The contractual status of online intermediary platforms

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A challenge to EU private law

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1. Introduction[1]

Online (intermediary) platforms, often referred to as online market places, match customers and suppliers of goods or services.[2] Intermediaries can reduce transaction and information costs and counterbalance information asymmetries.[3] Customers may use online platforms to quickly and easily find products and services, compare prices and check for customer reviews, while suppliers may increase their market share and visibility.[4] In the 21st century, online intermediaries, such as Ebay, Uber and Airbnb, have rapidly gained market share. Around 2.5 % of all purchases by EU households in 2014 were conducted via online platforms, amounting to a value of € 270 billion. It is estimated that this market will see further growth and that by 2020 the main online platforms (such as Amazon and Ebay) will account for up to 40 % of all sales.[5]

Although online intermediaries obviously bring benefits for contracting parties, they also complicate the legal picture. From one relationship, between a customer and a supplier, one goes to three relationships between: 1) customer and supplier, 2) customer and platform operator, and 3) supplier and platform operator. This contractual triangle can give rise to various legal uncertainties and risks.[6] In this paper the focus will lie on one particular challenge posed to EU *private law*: the unclear contractual status of online platforms from a customer perspective.[7] Is the

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[1] This draft paper is partially based on A. de Vries-Stotijn & A. Jabłonowska, 'Comments on Article 11', in: A. Wiewiorowska & F. Zoll (Eds.), *Discussion Draft of a Directive on Online Intermediary Platforms*, *forthcoming*.

[2] This paper does not look at platforms who do not match customers to suppliers, such as search engines (e.g. Google) or social media platforms (e.g. Facebook, Twitter or Instagram).

[3] On the functions of intermediaries also see: M. Colangelo & V. Zeno-Zencovic, 'Online Platforms, Competition Rules and Consumer Protection in Travel Industry', *EUCML* 2016-2, p. 75–76; M. Eckardt, 'Agent and Broker Intermediaries in Insurance Markets –An Empirical Analysis of Market Outcomes' (2002) Thünen-Series of Applied Economic Theory Working Paper No. 34, p. 6-7 < http://ssrn.com/abstract=655143> accessed 29 August 2017.

[4] For an extensive overview of benefits that platforms bring for consumers and businesses, see: European Commission, 'Staff Working Document Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market', SWD(2016) 172 final, p. 11-13.

[5] European Commission (n. 4), p. 18-19.

[6] On the many legal challenges related to online platforms see the whole first issue of the EuCML in 2016, p. 1-72.

[7] Other challenges relate, amongst other things, to the reliability of ratings and reviews and the criteria used by platform when presenting search results. See: European Commission, 'Commission Staff Working Document Evaluation of the Consumer Rights Directive', SWD(2017) 169 final, p. 56-58. On private law questions in respect of Online Auction platforms, see*:* C. Riefa, *Consumer Protection and Online Auction Platforms*, Ashgate: Farnham (UK) 2015.

platform solely an intermediary or does it act as the supplier of the products or services bought by the customer? Reportedly, the most often mentioned drawback of online platforms according to customers is not knowing who is responsible in case a problem arises.[8] Uncertainty over the platform's contractual status may have unforeseen and harsh legal consequences, in particular for consumers. For example, if a consumer unexpectedly finds that he deals with a supplier acting in a private capacity (another 'consumer') – rather than with the platform – he may not be protected by EU consumer law.[9]

This paper will first briefly explain what the problem is (§ 2) and why it is legally relevant (§ 3). Secondly, the controversial taxi booking app Uber will serve as an example of an online platform of which the contractual status has led to considerable dispute (§ 4). Next, current EU private law instruments will discussed as far as relevant in respect of the contractual status of online platforms (§ 5). Lastly, a conclusion is given as to the current legal situation. Furthermore, some tentative suggestions for improvement will be given by drawing inspiration from an academic initiative which aims for model rules on online platforms (§ 6).[10]

2. The problem: the platform's unclear contractual status

In legal literature it has been noted that it can be difficult to establish what the contractual status of an online platform is. Is it only an intermediary, matching supply to demand, or does it qualify as the supplier of products and services bought via the platform?[11] In transactions concluded on an online platform, there are often three actors involved: the customer who orders a particular product or service, the supplier who delivers that product or service, and the platform operator (e.g. Uber, AirBnB or Expedia) who (arguably) only acts as an intermediary between the two. As the Commission notes: "*In its purest form, an online platform simply offers a (virtual) transaction space where suppliers and consumers can meet. The platform does not intervene in the transaction, except by asking for a fee from one or multiple sides of the transaction in order to make a profit*".[12] Indeed, platforms often claim to be merely a facilitator that allows other parties to trade with each

[8] Flash Eurobarometer 438, 'The use of collaborative platforms', Survey conducted by TNS Political & Social at the request of the European Commission, March 2016, p. 4 & 26,
[9] European Commission (n. 7).
[10] See the Discussion Draft of a Directive on Online Intermediary Platforms Research Group on the Law of Digital Services, as published in EuCML 4/2016, p. 164-169. Also available through: www.elsi.uni-osnabrueck.de/projekte/model_rules_on_online_intermediary_platforms/discussion_draft.html (accessed 29 August 2017). The author is a member of this research group.
[11] On this question, see also: C. Busch et al., 'The Rise of the Platform Economy', *EuCML* 2016-1, p. 7-8; De Vries-Stotijn & Jabłonowska (n. 1).
[12] European Commission (n. 4), p. 3.

other via the platform, denying any responsibility for the (non-)performance of the contracts concluded.[13]

However, customers may not realize that they are dealing with third-party suppliers, because, from the customer's perspective, the online platform itself may look like the supplier.[14] Online platforms usually have a prominent role in the transaction process, being the primary communication channel between customer and supplier.[15] Moreover, they often have a considerable degree of control over the determination of the contractual terms and regularly offer services linked to the sale, such as delivery and payment services, insurance coverage, code of conducts, dispute resolution mechanisms, and rating and review systems.[16] Moreover, since a platform's success depends primarily on its amount of users, they tend to actively strive for a well-known, uniform and visible brand.[17] This prominent role in the transaction process may lead customers to believe that the platform is acting as the supplier. The role of the platform operator may be even more unclear in case of platforms such as Amazon or Bol.com,[18] which act as an intermediary for third-party suppliers but, at the same time, also offer goods and services in their own name.[19]

