InDret

The Case for a (European?) Law of Reputational Feedback Systems

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Abstract

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Reputational feedback systems are essential in the digital economy, as tools to build trust among traders and consumers and help the latter to make better choices. Although the number of platforms using such systems is growing, some aspects undermine their reliability, endangering the proper functioning of the market. In this context, it might be convenient to create a "law of reputational feedback systems" – a comprehensive set of rules specifically aimed at online reviews and ratings, and possibly at the European Union level with the goal of contributing to develop the digital single market. This paper aims at fostering a debate on the matter. First, it presents how important reputational feedback systems are and the weaknesses they are affected by. Then, it addresses the fragmentation argument that favours legal harmonisation, without forgetting that harmonisation has downsides, too. Afterwards, some possible rules are envisaged, considering academic or institutional initiatives and norms that already exist. Finally, to balance the discussion, this paper also offers arguments to support that further regulating reputational feedback systems, or at least doing it at the European level, could be a step in the wrong direction.

Sumario

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Los sistemas de feedback reputacional son esenciales en la economía digital, como herramientas que generan confianza entre empresarios y consumidores y que ayudan a estos últimos a tomar mejores decisiones. Aunque el número de plataformas que utilizan tales sistemas está aumentando, algunos aspectos menoscaban su fiabilidad, poniendo en peligro el correcto funcionamiento del mercado. En este contexto, podría ser conveniente crear un "Derecho de los sistemas de feedback reputacional", un conjunto de reglas específicamente dirigidas a las opiniones y evaluaciones en línea; y posiblemente a nivel de la Unión Europea, con el objetivo de contribuir al desarrollo del mercado único digital. Este artículo pretende fomentar un debate al respecto. En primer lugar, se expone la importancia de los sistemas de feedback reputacional y las debilidades que les afectan. Después se trata el argumento de la fragmentación, que favorece la armonización jurídica, sin olvidar que la armonización también cuenta con un lado negativo. A continuación, se contemplan posibles normas, tomando en consideración tanto iniciativas académicas e institucionales como reglas ya existentes. Finalmente, con el ánimo de equilibrar el debate, este trabajo también ofrece argumentos para sostener que regular en mayor medida los sistemas de feedback reputacional, o al menos hacerlo a nivel europeo, podría ser un paso en la dirección equivocada.

Título: *Los argumentos para un Derecho (¿europeo?) de los sistemas de feedback reputacional*

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Keywords: Reputational feedback systems, Consumer reviews, User ratings, Online platforms, Legal harmonisation.
Palabras clave: *Sistemas de feedback reputacional, Opiniones de los consumidores, Puntuaciones de los usuarios, Plataformas en línea, Armonización legislativa.*

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1. Introduction*

Within the digital economy, the role played by information is – at least – twofold. On the one hand, businesses use information to articulate a given business model, foresee consumer preferences and market changes, and adapt to them. This requires retrieving, processing, analysing, and combining data.[1] On the other hand, businesses supply information to generate trust – otherwise many people will not become clients and opportunities to make profits will be wasted.[2] In this paper the focus will be placed on the second dimension, in particular on reputational feedback systems in online platforms. The topic is important because the digital economy is based on reputation as a key component of the trust that, in fact, all commerce requires.[3] The question to be explored is whether the European Union should comprehensively regulate online reviews and ratings to protect consumers and foster the digital single market. This one is essential to maintain a "general" single market, considering the increasing importance of online commerce.[4] However, the analysis is of interest not only to lawyers, economists, and policy makers. Companies, marketing services, or programmers and platform designers are concerned, too. The legal framework applicable to reputational feedback systems will determine how electronic commerce tools must be designed, supplied, and operated. And it may influence the way technology and business models evolve over time.

In July 2013, the French Standardisation Association (*Association Française de Normalisation*, AFNOR) issued the first-ever voluntary standard aiming at increasing reliability of online consumer reviews, the NF Z74-501 on principles and requirements for their collection, moderation and publication. This standard was used as a model to devise an international one, the ISO 20488:2018 on principles and requirements for collection, moderation and publication of online consumer reviews, published in June 2018. Nowadays, the French NF Z74-501 has been replaced by the NF ISO 20488, published on 22 September 2018 and whose technical content matches the one of the international standard. Academic groups started to envisage common European rules on feedback mechanisms, one example being article 8 of the *Discussion Draft of a Directive on Online Intermediary Platforms*, elaborated by the Research Group on the Law of Digital Services.[5] This project was later taken over by the European Law Institute and continued within, ultimately giving rise to *Model Rules on Online Platforms*, whose articles 5 to 7 cover reputation systems.[6] The European Commission is following the challenges brought in this area, too. For just one instance, it set up a Multi-Stakeholder Group that issued *Key principles for comparison tools* which included guidelines aimed at ensuring transparency and trustworthiness of user

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[1] Ontiveros et al. (2017, pp. 7, 11, 21–24).

[2] A good definition of "trust" for our purposes is provided by Bicchieri, Duffy and Tolle (2004, p. 286) – "a disposition to engage in social exchanges that involve uncertainty and vulnerability, but that are also potentially rewarding."

[3] Busch (2016, pp. 224–227). See also Thierer et al. (2016, pp. 840–873).

[4] Manfellotto (2017).

[5] Research Group on the Law of Digital Services (2016).

[6] European Law Institute (2020).

ratings and reviews.[7] A couple of years ago, the Unfair Commercial Practices Directive[8] was modified by Directive (EU) 2019/2161,[9] and two provisions directly affecting platforms using feedback mechanisms have been included, namely points 23b and 23c of Annex I.[10]

With this background, fostering a discussion on the need of a "law of reputational feedback systems" – a comprehensive legal framework specifically aimed at online reviews and ratings – seems very appropriate.

This paper is organised as follows. Part 2 offers basic insights about feedback systems and their weaknesses. Part 3 deals with legal fragmentation as a common rationale for harmonisation, and how this argument must be weighed against other aspects that favour a lesser degree of legal approximation. Part 4 elaborates on possible – eventually harmonised – rules on reputational feedback systems that could make them more transparent, reliable, and useful. Finally, Part 5 provides some arguments that can be raised against passing specific regulation on the matter, especially if it were harmonised. However, before diving into the topic, two remarks must be made.

"Reputational feedback system" is to be understood as any mechanism for collecting, processing, and publishing ratings and reviews regarding suppliers, customers, goods, services, or digital content. This is a combination of the definition of "reputational feedback system" contained in article 2(k) of the *Discussion Draft of a Directive on Online Intermediary Platforms* ("Any mechanism for rating or reviewing suppliers, customers, goods, services or digital content") and the one of "reputation system" found in article 2(k) of the *Model Rules on Online Platforms* ("Any mechanism for collecting and publishing reviews regarding suppliers, customers, goods, services or digital content"). Feedback usually takes the form of a qualitative review or a numerical rating, both being often combined. Article 3.1 of standard ISO 20488:2018 on principles and requirements for collection, moderation and publication of online consumer reviews defines reviews as "recorded information made publicly available by a consumer about a specified product or service provided or sold by a supplier." In article 3.13 of the same ISO standard, rating is defined as "value, classification, or ranking of a product or service by a consumer."

From a methodological point of view, I have decided to take a broad approach, instead of focusing on a few possible rules and exploring them exhaustively. Such approach is the most convenient at the time. First, because we are still at the beginning of the debate, and one of the aims is setting the path for further research on particular points and from different angles. Second, because questions touching legal policy welcome a broad perspective to capture the bigger picture. And

[7] MULTI-STAKEHOLDER GROUP ON COMPARISON TOOLS (2016).

[8] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

[9] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

[10] According to article 7 of Directive (EU) 2019/2161, the deadline for transposition is 28 November 2021, while measures adopted shall apply from 28 May 2022.

third, because a wider scope provides a better architecture to study confronting views and undertake a balanced discussion.

2. Feedback as an (imperfect) source of trust within online platforms

One of the main features of modern commerce is the widespread resort to online platforms that bring offer and demand closer by solving problems related to distances, uncertainties, information asymmetries, lack of trust, etc.[11] Platforms may be matchmakers playing an intermediation role between two parties to facilitate transactions, but they can also play a more active role by supplying ancillary services in connection with the transaction, or even fixing some terms under which the underlying goods and services are to be provided.[12] In all cases, the platform operator may need not only to gain the confidence of the parties, but also to generate trust among the parties themselves. These two dimensions translate into two types of reputational mechanisms, centralised and peer-to-peer.[13]

Trust in online contexts can be built through direct interaction, third-party shared experiences, trademarks, certificates issued by governments or private organisations, and so on.[14] Platforms have indeed developed many tools to ensure quality, spread confidence and help consumers to make better choices, reputation systems being a major one.[15] These are mechanisms that, by way of users' feedback, present someone's reputation – a summary of their past actions within a platform – so other users can make decisions regarding whether to relate to that individual or not.[16] From a philosophical point of view, such feedback amounts to "testimony," one of the prima facie categories of evidence to acquire knowledge.[17] In sum, ratings and reviews are information uncertainty-reducing, knowledge-increasing tools.[18]

The development of the digital economy and the ever-higher volume of platforms using reputational feedback systems seem to show that these mechanisms are fulfilling their function in a quite satisfactory way. However, they are not perfect. For our purposes, it is not necessary to identify and categorise all their shortcomings. Revealing a suboptimal situation is enough.

