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Locating Online Platforms in the Right Place: Between the Digital Services Act and the Liability Law

Consumers and traders often conclude distance contracts via online platforms, receiving a wide range of goods. The online platform provider acts as an intermediary and, in principle, is not considered a party to the sales contract between the recipients of the intermediary service. This liability exemption, introduced by the E-Commerce Directive is maintained in the newly adopted Digital Services Act. However, certain online platforms play such a dominant role in the contract's conclusion that their practices go beyond traditional intermediary acts. Given the significant influence of the platform economy, it is unjust to absolve online platform providers of liability when a contracting party suffers severe harm. This paper addresses this issue by exploring potential liability grounds for online platform providers and proposes the need for dedicated legislation to regulate their liability.

I. Introduction

Consumers frequently engage in distance contracts through online platforms. The provider of the online platform[1] acts as an intermediary and, in principle, is not considered a party to the sales contract concluded on the platform between the recipients of the intermediary service. Accordingly, the provider is not liable in case the good is non-conformant or defective. Nevertheless, numerous online marketplaces engage in the fulfilment of the obligations arising from the contract between traders and consumers. These obligations include warehousing, packaging, and shipping goods to consumers, as well as handling monetary transactions and issuing refunds.

A fresh piece of legislation, the Digital Services Act (2022/2065) (hereinafter DSA) upholds the liability exemption of intermediary services for the third-party content which has first been provided by the E-Commerce Directive (2000/31/EC) (hereinafter ECD). This means that, despite the substantial influence and financial gains enjoyed by online platforms such as amazon.com, consumers who suffer damages resulting from non-conforming or defective goods are in principle, unable to direct their claims against the platform providers. Instead, consumers must direct their claims against the sellers. However, reaching the seller may prove challenging for the consumer, especially if the seller is located abroad or is insolvent.[2]

As elucidated in the subsequent analysis, the intermediary service provider's immunity from liability may be forfeited if it assumes an active role rather than functioning solely as an intermediary.[3] Furthermore, the DSA introduces an additional requirement for online platforms to avail themselves of the liability exemption. According to Art. 6(3) of the DSA, if an online platform creates a false impression in the eyes of an average and reasonably well-informed consumer, it may relinquish the protection afforded by the liability exemption. Nevertheless, it is important to note that the revocation of the liability exemption does not automatically render the provider accountable to the consumer. To hold the provider liable against the consumer, the contractual or extra-contractual liability of the provider should be established under the other provisions of EU law or relevant national law[4] which can prove to be a challenging endeavour. One might question whether the liability exemption granted to providers aligns with contemporary realities and the principles of consumer protection. Several US-cases against Amazon.com have shown that although the damage is very severe, we may encounter situations where liability is just as uncertain.[5] Particularly noteworthy is the *Oberdorf v. Amazon*.[6] *The* plaintiff purchased a retractable leash on Amazon.com from a third-party seller. During a dog walk, the leash malfunctioned, abruptly recoiled, and resulted in severe injury and permanent loss of vision for the plaintiff.

The situation presents an unconformity: consumers may suffer significant harm and encounter challenges when attempting to establish contact with traders and obtain appropriate compensation, while concurrently, the platform economy has expanded to vast proportions, exerting a greater influence on consumers' decision-making processes compared to third-party traders. Given these circumstances, it becomes apparent that the absence of regulation regarding the liability of providers fails to provide an equitable solution.

Against the backdrop outlined above, the present article endeavours to fulfil its objective of delineating the liability exemption and subsequently examining the contractual and extra-contractual liability of providers. Additionally, it posits that there is a necessity to establish regulations governing the liability of providers in relation to consumers. This paper contends that the implementation of liability regulations would engender outcomes that are more equitable for both consumers and providers alike.

II. Legal Background of the Liability Exemption

The legal foundation of the liability exemption can be traced back 20 years ago with the enactment of the Electronic Commerce Directive (ECD). This directive has granted intermedi-

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1 'The provider of the online platform' will be shortened as 'the provider' for the ease of reference.

