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INTERNAL COMPLAINT- HANDLING SYSTEMS OF ONLINE PLATFORMS, COMMERCIAL LAW AND THE BOARD OF DIRECTORS' DUTY OF CARE

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Abstract:

Technology causes the emergence of new kinds of disputes and dispute resolution methods. Accordingly, the era of online platform economy has created its own types of disputes and needs its own unique methods to deal with those disputes. Today, the dependence of business users on online platforms implies that the platforms have a large scope to engage in harmful trading practices which may unfairly limit business users' online activities. The Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 requires online platforms to establish internal complaint-handling systems. Internal complaint-handling systems have utmost importance regarding online platforms' decisions to restrict, suspend or terminate the business user's accounts. The Regulation provides the business users important procedural safeguards. Internal complaint- handling systems appear as an alternative dispute resolution method and supports the creation of accessible justice regimes. When evaluated in conjunction with the conventional alternative dispute resolution methods, it resembles the negotiation method. This article opines that even in jurisdictions where the Regulation is not applicable, the conventional commercial law principles may still require an internal complaint- handling system's implementation by the online platforms. The article sets forth how this may emerge by exemplifying the issue through the lens of trader's duty to act as a prudent businessman under Turkish law and the board of director's duty of care under US law. It is envisioned that internal complaint-handling systems will play a crucial role in the online platform economy, since the conventional principles of commercial law support and would inherently require its implementation.

Keywords: *Online Platforms, Internal Complaint-Handling Systems, Alternative Dispute Resolution, Duty to act as a Prudent Businessman, Duty of Care.*

I. INTRODUCTION

Online platforms¹ are central actors of the digital economy and can be both intermediaries and infrastructures of the digital economy, depending on their respective business models.² The intermediation, infrastructural support, and networking effects of online platforms make them indispensable for business users of those platforms.³ The market-making role of online platforms suggests that the business conduct of establishments operating online platforms may need to be monitored closely and even regulated to a certain extent,⁴ because of problems such as information asymmetry, imbalance in bargaining power, market power and dominance in the markets established by online platforms.⁵ The dependence of business users on online platforms implies that the platforms have a scope to engage in harmful trading practices which limit business users' activities through platforms.⁶

Pursuant to its acknowledgement of the utmost importance of online platforms for business users and the risks associated with the online platforms' unilateral actions which might affect the business users'

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The term "online platform" is generally used to refer search engines, social media, e-commerce platforms, application stores, price comparison websites, advertisement networks and other similar online venues (see, European Commission, 'Online Platforms' Commission Staff Working Document (2016), <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0172&from=EN>>, accessed on 30.12.2020).

² United Nations Conference on Trade and Development, *Digital Economy Report 2019* (UN 2019) 25.

³ Ibid 27.

⁴ Christian Twigg- Flesner, "The EU's Proposals for Regulating B2B Relationships on Online Platforms - Transparency, Fairness and Beyond", (2018) 6 EuCML, 222.

⁵ Alexandre de Stree, 'Online Intermediation Platforms and Fairness: An Assessment of the Recent Commission Proposal' (2018), Universite De Namur Working Paper, 5.

⁶ *Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services*, at 2, Com (2008) 238 final (Apr. 26, 2018) [*The Proposal*].

legitimate interests, the Regulation (EU) 2019/1150 of the European Parliament and the Council of 20 June 2019 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (the “Regulation”) was signed into law in the European Union (“EU”).⁷ The Regulation recognizes that there is an increased dependence of business users, particularly micro, small, and medium-sized enterprises, on the services of the online platforms in order to reach their consumers and that this environment causes the online platforms to have superior bargaining power.⁸

