensate for the rights of the holder.

The major lawsuit against intellectual property is, in fact, for the above-mentioned reasons, mostly brought out against the platform rather than the individual. It is often harder for an intellectual property right holder to fight hundreds of individuals rather than a single and easily identifiable subject.

6.1 Liability of third-party platforms

The neutral status of internet platform operators led to an extended debate regarding upon which extent and what kind of liability they should be held liable for. This is because the orthodox theory of responsibility dictates that "a person should be held liable for acts to which he had contributed[294]. Thus the third-party position makes it very hard to determine how much they actually contributed to the realization of the fact. Moreover, even if it is true that the low-cost avoider may be the easier solution for approaching internet conflicts, it may be counterproductive or even have some serious backlashes on the functioning of the internet itself since it could cause "substantial interference with legitimate activities"[295]. This is because platform operators may not be in the best position to distinguish between legitimate and unlawful activities since they are private entities that have no constitutional constraint and public accountability[296]. Applying a straight "lowest-cost avoider" strategy will have come serious and concrete consequences to the lawful activities and the huge economic ecosystem that rely on the platform. In a few words, directly tackling

[293] HB Holland, 'Section 230 of the CDA: Internet Exceptionalism as a Statutory Construct' in B Spokane and A Marcus (eds), The Next Digital Decade: Essays on the Future of the Internet (TechFreedom 2011), 201
[294] PS Davies, Accessory liability (Hart Publishing 2015), 13.
[295] R Burrel and K Weatherall, *Before the High Court - Providing Services to Copyright Infringer: Roadshow Films Pty Ltd v iiNet Ltd*, (2011) 33 Sydney Law Review 801, 830.
[296] NK Kaytal, *Criminal Law in Cyberspace*, (2001) 149 University of Pennsylvania Law Review 1003, 1007-08

Goliath may not be the most effective approach since many and different interests are involved and need to be balanced. Liability is a tool that can be used to shift some costs of enforcement to the intermediaries, which can affect their business model, creating the spectre of intrusive regulations.

Intellectual property is one of the main fields where internet platforms liability disputes arise[297] and are the main topic of the "E-commerce law", so we will focus on the legal interest concerning this topic that arises when platforms are regulated. Under the patent protection in e-commerce, we can find four main participants: EPOs, patent holders, sellers and consumers[298]. The contrast between the patent holder and the sellers is clear. The first try to pursue profit by producing and selling the patented product or selling royalties[299], while the seconds wish to reduce the fees to increase the profit by increasing the number of sales or increasing the profit margin, sometimes also by infringing the patent. The EPOs, on the other hand, make a profit from the number of operators on the platform[300]. Thus, they try to find an optimal solution for the conflicts between the two parties. The consumers' rights also need to be considered since they may be affected by this tug-of-war between the patent holders and the sellers, resulting in low quality and unsafe products in an unclear internet environment. When the legislator decides to intervene, it will shift the different equilibrium of these interests in favour of one or more of the above-mentioned parties, depending on the political orientation that guides the country's socio-economic path.

The traditional liability path for third parties takes three directions: strict liability, broad immunity, and the big umbrella of secondary liability (which includes joint liability, accessory liability, fault liability, etc.). The standards under which Online Service Providers are held liable for a third party's conduct

[297] *Supra* p.89
[298] Weijung Huang, Xiaoqiu Li, *The E-commerce Law of the People's Republic of China: E-commerce platform operators' liability for third-party patent infringement*, computer law & security review 35 (2019) 105347, p.3
[299] *Ibidem*
[300] Or by the number of transactions, depending on its business model

is unclear even under the same jurisdiction or in a harmonized system. The difficulty arises from the fast-changing and diverse nature of the intermediaries[301].

Strict liability seems to place excessive burdens on EPOs, affecting the market activities. Even if strict liability is not a new concept in the patent law landscape[302], deciding whether it shall be applied to EPOs, it should consider the real capacity of EPOs to ensure the legal protection of intellectual property rights legally and efficiently[303]. Under this regime, the EPOs would be held liable for any content or infringement carried out on his platform, even if the damage could not be prevented through the duty of care. Moreover, as Jeff Kosseff pointed out. "Unlike traditional media models such as newspapers, which are limited by the numbers of articles and pictures that their employees and contractors can produce, online platforms have a virtually limitless capacity to carry user contents"[304]. For this reason, strict liability exists in a few jurisdictions and is usually applied in particular areas of the law[305]. To avoid this kind of liability, EPOs would have to exercise such strict control transforming themselves into a "scapegoat" for the problem, basically nullifying their platform position destroying the market[306].

Broad liability is the other extreme of strict liability. A model where intermediaries are exempt from any liability for third party content is against the public interest and the rule of law[307]. It is more reasonable to provide some specific areas where EPOs are exempt from liability, and there are many discussions at the international level that aim to establish principles for broad immunity[308].

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[301] Graeme B. Dinwoodie*, above,* p.20

[302] Lynda J. Oswald, 'The Strict Liability of Direct Patent Infringement' (2017) 19 VAND. J. ENT. & TECH. L. 993-1025.

[303] Graeme B. Dinwoodie*, above,* p.19

[304] Jeff Kosseff, 'First Amendment Protection for Online Platforms' (2019) 35 CL&SR 199-213.

[305] Xue Hong, *above,* p.369

[306] Graeme B. Dinwoodie*, above,* p.20

[307] Xue Hong, *above,* p.370

[308] For example, in December 2011, the OECD Council included "limiting intermediary liability" as one of the recommended principles for internet policymaking to "promote and protect the global free flow of information online". "

Secondary liability seems the more reasonable kind of liability to address platforms for third party infringements. EPOs, in fact, do not participate in users' transactions, nor have they the ability to monitor offline products; they can only decide whether there is an infringement according to text, pictures, or other similar materials [309]. There have been several criteria between different legislations that have been identified that give birth to secondary liability for the platforms. For example, in *Smith vs. California*[310] the court stated that the publisher could be held liable only if the publisher, as a natural person "knew" or "had reason to know" of the violation, could be recognized as being at fault. Even the ECJ on applying the EU "E-commerce Directive" stressed the "active role" that an e-commerce platform shall have when falling outside the "safe harbour" provision prescribed in the directive. In the *Chen v. Dangdang* case, the Beijing Chaoyang District People's Court even considered the platform (*Dangdang*) to be liable based on an open promise to compensate five times the purchase price of any counterfeiting product bought through the platform[311].

Despite the different definitions of each legislation, secondary liability can be 'participant-based' or 'relationship-based'. Participant-based liability occurs when the secondary defendant induces, contributes, or facilitates[312] the primary wrongdoer's harmful conduct [313]. This type of claim revolves around two elements: the defendant's level of knowledge concerning the wrongful conduct and to which extent it contributed to causing the harm[314].
Relationship-based liability occurs when the defendant benefits from the harm, and it is considered a single entity with the primary wrongdoer because of its

[309] Huang W. & Li X., *above,* p 5
[310] *Smith v. California,361 U.S. 147 (1959)* A case where a publisher was charged because of pornography material created by the author of a book although he did not know anything about it.
[311] See Chen v. Beijing Dangdang Information Technology Co., Ltd., Beijing Chaoyang District People's Court, March 14, 2013.
[312] U.S. copyright law is an example of this type of liability, holding that “one who, with knowledge of the infringing activity, induces, causes, or materially contributes ... may be held liable as a contributory infringer.” *See* Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971).
[313] Graeme B. Dinwoodie*, above,* p.9
[314] *Ibidem*

close relationship[315]. These kinds of liability are very popular and less controversial, and they are often more common between the different primary causes of action because the extent of the liability derives from the type of the relationship[316] and the extent of the connection[317].

This definition seems slightly different from the "joint liability" provided in some civil law jurisdictions. If we take the joint liability provided in art. 2055 of the Italian Civil Code, the secondary liability is closely tied with the primary act. There is a much stronger relationship between the imputability of the wrongdoers to the harmful act. However, even in countries that insist on secondary liability's derivative nature, it is not always necessary to prove the primary infringement.

In some more extreme scenarios, a fact that would raise secondary liability in a common law country can be treated as involving direct liability under tort law for failure to have taken reasonable precautions.

6.2 Criteria for defining liability

As we saw, secondary liability can assume slightly different aspects depending on the legal system (Civil law and common law), and also, within the same law system, it can assume different facets depending on the national legislation. This is because the broadness or narrowness of the definition of liability will determine the subjects and behaviours that will be held responsible for the third-party wrongdoing.

Secondary liability can significantly affect the operators in the market, and within the subtle differences between countries, the legislators generally use two approaches to build the secondary liability systems.

[315] *Ibidem*
[316] *Such as* employees, agents, suppliers, landlords, etc.
[317] Graeme B. Dinwoodie*, above,* p.10

A. Positive approach

The first one is the positive approach, that consists in the application by the court of already existing principles of secondary liability repeated in national private law to the new intermediaries operating in the internet environment[318].
This approach has not proven very effective, especially in common law countries where proving intermediaries liable for active conduct and knowledge has been hard, if not impossible, to satisfy[319].
This largely prevented rightful owners from shifting enforcement costs entirely to intermediaries.[320]
Expanding already existing principles means using some criteria developed for different environments (as we precedent saw in *Sea Sheperd v Fish & Fish*) in a unique and fast developing-internet market that is guided by different forces[321].
Thus, the mere *knowledge* that a supply or service might be used to engage in unlawful activities is not enough to hold the platform liable, preventing the patent holder from shifting the liability toward the intermediaries[322]. This has been proved through judicial practice, such as the decision of the UK Supreme Court decision on the *eBay v. L'Oréal* case that can be summarized in the *eBay v. L'Oréal* opinion of Arnold J.:

"Mere assistance, even knowing assistance, does not suffice to make the "secondary" party liable as a joint tortfeasor with the primary party. What he does must go further. He must have conspired with the primary party or procured or induced his commission of the tort... ; or he must have joined in the common design pursuant to which the tort was committed ..."[323]

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[318] A. Graeme B. Dinwoodie*, above,* p.19
[319] A. Graeme B. Dinwoodie*, above,* p.20
[320] For example, in the United Kingdom, the applicable standard for liability across a range of causes of action in tort is drawn from the general law of "joint tortfeasorship," which premises so-called accessorial liability on (1) procurement of an infringement by inducement, incitement or persuasion, or (2) a common design.
[321] The "E-commerce Law" commission stressed out the importance of developing an intellectual property protection system from scratch in order to adapt to the dynamics of the internet. (p. 123)
[322] A. Graeme B. Dinwoodie*, above,* p.20
[323] *L'Oréal S.A. v. eBay* Int'l AG, [2009] EWHC 1094 at [350] (*quoting* Credit Lyonnais Bank Nederland NV v. Export Credit Guarantee Dep't, [1997] EWCA (Civ) 2165, [1998] 1 Lloyd's Rep 19, [48] (Eng.))

As stated in *Sea Shepherd v. Fish & Fish* case "What the authorities, taken as a whole, demonstrate is that the additional element, which is required to establish liability, over and above mere knowledge that an otherwise lawful act will assist the tort is a *shared intention* that it should do so".[324] There must be a "concerted action to a common end" [325] rather than independent but cumulative or coinciding acts[326].

An analogous criterion has been applied in the U.S. in *Tiffany v. eBay*[327] where Tiffany was required to show that eBay "*intentionally induces another to infringe Trademark*" or continue to offer its services "*to one whom it knows or has reason to know is engaging in trademark infringement*". In this case, Tiffany sued eBay on the basis that several operators were selling counterfeit products on the platform. The claim was that eBay was providing support to these operators despite the fact it had "reason to know" that they were infringing the law [328]. Essentially, the argument was that the widespread nature of infringement amounted to constructive knowledge[329].In this regard, the Second Circuit stated that "For contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods", especially because eBay promptly shut down the reported Tiffany listing (within 24 hours)[330]. Tiffany v. eBay was a leading case that has largely been followed by other U.S. courts.

These approaches led to two significant consequences. The first one is that platforms started to implement *notice and takedown* mechanism to minimize the risk of liability and pursue uniform procedures across borders. Secondly, claimants seeking to hold online intermediaries liable for third parties' conduct have opted to make more tenuous claims of primary liability[331].