Three major problems are rating collusion, obsolescence and manipulation.[19] Rating collusion is the tendency to give good ratings to others even if they have not earned it, in order to avoid any subsequent retaliation that may worsen one's own score.[20] Old reviews may result in not providing a precise picture of the quality users can expect at the time they make an economic

[11] Rodríguez de las Heras Ballell (2017, pp. 150, 162–164).

[12] Twigg-Flesner (2016a, pp. 28–29, 36–37); Rodríguez de las Heras Ballell (2017, pp. 157–159, 163, 167–168); Mak (2018, pp. 90–96). See also Steckbeck and Boettke (2004, pp. 223–224).

[13] Thierer et al. (2016, pp. 858–869).

[14] Alfonso Sánchez (2017, pp. 166–167).

[15] Koopman, Mitchell and Thierer (2015, pp. 540–542); Bae and Koo (2018, pp. 746–750).

[16] Dellarocas (2011, p. 4).

[17] Coady (1973, p. 149).

[18] Hira and Reilly (2017, p. 176).

[19] Alfonso Sánchez (2017, p. 168).

[20] Slee (2013, pp. 6–7).

decision.[21] And, for obvious reasons, manipulation by the platform – hiding bad reviews is the paradigmatic example – and fake reviews and ratings hamper the proper functioning of feedback mechanisms.[22] Furthermore, consumers are sometimes lured by traders into deleting bad reviews in exchange of some compensation.[23] Paying for good reviews is also a matter for concern.[24] Other problems that reduce the reliability of feedback systems are the lack of reviews and biased reviews – where the opinion submitted does not reflect the author's true opinion, the latter being extremely hard to identify and thus to correct.[25]

Other arguments highlighting the lack of reliability of reputational feedback systems look somewhat weaker. For instance, it has been argued that when almost every user of the platform receives very high grades, whether the system reflects true quality can be put into question.[26] Some consider rating collusion the main reason behind those too-high ratings.[27] Empathy can also favour not-so-harsh reviews.[28] And people with extremely positive or extremely negative opinions are more inclined to give feedback,[29] something that may contribute to some "reputation inflation".[30] Yet, alternative – and more optimistic – explanations exist.

Maybe a more influential factor to attain high averages overall is that, reputation being crucial in electronic commerce, less-than-very-good traders get easily crowded out.[31] Negative opinions have stronger effects than positive ones, perhaps because the latter just confirm expectations while the former are more informative, as they report cases where expectations were not met.[32] It is true that, consistently with the previous idea, if someone already has positive scores users are less inclined to give positive feedback but more prone to share a bad experience.[33] But studies show both that the probability of receiving a negative opinion increases after the first one is received, and that the worse the rating is, the more likely the trader exits the market.[34] Consumer satisfaction is possibly best assessed by looking at how many people go on using online platforms with feedback mechanisms. If they do, they must have had many more good experiences than bad ones. Indeed, most consumers report that goods and services met their expectations,[35] so maybe ratings are excellent simply because consumers find "greater convenience, better prices, and higher quality" in platforms.[36]

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[21] Busch (2016, p. 239).

[22] Malbon (2013, pp. 145–147); Mayzlin, Dover and Chevalier (2014, pp. 2421–2422); Busch (2016, pp. 224, 227–228).

[23] https://www.elconfidencial.com/tecnologia/2018-10-19/sobornos-amazon-regalos-opiniones-reviews-negativas_1631403/ (Accessed 11 May 2021).

[24] Competition and Markets Authority (United Kingdom), paragraphs 1.5 and 4.27.

[25] Narciso (2019, pp. 562–564).

[26] Busch (2016, p. 228).

[27] Slee (2013, p. 6).

[28] Narciso (2019, p. 563).

[29] Mayzlin, Dover and Chevalier (2014, p. 2422).

[30] Narciso (2019, p. 562).

[31] See Zervas, Proserpio and Byers (2015, p. 12).

[32] Diekmann et al. (2014, p. 68).

[33] Diekmann et al. (2014, pp. 78–80).

[34] Cabral and Hortaçsu (2010).

[35] Competition and Markets Authority (United Kingdom), paragraphs 3.19, 3.22, 4.36.

[36] Koopman, Mitchell and Thierer (2015, pp. 540, 543).

In sum, so far reputational feedback systems have been good enough to foster commerce, but they are not free from weaknesses.[37] Since consumers take feedback into account while making decisions, were feedback unreliable for whatever reason, those decisions would be based on wrong information.[38] Regulation *might* erase some of the shortcomings or alleviate their negative effects, improving the market. If regulation were passed at the European level, benefits would spread throughout the Union. However, there also are some arguments to push for less regulation or, at least, no legal harmonisation.

3. The fragmentation argument and the case for a harmonised legal framework

3.1. The obvious benefits and some downsides of harmonisation

The most general idea regarding the rationale for approximation or harmonisation of laws could be described in the following way. By removing obstacles and distortions caused by legal fragmentation, transaction costs in cross-border trade are reduced, and more businesses and consumers will contract abroad. Markets will get integrated, and this will lead to more (undistorted) competition and consumer choice.[39] Indeed, harmonisation is intrinsically linked to the single market (art. 114 of the Treaty on the Functioning of the European Union[40]). Establishing such market highly depends on the "[consumer] willingness to purchase goods and services across borders,"[41] and such willingness allegedly requires removing diverging national laws that generate uncertainty and oblige consumers – and also businesses – to spend time and resources to look for the substantive law to be applied in each case, among other micro and macroeconomic costs.[42] As Twigg-Flesner has noted, harmonisation is commonly regarded indispensable to boost consumer confidence.[43] In short, legal diversity is deemed to be an obstacle for the single market, including the "digital" one.[44] This perspective is explicitly found, for instance, in Directive (EU) 2019/770 on the supply of digital content[45] (recitals 1–11) and Directive (EU) 2019/771 on the sale of goods[46] (recitals 1–10). And the same line of reasoning can

[37] Frenken and Schor (2017, p. 4).

[38] Narciso (2019, pp. 559–561).

[39] Leczykiewicz and Weatherill (2016, p. 6). See also Weatherill (2005, pp. 1–15, 23–27, 34, 160–161); Weatherill (2016, pp. 5–6).

[40] OJ C 202, 7.6.2016, p. 47 (consolidated version). See Judgment of the Court of Justice of the European Union of 5 October 2000, *Germany v Parliament and Council*, C-376/98, ECLI:EU:C:2000:544, paragraphs 81–86; Weatherill (2005, pp. 61–65, 73–75); Weatherill (2016, pp. 57–61, 70–72).

[41] de Vries (2016, p. 401).

[42] Wagner (2012, pp. 541–542, 546–547).

[43] Twigg-Flesner (2016b, pp. 184–186).

[44] European Commission (2015, pp. 3–5).

[45] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

[46] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

be followed regarding online platforms in general[47] or more specific areas, such as crowdfunding[48] and reputational feedback systems.[49]

Harmonisation has nevertheless some downsides, too. And the more you homogenise, the higher they are. It reduces the number of alternatives available, and therefore liberty. After all, approximation of laws means tilting towards a "single vision" of the subject at hand.[50] It makes it harder for concerned individuals and companies to "escape" from undesired or unsatisfactory regulation, for moving to another region or state does not yield any result. And, as a consequence, authorities have less incentives to improve the regulatory framework.[51] Harmonisation sacrifices certain preferences which will not be met, or that will be met at a higher price – leaving those affected with less resources for other purposes. It also entails maybe-less-visible costs that should be considered as well. For example, those linked to the need of supervision and enforcement, cartel-like effects, transition costs, and a reduction of regulatory competition which hampers discovering the best rules through trial and experience processes.[52] Another matter of concern is to which extent harmonisation erases differences in legal culture – of course, provided that the existence of significant diversity in Europe is accepted.[53] Lastly, we should not forget the risk of dissatisfaction due to the fact that the standards are set by a centralised body, more distant from the citizens. In the context of the European Union, the impression of a transition from a cooperative model to a hierarchical one would arise.[54] Yet, one might argue that some distance between law-making bodies and citizens yields some benefits, for instance in terms of long-term governance.[55] Part 5 below will provide insights which reflect further, more particularised disadvantages of legal harmonisation.

In this scenario, it will be important both to carefully assess the market to be regulated and to clearly define the goals pursued. Without this, a decision on whether to harmonise and how cannot be properly made.

3.2. The characteristics of the relevant market and the goals pursued

From a general perspective, the European Union legislator aims at granting consumers a high level of protection and strengthening the internal market.[56] Yet, while designing specific policies, those general goals must be translated into more concrete ones, such as responding to heterogenous preferences, eliminating distortions and obstacles, or increasing consumer confidence. In order to do so, the characteristics of the relevant market must be taken into consideration. Especially two aspects, namely the type of firms regulation affects, and consumer

[47] Rodríguez de las Heras Ballell (2017, pp. 155, 175–176).

