Online Marketplaces in the Digital Services Act

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Abstract The developments in the DSA regarding provisions on online platforms that allow consumers to conclude distance contracts with traders (B2C) are to be welcomed. Nevertheless, Art. 6.3 DSA deals with liability exemptions and it is up to the Member States to decide when and under what conditions non-neutral platforms (those that have control or create the appearance of being the provider of the underliying service) should be liable for the seller's non-performance. The following pages provide a comparison between the legislation and case law in Portugal and Spain, showing to what extent or under what circumstances these Member States acknowledge the contractual liability of a third party not involved in the contract between the trader and the consumer.

1 Introduction

Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022, on a Single Market for Digital Services,[1] deals with the protection of citizens' fundamental rights in the online platform environment, and also addresses consumer protection issues in Art. 6.3 (online marketplace safe harbours), Art. 14 (transparency of contractual clauses), and Section 4 of Chapter III, Arts 30 ff. (Schulte-Nölke 2023, pp. 705–714).

[1] OJ L 277, of 27 October 2022.

The text of the lecture delivered on 16 April 2023 at the Universidade do Porto is reproduced here, with only a few essential footnotes. This contribution is based on the author's article "Consumer Protection in Online Marketplaces", previously published in Rev. Fac. Direito UFMG, Belo Horizonte, 2024, 83, 183–195 and falls within the scope of the R+D+I Project PID2024-157907NB-I00 funded by MICIN/AEI/https://doi.org/10.13039/501100001033 and ERDF 'A Way of Making Europe'.

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G. Enes et al. (eds.), *A Digital Europe for Citizens*,
https://doi.org/10.1007/978-3-032-02500-5_9

In this paper, I am mainly interested in focusing on Art. 6.3 DSA. The aim of this rule is to provide protection to consumers in the event that the seller using the platform to provide its services breaches the contract with the consumer, as long as certain requirements are met. The following pages will analyze whether or not the rule does indeed fulfil this goal.

2 Online Trading and Intermediation Platforms

For the analysis of Art. 6.3 DSA, it is essential to establish the role played by the intermediary and the consequences linked to its involvement in the contract's conclusion.

2.1 Control and Appearance Are Indications of Non-neutrality

When examining the role of collaborative platforms, the European Commission considered certain criteria that could provide insight into the role played by the platform. The Commission considered that some elements could indicate that the platform had a high level of control and influence over the provision of the underlying service and, therefore, that this could suggest that it also performed the underlying service in addition to providing an information society service. For example, if the platform established the price, set mandatory instructions on the underlying service, put the service provider in an employment relationship, owned key assets to perform the activity, or bore the costs and assumed all the risks associated with the supply of the underlying service.[2]

According to this approach, the CJEU held that Uber was a transport undertaking and not merely an intermediary providing information society services.[3] By contrast, the CJEU admitted that in the ancillary services offered by Airbnb (receipt of payment, assessment of the service, damage guarantee and, optionally, liability insurance), it is not possible to appreciate the same level of control as in Uber.[4] Airbnb does not directly or indirectly set the rental price, nor does it select the tenants or the

[2] COM (2016) 356 final, p. 6–7.

[3] CJEU C-434/15, of 20 December 2017, *Asociación Profesional Élite Taxi* (EU:C:2017:981), paras 39–40; CJEU C-320/16, of 10 April 2018, *Uber France* (EU:C:2018:221), paras 20–26.

[4] CJEU C-390/18, of 19 December 2019, *Airbnb Ireland* (EU:C:2019:1112), paras 56–64. Shortly before, the STJ Catalunya of 13 December 2019 (ES: TSJCAT:2019:8266) similarly did not deny Airbnb's role as an intermediary, but held that it was responsible because it could identify which housing should be offered as tourist accommodation (only those that were registered). On Homeaway (now Vrbo España), on the other hand, see STS 30 December 2020 (ES:TS:2020:4484), against STJ Catalunya of 5 October 2018 (with criticism, Álvarez Moreno, Mª Teresa, *La contratación electrónica mediante plataformas en línea*, Madrid, Reus, 2021, pp. 256–263) and, more recently, STS

accommodations offered on the platform (de Miguel Asensio 2022, p. 3).[5] Therefore, the higher the level of control and organisation in the selection of content providers or the way in which content services are delivered (e.g. if intermediary service providers verify quality and/or set the price), the more obvious it becomes that the platform itself may also be considered as a content provider and/or does not deserve to qualify as an information society service provider.[6]

