



ELI
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ELI Webinar

ELI at 10: EU Platform Regulation Beyond the Digital Services Act Package: What is the Role of ELI?

8 June 2021, 18:30–19:45 (CET)



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European Legal Studies Institute, Osnabrück

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Agenda

- The DSA package and ELI's work on platforms
- Platform regulation beyond the DSA package
- ELI's future role in the policy debate

Model Rules on Online Platforms

Report of the European Law Institute

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European Parliament Resolution 2020/2018(INI), 20 October 2020

The DSA should „address the **liability of online marketplaces** when those platforms have **predominant influence** over suppliers and essential elements of economic transactions, such as payment means, prices, default terms conditions, or conduct aimed at facilitating the sale of goods to a consumer in the Union market, and there is no manufacturer, importer, or distributor established in the Union that can be held liable.“

Art. 20(1) ELI Model Rules on Online Platforms

„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.“



Art. 5(3) DSA

Paragraph 1 shall not apply with respect to **liability** under consumer protection law of online platforms allowing 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 and reasonably well-informed consumer** to believe that the information, or the product or services that is the object of the transaction, is provided either by the online platform itself or by a recipient who is acting **under its authority or control**.

Art. 20(1) ELI Model Rules on Online Platforms

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2020/0361(COD)

28.5.2021

***I

DRAFT REPORT

on the 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)0825 – C9-0418/2020 – 2020/0361(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Christel Schaldemose

Rapporteurs for the opinion (*):
Henna Virkkunen, Committee on Industry, Research and Energy
Geoffroy Didier, Committee on Legal Affairs
Patrick Breyer, Committee on Civil Liberties, Justice and Home Affairs

(*) Associated committees – Rule 57 of the Rules of Procedure

PR\1232421EN.docx

PE693.594v01-00

EN

United in diversity

EN

Amendment 73 – Art. 5a (new)

*3. For the assessment of whether the online platform has that **control** or authority or **decisive influence** over the trader, relevant criteria shall include:*

- a) the trader-consumer contract is concluded exclusively through facilities provided on the platform;*
- b) the online platform operator withholds the identity of the trader or contact details until after the conclusion of the trader-consumer contract;*
- c) the online platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the consumer to the trader;*
- d) the terms of the trader-consumer contract are essentially determined by the online platform operator;*
- e) the price to be paid by the consumer is set by the online platform operator;*
- f) the online platform is marketing the product or service in its own name rather than using the name of the trader who will supply it;*

Amendment 73 – Art. 5a (new)

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- c) the online platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the consumer to the trader;*
- d) the terms of the trader-consumer contract are essentially determined by the online platform operator;*
- e) the price to be paid by the consumer is set by the online platform operator;*
- f) the online platform is marketing the product or service in its own name rather than using the name of the trader who will supply it;*

Art. 20(2) ELI Model Rules on Online Platforms

When assessing whether the customer can reasonably rely on the platform operator's **predominant influence** over the supplier, the following criteria may be considered in particular:

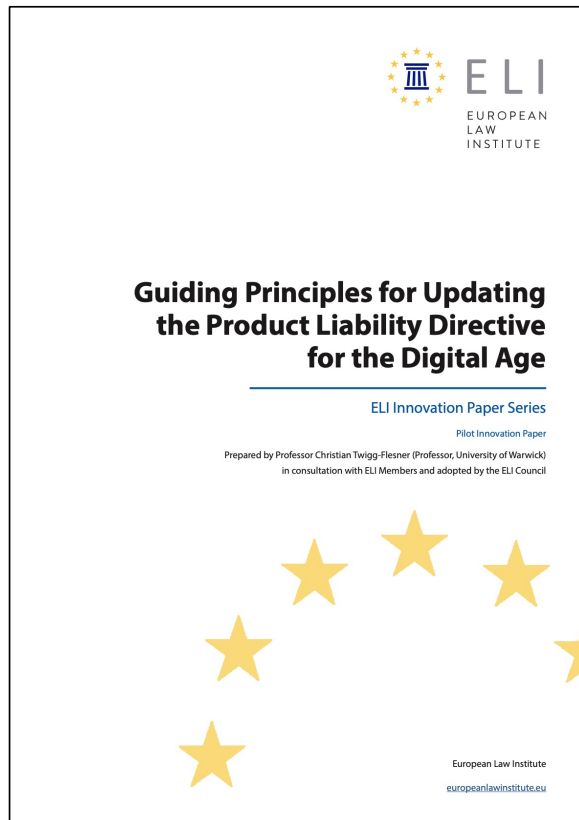
- a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;
- b) The platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract;
- c) The platform operator exclusively uses payment 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 suppliers and to enforce compliance with its standards beyond what is required by law.