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[324] *See id.* at [44]; see also id at [54] (Lord Neuberger) ("the assistance must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed").
[325] National Report of the United Kingdom, at 3.
[326] A. Graeme B. Dinwoodie*, above,* p.22
[327] *See* Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 99 (2d Cir. 2010).
[328] *See above*
[329] A. Graeme B. Dinwoodie*, above,* p.23
[330] *See Tiffany v eBay* at 99
[331] A. Graeme B. Dinwoodie*, above,* p.28

B. Negative approach

This approach takes the other way around. It focuses less on the platform's conduct and more on the legislative conditions it has satisfied that grants it immunity. It gives the platforms "safe harbours", behaviours, and procedures that grant immunity when followed[332].

This approach is deemed to be the more successful, and it is behind the main legislative acts concerning the regulation of e-commerce, such as the EU "E-commerce directive", the Digital Millennium Copyright Act (DMCA) and the "Chinese E-commerce law".

The provisions conferring immunity may be either subject-specific or horizontal, while in some countries, there might be an even more complex matrix[333].

The EU "E-commerce directive" is a clear example of a horizontal set of immunity provision extended to:

1) Operators who are mere neutral transient conduits for tortious or unlawful material authored and initiated by others (art. 12)
2) Operators who cache local copies of third parties' tortious or unlawful data (art. 13)
3) Operators who store third parties' tortious or unlawful material while having neither actual knowledge of the "unlawful activity information" nor an awareness of facts or circumstances from which that "would have been apparent" (art. 14)

The directive applies horizontally regardless of national law, copyright law, or unfair competition law claims. The ECJ took into account two crucial considerations on the application of the safe harbour. First, to take advantage of the safe harbour, an intermediary must be a "neutral" actor. Thus, the safe harbour protects conduct of a "mere technical, automatic and passive nature[334]".

[332] A. Graeme B. Dinwoodie*, above,* p.19
[333] Mark A. Lemley, *Rationalizing Internet Safe Harbours*, 6 J. Telecomm's & High Tech. L. 101, 104 n. 23
[334] Case C-324/09, L'Oréal SA v. eBay Int'l AG, 2011 E.C.R. I-6011

Secondly, even if the neutrality requirement is fulfilled, the platform would lose its immunity if it does not act expeditiously and stay inactive[335].
Hence, the E-commerce directive encourages platforms to implement a *notice and takedown* mechanism in order to avoid liability. Not complying with the notice and takedown, however, does not mean liability. It just means no automatic immunity[336].

Notice and takedown mechanism has become one of the most important tools to avoid liability in most positive and negative approach scenarios. It shifts some enforcement costs to the intermediaries working on their internal governance mechanisms and has been directly implemented in the "Chinese E-commerce Law" when regulating intellectual property protection duties for E-commerce operators even though, as we will see, it is a mechanism that has some flaws.

6.3 Intellectual property protection under the "Chinese E-commerce Law"

The Chinese "E-commerce law" provides intense regulation of platforms' liabilities and obligations concerning e-commerce intellectual property protection. The legislator pursued this aim by implementing four articles (from art. 41 to art 45) that explicitly regulate this topic. The system is based on existing laws and regulations but has been updated and developed to meet electronic commerce's specificities[337]. A negative approach has been adopted, providing a *notice and takedown* mechanisms interplayed with governance provisions, combining ex-ante controls and ex-post liability[338]. On the one hand, regulating liability has a deterrent effect that can be used as a useful tool to affect IPR governance. The law shifts the burden of regulation toward the

[335] A. Graeme B. Dinwoodie*, above,* p.19
[336] *Ibidem*
[337] 电子商务法条文释义, *above,* p.123
[338] 电子商务法条文释义, *above,* p.124

platforms saving social and governance costs[339]. On the other hand, ex ante controls strengthen IPR governance on the platform[340]. Intellectual property protection has always been one of the most debated chapters among the ToS. When the law does not provide sufficient protection in this respect, or when there are some legislative voids, Platforms often engage in separate agreements with the operators. One of the most prominent examples is the memorandum of understanding[341] (MOU) signed in 2011 between thirty brand owners and platforms regarding their respective roles on tackling counterfeiting online[342]. In this case the MOU provides a discipline concerning the notice and takedown procedures[343], especially on the abuse of the instrument where the EU E-commerce Directive remain silent.

Regulation of the platform governance is not uncommon and does not regard only China either[344]. In the 2015 Alibaba dispute with SAIC, the problems were, in fact, primarily caused by defects in Taobao's ToS, including unauthorized or untruthful sellers operating on the platform; counterfeit and substandard or listing of forbidden goods[345]. Thus, the Chinese legislator considered that strengthening the IP governance on the platform was the best instrument to reduce IP infringement risk.[346]

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[339] *See* Althaf Marsoof*, Internet intermediaries and trademark rights*, Routledge Research in Intellectual Property

[340] 电子商务法条文释义, *above*, p.124

[341] Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, May 4, 2011, *available at* http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf.

[342] A. Graeme B. Dinwoodie*, above,* p.41

[343] If a trademark owner makes notifications to an intermediary without exercising appropriate care, the owner may be denied future access to the system and must pay the platform any fees lost due to such notification and "sellers should be informed where an offer has been taken down, including the underlying reason, and be provided with the means to respond including the notifying party's contact details" (*see* n.346 *above*)

[344] The Irish Data Protection Commissioner, which presides over Facebook's European headquarters in Dublin, had briefed the social network provider to modify its data use policy to allow users a greater level of control over the way their information and content on the site can be utilized by the company.

[345] Xue Hong, *above,* p. 23

[346] 电子商务法条文释义, *above,* p. 124

6.3.1 Regulation of IP through ToS

The system of protection of intellectual property[347] set out by art. 41 to 45 is divided into three parts: protection rules, governance measures and infringement liability[348]. Art. 41 stipulates the protection rules.

This set of provisions is not a mere repetition of the relevant legal provisions or requirements. They have an elaborated structure because they do not want to repeat existing intellectual property rules inside the platform regulation. They are instead an adaption and application of these rules inside the platform's internet environment[349]. These provisions aim to regulate the practices that are usually governed by ToS. The law is trying to bring the transaction rules, usually determined by parties, into the legal frameworks, and platform operators who violate these rules should be subject to administrative sanctions according to the law[350].

The regulation of protection of intellectual property is embedded in a broader set of regulations concerning the transaction rules of the E-commerce platform operators. However, the legislator does not directly intervene in a platform's market operations, but it follows a due process policy that requires the platform's ToS to follow the principles of transparency, accountability and inclusive, multi-stakeholder policymaking[351]. ToS are often a set of standard terms provided by the platforms and not negotiated with the users. They regulate a great variety of topics that the Xue summarized in the following categories: (i) transactional rules, defining subscribers' eligibility and transactional validity and enforceability; (ii) rules on liabilities and risks, defining the platform provider's liability, limit, exemption and indemnity to the other parties; (iii) intellectual property policies and measures, protecting intellectual property

[347] The ordinary procedure for trademark violation is provided by the "Trademark law of the People's Republic of China". According to art. 60 of the law, when the dispute arises from an act infringing upon the exclusive right to use a registered trademark prescribed in Article 57 three scenarios unveil. The dispute shall be settled by dispute, the party may bring a lawsuit to the people's court or request the relevant administrative department for industry and commerce to settle the dispute.

[348] 电子商务法条文释义, *above,* p. 124

[349] *Ibidem*

[350] *Ibidem*

[351] Xue Hong, *above,* p. 383

rights of all parties involved; (iv) credit assessment mechanism, through which consumers may submit their comments or reviews on the quality of goods or services received; (v) consumer protection and data protection measures; (vi) content regulation measures; (vii) penalty and dispute resolution; (viii) ToS' applicable subjects, coverage and term; (ix) rules and procedure for amendment of the ToS; (x) Other rules such as on jurisdiction, anti-spamming, network security and data retention[352].

The terms of services should follow the principles of art. 32 of the "E-commerce law"[353] of openness, fairness and impartiality. Since the IP protection falls in the topics regulated by the ToS, when the law does not prescribe specific provisions, they shall be drafted according to art. 32. Hence, the rights and obligations of the platform and its users should be clearly defined: the rules that are implemented should be displayed on the platform's home page, amendments to the rules should be made available for the public hearing, penalties shall be promptly announced according to the ToS, etc[354].

Art. 32 must be seen as the reading key of art. 41 where it states that "*E-commerce platform operators shall establish their intellectual property rights protection rules*". The article only provides a general statement because the intellectual property protection rules fall into the rules of transactions regulated from art. 32 ss. of ECL.

Art. 41 provides two more elements, the first being strengthening the cooperation between intellectual property owners and platforms[355]. Even though according to art. 34[356] parties should be involved when the platform

[352] These categorisations are based on Chinese Ministry of Commerce "Stipulations on Development of Transactional Rules of Third-Party Platforms for Network Retailing (Trial Implementation)" (December 24, 2014), "Services Standards of Third-Party E-Commerce Transactional Platforms" (April 12, 2011) and SAIC "Regulations on Network Transactions" (January 26, 2014) and also takes into account the ToS adopted on six Chinese leading platforms, i.e. Taobao, Tmall, JD.com (Jingdong Online Mall), Tencent Paipai, Dangdang and Amazon (China).

[353] Art. 32 ECL: *E-commerce platform operators shall develop the service agreement and transaction rules of the platform under the principles of openness, fairness and impartiality, which shall provide for the rights and obligations in terms of entry into and exit from the platform, goods and service quality protection, consumers' interests protection and personal information protection*.

[354] *Above,* 电子商务法条文释义, p. 125

[355] ECL art. 41

[356] Art. 34: *Where an e-commerce platform operator intends to amend the platform service agreement and transaction rules, it shall solicit public opinions at a conspicuous position of its homepage and take reasonable measures to ensure various parties concerned able to timely and fully express their*

wants to modify the terms of services, art. 41 is specific to the rules of intellectual property protection. The principle behind this specification is that intellectual property owners outside the platform have a personal interest in the formulation, amendment and implementation of IP protection rules [357]. Therefore, the platform operator should ensure that all the relevant IPR holders are involved in the formulation of the rules[358]. According to the commission the IPRs inside and outside the platform should be treated in the same manner as provided by law and should not discriminate IPRs outside the platform. This provision wants to respond to the rise of the MoUs between IP owners and the platform, even though they are not part of the platform. [359]

The second and last element of art. 41 is the obligation of platforms to legally protect IPR owners[360]. Even though platforms do not have law enforcement powers, they have the right to impose and warn the users according with the terms of service agreement[361].

6.3.2 IP infringement remedies: Notice and Takedown

As we previously discussed, the "E-commerce law" of the PRC adopts a negative approach when defining liabilities for e-commerce platform operators[362]. This means that despite applying existing regulations to hold platform liable for their behaviour, the legislator provides the scenarios where platforms are exempted from liabilities, the so called "safe harbours". The instrument provided by the law that platforms can use to be exempted from liability is regulated by art. 42 to 45, the so-called "notice and takedown" (hereinafter NTD) mechanism, where an intermediary may be exempted from

opinions. The amended content thereof shall be publicized at least seven days before the implementation.

[357]电子商务法条文释义, *above,* p. 126

[358] *Ibidem*

[359] Alibaba itself have entered into brand partnership agreements with more than 200 brand companies.

[360] Art. 41 ECL

[361]电子商务法条文释义, *above,* p. 126

[362] *Supra,* p.98

liability provided that it removes certain content upon receiving notice from the right holder or discontinues the services[363].

NTD mechanism is not new in the law practice neither in the Chinese legislation. Even though the NTD practice was already in use between the online intermediaries, the Digital Millennium Copyright Act (Hereinafter DMCA) gave some legal force and structure to the notice and takedown system[364].
Before implementing the DMCA, the court was adopting a very aggressive position toward internet intermediaries, holding them liable even when they had no knowledge about the infringement or when they already took measures to protect the IP rights holder[365]. At that time section 512 of the DMCA[366] was regarded as a crucial legislative intervention in order to preserve innovation on the internet[367].
The motivation behind this tool was obliging intermediaries to remove infringing content upon being notified of its existence under the promise of conditional immunity. However, The DMCA NTD mechanism was not perfect, and its extra-judicial nature led to over compliance[368] by IP rights holders[369]. Lack of transparency of intermediaries' decision-making process was also often used to hide discriminatory practices or political pressures[370].

