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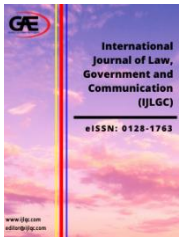

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LITERATURE REVIEW ON CIVIL LIABILITY FOR E-COMMERCE PLATFORMS AS INTERMEDIARIES IN E-COMMERCE DISPUTES COMPARISON WITH THE EUROPEAN UNION: THE ORETICAL EVOLUTION, REGULATORY FOCUS AND PROBLEMS IN CHINA

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Abstract:

With the rapid development of China's e-commerce economy, e-commerce disputes have surged, putting tremendous pressure on the administrative supervision of e-commerce economy and the judicial mediation of civil disputes. This article aims to review relevant literature, laws, and regulations concerning the civil liability of e-commerce platforms as intermediaries in e-commerce disputes. It compares the Chinese framework with that of the European Union (EU), examining the theoretical evolution, regulatory focus, and prevalent problems within the respective legal frameworks governing these platforms. The article highlights the shortcomings and challenges of current regulations for China's e-commerce platforms and provides suggestions for future legal and policy improvements.

Keywords:

E-Commerce Platform, Intermediary, Civil Liability, China, European Union

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Introduction

E-commerce platforms have significantly transformed the landscape of trade by acting as intermediaries between buyers and sellers. This intermediary role has introduced complex legal challenges, particularly concerning their liability in disputes stemming from transactions on their platforms. This literature review explores the civil liability of e-commerce platforms in China and the EU, focusing on the theoretical underpinnings, regulatory frameworks, and existing issues.

Compared with the EU, the research focuses on a literature review concerning the civil liability of e-commerce platforms as intermediaries in e-commerce dispute, including the theoretical evolution, regulatory focus, and issues in China. Firstly, the research introduces the history, current development status, and existing problems of China's e-commerce economy, providing a broad research background. It then explains the conceptual framework, detailing the roles and functions of e-commerce players, including merchants, consumers, Internet service providers (ISPs), and regulators. This article further discusses the legal supervision theories related to e-commerce intermediaries and analyzes the issues within the current governance framework in China. Finally, it proposes regulatory suggestions for e-commerce platforms based on a comparison with the EU.

Research Methodology

This study adopts a doctrinal research method, incorporating primary data such as laws and secondary data such as literature reviews. By combining relevant literature, the article explains the operation mode and characteristics of the e-commerce economy. It describes the existing legal framework and theoretical basis of responsibility for managing e-commerce platforms in China and the EU. At the same time, the comparative research method is adopted to make a longitudinal comparison of the development history of e-commerce in China and a horizontal comparison of the responsibility of China and the EU for e-commerce platforms in the same period. Finally, the current problems on civil liability for e-commerce platforms as intermediaries in e-commerce disputes and suggestions for improving regulation are concluded.

Research Background

E-commerce Development in China and the EU: Development

In the 1990s, China introduced digital technologies such as electronic data exchange (EDI) and electronic fund transfer (EFT). Since then, China's e-commerce industry has begun to continuously cultivate and develop rapidly (Gu, 2019). Since 2000, with the establishment of e-commerce network platforms such as Alibaba, the scale of e-commerce transactions in China has rapidly expanded yearly. At the same time, with the popularity of smartphones, the increasing number of Internet users also promotes the rapid expansion of the scale of e-commerce transactions. After Alibaba launched its first sales day on 11 November 2009 (called "GuangGun Jie"), e-commerce transactions climbed even higher yearly. There are 850 million Internet users in China in 2023. Moreover, according to data from www.statista.com website, e-commerce retail sales in China are at the top globally

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at $1,535 billion in 2022(Figure 1), climbing to $1,542 billion in 2023. So far, China has been the largest online retail market in the world for 11 consecutive years. Among these vast online sales, China's large e-commerce platforms, such as Alibaba, Pinduoduo and JD(Figure 2), have all made significant contributions (Yi, 2023).

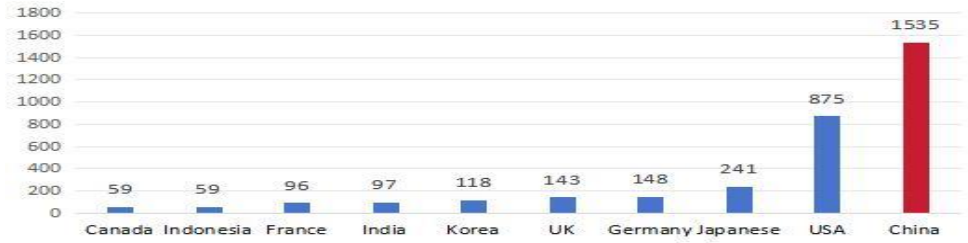

Figure 1: Sales In The World's Top10 Countries In E-Commerce In 2022(Unit:Billion Dollars).

Data sources: https://www.statista.com/

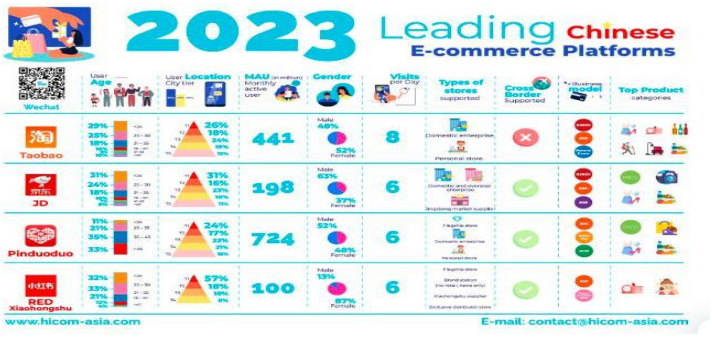

Figure 2: The E-Commerce Platforms In China.

Data sources: www.hicom-asia.com

The start of e-commerce in the EU was produced in the 1990s and underwent a development process from low to high, later developing rapidly. In the EU, e-commerce companies were mainly concentrated in eBay and Amazonia from the United States of American (USA) in the early stages, with few of its local e-commerce enterprises (Luceroet al., 2020). Soon later, the EU had a leadership position in e-commerce due to its online payments, security, public trust, well-developed logistics system with online facilities, and coordinated legal protection environment.However, as an economic organization with different cultural backgrounds and lifestyles in different countries, the EU e-commerce has its uniqueness and complexity compared with other countries and regions. In addition, the development is very uneven between countries. Despite 820 million Internet users with solid consumer power and huge market potential in the EU, the total volume of e-commerce in the EU has still been lower than that of China in recent years (Xiao, 2017).

