European Model Rules for Online Intermediary Platforms

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I. Introduction

For several years, online platforms such as Airbnb, Uber or Amazon Marketplace have experienced a dramatic growth and disrupted traditional business models in many sectors. At the same time, the rise of platforms has triggered a debate over whether the regulatory framework has to be adjusted in order to adequately reflect the new market conditions of the ‘platform economy’. From a competition law perspective, there are concerns that platforms could attain a dominant market position and undermine competition by using the power of network effects. From a labour law perspective, the rising number of ‘click workers’ hired via online platforms creates new legal challenges. Furthermore, there is currently an in-

1 The following text is a revised and expanded version of a chapter published in German in Rott (ed.), Das Recht der Online-Vermittlerplattformen, Nomos 2018.

The Discussion Draft for a Directive on Online Intermediary Platforms (hereafter: Discussion Draft), which has been published in the summer of 2016 by a network of European researchers attempts to contribute to this debate.\footnote{Research Group on the Law of Digital Services, Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 2016, 164 see also Busch/Dannemann/Schulte-Nölke, Ein neues Vertrags- und Verbraucherrecht für Online Plattformen im digitalen Binnenmarkt, MMR 2016, 787 (with a German translation of the Discussion Draft).} The Discussion Draft was elaborated by the Research Group on the Law of Digital Services (hereafter: Research Group) initiated in 2015 by a group of researchers from Osnabrück and Krakau. By the end of 2016 the research project was taken up by the European Law Institute (ELI) and is now being continued as an ELI Working Group.\footnote{Project leaders (“Reporters”): Christoph Busch (Osnabrück), Gerhard Dannemann (Berlin) Hans Schulte-Nölke (Osnabrück/Nijmegen), Aneta Wiewiórowska-Domagalska (Osnabrück), Fryderyk Zoll (Krakow/Osnabrück).} Meanwhile, the project team comprises more than 35 researchers from 10 European countries. The working method of the ELI Working Group has partially been inspired by the methodology of the Research Group on the Existing EC Private Law (Acquis Group). However, as many legal issues regarding online platforms have not yet been addressed by EU legislation, the scope of research also covers recent legislation and legislative proposals from member states. Moreover, recent legislative developments from some non-European countries have been taken into account (e.g. China, South Korea).\footnote{See e.g. the draft for a Chinese Act on E-Commerce of 27 December 2016 and the Korean Act on Consumer Protection in Electronic Commerce, Act No. 6687 of 30 March 2002, revised by Act No. 1412 of 29 May 2016, which introduced specific provisions on online intermediaries.} In addition, a number of soft law instruments have been considered as sources of inspiration, e.g. service standards and guidelines issued by national consumer protection authorities. Following the continuation of
the research project under the auspices of the ELI, the aim of the exercise has somewhat changed. The Discussion Draft presented in the summer of 2016 was clearly conceived as a blueprint for a possible EU directive. In contrast, the text, which is currently being elaborated by the ELI Working Group serves a broader purpose. The ELI proposal, which will be published in 2019, shall provide a set of model rules which could be a source of inspiration for legislators both on a European and national level. Some parts of the draft could also be used for elaborating voluntary industry standards.

II. Consumer law in the platform economy

As a matter of fact, the business model of online platforms is not entirely new. Online marketplaces such as eBay, which provide a possibility for non-professionals to sell used goods, have existed from the early days of the Internet. However, the rise of digital technology has dramatically changed the quantitative and qualitative dimension of contracts concluded via online platforms. The recent announcement that the Swedish home goods retailer Ikea had agreed to acquire TaskRabbit, a platform through which freelancers offer services such as furniture assembly, moving and handyman fixes, underlines the continuing dynamic of the platform economy.

However, the existing European consumer contract law does not fully reflect the growing importance of online platforms in the digital single market. In particular, EU consumer contract law still focuses on a traditional model based on two-party contractual relationships between a trader and a consumer. However, transactions in the platform economy typically involve a combination of three different contracts, between (1) the platform operator and the supplier, (2) the platform operator and the customer and (3) the supplier and the customer. Specific rules for these triangular relationships, which are the hallmark of the platform economy, are lacking in EU consumer law. In particular, it is unclear under which circumstances the platform operator may be liable for a non-performance in the relation-

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ship between suppliers and customers. The terms and conditions of the online platforms usually underline that they are not a party to these supplier-customer contracts, but only ‘facilitators’ or ‘matchmakers’. They emphasize that the platform operator takes no responsibility for non-performance and that platform users enter into contracts ‘at their own risk’.  