The EU "E-commerce directive" also provides a NTD mechanism creating immunity for service providers[371].
The EU directive categories are slightly different from the DMCA, but, most remarkably, in Europe, liability outside the safe harbour will only arise if the standard for secondary liability is also met under the national law[372]. Another

[363] Xue Hong, *above,* p. 372
[364] *Above*, Marsoof, chapter 6 "notice and takedown"
[365] *Ibidem*
[366] Section 512 of DMCA applies to four different activities that internet intermediaries engage: 1) Providing of internet access 2) System chaching 3) Hosting 4) Navigation
[367] *Above*, Marsoof, chapter 6 "notice and takedown"
[368] For more information *see Above*, Marsoof, chapter 6 "notice and takedown"
[369] *Above*, Marsoof, chapter 6 "notice and takedown"
[370] *Ibidem*
[371] *Supra* "negative approach" p.97
[372] *Above* "Secondary Liability of Internet Service Providers" p.38

crucial difference between these two systems is that in section 512(g), the DMCA contains put-back and counter-notification provisions, which cannot be found in the EU directive. Intermediaries can still adopt their own counter-notice mechanism, but it is possible that, without statutory regulation, they can fall outside the safe harbour[373]. However, this legislative void is filled by the EU MOU, which includes the counter-notice mechanism: "sellers should be informed where an offer has been taken down, including the underlying reasons, and be provided with the means to respond including that of notifying party's contact details[374]."

6.4 Notice and Takedown mechanism in the Chinese legal framework

A. Copyright law

In China NTD procedure was first introduced into Chinese Copyright law in 2000 through a judicial interpretation of the Supreme People's Court[375] and a regulation of the State Council[376]. It was seen as a necessary measure in order to face the challenges of the internet era. These two documents implement the safe harbour system and the NTD mechanism but, unfortunately, they cannot be directly transplanted into patent law[377]. The object of the rights that these two documents protect differs from the patent. The aim of the Supreme Court interpretation is the "Protection of dissemination of information" as intended in art. 10 (12) of Copyright Law of the People's Republic of China[378] and protecting the patent. Patent infringements are not properly "dissemination of information" but rather "copied data". Thus, posting the patent information on

[373] A. Graeme B. Dinwoodie*, above,* p.43
[374] *See* Memorandum of Understanding, *supra* n. 346, at ¶ 16.
[375] *See* "Provisions of the Supreme People's Court on Certain Issues Related to the Application of Law in the Trial of Civil Cases Involving Disputes over Infringement of the Right of Dissemination through Information Networks"
https://www.hfgip.com/sites/default/files/law/provisions_of_the_supreme_people_s_court_on_certain_issues_involving_disputes_over_infringement_2013_english.pdf
[376] See "Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (2013 Revision)"
http://www.lawinfochina.com/display.aspx?lib=law&id=12572&CGid=
[377] Huang W. & Li X., *above,* p. 6
[378] https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn031en.pdf

the e-commerce platform does not render liable[379]. Moreover, art. 13 of the interpretation does not seem suitable for patents since the platform is supposed to "know" the infringement and take necessary measures thoroughly after the notification. Unfortunately, unlike copyright infringement, patent infringement often requires technical knowledge and an in-depth analysis of the patent. It seems unfair to shift the burden of such a difficult decision to the platform, which lacks the technical knowledge for making such a decision.[380] Moreover, under this system it becomes a "whack-a-mole" game, where the users can simply re-upload the material[381].

B. Tort Law

The "Tort Law of the People's Republic of China" [382] also provides an NTD procedure in art. 36, but it is very different from the one provided in the Copyright law. Firstly, this procedure is not limited to intellectual property protection but, any time "*A network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability*"[383]. The requirements for the application of the measure are also different. Where the Copyright law requires measures to be taken after notification when prima facia evidence is provided, the Tort law requires that a tort has been committed or is being committed. The tort law does not provide counter-notice or restoration provisions for the protection of internet service users. Lastly, there is no provision for a complainant's liability or for the exemption of an ISP's liability, if takedown measures have been wrongfully carried out[384]. The ISP is put on very precarious ground, since it has to decide whether a tort has been committed and eventually face the user's complaints for wrongfully taking down the content. Even if the Beijing High People's Court

[379] Huang W. & Li X., *above,* p. 7
[380] *Ibidem*
[381] Feng S., Wan Y., Fang F., *Notice and Take Down: How the Shift from Copyright Law to Chinese E-Commerce Law Poses an Unnecessary Disturbance to E-Commerce*, Max Planck Institute for Innovation and Competition, Munich 2019, Published online: 28 August 2019, p. 1086
[382] Full text at: https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf
[383] Art. 36.1 of the "Tort Law of the People's Republic of China"
[384] C Feng S., Wan Y., Fang F., *above,* p.1088

tried to face these issues with the "*Answers to Certain Questions Concerning E-Commerce Related Intellectual Property Infringement Disputes*" providing liability for wrongful notice and adding counter-notice and restoration steps the platform is nonetheless facing great inconveniences[385]. The platform still needs to determine the existence of IP right infringement and take "necessary measures". It is still liable for any incorrect decisions on takedown or restoration measures and can restore the information only if the IP holder withdraws or does not confirm its complaint[386]. Finally, there is no consistency about what kind of "necessary measures" needs to be applied. As ruled by Zhejiang's People's High Court in "*Weihai Jiayikao Household Appliances Co., Ltd vs Yongkang Jinshide Industry & Trade Co., Ltd and Tmall"* the measures need to be decided case by case.

C. E-commerce law

As specified by the drafting commission, the Notice and takedown system provided in the Chinese "E-commerce law" is based on a notification mechanism that is applied contextually to the necessary measures required to repress the infringement. The mechanism is specifically laid down by art. 42 and 43, while art. 44 regulates the publicity of notification and art. 45 specifically address liability.

According to art. 42.1-2:
"*An IPR holder shall be entitled to notify the e-commerce platform operator to take such necessary measures as deletion, blocking, disabling the link, termination of transaction and service if the IPR holder believes that there is any infringement upon its or his IPR or IPRs. Such notice shall include prima facie evidence on the constitution of infringement.*

[385] C Feng S., Wan Y., Fang F., *above,* p.1088
[386] *Ibidem*

The e-commerce platform operator shall timely take necessary measures and forward such notice to operators on platform upon receipt of the same. Failure to timely take necessary measures shall result in the joint and several liability of the e-commerce platform operator for the enlargement of damage, together with the operators on platform."

The Chinese Supreme People's Court has defined the necessary information that should be contained in a valid notification[387], being: (i) the right holder's name and contact; (ii) relevant information to accurately locate the allegedly infringing contents and enabling necessary takedown measures; (iii) the reasons to take down the content[388]. According to the drafting committee, the notification should include at least proof of identity, proof of ownership of the intellectual property rights, and prima facia evidence of the infringement.
The E-commerce platform operator can receive a notice of violation of IP rights through an automated system. In this case, it is only required to conduct a formal review without making any legal determination as to the notice's content[389].

After the receival of the notice, the platform needs to evaluate whether its content may constitute an infringement of an intellectual property right. In the affirmative case, it shall adopt "*necessary measures".* This disposition is substantially the same as Art. 36[390] but limited to measures applied to intellectual property protection[391]. From the wording of the law, we can understand that these measures are different from the notification and that the latter is not part of the necessary measures[392]. As a consequence, the "*timely"* requisite of art. 42.2 does not concern the notification to the business operators.

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[387] Xue Hong, *above,* p. 375
[388] *Chinese Supreme People's Court Stipulations on Several Issues Regarding Application of Law in the Trials of Civil Disputes Cases Involving Infringements against Personal Rights and Interests via Information Network*, August 21, 2014.
[389]电子商务法条文释义, *above,* p. 129
[390] Art. 36: "*E-commerce platform operators shall timely make announcement if they take such measures as warning, suspension of business or termination of service against the violation of laws or regulations by operators on platform in accordance with the service agreement and the transaction rules.*"
[391] 电子商务法条文释义, *above,* p. 130
[392] Huang W. & Li X., *above,* p. 10

The same art. 42.1 illustrates the nature of the measures and makes four examples: deletion, blocking, disabling the link and termination of transaction and service. Some scholars however criticized this system.[393] The evaluation would be based solely on the notification from the IP holder that will automatically generate the takedown measures, and unlike the copyright law, the counter notice will not automatically generate the reversal takedown measure[394]. The content will be taken down for at least 15 days and both the commercial and legal consequences in case of a false accusation seem disproportionate[395]. The scholars pointed out that *"IP rights holders' liability for damage caused to online stores can only come about via the determination of improper notice, the determining of which is no easy task."*. Finally, this remedy does not take in consideration the effects of the reputation on the online store[396]. Considering that in 2016 in China, more than 80% of online shops were a victim of trademark trolls and that 18% of the online shops have been subject to more than five complaints, this can be a severe issue[397].

The measures are taken according to the *prima facia evidence* of the infringement provided by the IP rights holder. The E-commerce law puts the platform in a position to judge whether a specific behaviour constitutes an infringement. However, the platform is neither a judge nor an intellectual property expert. The law does not even distinguish between patents or copyright. It is reasonable to agree that distinguishing a violation of copyright is easier than distinguishing a violation of a patent since the latter often requires a much higher technical knowledge of the subject. Thus, it is very hard for the platforms to tell whether a product that a user sells online violates another one's patent solely based on the notice[398]. Other countries, such as Canada, opt for a Notice

[393] C Feng S., Wan Y., Fang F., *Notice and Take Down: How the Shift from Copyright Law to Chinese E-Commerce Law Poses an Unnecessary Disturbance to E-Commerce* Max Planck Institute for Innovation and Competition, Munich 2019, Published online: 28 August 2019
[394] C Feng S., Wan Y., Fang F., *above,* p.1094
[395] C Feng S., Wan Y., Fang F., *above,* p.1095
[396] *Ibidem*
[397] Yan Y (2017) *Who are harmed by trademark trolls?,* China Business Times (19 April 2017) Zhejiang Province High People's Court, Civil Judgement (2015) Zhe Zhi Zhong Zi No. 186. P.3
[398] Huang W. & Li X., *above,* p.11

and Notice mechanism[399]. A different and more neutral approach was adopted by Canada, where EPOs are only responsible for forwarding each other the notification without checking each other's content[400].

"Anyone who causes loss of operators on platform due to its wrong notice shall assume civil liability in accordance with the laws. Anyone who causes loss of operators on platform due to its maliciously wrong notice shall assume double liability for compensation[401]."

Even though the counter-notice does not automatically imply the casement of the takedown measures, art. 43.3 provides liability for wrongful or malicious notice. Some scholars [402] raised questions concerning the norm subjects, particularly whether "anyone" also refers to the EPOs. Considering EPOs liable for the wrongful notice would be deeply unfair since they would respond for a notice not sent by them[403]. However, even if we consider the platform immune from liability in case of wrongful or malicious notice, the EPO cannot be aware of the wrongfulness the moment it receives it. In this scenario, EPOs are always incentivized to take remedial measures in order to avoid liability[404]. This is because, as clearly stated by the commission, the IPR "notification error" should be judged by the objective consequences and not by the subjective state of mind of the IPR owner[405] The E-commerce law does not recognize the nature of the erroneous notice because it does not take into account the potential good faith of the compliant.

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[399] A. Graeme B. Dinwoodie*, above,* p.45
[400] Computer law pag 11 NELLA NOTA Sara Bannerman, 'Review: In the Public Interest: The Future of Canadian Copyright Law' (2002) 2 Canadian Journal of Com- munication <https://www.cjc-online.ca/index.php/journal/issue/ view/115/showToc> accessed 18 September 2019. The details in Cheryl Hamilton, 'Made in Canada: A Unique Approach to Internet Service Provider Liability and Copyright Infringement' in Michael Geist (eds.), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law 2005, pp. 285-308).
[401] Art. 42.3 of ECL
[402] According to Huang W. & Li X.
[403] Huang W. & Li X., *above,* p. 11
[404] *Ibidem*
[405] 电子商务法条文释义, *above,* p. 132

Art. 43:

"Upon receipt of the forwarded notice, operators on platform may submit a statement of no infringement to the e-commerce platform operator. Such statement shall include prima facie evidence on no act of infringement."