2 G Sartor, 'Providers Liability: From the E Commerce Directive to the Future (Report for the IMCO Committee of the Directorate-General for Internal Policies of the European Parliament, IP/A/IMCO/2017-07, 2017)' (2017), 10 <https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf> accessed 23 June 2023.

3 Recital 18 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

4 Recital 17 DSA (n 3); C Chauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' 12 European Journal of Risk Regulation 758, 766 < https://cris.maastrichtuniversity.nl/en/publications/a-new-order-the-digital-services-act-and-consumer-protection> accessed 23 June 2023.

5 Similar to the situation in Europe, online marketplaces in US are in principle immune from liability under the Section 230 of the Communications Decency Act 1996. For a survey of these cases, see Sean M Bender, 'Product Liability's Amazon Problem' (2021) 4 Journal of Law and Technology at Texas 95 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628921> accessed 23 June 2023.

6 *Oberdorf v. Amazon,* 930 F.3 d 136 (3 d Cir. 2019).

aries, including those offering mere conduit, caching, and hosting services, immunity from civil, criminal, and administrative liabilities (as outlined in Art. 12-14 of the ECD)[7]. The liability exemption brought by the ECD is seen as "a foundation of the digital economy and instrumental to the protection of fundamental rights online"[8] and made its way into the DSA. Consequently, these provisions have been incorporated into the new DSA, which will come into effect on 17th February 2024, replacing the liability regulations of the ECD. Despite the transition to the DSA, the underlying liability framework remains largely unchanged, maintaining the same principles outlined in Art. 12-14 of the ECD (now covered by Art. 4-6 of the DSA). However, the DSA introduces additional regulatory obligations for intermediaries.[9]

Online platforms as a subgroup of hosting services are subject to the liability exemption provided in Art. 6 DSA for hosting service providers. According to Art. 6(1) and (2):

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:

(a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or

(b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.

2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.

In addition, Recital 18 DSA emphasizes that liability exemptions shall not apply where the intermediary service provider plays an active role, rather than "providing the services neutrally by a merely technical and automatic processing of the information provided by the recipient of the service" with an aim to uphold the interpretation adopted by the Court of Justice of the European Union (hereinafter CJEU).[10]

Unlike the ECD, the DSA brings a new provision for online platforms in order to better protect the consumers who make distance contracts on online platforms. According to Art. 6 (3):

Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.

Against this backdrop, it is evident that the provider is generally shielded from liability towards the consumer for damages arising from the sale of non-conformant or defective goods on an online platform. However, this protection is withdrawn under certain circumstances, such as when the provider has actual knowledge of illegal content or fails to remove it after becoming aware (Art. 6(1)(a), (b) of the DSA). The liability exemption is also lost if the trader is acting under the authority of the provider (Art. 6(2) DSA); or if the online platform creates a false appearance in the eyes of the average and reasonably well-informed consumer (Art. 6 (3) DSA). On the surface, this framework appears to strike a fair balance between the interests of consumers, traders, and providers.

However, the issue lies in the fact that losing the liability exemption does not automatically render the provider liable to the consumer. In cases where non-conformant or defective goods are sold, there is no specific provision within the DSA[11] that imposes positive liability on online platforms for consumer damages. Consequently, the provider's liability must be established under relevant provisions of other EU legislation or national law.

In such instances, for a consumer to seek compensation from the provider, two conditions must be met: first, the liability exemption must be revoked, and second, contractual or extra-contractual liability of the provider must be established under the applicable liability laws of the EU or the respective member state. Although there is room for discussion regarding the differentiation between active and passive platforms and the definition of an average and reasonably well-informed consumer, this article primarily focuses on the second aspect: how to ascertain the liability of the online platform.

III. Extra-Contractual Liability of the Provider

Among the various grounds for the extra-contractual liability of the provider in cases involving non-conformant or defective goods, product liability emerges as particularly significant.[12] The product liability regime in Europe is to a great extent harmonized after the adoption of the 85/374/EEC Product Liability Directive (hereinafter PLD)[13]. This directive establishes a comprehensive framework for product liability,

7 See Recital 17 DSA (n 3).

8 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC COM(2020) 825 Final' (European Commission) 3 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en> accessed 23 June 2023.