E-commerce in China and the EU: Challenge

The most important feature of e-commerce is that business transactions are no longer face-to-face, and the scene where they occur is the network virtual space (e-commerce platform) (Ou, 2022). Due to the different participants, compared with traditional commodity

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transactions, some new legal issues have appeared in e-commerce. These include contract disputes between the buyer and the seller， and tort liability disputes infringe upon the rights of a third party, such as quality disputes, price fraud, intellectual property rights infringement, false advertising, and unlawful speech. According to the China's Supreme People's Court (2023), more and more e-commerce disputes are putting tremendous pressure on the Chinese court system. This has presented a significant challenge for the judicial system, highlighting the importance and urgency of studying the civil liability of e-commerce platforms as online intermediaries in e-commerce disputes. The situation is similar in the EU.

Findings

Conceptual Framework: E-commerce, Player of E-commerce, E-commerce Platform's Civil Liability

In general, the existing literature discusses the meaning of e-commerce platforms and their responsibilities. Especially the existing literature points out that the legal stature and the civil liability of "e-commerce platform" in the e-commerce law in China has led to a miscarriage of justice in court, but does not propose reasonable solutions. From the perspective of an e-commerce platform as the "intermediary of online transactions", this study will put forward a more perfect definition and expression of these relevant legal concepts.

"Electronic Commerce (E-commerce)" is an activity related to buying and selling goods and services over the Internet (Li, 2018). E-commerce, also called "Internet commerce" refers to the process of companies and individuals buying and selling goods and services over the Internet (Bloomenthal, 2022). E-commerce draws on various technologies, including mobile commerce, electronic funds transfer, supply chain management, Internet marketing, online transaction processing, electronic data interchange (EDI), inventory management systems, and automated data collection systems (Ruo, 2020). As described by Huseyin Guven (2020), e-commerce is a virtual marketplace that combines the buying and selling goods and services, facilitated by digital technologies. This encompasses utilizing websites, mobile applications, and social media platforms to showcase products and services and enable seamless payment and delivery processes (Guo, 2018).

Generally speaking, the e-commerce model can be mainly categorized into six types(B2C, B2B, B2G, G2B, C2C, and C2B) (Bai & Yue, 2021);Unlike traditional trade, the players in e-commerce similarly can be categorized into three legal subjects:

a. E-commerce traders are merchants (sellers) and consumers (buyers). Merchants on the e-commerce platforms are the sellers who sell their products or services with the help of digital marketplaces (Hua, 2021). The legal relationship between the parties is defined by the sales contract, which outlines their respective rights and obligations.

b. E-commerce regulators generally refer to government departments. They are responsible for standardizing the operation order of e-commerce and ensuring fair competition according to various laws and regulations (Ying, 2021).

c. Internet service provider (Isp), is a company that provides Internet connections and services to individuals and organizations (Usman, 2013). According to Jennie Ness (2013), a Regional IP Attaché at U.S. Commercial Service reported that the Functions of ISPs include:(1)Transitory communications (serving as an information carrier).ISP acts as a mere data conduit, transmitting digital information from one point on a network to another at a user's request. (2)System caching: Retaining copies, for a limited time, of material that has been made

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available online by a person other than the ISP. (3)Storage of information on systems or networks at direction of users (hosting). (4)Information location tools (searching):ISP provides Internet search engines and Hyperlinks Internet directories.

However, in the e-commerce transactions, not all ISPs are called “E-commerce platform operators”. According to Article 9 of the *E-commerce Law* in China, e-commerce platform operators only refer to legal persons or other unincorporated organizations that provide online business premises, transaction matching, information distribution and other services to two or more parties to an e-commerce transaction so that the parties may engage in independent transactions. E-commerce platforms allow merchants to set up shops on their platforms to make their products and services available to Internet users in the broadest sense.

From the essence of transactions, e-commerce and traditional commerce are the same (Ou, 2022). However, in terms of the specific form, they are different. The process of e-commerce is as follows: Sellers show all the information about products or services on the website of the e-commerce platform; while buyers find the products or services they prefer by searching online information, then click to confirm orders with sellers and pay money online via financial service providers. Finally, sellers send the goods via logistics service providers for transporting. The most important feature of e-commerce is that business transactions are no longer face-to-face; the scene where the transactions occur is the network virtual space (e-commerce platform) (Ou, 2022).

There are many views on the legal status of e-commerce platforms. The first is that the e-commerce platforms are regarded as "counter renters" and the legal status of supermarkets can be applied between the platform providers and the websites and network users. The second view regards the e-commerce platform as an intermediary for online transactions. The third view regards the e-commerce platforms as only ISPs. The article holds the second view that e-commerce platforms are intermediaries for online transactions (Chen, 2012). Therefore, among these players, the research is focused on the civil liability of e-commerce platforms, especially the regulatory framework for e-commerce platforms as intermediaries.

Through the literature review, it is found that the historical stage of the development of e-commerce in the EU is similar to that in China, and there is also a similar process in the administrative supervision and civil legal liability identification of e-commerce platforms as intermediaries. In the early period, the e-commerce platform was identified as a pure ISP, and the Safe Harbour rule and the Red Flag rule were adopted to encourage the development of the e-commerce economy. However, with the development of information technology, e-commerce platforms can dominate and even control e-commerce transactions based on the advantages of big data. It is no longer a simple ISP for e-commerce transactions. The EU applied the Gatekeeper theory, introducing *Digital Markets Act* (*DMA*) and the *Digital Services Act*(*DSA*), and a more stringent regulatory system to regular e-commerce platforms. Therefore, the position of the EU for e-commerce platform is a suitable benchmark to comparative analysis with China.

