

European Legal Studies Institute Osnabrück
Research Paper Series

No. 20-01

**Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke,
Aneta Wiewiorowska-Domagalska, Fryderyk Zoll**

The ELI Model Rules on Online Platforms

April 2020

The ELI Model Rules on Online Platforms

Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke,
Aneta Wiewiórowska- Domagalska, Fryderyk Zoll*

9 Journal of European Consumer and Market Law 61-70 (2020)

In March 2020, the membership of the European Law Institute adopted the ELI Model Rules on Online Platforms. These Model Rules are the result of a 5-year project during which a multinational working group drafted and developed rules for the relationship between online platforms and their users. The ELI Model Rules are meant as a contribution to the current debate on platform regulation and were drafted as a source of inspiration for legislators and for self-regulation. The wording of the ELI Model Rules is published at the end of this article. The present introduction, written by the project reporters who were appointed by the European Law Institute, summarises the main considerations, the economic and legal environment and presents the main features of the Model Rules.

I. Purpose and background

The rapid growth of online platforms is one of the fundamental economic and societal developments of recent years. The “platform economy” constitutes a fast growing part of the digital economy. Some observers even claim that we are living in a “platform society”.¹ Undoubtedly, the rise of online platforms has brought new challenges for traditional business models in many areas such as retail, hospitality and transportation. It is unclear which impact the pandemic spread of COVID-19 will have on the platform economy. While some platforms are critically affected, others are receiving an extra boost.² It remains to be seen if the crisis, in a long-term perspective, will even accelerate a shift to e-commerce in general and platforms in particular.

The rise of the platform economy has triggered a debate over whether the current regulatory framework needs to be adjusted in order to meet the challenges presented by the changing market structure. In particular, the need for a recalibration of rights and duties in the relationship between suppliers, customers and platform operators is being discussed.³ Meanwhile,

* Christoph Busch, Professor of Law, University of Osnabrück & Visiting Fellow, Yale Information Society Project; Gerhard Dannemann, Professor of Law, Humboldt University Berlin & Visiting Research Fellow, Institute of European and Comparative Law, University of Oxford; Hans Schulte-Nölke, Professor of Law, University of Osnabrück & Radboud University Nijmegen; Aneta Wiewiórowska-Domagalska, Postdoctoral Researcher, University of Osnabrück; Fryderyk Zoll, Professor of Law, University of Osnabrück & Jagiellonian University Krakow.

¹ José van Dijk, Thomas Poell and Martijn de Waal, *The Platform Society Public Values in a Connective World* (OUP 2018); Victoria Nash, Jonathan Bright, Helen Margetts, and Vili Lehdonvirta, ‘Public Policy in the Platform Society’, 9 *Policy and Internet* 368 (2017).

² Greg Bensinger, ‘We Need Amazon During the Coronavirus. That’s a Problem.’ *New York Times* (31 March 2020) <<https://www.nytimes.com/2020/03/31/opinion/covid-delivery-amazon.html>> accessed 2 April 2020.

³ See e.g. Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, ‘The Rise of the Platform Economy’ *EuCML* 2016, 3; Benjamin G. Edelman and Damien Geradin, ‘Efficiencies and Regulatory Shortcuts: How Should we Regulate Companies Like Airbnb and Uber?’ 19 *Stanford Technology Law*

legislators at the European and national level have taken first steps to adjust the regulatory framework. For example, the P2B Regulation (EU) 2019/1150, which will be applicable from 12 July 2020, introduces new rules regarding fairness and transparency in the relationship between platforms and businesses.⁴ In addition, the recently adopted Modernisation Directive (EU) 2019/1161 contains several provisions addressing various consumer law issues regarding online platforms. However, the emerging regulatory framework for the platform economy still remains fragmented and sometimes inconsistent. Further regulatory initiatives have already been announced, in particular the proposal for a “Digital Services Act”⁵ which is intended to replace the now twenty years old E-Commerce Directive 2000/31/EC.

Against this background, a working group under the auspices of the European Law Institute (ELI) has elaborated a set of Model Rules which address a number of key regulatory issues arising in the triangle between platforms, suppliers and customers. The ELI Model Rules are based on the premise that sharpening the tools of competition law is necessary,⁶ but not sufficient for ensuring fairness in the digital economy. The ELI Model Rules, which are applicable independently of any threshold regarding market power, are meant as a contribution to the current debate on platform regulation. They are not so much a plea for regulation, but rather a practical tool providing a ‘visualisation’ of how a balanced approach could look if regulatory action is considered necessary. In this perspective, the ELI Model Rules have been drafted as a source of inspiration for European and national legislators, for self-regulation, and for codes of conduct or standardization.

II. Methodology

The ELI Model Rules were elaborated by a network⁷ of legal scholars and practitioners under the auspices by the European Law Institute, an independent non-profit organisation established to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. In February 2020, the Model Rules were approved by the ELI Council and the ELI membership based on valuable input by the ELI bodies and many individual ELI members. The ELI project builds on earlier work, in particular the “Discussion Draft of a Directive on Online Intermediary Platforms” which was published in 2016 by the Research Group on the Law of Digital Services.⁸

Review 293 (2016); Stephen R. Miller, ‘First Principles for Regulating the Sharing Economy’ 53 *Harvard Journal on Legislation* 147 (2016); see also Bram Devolder (ed) *The Platform Economy* (Intersentia 2019).

⁴ See e.g. Christoph Busch, ‘Towards Fairness and Transparency in the Platform Economy? A First Look at the P2B Regulation’ in Alberto De Franceschi and Reiner Schulze, *Digital Revolution – New Challenges for Law*, (C.H.Beck 2019).

⁵ Cf. European Commission, ‘Shaping Europe’s Digital Future’ COM(2020) 67, 10; see also Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, ‘The Legal Framework for E-commerce in the Internal Market’ Analysis for the European Parliament’s Policy Department for Economic, Scientific and Quality of Life Policies (forthcoming 2020).

⁶ See the recent proposals for a reform of antitrust rules on digital platforms e.g. Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the digital era*, (2019); Jason Furman et al, *Unlocking digital competition*, Report of the Digital Competition Expert Panel (2019).

⁷ For a full list of the Project Team, the Advisory Committee and the ELI Members’ Consultative Committee see [www.europeanlawinstitute.eu \[https://perma.cc/PDL8-5TJ9\]](https://perma.cc/PDL8-5TJ9).

