

European Legal Studies Institute Osnabrück
Research Paper Series

No. 21-01

Christoph Busch

**Rethinking Product Liability Rules for Online Marketplaces:
A Comparative Perspective**

February 2021

Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective

*Christoph Busch**

[Draft – February 10, 2021]

Over the past decade, the rise of online marketplaces such as Amazon.com has profoundly changed the retail landscape. The current pandemic has further accelerated consumers' shift towards online buying in general and online marketplaces in particular. As a result, traditional distribution chains have been replaced by a market structure which is dominated by digital intermediaries. While this development has increased consumer choice, it has also enabled the influx of unsafe and defect products to US and EU consumer retail markets. It is a matter of controversy whether and how product liability rules, which have been designed for the traditional distribution chain model, can be applied to online intermediaries. Against this background, this Article explores how courts and lawmakers on both sides of the Atlantic are trying to adjust the existing product liability framework to the new reality of the platform economy.

The comparative analysis shows that the regulatory strategies in Europe and the US differ considerably. While US law focusses on indirect regulation through product liability, EU law puts its emphasis on direct regulation through public enforcement of product safety rules and market surveillance by public authorities. In this regard, the proposal for a Digital Services Act, published by the European Commission in December 2020, will not bring much of a change. The Article calls for a reform of the EU Product Liability Directive that takes inspiration from recent developments in US product liability law. This could lead not only to a more balanced regulatory framework within the EU, but also to a trans-Atlantic convergence in the field of product liability. Building on the findings of the comparative analysis, the Article outlines several options for law reform and discusses how the regulatory design of product liability rules could affect the market structure and competition in the platform economy.

** Professor of Law & Director, European Legal Studies Institute, University of Osnabrück, Germany; Visiting Fellow, Information Society Project, Yale Law School; Member of the European Commission's Expert Group for the EU Observatory on the Platform Economy; Reporter for the European Law Institute's Model Rules on Online Platforms. I am very grateful to Nikolas Guggenberger and the participants of the Yale ISP Writing Workshop for their incredibly helpful and insightful comments on an early draft of this essay.*

TABLE OF CONTENTS

INTRODUCTION.....	3
I. SETTING THE SCENE: TOWARD STRICT LIABILITY OF ONLINE MARKETPLACES IN THE US.....	6
A. Recent Developments in US Case Law	6
B. California’s AB 3262	9
C. Consumer Law Bills Pending in the US Congress	10
II. (NON-)LIABILITY OF ONLINE MARKETPLACES UNDER EU LAW	11
A. Product Liability Directive: A Law Made For Pipelines, Not Platforms	12
B. Electronic Commerce Directive: No Safe Harbor for Defect Products	15
III. BUILDING A NEW REGULATORY FRAMEWORK FOR ONLINE MARKETPLACES IN THE EU	18
A. Market Surveillance Regulation	18
B. Product Safety Pledge	20
C. Digital Services Act.....	21
1. No Specific Liability Regime for Online Marketplaces.....	23
2. Notice-and-Action Mechanism and Trusted Flaggers	24
3. Know Your Business Customer	25
IV. COMPARATIVE OBSERVATIONS: DIFFERENT PATTERNS OF PRODUCT SAFETY AND PRODUCT LIABILITY.....	27
A. Direct Regulation versus Indirect Regulation	27
B. Possible Explanations: The Social, Procedural and Cultural Context.....	30
V. POLICY IMPLICATIONS AND RECOMMENDATIONS	33
A. Should the EU Extend Product Liability to Online Marketplaces?	33
B. Regulatory Design of Product Liability	36
1. Controlling Platforms: The Uber Test	36
2. Online Marketplaces as Quasi-Importers	39
3. Asymmetric Regulation for Smaller Marketplaces?	40
C. Effects on Competition and Market Structure	41
CONCLUSION.....	43

INTRODUCTION

In 2016, Angela Bolger, a San Diego, CA resident decided to buy a replacement battery for her laptop computer.¹ As an Amazon Prime member, her natural choice was to look for the battery on the Amazon website. There she purchased it from Lenoge Technology Ltd., a technology merchant operating on the Amazon Marketplace under the name E-Life. The purchase was charged by Amazon and the battery was shipped to Bolger in an Amazon-branded packaging from an Amazon fulfillment Center in Oakland, CA where it had been stored before shipment. Several months later, the battery exploded inflicting serious burns on Bolger that required two weeks of hospitalization.

Bolger sued Amazon and several other defendants, including Lenoge, claiming strict product liability and several other causes of action. Lenoge was served but did not appear, so the trial court entered its default. Amazon moved for summary judgment, arguing that it could not be held liable under product liability law because it did not distribute, manufacture, or sell the product in question. A San Diego Superior Court granted the motion for summary judgment, and Bolger appealed. On August 13, 2020, the California Court of Appeal, reversed the lower court's decision and issued a ruling holding Amazon liable as "an integral part of the overall producing and marketing enterprise".²

This landmark ruling is linked to a string of court decisions involving inflammable hoverboards,³ a retractable dog leash,⁴ lethal caffeine powder⁵ and other dangerous or defective products. All of these cases have one point in common: They revolve around

¹ See *Bolger v. Amazon.com*, 53 Cal.App.5th 431 (Cal. Ct. App. 2020).

² *Id.* at 456. The California Supreme Court denied Amazon's petition to review, declining to hear the case on the merits.

³ See, for example *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019) (affirming dismissal of products liability claim against Amazon after a hoverboard purchased on Amazon's webpage burned down a house); see also Alexandra Berzon, *How Amazon Dodges Responsibility for Unsafe Products: The Case of the Hoverboard*, *Wall St. J.* (Dec. 5, 2019), <https://www.wsj.com/articles/how-amazon-dodges-responsibility-for-unsafe-products-the-case-of-the-hoverboard-11575563270>.

⁴ See *Oberdorf v. Amazon.com, Inc.*, 936 F.3d 182, (3d Cir. 2019) (vacating judgment and granting Amazon's petition for rehearing after previously holding that Amazon is a seller). For further analysis, see Christoph Busch, *When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon*, 8 *Journal of European Consumer and Market Law* 173 (2019).

⁵ *Stiner v. Amazon.com, Inc.* (Ohio Ct. App. 2019) 2019-Ohio-586, 2019 WL 757822.

the question whether Amazon can be held strictly liable for products sold on its marketplace by third-party sellers. So far, the answer given by the courts has been split. While the first wave of court decisions followed Amazon's line of argument,⁶ more recently the tide seems to turn. The growing number of cases concerning the Amazon Marketplace has sparked a debate among US legal scholars about whether online marketplaces can and should be held liable under product liability law.⁷

This debate takes place against the background of a profound structural change in the retail landscape. Over the past decade, the quarterly share of e-commerce sales of total US retail sales has grown from 4.1% in the first quarter of 2010 to 11.8% in the first quarter of 2020.⁸ The current COVID-19 pandemic has further accelerated consumers' shift towards online sales, raising the share of e-commerce sales to 16.1% in the second quarter of 2020.⁹ A large portion of these sales can be attributed to electronic retail platforms such as the Amazon Marketplace where third-party sellers offer a vast range of products. In 2020, third-party

⁶ See, e.g., *Garber v. Amazon.com, Inc.* (N.D.Ill. 2019) 380 F. Supp. 3d 766, 781 (applying Illinois law); *Stiner v. Amazon.com, Inc.* (Ohio Ct. App. 2019) 2019-Ohio-586, 2019 WL 757822 (applying Ohio law); *Eberhart v. Amazon.com, Inc.* (S.D.N.Y. 2018) 325 F. Supp. 3d 393, 397-400 (applying New York law); *Allstate N.J. Ins. Co. v. Amazon.com, Inc.* (D.N.J. July 24, 2018) No. 17 C 2738, 2018 U.S. Dist. LEXIS 123081, 2018 WL 3546197, at *5-12 (applying New Jersey law); *Fox v. Amazon.com, Inc.* (M.D. Tenn. May 30, 2018) No. 16 C 3013, 2018 U.S. Dist. LEXIS 90101, 2018 WL 2431628, at *8 (applying Tennessee law); *Erie Ins. Co v. Amazon.com Inc.* (D.Md.Jan.22,2018) No 16 C 2679, 2018 WL 3046243, at*1-3 (applying Maryland law).

⁷ See, e.g. Amy Ryan Bullard, *Out-Techning Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N. C. J. L. & Tech.181, 230 (2019); Aaron Doyer, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J. L. & Pol'y 719 (2019); Edward J. Janger and Aaron D. Twerski, *The Heavy Hand of Amazon: A Seller, Not a Neutral Platform*, 14 Brook. J. Corp. Fin. & Com. L. 259 (2020); Thomas Rickettson, *Blinded by the Leash: Strict Products Liability in the Age of Amazon*, 125 Penn St. L. Rev. 321; Robert Sprague, *It's a Jungle Out There: Public Policy Considerations Arising From a Liability-free Amazon.com*, 60 Santa Clara L. Rev 253 (2020); Catherine M. Sharkey, *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, Nw. U. L Rev. Online (2020), https://scholarlycommons.law.northwestern.edu/nulr_online/305; Elizabeth Shehan, *Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon*, 53 Ga. L. Rev. 1215 (2019); see also Eric Goldman and Edward J. Janger, *Should Amazon Be Responsible When Its Vendors' Products Turn Out to Be Unsafe?*, Wall Street Journal (Feb 28, 2020), <https://www.wsj.com/articles/should-amazon-be-responsible-when-its-vendors-products-turn-out-to-be-unsafe-11582898971>.

⁸ Statista, *Quarterly share of e-commerce sales of total U.S. retail sales from 1st quarter 2010 to 3rd quarter 2020*, (Dec 2, 2020) <https://www.statista.com/statistics/187439/share-of-e-commerce-sales-in-total-us-retail-sales-in-2010/>

⁹ *Id.*

sellers accounted for 62% of the total sales volume on Amazon websites, bringing in \$295 billion, up from \$200 billion in 2019.¹⁰ As a result, traditional distribution chains (“pipelines”) have been replaced by a market structure which is more and more dominated by digital intermediaries (“platforms”). While this development has increased consumer choice, it has also enabled the influx of unsafe and defect products to US and EU consumer retail markets.¹¹ It is a matter of debate whether and how product liability rules, which have been designed for the traditional pipeline model of supply chains, need to be adjusted in order to fulfill their purpose in a retail landscape shaped by platforms.

This essay adds a comparative perspective to this debate by exploring how courts and lawmakers on both sides of the Atlantic are trying to adjust product liability rules to the new reality of the platform economy. In doing so, it also puts product liability law in a broader context of product safety regulation and market surveillance rules.

This article proceeds in five parts. Part I sets the scene by giving a very brief overview of recent judicial and legislative developments in the US that point toward an extension of product liability to online marketplaces.

Part II confronts these developments with the current product liability framework in Europe and tries to answer the question how *Bolger v. Amazon* would be decided under EU law. In doing so, it makes the case that the current legal framework within the EU provides an inadequate answer to the dangers caused by defect products sold via online marketplaces.

Part III extends the scope of the comparative analysis beyond product liability law and reviews recent reforms of EU product safety law and market surveillance rules. It then discusses what contribution the much-anticipated proposal for a Digital Services Act,¹² which was published in December 2020, will make to increasing product safety in the platform economy.

Part IV summarizes the results of the comparative analysis and contrasts the different regulatory approaches in the EU and the US. It argues that US law focusses on *indirect* regulation

¹⁰ Juozas Kaziukenas, Marketplaces Year in Review 2020, Marketplace Pulse, <https://www.marketplacepulse.com/marketplaces-year-in-review-2020>.