However, another way of looking at things is to understand that the intermediary does not lose that role, even though it is clear that "intermediation + control" is something fundamentally different from "mere intermediation" (Hacker 2018, pp. 85–86, 93; Busch 2021, p. 38). Thus, the lack of neutrality is a criterion for attributing liability to the platform, which is something that US courts have also had occasion to affirm in the context of product liability (Podszun and Offergeld 2022, pp. 244–271; García-Micó 2022, pp. 6–12; Fernández Chacón 2022, pp. 711–718).

There is another element to be considered when analysing the role of the intermediary, which was initially pointed out by Advocate General Spuznar. The AG considered not only the functions or services provided by the platform, but also the appearance with which users perceived that rendering of services. As he stated:

> "[...] Uber's activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and [...] this service is provided, from an economic standpoint, by Uber or on its behalf. The service is *also presented to users, and perceived by them, in that way*. When users decide to use Uber's services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by Uber".[7]

Previously, the CJEU C-149/15, of 9 November 2016, *Wathelet*, had already ruled, in a case that had nothing to do with marketplaces, that the consumer must be protected by the rules of consumer law when it is not disclosed to them that the other party is acting on behalf of a natural person who does not have the status of a trader but appears to be acting as such. According to the judgment, the protection of appearance is crucial when the buyer believes that the seller is a trader, because there

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07 January 2002 (ES:TS:2022:6). On the housing portal *El Idealista*, see Juzgado de lo Contencioso-administrativo n° 1 de Barcelona, judgment of 11 October 2022 (La Ley 236,209/2022). On the role of platforms in short-term accommodation rental services, see now Proposal for a Regulation COM(2022) 571 final, Brussels, 7 November 2022.

[5] CJEU C-390/18, of 19 December 2019, *Airbnb Ireland* (EU:C:2019:1112), paras 66–68. For the transport sector, see CJEU C-62/19, of 3 December 2020, *Star Taxi App* (EU:C:2020:980), para 55, which holds that the platform operator does not select taxi drivers, nor does it fix or charge the price of the journey, nor does it exercise control over the quality of the vehicles or their drivers, nor over the behaviour of the latter. It follows that such a service cannot be considered as part of an overall service whose main element is the provision of transport. However, if this were the case, the intermediation service would still be subject to the rules of the DSA, in accordance with Recital 6 and Art. 2.2.

[6] SWD(2020) 348 final. Part 2/2, pp. 160–161.

[7] Opinion of Advocate Szpunar delivered on 11 May 2017, in Case C-434/15, *Asociación Profesional Élite Taxi*, (EU:C:2017:364), para 53.

is nothing that suggest that she/he is acting on behalf of another consumer.[8] If the reasoning of that judgment is extended to platforms, what would matter is how the platform presents itself to the buyer. In other words, despite the fact that the platform is not an agent of the trader or seller, as was the case in the latter judgment, the allocation of liability to the platform for the trader's breach of contract would result from the fact that it created the impression for the consumer that the contract was concluded with the platform and that it was the platform's responsibility to perform the contract.