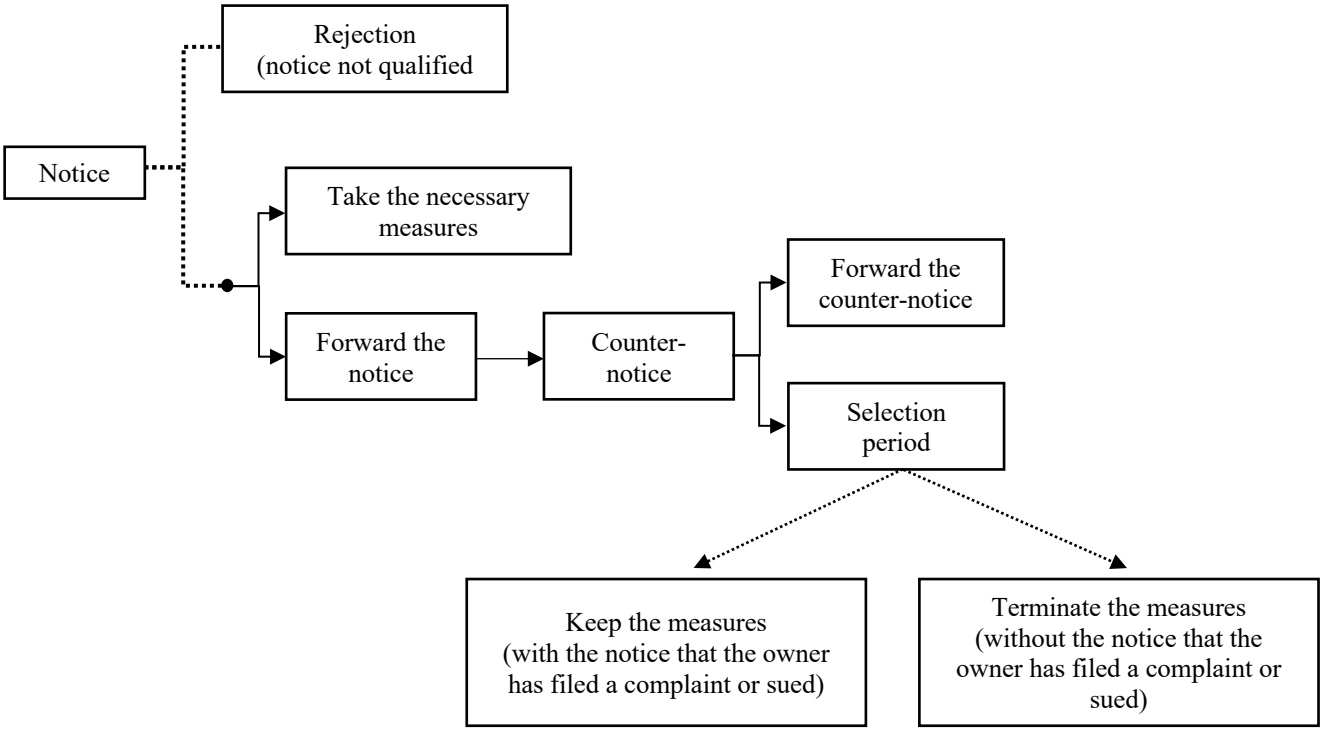
"Upon receipt of such statement, the e-commerce platform operator shall forward such statement to the IPR holder who issues the notice and informs the IPR holder of the right to file a complaint to relevant competent authority or bring a lawsuit before a people's court. If the e-commerce platform operator has not received any notice within fifteen days as of the arrival of the forwarded statement at the IPR holder that the right holder has filed a complaint or lawsuit, it shall immediately stop the measures it has taken."

As we mentioned above, the E-commerce law system provides a double notice mechanism. In order to remove the restrictive measures, the operator on the platform may submit a statement of infringement to the platform, which includes prima facia evidence on no act of infringement. This mechanism provides a way for the operator on the platform to prove its innocence. However, as we previously examined, in the best-case scenario, the measures will last fifteen days (as provided in paragraph 2) and in the modern internet environment, this period can be enough to ruin a product placement completely. The counter notice's content is described again by the drafting commission, which affirms that it should contain the same elements described by the Judicial interpretation above. Now the platform has an obligation to forward this notice to the IP owner that filed the complaint in order to: a) Provide the necessary support and facilities[406] to file a complaint to the relevant competent authorities or to file a legal action b) Set the 15 days' time limit for terminating the restrictive measures.

[406] 电子商务法条文释义, *above,* p. 131

It is always possible for the platform to use its online dispute resolution mechanism as prescribed by art. 63 of ECL.

This graph can provide a useful simplification of the NTD process of the E-commerce Law



The E-commerce platform operators shall make a timely announcement of the received notice, statement and handling results of art. 42 and 43[407]. The aim is to avoid situations in which an operator receives a notice or declaration and then hides it or take measures that do not comply with the rules [408]. The announcement shall be "*timely"* made, if this requirement is not fulfilled and this results in the expansion of the damage suffered by the intellectual property owner, it shall be held jointly and severally liable for the extended damage[409]. The law also provides an administrative sanction that ranges from 50.000 to 200.000 RMB if the error is not rectified.

[407] Art. 44 ECL
[408]电子商务法条文释义, *above,* p. 133
[409] *Ibidem*

The law remains silent if the platform publishes a declaration that is inconsistent with the facts, which causes damage to the IPR owner. In this case, according to the commission, the platform shall be subject to aggravated liability for the IPR infringement.

Platforms liability

"Where an e-commerce platform operator knows or should know any infringement upon IPR by operators on platform, the e-commerce platform operator shall take such necessary measures as deletion, blocking, disabling the link, termination of transaction and service, and shall assume joint and several liability with the infringer if it fails to take such necessary measures."

The platform operator is held liable for not implementing the necessary measures to stop the intellectual property rights infringement perpetrated on its platform. The principle behind this liability is that the platform operator is the platform's governor and has a general duty of care to prevent infringing on the platform[410]. Moreover, as we previously discussed, the EPO is in a much better position when monitoring and protecting I.P. rights infringements on the platform[411].

Art. 45 defines the criteria according to which a platform should be considered liable and opts for a fault-based liability rather than a strict one (only if it "knew or should have known"). This liability does not exempt the platform from liability arising from independent conduct as provided by art. 36.3 of Tort Law[412].

In this playfield, the E-commerce law provides two new types of liability. The first is where the platform operator "knows with certainty" about the infringement but does not take the necessary measures to stop it[413]. The second is where the platform's infringement is so evident that the platform should have

[410] 电子商务法条文释义, *above,* p. 136
[411] *Supra* p.93
[412] https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf
[413] 电子商务法条文释义, *above,* p. 136

been aware of it[414]. The platform operator has a general duty of care toward the operators on the platform. Therefore, even if the I.P. holder does not issue a specific "notice" to inform the platform of the existence of a copyright violation, it does not mean that the EPO can avoid its general duty of care[415]. The law does not specify how broadly the general duty of care is extended. We know from the drafting group that it certainly includes the duty of care provided by art. 38 concerning the compliance of the goods and services provided in the platform with safeguarding personal safety[416]. If we borrow the judicial practices from abroad, we can determine that the platform's automated system and the timely response to the infringement are two elements that can be considered without a doubt[417]. Several courts in the U.S. often relied on the *Inwood* test that requires more than "a general knowledge or reason to know that its service is being used to sell counterfeit goods"[418]. The general knowledge criteria described by art.45 is indeed different and broader from the judicial interpretation of the "red flag test", where the infringement is so clear that there is a presumption that the platform "knew" the fact[419].

The criticisms concerning this article mainly revolve around the fact that when the EPOs detects an infringement that they consider to be grounded, they will most probably refuse to restore such material[420]. This is the consequence of the high number of internet trolls that, being in fault, will not bring the issue before the court. This means that if they consider that the alleged I.P. infringement is not probable, they may refuse to follow the NTD procedure[421].

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[414] Similarly, to the EU Directive that describes the case where the ISP does not have explicit knowledge of the offending activity or information.

[415] 电子商务法条文释义, *above,* p. 136

[416] 电子商务法条文释义, *above,* p. 132 *and* art. 38 ECL

[417] *See* Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 99 (2d Cir. 2010). eBay: (1) developed software—a so-called "fraud engine"—to ferret out illegal listings, including of counterfeit goods; (2) offered mark owners space on its site (an "About Me" page) to warn users about suspected fakes; and (3) suspended hundreds of thousands of sellers each year whom it suspected of having engaged in infringing conduct. eBay maintained and administered the Verified Rights Owner (VeRO) Program, a notice and takedown system that allowed trademark owners to submit a Notice of Claimed Infringement (NOCI) to eBay identifying listings offering infringing items, so that eBay could remove such reported listings

[418] *See* Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 99 (2d Cir. 2010).

[419] Huang W. & Li X. *Above*, p.18

[420] C Feng S., Wan Y., Fang F., *above,* p.1097

[421] *Ibidem*

Conclusions

The intellectual property protection system introduced in the Chinese E-commerce law takes inspiration from domestic and international practice in order to create a system that is tailored for the internet environment. However, this task has proven to be not an easy one, numerous interests need to be balanced and traditional institutes reshaped and redefined in order to be effective. Different critiques pointed out some flaws or legislative voids that needs to be filled, such as the lack of inclusion of social media platforms into the e-commerce platform operator's category. Some authors, such as Shujie Feng, Yong Wan and Fang Fang, offer a more pessimistic prospective, arguing that the new procedure deprives platforms from the control of the NTD mechanism and this will cause serious disturbances for e-commerce[422].

On the other hand, other authors embraced the new regulation with more optimism and provided some solutions to the criticalities detected, such as a burden sharing regime of liability between the platform and the IP right's holder[423].

Overall, with all its limitations, I would consider the "E-commerce law" an improvement for the protection of IP rights holder online. It gives a mechanical and standardized procedure that can be carried out in a relatively short period (15 days) in order to protect their rights. Moreover, the E-commerce law does not stand alone, it is part of a broader project of the regulation of the internet that is still developing and will bring further improvements for the creation of a safer and more transparent internet environment, at least as far business is concerned.

[422] C Feng S., Wan Y., Fang F., *above,* p.1097
[423] *Above*, Huang W. & Li X. p.12

CHAPTER III

THE EUROPEAN FRAMEWORK

7. A brief history of the European legislative internet development and internet economy

Since the invention of internet in the early 1960s[424] a consistent number of years passed before its regulation came under the scrutiny of the European legislator. It was only in the 1990s, in fact, when the first small steps were made, and the topic became of public interest.

The first approaches to internet regulation recognized it intrinsic economic potential. However, some concern was expresses for its anonymity potential to create a fertile ground for economic and social crime.[425] The European Union has recognized the need to address the internet question and develop and implement solutions.[426] Major interest areas were identified as more likely to generate legal issues, being: the financial service system, unlicensed physicians

[424] Internet was developed by the U.S. military in the early 1960s to create a new means of communication. After that the military dropped the project, it was picked up by a group of four U.S. universities as a method of sharing information.

[425] *See* Neil Winton, *EU Commissioners Urge Internet Business Caution,* REUTER EUR. COMMUNITY Rep., June 3, 1997.

[426] Matthew J. Feeley, *EU Internet Regulation Policy: The Rise of Self- Regulation*, Boston College International and Comparative Law Review, article 6, p.2 Volume 22 | Issue 1

and lawyers, security fraud, copyright and trademark violations, dissemination of illegal information, contracts, taxation and defamation[427]. As we can see, the predictions were far from inaccurate, being the main controversies nowadays coming from these very sectors[428].

The first efforts in the EU occurred in 1991 wherein the "Privacy directive" (later formally adopted by the European Council of Ministers in 1995 as the "Directive on personal data") of the Council aimed to protect personal data stored in computer data banks.

The approach to privacy is one of the most prominent differences between the European approach on internet regulation and the Chinese one. The Chinese approach was, from the very beginning, more "economic oriented" with the introduction of the "Electronic Signature Law" in 2004. The European approach, on the other hand, was immediately directed toward the protection of data. This early day distinction will later evolve in two radically different approaches. In China sensitive information concerning individuals do not meet the European standards. For example, it now requires a "real name" system, a pervasive mechanism, to register in most Internet platforms. While in Europe, the legislator is much more cautious when it comes to handling personal data. We can find an extensive amount of detailed legislative documents, the more prominent one being the GDPR, that protects the treatment of personal information and data. The different approaches reflect two different political and historical heritages, with an illuminist individual-centric oriented culture in the west and a more collective-based heritage in the east. Both approaches have some pros and some flaws, and the optimal solution can sometimes be borrowed from each other.

