

China Insight



New Implementing Regulation on the Law on the Protection of Consumer Rights and Interests

On 19 March 2024, the State Council of the People's Republic of China ("**PRC**") issued the *Implementing Regulation on the Law of the People's Republic of China on the Protection of Consumer Rights and Interests* ("**Regulation**"). It will take effect on 1 July 2024. The Regulation has 53 articles and 7 chapters in total. The aim is to better adapt the consumer protection laws to the fast-changing business environment and to respond to the concerns in the implementation of the *Law on the PRC on the Protection of Consumer Rights and Interests* revised in 2013 ("**2013 Consumer Protection Law**").

The aspects covered include product liability, unfair trade practices, contractual issues and personal information rules. Also, topics, such as refund of advance payments, live streaming sales, control of online video games for minors etc. are included in the Regulation.

Please find below a brief on some key issues.

1. Product Liability

- Products Free of Charge

The Regulation confirms the product liability of sellers of free-of-charge products or services, including those offered as incentives, gifts and trial products. I.e., sellers offering free-of-charge products or services shall ensure that such products or services meet the requirements for protecting personal and property safety. Defects in free-of-charge products or services shall (1) not violate mandatory provisions; (2) not affect the normal usability; and (3) all sellers have an obligation to inform consumers of such defects before providing free-of-charge products or services to them.

- Safety of Business Premises

As already stipulated in the *PRC Civil Code* and the *2013 Consumer Protection Law*, business operators shall ensure the safety of their business premises. Breach of the obligation will result in tort liability. The Regulation further obliges business operators to post warning signs and to offer assistance in cases of danger or damage of customers in their business premises.

- Suggestions on Defective Products

Consumers are entitled to inform authorities of potential defects of products or services and to put forward suggestions. In fact, the *Interim Provisions on the Administration of Recalls of Consumer Goods* (effective as of 1 January 2020) contain a similar rule which stipulates that any entity or individual is entitled to inform the market supervision administrations of potential defects in consumer goods. However, it remains to be seen what steps or procedures the relevant authorities will take to deal with such suggestions and what impact such reporting mechanism will have on manufacturers and sellers.

2. Unfair Trade Practices

- Deceptive and Misleading Acts

Advertising increasingly enters into the focus of regulators in China. The *2013 Consumer Protection Law* recognizes the right of consumers to get to know authentic information of products and services they paid for and generally prohibits false advertisements. However, in the age of e-commerce, some new advertising practices and contents are not easy to be identified and therefore escape regulatory scrutiny. Taking into account the new ways of advertising, the Regulation aims at maintaining a stringent supervision system.

Based on the *2013 Consumer Protection Law*, the Regulation requires business operators to provide consumers with product-related information in an “easily understandable”, truthful and complete manner.

Other information of the business operator, including its qualifications, transaction/business data, consumer comments, shall not be falsified, concealed or fabricated to mislead consumers. This stipulation is also in line with the *Law of the PRC on Unfair Competition* (effective as of 23 April 2019) and the *E-commerce Law of the PRC* (effective as of 1 January 2019). Accordingly, relevant e-commerce platform operators displaying such information on their platforms are recommended to pay more attention to comply with this requirement.

- Livestreaming Sales

Livestreaming sales have been booming in China over the past few years, but the regulatory response continues to be relatively slow. The Regulation casts some attention on this problem and requires livestreaming platforms to establish a consumer disputes resolution mechanism. When disputes arise, the respective platform shall, upon request by a consumer, provide necessary information of livestreaming operators, personnels and marketing activities. If the livestreaming constitutes commercial advertisement, the obligations of advertisement publishers, operators and spokespersons shall be fulfilled in accordance with the *Advertising Law of the PRC* (revised in 2021). Relevant entities should also pay attention to the *Administrative Measures on Online Advertising* (effective as of 1 May 2023) for more detailed guidance on their livestreaming activities.

- Real Trade Name Disclosure

According to the *2013 Consumer Protection Law*, business operators, including those who lease sales counters or premises from others, shall clearly display their true trade names and trademarks. This rule can be easily implemented for brick-and-mortar stores. However, for online stores, tele sales, television shopping, mail orders, real names and marks of the sellers are harder to identify. The Regulation clarifies now that such sellers must indicate their trade names and marks on homepages, videos, calls, directories. This obligation also applies for providing products or services through promotional conferences, lotteries, or experiential activities.