2.2 A Soft Law *Model of Liability*

Building on these reflections, a group of academics, under the auspices of the European Law Institute (ELI), drafted model rules (Busch et al. 2020), which, taking up the ideas set out above, provided some examples to determine when the platform can be understood to have influence or control over the service provider (over the seller or trader) and what consequences should flow from the fact that the platforms display the information relating to the transaction in a way that suggests to consumers that it is the platforms or traders acting under their authority or control who are providing such information (Podszun and Offergeld 2022, pp. 259–263). These soft law provisions clearly call for liability to be imposed on the platform for the trader's breach, as long as the platform breaches its duty to disclose its role as a mere intermediary, or induces the consumer to reasonably rely on its predominant influence over the trader, without prejudice to the right of redress or recourse against the actual breaching party. Of course, in parallel, the platform may also be liable for damages if it provides misleading information, and in particular for breach of the duty to inform the consumer whether the supplier offers its goods, services or digital content as a trader, or of the duty to warn the consumer that consumer law does not apply to the contract between supplier and customer, where this is the case.[9]

[8] CJEU C-149/15, of 9 November 2019, *Wathelet* (EU:C:2016:840). On the possible extension of this judgment to platforms, see Communication from the Commission: Guidelines on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (OJ C, 525, 29 December 2021), pp. 27–28.

[9] See in particular Art. 13–14, 19–24, 25 ELI Model Rules.

3 Intermediation Platforms that Allow Consumers to Conclude Distance Contracts in the Digital Services Act

Art. 6.3 DSA is a rule specifically aimed at platforms acting as online marketplaces, which the provision defines as the intermediation service between a trader and a consumer for the conclusion of a contract. Only contracts between traders and consumers (B2C) are covered, so contracts between peers (B2B or C2C) are excluded.

3.1 What Art. 6.3 DSA Says

According to Art. 6.3 DSA, online marketplaces should not enjoy the safe harbour privilege where they present the specific piece of information or otherwise enable the specific transaction in question in a way that would lead a consumer to believe that the information, or the product or service which is the subject of the transaction, is provided by the online platform itself or by a recipient of the service acting under its control. It should be determined objectively, on the basis of all relevant circumstances, whether the presentation could lead an average consumer to believe that the information in question was provided by the online platform itself or by traders acting under its authority or control (Fernández Chacón 2022, pp. 737–742; Cauffmann and Goanta 2021, p. 9).[10]

This is a well-intentioned rule which, however, surely does not provide sufficient protection for consumers. Firstly, the criterion of the "average consumer" refers to one who is reasonably well-informed and reasonably observant, which opens the door to legal uncertainty and discussions on how the scenario should be interpreted. Secondly, the rule is vague, as will be explained below.

3.2 What Art. 6.3 DSA Does not Say

What does it mean to act under the authority or control of the platform? Only the Recitals of the Regulation can help to understand the undefined wording of Art. 6.3 DSA. Thus, Recital 23 refers to the fixing of the price of the goods or services offered by the provider, as a sign of the platform's predominant influence over the essential elements of the economic transactions. Moreover, Recital 24 describes other significant behaviours that may lead consumers to make erroneous assumptions about the identity of the supplier: failure to clearly display the identity of the trader

[10] Recital 24 DSA.

(Fernández Chacón 2022, pp. 683–690),[11] withholding the identity or contact details of the trader until after the conclusion of the contract between the trader and the consumer,[12] or marketing the product or service in the platform's own name.[13]

3.3 Provisional Assessment

An initial assessment of Art. 6.3 DSA requires considering that such platforms retain their status as intermediaries, even though they do not perform a "mere or simple" intermediary function. A distinction can thus be made between platforms providing goods and services which act as a contractual party in the sense of Recital 18 DCD;[14] other platforms which are mere intermediaries, not involved in the contractual relationship between customer and supplier; and finally, intermediary platforms which also have control of the underlying service (Díez Soto 2023, pp. 203–206, p. 210; Guimarães 2023, pp. 474 ff). The latter two categories of platforms are covered by the DSA.

Indeed, according to Art. 2.2 DSA, the DSA is only aimed at platforms acting as intermediaries. This also means that even if the intermediation service provided is part of an overall service whose main element is not remote (e.g. transport), the intermediation service is still subject to the rules of the DSA (Art. 2.2 and Recital 6 DSA). This changes the previous orientation of European case law.