The most far-reaching consequence of a platform's dominant presence in the transaction process would be that, legally, it qualifies as the costumer's contracting counterparty: the supplier.[20] In this respect the Commission mentions three key criteria which may render a platform operator liable as the supplier: 1) the setting of the price by the platform, 2) the determination of key contractual terms by the platform, and 3) ownership of the key assets used to provide the

[13] Busch et al. (n. 11), p. 5-6. For references to platforms trying to wave all liability for contractual non-performance, see below.
[14] Busch et al. (n. 11).
[15] European Commission, 'Commission Staff Working Document A Digital Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Single Market Strategy for Europe', SWD(2015) 100 final, p. 54.
[16] Likewise: Busch et al. (n. 11), p. 7-8. Extensively on the services offered by online (intermediary) platforms, see: European Commission (n. 4).
[17] European Commission (n. 4), p. 4-5; Busch et al. (n. 11), p. 8.
[18] <www.amazon.com> and <www.bol.com>.
[19] Likwise: De Vries-Stotijn & Jabłonowska (n. 1). Also see: European Commission, 'Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD(2016) 163 final, p. 127.
[20] Likewise: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy', COM(2016) 356 final, p. 6. Also see AG Szpunar who concludes that Uber is a transportation service rather than an intermediary/ booking service: Conclusion of 11 May 2017 in Case C-434/15, ECLI:EU:C:2017:364 (*Asociación Profesional Élite Taxi/Uber*) and Conclusion of 4 July 2017 in Case C-320/16, ECLI:EU:C:2017:511 (*Uber/France SA*S). At the time of the writing both cases are still pending.

service.[21] The Commission is not very precise about what it means by the third criteria, but one may think of a platform offering taxi services while also owning the cars used to perform those services.

3. Legal relevance

The qualification of the platform is important for customers for two main reasons. First of all, it is relevant to know who is responsible for contractual non-performance: the platform or a third party supplier. In case of damage or non-compliance, the customer may find it easier to get compensation from the bigger, financially more viable, platform operator. In any case, customers should be able to anticipate their legal position vis-à-vis both the platform and (a potential) third-party supplier before concluding a contract on the platform. Secondly, if the platform acts in the capacity of a supplier, the contract with a customer who acts in a private capacity, will qualify as a business-to-consumer (B2C) contract. This means that the customer enjoys protection under (EU) consumer law. In the sharing (or collaborative) economy, an increasing number of private individuals are now offering products and services to other consumers, typically via online platforms. These consumer-to-consumer (C2C) contracts will normally fall outside the scope of (EU) consumer law. Thus, if the customer, unexpectedly, finds that he is dealing with another consumer – rather than with the platform – he may not be protected by (EU) consumer law.[22] In order to prevent this unexpected loss of consumer rights, it is important that the consumer knows whether he is concluding a contract with the (professional) platform or with a third-party supplier who may be acting in a private capacity (so-called 'prosumers').

The platform's contractual status is less relevant if, under the existing legal framework, intermediaries are jointly responsible with the supplier anyway. Indeed, intermediaries are jointly responsible with the supplier for compliance with certain EU private law duties. The new Package Travel Directive[23] (hereafter: PTD), for instance, aims to clarify which party is responsible for compliance with its duties[24]: the travel supplier ('travel organiser') or the travel intermediary ('retailer'). Online travel platforms dealing in travel packages will normally qualify as retailer, unless they combine the various elements of the package themselves, in which case they would qualify as an 'organiser'.[25] Various duties in the directive now lie with both the travel organiser

[21] European Commission (n. 19), p. 6.
[22] European Commission (n. 15), p. 54. Note that it can be difficult to determine when a supplier in the sharing economy qualifies as a trader: European Commission, 'Commission Staff Working Document Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC, Directive 2006/114/EC', SWD(2017) 209 final, p. 107-109.
[23] Package Travel Directive (EU) 2015/2302, [2015] OJ L326/1.
[24] Recital 23-24 of the Preamble of the PTD. Extensively on who is responsible for compliance with EU travel law if a travel service is booked through an intermediary, see: A. de Vries-Stotijn, 'Travel intermediaries and responsibility for compliance with EU travel law: a scattered legal picture', *EuCML* 2016-3, p. 119–125.
[25] ECJ Case C-400/00, ECLI:EU:C:2002:272 (*Club Tour/Garrido*) and recital 22 PTD.

and the travel intermediary.[26] For example, all traders - both organisers and retailers - facilitating the procurement of linked travel arrangements[27] are obliged to secure insolvency protection (Article 19 of the PTD). More importantly, both retailers and organisers are under a duty to provide pre-contractual information to the traveller (Article 5 of the PTD). Much of this pre-contractual information, e.g. information on the main characteristics of the package deal, forms an integral part of the package travel contract (Article 6(1) of the PTD).

Similarly, in many EU consumer directives, the definition of 'trader' refers to persons acting in the name or on behalf of a trader, defining traders as: "*a natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession and anyone acting in the name of or on behalf of a trader*" [28] (underscore added – AV). This definition has been interpreted as making agents of the supplier (jointly) responsible for compliance with EU law next to the actual supplier.[29] For example, in its recent Guidance on the Unfair Commercial Practice Directive, the Commission stresses that the definition of trader clarifies that "*a trader can be held jointly liable with another trader for infringements of the UCPD committed by the latter on his behalf*".[30]