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Theoretical Frameworks

The article considers the e-commerce platform as an online intermediary. The obligations of e-commerce platforms as an online intermediary are divided into two major parts: fulfilling the duty of reasonable care and undertaking the obligation of monitoring (He, 2016). According to the literature, the laws and decided cases of China, the liability of the e-commerce platform as an online intermediary is as follows: First, Article 44 of the *Law of Protection of Consumer Rights and Interests* stipulates that network platform providers who fail to fulfil the obligations of subject qualification review shall bear joint and several liabilities. The second is the e-commerce platform operators' security obligations stipulated in the *E-commerce Law*, which mainly include: network security obligations, property security obligations and life and health security obligations (Liu, 2012). The third is tort liability, that is, when the operator of the platform knows or should know that such behavior is harmful to consumers but fails to prevent it in time, the platform should also bear civil liability. What has reached a relative consensus is that the tort liability (mainly indirect infringement) theory is the basis and theoretical root of the liability of e-commerce platforms (Liu, 2012). In the early days, the theory mainly discussed whether the e-commerce platform should bear the indirect tort liability for the infringement by the merchants. These are mainly the Safe Harbour rule and the Red Flag rule. In recent years, it is believed that the e-commerce platform is no longer only a pure neutral third party and should assume the Internal management responsibility of the platform management. Otherwise, it will assume more responsibility for mismanagement. There is mainly the Gatekeeper theory.

Tort Liability: Fault Liability

Safe Harbour rule--neutral for technology: The Safe Harbour rule was initially used to protect copyright and was later widely used in other online issues. It is based on the core theory that an ISP is merely a technical neutral party, similar to a conduit. While exploring the platform's responsibility, the USA government took the lead in stipulating the Safe Harbour rule for Internet service providers in the *Digital Millennium Copyright Law* issued in 1998. The economic basis for its application is that in the Web 1.0 era, the role of the ISP is still characterized by passivity, tool nature, and neutrality. This section states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another provider”(Ferrera et al., 2000). It is not directly involved in the transactions between buyers and sellers and does not need to assume any responsibility for e-commerce transactions. However, based on the convenience of its technology; after receiving complaints from platform users, it should promptly stop the infringement on the online platform and fulfil its duty of care (Liu, 2012). The *Communication Decency Act*（CDA） section 230(c)(2) further provides immunity for online intermediaries if they voluntarily engage in such activities. In other words, for online intermediaries such as e-commerce platforms, there is no knowledge, no liability, only responsibility for noticed−takedown.

Later, the Safe Harbour rule was introduced to Europe, China, and other countries. It was extended to all areas of online infringement groundbreaking and became the general rule for determining online service providers' legal obligations and liabilities. The Safe Harbour rule of e-commerce platform responsibility has been widely used for a long time. However, nowadays, many scholars argue that online intermediaries deny their controlling status with the so-called "technology neutrality" and abuse the Safe Harbour principle. Online intermediaries find it challenging to have the so-called "pure neutrality". In practice, due to the light responsibility

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of e-commerce platforms under this principle, network infringement cases are constantly rising, resulting in substantial judicial pressure. This phenomenon is particularly prominent in China.

Red Flag rule-know or should know: In the Digital Millennium Copyright Act

(USA, in 1998), the content and scope of the Red Flag rule are clarified.The rule states， "When the facts of infringement are as obvious as the red flag, the network service provider cannot say that it does not know the facts of infringement."(Zhao, 2020). It emphasizes the "knowledge standard" for network service providers, which is based on "you should know based on obvious infringement facts and environment" (i.e., being aware of facts or circumstances from which infringing activity is apparent). If the network service provider meets the "knowledge standard", they no longer qualify for the Safe Harbour rule and are subject to a legal duty of care for copyright protection (Zhao, 2020).

Later, the Red Flag rule was introduced to the EU, China, and other countries. Then, the Safe Harbour rule and the Red Flag rule have become two cornerstones of the theory of online platform liability. However, these regulations regarding "should know" or "know" remain somewhat ambiguous. In judicial practice, it is challenging for the plaintiff to prove that the online intermediary "knows" or "should know" the illegal behaviour of users or merchants, making this principle not widely applied in practice. Therefore, in some cases, final decisions can only rely on the personal understanding of judges (Zhao, 2020).

The Gatekeeper theory of the category of regulatory obligations:online monitor. The concept of "Gatekeeper" was first proposed by social psychologist Courtelwin in the 1940s. Since its introduction by Levin, the concept of "gatekeeper" has been absorbed by different disciplines such as political science, sociology, information science, management science, and law, and a theoretical system of "gatekeeper" adapted to different disciplines has been developed (Shoemaker et al.,2001). Kraakman(1986) discussed the "gatekeeper" from the perspective of legal responsibility, proposing that the legal "gatekeeper" is an intermediary body assisting supervision. Its jurisprudence is based on the theory of vicarious liability in tort law. The form of vicarious liability is that the civil subject is responsible for the tort of the third party. The theory of vicarious liability first originated from the legal proverb "patrol police liability". The theory suggests that the "gatekeeper" will be punished for neglecting to stop the wrongdoing. Lawrence Lessig (1999) proposed that the functional features of the technology define the scope of a user's online behaviour. The cyberspace responsibility systems can be regulated by changing online intermediaries' incentive mechanisms and technology operation modes.

In the EU, the background for introducing the "Gatekeeper" theory into the network platform accountability is as follows: The accountability of online intermediaries according to the existing laws such as *the E-commerce Directive* is far too light. Internet intermediary service providers have exacerbated the widespread proliferation of illegal goods or services and accelerated the spread of illegal content or false information, adversely affecting user rights and information flow (Autolitano, 2020). One of the watershed cases is *Delfi v. Estonia.* Despite Delfi's response of immediately deleting inappropriate remarks on the platform after receiving the notice, the Estonian courts still judged it to be liable a €320 fine as the publisher of defamatory comments. Finally, the Estonian courts concluded that Delfi exercised substantial control over the comments published on its portal, meaning that its involvement' went beyond that of a passive, purely technical service provider. This case is an essential breakthrough in the negative application of the Safe Harbour and Red Flag rules. Some scholars

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pointed out that the liability of online intermediaries for third-party content became "The Monitor" after the case *Delfi v. Estonia* (Brunner, 2016).