Additionally, the DSA breaks with the idea that an active role of the platform amounts to having control of the contents or that it amounts to a presumption of knowledge of wrongdoing. Recital 18 still refers to services playing an active role, but this concept is rather built on notions such as "editorial functions", "knowledge"

[11] See Communication from the Commission: Guidance on the interpretation and implementation of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ C 526, 29 December 2021), p. 89: "In fact, if the failure by the marketplace to inform about the identity of the actual trader creates the impression that the marketplace is the actual trader, this may result in it being liable for the obligations of the trader". Regarding the obligation to display such information, see Art. 30.1 DSA and Art. 3.4 (a) (ii) and Art. 4.5 of Directive (EU) 2019/2161, of 27 November 2019, on modernisation of Union consumer protection rules (OJ L 328, 18 December 2019) inserting a new Art. 7.4 (f) in Directive 2005/29/EC and a new Art. 6a in Directive 2011/83, of 25 October 2011, on consumer rights, respectively. See also Art. 30.7 DSA and Art. 3.5 of Regulation (EU) 2019/1150, of 20 June 2019, on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11 July 2019) in relation to the visibility of the identity of the professional user offering goods or services.

[12] Art. 20.2 (b) ELI Model Rules.

[13] Art. 20.2 (f) ELI Model Rules.

[14] Directive (EU) 2019/770 of the European Parliament and of the Council, of 20 May 2019, on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22 May 2019).

and "(intellectual) control".[15] What is important in the context of online markets is to analyse the way in which platforms design their information society services in order to find out whether they actually act as true hosting intermediaries. It is indeed generally the case that the role of platforms today always involves some degree of activity, either by optimising the presentation of user content, promoting it, tagging or indexing it, or providing search functionality, among other activities. Therefore, if "control" is to be identified with an active role of the platform, it must refer to intellectual control of the activity (Wimmers 2021, p. 384).[16] and, additionally, the relevant indicators must be established to define when platforms are to be understood as having control over and participating in the underlying business. The problem is that there is a lack of clear indicators in the DSA. As mentioned above, Recitals 23 and 24 provide some clues, but they are not enough and it is not certain that a single parameter is sufficient to interpret that the platform plays a role that goes beyond mere or simple intermediation.

4 The Effect of the Safe Harbour on Platforms that Do not Act as Simple Intermediaries

What happens when a platform is not simply an intermediary, but also has control and/or otherwise gives the consumer the impression that it is the other party to the contract? At this point it is necessary to refer to another novelty of the DSA, which consists of maintaining the safe harbours, previously regulated in Directive 2000/31, of 8 June 2000, on electronic commerce,[17] in exchange for imposing duties of care on intermediary companies (regardless of whether or not they qualify as platforms). The DSA establishes a scenario with differentiated duties of care, tailored to the nature and size of intermediary undertakings, including hosting businesses and content distribution platforms and search engines, with a particular focus on very large platforms and search engines (Díez Soto 2023, pp. 159–220; Arroyo Amayuelas 2025, pp. 716 ff).

The DSA continues to focus the exemption from liability on the concept of illegality (of content, products, services, activities), which must be defined in accordance with European law or national law in accordance with European law [Art. 3 (h) DSA]. The concept refers to what, under the applicable law, is illegal in itself or is related to activities that are illegal. Recital 12 provides illustrative examples, which broadly reflect existing rules in the offline environment.

[15] Significantly, CJEU C-682/18, of 22 June 2021, *Frank Peterson/YouTube* and C-683/18, *Elsevier/Cyando* (ECLI:EU:C:2020:586), paras 79–80, 105–106, 108, 114–115, 117, has ruled that an active role of the provider amounts to control of the activity or a presumption of knowledge of the activity.

[16] Opinion AG Saugmandsgaard Øe of 16 July 2020, delivered in C-682/18, *Frank Peterson/Youtube* and C-683/18 (*Elsevier/Cyando*) (ECLI: EU:C:2020:586), para 152.

[17] OJ L 178, 17 July 2000.