¹¹ See Alexandra Berzon et al., Amazon Has Ceded Control of Its Site—The Result: Thousands of Banned, Unsafe or Mislabeled Products, Wall Street Journal (Aug. 24, 2019) at B1.

¹² European Commission, Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final.

through product liability whereas EU law puts its emphasis on *direct* regulation through public enforcement of product safety rules and market surveillance by public authorities. The Part then discusses some possible explanations for the divergences that have been identified.

Finally, Part V, which is normative and prescriptive, calls for a reform of the EU Products Liability Directive that takes inspiration from recent developments in US product liability law. This could lead not only to a more balanced regulatory framework within the EU, but also to a trans-Atlantic convergence in the field of products liability. Building on the findings of the comparative analysis, the Part outlines several options for law reform. It concludes by taking a brief look at how the regulatory design of product liability rules could affect the market structure and competition in the platform economy.

Before venturing into the comparative analysis of the product liability framework for online marketplaces, a preliminary note of caution is in order. As Jane Stapleton wrote: “Comparative products liability law is a dangerous business.”¹³ Matthias Reimann, who authored the general report on product liability for the XVIth Congress of the International Academy of Comparative Law, added: “It is fraught with dangers of misunderstanding, lagging behind changes, and getting drowned in detail on the one hand while overgeneralizing on the other.”¹⁴ This is especially true considering that the substantive rules on product liability are embedded in a broader context of rules on procedure and legal practice including methods of funding litigation.¹⁵

I. SETTING THE SCENE: TOWARD STRICT LIABILITY OF ONLINE MARKETPLACES IN THE US

A. Recent Developments in US Case Law

Over the past few years, courts across the US have been asked to decide whether Amazon can be held liable for defective

¹³ Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 *Texas International Law Journal* 45, 46 (1999).

¹⁴ Matthias Reimann, *Liability for Defective Products at the Beginning of the Twenty-first Century: Emergence of a Worldwide Standard?*, 51 *American Journal of Comparative Law*, 751, 755 (2003).

¹⁵ See Geraint Howells and David G. Owen, *Products liability in America and Europe*, in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (ed.) *Handbook of Research on International Consumer Law*, 2nd ed, 2018, 202, 203.

products sold on its marketplace by third-party vendors. While the exact framing of the legal issues may vary depending on the applicable state law, the essential question is the following: When Amazon allows third parties to sell products on its website, can it be considered a “seller” who places the products into the stream of commerce or is it merely “facilitating” the stream?¹⁶ If the former, then Amazon can be held responsible under product liability law.¹⁷ If, however, Amazon only facilitates the stream of commerce, injured consumers cannot sue for alleged product defects.

In considering this issue, the courts have come do diverging results. In some cases, the courts applied a somewhat formalistic approach. For example, in *Eberhart v. Amazon* a US District Court argued that Amazon cannot be considered a “seller” because it never took title to the product at issue.¹⁸ Based on this reasoning, the court held that Amazon “is better characterized as a provider of services” and not a seller.¹⁹

Other courts did not focus on the formal possession of “title” but rather asked whether Amazon had a sufficient degree of “control” over the transaction. One factor that could be taken into account when assessing the degree of control is whether the product reached the consumer through one of Amazon’s fulfillment centers (“Fulfilled by Amazon” or, in short, FBA) or whether it was sent directly by the third-party seller (“Fulfilled by Merchant”, or, in short, FBM).

This reasoning was applied in October 2020 by the Ohio Supreme Court in *Stiner v. Amazon*, which involved the death of a teenager after ingesting a lethal dose of caffeine.²⁰ The product, which was given to the teenager by a friend who had bought it on the Amazon Marketplace, had been shipped directly to the buyer by the third-party seller. Pointing to this element of fact, the Ohio Supreme Court held that Amazon, although it exerted some

¹⁶ *McMillan v. Amazon.com, Inc.*, No. 20-20108 (5th Cir. 2020) (Dec 18, 2020).

¹⁷ See Restatement (Second) of Torts § 402A (1965) (stipulating a special liability for sellers of products for physical harm to users or consumers).

¹⁸ *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018) (“First, regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside.”); see also *Philadelphia Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019).

¹⁹ *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 399 (S.D.N.Y. 2018); see also *Philadelphia Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019).

²⁰ *Stiner v. Amazon.com, Inc.*, Slip Opinion No. 2020-Ohio-4632 (Oct. 1, 2020).

degree of control in its relationship with a third-party seller, was not subject to product liability because it did not exercise a sufficient level of control over the product itself.²¹

A counterexample is the case *Oberdorf v. Amazon*, in which the US Court of Appeals for the Third Circuit ruled in favor of the plaintiff, Heather Oberdorf, who was blinded in one eye by a retractable dog leash which she had bought on the Amazon Marketplace. Despite the fact that the product was shipped to Oberdorf without passing through one of Amazon's fulfillment centers, the Third Circuit held that Amazon was subject to strict liability because it "exerts substantial control over third-party vendors".²²

In addition to the uncertainties regarding the application of strict product liability to online marketplaces, a second issue was discussed in some Amazon Marketplace product liability cases. In defending against product liability claims, in some cases Amazon argued that the claims were barred under Section 230 of the Communications Decency Act (CDA).²³ Under this 25 year old rule dating back to the early days of the Internet, which is currently a matter of much controversy, online platforms are granted broad immunity from liability for content published on their services by third parties. So far, however, Amazon was not very successful in raising Section 230 CDA as a shield against product liability claims.²⁴

The list of cases involving products bought on the Amazon Marketplaces is much longer and it seems fair to say that the issue of product liability of online marketplaces "is a developing area of law".²⁵ But some observers consider that the development

²¹ Id at ¶ 21 ("While these factors may demonstrate the degree of control that Amazon seeks to exert in its relationship with sellers, they do not establish that Amazon exercised control over the product itself sufficient to make it a "supplier" under the Act.").

²² *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir. 2019) ("Although Amazon does not have direct influence over the design and manufacture of third-party products, Amazon exerts substantial control over third-party vendors.").

²³ See, e.g., *Oberdorf*, 930 F.3d at 151-52.

²⁴ See *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 464 (Cal. Ct. App. 2020); *Erie Ins. Co. v. Amazon.Com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019) (arguing that Sec. 230 CDA protects digital platforms as a publisher of speech, but it does not protect them from liability as the seller of a defective product).

²⁵ *Philadelphia Indem. Ins. Co. v. Amazon.com, Inc.*, 425 F. Supp. 3d 158, 163 (E.D.N.Y. 2019); see also Sean M. Bender, *Product Liability's Amazon Problem*, J. L. & Tech. Tex (forthcoming 2021), <https://ssrn.com/abstract=3628921> (providing an overview of every product liability lawsuit filed against Amazon between 2015 and 2020); Sprague supra note 7 (providing a summary of recent Amazon Marketplace Product Liability Cases).

of the case law “may have reached an inflection point”²⁶ with *Oberdorf* and *Bolger*. It seems that the tide is beginning to turn against Amazon.

B. California’s AB 3262

In the controversial debate about the need for an adjustment of product liability law, some courts were hesitant to expand the existing law to online marketplaces and underlined that such an expansion “is a job for the legislature, not the courts”.²⁷

Taking up this suggestion, in 2020 a California consumer protection bill, known as AB 3262, suggested to introduce new liability rules for online marketplaces.²⁸ In doing so, the bill sought to eliminate the legal uncertainty on how to apply strict product liability to electronic retail marketplaces in favor of compensating injured consumers. The bill provided for several exemptions, in particular for sellers of preowned, used or handmade goods. In addition, online marketplaces should not be subject to strict liability if they did not receive a direct or indirect financial benefit.

As one would expect, the bill stirred a controversial debate. Unsurprisingly, a broad coalition of online marketplaces initially opposed the bill. However, the situation changed after a California appeals court decided on August 13, 2020 in *Bolger* that Amazon can be held liable for an exploding battery sold by a third-party vendor on its Marketplace.²⁹ In a surprise maneuver, after the *Bolger* decision, Amazon issued a public statement indicating that it would support AB 3262 under certain conditions. Specifically, Amazon argued that the law should apply “equally to all stores, including all online marketplaces”.³⁰

Following Amazon’s volte-face, the California Senate amended the bill and deleted an exemption for websites that simply receive a fee for advertising a vendor’s product. As expected, this led to fierce opposition by advertising trade groups. Moreover, Etsy and eBay condemned the bill arguing that it

²⁶ Sharkey supra note 7.

²⁷ See, e.g., *Fox v. Amazon.com, Inc.*, 2018 WL 2431628, at *8 (M.D. Tenn. May 30, 2018).

²⁸ See California AB 3262 (Stone) Product liability: electronic marketplaces.

²⁹ *Bolger v. Amazon.com, Inc.*, Cal. Ct. App., 4th Dist., No. D07573.

³⁰ Amazon backs proposed Calif. product liability law for online sellers (with conditions), Reuters.com, August 25, 2020, <https://de.reuters.com/article/legal-us-otc-amazon/amazon-backs-proposed-calif-product-liability-law-for-online-sellers-idUKKBN25L2JS>.

would severely hurt small online marketplaces and solo entrepreneurs that rely on marketplaces for selling their products. In addition, they argued that “Amazon could even end up benefiting from the law because it’s better positioned than small competitors to weather exposure to liability for defective products”.³¹

One of the most vocal critics of AB 3262 was Josh Silverman, the CEO of Etsy, who called the bill a “wolf in sheep’s clothing”³² and claimed that it “would embolden players like Amazon, hobble small businesses – while not adding protections beyond those that consumers already have under the law”³³. And he continued: “With Amazon’s lobbying, AB 3262 has become an increasingly complicated piece of legislation that is going to be expensive for any small or mid-sized business to try to comply with. Amazon is betting on that. While AB 3262 will be an inconvenience to the ecommerce behemoth, it could be crushing to smaller ecommerce players.”³⁴

Although this criticism may be somewhat exaggerated, it does make an important point.³⁵ The choice of regulatory design of product liability rules not only affects the relationship between tortfeasor and victim, but also has implications for competition between platforms. This is a public policy aspect that must be taken into consideration and will be discussed in more detail in Part V.C.

C. Consumer Law Bills Pending in the US Congress

The account of recent developments regarding product liability and product safety on electronic retail marketplaces would be incomplete without briefly mentioning a series of bills

³¹ Id.

³² Josh Silverman, A wolf in sheep’s clothing: California’s AB 3262 “Consumer Protection” bill will empower Amazon to put small businesses out of business, Medium.com (Aug. 25, 2020), <https://medium.com/etsy-impact/a-wolf-in-sheeps-clothing-california-s-ab-3262-consumer-protection-bill-will-empower-amazon-to-c131ffedc3dd>.

³³ Id.

³⁴ Id.

³⁵ As a sidenote, it should be noted that campaign against AB3262 initiated by Etsy and eBay illustrates how successfully platforms can mobilize their users for political causes. Another example is the Yes on Prop. 22 campaign backed by Uber and Lyft and Doordash. See Kate Conger, Uber and Lyft Drivers in California Will Remain Contractors, New York Times (Nov 4, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>. See also Petter Törnberg and Justus Uitermark, Complex Control and the Governmentality of Digital Platforms, 2 *Frontiers in Sustainable Cities* 6 (2020) (regarding the “Airbnb Citizen initiative” lobbying for liberalizing short-term rental laws).

currently pending in the US Congress, in particular the SANTA Act³⁶ and the INFORM Consumers Act³⁷, which were introduced into the US Senate in December 2019 and March 2020, respectively. A third bill, the SHOP SAFE Act of 2020, which focusses on counterfeit products,³⁸ was proposed in March 2020 by a bipartisan group of members of the House of Representatives.³⁹

The three bills, which have gained less public attention than cases like *Oberdorf* or *Bolger*, do not address issues of product liability. Instead, they tackle the problem of unsafe and dangerous products from a different angle and require online platforms to verify the identity of traders and provide information about traders' identities to customers. Should these bills be voted into law, they could serve as an important complement to the regulatory function of product liability law.