⁸ Research Group on the Law of Digital Services, ‘Discussion Draft of a Directive on Online Intermediary Platforms’ *EuCML* 2016, 164–169. For an article-by-article commentary of the Discussion Draft see Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll (eds) *Discussion Draft of a Directive on Online Intermediary Platforms: Commentary* (Jagiellonian University Press 2019); see also Christoph Busch, ‘European Model Rules for Online Intermediary Platforms’ in Uwe Blaurock, Martin Schmidt-Kessel and Katharina Erler (eds) *Plattformen* (Nomos 2018) 37–57; Felix Maultzsch, ‘Contractual Liability of Online Platform Operators: European Proposals and Established Principles’ 14 *European Review of Contract Law* 209–240 (2018); Marie Jull Sørensen, ‘Draft Model Rules on Online Intermediary Platforms’ in

The working method of the ELI project team took some inspiration from the methodology of the Research Group on the Existing EC Private Law (Acquis Group).⁹ In this perspective, the ELI project team aimed at identifying dispersed provisions of EU law that could be reformulated as an expression of a more general principle and offer a solution to regulatory issues regarding online platforms. For example, the provision on portability of online reviews (Art. 7 ELI Model Rules) is an extension of the data portability rule in Art. 20(1) General Data Protection Regulation (EU) 2016/679. The rule on liability of platform operators with predominant influence (Art. 20 Model Rules) was inspired inter alia by the CJEU decisions regarding *Uber*¹⁰ and *Airbnb*.¹¹ Although these decisions do not directly address issues of contractual liability, they could be read as the expression of a more general principle which is capable of being transferred to the field of contract law.¹² In other cases, the ELI Model Rules aim at consolidating dispersed and sometimes inconsistent provisions.¹³

Further inspiration for drafting the ELI Model Rules was drawn from national legislation and case law. In particular, the new provisions regarding digital platforms in the French Code de la consommation provided a very useful source, e.g. for transparency requirements within online reputation systems (Art. 5 ELI Model Rules).¹⁴ Considering modern approaches to legal pluralism,¹⁵ the drafters also took into account soft law instruments such as codes of conduct and industry standards. For example, the ISO standard on online consumer reviews (ISO 20488:2018) not only served as a source of inspiration for the minimum quality requirements for reputation systems (Art. 6 ELI Model Rules) but is also directly referenced in Art. 5(3)(b) ELI Model Rules. Finally, the drafting team also considered selected case law from U.S. courts regarding online platforms, such as the recent decision of the U.S. Court of Appeal for the Third Circuit in *Oberdorf v. Amazon*.¹⁶

Bram Devolder (ed) *The Platform Economy* (Intersentia 2019), 173–186; Fryderyk Zoll, ‘Le projet académique pour une directive relative aux plateformes en ligne – la question de la responsabilité des opérateurs de plateforme pour inexécution du contrat par les fournisseurs’ in Juliette Sénéchal and Sophie Stalla-Bourdillon (eds) *Rôle et responsabilité des opérateurs de la plateforme en ligne: Approche(s) transversale(s) ou approches sectorielles?*, (IRJS 2018), 107–116.

⁹ See Gerhard Dannemann, ‘Consolidating EC Contract Law: An Introduction to the Work of the Acquis Group’ in Research Group on the Existing EC Private Law (Acquis Group) (ed) *Principles of the Existing EC Contract Law (Acquis Principles), Contract II* (Sellier 2009) XXXVI–XLIX.

¹⁰ Case C-320/16 *Uber France* ECLI:EU:C:2018:221; Case C-434/15 *Uber Spain* ECLI:EU:C:2017:981.

¹¹ Case C-390/18 *Airbnb Ireland* ECLI:EU:C:2019:1112.

¹² See Zoll (n. 8); see also Busch (n. 8) 49–51.

¹³ See e.g. Art. 4 ELI Model Rules regarding the transparency of rankings which combines and reformulates Art. 5, 7 P2B Regulation (EU) 2019/1150, Art. 2(1)(m), Art. 7(4a), Annex No. 11a Unfair Commercial Practices Directive 2005/29/EC and Art. 6a(1)(a) Consumer Rights Directive 2011/28/EU (as revised under the Modernisation Directive (EU) 2019/2161).

¹⁴ See Juliette Sénéchal, ‘French Law on Online Platforms and Discussion Draft of a Directive on Online Intermediary Platforms: Common or Divergent Approaches?’ in Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, Aneta Wiewiórska-Domagalska and Fryderyk Zoll (eds) *Discussion Draft of a Directive on Online Intermediary Platforms: Commentary* (Jagiellonian University Press 2019) 235–256.

¹⁵ See e.g. Vanessa Mak, ‘Pluralism in European Private Law’ 20 Cambridge Yearbook of European Legal Studies 202–232 (2018).

¹⁶ *Oberdorf v. Amazon.com, Inc.*, 930 F 3d 136, 151 (EdCir. 2019); see Edward J. Janger and Aaron D. Twerski, ‘The Heavy Hand of Amazon: A Seller Not a Neutral Platform’ Brooklyn Journal of Corporate Financial & Commercial Law 2020 (forthcoming); Christoph Busch, ‘When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon’ EuCML 2019, 173–174.

III. Legislative challenges and regulatory techniques

Drafting rules for the platform economy involves a number of challenges. Two of the key problems are the great variety of business models and the rapid technological development. Online marketplaces such as Amazon and comparison sites such as Google Shopping may presently attract much attention, but sooner rather than later the regulatory focus may shift to next-generation platforms such as voice-controlled digital assistants, which could establish themselves as gateways for all kinds of transactions.¹⁷ In the near future, even connected cars and other Internet-of-Things (IoT) devices might turn themselves into “platforms” for electronic commerce.¹⁸ Against this background, it is essential that legal rules for the platform economy are flexible enough to adapt to technological changes and to cover different categories of platforms. The ELI Model Rules offer some solutions and provide illustrations how legislators could address these challenges.

One way forward could be a model of ‘layered regulation’ based on a combination of general clauses and techno-legal standards. While open-textured and principles-based provisions offer flexibility, they do not provide sufficient guidance for market participants. In order to ensure a reasonable degree of predictability and legal certainty, it might be necessary to add an ‘intermediate normative layer’ between technology-neutral general principles and pointillistic case law that applies these principles to the diverse and technology-based business models of online platforms. One option could be the use of standards elaborated by international or European standard setting organisations (e.g. ISO, CEN) that flesh out the general principles with more detailed and actionable guidance.

In this perspective, platform regulation could draw inspiration from the so-called “New Approach” to harmonisation, a model of co-regulation which has been used for many years in the area of product safety. Under the “New Approach”, directives have been limited to setting ‘essential’ product safety requirements.¹⁹ Technical details are left to standards elaborated by the European standard setting organisations. The link between the directive and the (voluntary) standards is created via a presumption of conformity. This model could easily be transferred to the area of platform regulation and digital services.²⁰

How such a model could be implemented is illustrated by Art. 5 ELI Model Rules. As stipulated in Art. 5(2), reputation systems have to comply with the requirements of “professional diligence”. This general clause is complemented by two presumptions of conformity in Art. 5(3). According to Art. 5(3)(a), any reputation system which complies with a standard such as ISO 20488:2018 (Online Consumer Reviews) is presumed to comply with the requirements of professional diligence. The application of the ISO standard would of course remain voluntary. For those platform operators who prefer to use a reputation system that deviates from the ISO standard, Art. 5(3)(b) offers a second presumption of conformity. According to that provision,

¹⁷ See e.g. Michael A. Cusumano, Annabelle Gawer and David B. Yoffie, *The Business of Platforms* (Harper Collins 2019) 220-223; see also Karin Sein, ‘Concluding Consumer Contracts via Smart Assistants: Mission Impossible under European Consumer Law?’ *EuCML* 2016, 179–188.