Once the safe harbour no longer applies, the intermediary is only liable for the infringement if the conditions laid down in the respective Member State for doing so are fulfilled. Therefore, not being exempted from liability (under EU law) does not imply a correlative and automatic imposition of liability (under national law). It is the case, however, that the loss of immunity can be considered as an indication from which it might be to deduced that the provider was aware of or contributed in some way to the wrongful act or the infringement, which is, at the same time, an indication that due diligence was not exercised, and therefore an element that would allow liability to be charged on this ground (Arroyo Amayuelas 2020, pp. 809–810).

It can be assumed that in all cases where the intermediary should have had knowledge that the content it hosts is illegal, but does not obtain such knowledge because it breaches certain duties of care, e.g. does not establish contact points, does not have a mechanism for notice and action, or does not clearly explain how the notification should be made, the benefit of the exemption from liability should be lost (De Miguel Asensio 2022, p. 16). However, Recital 44 states that the due diligence obligations are independent of the question of the exemption of intermediary service providers from liability. It would seem, on the contrary, that Art. 6.3 DSA starts from precisely the opposite premise, i.e. that the exemption from liability does not apply when the platform infringes certain duties of care, such as the duty to inform about the trader (Art. 30.1 DSA), notwithstanding the fact that, in addition, the infringement of this duty entails liability ex Art. 54 DSA.

It does not seem appropriate to rely on the loss of the safe harbour to hold platforms liable when they fail to fulfil duties for which they themselves are solely responsible. Indeed, platforms are liable for non-performance of ancillary services they may offer (e.g. car rental insurance or airport transfer to hotels) and/or for breach of their own duties of transparency, e.g. by providing misleading information or otherwise failing to comply with their information duties under national and EU law.[18] Liability also arises for breach of obligations relating to the contract that have been shared with the online marketplace provider.[19] The safe harbour is only intended to exempt intermediaries from liability for illegal content/infringing conduct of third parties (Schulte-Nölke 2023, pp. 705–714). When the platforms breach their own duties the

[18] Art. 6 and 7 of Directive 2005/29, and Art. 3.7 of Directive (EU) 2019/2161 on modernisation of Union consumer protection rules, amending Annex I of Directive 2005/29. See Guidance on the interpretation and implementation of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ C 526, 29 December 2021), pp. 87–89.

[19] According to Art. 6a of Directive 2011/83, as amended by Art. 4.5 of Directive (EU) 2019/2161 on modernisation of Union consumer protection rules, obligations related to the contract can be shared between the third party offering the goods, services or digital content and the online marketplace provider. As per CJEU C-536/20, of 24 February 2022, *Tiketa* (ECLI:EU:C:2022:112), para 53, the information referred to in Art. 6.1 of Directive 2011/83 can only be provided to the consumer, prior to the conclusion of the contract, in the general conditions for the provision of services on the intermediary's website, which that consumer actively accepts by ticking the box provided for that purpose, provided that such information is brought to the consumer's attention in a clear and comprehensible manner.

liability for this is direct and cannot be derived from the fact that a safe harbour (that applies in different scenarios) has been lost.

But what about otherwise? It is up to the Member States to decide when and under what conditions non-neutral platforms (those that have control or create the appearance of being the provider) should be liable for the seller's non-performance of its duties. Art. 6.3 DSA merely states that they will not enjoy the (conditional) exemption from liability that other platforms (hosting intermediaries in general) can benefit from for infringements committed by third parties using their services.

5 Which Liability for Intermediation Platforms?

5.1 On the Identification of the Seller

The DSA seeks to ensure that traders improve compliance with consumer legislation. Thus, the marketplaces referred to in Chapter II, Section 4 (excluding micro or small enterprises) must ensure that the trader offers products that comply with applicable EU consumer law and product safety legislation, although for this purpose self-certification by the trader her/himself is sufficient [Art. 30.1 (e) DSA], who is solely responsible for the information s/he provides, without detriment to the platforms making every effort to assess whether this information is reliable, complete and accurate (Art. 30.2 DSA).[20] Indeed, imposing a duty on the platform to provide information on the trader, as well as ensuring that the design of the online interface facilitates this (Art. 31 DSA), aims to make it clear with whom the consumer is contracting, to ensure traceability and/or to suspend the provision of their service to certain traders who do not comply with the request to provide reliable, complete and up-to-date information (Art. 30.3, 31.3 DSA).