The Regulation sets forth the principle that while online platforms may have legitimate reasons to decide to restrict, suspend or terminate the provision of its services to a particular business user, that particular business user should be given a chance to defend itself and re-establish compliance.⁹ However, business users of online platforms often find themselves in a position that they have limited capabilities to seek redress when the unilateral actions of the platforms lead to a dispute.¹⁰ In such cases, business users are limited to the options of applying out-of-court dispute settlement mechanisms or applying to the courts. Unfortunately, both may be ineffective due to transaction costs, lack of specialized authorities and business users’ fear of retaliation. Accordingly, the Regulation imposes on the online platforms the obligation to provide for an internal complaint-handling system in order to enable business users to have access to immediate, suitable, and effective possibilities of redress, particularly for the ones who have been restricted, suspended, or terminated.¹¹

⁷ See Council Regulation 2019/1150, 2019 O.J. (L 186) (EU) [hereinafter *Regulation*].

⁸ Regulation, Recital Par. 2.

⁹ Regulation, Recital Par. 22.

¹⁰ Regulation, Recital Par. 5.

¹¹ Regulation, Recital Par. 37.

This article outlines the principles regarding the internal complaint-handling system mechanism which the Regulation establishes and evaluates the system in relation to the concept of alternative dispute resolution. It further expresses that the contractual relationship between the online platform and its business users, in connection with pertinent principles of commercial law, may compel platforms to establish internal complaint-handling systems even where the Regulation is not applicable. Likewise, the article explains how an online platform provider corporation's board of directors may need to implement this system in order to satisfy its duty of care even in the absence of the Regulation. This study envisages that the internal complaint-handling systems will become a main component of the online platform services in the future.

II. INTERNAL COMPLAINT-HANDLING SYSTEMS

In a nutshell, the Regulation provides that the online platform shall set out the grounds for its decisions to suspend, terminate, or restrict, in whole or in part, the provision of their online intermediation services to business users in their terms and conditions (Article 3(1)(c)). Since the "terms and conditions" is defined as all terms and conditions or specifications which govern the contractual relationship between the online platform and its business user and are unilaterally determined by the online platform (Article 2(10)), the Regulation presumes that there is a contractual relationship between the online platforms and their business users. Article 4(5) of the Regulation dictates the internal complaint-handling system as an important procedural part of this contractual relationship.¹²

¹² The legislative process concerning the Regulation has shown that there is a division among supporters of light-touch regulatory approach based on transparency requirements and more hands-on approach based on mandatory fairness standards (Christian Busch, 'Towards Fairness and Transparency in the Platform Economy? A First Look at the P2B Regulation' in De Franceschi and Schulze (eds), *New Challenges*

This part of the article first explains the concepts of “business users” and “online intermediation services,”¹³ and then outlines the internal complaint-handling system in connection with those concepts. These concepts, together with the internal complaint-handling system, are not only central for the framework of the Regulation but also for the fundamental rights that it preserves. The Regulation and the measures it stipulate signal that the EU is committed to safeguard for business users of online platforms the right to an effective remedy and to a fair trial as articulated in Article 47 of the Charter of Fundamental Rights of the European Union.¹⁴ The Regulation further effectuates Article 16 of the Charter of Fundamental Rights of the European Union which recognizes the freedom to conduct a business, by protecting a fair, predictable, sustainable, and trusted online business environment.¹⁵

It should also be noted that since the Regulation does not affect national civil law, in particular contract law and unfair competition law, Member States remain free to apply national laws insofar as the rules are in conformity with the EU law and to the extent not covered by the Regulation (Article 1(4)). Accordingly, any attempt to reach an agreement through the internal complaint-handling system does not affect the business users’ or the providers’ right to initiate judicial proceedings during or after the process.¹⁶ Consequently, an online platform which has

for Law (C.H. Beck 2019), 57). Nevertheless, the Regulation tends to focus on procedural measures rather than a substantive regulation (Christoph Busch, “The P2B Regulation (EU) 2019/1150: Towards a “Procedural Turn” in EU Platform Regulation”, (2020) 4 *EuCML* 134).

¹³ In this article, the term “online platform” and “providers of online intermediation services” are used interchangeably. The term “online platform” is preferred over “providers of online intermediation services” as it is a better-known and understood terminology.