[48] Estevan de Quesada (2018, pp. 131–133).

[49] Busch (2016, pp. 224, 243).

[50] See Weatherill (2016, p. 242).

[51] Epstein (2016).

[52] See Wagner (2012, pp. 549–552).

[53] See Weatherill (2005, pp. 164–168).

[54] See Weatherill (2016, pp. 237, 240, 242–244).

[55] See Lilleholt (2011, p. 357).

[56] Grundmann (2013, p. 120).

preferences.[57] Depending on these factors and the weight given to the specific goals pursued, there will be a case for more or for less harmonisation, and this will recommend choosing one or another legal instrument.

Every European has different interests depending on the good or service at hand, preferring stricter rules in some areas – call it "protection" – and more flexibility and lower minimum standards in others. I have not conducted any empirical study on consumer preferences regarding reputational feedback systems, but such a study is not indispensable. Unless consumers show them with actual market behaviour, the then-only-said-to-be preferences are not reliable.[58] Behavioural economists put into question that real actions reveal true preferences, but it seems there is not a better criterion than actual choice to identify welfare-increasing conducts. Asserting that one wants something is a mere wish, not a consumer preference – which requires being willing to assume the costs of the choice.[59] In any case, consumers' tastes are changing all the time.[60] European firms are heterogeneous, too. Some offer high-quality goods and services but at a high price, while others may not supply goods and services of high quality in the abstract but are good options from a quality-price ratio point of view. Depending on their business model, the nature of their products and services, their trademark, or their customer loyalty, some companies will need extremely reliable feedback mechanisms, whereas others will make profits with a lower standard. Considering the heterogeneity of both firms and consumer preferences, the most desirable harmonised rule probably lies at an intermediate level between the more demanding and the more flexible one.

Having said that, if legislators are more sensible about diversity and care much about meeting preferences, optional instruments and legal competition would be preferable to harmonisation.[61] The judgment of the Court of Justice of the European Union in *Starman*[62] shows that full harmonisation implies reducing consumer choice in certain areas for the sake of avoiding fragmentation. And the unsuitability of the rules to satisfy preferences entails transaction costs itself, reducing the gains resulting from trade.[63] Thus, if meeting preferences is given more weight, third-party certifications and voluntary-based "quality labels" for reputational feedback systems should be encouraged, rather than legislative actions. Such mechanisms are well known tools to generate trust.[64] In any case, a positive attitude towards the idea of regulatory competition challenges the claim that legal fragmentation creates "distortions" – with its negative connotation, one of the central elements presented above in the beginning of section 3.1 that calls for more approximation of laws.[65] Consequently, it is unsurprising that regulatory competition does not have much appeal in the EU nowadays, as minimum harmonisation seems to have been losing ground to more ambitious approaches.[66] Maybe trying to reach legal

[57] Gomez and Ganuza (2011, pp. 281–282).

[58] von Mises (1998, pp. 94–97); Posner (2003, p. 15).

[59] Rizzo and Whitman (2009, pp. 919–921).

[60] Kirzner (1997, pp. 72, 78).

[61] Gomez and Ganuza (2011, pp. 291–292); Grundmann (2013, p. 124).

[62] Judgment of 13 September 2018, *Starman*, C-332/17, ECLI:EU:C:2018:721.

[63] Bagchi (2014, pp. 690–691, 702–710, 724–729).

[64] See Shearmur and Klein (1997, pp. 36–38); Thierer et al. (2016, p. 852–854).

[65] See Weatherill (2005, pp. 162–163).

[66] Grundmann (2013, p. 120).

consensus "softly," through the ideas of coordination and cooperation rather than unification or harmonisation, could somehow align the interests of those more concerned with preserving diversity and those aiming at more likeness. But this approach certainly has limitations.[67]

If the main goal is erasing legal barriers and integrating markets, full harmonisation or a regulation seem better choices, for rules would be very close or unified in the whole of Europe.[68] If lawmakers aim particularly at boosting consumer confidence, the case for legal approximation and stricter rules seems favoured because more reliability in this area could promote better practices by suppliers. Minimum harmonisation might nevertheless suffice, because consumers – who often do not know the content of the law – possibly do not need to be aware that national rules are closer to each other, but only that all of them are protective enough.[69] If more attention is dedicated to creating a level playing field, this can be achieved through harmonised regulation, but also by suppressing current legislation and preventing the addition of new one.[70] However, whereas legal rules currently in force may be obstacles for innovation and a deregulation-oriented approach could help, this perspective is at the same time risky because it probably means derogating some consumer protection rules.[71]

Only once there is an assessment of the characteristics of the market where reputational feedback systems are broadly used and a clarification of the specific objectives to attain, the question of the appropriate harmonisation instrument can be raised. Article 288 of the Treaty on the Functioning of the European Union provides a first, very basic idea when it affirms that a regulation "shall have general application. It shall be binding in its entirety and directly applicable in all Member States," whereas a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." The cited provision allows to capture the main features of these legislative acts, but reality is more complex. And this, in turn, creates an extremely broad range of possibilities.

An eventual regulation regarding reputational feedback systems could be very detailed, but also very general. In fact, the referred characteristics of regulations do not prevent the existence of incomplete ones needing further action, be it at the European or at the national level.[72] Even their immediate effect is in a certain way nuanced when some of their provisions "necessitate, for their implementation, the adoption of measures of application by the Member States."[73] As a consequence, the unification that would result from the adoption of a regulation may have multiple degrees, depending on the issues covered by the text at hand.

For their part, directives leave more liberty to Member States, which can select the most suitable technique to achieve the results mandated by the Union. However, whereas the possibility of

[67] See Smits (2011, pp. 332–333); Lilleholt (2011, pp. 353–354, 357–361).

[68] Gomez and Ganuza (2011, p. 291); Bagchi (2014, pp. 727–728).

[69] Grundmann (2013, pp. 124–125).

[70] Koopman, Mitchell and Thierer (2015, p. 544); Thierer et al. (2016, p. 876).

[71] Twigg-Flesner (2016a, p. 25).

[72] See Blanquet (2018, pp. 372–374, 377, 387–388, 598–600).

[73] Judgment of 11 January 2001, *Monte Arcosu*, C-403/98, ECLI:EU:C:2000:175, paragraph 26; and more recently, judgment of 12 April 2018, *Commission v Denmark*, C-541/16, ECLI:EU:C:2018:251, paragraph 27. See Blanquet (2018, pp. 574–576).

differentiation exists, it will be higher or lower depending on the results sought – a given goal may virtually be attained exclusively by one means – and on how detailed the European text is.[74] It is also worth noting that directives may set minimum standards Member States cannot fall below of (minimum harmonisation), but also the precise standards to be translated by each Member State into its national law (full harmonisation). The latter alternative aims at reducing fragmentation, creating a level playing field, and gaining uniformity and coherence, while the former tries to integrate markets but preserving to a higher degree both autonomy and diversity within the European Union.[75] Sometimes full harmonisation does not leave "much more room for national variations than a regulation would have done."[76]

Since the differentiation between minimum and full harmonisation has been raised, there is a point that should not be left out. The second alternative sometimes raises concerns about a decrease in the level of protection granted to the consumers in certain countries. Obviously, such concern is only justified if the standard set by the harmonised measure falls below the pre-existing national one.[77] This risk is not significant regarding reputational feedback systems, because few Member States count with specific rules on the matter, and it would be rare for the harmonised norm to be less protective.

In sum, the array of possibilities is extremely large. There are many intermediate options between the main categories mentioned. In fact, some aspects of a hypothetical legal framework specifically designed for reputation systems could be fixed by way of a regulation, whereas others could be subjected to full-harmonisation, others to minimum harmonisation, and some features left in optional codes.[78]

I will not elaborate further on harmonisation instruments. But it is worth noting that, according to authoritative opinions, a plausible alternative for rules on feedback systems is combining a directive – that would fix basic elements – with voluntary standards, presuming compliance with the directive when those standards are respected.[79] This approach has been followed by both the Research Group on the Law of Digital Services in article 8(3) of its *Discussion Draft of a Directive on Online Intermediary Platforms*, and the European Law Institute in article 5(3) of the *Model Rules on Online Platforms*.

In any event, account must be taken of the principle of proportionality set forth in article 5(4) of the Treaty on European Union.[80] According to this provision, "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." And this could also be connected with article 296 of the Treaty on the Functioning of the European Union, stressing that "where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality." Thus, such principle would indirectly imply that, all things being

[74] Blanquet (2018, pp. 379–381). See also Mangas Martín and Liñán Nogueras (2020, p. 408).

[75] Weatherill (2016, pp. 225, 227, 234–237).

[76] Lilleholt (2011, p. 355).

[77] See Weatherill (2005, p. 29); Lilleholt (2011, pp. 355–356); Grundmann (2013, pp. 115, 123); Weatherill (2016, p. 239).

