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Online Intermediary Platforms and English Contract Law

Christian Twigg-Flesner

Introduction

This paper focuses on one particular form of intermediary which has emerged as a core component of the digital economy: platforms. Platforms are the beating heart of the digital world, bringing together those who provide and those who acquire: on social media, people share their lives with their followers; content creators use photo or video-sharing platforms to distribute their output to viewers; service providers can offer their services as and when they wish to do so; and businesses can offer their goods to trade and consumer customers. Online platforms take a variety of forms.¹ This paper excludes from its scope social media and content sharing platforms,² and focuses on platforms facilitating contracts for the supply of goods, services, and digital products. Such platforms are referred to as online intermediary platforms ('OIP'). OIPs are commonly described as marketplace platforms, or 'market makers', because they create a digital version of a marketplace which brings together suppliers of goods, services and digital products with prospective customers.

The digital environment means that the number of suppliers and customers is not limited. To bring them together, OIPs often seek to present themselves as pure intermediaries, confined to creating the digital environment which enables suppliers of goods and services and interested customers to be brought together and to conclude contracts with each other. The reality, however, is that most platforms do more than act as a passive operator of a digital space for suppliers and customers to conclude contracts. OIPs constitute a market ecosystem, with the OIP operator serving as both market *creator* and market *regulator*.³ In its role as regulator, the operator can control access of suppliers to the platform, determine the conditions on which contracts are concluded and performed, require the use of payment service and/or fulfilment services offered by or through the platform, allow customers to leave feedback and ratings on their experience and use these to sanction suppliers. Furthermore, many OIPs provide a dispute resolution mechanism in respect of disputes between customers and suppliers as an alternative to court-based dispute resolution. The design of such mechanisms varies

¹ See European Commission, *Staff Working Document – Online Platforms* SWD (2016) 172 for an overview.

² Some social media platforms have started to venture into the e-commerce/marketplace platform arena, but for present purposes, this need not be considered further.

³ See e.g., M Cantero Gamito, 'Regulation.com. Self-Regulation and Contract Governance in the Platform Economy: A Research Agenda' (2017) 9 *European Journal of Legal Studies* 54; JK Winn, 'The Secession of the Successful: The rise of Amazon as a Private Global Consumer Protection Regulator' (2016) 58 *Arizona Law Review* 193.

from acting as an intermediary to ensure that complaints are received and responded to, to actively intervening by e.g., withholding payments collected through the OIP from a customer and to be transferred to the supplier.

The architecture of OIPs is based on contracts. The core contractual structure of any OIP comprises three contractual relationships:⁴ (i) the contract between the OIP and the supplier setting out the conditions on which the supplier can offer its products via the platform; (ii) the contract between OIP and customer which enables the customer to place orders; and (iii) the main supply contract between supplier and customer. There can be additional contractual relationships collateral to this triangle of contracts which might concern the provision of payment facilities, warehousing and distribution services for suppliers, or guarantees given by the platform to customers in respect of supply contracts concluded via the platform.

An important feature of the contracts between the OIP operator and the platform's suppliers and customers (i.e., the platform users) is that these are not transactional, unlike the contracts concluded between suppliers and customers. Rather, the contracts between the OIP operator and platform users govern the relationship between the operator of the OIP and the users of the OIP for as long as they are using the platform. As such, these contracts effectively comprise the governance structure for an online platform.

There are several aspects about the role of contracts and Contract Law in the context of online platforms which merit exploration. This chapter first considers the fact that online platforms are an instance of 'governance by contract',⁵ which leads to questions over the suitability of contracts and of English Contract Law for this purpose. Secondly, the OIP operator has a significant role in managing participation of, and in the resolution of disputes between, platform users, but does Contract Law ensure that the OIP operator cannot act in this role in an unfettered manner? Thirdly, the contracts comprising the platform architecture might not only serve to regulate platform users, but themselves become the target of regulation. Finally, with regulation of online platforms a priority for both national and supranational legislators,⁶ the contractual architecture of an online platform and the wider regulatory context have to interact. The overarching purpose is to question whether a predominantly contract-focused approach to platforms is sufficient and therefore whether any specific regulatory

⁴ C Twigg-Flesner, "Legal and Policy Responses to Online Platforms – A UK Perspective" in U. Blaurock, M. Schmidt-Kessel and K. Erler (eds), *Plattformen - Geschäftsmodelle und Verträge* (Nomos, 2018).

⁵ Cf. L Bygrave, *Internet Governance by Contract* (Oxford, Oxford University Press, 2015).

⁶ In particular, the European Union's recent proposals for a Digital Services Act (*Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act)* COM (2020) 825 final) and a Digital Markets Act (*Proposal for a Regulation on contestable and fair markets in the digital sector* COM (2020) 842 final).

objectives can be pursued effectively through the regulation of the platform contracts. The academic literature on platforms discusses a variety of regulatory approaches alternative to Contract Law, ranging from the direct regulation of the activities of OIP operators⁷ to treating OIPs as a new organisational form to be regulated analogously with companies.⁸ However, direct regulatory intervention in pursuit of specific policy objectives is not a new phenomenon in Contract Law,⁹ e.g., through the implications of particular terms into contracts between business and consumers.¹⁰ However, the fact that contracts are used in the context of OIPs to construct the governance architecture rather than for transactions might pose challenges for Contract Law, e.g., by taking into account the interdependencies between the various OIP contracts, or the relational nature of each contract.

Law and new digital business models

A preliminary step is to locate the present discussion in the wider context of how law generally responds to the legal issues associated with new business models in the digital economy (of which OIPs are one instance) and the wider challenge of keeping law in step with technological development. The legal response to new digital business models is characterised by the tension between seeking to apply existing laws to new developments, and a focus on developing targeted laws in response to novel legal issues raised by new business models. The former approach essentially starts from the perspective of existing laws (such as contract law) and seeks to establish how a new development would slot into established legal rules. One example of this approach are attempts to analyse how Contract Law might deal with so-called 'smart contracts'.¹¹ The latter prioritises the identification of whatever novel legal or regulatory questions a new business model has raised, and the development of targeted legal solutions to tackle these. Brownsword has described these respective approaches as reflecting, on the one hand, a 'coherentist' mindset, and on the other hand, a 'regulatory-

⁷ See e.g. T Rodrigues de las Heras Ballell, 'The Legal Anatomy of Electronic Platforms: A prior study to assess the need of a law of platforms in the EU' (2017) 3 *Italian Law Journal* 149.

⁸ IHY Chiu, 'The platform economy and the law of organisations and governance' in RM Barker and IHY Chiu, *The Law and Governance of Decentralised Business Models* (Abingdon, Routledge, 2020).

⁹ Many contract types have been the subject of direct regulation, e.g., to protect the interests of parties in contracts regarded as inherently imbalanced, such as consumer or employment contracts, or because a contract is of a particularly complex nature (e.g., financial services). Furthermore, other areas of law interact with contracts and Contract Law, such as intellectual property law, competition law, or tax law.

¹⁰ Under the Consumer Rights Act 2015.