Rather surprisingly, the two recent legislative proposals for a Directive on Digital Content and a Directive on the Online Sale of Goods,\(^{12}\) presented by the European Commission in December 2015 as part of the Digital Single Market Strategy,\(^{13}\) do not contain any specific rules regarding online platforms. In contrast, the two recent communications from the European Commission on online platforms and the collaborative economy (as the ‘sharing economy’ is called in EU parlance) published in the summer of 2016, address the regulatory challenges created by the rise of the platform economy.\(^{14}\) However, in these two documents, the European Commission displays a certain regulatory reluctance. In the face of the rapidly-changing digital economy the European Commission seems to shy away from imposing new rules that could stifle innovation. In its Communication on Online Platforms and the Digital Single Market published in May 2016, the Commission emphasizes that the right regulatory framework for the digital economy must be conduciive ‘to scaling-up of the platform business model in Europe’\(^{15}\) and ‘fostering the innovation-promoting role of platforms’.\(^{16}\)

At the national level, the picture looks different. The rise of the platform economy has recently prompted regulatory initiatives in a number of

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11 See e.g. *Mak*, Private Law Perspectives on Platform Services, EuCML 2016, 19, 21 (for *Airbnb*).
EU member states. The spectrum ranges from traditional instruments such as guidelines issued by national market watchdogs and legislative amendments to consumer laws to rather novel tools such as service standards drafted by national standardization bodies. In Europe, one of the regulatory frontrunners is France. Already in July 2013 the French Association for Standardization (AFNOR) has published a standard that provides general principles and detailed requirements for the collection, screening and publication of online consumer reviews, which are a core design element of most online platforms.\textsuperscript{17} Two recent amendments of the French \textit{Code de la consommation}, by the \textit{Loi Macron}\textsuperscript{18} in 2015 and the \textit{Loi pour une République numérique}\textsuperscript{19} in 2016, have added a number of provisions specifically targeted at online platforms. In Italy, a legislation package dealing with various aspects of the sharing economy has been proposed in 2016.\textsuperscript{20} In May 2015 the Danish Consumer Ombudsman has published guidelines on the publication of user reviews setting up requirements based on the Danish Marketing Practices Act.\textsuperscript{21} In Germany, so far no legislative initiative has been proposed, but the German Monopolies Commission has addressed the need for potential amendments of the regulatory framework in its latest biennial report published in 2016.\textsuperscript{22} In addition, the German Fed-

\textsuperscript{17} AFNOR, French Standard NF Z 74-501 – Avis en ligne de consommateurs – Principes et exigencies portant sur les processus de collecte, moderation et restitution des avis en ligne de consommateurs (19 July 2013). Taking inspiration from the French standard, the International Organization for Standardization (ISO) in 2014 has set up a new technical committee (ISO/TC 290 – Online reputation) which is currently elaborating a global standard for methods, tools, processes, measures and best practices related to online reputation of organizations or individuals providing services or products, derived from user-generated content available on the Internet.

\textsuperscript{18} Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chanc-es économiques.

\textsuperscript{19} Loi n° 2016-1312 du 7 octobre 2016 pour une République numérique; see also Grynbaum, Loyauté des plateformes: un champ d’application à redéfinir dans les limites du droit européen, A propos du projet de loi pour une République numérique, La Semaine Juridique, Édition Générale, N° 16, 18 April 2016, p. 778.

\textsuperscript{20} Proposta di legge n° 3564 ‘Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione’ (27 January 2016).

\textsuperscript{21} Danish Consumer Ombudsman, Guidelines on publication of user reviews (1 May 2015), <https://www.consumerombudsman.dk/media/49717/guidelines.pdf>.

\textsuperscript{22} An English version of the chapter on the sharing economy is available from the website of the Monopolies Commission at <http://www.monopolkommission.de/images/HG21/HGXXI_Chapter_V.pdf>.
eral Ministry of Economic Affairs has published a White Paper on Digital Platforms in March 2017. The variety of different initiatives provides a fine example of regulatory pluralism in the European Union. At the same time, the uncoordinated national initiatives could lead to further fragmentation of the regulatory framework and create the risk of new obstacles to the Digital Single Market.