In 2016, the EU issued the *Uniform Digital Market Copyright Directive*, which requires social platform service providers to take effective automated technical measures to actively and effectively stop the dissemination of online infringing works on their platforms (Rosati, 2021). Then, *the General Data Protection Regulation* in the EU, which took effect in May 2018, clarified the EU's principles on the processing of personal data, implements the EU's legal tradition of attaching importance to privacy protection, established new types of data rights, and forms a digital economy. Since then, the EU data protection model affecting the development of the global Internet economy has been established, the Safe Harbour rule has taken the lead in the EU region, and the regulatory obligations of e- commerce platforms as intermediaries have been formally clarified by legislation.

In December 2020, the *DSA* and *DMA* were published, and the two drafts, as a supplement to existing EU laws and regulations such as the GDPR, establish corresponding ex-ante regulatory rules for Internet services and market competition, respectively. The *DSA* defines the scope of digital services, specifies the responsibilities and obligations of online platforms regarding content, goods, and services, aims to build a mechanism to protect users' fundamental rights, and proposes regulatory measures for "mega-platforms" (Chen, 2022). The *DMA* emphasizes maintaining a competitive environment, specifies the standards and obligations of "gatekeepers," and calls for enhanced regulation of "gatekeepers." In July 2022, the European Council approved the *DMA*, which clarifies the rights and obligations of large online platforms (i.e., "gatekeepers") to ensure that none of them abuses their position. Based on this, China has recently proposed a "Classification and Grading Guide (Draft for Comments)," which classifies platforms into "super platforms", "large platforms"and "small and medium platforms" based on the grading criteria of user size, business type, economic volume and restrictive capacity, and attempts to explore a "gatekeeper" management system for e-commerce platforms concerning *DSA* and *DMA*.

Internet information technology has evolved into the Web 3.0 era, and the platform economy has become a powerful and indispensable force in the social economy. Online platforms are no longer purely neutral intermediaries, as they were when the Safe Harbour provision came into effect. With the further development of block chain, big data, artificial intelligence, and other Internet technologies, the digital economy is becoming the core driver of today's economic development (Mei & Zhu, 2019). Platform algorithms are becoming increasingly influential in controlling platforms. E-commerce platforms are becoming hubs, intermediaries, and portals to connect users for communication and interconnection. However, the development of the online economy is not going to stop with "Gatekeepers","intermediary power", "bottleneck power"and other different theories still need to be further researched and refined.

There has been a consensus that the e-commerce platform, as a third-party network intermediary, must fulfil the reasonable duty of care, mainly manifested in the broad application of the Safe Harbour rule and the Red Flag rule. However, the obligation to undertake monitoring has been controversial, and many early scholars believe that in actual transactions, although the e-commerce platform has the right to monitor, it still needs to have the ability to monitor. They believe online trading activities are more complex and diverse than offline transactions. On the one hand, e-commerce platforms do not possess goods and

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commodities like shopping malls. On the other hand, the number of trading activities and transactions on the platforms is extensive and continuously increasing. Therefore, some scholars raised the concern that in the unique environment of rapid e-commerce development, the obligation to monitor the e-commerce platform actively not only increases the cost of e-commerce transactions but also reduces their efficiency (Ou, 2022). According to Chen Genghua (2023), the Internet platform has the dual attributes of private business and public space. As a third-party network intermediary, the Internet platform should not only provide a trading place in the network market but also assume the role of the public platform manager. Internet platforms should be responsible for their business activities and the rights and interests of merchants and users within the platform to maintain the network economy's legal order.

Moreover, due to the dynamic development of e-commerce platforms, it is not easy to implement the classification standards accurately. Therefore, further studies are needed to explore enhancing the legislative framework or management system by establishing a systematic and internationally applicable approach.

Legal Framework

As for the existing regulatory framework of e-commerce in China, the document types generally cover laws, regulations, rules, management methods, etc. The focus of the regulatory system has been adjusted according to the different development stages of e-commerce in China, and the boundary between government regulation and the market has also changed significantly. By searching with the exact keyword "e-commerce" in "full text" (from January 1999 until May 2023) on the authoritative law website (www.pkulaw.com/law) in China, 5,168 central regulations, 42,248 local regulations, and 266 legislative materials are yielded.

During the first phase (from 1999 to 2004), China's e-commerce had just started. In the early stages of e-commerce development, China adopted relatively liberal policies to facilitate the development of the e-commerce economy. The regulatory framework for e-commerce in China was relatively scattered and unsystematic. Moreover, the relevant norms were primarily departmental regulations with low effectiveness. The number of policies increased during the second phase (from 2005 to 2010), doubling the first phase. In 2015, the third and fourth stages were divided, and the policy numbers peaked (Ren, 2022). Among these, the most important law is *the E-commerce Law of the People's Republic of China (E-commerce Law)*, which was comprehensively enacted in 2019 for the first time. It stipulates that e-commerce platforms, as intermediary operators, should bear certain legal responsibilities for disputes in e-commerce transactions (He, 2016).

In the early stages of developing the Internet economy, countries had relatively loose policies on online intermediaries and e-commerce platforms, with no specific management system in place. However, as the number of network infringement incidents increased, a new era of strict government supervision gradually emerged. According to Jiang Guoyin and Fu Jian (2023), both China and the EU have shifted their policies from liberal technological freedom to strict regulation in managing the online economic order, including the legal aspects of e-commerce platforms and online intermediaries.

Regarding policy tools, the differences primarily lie in industry self-regulation, optimizing the competitive environment, guidance on healthy competition, defining competitor rights and responsibilities, supervision and regulation, public sector coordination, and institutional

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changes. The EU focuses more on building the capacity for industry self-regulation than China, emphasizing a "government-led, industry-led governance" approach.

Jiang Guoyin and Fu Jian (2023) classify the legislative and enforcement bodies related to online intermediaries in both countries into three levels: First level—whether the Chinese National People's Congress, the European Parliament, and the Council of the European Union are involved; Second level—whether the Chinese State Council or the European Commission are involved; Third level—Participation of the consulting body whether ad hoc or bureau-level administrative bodies directly under the Chinese State Council or the EU advisory bodies are involved.

The analysis of the data shows that there are significant differences between China and the EU in terms of the dimension of policy implementation. In China, 44.72% of policies are issued by first-tier institutions, 17.08% by second-tier institutions, and 38.20% by third-tier institutions; in the EU, 94.58% of policies are issued by first-tier institutions, 2.59% by second-tier institutions and 2.83% by third-tier institutions (Jiang& Fu, 2023).