¹⁸ Jacqui Levy, *Is the connected car the next big ecommerce platform?*, IBM Internet of Things Blog (1 January 2017) <<https://www.ibm.com/blogs/internet-of-things/is-the-connected-car-the-next-big-ecommerce-platform/>> accessed 2 April 2020.

¹⁹ European Commission, *Technical Harmonisation and Standardisation: A New Approach*, COM(1985) 19. The New Approach was remodelled in 2012 by Regulation (EU) 1025/2012 on European standardisation: see Harm Schepel, ‘The New Approach to the New Approach: The Juridification of Harmonized Standards in EU Law’, 30 *Maastricht Journal of European and Comparative Law* 521 (2013).

²⁰ See Christoph Busch, ‘Towards a “New Approach” in European Consumer Law, Standardisation and Co-Regulation in the Digital Single Market’ *EuCML* 2016, 197–198.

a reputation system is presumed to be in conformity with Art. 5(2) if it complies with the criteria set out in Art. 6 ELI Model Rules.

Another way of addressing the broad variety of different business models is illustrated by Art. 20 ELI Model Rules regarding the liability of platform operators. According to Art. 20(1), platform operators may be liable for non-performance by suppliers if the customer can reasonably rely on the platform operator having a predominant influence over the supplier. The general criterion of “predominant influence” is fleshed out in Art. 20(2) which contains a non-exhaustive list of sub-criteria. These sub-criteria are conceived as elements of a “flexible system”.²¹ Thus, it is not necessary that all criteria are fulfilled nor is it sufficient that one single criterion is fulfilled. Art. 20(2) is rather an invitation for the courts to apply a flexible approach and assess the business model of a specific platform on its own merits based on a typological case assessment. Considering the broad variety of rapidly developing business models, this legislative approach takes a middle ground between a rigid list of criteria and an open-ended general clause. While this combination is nearly as flexible as a simple general clause, and while it fails to provide the same level of certainty as would a rigid list of criteria, it nevertheless enables businesses to check their model against the criteria list and adapt their business practices to reduce the number of matches and thus the likelihood of being held liable for non-performance of their suppliers.

IV. Scope

Nearly any website or connected device can be understood as being a platform.²² The contourless notion of the ‘platform’ requires limitation in order to provide a clearer picture of what is meant when discussing platform regulation and for what kind of platforms the contemplated rules are designed. The working group took an ‘incrementalist’ approach in the sense that it started to draft rules for a rather narrow group of platforms and then moved forward in small steps to a broader scope.

The starting point, which can still be seen in Art. 1(2)(a) ELI Model Rules, consisted in platforms that operate as online marketplaces by enabling customers to conclude contracts with suppliers on the platform itself (e.g. Amazon Marketplace, Airbnb). The characteristic feature of this business model is a triangle of three persons and three contractual relations that interrelate with one another, which the ELI Model Rules illustratively calls ‘supplier-customer contract’, ‘platform-supplier contract’ and ‘platform-customer contract’ (Art. 2 ELI Model Rules). This business model is, of course, driven by the platform operator whose main service is to connect the group of suppliers with the group of customers and to provide a digital environment wherein the contracts can be concluded.

²¹ Cf. Walter Wilburg, *Entwicklung eines beweglichen Systems im Bürgerlichen Recht* (Graz 1950). An English translation has been published as Walter Wilburg, *The Development of a Flexible System in the Area of Private Law* (Vienna 2000); see also Helmut Koziol, ‘Das bewegliche System’ *Austrian Law Journal* 160–182 (2017).

²² See e.g. from an economic perspective David S. Evans and Richard Schmalensee, ‘The Antitrust Analysis of Multi-Sided Platform Businesses’ in Blair and Sokol (eds) *Oxford Handbook of International Antitrust Economics*, vol 1 (OUP 2015) 404–449 at 405 (underlining that two-sided platforms create value by bringing two or more different types of economic agents together and facilitating interactions between them); see also from a legal perspective Alain Strowel and Wouter Vergote, ‘Digital Platforms: To Regulate or Not to Regulate?’ in Bram Devolder (ed) *The Platform Economy* (Intersentia 2019) 3–30 at 7–14 (discussing typologies and legal definitions of platforms); see also Teresa Rodríguez de las Heras Ballell, *The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU*, 3 *The Italian Law Journal* (2017) 149–176 (suggesting a concept of platform based on the relationships and interactions between the platform operator and the users).

In the course of the work, it became clear that, for the purpose of the ELI Model Rules, platforms, which exist in unimaginable diversity and which show a highly dynamic development, cannot be defined as objects. Since the legal relations between platform operators and users mainly depend on the kind of service a platform provides, the definition of a platform should actually be a definition of the services of platforms that the model rules seek to cover. Consequently, the scope of the ELI Model Rules is not defined by the platform but instead by the platform operator who provides one or several of the services listed in Art. 1(2) ELI Model Rules.

As previously stated, the working group started drafting rules only for online marketplaces pursuant to Art. 1(2)(a) ELI Model Rules and then carefully contemplated whether these rules might also be appropriate for other services provided by platforms.²³ Further types of services that have the characteristic triangle of three persons and three contractual relationships that interrelate with one another in common were identified. These services are listed in Art. 1(2)(b), (c) and (d). Letter (b) extends the scope to platforms that enable suppliers to place advertisements on the platform, which can be browsed by customers in order to contact suppliers and conclude a contract outside of the platform (e.g. Craigslist, Gumtree). Letter (c) covers comparisons or other advisory services to customers (e.g. Idealo, Shopzilla), and letter (d) covers the facility to provide reviews regarding suppliers, customers, goods, services or digital content through a reputation system (e.g. Tripadvisor, Yelp).

The technique used to define the scope of the ELI Model Rules can be described as a modular approach in the sense that any platform that provides one or several of the services listed in Art. 1(2) falls within the scope of the ELI Model Rules. In particular, it does not matter to which profit making model the platform operator subscribes, as long as the service provided by the platform is directed towards the conclusion of supplier-customer contracts for goods or services against the payment of a price or any other counter-performance, including data (Art. 2(e)). This implies that dating websites are not covered by the ELI Model Rules, since such websites are not directed at the conclusion of contracts between its users. Mere search engines that do not provide one of the services listed in Art. 1(2) ELI Model Rules also do not fall within the scope, because they simply assist users in finding websites, regardless of whether contracts may be concluded as a consequence of such searches. It should be noted, however, that search engines that, e.g., allow their users to review products, run a reputation system pursuant to Art. 1(2)(d) ELI Model Rules and therefore fall under the Model Rules for this aspect of their service. In the same vein, social networks like Facebook or Instagram may fall within the scope in so far as they are not only a virtual forum for socializing with other users, but also a catalyst for economic transactions (e.g. Facebook Marketplace, Shoppable Posts on Instagram).

It should further be noted that the ELI Model Rules do not deal with regulatory issues concerning some specific sectors, such as financial or insurance services or package travel. Therefore, the ELI Model Rules clarify that there may be more specific rules that take precedence to the extent that they deviate from the rather general rules provided for in the ELI Model Rules/Art. 1(4) ELI Model Rules).