III. Overview of the discussion draft

1. Scope of application

In the legal and political debate the notion of ‘platform’ refers to a wide range of different business models. The White Paper on Digital Platforms published in March 2017 by the German Ministry of Economic Affairs and Energy defines platforms as “internet-based forums for digital interaction and transaction”. In order to elaborate a workable set of rules and standards, the Research Group has decided to start with a rather narrow scope of application, which – in a later stage – could be extended. First, the scope of the Discussion Draft is currently limited to so-called «transaction platforms» which enable users to conclude a contract for goods, services or digital content via the platform (e.g. Airbnb, Ebay, Uber). Therefore, platforms that operate only as search engines (e.g. Google) or social networks (e.g. Facebook) are excluded from the scope. However, it is dif-


25 White Paper on Digital Platforms, p. 21. See also Srnicek, Platform Capitalism, 2017, p. 43: „digital infrastructures that enable two or more groups to interact“. A legal definition is provided by Art. L 111-7 para. 1 of the French Code de la consommation: „Est qualifiée d’opérateur de plateforme en ligne toute personne physique ou morale proposant, à titre professionnel, de manière rémunérée ou non, un service de communication au public en ligne reposant sur : 1° Le classement ou le référencement, au moyen d’algorithmes informatiques, de contenus, de biens ou de services proposés ou mis en ligne par des tiers ; 2° Ou la mise en relation de plusieurs parties en vue de la vente d’un bien, de la fourniture d’un service ou de l’échange ou du partage d’un contenu, d’un bien ou d’un service.“
difficult to draw a clear line between the different categories of platforms, as the business models are quickly changing. For example, Facebook recently started a ‘marketplace’, available in a number of countries, which allows users to buy and sell items. Second, the scope is currently limited to situations where the supplier provides goods, services or digital content to a customer against the payment of a price in money (Art. 2(e) Discussion Draft). One may consider, however, extending the scope of application to other counter-performances, in particular data, and contracts for barter. This raises the question whether the rules presented her should also be applicable to ‘social platforms’ where goods or services are exchanged on a not-for profit basis (e.g. Homeshare, Couchsurfing). It is important to note that the Discussion Draft is not limited to business-to-consumer (B2C) contracts. It also covers business-to-business (B2B) contracts and consumer-to-consumer (C2C) contracts. However, some of the provisions are mandatory only for B2C contracts (Art. 12 Discussion Draft). On the one hand, this approach reflects the fact that the contours of the traditional notion of consumer are dissolving on platforms which are part of the so-called ‘Sharing Economy’. On the other hand, it takes into account that on platform markets there is often also a need to protect small businesses, micro-entrepreneurs and prosumers. The latter aspect is underlined by the European Commission’s recent announcement to address issues of fairness in platform to business relations in a communication or possibly even a legislative proposal expected in early 2018.

2. Structure

The Discussion Draft is structured into seven chapters. The first chapter delineates the scope of application (Art. 1) and provides a number of defi-

26 For example, in Germany Facebook Marketplace has been available since August 2017, see <http://www.spiegel.de/netzwelt/web/facebook-kleinanzeigen-machen-ebay-konkurrenz-a-1162907.html>.
27 See e.g. Schulte-Nölke, The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law?, EuCML 2015, 135; see also Engel/Stark, Verbraucherrecht ohne Verbraucher?, ZEuP 2015, 32.
nitions for key concepts (Art. 2). The second chapter contains some ‘gen-
eral provisions’ that are relevant for both sides of the platform, i.e. suppli-
ers and customers. In particular, this part contains provisions on the trans-
parency of listings (Art. 7) and reputation systems (Art. 8). The following
two chapters separately set out the duties of the platform operator towards
the customer (Art. 11 et seq.) and towards the supplier (Art. 13 et seq.).
This structure follows the general approach used by economists, who usu-
ally refer to platforms as two-sided (or multi-sided) markets. The fifth
chapter addresses the crucial question of the platform operator’s liability
(Art. 16 et seq.). The rules on liability are complemented in the sixth chap-
ter by two provisions dealing with the platform operator’s right to redress
against the supplier and vice-versa (Art. 22 et seq.). The draft is rounded
off by a number of ‘final provisions’ in the seventh chapter which address
issues of private international law and enforcement (Art. 24 et seq.).

