

# Platform Economy and Product Liability: Old Rules for New Markets

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Date of submission: January 2021

Accepted in: May 2021

Published in: March 2022

## Abstract

According to statistics, Amazon is one of the most-used online marketplaces worldwide. The COVID-19 pandemic and the ensuing lockdowns to reduce the spread of the virus have shown how critical online marketplaces are to enable e-commerce and keep commercial transactions alive, especially in such times when regular commerce is disrupted. However, when we buy online, we have no chance of examining whether the product works or whether it is defective. If something goes wrong when we buy a product from a third-party seller through Amazon, as consumers, we then face the challenge of trying to file a claim for the damages that might have arisen due to the defectiveness of the product. This article explores Amazon's position in this scenario, with reference to the case law from both US and EU courts and regulations, not solely from the point of view of Product Liability Law, but also according to the E-Commerce Directive liability.

## Keywords

platform economy, Amazon, product liability, defective product, tort law

1. The author is a member of a consolidated regional Research Group in Private Law ('Grup de Recerca en Dret Patrimonial', 2017 SGR 1636) funded by the Agency for Management of University and Research Grants, dependent of the Catalan Government (AGAUR - *Agència de Gestió d'Ajuts Universitaris i de Recerca*), and directed by Prof. Josep Ferrer Riba (Pompeu Fabra University, Barcelona). PhD researcher and teaching assistant at the Pompeu Fabra University (Barcelona). The author holds a grant for the recruitment of early-stage research staff (FI 2021) awarded by the AGAUR under an open and competitive process and co-funded by the European Social Fund's Operative Program of Catalonia 2014-2020 CCI 2014ES05SFOP007.

## *La responsabilidad de producto en la economía de plataforma: viejas reglas para nuevos mercados*

### **Resumen**

*Las estadísticas muestran que Amazon constituye uno de los mercados en línea más utilizados del mundo. La pandemia de la COVID-19 y las medidas de confinamiento adoptadas posteriormente para detener la propagación del virus, revelan la importancia de los mercados en línea como facilitadores del comercio electrónico; asimismo, estos contribuyen a mantener la vitalidad en las operaciones comerciales, especialmente en circunstancias en que el comercio regular queda interrumpido. Sin embargo, los compradores en internet se ven privados de la posibilidad de comprobar si el producto funciona correctamente o si es defectuoso. Si se observa un desperfecto al comprar un producto vendido por terceros en Amazon, los consumidores enfrentan dificultades para presentar una reclamación por cualquier daño ocasionado por defectos en el producto. El presente artículo explora la posición de Amazon en el caso mencionado, refiriéndose a la jurisprudencia establecida por los tribunales de los EE. UU. y la Unión Europea, así como por sus normativas; no solo desde la perspectiva de la legislación en materia de responsabilidad por el producto sino también conforme a la responsabilidad que emana de la Directiva de Comercio Electrónico.*

### **Palabras clave**

*economía de plataforma, Amazon, responsabilidad de producto, producto defectuoso, derecho de daños*

## 1. Introduction

Online marketplaces are online intermediation services, acting as a go-between for the professional users (businesses) and consumers who want to purchase a good to be delivered to his or her home. As of 2019, e-commerce sales accounted for 14.1 % of the overall retail sales worldwide and will reach 22%, according to projections.<sup>2</sup>

One of the most used online marketplaces in Europe and the United States is Amazon. According to the statistics, in the US, Amazon holds 49.1% of the US e-commerce market share, followed by eBay (6.6%), Apple (3.9%), Walmart (3.7%), Home Depot (1.5%), Best Buy (1.3%) and Costco (1.2%).<sup>3</sup> In 2019, Amazon accommodated up to 45% of consumer spending in all e-commerce platforms in the US, and this percentage is expected to rise to 47% in the year 2020 and 50% in 2021.<sup>4</sup>

As of June 2020, the ten most-visited online retail websites, by unique visitors, have been Amazon (5,219; 44.83%), eBay (1,522; 13.07%), Rakuten (886; 7.61%), Apple (718; 6.17%), Samsung (690; 5.93%), Walmart (622; 5.34%),

Etsy (578; 4.97%), Aliexpress (539; 4.63%), Ikea (450; 3.87%) and Home Depot (417; 3.58%).<sup>5</sup>

According to the most recent data, Amazon was the most visited website in the United States, accounting for 56.1% of all online marketplace visits, followed by eBay (19.7%) and Walmart (10.8%).<sup>6</sup>

As regards its position in Europe, according to the 2019 report by Statista,<sup>7</sup> Amazon is the most relevant e-commerce platform in Europe. Its sales amount to US\$ 6,555 million in the UK.<sup>8</sup> In Germany, its sales reached US\$ 11,077.8 million,<sup>9</sup> and in France<sup>10</sup> US\$ 2,455.8 million.<sup>11</sup>

The COVID-19 pandemic and the accompanying global lockdown have increased consumer spending at Amazon by 60% between May and July 2020 compared with the year 2019;<sup>12</sup> and this trend has increased exponentially during the most severe measures to curb the pandemic,<sup>13</sup> moving from more than 20%, at the end of March, to nearly 80% in mid-July.<sup>14</sup>

Therefore, given the data discussed above, Amazon is the biggest and the most important e-commerce platform in Europe and the US.

2. See the "E-Commerce share of total global retail sales from 2015 to 2023" statistics from Statista, published on November 26, 2020. The statistics can be seen here: <https://www.statista.com/statistics/534123/e-commerce-share-of-retail-sales-worldwide/> [Date of consultation: 9 December 2020].
3. See "74 Amazon Statistics You Must Know: 2020 Market Share Analytics & Data" from FinancesOnline. The statistics can be seen here: <https://financesonline.com/amazon-statistics/#link5> [Date of consultation: 10 December 2020].
4. See "Projected retail e-commerce GMV share of Amazon in the United States from 2016 to 2021" statistics from Statista, published on December 1, 2020. The statistics can be seen here: <https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/> [Date of consultation: 10 December 2020].
5. See the "Most popular online retail websites worldwide in June 2020, by unique visitors (in millions)" statistics from Statista, published on November 3, 2020. The statistics can be seen here: <https://www.statista.com/statistics/274708/online-retail-and-auction-ranked-by-worldwide-audiences/> [Date of consultation: 9 December 2020].
6. See the "Leading online marketplace websites in the United States as of 4th quarter 2018, based on share of visits" statistics from Statista, published on November 30, 2020. The statistics can be seen here: <https://www.statista.com/statistics/270884/most-visited-websites-in-the-retail-sector-in-the-us/> [Date of consultation: 9 December 2020].
7. Buss et alii (2020), p. 137.
8. Followed by TESCO, with US\$ 4,001.9 million; Argos, with US\$ 3,005.3 million; John Lewis, US\$ 2,632.3 million; and Next, with US\$ 2,010.4 million.
9. Followed by Otto, with US\$ 3,555.4 million; Zalando, with US\$ 1,646 million; MediaMarkt, with US\$ 959.6 million and Notebooksbilliger.de, with US\$ 881.2 million.
10. Buss et alii (2020), p. 135.
11. Closely followed by Vente-Privee.com, with US\$ 2,331.9 million; Cdiscount, with US\$ 2,188.7 million; Auchan, with US\$ 1,481.8 million; and Apple, with US\$ 921.7 million.
12. Semuels (2020): "Consumer spending on Amazon between May and July was up 60% from the same time frame last year".
13. It should be stated that the first COVID-19 pandemic case reported in the United States was on January 20, 2020. See Holshue et alii (2020), p. 929.
14. Facticeus (2020). See the section "Consumer Spend on Amazon and Walmart".

Amidst the increase in product sales through this online marketplace - this online intermediation service<sup>15</sup> - a legal question arises about what happens when a consumer purchases a product through Amazon and suffers damages due to the product's defectiveness. The present article aims to answer this question and analyze how liability can be imposed, if possible, on online marketplaces such as Amazon. A preliminary conclusion is as follows: in Europe and the United States, Amazon will rarely be liable for a defective product sold by third-party sellers through its marketplace.

The article is structured as follows: Section 1 sets the scene by describing the Amazon Marketplace and distinguishing between products sold directly by Amazon and those sold by third-party sellers through Amazon under the Business Solutions Agreement (BSA), explaining also the Fulfilment by Amazon (FBA) program. Section 2 outlines the US case law, distinguishing between two different sets of cases: cases where the courts found Amazon strictly liable due to public policy considerations behind product liability law, and cases (representing the majority) where courts found Amazon not liable. The underlying reasons for this lack of liability are analyzed, e.g. the passive intermediation by Amazon in the transactions between third-party sellers and consumers; the nature of Amazon as a service provider and not a seller and the lack of evidence on Amazon's causal connection with the product defect. This section concludes with the discussion on the first legislative attempt to regulate the liability of online marketplaces. Section 3 then focuses on the supranational (EU) and national context (Spain), answering the question whether Amazon can be considered a "producer" according to Article 3(1) of the Council Directive 85/374/EEC,<sup>16</sup> of July 25, 1985, (hereinafter referred to as the PLD) and if the apparent manufacturer doctrine<sup>17</sup> is applicable. The section further considers whether Amazon is liable in any way as a provider of a composite service and determines its position under the current Directive 2000/31/EC.<sup>18</sup>

## 1. The functioning of Amazon's Online Marketplace

The previously detailed account of the functioning of Amazon's Online Marketplace (hereinafter referred as to AOM) calls for a more thorough discussion of its legal issues. Therefore, the present section is structured as follows: subsection 1.1 shows the types of products a consumer may buy on AOM while subsection 1.2 in turn discusses the pre-condition for every third-party seller to fulfill before being able to offer its products on AOM (e.g. the Business Solutions Agreement (BSA) and the Fulfilment by Amazon (FBA) program).

