Enforcing Private Regulation in the Platform Economy

Edited by
FEDERICA CASAROSA and
MATEUSZ GROCHOWSKI

Max-Planck-Institut für ausländisches und internationales Privatrecht

Studien zum ausländischen und internationalen Privatrecht

Mohr Siebeck

Studien zum ausländischen und internationalen Privatrecht

542

Herausgegeben vom

Max-Planck-Institut für ausländisches
und internationales Privatrecht

Direktorium:

Holger Fleischer, Ralf Michaels, Anne Röthel

Enforcing Private Regulation in the Platform Economy

Edited by

Federica Casarosa and Mateusz Grochowski

Mohr Siebeck

Federica Casarosa is Research Affiliate at the Sant'Anna School of Advanced Studies and part-time professor at the European University Institute in Florence, Italy.
orcid.org/0000-0002-5256-3505

Mateusz Grochowski is Affiliated Fellow at the Information Society Project, Yale Law School and Associate Professor of Law at Tulane University School of Law, New Orleans.
orcid.org/0000-0001-5013-4830

Open Access funding provided by Max Planck Society.

ISBN 978-3-16-163903-6 / eISBN 978-3-16-163904-3
DOI 10.1628/978-3-16-163904-3

ISSN 0720-1141 / eISSN 2568-7441
(Studien zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at *https://dnb.dnb.de.*

Published by Mohr Siebeck Tübingen 2025.

Printed on non-aging paper.

Mohr Siebeck GmbH & Co. KG, Wilhelmstraße 18, 72074 Tübingen, Germany
www.mohrsiebeck.com, info@mohrsiebeck.com

Liability of Online Marketplaces

The Portuguese Solution for the Sale of Consumer Goods

Joana Campos Carvalho[*]

I. Introduction

Online platforms can be defined as hosting services that, at the request of a recipient of the service, store and disseminate information to the public.[1] Online platforms include, among others, social networks, such as Instagram or Linkedin, massively multiplayer online games, such as World of Warcraft, and online marketplaces, which constitute the focus of this paper. Online marketplaces are a subcategory inside the greater category of online platforms and can be defined as services 'using software, including a website, part of a website or an application, operated by or on behalf of a trader which allow consumers to conclude distance contracts with other traders or consumers'.[2]

---

[*] All internet links were last accessed on 9 September 2024.

[1] 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 L277/1 (DSA), art 3(i). The full definition clarifies that entities that fulfil these criteria are considered online platforms 'unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation'.

[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC

The business model of online marketplaces is based on a triangularity. Three contracts are concluded in order for the user to have access to the good or service: (i) the contract between the marketplace operator and the supplier; (ii) the contract between the marketplace operator and the customer; (iii) the main contract. This main contract, which is the one that allows access to the good or service, is concluded directly between the supplier and the customer (usually a sales contract, provision of services, lease, etc). Bearing in mind that the principle of relativity of contracts is a fundamental principle of private law and that the marketplace operator is not a party to the main contract, the straightforward conclusion would be that the marketplace operator is never liable for problems that occur which relate to main contract. However, closer observation shows that these entities usually occupy a very relevant role in the transaction, thus having a significant impact on customer trust, and that the focus cannot be solely on the main contract and its parties but must rather take in the whole triangle and the different dynamics it entails.

This issue has been significantly debated in Europe. The work of the ELI Model Rules on Online Platforms research group, especially art 20, is a good example of this discussion and the attempts to achieve balanced solutions. It sets forth the joint liability of supplier and platform operator in cases of predominant influence, thus acknowledging the need to address and regulate the role of the platform operator in the contractual dynamic.[3]

In Portugal, the topic of the contractual liability of online marketplaces was addressed in the consumer sales law adopted in 2021 (Decree-Law 84/2021), which transposes Directives 2019/770 and 2019/771.[4] Art 44 of Decree-Law 84/2021 will be the main focus of the paper as it entails an attempt at regulating the matter of contractual liability, departing from a purely bilateral approach and focusing instead on the entire triangular dynamic.

This approach, namely the focus on the entire network instead of on single contracts, recognizes online platforms as private regulators of social and economic issues, acknowledging that they control and thus are able to regulate the communities of their users.

---

of the European Parliament and of the Council and Regulation (EC) 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22 (UCPD), as amended by Directive (EU) 2019/2161, art 2(n).

[3] European Law Institute, *Model Rules on Online Platforms*, 2019, available at <https://www.europeanlawinstitute.eu/projects-publications/completed-projects/online-platforms/>.

[4] 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 [2019] OJ L136/1; Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28

By approving a rule that makes online marketplaces liable for the conformity of goods that are supplied by a user of the marketplace, Portugal is limiting the possibility of platforms to set the terms of their relationship with users, in that such a rule limits their possibility to establish contractual terms that exempt them from this type of liability.[5]

However, in addition to that, this rule also encourages platforms to further self-regulate. By making the platform responsible for the conformity (and therefore the quality) of the goods and services supplied, the State is incentivizing platforms to regulate the market, because achieving high standards of quality in the marketplace lowers their risk of being held liable and thus of incurring financial losses.

We will firstly explore the influence of EU law on the Portuguese solution. Then we will lay out the Portuguese regime and the requirements for the liability of the marketplace operator, indicating the parallels with the ELI Model Rules. Finally, we present some critical remarks regarding the adopted solution.