¹¹ See Law Commission Call for Evidence; also M Durovic and A Janssen, 'The Formation of Blockchain-based Smart Contracts in the Light of Contract Law' (2018) 26 *European Rev of Private Law* 753; for critique, see e.g., K Lowe and E Mik, 'Pause the Blockchain Legal Revolution' (2020) 69 *International and Comparative Law Quarterly* 135.

instrumentalist' mindset.¹² However, these are not necessarily mutually exclusive approaches. Rather, having identified the specific issues of a new development, it might first be considered whether existing contract law can do the job of addressing these and whether Contract Law could evolve as necessary. This does not mean that statutory intervention in pursuit of regulatory objectives would not be needed, but might only become necessary where a contract-focused approach does not provide the answers. In this regard, Eliza Mik recently wrote that

*'The revolution in how people conduct business need not result in a revolution in Contract Law. Contract Law can absorb technological change. The question is not do traditional principles apply? But how do they apply?'*¹³

When it comes to OIPs, the capacity of Contract Law to deal with the particular features of platforms needs to be examined first before effort is expended on developing new legal and regulatory provisions specifically for OIPs. To the extent that the application of Contract Law does not provide a solution to an identified issue, a different route for addressing these would have to be taken. Indeed, scholars have mooted whether alternative approaches focusing on the market-making and market-controlling role of an OIP operator could be a basis for developing a regulatory strategy instead;¹⁴ indeed, there have been suggestions in that direction, e.g., by focusing on the market-creating role of OIP providers,¹⁵ or by introducing some form of accountability of the OIP operator towards platform users collectively.¹⁶ However, the task for this chapter is to explore whether Contract Law can absorb the changes posed by OIPs.

The contractual architecture of platforms

A platform is set-up by the operator through contracts with both suppliers and users. Although these are all discrete contracts, they are standard form contracts and so the contractual architecture of a platform consists of a very large number of contracts to which the OIP operator is one party, and the many suppliers and customers are, individually, the other party. One can divide this almost infinite number of contracts into three types: first, the contract between an OIP operator and the suppliers seeking to offer their goods or services through the platform. This contract sets out the conditions for

¹² See e.g. R Brownsword, *Law, Technology and Society* (Abingdon, Routledge, 2019)

¹³ Cf. E Mik, 'The resilience of contract law in light of technological change' in M Furmston (ed) *The Future of the Law of Contract* (Abingdon, Routledge 2020), p.139.

¹⁴ C Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond' (2018) 7 *Journal of European Consumer and Market Law* 222

¹⁵ T Rodriguez de las Heras Ballell, 'Refusal to deal, abuse of right and competition law in electronic markets and digital communities' (2014) 22 *European Review of Private Law* 685

¹⁶ Cf. N Helberger, J Pierson and T Poell, 'Governing Online Platforms: from contested to cooperative responsibility' (2018) 34 *The Information Society* 1.

the admission of a supplier to the platform, and can cover matters such as a supplier's obligations when dealing with platform customers, the requirement to use the platform for receiving orders and communicating with customers, conditions for suspension or permanent removal of access, as well as the process for varying the terms of the contract. Second, there is the contract between customers and the OIP operator, usually created by a customer registering on the platform, which allows the customer to browse and place orders. Many problems do not require customers to pay to register, although they will seek consent to collect data from a customer. Some platforms will offer paid-for membership which provides additional benefits to paying customers.

The third contract is the supply contract for goods or services concluded between suppliers and customers. To this, the OIP operator is not a party. Indeed, most OIP operators go through great lengths to make it clear in their terms and conditions that they are only providing an intermediation service and that they are not involved in the supply contract. Even where an OIP operator is a stranger to the supply contract, it will have had some influence over the terms of that contract. For instance, an OIP may require that the supply contract is based on standard terms set by the platform, and it may also require that performance of some of the contractual obligations, such as payment, is made through facilities provided by the platform.

This simplified triangular analysis of the various contracts obscures several aspects, however. First, there may be more contractual relationships than just the three described above. Often, OIPs are themselves complex corporate groups and both suppliers and customers may be multiple contracts with the various OIP companies. For example, payments may be processed by one OIP company, fulfilment services might be provided by another, and the main digital platform might be operated by a third. Secondly, even the contractual relationship between the OIP operator and a supplier often consists of multiple contracts: there might be conditions of use of the digital facility, separate terms of service for each of the various services provided by the platform, and so on. So instead of talking about the contract between an OIP and a platform user, the contractual relationship between both might be better understood as comprising a bundle of contracts.

Platforms self-designating as intermediaries

One feature of the OIP contractual architecture is the way in which the OIP operator seeks to determine its relationship with suppliers and customers, particularly in respect of the main supply contract. The OIP operator usually defines its role as that of an intermediary, whether described as a

hosting service or possibly as an ‘agent’¹⁷ acting on behalf of suppliers (irrespective of whether the relationship is truly one of agency). This is done by using specific labels to denote the role of the various parties which are intended to limit the role of the OIP operator to that of an intermediary. There are two likely motivations for this: first, the OIP operator can benefit from liability exemptions for hosting services available to providers of information society services (ISS) under the Electronic Commerce Regulations (especially Regulation 19).¹⁸ Secondly, the OIP operator would avoid incurring any direct liability under the main supply contract between supplier and customer towards the customer.

However, several of the leading online platforms have been the subject of litigation at both the national and European level in order to test whether their claim to be a pure intermediary withstands scrutiny. In the UK, the Supreme Court indirectly touched on this issue most recently in its ruling in *Uber*.¹⁹ The central question for the Court was whether Uber drivers were self-employed (as claimed by Uber) or workers (as argued by the claimants). The Employment Tribunal,²⁰ Employment Appeals Tribunal²¹ and the Court of Appeal (by a majority)²² had all concluded that drivers fell within the definition of worker. Uber had relied on the wording of its standard contracts which sought to present its business model as intermediating between drivers and passengers, and as acting as ‘booking agent’ on behalf of the drivers. In the lower courts, the mismatch between the written contract and the reality of the situation in the way Uber operated its business was central to the determination, relying on the *Autoclenz* principles²³ to be applied in disregarding the terms of the agreement when determining the true nature of an employment relationship. In the Supreme Court, Lord Leggatt JSC, who gave the only judgment, stressed that the *Autoclenz* approach was particular to employment contracts because the rights at issue were granted to workers under statute, i.e., this was not a straightforward situation involving the construction of a contract.²⁴ The extent of Uber’s influence

¹⁷ See e.g. clause 4.1 of the Uber services agreement considered in *Uber BV and others v Aslam and others* [2021] UKSC 5, para [25]: ‘Customer: (i) appoints Uber [BV] as Customer’s limited payment collection agent solely for the purpose of accepting the Fare...’.

¹⁸ The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013), which implement Directive 2000/31/EC on E-Commerce. In addition, under the Directive, ISS providers established in one Member State cannot be made subject to regulation in another Member State.

¹⁹ *Uber BV and others v Aslam and others* [2021] UKSC 5.

²⁰ *Y Aslam, J Farrar & others v Uber B.V., Uber London Ltd., Uber Britannia Ltd.*, Employment Tribunal, 28 October 2016.

²¹ *Uber B.V. and others v Aslam and others*, UKEAT/0056/17/DA, 10 November 2017.

²² [2019] EWCA Civ 2748. Underhill LJ dissented on the basis that this was not a situation where the terms of the agreement could be disregarded as being inconsistent with the reality of the situation, and that the terms of the agreement should govern the classification of the drivers and of Uber’s role.

²³ *Autoclenz Ltd v Belcher* [2011] UKSC 41.

²⁴ At paras [68]-[70].

over the way in which the drivers provided their services was consistent with their classification as worker.²⁵ However, Leggatt JSC also stressed that in situations not involving employment situations, ordinary principles of contract interpretation would apply. He gave the examples of accommodation booking platforms which are much more likely to be operating as intermediaries,²⁶ not least because accommodation providers offering their services are competing with one another,²⁷ and can also be on multiple platforms at the same time.