9 On the regulatory aspect of the DSA, see M C Buiten, 'The Digital Services Act From Intermediary Liability to Platform Regulation' (2021) 12 J Intell Prop Info Tech & Elec Com L 361 < https://www.jipitec.eu/issues/jipitec-12-5-2021/5491> accessed 23 June 2023.

10 Proposal for DSA (n 8) 3. See for example, "where (…) the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31" Case C-324/09, *L'Oréal v eBay,* ECLI:EU:C:2011:474, para 116. See also, Chauffman and Goanta (n 4) 764; Ch Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' 24 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784466> accessed 23 June 2023.

11 Recital 17 DSA (n 3) reads as follows: "The rules on liability of providers of intermediary services set out in this Regulation should only establish when the provider of intermediary services concerned cannot be held liable in relation to illegal content provided by the recipients of the service. Those rules should not be understood to provide a positive basis for establishing when a provider can be held liable, which is for the applicable rules of Union or national law to determine (…)" See also, 'The Digital Services Act Proposal BEUC Position Paper' (BEUC The European Consumer Organization 2021) BEUC-X-2021-032 9 <https://www.beuc.eu/sites/default/files/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf> accessed 23 June 2023.

12 Büyüksagis analysed the vicarious liability of online marketplaces for organisational defects. For this analysis, see E Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13 JETL 64 <https://www.degruyter.com/document/doi/10.1515/jetl-2022-0003/html> accessed 23 June 2023.

13 Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), OJ L 210.

enabling victims to seek compensation from producers in situations where they have suffered harm due to a defective product. According to Art. 6(1) of the PLD, "a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product; the use to which it could reasonably be expected that the product would be put; and the time when the product was put into circulation." So defectiveness of the product is distinct from what has been promised in the contract.

The relevant question for this article is whether the provider can be considered as a liable subject under the PLD regime. Art. 3 of the PLD enumerates potential liable actors, namely the producer, importer, and supplier. The definition of a producer encompasses both the manufacturer of component parts and the producer of the final product. Additionally, it includes those who present themselves as the producer by affixing their name, trademark, or other identifiers on the product (*Anscheinproduzent* or quasi-producer) (Art. 3(1) PLD). Holding the provider liable as a producer appears improbable. Even though certain online platforms may package products with their branding (such as Amazon.com), this act cannot be regarded as the placement of a trademark on the actual 'product.[14]

Apart from the producer, the PLD also attributes potential liability to the importer and the supplier (Art. 3(2), (3) PLD). However, it remains doubtful whether the provider can be held liable as an importer when the seller operates from a location outside the European Union. In such instances, the consumer, rather than the provider, is more likely to qualify as the importer of the product. Finally, the PLD stipulates that every supplier involved in the distribution of the product can be held liable. The term "supplier" encompasses any person, excluding the producer or importer, who has participated in the product's distribution.[15] From our perspective, the provider can be considered as a supplier.[16] If the provider loses the liability exemption because of taking an active role or creating a false appearance in the eyes of the consumer (Art. 6 DSA), it strongly indicates that the provider has taken a role in the supply of the product to the consumer. Nevertheless, designating the provider as the supplier is not a robust option since the supplier can absolve themselves of liability by disclosing to the injured party, "within a reasonable time, the identity of the producer or the person who supplied the product to them" (Art. 3(3) PLD). The DSA's "know your business customer" approach already necessitates the provider to obtain the requisite information for identifying the trader (Art. 31 DSA).[17] Consequently, compliance with such obligations under the DSA is likely to enable the provider to evade liability under the product liability framework. Against this backdrop, product liability does not offer promising prospects for injured consumers.

The Proposal for the Product Liability Directive (COM (2022) 495final),[18] hereinafter referred to as the PLD Proposal, has been officially released, and it notably includes provisions relating to online platforms. Within the PLD Proposal, Art. 7(6) outlines that the provider assumes liability under the same conditions as the distributor.[19] Consequently, if the claimant requests the provider to disclose the identity of the economic operator or the person who supplied the product to the provider, and the provider fails to provide this information within one month of receiving the request, the provider will be held liable for any damages suffered by the victim, provided that the provider has lost the exemption as outlined in Art. 6(3) of the DSA (Art. 7(5), (6) of the PLD Proposal). Once again, it is evident that the provider, who possesses knowledge of the business customer and furnishes the consumer with the relevant information, will be exempted from liability in such cases.