Platform regulation beyond the DSA package

- **Revision of the General Product Safety Directive**
Responsibility of digital platforms for product safety
- **Update of guidance documents for CRD and UCPD**
Application of UCPD and CRD to digital platforms
- **Revision of the Product Liability Directive**
Product liability of online marketplaces
- **Evaluation of the P2B Regulation**
Interplay with DSA and DMA
- **Corporate due diligence and corporate accountability**
Responsibility of online marketplaces for supply chains

New Consumer Agenda
COM(2020) 696 final

Revision of the Product Liability Directive



Guiding Principle 5

„The category of persons liable towards an individual (the notion of “producer”) should be revised to reflect the different actors involved.“



REUTERS

AUGUST 13, 2020 / 11:42 PM / UPDATED 6 MONTHS AGO

California court rules Amazon is liable for injuries from defective products

Bolger v. Amazon.com, 53 Cal.App.5th 431
(Cal. Ct. App. August 13, 2020)

Loomis v. Amazon.com, 2021 WL 1608878
(Cal. App. Ct. April 26, 2021)

Procedural turn in platform regulation

P2B Regulation

- Internal complaint-handling system (Art. 11)
- Mediation (Art. 12)

DSA

- Notice and action mechanisms (Art. 14)
- Internal complaint-handling system (Art. 17)
- Out-of-court dispute settlement (Art. 18)

The P2B Regulation (EU) 2019/1150: Towards a 'Procedural Turn' in EU Platform Regulation?

9 Journal of European Consumer and Market Law 133 (2020)

2 Pages • Posted: 22 Oct 2020

[Christoph Busch](#)

University of Osnabrück - European Legal Studies Institute; Yale University - Yale Information Society Project

Date Written: August 17, 2020

Federal Rules of Platform Procedure

University of Chicago Law Review, Forthcoming

Boston Univ. School of Law, Law and Economics Research Paper

68 Pages • Posted: 20 May 2020 • Last revised: 18 Mar 2021

[Rory Van Loo](#)

Boston University - School of Law; Yale University - Yale Information Society Project

Date Written: April 15, 2020

ELI Model Rules on Platform Procedure?



ELI – UNIDROIT

**MODEL EUROPEAN RULES OF CIVIL
PROCEDURE**

*FROM TRANSNATIONAL PRINCIPLES TO EUROPEAN
RULES OF CIVIL PROCEDURE*

Codes of conduct

- Art. 17 P2B Regulation
- Art. 35 DSA

CEN / ISO Standards

- Art. 34 DSA
- ISO 10002:2018 Guidelines for complaint handling



„The control exercised by platforms can no longer be adequately captured by merely looking at economic characteristics (such as network effects, and economies of scale and scope) and the existing notion of ‘market power’.“

„The power held by platforms goes beyond control over markets and also directly impacts businesses, consumers and our society at large.“

Expert Group for the Observatory on the Online Platform Economy, March 2021

Digital platforms as infrastructures for services of general interest:

➔ Mobility, education, healthcare

Further reading

- C. Busch, G. Dannemann, H. Schulte-Nölke, A. Wiewiorowska & F. Zoll, The ELI Model Rules on Online Platforms [2020] Journal of European Consumer and Market Law 61-70.
- C. Busch, Rethinking Product Liability Rules for Online Marketplaces: A Comparative Overview, ELSI Osnabrück Working Paper 1/2021, <http://ssrn.com/abstract=3784466>
- C. Busch, Regulation of Digital Platforms as Infrastructures for Services of General Interest, WISO-Diskurs 04/2021, <https://library.fes.de/pdf-files/wiso/17836.pdf>
- C. Busch & V. Mak, Putting the Digital Services Act in Context, [2021] Journal of European Consumer and Market Law 109-115.



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