### 1.1. Types of products sold on AOM

There are two different groups of products for sale in Amazon: the first group is formed by products branded by Amazon or brands exclusively sold on Amazon, such as Amazon Basics, Amazon Essentials, Amazon Fresh, also including Ravenna Home and Pinzon,<sup>19</sup> and then the other group of products sold by independent third-party sellers.

When we access the first group of products, we can see a message that reads "shipped and sold by Amazon.com" (see Diagram 1 below).



In this group of cases, according to US law and provided that Amazon is the seller, if the product turns out to be

15. As defined according to the Regulation (EU) 2019/1150 of the European Parliament and of the Council, of 20 June 2019.

16. Council Directive 85/374/EEC, of July 25 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

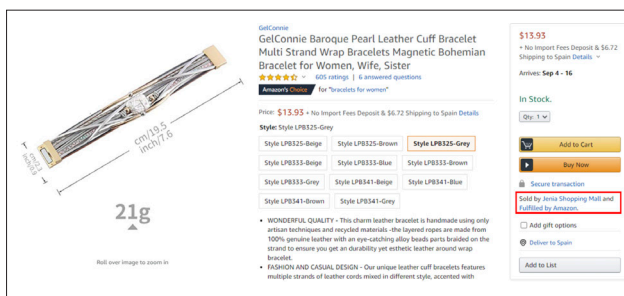
17. See Section 3.1.1 below.

18. Directive 2000/31/CE of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as the E-Commerce Directive).

19. See [https://www.amazon.com/b/ref=s9\\_acss\\_bw\\_h1\\_OBHead\\_md1\\_w?node=17728530011&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=merchandised-search-top-1&pf\\_rd\\_r=2BQ90H6B5HHJ5669Y7G9&pf\\_rd\\_t=101&pf\\_rd\\_p=b2684a67-dfb4-4f04-b198-6bcc12422a86&pf\\_rd\\_i=17602470011](https://www.amazon.com/b/ref=s9_acss_bw_h1_OBHead_md1_w?node=17728530011&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=merchandised-search-top-1&pf_rd_r=2BQ90H6B5HHJ5669Y7G9&pf_rd_t=101&pf_rd_p=b2684a67-dfb4-4f04-b198-6bcc12422a86&pf_rd_i=17602470011) [Date of consultation: 23 August 2020].

defective and causes damages to a consumer, Amazon will be liable for these damages.<sup>20</sup> The situation in the EU is different, as the liability is imposed upon the “producer” rather than the seller. Therefore, any consumer who is affected by damages due to a defective product branded under one of Amazon’s subsidiaries, will have to ascertain who produced the product. If the producer is a subsidiary without legal personhood, consumers need to refer to the apparent manufacturer doctrine. Further debate on this particular recourse is analyzed in Section 3.

The second category of products, those of third-party sellers, usually pertain to companies (large or SMEs) who enter into the BSA with Amazon and can sell their products through AOM. They can also enter into the FBA program, under which “you store your products in Amazon’s fulfillment centers, and we will pick, pack, ship, and provide customer service for them.”<sup>21</sup> If the third-party seller becomes part of the FBA program, consumers will see that the product is “sold by [name of the third-party seller] and Fulfilled by Amazon” (see Diagram 2 below).



## 1.2. Selling on Amazon: the BSA and the (possible) subscription to the FBA program

Under the BSA, third-party seller obligations are:<sup>22</sup> to indemnify Amazon against any consumer claim arising from personal injury and non-compliance,<sup>23</sup> to take out general commercial liability insurance in case of exceeding a specific threshold of sales, naming Amazon and its assignees as insured parties,<sup>24</sup> to provide accurate information of products sold on Amazon,<sup>25</sup> to ensure that products sold on Amazon comply with the laws applicable to the place where they are intended to be sold,<sup>26</sup> to notify public or private safety-related alerts or recalls,<sup>27</sup> and to refrain from contacting the consumer by means other than Amazon’s website.<sup>28</sup> Amazon will deal with consumer post-sale services, complaints about the product not being fit for purpose or being defective, refunding money to the consumer when appropriate.

“Amazon requires third-party sellers to use only the tools and methods designated by Amazon to communicate with Amazon customers. Amazon prohibits third-party sellers from contacting customers to collect payments or influence their purchase decisions”.

All third-party sellers can be part of the FBA program in exchange for paying a monthly fee and a fee per completed sale. To sell any product through the FBA program, the third-party seller shall ship its products to one of Amazon’s Fulfillment Centers. Once received, Amazon can refuse to accept one or more product units, if there is an FBA policy breach. Afterwards, all the logistics related to

20. Janger and Twerski (2020), p. 268: “Only in the third category, sold and shipped by Amazon, would Amazon concede liability for the sale of a defective product that causes personal injury or property damage”.
21. See [https://www.amazon.com/fulfillment-by-amazon/b?ie=UTF8&node=13245485011#:~:text=Fulfillment%20by%20Amazon%20\(FBA\)%20is,provide%20customer%20service%20for%20them.](https://www.amazon.com/fulfillment-by-amazon/b?ie=UTF8&node=13245485011#:~:text=Fulfillment%20by%20Amazon%20(FBA)%20is,provide%20customer%20service%20for%20them.) [Date of consultation: 23 August 2020].
22. See <https://sellercentral.amazon.com/gp/help/external/G1791> [Date of consultation: 23 August 2020] and [https://sellercentral.amazon.co.uk/gp/help/external/201190440?language=en\\_GB&ref=efph\\_201190440\\_cont\\_G201190440](https://sellercentral.amazon.co.uk/gp/help/external/201190440?language=en_GB&ref=efph_201190440_cont_G201190440) [Date of consultation: 23 August 2020].
23. Clause 6.1 of the US and the European versions of the BSA.
24. Clause 9 of the US version of the BSA, and clause 8 of the European version of the BSA.
25. Clause S-1.1 of the US and the European versions of the BSA.
26. Ibid., as Amazon does not conduct any control over the products. See, also, Berzon et alii (2020): This report raised the alert about the fact that 4,152 items for sale on Amazon were not safe. Some were banned, or were recalled by Federal Authorities, or contained misleading or false labeling.
27. Clause S-3.1 of the US and the European versions of the BSA.
28. Bolger, at 7-8: “Amazon owns and controls the relationship with the buyer [...]. The supplier has no direct relationship with the buyer, and indeed in most cases does not even have an indirect relationship with the buyer. That is, in most cases there are no communications between FBA supplier and buyer; the FBA supplier simply discovers in a report or some other form of notification that a product has been sold to the buyer”.

delivering the products to the consumer will be dealt with by Amazon.

## 2. From the “Amazon exception to tort law”<sup>29</sup> to *Bolger v Amazon*

Several decisions have been issued by the US State and Federal Courts regarding the possibility of Amazon being held liable for a defective product that has caused personal or property damage to a consumer.<sup>30</sup> All these decisions have involved products sold by third-party sellers. There is a mix of cases involving products shipped by Amazon under the FBA program and those shipped by the third-party seller itself. The common core of these cases is the challenge to establish whether Amazon could be deemed a seller or a

manufacturer, or an entity involved in passing the product through the vertical distribution chain from one of the earlier mentioned manufacturers to the final consumer.<sup>31</sup>

Today, 80% of these judicial decisions (8) have been in Amazon's favor, granting the motion for summary judgment, and 20% (2) in favor of the consumer. Out of the former, 62.5% (5) in cases regarding products shipped by third-party sellers. The remaining 37.5% (3) involved products shipped by Amazon under the FBA program. Regarding the judgments in favor of the plaintiff, one is related to products shipped by Amazon under the FBA program, while the other one refers to products shipped by the third-party seller. Out of 10 cases analyzed, two have been issued by the State Courts (20%), and eight (80%) by the Federal Courts. The table below<sup>32</sup> further clarifies these numbers:

29. Janger and Twerski (2020), p. 262.

30. It has been the growing number of decisions by US courts that has provoked that this issue is becoming increasingly important among the scholarship. See, Rickettson (2020), Sharkey (2020), Sprague (2020), Bullard (2019), Doyer (2019), and Shehan (2019).

31. Called: “entities” involved in the vertical distribution of consumer goods” (Bolger, at 18-19; Carpenter, at 6); “provider outside the distributive chain” (Garber, at 18); and entities that “otherwise participate in the placing of a product in the stream of commerce” (Stiner, at 9; and Allstate, at 12).