[78] See Grundmann (2013, p. 121) – not focused on reputation systems.

[79] Busch (2016, pp. 233–234, 243).

[80] OJ C 202, 7.6.2016, p. 13 (consolidated version).

equal, directives should be preferred to regulations and framework directives to more detailed measures.[81] This was explicitly stated in point 6 of former versions – before the adoption of the Lisbon Treaty – of the Protocol on the application of the principles of subsidiarity and proportionality.[82]

To summarise, legal fragmentation provides a strong argument for regulating reputational feedback systems at the European Union level, but there are also good reasons to hold that decentralisation would be a better choice. The analysis must continue with Part 4, which will present some ideas that in principle support regulation, and Part 5, that will explore arguments against it.

4. The case for regulation. Some ways of improving the current scenario

4.1. Setting the scene. Existing European rules affecting reputational feedback systems

Reputational feedback systems do not count with a comprehensive, specific legal framework at the European Union level, but they are far from being unregulated. Harmonised rules already protect users against some of their dangers. Only two examples – probably the most important ones – will be given.

A first relevant instrument is the Directive on electronic commerce,[83] because online platforms using reputational feedback systems will usually qualify as a provider of an information society service ("any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"). The big question is whether those platforms benefit from the exemption of liability set out in article 14 for hosting service providers, for the information stored – in our case ratings and reviews. First, it must be recalled that, according to recital 42, such exemption only applies when the activity is restricted to "operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient." The same recital states that such activity is therefore merely technical, automatic, and passive, implying a lack of knowledge of and control over the information by the information society service provider. Second, the exemption will not apply when the service provider has "actual knowledge of illegal activity or information" (art. 14(a)). And third, the exemption will not apply either, when the provider has such knowledge and does not act fast "to remove or to disable access to the information" (art. 14(b)).

The condition of playing a passive role is especially problematic for platform operators providing review mechanisms. In the context of a sales platform, the Court of Justice of the European Union has held that storing offers for sale, setting the terms of its service, being remunerated, and providing general information to its customers, is not enough to deny it the exemption of liability. However, optimising the presentation of the offers for sale and promoting them amounts to providing assistance, and this would not allow to qualify the position of the operator

[81] BLANQUET (2018, pp. 124–125).

[82] OJ C 340, 10.11.1997, p. 105; OJ C 321E, 29.12.2006, p. 308. See MANGAS MARTÍN and LIÑÁN NOGUERAS (2020, p. 87).

[83] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1).

of the online marketplace as neutral.[84] In light of this case-law, it is questionable that platform operators providing review tools can be regarded as passive, considering their efforts to design successful feedback systems, so users make a decision based on them and even conclude the contract through the platform.[85]

A second, important European text is the Unfair Commercial Practices Directive, because online platforms using review tools often qualify as a "trader." This notion is defined in article 2(b) as "any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader." And the practices referred to are defined in article 2(d) as "any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers."

The Directive forbids misleading and aggressive practices, and, in general, any practice contrary to the requirements of professional diligence that materially distorts or is likely to materially distort the economic behaviour of the average consumer (art. 5). Some years ago, the European Commission stated that making consumers believe that displayed reviews reflect real users' experiences when that cannot be ensured, explicitly claiming that reviews originate from users without taking reasonable steps to increase the likelihood of that being so, posting fake reviews in the name of consumers, suppressing genuine negative reviews without informing consumers that only a selection is displayed, or not disclosing the connection between the provider of the review tool and the trader that supplies the reviewed product, all violated the Directive.[86] Not to inform about the main features of the feedback system, including those determining its design and how reviews are displayed, could also be qualified as a misleading omission.[87] The recent Directive (EU) 2019/2161 modifies – among others – the Unfair Commercial Practices Directive, and some points inserted in the latter's Annex I specifically relate to feedback systems. Practices to be considered unfair in all circumstances now include "Stating that reviews of a product are submitted by consumers who have actually used or purchased the product without taking reasonable and proportionate steps to check that they originate from such consumers" (23b), and "Submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products" (23c).[88]

Thus, the situation of reputational feedback systems is comparable to the one of online platforms. While there is no such thing as a "law of platforms," their structure and activity is partially covered by different (fragmented) rules.[89] Consequently, the question is whether *further, comprehensive* regulation on feedback systems is desirable.

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[84] Judgment of 12 July 2011, *L'Oréal and Others*, C-324/09, ECLI:EU:C:2011:474, paragraphs 111–116.

[85] On the relationship between reputational feedback systems and the Directive on electronic commerce, I have followed the presentation of NARCISO (2019, pp. 568–573). See also BUSCH (2016, pp. 237–238).

[86] EUROPEAN COMMISSION (2016b, pp. 126–129).

[87] On the relationship between reputational feedback systems and the Unfair Commercial Practices Directive, see NARCISO (2019, pp. 573–578).

[88] See recitals 47–49 of Directive (EU) 2019/2161. Scholars have assessed probable violations within the domain of feedback systems from the point of view of national law, too. See SCHIRMBACHER (2018).

[89] RODRÍGUEZ DE LAS HERAS BALLELL (2017, pp. 151–153).

Another question, intertwined with the previous one, is how to intervene. The softest approach would be a simple mandated disclosure on the features of the feedback mechanism used by the platform. Platforms could design it completely as they please, and their only duty would be to transparently explain its characteristics. The hardest approach would be to establish rules on both how rating and review systems must be designed, and the results disclosed. In between, all kinds of combinations of obligations of information and more "substantive" rules. Finding the appropriate legal framework is crucial to avoid hyperregulation. The European Commission has acknowledged that the need for intervention in some areas of online platforms may disappear if feedback systems are trustworthy.[90]

A third question that could be posed is whether to apply the eventual regulation to all platforms that use reputational feedback systems, or only to some of them. For instance, one may conceive excluding those platforms whose users are all of them businesses.[91] This aspect will be nevertheless left aside, and I will mainly have in mind situations where a non-commercial party intervenes.

Much ink could be spilled on every issue covered in this part, but an exhaustive reflection on specific measures goes beyond the scope of this paper. A presentation of some lines of action is enough to show how reputational feedback systems could be more useful and trustworthy with the right rules.

4.2. Mandated disclosures

As Schwartz and Wilde have explained, regulation tends to be regarded as justified in situations of imperfect information, because it is widely thought that less-than-perfectly-informed consumers will not be able to make good choices.[92] In fact, obligations of information have been a traditional regulatory technique in the EU consumer protection agenda, due to its lesser intrusiveness and the aim of maintaining consumer (informed) choice.[93] Therefore, a general mandated disclosure on how the review and rating system works, as well as a duty to disclose specific relevant data, seems highly recommendable. The public availability of each online platform's policy on feedback has been deemed essential for market transparency.[94] All information to be supplied should be easily accessible, plain, and intelligible. The extensive interpretation made by the Court of Justice of the European Union of the transparency requirement in certain contexts, such as unfair terms in consumer contracts,[95] might inspire requirements for transparency in reputational feedback systems.

[90] European Commission (2016c, p. 4).

[91] See Rodríguez de las Heras Ballell (2017, pp. 160–161).

[92] Schwartz and Wilde (1979, pp. 632, 682).

[93] Weatherill (2005, pp. 84–85).

[94] Busch (2016, p. 234).

[95] See for instance judgment of 30 April 2014, *Kásler and Káslerné Rábai*, C-26/13, ECLI:EU:C:2014:282, paragraphs 70–73; judgment of 20 September 2017, *Andriciuc and Others*, C-186/16, ECLI:EU:C:2017:703, paragraphs 44–50; judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, ECLI:EU:C:2020:138, paragraphs 49–55.

Examples of principles and rules setting out general obligations linked to transparency are ubiquitous. The *Key principles for comparison tools* contain the duty to explain the creation, posting, ranking, and sorting of consumer reviews.[96] In France, special attention must be paid to article L. 111-7-2 of the French Consumer Code. According to this provision, natural or legal persons who have as principal or secondary activity collecting, moderating, or disseminating online consumer reviews – ratings are included, since article D. 111-16 specifies that both "qualitative or quantitative" opinions are covered – have a duty to supply honest, clear, and transparent information on the procedures for processing and publication. They must also signal whether reviews are subjected to their control and, if so, its main features. In Portugal, article 19.1.d) of Act No. 45/2018 on transportation of passengers in ordinary vehicles mediated by online platforms[97] imposes on platform operators the obligation to make quality assessment mechanisms available for consumers, both before the beginning of a ride and during it. They must be transparent, credible, and reliable – criteria related to clarity, unambiguity, and trustworthiness.[98]

More specific ideas on transparency can be easily found, too. According to the Danish Consumer Ombudsman's *Guidelines on publication of user reviews*, if results are consolidated into one overall rating, there is a duty to "provide general and clear information about how the rating has been determined and the total number of reviews on which the rating is based."[99] The *Key principles for comparison tools* highlight that consumers must be informed if a review has been paid for or the reviewer's opinion may be influenced because of the way the opinion has been procured, while sponsored reviews and organic results "should be distinguished, visually and structurally."[100]

In France, pursuant to article L. 111-7-2 of the Consumer Code, the date of each review and eventual updates must be indicated. If a review is not published, the consumer who submitted it must be told the reasons why (reaffirmed in art. D. 111-19). Other provisions further define transparency requirements. Information to be provided near (*à proximité*) the reviews and in a clear and visible manner encompasses whether there is a procedure of control of reviews, the dates of both the publication of the review and the "consumer experience" concerned (notion that does not require an actual purchase – art. D. 111-16), and the criteria to order reviews – among which a chronological one is compulsory (art. D. 111-17.1º). Information to be displayed in an easy-accessible specific section (*rubrique*) includes the existence of consideration in exchange of the review, and the maximum time periods to publish a review and for its storage (art. D. 111-17.2º). Additional obligations are imposed on the natural or legal persons that exercise control over reviews. In the aforementioned section, they must define the main features of such control, whether the consumer who submitted the opinion can be contacted, whether reviews can be modified and the method of such modification, and the reasons that may justify the refusal to publish a review (art. D. 111-18).