IV. Contractual Liability of the Provider

Within the context of online platforms, a triangular relationship exists among the trader, consumer, and provider. The trader and consumer, as recipients of the service, enter into user agreements with the provider to utilize the online platform. Simultaneously, the sales contract is formed exclusively between the trader and the consumer, with the provider not being a party to this contractual arrangement. However, it is possible to interpret the active involvement of the provider in the sales contract as a factual expression of intent, indicating an intention to be a party to said contract. This occurs when the provider *de facto* assumes and fulfils the primary obligations stemming from the contract. Notably, the absence of a general form requirement for the sale of movable goods enables the conclusion that a contract exists between the provider and the buyer regarding the provision of relevant goods. To note a fundamental, the seller does not have to be the owner of the good sold for the sales contract to be valid.

For instance, actions undertaken by the provider such as receiving goods from traders prior to their sale to consumers, directly accepting payment from consumers, packaging and shipping items, and handling refund requests may lead the courts to determine the existence of a sales contract between the provider and the consumer. In such cases, the factual circumstances depict a linear relationship rather than the superficial triangular relationship. The provider, by engaging in such activities, assumes the role of a middleman rather than a mere facilitator of the transaction between the trader and the consumer.

Alternatively, it is plausible to consider the provider as a co-selling party alongside the trader, implying that both entities collectively form the seller. The fact that the trader and provider fulfil obligations arising from the same sales contract and share the consideration received from the consumer can be interpreted as a form of partnership between them. Once again, the actions of the provider and the trust cultivated by the provider in the consumer may lead the court to conclude that the provider has effectively become a party to the sales contract.

The *Wathelet* judgement rendered by the Court of Justice of the European Union (CJEU) can be supportive of the proposition that a contract exists between the provider and the consumer, other than the user agreement. The CJEU has expressed the opinion that "…the seller's liability…must extend to an intermediary who, by engaging with the consumer, generates a likelihood of confusion in the consumer's mind, leading them to believe that the intermediary is the owner of the goods being sold."[20]

In cases where the factual circumstances indicate the existence of a sales contract between the provider and the con-

14 Busch (n 10) 12–13.
15 ibid 14.
16 Cf. ibid.
17 For the disclosure duties, see Chauffman and Goanta (n 4) 761–762.
18 Proposal for a Directive of the European Parliament and of the Council on liability for defective products (COM(2022) 495 final) 28.9.2022.
19 Unlike the PLD, the PLD Proposal uses the term distributor instead of the supplier.
20 CJEU – 149/15, *Sabrina Wathelet v Garage Bietheres & Fils SPRL*, para. 41.

sumer, the liability of the provider will be on par with that of the seller. In other words, the consumer retains the right to enforce all the rights and remedies afforded under the sales contract against the provider.

V. Discussion and Conclusion

Although it is possible for consumers to exercise their rights not only against the trader but *also* against the provider, it requires them to go through a difficult and winding road. Given that this situation appears to be incongruent with the objectives of consumer law, it is deemed more appropriate to establish a clear provision regarding the liability of online platforms for breaches of sales contracts with consumers. This would entail relinquishing the "safe harbor" regime. As *Busch* states "(…) the policy debate about the reform of the liability framework has focused on political issues such as hate speech, terrorist content and freedom of speech. As important as these topics may be from a societal perspective, they overshadowed the debate about consumer protection and product safety."[21]

For sure, the liability exemption for intermediary service providers bears rationales such as "promoting the activity of the intermediaries, preserving their business models, preventing excessive collateral censorship",[22] etc. However, the circumstances surrounding platforms like Twitter significantly differ from those of platforms like Amazon.com. In this regard, Art. 6(3) of the DSA can be considered as a positive but insufficient step.[23] The BEUC has advocated for imposing liability on online marketplaces that possess predominant influence or control over suppliers and has presented a non-exhaustive list of criteria as indicators of such influence or control.[24] The BEUC draws inspiration from Art. 20 of the Model Rules on Online Platforms (hereinafter Model Rules) proposed by the European Law Institute (ELI):