3. Main topics

The following section provides a short overview of some of the key provi-
sions of the Discussion Draft. It is important to note, that the Discussion
Draft does not deal with all possible legal issues concerning transactions
concluded online platforms. The draft mainly deals with the transparency
of contractual roles in the ‘platform triangle’, the flow of information via
the platform and the liability of the platform operator. Another key aspect
is the regulation of online reputation systems which are a crucial design
element of most online platforms.

a) Transparency requirements

i) Listings

Article 6 of the Discussion Draft sets out transparency requirements for
listings (e.g. search results for apartments on Airbnb). If the placement or
»rank« within a listing on the online intermediary platform depends on the
supplier paying for better placement or any corporate link between suppli-

29 See the seminal work by Rochet/Tirole, ‘Platform Competition in Two-Sided Mar-
er and platform operator this must be indicated to the customer. This provision is, in essence, a concretisation of the prohibition of misleading customers on the motives for commercial practices (Art. 6(1)(c) Directive 2005/29/EC) and the prohibition of hiding the commercial intent of a commercial practice (Art. 7(2) Directive 2005/29/EC).\textsuperscript{30} Both customers and suppliers have the legitimate expectation that the platform uses a »neutral« algorithm for displaying »organic« search results. Article 6 is modelled on the transparency requirements set out in Art. 111-7 of the French \textit{Code de la consommation}, which have been recently introduced by the \textit{Loi Macron}.\textsuperscript{31}

ii) Contractual roles

Another transparency requirement is laid down in Art. 11 of the Discussion Draft. According Art. 11(1) of the Draft the platform operator must inform the customer before the conclusion of a contract with another user (i.e. the supplier) that the customer will be entering into a contact with the supplier and not with the platform operator. In other words, the platform operator must ensure that its contractual role as a mere intermediary is made clear. In practice, this requirement is not always fulfilled by platform operators. In particular, in some online shops for mobile phone applications (»app stores«) it is not always sufficiently clear that the user who downloads an application enters into a contract with a third party and not the operator of the app store.\textsuperscript{32} Interestingly, the original proposal of the Consumer Rights Directive published by the European Commission in 2008 contained such a duty to inform about the contractual role.\textsuperscript{33} However,


\textsuperscript{31} Loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chanc-es économiques. A similar transparency rule has been formulated by the Regional Court of Munich, Judgment of 18 March 2015, Case no. 37 O 19570/14, MMR 2016, 257.

\textsuperscript{32} Gutachten des Sachverständigenrates für Verbraucherfragen, Verbraucherrecht 2.0, Verbraucher in der digitalen Welt, December 2016, p. 27.

\textsuperscript{33} See COM(2008) 614 final, Art. 7(1): »Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive. «
er, the provision was not included in the final text of the Directive. Another model for a duty to inform about the contractual role of the platform is provided by the Korean Act on Consumer Protection in Electronic Commerce. According to the recently revised Art. 20(1) of this Act, an online intermediary must inform the consumer in a prominent way that he is not a party to the main supply contract.

In its current version, Art. 11(1) of the Discussion Draft is silent about the legal consequences of a breach of this information duty. Two different solutions could be envisaged: On the one hand, a platform operator who fails to provide the information required under Art. 11(1) of the Discussion Draft could be considered as a party to the main supply contract. This would be in line with § 164(2) of the German Civil Code and the solution suggested by the original proposal for the Consumer Right’s Directive. It could also be envisaged that a breach of the information duty does not affect the attribution of contractual roles in the platform triangle and only gives rise to a claim for damages against the platform operator in addition to any contractual claim against the supplier. A revised version of the Discussion Draft should clarify which of the above solutions applies. Moreover, the relationship with Art. 16(1) of the Discussion Draft should be clarified which also concerns the transparency of contractual roles, but unlike Art. 11(1) requires that the platform operator »presents itself to customers and suppliers as intermediary in a prominent way«.

iii) Status of the contractual partner

The duty of the platform operator to clarify its contractual role is complemented by Art. 11(2) of the Discussion Draft which requires the platform operator to ensure that the supplier informs the customer whether it offers its goods or services or digital content as a trader. This information is particularly important for the consumer because the classification of the supplier as a trader decides on whether consumer protection rules apply to the