¹⁴ Proposal 9.

¹⁵ Proposal 9.

¹⁶ Regulation, Recital Par. 37.

complied with the Regulation's internal complaint-handling system principles might still end up in a position that it is contractually or non-contractually liable to the business users.

A. Business Users and Online Intermediation Services

Article 11 of the Regulation requires that providers of online intermediation services shall provide for an internal system for handling the complaints of business users. The Regulation defines a "business user" as 'any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to trade, business, craft or profession' (Article 2(1)). Corollary, a "consumer" means 'any natural person who is acting for purposes which are outside this person's trade, business, craft or profession' (Regulation Article 2(2)).

The meaning given to the term of "business user" appears to have a narrower scope when compared with the terms of "trader" and "seller", which are terms that are frequently used in EU legislation on consumer rights. For example, the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 ("Directive") provides that "trader" means "*any natural person or any legal person irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive*" (Article 2(2)). Likewise, the term "seller" is given a nearly identical meaning by the Article 2(3) of the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019. The term "consumer" has nearly identical definitions with the Regulation in both aforementioned directives. Because the Regulation would not

affect the applicability of EU law on consumer protection (Article 1(5)), a business user under the Regulation may still be deemed a seller or trader pursuant to the applicable legislation protecting consumers.

The “business user” term is linked with the term of “online intermediation services”. According to the Regulation, “online intermediation services” means services which meet all of the following requirements: (1) They constitute information society services within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535 of the European Parliament and of the Council, (2) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded, (3) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers (Article 2(2)). Furthermore, an information society service is any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services (Article 1(1) of Directive (EU) 2015/1535). Accordingly, the Regulation covers a wide range of online intermediation services, including e-commerce marketplaces, online software applications services and online social media services.¹⁷

A business user would be able to benefit from the Regulation’s internal complaint-handling system mechanism given that the online intermediation service is covered by the Regulation scale-wise, subject-wise and geographic-wise. The first limitation provides that online intermediation services that are small enterprises within the meaning of Annex to Recommendation 2003/361/EC would not be obligated to

¹⁷ Regulation, Recital Par. 11.

provide internal complaint- handling systems for its business users (Article 11(5)), due to the costs associated with operating such a system.¹⁸The second limitation is reflected in Regulation Article 1(3) which states that it shall not apply to online payment services or to online advertising tools or online advertising exchanges which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers (Article 1(3)). In addition to this, a business user which provides its goods or services to artificial persons or traders would not be covered by the Regulation.¹⁹ The third limitation provided in Regulation Article 1(2) and sets forth the satisfaction of two cumulative conditions: (1) The business users should be established in the EU and (2) business users should, through the provision of the online intermediation services, offer their goods and services to consumers located in the EU.²⁰

B. Principles of the Internal Complaint- Handling Systems

The Regulation Article 11(1) provides that the internal complaint-handling system shall be easily accessible and free of charge for business users and shall be handling complaints within a reasonable time frame.²¹ Accordingly, the information relating to the access to and functioning of the internal complaint- handling system shall be articulated in the terms and conditions of the online intermediation services provider (Article 11(3)). Likewise, the transparency, equal treatment, and proportionality standards are to be observed (Article 11(1) (Par. 2)). These standards would be subject to the scrutiny of the public since the providers of online

¹⁸ Regulation, Recital Par. 38.

¹⁹ Regulation, Recital Par. 11 and Par. 9.

²⁰ Regulation, Recital Par. 9.

²¹ While the term “reasonable time frame” is not defined by the Regulation, the time frame determined by the online platform should at least need to pattern after Article 4(2) under disputes relating to platform actions covered by Article 4, in order to satisfy the general purpose of the Regulation.

intermediation services are required to make information on the functioning and effectiveness of their system available to the public (Article 11(4)).