II. (NON-)LIABILITY OF ONLINE MARKETPLACES UNDER EU LAW

Part I has given a brief overview of recent judicial and legislative developments in the US pointing toward strict liability of online marketplaces. Against this background, the following section seeks to answer a simple question: How would a case based on similar facts like *Bolger* be decided under EU law? The answer can only be tentative, as the European Court of Justice has not yet ruled on how product liability rules apply to online marketplaces. Answering the question requires a closer look at

³⁶ Stopping All Nefarious Toys Act ("SANTA Act"), S.3073 – 116th Congress (2019-2020) (Cassidy R-LA).

³⁷ Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act ("INFORM Consumers Act"), S.3431 – 116th Congress (2019-2020), March 10, 2020 (Cassidy R-LA).

³⁸ Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2020 ("SHOP SAFE Act of 2020"), H.R. 6058 – 116th Congress (Nadler D-CA) (which applies only to goods that implicate health and safety).

³⁹ For an overview and discussion of these bills see John H. Zacharia and Kari Kammel, How Congress Proposes to Protect Consumers From Online Counterfeits: The Good, the Bad and the Ugly, Working Paper, September 2020, https://a-capp.msu.edu/wp-content/uploads/2020/09/How-Congress-Proposes-to-Protect-Consumers-From-Online-Counterfeits_FINAL.pdf.

two pieces of EU legislation – the Product Liability Directive⁴⁰ and the e-Commerce Directive⁴¹.

A. Product Liability Directive: A Law Made For Pipelines, Not Platforms

The main legislative instrument relating to product liability at an EU level is the Product Liability Directive (PLD), which sets out the EU-wide strict liability regime for defective products. As a directive, the PLD has been implemented by EU member states and their national courts enforce the directive in line with the relevant domestic laws that implement it. When it was adopted in 1985, the PLD was a bold and modern instrument that required substantial adaptations of Member State civil liability regimes. But today, more than 35 years later, it is questionable whether the PLD is still fit for purpose considering the changing realities of the platform economy.

Under the PLD, liability principally rests on the “producer” as defined in Article 3(1) PLD.⁴² The definition not only covers the “manufacturer of a finished product”, but also “the producer of any raw material or the manufacturer of a component part”. In addition, a participant in the distribution process may be liable if “by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer” (sometimes referred to as “quasi-producer”). Some courts have applied this provision extensively even if the name and trademark is not used on the product itself, but only on the packaging of the product.⁴³ This raises the question whether Amazon could be considered a “quasi-producer” under Article 3(1) PLD if a product is sent from one of its fulfillment centers in an Amazon-branded packaging.

⁴⁰ Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Product Liability Directive) [1985] OJ L 210/29.

⁴¹ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) [2000] OJ L 178.

⁴² Art. 3(1) Product Liability Directive (“Producer’ means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer. 2. Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.”).

⁴³ Higher Regional Court Düsseldorf (Sept. 22, 2000) 22 U 208/99, BeckRS 2000, 30133008.

However, the answer will most likely be negative if the product itself or any other information in the package points to a different producer.

Article 3(2) PLD further extends the liability to the “importer” of the product into the European Economic Area⁴⁴ (EEA).⁴⁵ This extension of liability aims to strengthen consumer protection and is primarily intended to ensure the actual enforcement of product liability claims in the context of international trade. The purpose of Article 3(2) PLD is to avoid a situation in which a consumer who has suffered damage in a member state of the European Union has to assert her rights against a manufacturer based outside of the EU. In this perspective, the importer can be considered as a “link between the safety standards of the country of origin and the reasonable safety expectations in the market state”.⁴⁶

When assessing whether the operator of an online marketplace like Amazon could be considered an “importer” under Article 3(2) PLD, it may be necessary to differentiate between two scenarios. As already mentioned, Amazon offers two ways for third-party vendors to deliver their products to customers. Products can be (1) shipped directly to the buyer by the third-party vendor, referred to by Amazon as “fulfilled by merchant” (FBM), or (2) delivered via one of Amazon’s fulfillment centers (FBA).

In the FBM scenario it is rather doubtful whether the operator of an online marketplace could be considered as an “importer” under Article 3(2) PLD. Instead, the consumer herself could be considered as the importer. Such a reading would be in line with the US case law that distinguishes between FBA and FBM when determining whether Amazon can be considered as a “seller”.⁴⁷ The reasoning might be different in the FBA scenario where the marketplace operator also provides fulfillment services. But even in such a scenario one might argue that it is the third-party vendor (or maybe even the consumer) who acts as

⁴⁴ The European Economic Area (EEA), consists of the Member States of the European Union and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway).

⁴⁵ Art. 3(2) Product Liability Directive (“Without prejudice to the liability of the producer, any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business shall be deemed to be a producer within the meaning of this Directive and shall be responsible as a producer.”).

⁴⁶ Gerhard Wagner, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th ed 2020, § 4 ProdHaftG, para. 43.

⁴⁷ See *supra* Part I.A.

importer and not the platform operator. So far, there is no reported case law on this issue.

Finally, Article 3(3) PLD further extends liability to the “supplier” in case the producer or the importer cannot be identified. In this context, the term “supplier” can be understood in a broad sense as referring to any person distributing a product to the consumer who is neither a “producer” nor an “importer”. Whether this includes operators of online marketplaces is less than clear. Platform operators would probably argue that they are not distributors but only facilitators offering a digital intermediation service or providing a digital infrastructure.

Such a reading of Article 3(3) PLD, however, would leave victims in many cases without a defendant against whom they can introduce a claim. Even if Article 3(3) PLD is applied to online marketplaces, the benefit for consumers is rather limited as marketplace operators could easily evade liability by informing the victim about the identity of the producer. However, this information would not be much of a help if the producer is based outside the EU and thus unreachable for a product liability claim. Moreover, as we will see, a duty to collect information about the identity of traders has already been included in the recent proposal for a Digital Services Act.⁴⁸ Therefore, applying Article 3(3) PLD to online marketplaces would not bring much added value.

One reason for the legal uncertainty is that the PLD harks back to the pre-Internet era when supply chains were mainly organized as “pipelines” involving importers, wholesalers and retailers.⁴⁹ The text of the Directive does not reflect the rise of “platforms” as key players in digital markets, which have facilitated the creation of new supply chains that directly link European consumers with sellers or producers outside the European Union. So far, the European Commission has not taken any steps for adapting the PLD to the new realities of electronic retail. In its 2018 report on the application of the PLD,⁵⁰ the European Commission acknowledged the need for a reform of the PLD. However, the focus of the Commission’s report lies on how digital technological have changed the characteristics of *products*.

⁴⁸ See *infra* Part III.C.

⁴⁹ See, e.g., Marshall W. Van Alstyne, Geoffrey G. Parker and Sangeet Paul Choudary, Pipelines, platforms, and the new rules of strategy, 94 *Harvard Business review* 54 (2016).

⁵⁰ European Commission, Report on the Application of Directive 85/374/EEC, COM(2018) 246 final.

In this perspective, the report explicitly mentions challenges relating “to digitisation, the Internet of Things, artificial intelligence and cybersecurity”.⁵¹

While this is certainly true, digital technologies have not only changed products, but also how these products are *distributed*. However, the Commission’s 2018 report barely mentions this important aspect of the product liability framework. The only reference to changing supply chains is found in a footnote, saying: “Another aspect to be taken into account are direct online sales from third countries.”⁵² Rather surprisingly, the role of digital marketplaces as key actors in online retail is not mentioned at all in the 2018 report.

B. Electronic Commerce Directive: No Safe Harbor for Defect Products

As already mentioned, one of Amazon’s defenses in US courts was that product liability claims are barred by Section 230 of the Communications Decency Act (CDA).⁵³ For example, in *Oberdorf* Amazon argued that because it merely provides a platform where other vendors can market their products, it cannot be held responsible for representations and, ultimately, defects in products associated with those representations made on its platform by other information content providers.⁵⁴

From a European perspective, a similar argument could be construed on the basis of Article 14 of the e-Commerce Directive (ECD),⁵⁵ which stipulates a liability exemption for hosting providers including online marketplaces.⁵⁶ However, whether Article 14 ECD stands in the way of product liability claims against online intermediaries is unclear. Therefore, the ECD is an additional source of legal uncertainty with regard to the application of product liability rules on online marketplaces.

For the sake of clarity, it should be noted that the ECD does not grant online intermediaries a blanket liability exemption like Section 230 CDA. Instead, the approach taken by the ECD bears more similarities with the ‘safe harbor’ regime of Section 512(c)

⁵¹ Id. at 1.

⁵² Id. at 9, footnote 28.

⁵³ See e.g. *Oberdorf*, 930 F.3d at 151-52.

⁵⁴ *Oberdorf*, 930 F.3d at 151-52; see also Doyer *supra* note 7, at 726.

⁵⁵ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) [2000] OJ L 178.

⁵⁶ Case C-324/09, *L’Oreal v eBay*, ECLI:EU:C:2011:474.

Digital Millennium Copyright Act (DMCA).⁵⁷ However, Article 14 ECD is horizontal in nature and therefore, unlike the DMCA, applies not only in relation to copyright, but to all claims related to user-generated content. Therefore, the operator of an online marketplace being confronted with a product liability claim would probably raise Article 14 ECD as a defense.⁵⁸

Under Article 14 ECD, a hosting provider (including online marketplaces) is exempt from liability in respect of the “storage of information” on condition that it does “not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent”.⁵⁹ If a platform operator receives a notice of illegal activity or illegal content, it can avoid liability by “acting expeditiously”⁶⁰ to take down or block access to the information stored on the platform.

When it comes to assessing whether an online marketplace such as Amazon would be able to raise Article 14 ECD as a defense against product liability claims, there are two arguments that speak against it.

First, one could argue that Article 14 ECD exempts online intermediaries only from liability related to information stored *online*, but not from liability related to their involvement in the physical distribution of dangerous products that takes place *offline*. This interpretation finds support in the wording of Article 14 ECD which stipulates that online intermediaries shall be exempted from liability “for the information stored” at the request of platform users. Such a restrictive reading of Article 14 ECD would be in line with the recent US court decisions that have declined to apply section 230 CDA to strict products liability claims.⁶¹ Thus, in *Bolger*, the Court argued that the product liability claim is not based on the content of a product listing published by Amazon, but rather on Amazon’s involvement in the distribution of an allegedly defective product.⁶² Similarly, in *Erie* a three-judge panel on the 4th Circuit held: “While the

⁵⁷ See Eric Goldman, Overview of the United States’ Section 230 Internet Immunity, in Giancarlo Frosio (ed) *The Oxford Handbook of Online Intermediary Liability* (Oxford 2020) 155, 167.

⁵⁸ See Paul Verbruggen, Online platformen en onveilige producten, *Tijdschrift voor Consumentenrecht en handelspraktijken* 255, 259 (2020).

⁵⁹ Art. 14(1)(a) E-Commerce Directive.

⁶⁰ Art. 14(1)(b) E-Commerce Directive.