35 COM(2008) 614 final, Art. 7 (2): »The intermediary« who does not fulfil the obligation under paragraph 1, shall be deemed to have concluded the contract in his own name.«
36 For critical comments on the relation between Art. 11(1) and Art. 16(1) of the Discussion Draft see Maultzsch in this volume.
main supply contract. To be more precise, Art. 11(2) does not so much stipulate an information duty but rather a ‘platform design duty’.\textsuperscript{37} In practical terms, it requires the platform operator to design the platform in way that each supplier who registers an account indicates whether he or she acts as professional or as non-professional seller or service provider. During the registration process it will not be possible for the platform operator to verify whether the self-classification provided by the supplier is correct. In some instances it may also be difficult for the supplier himself to make a correct self-classification as clear criteria for defining the borderline between professional and non-professional activities are lacking for some business models (e.g. short term rentals). In such cases the definition of clear thresholds based on turnover volume would be helpful. However, considering the economic differences between member states it will probably be impossible to define a uniform European threshold. Nevertheless, it would be rather easy for the platform operator to verify the supplier’s initial self-classification at a later stage on the basis of the transaction data (e.g. number of transactions, turnover data). It could thus be considered, whether Article 11(2) should be amended as to require the platform operator to implement such a data-driven verification system. At least in clear cases the platform operator could be required to change an incorrect self-classification or ask the supplier to revise it. This example illustrates the possibilities of a »more technological approach«\textsuperscript{38} towards the regulatory design of consumer law in the platform economy. From this perspective, the platform operator plays a key role as »regulatory intermediary« based on the available transaction data.\textsuperscript{39}

\textsuperscript{37} Cf. \textit{Sylvain}, Intermediary Design Duties, 50 Connecticut Law Review 1 (2017); on the regulatory function of design see also \textit{von Borries}, Weltentwerfen: Eine Politische Designtheorie, 2017, p. 9 („Alles, was gestaltet ist, entwirft und unterwirft“).


b) Liability of the platform

One of the most controversial questions with regard to online intermediary platforms is to determine under which conditions a platform operator is liable for a non-performance by the supplier. Article 16 of the Discussion Draft provides an overview of the liability regime. Paragraph 1 of the provision emphasizes the principle that a platform operator who presents itself to customers and suppliers as intermediary in a prominent way is not liable for non-performance under supplier-customer contracts. Article 16(2) then enumerates the situations in which a liability of the platform operator may arise. The most important provisions in this context are Art. 17 and 18 of the Draft.

i) Liability for misleading information given by suppliers

Under Art. 17(1) of the Discussion Draft, a liability of the platform operator for a non-performance under the supplier-customer contract may arise, if the platform operator fails to remove or rectify misleading information from the platform although he has been notified about such misleading information. This provision applies a »notice and take-down« approach, which is broadly modelled on the rules on intermediary liability under Arts. 12 to 15 of Directive 2000/31/EC. So far, the »safe harbour« provisions of the E-Commerce Directive have been applied mainly with regard to infringements of intellectual property and personality rights. The Discussion Draft follows the approach taken by the E-Commerce Directive and transfers it to the area of contract law. A revised version of the Discussion Draft should clarify the relation between Art. 17 and the duty to protect users under Art. 9 of the Discussion Draft. Moreover, it should be considered whether Art. 17, which is currently limited to misleading information provided by suppliers, should be amended as to cover also misleading information provided by customers.

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40 See e.g. CJEU Case C324/09, ECLI:EU:C:2011:474 – L’Oréal SA et al v eBay International AG.
41 See also Maultzsch in this volume.
ii) Liability of the platform operator for non-performance of suppliers

The ‘notice and take-down’ rule of Art. 17 is complemented by Article 18 of the Discussion Draft, which adds a liability rule based on the concept of ‘reliance liability’ (Vertrauenshaftung). According to Article 18(1) the platform operator is jointly liable with the supplier for non-performance of the supplier-customer contract, if the customer can reasonably rely on the platform operator having a predominant influence over the supplier. The basic criterion of ‘predominant influence’ is fleshed out by a list of sub-criteria in Article 18(2), e.g. the role of the platform in providing facilities for the conclusion of the supplier-customer contract, its role as a payment services provider and the marketing strategy of the platform. The individual sub-criteria can be understood as elements of a ‘flexible system’ (bewegliches System) based on the concept developed by the Austrian legal scholar Walter Wilburg. Thus, it is not necessary that all sub-criteria are fulfilled nor is it sufficient that one single sub-criterion is fulfilled. The list of sub-criteria in Art. 18(2) is rather an invitation for the courts to apply a flexible approach and assess each case on its own merits based on a typological case assessment. In the light of the great variety of rapidly developing business models this legislative approach takes a middle ground between a rigid list of criteria and an open-textured general clause and thus tries to combine the necessary flexibility with a higher degree of legal certainty.