V. Structure

The ELI Model Rules are structured into seven chapters. Chapter 1 sets out the scope of application (Art. 1) and provides definitions for key concepts (Art. 2). Chapter 2 regulates a number of general obligations of platform operators towards both of the relevant user groups,

²³ Cf. Hans Schulte-Nölke, Article 1: Scope in Busch et al (n. 8) 33–40.

i.e. suppliers and customers (Art. 3-12). In particular, this part contains provisions regarding the transparency of rankings (Art. 4), reputation systems (Art. 5-7) and platform operators' duties to protect users (Art. 8-10). Specific duties of the platform operators towards customers are regulated in Chapter 3, (Art. 13-14), those towards suppliers in Chapter 4 (Art. 15-18). This two-pronged structure reflects the common characterization of as two-sided (or multi-sided) markets.²⁴ While Chapter 3 focuses on transparency requirements, Chapter 4 also contains fairness requirements regarding the termination or suspension of platform-supplier contracts. Chapter 5 addresses the crucial question of platform liability (Art. 19-24). The liability rules are complemented in Chapter 6 by a provision dealing with the platform operator's right to redress against the supplier and vice-versa (Art. 25). Chapter 6 rounds off the Model Rules with provisions stipulating the mandatory nature of the provisions (Art. 26) and addressing issues of private international law (Art. 28).

VI. Main topics

The following section provides a brief overview of some of the key provisions of the ELI Model Rules.²⁵ It goes without saying that the ELI Model Rules cannot address all possible legal aspects of the platform economy. Generally speaking, these rules focus on one core aspect, namely relationship between platform operators and platform users. What are the duties of platform operators towards platform users? In which cases may operators be liable towards users? What are the minimum requirements regarding fairness and the transparency of platforms? Should there be a right to portability for "reputational capital"? How should reputation systems for the collection of customer reviews be designed? Other aspects regarding online platforms, in particular issues of competition law, access to data, or issues of public policy such as free speech and content moderation have not been addressed.

1. Transparency

A number of provisions in the ELI Model Rules lay down transparency requirements for online platforms. Some of the provisions aim at consolidating and reformulating information duties harvested from existing EU legislation (e.g. Art. 4 ELI Model Rules on the transparency of rankings). Others seek to fill gaps identified in EU law or to add some innovative elements. For example, Art. 3 ELI Model Rules requires platform operators to present all required information as well as their contract terms in a machine-readable format in order to facilitate an automated analysis via AI tools.²⁶

As another example, Art. 14 ELI Model Rules requires platform operators to inform customers whether the supplier with whom they enter into a contract is a trader. This provision echoes the recently introduced Art. 6a(1)(b) Consumer Rights Directive,²⁷ but goes one step further. Under the Consumer Rights Directive, the provider of an online marketplace can rely on the

²⁴ See e.g. Jean-Charles Rochet and Jean Tirole, Platform Competition in Two-Sided Markets, *Journal of the European Economic Association* 2003, 990–1029; Mark Armstrong, Competition in Two-sided Markets, *RAND Journal of Economics* 37(3) 2006, 317–333; see also Paul Belleflamme and Martin Peitz, *Industrial Organization*, (2nd edn, Cambridge 2015) 662–685 (referring to intermediaries as two-sided platforms).

²⁵ A more detailed account of the underlying considerations is provided by the article-by-article commentary to the Discussion Draft, which served as a starting point for the elaboration of the ELI Model Rules, see Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll (eds) *Discussion Draft of a Directive on Online Intermediary Platforms: Commentary* (Jagiellonian University Press 2019).

²⁶ See e.g. Lippi et al. 'CLAUDETTE: an automated detector of potentially unfair clauses in online terms of service' *Artificial Intelligence and Law* 27.2 (2019): 117-139.

²⁷ See Art. 4(5) Modernisation Directive 2019/2161.

declaration of the third-party seller to be a non-trader. In contrast, Art. 14(3) ELI Model Rules requires the platform operator to analyse the available transaction data in order to verify whether the self-declaration is (still) correct.²⁸ This is an example of a regulatory technique that can be referred to as data-driven regulation.²⁹ Under this approach, platforms are expected to use their superior access to data generated by transactions on the platform not only in their own interest, but also for implementing regulatory goals, such as protecting customers.

2. Fairness of contract terms

In addition to transparency obligations the ELI Model Rules contain a number of provisions imposing fairness requirements for platforms' terms of use (Art. 12, 17, 18). These provisions have been inspired mainly by the recently adopted P2B Regulation.³⁰ However, the ELI Model Rules add some more stringent fairness requirements. For example, unlike Art. 4(2) P2B Regulation, which imposes a uniform 30-day notice period for the termination of a platform-supplier contract, the ELI Model Rules have opted for a graduated model of notice periods borrowed from Art. 15(2) Commercial Agents Directive 86/653/EEC. Thus, under Art. 17(1) ELI Model Rules the notice period depends on the duration of the contract and ranges from 30 to 90 days.

Another important deviation from the P2B Regulation is found in Art. 12 ELI Model Rules regarding unilateral changes of platform-user contracts. First, unlike the corresponding Art. 3 P2B Regulation, this provision does not only apply to platform-supplier contracts, but also to platform-customer contracts. Second, the provision not only imposes a one-month notice period for unilateral changes, but also requires that the variation is in accordance with good faith and fair dealing (Art. 12(1)(b) ELI Model Rules).

3. Liability of the platform operator

One of the most controversial issues surrounding online platforms which facilitate transactions between customers and suppliers is under which conditions a platform operator is liable towards platform users.³¹ In this context, three different questions have to be distinguished:³² (1) To what extent can a platform operator be held liable if its intended contractual role as a mere intermediary was not made sufficiently clear? (2) Can a platform operator be held liable – even if its role as an intermediary has been sufficiently transparent – on the grounds that it has a “predominant influence” over the supplier? (3) To what extent is the platform operator liable for breach of a duty of care towards platform users arising under the platform-customer or platform-supplier contract?

a) Lack of transparency

²⁸ For more details on the background of this provision see Busch (n. 8) 46–47.

²⁹ Cf. Arun Sundararajan, *The Sharing Economy* (MIT Press 2016) 155 (on data-driven delegation in the sharing economy); see also Christoph Busch ‘Self-regulation and regulatory intermediation in the platform economy’ in Marta Cantero Gamito and Hans-W. Micklitz (eds) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Elgar 2020) 115–134, 123 (arguing for data-driven regulation in the platform economy).

³⁰ See Friedrich Graf von Westphalen, *B2B-Plattform-Verordnung: Das AGB-Recht vor weitreichenden Veränderungen*, BB 2020, 579-586; see also Busch (n. 4) 61–66.

³¹ See e.g. Bram Devolder, ‘Contractual Liability of the Platform’ in Devolder (n. 3) 31–88; Maultzsch (n. 8); see also Vassilis Hatzopoulos, *The Collaborative Economy and EU Law* (Hart 2018) 56–61.