⁶¹ See *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 464 (Cal. Ct. App. 2020); *Erie Ins. Co. v. Amazon.Com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019).

⁶² *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 464 (Cal. Ct. App. 2020).

Communications Decency Act protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product.”⁶³ Considering the functional parallel between the CDA and the ECD, this distinction could also be applied to the liability exemption afforded by Article 14 ECD.

Second, in its case law the Court of Justice of the European Union (CJEU) has clarified that the safe harbor under Article 14 ECD is only available to online intermediaries that take a “neutral position” between buyers and sellers, but not to intermediaries that play an “active role”.⁶⁴ The dividing line between a “neutral position” and an “active role” is likely to be crossed in cases where the marketplace operator is not only involved in the conclusion of the contract, but also takes care of the delivery of the goods (as for example through the “Fulfilled by Amazon” Program). This view finds support by the recent trademark case *Coty v. Amazon*, in which the CJEU’s Advocate General Campos Sánchez-Bordona argued that Amazon plays a very “active role”:

“As part of their *active and coordinated involvement in the marketing of goods*, Amazon undertakings take on many of the tasks that would ordinarily be performed by the seller, for whom Amazon ‘does the heavy lifting’, as its website points out. Posted on that website as an incentive for sellers to join the ‘Fulfilment by Amazon’ program is the following sentence: ‘Send your products to Amazon’s Fulfilment Centres and let us take care of the rest’.”⁶⁵

Unfortunately, the CJEU narrowly stuck to the question referred by the national court and decided only on the interpretation of Article 9 of the EU Trademark Regulation.⁶⁶ The question raised by the Advocate General in his Opinion regarding

⁶³ *Erie Ins. Co. v. Amazon.Com, Inc.*, 925 F.3d 135, 140 (4th Cir. 2019).

⁶⁴ Case C-324/09, *L’Oreal v eBay*, ECLI:EU:C:2011:474; Cases C-236/08 to C-238/08, *Google France and Google v. Vuitton*, ECLI:EU:C:2010:159.

⁶⁵ Case C-567/18 *Coty Germany GmbH v Amazon Services Europe Sàrl*, Opinion of Advocate General Campos Sánchez-Bordona, delivered on November 2, 2019, ECLI:EU:C:2019:1031, para. 57 (emphasis added).

⁶⁶ Case C-567/18 *Coty Germany GmbH v Amazon Services Europe Sàrl*, ECLI:EU:C:2020:267.

the application of Article 14 ECD was not discussed and left open for future cases.

III. BUILDING A NEW REGULATORY FRAMEWORK FOR ONLINE MARKETPLACES IN THE EU

While the debate about unsafe products in the US focusses on product liability of online marketplace, the policy debate in the EU follows a different path. Here the focus lies on product safety regulation and market surveillance by public authorities. In this regard, the proposal for a Digital Services Act, which aims to modernize the rules on platform regulation, does not bring much of a change.

A. Market Surveillance Regulation

While a reform of the European product liability regime remains to be seen, the European Commission recently moved to adapt the existing regulatory framework of product safety regulation and market surveillance rules to the changing structure of supply chains.

Like the Product Liability Directive, the regulatory framework for the implementation of EU product safety rules was originally built on the traditional “pipeline” model. In this sense, Regulation 339/93/EEC⁶⁷ and its successor Regulation 765/2008/EC,⁶⁸ which provided the legal framework for market surveillance and for controls on imported products, allocated the responsibility for placing products on the EU market on three categories of actors: manufacturers, importers and distributors.⁶⁹

However, with the rise of the platform economy and emergence of new supply chains, the gap between the regulatory framework built on the “pipeline” model and market realities shaped by “platforms” kept growing. In a first attempt to adapt the regulatory model to the changing market structure, the European Commission in 2017 published a “Notice on the market surveillance of products sold online”⁷⁰, which tried to fit new market players such as online marketplaces and fulfilment

⁶⁷ Regulation (EEC) No 339/93 on checks for conformity with the rules on product safety in the case of products imported from third countries [1993] OJ L 40.

⁶⁸ Regulation 765/2008/EC setting out the requirements for accreditation and market surveillance relating to the marketing of products [2008] OJ L 218/30.

⁶⁹ See Article 2(7) Regulation 765/2008/EC.

⁷⁰ Commission Notice on the market surveillance of products sold online, C/2017/5200 [2017] OJ C 250.

centers into the traditional legal categories of “importers” and “distributors”. However, as the Notice was not legally binding, it did not eliminate the legal uncertainty. Two years later, in June 2019, the European Commission took another step towards a transition to a regulatory framework for “market surveillance in the digital age”⁷¹ with the adoption of the Market Surveillance Regulation.⁷²

The Regulation, which will be applicable from July 16, 2021, tightens the market surveillance regime for products for which the well-known CE mark is mandatory. The CE mark, sometimes referred to as the “products’ passport to the EU market”, indicates that the manufacturer of a product affirms its compliance with EU health and safety standards. In order to be traded in the EU, a broad range of products are required to be CE-marked (e.g. toys, electronics, personal protective equipment, machinery, construction products, gas appliances).

With regard to these products, the Market Surveillance Regulation adds the requirement that there must be an “economic operator” established in the EU who is responsible for the conformity of the CE-marked product and acts as the point of contact for market surveillance authorities.⁷³ In other words, after July 16, 2021, it will be illegal to sell CE-marked products on the European market without such a designated contact point based in the EU. Such a contact point can be either the manufacturer, the importer, an authorized representative or a fulfillment service provider (provided they are established in the EU).

By adding fulfillment service providers to the list of “economic operators” who serve as contact points for market surveillance authorities, the Market Surveillance Regulation

⁷¹ See Joachim Geiß and Sebastian Felz, *Das neue Recht der Marktüberwachung im digitalen Zeitalter*, 72 *Neue Juristische Wochenschrift* 2961 (2019).

⁷² Regulation (EU) 2019/1020 on market surveillance and compliance of products (Market Surveillance Regulation) [2019] OJ L 169. See Paul Verbruggen, *Online platformen en onveilige producten*, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2020, 255, 260; see also Lenz, *Die Auswirkungen der (neuen) Marktüberwachungs-Verordnung für Unternehmer, Betriebs-Berater* 2020, 707.

⁷³ See Article 4(1) Market Surveillance Regulation. According to Art. 4(3) Market Surveillance Regulation, the obligations of the EU economic operator include keeping the EU declaration of conformity (which is a necessary requirement for the well-known CE marking), making technical documentation for the product available to market surveillance authorities on request, informing the authorities if a product is deemed to pose a risk, cooperating with market surveillance authorities in case of product recalls and indicating their name and contact details on the product, packaging or an accompanying document.

takes account of the fact, that a growing number of products enter the EU not with the help of importers, but via online marketplaces and their fulfillment centers. The Regulation defines fulfillment service providers as “any natural or legal person offering in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved”.⁷⁴ Postal services, parcel delivery services and other freight transport services are explicitly excluded.⁷⁵

The Market Surveillance Regulation adds fulfillment service providers also to the list of entities against whom market surveillance authorities may take enforcement measures.⁷⁶ For example, fulfillment service providers may be required to verify the applicable declarations of conformity and the accompanying technical documentation of the products. They must also inform supervisory authorities of possible safety risks of products and cooperate with them in investigations of the products in question.

While the inclusion of fulfillment service providers into the scope of market surveillance could help to improve the enforcement of EU product safety rules, some gaps remain in the regulatory framework. In particular, the Market Surveillance Regulation does not stipulate any verification requirements for online marketplaces if they do not provide fulfillment services. Unlike fulfillment service providers, online marketplaces do not appear in the list of “economic operators” who are responsible for product safety.⁷⁷ Instead, the Regulation only vaguely requires online marketplaces “to cooperate with market surveillance authorities”.⁷⁸

B. Product Safety Pledge

The recent tightening of product safety regulations is complemented by a voluntary commitment of several major

⁷⁴ Art. 3(11) Market Surveillance Regulation.

⁷⁵ *Id.*

⁷⁶ Art. 4(2)(d) Market Surveillance Regulation.

⁷⁷ Art. 4(2) Market Surveillance Regulation.

⁷⁸ Art. 7(2) Market Surveillance Regulation (“Information society service providers shall cooperate with the market surveillance authorities, at the request of the market surveillance authorities and in specific cases, to facilitate any action taken to eliminate or, if that is not possible, to mitigate the risks presented by a product that is or was offered for sale online through their services.”). This duty to cooperate may include the duty to remove content referring to dangerous products or to display a warning to users when they access the online marketplace (see Art. 15(k)(i) Market Surveillance Regulation).

online marketplaces – the “Product Safety Pledge” – which was initiated by the European Commission in June 2018.⁷⁹ The four signatories of the pledge (AliExpress, Amazon, eBay and Rakuten France) committed to take actions against unsafe products that go beyond what is already required under EU law.⁸⁰ The commitment includes responding to notifications on dangerous products from Member State authorities within two working days and take action on notices from customers within five working days. The signatories also pledged to take measures aimed at preventing the reappearance of dangerous product listings already removed. In addition, the online marketplaces have also committed to report to the European Commission every six months on the actions taken to implement the Product Safety Pledge.

There are conflicting views about the effectiveness of the Product Safety Pledge. While the European Commission praises the progress made under the Product Safety Pledge,⁸¹ consumer associations take a more skeptical view. The European Consumer Association (BEUC)⁸² recently criticized that eBay, who is a signatory of the Product Safety Pledge, allegedly failed to remove unsafe smoke alarms from its marketplace.⁸³ In addition, not all relevant market players have joined the pledge, which means that the voluntary initiative covers only a part of the market.⁸⁴

C. Digital Services Act

On 15 December 2020 the European Commission published its much-anticipated regulation proposal for a Digital Services Act (DSA).⁸⁵ The draft regulation is part a of a more comprehensive legislative package that also includes the Digital

⁷⁹ European Commission, Press release “European Commission and four online marketplaces sign a Product Safety Pledge to remove dangerous products” (June 25, 2018), IP/18/4247

⁸⁰ Recently, three other companies, Allegro, C-Discount, and Wish, have also recently signed the Pledge.

⁸¹ See European Commission, Third Progress Report on the implementation of the Product Safety Pledge (November 6, 2020), https://ec.europa.eu/info/sites/info/files/3rd_progress_report_product_safety_pledge.pdf.

⁸² From the French name “Bureau Européen des Unions de Consommateurs” (European Bureau of Consumers’ Unions).

⁸³ BEUC, Making the Digital Services Act Work for Consumers, May 2020, p. 5, <https://www.beuc.eu/publications/making-digital-services-act-work-consumers>.

⁸⁴ *Id.* at 6.

⁸⁵ European Commission, Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final.

Markets Act (DMA).⁸⁶ Together, the DSA and the DMA shall create a new regulatory framework for the governance of digital services in the European Union. While the DMA introduces *ex ante* rules applicable only to large online platforms which act as “gatekeepers”,⁸⁷ the DSA has a much broader scope and aims to update the existing rules on platform responsibilities in the provision of digital services, by means of revising the e-Commerce Directive 2000/31/EC (ECD).

Unlike earlier legislative reforms and regulatory initiatives regarding platform responsibilities that focused on specific issues (e.g. copyright⁸⁸, child abuse material⁸⁹, illegal hate speech⁹⁰, terrorist content⁹¹) or specific platforms (e.g. audio-video sharing platforms⁹²), the DSA adopts a horizontal approach that covers a broad range of issues and digital intermediaries including also the responsibility of online marketplaces for unsafe and dangerous products.