- “Choosing One from Two”

In practice, the so-called “choose one from two” tactics are relatively common. Consumers are enticed by some technical means to choose one seller/platform against another. These tactics limit consumers’ choices and increases the cost of shopping. The Regulation now explicitly prohibits the use of technical means to force or indirectly compel consumers to purchase products/services, or to exclude and limit consumers’ ability to purchase from other sellers. Although the *E-Commerce Law of the PRC* and *Antitrust Law of the PRC* already provided a legal basis to prohibit “choosing one from two” practices, the Regulation extends such prohibition to all sellers/platforms in retail sector, and thus can offer stronger protection to consumers. The Regulation also obligates sellers engaging in tying sales and bundling sales to call the attention of consumers thereto in a prominent way.

- Subscription Service

The automatic extension or automatic renewal terms, in particular in relation to subscription services in mobile apps, have caught the attention from lawmakers. The *Measures for the Supervision and Administration of Online Transactions* (effective as of 5 May 2021) stipulate that online transaction operators shall, prior to five days before the date of automatic extension or automatic renewal, etc., call the attention of consumers thereto in a prominent way for their independent selection. The Regulation now reiterates this rule, and extends it to all business operators, i.e., not only online transaction operators.

- Special Protection of Elderly and Minors

The Regulation emphasizes that business operators shall not “fabricate or exaggerate” efficacies in treatment, health, wellness of their goods or services to solicit the elders to buy the goods beyond their “actual needs”.

In line with the recent *Regulations on the Protection of Minors Online* (effective as of 1 January 2024), the Regulation now stipulates mandatory restrictions on time, access, spending, signing in and logging in for the minors.

- Punitive Damages

Paragraph 1 of Article 55 of the *2013 Consumer Protection Law* stipulates punitive damages for fraudulent practices, i.e., the increased amount of the compensation as claimed by the customer shall be three times of the costs that the consumer paid for the goods or services. However, in practice, this provision led to abuse by counterfeit hunters. In order to reduce the possibility of such abuse, the Regulation now provides two exceptions where Paragraph 1 of Article 55 of the *2013 Consumer Protection Law* does not apply:

- Flaws in the labels of goods or services, instructions, promotional materials and etc. that do not affect the quality of goods or services and do not mislead consumers;
- Actions of entailing, switching, falsifying, altering the date of production of a commodity, fabricating facts, etc. so as to defraud a business operator of compensation or extort money from a business operator.

3. Contractual Issues

- General Terms and Conditions (GTC)

Usually, both manufacturers and seller use general terms and conditions ("**GTC**"). The *PRC Civil Code* and the *2013 Consumer Protection Law* both provide for rules for GTC, i.e., GTC are null and void if they unreasonably exempt or reduce the duties of the seller which provides the GTC, or exclude and limit the rights of consumers. In the Regulation, this rule is reemphasized and refined by providing that GTC provided by the sellers shall not impair the following rights of the customers:

- the right to change or terminate the contract;
- the right to choose litigation or arbitration to resolve disputes; and
- the right to choose the products or services from other sellers.

Thus, sellers or other business operators dealing with consumers are recommended to review and update their current GTC in order to avoid any non-compliance with the Regulation.

- **Warranty Period**

Article 18 of the Regulation provides for the calculation of the warranty period in different cases. In general, the warranty period shall start from the date when the seller completes the delivery of products or provision of services. For products that require installation, the warranty period shall begin on the day the installation is completed. In case of replacement, the warranty period for the new products shall start again from the date of completion of the replacement. Article 18 of the Regulation also clarifies that the time for repair shall not be included in the said period of warranty.

Business operators are generally recommended to review applicable laws in order to ensure whether or not the products (or services) they are offering are subject to any statutory warranty period. E.g., according to the *Provisions on the Liability for the Repair, Replacement and Return of Automobile Products for Household Use* (effective as of 1 January 2022), the validity period of the "Three Guarantees" for automobile products for household use shall be no less than two years or cover a mileage of 50,000 km, whichever comes first. The validity period of the Three Guarantees shall commence as of the date on which the seller issues the purchase invoice. If the date on which the purchase invoice is issued is inconsistent with the date on which the automobile product for household use is delivered, the aforesaid period shall commence as of the actual delivery date.