Uber, however, has fared no better before the European Court of Justice, which has considered whether both *Uber* and *Airbnb*, two of the leading platforms, qualify as ISS providers and fall within the scope of the E-Commerce Directive. The first was C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL*.²⁸ The CJEU described Uber's activities as an 'intermediation service ... the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys.'²⁹ However, in the CJEU's assessment, Uber offered urban transport services which incorporated an intermediation service.³⁰ It held that Uber organised the general operation of the transport services undertaken by individual drivers,³¹ evidenced e.g., by the fact that prospective passengers use the services of drivers selected by Uber.³² Most significantly, Uber exercised 'decisive influence' over the drivers' services, such as the fare to be charged, the quality of the vehicles that could be used, and the conduct of the drivers.³³ Consequently, Uber's central business activity was the provision of transport services, with a subsidiary ISS element only.³⁴

In contrast, when considering whether Airbnb, provided an information society service or an accommodation service, the CJEU reached the opposite conclusion.³⁵ It described Airbnb as an online

²⁵ Paras [93] – [101].

²⁶ Paras [103]-[104].

²⁷ See also *Secret Hotels2 Ltd v Her Majesty's Commissioners of Revenue and Customs* [2014] UKSC 16, a VAT case, reaching a similar conclusion in the context of a hotel booking platform. Here, the statutory context of the VAT regime which gives freedom to taxable persons to determine their organisational structure (para [107]).

²⁸ ECLI:EU:C:2017:981, judgment of 20 December 2017.

²⁹ Para [33].

³⁰ Para [38].

³¹ *Ibid.*

³² Para [39].

³³ *Ibid.*

³⁴ One explanation for this ruling might be that to treat Uber as an ISS would mean Uber would not be subject to national regulations, such as licencing requirements, in respect of personal transport services and consequently create a regulatory vacuum. The CJEU confirmed its assessment in C-320/16 *Uber France SAS v Nabil Bensalem* ECLI:EU:C:2018:221 (10 April 2018), which involved a provision of French Law imposing criminal penalties for organising a system to put customers in touch with drivers to transport them by road without having obtained authorisation for this.

³⁵ C-390/18 *Criminal proceedings against X (Airbnb Ireland)* ECLI:EU:C:2019:1112 (19 December 2019).

platform allowing professional and non-professional hosts to offer accommodation on a short-term basis to prospective guests via the platform. Airbnb offered additional services, such as a payment system which holds a guest's payment in escrow for 24 hours from guest check-in and from which Airbnb deducts a commission, a formatting tool for presenting the accommodation, a photography service, a guarantee and insurance scheme, and a tool for estimating the rental value of the accommodation (but, crucially, not for determining the price the host can charge).³⁶ In the CJEU's view, Airbnb's core activities involved the creation of lists of available accommodation based on criteria set by a prospective guest to then enable a guest to make a booking.³⁷ This service competes with other channels for advertising accommodation.³⁸ Crucially, Airbnb does not determine the rental price to be charged,³⁹ and the additional services offered by Airbnb were merely ancillary and did not 'constitute an end in itself'. The crucial distinction between Airbnb and Uber was that Uber had a decisive influence over the provision of the transport service, i.e., the underlying supply transaction, whereas Airbnb did not have such influence.⁴⁰

Despite the very different legal questions in issue, a common strand in these cases is that, when classifying the activities of an online platform, the OIP's active control over the provision of the main supply contract, particularly where this involves the provision of a service, and over the price to be paid by the customer can undermine the claim by an OIP operator that it is merely acting as an intermediary. This can be so despite the careful drafting of the relevant contracts with a view to limiting the OIP operator's role to that of an intermediary. This poses some limitations to the use of contracts for designing the architecture of a particular platform where this has the effect of displacing the wording of the contracts themselves – something which clearly troubled Underhill LJ in the Court of Appeal in *Uber*. The statutory context relevant to the assessment in *Uber* can be distinguished in other situations where the main issue is one of construction of the contract. Here, careful design of the contract can ensure that the OIP operator's role is confined to that of an intermediary, although more will be required than the use of particular labels – what matters is the substance of the respective obligations of the parties towards one another.⁴¹ However, even an OIP operator might discover that its desire to be a passive intermediary is not endorsed by a court.

³⁶ Para [39].

³⁷ Para [53].

³⁸ Para [55].

³⁹ Para [56].

⁴⁰ Paras [65] – [68].

⁴¹ E.g., *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537; *PST Energy 7 Shipping LC v OW Bunker Malta Ltd.* [2016] UKSC 23. See also *Agnew and Bearsley v Commissioner of Inland Revenue* [2001] UKPC 28, para [32] (Lord Millett) in the context of classifying security interests over book debts (ruling approved in *National Westminster Bank plc v. Spectrum Plus Limited* [2005] UKHL 41).

Platform Contracts and OIP governance

The triangular view of the contractual relationships within an OIP ecosystem makes it seem that a platform essentially is an infinite replication of discrete triangular relationships. This might be true in respect of the contracts between suppliers and customers. However, as far as the contracts between OIP operator and platform users are concerned, there is a high degree of interconnectedness between them because of the nature of online platforms. For a platform to succeed, it needs to attract a large number of platform users both on the supply side and customer side. The more customers there are, the more suppliers there will be and *vice versa*. This is known as a 'positive indirect network effect' of platforms,⁴² which creates a continuous cycle of growth of both sides, facilitated by the platform. An OIP operator will gain financially by attracting and retaining large numbers of both suppliers and customers. The more transactions are concluded through the platform, the greater the immediate economic benefit will be to the platform operator, e.g., due to a percentage charged on the price of each transaction. Similarly, the economic benefit to suppliers will be access to a much wider number of potential customers and the potential for increased business. Customers, in turn, will have access to a wider range of suppliers of a particular item, with price competition between them.

However, a much more significant economic benefit to the OIP operator than the commission charged on each transaction concluded on the platform is the vast amount of data which the OIP operator can collect from all its users and from the transactions they conclude. Such data has economic value as a commodity, but it can also be used by the OIP operator to target advertising for additional services at platform users based on the profiles created through data analysis. It is also crucial for recommender systems⁴³ which encourage customers to buy products based on their transaction history.

Once a platform has reached a critical mass of users at both ends of the supply transaction facilitated by the platform, the OIP operator will be in a position of great strength to exercise its regulatory functions. Based on this significantly stronger bargaining power vis-a-vis platform users,⁴⁴ an OIP operator can act without constraint in setting the terms on which all the platform users can be active on the platform. Moreover, the OIP operator will often have extensive discretionary powers on a range of matters under the terms of its contracts with platform users, e.g., in respect of unilateral changes

⁴² OECD, *An introduction to online platforms and their role in the digital transformation* (Paris, OECD, 2019), p.22.

⁴³ C Busch, 'Crowdsourcing Consumer Confidence. How to regulate online rating and review systems in the collaborative economy' in A de Franceschi (ed.), *European Contract Law and the Digital Single Market* (Intersentia, 2016).

⁴⁴ The bargaining strength of platform users will, of course, vary. Some suppliers may be in a stronger position than others if their presence on the platform is particularly important to the OIP operator and the platform's customers.

to the terms of the contracts. The OIP operator therefore has a strong hierarchical position towards the other platform users.