[26] Also see: M. Loos, 'Precontractual Information Obligations for Package Travel Contracts', *EuCM*L 2016-3, p. 125-130, who notes that this means that the information should be provided twice in case a travel package is booked through an intermediary.
[27] See for a definition: Art. 3(5) PTD.
[28] Art. 2(e) of the Timeshare Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10, Art. 2(b) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/ 22, Art. 2(d) Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21, Art. 2 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31. A similar definition of trader could also be found in the proposals for a Distance Sales Directive Proposal (COM/92/11 final) and for a Distance Marketing of Financial Services Directive (COM/98/0468 final). These definitions did not make it into the final directives, the reasons for this being unapparent (H. Schulte-Nölke, C. Twigg-Flesner & M. Ebers, *EC Consumer Law Compendium. Comparative Analysis*, Universität Bielefeld 2008) <http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final .pdf> accessed 29 August 2017, p. 735).
[29] Schulte-Nölke, Twigg-Flesner & Ebers 2008 (n. 27). Also see: G.G. Howells, H-W. Micklitz & T. Wilhelmsson, *European fair trading law: the unfair commercial practices directive*, Ashgate Publishing: Farnham (UK) 2006, p. 68, stipulating that non-professional representatives of a trader, e.g. a consumer who organizes a Tupperware party, are also captured under the 'trader' definition; More extensively on the meaning of the 'trader' definition see my publications: De Vries-Stotijn (n. 23) and A. de Vries, 'Liability for Independent Intermediaries in EU Consumer Law', Tilburg Law School Research Paper No. 06/2015 (available through: https://ssrn.com/abstract=2655896.
[30] European Commission (n. 18), p. 33. Likewise, the 'trader' definition in the Doorstep Selling Directive was said to clarify that "*representatives should also be included in the definition of a 'trader"* ('Opinion of the Economic and Social Committee on the proposal for a Council Directive to protect the consumer in respect of contracts which have been negotiated away from business premises', [1977] OJ C180/39, 40). Also see: see European Commission, 'Guidance on the implementation/application of directive 2005/29/EC on Unfair Commercial Practices', SEC(2009)1666 final, p. 14.

If many EU private law instruments would opt for joint responsibility of the intermediary next to the supplier, the platform operator's contractual status would become less important. In that scenario, no matter what the role of the platform operator is - intermediary or supplier - it would be bound by the same EU private law duties anyway. However, this is currently not the situation. For instance, the new PTD explicitly makes only the supplier responsible for performance of the package (Article 13 and 14 of the PTD) and for providing assistance to the traveller (Article 16 of the PTD).[31] As stated above, incorrect pre-contractual information given by the intermediary can become an integral part of the package travel contract. For example, if a travel intermediary claims that the traveller will receive a hotel room with a double bed, this becomes an integral part of the travel contract with the supplier. If then only a single bed is present, this will most likely lead to non-performance on the side of the supplier, making him liable for damages or price-reduction (Article 14 of the PTD).[32] This means that even though the pre-contractual information duties rest with both the supplier and the intermediary, the remedies resulting from a breach of these duties are still directed against the supplier only.[33] Thus, also under the PTD it remains very relevant whether an online platform qualifies as the supplier of the travel package.

In addition, the meaning of the 'trader' definition and, in particular, the phrase *'anyone acting in the name or on behalf of a trader'* is not entirely clear.[34] On various occasions the EU institution opted for different (often conflicting) interpretations of that phrase[35] and there are

[31] Unless the travel organiser is established outside the European Economic Area (EEA), in which case the retailer is primarily responsible for non-performance and for procuring insolvency protection (Art. 20 PTD). Furthermore, Member States are free to make retailers jointly liable for the performance of the package (Art. 13(1) PTD).
[32] Also see: CJEU of 11 May 2017, Case C-302/16 (*Bas Jacob Adriaan Krijgsman v Surinaamse Luchtvaart Maatschappij NV*), where an air carrier had to carry the risk for an online platform's failure to pass on the cancelation of flight to the passenger. This case was on the interpretation of the Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.
[33] Also see the imputation rule of Art. 15 PTD: "*the traveller may address messages, complaints, and claims relating to the performance of the package also to the retailer, who shall forward such notifications to the organiser. For the purpose of compliance with time-limits, receipt by the retailer shall be considered as receipt by the organiser*." About this rule in respect of online platforms, see: Busch et al. (n. 11), p. 7.
[34] Schulte-Nölke, Twigg-Flesner & Ebers (n. 27), p. 735. Možina argues that, since the law of agency is not harmonized at EU-level, the meaning of this phrase should be determined by recourse to national law (in: D. Možina, 'Retail business, platform services and information duties' *EuCML* 2016-1, p. 27).
[35] On the initial disagreement on the meaning of the definition between the EU institutions see: B. Keirsbilck, *The New European Law of Unfair Commercial practices and competition law*, Hart Publishing: Oxford and Portland 2011, p. 40-241. Also see the divergent interpretations of the Parliament ('Draft European Parliament Legislative Resolution on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices' A5-0188/2004, amendment 14), the Council (Common Position (EC) No 6/2005 of 15 November 2004 adopted by the Council, [2005] OJ C38E, p. 17) and the Commission (in: European Commission (n. 18), p. 33; SEC(2009)1666, p. 15; COM(2004)753 final, p. 5; COM(1998)468, p. 11 & 13).

substantial implementation differences amongst Member States as well.[36] In legal literature some authors have interpreted the definition as an imputation rule, making the supplier primarily responsible for activities of intermediaries, rather than making the intermediary himself liable for breaches of EU consumer law.[37] That interpretation is particularly sensible where remedies are only effective in relation to the supplier and is in line with the *Crailsheimer Volksbank* judgement of the ECJ.[38] Moreover, the wording of the 'trader' definition in the Consumer Rights Directive[39] and the new PTD[40] have been slightly amended by the Council. This has been done to clarify that the definition is meant to make traders liable for their representatives, rather than making representatives responsible for compliance themselves.[41] On the other hand, the Commission still interprets the 'trader' definition in the Consumer Rights Directive as making intermediaries and suppliers jointly responsible for compliance, with an explicit reference to online platforms.[42] If anything, the controversy over the meaning of the 'trader' definition shows that it is probably not the best approach to regulate liability of and/or for agents rather ambiguously, in a definition.[43] Therefore, as long as the 'trader' definition does not clearly make online platforms jointly responsible with the supplier for *all* legal duties (including contractual performance), the platform's qualification as a supplier or intermediary remains highly relevant.