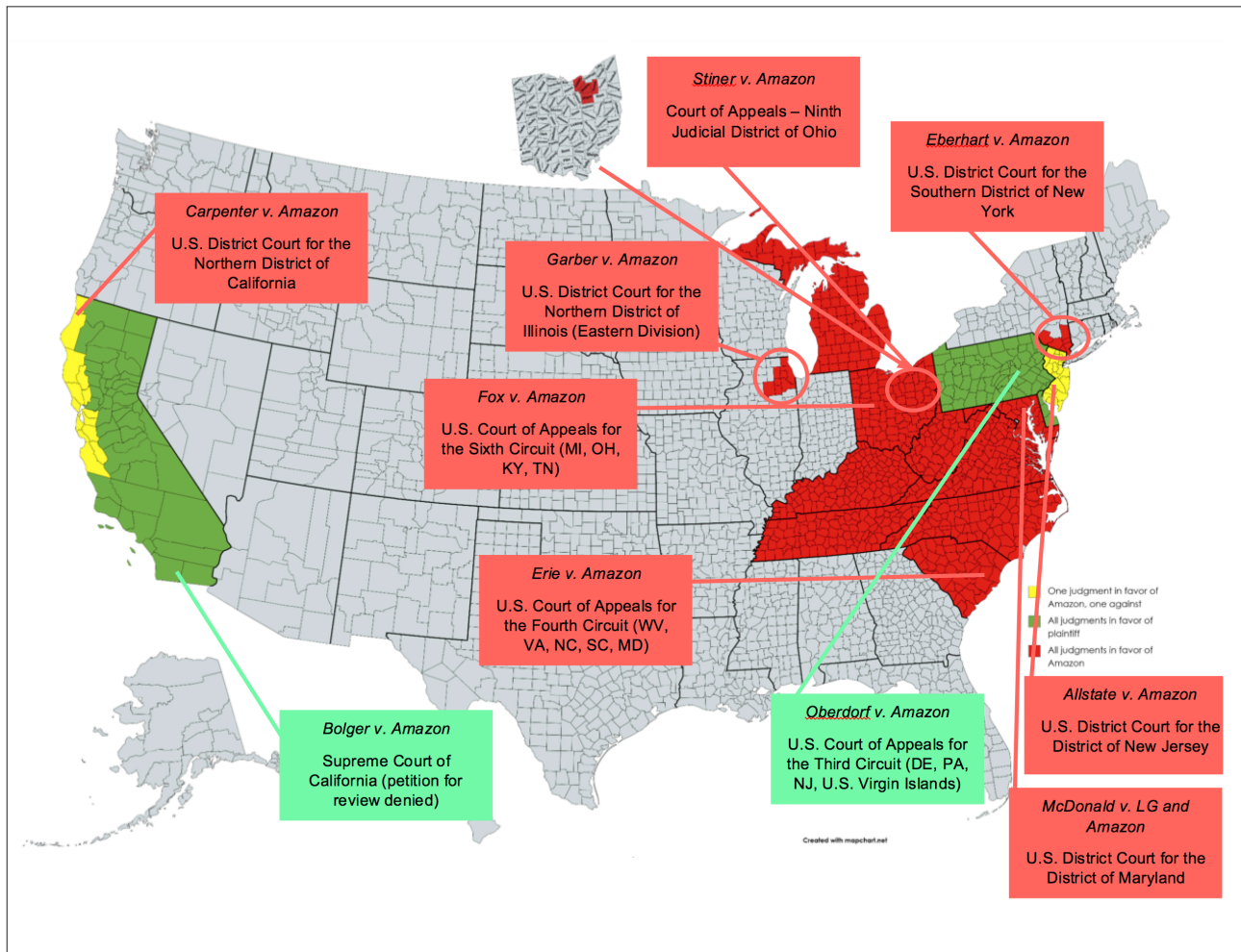
32. Legend: St.C. (State Court), F.C. (Federal Court), CA (applying California Law), IL (applying Illinois Law), MD (applying Maryland Law), NJ (applying New Jersey Law), NY (applying New York Law), OH (applying Ohio Law), PA (applying Pennsylvania Law) and TN (applying Tennessee Law).

Sold by \ Shipped by	Amazon		Third-party seller	
	In favor of the consumer	In favor of Amazon	In favor of the consumer	In favor of Amazon
Amazon	In favor of the consumer	In favor of Amazon	In favor of the consumer	In favor of Amazon
Third-party seller	Bolger (St.C./CA) <sup>33</sup>	Erie (F.C./MD) <sup>34</sup> Eberhart (F.C./NY) <sup>35</sup> Allstate (F.C./NJ) <sup>36</sup>	Oberdorf (F.C./PA) <sup>37</sup>	Fox (F.C./TN) <sup>38</sup> Garber (F.C./IL) <sup>39</sup> Carpenter (F.C./CA) <sup>40</sup> Stiner (St.C./OH) <sup>41</sup> McDonald (F.C./MD) <sup>42</sup>

Table 1. Distribution of all judgments in all cases involving Amazon, depending on who sold and shipped the product

33. *Bolger v. Amazon.com, LLC.*, Super. Ct. No. 37-2017-00003009-CU-PL-CTL (August 13, 2020). This case has been appealed by Amazon on September 22, 2020 (see <https://es.scribd.com/document/477198259/Bolger-v-Amazon-Amazon-Petition-for-Review-CA-Supreme-Court>) and will be heard by the Supreme Court of the State of California.
34. *Erie Insurance Company v. Amazon.com, Inc.*, No. 18-1198 (May 22, 2019).
35. *Jacob T. Eberhart v. Amazon.com, Inc.*, 16-CV-8546 (August 21, 2018).
36. *Allstate New Jersey Insurance Company v. Amazon.com, Inc.*, Civil Action No. 17-2738 (FLW)(LHG) (July 24, 2018).
37. *Heather R. Oberdorf and Michael A. Oberdorf v. Amazon.com, Inc.*, No. 18-1041 (July 3, 2019). This case once returned to the Pennsylvania Supreme Court has been settled by the parties. See the Stipulation of Dismissal filed by both parties before the US Court of Appeals for the Third Circuit on September 23, 2020 (see <https://static.reuters.com/resources/media/editorial/20200924/oberdorfvamazon--settlement.pdf>).
38. *Charles Brian Fox and Megan Fox v. Amazon.com, Inc.*, No. 18-5661 (July 5, 2019).
39. *David Garber and Annette Garber v. Amazon.com, Inc. and Shenzhen Gangshen Technology Company Ltd.*, No. 17 C 673 (March 31, 2019).
40. *David Carpenter, et al. v. Amazon.com, Inc.*, 17-cv-03221-JST (March 19, 2019).
41. *Dennis Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885 (February 19, 2019).
42. *Ryan McDonald v. LG Electronics USA, Inc. and Amazon.com, Inc.*, No. RDB-16-1093 (October 10, 2016).

Table 1 above is further illustrated by the following diagram:



Some authors have coined the term “Amazon exception to tort” due to the situation that the different rulings from US courts have created.<sup>43</sup>

The following section analyses two different scenarios, both of them involving third-party sellers selling their products on Amazon: here the distinction is made between the cases where courts found Amazon strictly liable and the cases where courts found Amazon not liable. The section further offers an analysis of the first legislative attempt to expressly regulate the liability of online marketplaces.

### 2.1. Analysis of cases where courts held Amazon strictly liable for defective products sold by third-party sellers due to public policy considerations: *Oberdorf* and *Bolger*

#### a) *Oberdorf*

The conclusion of the *Oberdorf* case cannot be applied to all cases by analogy, as it entails one specificity: there was no representative of the third-party seller (The Furry Gang) to be sued. Amazon was the only party that could

43. See *supra* fn. 29.



be identified. No representative of The Furry Gang was identified either by the plaintiff or by Amazon.

The facts of the case are: On December 2, 2014, Heather Oberdorf bought a dog collar sold and shipped by The Furry Gang. On January 12, 2015, while Oberdorf was walking her dog (Sadie), the D-ring on the collar broke, and the retractable leash recoiled into Oberdorf's spectacles injuring her and permanently blinding her in her left eye.

From the procedural standpoint, it should be noted that the District Court did grant Amazon's motion for summary judgment. However, the US Court of Appeals reversed that judgment and denied Amazon's motion for summary judgment. Thus, it returned the case to the District Court to rule the case according to the Court of Appeal's ruling: the US Court of Appeals considered Amazon the seller under Restatement Second of Torts § 402A.<sup>44</sup>

To reach this conclusion, the US Court of Appeals called upon a referential case, *Musser v. Vilsmeier Auction Co., Inc.*,<sup>45</sup> where the Pennsylvania Supreme Court ruled that an auctioneer is not a seller under the Restatement for not fulfilling the four necessary cumulative conditions. The *Oberdorf* court case applies the *Musser* test:

Firstly, Amazon is the only member of the marketing chain available to the injured plaintiff for seeking redress. The functioning of Amazon's marketplace might result, in some cases, in the plaintiff being unable to find who sold the product.<sup>46</sup>

Secondly, the imposition of strict liability upon Amazon serves as an incentive to foster product safety. Amazon has a robust (as qualified by an Amazon expert) system of monitoring consumer complaints and acts accordingly: withdrawing a specific product due to health or safety concerns, retaining fees, or suspending (temporarily or permanently) the account of the third-party seller.<sup>47</sup>

Thirdly, Amazon is in a better position than the plaintiff to prevent the circulation of defective products.

Lastly, Amazon can distribute the cost of compensating for injuries resulting from defective products through commission-based fees that it deducts from each sale.

In conclusion, the *Oberdorf* case vacates the District Court's judgment and requires it to rule the case as if Amazon were a seller according to the Restatement Second of Torts' § 402A. Even though the Pennsylvania Supreme Court was expected to decide on *Oberdorf* by petition of the US Court of Appeals, the parties finally settled the case, filing a stipulation of dismissal on September 23, 2020.<sup>48</sup>

#### b) Bolger

The facts of this case are as follows. In August 2016, Bolger was looking for a laptop battery replacement on the Internet. She found a link to Amazon Marketplace, where she purchased the battery for \$12.30, and charged her purchase to her credit card from Amazon. The battery has been stored in Amazon's fulfillment center in Oakland (California) and

44. "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller". 45.562 A.2d 297 (Pa. 1989).

46. Let us imagine the case of a customer who buys a product that is manufactured by a Chinese company. If it were not for the existence of Amazon's online marketplace the customer would not have acquired it there, but in a store or company nearby. Therefore, in the latter case, a potential plaintiff is easily identifiable; while in the former, such identification might be harder, and if the potential defendant's identification provides results, the problem is to sue or notify about the claim, or to execute the judgment in the case it is in the plaintiff's favor (with all the troublesome issues arising from a Private International Law standpoint).