Comparing the differences in policy implementation between China and the EU regarding policy institutions, the EU's policies come more from first-tier institutions such as the European Parliament and the Council of the EU, and some policies need to be coordinated with member states.

The development of Internet in China started relatively late, but the relevant legislative process was relatively fast. In the early development stage of e-commerce, there was no systematic legislation and only three policy documents from relevant departments. In 2000, the State Council issued *"Measures on the Administration of Internet Information Services"* which provided that "a service provider shall not produce, reproduce, post, or disseminate illegal information. China started relatively late, but the relevant legislative process was relatively fast. In the early development stage of e-commerce, there was no systematic legislation and only three policy documents from relevant departments. In 2000, the State Council issued *"Measures on the Administration of Internet Information Services"* which provided that "a service provider shall not produce, reproduce, post, or disseminate illegal information. And it shall immediately discontinue transmitting such information if it finds it transmitted through its website." Shortly after, the Ministry of the Information Industry issued another document-*Provisions on the Administration of Electronic Bulletin Services via the Internet*.

This restated the requirement in the measures mentioned above but specifically related to electronic messaging services, including mainly BBS and discussion forums. Furthermore, Internet service providers were required to post their "terms of use" at a prominent place on their website and warn online subscribers of the legal liabilities they must bear for disseminating unlawful information. In addition, the Standing Committee of the National People's Congress passed the *Decision on Guarding Internet Security* in December 2000. The release of these three rules reflected that the online world was in disorder then. Although these provisions are aimed mainly at providing guidelines for public authorities to carry out their duties, courts apply them when deciding cases. Since 2006, in the stage of rapid development of e-commerce, China has issued some laws and regulations, gradually forming a sound legal system in network information, especially the *Regulation on the Protection of the Right of Communication to the Public on Information Networks* (2006, current).

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Regulation on the Protection of the Right of Communication to the Public on Information Networks (2006, current). As the first regulation on online intermediary responsibility in China, it mainly protects the right of information network dissemination of copyright owners, performers, and audio and video producers, to regulate the use of information networks to infringe IP rights. For the first time, the Safe Harbour rule was introduced to China. The regulation provided an excellent legislative idea for protecting other online intellectual property rights.

*Law on Protection of the Rights and Interests of Consumers (*1993, current). The special law to protect the legitimate rights and interests of consumers was first enacted mainly for offline transactions. With the rapid development of the e-commerce economy, e-commerce transaction disputes continue to increase. In 2013, the Law was amended, adding much content on how to protect the rights and interests of consumers in e-commerce disputes, especially the obligations and responsibilities of e-commerce platforms in e-commerce disputes. For example, "If the online shopping third-party platform cannot provide accurate merchant information, and the promise cannot be fulfilled, in this case, the online shopping third-party platform must bear joint and several liability." Proposes the civil liability that the e-commerce platform needs to bear.

E-commerce Law (2019, current) This is the first comprehensive regulation governing electronic commerce activities in the history of China. The law was enacted to regulate various aspects of e-commerce, protect consumer rights, promote fair competition, and maintain a secure online environment. The most prominent feature of the law is the emphasis on the legal responsibility of e-commerce platforms. The *E-commerce Law* points out that e-commerce platforms are held responsible for managing and regulating the activities of online vendors on their platforms. They are required to establish mechanisms for registration and licensing, data protection, consumer protection, and intellectual property rights to prevent the sale of counterfeit or substandard products (Liu, 2021). Article 9 of the *E-commerce Law* describes the definition of e-commerce platform operators, Article 38 describes the Red Flag rule, and describes the compensation liability for consumers' health rights due to e-commerce platform operators not completing audit obligations. Articles 42-45 mainly describe the principle of accountability (Safe Harbour and Red Flag rules) of e-commerce platforms in online IPR infringement. As for the legal liability of e-commerce platforms, the main content focuses on consumer protection and IP infringement. However, *E-commerce Law* does not sufficiently explain the definition and the standard of specific liability for e-commerce platforms.It leads to confusion of understanding in judicial practice， resulting miscarriage of justice.

Civil Code (2021, current). The responsibility of the *Civil Code* on e-commerce platforms is mainly to absorb the tort liability law. *Tort Liability Law* (2010, abolished) mainly indicated how liability for online information is to be determined and introduces the principle of "fault-based liability". Meanwhile, *Tort Liability Law* also introduced the principle of "red flag" on top of the existing "Safe Harbour", which was absorbed by the *Civil Code* and repealed later.[1] In the *Civil Code*, online intermediaries are termed as 'network service provider' subjects. The law primarily deals with the tort liability of the online user and network service provider. The *Civil Code* sets out three principles of imputation, including 'fault-based liability,' the safe harbor rule, and the Red Flags rule, across articles 1195-1197. However, the *Civil Code* only

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provides a general understanding of these principles, leaving the specific implementation in judicial practice largely unaddressed. This situation underscores the responsibility of legal professionals, policymakers, and individuals involved in online services and platforms to fill these gaps in the specific application of judicial practice.

Measures for the Supervision and Administration of Online Transactions (2021, current). In this regulation, the primary content is about identifying the e-commerce platform. The identification idea of "functional equivalence" was adopted. This Measures show that only when all elements form a so-called "closed loop" simultaneously can it be identified as providing essential e-commerce platform services, and the corresponding platform can be defined as an e-commerce platform. Moreover, more specific explanations are made for the application of *E-commerce Law*. As stated above (Problem Statement), such an identification method is too strict. Some Internet service providers may not be identified as e-commerce platforms, thus evading their due legal responsibilities.

Moreover, *Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Law in Hearing Civil Disputes Concerning the Right of Information Network Communication* (2014, current) afforded the rule on disputes regarding some issues of applicable law provisions about the standards of how to certify that the e-commerce platform should know or have known about the tort acts done by the seller. To some extent, this responds to the identification problem of "know" or "should know" of the e-commerce platforms, but it still has not entirely solved the difficulty of proving by the plaintiff.

In addition to these significant laws and regulations, there are some other laws and regulations also involved in the identification of online intermediary responsibility. Such as *Administrative Measures for Internet Information Services(2000, current), Tort Liability Law (2009, abolished),Network Security Law (2016, current), Provisions on the Administration of Internet News Services (2017, current), Provisions on the Administration of Internet Live-streaming Services(2016, current), Personal Information Protection Law (2021, current), Anti-Unfair Competition Law(1993, current), Product Quality Law (1993, current),* in legislation, there are still many outstanding problems in the legal liability framework of e-commerce platforms as online intermediaries in China.