II. Liability of Online Marketplaces: The Portuguese Solution for the Sale of Goods and the Supply of Digital Content and Services

1. *The Influence of EU Law*

Directive (EU) 2019/770 regulates certain aspects of contracts for the supply of digital content and services. In turn, Directive (EU) 2019/771 regulates certain aspects of contracts for the sale of goods, amends Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repeals Directive 1999/44/EC, which until now regulated the sale of consumer goods. These two Directives were transposed into the Portuguese legal system through Decree-Law 84/2021, of 18 October 2021, which regulates consumer rights in the sale of goods and the supply of digital content and services, revoking Decree-Law 67/2003, which previously regulated the sale of consumer goods in Portugal. These Directives do not regulate the activity of online marketplaces. However, they include two relevant recitals that were decisive during the Portuguese legislative procedure. It is interesting to note that these recitals include the

[5] These contract terms are very common. See, for instance, Booking.com's general terms: A3.-1 'When you book an accommodation, flight or attraction, Booking.com B.V. provides and is responsible for the Platform – but not the Travel Experience itself' and A4.-4 'We're not a party to the terms between you and the Service Provider. The Service Provider is solely responsible for the Travel Experience', available at <https://www.booking.com/content/terms>.

only references made in the Directives to online platforms; there are no rules relating to this topic.

Recital 23 of Directive 2019/771 reads as follows:

> 'Platform providers could be considered to be sellers under this Directive if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the sale of goods. Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a seller under this Directive'.

The content of recital 18 of Directive 2019/770 is identical, except for the term 'sellers' that is replaced by 'traders' and the phrase 'sale of goods' which is replaced by 'supply of digital content or a digital service'.[6]

It is possible to divide the recital and to distinguish two parts. The first part, corresponding to the first sentence, clarifies the cases in which the regime of the Directives applies to platform operators. Directive 2019/771 applies where operators are considered to be sellers and Directive 2019/770 where they are qualified as traders. The recitals further clarify that this is the case where the operators (i) act for purposes related to their own business and (ii) act as a direct contractual partner of the consumer. The first requirement does not raise many doubts, and it is verified whenever the operator pursues, with the platform, commercial and profit-making objectives. Regarding the second requirement, where the consumer is legitimately convinced that he is entering into a contract with the operator of the platform, the latter is his contractual partner even if the operator wishes to hide behind another legal construction. This recital clarifies that operators that sell or provide services on the platform alongside other suppliers are considered to be sellers or professionals regarding their own products (eg Amazon). It also clarifies that operators claiming to be mere intermediaries, but acting as direct contractual partners, such as Uber or Farfetch, are also considered sellers or professionals. The second part of the recitals grants the Member States the possibility to extend the Directive's scope of application. Member States are free to decide upon the application of the Directives' regime to operators who are not considered to be sellers or professionals.[7] However, this freedom is not absolute. The criteria defined by national laws for considering the regime of the Directive applicable to platform operators have to respect European law, such as

---

[6] On these recitals, Esther Arroyo Amayuelas, 'El derecho de las plataformas en la Unión Europea' in Esther Arroyo Amayuelas and others, *Servicios en plataforma Estrategias regulatorias* (Marcial Pons 2021) 51.

[7] Karin Sein and Gerald Spindler, 'The new directive on contracts for the supply of digital content and digital services – Scope of application and trader's obligation to supply – Part 1' (2019) 15(3) ERCL 257, 261.

arts 6 and 8 of the Digital Services Act[8] (corresponding to the still in force arts 14 and 15 of the E-Commerce Directive[9]), and, we would add, also the principles of national law. It was based on the second part of the recitals that Portuguese legislators included a rule on the platform operators' liability in Decree-Law 84/2021.

2. Decree-Law 84/2021

Decree-Law 84/2021 of 18 October 2021 (DL 84/2021) regulates consumer rights in the sale of goods and the supply of digital content and services, transposing Directives (EU) 2019/771 and (EU) 2019/770. The act applies only to consumer relations, ie relations between a trader and a consumer.[10] Furthermore, it applies only to contracts of sale and other contracts for the supply of tangible things, such as works and leases, and also to contracts for the supply of digital content and services (art 3).[11] Therefore, only certain online marketplaces will be covered by this regime. For example, contracts concluded on Amazon or Vinted are covered. The case of Airbnb is debatable. The contract concluded between the guest and the host is a mixed contract that has lease elements. Thus, this regime may apply when an issue related to that part of the contract is at stake.

DL 84/2021 includes a rule that provides for the joint and several liability of the operator of the online market (art 44).[12] This is an innovative solution and, to date, unique in the European context.[13]

---

[8] 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 L277/1 (DSA).

[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

[10] On the concept of consumer, Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2018) 25.

[11] On the decree's scope of application, Jorge Morais Carvalho, 'Decreto-Lei n.º 84/2021, de 18 de outubro – Apresentação geral', *Diretivas 2019/770 e 2019/771 e Decreto-Lei nº 84/2021* (Almedina 2022) 51; David Falcão, 'Análise à nova lei das garantias – DL 84/2021, de 18 de outubro' (2021) III, IV Revista da Ordem dos Advogados 493, 496; Jorge Morais Carvalho, *Compra e venda e fornecimento de conteúdos e serviços digitais: Anotação ao Decreto-Lei n.º 84/2021, de 18 de outubro* (Almedina 2021) 24; Sandra Passinhas, 'O novo regime da compra e venda de bens de consumo – exegese do novo regime legal' [2021] Revista de direito comercial 1463, 1468.