47. Even though third-party sellers should ensure that products sold on Amazon comply with the applicable laws of the place where they are intended to be sold, Amazon's Vice President of Marketing Business admitted that "Amazon generally takes no precautions to ensure that third-party vendors are in good standing under the laws of the country in which their business is registered" (*Oberdorf*, at 14).

48. See the stipulation of dismissal filed by the parties before the US Court of Appeals for the Third District: <https://static.reuters.com/resources/media/editorial/20200924/oberdorfamazon--settlement.pdf> [Date of consultation: 11 December 2020].

sent to her via free two-day shipping (as she was a member of Amazon Prime). Bolger received “the battery a few days later in Amazon packaging, including an Amazon-branded box with Amazon-branded shipping tape” (*Bolger*, at 11). No contract existed between Bolger and Lenoge (or E-Life, as it appeared on Amazon marketplace), and the latter was charged with a fee of 40% of the purchase price (\$4.87).

In September 2016, Amazon suspended Lenoge’s account due to several safety reports involving the same product that Bolger bought. Bolger filed the first claim due to the injuries resulting from the explosion of E-Life’s battery.

The *Bolger* court reverses the lower court’s judgment and extends the strict product liability to Amazon. In reaching such a conclusion, the Court focuses on the public policy considerations underlying the imposition of strict liability in cases of defective products. Such public policy concerns are enhancing product safety, maximizing protection for the injured plaintiff, and apportioning costs among the defendants.<sup>49</sup> Only when all of these considerations concur in the case at hand, can the Court in California extend strict liability beyond manufacturers,<sup>50</sup> retailers,<sup>51</sup> sellers of mass-produced homes,<sup>52</sup> and entities involved in the vertical chain of distribution.<sup>53</sup>

The *Bolger* court, like the *Oberdorf* court, considered all public policy considerations underlying the imposition of strict liability upon Amazon:

- Firstly, like the *Oberdorf* court, the Court considered that Amazon is the only distributive chain member that the plaintiff can sue. According to the BSA, the possibility of Amazon being sued is not an obstacle for the latter to seek indemnity from the third-party seller, who entered into this obligation with Amazon.
- Secondly, the Court considered that Amazon is better positioned than the plaintiff to exert pressure on third-party sellers to guarantee that the products offered on Amazon are safe.

- Finally, Amazon can adjust the cost of product liability claims, as it can modify the fees it deducts from each sale.

Unlike *Oberdorf*, the seller was known but practically unreachable to the plaintiff (as it was based in China). So, the Court considers that Amazon should be liable as Amazon’s position in the online marketplace is not one of a “mere bystander” (*Bolger*, at 32), but one of controlling all the operations in its marketplace (from the uploading of a product, to its arrival at the consumer’s destination, as well as all post-market issues that might occur).

Amazon filed a petition with the California Supreme Court to review the Superior Court’s judgment, but this was rejected, making the decision final and with the power of creating precedence.<sup>54</sup>

## 2.2. Analysis of cases where courts did not hold Amazon strictly liable

### 2.2.1. Due to Amazon’s role in managing transactions: *Garber, Carpenter, Stiner, Fox, Erie, and Allstate*

In all these cases, the majority of all cases analyzed, the solution is clear: Amazon is not a seller and, thus, not liable for the injuries sustained by the plaintiffs due to the defectiveness of products sold by third-party sellers through Amazon’s marketplace.

In three of the cases, *Garber, Carpenter* and *Fox*, the courts dealt with a defect with the rechargeable lithium-ion batteries on hoverboards bought through Amazon, which caused property damages, as the homes of the plaintiffs were ignited.

In *Garber* and *Carpenter*, the courts use similar tests, despite being in different jurisdictions, the former in Illinois and the latter in California. In *Garber*, the court considers that the plaintiff is only capable of proving one of the

49. *Bolger*, at 20.

50. See *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57. This is, even, the first case establishing strict liability in product liability law throughout the United States.

51. See *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256.

52. See *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121.

53. See *Bay Summit Cmty. Ass’n v. Shell Oil Co.*, 51 Cal. App. 4th 762.

54. Curley (2020) [Date of consultation: 11 December 2020].

three requirements to impose liability beyond the distributive chain: the fact that Amazon obtains a financial benefit from each transaction. But the plaintiff is not capable of providing substantial evidence of the first requirement, participation in the manufacturing, marketing, and distribution processes, and third, being able to eliminate the unsafe character, requirements, as Amazon “cannot be expected to judge the quality of every product for sale by third parties” (Garber, at 18). The Fox court concluded likewise.<sup>55</sup>

The *Carpenter* court uses a five-prong test to conclude that Amazon’s role was merely a facilitating one, not a predominant one. The plaintiffs did not produce sufficient evidence to prove that had Amazon not placed the hoverboard on the online marketplace, the plaintiffs would never have bought it.

In *Stiner*, a case involving a teenager death due to acute caffeine intoxication by a product sold by a third-party seller on Amazon, the court considered that the actions of the seller, The Bulk Source, were predominant. Amazon “had no role in procuring the caffeine powder from its manufacturer, storing, packaging, or distributing the product [nor in] determin[ing] the sale price, provid[ing] all product information for the listing, packag[ing] and fulfill[ing] all orders” (*Stiner*, at 17).

*Erie* and *Allstate* are cases where an insurance company sued Amazon for the compensations they paid to their insured clients as a result of the fires that consumed their homes as a consequence of a defect in a headlamp in the home (*Erie*) and a laptop’s replacement battery (*Allstate*).

The *Erie* court decided based on the definitions of “seller” and “sale”, which require the “transfer of the ownership of

and the title to property from one person to another for a price” (*Erie*, at 11). The Court considered that, at most, Amazon received the “possession” of the object that has been sent to the consumer (*Erie*, at 12). Amazon, thus, is not the seller, as it only facilitated the sale of the product. The *Allstate* court took a similar approach to the case and solved it similarly.

### 2.2.2. Due to Amazon’s position as a service provider: *Eberhart*

In the *Eberhart* case, the claim is for the plaintiff’s injuries due to the explosion of the glass in a French coffeemaker pot.

The court analyzed New York product liability law to conclude that those that might be found liable for the injuries caused by a defect in a product are the parties “within the distribution chain” (*Finerty*, at 241-242): manufacturers,<sup>56</sup> the retailers, and distributors.<sup>57</sup> The court defined Amazon not as one of such parties but rather as a service provider (*Eberhart*, at 8) and, therefore, not subject to strict product liability.<sup>58</sup>

### 2.2.3. Due to the lack of evidence of Amazon’s involvement in the causation of the defect on the product: *McDonald*

In the *McDonald* case, the defect was present in an LG battery that exploded while in the plaintiff’s pocket, causing severe burn injuries. The court granted Amazon’s motion for summary judgment as the plaintiff had provided no evidence regarding the possibility of attributing the defect to Amazon’s actions or omissions.

55. “Given that the Defendant assumed a duty to act, there remain genuine issues of material fact regarding whether the Defendant breached that duty [...] regarding whether the Defendant’s failure to include certain information in the December 12, 2015 email amounted to negligence. The email did not inform [...] of the actions the Defendant had taken to evaluate dangers [...] that the reported safety issues included a risk of fire or explosion [...] And that] the Defendant had ceased all hoverboard sales worldwide. [...] The Plaintiff also testified she would not have let the hoverboard enter or remain in her home had she known, among other things, that there had been 17 complaints about hoverboard fires or explosions in the United States that involved hoverboards purchased on the Defendant’s marketplace, that the Defendant anticipated additional complaints, particularly during the holiday season in the late December, or that the Defendant had ceased all hoverboard sales worldwide” (*Fox*, at 15-6).

56 See *Finerty v. Abex Corp.*, 27 N.Y.3d 236, 241 (2016).

57 See *Sukljan v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986).

58 See *Milau Assocs. v. N. Ave. Dev. Corp.*, 42 N.Y.2d 482 (1977).

### 2.3. The first (and unique) legislative attempt of holding online marketplaces strictly liable for defective products sold through these marketplaces: the AB-3262 initiative

In February 2020, California Assembly Member Mark Stone filed a legislative initiative AB-3262 called “Product liability: electronic retail marketplaces.”<sup>59</sup> This proposal was aimed to add a new Section 1714.46 to the California Civil Code, holding electronic retail marketplaces strictly liable for “all damages caused by defective products placed into the stream of commerce to the same extent as a retailer of that defective product would be liable and shall be deemed to be a retailer for purposes of California strict liability law” (proposed 1714.46.(a)).

However, there are several exceptions to the proposed liability regime for electronic retail marketplaces: that the product was (1) preowned or used, (2) handmade, and the electronic retail marketplace does not receive “a direct or indirect financial benefit from the sale” or if the sale occurred by auction and, therefore, is exempt from strict liability (proposed 1714.46.(b)). Subparagraph (c) allows that, even when any of the exceptions concur, the Courts could still hold the electronic retail marketplace liable if “the application of strict liability to the electronic retail marketplace is consistent with the policy considerations underlying strict liability.”

Currently, the bill has been shelved. According to the Assemblyman who promoted it, it “will not advance in its present form by the legislative deadline.” He is committed nonetheless to “continuing the conversation with the online industry, with my fellow [sic] members in the legislature, and with California consumers, to create a strong and effective measure in the future that ensures that if a defective product is purchased online, the consumer has a remedy”.<sup>60</sup>

## 3. *Et tu, Europa? Tu quoque?*

This is the final question to be explored by the present article. What would be the European position in cases like those described in the paragraphs above? A caveat is in order: as of today, there has not been any judgment on Amazon's position in the EU legal framework issued by the Court of Justice of the European Union (hereinafter referred to as the CJEU). Therefore, the answers provided hereto take into consideration the *status quo* of scholarship and CJEU case-law.