A business user would be allowed to lodge complaints directly with the provider on three sets of issues: (1) alleged non-compliance by that provider with any obligation laid down in the Regulation which affects the complainant (Article 11(1)(a)), (2) technological issues which relate directly to the provision of online intermediation services and which affect the complainant (Article 11(1)(b)), (3) measures taken by, or behavior of, that provider which relate directly to the provision of the online intermediation services, and which affect the complainant (Article 11(1)(c)). Providers of online intermediation service shall: (1) duly consider complaints filed and the follow-up which they may need to give to the complaint in order to adequately address the issue raised, (2) process complaints swiftly and effectively, and (3) communicate to the complainant the outcome of the process in an individualized manner and drafted in plain and intelligible language.

While the set of issues for which the internal complaint-handling system may be effectuated is not exemplified by Article 11(1) by articulating specific instances and cases, any decision by the online platform regarding the business user's account's termination, suspension or restriction would provide legitimate legal basis for a complaint pursuant to Article 11(1)(c). The Regulation provides that prior to or at the time of the restriction, suspension or termination taking effect, the provider shall state its reasons (unless Article 4(5) Par. 2 applies) for the action affecting the business users (Article 4(1)). "To minimize the negative impact of such decisions on business users," the providers should allow the business users "to clarify the facts that led to that decision through the internal

complaint-handling system process” (Article 4(3)).²² While the Regulation seems silent on the substantive conditions²³ that may justify decisions on restriction, suspension or termination of business users’ accounts, the internal complaint- handling system gives the business users the chance to clarify the respective issues based on the transparency obligation provided in Article 4 of the Regulation.²⁴

C. Alternative Dispute Resolution and Internal Complaint-Handling Systems

Technology creates new venues for disputes and changes the circumstances which gives rise to the need for better access to justice, including alternative dispute resolution (“ADR”). The types of disputes which are inevitable in the context of online platforms may be divided into three main categories: (1) contractual disputes (e.g., interruptions in services, breach of data security, non-performance of obligations, misrepresentations, customer complaints due to non-conformity, unjust withholding of money, free speech), (2) non- contractual disputes (e.g., copyright, trademark, data protection, defamation, competition law),²⁵ and (3) public law disputes (e.g., actions and decisions of administrative authorities). The disputes between the business users and online platforms generally fall into one of these categories.

ADR appears as a term generally used to refer to situations where a complaint may be settled “out of court with the assistance of an impartial

²² Regulation, Recital Par. 22.

²³ Regulation Recital Par. 23 provides that the sanction to be applied by the online platform should be proportional, but this wording does not identically appear in Article 11(1) (Par. 2) or Article 4.

²⁴ Busch 134.

²⁵ See, Kah- Wei Chong, Len Kardon, ‘E- Commerce: An Introduction’, Berkman Center for Internet and Society Open Education 30.04.2001- 09.05.2001, <<http://cyber.law.harvard.edu/ecommerce/disputes.html>>, accessed 12.02.2021.

dispute resolution body.”²⁶ There are many types of ADR, such as mediation, conciliation, ombudsmen, arbitration, and complaints boards.”²⁷ Depending on how ADR is defined, negotiation may also fall under the designated types of ADR.²⁸ The types of ADR may be categorized as “binding (adjudicative) and non-binding (consensual) ADR.”²⁹ While binding ADR includes a “neutral third party” which “renders a decision that is binding upon the parties in dispute,” non-binding ADR confers to the “neutral third party” the role of facilitating dialogue between the parties.³⁰ Online ADR has also emerged, and it is defined as a process involving parties “communicating by electronic means in an attempt to reach an agreement.”³¹ⁿ

The internal complaint-handling system of the Regulation is a form of non-binding (consensual) ADR. First, while the Regulation does not require the business user to give up their rights to go to court,³² it requires the online intermediary service provider to initiate the dispute resolution process at the request of the business user.³³ Second, since the Regulation provides mediation as a method to resolve disputes,³⁴ the internal complaint-handling system appears to be a mechanism which

²⁶ European Commission, ‘Alternative dispute resolution for consumers’, <https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/alternative-dispute-resolution-consumers_en> accessed 01.02.2021.

