Article 16: Overview

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CHAPTER V: LIABILITY OF THE PLATFORM OPERATOR ARTICLE 16: OVERVIEW

1. A platform operator who presents itself to customers and suppliers as an intermediary in a prominent way is not liable for non-performance under supplier-customer contracts.
2. In addition to any other liability of the platform operator under platform-supplier contracts or platform-customer contracts, a platform operator may be liable:
   (a) to customers for failing to remove misleading information given by suppliers under Article 17;
   (b) to customers who can reasonably rely on the predominant influence of the platform operator over suppliers under Article 18;
   (c) to customers or suppliers for misleading statements made by the platform operator under Article 19;
   (d) to customers or suppliers for guarantees given under Article 20.

1. Main content and function

Chapter V governs the liability of the platform operator towards suppliers.[1] The heading of the chapter is, however, not completely accurate, as it suggests this chapter should determine the specific requirements for the liability of the platform operator for the non-performance or improper performance or other types of misbehaviour by suppliers. Chapter V, however, does not deal principally with the question of the operator's liability resulting from its role as intermediary, i.e. resulting directly from the contracts concluded between customers and

[1] Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for the Consumer Contract Law' (2016) EuCML 3, 7–9.

the platform operator. The Discussion Draft sets out rules on the duties of the platforms in relation to customers in Chapter III and towards the suppliers in Chapter IV. Among the general provisions of Chapter II, there are also rules that are applicable to the relationships of the platform with customers and suppliers alike, though seen from the perspective of the 'two-sided-relationship' that the platform concludes with both groups of users. Chapter V, on the other hand, purports to deal with the triangular relationship that emerges between the operator, the customer and the supplier or that might emerge among them.[2]

While the liability of the platform operator for the suppliers, or (in the case of Articles 19 and 20) also for the customers, is perceived as an exception in terms of the regular contract law, it is one of the characteristic features of the rules introduced by the Discussion Draft. The role of a platform often goes beyond the role of a simple intermediary. The platform could be the organiser of two markets (of the suppliers and of the customers), the main player in the organisation of certain business activities and often also the party dominating all legal relationships, not only between the platform operator and the users (the customer and supplier respectively) but also between the customers and suppliers.[3] The platform may also exercise an important role in the fulfilment of contractual obligations – it often receives payments from the customers, which are then distributed to the suppliers. In many situations, to reduce the role of the platform operator exclusively to the role of the intermediary would not reflect the real position of the operator in this triangular relationship.[4] The platform scheme not only facilitates the process of contract-making, but the role of the platform operator might not differ greatly from the role of a trader, who renders its business with the help and participation of suppliers. It is, however, also true that the role played by the suppliers differs from being merely an employee,[5] as they usually have more autonomy in organising their commercial activity. Therefore, it would often be incorrect to discharge the suppliers from the contractual obligations. If certain conditions are fulfilled, the suppliers and the platform should form a 'camp' over the contractual relationship, participating not only in the profits generated by the contract concluded with the customers but also sharing the contractual risks.

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[2] See however the criticism to the approach presented in this Chapter: Caroline Cauffmann, 'The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?' (2016) EuCML 235, 240.

[3] Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska, Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for the Consumer Contract Law' (2016) EuCML 3–5.

[4] Ibidem 3, 4.

[5] Albeit the role of the supplier in the particular scheme (e.g. Uber) of the relationships within the triangle consisting of the supplier, platform operator and the customer can be controversial. See: *O'Connor v Uber Technologies, Inc.,* No C-13-3826 EMC (N D Cal. 2015). Marie Jull Sørensen, 'Private Law Perspectives on Platform Law Services' (2016) EuCML 15, 16. See also sceptical analysis of Marie Jull Sørensen at 16–17; Cf. Art. 1 Commentary, 1.1. General scope: Triangle of contracts.

Article 16 has a double function. Primarily it expresses the principle of non-liability of the platform operator, which presents its role as an intermediary in a transparent way (section 1). Section 2 sets out exceptions to the principle of the non-liability of the intermediary. These are the following: (1) the liability to customers for failing to remove misleading information provided by the platform provider; (2) the liability for the non-performance of the supplier if qualified requirements are fulfilled; (3) the liability of the platform for its own misleading statements (in relation to customers and suppliers); and finally (4) the liability for the operator's own promises (guarantees). Article 16 section 2 does not elaborate on these exceptions, since it is the subject matter of subsequent articles. Article 16 section 1 provides only an overview to facilitate the orientation within the system of Chapter V.