This last section of the article addresses two possible liability regimes for online marketplaces like Amazon: firstly, under the provisions of product liability law contained in the PLD and secondly, under the provisions of liability of internet services providers or information society services providers under the E-Commerce Directive. The foundations of liability in the former and in the latter are different: while in the PLD, it is for the damages to the victim caused by a defective product; in the latter it is for the content hosted on the subject's servers.

### 3.1. First source of potential liability: The PLD

#### 3.1.1. Analysis of the potentially liable subjects

As a general principle, Article 1 of the PLD sets that the “producer shall be liable for damage caused by a defect in his product.”

The “producer” is defined in Article 3(1) of the Directive as:

- The producer *stricto sensu*: The “manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part.”
- The apparent manufacturer:<sup>61</sup> A party who is liable in the same terms as the producer *stricto sensu*, who “by

59. The last updated version of the bill can be found at [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB3262](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB3262) [Date of consultation: 6 September 2020].

60. Abdollah, Uranga and Blake (2020).

61. Franklyn (1999), p. 692; and Henderson and Twerski (2011), p. 80. The Restatement Third of Torts: Products Liability devotes § 14 to this specific doctrine, which can be read as: “One engaged in the business of selling or otherwise distributing products who sells or distributes as its own a product manufactured by another is subject to the same liability as though the seller or distributor were the product's manufacturer”. See comment c of § 14 of the Restatement Third of Torts: Products Liability.

putting his name, trade mark or other distinguishing feature on the product<sup>62</sup> presents himself as its producer.” This provision is usually applied to chain-store retailers or mail-order operators who sell products manufactured by unknown third companies and who do it following the instructions of the apparent manufacturer.<sup>63</sup>

In Spain, the latter doctrine has been applied to a few cases,<sup>64</sup> and scholars have considered that those who add their name or trademark to show their involvement in the process of distributing the product, or just for advertising reasons,<sup>65</sup> but do not identify themselves as the producer,<sup>66</sup> do not qualify as apparent manufacturers.

Other potentially liable parties are the importer within the European Union of a product manufactured in a third State (Article 3(2) of the PLD),<sup>67</sup> as well as the supplier if (i) it fails to inform the injured person of the identity of the producer - or the importer - within a reasonable

time (Article 3(3) of the PLD) and (ii) if it has supplied the product “knowing<sup>68</sup> the existence of the defect” (Article 146 of the TRLGDCU).<sup>69</sup>

Thus far, one fundamental difference can be drawn between the regime in the European Union and the United States: in the former, the liability is imposed on the producer, while in the latter, the seller is the subject of liability.

### 3.1.2. The application of the apparent manufacturer doctrine to Amazon

If one browses the Amazon marketplace searching for rechargeable batteries, one may find several products listed on AOM by way of example. Some of them are (i) sold and shipped by third-party sellers, others (ii) sold by third-party sellers but shipped by Amazon under its FBA program, and others (iii) sold and shipped by Amazon. We will use these three scenarios.<sup>70</sup>

62. Article 5 of the Spanish Legislative Royal Decree 1/2007, of November 16, approving the consolidated text of the general consumer and user Protection Act and other complementary laws, hereinafter referred as to the TRLGDCU) clarifies that a party will qualify as an apparent manufacturer when the identifying elements mentioned in article 3(1) of the Directive appear “on the product, whether on the container, wrapping or any other protective or presentational component”.

63. Fairgrieve et alii (2016), pp. 63-64.

64. Judgment of the Spanish Supreme Court, Civil Chamber, Plenary, number 448/2020 (ECLI:ES:TS:2020:2492): “Es presupuesto de la responsabilidad del “productor aparente” no solo que el nombre, la marca o el signo distintivo de la empresa figure en el producto o en su embalaje, sino que es preciso que lo identifique como productor”. See, also, the judgment of 5th Section of the Provincial Appellate Court of Murcia, number 220/2017 (ECLI:ES:APMU:2017:2299), where Abbott Laboratories S.A. was found liable because: (i) Abbott’s website was closed with the expression “Copyright © 2003 Abbott Laboratories S.A.”, and on such website eyecare appeared as one of the areas of Abbott’s specialization; (ii) Abbott Laboratories and Abbott Medical Optics use the same registered office; and (iii) both companies use the same trademark. The Court concludes that “Esos datos son suficientes para configurar a la demandada como productora aparente, con una presentación en Internet que induce a concebirla como la productora, y por tanto para atribuirle legitimación pasiva frente a la acción ejercitada” (hereinafter referred to as the Abbott case); and judgment of the 4th Section of the Provincial Appellate Court of Barcelona, number 95/2018 (ECLI:ES:APB:2018:305).

65. Parra Lucán (2009), p. 1682.

66. Seuba Torreblanca et al. (2008), p. 233.

67. This excludes the liability of national importers in case the manufacturer is established in a Member State of the European Union. Also, according to the case-law that Seuba Torreblanca et al. (2008), p. 235 analyzes, it can be concluded that the liability of the importer is subsidiary to the liability of the manufacturer if the latter is identifiable as the function of finding importers within the EU liable is the “protection of consumers that [...] would be disincentivized to claim against the producer due to the rules on jurisdiction and enforcement of the judgment”.

68. According to Seuba Torreblanca et al (2008), p. 245, the knowledge requirement encompasses only gross negligence and recklessness.

69. These two regimes, which are alternative (see Gili Saldaña (2008), p. 86) are not contained in the PLD, but are the result of the Spanish product liability law tradition: see Sole i Feliu (1997), pp. 313-318.

70. See <https://amazonseoconsultant.com/add-product-amazon/>: “It’s also necessary that you fill in the brand name and manufacturer tab. If you have built your own brand separate from the manufacturer, then you can just put the relevant information in this section” [Date of consultation: 9 September 2020].

a) Products sold by third-party sellers (scenarios (i) and (ii))



As we can see in Diagram 4 above, the third-party seller is “Masvoltios Entrega 24-48h”, whose real name is “Equipamiento y Energía Autónoma Arehas SL,” a company located in Valencia.

Diagram 4 above also shows that the producer is a company called Yuasa. This company has its website, with registered offices in Madrid. Therefore, Yuasa will be liable if the defective product causes personal or property damages, as it is the party who is liable according to the PLD. In the US, on the other hand, the liable subject would be the seller: Equipamiento y Energía Autónoma Arehas SL.

Despite the above, which are the consequences if the product is shipped by Amazon pursuing the FBA program? The answer is that if the producer is identified and can be reached without resorting to complex Private International Law mechanisms on serving court notifications for non-EU countries (most commonly, China), the mere fact that the product is shipped through the FBA program does not change what it has been explained earlier regarding Amazon’s liability.

If any of the scenarios displayed above takes place, we need to see if the plaintiff can resort to the apparent manufacturer doctrine to hold Amazon liable, which, under the author’s point of view, will be futile, as Amazon will not, and should not, be liable for offering its FBA service. Amazon never “sells or distributes as its own product

manufactured by another”<sup>71</sup> or “presents itself to the public as the manufacturer [...], by affixing his name, trademark, or other distinguishing mark”.<sup>72</sup> The product inside the labeled package remains unaltered. Furthermore, Amazon never substitutes the boxing of products to affix its trademark. Thus, the confusion of producers that the apparent manufacturer doctrine requires will not exist when orders are fulfilled under the FBA program as, once the package is opened, the display of the product will clearly show that Amazon is not involved in its manufacture.

b) Products sold by Amazon (scenario (iii))

Having seen that under the PLD, Amazon will not be liable for any damages caused by a defective product sold by third-party sellers on AOM, it is left to ascertain whether it could still be liable if these damages are caused by a defective product sold by Amazon itself or one of its brands.

Detalles técnicos	
Marca	AmazonBasics
Fabricante	AmazonBasics

In Diagram 5, we can see a rechargeable battery manufactured by AmazonBasics. There are no details about the location of the registered office of AmazonBasics or where we can sue them.

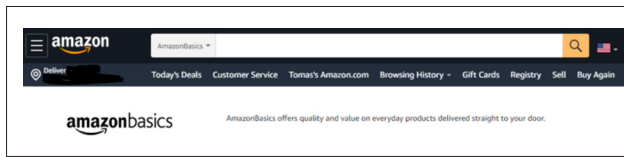
Under this scenario, the plaintiff could resort to the apparent manufacturer doctrine to sue Amazon. In the Abbott case,<sup>73</sup> the Provincial Appellate Court considered Abbott Laboratories liable under this doctrine by applying a three-prong test. From the facts we have, it can be concluded that all three requirements concur and, therefore, Amazon could be held liable:

- If we enter the AmazonBasics website, we can only see the Amazon brand at the screen’s top-black margin.

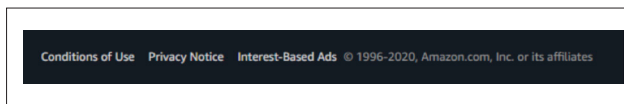
71. Henderson and Twerski (2011), p. 80.

72. Solé i Feliu (1997), p. 307 and, in similar terms, Seuba Torreblanca et al (2008), p. 233.

73. See *supra* fn 64.



- At the end of the website, we can see the following trademark: “1996-2020, Amazon.com, Inc. or its affiliates”.