- **Return and Refund**

The Regulation requires sellers to refund to consumer the lump sum amount shown on the receipts or invoices unless the seller otherwise proves that a different actual payment was made by the customer.

The arbitrary widening of the scope of products not eligible for sales return by sellers is another concern of the Regulation. As provided for in the *2013 Consumer Protection Law*, the statutory exception for return and refund without specifying a reason generally applies only to the following four categories:

- products customized by consumers;
- fresh and perishable products;
- audio-visual products, computer software and other digital products downloaded online or unpacked by consumers; and
- delivered newspapers and periodicals.

In order to limit the illegal non-refund policies, the Regulation requires that products not eligible for refund must be marked in a conspicuous manner and that consumers shall give their explicit consent to the non-refund policies at the time of purchase. The seller shall not set the non-refund policies as a default option for the consumers' consent.

In practice, some sellers also set unreasonably high thresholds for refund. On this topic, the Regulation expressly states that sellers must still give a refund for products that have already been unpacked for inspection or tested to check their quality and function, provided that the original quality, functionality and appearance of such products is not prejudiced. However, to balance the interest of sellers and consumers, based on good faith, the latter shall not abuse refund policies to undermine the interests of sellers and other consumers.

- Pre-payment, cease to operate or change premises

Gyms, beauty salons, barbershops have become the targets of complaints in recent years because they silently close or change their premises with pre-payments received but without notifying their customers. To fill the current regulation gap for such type of pre-payments, the Regulation stipulates that business operators shall notify customers of the valid contact of the business operators at a conspicuous place in their premises, websites, online stores 30 days before the decision on ceasing to operate or changing premises. Further, as to pre-payments, the Regulation provides that the contract shall be in written form and specify the content of products or services, price, modalities for the return of pre-payment and breach of contract liability. After pre-payments are received, the relevant products or services shall be provided as agreed and prices cannot be raised unreasonably. In case of breach of contract, pre-payments shall be returned according to the contract.

The Regulation also requires business operators to stop receiving pre-payments when there is a significant operational risk which may affect their ability to continue to provide products or services as agreed or according to customs. In this case, consumers may either request the business operators to continue providing the relevant products or services, or request them to return the pre-payments.

Any violations of the above-mentioned rules by the business operators shall be subject to administrative punishments.

4. Personal Information Protection

With the implementation of the *Personal Information Protection Law of the PRC* (effective as of 1 November 2021), the *PRC Civil Code* and other relevant regulations, China has established a legal framework for the protection of personal information. In the context of consumer protection, the Regulation further reiterates the illegality of once-for-all authorization and opt-out authorization for collecting and using personal information that is unrelated to business when providing products or services.

- Cold Calls and Other Promotional Calls

As the enforcement of personal information protection laws has been strengthened, the Regulation requires prior consent from consumers for cold calls and other promotional calls and business operators are obliged to provide clear and quick means to opt out. Once the consent is withdrawn, calls shall be stopped immediately.

- Big-Data-Enabled Discriminatory Pricing

Big-data-enabled discriminatory pricing makes it possible for two individuals to be offered exactly the same product, at precisely the same time, but at different prices, based on an algorithmic assessment of each shopper's predicted willingness to pay. This issue has already been prohibited by the *Personal*

Information Protection Law of the PRC. The Regulation also stipulates that business operators shall not, without the knowledge of consumers, set differential prices or charges for the same products or services under the same trading conditions.

5. Our Comments

Although no substantial changes are made to the current legal framework of consumer protection by the Regulation, targeted norms have been put in place to address issues frequently complained about by consumers. Examples are improving the regulation of new businesses such as livestreaming sales, regulating big-data-enabled discriminatory pricing, and strengthening the protection of pre-payment consumption.

For retailers or other business operators dealing with consumers, we suggest that they should especially review the policies for free-of-charge products and services, pay more attention to advertising and campaign activities and accordingly update their respective contracts and general terms and conditions to ensure all policies and clauses are consistent with the Regulation.

In case you have questions or for further information, please contact the authors of this newsletter:

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