If the customer can reasonably rely on the platform operator having a predominant influence over the supplier, the customer can exercise the rights and remedies for the non-performance available against the supplier under the supplier-customer contract also against the platform operator.[25]

If this proposal, which has garnered support from the European Parliament,[26] were to be incorporated into the DSA, it would enable consumers to assert their rights and seek remedies for non-performance against the provider (platform operator) wielding predominant influence. The ELI has outlined a non-exhaustive list of criteria indicative of such predominant influence or control in Art. 20(2) of the Model Rules:

a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;

b) The platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract;

c) The platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the customer to the supplier;

d) The terms of the supplier-customer contract are essentially determined by the platform operator;

e) The price to be paid by the customer is set by the platform operator;

f) The marketing is focused on the platform operator and not on the suppliers; or

g) The platform operator promises to monitor the conduct of supplier and to enforce compliance with its standards beyond what is required by law.[27]

These criteria serve as indicators for assessing whether the platform operator holds a position of predominant influence or control over the supplier-consumer relationship. Incorporating these criteria into the DSA would provide a framework for determining the liability of online platforms in cases where they possess such influence or control. Despite the support from organizations such as the BEUC and the European Parliament, the DSA does not adopt the notion of positive liability. The European Commission, in its Impact Assessment, stated that:

(…) some of these criteria would actually mean, following existing case-law that the intermediary is not an information society service provider. In those cases, normal liability rules as in the offline world for services and traders would apply.

Instead, this seems to support a codification of a sort of "vicarious liability" for those cases where the service provider deliberately collaborates with one of the recipients of its service in order to undertake illegal acts or is integrated with the content provider, and as a result it should not benefit from the liability exemptions established for intermediaries. (…)[28]

However, as explained above and also stated in the same Impact Assessment,[29] losing the liability exemption does not inherently establish a positive basis for holding the provider liable. In order to address the issue more effectively, enacting positive liability rules specifically for online marketplaces would not significantly undermine the benefits brought by the safe harbor regime. Online platforms that function solely as intermediaries should still be exempt from liability, while the liability of active platforms should be appropriately regulated. Implementing such rules would incentivize online platforms to take measures to filter out rogue or unsafe products from their platforms.

Considering the organizational and financial resources available to online platforms, they are better positioned than individual consumers to manage risks associated with product quality and safety. Regulating the liability of online platforms may result in increased costs of activity due to higher standards of care expected from them. However, online platforms have the capacity to reflect these costs onto the prices charged for their services. While it can be argued that this may contradict consumer interests by potentially raising prices, it is important to prioritize consumer safety over low

21 Busch (n 10) 23.
22 Sartor (n 2) 4.
23 'The Digital Services Act Proposal BEUC Position Paper' (n 11) 9.
24 ibid 16.
25 Ch Busch et al., 'Model Rules on Online Platforms' (European Law Institute 2020) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf> accessed 23 June 2023.
26 'Resolution 0 f 20 October 2020 with Recommendations to the Commission on the Digital Services Act: Improving the Functioning of the Single Market (2020/2018(INL)), P9_TA(2020)0272' (European Parliament 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IP0272> accessed 23 June 2023.
27 Art. 20(2) Busch and others (n 25).
28 'Commission Staff Working Document – Digital Services Act Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC' (European Commission 2020) SWD(2020) 348 final 161 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2020:348:FIN> accessed 23 June 2023.
29 ibid 157.

prices. The presence of dangerous products in the market poses a threat to consumer well-being, and the inability of consumers to seek adequate compensation in case of harm.

On the other hand, the implementation of a positive liability rule would not only benefit consumers but also provide advantages for providers by introducing a higher level of foreseeability. In the absence of a positive liability provision, the provider may be regarded as a contractual partner, subjecting them to liability no less extensive than that of the seller. Establishing a statutory liability regime, as suggested in this context, would serve to limit the liability of providers and promote a fair and predictable allocation of risks for both parties involved.