The liability rule laid down in Article 18 has attracted some criticism. In particular, it has been criticised that a liability of the platform operator for non-performance based solely on its ‘predominant influence’ over a third party, is incompatible with general principles of contract law. However, the rationale behind the liability rule can be explained form an economic point of view. In the terminology of transaction cost economics many platforms can be considered as a hybrid between the two alternative ways of coordinating resources in production usually described as ‘firm’

42 Cf. the seminal work by Canaris, Die Vertrauenshaftung im deutschen Privatrecht, Munich 1971.
44 See especially Maultzsch in this volume; see also Cauffmann, EuCML 2016, 235, 239; Engert, Digitale Plattformen, AcP 218 (2018) (forthcoming).
Modern information technology makes it possible for platform operators to install data-driven governance structures and exercise control over production and distribution of goods and services without the need for the organisational structure and corporate form of a firm. At the same time, the degree of control exercised through information technology in the platform economy is much higher than the usual governance structure for traditional market transactions. Considering the many variations of business models in the platform economy there is a sort of continuum between organisation (»firm«) and transaction (»market«). If the degree of influence and control – visible to the customer – reaches a certain level, the platform business model shows a degree of resemblance to the model of a firm, that it seems justified to apply the principle that liability follows control. A similar line of argument has been adopted by the CJEU in the Uber Spain case. For classifying Uber as provider of services in the field of transport, the Court explicitly referred to the »decisive influence« exercised by Uber over the conditions under which the transport service is provided by the drivers as well as »a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion«.

In a similar perspective, Art. 18 of the Discussion Draft creates a link between the platform user’s reliance on control exercised by the platform and the platform operator’s liability. If, however, a platform operator who exercises a predominant influence of the entire transaction invokes the doctrine of privity of contract and insists on the distinction between the different contractual relationships in the »platform triangle«, such arguments can be dismissed as an irrelevant protestatio facto contraria. From a theoretical perspective, the Discussion Draft takes also inspiration from the »doctrine of contractual networks«, elaborated in particular by Gunther Teubner, which questions the privity of contracts in case of complex economic networks (e.g. franchising). In the case of online platforms,

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45 See the seminal article by Coase, The Nature of the Firm, Economica, Vol. 4, No. 16. (1937), 386-405; see also Williamson, Economic Organisation: Firms, Markets and Policy Control, 1986; for an application of transaction cost economics on the platform economy see Tomassetti, Does Uber redefine the firm? The postindustrial corporation and advanced information technology, 34 Hofstra Lab. & Emp. L.J. 1 (2016).


47 See e.g. Teubner, Den Schleier des Vetrags zerreißen? Zur rechtlichen Verantwortung ökonomisch „effizienter“ Vertragsnetzwerke, KritV 1993, 367; idem, Net-
the comprehensive control over the supplier made possible by digital technologies adds a new element to the concept of contractual networks which even more justifies the liability of the platform operator as the dominant economic actor. In this sense, Art. 18 of the Discussion Draft can be seen as another application of the ‘more technological approach’. 48

The architecture of the liability regime would be incomplete without an appropriate redress mechanism. Therefore, Art. 22(1) of the Discussion Draft gives the platform operator a right to redress if the platform operator is liable under Art. 17 or 18 towards a customer for a supplier’s misleading statement or a supplier’s failure to perform the supplier-customer contract.

c) Reputation systems

i) Transparency and systemic trust

Reputation systems, i.e. technical systems used for collecting and publishing user-generated ratings and reviews, are a central element of the business model applied by most platforms. The Chinese draft for an Act on E-Commerce published in December 2016 even requires online platforms to introduce reputation systems.49 The widespread use of reputation systems is a key factor for establishing trust in online marketplaces. In order to fulfil this function, it is necessary that the reviews and ratings are trustworthy and free from manipulation. If a »systemic trust« in the functioning of the reputation system is lacking, the entire business model of the online platform is in danger. From this perspective, one might assume that the platform operator has a sufficiently strong incentive to ensure the integrity of the reputation system. As a consequence, there would be no need for regulation. It is doubtful, however, that there is a full overlap between the interest of platform users and the interest of the platform operator with regard to the design of the reputation system. Such an overlap can only be

works as Connected Contracts, Oxford 2011; for a critical view see Grundmann, Die Dogmatik der Vertragsnetze, AcP 207 (2007), 718.
assumed in so far as a totally dysfunctional reputation system would endanger the business model of the platform. In contrast, minor manipulations or certain systemic biases could be acceptable or even desirable from a platform operator’s point of view, if they exaggerate (just a little bit) the overall quality of suppliers on the platform. Hence, it seems overly optimistic to assume that reputation systems could render traditional instruments of consumer protection, such as pre-contractual information duties, superfluous. User reviews can only provide information about such product qualities that can be observed by customers (i.e. experience qualities such as the cleanliness of an Uber car or the driver’s driving style), but not about those which are unobservable (i.e. credence qualities such as the observance of maintenance intervals or the condition of the brakes). Within these limits, a well-functioning reputation system can contribute to the development of generalized trust among users of online platforms and complement existing tools for enhancing consumer confidence.