- If we click on the data to check the location of AmazonBasics' registered office, we are directly shown the information about Amazon itself.

To the contrary, and as it has been said in the previous subsection,<sup>74</sup> if the manufacturer is well-identified on the website, under the PLD, the consumer would have the identity of the suable party, and this party can be found in a Member State, and, if it is not Amazon, this company should be free from liability as it has not produced the defective product.

### 3.2. Second source of liability: The E-Commerce Directive

#### 3.2.1. The E-Commerce Directive and the liability of information service providers

##### a) *The concept of internet services provider and its relation to the concept of online intermediation service*

The relevant rule is the E-Commerce Directive, which covers certain legal aspects of information society services or internet services providers (hereinafter referred to as ISPs), in particular electronic commerce, in the Internal Market (the “E-Commerce Directive”). It intends to “contribute to the proper functioning of the internal market by ensuring the free movement of information

society services between the Member States” (article 1(1) of the E-Commerce Directive). Therefore, the liability of ISPs will be applicable for the service provided by Amazon.

The concept of information society services is defined by the definition of “services” laid down in Article 1(2) of Directive 98/34/EC, currently repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council, of September 9, 2015, laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services (the “EU 2015 Directive”).

According to Article 1(1)(b) of the EU 2015 Directive, a “service” is “any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”

- “at a distance” means, under Article 1(1)(b)(i), “that the service is provided without the parties being simultaneously present.”
- “by electronic means” means, under Article 1(1)(b)(ii), “that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.”
- And “at the individual request of a recipient of services” means, under Article 1(1)(b)(iii), “that the service is provided through the transmission of data on individual request.”

Amazon can be considered a hosting provider,<sup>75</sup> an ISP,<sup>76</sup> since the function of an online marketplace like Amazon meets the conditions to be legally deemed as a service under the E-Commerce Directive.

74. See subsection 3.1.2.a).

75. Busch (2021), p. 16.

76. Some scholarly doubts have arisen regarding the situation of the providers of composite services, and even the Advocate General at the CJEU Campos Sánchez-Bordona questions its qualification as an information service provider. See fn 89.

As of today, Airbnb-similar services,<sup>77</sup> and not Uber,<sup>78</sup> are considered ISPs under the E-Commerce Directive, in connection with the EU 2015 Directive. In the case of *Uber France*, the Court of Justice of the European Union considered that when “the intermediation service at issue [...] had to be regarded as forming an integral part of an overall service the main component of which was a transport service”, the service provider cannot be classified as an information society service.<sup>79</sup>

In the *L'Oréal* case, the Court considered that eBay was an ISP as “the definition [...] encompasses services provided at a distance by electronic means [...]. It is clear that the operation of an online marketplace can bring all those elements into play”.<sup>80</sup>

#### b) Service providers and the PLD

Under the current state of the art at the EU level with the PLD, Amazon would possibly not be liable, as service providers are not among the potentially liable subjects according to the PLD.<sup>81</sup>

On the contrary, under the TRLGDCU, service providers might be held liable if the recipient of the service is injured

as a result of not having “complied with the demands and requirements established in regulations and with all other care and diligence required by the nature of the service” (Article 147).<sup>82</sup> Thus, Amazon’s liability under this article will be related to whether the service provided was according to the standard of diligence. However, if Amazon, as a service provider, a supplier, delivered the product knowing that it was defective, we shall bear in mind that, according to Article 146 TRLGDCU, it will be liable, equating its liability regime to the one applicable to producers.

#### c) Exceptions to the liability of information services providers

The E-Commerce Directive regulates liability exemptions of ISPs for the “information transmitted” (Article 12), “for the automatic, intermediate and temporary storage of [information provided by a recipient of a service]” (Article 13), and “for the information stored at the request of a recipient of the service” (Article 14), provided that the function of the ISP, as an intermediary, is “neutral, in the sense that [it] is merely technical, automatic and passive.”<sup>83</sup>

In all cases, the liability has to do with handling information, which, concerning Article 14, includes platform

77. See judgment of the Court of Justice of the European Union (Grand Chamber), of 19 December 2019, case C-390/18 (*Airbnb Ireland*, ECLI:EU:C:2019:1112), para 69: “In the light of the foregoing, the answer to the first question is that Article 2(a) of Directive 2000/31, which refers to Article 1(1)(b) of Directive 2015/1535, must be interpreted as meaning that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with professional or non-professional hosts offering short-term accommodation services, while also providing a certain number of services ancillary to that intermediation service, must be classified as an ‘information society service’ under Directive 2000/31”.

78. See judgment of the Court of Justice of the European Union (Grand Chamber), of 20 December 2017, case C-434/15 (*Asociación Profesional Élite Taxi*, ECLI:EU:C:2017:981), para 40: “That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123”.

79. See judgment of the Court of Justice of the European Union (Grand Chamber), of 10 April 2018, case C-320/16 (*Uber France*, ECLI:EU:C:2018:221), para 22.

80. *L'Oréal*, para 109.

81. Busch (2019), p. 174. Busch proposes Article 3(3) of the PLD to be revised to include service providers, which would include operators of online marketplaces, among the liable subjects under the PLD.

82. The liability system that the TRLGDCU provides for service providers is not based on strict liability, but rather on fault liability. Santos Moron (2017), p. 122.

83. See judgment of the Court of Justice of the European Union (Grand Chamber), of 23 March 2010, joined cases C-236/08 to C-238/08 (*Google v. Louis Vuitton and others*, ECLI:EU:C:2010:159), para 114. In this case, the Court considered that Google’s *AdWords* fell within the definition of Article 14 of the E-Commerce Directive and, therefore, was not subject to liability. See also, Arroyo Amayuelas (2020a), p. 814.



transactions. If the provider has allowed<sup>84</sup> the storage of unlawful data<sup>85</sup> (namely, the products uploaded by third-party sellers on eBay infringing the intellectual property rights of L'Oréal), then the conditions for holding the ISP liable are met.<sup>86</sup>

The French *Cour de Cassation* considered eBay to have an active role in promoting transactions of third-party sellers with costumers,<sup>87</sup> and, therefore, could not qualify as a service with a neutral function, since it was required by the CJEU in *L'Oréal* for an ISP to be protected by the exemption of liability pursuant to Article 14 of the E-Commerce

Directive. Therefore, eBay was found liable for the content of the ads of pirated assets sold through its website.<sup>88</sup>

Despite being a composite service,<sup>89</sup> Amazon would not be exempt of liability under the E-Commerce Directive, since its role in transactions, similar to that of eBay, is not neutral, because it relies on diverse systems of optimizing offers and promoting sales through the platform by using, among others, the "Amazon's choice" label.<sup>90</sup>

In December 2020, the European Commission published the proposals for a new set of rules governing digital

84. The operator shall have actual knowledge about the unlawfulness of the content stored (i.e., the person whose intellectual property rights have been infringed addresses a letter to the operator). But, in some cases, this knowledge might be presumed, as in the judgment of the Court of Justice of the European Union (Second Chamber), of 8 September 2016, case C-160/15 (*GS Media*, ECLI:EU:C:2016:644), para 51, when the operator of the platform provides its service for profit, there is an expectation that it will "carr[y] out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that said posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder". While, on the other hand, the judgment of the Court of Justice of the European Union (Third Chamber), of 15 September 2016, case C-484/14 (*Mc Fadden*, ECLI:EU:C:2016:689), para 87, considered that "monitoring all of the information transmitted, such a measure must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31, which excludes the imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit". In this regard, Rosati (2017), p. 13 denounces a lack of clarity in this regard as to whether the operator of a platform who acts for profit is subject to a presumption of monitoring the content uploaded, or if the confusion created by the duality of potential solutions in *GS Media*, on the one hand, and *eBay* and *Mc Fadden* should be interpreted "as part of a broader obligation to conform to the behaviour of the 'diligent economic operator'". In this sense, operators of platforms with a profit-making intention would have an *ex ante* reasonable duty of care and be subject to an *ex post* notice-and-takedown system, which would also include an obligation to prevent infringements of the same kind". See, in this sense, Peguera Poch (2016), pp. 77 y ss.; Leistner (2017), p. 331 and Arroyo Amayuelas (2020b), p. 353.

85. Lodder (2020), p. 33, puts examples of liability under Article 14(1)(a), such as when the "provider knows that the recipient stores child porn or copyright infringing material [...] (information). He is also liable if he knows that in a newsgroup information is exchanged about where to obtain illegal material (activity)".

86. In *L'Oréal* case, the Court considers this determination to be done by national courts under the premise of whether "the provider concerned becomes aware, in one way or another, of such facts or circumstances" (para 121). And the situations covered by the scope of Article 14 include "that in which the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information [... provided that...] the information so transmitted to the operator [allowed the latter to be] aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality" (para 122).

87. See *arrêt* of the *Cour de cassation, civile, Chambre commerciale* of 3 May 2012 (11-10.505): "leur rôle [of eBay] ne se limite donc pas à classer et à faciliter la lisibilité des offres et des demandes mais consiste à les promouvoir activement et à les orienter pour optimiser les chances qu'elles aboutissent à des transactions effectives sur le montant desquelles elles percevront une commission".

88. See *arrêt* of the *Cour de cassation, civile, Chambre commerciale* of 3 May 2012 (11-10.505): "qu'en l'espèce, la prestation de courtage fournie par les appelantes supposait qu'elles vérifient que les marchandises dont elles assuraient la promotion de la vente, étaient ou non hors commerce en raison de leur caractère contrefaisant".