²⁷ Ibid.

²⁸ Jordan Goldberg, “Online Alternative Dispute Resolution and Why Law Schools Should Prepare Future Lawyers for the Online Forum”, (2014) 14 Pepp. Disp. Resol. L. J. 1.

²⁹ Maud Piers, “Europe’s Role in Alternative Dispute Resolution: Off to a Good Start?”, (2014) 2 Journal of Dispute Resolution 273.

³⁰ Piers 274.

³¹ Goldberg 2.

³² See *Regulation*, supra note 7, at 77 (Art. XIV, par. 9).

³³ See *Regulation*, supra note 7, at 77 (Art. XI, par. 1)

³⁴ See *Regulation*, supra note 7, at 77 (Art. XII, par. 2)

should be initiated prior to the mediation process.³⁵ Third, as there is no neutral third party involved in the internal complaint-handling system and the parties are initiating a dialogue between each other, it may be understood as a negotiation process. Fourth, since an online intermediary service provider may delegate the operations of the system to an external service provider (i.e., third party service providers),³⁶ it is fair to say that the system may be envisioned as a neutral and separate venue.

It may be said that the internal complaint-handling system is a specific type of ADR, which has the characteristics of the negotiation method. While such systems are provided by the online platforms pursuant to the Regulation, it is set as a pre-mediation method³⁷ and its details should be articulated in the terms and conditions of the online platform.³⁸ Since negotiation is the only pre-mediation ADR method and it is in the form of “a contractual obligation to settle disputes peacefully and amicably,”³⁹ internal complaint-handling systems fit within the framework of negotiation. While the online platform shall communicate the complainant the outcome of the complaint handling process in an individualized manner drafted in plain and intelligible language,⁴⁰ any resolution reached by the parties through the process would reflect the platform’s willingness to resolve the issue by way of negotiation, since the platform would not have made the decision giving rise to the complaint in the first place if it was not in the opinion that its decision was legitimate. Because the system is internet based, it can also be categorized as an online alternative dispute resolution method.

³⁵ See *Regulation*, supra note 7, at 77 (Art. XII, par. 1)

³⁶ Regulation, Recital Par. 37 .

³⁷ See *Regulation*, supra note 7, at 77 (Art. XII, par. 2)

³⁸ See *Regulation*, supra note 7, at 77 (Art. III, par. 1(c))

³⁹ Borut Strazisar, “Alternative Dispute Resolution”, Law: Journal of Higher School of Economics (2018) 214, 219.

⁴⁰ See *Regulation*, supra note 7, at 77 (Art. XII, par. 2(c))

III. CONTRACT LAW AND COMMERCIAL LAW INTERPLAY

“In today’s transnational regulatory environment, it can be observed that intermediaries are not always assigned specific or discrete roles and this assignment is not only done by regulators alone.”⁴¹ While general examination of the terms and conditions of online platforms shows that while online platforms may designate the nature of the legal relationship between the platform and its business user differently⁴², the relationship between the business users of the online platform and the platform itself appears generally to be contractual in nature.⁴³

The “terms and conditions” or “terms of services” are unilateral contracts the business users agree to at the time of their subscription with the platform.⁴⁴ These agreements are contracts subject to the applicable laws governing contracts.⁴⁵ For example, the Regulation, with its exceptions, provides for a thirty-day prior notice period in case of termination of services (Article 3(2)). Likewise, the Regulation requires that the statements of reasons for termination state the specific facts or circumstances, including third party notifications, that led to the decision, as well as reference to applicable Article 3(1)(c) grounds for termination

⁴¹ Arno Kourula, Markus Paukku, Andrew Peterman, Mikko Koria, “Intermediary Roles in Regulatory Programs: Toward a Role- Based Framework”, (2019) 13 *Regulation & Governance*, 141, 142.