This scheme requires further discussion, as the current text is somewhat incoherent.[6] Article 16 section 1 has been drafted as a principle, and section 2 contains exceptions to this principle. The liability provided by letters (c) and (d) is not a liability of the operator for the non-performance of the supplier, but it is the own liability of the platform operator. Hence the liability under letters (c) and (d) cannot be perceived as an exception to the principle of the non-liability of the operator as an intermediary for the misbehaviour of suppliers.[7]

2. Sources

The principle of the non-liability of the platforms is a result of adopting the classical approach to the privity of contracts. Hence, the contract concluded between a customer and the platform operator produces only effects between the parties of the contract. These effects are generally not governed by this chapter, despite the content of Articles 19 and 20, which might be seen as also governing the relationship arising directly from the contract between the platform operator and the supplier.

The question of the liability of the platform operator for the failure of the supplier's performance is already addressed in the existing *acquis communautaire*. The main example could be the new Package Travel Directive. This directive also deals with online-platforms, although the concept has not been used in the text of the directive.[8] The directive addresses one of the main problems,

[6] These ambiguities have been identified by Caroline Cauffmann, 'The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?' (2016) EuCML 235, 240.

[7] Ibidem.

[8] The adjustment of the law on package travel to the digital era is, however, clearly one of the main objectives of the new Package Travel Directive – see: Stefanie Bergmann, 'Die EU-Richtlinie über Pauschalreisen und verbundene Reiseleistungen – eine lange Reise zum neuen Recht' (2016) VuR 43, 44.

which also exists in the world of the platform economy, i.e. the attribution of the contractual relationship to the trader.[9] The Package Travel Directive attributes the contractual relationship to the organiser of the package travel (as defined in Article 3 section 8), irrespective of the content of declarations by the parties, as long as the requirements for the package are fulfilled (as defined in Article 3 section 2). This creates a different perspective on the concept of contract and the sources of obligations. The Package Travel Directive, however, also addresses the question of the intermediaries and their liability for the organiser's failure to perform its obligations properly. This category of intermediaries is called, in the language of the directive, a 'retailer' (Article 3 section 9). The Package Travel Directive allows the Member States to broaden the scope of the organiser's liability and to apply it respectively to the liability of the retailer (Article 13 section 1, second sentence). This means that it is possible for the Member State to extend the scope of the liability also to retailers, and the requirement of full harmonisation (Article 4) will be not infringed.[10] In Article 20, the Package Travel Directive provides for the liability of the retailer for an organiser situated outside of the European Economic Area, unless the retailer provides evidence that the organiser complies with the specified provisions of the directive. It is a rule that prevents the directive's liability regime from being circumvented.[11] Finally, the Package Travel Directive regulates an 'intermediary clause' – Article 23 of the directive stipulates that a trader cannot be discharged from the liability arising under the directive solely by labelling itself as intermediary.

The question of the liability of the intermediary has also been addressed in the *Wathelet* case decided by the CJEU.[12] The CJEU proposed the criteria to apply the rules on the seller's liability in the sense of the Consumer Sales Directive to intermediaries.[13] They are, however, mostly connected with the requirement of the transparency or the lack of transparency of the intermediary.[14] The problem of transparency is also addressed by Article 16 section 1 of the Discussion Draft. An intermediary who presents itself in an insufficiently 'prominent' way does not benefit from the general privilege of non-liability. A Member State's law may impose such liability on the platform operator, treating it as a part of the supplier-customer contract.

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[9] Klaus Tonner, 'Die neue Pauschalreisenrichtlinie' (2016) EuZW 95.

[10] Stefanie Bergmann, 'Die EU-Richtlinie über Pauschalreisen und verbundene Reiseleistungen – eine lange Reise zum neuen Recht', (2016) VuR 43, 50.

[11] Ibidem, 44.

[12] Cf. Art. 11 Commentary, 5.3.1.Platform becomes liable under the supplier customer contract; Art. 18 Commentary, 2. Sources; Art. 22 Commentary, 4. Relation to other provisions in the Discussion Draft.

[13] Thomas Pfeiffer, 'EuGH: Agenturmodell im Gebrauchtwagenhandel und Verbrauchsgüterkaufrichtlinie' LMK 2016, 384085; Cf. Art. 18 Commentary, 3. Explanation.

[14] Thomas Pfeiffer, 'EuGH: Agenturmodell im Gebrauchtwagenhandel und Verbrauchsgüterkaufrichtlinie' LMK 2016, 384085.