If one asks what contribution the DSA makes to product safety on online marketplaces, the verdict is rather mixed. Three observations may illustrate this: (1) The rules on platform liability in the DSA do not address product liability of online marketplaces. (2) The DSA “outsources” market monitoring through a notice-and-action mechanism and rules on “trusted flaggers”. (3) The Proposal requires make “reasonable efforts” to verify the identity of third-party vendors in order to keep untrustworthy traders away from the marketplace.

⁸⁶ European Commission, Proposal for Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

⁸⁷ See Alexandre de Streel, The European Proposal for a Digital Markets Act – A First Assessment (Jan 19, 2021), <https://cerre.eu/publications/the-european-proposal-for-a-digital-markets-act-a-first-assessment>.

⁸⁸ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92.

⁸⁹ European Commission, Proposal for an Interim Regulation on the processing of personal and other data for the purpose of combatting child sexual abuse, COM(2020) 568 final; see also, European Commission, EU strategy for a more effective fight against child sexual abuse, COM(2020) 607 final.

⁹⁰ European Commission, Code of Conduct on Countering Illegal Hate Speech Online (May 2016), https://ec.europa.eu/newsroom/document.cfm?doc_id=42985.

⁹¹ European Commission, Proposal for a Regulation on preventing the dissemination of terrorist content online, COM(2018) 640.

⁹² See Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2018] OJ L 303.

1. No Specific Liability Regime for Online Marketplaces

Since the first announcement by the European Commission of its plans for the DSA in February 2020,⁹³ the policy debate about the reform of the liability framework has focused on political issues such as hate speech, terrorist content and freedom of speech. As important as these topics may be from a societal perspective, they overshadowed the debate about consumer protection and product safety. Against this background, the European Consumer Association (BEUC) in a position paper published in May 2020, criticized that in the policy debate about the reform of the e-Commerce Directive “not enough attention has been given to the fact that the e-Commerce Directive also matters for consumer protection in the context of online transactions”.⁹⁴ In this perspective, BEUC called for creating a special liability regime for online marketplaces. Drawing inspiration from the “ELI Model Rules on Online Platforms”,⁹⁵ BEUC suggested that the DSA should introduce a special liability rule for platforms which have a “predominant influence” or “control” over suppliers.⁹⁶

Interestingly, this idea was taken up by the European Parliament, which in October 2020 adopted a resolution with recommendations for the DSA.⁹⁷ In its resolution, the European Parliament called on the European Commission to reinforce the liability regime for online marketplaces.⁹⁸ More specifically, the European Parliament suggested that the DSA should “address the liability of online marketplaces when those platforms have *predominant influence over suppliers and essential elements of economic transactions*.”⁹⁹ According to the European Parliament such a product liability of online marketplaces should be limited

⁹³ European Commission, Shaping Europe’s Digital Future (February 2020), https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf

⁹⁴ BEUC, Making the Digital Services Act Work for Consumers, May 2020, p. 6, <https://www.beuc.eu/publications/making-digital-services-act-work-consumers>.

⁹⁵ See Article 20 ELI Model Rules on Online Platforms (March 2020) [<https://perma.cc/PDL8-5TJ9>]; see Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, Aneta Wiewiorowska-Domagalska, Fryderyk Zoll, The ELI Model Rules on Online Platforms, 9 *Journal of European Consumer and Market Law* 61 (2020).

⁹⁶ *Id.* at 16.

⁹⁷ European Parliament, Resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)), P9_TA(2020)0272.

⁹⁸ *Id.* at para. 61.

⁹⁹ *Id.* Annex, sub VI (emphasis added).

to cases where there is no manufacturer, importer, or distributor established in the Union that can be held liable.¹⁰⁰

However, the European Parliament's suggestion did not make its way into the proposal for the DSA which was published by the European Commission in December 2020. On the contrary, the DSA proposal more or less maintains the existing system of limited liability of the e-Commerce Directive 2000/31/EC and, in addition, mainly codifies the interpretation given to these rules by the European Court of Justice.¹⁰¹ In particular, Article 5(1) DSA keeps the so-called "hosting exemption", under which online platforms are not subject to liability if they do not have actual knowledge of illegal activities or illegal content or, upon obtaining such knowledge, act expeditiously to remove or to disable access to the illegal content.¹⁰² This provision more or less contains the same rule as the existing Article 14 ECD.¹⁰³

In summary, the DSA keeps the existing system of liability exemptions and limits itself to adding some clarifications, for example by introducing a "Good Samaritan clause" (Article 6 DSA). But the Commission's proposal is silent on the crucial question whether online marketplaces can be held liable for facilitating the marketing and distribution of unsafe products. Instead, the DSA relies on other instruments to prevent dangerous products from entering the European market.

2. Notice-and-Action Mechanism and Trusted Flaggers

According to Article 14 DSA providers of hosting services, including online platforms, are required to put in place user-friendly notice and action mechanisms that facilitate the notification of illegal content, including dangerous or unsafe products, by users. This rule is complemented by Article 19 DSA which stipulates that notices submitted by "trusted flaggers"

¹⁰⁰ Id.

¹⁰¹ See European Commission, *supra* note 85, at 3; see also Caroline Cauffman and Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection* (forthcoming 2021).

¹⁰² An interesting addition to the liability existing regime Article 5(3) DSA, which states that the hosting exemption does "not apply with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control."

¹⁰³ See *supra* Part II.A.

shall be treated with priority and without delay. The status of trusted flagger can be awarded to public entities or non-governmental organizations (e.g. consumer associations) by national authorities responsible for the enforcement of DSA in the EU member states.

The evaluation of this approach is somewhat ambivalent. The introduction of a standardized notice-and-action mechanism, which did not previously exist in the EU,¹⁰⁴ is certainly a step forward. Also, the notifications through trusted flaggers may contribute to reducing the number of dangerous products on online marketplaces. The concept of trusted flaggers has been imported to the DSA proposal from earlier initiatives regarding the fight against illegal hate speech, which heavily rely on the cooperation with civil society organizations.¹⁰⁵ The involvement of various societal stakeholders maybe indeed be sensible approach in a highly politicized field such as combatting illegal hate speech. With regard to product safety, however, outsourcing market monitoring to trusted flaggers seems less appropriate as this form of “regulatory crowdsourcing” rather distracts from the responsibility of central actors which are the online platform operators.

3. Know Your Business Customer

According to Article 22 DSA online marketplaces must obtain information about the identity of traders.¹⁰⁶ In addition, the platform has to make “reasonable efforts” to verify the reliability of the information submitted.¹⁰⁷ If the platform obtains indications that the information is inaccurate or incomplete, the platform must request the trader to correct the information. Traders who fail to do so must be suspended from the platform.¹⁰⁸

¹⁰⁴ The e-Commerce Directive does not set out standardized procedure for notice-and-action, but Member States have the possibility to establish such procedures. See European Commission, Overview of the legal framework of notice-and-action procedures in Member States (July 2018), SMART 2016/0039.

¹⁰⁵ See European Commission, Code of Conduct on Countering Illegal Hate Speech Online (May 2016), https://ec.europa.eu/newsroom/document.cfm?doc_id=42985.

¹⁰⁶ According to Article 22(1) DSA, this information includes the trader’s name, address, telephone and electronic mail address, a copy of their identification document or any other electronic identification, bank account details (for natural persons), the trade register in which they are registered and the registration number and a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

¹⁰⁷ Art. 22(2) DSA.

¹⁰⁸ Art. 22(3) DSA.

Article 22 DSA basically enshrines the principle commonly referred to as “know your customer” (KYC) or “know your business customer” (KYBC), which is already widely used in anti-money laundering regulations.¹⁰⁹ The purpose of the KYBC rule is to facilitate traceability of traders and keep away untrustworthy businesses.

In a comparative perspective, Article 22 DSA bears some resemblance to recent legislative proposals in the United States, in particular the SANTA Act¹¹⁰ and the INFORM Consumers Act¹¹¹, which were introduced into the US Senate in December 2019 and March 2020, respectively.¹¹² Like the DSA, these bills would require online platforms to verify the identity of traders and provide information about traders’ identities to customers. However, the scope of these bills is much narrower than that of the DSA. The SANTA Act only applies to children’s products, defined by the Act as consumer products designed or intended primarily for children 12 years of age or younger.¹¹³ The INFORM Consumer Act only requires online marketplaces to verify the identity of high-volume third-party sellers.¹¹⁴ In contrast, Article 22 DSA applies to all traders regardless of their size and the products they offer.

Again, the assessment of Article 22 DSA is somewhat ambivalent. A vetting requirement could contribute to reducing the number of untrustworthy sellers on digital marketplaces, in

¹⁰⁹ See, for example, Article 13 of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L 141/73.

¹¹⁰ Stopping All Nefarious Toys Act (“SANTA Act”), S.3073 – 116th Congress (2019-2020) (Cassidy R-LA).

¹¹¹ Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (“INFORM Consumers Act”), S.3431 – 116th Congress (2019-2020), March 10, 2020 (Cassidy R-LA).

¹¹² See also the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2020 (“SHOP SAFE Act of 2020”), H.R. 6058 – 116th Congress (Nadler D-CA) (which applies only to goods that implicate health and safety). For an overview and discussion of these bills see John H. Zacharia and Kari Kammel, *How Congress Proposes to Protect Consumers From Online Counterfeits: The Good, the Bad and the Ugly*, Working Paper, September 2020, https://a-capp.msu.edu/wp-content/uploads/2020/09/How-Congress-Proposes-to-Protect-Consumers-From-Online-Counterfeits_FINAL.pdf.

¹¹³ S.3073 – 116th Congress (2019-2020), at Sec. 2(e).

¹¹⁴ Sec. 2(e)(3) of the INFORM Consumers Act defines a “high-volume third party seller” as a third-party seller who, in any continuous 12 month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products resulting in the accumulation of an aggregate total of \$5,000 or more in gross revenues”.

particular, if it prevents sellers from easily setting up a new storefront when an existing account has been shut down by the platform (sometimes referred to as “phoenixing”). But knowing a trader’s verified identity does not help victims of unsafe products if they are unable to pursue their claim against a trader who is based overseas. In such a scenario, it would be helpful if the consumer had a claim against a platform operator who did not fulfill its obligations under Article 22 DSA. However, the DSA proposal does not establish any link between the KYBC rule and platform liability. Neither does Article 22 DSA create a safe harbor for platforms that fulfill their vetting requirements, nor does the provision state that platforms who violate their vetting requirements are subject to liability.

This shows again a glaring gap in the DSA: The proposal cautiously codifies existing case law regarding liability exemptions of hosting providers and adds some due diligence requirements for platforms. But it does not take a clear stance on whether and when online marketplaces are subject to product liability. In summary, from the perspective of a consumer who seeks compensation for injury resulting from an unsafe product purchased from an online marketplace, the DSA has not much to offer.

IV. COMPARATIVE OBSERVATIONS: DIFFERENT PATTERNS OF PRODUCT SAFETY AND PRODUCT LIABILITY

The previous Parts have given an overview of recent judicial and legislative changes in the field of product liability and product safety in the US and the EU. This Part summarizes the results of the comparative analysis and contrasts the different regulatory approaches in the EU and the US. It then discusses some possible explanations for the divergences that have emerged.