³² For a similar analysis see Maultzsch (n. 8) 214.

The first question is addressed by Art. 19 ELI Model Rules. Under this provision, customers can exercise any rights and remedies which they have against the supplier under the supplier-customer contract also against the platform operator if the latter has not properly informed the customer about its intermediary role as required under Art. 13 ELI Model Rules. It is important to note that a violation of Art. 13 does not affect the attribution of contractual roles in the platform triangle. As a consequence, the customer can choose whether they exercise the available rights or remedies against the supplier or the platform-operator. Art. 21(1) ELI Model Rules further strengthens the position of the customer in cases where the supplier is not a business. In such a scenario, consumer protection rules do not apply, as the customer-supplier relationship is a C2C contract. However, under Art. 21(1), the customer can invoke consumer protection rules vis-à-vis the platform operator just as if the customer-supplier relationship was a B2C contract – provided that the platform operator is liable for lack of transparency (Art. 19) or because of its predominant influence (Art. 20).

b) Predominant influence

The second question deals with the liability of platforms that have made sufficiently clear that they only intend to act as intermediaries. While the business model of some platforms is limited to displaying classified ads (e.g. Craigslist, Gumtree), the involvement of other platform operators in the transaction between suppliers and customers goes much further. It is doubtful whether platform operators who not only offer facilities for the conclusion of supplier-customer contracts but also provide algorithm-driven recommender systems, process payments and offer fulfilment services (e.g. Amazon) can be characterized as mere intermediaries or facilitators. Some self-styled “intermediaries” exercise such a high level of control over third-party suppliers that they can even determine product prices (e.g. Uber). Such cases are addressed in Art. 20(1) ELI Model Rules which stipulates that a customer can exercise rights and remedies for non-performance available against the supplier under the supplier-customer contract also against the platform operator, if “the customer can reasonably rely on the platform operator having a predominant influence over the supplier”. As explained above,³³ the general term of “predominant influence” is fleshed out by a list of criteria in Art. 20(2) ELI Model Rules which are conceived as elements of a flexible system.³⁴

c) Duty of care

The third issue hinges on the question to what extent platform operators have a duty of care towards platform users. This question is addressed in Art. 8 and 9 ELI Model Rules which respectively deal with the “duty to protect users” and the “duty to react to misleading information” uploaded by users. Following the model of Art. 15(1) of the E-Commerce Directive 2000/31/EC, both provisions emphasize the premise that platform operators have no general duty to monitor the activity of platform users, nor any information uploaded to the platform (Art. 8(1) and 9(1) ELI Model Rules). If, however, the platform operator obtains credible evidence of harmful activities (as detailed in Art. 8(2) ELI Model Rules), a duty to take adequate measures for protecting platform users arises. This provision more or less follows the model of Art. 14(1) of the E-Commerce Directive 2000/31/EC. However, whereas the E-Commerce Directive only formulates liability exemptions, Art. 8(2) ELI Model Rules takes a

³³ See section III.

³⁴ It may not come as a surprise that the liability rule laid down in Art. 20 ELI Model Rule has attracted some criticism, see e.g. Maultzsch (n. 8) at 227–235 (with regard to Art. 18 Discussion Draft). For a more detailed discussion see Busch (n. 8) at 48–51 and Marlena Pecyna in Busch et al (n. 8) 157–165.

different approach and states that a violation of the duty of care renders the platform operator liable for damages.

Similarly, under Art. 9(2) ELI Model Rules platform operators are liable if they fail to take reasonable steps upon a receiving a notification regarding misleading information uploaded by suppliers. As stipulated by Art. 9(2) sentence 2, such reasonable steps may require more than just removing the misleading information. For example, a short-term rental platform which is informed about the fact that an apartment was falsely advertised as suitable for wheelchair users, may have to contact customers who have booked the apartment for an upcoming stay.

4. Reputation systems

Reputation systems, i.e. mechanisms for collecting and publishing reviews regarding suppliers, customers, goods, services or digital content (Art. 2(k) ELI Model Rules), are a central element of the “market design” applied by online platforms.³⁵ They play a key role in reducing information asymmetries and creating trust between platform users. Online reviews serve as an instrument for sanctioning bad behavior (reputational enforcement) and for rewarding good behavior. In this perspective, trustworthy platform users who receive positive ratings accumulate “reputational capital” which facilitates future transactions.³⁶ In spite of the importance of reputation systems, the EU legislator so far has hardly addressed this issue.³⁷ In order to fill this gap, Art. 5-7 ELI Model Rules introduce a number of provisions which define quality requirements for reputation systems and introduce a right to portability of reputational data.

a) Transparency and systemic trust

Reputation systems can only fulfil their trust-building and market-stabilizing function if it is ensured that the reviews and ratings are trustworthy and free from manipulation. One might argue about whether this can be left to the market or whether there is a need for regulation. Platform operators have an incentive to keep their reputation systems free from manipulation, various reports³⁸ about fake reviews and a growing number of legal disputes³⁹ regarding the design of reputation systems suggest that there is a need for setting minimum requirements regarding transparency and procedural fairness.

Therefore, Art. 5(1) ELI Model Rules stipulates a general information duty regarding the collection, processing and publication of reviews. In applying the provision, courts will have to balance the legitimate interest of platform operators to protect their trade secrets and the users’ interest to establish a reasonable level of algorithmic transparency. Article 5(2) ELI Model Rules contains a general clause stipulating that reputation systems must comply with the

³⁵ See e.g. Michael Luca, ‘Designing Online Marketplaces: Trust and Reputation Mechanisms’ 17 *Innovation Policy and the Economy* 77–94 (2017); Gary Bolton, Ben Greiner and Axel Ockenfels, ‘Engineering Trust: Reciprocity in the Production of Reputation’ 59 *Information, Management Science* 265–285 (2013).

³⁶ See Eric Goldman, ‘Regulating Reputation’, in Hassan Masum and Mark Tovey (eds) *The Reputation Society* (MIT Press 2011) 51, 53 (referring to reputational enforcement as a ‘secondary invisible hand’).

³⁷ The P2B Regulation 2019/1150 does not address reputation systems at all. The Modernisation Directive 2019/2161 only introduce a few transparency duties cf. Arts. 3(4)(c) and 7(b) of Directive 2019/2161.

³⁸ See e.g. Rebecca Smithers, ‘Flood of ‘fake’ five-star reviews inundating Amazon, Which? Finds’ *The Guardian* (16 April 2019) <<https://www.theguardian.com/technology/2019/apr/16/flood-of-fake-five-star-reviews-inundating-amazon-which-finds>>.