The EU started with the *E-commerce Directive*, which introduced the Safe Harbor rule and the Red Flag rule. Later, with the formation of the monopoly of the Internet mega-platforms, the *DMA* and the *DSA* were established, gradually entering an era of strong government regulation of online platforms. The "Gatekeeper" system reflects the EU's attempts to strengthen prior supervision and gradually regulate the competition requirements of platform companies.

Directive on Electronic Commerce (2000/31/EC, current) This directive set out the basic legal framework for providing online intermediary services in the EU and defined the responsibilities and liabilities of these intermediaries. The directive introduced the "Safe Harbour rule" to the EU and set out an exemption of liability for users to publish content for information society service provider, ISSP. The directive also introduced the basic principles of intermediary liability (such as the "mere conduit" and "hosting" exemptions), and the notice-takedown procedure. Under this directive, online intermediaries, just as mere conduits, do not modify

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what users post in cyberspace. They are generally not liable for the content users post on their platforms.

Directive on Copyright in the Digital Single Market (*CDSM*, 2019, Current) The *CDSM* has created a unique copyright liability mechanism. The *CDSM* mainly requires online content-sharing service providers (OCSSP) to seek permission from the copyright owner to use the work and review their legitimate ownership. (Cornell Law School, 2018). article 66 of the *CDSM* shows that online content-sharing service providers must be liable for unauthorized communication to the public of works or other subject matter on their platforms, regardless of efforts made or information provided by right holders. Failure to promptly restrict access to notified works or prevent future uploads of unauthorized content may result in liability for these providers. This clause is expressed in both the Safe Harbor rule and the Red Flag rule.

Digital Services Act (DSA,2021, current) DSA proposes a new regulatory framework for online intermediaries in the EU, including provisions on content moderation, transparency, and liability. *DSA* would impose additional obligations on specific online platforms, such as those that host user-generated content or provide advertising services. *DSA* does not explicitly define the concept of "gatekeepers." *DSA* classifies online intermediary services into four categories based on the platform's role, scale, and impact in the network ecosystem. *DSA* imposes requirements on very large platforms in terms of recommendation algorithm systems, advertising, data access, staffing, and corporate transparency, and imposes strict liability on mega-platforms (Chen, 2023).

Digital Markets Act (*DMA*, 2021, current)
Alongside *DSA*, the European Commission also proposed *DMA*, which would regulate "gatekeeper" platforms that significantly impact the digital market. *DMA* would impose additional obligations on these platforms to promote competition and fairness. The focus and purpose of its legislation is to prevent the destruction of the digital market by super e-commerce platforms. *DMA* evolved the concept of "Gatekeeper" from a theoretical definition to legal practice for the first time and proposed three specific conditions and characteristics that an e-commerce platform must have to constitute a "Gatekeeper" (Zhang, 2021).

In addition to these significant laws and regulations, some other laws and regulations are also involved in identifying online intermediary responsibility. They are *Network and Information Security Directive (NIS,2016)* which established security and incident reporting requirements for digital service providers (including online intermediaries). *General Data Protection Regulation (GDPR, 2018) which* set out data protection requirements for online intermediaries that process personal data and *European Copyright Directive (2019)* which required online platforms to take measures to prevent the unauthorized use of copyrighted content on their platforms. Moreover, the cases issued by the Court of Justice of the European Union (CJEU) have raised several vital rulings on intermediary liability, breaking through the limitation of the scope of *the E-commerce Directive*. Some of the most significant cases include *L'Oreal v. eBay, Google Spain v. AEPD, Delfi v. Estonia*, and *McFadden v.Sony* (Gosztonyi, 2020).

Compared with the literature, the EU has gone further than China in the legal framework of e-commerce platforms. In addition to the Safe Harbour rule and the Red Flag rule, the EU also proposed new theories and bills and put forward the classification and management according

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to the different scales of e-commerce platforms and the theory of gatekeeper, which increases the legal responsibility of large platforms. These can be used as references for China in studying the deficiencies and improvement measures of legislation and judicial aspects from the perspective of the e-commerce platforms as online intermediaries.

Problems and Challenges in China

What is the civil liability of e-commerce platforms as online intermediaries for issues related to e-commerce transactions in China? There are four critical issues that are fundamental to the regulation.

Firstly, the existing law is not unified and clear on the legal status and responsibility of e-commerce platforms as online intermediaries, making it challenging to hold e-commerce platforms accountable in e-commerce disputes. Article 9 of the *E-commerce Law* defines the term "e-commerce platform" or "e-commerce platform operators" in China. It provides for the functions of an e-commerce platform and the essential criteria to assess whether it is an e-commerce platform (He, 2016). However, the *E-commerce Law* does not clarify how these element functions will be met simultaneously or separately (Zheng, 2020).

The later implementation of the *Civil Code* only uniformly described online trading platforms as "network service providers", without providing a detailed explanation of what a "network service provider" is. Subsequently, other regulations, such as the *Measures for the Supervision and Administration of Online Transactions* (article 7), adopt the concept of "functional equivalence" for identification purposes. The regulator emphasizes the importance of fulfilling all functions to form a so-called "closed loop" to be identified as providing essential e-commerce platform services. Therefore, the corresponding platform can be defined as an e-commerce platform. Obviously, such an identification method is relatively strict. Some Internet service providers use this point to argue that they do not have all these functions at the same time and cannot be identified as e-commerce platforms, thus evading their due legal responsibilities.

Article 38 of the *E-commerce Law* shows that the legal liability of e-commerce platform operators for violating statutory audit obligations or security obligations needs to be borne by "corresponding responsibilities", and the understanding of corresponding responsibilities is not explained in more detail in the law. There are two prominent opinions on the understanding of this issue. One holds that the interpretation of "corresponding responsibility" should be expanded to include civil liability, criminal liability and administrative liability. The other is that the term "corresponding liability" should be interpreted in the civil law system and refer only to civil liability. The specific civil liability also covers joint liability, supplementary liability, vicarious liability and so on.