[12] Mafalda Miranda Barbosa, 'Responsabilidade civil das plataformas digitais' (2022) 4 Revista de direito da responsabilidade 791, 795, argues that this solution seems to be in line with the *Wathelet* judgment (CJEU 9 November 2016, C-149/15, ECLI:EU:C:2016:840). It seems to us that this article and the judgment deal with different issues. The Wathelet judgment aims to solve a situation where the intermediary behaves as a party – the court having ruled that there is liability because the customer has become convinced

a) Requirements for the liability of the online marketplace's operator

Art 44(1) DL 84/2021 states that

> 'the online marketplace provider who, acting for purposes related to its activity, is the contractual partner of the supplier […] is jointly and severally liable, vis-à-vis the consumer, for the lack of conformity under the terms of the present decree-law.'

The first requirement is that the operator acts for purposes related to its activity, which is the case whenever its activity concerns the operation or use of the platform. The second requirement for liability is that the platform operator is a contractual partner of the supplier. It is difficult to understand the purpose of using this expression in the law. A contractual partner of the supplier is someone who has entered into a contract with the supplier. When analyzing the triangular structure of contracts concluded through online marketplaces, a contract is always concluded between the supplier and the platform operator. To that extent, the operator is always a contractual partner of the supplier.

---

that the intermediary is a party. This matter is referred to in the first part of recital 23 of Directive 2019/771 and recital 18 of Directive 2019/770. The solution in art 44 concerns situations where the customer knows that his counterparty is not the marketplace operator. Liability is based on the circumstance that the operator, although not being a party and not presenting itself as such, exercises control over the contract.

[13] In Brazil, for instance, the question arises differently, since the concept of supplier in the Consumer Protection Code (art 3) is interpreted quite broadly, including, in addition to the producer, any person who, exercising a professional activity, participates in the supply chain until the good or service reaches the end recipient. Therefore, as a rule, the online marketplace is also qualified as supplier, and there are several case law decisions that confirm this understanding. All suppliers (seller, producer, online marketplace, etc.) are jointly and severally liable for defects in the product or service (art 18), which means that in Brazil the marketplace may be liable according to the general terms of the Consumer Protection Code (Claudia Lima Marques, *Contratos no Código de Defesa do Consumidor* (9th edn, Revista dos Tribunais 2019) RB-2.2; Bruno Miragem, *Curso de direito do consumidor* (Revista dos Tribunais 2020) RB-1.58; Alvimar Virgílio de Almeida, *Defesa do consumidor na economia compartilhada: a questão da responsabilidade civil* (Pontifícia Universidade Católica de São Paulo 2019) 116; Claudia Lima Marques, 'A nova noção de fornecedor no consumo compartilhado: Um estudo sobre as correlações do pluralismo contratual e o acesso ao consumo' (2017) 111 Revista de Direito do Consumidor 247, 256; 261; Bruno Miragem, 'Novo paradigma tecnológico, mercado de consumo digital e o direito do consumidor' (2019) 125 Revista de Direito do Consumidor 17, 26, admits that this conclusion may depend on 'the way in which the organiser of the platform acts'. Fernanda Manuela Goebel and Analice Achaefer de Moura, 'A possibilidade de responsabilização da plataforma de economia compartilhamento Airbnb' (2022) 13(1) Revista de Direito Faculdade Dom Alberto 18, 30.; Guilherme Mucelin, *Conexão online e hiperconfiança* (Revista dos Tribunais 2020) RB-2.1; Davi Pinheiro de Morais, *O marketplace: análise da relação de consumo em prol do fornecedor e a responsabilidade civil das intermediadoras de produtos e serviços* (Faculdade Baiana de Direito) 44–46.

The purpose of the law is not, however, to hold online marketplace operators liable in all cases. This is made clear in art 44(2), which clarifies that the operator of the online marketplace is considered to be the contractual partner of the trader only whenever it exercises a predominant influence on the conclusion of the contract. From the reading of both rules, it appears that the law refers to a contractual partner not in a technical/legal sense, but rather in the sense of partnership in business,[14] of two people who come together to achieve a certain objective – in this case to conclude a contract with the client.

It would have been preferable to avoid this expression (which adds nothing and proves to be inaccurate) by directly specifying, in para 1, that the second requirement is the exercise of predominant influence by the operator in the conclusion of the contract. The use of the expression predominant influence reflects the approach adopted in art 20 of the ELI Model Rules on Online Platforms (Model Rules).[15]

b) Comparison between the ELI Model Rules and the Portuguese solution

The legislative procedure leading to the adoption of the Portuguese regime was not very transparent.[16] No preparatory works were made publicly available, which makes it difficult to determine the reasoning behind art 44 DL 84/2021. Nevertheless, the terminology used, especially the reference to predominant influence, makes it clear that the Portuguese law finds its inspiration in the Model Rules. Despite that, the Portuguese legislators have also taken some decisions that distance the Portuguese solution from the Model Rules.

---

[14] Barbosa (n 12) 797, speaks of the operator as a 'business partner of the party providing the good or service'.

[15] European Law Institute (n 3). Christoph Busch, 'Europäische Modellregeln für Online-Vermittlungsplattformen' in Peter Rott and Klaus Tonner (eds.), *Online-Vermittlungsplattformen in der Rechtspraxis* (Nomos Praxis 2018). Critical of the solution of art 20, Fabian Vilgertshofer, *Online-Plattformen und vertragliche Haftung* (CH Beck 2019) 69, as he believes that its adoption, particularly in German law, would imply a breach in the system, thus resulting in a deviation from (i) the rules of interpretation of legal statements, in that it is clear that the operator is not a party, and (ii) the principle of relativity of contracts. Also Andreas Engert, 'Digitale Plattformen' (2018) 218 AcP 304, 316, believes that the solution of the Model Rules is not appropriate as it calls into question the principle of private autonomy without justification. It is up to online marketplaces to choose to the extent to which they want to be liable, with the knowledge that their business model relies heavily on the trust of users and that they therefore cannot, strategically speaking, totally remove themselves from problems. However, that should be their choice.