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[36] For example, with regard to the Doorstep Selling Directive, Austria, Bulgaria, Finland, Poland and Lithuania do not refer to the trader's representatives, whereas in Belgium, Cyprus, the Czech Republic, Malta, Slovakia, Romania and the UK do (Schulte-Nölke, Twigg-Flesner and Ebers (n. 27) 178-180).

[37] Keirsbilck (n. 34), p. 239-241; G.G. Howells, H-W Micklitz & T.Wilhelmsson (n. 28), p. 68. Also see: H. Schulte-Nölke, 'Scope and Role of the Horizontal Directive and its Relationship to the CFR', in G.G. Howells & R. Schulze (Eds.), *Modernising and Harmonising Consumer Contract Law*, Sellier de Gruyter: Munich 2009, p. 38.

[38] ECJ Case C-229/04, ECLI:EU:C:2005:640 (*Crailsheimer Volksbank v Klaus Conrads)*, paras. 20-21, 41-42 and 45. In the case the ECJ interpreted the definition as making the supplier responsible for an intermediary's breach of the Doorstep Selling Directive (85/577/EEC). On this case: H-W Micklitz, J. Stuyck & E. Terryn, *Consumer Law: Ius Commune Casebooks for a Common Law of Europe*, Hart Publishing; Oxford and Portland 2010, chapter 4, par. 4.3; N. Reich, 'Balancing in Private Law: Experiences and Opportunities', in R. Brownsword, H-W Micklitz & L. Niglia (Eds.), *The Foundations of European Private Law*, Hart Publishing: Oxford and Portland 2011, p. 230-235; P. Rott. 'The Court of Justice's Principle of Effectiveness and its Unforeseeable Impact on Private Law Relationships', in D.Leczykiewicz & S. Weatherill (Eds.), *The Involvement of EU Law in Private Law Relationships*, Hart Publishing: Oxford and Portland 2013, p. 540-542.

[39] Art. 2(2) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] *OJ* L304/64. In addition, recital 20 of the directive's preamble stresses that the notion of 'an organised distance sales or service provision scheme' includes third-party schemes used by the trader, such as online platforms.

[40] Art. 3(7) PTD.

[41] EU Council, 'Proposal for a Directive of the European Parliament and of the Council on consumer rights, First reading Preparation for the next informal trilogue', 10481/11 CONSOM 80 JUSTCIV 138 CODEC 859. Rightfully critical because the definition also makes traders fully responsible for *indirect* representatives: M. Loos, 'Onvolkomenheden bij de implementatie van de richtlijn consumentenrecht', *NJB* 2013, p. 2255.

[42] European Commission, 'DG Justice Guidance Document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights', p. 30-31: "*When a trader uses an online platform to market his products and conclude contracts with consumers, the provider of that platform shares, in so far as he is acting in the name of or on behalf of that trader, the responsibility for ensuring compliance with the Directive*".

[43] Likewise: Schulte-Nölke (n. 36), p. 38; De Vries-Stotijn (n. 23).

4. An example from practice: Uber

The popular and controversial taxi booking application Uber[44], has already lead to plenty of discussion amongst legal scholars. Part of this discussion focuses on the unclear contractual status of Uber: is it only an electronic device which intermediates between passengers and drivers, or is it actually a transport service offering taxi rides in its own name? This question has already led to considerable debate in legal literature. Most authors argue that Uber might very well qualify as a supplier of transportation services rather than an intermediary.[45] This is also one of the primary points of discussion in *Asociación Profesional Élite Taxi/Uber*[46]and *Uber/France SAS*,[47] two cases now pending before the European Court of Justice (ECJ).

In literature, Uber has been named as an example of an online platform which, due to its predominant role in the transaction process and strong branding of its platform, may legally qualify as a supplier rather than an intermediary.[48] Indeed, from Uber's terms and conditions it follows that it exercises considerable control over the transaction process and the content of the transportation service contract.[49] For example, Uber sets the fare rates,[50] offers promotions and discounts,[51] determines the payment methods,[52] sets the cancellation policy,[53] and selects the driver when a particular ride is requested.[54] Furthermore, Uber provides behavioral guidelines for both

[44] www.uber.com.
[45] M. Jull Sørensen, 'Private law perspectives on platform services: Uber – a business model in search of a new contractual legal frame?', *EuCML* 2016-1, p. 15-19; E. Terryn, 'The sharing economy in Belgium – a case for regulation?', *EuCML* 2016-1, p. 45-51, in particular p. 49-51; C. Wendehorst, 'Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive', *EuCML* 2016-1, p. 30-33; A. de Vries-Stotijn, 'De status van Uber – Wie betaalt er aan het eind van de rit?', *TvC* 2016-3, p. 99-106; Busch et al. (n. 11), p. 7. On the other hand, the Italian Competition Authority has argued in favor of treating Uber merely as an intermediary rather than a transportation provider (see: A. De Franceschi, 'The Adequacy of Italian Law', *EuCML* 2016-1, p. 60).
[46] Case C-434/15, currently pending before the CJEU.
[47] Case C-320/16, currently pending before the CJEU.
[48] Busch et al. (n. 11), p. 8; Jull Sørensen (n. 44), p. 15-19; De Vries-Stotijn (n. 44), p. 99-106. On the question whether Uber qualifies as the employer of the taxi drivers, see, amongst others: B. Rogers, 'The Social Costs of Uber', *The University of Chicago Law Review Dialogue* 2015-3, p. 98-99 M.S. Houwerzijl, 'Arbeid en arbeidsrecht in de digitale platformsamenleving: een verkenning', *Tijdschrift Recht en Arbeid* 2017- 2, p. 3-8.
[49] See, for instance, the terms and conditions of Uber UK: www.uber.com/legal/terms/gb accessed 27 August 2017.
[50] See point 5 of Part 1 of the Uber UK general terms and conditions (<www.uber.com/legal/terms/gb>)
[51] www.uber.com/legal/terms/gb, under: '3. Your Use of the Services', 'Promotional Codes'. https://help.uber.com/en-GB/, 'For Riders', 'Account and Payment Options', under 'Using Uber promotions and credits' and 'Earning free rides'.
[52] www.uber.com/legal/terms/gb, under '4. Payment'. E.g. paying in cash is not a possibility, see: https://help.uber.com/en-GB/, 'For Riders', 'Account and Payment Options', under 'Paying with cash'.
[53] https://help.uber.com/en-GB/, 'For Riders', 'A Guide to Uber', under 'Cancelling an Uber ride'.
[54] It is not possible to request a particular driver: https://help.uber.com/en-GB/, 'For Riders', 'A Guide to Uber', under 'Requesting a specific drive'.