Invariably, this raises concerns about the OIP operator's ability to utilise this power in a one-sided manner. In the case of the economically most powerful platforms, Competition Law might be deployed to ensure that an OIP operator does not abuse its dominant position; however, it has proven to be a challenge to apply Competition Law principles to the particular features of online platforms.⁴⁵

Matters of concern include the fact that the OIP operator can determine the conditions of access and can remove suppliers from the platform. It can also change the conditions which suppliers must follow when concluding contracts with customers. An OIP operator has the power under its contracts with other platform users to exercise a broad range of powers regarding the management and governance of the platform, with little or no opportunity for other platform users to influence the OIP operator. In addition, the OIP will often have an internal dispute resolution system in respect of contracts between customers and suppliers, which effectively allows it to resolve such disputes based on its platform rules, which may not necessarily reflect precisely to respective legal rights of suppliers and customers respectively.

The powers of the OIP operator go beyond the immediate management of platform activities. An OIP operator can generate value not only from the many supply transactions it facilitates (through commission on each transaction) but also from the data the OIP operator is able to collect from each user and arising from every transaction.⁴⁶ It is able to create this additional value as a result of the platform's positive indirect network effects, with the value of this data increasing, the more participants are active on the platform. So, as well as exercising a direct governance function, the OIP operator gains substantial value from platform interactions. Often, this is not shared with platform participants directly; indeed, an individual supplier often will not have access to data which has been derived from contracts with that supplier's customer. All of these aspects invariably attract proposals for regulation to control the exercise by an OIP operator of its powers. For example, the role of certain platforms as 'gatekeepers' to the market as prompted the European Commission to propose its *Digital Markets Act*.⁴⁷ Whether the UK will follow suit and develop its own proposals remains to be seen.

The focus of this chapter is to examine the potential of Contract Law to put some limits on the ability of an OIP operator to act without constraints.

⁴⁵ A Ezrachi and ME Stucke, *Virtual Competition* (Cambridge MA, Harvard University Press, 2016), chs. 14 and 16; AC Hoyng and R van Martrigt, 'Is the current debate about changing the competition law toolbox warranted? A perspective from a digital platform' (2020) 41 *European Competition Law Review* 327.

⁴⁶ IHY Chiu, 'The platform economy and the law of organisations and governance' in RM Barker and IHY Chiu, *The Law and Governance of Decentralised Business Models* (Abingdon, Routledge, 2020).

⁴⁷ COM (2020) 825 final.

Implications for Contract Law

It has been shown that the contractual architecture of OIPs enables an OIP operator to move into a position whereby it has broad powers under its contracts with customers and suppliers to control continuing access of users to the platform, to determine the terms and conditions of such access, and to set the terms of the underlying supply contracts.

The OIP operator's powers can be treated as a particularly broad type of contractual discretion, e.g., when considering whether to suspend access to the platform, or varying the terms of the contract with its users. English Contract Law has developed a mechanism for controlling the exercise of discretionary powers, albeit one that is not without controversy. In *Braganza v BP Shipping Ltd*,⁴⁸ Lady Hale noted how common terms conferring discretion on one contracting party are, and stressed that the courts should not interfere with such terms, let alone substitute its views for those of the party given the discretionary power to make a decision.⁴⁹ This stresses the generous attitude of English Contract Law to contractual freedom and that the 'parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them.'⁵⁰

Nevertheless, a line of cases preceding *Braganza* has developed principles for curtailing the extent such a discretionary power. In *Paragon Finance plc v Nash*,⁵¹ for example, the Court of Appeal held that term granting a lender a discretionary power to vary the interest rate to be paid by a borrower was not completely unfettered; rather, the parties reasonably to expect that the discretion would not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way which no reasonable lender, acting reasonably, would do. In *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)*,⁵² in considering whether there were any restrictions on when a reinsurer might withhold approval, the Court of Appeal recognised as a limitation that such a decision 'should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject-matter of the particular reinsurance'.⁵³ In *British Telecommunications plc v Telefónica O2 UK Ltd*,⁵⁴ Lord Sumption said that 'as a general rule,

⁴⁸ [2015] UKSC 17.

⁴⁹ *Ibid*, para [18].

⁵⁰ Lord Toulson in *Prime Sight Limited (A company Registered in Gibraltar) (Appellant) v Edgar Charles Lavarello (Official Trustee of Benjamin Marrache a Bankrupt) (Respondent)* [2013] UKPC 22, para [47].

⁵¹ [2002] 1 WLR 685. See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397.

⁵² [2001] EWCA Civ 1047.

⁵³ *Ibid*, para [67]. See also *Equitable Life Assurance Society v Hyman* [2000] UKHL 39 in the context of a discretionary power to pay bonuses to policy holders, which could not be exercised in manner that would conflict with policy holders contractual rights.

⁵⁴ [2014] UKSC 42.

the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously.⁵⁵

In *Braganza*, Lady Hale explained the problem of discretionary contractual powers thus:

‘... the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting ... The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.’⁵⁶

The fact that such a term will vary depending on the terms of the contract may explain the different expressions in the case-law; in some instances, overt reference is made to good faith as the controlling principle, whereas in others, the criterion is whether the exercise of the power would be so unreasonable that no reasonable person in the contracting party’s position would act in this way. In *Braganza*, the Supreme Court held that the approach to determining whether a discretionary power under a contract has been exercised reasonably should comprise both the process by which the decision to exercise the discretion in a particular way was made (i.e., whether it is based on the correct matters) and whether the substantive result is reasonable (i.e., not ‘so outrageous that no reasonable decision-maker could have reached it’).⁵⁷ In short, the approach follows the one used in the context of judicial review under the *Wednesbury* principle.⁵⁸ Whether this is the right standard is open to debate, and this instance of borrowing from Public Law has been criticised.⁵⁹

Although the recognition of a control mechanism over discretionary powers in contracts is welcome, there are questions about the approach emerging from the cases leading up to *Braganza*. First, the

⁵⁵ *Ibid*, para [37].

⁵⁶ *Braganza*, para [18].

⁵⁷ *Ibid*, Lady Hale at para [24]; Lord Hodge at para [53] and Lord Neuberger at para [103].

⁵⁸ *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁵⁹ M Bridge, ‘The exercise of contractual discretion’ (2019) 135 *L.Q.R.* 227, 230.

control is inserted into a contract as an implied term, and it is one implied in fact⁶⁰ on the basis of the particular contract. This means that a term restricting the exercise of contractual discretion might not be implied into every contract providing for this. Secondly, the improper exercise of discretion would be a breach of the implied term, for which a remedy would be damages for any provable losses but not a reversal of the decision made. This makes this a rather ineffective control mechanism in many cases.

Moreover, there is, at least theoretically, a possibility that this implied term might be excluded altogether by an appropriately worded term in the contract itself.⁶¹ It is possible that such a term might be caught by s.3(2)(b)(i) of the Unfair Contract Terms Act 1977 if it is contained in the standard terms used by the party exercising the discretion (i.e., the OIP operator) because it could be read as giving that party the right 'render a contractual performance substantially different from that which was reasonably expected of him', e.g., in exercising a discretion for an improper purpose. In that case, it would have to pass the reasonableness test. However, insofar as the exercise of the contractual discretion concerns the performance of the other party (i.e., platform users), such a term would not be caught by s.3 UCTA at all.