[16] Jorge Morais Carvalho, 'Portugal' in Alberto De Franceschi and Reiner Schulze (eds), *Harmonizing Digital Contract Law – The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms* (Nomos 2023) 527, criticizes the fact that 'the entire process took place in the secrecy of the offices, without the necessary public discussion of the solutions enshrined in the legal regime'.

Firstly, the liability of art 20 of the Model Rules stems from trust on the consumer side.[17] Liability exists when the client can reasonably rely on a certain scenario, ie when the platform operator's actions lead him to believe in a certain design of reality.[18] The logic of the solution is the following: if I made someone (reasonably) believe that they would have certain rights by the way I behaved, then I must be liable for it. If the operator creates the trust in the customer that he forms a unity with the supplier, that both are closely linked, then he must answer as if that unity really existed. Under Portuguese law, the trust element is missing: there is liability when there is predominant influence, and it is not necessary to know whether the counterparty trusted in the existence of that predominant influence. The intention is not to match the consequences with what the reality appeared to be; rather, the objective is that the platform operator be liable when it effectively exercises control.[19]

Secondly, the Portuguese law refers to a predominant influence over the contract and not over the supplier. In practice, the result will be the same, since the criteria in para 2 for determining the existence of predominant influence over the contract are similar to those in the Model Rules for determining the existence of predominant influence over the supplier. However, in terms of the logic of the solution and its theoretical underpinning, the regimes are distinct. The predominant influence on the supplier encapsulates the idea that there is a factual approximation to a situation of a single legal person or a close collaborative relationship that motivates the liability of the operator.[20] Just as a legal person is liable for the acts of its organs or employees, the platform operator is liable when the way it behaves towards suppliers resembles a hierarchical relationship within a single legal entity. The predominant influence over the contract, on the other hand, referred to by Portuguese law does not refer to a

[17] Vilgertshofer (n 15) 68; Research Group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 5(4) EuCML 164, 165.

[18] Klaus Tonner, 'Verbraucherschutz in der Plattform-Ökonomie' (2017) 32(5) VuR 161, 162.

[19] Nataliia Filatova-Bilous, 'Once again platform liability: on the edge of the 'Uber' and 'Airbnb' cases' (2021) 10(2) Internet Policy Review – Journal on Internet Regulation 1, 12, refers to an objective approach (although she does not specifically speak about Portuguese law), which is opposed to the subjective approach followed, for example, in the ELI Model Rules.

[20] Juliette Sénéchal, 'L'opérateur de plateforme en ligne, régulateur économique par fourniture de prestations de services interpersonnelles – Un phénomène complexe à saisir selon trois approches de droit économique transversales et complémentaires' in Juliette Sénéchal and Sophie Stalla-Bourdillon (eds), *Rôle et responsabilité des opérateurs de plateforme en ligne: aproche(s) transversale(s) ou aproches sectorielles?* (IRJS Éditions 2018) 8, points out that the concept of predominant influence enables online marketplace providers to move from being mere intermediaries to being responsible for the supplier's compliance with its obligations.

factual unit – a team – on the supplier's side, but to a situation in which someone interferes in the contract concluded between two other people.

Thirdly, both solutions rely on the concept of predominant influence.[21] However, in the Model Rules the concept of predominant influence appears as a type concept and under Portuguese Law it is constructed as a classificatory concept.[22] In the Model Rules there is a list of criteria to help assess the existence of predominant influence, but this list is merely exemplary. The analysis is always a general one: the various characteristics that can be observed (ultimately by a court) lead to the conclusion that there is or that there isn't control over the supplier. In some cases, more characteristics are present, in others less, but with greater intensity. The conclusion is always the result of that global analysis. art 20-2 Model rules includes a set of criteria that can be taken into account when assessing the existence of predominant influence. However, those criteria are only indicative and do not exclude other criteria that the enforcer may consider relevant in the specific case. The assessment is up to the enforcer of the standard, who has to look at reality as a whole to conclude whether, in that particular case, the client could rely on the existence of a predominant influence. Portuguese law, by using the adverb 'namely',[23] points to a completely different type of analysis. It is enough that one of the listed characteristics is verified for there to be a predominant influence. This is a classificatory concept and not a type concept. There is no fluidity in the analysis, but a rigidity that we feel is not in line with the diverse and complex nature of platforms.

[21] Felix Maultzsch, 'Contractual liability of online platform operators: European proposals and established principles' (2018) 14, 3 ERCL 209, 227, expresses his opposition to this liability solution, arguing that making a person liable for the obligations of another merely because he exercises a predominant influence over him is contrary to the logic of contract law.

[22] On type and classificatory concepts, Karl Larenz, *Methodenlehre der Rechtswissenschaft* (Springer 1991) 307. Both serve to describe and identify a given reality. However, the classificatory concept uses the enunciation of a set of characteristics or qualities that must be present in the object. There are a certain number of elements in the classificatory concept and they are all necessary. If one of these characteristics or qualities is missing, the object must be considered excluded from the concept. The type concept, on the other hand, does not need to be rigid or exhaustive. It is possible for a finished object not to have all the qualities that make up the type concept and still be included in it. Marie Jull Sørensen, 'Intermediary platforms – The contractual legal framework' (2018) 1 NJCL 63, 90; Maultzsch (n 11) 222. Busch (n 15) 161, speaks of a 'mobile system', which allows for adjustment to the specific case.