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[96] MULTI-STAKEHOLDER GROUP ON COMPARISON TOOLS (2016, p. 5).

[97] Lei n.º 45/2018, de 10 de agosto. Regime jurídico da atividade de transporte individual e remunerado de passageiros em veículos descaracterizados a partir de plataforma eletrônica, ELI: https://data.dre.pt/eli/lei/45/2018/08/10/p/dre/pt/html.

[98] MORAIS CARVALHO (2018, pp. 1214-1216).

[99] FORBRUGEROMBUDSMANDEN (2015, p. 16).

[100] MULTI-STAKEHOLDER GROUP ON COMPARISON TOOLS (2016, p. 5).

All the principles, guidelines and rules presented seem capable of increasing transparency in the market and making reputational feedback systems more reliable. And those are not the only information duties one can imagine. The possibilities to improve the current situation through this type of legislation are obvious, just like the advantages of making it at the European level.

However, mandated disclosures have sometimes been criticised. It is acknowledged that their success depends on the consumer properly processing the information supplied and rationally acting upon it.[101] Some authors even claim that they constitute a regulatory technique inevitably deemed to failure.[102] Of course, this negative opinion is far from being unanimous, and such a technique – with the necessary nuances and adjustments to make it effective – has been backed up as well.[103] In any case, it is impossible to deny that supplying more information does not mean consumers will read it, process it, or understand it, while entailing a risk of "information overload" that might result in important information going unnoticed.[104] Overload is combined with the so-called "accumulation problem," i. e., many mandated disclosures in different areas pile up, and both aspects increase the risk of useful information being crowded out.[105] Besides, the heterogeneity of consumer preferences also concerns the information people are interested on. This means that a given information provided in a certain way is not equally satisfactory to all consumers. Mandated disclosures may attract their attention to features of little interest to them.[106] That is why a thorough study before deciding which data must be disclosed seems unavoidable. For instance, some reports indicate that many consumers look at the average score but not at the number of people who have submitted a rating.[107] This being so, it could be questioned whether an eventual rule imposing on platforms the duty to disclose the total number of opinions submitted would be welfare-enhancing.

4.3. Behavioural insights and a colour code for ratings and reviews

This section merely aims to highlight that behavioural research can help to make better regulatory proposals on feedback mechanisms. The cognitive style of each person is different. And the heuristics used to make decisions also vary depending on the underlying information, mainly when the consumer already has a first impression and is trying to increase the amount of data gathered.[108] Behavioural research can tell a lot about how users respond to different kinds of information, and this would make possible to articulate better mandated disclosures for reputational feedback systems. Findings in that area may also inspire substantive rules, suggesting that feedback systems should be designed in a certain way, thus supporting more intrusive regulation. Further thinking could make us draw ideas from – among many others – studies on consumer perception of numerical ratings,[109] on the "binary bias" that makes people

[101] Weatherill (2005, pp. 85, 113).

[102] Ben-Shahar and Schneider (2011).

[103] Bar-Gill (2015).

[104] Mik (2011, p. 336).

[105] Ben-Shahar and Schneider (2011, pp. 686–690, 737).

[106] Ben-Shahar and Schneider (2011, p. 745).

[107] Busch (2016, p. 240).

[108] Bae and Koo (2018, pp. 751–761).

[109] Kyung, Thomas and Krishna (2017).

classify quantitative results into two qualitative categories,[110] or on how the format of online ratings influences purchase intentions.[111]

To give just one example, one can think about a rule mandating a colour code for feedback in online platforms, analogous to traffic light systems in food labelling. For reviewers, it would be an additional element to make them more aware that they are giving an extremely bad, bad, average, good or excellent opinion. In fact, some companies already display a feedback form where a numeral grade is combined with a one or two-word remark and a colour. For users, colours would help them to ascertain whether the review is extremely negative, extremely positive or any grade in between. This could be useful because in certain contexts moderate reviews are more persuasive than extreme ones.[112] That a traffic light system may facilitate choice within the digital context in general is not a new idea.[113] Nevertheless, how information is aggregated and displayed is a key aspect of the feedback system architecture.[114] Therefore, caution is needed while developing any rule on the matter, because different platforms may need different appearances.

4.4. Some possible "substantive" rules on feedback systems

Since this paper aims at fostering a discussion and not at exhaustively analysing concrete regulatory possibilities for feedback systems, only some examples will be given. Professor Busch's study, which explores the options outlined in this section that are not explicitly referred to a source, offers a more complete picture.[115]

There are many conceivable rules on how feedback systems should be articulated. Maybe platforms should be obliged to publish reviews by both parties – where applicable – at the same time to mitigate the problem of rating collusion, grant a right of reply to those affected by an opinion, or establish an expiry date for ratings and reviews to avoid information obsolescence. For their part, the *Key principles for comparison tools* affirm that all reviews should be published in an objective manner if they do not violate the terms of service nor defamation laws.[116] This would prohibit increasing the visibility of some reviews by showing them at the beginning of the list while sending others to the bottom. It seems however unsure whether altering the order would be allowed if based on objective grounds, such as the number of people who have reported one review as being useful, or when the author of the opinion has been somehow recognised as a "valued" or "experienced" reviewer. In my view, this should be permitted. Filtering information to counterbalance an overwhelming number of reviews is a reasonable goal that platforms may pursue.[117] The *Key principles* also indicate that aggregated review scores should not count sponsored reviews in.[118] In France, article L. 111-7-2 of the Consumer Code obliges to offer a

[110] Fisher, Newman and Dhar (2018).

[111] Kostyk, Niculescu and Leonhardt (2017).

[112] Kupor and Tormala (2018).

[113] Grundmann and Hacker (2018, pp. 34–35).

[114] Dellarocas (2011, pp. 7–8).

[115] See Busch (2016, pp. 234–242).

[116] Multi-Stakeholder Group on Comparison Tools (2016, p. 5).

[117] Dellarocas (2011, p. 4).

[118] Multi-Stakeholder Group on Comparison Tools (2016, p. 5).

free-of-charge function so traders can report doubts about the authenticity of reviews that concern them – requiring to provide justification for their suspicions. In Portugal, article 19.5 of Act No. 45/2018 forbids both platform operators and drivers to create and use mechanisms to evaluate customers.

Regarding rules on feedback systems, an important decision to make is whether a mandated disclosure is enough or stricter rules are needed. For example, would it be sufficient for the platform to disclose that anonymous feedback is permitted, should it necessarily allow filtering the results in order for users to have easy access to the rating average and reviews of only identified people, or should anonymous feedback be banned altogether? The same question could be raised about verified transactions, although this would be problematic in certain sectors where people often do not keep the receipt (e. g., bars and cafés). Similar considerations are possible about "incentivised" opinions.

In the European context, identifying the least intrusive measure is crucial to comply with the principle of proportionality (art. 5(4) of the Treaty on European Union). As stated by the Court of Justice in *Nelson and others*, such principle "requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[119] The three anchors identified – appropriateness, necessity, and non-disproportion – tip the scales in favour of granting more liberty to Member States, individuals, and companies.[120]

4.5. The Discussion Draft of a Directive on Online Intermediary Platforms and the Model Rules on Online Platforms

Considering the *auctoritas* of the members of the Research Group on the Law of Digital Services who elaborated the *Discussion Draft* and of all those who worked in the European Law Institute's Project Team on *Model Rules on Online Platforms*, the two texts deserve a section to present their specific rules on reputational feedback systems.

Four main elements can be found in article 8 of the *Discussion Draft of a Directive on Online Intermediary Platforms*. First, a mandated disclosure on the modalities of collection, processing and publication of ratings and reviews. Second, a duty to comply with the standards of "professional diligence," notion to be understood as in the Unfair Commercial Practices Directive.[121] According to the latter's article 2(h), it means "the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity." Third, a presumption of conformity to the standards of professional diligence if the feedback system respects certain standards referred to in the provision. And fourth, a right to "reputational data portability" upon termination of the contract between platform and supplier

[119] Judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, ECLI:EU:C:2012:657, paragraph 71.