As noted, the alignment with the *Wednesbury* test has not passed without criticism. As an alternative, Davies has argued⁶² that 'fraud on a power', or the 'proper purpose' rule, might be a better means of controlling the exercise of contractual discretion. Crucially, the doctrine requires the exercise of a power (whether contractual or otherwise) for a proper purpose, and this rule is of a mandatory, non-excludable character. Exercising a power for an improper purpose should therefore mean that the exercise is void and therefore the prior status reassumed.⁶³ Sales, who dislikes the influence of *Wednesbury* in current case-law, has argued⁶⁴ that controls over discretion should start with the interpretation of the contract to determine what purposes for the exercise of a discretionary power were in the contemplation of the parties, and that 'fraud on a power' should be set in that context. Although the parallel with 'fraud on a power' has yet to become established in the common law approach to controlling the exercise of contractual discretion, decisions such as *BT v Telefonica*,⁶⁵

⁶⁰ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200, para.[82]. Implication in fact is strictly controlled via the 'business efficacy' and 'officious bystander' tests: *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72.

⁶¹ M Bridge, 'The exercise of contractual discretion' (2019) 135 *L.Q.R.* 227, 228-232.

⁶² PS Davies, 'Excluding good faith and restricting discretion' in PS Davies and M Raczynska, *Contents of Commercial Contracts – Terms affecting freedoms* (Oxford, Hart, 2020).

⁶³ *Ibid.*, 104-111.

⁶⁴ P Sales, 'Use of powers for proper purposes in private law' (2020) 136 *L.Q.R.* 384.

⁶⁵ *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42.

where the Supreme Court noted that contractual discretion ‘must be exercised consistently with its contractual purpose’⁶⁶ are steering the law in that direction.

There is a recognition that the exercise of contractual discretion should be subject to constraint, therefore – even if the precise way in which this happens has yet to be settled definitively. However, an OIP operator does not have unfettered discretion to act as it pleases.

The common interests of platform users

The three contractual relationships at the core of the OIP architecture are often portrayed as discrete relationships, with no connection between them other than the fact that the OIP operator is a party to two of the three relationships. This is helpful insofar as it provides an abstraction of the *formal* legal relationship of suppliers and customers with the OIP and with each other (where they are parties to a supply transaction concluded via the platform). However, this analysis fails to capture the complexity and interconnectedness between the many relationships within an OIP. As noted, the success of a platform relies on the presence of many customers and suppliers, and there may be a collective interest among all users as to how they conduct their activities on the platform (how individual conduct of suppliers might reflect on the platform community; how actions by OIP can harm reputations and create adverse economic effects etc). The contracts between an OIP operator and platform users might include specific terms regarding the conduct of users,⁶⁷ but this does not mean that users which have suffered a loss due to the conduct of another user will have a direct right of action: only OIP operator and each platform user will be in privity.⁶⁸

A core feature of online platforms is that all the platform users have a contract with the OIP operator, as (business) suppliers or customers. A platform therefore operates as a hub-and-spoke set-up, with the OIP operator as the “hub” element, and each platform user a separate spoke. Those platform users who enter into supply contracts via the platform will have a direct contractual relationship, but all the platform users who do not conclude any supply contracts with one another will not. If the terms of their platform user contracts require them to act in a manner that requires them to act in a way that does not harm the interests of other platform users, would this be enforceable only by the OIP operator, or could other platform users take action directly against that platform user? Privity would suggest that only the OIP operator could act. There have been instances where English law has recognised the possibility that contractual rights can be created as between participants in a common

⁶⁶ *Ibid*, para. [37].

⁶⁷ Social media platforms usually operate with “Community Standards” or similar.

⁶⁸ E Peel, *Treitel’s Law of Contract*, 15th ed. (London: Sweet and Maxwell, 2020), ch.14.

endeavour, as older cases on insurance funds show.⁶⁹ A closer, but far from perfect, analogy are the sports competition cases. In *The Santanita*,⁷⁰ yacht owners entering their yachts in a race organised by a yachting club had concluded a contract with the club's committee, undertaking to be bound by certain rules and to accept liability for all damages arising from failing to obey the rules. One yacht owner sued another after the former's yacht was sunk in a collision, and the House of Lords held, without discussion of the relevant principles, that a contract came into existence between competing yacht owners once they started sailing in the race.⁷¹ It seemed to matter that the rules included an undertaking to compensate other competitors. In contrast, in *Earl of Ellesmere v Wallace*,⁷² a horse owner agreeing with the Jockey Club to enter his horse in two races did not thereby conclude a contract with all the other owners of the horses also in that race.

The difference between these instances and online platforms is that it is difficult to treat online platforms as membership organisations and platform users as members, and even less as analogous to sporting competitions. In contrast to membership organisations, such as a stock exchange,⁷³ the main objective for platform users is to gain access to the market to either buy or sell a wide variety of products, making this a much more diffuse grouping than an organisation like the stock exchange. What these cases do suggest is that any terms in the contract between a platform user and OIP operator which might require acting in a way that is not detrimental to the platform could create binding obligations between the various platform users, although this is far from clear.⁷⁴

A recent development in English Contract Law might suggest another possibility. Although the paradigm contract underpinning much of Contract Law is a bilateral transaction-focused contract, many contracts are intended to be long-term and to underpin a lasting commercial relationship. There is extensive academic literature exploring 'relational' contracts, i.e., contracts which have a long-term and collaborative focus.⁷⁵ There are signs that English Contract Law will recognise relational contracts

⁶⁹ *Gray v Pearson* (1869-70) L.R. 5 C.P. 568 (manager appointed by insurance fund members could not sue members for unpaid contributions as only members contractually bound); approved in *Evans v Hooper* (1875) 1 Q.B.D. 45.

⁷⁰ *Clarke v The Earl of Dunraven and Mount Earl, The Santanita* [1897] A.C. 59 (HL).

⁷¹ Similarly, all three judges in the Court of Appeal thought a contract was formed between the competitors who had accepted the rules and started the race: [1895] P. 248.

⁷² [1929] Ch.11

⁷³ See e.g., *Kowloon Stock Exchange v Inland Revenue Commissioners (Hong Kong)* [1985] 1 W.L.R. 133 (PC).

⁷⁴ There is also the possibility that a more precisely worded term could be enforceable by virtue of s.1(1) of the Contracts (Rights of Third Parties) Act 1999, although the Act can be, and often is, excluded.

⁷⁵ See D Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (London, Sweet & Maxwell, 2001); also I McNeil, 'Reflections on Relational Contract Theory after a Neo-classical Seminar' in H Collins, D Campbell and J Wightman (Eds) *The Implicit Dimensions of Contract* (Oxford, Hart, 2003).

as a particular type of contract.⁷⁶ In *Bates v Post Office (No.3)*,⁷⁷ Fraser J reviewed recent authorities and concluded that ‘the concept of relational contracts is an established one in English law.’⁷⁸ Importantly, Fraser J recognises that in relational contracts, there is a (presumed⁷⁹) implied obligation of good faith or fair dealing, obliging the parties to refrain from commercially unreasonable conduct, determined objectively and in the relevant context.⁸⁰ Whether this will be a term implied in law (i.e., into all relational contracts), or implied in fact (i.e., dependent on the context in each contract) remains to be determined,⁸¹ although Fraser J seems to take the view that the term is implied into all contracts which qualify as relational contracts.⁸²

This leads to the question of how one might identify a contract as ‘relational’. At para.[725], the judge spells out in some detail the characteristics of a relational contract. Although the long-term nature of the contract will be central to characterising it as ‘relational’, this is far from sufficient. A relational contract also typically involves collaboration between the parties, with mutual trust and confidence reposed in one another, a high degree of communication and co-operation, expectations of loyalty and others. Whilst many contracts between an OIP operator and platform users are likely to be long-term, they seem some distance away from being ‘relational’. Although both parties typically have an interest in a long-term relationship, their reasons are quite different. The OIP operator needs a large volume of suppliers and customers to maximise the indirect network effects of the platform and the direct and indirect value it can generate from transactions concluded via the platform. Suppliers will seek access to the platform to broaden their customer-base and will have a long-term interest in maintaining this. But this does not make it a common endeavour, nor does it involve a high level of co-operation; the relationship between OIP operator and suppliers is not intended to be collaborative, even if it is to be long term. In any case, the economic imbalance between OIP operator and platform users would suggest that this is not a collaborative endeavour. So even if ‘relational contracts’ stick around as a recognised contract type in English Contract Law, this would not seem to have any immediate significance for online platform contracts.