riders and drivers, violation of which may lead to being excluded from the platform.[55] Nonetheless, Uber stresses – in capitals – that it is not acting as the provider of the service transport:

> "*You acknowledge that Uber does not provide transportation, logistics, delivery or vendor services or function as a transportation provider or carrier and that all such transportation, logistics, delivery and vendor services are provided by independent third party contractors who are not employed by Uber or any of its affiliates*."[56]

It denies – again in capitals - all liability for the performance of the transportation service as far as allowed under the law:

> "*you agree that Uber has no responsibility or liability to you related to any transportation, good, logistics, delivery or vendor services provided to you by third party providers other than as expressly set forth in these terms*."[57]

It even denies all responsibility for damage *"even if Uber has been advised of the possibility of such damages*". As will be discussed below, it is possible that these terms and conditions must be deemed unfair under the Unfair Terms Directive.[58]

In May and July 2017, Advocate General Szpunar delivered his opinion in *Asociación Profesional Élite Taxi/Uber*[59] and in *Uber/France SAS.*[60] These cases – both still pending before the ECJ at the time of writing - involve national permit systems and criminal prohibitions. Nevertheless, they may prove very interesting also in respect of Uber's contractual status. In these cases AG Szpunar asks himself: "*What is Uber? Is it a transport undertaking, a taxi business to be blunt? Or is it solely an electronic platform enabling users to locate, book and pay for a transport service provided by someone else?*"[61] In order to answer this question, the AG carefully assesses Uber's working method. He considers that, rather than simply matching supply to demand, Uber has created the supply itself. Also Uber determines the essential characteristics of that supply and organizes how it works.[62] Uber determines the terms and conditions, sets (safety) standards for vehicles, and provides for conduct rules. Furthermore, Uber sets the fare rates and provides for a rating system whereby bad reviews may result in exclusion from the platform.[63] All in all, the AG concludes that Uber exerts control over all the relevant aspects of an urban transport

[55] See e.g.: www.uber.com/legal/community-guidelines/us-en/ and www.uber.com/legal/community-guidelines/uk-en/.
[56] www.uber.com/legal/terms/gb/, part 2, point 2 'The services'.
[57] www.uber.com/legal/terms/gb/, part 2, point 5 'Disclaimers; limitation of liability; indemnity'.
[58] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L95/29.
[59] Conclusion of AG Szpunar of 11 May 2017 in Case C-434/15, ECLI:EU:C:2017:364.
[60] Conclusion of AG Szpunar of 4 July 2017 in Case C-320/16, ECLI:EU:C:2017:511. This conclusion is largely a confirmation and recap of the 11 May 2017 conclusion. Hereafter reference will be made primarily to the latter.
[61] Conclusion of A-G Szpunar of 11 May 2017 in Case C-434/15, ECLI:EU:C:2017:364, par. 41.
[62] Ibid., par. 43.
[63] Ibid., par. 44-50.

service. [64] The transport service is therefore, from an economic point of view, provided by Uber or on its behalf and the service is also presented to users, and perceived by them, in that way. [65] This means, according to the AG, that Uber qualifies as the supplier of a transportation service.

Although these cases involve public law permit requirements and criminal law, they could very well have a spill-over effect on Uber's qualification in private law. Supposedly in 2017 the ECJ will deliver a judgement in both cases. If it chooses to follow the AG's conclusion, this would be a clear sign to online platforms that they cannot avoid responsibility as a supplier if they act and are perceived as suppliers. On the other hand, although many online platforms do exercise a certain degree of control over the transaction process, in comparison with Uber, many cases will be less clear-cut. Therefore, it is unlikely that the anticipated ECJ's rulings regarding Uber's status will instantly clear up all discussion regarding the contractual status of all other online platforms.

5. Current solutions in EU private law

Several EU information duties apply to online platforms.[66] First of all, the Consumer Sales Directive (§ 5.1), the Consumer Rights Directive (§ 5.2) and the Unfair Commercial Practices Directive (§ 5.3) will be discussed, because they (may) impose information duties on the platform in respect of the supplier's identity. Secondly, avoidance of liability for contractual non-performance by online platforms may, under certain circumstances, be considered unfair under the Unfair Commercial Practices Directive (§ 5.3) and the Unfair Terms Directive (§ 5.4).

5.1. The Consumer Sales Directive

The Consumer Sales Directive (hereafter: CSD) provides for liability of sellers of goods in case of non-conformity of the good.[67] As the Commission has noted: "*A specific issue for marketplaces is whether they are liable in cases of non-conformity of goods supplied by third party sellers, including non-delivery.*"[68] According to Articles 3 and 5 of the CSD liability for non-conformity rests with the '*seller*'. As defined by Article 1(2)(c) of the CSD, a seller is a: "*natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession"*. In sum, this means that the consumer has remedies only against the person with whom he has concluded the sales contract. Thus, an online platform will not be liable for non-conformity under the CSD if it qualifies as an intermediary. As stated earlier, the status of the platform will

[64] Ibid., par. 51.
[65] Ibid., par. 53.
[66] On information duties in relation to online platforms see: Možina (n. 33), p. 25.
[67] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L171/12.
[68] European Commission (n. 18), p. 127.

depend on the particular circumstances of the case, such as the control of the platform over the supplier-customer contract.[69] The CSD does not provide guidance on this matter, leaving this interpretation exercise largely up to (national) statutory law and case-law.