⁴² Pinar Akman, “Online Platforms, Agency, and Competition Law: Mind the Gap,” (2019) 43 *Fordham INT’L L.J.* 209, 264.

⁴³ Regulation, Recital Par. 10. Application of contractual theories to online platforms for liability is also an approach embraced by courts; *see also*, *Barnes v. Yahoo!, Inc.*, 565 F.3d 560, 572 (9th Cir. 2009).

⁴⁴ See, Graham J. H. Smith, *Internet Law and Regulation* 821 (4th Ed. 2007).

⁴⁵ See, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), Article 9.

(Article 4). When the relationship between the business user and the online platform is deemed contractual, the requirement that both parties are acting in good faith and fair dealing applies.⁴⁶

Commercial law, when read in conjunction with the law of contracts, may both supplement and complement the relationship between the business user and the online platform. Its supplementary function may be exemplified through the online platform's duty to act as a prudent businessman under Turkish law, and its complementary function may be exemplified as the board of directors' corporate governance obligations under US law. In this section, it will be explained that an online platform may find itself in a position that it should inevitably establish an internal complaint-handling system even where the Regulation does not apply to any of its operations or business users.⁴⁷

A. The Duty to Act as a Prudent Businessman

4721 numbered Turkish Civil Code ("TCVC") Article 2 provides that everyone shall abide by the duty of good faith when exercising their rights and fulfilling their obligations, and that the law does not protect the outright abuse of a right. In Turkish law, this statutory principle is called as the "rule of good faith" and it is in effect in all private law relationships (TCVC Article 5). Accordingly, this principle imposes upon each party

⁴⁶ Regulation, Article 8.

⁴⁷ It should be noted that other statutory rules which are non-contractual in nature, may still give rise to this obligation, such as the law of unfair competition (Murat Can Pehlivanoglu, "Tarım Sektörü, Haksız Rekabet ve Son Dakika Sipariş İptalleri", (2020) 195- 196 Bahçeşehir Hukuk Fakültesi Dergisi). However, this evaluation is beyond the scope of this study.

of a contract a duty of good faith in the contract's performance.⁴⁸ The rule is mandatory in nature⁴⁹ and cannot be contracted around⁵⁰.

A mandatory rule in commercial law which appears to provide similar outcomes with the duty of good faith in terms of contractual relationships of the trader⁵¹ is the duty to act as a prudent businessman. 6102 numbered Turkish Commercial Code ("TCC") Article 18 expresses the above mentioned rule by stating that every trader has to act as a prudent businessman in all of its commercial affairs. It is suggested that this duty provides an "objective duty of care" that requires the trader to perform the care that is reasonably expected from a cautious and farsighted trader in its affairs.⁵²

The duty to act as a prudent businessman is connected with the status of "trader" (TCC Article 18(2)). Since online platforms are widely operated through artificial persons in the form of commercial companies, and in particular, stock corporations, such online platform providers are automatically deemed "merchants" (TCC Article 16(1)), and they are under the duty to act as a prudent businessman in their dealings. However, it should be recognized that the person under the duty to act as a prudent businessman is the stock corporation itself and not its managers.⁵³

⁴⁸ Muhammet Emin Bingöl, *Basiretli İş Adamı Gibi Hareket Yükümlülüğü: Özellikle Tacirin Ücret ve Cezai Şartın İndirilmesini İsteyememesi* (XII Levha 2018) 58.

⁴⁹ Yargıtay 3. H.D. E. 2015/11929 K. 2015/20070.

⁵⁰ See *Carma Developers (Cal.), Inc. V. Marathon Development California, Inc.*, 826 P.2d 710 (Cal. 1992) (For example, while this duty is recognized in the majority of American jurisdictions, the case law in California suggests that the parties can contract around the duty of good faith).