⁷⁶ *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 (Comm).

⁷⁷ [2019] EWHC 606 (QB).

⁷⁸ *Ibid.*, para [705].

⁷⁹ Cf. para [721].

⁸⁰ *Ibid.*, para [711].

⁸¹ Soper argues that a good faith term is unnecessary: CH Soper, ‘Occam’s razor or Leggatt’s multiblade – good faith or clean shave?’ [2021] *J.B.L.* 580.

⁸² Cf. PS Davies, ‘Excluding good faith and restricting discretion’ in PS Davies and M Raczynska, *Contents of Commercial Contracts – Terms affecting freedoms* (Oxford, Hart, 2020), 94-97.

The significance of this development might lie elsewhere: the emergence of relational contracts is a flicker of an indicator that English Contract Law could develop a distinct approach to long-term contracts, particularly those involving more than common repeat transactions such as subscription contracts or instalment supply contracts. In a similar way, the contractual architecture of an online platform might eventually gain distinct recognition at some point in the future. In particular, the very strong position of the OIP operator compared to (most of) its business users, and customers, and the relative imbalance of economic strength and control, might lead to the strengthening of existing control mechanisms such as those over discretionary powers, as well as to the recognition of specific obligations appropriate to online platforms implied into the relevant contracts. One might, for instance, expect an implied term requiring the OIP operator to ensure that the platform continues to operate smoothly and not prevent platform users from being able to use the platform fully.⁸³

The tension between contractual and organisational norms in the context of platforms could be the trigger: as a legal form, platforms are contractual constructs, but platforms can also be viewed as an ecosystem with organisational characteristics. Indeed, this has led some to call for recognising platforms as a distinct organisational form in law.⁸⁴ It might not be necessary to go quite as far; recognising a type of contract reflecting the particular way in which contracts are used for the architecture of online platforms might well be sufficient. Yet, despite all this, such a development is a long way off, and so relying on Contract Law alone to address at least some of the challenges associated with online platforms might not suffice.⁸⁵

Contracts as a regulatory target

The preceding section has shown that the ability of the English Contract Law to offer sufficient controls over the contracts between an OIP operator and its platform users is limited, other than perhaps the possible control over exercise by an OIP operator of its discretionary powers. Concerns about online platforms have been in the eye of policy-makers for over half a decade,⁸⁶ particularly the strong controlling role of an OIP operator over everything that happens on their platform. As explained

⁸³ Cf. *Mackay v Dick* (1876) 6 App. Cas. 251.

⁸⁴ IHY Chiu, 'The platform economy and the law of organisations and governance' in RM Barker and IHY Chiu, *The Law and Governance of Decentralised Business Models* (Abingdon, Routledge, 2020).

⁸⁵ Cf R Brownsword, 'Three approaches to the governance of decentralised business models' in RM Barker and IHY Chiu, *The Law and Governance of Decentralised Business Models* (Abingdon, Routledge, 2020).

⁸⁶ European Commission, *Communication on Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe* COM (2016) 288 final; House of Lords Select Committee on European Union, *Online Platforms and the Digital Single Market – 10th Report of Session 2015-16*, HL Paper 129 (April 2016).

above, the strong position of the OIP operator is enshrined in the terms and conditions with platform users, and these generally determine the OIP operator's right to change the terms and conditions unilaterally, to suspend or remove a platform user, control over personal data, the use of ancillary services and so on. The ability of an OIP operator to take all these decisions give it a powerful role vis-a-vis all the platform users. This prompted the European Commission to investigate, with two studies identifying as the main areas of concern a number of unfair B2B trading practices on online platforms,⁸⁷ as well as the potential unfairness of some terms and conditions in online platform contracts.⁸⁸ As will be explained below, it chose to respond by proposing a Regulation that would directly intervene in the contracts between an OIP operator and its *business* platform users.⁸⁹ To an English lawyer, this is a familiar technique; legislation has been used to require that contracts provide for certain matters or to insert terms into particular types of contract,⁹⁰ and the common law has, on occasion, implied terms into particular types of contract as a matter of law.⁹¹ Indeed, as discussed earlier, the ability of an OIP operator to exercise its discretionary powers under the platform contract would be constrained by a requirement that this needs to be exercised reasonably and for a proper purpose.

The B2B Fairness and Transparency Regulation

The Commission's proposal was eventually adopted as Regulation 2019/1150 *on promoting fairness and transparency for business users of online intermediation services*.⁹² It implements a specific regulatory objective - to limit the unfettered freedom of an OIP operator – by regulating aspects of the contract between the OIP operator and its business users substantive content of the terms and conditions, rather than by imposing a set of obligations directed at the OIP operator's conduct. It focuses on the contracts between an OIP operator and 'business users', i.e., any business offering

⁸⁷ Ecorys, *Business-to-Business Relations in the Online Platform Environment – Final Report* (European Commission, 2017), available at <https://publications.europa.eu/en/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en> [accessed 14 September 2021].

⁸⁸ EY, *Study on Contractual Relationships between online platforms and their professional users – Final Report* (European Commission, 2018), available at <https://publications.europa.eu/en/publication-detail/-/publication/b3d856d9-4885-11e8-be1d-01aa75ed71a1/language-en> [accessed 14 September 2021].

⁸⁹ European Commission, *Proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services* COM (2018) 238 final. See C Twigg-Flesner, 'The EU's Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond' (2018) 7 *Journal of European Consumer and Market Law* 222.

⁹⁰ E.g., Sale of Goods Act 1979, ss.13(1), 14(2) and 14(3); or Consumer Rights Act 2015, ss.9-11.

⁹¹ *Liverpool CC v Irwin* [1976] 2 All ER 563; *Scallly v Southern Social Services Board* [1991] 4 All ER 563; or *Ali Shipping Corporation v Shipyard Trogry* [1999] 1 W.L.R. 314.