However, the duty to require this prior identification or information is of limited use to consumers if it turns out that they cannot sue traders, for example, because they live in another country or because they are not creditworthy. In addition, platforms

[20] See Regulation (EU) 2023/988 of the European Parliament and of the Council of 10 May 2023 on general product safety (OJ L 135, 23 May 2023), Recital 58: "Building on the provisions of Regulation (EU) 2022/2065 concerning the traceability of traders, providers of online marketplaces should not allow a specific product offer to be listed on their platforms unless the trader has provided all information related to product safety and traceability as specified in this Regulation. Such information should be displayed together with the product listing so that consumers can benefit from the same information made available online and offline. However, providers of online marketplaces should not be responsible for verifying the completeness, correctness and the accuracy of the information itself, as the obligation to ensure the traceability of products lies with the relevant trader". On traceability of products, the obligations of economic operators in case of distance selling and, specifically, the obligations of online marketplace providers related to product safety, see Art. 18, 19 and 22 of Regulation 2023/988. In particular, Art. 20.10 (b) stresses that it is the self-certification of traders that commits them to offer only products that comply with the provisions of the Regulation 2023/988 and additional identification information, in accordance with Art. 30.1 DSA.

are only required to check randomly whether products offered by third parties have been identified as illegal (Art. 31.3 DSA). Art. 32 DSA is particularly noteworthy in the sense that, while it obliges the platform to explain to the consumers concerned—or publicly in the online interface—that it has identified the illegality of the goods or services offered through its services, this duty is limited to transactions made within the last six months from the moment the platform becomes aware of such illegality. The platform is not liable for having made the illicit behaviour possible; it must simply warn deceived consumers of the identity of the trader and of the remedies available to them against the latter.

5.2 On the Seller's Breach of Contract

5.2.1 The Portuguese Example

Portugal is the only country, to my knowledge, that has addressed the liability of non-neutral platforms in accordance with the proposed ELI Model Rules on Online Platforms (Morais Carvalho 2023, pp. 541–542). Thus, if the requirements foreseen in art. 44 Decreto-Lei n. 84/2021 are met, online marketplaces are jointly and severally liable with traders for non-compliance:

1. The online marketplace provider who, acting for purposes related to her/his activity, is a contractual partner of the professional who makes the digital good, content or service available is jointly and severally liable to the consumer for the latter's lack of conformity under the terms of this decree-law.
2. For the purposes of the provisions of the previous paragraph, the online marketplace provider shall be considered the contractual partner of the professional if he exercises a predominant influence on the conclusion of the contract, which shall be the case in the following cases:
   a) The contract is concluded exclusively through the means made available by the online marketplace provider;
   b) the payment is executed exclusively through the means made available by the online marketplace provider; or
   c) the terms of the contract concluded with the consumer are mainly determined by the Online Marketplace Provider or the price to be paid by the consumer may be influenced by the Online Marketplace Provider; or
   d) the associated advertising is focused on the Online Marketplace Provider and not on professionals.
3. Without prejudice to the provisions of the previous paragraph, for the purposes of assessing the existence of dominant influence in the conclusion of the contract, any facts which may give rise to the consumer's confidence that the online marketplace provider exercises a dominant influence over the professional supplying the digital good, content or service may be considered.