Indeed, some clarification can be found in case-law. In particular, the *Wathelet* case is relevant.[70] The case involved a consumer buying a second-hand car from a garage. The engine broke down and the consumer claimed repair. However, the garage denied liability, claiming that it was not the seller since it had sold the car on behalf of another consumer. According to the garage, this meant that the sale contract qualified as a C2C relationship to which the CSD does not apply. The ECJ, on the other hand, observed that, for the purpose of ensuring effective consumer protection, it is essential that consumers are aware of the seller's identity. After all, consumers need to know whether the seller acts in the capacity of a trader, in which case they enjoy protection under the CSD.[71] Therefore, the ECJ ruled that an intermediary becomes liable as the seller under the CSD if the intermediary: "*by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold*."[72] Whether this is the case, depends on the particular circumstances of the case. In particular relevant to determine whether the consumer could have understood that the intermediary was acting on behalf of a private individual are: "*The degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer and the latter's behaviour*".[73] This lines up nicely with the Advocate-General's approach in the Uber-cases discussed above. Also in national systems the status of the platform will usually not only depend on the platform's statements regarding its status, but also on the particular context in which those statements are made.[74]

The *Wathelet* case provides for an argument to hold online platforms liable for non-performance as a seller, where they have not properly disclosed their status as an intermediary. On the other hand, it is unclear whether the rationale behind the judgement still applies if the undisclosed seller is a trader, in which case the consumer would enjoy consumer protection also against the actual seller. Moreover the circumstances of the *Wathelet* case were very clear-cut: the buyer was not informed at all about the existence of a third-party (non-professional) supplier. Save from common law systems, where it is possible to contract with an undisclosed principal, in most other countries a similar result would probably result from general national contract law already.[75]

[69] Likewise: European Commission (n. 19), p. 6.
[70] CJEU Case C-149/15, ECLI:EU:C:2016:217 (*Sabrina Wathelet v Garage Bietheres & Fils SPRL*).
[71] Ibid., paras 37–39.
[72] Ibid. paras 41, 45.
[73] Ibid., para. 44.
[74] Busch et al. (n. 11), p. 5. Also see: Wendehorst (n. 44), p. 32.
[75] For example, in the Netherland this would follow from case law: Dutch Supreme Court 8 September 2001, ECLI:NL:HR:2000:AA7041 (*Baby Joost*). Also see the Danish case law discussed below (n. 86). In many civil law systems a common basic premise is that -except for some clearly defined exceptions - the indirect representative's

After all, in most national systems the status of the platform will usually be a matter of contractual interpretation which serves to determine how a customer could, in a particular context, perceive the platform's role.[76] Since the circumstances in the *Wathelet* case were rather self-evident, the case does not offer much guidance in respect of online platforms where the circumstances are often more blurry, e.g. because the platform has disclosed its role as an intermediary clearly in its terms and conditions, while nonetheless acting very much like a supplier.

5.2.The Consumer Rights Directive

Article 6 of the Consumer Rights Directive[77] (hereafter: CRD) contains various information duties for traders in the case of distance B2C contracting.[78] Article 6(1)(c) of the CRD provides that the trader must give information to the consumer on "*the geographical address and identity of the trader on whose behalf he is acting*". In its (non-binding) Guidance on the CRD, the Commission explicitly refers to online platforms: "*where the trader provides an on-line trading platform for other traders to market their products, for example, an app store for selling digital content offered by […] developers, the platform provider should make sure, through appropriate arrangements with the developers, that information about them as content providers is duly displayed."*[79] Thus, pursuant to Article 6(1)(c) of the CRD, the platform operator is under a duty to provide information on the *identity of the supplier*. However, Article 6(1)(c) does not necessarily require the platform operator to provide clear information on *his own role* as an intermediary. On the other hand, one may argue that where a consumer has been informed about the identity of the third-party supplier, he should be able to conclude from that information that the platform only acts as an intermediary.

More problematic is that Article 6 CRD only applies when the customer is a consumer and the supplier is a trader. Thus, Article 6(1)(c) of the CRD does not apply when the supplier acts in a private capacity. As stated earlier, it is exactly in that situation that it is (even more) important that a customer realizes that the platform is not his contracting. Interestingly, Article 7 of the Proposal for a CRD – which did not make it into the final version of the CRD - tried to tackle exactly this situation.[80] This provision required professional intermediaries acting in the name or on behalf of another consumer, to disclose to the consumer that is was acting for another consumer and that the

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acts only affect himself and not the undisclosed principal (see: D. Bush, *Indirect Representation in European Contract Law*, Kluwer Law International: The Hague 2005, p. 43-44 (on Dutch law, with exceptions to this general rule on p. 44-72), p. 79 (on German law with exceptions on p. 93-124) and, p. 242 regarding the PECL. Also see p. 133-174, where it is discussed that under UK law this premise is absent on the basis of the undisclosed agency doctrine.

[76] Likewise: Busch et al. (n. 11), p. 5; C. Wendehorst (n. 44), p. 32.

[77] Consumer Rights Directive (2011/83/EU) [2011] OJ L304/64.

[78] Note that certain services are excluded from the CRD's scope (Art. 3(3) CRD).

[79] European Commission (n. 41), p. 24.

[80] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on consumer rights', COM(2008) 614 final.

contract therefore would fall outside the scope of the CRD. Similar to the ECJ's reasoning in the *Wathelet* case, the idea was that consumers need to know whether or not they enjoy the protection of the CRD.[81] Article 7(2) of the CRD Proposal also provided for a sanction along the lines of the *Wathelet* case: if the intermediary failed to provide the information, it would be deemed to have concluded the contract in its own name. Article 7 of the CRD Proposal did not make it into the final version of the CRD, the reasons for its removal being unapparent. Nevertheless, in a 2017 review by the Commission it was observed that there is still a strong call, especially from consumer associations, for a provision which obliges online market places to inform consumers about the identity ('trader' or 'consumer') of the supplier. The Commission will therefore look into the possibility of introducing again a similar transparency requirement into the CRD.[82] This could make the CRD an important instrument in bringing more clarity to customers about the platform's contractual status and their own legal position.