⁵¹ Yargıtay H.G.K. E. 2012/68 K. 2012/244 T. 28/03/2012.

⁵² Yargıtay H.G.K. E. 2003/332 K. 2003/340 T. 07/05/2003.

⁵³ TCC Article 369 Official Comment.

In contractual relationships, the duty to act as a prudent businessman may cause the emergence of contractual obligations which are not expressly articulated in the contract itself.⁵⁴ When these implied obligations are violated, the complainant may sue the trader for damages.⁵⁵ Given that there is a contractual relationship between the online platform and its business users, even in the absence of any specific statutory law or provision in the terms and conditions determined by the platform, the duty to act as a prudent businessman may give rise to certain obligations on the part of the online platform.⁵⁶

Just as the covenant of good faith finds particular application in cases where one party is invested with a discretionary power affecting the rights of the other party,⁵⁷ the duty to act as a prudent businessman may cause the emergence of an implied obligation to not terminate or restrict an online platform's business user's account without an objective basis for the decision or an opportunity to cure any breach. The usage of internal complaint-handling systems may provide evidence that discretionary contractual rights are exercised objectively. The rationale of activating the duty to act as a prudent businessman in this context may also be based upon the fact that the business user has reasonable expectations that the online platform will, as the better-informed party, intervene to resolve any disputes that arise.

B. Board of Directors' Duty of Care

⁵⁴ Sabih Arkan, *Ticari İşletme Hukuku* (BTHAE 2019) 154.

⁵⁵ Bingöl, 25.

⁵⁶ Murat Can Pehlivanoğlu, 'Basiretli Bir İş Adamı Gibi Hareket Etme Yükümlülüğü ve Elektronik Ticaret Platformlarının Alıcılara Karşı Sorumluluğu' (Selçuk Hukuk Kongresi 2020 Özel Hukuk Tebliğleri Tam Metin Kitabı, Ankara 2020) 63.

⁵⁷ *Carma Developers (Cal.), Inc. V. Marathon Development California, Inc.* (1992) 2 Cal. 4th 342.

The generally articulated model of corporations contemplates that the board of directors manages the corporation's business and makes business policies; the officers execute the board's decisions, and the shareholders elect the board and approves major corporate actions.⁵⁸ According to this model, the board of directors' duty of care includes the board's duty to be the monitor of corporate performance, even in cases which do not allege any self-dealing or breach of the duty of loyalty issues, for example. Accordingly, a claim of breach of duty to exercise appropriate attention may follow from a board decision that results in a loss because that decision was ill-advised or negligent, or may follow from a loss arising from an unconsidered failure of the board to act in circumstances in which due attention would have prevented the loss.⁵⁹

Since the board of directors are responsible for oversight of corporations and they owe their corporations a duty of care, some jurisdictions tend to impose a specific corporate compliance obligation on the board of directors. After all, corporate activities may be subject to regulatory obligations which may subject a non-complying corporation to civil, criminal or administrative penalties that reduces the profits of the corporation.⁶⁰ Whether the board has satisfied such an obligation would be tested with the applicable duty of care standard, such as the business judgment rule.⁶¹ While there is little consensus on how corporations should effectuate compliance in general, its details are statutorily stipulated in some areas, such as financial audit and anti-money laundering.⁶²

⁵⁸ Melvin A. Eisenberg, "The Duty of Care of Corporate Directors and Officers", (1990) 51 U. PITT L. REV. 945, 950.

⁵⁹ See generally, *In re Caremark International Inc. Derivative Litigation* 698 A.2d 959 (1996).

⁶⁰ John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, "Board Compliance", (2020) 104 MINN. L. REV. 1191, 1204.

⁶¹ Armour, et. al., 1197.

⁶² Armour, et. al., 1206-1207.