5.2.2 And in Spain?

The platform's liability for breach of a contract that it has not entered into and from which no obligation arises for it is a complex issue. Certainly, assigning liability to it is contrary to the principle of the relativity of contracts, and yet, if the European legislator decided to do so, it would not be the first time that this would have happened (Díez Soto 2023, pp. 211 ff; Podszun and Offergeld 2022, p. 261; Martínez Espín 2023, pp. 473–474).[21] Without referring specifically to platforms, the Consumer Code in Catalonia had already provided (not necessarily in a representative action scenario), for the joint and several liability of the traders and the intermediary who offers goods or services to consumers (Art. 231–1, Art. 231–5.2), for the breaches of the latter, though the consequences are not limited to private law. According to this rule, the trader is also liable to the consumer for breaches of duties that are only incumbent on the intermediary with whom he has a contractual relationship. This is not what is being discussed here, but the example illustrates well how relative the very relativity of contracts ends up being when the legislator imposes it for the sake of greater consumer protection.

It is reasonable to impose liability on platforms, at the very least if they are not neutral and play a role of predominant control, if one considers that they do not merely facilitate transactions but, beyond that, have the power to transform market relations and to influence the contract between their users (Arroyo Amayuelas 2023, pp. 545–547). There is an economic link between contracts concluded on and with platforms that should also be considered. Moreover, if the consumer enters into a contract with the supplier of goods and services through the platform, it is precisely because of the trust that the platform merits. In Spain, the confidence or good faith placed in third parties is an argument that has been particularly considered in the *Dieselgate* judgments. The Spanish Supreme Court Judgement of 11th March 2020 allows the consumer to claim damages from the manufacturer, on the understanding that this is a basic consumer right that could be frustrated by the difficulty in claiming damages from a seller who could be insolvent, or which could be affected in the event that the seller was in good faith and, on the other hand, the manufacturer was fraudulent (art. 1107 CC). Thus, if the car does not meet the characteristics with which it was offered, with respect to the ultimate consumer, there is not only a breach by the seller, but also by the manufacturer who placed it on the market and advertised it; the damage suffered by the buyer corresponds directly to the breach attributed to the manufacturer. Therefore, if such a direct action is possible against the manufacturer, with a scope that goes beyond the provisions of art. 125 TR-LGDCU, why should it be ruled out that this same (contractual) action could be brought against the platform, when it is the platform that, in the end, creates the risk of contracting with it? These risks—when they exist—should be borne by them, jointly and severally with the seller, without prejudice to the actions that they could

[21] See Recital 46 and Art. 13, 23 of Directive (EU) 2015/2302, of 23 April 2008, on package travel and linked travel arrangements (OJ L 326, 11 December 2015).

later bring against the latter, given that the platform is in the best position to hold the defaulting supplier liable (Cauffmann and Goanta 2021, p. 10).[22]

Therefore, it is reasonable that such platforms are contractually liable, not only for the breach of the duties incumbent on them—because they have so assumed in the contract with the seller or because professional diligence so requires—but also when the third party, i.e. the seller (who fails to supply, supplies late, or supplies improperly), is in breach of its obligations. In Spain, until now, platforms have been held jointly and severally liable only when they could be understood to have implicitly taken on the role of guarantor with respect to the suppliers' fulfilment of their contractual obligations, for example, by providing misleading information about the quality standards of the underlying service. In particular, this is the view of the SAP Cuenca of 8 May 2018 (Álvarez Moreno 2021, pp. 208–210). Nevertheless, some of the reasoning in this judgement is not consistent, since it cannot be said that the platform should have informed the consumer that the service provider was not legal, and/or neither did it have the required liability or accident insurance. If the platform had been aware of this situation, the liability would not derive from the lack of information in this respect, but from the failure to immediately withdraw the offer of the hosted services.

6 Conclusions

The new features of the DSA regarding the liability of certain platforms that allow online contracts to be concluded with consumers are to be welcomed. However, the regulation is still too dependent on how Member States decide to impose such liability in their domestic legislation. It is necessary to be very expectant of the evolution, in particular, of the Portuguese regime and, in other countries, to wait until the legislator undertakes a reform of domestic legislation, waiting for national jurisprudence to lead the way, as has already happened in other areas in which there has been no hesitation in recognising the contractual liability of a third party not involved in the contract.

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[22] See European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (Section VI); Draft IMCO I report (2020/0361 (COD)). Amendment 73 with a proposal for a new Art. 5 (a).

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