[23] 'For the purposes of [art 44(1)], the online marketplace provider is a contractual partner of the professional whenever it exercises a predominant influence over the conclusion of the contract, which will occur *namely* in the following situations […]' (art 44(2) DL 84/2021, emphasis added).

Art 44(3) adds that

> 'Without prejudice to the preceding provisions, any facts that lead the consumer to rely on the online marketplace provider having a predominant influence over the professional providing the good, digital content or digital service may be considered for the purpose of determining the existence of a predominant influence over the conclusion of the contract'.

This provision allows for facts other than those identified in para 2 to be considered in concluding that predominant influence exists. It removes some of the rigidity from the analysis since it gives the enforcer freedom to conclude that predominant influence exists in other cases not foreseen in the law. However, the rigidity remains in the opposite direction: whenever one of the law's criteria is met there is predominant influence, with no room for consideration of the specific case. Furthermore, the rule contained in art 44(3) comes close to the solution of the model law in the two points where art 44(2) departs from it. On the one hand, it is a liability based on trust – on a performance that led the consumer to believe in a certain scenario. On the other hand, it is determined that there is predominant influence over the contract when there is predominant influence over the supplier.

In short, the Portuguese solution is constructed as follows: there is liability of the operator of the online market for breach of the main contract in two situations. On the one hand, there is liability when the market operator has predominant influence over the contract. This happens in the five situations provided for in the sub paras of art 44(2) DL 84/2021. The rule is constructed on the basis of a classificatory concept, whereby the enforcer of the law is limited to verifying whether any of the sub paras is fulfilled. It is sufficient if one of the subparas is fulfilled for there to be predominant influence and, therefore, liability of the operator. The enforcer of the law is not able to assess the concrete case as a whole. On the other hand, there is liability when any facts occur that are likely to give rise to the consumer's confidence that the operator has a predominant influence over the professional. This rule is based on an indeterminate concept, which requires the enforcer to conduct an overall analysis in order to conclude whether, in that specific case, there is predominant influence.

c) *The criteria of article 44(2)*

Art 44(2) DL 84/2021 lists the situations in which predominant influence over the contract is deemed to exist.

The concept of predominant influence points to the recognition of online platforms – or in this case online marketplaces – as entities that exercise regulatory power on the market. It departs from a purely contractual approach that, based on the principle of relativity, concludes that the platform, because it is not a party to the supplier-consumer contract, is entirely removed from any problems arising from that relationship. The concept of predominant influence acknowledges the importance of self-regulation, enforced by online platforms on their users, on the design of all relationships formed on the platform.

There are four paragraphs under art 44(2), which correspond to five distinct situations.

Firstly, there is predominant influence when the contract is concluded exclusively through the means made available by the online marketplace provider (subpara a). These cases correspond to those where the platform is constructed in such a way that the contract is necessarily concluded in that digital space. For example, on Amazon the contract is concluded through the platform's software. The customer adds the products to the cart and checks out, thus accepting the contractual proposal that the supplier has issued through the website. More debatable would be the situation of platforms that provide a messaging service through which the parties can conclude the contract. There are some cases where the customers use the messaging service and others where they do not. There are situations where people exchange contacts and continue negotiations off the platform, and there are situations where people arrange to meet through the platform and only conclude the contract in person, for example because the buyer wants to see the condition of the item first. We argue that this paragraph has to be understood as being restricted to cases where the architecture obliges the contract to be concluded within the platform. It is not sufficient that the platform allows for the conclusion of the contract. It is necessary that it requires the conclusion through the means made available there. Where there is the option of using the platform to conclude the contract, an additional service is offered to users. Where the contract is necessarily concluded through the platform, there is a situation of control over the relationship that the parties establish through the platform.

Secondly, there is predominant influence when payment is made exclusively through means made available by the online marketplace provider (subpara b). This point should also be understood as meaning that it covers platforms whose architecture implies that payments take place via the platform. The existence of a payment possibility via the platform, by contrast, is not sufficient. The processing of payments through the platform is associated with a control over the financial side of the contract and the fulfilment itself. Platform operators that process payments occupy a guarantor role that gives them great power especially over suppliers. They receive the payment from customers and withhold it until the suppliers comply. This allows them to exert pressure on the supplier and leaves the supplier in a position of dependence.

Thirdly, there is predominant influence where 'the terms of the contract concluded with the consumer are essentially determined by the online marketplace provider' (subpara c). This criterion is intended to cover platforms which determine a significant part of the terms of contracts concluded between the consumer and the supplier. They usually do so by including general contract terms in their contracts with users. For example, on Airbnb, the standard terms and conditions in the contract with the host read: ‘Any terms or conditions you include in any supplementary agreement with Guests must: (i) be consistent with these Terms, our Policies, and the information provided in your Advertisement’ (point 5.2). And in those terms relating to the contract entered into with the guest it reads: ‘The cancellation policy and all other rules, standards, policies or requirements identified in the Advertisement or during the Booking form part of your contract with the Host’ (points 2.2 and 3.1).

Fourthly, the law autonomizes the determination of one of the contractual clauses – that of the price – by establishing that there is predominant influence when the price to be paid by the consumer is likely to be influenced by the platform operator (subpara c). Note that it is not necessary for the price to be determined by the platform operator; it is sufficient for it to influence that determination. It is not easy to determine when the operator influences the price. The mere fact of using a given platform will influence the price, as the supplier will probably analyze the prices charged on the platform for products similar to its own in order to set the price. Some platforms provide tools to perform this analysis. For example, Airbnb has a tool that allows hosts to ‘quickly access a map that shows the average prices of places like yours’.[24] We would argue that this type of tool is not enough to conclude that the platform influences the price, since the spirit of freedom of the provider remains. There is influence on price only when there is a concerted strategy on the part of the platform, which, although it does not set the price, imposes certain criteria or makes access to certain benefits dependent on compliance with price rules. These paragraphs serve to define when there is control over the platform operator, and it is in this light that they must be interpreted.