Moreover, the introduction of such a regulation would contribute to achieving uniformity across Europe, preventing divergent decisions from being reached in the various legal systems of the member states. This harmonization would ensure consistency and coherence in the application of liability rules, promoting legal certainty and facilitating cross-border transactions within the European Union.

In our analysis, we believe that a potential regulatory framework should incorporate clarity regarding the following aspects:

1. Conditions for Provider Liability: It is imperative to define the specific circumstances under which providers can be held liable in addition to the seller or supplier. This entails elucidating the criteria that establish the provider's involvement and responsibility in the transaction or provision of goods or services.

2. Scope of Liability:

a. Rights Against the Provider: The regulatory framework should outline the extent of rights that can be enforced against the provider. This includes determining whether compensation is the sole remedy available or if other rights such as replacement, repair, price reduction, or termination of the contract can also be pursued.

b. Scope of Compensation: Clarity should be provided on the scope of compensation, including any limitations on pecuniary damages and whether non-pecuniary damages are eligible for compensation.

c. Entitlement to Claim Compensation: It is necessary to determine whether only the buyer or consumer has the right to claim compensation or if any party adversely affected by the provider's actions can seek redress.

d. Defenses Available to Providers: The regulatory framework should establish the defenses that can be invoked by providers in order to avoid or mitigate liability, taking into account legitimate circumstances where providers may not be held responsible.

In this regard, the inclusion of Art. 20 from the Model Rules proposed by the ELI[30] can serve as a noteworthy example. The approach presented in Art. 20 should be supported in principle, as it aligns with the doctrine of "reliance liability" (*Vertrauenshaftung*)[31] found in various national legal systems. The Comments section of Art. 20 further explains this approach, drawing parallels to BGB § 311(3)[32] in the German Civil Code. However, unlike BGB § 311(3), which establishes a pre-contractual relationship, Art. 20 of the ELI Model Law holds the platform operator liable for the supplier's breach of contract. This approach finds support in notable judgments such as *Wathelet,*[33] *Uber*,[34] and the well-known US case of *Oberdorf v. Amazon.*[35]

Considering the above discussion, the authors of this study propose that the following issues should be taken into consideration in a potential regulatory framework:

1. Limiting Customer Rights: The rights that customers may exercise against the provider should be restricted to contract termination and compensation. Expecting the provider to fulfill remedies such as repair or replacement, which are considered derivatives of specific performance, would be impractical. Hence, these remedies should only be sought from the seller or supplier.

2. Scope of Claims: Claims against providers should be limited to cases involving death, bodily harm, and significant property damage above a predetermined threshold. This limitation aims to prevent an overwhelming number of cases. However, claims for non-pecuniary damages should be subject to general provisions.

3. Restriction to Consumer Claims: This special liability regime should exclusively cover compensation claims made by consumers. Third parties other than the customer should not be entitled to claim compensation under this specific regime.

4. Liability and Knowledge: Providers cannot be absolved of liability on the basis of claiming ignorance regarding the breach of contract. They should be held accountable for their role in facilitating the transaction, regardless of their knowledge of the breach.

By addressing these aspects, a comprehensive regulatory framework can provide legal certainty and establish a balanced approach that protects the interests of both consumers and providers, while fostering transparency and facilitating dispute resolution in cases of contractual breaches or harm caused by defective products or services. ■

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30 Busch and others (n 25).

31 ibid 40.

32 „*Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 kann auch zu Personen entstehen, die nicht selbst Vertragspartei werden sollen. Ein solches Schuldverhältnis entsteht insbesondere, wenn der Dritte in besonderem Maße Vertrauen für sich in Anspruch nimmt und dadurch die Vertragsverhandlungen oder den Vertragsschluss erheblich beeinflusst.*" Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBI. S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 14. März 2023 (BGBI. 2023 1 Nr. 72) geändert worden ist.

33 *Sabrina Wathelet v Garage Bietheres & Fils SPRL* (n 20), para. 41.

34 CJEU C- 320/16, *UBER France SAS v Nabil Bensalem*, ECLI:EU:C:2018:221.

35 *Oberdorf v. Amazon*, 930 F.3 d 136 (3 d Cir. 2019).