⁹² (2019) OJ L 187/57. This is now saved 'direct EU legislation' under ss.3(1) and (2) of the European Union (Withdrawal) Act 2018 and continues in effect.

goods or service via an OIP to *consumers*.⁹³ The Regulation therefore constitutes a rare intervention in commercial contracts, but is limited to OIPs where goods or services are offered to consumers by businesses.⁹⁴ It is supplemented by domestic regulations dealing with aspects of enforcement.⁹⁵

One of the key objectives of the Regulation is to enhance transparency of the terms and conditions which form the basis of the contractual relationship between OIP operator and business users. For these purposes, ‘terms and conditions’ includes all terms and conditions, whatever they are called or which form they take, which govern the contractual relationship between OIP operator and business users (hereafter ‘terms’). These must have been determined unilaterally by the OIP operator, although in practice, this will usually be the case. Whether they were determined unilaterally is established on an overall assessment and the relative size of the parties, but allowing for the possibility of some negotiation. The fact that some provisions might be the result of such negotiations would not, on their own, mean that terms as a whole were not ‘unilaterally determined’.⁹⁶ The challenge of working out when that line is crossed is familiar to English lawyers thanks to s.3(1) of the Unfair Contract Terms Act 1977.⁹⁷

The Regulation then stipulates a number of things regarding the terms, both with regard to their presentation and content. Thus, terms must be drafted in plain and intelligible language⁹⁸ and available from the pre-contractual stage right through the duration of the contract.⁹⁹ In addition, Art.3(c)-(e) requires that the contract sets out how access to the OIP might be suspended, terminated or otherwise restricted; information about additional distribution or marketing channels through which the OIP operator might market the goods or services offered by business users; and the effect of the contract on intellectual property rights owned or controlled by business users. Terms which fail to comply with these requirements, either as a whole or in respect of specific provisions, are deemed to be ‘null and void’.¹⁰⁰ This seems a drastic consequence, because if the terms as a whole are ‘null and void’, then it would almost certainly mean that there is no contract between OIP operator and business platform users at all. This cannot be what the parties would want in respect of non-compliance with these requirements. In the absence of any domestic or CJEU case-law on this, it is

⁹³ Art.2(1).

⁹⁴ This therefore excludes platforms which offer only peer-to-peer or business-to-business transactions but not business-to-consumer ones.

⁹⁵ The Online Intermediation Services for Business Users (Enforcement) Regulations 2020 (S.I. 2020/609).

⁹⁶ Art.2(10).

⁹⁷ S.3(1) UCTA refers to ‘...the other’s written standard terms of business...’. In *Salvage Association v CAP Services* [1995] F.S.R. 654, it was noted that a degree of negotiated amendment to standard terms would not take the contract out of the scope of s.3(1), but this required case-by-case consideration.

⁹⁸ Art.3(1)(a).

⁹⁹ Art.3(1)(b).

¹⁰⁰ Art.3(3).

impossible to say how strictly this would apply to the terms as a whole rather than individual non-complying provisions. In addition, in domestic law, a failure to comply with these requirements is treated as a breach of duty, and a business user is entitled to compensation for loss or damage suffered as a result.¹⁰¹ However, it is unclear whether this would extend to losses caused by the fact that the terms as a whole, and therefore potentially the whole contract, are deemed null and void.

Furthermore, the procedure for varying terms is specified in Art.3(2), and requires a notice period which must be reasonable and proportionate to the extent of the changes, but in any case, no less than 15 days.¹⁰² A business user can decide to terminate the contract during the notice period if it does not wish to continue to operate via the platform on the basis of the varied terms. A business user may waive the notice period, and can be deemed to have done so if new listings are added during the notice period.

A variation which fails to comply with these requirements will also be 'null and void', although here, this consequence makes more sense. As before, this will also be a breach of duty attracting a right to seek compensation for losses under UK law.¹⁰³

There are several further transparency obligations. Thus, terms must state whether business users are restricted from offering their goods or services through other channels than the OIP, including the grounds for such restrictions (available to the public) based on relevant economic, commercial or legal considerations.¹⁰⁴

Article 5, which deals with the ranking of search results, requires that the terms set out the main parameters, and their relative importance compared to other parameters, which determine the way rankings are created.¹⁰⁵ Where an OIP allows business users to pay for a higher ranking, this must also be stated.¹⁰⁶ Terms only need to provide sufficient information to allow business users to gain an 'adequate' understanding of whether and how rankings are based on the characteristics of the goods or services offered to consumers and the relevance of those characteristics for those consumers; there is no obligation to disclose details of the underlying algorithm or other information that would enable business users to mislead consumers by gaming the ranking system.¹⁰⁷

Furthermore, Art.6 requires that terms specify which ancillary goods or services are offered by the OIP operator, and whether a business user is able to offer its own ancillary goods or services through the

¹⁰¹ Regulation 3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020.

¹⁰² Except where there are legal or safety/cybersecurity reasons for the change: Art.3(4).

¹⁰³ Regulation 3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020.

¹⁰⁴ Art.10(1).

¹⁰⁵ Art.5(1).

¹⁰⁶ Art.5(3).

¹⁰⁷ Arts.5(5)/(6).

platform. Another issue is that some OIP operators (e.g., Amazon) also offer their own goods or services through the platform and might rank them in preference to those offered by business users. The terms have to state where this is the case and describe the 'main economic, commercial or legal considerations' for this differentiation. In particular, this has to include whether differentiation relates to the fact that the OIP operator has access to personal or non-personal data which platform users provide when using the platform; rankings or other settings applied by the OIP operator which influence consumer access to goods or services offered by business users; as well as any direct or indirect payment for using the OIP.¹⁰⁸

Indeed, with regard to personal and non-personal data provided by platform users, the terms must specify whether and how business users are entitled to access such data. In any case, information has to be given about the OIP operator's access to such data and whether this is shared with third parties; whether business users can access data they provide or generate, or which are generated by transactions between a business user and its customers; and whether business users can access aggregate data based on all platform users.¹⁰⁹

This overview shows that the Regulation requires that certain matters are expressly stated in the contract, but it does not go so far as to require substantive obligations: an OIP operator is free to give preferential rankings, or restrict access to data – but needs to be transparent about this. However, there might be an incidental effect from such transparency in that an OIP operator might adjust its approach to some or all of these issues as a result.

In addition to requirements regarding the content of a contract, the exercise of certain powers under the contract is also controlled by the Regulation. Thus, prior to taking a decision to restrict or suspend a business user from the platform, a statement of reasons must be given no later than the moment when this decision becomes effective.¹¹⁰ If the decision is to terminate the contract altogether, a minimum of 30 days' notice¹¹¹ must be given, together with a statement of reasons. In either situation, the statement of reasons must explain the facts (including third-party notifications) leading to the decision and the relevant grounds for the decision stated in the terms and conditions.¹¹² There are no

¹⁰⁸ Art.7(3).

¹⁰⁹ Art.9.

¹¹⁰ Art.4(1).

¹¹¹ Again, this does not apply where there are legal reasons for this, or where the business user has repeatedly infringed the terms of the contract: Art.4(4).

¹¹² Art.4(5).

specific sanctions provided under the Regulation, but in UK Law, this is also treated as a breach of duty in respect of which compensation for loss can be claimed.¹¹³

A number of further requirements are imposed to ensure that ‘contractual relations...are conducted in good faith and based on fair dealing’.¹¹⁴ an OIP operator must not impose retroactive changes to the terms,¹¹⁵ terms must state how business users can terminate the contractual relationship, and also whether and how there will be post-termination access to information provided or generated by the business user.¹¹⁶ The opening sentence of Article 8, quoted above, is difficult: as worded, it falls short of requiring the parties act in good faith and based on fair dealing, and instead mandates a number of specific requirements which are treated as being in accordance with a general good faith and fair dealing principle. However, it could equally be treated as an ‘exhortation’¹¹⁷ to act in accordance with good faith and fair dealing, coming perilously close to introducing such a duty into this type of contract. If it were treated as a specific duty, a failure to act in accordance with such a duty it would attract the possibility of claiming compensation for loss or damage suffered as a result.¹¹⁸ However, the significance of this effect would lie elsewhere: legislation would impose a legal duty on the parties to a contract between an OIP operator and business user to act in accordance with good faith and fair dealing, which would mean that such a duty is imposed in an commercial contract which does not seem to have any particular features meriting such a duty. The scope of Art.8 might eventually be clarified in court,¹¹⁹ but for now, uncertainty remains about the extent of its good faith and fair dealing element.¹²⁰

Finally, OIP operators must provide an internal complaint-handling system in respect of complaints by business users regarding the OIP operator’s compliance with the obligations imposed by the Regulation, as well as about technical matters or the behaviour of the OIP operator,¹²¹ and provide information about the access and functioning of this in their terms and conditions.¹²²

¹¹³ Regulation 3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020.