[120] BLANQUET (2018, pp. 124–125).

[121] BUSCH (2018, p. 53).

or platform and customer. Existing reviews must be transferable "in a structured, commonly used and machine-readable format." Surely, this right is inspired in the one granted in article 20 of the General Data Protection Regulation.[122]

Regarding the third aspect, the *Discussion Draft* offers two sets of standards feedback systems can comply with to benefit from the presumption of conformity. Either eventual voluntary national standards transposing European ones, or the ones set out in article 8(4). The latter cover many different areas. Platform operators claiming that reviews are made by real customers must take "reasonable and proportionate" measures to verify that there is a confirmed transaction behind them. Operators must signal those reviews asked for in exchange of any benefit. Reviews must be published without undue delay and, if they are rejected, the author must be informed without undue delay about the reasons why. Users must be offered the possibility to see reviews in chronological order, although the order by default can be a different one, provided that it is not misleading. Deleting older reviews is not imposed on platforms, but if they do, they must inform users. There is, however, a minimum time frame of storage of twelve months. Platforms must indicate the total number of ratings if they are consolidated into an overall score. Finally, in order to warn about reviews whose authenticity may be doubtful, the platform must provide a free-of-charge complaint mechanism, so users can submit a reasoned notification on the matter.

Regarding the *Model Rules on Online Platforms*, articles 5 to 7 take the *Discussion Draft* as a basis – for the most part they clarify and further develop the latter's article 8.

Article 5 of the *Model Rules* sets out two general requirements for reputation systems. First, a disclosure on how the relevant information is collected, processed, and published as reviews. And second, the obligation to comply with the requirements of professional diligence. Again, there is a presumption of satisfying such requirements if certain standards are complied with. Either "voluntary standards adopted by a national, European or an international standardisation organization" – ISO 20488:2018 is explicitly cited, or the criteria set out in Article 6. Just like in the *Discussion Draft*, many different areas are concerned by these criteria.

In all cases, reasonable and proportionate steps must be taken to make sure that each review originates from a genuine experience. When it is asserted that a review is based on a verified transaction, the platform operator must ensure its author was one of the parties. There must be an indication that the review has been incentivised, if the operator knows or ought to know that the author has received any benefit for submitting it. However, when the platform operator knows or ought to know that such a benefit has been procured in exchange of giving the review a positive or a negative content, the review must not be or remain published. Only legitimate reasons justify rejecting or removing a review. When this happens, the author must be informed without undue delay about it and the reasons why reject or removal took place. However, it is clarified that "Platform operators are not required to disclose any information which could easily be used to manipulate the reputation system to the detriment of customers."

[122] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1). For a thorough study on the right to personal data portability, see PAZOS CASTRO (2020).

Reviews are to be published without undue delay and their submission date must be indicated. They must be presented by default in a non-misleading order. There is a duty to inform about the main parameters determining such order or relative prominence, which will be easily accessible for users. It is compulsory to offer users the possibility to view reviews in chronological order. If reviews are not displayed anymore after a given period of time, users will be informed of its duration, which will be subjected to a reasonableness criterion and not shorter than 12 months. In case individual reviews are consolidated into a single rating, the *Model Rules* forbid to lead to misleading results through the calculation method. When factors other than the numerical average influence the consolidated score, users must be informed about them. The total number of reviews used to calculate the consolidated rating must appear, and those reviews which are not displayed because of exceeding a fixed period of time cannot be used for the calculation. Finally, platform operators must put in place free-of-charge mechanisms allowing users two functions. First, submitting a reasoned notification of any abuse. And second, for those affected by a review, responding to it. The response must be published without undue delay and together with the review.

Article 7 of the *Model Rules* deals with the portability of reviews. It grants the right to have reviews transferred to the reputation system of another platform operator in a structured, commonly used and machine-readable format. But, differently from the *Discussion Draft*, the right may be exercised not only upon the termination of the platform-user contract, but also at least monthly. There is a duty to inform, before the conclusion of the contract between the platform and the user, about the processes, technical requirements, timeframes, and charges that apply for transfers. The platform operator that receives reviews from another platform must verify that they were generated respecting the requirements of professional diligence. And it will have to indicate that the imported reviews were generated on a different platform.

Digital companies should carefully assess the two proposals. Not because these would be bad regulation or negative for them – I have no intention of making any appraisal, but simply because of the practical consequences of adopting them. In my view, the blurred notion of "professional diligence" combined with the presumption of conformity if some standards are complied with, would massively steer platform operators to design their feedback systems exactly according to the criteria of a standardisation organisation or the ones set out in the norm. That is why although the standards referred to in the proposals are not mandatory, their effective influence would probably be very high.

4.6. Closing comment

Part 4 has outlined some principles, rules and lines of work that could help to improve reputational feedback systems. Many more can be imagined, and it would be easy to see which problems or weaknesses could eventually be corrected. That is why exploring such possibilities would make the paper longer without providing corresponding benefits in terms of more insight to the reader. On the contrary, identifying the negative side of regulating is less obvious. This makes particularly important not to hide the arguments against intervention.

5. The case for no (or not harmonised) further intervention

5.1. Preliminary remark

The following are some arguments that could eventually support a negative answer to the question on whether adopting a comprehensive set of rules on reputational feedback systems is convenient. Most of them would make that not only regarding harmonised regulation, but regulation in general – the alleged negative effects would only be worsened were the rules enacted at the Union level. Only section 5.7 contains considerations exclusively applicable to European legal approximation. My aim is not to back these arguments up, nor arguing that they are stronger than those in favour of regulation. They are just issues that the eventual discussion this paper tries to promote should not avoid.

5.2. There may not be any significant market failure

The case for no further intervention might begin by noting that "market failures" are opportunities for businesses to make profits by correcting them.[123] Intervention would not be necessary because platform operators are very much interested in identifying as many shortcomings as possible and solving all existing problems in the most efficient way. Nevertheless, European scholars and institutions are not particularly fond of this line of reasoning. Market failures are indeed the starting point for harmonised regulation aimed at consumer protection.[124] The argument would then have to be that there is no *significant* market failure to be corrected.

Imperfect information is one of the situations that ordinarily justifies the call for rules. However, behind any regulation aimed at forcing businesses to disclose some data, there often is the assumption that without such a duty the data will never be disclosed. Yet, competitive markets do punish businesses that are not transparent enough regarding features consumers are truly interested on. Put in a different way, consumers reward transparent traders that give them useful information. There is apparently no reason to maintain that this claim, made for example in connection with food labelling,[125] cannot hold for reputational feedback systems as well. People demand (relevant) information, so in the long run platforms will probably offer successful review tools.[126] Another typical argument to intervene in a market is lack of competition. However, platform operators are trying to correct the reliability problems of their feedback mechanisms.[127] There are platforms where reviews by both parties are published simultaneously to avoid the collusion problem. Others ban incentivised reviews. And average ratings are sometimes available classified for several periods of time, thus reducing the obsolescence problem. This amounts to a "racing to the top," precisely the opposite of the lack of competition that could be regarded a market failure.

[123] See Kirzner (1997, pp. 69–73, 81–82); Steckbeck and Boettke (2004, pp. 220–223, 226–227); DiLorenzo (2011, pp. 249–253); Koopman, Mitchell and Thierer (2015, pp. 532–533); Thierer et al. (2016, pp. 832–833, 836–840, 849–850).

[124] Mak (2016, p. 399).

[125] Adler (2016, p. 32).

[126] Thierer et al. (2016, p. 839).

[127] Competition and Markets Authority (United Kingdom), paragraphs 3.6, 3.20, 3.21, 4.18, 4.31.

Nobody puts into question neither that digital business models need to ensure trust among strangers to succeed,[128] nor that platforms have incentives to correct the shortcomings of feedback systems.[129] The key lies on whether incentives are strong enough. An affirmative answer is plausible. Shortcomings of feedback systems are not merely making it harder for platforms to make profits but putting their business models on the line. Besides, all companies have incentives to highlight not only their reliability, but also the unreliability of their competitors.[130] Surely, the persistence of some non-major weaknesses will probably not be avoided.[131] But the smaller the underlying problem, the lesser the case for intervention. And, since the main platforms using feedback systems are present all over Europe, the absence of any important market failure can be said with regard to both the national and the Union spheres.

The European Commission wants to help the industry to articulate voluntary action to tackle trust-diminishing practices.[132] Maybe we should not go beyond that for now. A satisfying solution could result from the combination of repeated interaction and third-party certifications and "quality labels" for reputational feedback systems.[133] Evidently, voluntary tools such as disclosures by businesses themselves and by certifiers are not perfect.[134] But nor is regulation. And we should not commit the "Nirvana fallacy" and compare imperfect, private arrangements with a perfect, ideal legislation. The proper comparison is between imperfect, market-based solutions, and equally imperfect, regulatory tools.[135]

5.3. The result of a cost-benefit analysis remains unsure

Evaluating the costs and benefits of any regulatory project is very difficult. Lawmakers make predictions on what will happen if things are left their way and what the results will be if some given measures are taken. Rugged terrain, forecasting the future and identifying the unintended consequences regulation will entail. This is even more so in the dynamic context of digital business models and ever-evolving technologies, where review tools are widely used. It has been said that in such areas errors in legislation are more common[136] and the price of passing bad regulation higher.[137] At the same time, offering an assessment that leaves aside indirect costs constitutes an incomplete depiction of the regulatory impact.[138] It is necessary to include opportunity costs – the loss suffered in all areas where funds to comply with regulation would have been used had it not been adopted,[139] as well as costs of "implementation and

[128] Frenken and Schor (2017, pp. 4, 6).