A. Direct Regulation versus Indirect Regulation

As a starting point, it can be noted that the regulatory approaches regarding online product safety in the EU and US have one commonality: they both focus on the operators of electronic retail marketplaces and not on the myriad of third-party vendors. In some sense, this corresponds to the way how antitrust law describes large digital platforms as

“gatekeepers”.¹¹⁵ From the perspective of product safety law, Amazon not only holds the keys to a market of 214 million monthly users in the US¹¹⁶ and millions more in the EU, but also controls the floodgates through which thousands of dangerous and unsafe products are entering the US and EU markets. Considering their “pivotal”¹¹⁷ role in the supply chains of digital retail, marketplace operators are as cheapest cost avoiders in the best position to ensure a high level of product safety.¹¹⁸ It therefore stands to reason that regulatory strategies both in the EU and the US put marketplace operators at the center.

But apart from this common starting point the regulatory strategies differ considerably. The two legal systems apply two rather different approaches for ensuring that platform operators take sufficient measures to keep dangerous products away from online marketplaces. Put simply, US law focusses on *indirect* regulation through product liability whereas EU law puts its emphasis on *direct* regulation through public enforcement of product safety rules and market surveillance by public authorities. The EU’s approach builds on its well-established framework of product safety regulations.¹¹⁹ More recently, the market surveillance framework has been updated in response to the rise of new actors, such as fulfillment service providers. The voluntary “Product Safety Pledge” also fits into this pattern as the participating platforms mainly commit themselves to respond more quickly to notices issued by public authorities about

¹¹⁵ See, e.g., Lina M. Khan, *The Separation of Platform and Commerce*, 119 *Columbia Law Review* 973 (2019) („A handful of digital platforms mediate a growing share of online commerce and communications. By structuring access to markets, these firms function as gatekeepers for billions of dollars in economic activity.”); see also, from a different perspective Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 *Va. L. Rev.* 467 (2020) (explaining how private firms perform duties as a public regulator).

¹¹⁶ Statista, *Most popular retail websites in the United States as of December 2019*, ranked by visitors (Nov. 30, 2020), <https://www.statista.com/statistics/271450/monthly-unique-visitors-to-us-retail-websites>.

¹¹⁷ See *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 438 (Cal. Ct. App. 2020) (“Whatever term we use to describe Amazon’s role, be it “retailer,” “distributor,” or merely “facilitator,” it was pivotal in bringing the product here to the consumer.”)

¹¹⁸ See, e.g., Miriam C. Buiten, Alexandre de Streel and Martin Peitz, *Rethinking liability rules for online hosting platforms*, 28 *Int J Law Info Tech* 139, 152 (2020) (discussing the role of hosting providers as cheapest cost avoiders with regard to detection, monitoring and removal of illegal content).

¹¹⁹ See Geraint Howells, *The Relationship between Product Liability and Product Safety - Understanding a Necessary Element in European Product Liability through a Comparison with the U.S. Position*, 39 *Washburn L.J.* 305 (2000) (emphasizing the European commitment to regulation, rather than, litigation as a means of promoting product safety).

dangerous products under the EU's rapid alert system (RAPEX/Safety Gate).¹²⁰

To be precise, direct regulation and market surveillance is not totally absent from the US policy toolbox as the Consumer Product Safety Commission's (CPSC) import surveillance program shows.¹²¹ Most recently, there have even been proposals to increase staffing at the US (CPSC) in order to enhance its ability to identify unsafe consumer products entering the US.¹²² However, when put in perspective with the impact of product liability litigation, the CPSC seems to play a minor role.¹²³

For comparative scholars of product liability law, the divergence between the EU and the US described here comes not as a surprise. The findings presented here fit neatly in with a larger body of comparative research regarding product safety in offline markets which has analyzed the different regulatory patterns on both sides of the Atlantic. In this perspective, earlier studies have underlined "the European commitment to regulation, rather than litigation as a means of promoting product safety"¹²⁴. As our study shows, the divergent approaches can also be observed with regard to product safety risks arising related to online marketplaces.

In the EU product liability law plays only a negligible role in the policy debate regarding online marketplaces. So far, there has been no prominently reported court decision that would have raised the question whether the 35 year old EU Product Liability

¹²⁰ The "Safety Gate" rapid alert system (formerly known as RAPEX) facilitates the rapid exchange of information between national authorities and the European Commission on dangerous products (see Annex II of Directive 2001/95/EC on general product safety [2001] OJ L 11).

¹²¹ See US Consumer Product Safety Commission, CPSC e-Commerce Assessment Report (Nov. 2019), <https://cpsc.gov/s3fs-public/CPSC-e-Commerce-Assessment-Report.pdf>.

¹²² Consumer Product Safety Inspection Enhancement Act, H.R. 8134 – 116th Congress (2019-2020) (Schakowsky D-IL). ("The bill requires the CPSC to hire no less than 16 employees and add staffing every year until needs are met to identify violative products at ports and to complete a study and report on the CPSC's efforts and needs to effectively stop violative products from entering the United States.").

¹²³ See Kati Cseres, *Integrate or separate. Institutional design for the enforcement of competition law and consumer law*, Amsterdam Law School Legal Studies Research Paper No. 2013-03 (claiming that the CPSC has been suffering from "chronical underfunding and understaffing").

¹²⁴ See Howells, *supra* note 119, at 308; see also Geraint Howells and David G. Owen, *Products liability law in America and Europe*, in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds) *Handbook of Research on International Consumer Law*, 202 (2018) at 203 (explaining that the US, unlike European states, typically view *ex ante* governmental regulation as a preferable way to achieve product safety compared to litigation *ex post*).

Directive needs to be updated with regard to online marketplaces. Although there have been media reports on *Bolger* and *Oberdorf* in European news outlets,¹²⁵ there is no broad academic or political debate on an extension of product liability law to online marketplaces. In the heated policy debate about platform regulation, product liability plays virtually no role as a regulatory tool. Similarly, in the European academic literature there are only very few contributions addressing this topic and most of them look at the issue from a comparative perspective taking recent US case law as the starting point for their analysis.¹²⁶

B. Possible Explanations: The Social, Procedural and Cultural Context

Earlier studies have suggested several explanations for the different impact of product liability law on both sides of the Atlantic.¹²⁷ Most of them refer to the different legal and cultural contexts in which product liability is embedded in Europe and the US. For example, some observers have pointed out that the widespread availability of public health care in much of Europe might be a factor which “reduces the need for victims to employ litigation as a compensatory device to cover medical bills resulting from product accidents”¹²⁸ and may help to explain the higher volume of product liability litigation in the US. In this context, it has even been argued that, “product liability damages in the United States often act as a surrogate for a Welfare

¹²⁵ See, for example, Amazon est responsable des produits de fournisseurs tiers dit la Cour d'appel des États-Unis, *zdnnet.fr* (July 4, 2019), <https://www.zdnnet.fr/actualites/amazon-est-responsable-des-produits-de-fournisseurs-tiers-dit-la-cour-d-appel-des-tats-unis-39887117.htm>; see also, Amazon removes hundreds of toxic and unsafe products after news report, *The Guardian* (August 23, 2019), <https://www.theguardian.com/technology/2019/aug/23/amazon-products-removed-toxic-wsj> (both referring to *Oberdorf v. Amazon*).

¹²⁶ See, for example Christoph Busch, When Product Liability Meets the Platform Economy: A European Perspective on *Oberdorf v. Amazon*, 8 *Journal of European Consumer and Market Law* 173 (2019); Paul Verbruggen, Online platformen en onveilige producten, *Tijdschrift voor Consumentenrecht en handelspraktijken* 255, 259 (2020); Boris Schinkels, Fehlerhafte Produkte aus Fernost auf Amazon Marketplace – Für eine Produkthaftung transnationaler Warenhausplattformen als Quasi-Importeur, in Christoph Benicke and Stefan Huber (eds), *National, International, Transnational: Harmonischer Dreiklang im Recht: Festschrift für Herbert Kronke zum 70. Geburtstag*, 1235 (Giesecking 2020).

¹²⁷ See Reimann, *supra* note 14.

¹²⁸ Geraint Howells and David G. Owen, *supra* note 124, at 203; see also Reimann, *supra* note 14, at 827.

State”.¹²⁹ When it comes to the extent of first-party insurance coverage, there is indeed a significant difference between the US on the one hand and most EU member states on the other hand. According to recent census data, in 2018 an estimated 27.5 million people, 8,5% of the US population, went without health insurance.¹³⁰ In some demographics, the percentage of uninsured people is even higher. For example, 17.8% of people with Hispanic origin did not have health insurance in 2018.¹³¹ The percentage of uninsured people also varies between different states (e.g. 4.4% in Minnesota versus 17.7% in Texas).¹³² In contrast, virtually throughout Western Europe, the consequences of personal injuries caused by defective products are mostly covered under a variety of public, semi-public or work-related insurance schemes, ranging from tax funded national health insurance to fairly generous unemployment benefits and long-term disability pensions.¹³³

As pointed out by Mathias Reimann, other factors to be taken into account may be found in differences regarding procedural law and the rules concerning the cost of product liability lawsuits.¹³⁴ Indeed, the victim’s willingness to file a personal injury claim will very much depend on the cost involved in a lawsuit. In the US it is fairly inexpensive to file a personal injury lawsuit as compared to many European countries as attorneys typically take such cases on a contingency basis. In contrast, European jurisdictions are much more skeptical about contingency fees. In many EU member states, contingency fees are either prohibited or only admissible with various restrictions. Also, the European Commission in its 2013 recommendation on collective redress mechanisms, advised Member States not to permit contingency fees and warned of the risk that they create “an incentive to litigation that is unnecessary from the point of view of the interest of any of the parties”.¹³⁵

¹²⁹ Howells and Wilhelmsson, *supra* note 15, at 213; see also Anita Bernstein, *A Duty to Warn: One American View of the EC Products Liability Directive*, 20 *Anglo-American L. Rev.* 224 (1991).

¹³⁰ United States Census Bureau, *Health Insurance Coverage in the United States: 2018* (Nov. 2019), 10.

¹³¹ *Id.* at 14

¹³² *Id.* at 19.

¹³³ See Reimann, *supra* note 14 at 829.

¹³⁴ *Id.* at 816, 822-25.

¹³⁵ European Commission, *Communication on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)* [2013] OJ L 201/60, para. 29 (“The

In addition to the restrictions or prohibitions regarding contingency fees, the basic cost allocation rules for civil proceedings in the EU may influence the decision of a consumer whether or not to file a product liability lawsuit.¹³⁶ The American rule, under which each side pays its own lawyer, regardless of outcome, is highly favorable to plaintiffs, especially when combined with contingency fees. In contrast, under the English rule, which applies in most of EU Member States, the loser pays both his and the winner's attorney fees. In view of this risk, many European consumers will shy away from filing a product liability lawsuit.

Finally, there may be cultural factors that influence the different roles played by product liability on both sides of the Atlantic. In this sense, some scholars emphasize that tort law serves as a "cultural mirror".¹³⁷ In this perspective, the recent court decisions holding Amazon liable as a seller are consistent with a shift in consumer sentiment towards the platform economy.¹³⁸ Thus, the question whether online marketplaces can be held liable under the rules of product liability law can be situated within the broader societal debate about the regulation of BigTech firms. In this view, *Oberdorf* and *Bolger* may be seen as the tort law version of the "techlash"¹³⁹ that is currently shifting popular views about BigTech firms.

While the debate about the regulation of digital behemoths and the platform economy is no less intense in Europe than in the US, the focus differs. In Europe, the focus has so far been on privacy regulation (such as the General Data Protection Regulation) and the ex ante regulation of gatekeepers (as recently proposed in the Digital Market Act). In contrast, the regulatory function of product liability law has not yet played a prominent role in the European debate. It would be a worthwhile topic for further research to explore the deeper causes of these different manifestations of the legal "techlash" on both sides of the Atlantic.

Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties").