5.3.The Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive (hereafter: UCPD)[83] prohibits the use of unfair commercial practices.[84] Article 7(4)(b) of the UCPD clarifies that an misleading omission may relate – amongst other things - to "*the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting*." Thus, the UCPD could be interpreted as imposing a duty on platforms to clearly state their capacity as an intermediary. Indeed, the European Commission has derived from the UCPD such a transparency requirement for online platforms. In particular, operators of online platforms should "*take appropriate measures enabling […] their users to clearly understand who their contracting party is – and the fact that they will only benefit from protection under EU consumer and marketing laws in their relations with those suppliers who are traders.*"[85]

Next to (or instead of) imposing transparency duties on platforms, one may simply wish to prohibit the practice by which a platform operator denies all responsibility for the performance of the supplier-customer contract, whilst on the other hand exercising considerable control over that

[81] Ibid, recital 20.
[82] European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU', COM(2017) 259 final, p. 8 & 10.
[83] Unfair Commercial Practices Directive (2005/29/EC) [2005] OJ L149/22.
[84] Meaning that they are contrary to the requirements of professional diligence and are likely to materially distort the economic behaviour of the average consumer (Art. 5(2) UCPD).
[85] European Commission (n. 18), p. 127. Also see p. 132 where the Commission states that an operator of a collaborative economy platform should "*enable relevant third party traders to indicate to users that they are traders*".

contract.[86] Under certain conditions, this could indeed amount to an unfair commercial practice. In particular, it might be considered misleading if a platforms states that it acts merely as an intermediary where it is clear, e.g. due to a settled line in case-law, that the platform is considered the customer's contracting counterparty. Article 6(1)(c) of the UCPD clarifies that it can be regarded as misleading if a commercial practice deceives or is likely to deceive a consumer as to the "*extent of the trader's commitments* […]". Art. 6(1)(f) further adds that the deception may also relate to: "*the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation* […]". Thus, it seems that an online platform operator may not deny liability for the performance of the supply contract, if he knows (or should know) that legally he is liable. The platform's liability for the performance of the contract may follow from EU case law, such as the *Wathelet* judgement and in the future possibly also the much awaited ECJ Uber rulings. It may also follow from national case law. For instance, Danish case law provides that a professional intermediary who failed to disclose his role as an intermediary adequately, is deemed to have concluded the contract in its own name.[87] Furthermore, the platform's liability (as a supplier) may follow from national or EU statutory law, such as provisions similar to Article 7 in the CRD Proposal (discussed above).

5.4. Unfair Terms Directive

Online platforms generally require users to accept their terms of use. These terms and conditions often clearly state that the platform only acts as an intermediary and is not liable for performance by the supplier, nor any damage deriving from the contract between customer and supplier. Uber's terms and conditions are already mentioned as an example, but many other online platforms, such as Airbnb[88] and Expedia[89] provide for similar disclaimers in their terms and conditions. These terms might prove unfair under the Unfair Terms Directive[90] (UTD).

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[86] Art. 2(d) of the UCPD defines a commercial practice as: "*any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers".*

[87] For more on this, see: De Vries-Stotijn & Jabłonowska 2017 (n. 1), with references to: Judgment of the Eastern High Court (Østre Landsret) of 8 November 2015 in case U 2016.1062 Ø. : *Marie Jull Sørensen*, 'Digitale formidlingsplatforme – formidlingsreglen i dansk forbrugerret' Ugeskrift for Retsvaesen 2017, p.119.

[88] Par. 1.2 of Airbnb's Terms of Service (www.airbnb.com/terms, accessed 28 August 2017) provides: "*As the provider of the Airbnb Platform, Airbnb does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services. Hosts alone are responsible for their Listings and Host Services. When Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to or other participant in any contractual relationship between Members*".

[89] Art. 7 of the Expedia UK General Terms and Conditions for Booking (www.expedia.co.uk/p/support/general-booking-conditions, accessed 28 August 2017) provides: "*The Customer accepts that where Expedia, Inc. acts as an interface between the Customer and the Suppliers, Expedia, Inc. will under no circumstances be held liable with respect to Services the Customer has booked with one or more Suppliers*".

[90] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L 95/29.

The UTD renders terms and consitions unfair "*if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*" (Article 3(1) of the UTD). Unfair terms are not binding on the consumer (Article 6(1) of the UTD). The annex with the UTD contains an indicative list with terms that may be unfair. As previously noted by Terryn in relation to Uber's general terms,[91] particularly interesting is point 1(b) of the Annex, which lists as potential unfair any term: "*inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations*" (underscore added – AV). Interesting here is the reference to 'another party'. The meaning of this phrase is rather unclear, but it could be interpreted as capturing online platforms with considerable control over the supply contract. Interpreted as such, a platform may not be able to deny liability for non-performance, even if it merely qualifies as an intermediary. Annex point (1)(b) makes a much stronger case once it is clear that the online platform qualifies as the supplier. If it is a settled matter that the platform legally qualifies as the supplier, it seems fairly unreasonable to deny all responsibility for non-performance.

6. Conclusion and tentative suggestions

6.1. Summary: where do we stand?

Online (intermediary) platforms often portray themselves as mere intermediaries, matching customers to third-party suppliers. However, a platform's predominant control over the transaction process, may lead customers to believe that the platform is actually the supplier. The platforms role - intermediary or supplier - can have considerable legal consequences for customers. It is therefore important that the customer is aware of the identity of his contracting counterparty. However, the contractual status of an online platform is not always clear and can lead to extensive legal discussions, as illustrated by the two Uber cases pending currently before the ECJ.