Against this background, Art. 8 of the Discussion Draft lays down a general transparency rule and additional substantive requirements for reputation systems. Article 8(1) stipulates a general information duty and requires operators of reputation systems to provide information about the three levels of the system: collection, processing and publication of ratings and reviews. Considering the broad variety of different reputation systems, the provision refrains from setting out in more detail which information has to be provided (e.g. about filtering algorithms). In applying the provision, courts will have to strike a balance between the legitimate interest of platform operators to protect their trade secrets and the users’ interest in establishing a reasonable level of algorithmic transparency.

51 Cf. German Monopolies Commission, Biennial Report XXI, 2016, para. 1202; on the importance of the distinction between search, experience and credence qualities for the design of pre-contractual information duties see Busch, Informationspflichten im Wettbewerbs- und Vertragsrecht, 2008, 44 et seq.
53 Cf. Kammergericht, 10 December 2015, MMR 2016, 352 und Oberlandesgericht Hamburg, 10 November 2015, MMR 2016, 355 (regarding the filter algorithm of the review platform Yelp); see also Büscher, Soziale Medien, Bewertungsplattfor-
ii) Standardisation and presumptions of conformity

Article 8(2) of the Discussion Draft contains a general clause which sets out the general standard of »professional diligence«. The notion of »professional diligence« has been borrowed from Art. 2(h) of Directive 2005/29/EC. The terminological coherence with the Unfair Commercial Practices Directive underlines that Art. 8 of the Discussion Draft has been drafted with the intention to complement and flesh out the general requirements for reputation systems under the existing European unfair commercial practices law.  

Article 8(3) of the Draft contains two presumptions of conformity which complement the general clause set out in Art. 8(2). According to Art. 8(3)(a) any reputation system which complies with a harmonized European standard elaborated under the auspices of the European Committee for Standardization (CEN) is presumed to comply with the requirements of professional diligence. The application of such a European standard would of course remain voluntary for platform providers. For those businesses which prefer to use a reputation system that deviates from the harmonized European standard, Art. 8(3)(b) offers a second presumption of conformity. According to that provision, the reputation system is presumed to be in conformity with Art. 8(2) if it complies with the »essential requirements« set out in Art. 8(4) of the Discussion Draft.

Article 8(3) draws inspiration from a model of co-regulation which has been used for a long time in the area of product safety. Under the so-called »New Approach« to harmonisation introduced in the 1980s, directives have been limited to the setting of »essential requirements« while technical details are left to standards elaborated by the European Standardization Bodies (CEN, CENELEC, ETSI). The link between the directive and the standards is created via a presumption of conformity. Products that comply with the (voluntary) harmonized standards are presumed to be in conformity with the directive.
conformity with the requirements of the essential health and safety requirements of the corresponding directive. The Discussion Draft makes the proposal to transfer this regulatory approach to the area of services.\textsuperscript{56} In this model the harmonized standards for digital services elaborated under the auspices of the European Committee for Standardisation (CEN) facilitate the application and interpretation of EU law and provide consumers and businesses with a higher degree of legal certainty. A future European standard on ratings and reviews could take inspiration from the French\textit{ AFNOR} Standard NF Z 74-501 which currently serves as a model for the elaboration of a global standard for online reputation systems under the auspices of the\textit{ International Organisation for Standardization} (ISO DIS 20488). Such a co-regulation approach based on standardization seems particularly appropriate for digital platforms as it combines legal and technical requirements.\textsuperscript{57}

Article 8(4) of the Discussion Draft addresses several design features of reputation systems and contains a list of »essential requirements« for the collection, processing and publication of ratings and reviews. It goes without saying that a harmonized European standard would also have to be in conformity with these requirements. The list is based on a compara-