¹³⁶ See Reimann, *supra* note 14 at 824.

¹³⁷ Marshall S. Shapo, In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience, 89 *Nw. U. L Rev.* 1567, 1570 (1995).

¹³⁸ See Sharkey *supra* note 7.

¹³⁹ See *The Economist*, The techlash against Amazon, Facebook and Google—and what they can do (January 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do>.

V. POLICY IMPLICATIONS AND RECOMMENDATIONS

Building on the findings of the comparative analysis, the final Part of this Essay will address two questions: (1) Should the EU follow the trend of recent US case law and extend product liability law to online marketplaces? (2) If yes, how should such a liability regime be designed. When answering these questions, one should not merely consider which contribution product liability can make to increasing product safety in online marketplaces. It is also important to consider how the design of product liability rules affects competition between different types of platforms and the market structure of the platform economy.

A. Should the EU Extend Product Liability to Online Marketplaces?

From a European perspective, the findings of the comparative analysis lead to the question if there is a need to extend product liability to online marketplaces or if the existing regulatory framework, which focuses on market surveillance and public enforcement of product safety rules, is sufficient.

This question is related to the broader debate about the relationship between product liability and safety regulation.¹⁴⁰ In this view, the crucial question is what product liability of online marketplace could add to the existing EU regulatory framework. Put simply, there could be three beneficial of adding product liability: inducing online marketplaces to improve the safety of products (by vetting third-party vendors), causing prices of products to reflect their risks, and providing compensation to injured consumers.¹⁴¹

As regards the *incentives to improve product safety*, there is no need to extend product liability to marketplace operators if they have already an incentive to ensure that only safe products are offered on their marketplace even in the absence of product liability. One reason that firms like Amazon might have such an incentive concerns *market forces*. In this sense, one could expect the volume of sales to fall if products on an online marketplace

¹⁴⁰ See, on the one hand, Alan Mitchell Polinsky and Steven Shavell, *The uneasy case for product liability* 123 Harv. L. Rev. 1437 (2009) and, on the other hand, John C.P. Goldberg and Benjamin C. Zipursky, *The easy case for products liability law: A response to Professors Polinsky and Shavell*, 123 Harv. L. Rev. 1919 (2010); see also José Ganuza, Juan, Fernando Gomez, and Marta Robles, *Product liability versus reputation*, 32 Journal of Law, Economics, and Organization 213 (2016).

¹⁴¹ See Polinsky and Shavell, *supra* note 140, at 1440.

are viewed as unduly risky, or that their volume may rise if products are seen as particularly safe. However, the effect of market forces on the safety levels implemented by online marketplaces may be disturbed by consumer misperceptions about the risks of product failures.¹⁴² Moreover, a high level of market concentration may also weaken the disciplining effect of market forces. The fact that Amazon's market share in the US has grown from 34% in 2016 to 50% percent in 2020,¹⁴³ despite media reports about the high number of dangerous products on the Amazon marketplace,¹⁴⁴ suggests that market forces alone do not provide sufficient incentive to ensure product safety in online marketplaces. A second reason that platforms might take steps to enhance the safety of products is that they may be subject to public enforcement of *product safety regulations*. This assumption is the basis of the current regulatory strategy of the EU. In the past, however, market surveillance and public enforcement of product safety rules in e-commerce has been rather spotty. Whether the new EU Market Surveillance Regulation, which will be applicable from July 16, 2021, can effectively close this gap is doubtful.¹⁴⁵ Rather, it is to be expected that the new market surveillance regime will be far from perfect due to limited knowledge of regulators and budgetary constraints.

Another reason for the extension of product liability to online marketplaces could be the so-called *price-signaling benefit of product liability*.¹⁴⁶ If product liability causes prices to rise to reflect product risks, this could discourage consumers from buying risky products.¹⁴⁷ In this sense, price signals related to product liability could correct for consumer misperceptions of product risks. This consideration finds support in *Oberdorf v Amazon*. In its decision the Court argued that Amazon could distribute the cost of compensating for injuries by adjusting the

¹⁴² See Michael Spence, Consumer misperceptions, product failure and producer liability, 44 *Review of Economic Studies* 561 (1977); see also Florian Baumann and Tim Friehe, Products liability, consumer misperceptions, and the allocation of consumers to firms, 198 *Economics Letters* 198 109658 (2021).

¹⁴³ Statista, U.S. Amazon retail market share 2016 and 2020 (Dec. 1, 2020), <https://www.statista.com/statistics/709515/amazon-retail-market-share-usa/>

¹⁴⁴ Alexandra Berzon, Shane Shifflett and Justin Scheck, Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products, *WSJ.com* (Aug. 23, 2019), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

¹⁴⁵ See *supra* Part III.A.

¹⁴⁶ Polinsky and Shavell, *supra* note 140, at 1459.

¹⁴⁷ *Id.*

commission-based fees that it charges to third-party vendors based on the risk that the third-party vendor presents.¹⁴⁸ As a result, the prices of dangerous products would rise. Highly dangerous products could even be priced out of the market.

Finally, extending product liability to online marketplaces would ensure that *victims get compensated for injuries* caused by defective products. However, critics of product liability law have argued that product liability promotes the compensation goal only incrementally because of insurance coverage. This may be particularly true from a European perspective, considering that first-party or government-provided health or disability insurance is widely available in the EU. In fact, the differences between social security and health care systems in the EU and the US has been often cited as one of reasons for the greater impact of product liability litigation in the US.¹⁴⁹ It is questionable, however, whether the existence of first-party insurance can be construed as an argument against product liability. While the widespread availability of insurance may offer a factual explanation for the lower numbers of product liability verdicts in Europe, it does not provide a normative argument against product liability. Moreover, in jurisdictions where subrogation rights allow insurers to stand in the shoes of the insured and seek reimbursement from the tortfeasor, the availability of a product liability claim against the marketplace operator may reduce the overall cost of insurance and, at the same time, strengthen the deterrence effect of product liability.

These considerations recall a quote from Geraint Howells, who more than 20 years ago opined that:

“these problems should serve to remind us that consumer policy need not be based exclusively on one approach. Therefore, even within Europe, one can argue that product liability remains an important weapon in the consumer's arsenal. It is a question of

¹⁴⁸ Oberdorf v. Amazon.com Inc., 930 F.3d 136, 147 (3d Cir. 2019).

¹⁴⁹ Howells and Owen, *supra* note 124, at 203 (“Moreover, public health care in much of Europe reduces the need for victims to employ litigation as a compensatory device to cover medical bills resulting from product evidence.”); Reimann, *supra* note 14, 784 (“In most of the countries surveyed here, especially in Europe, product liability has come to play a more modest role. It mainly supplements the compensation available under various social or employment insurance regime.”); see also Howells, *supra* note 117, at 307.

balance between product safety and product liability, rather than a choice between one or the other.”¹⁵⁰

B. Regulatory Design of Product Liability

If one assumes that there are good reasons for introducing product liability for online marketplaces in the EU as a useful complement to the existing product safety and market surveillance framework, the question arises how such a liability regime should be designed. In the following section, three aspects of regulatory design will be briefly discussed: (1) Should product liability rules apply to all types of online marketplaces or only those that also offer fulfillment services? (2) Should marketplaces only be held liable if the third-party vendor is located outside the EU? (3) Is it desirable to stipulate liability exemptions for smaller platforms in order to facilitate the market entry of new competitors?

1. Controlling Platforms: The Uber Test

Online intermediaries that facilitate the sale of products exist in many different varieties. The spectrum ranges from classified ads websites like Craigslist or Gumtree to electronic retail marketplaces like eBay, Etsy and Amazon, the “the titan of twenty-first century commerce”.¹⁵¹

There seems to be broad consensus that classified ads websites, which play only an incidental role in putting products into the stream of commerce, should not be held liable under product liability laws. In contrast, with regard to online marketplaces like Amazon, it is a matter of debate whether product liability rules should apply only to cases where the marketplace operator takes care of fulfillment services (as in the “Fulfilled by Amazon” scenario) or also in cases where the marketplace is not involved in the order fulfillment process.¹⁵²

In order to answer this question, it is necessary to identify the decisive factor that determines whether a platform should be subject to product liability or not. Those US courts, which do not adhere to formal criteria (such as possession of “title”), essentially focus on the question of whether the platform has “control” over

¹⁵⁰ Howells, *supra* note 117, at 345.

¹⁵¹ Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *Yale Law Journal* 710 (2017).

¹⁵² See, e.g., Ryan Bullard *supra* note 7, at 230 (arguing that Amazon should only be held liable only in cases where products are delivered via the FBA service).

the transaction.¹⁵³ This is also illustrated by the recent decision of the US Court of Appeals for the Fifth Circuit to certify the following question to the Texas Supreme Court:

“Under Texas products-liability law, is Amazon a “seller” of third-party products sold on Amazon’s website when Amazon does not hold title to the product but *controls* the process of the transaction and delivery through Amazon’s Fulfillment by Amazon program?”¹⁵⁴

From a comparative perspective, there is a certain parallel with the “Uber test”¹⁵⁵ applied by the Court of Justice of the European Union (CJEU) in its recent case law on digital platforms. The test, which also focusses on the concept of “control” was introduced by the CJEU in 2017 in its *Uber Spain* decision.¹⁵⁶ Put simply, the CJEU had to decide whether Uber, the ridesharing company, can be considered as providing a service of transport or merely as an “information society service” facilitating transportation services provided by third parties (the Uber drivers).¹⁵⁷ If the former, Uber has to comply with local regulation governing taxi transportation. But if Uber only acts as a digital facilitator, they are not subject to any sector-specific regulations and may avail themselves of a number of privileges under EU law. According to the CJEU, Uber’s involvement goes beyond a mere intermediation services because it exercises “decisive influence”¹⁵⁸ over the conditions under which the transport service is provided by the Uber drivers. In other words,

¹⁵³ See, for example, *Bolger v. Amazon.com, LLC*, 53 Cal.App.5th 431, 456 (Cal. Ct. App. 2020) (“Amazon had control over both the product at issue and the transaction that resulted in its sale to Bolger.”); see also Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 *Geo. L. J.* 141 (2020) at 148 (“The most consistent theme in this messy and evolving doctrine is a goal still relevant to today’s commercial landscape, dominated as it is by fragmented actors and large corporations: to impose liability on those with the power to control others.”).

¹⁵⁴ *McMillan v. Amazon.com, Inc.*, No. 20-20108 (5th Cir. 2020) (Dec 18, 2020).

¹⁵⁵ See Christoph Busch, *The Sharing Economy at the CJEU: Does Airbnb pass the ‘Uber test’?* 7 *Journal of European Consumer and Market Law* 172 (2018).

¹⁵⁶ C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981.

¹⁵⁷ See Philipp Hacker, *UberPop, UberBlack, and the regulation of digital platforms after the Asociación Profesional Elite Taxi judgment of the CJEU*, 14 *European Review of Contract Law* 80 (2018).

¹⁵⁸ C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain*, ECLI:EU:C:2017:981, para 39.

the business model of Uber can be described as “intermediation plus control”.¹⁵⁹ For the CJEU, this justifies classifying the services offered by Uber as a transport service.

More recently, the CJEU has applied the “Uber test” to other platform-based business models, such as the short-term rental marketplace Airbnb¹⁶⁰ and the Romanian taxi app Star Taxi.¹⁶¹ In *Airbnb Ireland*, the Court argued that Airbnb does not exercise “the same level of control”¹⁶² as Uber and therefore cannot be considered as a provider of accommodation services, but only a digital facilitator. Similarly, in *Star Taxi*, the Court argued that Star Taxi, unlike Uber, does not “control” the behavior of taxi drivers and therefore cannot be considered a transport service, but only a digital facilitator.