For example, Delaware law requires that the board of directors “exercise a good faith judgment that the corporation’s information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.”⁶³ Failure to do so may cause the directors’ liability for losses caused by the non-compliance of the corporation with applicable legal standards, since such a failure would be a violation of the duty of care.⁶⁴

Accordingly, even in the absence of the Regulation requirement to establish an internal complaint-handling system, the online platform’s board of directors’ duty to monitor the corporate activities under the duty of care owed to the corporation may require the board to implement such a system. For example, California’s Civil Code Sec. 1749.7 resembles a version of the Regulation,⁶⁵ but it does not include the internal complaint-handling system establishment requirement. Still, since it provides that the marketplace should, in its written statements regarding the suspension or termination decision, explain whether or not the decision may be appealed and if so the procedure for such an appeal (Sec. 1749.7(c)(3)), the board of directors of a corporation operating a marketplace covered by the section would need to consider the methods to satisfy the requirements of the aforementioned section. The internal complaint-handling system is one of the alternatives which could enable the board to review the treatments of the corporation.

⁶³ In re Caremark International Inc. Derivative Litigation 698 A.2d 959 (1996).

⁶⁴ In re Caremark International Inc. Derivative Litigation 698 A.2d 959 (1996). However, see, *Stone v. Ritter* 911 A.2d 362, 370 (Del. 2006).

⁶⁵ Assembly Committee on Privacy and Consumer Protection AB 1790 (Wicks) Report, p. 4.

Whether it is accepted or not that the above mentioned⁶⁶ contract law and commercial law interplay creates contractual obligations to make sure contractual rights are objectively exercised, the duty of care may still effectively require the corporation to have the internal complaint-handling system since lawsuits by business users alleging unfair treatment or unlawful termination may result in civil losses to the corporation.⁶⁷ Likewise, the wide range of the law of unfair competition may be used to hold the online platform liable in specific circumstances.⁶⁸ In such a case, the board would be in violation of its duty of care if it cannot show that it satisfied its duty to monitor by, for example, using an internal complaint-handling system to consider and resolve any claims by the business users beforehand.

IV. CONCLUSION

Inevitably, technology creates new venues for business competition and changes the circumstances giving rise to the need of ADR. While administrating disputes concerning transactions made through internet requires a determination of balance between government intervention and self-regulation,⁶⁹ the Regulation's internal complaint handling system shows that a mandatory self-regulation may support the creation of

⁶⁶ See, III.A.

⁶⁷ In general, the concept of compliance does not include contractual duties (see, *Armour, et. al.*, 1204), since contracts are not rule of law, but merely subjective rules determined by the parties. Still, the notion that the corporation may suffer losses in case of breach of its contractual duties requires the board to not to breach contracts unless such breach may be accepted within the board's exercise of its business judgment. However, if the breached contractual duty is based upon a statutory obligation, then its violation may be deemed a violation of a rule of law.

⁶⁸ For example, any unlawful business practice would be deemed an unfair competition (California Business and Professions Code Sec. 17200), and whether an act is an unlawful business practice may be defined by borrowing from other statutes, so that violations of other laws would be treated as unlawful practices (see, *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185 (2013)).

⁶⁹ Haitham A. Haloush, "Internet Infrastructure and Online Alternative Dispute Resolution", (2008) 25 *J. Marshall J. COMPUTER & INFO. L.* 217, 219.

accessible justice regimes without too much government intervention. After all, internal complaint- handling systems are venues where the parties would be discussing and negotiating a resolution for their disputes without the involvement of any third party overseeing their actions.

Although the Regulation provides important procedural safeguards, conventional commercial law principles may also require the implementation of similar safeguards. First, the interplay between commercial law and contract law may require online platform operators to provide an internal complaint- handling system in order to satisfy their statutory duty to exercise their contractual rights objectively, as a trader. Second, an online platform provider corporation's board of director's duty of care may require the board to implement such systems in order to satisfy its monitoring and compliance obligations provided under their duty of care owed to the corporation. Accordingly, it is envisioned that the internal complaint- handling system will play an important role as an ADR method, even in jurisdictions where the Regulation is not applicable.