89. Sousa Ferro (2019), p. 73. In the *eBay* case before the *Cour de cassation* of France, the Court considers that the nature of the eBay platform is mixed, including hosting activities, as well as brokering activities. And this hybrid nature cannot be divided. See, also, Chapuis-Doppler et al. (2020), p. 417: "although AG Campos Sánchez-Bordona had contended that Amazon did not operate like a neutral e-commerce platform under its "Fulfillment by Amazon" scheme, given that Amazon takes care of all operations on behalf of retailers, the Court carefully stuck to the facts presented by the referring court, leaving the question open for future proceedings" [see the judgment of the Court of Justice of the European Union (Fifth Chamber), of 2 April 2020, case C-567/18 (*Coty Germany GmbH v. Amazon Services Europe Srl and others*, ECLI:EU:C:2020:267)].

90. See Minero Alejandro (2021), p. 39.

services within the EU. This Digital Services Act package includes the Digital Services Act<sup>91</sup> and the Digital Markets Act.<sup>92</sup> According to the explanatory memorandum, the first rule mentioned (the Digital Services Act) is based upon the principles outlined in the E-Commerce Directive,<sup>93</sup> and it maintains the liability rules and exemptions contained therein.<sup>94</sup> The future Digital Services Act is not intended to be applied solely to information society services domiciled within the Union,<sup>95</sup> as it will be applicable to all those who have a “substantial connection with the Union”, meaning that they have a “significant number of users in one or more Member States” or target “activities towards one or more Member States.”<sup>96</sup>

The Digital Services Act, at least in its current stage, maintains the authority exception contained in Article 14(2) of the E-Commerce Directive by stating, in Article 5(3), that the general exemption of liability of Article 5(1) will not apply “with respect to the 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 [...] in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that it 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”.

### 3.2.2. The ELI Model Rules for Online Platforms: from *Oberdorfs* “substantial control” to the “predominant influence”

The European Law Institute (“ELI”) has been working on the ELI Model Rules for Online Platforms.<sup>97</sup> In particular, Article 20 of the project envisages imposing liability upon platforms that can be considered “Operator[s] with Predominant Influence” if some criteria laid down in the same article concur.

On the basis of this provision, the author considers that platform operators with similar characteristics to Amazon could be considered “Platform Operator[s] with Predominant Influence” and, therefore, be subject to the specific remedies contained in the same article. The reason for this statement is that a business such as Amazon complies with nearly every criterion laid down in Article 20:

- First, the “supplier [i.e., the third-party seller]-customer contract is concluded exclusively through facilities provided on the platform.” The contract is concluded only when the customer puts all the objects in the basket and accepts the specific terms.
- Second, the “platform operator withholds the identity of the supplier or contact details until after the conclu-

91. Proposal for a Regulation by the European Parliament and the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

92. Proposal for a Regulation of the European Parliament and the Council on contestable and fair markets in the digital sector (Digital Markets Act).

93. “Building on the key principles set out in the E-Commerce Directive [...] to contribute to online safety and the protection of fundamental rights” (see p. 2).

94. “The proposal maintains the liability rules for providers of intermediary services set out in the E-Commerce Directive [...]. With regard to the horizontal framework of the liability exemption for providers of intermediary services, this Regulation deletes Articles 12-15 in the E-Commerce Directive and reproduces them in the Regulation, maintaining the liability exemptions of such providers, as interpreted by the Court of Justice of the European Union” (see p. 3).

95. See Article 1(3) of the Digital Services Act: “This Regulation shall apply to intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services”.

96. In determining the existence of a “substantial connection” required by Article 2(d), we should take into consideration the criteria set forth in the eighth recital of the Digital Services Act: “the use of a language or a currency generally used in that Member State, or the possibility of ordering products or services, or using a national top level domain. The targeting of activities towards a Member State could also be derived from the availability of an application in the relevant national application store, from the provision of local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection should also be assumed where a service provider directs its activities to one or more Member States as set out in Article 17(1)(c) of Regulation (EU) 1215/2012 of the European Parliament and Council. On the other hand, the mere technical accessibility of a website from the Union cannot, on that ground alone, be considered as establishing a substantial connection to the Union”.

97. European Law Institute (2019).

sion of the supplier-customer contract.” This requirement also applies because usually third-party sellers conceal their real identity and contacts can only be made through Amazon’s-enabled forum. Nonetheless, the real identity of the third-party seller can be discovered once the transaction has been finalized and, for instance, the consumer wants the bill.

- Third, the “platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the customer to the supplier.” That is true, as the payment is made through Amazon, and “Amazon” appears on the credit card account, not the name of the third-party seller. Additionally, the payment is directed to Amazon, which pays the third-party seller periodically once Amazon deduces its fees.
- Fourth, the “terms of the supplier-customer contract are essentially determined by the platform operator.” That is true, provided that the service conditions to be provided by the third-party seller are governed by the BSA and the A-to-Z guarantee that Amazon has published on its website. The third-party seller can only decide the product’s price and the postage and packing expenses (except if it is covered by the FBA program, where Amazon retains control).
- The fifth criterion is that the platform operator setting the “price to be paid by the customer,” does not apply, since the price is set by the third-party supplier, not by Amazon.
- The sixth criterion is that “marketing is focused on the platform operator and not on suppliers,” which is also true. The suppliers’ identity is concealed, so all marketing strategies (Amazon’s choice, among others) are focused on Amazon and under Amazon’s conditions, not the third-party sellers.
- Finally, the “platform operator promises to monitor the conduct of suppliers and to enforce compliance with its standards beyond what is required by law.” That is also true, as Amazon has its A-to-Z guarantee.

In the case of Amazon, if Courts applied these rules as enacted law, the platform operator (Amazon) would be liable for “non-performance” (Article 20(1) of the ELI Model Rules) of the supplier-customer contract if “the customer can reasonably rely on the platform operator having a predominant influence over the supplier,” which is similar wording to the “substantial control” stated by the *Oberdorf* case.

In that regard, the European Parliament resolution of October 20, 2020, with recommendations to the Commission on the Digital Services Act: “Improving the functioning of the Single Market”<sup>98</sup> considers that liability should be imposed upon an online marketplace when it has “predominant influence over the supplier 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,” provided that “there is no manufacturer, importer, or distributor established in the Union that can be held liable.”

From the wording of the resolution and the express reference to the potentially liable subjects contained on the PLD, it can be inferred that the European Parliament is envisaging broadening the product liability regime to online marketplaces, as an *ultima ratio*, to ensure that victims of defective products always have an effective remedy within the EU.

## Conclusions

1. The following conclusions may be drawn from the present Article: Amazon is an online intermediary for the sale of products from third-party sellers and Amazon’s affiliated brands. Third-party sellers who want to sell through Amazon must enter into the BSA.
2. The orders placed through Amazon to third-party sellers can be fulfilled by the third-party seller or under the FBA program offered by Amazon.
3. Under the current state of the case law in the US, it is more probable (80%) that claims against Amazon

98. P9\_TA(2020) 0272.

for the injuries sustained by consumers of products sold by third-party sellers through Amazon, will be dismissed by courts: the US courts are more open to grant Amazon's motion for summary judgments, as the latter is not the seller of the product. Only in two cases (*Oberdorf* and most recently, *Bolger*) did the courts find Amazon liable for having substantial control over the supplier-customer contract. The *Oberdorf* case is not precedential, as the parties settled it. Only *Bolger* set a precedent in US law as the California Supreme Court rejected Amazon's petition to review the lower court's judgment entered in favor of the plaintiff.

4. In the European Union, the liability system for defective products is based on whether the sued party is the producer, or acts as such (apparent manufacturer doctrine), or has imported the product within the European Union from the third country. When all the above are not available or identified, the supplier is liable if it fails to identify the manufacturer or the importer of the product within the European Union, or when the supplier knew about the defect and, nonetheless, furnished the product to the customer. In *Amazon*,<sup>99</sup> the manufacturer of a product always has to be identified when a third-party seller uploads a product on its marketplace.

For this reason, identification of the manufacturer will always be possible and, thus, Amazon will not be liable unless it has manufactured the product itself.

In the case of Amazon-branded products, the producer is usually one of the affiliate brands that are not registered companies, and therefore Amazon might be held liable if the requirements of the apparent manufacturer doctrine are met.

5. Under the current state of the CJEU's case law, Amazon (as happened with eBay) will be considered an ISP. A question mark still hangs over this statement, because the CJEU has not yet ruled on whether a company that provides a composite service, like Amazon through its FBA program, fits the definition of an ISP, as the Attorney General of the CJEU stated in his conclusions in *Coty*.<sup>100</sup>
6. If Amazon meets the requirements of an ISP, it is considered that it will be liable unless the exemption from liability in Article 14 of the E-Commerce Directive applies. The author considers that Amazon's role in managing transactions is hardly applicable, since it cannot be qualified as neutral or passive, like in eBay.

<sup>99</sup> See fn. 70.

<sup>100</sup> See fn. 89.