3. Explanation

3.1 The meaning of Article 16 section 1

This provision sets out the requirements allowing the platform operator to be exempted from liability for the supplier, in spite of the exceptions provided in Chapter V, especially in the core provision of this chapter – Article 18. In its current wording, Article 16 section 1 envisages a guarantee for the platform operators against the Member States' law imposing liability on the platform operator for the supplier's non-performance, unless the provisions of Chapter V provide for such liability. This does not mean, however, that a platform operator which fails to present itself as an intermediary in a sufficiently transparent way could escape liability provided under Chapter V. All of the liability provisions would apply also to such an operator. A non-transparent platform operator, however, could also be subject to further rules coming from the Member State's law, imposing additional liability on the platform operator.

To benefit from the guarantee of Article 16 section 1, the platform operator must present itself as an intermediary in a transparent way. This means that a reasonable customer cannot be misled about the role of the platform operator when assessing the presentation of the website.

3.2 The meaning of Article 16 section 2

This provision simply plays an informative role and provides an overview of the legal institutions arising on the basis of the Discussion Draft.

4. Relation to other provisions in the Discussion Draft

The rules provided by Chapter V are self-standing. This chapter does not currently provide any sanctions for infringements of the platform operator's duties arising under other chapters of the Discussion Draft. It imposes duties or links the liability to the role that the platform operator has as an intermediary (Article 18[15]), defines the requirements of the liability for the misleading information posed by the supplier on the facilities of the platform (Article 17[16]), and deals with the liability of the platform for its own misleading statements (Articles 19[17] and 20[18]). Chapter V applies only to such platform operators that are intermediaries in the sense of Article 2 letter a. In addition, the platform

[15] Cf. Art. 18 Commentary, 1. Main Content and function.

[16] Cf. Art. 17 Commentary, 1. Main content and function.

[17] Cf. Art. 19 Commentary, 1.1. The principle of liability of the platform operator for damage caused by misleading statements made by the platform operator.

[18] Cf. Art. 20 Commentary, 1. Main content and function.

operators that fulfil the criteria set out in Article 18 section 2[19] are also regarded as intermediaries. In this sense, Article 18 section 2 extends the definition of the intermediary. The operator, who dominates the business of the supplier in the way as defined in Article 18 and presents itself as intermediary (even in a non-transparent way), will be consequently treated as an intermediary, falling in the scope of application of the Discussion Draft, even if the Member State law regards the platform operator as a party to the supplier-customer contract.

Article 16 section 1 may be read as a sanction for infringing Article 11 section 1,[20] which requires that the platform operator informs the customer before the conclusion of a supplier-customer contract that the customer will be entering into a contract with the supplier and not with the platform operator. Section 2 sets out a duty of the platform operator to ensure that the supplier informs the customer that it offers its goods, services or digital content as a trader. There is an overlap between Article 16 section 1 and Article 11 section 1, as Article 16 section 1 adds a requirement to inform customers in a 'prominent way' about the platform operator's role as an intermediary. Here, Article 16 section 1 must be read in connection with Article 11 section 1, which means that the principle of non-liability applies to the platform operator that has fulfilled the duty arising from Article 11 section 1 and has provided the information in the 'prominent way'. The infringement of Article 11 section 2 is not sanctioned by Article 16 section 1.[21]

5. Criticism; amendment proposal

The general concept behind Article 16 section 1 needs to be discussed. From the internal market's perspective, leaving the non-transparent online platform partially outside of the harmonisation is a sanction that does not increase the customers' and suppliers' reliance on the certainty of the platform law. Therefore, the Discussion Draft should also address the problem of the liability of non-transparent platform operators and subject them to the harmonised law.

Article 16 should then be reformulated in order to become a real overview. It should be noted that the heading is currently rather misleading, as Article 16 section 1 does not have an informative role but rather a normative one. A new article should be created to clearly establish the principle of the non-liability of a transparent operator and the liability of a non-transparent operator. The respective rules could look like this:

[19] Cf. Art. 18 Commentary, 3. Explanation.

[20] Cf. Art. 11 Commentary, 4.5. Sanctions.

[21] Cf. Art. 11 Commentary, 5.3. Consequences and Sanctions.

Article 16: Overview

In addition to any other liability of the platform operator under the platform-supplier contract or the platform-customer contract, the platform operator may be liable:

(a) to customers for a failure to present itself as an intermediary in a prominent way (Article 16 a Section 2);
(b) to customers for a failure to remove misleading information given by suppliers under Article 17;
(c) to customers who can reasonably rely on the predominant influence of the platform operator over the suppliers according to Article 18;
(d) to customers or suppliers for misleading statements made by the platform operator under Article 19;
(e) to customers or suppliers for guarantees given under Article 20.