Finally, there is predominant influence when the advertising associated with the platform is focused on the online marketplace provider rather than the professionals (subpara d). This point has to be understood as referring to the image that the platform operator communicates through its marketing. Does the platform present itself as a unit, where the customer’s trust is directed exclusively to the platform operator? This is the case with Amazon, which conveys the message that on the platform the customer has access to everything and in a fast and secure way thanks to the Amazon system. Or does the platform want to present itself as an entity that groups and manages suppliers that have their own identity? This point in particular demonstrates that the nature of the analysis is rarely conducive to binary answers of yes or no. As far as marketing is concerned, there is a continuum in which the various platforms are positioned between the axes of ‘totally platform-focused’ and ‘totally supplier-focused’, and it is doubtful that any of them are at the extremes.

[24] <https://www.airbnb.co.uk/resources/hosting-homes/a/new-pricing-tool-compares-similar-listings-nearby-583>.

d) Consequences of the existence of predominant influence over the contract

Art 44(1) DL 84/2021 provides that the operator of the online market is jointly and severally liable to the consumer, pursuant to the decree-law. Joint and several liability is the source of joint and several obligations. As regards these obligations, the two debtors – the supplier and the market operator – are liable for full performance, pursuant to art 512 of the Portuguese Civil Code, which means that the consumer can demand compliance from either of the debtors.[25] The question may be raised as to whether this rule only determines the existence of an obligation of the market operator to indemnify the consumer, since this is the obligation that arises in the sphere of the debtor when there is civil liability. However, the rule determines that the operator is liable under the terms of DL 84/2021. This regime establishes that the non-fulfilment of the contract, specifically the non-conformity of the goods with the contract, gives rise to various distinct rights within the legal sphere of the consumer – repair, replacement, price reduction, or termination of the contract – although the consumer may not always be able to choose between them all at the outset (art 15 DL 84/2021).

The consumer appears to be able to exercise these rights against the platform operator under the same terms that would apply against the seller. However, the obligations corresponding to these rights are intended for the party to the contract who provides the goods to the consumer, so a cautious interpretation is needed. The activity of the operator of the online marketplace, although it may be very significant in the context of the conclusion of the contract, should not be confused with the activity of the supplier. The operator does not have the same products as the supplier to replace the defective good and may not have the expertise within its business structure to repair the good. For this reason, the refusal referred to in art 15-3 – 'the trader may refuse to remedy the lack of conformity of the goods if repair or replacement is impossible or would impose costs that would be disproportionate' – must be assessed taking into account these particularities.

As for the other two rights, they can only logically be enforced against the counterparty.[26] The consumer may not demand the termination of the contract from someone who is not party to the contract. He may demand payment in the amount corresponding to the price he has paid or a part of that price, but this will be by way of damages. The marketplace operator cannot return the price paid, as it does not belong to him, even if it has received it in practice.

---

[25] António Menezes Cordeiro, *Tratado de direito civil português, II, Tomo I* (Almedina 2009) 719.

[26] For example, in the context of product liability, these two rights are not available to the buyer precisely for this reason: Luís Menezes Leitão, 'O novo regime da venda de bens de consumo' (2005) II Estudos do Instituto de Direito do Consumo 37, 63.

e) *The limit of article 6 of the Digital Services Act*

The permission that is granted to Member States to hold operators of online marketplaces liable under the regime of Directives 2019/770 and 2019/771 must be understood in the overall context of European law. Specifically, the provision of Portuguese law must be read in conjunction with art 6 of the Digital Services Act (corresponding to the still in force art 14 of the E-Commerce Directive), which sets forth that where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States are to ensure that the service provider is not liable for the information stored at the request of a recipient of the service, provided that the conditions listed in the Regulation's subparagraphs are met. It follows that even if an online marketplace is covered by art 44 DL 84/2021, it will not be held liable if it falls within the scope of protection of art 6 of the Digital Services Act.

f) *Right of redress*

Art 46 DL 84/2021 provides that

> 'an online marketplace provider who, pursuant to Articles 44 and 45, becomes liable to the consumer because of misleading statements by the trader or the trader's failure to perform the contract shall have the right to be indemnified by the trader under the general terms'.[27]

It follows that the responsibility of the operator is only a means of protecting consumers, since it will be easier for consumers to obtain compensation, but the economic effects of the breach are kept on the supplier's side. The only case where the marketplace operator bears the economic burden is the case of insolvency of the supplier. In this case, the marketplace operator may not be able to recover what it has spent on resolving the consumer's problem.

In short, the solution of DL 84/2021 implies a twofold protection of the consumer: (i) it gives the consumer more choice, allowing him to decide between resorting to the supplier, to the marketplace operator, or to both and to thereby determine which of the two is capable of providing a faster or more satisfactory response; (ii) it protects him from the possible insolvency of the supplier, passing this risk on to the operator.

---

[27] On the general terms of the right of redress in Portugal, Rui Pinto Duarte, 'O direito de regresso do vendedor final na venda para consumo' (2001) II(4) Themis – Revista da Faculdade de Direito da UNL 173, 186; Paulo Mota Pinto, 'Conformidade e garantias na venda de bens de consumo: A directiva 1999/44/CE e o direito português' (2000) 2 Estudos de direito do consumidor 197, 280.