## References

- ABDOLLAH, T.; URANGA, R.; BLAKE, S. (2020). California's AB 3262 Is Quietly Shelved; GoodRx Files for IPO; Scopely Adds FoxNext Exec to Its Ranks. *dot.LA*, August 31 2019. <<https://dot.la/ab-3262-2647414886/foxnext-games-executive-to-head-scopelys-business-operations>> [Date of consultation: 6 September 2020].
- ARROYO AMAYUELAS, E. (2020a). La responsabilidad de los intermediarios en Internet ¿Puertos seguros a prueba de futuro?. *Cuadernos de Derecho Transnacional*. Vol. 20, No. 1, pp. 808-837. DOI: <https://doi.org/10.20318/cdt.2020.5225>
- ARROYO AMAYUELAS, E. (2020b). La responsabilidad de los intermediarios en internet: ¿puertos seguros a prueba de futuro?. In: *El Derecho Privado en el nuevo paradigma digital*. Madrid: Marcial Pons. DOI: <https://doi.org/10.20318/cdt.2020.5225>
- ATAZ, J.A. (2020). Daños causados por las cosas: Una nueva visión a raíz de la robótica y de la inteligencia artificial. *Working Paper 4/2020*. Jean Monnet Chair. European Private Law: Universitat de Barcelona. <[http://diposit.ub.edu/dspace/bitstream/2445/169850/1/WP\\_2020\\_4%20%28Ataz%29.pdf](http://diposit.ub.edu/dspace/bitstream/2445/169850/1/WP_2020_4%20%28Ataz%29.pdf)> [Date of consultation: 19 March 2021].
- BARRIO ANDRÉS, M. (2020). *Internet de las Cosas*. 2nd ed. Madrid: Reus.
- BERZON, A.; SHIFFLETT, S.; SCHEEK, J. (2020). Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products. *The Wall Street Journal*, August 23 2019. <<https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>> [Date of consultation: 23 August 2020].
- BULLARD, A.R. (2019). Out-Techning Products Liability: Reviving Strict Products Liability in an Age of Amazon. *North Carolina Journal of Law & Technology*. Vol. 20, No. 5, pp. 181-233.
- BUSCH, C. (2019). When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon. *Journal of European Consumer and Market Law*. Vol. 8, No. 5, p. 173-174.
- BUSCH, C. (2021). Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective. Updated version uploaded to SSRN. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3784466](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784466)> [Date of consultation: 18 March 2021]. DOI: <https://doi.org/10.2139/ssrn.3784466>
- BUSS, S.; BECKER, D.; DANIELS, M.; NÖLDEKE, G.; BLUMTRITT, C.; STRIAPUNINA, K. (2020). Digital Economy Compass. *Statista*.
- CHAPUIS-DOPPLER, A. and DELHOMME, V. (2020). Regulating Composite Platform Economy Services: The State-of-play After Airbnb Ireland. *European Papers*. No. 12, pp. 411-428.
- CILLIZZA, C. (2020). 7 governors still haven't issued stay-at-home orders. Here's why. *CNN Politics*, April 13 2020. <<https://edition.cnn.com/2020/04/13/politics/asa-hutchison-arkansas-coronavirus/index.html>> [Date of consultation: 23 August 2020].
- CURLEY, M. (2020). Calif. Supreme Court Won't Hear Amazon Batteries Case, November 23 2020. <<https://www.law360.com/articles/1331604/calif-supreme-court-won-t-hear-amazon-batteries-case>> [Date of consultation: 11 December 2020].
- DOYER, A. (2019). Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond. *Journal of Law and Policy*. Vol. 28, No. 2, pp. 719-761.
- EUROPEAN LAW INSTITUTE (2019). *Report of the European Law Institute. Model Rules on Online Platforms*. <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Model\\_Rules\\_on\\_Online\\_Platforms.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf)> [Date of consultation: 11 September 2020].

- FACTEUS (2020). *Insights on Changing Consumer Spending. Factiveus Insight Report on Consumer Spending and Transactions (FIRST)*. <<https://www.factiveus.com/reports/first-report-7-15-2020/>> [Date of consultation: 23 August 2020].
- FAIRGRIEVE, D.; HOWELLS, G.; MØGELVANG-HANSEN, P.; STRAETMANS, G.; VERHOEVEN, D.; MACHNIKOWSKI, P.; JANSSEN, A.; SCHULZE, R. (2016). Product Liability Directive. In: *European Product Liability Law - An Analysis of the State of the Art in the Era of New Technologies*. Cambridge: Intersentia, pp. 17-108. DOI: <https://doi.org/10.1017/9781780685243.002>
- FRANKLYN, D.J. (1999). The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts. *Case Western Reserve Law Review*. Vol. 49, 4, pp. 671-729.
- GILI SALDAÑA, M. (2008). *El producto sanitario defectuoso en Derecho español*. Barcelona: Atelier.
- HANDELSRÅDET (2019). *Report on Digital marketplaces and e-commerce platforms*. <[https://handelsradet.se/wp-content/uploads/2020/04/Digital-marketplaces-and-e-commerce-platforms\\_EN2B.pdf](https://handelsradet.se/wp-content/uploads/2020/04/Digital-marketplaces-and-e-commerce-platforms_EN2B.pdf)> [Date of consultation: 12 September 2020].
- HENDERSON, J.A.; TWERSKI, A.D. (2011). *Products Liability. Problems and Process*. 7th ed. New York: Aspen Publishers: 789 pages.
- HOLSHUE, M.L.; DEBOLT, C.; LINDQUIST, S.; LOFY, K.H.; WIESMAN, J.; BRUCE, H.; SPITTERS, C.; ERICSON, K.; WILKERSON, S.; TURAL, A.; DIAZ, G.; COHN, A.; FOX, L.; PATEL, A.; GERBER, S.I.; KIM, L.; TONG, S.; LU, X.; LINDSTROM, S.; PALLANSCH, M.A.; WELDON, W.C.; BIGGS, H.M.; UYEKI, T.M.; PILLAI, S.K. (2020). First Case of 2019 Novel Coronavirus in the United States. *The New England Journal of Medicine*. Vol. 382, 10, pp. 929-936. DOI: <https://doi.org/10.1056/NEJMoa2001191>
- JANGER, E.J.; TWERSKI, A.D. (2020). The Heavy Hand of Amazon: A Seller Not a Neutral Platform. *Brooklyn Journal of Corporate, Financial & Commercial Law*. Vol. 14, 2, pp. 259-273.
- KELLEHER, S.R. (2020). 45 US States Shut Down And Counting: State-By-State Travel Restrictions. *Forbes*, March 28 2020 (updated April 6 2020). <<https://www.forbes.com/sites/suzannerowankelleher/2020/03/28/23-states-shut-down-and-counting-state-by-state-travel-restrictions/#69782deb58f4>>.
- LEISTNER, M. (2017). Closing the book of the hyperlinks: brief outline of the CJEU's case law and proposal for European legislative reform. *European Intellectual Property Review*. Vol. 39, No. 6, pp. 327-333.
- LÖDDER, A.R. (2020). 2.6.3. Article 14 - Hosting. In: *EU Regulation of E-Commerce. A Commentary*. Cheltenham: Edward Elgar.
- MINERO ALEJANDRE, G. (2021). ¿Responsabilidad de Amazon por las ventas concertadas por terceros en su Marketplace? Estudio de la cuestión a fecha de 2021 y perspectivas de futuro. *Revista CESCO de Derecho de Consumo*, No. 37, pp. 33-50.
- PARRA LUCÁN, M.A. (2007). Comentario al artículo 138 TRLGDCU. In: *Comentario del Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*. Cizur Menor: Aranzadi, pp. 1678-1688.
- PEGUERA POCH, M. (2016). Los prestadores de servicios de internet y la normativa sobre responsabilidad. In: *Derecho TIC. Derecho de las tecnologías de la información y de la comunicación*. Valencia: Tirant Lo Blanch.
- RICKETTSON, T. (2020). Blinded by the Leash: Strict Products Liability in the Age of Amazon. *Penn State Law Review*, Vol. 125, No. 1, pp. 321-351.

- ROSATI, E. (2017). The CJEU Pirate Bay judgment and its impact on the liability of online platforms. *European Intellectual Property Review*. Version uploaded to [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3006591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591).
- SANTOS MORON, M.J. (2017). La imputación de responsabilidad médica con base en las normas de protección de consumidores: el artículo 148 TRLC. *Anuario de Derecho Civil*. Tomo LXX, fasc. I, pp. 119-164.
- SEMUELS, A. (2020). Many Companies Won't Survive the Pandemic. Amazon Will Emerge Stronger Than Ever. *Time*, July 28 2020. <<https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/>> [Date of consultation: 23 August 2020].
- SEUBA TORREBLANCA, J.C. and CERDÀ ALBERO, F. (2008). Capitulo V. Sujetos responsables. In: *Tratado de Responsabilidad Civil del Fabricante*. Cizur Menor: Aranzadi, pp. 221-247.
- SHARKEY, C.M. (2020). Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives. *Northwestern University Law Review Online*, Vol. 115, pp. 339-356.
- SHEHAN, A.E. (2019). Amazon's Invincibility: The Effect of Defective Third-Party Vendors' Products on Amazon. *Georgia Law Review*, Vol. 53, No. 3, pp. 1215-1236.
- SOLE I FELIU, J. (1997). El concepto de defecto del producto en la responsabilidad civil del fabricante. Valencia: Tirant lo Blanch.
- SOUSA FERRO, M. (2019). Uber Court: a look at recent sharing economy cases before the CJEU. *UNIO - EU Law Journal*, Vol. 5, No. 1, pp. 69-75. DOI: <https://doi.org/10.21814/unio.5.1.251>
- SPRAGUE, R. (2020). It's a Jungle Out There: Public Policy Considerations Arising From a Liability-free Amazon.com. *Santa Clara Law Review*. Vol. 60, pp. 253-287.
- YZQUIERDO TOLSADA, M. (2018). *Responsabilidad civil extracontractual. Parte General*. 4th ed. Dykinson.

### Recommended citation

GARCÍA-MICÓ, Tomás Gabriel (2022). "Platform Economy and Product Liability: Old Rules for New Markets". *IDP. Journal promoted by the Department of Law and Political Science*, No. 35, pp. 1-24. UOC [Accessed: dd/mm/yy] <http://dx.doi.org/10.7238/idp.v0i35.378523>



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