Article 16 a: Duty to disclose the role of the platform operator as an intermediary

1. A platform operator that presents itself to customers in a prominent way as an intermediary is not liable for the non-performance under the supplier-customer contracts.
2. A platform operator that does not present itself to customers in a prominent way as an intermediary is jointly liable with the supplier for the non-performance of the supplier-customer contract.

Reformulating Article 16 in the suggested way would reduce the function of Article 16 to that of pure information on the scheme contained in Chapter V. One could ask whether this provision is necessary, bearing in mind that the entire structure of the Discussion Draft should be, among other things, consistent. Therefore, if the idea of having an introductory provision with an overview function is correct, then it should also be used in other chapters, or alternatively, it should be abandoned altogether. This must be a matter for further discussion. There are arguments, however, for having the introductory provision even if such a structure would not be endorsed in the remaining chapters. Chapter V deals with quite a broad array of the various aspects of liability of the platform operator in relation to the performance of the supplier and, in special cases, also of the customer. Hence, a certain guide to the structure of Chapter V might be useful to facilitate the orientation within the text. Therefore, to secure the accessibility of the Discussion Draft, it is recommended to maintain such introductory provision with a solely informative function.

However, reshaping Article 16 and departing from its current version changes the normative content of the article. The existing version sets out a closed list of grounds for liability of the platform operator in the event of a failure by the supplier or customer to perform, but does not provide the basis for the own liability of a non-transparent platform operator. This means that the Member

States are entitled to provide additional liability rules for this category of platform operator. This system would, however, be too complicated to use in practice, and customers (as well as suppliers) would never have certainty in relation to content of the rules concerning the liability of the platform operators. The transparency requirement is very vague, since it cannot be precisely established whether a certain practice meets this requirement. Therefore, it is not a very reliable requirement for determining the limits of harmonisation. Hence it would be easier to harmonise the liability also in the case of a non-transparent platform operator.

The suggested Article 16a would harmonise rules on the liability of the non-transparent platform operator. The first section of the proposed article expresses the principle that the transparent platform operator is not liable for the non-performance of the supplier. This provision would not, however, prevent the possibility of a contractual extension of the platform operator's liability by agreement with the customer. However, the full harmonisation principle would prevent extending the platform operator's liability via extensive interpretation the contract in accordance with the Member States' law. Such liability should not be imposed through various ways of completing the contract by the means of the 'fictitious' interpretation (completing interpretation: *ergänzende Willensauslegung*)[22] or implied terms.[23]

As opposed to the current version of Article 16 section 1, the proposed Article 16a section 1 has been slightly reformulated. In the original version, the requirement of transparency in relation to the role of the platform operator as an intermediary protects also suppliers. There are, however, no convincing arguments why the lack of transparency of the platform operator in relation to the supplier should open the path for the platform operator's liability against the customer. Article 13 letter a already governs this requirement. Hence, the suggested Article 16a section 1 governs exclusively the relationship between the platform operator and the customer.

Article 16a section 2 provides a harmonised basis for the platform operator's liability for the non-performance of a supplier in a situation where a platform was not identified in a transparent way as an intermediary. It is envisaged as a fully harmonised provision, so the Member States would not be allowed to adopt rules providing more severe liability of the platform operator for the non-performance of suppliers. Using full harmonisation provides an advantage in terms of strengthening the internal market, but at the same time it is a source of difficulty when it comes to determining the scope of the required harmonisation, and it imposes strict limitations on

[22] On the "completing interpretation" (*ergänzende Willensauslegung)* in the German law see e.g.: Heinrich Dörner, in Reiner Schulze (ed.), *Bürgerliches Gesetzbuch* (Baden-Baden 2016) § 157 No 4.

[23] On the notion of the implied terms in the Common Law see: Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar Publishing 2017) 37.

the national law-makers. The provision provides that the platform operator is liable for the non-performance of the supplier, and that this liability is borne jointly with the supplier. The proposed solution, in line with the remaining provisions of this chapter, does not, however, determine the requirements of the liability and their specifics. The question may be raised as to whether, if the proposed provision would be adopted, the Discussion Draft should establish all the requirements for the liability, or whether specifying these requirements should be left to the Member States. The proposed provision makes the requirements of the platform operator dependent on the requirements for the liability of the supplier. In this sense, the requirements for the liability are complete – they duplicate the requirements for the liability of the supplier. The non-transparent operator is liable, if the conditions for the liability of the supplier are met. No further requirements for the liability of the operator (apart from the requirement of the lack of transparency) are set or could be set by the Member State. The prerequisites of the supplier's liability would be governed, however, by the applicable law.