Even though the CJEU case law cited here concerns the question whether platforms are subject to sector-specific regulation by EU Member States, the “Uber test” based on the notion of “decisive influence” (or control) can be seen as the expression of a general principle of responsibility which is transferrable to the field of platform liability.

Such a transfer has recently been suggested by the “ELI Model Rules on Online Platforms”, which have been elaborated by an international group of legal scholars and practitioners under the auspices of the European Law Institute (ELI), the European equivalent to the American Law Institute.¹⁶³ Article 20(1) of the ELI Model Rules stipulates that a customer who has entered into a contract with a supplier on a digital platform 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”.¹⁶⁴

In October 2020, the suggestion made by the ELI working group was taken up by the European Parliament, which

¹⁵⁹ Hacker, *supra* note 157, at 84.

¹⁶⁰ C-390/18 *Airbnb Ireland*, ECLI:EU:C:2019:1112; see also Busch, *supra* note 155.

¹⁶¹ C-62/19 *Star Taxi App*, ECLI:EU:C:2020:980.

¹⁶² C-390/18 *Airbnb Ireland*, ECLI:EU:C:2019:1112, para. 66.

¹⁶³ ELI Model Rules on Online Platforms (March 2020) [<https://perma.cc/PDL8-5TJ9>]; see Christoph Busch, Gerhard Dannemann, Hans Schulte-Nölke, Aneta Wiewiorowska-Domagalska, Fryderyk Zoll, *The ELI Model Rules on Online Platforms*, 9 *Journal of European Consumer and Market Law* 61 (2020).

¹⁶⁴ Art. 20(1) ELI Model Rules on Online Platforms (emphasis added).

suggested that the European Union should introduce specific new rules for online marketplaces, which should:

“address the liability of online marketplaces when those platforms have *predominant influence over suppliers and essential elements of economic transactions*, such as payment means, prices, default terms conditions, or conduct aimed at facilitating the sale of goods to a consumer in the Union market, and there is no manufacturer, importer, or distributor established in the Union that can be held liable.”¹⁶⁵

When applying the criterion of “control” (or its variants “predominant influence” and “decisive influence”) to online marketplaces, it seems reasonable to distinguish between platforms that offer fulfillment services and those that do not. First of all, in the former case the degree of control is considerably higher. Platforms that do offer fulfillment services not only exercise “algorithmic control” over product visibility, but also “physical control” of the product itself during various stages of the distribution process.¹⁶⁶ Moreover, this approach would be in line with the Market Surveillance Regulation (EU) 2019/2010, which also distinguishes between “fulfillment services providers”¹⁶⁷ and online intermediary platforms without fulfillment service (referred to as “information society service providers”¹⁶⁸).¹⁶⁹ Such a distinction could raise issues regarding the potential effects on competition between platforms with different business models which will be discussed in Part V.C.

2. Online Marketplaces as Quasi-Importers

A second question regarding the design of the product liability regime is, whether online marketplaces should only be liable if the third-party vendor is established outside the EU and therefore “unreachable” for victims seeking compensation for their injuries.

Such a restriction would be in line with the existing liability model of the Product Liability Directive. The extension of liability

¹⁶⁵ European Parliament *supra* note 97, at Annex, sub VI (emphasis added).

¹⁶⁶ See Bullard, *supra* note 7, at 203.

¹⁶⁷ Arts. 3(11), 4(2)(d) Market Surveillance Regulation.

¹⁶⁸ Art. 7(2) Market Surveillance Regulation.

¹⁶⁹ See *supra* Part III.A.

from manufacturers to importers by Article 3(2) of the Directive was exactly intended to ensure that consumers can sue a plaintiff established in the European Economic Area (EEA).¹⁷⁰ For this purpose, it would be sufficient if a marketplace were only subject to product liability if the third-party vendor was not established in the EEA. At the same time, such a liability model would ensure a level playing field between online marketplaces and importers following a more traditional “pipeline” model.

3. Asymmetric Regulation for Smaller Marketplaces?

Another aspect regarding the regulatory design of the product liability regime is the question whether there should be liability exemptions for smaller marketplaces. In its recent legislation on digital platforms, the EU often included *de minimis* clauses in order to avoid burdening smaller platform providers with excessive compliance costs.¹⁷¹ In particular, the recent DSA proposal stipulates “asymmetric due diligence obligations” for different types of digital service providers depending on the nature of their services and their size.¹⁷² Under this regulatory approach, which is based on the principle of proportionality, certain obligations are limited only to “very large online platforms” (with at least 45 million average monthly users).¹⁷³ In contrast, very small providers of digital services are completely exempt from the obligations.¹⁷⁴ From a competition policy perspective, such a model, which favors small platforms, could facilitate the market entry of new competitors. Nevertheless, a model of “asymmetric regulation”, which currently seems *en vogue* in the field of EU platform regulation, is not suitable for the field of product liability. Until now, it has been an uncontested principle in European consumer law that the legitimate expectations of consumers are protected regardless of the size of the business concerned. This principle of a uniform level of protection should be preserved. Differentiating the standard of liability depending on the size of the platform would lead to legal uncertainty. For, in many cases, it will be difficult for consumers

¹⁷⁰ See Part II.A.

¹⁷¹ See, e.g., Arts. 11(5), 12(7) Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (Platform-to-Business Regulation) [2019] OJ L 186 (exempting small platforms from the requirement to establish an internal complaint handling system and offer mediation to business users).

¹⁷² European Commission, DSA Proposal, COM(2020) 825, at 6.

¹⁷³ Art. 25 DSA Proposal.

¹⁷⁴ See, for example, Art. 16 DSA Proposal.

to assess whether the marketplace they are purchasing from is a micro or small enterprise which is exempt from product liability.

Second, differentiating the liability standard between smaller and larger platforms could lead to a situation where products are offered at lower prices on small marketplaces, since the liability costs do not have to be factored in when calculating the platform fee. As a consequence, financially weaker consumer might prefer shopping on marketplaces where they are not protected by product liability law. In contrast, more affluent consumers might prefer buying on larger platforms like Amazon where they get better consumer protection.¹⁷⁵ As a result, protection by product liability law would no longer be a right, but a luxury that a consumer must be able to afford.

C. Effects on Competition and Market Structure

It has often been underlined that product liability law is “a blend of policy considerations, institutional economics, and other Realist concerns about the social significance of legal outcomes”¹⁷⁶, sometimes referred to as “pragmatic instrumentalism”¹⁷⁷ In most cases, these public considerations are limited to the two-party relationship between the plaintiff and the defendant. Sometimes third parties that may have to indemnify the defendant are included in the equation. But maybe one should further extend the scope of the public policy analysis and consider the “macro effects” of a specific product liability law solution. As the controversial debate about California’s AB 3262 shows,¹⁷⁸ these public policy considerations also include an assessment of the effects a specific product liability regime could have on static and dynamic competition and the structure of the relevant market.

In this sense, the design of the product liability regime might be a factor to be taken into account when businesses make a fundamental choice regarding their business model: Should they

¹⁷⁵ See Jane K. Winn, *The Secession of the Successful: The Rise of Amazon as Private Global Consumer Protection Regulator*, 58 *Ariz. L. Rev.* 193 (2016) (describing how Amazon’s pursuit of customer satisfaction contributes to a high level of consumer protection, but often at the expense of its employees and suppliers).

¹⁷⁶ Bender *supra* note 25.

¹⁷⁷ Robert S. Summer, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought*, 66 *Cornell L. Rev.* 861, 863 (1981); see also James R. Hackney, *The Intellectual Origins of American Strict Liability: A Case Study in Pragmatic Instrumentalism*, 39 *American Journal of Legal History* 443 (1995).

¹⁷⁸ See *supra* Part I.B.

be resellers or marketplaces? Or, to put it more precisely, which position along the continuum between pure reseller and pure marketplace should a firm choose? Marketplaces have typically low operating costs and high margins, whereas resellers tend to have higher capital and operating costs and lower percentage margins.¹⁷⁹ Moreover, as a general rule, high-demand products are more efficiently sold by one large reseller, who can capitalize on economies of scale, whereas marketplaces are particularly suitable for low-demand (or “long-tail”) products.¹⁸⁰ If online marketplaces lose their current exemption from product liability, this might tilt the decision in favor of the reseller model. It could also accelerate the recent trend towards direct-to-consumer retail which is cutting out the platform middlemen.¹⁸¹

Moreover, the design of the product liability regime might influence the choice between different platform models. In the previous section, we have argued that product liability should be limited to online marketplaces that are not only involved in the conclusion of the contract between consumers and third-party vendors, but also take care of shipping and delivery via their fulfillment centers, as in the case of the “Fulfillment by Amazon” (FBA) program. What would be the competitive effect of such distinction? One possible scenario is that smaller marketplaces will shy away from offering fulfillment services in order to avoid exposure to product liability. This, in turn, would mean that they offer consumers a poorer retail experience as they will not be able to guarantee fast delivery, a seamless returns management or reliable and standardized information about product characteristics and availability. In contrast, a large platform like Amazon would still be able to offer the FBA service given its financial strength. Considering its role as an “unavoidable trading partner”¹⁸² for third-party vendors, Amazon would also be able to charge higher fees from merchants and thus pass on the financial burden resulting from strict liability. So, in the end,

¹⁷⁹ Andrei Hagiu and Julian Wright, Do you really want to be an eBay?, 91 *Harvard Business Review* 102 (2013).

¹⁸⁰ Id. („That is why Amazon acts as a reseller for high-demand products but as a multisided platform for long-tail products, which are available on the site from independent sellers.“).

¹⁸¹ See, e.g. Joseph Safina, Why Brands Are Shifting To Direct-To-Consumer Marketing, *Forbes.com* (March 11, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/03/11/why-brands-are-shifting-to-direct-to-consumer-marketing/>.

¹⁸² See Case T 286/09, *Intel Corp. v. Commission*, ECLI:EU:T:2014:547 para. 91 (E.C.J. June 12, 2014) (discussing “unavoidable trading partner”).

depending on the design of the regulatory regime, Amazon could actually benefit from extending product liability to online marketplaces. Does this mean that consumers should not be protected from dangerous goods through strict liability? Probably not. The competitive effects of product liability described here are largely due to the fact that Amazon has become gatekeeper for third-party sellers who are seeking access to consumers in the EU and the US. But this is a problem to be solved by antitrust law or ex ante regulation, not by limiting the scope of product liability rules.

CONCLUSION

The rise of the platform economy has created a broad range new challenges for consumer law.¹⁸³ Online marketplaces such as Amazon have not only increased consumer choice, but also facilitated the influx of unsafe and defect products to US and EU consumer retail markets. The comparative analysis has shown that the regulatory responses to this development differ considerably in Europe and the US. While US law focusses on indirect regulation through product liability, EU law puts its emphasis on direct regulation through public enforcement of product safety rules and market surveillance by public authorities. A balanced consumer policy should combine the strengths of both approaches. Therefore, the European legislator should revise the EU Product Liability Directive and expand its application to online marketplaces. Regarding the appropriate regulatory design, several options are available. When making a policy choice between different regulatory models for product liability, the potential effects for competition and market structure in the platform economy should be carefully considered. In this perspective, the European legislator could learn from the controversy about California's AB 3262.

¹⁸³ See, e.g., Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, *The Rise of the Platform Economy: A New Challenge for Consumer Law* 5 *Journal of European Consumer and Market Law* 3 (2016).