The European legislator stayed silent until July 1994, when it issued a document entitled “Europe’s way to the Information Society: An Action Plan.” The commission proposed a “broad regulatory framework package” that would

[427] Neil Winton, *above,* p.161
[428] *Supra* p. 89

cover market access, compatibility between networks, IP rights and data protection[429].

In 1996, the European Parliament issued a Resolution explicitly calling for a robust regulatory framework to achieve maximum public protection[430].

In 1997 a paper entitled "A European Initiative in Electronic Commerce" focusing on the new forms of businesses that have been developing in the electronic market[431] prepared the ground for the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, also known as the "E-commerce Directive".

The future approach toward regulation reflected the concern of not over-regulating the sector and can be summarized in the former EU Internal Market Commissioner Mario Monti's words, who stated, "We definitely want to avoid, like in other sectors, having too much legislation too early".

The actual landscape is filled with regulations and directives that try to harmonize the legislation to create a single internet market on the one hand and balance the consumers' interests and rights on the other hand.

A brief introduction to the internet economy

As we extensively discussed, it is pointless analysing the legislative disposition without understanding the economic framework where they do operate. Thus, we will briefly introduce the actual internet landscape in Europe.

Digital platforms

In the modern Internet economy, a key role is played by the "digital platforms" that provide services and technological tools, programmes and applications, for

[429] Neil Winton, *above,* p.165
[430] *Ibidem*
[431] *Ibidem*

the distribution, management and creation of free or paid-for digital content and services, including through the integration of several media[432].

The platform can be *open source* or commercial and can be structured, respectively, for public access or for a limited target audience subject to registration. It can provide information, entertainment, file sharing, streaming and multimedia communication and sharing services.

The use of online digital platforms is of primary importance for increasingly widespread intermediation services[433] and applications such as e-commerce and payment services, Internet search engines, the sharing economy, the gig economy, e-learning, pay-tv and Video on Demand services, etc.

Digital businesses encompass transactions that are digitally mediated (often via apps) or involve products or services used digitally by complementary users sharing a network[434].

Digital platforms consist of a complex set of software, hardware, information exchange operations (big data) or transactions and networks[435]. Within digital platforms, the software that controls and manages their functions is of particular importance. Software platforms are the technological place where application developers and end users converge[436].

Innovative business models

Digital platforms are the basis of innovative business models of highly profitable companies (such as Google or Facebook), thanks to the (supposedly)

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[432] Spagnoletti - Resca - Lee, *A design theory for digital platforms supporting online communities: a multiple case study*, in *Journal of Information Technology*, 2015, 30, 4, 364-380.

[433] In its ruling of 20 December 2017, the EU Court declared, in the first instance, the qualification of Uber as an "intermediation service", i.e. a service that is essentially based on putting a non-professional driver of a vehicle in contact, by electronic means, with a customer who, through a reservation, intends to make a journey in an urban area. See https://www.iusinitinere.it/uber-le-sfide-giuridiche-della-sharing-economy-21621.

[434] Rochet - Tirole, *Platform Competition in Two-Sided Markets*, in *Journal of the European Economic Association*, 2003, 1, 4, 990-1029.

[435] de Reuven - Sørensen - Basole, *The digital platform: a research agenda*, in *Journal of Information Technology*, 2018, 33, 124-135.

[436] Tiwana, *Platform Ecosystems: Aligning Architecture, Governance, and Strategy*, Morgan Kaufmann, 2014.

free services offered, typically counterbalanced by advertising revenues. Valuation metrics become relevant not only for the target companies, but *for value increasingly pervasive and sophisticated digital ecosystems* in which user-consumers are of primary importance.

The monetary value of digital assets depends on parameters and value drivers that make it possible to go beyond the traditional free access, with hypotheses of indirect or mixed remuneration (freemium).

The sharing economy is the basis of an innovative economic system based on the sharing of goods and services by a community of users who operate through ad hoc digital platforms.

An innovative interpretation of digital platforms can be provided by network theory[437], in which digital platforms represent a virtual node that connects with other nodes manned by stakeholders, enabling the circulation of information, the execution of transactions, etc.

A further extension concerns applying the paradigms of the *sharing economy*[438] whose stakeholders interact through digital platforms.

The main types of digital platforms are as follows:

- E-commerce platforms: that (i.e., Amazon, eBay, Airbnb…) that facilitate online transitions B2B, C2C, B2C etc.
- Innovative platforms: that allow third parties to develop complementary products and services, integrating proprietary business models with open sources extension (such as Microsoft)
- Integrated platforms: that combines aspects from both e-commerce platforms and innovative platforms (i.e., Google, Apple, Alibaba…).

[437] Moro Visconti, *Corporate governance, digital platforms, and network theory: information and risk-return sharing of connected stakeholders*, Management Control, 2020, n. 2.
[438] Sutherland - Jarrahi, *The sharing economy and digital platforms: A review and research agenda*, in *International Journal of Information Management*, 2018, 43, 328-341.

7.1 The internet economy: problematic aspects

Digital services, being typically free of charge, are sometimes assimilated into public goods. They are typically so-called non-rival goods, as their use by one consumer does not prevent others' consumption, even simultaneously.[439] For example, while a sandwich is a typical rival good (since only one person can consume it), the use of a film in streaming is open to a potentially unlimited number of consumers.

The circumstance that the (free) use of a digital service usually presupposes a registration and profiling of the user (generating data then subject to commercial exploitation, even surreptitiously, by the provider) places digital services between public and private goods.

EU and national provisions on the liability of hosting providers concerning the publication of illegal content uploaded on these platforms by users are inadequate to digital platforms' evolution. This is why the case law, has been drafted in an often disharmonious manner[440].

EU Reg. 2019/1150, in force since 12 July 2020[441], promotes fairness and transparency for commercial users of online intermediary services.

The Digital Agenda for Europe is one of the seven pillars of the Europe 2020 Strategy, which sets out the EU's growth targets up to 2020.

The Digital Agenda aims to leverage ICT technologies' potential to foster innovation, progress, and economic growth, with the development of the single digital market as its primary objective[442].

Digital platforms can easily give rise to monopoly rents that can lead to antitrust problems. Large players, typically belonging to big tech, have an infrastructure based on a capillary and scalable IT network, which can be relatively easily adapted to different geographical contexts, offering global services and content.

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[439] Contaldo, *Profili giuridici della piattaforma digitale*, in *Il diritto d'autore*, 1998, 69, 3, 291-304.
[440] Pacella, *Il lavoro tramite piattaforma digitale nella giurisprudenza dei Paesi di Civil law*, in *Labour & Law Issues*, 2019, 5, 1, 15-42, in *https://labourlaw.unibo.it/article/view/9609*.
[441] Ammannati, *Verso un diritto delle piattaforme digitali?*, in *Federalismi.it*, 2019, 7, in http://www.astrid-online.it/static/upload/0204/02042019235942.pdf.
[442] *https://www.agendadigitale.eu/mercati-digitali/responsabilita-dellhosting-provider-luci-e-ombre-della-giurisprudenza/*.

This can give rise to numerous behaviours potentially detrimental to free competition[443].

Among the main assets that are not always used transparently is big data, collected through systematic and capillary user information profiling. Big data can feed a wealth of information that is surreptitiously characterized by anti-competitive effects, creating barriers to entry in a market dominated by incumbents who can strengthen their dominant position. In this context, the protection of transparency in data use must be combined with consumer protection.

Issues in the field of labour law may also be relevant. Digital platforms such as Google, Facebook or Amazon, and Foodora or start-ups such as Deliveroo are now an integral part of billions of people's daily lives.[444] The gig economy is based on the organisation of digital platforms, associated with dedicated mobile apps, which orchestrate the precarious interaction of freelancers with principals, as seen during the lockdown. Poor regulation facilitates a model's flexibility that also lends itself to abuses that proliferate thanks to the regulatory vacuum.

The recent phenomena linked to the Covid-19 pandemic constantly draws attention to the extensive digital platform players' role, whose business models are much more organized than others to rapidly and widely implement agile working tools (smart working).
The non-rivalry of digital platforms implies, in economic terms, the scalability of the business model. The business is scalable when an increase in revenues is significantly transferred to the operating result, thanks to a mix of operating costs in which fixed costs are preponderant, compared to variable costs. Since fixed costs by definition do not vary as revenues change, a rigid cost structure guarantees a more intense translation of increasing revenues to the operating

[443] Colangelo - Falce, *Concorrenza e comportamenti escludenti nei mercati dell'innovazione*, Bologna, 2017, 31.
[444] Guarascio - Sacchi, *Le piattaforme digitali in Italia. Un'analisi della dinamica economica e occupazionale*, Inapp, Policy Brief, 2018, 8, in *https://oa.inapp.org/xmlui/handle/123456789/194*.

margin (with a boomerang effect if revenues contract, contributing in this case to increasing losses or to reaching an economic balance between revenues and costs with greater difficulty).

Economies of scale and experience (the latter also referring to mechanisms of interaction with customers, who with their feedback participate in the creation of value[445]) represent a fundamental strategic lever for interpreting innovative value creation models (value drivers).
Scalability can be greatly increased in the presence of digital platforms that intermediate between stakeholders in real-time (24/7) everywhere, ensuring dissemination and comparability of information.

The proactive role of digital platforms can be better understood by considering their interactive properties in terms of network theory.
Network theory stems from the theory of graphs, which originated in the field of topological geometry following the Konigsberg bridge problem: in 1736 the mathematician Leonardo Euler asked himself whether it was possible to follow a pedestrian path that crossed each bridge only once. The question and the (negative) answer were not, in themselves, of great importance, except for the fact that they casually gave rise to the topological theory of graphs, which expresses an architecture of nodes obtained by connecting different points together. What is most important in interpreting the connections between different nodes is their distance and the characteristics of the interrelationships, starting with their intensity. Consider, for instance, the nodes arising from an e-mail exchange between several subjects: the distance between the computers that send and receive e-mail messages is entirely irrelevant. In contrast, the influence of the subjects and the nature of their interrelationships becomes important.
Networks seek to explain how a collection of isolated elements can be transformed through interaction models (such as computer platforms on the

[445] Such as tripadvisor

internet), into groups and communities. In its most basic formulation, a network represents a set of points (vertices or nodes) connected by lines (sides or edges). Critical are social networks[446], which rely on digital platforms (such as Facebook or LinkedIn) as a point of the interchange (so-called 'bridge node') between different individuals. The theory of networks also assumes economic-legal relevance in the interpretation of corporate governance issues, where stakeholders are considered nodes connected to each other thanks to the intermediation of "bridge nodes" such as digital platforms[447] that represent a new intangible stakeholder.

The economic valuation profiles depend first of all on the type of platform being valued (e.g., open source or commercial). A further prerequisite is represented by the subject who deals with the platform to be evaluated: the owner, the consumer-user, the intermediary (who provides hosting services or M-Apps, etc.).

While the proprietary platform's evaluation involves a relatively small number of subjects, consumers' extension concerns a much more comprehensive range of potentially interested subjects. In this context, it is not the value of the platform itself that is relevant, but rather the added value it generates on the user's business (net of the intermediation costs for using the third-party platform).

If the economic valuation refers to an asset (or branch of business, such as under Article 2555 of the Italian Civil Code) independently identifiable and susceptible to economic exploitation and consequent estimation in terms of value, no particular methodological issues arise.

More complex however, is the estimation of value for non-owners (such as consumers-users). Profiles of value co-creation emerge, enriching the traditional valuation panorama by including new stakeholders such as consumers, who, although not being co-owners of the goods or services being

[446] Moro Visconti, *La valutazione dei* social network, in Foro.it, 2020, 71.
[447] Moro Visconti, *Combining Network Theory With Corporate Governance: Converging Models For Connected Stakeholders*, Corporate Ownership & Control, 2019, 17(1):125-139.

valued, participate (sometimes even with surreptitious strategies to which they are unwittingly subjected), releasing personal information (habits and customs which are then profiled for vertical marketing strategies; feedback which feeds big data, etc.) which create a value which is still greatly underestimated.