³⁹ See e.g. BGH, 20 February 2020, I ZR 193/18, CR 2020, 253 (regarding reviews for medical products on Amazon); BGH, 14 January 2020, VI ZR 496/18, GRUR 2020, 439 (regarding the filtering algorithm of the review site Yelp); OLG Frankfurt, 22 February 2019, 6 W 9/19, MMR 2019, 313 (regarding paid reviews on Amazon).

requirements of “professional diligence”. This notion has been borrowed from Art. 2(h) of the Unfair Commercial Practices Directive. This general clause is complemented by conformity provisions and minimum quality requirements in Arts. 5(3) and Art. 6 which have been described above at III.

b) Portability of reputational capital

Considering the importance of positive reviews as ‘reputational capital’ in the platform economy, users who want to switch from one platform to another or to engage in multi-homing between different platforms have a strong interest in taking their reviews with them. If no such portability of reputational data is possible, switching costs between platforms may be prohibitively high and users can become essentially locked in.⁴⁰

In order to increase competition between platforms, Art. 7 ELI Model Rules creates a right to data portability for reputational data. This provision, which can be understood as a component of a broader framework for digital identity management,⁴¹ fills a gap in Art. 20(1) General Data Protection Regulation (EU) 2016/679.⁴² It is important to note that Art. 7 ELI Model Rules, only grants a right to ‘export’ data. Whether platforms allow the ‘import’ of reviews originating from other platforms is left to the market.

5. Conflicts of laws

Online platforms operate across borders and thus frequently connect suppliers with customers in different countries. This can easily imply that goods and services are exchanged in a triangular contractual relationship where the platform-supplier contract, the platform-customer contract and the supplier-customer contract are governed by the laws of two or three different countries. For this reason, Art. 28 of the ELI Model Rules explain the scope of international application of the Model Rules. Some rules, in particular most of the general obligations of the platform operator, apply to all platform operators who have their habitual residence at a place which has adopted the Model Rules, following a similar provision in Art. 1 (2) of the P2B Regulation (EU) 2019/1150. Other rules relate clearly to one of the three contractual relationships, with the consequence that the application of the Model Rules follows private international rules on contracts, in particular on choice of law and on application of the law at the place of the party which provides the characteristic performance, which should be the platform operator in platform-supplier and platform-customer contracts, and the supplier in supplier-customer contracts.⁴³ Consumer protection provisions may take precedence.⁴⁴

IV. Outlook

Online platforms create global virtual spaces and markets that are designed by the platform operator. Their promise is to create value for customers and suppliers by solving coordination and transaction cost problems and thus contributing to innovation and economic growth. At the same time, platforms create increasingly assume the role of gatekeepers who control access to

⁴⁰ Barbara Engels, ‘Data portability among online platforms’ 5(2) *Internet Policy Review* 5 (2016).

⁴¹ Cf. Maik Hesse and Timm Teubner, ‘Reputation portability - quo vadis?’ *Electronic Markets* 1 (2019).

⁴² Under the Art. 20(1) GDPR, a right to data portability is only granted for data that the data subject has provided to the data controller. It is therefore at least debatable whether online reviews, which have been submitted by third parties, are covered by Art. 20(1) GDPR. cf. Vikas Kathuria and Jessica C. Lai, *User review portability: Why and how?* 34 *Computer Law & Security Review* 1291, 1297 (2018); see also Busch (n. 8) 55–56). Moreover, GDPR does not cover reputational data concerning legal persons (e.g. a corporation that runs a hotel).

⁴³ Arts. 3, 4 Rome I Regulation (EC) 593/2008.

⁴⁴ Art. 6 Rome I Regulation (EC) 593/2008.

the market. In this perspective, platforms can be conceptualised as virtual spaces which are governed by rules defined by platforms operators who act as private rule makers.⁴⁵ These rules are often implemented and enforced by technological design choices made by the platform operators.⁴⁶ However, these design choices and the rules set by the platform operator are not necessarily committed to the common good, but serve the goals of the platform operator.

As online platforms are turning into essential infrastructures for the exchange of goods, services and digital content, legal systems have entered into a learning process as to whether and how they can and should enforce their values and rules in the virtual spaces of the online platforms. The solutions for the relationship between providers and customers that have been developed over decades, if not centuries, have not yet found a place for platforms as the new and particularly influential actor. The bilateral relationship between the contracting parties has turned into a triangle. This puts classic doctrines of contract and tort law to the test. The distribution of duties and risks developed for traditional supply chains no longer fits for online platforms in the platform economy.

The debate about what rights and obligations platform operators have and what risks they should bear cannot be conducted at national or European level alone. It is a global debate.⁴⁷ The ELI Model Rules on Online Platforms are a contribution to this discussion. Based on the emerging developments in national legal systems, they seek to transfer the values of contract and tort law to online platforms, not at least by describing the obligations that platform operators might have towards their users. The rules proposed in these Model Rules are a European contribution to the global discussion. Their outstanding feature is that they do not merely formulate abstract principles, but illustrate how concrete rules for online platforms could look like. The debate is open.

⁴⁵ See e.g. Heike Schweitzer, *Digitale Plattformen als private Regelgeber*, ZEuP 2019, 1–12; Christoph Busch ‘Self-regulation and regulatory intermediation in the platform economy’ in Marta Cantero Gamito and Hans-W. Micklitz (eds) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Elgar 2020) 115–134; Przemysław Jacek Pałka, ‘Terms of Service are not Contracts – Beyond Contract Law in the Regulation of Online Platforms’ in Stefan Grundman (ed) *European Contract Law in the Digital Age* (Intersentia 2018) 135–161 (arguing that online platforms are proprietary spaces and that their terms of service should be treated as an exercise of property right on them, rather than contracts); see also Rory van Loo, ‘Rise of the Digital Regulator’, 66 *Duke Law Journal* 1267 (2017).

⁴⁶ See the seminal contributions on ‘code’ as a modality of regulation by Lawrence Lessig, ‘The Law of the Horse: What Cyber Law Might Teach’ 113 *Harvard Law Review* 501 (1999) and Joel R Reidenberg, ‘Lex Informatica: The Formulation of Information Policy Rules through Technology’ , 76 *Tex L Rev* 553 (1997–8).

⁴⁷ See, for example, the recent regulatory initiatives regarding online platforms in China (E-Commerce Law of the People’s Republic of China, adopted at the Fifth Session of the Standing Committee of the 13th National People’s Congress on 31 August 2018) and India (Consumer Protection Act 2019, Act No. 35 of 2019, 9 August 2019); for a perspective from the United States see e.g. Julie E. Cohen, ‘Law for the Platform Economy’ 51 *University of California Davis Law Review* 133 (2017) and Lina M. Khan, ‘The Separation of Platforms and Commerce’, 119 *Columbia Law Review* 973 (2019).

ELI Model Rules on Online Platforms*

Chapter I: Scope and Definitions

Article 1: Purpose and Scope

1. The purpose of these Model Rules is to provide a set of rules that contribute to fairness and transparency in the relations between platform operators and platform users. They may serve as a model for national, European and international legislators as well as a source of inspiration for self-regulation and standardisation.
2. These rules are intended to be used in relation to platforms which:
 - a) enable customers to conclude contracts for the supply of goods, services or digital content with suppliers within a digital environment controlled by the platform operator;
 - b) enable suppliers to place advertisements within a digital environment controlled by the platform operator which can be browsed by customers in order to contact suppliers and to conclude a contract outside the platform;
 - c) offer comparisons or other advisory services to customers which identify relevant suppliers of goods, services or digital content and which direct customers to those suppliers' websites or provide contact details; or
 - d) enable platform users to provide reviews regarding suppliers, customers, goods, services or digital content offered by suppliers, through a reputation system.
3. These rules are not intended to be used in relation to platforms operated in the exercise of public authority.
4. Provisions for specific sectors, such as financial services, including insurance, or package travel and linked travel arrangements, take precedence to the extent that they deviate from these rules.