Moreover, nowadays, new forms of e-commerce models, such as those found in social platform diversion, live streaming, and short video, have emerged, further complicating the definition of e-commerce platform (Zhou, 2022). It is crucial to clarify whether these emerging e-commerce models are also e-commerce platforms and whether they should be held accountable for corresponding legal responsibilities.

Secondly, e-commerce platforms frequently misuse the Safe Harbour rule (articles 1195-1196 of the *Civil Code* or 42-44 of the *E-commerce Law*) to evade responsibility and liability,

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leading to unfair competition. The Safe Harbour rule sets out exemptions of liability for users who publish content for information society service providers (ISSPs) and the basic principles of intermediary liability, such as the " mere conduit" and "hosting" exemptions, as well as the "notice-takedown" procedure. When network users use network services to infringe, the right holder has the right to notify the service provider to take necessary measures such as deletion, blocking, and broken links. The notice shall include preliminary evidence of infringement and the real identity of the right holder. Network service providers shall promptly forward the notice to the relevant network users upon receipt of the notice and, according to the preliminary evidence of infringement and the type of service, take the necessary measures. If network service providers fail to take the necessary measures promptly, they should bear joint and several liabilities for expanding the damage to the network users (MacKinnon et al., 2015).

The Safe Harbour rule was proposed early in the development of the e-commerce economy. It was initially intended to promote the development of e-commerce, with the view that the e-commerce platform was only a neutral third party not involved in the actual operation of the buyer and seller and only assumed the "notice-takedown" responsibility as stated above. While the e-commerce platforms often employ the concept of "technology neutrality" to disassociate themselves from liability as infringing parties, exploiting the protection offered by the Safe Harbour rule. When sued for joint and several liability for infringement, they often claim that they had not participated in the commission of the infringement, and without causing the expansion of losses they should not be held liable for compensation. They often put forward three points of defence opinions: First, the platform and the merchant have already signed a cooperation agreement. The agreement stipulates that the e-commerce platform, as a pure network service provider, is only responsible for the platform's daily maintenance and technical support and is not involved in the specific sales process. Through the agreement, the platform has done its duty to remind the sellers not to sell fake or infringing goods. Secondly, for the many goods on the network, the e-commerce platform claims that they objectively do not have enough professional ability to identify or supervise effectively. Thirdly, they claim that they have set up a channel of rights defence, allowing IP rights holders or consumers to apply for protection by reporting infringements (Ying, 2023).

However, e-commerce platforms tend to benefit from the transactions between buyers and sellers. In fact, e-commerce platforms seldom have the so-called "pure neutrality" hosting" exemptions. Moreover, even if the IP right holder or the consumer does follow the so-called guidelines of the e-commerce platform reporting the infringement, the online service provider is still seldom responsible because of the vague statement of the alleged "valid notice". This situation has resulted in a constant rise in network infringement cases and has placed heavy pressure on the judiciary. This phenomenon is particularly pronounced in China.

There are many cases, such as the BioBond glue goods infringement case (*BioBond v.Liuxihuan*). The plaintiff adduced evidence that he had once reported to the Pinduoduo platform that a seller had infringed on his trademark. The plaintiff argued that Pinduoduo, as an e-commerce platform, had not fulfilled its obligation of “notice-takedown” and should be jointly liable. However, finally, the court held that the plaintiff, without adequate proof, ruled that the e-commerce platform did not violate the safe harbour rule and did not need to assume responsibility. A review of cases published on the China Judicial Documents Network in 2020 involving platforms such as Taobao (667 cases), Jindong (183 cases), and Pinduoduo (420 cases) revealed that none of these cases held the e-commerce platforms accountable for any

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tort liability. Analysis of court judgments indicates that the failure to attribute responsibility to e-commerce platforms was due to the application of the Safe Harbour rule, which exempts them from tort liability as long as they promptly remove infringing goods or links upon receiving notice (Shao, 2022). Therefore, the Safe Harbour rule applied to e-commerce platforms' liability in infringement disputes is perceived as too lenient, resulting in frequent infringement cases and perpetuating adetrimental cycle (Wu, 2023).

In judicial practice, it is challenging to apply the Red Flag rule (article 38 of *E-commerce Law* and article 1197 of the *Civil Code*) to establish the liability of e-commerce platforms. The Red Flag rule states, "When the facts of infringement are as obvious as the red flag, the network service provider cannot claim ignorance." At this point, concerning the infringement actions of sellers within the e-commerce platform, the platform can no longer invoke the safe harbour rule as a defence. The Red Flag rule is an exception to the Safe Harbour rule and is crucial in determining the legal duty of care for network service providers (Mei & Zhu, 2019).

However, due to the lack of specific operable standards about the Red Flag rule, whether e-commerce platforms "know" or "should know" about online sellers' infringement is relatively vague in judicial practice. "know" or "should know" belongs to the subjective mentality of the network, and it is difficult to judge externally. It is difficult for the plaintiff to prove that the Internet platforms had subjective knowledge of the infringement committed by the seller. Moreover, e-commerce platforms often claim they cannot detect and identify infringements because they lack the professional capacity to avoid this responsibility (Ying, 2023).

Therefore, in judicial practice, applying the Red Flag rule can only rely more on the judge's individual specific analysis of the case and the breakthrough understanding of the law. This situation is evident from the judgments in numerous online infringement cases in China. Despite many cases of online merchants selling fake goods, the court rarely cites the Red Flag rule to establish liability for e-commerce platforms. Only a few cases, such as the case *"Fat Tiger Vaccine"* (adjudicated by the Hangzhou Internet Court in 2021), have achieved significant breakthroughs (Wang, 2022).

The court held that the platform did not fulfil its essential review obligations and ignored the apparent infringement behaviour like a red flag, ignoring the seller uploading the picture with the watermark code of the original copyright owner. According to the Red Flag rule, the court ultimately decided that the NFT platform should bear joint and several liability for compensation (Wang, 2022).

Similarly, in the EU, such as in the *Delfi v. Estonia* case, the judge makes a point when the inappropriate remarks made by users are obvious, just like a red flag; As a media platform, Delfi should be aware of and delete it immediately (Brunner, 2016). Still, only a few cases have witnessed groundbreaking trials so far. Overall, applying this principle in judicial practice remains highly debated and controversial.