This liability scheme assumes that, while the liability of the platform operator is dependent on the liability of the supplier, it is not a subsidiary liability. The customer is entitled to remedy the non-performance directly from the platform operator, irrespective of whether the customer has ineffectively tried to remedy the non-performance from the supplier. The customer has a right to exercise all the remedies available against the supplier in relation to the platform operator. It means that Article 16a section 2 provides the customer with a possibility to exercise also those remedies against the platform operator that modify the legal relationship between the customer and the supplier, such as terminating the contract or demanding a price reduction. Hence, the customer can exercise these remedies against the platform operator with a direct effect on the relationship between the supplier and the customer.

It also means that the platform operator could be an addressee of notices on the termination or a price reduction with a direct effect on the customer--supplier contract. The linkage between the supplier-customer contract and the operator-customer contract is very close, and Article 16a section 2 builds on this foundation. Any notices on termination and price reduction addressed directly to the supplier would produce also a direct effect in relation to the platform operator. The platform operator will then be jointly liable for the reimbursement of the price or its surplus. It is still worth discussing whether there is a need to provide more detailed rules concerning the content and the requirements of the platform operator's liability. In particular it must be discussed whether, in the case of a non-professional supplier, the platform operator should be liable as a professional, or like it is at the moment, where the content of his liability would be identical to that of the supplier's liability.

Such an article could be formulated in the following way:

Article 16 b: Remedies against the platform operator

1. If the platform operator is liable for the non-performance of the supplier in accordance with Article 16a or Article 18, the customer is entitled to any remedy against the supplier provided by the law applicable to the supplier-customer contract.
2. If, according to the applicable law, in order to exercise a remedy, a customer needs to notify the supplier, then notifying the platform operator produces all effects also in relation to the supplier, and notifying the supplier produces all effects in relation to the platform operator.
3. If the platform operator has received notification from the customer that might have an impact on the liability of the supplier, the platform operator must inform the supplier about it. This rule applies respectively if the supplier has received such a notification.
4. The platform operator may raise all defences that the supplier may have against the customer, unless the non-performance is mostly attributable to the acts or omissions of the platform operator itself.

The adoption of this article would help to clarify the scheme behind the platform operator's liability: the customer would have the same set of remedies against the platform operator as the customer would have under the applicable law against the supplier under the supplier-customer contract. Technically, a different law could be applicable to the relations between the platform operator and the customers. However, Article 16b provides the same set of remedies in the customer-platform operator relation as in the customer-supplier relation. It means that the applicable law for the customer-operator relation must duplicate the solutions of the law applicable to the customer-supplier contract.

Article 16b section 1 does not repeat the content of Article 7 section 2. Article 7 section 2 deals with the notification addressed to the supplier sent using the platform's facilities,[24] while Article 16b section 1 deals with a notification addressed to the platform operator that also produces effects towards the supplier and vice versa. Article 16b section 1 does not deal with the attribution of a notification to the supplier but with the extended effects of the notice. Article 16b section 3 imposes a duty to report the received notification. This duty differs from the duty arising on the basis of Article 7 section 1, which governs a duty of the platform operator to forward any communication without undue delay. This duty does not concern, however, notifications addressed to the platform operator/or to the supplier with a direct effect for the other party. Therefore, Article 16b section 2 is necessary.

Article 16b section 4 clarifies the relationship between the obligation of the supplier and the liability of the operator. The obligation of the operator

[24] Cf. Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, 'The Rise of the Platform Economy: A New Challenge for the Consumer Contract Law' (2016) EuCML 3, 6–7; Art. 7 Commentary, 1. Main content and function.

arising from Articles 16a section 2 (as suggested here) and Article 18 should then be regarded as dependent (accessory). The operator will be entitled to raise all exceptions that the supplier would be entitled to raise, such as set off or time limits. In certain situations, the liability of the operator should become autonomous – if the non-performance of the supplier is caused by the behaviour of the operator itself (who, for example, has failed to transmit an order to the supplier). In such cases, it would be inappropriate to allow the operator to hide behind the defences of the supplier.

The new composition of Article 16 and the introduction of Article 16a were discussed at the meeting of the Research Group in Osnabrück in March 2017, but no final decision was made. The proposed Article 16b has not yet been discussed at all.