Article 2: Definitions

For the purpose of these rules:

- a) 'platform' means an information society service which provides one or more of the services set out in paragraph (2) of Article 1.
- b) 'platform operator' means a trader who operates a platform;
- c) 'customer' means any natural or legal person who uses a platform for searching for or obtaining goods, services or digital content;
- d) 'supplier' means any natural or legal person who uses a platform for marketing goods, services or digital content to customers, or who has been suggested to customers by a platform;

* The text of the ELI Model Rules, a list of sources and comments to the individual provisions are available from the website of the European Law Institute: www.europeanlawinstitute.eu [<https://perma.cc/PDL8-5TJ9>].

e) ‘supplier-customer contract’ means a contract under which goods, services or digital content are to be provided by a supplier to a customer against the payment of a price in money, or any other counter-performance, or in exchange for data;

f) ‘platform-customer contract’ means a contract concluded between a platform operator and a customer on the use of a platform;

g) ‘platform-supplier contract’ means a contract concluded between a platform operator and a supplier on the use of a platform;

h) ‘consumer’ means any natural person who, in contracts covered by these rules, is acting for purposes which are outside his or her trade, business, craft or profession;

i) ‘trader’ means any natural person or legal person, irrespective of whether privately or publicly owned, who is acting for purposes relating to its trade, business, craft or profession in relation to contracts covered by these rules;

j) ‘platform user’ means a supplier, a customer or a person who provides a review; and

k) ‘reputation system’ means any mechanism for collecting and publishing reviews regarding suppliers, customers, goods, services or digital content.

Chapter II: General Obligations of Platform Operators Towards Platform Users

Article 3: Transparency of Information and Contract Terms

Information to be provided under these rules, as well as contract terms, must be clear and presented in a comprehensible manner, and in machine-readable format. Contract terms must be easily available to platform users at all stages of their relationship with the platform operator, including the pre-contractual stage.

Article 4: Transparency of Rankings

1. Platform operators must provide users with easily accessible information about the main parameters determining rankings presented to users as a result of their search query, and the relative importance of these main parameters. This duty is without prejudice to any trade secrets regarding the underlying algorithms. Platform operators are not required to disclose any information which could easily be used to manipulate search results to the detriment of customers.

2. Platform operators must inform users if the result of a search query has been influenced by any remuneration paid by a supplier or any other financial or corporate ties between the platform operator and the supplier.

Article 5: General Requirements for Reputation Systems

1. A platform operator who provides a reputation system on its online platform must provide information about how the relevant information is collected, processed and published as reviews.

2. The reputation system must comply with the requirements of professional diligence.

3. A reputation system is presumed to comply with the requirements of professional diligence if it complies with either:

- a) voluntary standards adopted by a national, European or an international standardisation organisation, such as ISO 20488:2018 (Online Consumer Reviews); or
- b) the criteria set out in Article 6.

Article 6: Criteria of Professional Diligence for Reputation Systems

The criteria in the meaning of paragraph (3) (b) of Article 5 are:

- a) The platform operator must take reasonable and proportionate steps to ensure that the review is based on a genuine experience of its object.
 - b) If the platform operator claims that reviews are based on a verified transaction, it must ensure that the review originates from a party to that transaction.
 - c) If the platform operator knows or ought to know that the author of a review has received any benefit for providing the review, this must be indicated. If the platform operator knows or ought to know that the author of a review has received any benefit for giving the review a specific positive or negative content, the platform operator must ensure that no such review is or remains published.
 - d) Reviews may be rejected or removed only for a legitimate reason. The author of the review must be informed without undue delay about the rejection or removal, along with the reasons for such rejection or removal. Platform operators are not required to disclose any information which could easily be used to manipulate the reputation system to the detriment of customers.
 - e) Reviews must be published without undue delay.
 - f) The order or relative prominence in which reviews are presented by default must not be misleading. Platform operators must provide users with easily accessible information about the main parameters determining the order or relative prominence in which reviews are presented. Reviews must indicate their submission date. Platform users must be able to view reviews in chronological order.
 - g) If the reputation system displays reviews for a fixed period of time only, the duration of this period must be indicated to platform users. This period must be reasonable, but not shorter than 12 months.
 - h) If individual reviews are combined into a consolidated rating, the calculation method must not lead to misleading results. If the consolidated rating is calculated on the basis of factors other than the numerical average of reviews, the platform operator must inform the platform users about such factors. The total number of reviews on which the consolidated rating is based must be indicated.
- If reviews are displayed for a fixed period of time only, reviews which are older than this period must not be used for the calculation of a consolidated rating.
- i) The platform operator must provide free-of-charge mechanisms which allow platform users:
 - aa) to submit a reasoned notification of any abuse;
 - bb) who have been affected by a review to submit a response, which must be published together with that review without undue delay.

Article 7: Portability of Reviews

1. The platform operator must provide a facility for existing reviews to be directly transferred at least monthly and upon the termination of the platform-user contract to the reputational system of another platform operator in a structured, commonly used and machine-readable format.
2. Before the conclusion of the platform-supplier or the platform-customer contract, the platform operator must provide information about the processes, technical requirements, timeframes and charges that apply in case a platform user wants to transfer reviews to the reputation system of another platform operator.
3. When importing reviews from another platform, the platform operator must verify that these reviews were generated in conformity with the requirements of professional diligence under paragraphs (2) and (3) of Article 5.
4. When displaying reviews imported from another platform, the platform operator must indicate that these reviews were generated on a different platform.

Article 8: Duty to Protect Users

1. The platform operator has no general duty to monitor the activity of platform users. 2. A platform operator who, on obtaining credible evidence of:
 - a) criminal conduct of a supplier or customer to the detriment of other users; or
 - b) conduct of a supplier or customer which is likely to cause physical injury, a violation of privacy, infringement of corporeal property, deprivation of liberty or a violation of another similar right to the detriment of another platform user,fails to take adequate measures for the protection of the platform users, is liable for damage caused to platform users as a result of this failure.
3. Paragraph (2) also applies where the detriment is suffered by another person who stands to benefit from, or to be exposed to risks emanating from the goods, services or digital content to be provided under the supplier-customer contract.

Article 9: Duty to React to Misleading Information Given by Users

1. A platform operator has no duty to monitor information presented by suppliers or customers on the platform, unless provided otherwise by law.
2. If a platform operator receives a notification of misleading information presented by suppliers on the platform, whether about themselves or the goods, services or digital content they are offering, the platform operator must, in cooperation with the supplier, take reasonable steps to have the misleading information rectified, removed or made inaccessible. Platform operators must also take reasonable and proportionate steps to inform customers who have entered into supplier-customer contracts on their platform and who could have been affected by such misleading information.
3. Paragraph (2) applies accordingly to misleading information presented by customers about themselves.