[129] Busch (2016, pp. 224, 236–237).

[130] Klein (1997, pp. 118–120).

[131] Busch (2018, pp. 51–52).

[132] European Commission (2016a, p. 11).

[133] See Shearmur and Klein (1997, pp. 32–33, 36–41).

[134] Dranove and Jin (2010).

[135] See Demsetz (1969).

[136] Easterbrook (1996, p. 215).

[137] Shapiro and McDonald (2018, pp. 461–462).

[138] Shapiro and McDonald (2018, pp. 463–464).

[139] Posner (2003, p. 6).

imposition."[140] And it should not be forgotten that one specific rule is rarely too costly, but when tens of them are approved, the whole bundle might become prohibitive.

Prospective benefits are always unknown, and estimations are sometimes too wide. For instance, the Explanatory Memorandum of the 2018 Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services[141] affirmed that it could reverse "a dampening effect on the online platform economy [...] amounting to at least between EUR 0.81 billion and EUR 4.05 billion." On other occasions the estimated figures are narrower, but their correctness is put into question.[142] Scepticism is not unreasonable, for the potential benefits are usually reported by a source that is trying to justify why action is needed. In other words, the source has an incentive to be very optimistic and overvalue the advantages of its plan. A better regulatory framework will certainly foster innovation, business opportunities and commerce, but nobody knows the potential of the platform economy. In this regard, three aspects must be underlined. First, it is dubious whether traditional systems to measure economic impact provide a good picture when it comes to the information economy. Second, the evolution capacity of the data economy is huge, thus reducing the reliability of any prediction. And third, economic estimations greatly differ and there are examples where reality did not meet the forecasts.[143]

In this scenario, it becomes difficult to assert that specific regulation on reputational feedback systems will enhance welfare. Even mandated disclosures are not trouble-free. They can lower search costs for consumers and provide other benefits, but they entail disadvantages and risks, too.[144] In particular, complying with the rules represents a cost for traders – who will possibly pass part of it on to their customers – and authorities must incur in costs to control and ensure compliance. And regarding potential benefits derived from disclosures, let us remember that more accessibility of information does not necessarily mean a significantly increased readership.[145] It is doubtful whether lawmakers have the tools to make all the necessary calculations.[146] And the wider the geographical scope of the potential action, the more difficult for such calculations to be reliable.

5.4. The average reputational feedback system user is quite informed

In European Union law, although some consumer abstract "images" to inspire policy choices coexist,[147] the main one is that of the average consumer – someone who is "reasonably well-informed and reasonably observant and circumspect."[148] In the case of users who pay attention

[140] Gomez and Ganuza (2011, p. 281).

[141] COM(2018) 238 final. This proposal resulted in Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11.7.2019, p. 57).

[142] See Ramberg (2018, p. 326).

[143] Ontiveros et al. (2017, pp. 15, 29–30).

[144] Ben-Shahar and Schneider (2011, pp. 735–742).

[145] See Marotta-Wurgler (2011, pp. 171–182).

[146] Schwartz and Wilde (1979, p. 668).

[147] Mak (2016).

[148] Judgment of 16 July 1998, *Gut Springenheide and Tusky v Oberkreisdirektor Steinfurt*, C-210/96, ECLI:EU:C:1998:369, paragraph 31.

to ratings and reviews, the average one happens to be quite informed, possibly in a good-enough position to protect themselves. In this case, a general legal framework that forbids false and misleading information – which Europe already has – might suffice, as it has been claimed in other contexts.[149]

Studies show that recommendations from relatives and friends are more trusted than online reviews and ratings, and that the latter are not *much* more trusted than advertisements through traditional media.[150] Consumers do not use feedback as their only source of information, and they do not give the same value to reviews and ratings in all sectors[151] and for all kinds of products – users rely more on reviews when the purchase is "material" (about possessions) than when it is "experiential" (about events inspiring feelings).[152] Users look for elements to judge the trustworthiness of the reviewer, attach more value to reviews of moderate ratings than of extreme ones, and take into account price considerations.[153] The fact of paying more attention to negative reviews than to good ones, looking for more information especially when ratings are low, relying less in third-party opinions as they get more experience themselves, or being aware of the existence of fake reviews and the rating collusion problem,[154] all lead to think the average European user of feedback systems is sophisticated enough. And I have not found any indication that users of a particular Member State are far-below the average in that regard – something that might eventually support the adoption of national regulation but not harmonised rules.

In this context, it can be maintained that further regulation is not the best solution. All paternalistic proposals – those that restrict choice but also the "softer" ones related to informational duties – reduce incentives for self-learning. They discourage to a higher or lesser degree observation, experience, memory, prediction, problem-solving processes, and so on. Paternalism can aggravate decision-making problems.[155] Some could argue that information asymmetry issues should not be analysed from the perspective of the average consumer that would somehow represent the class, but rather by assessing whether, in an overall scenario of imperfect information, there is enough competition to yield satisfying solutions for all consumers.[156] However, the preference for not intervening in the market can stand with such approach, because platforms are trying to improve their reputational feedback systems, as outlined above.

5.5. Rules on feedback systems may weaken the future European digital consumer

Depending on the type of access the source had to the reality or facts reported, we can easily differentiate four categories. Information can be given by an authoritative source (someone with expertise), by an eyewitness (a person who had direct contact with the event), by somebody in position to know (the person could objectively know, but it is unsure whether they actually do),

[149] See Adler (2016, p. 30).

[150] Malbon (2013, p. 143); Fisher, Newman and Dhar (2018, p. 487).

[151] Competition and Markets Authority (United Kingdom), paragraphs 3.15–3.17; Kim (2020).

[152] Dai, Chan, and Mogilner (2020).

[153] Malbon (2013, pp. 144–145).

[154] Bae and Koo (2018, pp. 751–756).

[155] Klick and Mitchell (2006).

[156] Schwartz and Wilde (1979, pp. 636–638).

or by just anybody who might tell. If all four categories are included within the notion of "testimony," it does not seem the presumptive veracity of any speech can stand. It looks risky to believe a given testimony without having any knowledge of the reliability of the speaker.[157]

Genuinely authoritative sources are virtually non-existent in online reviews and ratings. Verified transactions get closer to the eyewitness situation, but most feedback belongs to the last two categories. In addition to that, consumers have different preferences and values, that is, different scales to assess quality. If other problems are added to the mix – such as those mentioned in Part 2 – the result will inevitably be "noisy" data.[158] This being so, as a matter of principle people should be told to be relatively wary of reputational feedback systems. This is not to say that they should consider false – and give absolutely no weight to – all feedback unless there is clear evidence otherwise. Obtaining such evidence is extremely difficult and inefficient, and review mechanisms would be abandoned altogether. It is just to promote a certain degree of scepticism, alertness, and a critical look at things. It would be wise to monitor all sources, although such monitoring does not need to be – in fact cannot be – exhaustive and completely conscious.[159] If this perspective is accepted, comprehensively regulating reputational feedback systems may be a step in the wrong direction.

Being undisputed that a reputation system can only fulfil its function if it is reliable, it seems fair to think that "it is necessary to clearly define the requirements for such reputation mechanisms."[160] But this could mean steering consumers towards presuming veracity in an environment that because of its very own nature recommends some wariness. The Internet makes easy for anyone to share truthful and useful information, but also false and confusing one.[161] In a digital world of complex data and fake news, people should be skilled at questioning and assessing the trustworthiness of the source, rather than the content of the information itself. In other words, at determining to which extent persons and institutions disseminating a given information deserve to be in our "system of knowledge."[162] And this requires checking their goals and vested interests.[163] A complete set of rules on feedback systems would possibly not favour more competent consumers in this sense.

5.6. Rules on feedback systems bring a risk of regulatory capture and could be obstacles for innovation

One could claim that approximation of laws goes against regulatory capture because fragmentation creates transaction costs that, while not representing a major problem for big firms, are impossible to absorb by the small and medium-sized ones.[164] Therefore, a common regulatory landscape would give the latter more chances to succeed. However, harmonisation is

[157] The previous considerations are inspired in the presentation made by FRICKER (1995, pp. 396–400).

[158] DRANOVE and JIN (2010, pp. 945–946).

[159] See FRICKER (1995, pp. 403–408).

[160] BUSCH (2016, p. 232).

[161] MALBON (2013, p. 149).

[162] ORIGGI (2018).

[163] See ANDRESKI (1973, pp. 60-61).