The very nature of the "asset" being estimated - the digital platform - and its nature, first and foremost from the point of view of legal ownership (public, private, or consortium asset?) contributes to fuelling a debate, also of an "ontological" nature, on the rationale and objectives of the estimate (cui prodest?). By way of analogy, reference can be made to the Blockchain, which can also be of public, private or consortium[448] nature and which present significant intersections, especially in perspective, with digital platforms, since they can preside over a certification/authentication of the digitized information passing through the platform.

The interrelationships between digital platforms and other intangible assets may also be relevant, such as patents or know-how (with platforms incorporating inventions) and already mentioned intangibles such as software (which is the indispensable IT infrastructure of digital platforms), Blockchain, big data (which feed the platforms, coming out of them enriched, with a surplus-value to be also evaluated economically), (social) networks, mobile apps (which represent an 'IT shortcut' to access the platforms). Other intangibles that process the information intermediated by the platforms are also relevant, through algorithms orchestrated by artificial intelligence, which re-processes information data stored in the cloud into interoperable databases. Nor should we forget brands, even in their digital branding extensions, for platforms with broad visibility, often related to big tech.

From a valuation perspective, examining the platform's business model is preordained to the identification and estimation of the value drivers that emanate from it. In this context, the following value creation levers are of primary importance: - Internet traffic conveyed by the platform, as instrumental to economic use of data and information, atomistically considered as "small

[448] Moro Visconti, *La valutazione delle* blockchain*:* Internet of Value, network *digitali e* smart transaction, in Foro.it, 2019, 301.

data" but then aggregated at the level of "big data"- the volume of transactions carried by e-commerce platforms, with B2B/B2C profiling depending on the business operator's counterpart, which may be another company or a consumer. The digital platform and its function as a virtual showcase make it possible, thanks to the use of the web, to overcome space-time barriers, operating in a so-called "24/7" space-time environment and allowing the pursuit of digital scalability strategies, also through a co-creation of value[449] between providers and users.

8. Intellectual property protection and the "Notice and Takedown" mechanism

IP rights protection is a serious and fascinating issue regarding electronic commerce. If the internet allows a brand to expand exponentially, reach new markets and gain worldwide relevance, it also exposes it to countless wrongdoers willing to exploit the brand for their businesses.

In the internet environment, the brand fulfils an even more decisive role than the offline context. As recognized by the Court of Justice of the European Union,[450] the trademark includes the essential function of indicating the origin and asserting the quality of the product or services and those of communication, advertising, and investments[451].

The practical implication of the *origin* function is that the costumer expects a certain standard of quality from a product under a specific brand[452] and is more willing to trust the goods or services' reliability according to their source. The consumer is more willing to buy a tech product with the *Apple* logo because it will trust the high standard quality of the goods thanks to the company's efforts

[449] Ceccagnoli - Forman - Huang - Wu, *Co-creation of Value in a Platform Ecosystem: The Case of Enterprise Software*, in *MIS Quarterly*, 2012, 36, 1, 263-290.
[450] Case C-487/07, L'Oréal SA v Bellure NV [2009] ECR I-05185, [58]. See also, W. Cornish, D Llewelyn and T. Aplin, Intellectual Propety: Patents, copyright, Trade Marks and Allied Rights,8th end, Sweet & Maxwell 2013, 644.
[451] Marsoof, *above,*
[452] W. Cornish, D Llewelyn and T. Aplin, Intellectual Propety: Patents, copyright, Trade Marks and Allied Rights,8th end, Sweet & Maxwell 2013

to create a reputation. It is easy to understand how large-scale counterfeiting can seriously damage the companies brand positioning.

The trademark is a distinctive element that has a strong communicative value. It gives easy access to relevant information about the underlying product. The intrinsic advertising function of a trademark is even more accentuated on the internet since the consumers rely solely on the seller's images and information. Thus, the need to protect the advertising function is even more vital in the online environment[453].

Following the *lowest cost avoider* theory[454] holding the internet service providers liable for intellectual property rights infringement of third parties has been proven, despite its limits, to be the most effective solution. The strategy adopted consists of a *negative approach*[455] that exempt ISP from secondary liability platform for third party infringements by creating immunity provisions precluding liability (*safe harbours*[456]) that can be either *subject-specific* or *horizontal*. In order to benefit from the safe harbour, platforms often establish a *notice and takedown* (NTD[457]) mechanism to protect business users' intellectual property rights on the platform, where the harmful content is taken down from the platform after a formal notice to the alleged wrongdoer[458]. NTD procedures can be prescribed by the law, such as the Chinese "E-commerce law", or be developed by the platforms themselves to avoid liability, such as the E-commerce directive.

Online platforms can also be held liable for primary liability under the trademark law. The claimant's choice of which road to follow often depends on

[453] Marsoof, *above,* "Reasons for a Trade Mark Prospective"
[454] *Supra* p.89
[455] *Supra* p.98
[456] *Ibidem*
[457] Another famous NTD system is the one provided by the famous art. 13 of the debated Copyright directive. In this case the directive requires the platform to filter the contents displayed. The uncertain broadness of the filter makes unclear to what extent the reproduction of copyrighted content is allowed, resulting in an excessive compression of the right of free speech.
http://copyrightblog.kluweriplaw.com/2018/06/12/much-know-notice-takedown-new-study-tracks-youtube-removals/
[458] *Supra* p.98

the national law's framework that might see one accusation in more/more in favour than the other.

The relevant provisions in the European Context are the "European E-commerce Directive" that provide the safe harbours provision, and the "Copyright directive" that outlines the preconditions for IP rights infringement.

8.1 Secondary liability: the "E-commerce Directive"

The "E-commerce directive" introduces horizontal safe harbour provision in art. 12 to 14 for three specific operations:

1) *Mere conduit*[459], when:
   a) It does not initiate the transmission
   b) Does not select the receiver of the transmission
   c) Does not select or modify the information contained in the transmission
2) *Caching*[460], when:
   a) the provider does not modify the information.
   b) the provider complies with conditions on access to the information.
   c) the provider complies with the rules regarding the updating of the information, specified in a manner widely recognized and used by industry.
   d) the provider does not interfere with the lawful use of the technology, widely recognised and used by industry, to obtain data on the use of the information.
   e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
3) *Hosting*[461], when:

[459] Art. 12 of the "E-commerce Directive"
[460] Art. 13 of the "E-commerce Directive"
[461] Art. 14 of the "E-commerce Directive"

a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent.
b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

As far as e-commerce platforms are concerned, the more relevant operation is the *Hosting* of information *provided by a recipient of the service.* This provision exempts the platform from liability when, after obtaining the knowledge or awareness, it takes measures to remove the harm by expeditiously removing or disabling the access. The requisites of these provisions are less strict than the "E-commerce law" since they require knowledge or mere "awareness", unlike the presumption of knowledge prescribed in art. 42 of the "E-commerce law"[462].

The European Court of Justice (ECJ) in two leading cases clarified the meaning of "awareness" and whether a "general knowledge" of the infringement is a sufficient requirement to hold the platform liable. In *Google France* and *eBay v. L'Oréal*. The court held that:

1) The safe harbour protects conduct of a "mere technical, automatic and passive nature"[463], and that the intermediary must be a "neutral" actor[464]. Thus, Google's liability would depend upon the role it played in the selection of keywords.
2) Even if an intermediary were insufficiently inactive, it would lose immunity if it was put on the knowledge of a wrong and did not act expeditiously.

[462] *Supra* p.109
[463] Case C-324/09, L'Oréal SA v. eBay Int'l AG, 2011 E.C.R. I-6011, ¶ 113; *see id.* ¶ 115 ("[T]he mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by [the E-Commerce Directive].")
[464] The Advocate-General in *eBay* had questioned the application of the neutrality condition to immunity under Article 14; the concept is referenced in a recital addressing another provision. *See eBay*, ¶¶ AG 139−46. But the Court of Justice adopted the requirement in both *Google France* and *eBay*. *See Google France*, at ¶¶ 113−16.

This means that liability can arise only when there is an active role of the platform in relation to the infringement.

The law does not provide examples to understand what kind of remedies are adequate to remove the harm, and it remains silent on the meaning of *expeditiously*. It does not provide any prevention for the abuse of the NTD mechanism (unlike the DMCA that, in section 512(f), requires any notice of claimed infringement to be served in good faith).

Platforms have made efforts to create a dialogue with the major businesses to develop a procedure that will satisfy the directive's protection requirements to fill the legislative vagueness.

The most prominent example is the EU Memorandum of Understanding (EU MOU) in 2011 between thirty brand owners and Internet platforms in Europe regarding their respective roles in tackling counterfeiting online. The EU MOU also provides a counter-notice system to inform the seller about the reasons why the product or service has been taken down, trying to prevent the abuse of the mechanism. The EU MOU is not the only measure taken by the companies to create a secure NTD mechanism. In 2018, for example, four major online marketplaces, Alibaba (for AliExpress), Amazon, eBay and Rakuten-France, signed a commitment for faster removal of dangerous products sold on their online marketplaces[465].

8.2 Primary liability of online platforms: the "Trademark Directive"

Internet service providers intermediary position often constitutes the main revenue source of the internet platforms. E-commerce operators can in fact pay in order to have a better exposition when certain words are searched by the consumers (such as Google ad Service). Thanks to the very detailed level of profilisation of the users, this kind of *sponsor* is very effective and have a positive impact on the engagement with the business.

[465] https://ec.europa.eu/commission/news/safer-e-commerce-2018-jun-25_en

The Copyright law's purpose is to grant the author the exclusive right of economic exploitation of the work or invention, either directly or by transferring it to third parties giving the IP owner the exclusive right on the patent and preventing others from using it[466], refraining others from interfering with it.
Art. 5.1 of the trademark directive states that:

The registered trademark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using it in the course of trade:

A question arises when the platform is sponsoring a link that infringes the rights of a legitimate trademark holder: can the platform be held responsible for *using* a protected trademark in the course of trade?
The entire debate was addressed by the European Court of Justice in *Google v. Luis Vuitton*[467].
Google was found liable by the Tribunal de Grande Istance de Paris for trademark infringement because Google permitted its advertisers to select and use keywords that where identical or similar to registered French trademarks. Google appealed. The Appeal court asked CJEU to consider whether a trademark proprietor was entitled to prevent the use of a keyword that was identical or similar to a registered trademark by an intermediary (such as Google) in offering keyword advertising services, rising the more crucial question: what types of use of a trademark made by an unauthorized third party are prohibited under art. 5.1 of the Trademark Directive?
Upon reading of art. 5.1 it becomes clear that the reference 'use' has a double meaning. First, only third party use of a registered trademark in the course of trade may be prohibited. Second, only third-party use of a registered trademark in relation to goods or services that are identical or similar to those for which the trademark is registered may be prohibited.

[466] G.F. Campobasso, *Diritto Commerciale 1 Diritto dell'Impresa"*, UTET Giuridica, 7th Edition, p.194
[467] For the procedural story of the case, *See, Google v. Louis Vuitton* at https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX%3A62008CJ0236

The court considered whether Google made use of any trademarks in the course of trade[468]. In this regard, it concluded that Google did make use of the TM concerned with a view of gaining economically and that this constituted use in the course of trade. However, the court added the following qualification: "*The use, by a third party, of a sign identical with, or similar to the proprietor's TM implies, at the very least, that that third party uses the sign in its own commercial communication"* and being paid for that service does not mean that the party offering the service itself uses the mark in its own commercial communication.

The commercial communication requirement has effectively rendered the Trademarks Directive inapplicable to internal, technical and invisible uses of trademarks on intermediaries providing keyword advertising services.

Two more cases by the Court of Justice of the European Union describe more details about the broadness of the liability.

In *CJEU Hölterhoff v Freiesleben*[469], the court stated that the purely descriptive uses of trademarks made by third parties do not affect the original function of a trademark protected by art. 5 of the trademark's directive.

Purely descriptive uses of trademarks do not amount to a type of "use" within the meaning of the TM Directive

While in *Adam Opel v. Autec*[470] "The affixing by a third party of a sign identical to a trademark registered for toys to scale models of vehicles cannot be prohibited under Art. 5(1) (a) of the directive unless it affects or is liable to affect the functions of that trademark."