\textsuperscript{57} See e.g. the Guidelines for Online Reviews and Endorsements (2016) of the International Consumer Protection and Enforcement Network (ICPEN); see also Danish Consumer Ombudsman, Guidelines on publication of user reviews (2015); Norwegian Consumer Ombudsman, Guidelines User Reviews in Marketing (2017); Dutch Autoriteit Consument & Markt, Richtlijnien online reviews (2017) as well as the French\textit{ AFNOR} Standard Avis en ligne de consommateurs – Principes et exigences portant sur les processus de collecte, moderation et restitution des avis en ligne de consommateurs, NF Z 74-501 (2013); see also the Key principles for comparison tools (2012), elaborated by a multistakeholder group on behalf of the European Commission.
iii) Portability of reputational data

Article 8(5) of the Discussion Draft introduces a special right to data portability for reputational data. The provision takes into account that positive ratings and reviews accumulated by platform users can be considered as a kind of »reputational capital«. If a user who wants to leave one platform in order to join a competing platform would be prohibited from transferring the reputational data, this could create lock-in effects with negative consequences for competition among platforms.59 Article 8(5) of the provision is modelled on Article 20(1) of the EU General Data Protection Regulation (GDPR), which also stipulates a right to data portability. However, Art. 20(1) GDPR only applies to data which the data subject has provided to the data controller.60 Therefore, it does not cover ratings and reviews which have been uploaded by third parties. The same is true for the rules on data portability in the proposal for a Directive on digital content (DCD Proposal).61 Art. 13(2)(c) and Art. 16(4)(b) of the DCD Proposal only apply to »content provided by the consumer and any other data produced or generated through the consumer’s use of the digital content«. It would probably overstretch the wording of these provisions if one would consider reviews posted by third parties as »data generated through the consumer’s

58 See in particular set of Guidelines for Online Reviews and Endorsements (June 2016) elaborated by the International Consumer Protection and Enforcement Network (ICPEN); see also Danish Consumer Ombudsman, Guidelines on publication of user reviews (May 2015); Norwegian Consumer Ombudsman, Guidelines User Reviews in Marketing (January 2017); Dutch Autoriteit Consument & Markt, Richtlijnen online reviews (May 2017) and the French Standard Avis en ligne de consommateurs – Principes et exigencies portant sur les processus de collecte, moderation et restitution des avis en ligne de consommateurs (NF Z 74-501) published by AFNOR in 2013; see also the Key principles for comparison tools, which have been elaborated by a multi-stakeholder group launched by the European Commission in 2012.


60 See also Article 29 Data Protection Working Party, Guidelines on the right to data portability, as last revised and adopted on 5 April 2017, WP 242 rev.01, which does not address any issues relating to reputational data.

use of the digital content«. In any case, the personal scope of the portability rules in the GDPR and the DCD Proposal is too narrow. Article 20(1) GDPR only applies to natural persons while the DCD Proposal is limited to consumers as defined in Art. 2(4) DCD Proposal. However, from a competition law perspective, a need for the portability of reputational data also exists if such data relates to a legal person (e.g. a corporation operating a hotel). It goes without saying that the portability of reputational data raises a number of legal and technical questions that require further research, e.g. the ownership of reputational data, issues of data protection, third party rights and the interoperability of reputation systems, which cannot be discussed here in detail. The ELI Working group will certainly address these issues over the next months and further refine the provision on data portability until the final draft of the ELI model rules on online intermediary platforms will be presented to the public at the ELI annual conference in the autumn of 2019.

IV. Conclusion

Against the background of the recent developments on the digital markets and the regulatory initiatives taken by some member states, the work of the Research Group on the Law of Digital Services and its continuation by the ELI Working Group on Online Intermediary Platforms meant to provide a contribution to the debate about the future design of the regulatory framework for the platform economy. In order to understand the particular purpose of the academic proposal, it might be helpful to quote a paragraph from the Explanatory Memorandum which accompanies the Discussion Draft for a Directive on Online Intermediary Platforms: «Whether the current changes in the digital single market justify any regulatory action is an open question. The researchers involved in the elaboration of the Discussion Draft have different opinions with regard to this question and how to strike the right balance between consumer protection, market freedom and innovation. However, they share the view that the debate, which has so far been conducted on a rather abstract level, may benefit from a »visualisation« that provides a clearer picture how a concrete regulatory instrument – if necessary – might look like. In this sense, the text presented here is

62 See also Janal in this volume.
not meant as a plea for regulation, but rather as an instrument that could give a new »focal point’ to the debate on the platform economy. «⁶³ At least to a certain degree, this purpose seems to have been fulfilled, as the comments on the Discussion Draft – whether critical or praiseful – in the recent literature on online platforms show.⁶⁴