Finally, large e-commerce platforms monopolize the e-commerce market and use strategies such as algorithms and platform protocols to evade their obligations and legal responsibilities, resulting in unfair competition. In order to strengthen the regulation of e-commerce sellers, e-commerce law explicitly assigns quasi-administrative responsibilities for internal management to e-commerce platforms (Xue, 2019). Under these conditions, many e-commerce platforms

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manage the online market by signing format agreements with the seller to exclude the seller's rights or aggravate its obligations. As XueJun (2019) stated, platform operators significantly influence transaction rules and service agreements. Through these rules and agreements, they may exploit this influence to establish unreasonable transaction conditions and shift corresponding responsibilities onto sellers within the platform (Ying, 2021).

One much-criticized example is Pinduoduo's unfair contract with sellers. Article 38 of the *E-commerce Law* stipulates the safety guarantee and audit obligations of e-commerce platforms for products that affect the life, health, and safety of consumers, while Pinduoduo unilaterally formulated a rule of ten times penalties for false seller. This punishment responsibility is far heavier than Article 55 of the *Protection Consumer Rights and Interests Protection Law* "False sales need to bear a refund and compensate three times sums". In this way, when the platform may be liable for compensation, it can smoothly transfer the liability to the seller. However, this is obviously an improper use of the platform's quasi-administrative responsibilities, increasing the seller's responsibility.

E-commerce platforms also use their dominant market advantage by adopting diverse mechanisms such as search ranking, credit evaluation, demerit point systems, internal discipline, and dispute resolution to achieve integrated management control over the seller. Moreover, large e-commerce platforms have absolute advantages in the network economy, and it is straightforward to form a monopoly position to infringe on the interests of other competitors or consumers. For example, Alibaba's market share is more than 60%. It's formulating platform rules and algorithms determines the search ranking of sellers and goods and their platform display position, which has a decisive impact on the operation. In 2017, JD reported to the *State Administration for Market Regulation*, claiming that Alibaba forced sellers to select one between Alibaba and JD platforms abusing its dominant market position. The incident lasted until 2021 when the State Administration for Market Regulation imposed an administrative penalty of RMB18.2 billion on Alibaba (Chen & Wu, 2023).

Countermeasure And Suggestion

Through a comparative study of the literature on e-commerce platforms as online intermediaries in China and the EU, it is evident that their developmental trajectories in e-commerce share similarities. However, there are certain differences in the regulatory approaches and theoretical frameworks governing e-commerce intermediaries in China and the EU. Firstly, the EU places greater emphasis on cross-border management and the application of the Gatekeeper theory, enforcing stringent regulations on large e-commerce platforms and employing specific tiered and classified management measures. In contrast, China currently lacks highly detailed regulations and primarily relies on the Safe Harbor rule and the Red Flag rule as the main judicial adjudication standards. Additionally, China's e-commerce volume ranks first globally, and the rapid growth of the e-commerce economy has led to a surge in disputes, highlighting deficiencies in the current legal and regulatory structures. This necessitates the implementation of more effective measures to strengthen the regulation of e-commerce platforms.

By learning from regulatory experience of the EU, China can improve its e-commerce legal framework, fostering a more reliable and equitable market environment. This will benefit all stakeholders, from policymakers and legal practitioners to e-commerce platforms and consumers.

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First, it is essential to clarify the criteria for identifying e-commerce platforms, thereby reducing ambiguities that cause confusion in judicial practice. Second, drawing from the EU's example, the Gatekeeper theory should be applied to implement tiered and classified management for more effective regulation of e-commerce platforms. Third, dispute resolution mechanisms need to be simplified to accelerate judicial processes. Additionally, it is important to enhancing information sharing with administrative enforcement agencies is crucial for establishing robust self-regulation mechanisms by e-commerce platforms, strengthening their supervision before, during, and after transactions. E-commerce industry associations should enhance their self-regulation capabilities, leveraging their role in overseeing and managing the industry. Furthermore, utilizing advanced technologies such as AI and big data can improve monitoring and detection of illegal activities on e-commerce platforms.

Conclusion

The legal status and obligations of e-commerce platforms are the essential prerequisites for determining the principle of recourse. There are different academic views on the division of civil liability of e-commerce platforms. An academic opinion holds that merchants and consumers are both parties to the sale contract, and the e-commerce platform is not directly involved in the transaction behaviour of buyers and sellers. According to the principle of contract relativity, there is no relationship of rights and obligations between the operator and the consumer of the e-commerce platform, and they do not need to bear the legal responsibility for breach of contract. This view is unable to meet the regulatory needs of the current e-commerce order. Another view is that e-commerce platform operators should bear supplementary responsibility. As a third-party e-commerce platform operator other than the buyer and seller, it is a platform that has regulatory obligations for the qualification of operators within its platform. Therefore, when there is an online transaction dispute on its platform, e-commerce operators bear the primary responsibility, and e-commerce platform operators bear the supplementary responsibility. This theory is generally accepted by the academic circles. However, the existing problem is, what kind of supplementary responsibility should the e-commerce platform operators bear, and how to grasp the scale of this law. If the platform operators bear strict no-fault liability, it may hit the enthusiasm of e-commerce transactions, which is not conducive to the development of market economy. If the e-commerce operators bear ordinary fault responsibility, it is not conducive to the rights protection of consumers (Guo, 2022).

To sum up, the existing legal framework makes it difficult for judicial accountability in this field, which may lead to unfairness and injustice and hinder the development of the Internet digital economy. Furthermore, with the rapid development of internet technology and the emergence of new digital worlds such as Blockchain and Metaverse, we will face even more issues related to the liability of online platforms in the future. Therefore, it is necessary to establish a more comprehensive legal framework to regulate the liability of online platforms. By examining the civil liability frameworks for e-commerce platforms in China and the EU, this literature review underscores the importance of robust and adaptable regulatory measures to safeguard consumer interests and ensure fair market practices.

The civil liability of e-commerce platforms as intermediaries is a complex and evolving area of law. Both China and the EU have made significant strides in developing regulatory frameworks that address the unique challenges of e-commerce. However, ongoing challenges in enforcement and the need for adaptable regulations highlight the importance of continuous

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evaluation and improvement. Future research should focus on the effectiveness of these regulatory measures in practice and explore innovative solutions to enhance consumer protection and market fairness.

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