So where do we stand? As discussed, EU private law contains various information duties which may oblige online platforms to clarify their contractual status vis-à-vis consumers. In particular, Article 6(1)(c) of the Consumer Rights Directive requires the platform to indicate to consumers the identity of the (third-party) supplier. In addition, the Unfair Commercial Practices Directive may require the platform to be clear about its own status as an intermediary. Moreover, if the online platform is unclear about its status as an intermediary, he risks being held liable for non-conformity under the Consumer Sales Directive, as happened in the *Wathelet* case. Besides these disclosure duties, an online platform may not be able to exempt itself from liability for the

[91] Terryn (n. 44), p. 49.

performance of the supply contract. If, from national or European law, it follows that a particular online platform qualifies as supplier rather than intermediary, the platform's claims to the contrary may result in an unfair practice under the Unfair Commercial Practices Directive. Furthermore, such disclaimers in the terms and conditions risk being deemed unfair under the Unfair Terms Directive.

Although EU consumer law offers various rules dealing with the platform's status and liability vis-à-vis customers, these rules are not applicable if the customer acts in a business capacity. Likewise, the information duties may not apply to C2C transactions. More importantly, many of the rules discussed are rather open and not particularly tailored to deal with the ambiguous contractual status of online platforms. Thus, they need further interpretation. Considering the explosive growth of the platform economy and the new legal challenges it brings, more specific rules could be useful in preventing legal uncertainty amongst customers. Obviously, a platform's contractual status will be dependent on the individual context of each case. Nonetheless, an open norm which addresses the contractual status of the platform, could give customers a much better idea of their legal position than the plethora of legal instruments, case law and legal opinions discussed above.

6.2. Suggestions

The Research Group on the Law of Digital Services, an academic initiative of which the author of this paper is a member, has been working on a Discussion Draft of a Directive on Online Intermediary Platforms.[92] The Discussion Draft aims to protect *all* customers vis-à-vis the platform, meaning that it is also relevant in case of C2C or B2B transactions. In Article 11 of the Discussion Draft it is proposed that the platform should, before each transaction, clearly inform customers that it only acts as an intermediary and that the supply contract will be concluded with a third-party supplier. In addition, the customer should be informed on the third-party supplier's capacity as a trader.

The Discussion Draft does not provide for a clear sanction in case a platform fails to comply with this information duties. In particular, a rule along the lines of Article 7 of the CRD Proposal and the *Wathelet* case, whereby an intermediary can become liable as the customer's contracting counterparty if his status is not clear, cannot be found in the Discussion Draft. Rather, Article 16 of these model rules does provide that the platform operator is in principle not liable for non-performance by the third-party supplier if the platform has informed the customer about its role as an intermediary. An important exception to this rule can be found in Article 18 of the Discussion

[92] As published in the EuCML, 2016-4, p. 164-169. Also available through: www.elsi.uni-osnabrueck.de/projekte/model_rules_on_online_intermediary_platforms/discussion_draft.html. This instrument is a draft, the model rules are still in the process of being fine-tuned.

Draft, which makes the platform operator jointly liable for performance if the customer can reasonably rely on the platform operator having a predominant influence over the supplier. It also gives criteria which are to be considered when assessing whether such a predominant influence exists. These criteria are:

(a) The supplier-customer contract is concluded exclusively through facilities provided on the platform;
(b) The platform operator can withhold payments made by customers under supplier-customer contracts;
(c) The terms of the supplier-customer contract are essentially determined by the platform operator;
(d) The price to be paid by the customer is determined by the platform operator;
(e) The platform operator provides a uniform image of suppliers or a trademark;
(f) The marketing is focused on the platform operator and not on the suppliers;
(g) [OPT:] The platform operator promises to monitor the conduct of suppliers.

By giving an indicative list, legal certainty is promoted while leaving enough room for the specifics of individual cases. It stands out that many of these criteria align nicely with AG Szpunars conclusions in the Uber cases and the Commission's considerations regarding the contractual status of online platforms.

In June 2017, the European Parliament adopted a resolution on online platforms, in which it, among other things, calls upon the Commission to clarify the liability of online platforms.[93] The Parliament unfortunately does not specifically mention the issue of the unclear contractual status of online platforms.[94] Nevertheless, one may hope that the Commission will use this opportunity to create legal certainty in the field. After all, the platform economy is rapidly growing. Consequently many customers can be affected by uncertainty over their legal position towards nonline platforms. A rule on the platform operator's liability and contractual status vis-à-vis customers could be drafted along the lines of the *Wathelet* case and Article 7 of the CRD Proposal, making a platform liable as the supplier when it has been unclear about its status as an intermediary. This could be complemented by a rule along the lines of Article 17 of the Platform Discussion Draft which would kick in if the platform *does not* qualify as the supplier. For instance, because it has been very clear about its role as an intermediary. The intention of such a provision

[93] European Parliament, 'European Parliament resolution of 15 June 2017 on online platforms and the digital single market', P8_TA-PROV(2017)0272.
[94] Rather it largely focuses on the question whether online platforms enjoy the exemption from liability for neutral hosting services under the E-Commerce Directive (see Art. 14). In my view, this discussion is not very relevant in respect of online (intermediary) platforms, which almost never qualify as merely neutral hosting services (likewise, see the Commission: Commission Staff Working Document Evaluation of the Consumer Rights Directive (n. 7), p. 59).

would be to prevent that a platform operator may, on the one hand, control the entire sales process and the content of the supply contract, while on the other hand denying all responsibility for the performance of that contract.

Last, a platform's dominant control over the transaction process, may trigger yet other related legal questions. This paper has focused on protection of the customer against the platform, but the supplier may be in need of protection as well. In particular, one may wonder whether it is justified that online platforms are protected vis-à-vis the suppliers under the Commercial Agency Directive.[95] This directive aims to protect the (economically) weaker agent against his principal, whereas in the platform economy, the agent (the platform) is often much more powerful than its principal (the supplier). [96] All in all, next to the platform's contractual status in relation to the customer, the platform economy gives rise to many legal questions which will keep private lawyers and legislators busy for quite some time.

[95] Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L382/21.
[96] Likewise: R. Podszun & S. Kreifels, 'Digital platforms and competition law', EuCML 2016-1, p. 33-39. On the question whether Uber qualifies as the employer of the taxi drivers, see footnote 48.