[164] See WEATHERILL (2005, p. 161).

not simply about market integration, but also a way to regulate and re-regulate spheres of trade.[165] And this brings back the risk of regulatory capture that only big firms may aspire to.

The negative consequences of regulatory capture are numerous – less competition, more resources going to lobbying rather than to research and development, less incentives for satisfying consumer preferences, and so on.[166] The risk is higher if the rules passed relate to how feedback systems must be designed, and lower if they concern mandated disclosures. But it is never non-existent. For example, a duty to disclose the total number of reviews or ratings submitted benefits those traders who already have entered a market, and especially big players. This will be so even if, in order to reduce obsolescence, lawmakers set a time limit after which reviews must be erased and ratings not counted, unless the time limit is extremely short – which in turn would make the feedback mechanism worthless. In any case, the tendency does not seem to be towards an early oblivion. The *Guidelines on publication of user reviews* published by the Danish Consumer Ombudsman state that an intermediary "should not on its own initiative remove a user review within 12 months."[167] The same minimum period has been chosen in article 8(4)(f) of the *Discussion Draft of a Directive on Online Intermediary Platforms* and in article 6(g) of the *Model Rules on Online Platforms*.

It is also important to remember the anticompetitive effect of highly protective rules for consumers. These benefit but so do big firms, as their weaker competitors cannot absorb the increased costs, or they can but suffer a competitive disadvantage.[168] Raising operating costs is a way big players can silently protect and improve their position within a market.[169] Such an anticompetitive effect may also result from the higher costs due to mandated disclosures.[170]

Another relevant aspect is that nobody knows which business models and technologies will exist some years from now. People are imaginative, bold, and surprising.[171] Let us imagine a self-learning algorithm that, after processing all ratings and reviews, summarises them into only one rating-plus-review expression on the basis of whatever criteria it develops. What would happen if a platform operator believed this single *metaopinion* provides better results and wished to propose consumers to make decisions based on it? Surely, whether using algorithms that correct "raw" ratings should be allowed is up for debate. They could provide better information, but there are manipulation and discrimination risks.[172] With this extreme example, the goal is just raising the argument that regulating review mechanisms could be an obstacle for developing new ways of quality assessment, unsuited for the eventual rules but maybe better than the current tools. Instead of regulating reputational feedback systems, something that would lead platform operators towards similar architectures, letting them compete to find the most efficient solution – just like competition plays for many other goods and services – could be the best choice.[173] And

[165] Weatherill (2005, pp. 1–3, 11–13, 63, 69, 74); Leczykiewicz and Weatherill (2016, p. 6); Weatherill (2016, pp. 59, 63–68, 83–87, 95–99).

[166] Koopman, Mitchell and Thierer (2015, pp. 534–539); Shapiro and McDonald (2018, pp. 465–467, 482).

[167] Forbrugerombudsmanden (2015, p. 16).

[168] Farjat (2004, p. 56).

[169] Salop and Scheffman (1983, pp. 267–271).

[170] Ben-Shahar and Schneider (2011, p. 738).

[171] Kirzner (1997, p. 64).

[172] Busch (2016, p. 241).

[173] Thierer et al. (2016, p. 858).

the larger the area where competition plays, the more chances for groundbreaking ideas and solutions to emerge.

5.7. Legal fragmentation does not seem a serious problem regarding reputational feedback systems

Member States do not have any incentive for a regulatory race to the bottom on feedback systems. Countries want to attract commerce. Therefore, if reliability and trust are increased through specific, more stringent rules, states will race to the top in a regulatory competition environment. Consumers will not be reluctant to contract abroad because, even if legislation is different, reputational feedback systems will always be reliable enough – something they will continuously verify as their expectations are routinely met. This would mean more profit opportunities for businesses, who would then be more willing to assume costs to enter new markets. From the point of view of platforms, in many cases it will not be efficient to design one feedback mechanism for each country. One jurisdiction with an attractive market adopting regulation may be all what it takes to increase reliability in the whole of Europe.

As a result, within the realm of feedback mechanisms, it can be questioned whether legal fragmentation is a problem. This is important because, under the principle of subsidiarity set forth in article 5(3) of the Treaty on European Union, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." One might think that such principle allows the EU to act provided that it improves action taken at the national level. That is, the issue would be a simple matter of efficiency, so EU action would be possible anytime it added value to the national one.[174] However, a better reading is that the Union can act only if a double – or triple, depending on how it is framed – condition is fulfilled. Namely, the *insufficiency* of Member State action and the *greater efficacity* of the European one *due to its scale or effects*.[175] In fact, according to the fact sheet on the European Union devoted to the principle of subsidiarity,[176] such principle "rules out Union intervention when an issue can be dealt with effectively by Member States themselves at central, regional or local level. The Union is justified in exercising its powers only when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level."

The proper understanding of the subsidiarity principle creates a presumption in favour of Member State action because the goal is not to exercise competences at the most efficient level, but at the lowest level which is efficient.[177] The other perspective, placing the focus exclusively on the efficiency criterion, would lead to a strongly centralised system – to a big extent because of the greater resources of the European Union.[178] In short, European legislation does not only

[174] See WEATHERILL (2005, p. 19); WEATHERILL (2016, pp. 193–194).

[175] BLANQUET (2018, p. 114); MANGAS MARTÍN and LIÑÁN NOGUERAS (2020, pp. 83–85).

[176] https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf.

[177] BLANQUET (2018, p. 114). See also SMITS (2011, p. 329). However, for WEATHERILL (2016, p. 194) the referred presumption is a misconception and must be nuanced, for it would only apply "in the unlikely case where all things are otherwise equal."

[178] MANGAS MARTÍN and LIÑÁN NOGUERAS (2020, pp. 83–84).

aim to create and develop a single market and ensure a high level of consumer protection, but also "to maintain the best possible variety of national laws."[179]

5.8. Final remarks

The dynamism of online markets, the risk of regulation getting outdated soon, experience about how private, market-based, decentralised mechanisms have overcome trust problems in the past, the fact that any market failure is an opportunity for entrepreneurs, and so on and so forth, are good arguments against highly regulating online commerce.[180] The same reasons militate in favour of adopting no – or not harmonised – detailed rules regarding reviews and ratings, at least for now. However tempting it is to call for new rules when law seems disrupted by technology, taking time to fully analyse the situation and tailor the legal response is a wise choice.[181] Authors have admitted that technology evolving quickly forces lawmakers to respond with little time for undertaking a calm reflection.[182] It is reasonable to think that, if legislative action is not taken fast, eventual rules will arrive too late, when negative effects have already been produced. However, intervening very early increases the risk of making errors and hampering innovation. In addition to that, regulating too soon may be costly in terms of getting stuck with a certain approach, slowing down a change of perspective in the future even if rules reveal themselves to be ineffective.[183] At the same time, when reality is fast-changing, general contract law rules might possibly be a better response than "micro-rules" – too-specific provisions.[184]

6. Conclusions

Reputational feedback systems are not working poorly, so it cannot be asserted that a comprehensive legal framework specifically aimed at them is indispensable. However, since they are not entirely reliable because of the shortcomings they have – some of them evoked in Part 2, it must be admitted that regulation might improve things. As seen in Part 3, legal fragmentation entails some problems that recommend regulating review mechanisms at the European Union level, but there are also reasons to hold that legal decentralisation is the better way. The rules, principles and initiatives presented in Part 4 clearly have potential for improving the current situation, thus militating in favour of intervening in the market. If rules were European-wide, benefits would easily spread throughout all Member States. Nevertheless, Part 5 offers arguments not to further intervene in the market, or at least not at the EU level – because this would exacerbate its eventual negative effects.

The analysis conducted in this paper shows that, at this moment, it is very difficult to make an *undisputed* case for harmonising rules on feedback mechanisms and creating a European "law of reputational feedback systems." There are arguments both for and against it. Further discussion should be welcomed before adopting any set of rules on the matter, because "if you don't know

[179] GRUNDMANN (2013, p. 120).

[180] See STECKBECK and BOETTKE (2004).

[181] TWIGG-FLESNER (2016a, pp. 22, 24, 43).

[182] LUQUIN BERGARECHE (2018, p. 276).

[183] See MAROTTA-WURGLER (2011, p. 183).

[184] RAMBERG (2018, pp. 326–327).

what is best, let people make their own arrangements."[185] Therefore, I am in favour of a wait-and-see approach, especially after the COVID-19 pandemic, which has resulted in an increase of online commerce. This ultimately means more opportunities to check whether current reputational feedback systems work well, and more incentives to improve them and make the profits derived thereof. In any case, it could be fruitful to engage in action aimed at making both businesses and consumers (even more) aware of the shortcomings affecting reputation systems. This would foster the state of "natural alertness" that helps market participants to identify opportunities to make profits within an imperfect world, triggering dynamic competition and entrepreneurial discovery processes.[186] And consumers would be encouraged to be more demanding and responsible, better prepared for the challenges the digital world brings.

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[185] EASTERBROOK (1996, p. 210).

[186] KIRZNER (1997).

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