In essence it confirms that the TM Directive does not apply to unauthorized third-party use of a trademark when the relevant public does not perceive such use as indicating the origins of the third party's goods or services.

[468] The CJEU observed (at [50]) that 'the use of a sign identical with a trade mark constitutes use in the course of trade where it occurs in the context of commercial activity with a view to economic advantage and not as a private matter'

[469] Judgment of the Court of 14 May 2002. - Michael Hölterhoff v Ulrich Freiesleben.

[470] Adam Opel AG v Autec AG (C-48/05) EU:C:2007:55 (25 January 2007)

9. Safeguard of platform's businesses interest: "Regulation (EU) 2019/1150"

Regulation EU 2019/1150 *on promoting fairness and transparency for business users of online intermediation services* is a very recent regulation issued by the Council that aims to regulate B2B e-commerce relations in the European internal market.

The Regulation is part of the *Digital Single Market*[471] (DSM) strategy for Europe set out by the Commission in May 2015. The commission aimed to tackle the market with a limited number of legislative and regulatory measures to make it work for businesses and consumers more alike[472]. DSM is focusing on specific areas that required legislative adaptation using a problem-based approach[473].

This regulation is also the first step in the European Union's strategy to set up the *Digital Service Package*[474] (DSP) to create new rules for the online platform economy[475].

Although many efforts were made in order to ensure consumer protection[476] from the digitalization impact, other challenges emerged on the supply side, especially concerning the supply of goods and services through online intermediation services. The establishment of a well-functioning internal market has always relied on consumer's law regulation in order to respond to market failure[477], little has been done for the businesses market regulation.

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[471] https://ec.europa.eu/digital-single-market/en/shaping-digital-single-market

[472] Piedade Costa de Oliveira, *Digital Single Market: electronic commerce and collaborative economy,* UNIO - *EU Law Journal*. Vol. 5, No. 2, July 2019, pp 4-14.

[473] *Ibidem*

[474] https://ec.europa.eu/digital-single-market/en/digital-services-act-package

[475] *The P2B Regulation (EU) 2019/1150: Towards a "procedural turn" in EU platform regulation?,* Journal of European Consumer and Market Law, EuCML 4/2020 · Volume 9, 17 August 2020 · Pages 133 – 178

[476] "E-commerce directive", "Consumer's sale directive (eu 2019/770)

[477] Paola Iamiceli, *Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity*, ERCL 2019; 15(4): 392–420 https://doi.org/10.1515/ercl-2019-0024, p.401

Contrary to the traditional EU tradition of using *generalist* approaches,[478] the regulation utilized a *dedicated* approach, focusing on specific problems that arose in commercial practices over recent years, especially the unbalanced relationship between the online platforms' independent businesses. They often heavily rely on their platform and have minimal contractual power. Operating as a "multi-sided market" the platform derives an incredible comparative advantage due to their control over an enormous number of data's concerning users. These asymmetries cause unfair practices that can harm both consumers and businesses[479].

The Regulation has a procedural approach that targets the structure of the terms of service (TOS) of the platform to grant "*appropriate transparency, fairness and effective redress possibilities*[480]*."* The provision's core *ratio* is that the of the "intermediation" role of the platform and its possibility to "*govern power and value allocation in the online market*[481]*."* The approach is very similar to the Chinese "E-commerce Law". The platform finds itself in a position where it can easily govern its internal dynamics. It is simpler to regulate the market environment by keeping the governance power with the platforms but establishing some exercise burdens[482]. The regulation introduces an *ex ante*[483] approach, prohibiting practices that discriminate through the different businesses on the platform[484].

The Regulation uses a broad definition of "Online Intermediation Services" in art. 2(2) that need to fulfil three conditions:

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[478] Consumer Sales and Guarantees Directive 1999/44/EC
[479] Paola Iamicelli, *supra,* p.401
[480] Art. 1 Regulation 1150/2019
[481] Paola Iamicelli, *supra,* p.407
[482] *Supra,* p. 100
[483] In *Google Search(Shopping)* (Case AT.39740). Commission Cecision, para 699, the EC established an *ex post* remedy obliging Google "*To comply with the simple principle of giving equal treatment to rival comparison shopping services and its own service"*
[484] Friso Bostoen, *Regulating Online Platforms Lessons From 100 Years Of Telecommunications Regulation***,** 8th Conference on the Regulation of Infrastructures, p. 28 Date: 2019/06/20 - 2019/06/21, publication date 2019-06 https://lirias.kuleuven.be/2812156?limo=0

1. *they constitute information society services within the meaning of point (b) of Article 1(1)* [485] *of Directive (EU) 2015/1535 of the European Parliament and of the Council (12)* [486]*;*

2. *they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;*

3. *they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers;*

However, the main critiques arose around the definitions of "business users" and "consumers".

According to point 4 of art. 2 *consumer* only refers to a *natural person,* excluding business purchasers. On the other hand, the strict application to *business users* as professional users "*acting for purposes relating to their trade, business, craft, profession"* [487] keeps aside the so called "collaborative economy" [488], that provides access between new forms of exchange by unprofessional users[489].

[485] According to art. 1.1-point (b) of Directive (EU) 2015/1535: '*service' means any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*
For the purposes of this definition:
(i) at a distance' means that the service is provided without the parties being simultaneously present;
(ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
(iii) at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request

[486] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L1535

[487] Art. 1.1 point (1) "Regulation EU 2019/1150"

[488] Paola Iamicelli, *above,* p.407

[489] For example, in the case of Uber only professional drivers would benefit from the protection of the regulation.

The procedural approach is reflected throughout the regulation starting from a general provision in art. 3 that states that the terms and conditions shall be drafted in *plain and intelligible language* and be easily available to business users at all stages of their commercial relationship. The same article provides a long list of ToS requirements and notification to their business users of the proposed changes at least 15 days before applying them, even if it does not require any substantive requirements for the change[490].

The harmful consequences that the termination of the service can cause to the business operating on it requires that any restriction, suspension and termination shall be preceded by a notification at least 30 days prior to the termination taking effect[491]. In case of restriction, the platform shall give the opportunity to clarify the facts and circumstances under an internal complaint-handling process or external mediation process.

Other provisions regard ancillary goods and services [492], differentiated treatments[493], specific contractual terms[494]… but some words need to be spent on the regulation of the ranking system. This is a topic that can be approached both from the consumer and from the businesses point of view. The former is based on the consumer's awareness flaws when making a purchase. The latter aims to reduce the occurrence of market failure and the adverse selection as a consequence of information asymmetry between the platform and the supplier[495].
Following the principles of fairness and transparency, providers of intermediation services shall set the main parameters that influence the ranking and provide an easy and public description in a plain intelligible language, in

[490] Busch, *above,* p. 134
[491] Art. 4 "Regulation EU 1150/2019"
[492] Art. 6 "Regulation EU 1150/2019"
[493] Art. 7 "Regulation EU 1150/2019"
[494] Art. 8 "Regulation EU 1150/2019"
[495] A. Renda, F.Cafaggi and J. Pelkmans, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain*, Final Report, prepared for the European Commission, DG Internal Market DG MARKT/2012/049/E, February 2014, available at http://ec.eu ropa.eu/internal_market/retail/docs/140711-study-utp-legal-framework_en.pdf, 35, 122.

order to let the business understand whether the ranking mechanism takes into account: a) the characteristics of the goods and services offered to consumers, b) the relevance of those characteristics for those consumers, c) as regards online search engines, the design characteristic of the website used by corporate website users[496].

10. Data economy

The ranking system problematics ruthlessly unveils the elephant in the room behind the internet economy: the big data. None of these comparative advantages of the platforms nor their business models could exist without exploiting and collecting data. The big internet platform companies, regardless of social media platforms, e-commerce platforms or search engines, usually propose their service to the consumers for free to collect personal data to assure a high level of profiling. This allows the platforms to offer a very effective advertisement service to businesses with exceptional levels of engagement.

The commodification process has also affected personal data so deeply that EU Reg. 2016/679 explicitly addresses *data circulation.* It lays rules to protect the individual, aimed to ensure that this circulatory phenomenon, which is necessary and therefore inevitable, does not go beyond the limits of personal dignity[497].
We are in the presence of the discipline of the market of personal data: the data circulates in the market, which attributes a value of use and an exchange value to them, raising them to legal goods and the potential object of contracts.[498]

[496] Art. 5.5 "Regulation 2019/1150"
[497] Cuffaro*, Il diritto europeo sul trattamento dei dati personali e la sua applicazione in Italia: elementi per un bilancio ventennale*, in *I dati personali nel diritto europeo*, edited by Cuffaro, D'Orazio e Ricciuto, cit., p. 20 s. V. also RODOTÀ, Privacy *e costruzione della sfera privata. Ipotesi e prospettive*, in *Pol. dir.*, 1991, p. 521 ss.; ID., *Tecnologie e diritti*, Bologna, 1995, p. 27 ss.
[498] Calisai, *I diritti dell'interessato*, in *I dati personali nel diritto europeo*, edited by Cuffaro, D'Orazio and Ricciuto, cit., p. 327 ss.; ZORZI, Galgano, *Le due anime del GDPR e la tutela del diritto alla* privacy, in *Persona e mercato dei dati. Riflessioni sul GDPR*, edited by Zorzi Galgano, Padova, 2019, p. 35 ss.

Paragraph 4 of art. 7 of the GDPR gives an extensive interpretation of the interests protected by the moral personality rights[499] in terms of economically valuable resources. It admits the possibility of remunerating the provision of a good or service with the consent to the processing of personal data, in the logic of exchange[500].

The literal tenor of the provision seems to support this hermeneutical approach. This considers the exchange of goods and services against personal data as a factor to evaluate whether the consent to the treatment has been freely given[501]. This seems to be the only meaning that is compatible with the Directive 2019/770/EU of 20 May 2019 on certain aspects of contracts for the supply of digital content and digital services[502]; in which, for the first time, the process of commodification (in particular) of personal data finds an express formal recognition through the typification of the case of negotiation of digital content/services against personal data[503]. The supranational legislator, while avoiding, at the urging of the European Data Protection Supervisor, the use of the word "consideration"[504] in the description of the structure of the regulated

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[499] RESTA, *Contratto e diritti della personalità*, cit., p. 14. Di «beni-fine» discorre invece NICOLUSSI, voce *Autonomia privata e diritti della persona*, cit., p. 138. See also Castronovo, *Autodeterminazione e diritto privato*, in *Eur. dir. priv.*, 2010, p. 1051.

[500] Resta and Zeno Zencovich, *Volontà e consenso nella fruizione dei servizi in rete*, in *Riv. trim. dir. proc. civ.*, 2018, p. 432; Bravo, Lo *"scambio di dati personali" nei contratti di fornitura di servizi digitali e il consenso dell'interessato tra autorizzazione e contratto*, in *Foro.it*, 2019, p. 43; Ricciuto, *La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno*, cit., p. 53 ss.

[501] Please refer to the detailes contained in EDPB, *Guidelines 05/2020 on consent under Regulation 2016/679*, May,42020, at "" *https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf.* V., see also, Bravo, *Lo "scambio di dati personali" nei contratti di fornitura di servizi digitali e il consenso dell'interessato tra autorizzazione e contratto*, cit., p. 55. See also Cass., 2 luglio 2018, n. 17278, in *Nuova giur. civ.*, 2019, p. 1775, with Zanovello annotation, *Consenso libero e specific alle e-mail promozionali*, which considers that the regulatory provision (the textual reference is to the repealed art. 23 of the Privacy Code, whose provision is now contained in art. 7 GDPR) allows "the manager of an Internet site, which administers a fungible service, which the user can renounce without heavy sacrifice (in the species newsletter service on themes connected to finance, tax, law and work), to condition the supply of the service to the treatment of the data for advertising purposes, provided that the consent is singularly and unequivocally given in reference to such effect, which also implies the necessity, at least, of the indication of the product sectors or services to which the advertising messages will be referred".

[502] Camardi, *Prime osservazioni sulla Direttiva (UE) 2019/770 sui contratti per la fornitura di contenuti e servizi digitali. Operazioni di consumo e circolazione di dati personali*, in *Giust. civ.*, 2019, p. 499 ss.; De Cristofaro, *40 anni di diritto europeo dei contratti dei consumatori: linee evolutive e prospettive future*, in *Contr.*, 2019, p. 187 ss.