3. Critical Remarks on the Portuguese Solution

The business model of platforms has been recognized as beneficial to society.[28] Furthermore, online marketplaces are not all the same. Rather, it is a business model that is adopted by very different companies of very different sizes. To give a few examples, Airbnb will vary significantly form Vinted, and Amazon will differ greatly from national marketplaces for the peer-to-peer sales of goods. Moreover, the revenue structure itself varies greatly, with some companies taking a substantial share of the provider's profit margin and others a small share or nothing at all, basing their profits only on third-party advertising hosted on the site. It follows that regulation should be cautious, ensuring that the necessary interests are protected, without, however, calling into question the business model as a whole. Furthermore, a solution that treats all online marketplaces as equal is hardly adequate.[29] And that is precisely what the Portuguese law does – adopt a unitary solution to a problem that has different aspects. Virtually all online marketplaces meet at least one of the undemanding subparagraphs of art 44 DL 84/2021, which means that virtually all online marketplaces are liable under this rule.[30] Even compared to the solution in the ELI Model Rules, the Portuguese solution goes further. Although the Portuguese act uses the same term 'predominant influence', it does so with a different content. Used as a classificatory concept in the Portuguese act and as a type concept in the Model Rules, the term will cover a

[28] This has been recognized in several European Union documents. See, eg, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 (P2B Regulation), recital 1: 'Online intermediation services are key enablers of entrepreneurship and new business models, trade and innovation, which can also improve consumer welfare […] They offer access to new markets and commercial opportunities allowing undertakings to exploit the benefits of the internal market. They allow consumers in the Union to exploit those benefits, in particular by increasing their choice of goods and services, as well as by contributing to offering competitive pricing online'. Maultzsch (n 11) 212, speaks of potential for innovation and added value; Vanessa Mak, 'Private Law Perspectives on Platform Services. Airbnb: Home Rentals between AYOR and NIMBY' (2016) 5(1) EuCML 19, 25.

[29] The path of differentiation is the one followed in the European Union after the approval of the Digital Services Act, as it distinguishes between online platforms and very large online platforms, with the latter being those with more than 45 million users (art. 25). Maria Romana Allegri, 'Il futuro digitale dell'Unione europea: nuove categorie di intermediari digitali, nuove forme di responsabilità' (2021) 2 Rivista Italiana di Informatica e Diritto 7, 16.

[30] Such a solution may have the effect of favouring larger online marketplaces to the detriment of smaller ones, as the former are better able to cope with increased operating costs. Ricardo Pazos Castro, 'Uber, Airbnb y la llamada "influencia decisiva" de las plataformas digitales' (2020) 31 IDP – Revista d'Internet, dret i política 1, 10.

much larger number of situations under Portuguese law.[31] More than that, the *raison d'être* behind the Model Rules concept is lost. The idea there is to guarantee that the operator will be liable for the (bad) performance of the supplier if he creates the expectation that he controls the supplier – because the client believed that the marketplace operator would have a say in that performance. The Portuguese solution has the advantage of being innovative and will certainly serve as an example to be discussed in other European countries. However, if it is widely (and consistently) applied, it may have the unwanted side effect of harming Portuguese consumers because it will mean the end of some national marketplaces which do not have the financial capacity to assume the obligations imposed on them,[32] and it may lead some foreign marketplaces to stop operating in Portugal because the potential economic benefits offered by the Portuguese market do not outweigh the risks.[33]

Furthermore, we would argue that the solution is contrary to European law.[34] The European Commission's Communication on online platforms[35] states that any regulation 'must be conducive to furthering sustainable development and scaling-up of the platform business model in Europe', since platforms 'play a prominent role in the creation of 'digital value' that underpins future economic growth in the EU and consequently are of major importance to the effective functioning of the digital single market'.[36] As this document

[31] Sørensen (n 22) 90, criticizes the choice of a standard concept in the model law on account of its more debatable application, which creates uncertainty.

[32] Research group on the Law of Digital Services (n 17) 165: 'a heavy-handed regulatory approach creates the risk of stifling innovation and creativity'. Luca Belli and Cristiana Sappa, 'The intermediary conundrum – Cyber-regulators, cyber-police or both?' (2017) 8(3) JIPITEC 183, 192, talk about the risk of a less eclectic market.

[33] For instance, the Research group on the Law of Digital Services (n 17) 164, argued that if it was felt that platforms needed to be regulated, this should take place at European level to avoid imposing obstacles to the development of the single market. There is also the possibility that the solution will not be applied in practice because consumers are unaware of its existence. Addressing a reduced awareness of their rights among Portuguese consumers, António Pinto Monteiro, Sandra Passinhas and Maria Raquel Guimarães, 'Enforcement and Effectiveness of Consumer Law in Portugal: Filling the Gap between the Law on the Books and the Law in Action' in Hans Micklitz and Geneviève Saumier (eds), *Enforcement and Effectiveness of Consumer Law* (Springer 2018) 476.

[34] The Research group on the Law of Digital Services (n 17) 165, notes the European Commission's cautious approach to this issue, seeking solutions that strike a balance between market regulation and innovation.

[35] European Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe', COM/2016/288 final (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions).