¹¹⁴ Art.8.

¹¹⁵ Art.8(a).

¹¹⁶ Art.8(b) and (c).

¹¹⁷ C Busch, ‘Towards Fairness and Transparency in the Platform Economy?’ in A De Franceschi and R Schulze, *Digital Revolution – New Challenges for Law* (Munich, Beck/Nomos, 2019), 63.

¹¹⁸ Regulation 3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020 applies simply to a breach of Articles 3, 4 and 8 of Regulation 2019/1150.

¹¹⁹ Although one might expect this to come from the CJEU rather than the domestic courts, most EU national legal systems already have a good faith duty, so would not regard Art.8 as raising any particular issues.

¹²⁰ It is also possible that the planned review of ‘retained EU legislation’ announced by the UK government might lead to a repeal of the Regulation, or modifications to it, although this area is not among those identified in a list published as *Brexit Opportunities: Regulatory Reform* on the government webservice on 16 September 2021.

¹²¹ Art.11(1).

¹²² Art.11(3).

Implications of regulatory intervention in contracts

Regulating aspects of the contract between the OIP operator and business users operating via the platform reflects the contractual architecture of platforms. However, one might question what the implications of using contracts as regulatory vectors in this way might be. The effect of such intervention, as the B2B Fairness Regulation shows, is to oblige an OIP to act in a particular way and to make this a contractual obligation towards every business customer. This leads to the question as to how such intervention might interact with the application of general rules of Contract Law? For example, the Regulation controls the exercise of an OIP operator's discretion with regard to restriction, suspension or termination of a business user's access to the platform. The use of discretionary powers is policed generally at common law under the *Braganza* line of cases, as discussed above. The decision to sanction a business user under the Regulation needs relate to grounds for action specified in the terms and conditions and requires transparency about the facts which have led the OIP operator to its decision. In this particular instance, English Law would provide for a remedy in Reg.3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020, but there might be instances where statutory control over discretionary powers does not attract specific sanctions, and so there might still be room for the *Braganza* principles to operate in such circumstances.

Secondly, what would be the remedial consequences if an OIP operator had acted in breach of one of the obligations inserted into the terms and conditions by the Regulation, or some other regulatory measure? English Contract Law prioritises damages as the remedy for breach of a term, but this requires that a claimant can demonstrate that it has suffered a loss. In addition, Regulation 3 of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020 provides for a right to compensation for loss or damage. However, not every breach of a regulatory obligation might result in a quantifiable loss, so damages may not always be the most appropriate remedy.

For most business users, ensuring compliance would probably be the preferred outcome. Securing compliance would mean a remedy to prevent further breaches of the terms which would make an injunction a more suitable remedy. Usually, injunctions are granted infrequently in respect of a breach of contract, but there have been instances where a court has granted an injunction to stop a party from breaching a contract in a situation when damages would not have been an appropriate remedy.¹²³ Indeed, the Regulation itself envisages this as a means of enforcing compliance by an OIP operator,¹²⁴ and this is given effect in domestic law through Regulations 4 and 5 of the Online

¹²³ *Araci v Fallon* [2011] EWCA Civ 668; *AB v CD* [2014] EWCA Civ 29.

¹²⁴ See Art.14.

Intermediation Services for Business Users (Enforcement) Regulations 2020. Under the 2020 Regulations, this right is granted to ‘qualifying organisations or associations’,¹²⁵ which covers associations with a legitimate interest in representing business users or public bodies,¹²⁶ but not business users acting individually. Interestingly, this power is not available in respect of a breach of Article 8, which contains the express good faith and fair dealing aspect. As this obligation is not made a term of the contract itself, an individual business user could not seek an equitable injunction in respect of this, but as noted, there is the statutory right to claim compensation for any loss caused by a breach of Art.8.

Interaction between contracts and possible regulatory action

Whilst legislative action specifically targeting online platforms has not been extensive thus far, there are further measures in the pipeline. The EU will in due course have its *Digital Services Act* and *Digital Markets Act*, and the UK Parliament examined a draft Online Safety Bill during the 2021/22 session. A central focus of these measures is on social media and audio-visual media content sharing platforms, particularly the problem of harmful and illegal posts on such sites. In the context of commercial OIPs, there are fewer concerns of this kind, but this does not mean that these will escape future regulatory action. Indeed, draft Art.14 in the Digital Services Act proposal (notice and action mechanism) requires an online platform provider to provide for the possibility that individuals can notify the platform of ‘illegal content’ posted thereon. The definition of ‘illegal content’¹²⁷ is broad and understood to include content in breach of consumer protection law.¹²⁸ Notification would trigger the need to remove or disable such content swiftly so as to preserve the liability exemption under draft Art.5. Furthermore, draft Arts.5 and 6 in the Digital Markets Act proposal impose a number of obligations on ‘gatekeeper’ platforms, such as permitting platform users to offer their products through other platforms or websites at different prices, which might differ from obligations contained in the terms of the contract between OIP operator and platform users.

It is therefore possible, even likely, that there will be future regulatory measures which will alter the overall legal and regulatory context for platforms and the contracts on which platforms are based. Even where such measures do not directly regulate those contracts (such as Regulation 2019/1150, discussed earlier), they could still potentially affect the ability of an OIP operator to set the terms of

¹²⁵ Reg.4(1) and (3)(b) of the Online Intermediation Services for Business Users (Enforcement) Regulations 2020.

¹²⁶ Cf. Art.14.

¹²⁷ Draft Art.2(g).

¹²⁸ Draft Recital 12.

those contracts and, more generally, the conduct of an OIP operator in respect of all matters related to running the platform.

The specific challenges of online platforms will eventually have to produce some kind of regulatory intervention, because contract law does not seem likely to respond to many of these challenges,¹²⁹ although whether this will seek to start from contract or from regulatory objectives which indirectly affect the operation of contracts remains to be seen.

Conclusions

Prompted by the role of OIP operators as self-proclaimed intermediaries in facilitating transactions between suppliers and customers enrolled on an online platform, this chapter has sought to probe the capacity of Contract Law to deal with some of the particular features of online platforms. Although Contract Law offers some hooks on which the development of targeted principles could be hung, these are far from solid. Contract Law would have to make significant leaps to recognise the interconnectedness between the many contractual relationships which are formed through a platform, in particular between the infinite spokes created by the contracts between an OIP operator and platform users. It is therefore likely that Parliament will have to step in and address at least some of the legal challenges of online platforms. The B2B Fairness and Transparency Regulation (2019/1150), which continues to apply in the UK, at least for the immediate future, offers a template for how regulatory objectives can be reconciled with the contractual nature of an online platform.

¹²⁹ R Brownsword, 'Three approaches to the governance of decentralised business models' in RM Barker and IHY Chiu, *The Law and Governance of Decentralised Business Models* (Abingdon, Routledge, 2020).