Article 10: Reporting Facilities

The platform operator must provide an openly accessible means of communication for making notifications of conduct under Articles 8 and 9, which also allows for anonymous notifications.

Article 11: Communication via Platform

Where a platform offers facilities for communication between customers and suppliers relating to the conclusion or performance of supplier-customer contracts, the platform operator must forward any such communications without undue delay.

Article 12: Unilateral Changes of the Platform-User Contract

1. A platform operator may unilaterally vary the terms of a platform-user contract, provided the following requirements are met:

a) The user is given reasonable notice of this variation on a durable medium at least one month before the variation takes effect; and

b) the variation is in accordance with good faith and fair dealing.

2. The platform operator need not observe the notice period in paragraph (1) (a) where the variation is required by a sudden change of the law, or in order to address an imminent cybersecurity risk.

3. With the notice of a variation, the user must receive a copy of the revised terms together with an explanation of what has been changed.

4. The platform user may terminate the platform-user contract on the occasion of changes of terms without having to observe any period of notice which would otherwise apply. The notice under paragraph (1) (a) must inform the user of this right.

Chapter III: Duties of the Platform Operator Towards the Customer

Article 13: Duty to Inform About the Role of the Platform

At the earliest opportunity and directly before the conclusion of the supplier-customer contract, the platform operator must inform the customer, in a prominent manner, that the customer will be entering into a contract with a supplier and not with the platform operator.

Article 14: Duty to Inform About the Supplier

1. Directly before the conclusion of a supplier-customer contract, the platform operator must inform the customer, in a prominent manner, whether the supplier offers its goods, services or digital content as a trader. Where the supplier is not a trader, the platform operator should also inform the customer that consumer law does not apply to the supplier-customer contract.

2. Not later than immediately after the conclusion of a supplier-customer contract, the platform operator must inform the customer about the identity of the supplier, and must enable communication between the supplier and the customer. At the customer's request, the platform operator must disclose the address of the supplier.

3. For the purpose of paragraphs (1) and (2), the platform operator may rely on the information provided to it by the supplier, unless the platform operator knows or ought to know, on the basis of the available data regarding transactions on the platform, that this information is incorrect. Platform operators must take adequate measures to prevent traders from appearing on the platform as non-traders.

Chapter IV: Duties of the Platform Operator Towards the Supplier

Article 15: Duty of the Platform Operator to Inform Suppliers

Before concluding the platform-supplier contract, the platform operator must inform the supplier on a durable medium:

- a) that the supplier will supply goods, services or digital content under contracts with customers, and not with the platform operator;
- b) how the platform-supplier contract can be terminated by the supplier;
- c) how the platform-supplier contract can be terminated by the platform operator;
- d) about fees due to the platform operator, and how they are calculated;
- e) about any payment mechanism which the platform operator provides for supplier-customer contracts; and
- f) about any method of transferring communications between the supplier and its customers. 18

Article 16: Duty to Provide Facilities for Informing Customers

1. The platform operator must provide the supplier with facilities for fulfilling the supplier's information duties towards the customer.
2. Where the platform-supplier contract does not exclude the supplier from using standard terms for the supplier-customer contract, the platform operator must provide a facility which allows the inclusion of these terms.

Article 17: Termination

1. Either party to a platform-supplier contract may terminate that contract by giving notice to the other. The period of notice for the platform operator is no shorter than 30 days for the first year, 60 days for the second year, and 90 days for the third and subsequent years during which the contractual relationship has lasted. If the platform-supplier contract stipulates a longer notice period for the supplier, that longer period also applies to the notice given by the platform operator. In order to be valid, such a longer notice period must be appropriate.
2. A party may terminate the contract with immediate effect if it has a compelling reason for doing so.
3. The notice under paragraphs (1) or (2) must specify the reasons for termination.

Article 18: Restriction and Suspension

1. The platform operator may suspend the provision of its services to a supplier, or restrict the range of specific goods or services or digital content offered by the supplier, by giving notice to the supplier. The notice must specify the reason for the restriction or suspension.
2. Where a restriction or suspension under paragraph (1) has an effect which is similar to that of the termination of the platform-supplier contract, Article 17 applies with appropriate modifications.

Chapter V: Liability

Article 19: Liability of the Platform Operator for Lack of Transparency

In the case of a violation of Article 13, the customer can exercise the rights and remedies available against the supplier under the supplier-customer contract also against the platform operator.

Article 20: Liability of the Platform Operator with Predominant Influence

1. 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.

2. 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.

Article 21: Exercise of Rights and Remedies Against the Platform Operator

1. Where Article 19 or Article 20 (1) apply, a customer who is a consumer can exercise against the platform operator all the rights and remedies that would be available against the supplier if the supplier were a business, irrespective of whether the supplier is a business.

2. Where Article 19 or Article 20 (1) apply, if, according to the applicable law, a customer needs to notify the supplier in order to exercise a remedy, then notifying the supplier produces all effects also in relation to the platform operator.

Article 22: Misleading Statements Made by the Platform Operator

If a platform operator makes misleading statements about suppliers or customers, about goods, services or digital content offered by suppliers, or about any other terms of the supplier-customer contract, the platform operator is liable for the damage which this misleading information causes to customers or suppliers.

Article 23: Guarantees

A platform operator is liable for guarantees which it gives about suppliers or customers, or about goods, services or digital content offered by suppliers.

Article 24: Liability for Violation of Other Roles

A platform operator is liable for damage caused to platform users by a violation of Articles 3, 4, 5, 7, 9 paragraphs (2) and (3), 10, 11, 14, 15, 16, 17, 18.

Chapter VI: Redress

Article 25: Right of Redress

1. A platform operator who, under Articles 19 or 20, has become liable towards a customer for:

- a) a supplier's misleading statements; or
- b) a supplier's failure to perform the supplier-customer contract,

has the right to be indemnified by the supplier.

2. A supplier who has become liable towards a customer because of misleading statements made by the platform operator has the right to be indemnified by the platform operator.

Chapter VII: Final Provisions

Article 26: Mandatory Nature

The parties may not deviate from these rules or vary their effects to the detriment of the platform user.

Article 27: Third-Party Complaint Mechanism

The platform operator must provide a free-of-charge openly accessible complaint mechanism which allows third parties to submit a reasoned notification of any nuisance or damage caused by platform users. Upon receiving such a notification, the platform operator must take reasonable and proportionate steps to prevent future nuisance or damage.

Article 28: Applicable Law

1. The provisions in Articles 3–11 and 27 apply to platforms which provide services as defined in Article 1 to suppliers and customers who have their habitual residence in a state which has adopted these Model Rules.

2. Article 12 and the provisions in Chapters III–V apply to platform-customer contracts and to platform-supplier contracts which are governed by the law of a state which has adopted these Model Rules.

3. The provision in Chapter VI applies to platform-customer contracts and to platform-supplier contracts where the applicable private international law on legal subrogation or multiple debtors invokes the law of a state which has adopted these Model Rules.