[36] Page 5 of the Communication. On the relevance placed on the idea of a digital single market, Dariusz Adamski, 'Lost on the digital platform: Europe's legal travails with the digital single market' (2018) 55 CML Rev 719, 721.

includes the guidelines on this issue, it is in its light that one should interpret the permission included in the recitals of Directives 2019/770 and 2019/771.[37] In this sense, Member States may extend the application of the Directives to platform operators, but they must do so in a way that ensures a balanced solution that does not lead to the end of the viability of the business model of online marketplaces, in particular smaller ones. Going back to the principles of private law, this solution also seems to call into question the principle of private autonomy, without sufficient reason.[38]

We do not argue that online marketplace operators can always hide behind triangularity. There are cases where they should be considered parties to the contract because they give this impression to the user, and operators are also liable for a breach of the main contract insofar as they assume this obligation (eg Amazon's A-to-z guarantee)[39]. However, we argue that it should be possible to use a business model that is based on the separation of three contracts, and on the separation of responsibilities, provided that the user is aware of this separation.[40]

It is also true that the Portuguese solution does not place the final burden on the marketplace operator. The marketplace operator is primarily responsible and may exercise a right of redress against the supplier. However, even this position of being responsible in the first place represents a significant burden that a small company may not be able to bear.

---

[37] Christian Twigg-Flesner, 'From REFIT to a rethink: Time for fundamental EU consumer law reform?' (2017) 6(5) EuCML 185, 189, argues that European consumer law should increasingly become a set of principles guiding the legislative output of the Member States.

[38] With regard to the solution of the ELI Model Rules, Maultzsch (n 11) 230, argues that '[t]here are no compelling reasons for such a restriction of freedom of contract'. *A fortiori* he would defend this in Portuguese law where the solution is even more demanding for operators. The author argues that 'liberal contract law should not prescribe mandatory and therefore necessarily 'rough' responsibilities solely on the basis that one of the parties has superior risk control from an objective point of view. Rather, it leaves room for more apt individual contractual solutions'. Also, Damjan Možina, 'Retail business, platform services and information duties' (2016) 5(1) EuCML 25, 29, argues that any measures to maintain customer confidence should be left to regulation by the market.

[39] Available at: <https://www.amazon.com/gp/help/customer/display.html?nodeId=GQ37ZCNECJKTFYQV>.

[40] In economic terms, the platform-based business model has advantages, David S Evans, 'Some empirical aspects of multi-sided platform industries' (2003) 2, 3 RNE 191, 192: a platform increases 'social surplus when three necessary conditions are true: (1) there are distinct groups of customers; (2) a member of one group benefits from having his demand coordinated with one or more members of another group; and (3) an intermediary can facilitate that coordination more efficiently than bi-lateral relationships between the members of the group'.

We maintain that the solution would be more balanced if it were closer to the solution of the Model Rules, whereby marketplace operators who create the expectation that they have a predominant influence over suppliers are held liable.[41] Alternatively, if one wishes to maintain the more comprehensive solution of the Portuguese act, it might be more balanced to make a differentiation according to the size (and financial capacity) of the company,[42] following, for example, the distinction proposed in the Digital Services Act between online platforms and very large online platforms[43] and imposing liability only on the latter.

III. Conclusions

Art 44 DL 84/2021 sets forth that an online marketplace operator exercising predominant influence over the contract is jointly and severally liable with the supplier to the consumer for the lack of conformity of the subject matter with the contract. The Portuguese solution, which is pioneering in the European context, draws inspiration from the ELI model law but covers a much wider range of online marketplaces. The term 'predominant influence' is used as a type concept in the Model Rules and as a classificatory concept in the Portuguese law, which results in a rigidity that is not in line with the variety of business models existing among platforms.

We argue that the Portuguese solution is contrary to EU law, insofar as it may jeopardize the business model of platforms, at least for smaller platforms, which goes against the European goals. The permission to extend the application of Directives 2019/770 and 2019/771 to platform operators must

---

[41] On the ELI Model Rules Research Group's concern for this balance, Christoph Busch, Gerhard Dannemann and Hans Schulte-Nölke, 'Ein neues Vertrags- und Verbraucherrecht für online-Plattformen im digitalen Binnenmarkt? – Diskussionsentwurf für eine mögliche EU-Richtlinie' (2016) MMR 787, 788. Taking the contrary position, Maultzsch (n 11) 235, maintains that a solution such as that of the Model Rules should be accepted only in C2C relationships, ie situations where the main contract is concluded between two private individuals. Jorge Tomillo Urbina, 'Los consumidores ante las plataformas de intermediacion online: Algunas reflexiones' (2021) 27 LEX – Revista de la Facultad de Derecho y Ciencia Politica 97, 127, and Gemma Rubio Gimeno, 'Responsabilidad de las plataformas de economía colaborativa y responsabilidad del proveedor del servicio' in Gemma Rubio Gimeno and Antonio Orti Vallejo (eds), *Propuestas de regulación de las plataformas de economía colaborativa: perspectivas general y sectoriales* (Aranzadi 2019) 133, also argue that the supplier should be held liable in C2C cases. This is a situation that is not covered by DL 84/2021, which applies only to B2C relationships. Engert (n 15) 316, is completely opposed to the solution of the Model Rules.

[42] Busch, Dannemann and Schulte-Nölke (n 41) 671, argue that the model law solution allows for this differentiation.

[43] DSA, art 25.

be read in the light of, among other texts, the European Commission's Communication on digital platforms.

We conclude that the solution would be more balanced if it were closer to the solution of the ELI Model Rules, in which liability is imposed only on marketplace operators who create the expectation that they exercise predominant influence over suppliers. Alternatively, if the more comprehensive solution of Portuguese approach is to be maintained, it might be more balanced to differentiate according to the size (and financial capacity) of the companies, following, for example, the distinction proposed in the Digital Services Act between online platforms and very large online platforms, with liability of this nature imposed only on the latter.