[503] De Franceschi, *Il «pagamento» mediante dati personali*, cit., p. 1393-1394.

[504] In fact, the European Data Protection Supervisor has shown itself to be openly opposed to the qualification in terms of "non-pecuniary consideration on its *Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts or the supply of digital content,* march 14, 2017 where

economic transaction, has confirmed the possibility of deducting personal information as a service and, therefore, the synallagmatic structure of the contractual relationship whenever personal data are provided in exchange for the supply of the digital content or service[505]. This structure is also recognizable when the authorization to collect one's data is issued by accepting the so-called cookies, since also in this hypothesis, the person concerned 'actively' provides personal data[506].

The same directive confirms the synallagmatic nature. It considers the exchange of digital contents/services against personal data as the payment of a price and the exclusion from the operative scope of the discipline sanctioned by the same Art. 3, par. 2, of the cases which "the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose."

In this hypothesis, in reality, it is not a question of exchange, since the treatment finds its basis of legitimacy not in the consent, but, respectively, in letter b) and letter c) of Art. 6, para. 1, GDPR, in which the treatment constitutes

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he recommended avoiding the indication of personal data as a possible consideration, since "personal information is related to a fundamental right and cannot be considered as a commodity". On the same topic see, Ricciuto, *Nuove prospettive del diritto privato dell'economia*, in Picozza e Ricciuto,*Diritto dell'economia*, 2ª ed., Torino, 2017, p. 357 ss.; Resta e Zeno Zencovich, *Volontà e consenso nella fruizione dei servizi in rete*, cit., p. 411 ss.; De Franceschi, *Il «pagamento» mediante dati personali*, cit., p. 1393.

[505] This was subsequently reiterated by Directive 2019/2161/EU of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council for the better enforcement and modernisation of EU consumer protection rules.

[506] De Franceschi, *Il «pagamento» mediante dati personali, p. 1388.* The author adds that 'against improper conduct on the part of the provider and in order to ensure adequate consumer protection' it is 'not decisive whether personal data are supplied 'actively' or 'passively' but whether by means of' that supply 'the consumer "pays" knowingly or unknowingly with his personal data: such data may in fact be transmitted 'passively' (i.e.: taken directly from the person who seeks to process them), but nevertheless knowingly, and vice versa'. See also, Thobani, *Diritti della personalità e contratto: dalle fattispecie più tradizionali al trattamento in massa dei dati personali*, cit., p. 160 ss.

an *accessory performance* and not, instead, as in the aforementioned operation, the contract's *principal performance*.[507]

In short, the EU legislator wanted to regulate a widely spread occurrence in the practices of the digital environment: the exchange by by an individual personal data for the sole purpose of obtaining a digital content or service in exchange, such as digital content or a digital service[508].

In all these cases, consent to the processing of personal data is granted in the function of the economic transaction; such data are considered as 'goods' in exchange for the provision of digital content or services[509].

It is clear that the Directive 2019/770 regulates one specific aspect of the broader phenomenon of the circulation of data, thus placing itself in continuity with EU Regulation 2016/679.

This link of continuity is to be understood in the sense that if the GDPR is marked by the need for the circulation of data, in the awareness that the "personal information of the consumers constitutes the economic core of the majority of the enterprises that supply services of the information society and carry out activities of electronic commerce"[510].With the directive 2019/770/EU, the European Union legislator regulates a manifestation of that phenomenon, the onerous supply of contents or digital services, implemented either towards the payment of a price or towards the supply of personal data. The latter, like the price, always constitute a (counter) performance, which is in a relationship of correspondence with the one received[511], as further supported by the

[507]Thobani, *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, in *Eur. dir. priv.*, 2016, p. 526 s., who adds that 'reasoning otherwise would make it sufficient to include consent in a contract rather than in a unilateral declaration to exclude the application of the rules laid down by the Privacy Code'.

[508] *Considerando* n. 19 Directive 2019/770/UE.

[509]Perlingieri, *La tutela dei minori di età nei* social networks, in *Rass. dir. civ.*, 2016, considers that the 'consent given at the time of subscription or registration to the social platform' is not 'susceptible to being brought within the scope of consent to the processing of personal data, since it is necessary to frame the question in a more complex perspective linked to the concrete and effective negotiation transaction that takes place'.

[510] Alvisi, *Dati personali e diritti dei consumatori*, in *I dati personali nel diritto europeo*, edited by Cuffaro, D'Orazio e Ricciuto, p. 674; v. also Memmo, *La* privacy *informatica: linee di un percorso normativo*, in *Foro.it*, 2000, p. 1213 ss.

[511] Ricciuto, *La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno*, in *Dir. inf.*, 2018, p. 709.

Directive 2019/2161/EU of 27 November 2019 for a better application and modernization of the Union rules on consumer protection.

The most recent Italian case law arrived at the same conclusions. Given the potentialities inherent in the exploitation of personal data, that are considered to 'constitute an "asset" available in a negotiated sense, susceptible to economic exploitation and, therefore, capable of assuming the function of "counter-performance" in the technical sense of a contract'[512].

Having ascertained the possibility to dispose of personal data, the opinion of the European Data Protection Supervisor rendered in 2017 on the directive 2019/770 considers that "the fundamental rights, such as the right to the protection of personal data, cannot be reduced to mere consumer interests and personal data cannot be considered a mere commodity". The supranational legislator supported this opinion by merely deleting a word (that of "consideration") from the directive's final text.

As a result, personal data, like any other right of personality other than the body (for which the rule of inalienability/gratuity is expressly sanctioned, especially by art. 8 of the EU Charter of Fundamental Rights), may be affected by commodification and be inferred "in a transaction as part of its content[513]."

However, as the Guarantor rightly points out, they cannot be treated as 'mere' goods and the right to their protection as 'mere' consumer interest. In fact, when attributes of the person (from the information concerning the person to the name, image, voice, etc.) take on an economic value, they must necessarily be placed on a different level from that of other goods[514], precisely because of their inherent nature in the identity of the person.

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[512] T.a.r. LAZIO, Roma, 10 January 2020, n. 260, in *Dir. gius.*, 2020, 13 January which adds that 'the phenomenon of the "patrimonialisation" of personal data, typical of the new economies of the digital markets, requires operators to respect, in the relevant commercial transactions, those obligations of clarity, completeness and non-deceptiveness of the information provided by the legislation for the protection of the consumer, who must be made aware of the exchange of services underlying the adhesion to a contract for the use of a service, such as the use of a "social network"'.

[513] Perlingieri, *L'informazione come bene giuridico*, in *Rass. dir. civ.*, 1990, p. 339.

[514] Resta, *Dignità, persone, mercati*, cit., p. 101. The difference between corporeal things and incorporeal things (including personal information) lies precisely in the fact that while the former are necessarily legal assets (even if nullius) because they are capable of becoming 'the object of rights', the latter take on 'the physiognomy of an autonomous asset and relevant to law in function of a determined socially and legally deserving utility'.; Perlingieri in, *L'informazione come bene giuridico*, cit., p. 333 s., adds that "here the interest in information is not natural, but is the consequence of its

As every form of expression of the individual personality finds its limit in human dignity, the legal regime of the 'circulation' of personal 'goods' cannot but be articulated under the banner of this same axiological demarcation. This requires that the contractual relationship that regards personal information, in which one of the services consists precisely in the supply of data, is governed by a discipline whose coordinates mark the compatibility between the contract's rules and principles.

In this framework, the data's consent takes part in the contract - as an objectively complex act - concerning the provision of digital contents and services against personal data, not so much as an external factor, but as a function conforming to the object.

Indeed, it is the consent to the processing that defines the *purposes* for the pursuit of which the use of personal information is made possible. It also defines the latter's extent, which 'takes on the role of the object of the negotiation initiative and of the asset deducted in the negotiation relationship[515].'

Therefore, the consent to the processing (but also to the use of other personal "goods"), which must be (previously) informed about the contents and the modalities of (and which circumscribe the) the same, in the sense of being conscious and specific, also and necessarily determines the object of the contract[516].

Ultimately, when personal good enters into a contract, the act of negotiation consenting to the interference in one's personal sphere using the specific "good" (consent to treatment) and the act of disposition of the "good" itself (contractual consent) participate in the same contractual case by entering into a conforming relationship, in which the former acts as a device for determining the value of the "good" (consent to the treatment). The act of disposition of the property of

social utility, albeit measured against a specific subjective interest, almost always connected or linked to more complex situations in which the information nevertheless has its own individuality".

[515] Perlingieri, *L'informazione come bene giuridico*, cit., p. 338 s.

[516] Thobani, *La libertà del consenso al trattamento dei dati personali e lo sfruttamento economico dei diritti della personalità*, cit., p. 520; ID., *Diritti della personalità e contratto: dalle fattispecie più tradizionali al trattamento in massa dei dati personali*, cit., p. 158 ss. See also Gitti, *L'oggetto del contratto e le fonti di determinazione dell'oggetto dei contratti di massa*, in *Riv. dir. civ.*, 2005, I, p. 11 ss.; ID., *Problemi dell'oggetto*, in *Trattato del contratto*, directed by V. Roppo, II, *Regolamento*, edited by, G. Vettori, Milano, 2006, p. 19 ss.

the "good" itself (contractual consent) participates in the same negotiation case by entering into a conforming relationship, in which the former acts as the determinative device of the object of the contract.

On the other hand, the reconstruction that sees in the consent to the processing a dual nature and a role external to the contractual case seems to be less representative of this reality of the exchange: "on the one hand, a unilateral act of the authorizing type that excludes the illegitimacy of the use of another person's personality attribute by third parties, allowing the de facto negotiation of the data; on the other hand, the expression of the lordship of the individual on the information concerning him, which cannot be lost following the communication of the data to third parties, but finds only in the provisions of the law specific limitations or derogations"[517].

[517] Mantelero, *La* privacy *all'epoca dei* Big Data, in *I dati personali nel diritto europeo*, a cura di Cuffaro, D'Orazio e Ricciuto, cit., p. 1185.

CONCLUSIONS

When quantum physics was discovered in the first half of the XX century, it was an unprecedented and revolutionary breakthrough in the scientific world. It was not a simple “innovation”; it drastically redefined the boundaries and our whole view on physics, it shook the very foundations of science. What was considered “universal” suddenly became “relative,” and a whole new world came into being. New rules need to be re-written because the ordinary rules of physics were unsuitable.

The law is now living the same earthquake that destroyed the very basements of physics one century ago. Different dynamics regulate cyberspace than the “real world”. The internet is redefining the traditional institutes of law that often seem inadequate to regulate the web phenomenon.

A change of approach to the legislative process is needed to avoid enacting 'born old' laws. Legislators should no longer wait for a phenomenon to emerge but anticipate it. They should not only ask themselves how to regulate food delivery now but also how it might evolve, and above all, other sectors, such as tourism, might change in light of the use of big data and new alternative forms of remuneration. More than ever before, national and international legislators need to communicate with each other, exchange information, be aware of specific market dynamics' workings, and enlist the help of experts to predict and regulate an ever-evolving phenomenon.

The study of Chinese economics and legislation can be of great help in this regard, as it can enable us to enrich ourselves with the experiences of others and be prepared for the next waves of innovation. Studying and analyzing phenomena such as social commerce or O2O models can be of great help in directing legislative activity. With regard to the O2O phenomenon, for example, the Chinese experience has taught us that in the medium to long term, the differences between offline and online commerce tend to narrow, also in the light of new methods of approaching the market. Therefore, it might be more appropriate to accompany and regulate change not by hindering the digitisation process from eliminating the competitive advantage between online and offline

businesses, when giving offline businesses the right incentives and tools to work at the same level as their online competitors.

It is undeniable that the world is moving more and more towards creating a single market at a global level, that competition can no longer be only national but also European. Just as the economy has to adapt to the new challenges posed by the modern market, the law has to break with traditional paradigms to approach its future challenges in a dynamic and anti-disciplinary manner.

Properly regulating e-commerce means determine how responsive and efficient we will be in exploiting the unprecedented economic opportunity brought by the internet economy. The challenges are many, but the reward is high.

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