
Articles

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The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act

Consumers increasingly shop through online marketplaces like Amazon. As a consequence, these platforms have come to play a central role in the marketing of products to consumers. But to what extent are online marketplaces liable if the way in which a product is marketed infringes the Unfair Commercial Practices Directive, which is meant to protect consumers against unfair marketing? This article discusses the liability of online marketplaces under the Unfair Commercial Practices Directive, taking into consideration the exemptions from liability for hosting in the E-commerce Directive and the draft Digital Services Act. Several scenarios are discussed. This discussion shows that despite the liability exemptions in the E-commerce Directive and the draft Digital Services Act, the UCPD provides significant room to hold online marketplaces liable. In addition, it is argued that the E-commerce Directive and the draft Digital Services Act do not stand in the way of extending the liability of online marketplaces, if desired.

I. Introduction

Online marketplaces such as Amazon and Zalando are of growing importance for both consumers and sellers.¹ For consumers, online marketplaces provide considerable convenience: consumers can shop through one trusted channel, having access to a large amount of products from different sellers. For sellers, online marketplaces provide an easy way to reach large populations of potential buyers, while relying on the IT infrastructure of the platform. As a consequence, online marketplaces now play a central role in the marketing of products to consumers. However, while online marketplaces clearly offer benefits to both consumers and businesses, the purchasing of consumer products through platforms has also raised concerns in terms of consumer protection. While consumers often see the platform as a trusted channel for their purchases, online marketplaces have been criticised for not communicating clearly to consumers and for not taking responsibility towards consumers if something goes wrong.²

The liability of online marketplaces for breaches of consumer protection law has already received attention in legal literature.³ The literature shows that it is often difficult to determine whether and to what extent online marketplaces can be held liable under EU consumer law. One reason why this is difficult is that each consumer law directive paints its own picture in terms of the liability of online intermediaries.⁴ Another complication is that online marketplaces – at least under certain conditions – are exempted from liability under the E-commerce Directive.⁵ This raises the question whether and to what extent this exemption impacts potential liability on the basis of EU consumer law. Moreover, the picture may change as a result of the draft Digital Services Act (“DSA”),⁶ which – when adopted – will introduce new rules for online intermediaries (including online marketplaces) and will update the liability exemption in the E-

commerce Directive. What will be the impact of the DSA on the potential liability of online marketplaces on the basis of EU consumer law?

Taking into consideration that each EU consumer law directive is different in terms of the liability of online marketplaces, this article specifically focuses on the liability of online marketplaces under one of the EU consumer law directives: the Unfair Commercial Practices Directive (“UCPD”).⁷ The UCPD regulates business-to-consumer marketing and has a

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- For the purpose of this article, online marketplaces are defined in line with the definition of the Modernisation Directive (2019/2161): “a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers.” The examples that are used for clarification in this article will focus on the sale of online goods via online marketplaces. Online marketplaces are also known as “e-commerce platforms”. Some of these platforms (such as Amazon and Zalando) started off as regular web stores (selling their own products), but increasingly focus on third-party selling.
- See e.g. Ursula Pachl, ‘Online marketplaces have it too easy. It’s time the EU acts’ (*Euronews*, 6 December 2020) <<https://www.euronews.com/2021/12/06/online-marketplaces-have-it-too-easy-it-s-time-the-eu-acts-view>> accessed 9 February 2021 and Netherlands Authority for Consumers and Markets, *Rules of thumb: online platforms* (2020), 2.
- See in relation to the Consumer Rights Directive Christiane Wendehorst, ‘Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive’ [2016] *EuCML* 30, Damjan Možina, ‘Retail business, platform services and information duties’ [2016] *EuCML* 25 and Christiana Markou, ‘Directive 2011/83/EU on Consumer Rights’ in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 177, 185-186. In relation to the Product Liability Directive, see Christoph Busch, ‘When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon’ [2019] *EuCML* 173 and Christoph Busch, ‘Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective’ [2021] *European Legal Studies Institute Osnabrück Research Paper Series No. 21-01*. For a general perspective, see Irina Domurath, ‘Platforms as contract partners: Uber and beyond’ [2018] *Maastricht Journal of European and Comparative Law* 565.
- See the references in footnote 3. Despite each directive painting its own picture, the picture is hardly ever clear.
- 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) [2000] *OJ L178/1*.
- Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC’ COM(2020) 825 final. European Parliament approved the proposal on 20 January 2022, making amendments to the original proposal. See European Parliament, ‘Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD))’ P9_TA(2022)0014.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’) [2005] *OJ L149/22*.

broad scope of application, and has so far received limited attention in the debate on the liability of online marketplaces for breaches of EU consumer law.⁸ The question addressed in this article is to what extent online marketplaces can be held liable under the UCPD, taking into consideration the liability exemption in the E-commerce Directive and the upcoming changes under the DSA.⁹ In order to answer this question, this article distinguishes different scenarios for potential liability of online marketplaces under the UCPD. In particular, the article explores scenarios in which the online marketplace may be held liable for its own conduct in relation to the marketing of products on its platform and scenarios in which the breach of the UCPD is essentially caused by a third-party seller. The focus is on scenarios in which products are sold by professional third-party sellers, i.e. not by the platform itself.¹⁰

While the main focus of this article is on the position of online marketplaces under the UCPD, the article will first discuss the liability exemption under the E-commerce Directive and its significance for EU consumer law. (par. II). After that, it is discussed to what extent online marketplaces can currently be held liable under the UCPD, taking into consideration the E-commerce Directive's liability exemption (par. III). In par. IV, it is discussed to what extent this picture changes under the draft DSA. The conclusions and their policy implications are presented in par. V.

This article will show that despite the liability exemptions in the E-commerce Directive and the DSA, the UCPD provides significant room to hold online marketplaces liable. In addition, it is argued that the E-commerce Directive and the DSA do not preclude further extending the liability of online marketplaces. The latter conclusion is relevant for the context of the UCPD, but also for other EU consumer law instruments.

II. The Liability Exemption in the E-Commerce Directive

1. Introduction

Before this article turns to the UCPD, this paragraph first discusses the liability exemption for hosting providers under the E-commerce Directive. This general exemption from liability can be invoked by online intermediary service providers against all sorts of liability claims, and has also been invoked by online platforms (such as comparison websites) against claims on the basis of the UCPD.¹¹ To what extent can online marketplaces invoke this liability exemption, and how does this liability exemption relate to potential liabilities on the basis of EU consumer law?

2. The E-Commerce Directive

In 2000, the European Commission adopted the E-commerce Directive. The E-commerce Directive regulates certain aspects of "information society services".¹² This term is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." According to the Preamble to the E-commerce Directive and the case law of the European Court of Justice ("CJEU"), this includes the online sale of goods.¹³ The E-commerce Directive regulates several issues in relation to electronic commerce. For example, it lays down information requirements for information society services, including specific requirements for the conclusion of contracts via electronic means.¹⁴ It also provides liability exemptions for intermediaries.

3. The Liability Exemption for Hosting

One of the key aspects of the E-commerce Directive is the exemption of liability of intermediary service providers.¹⁵ The E-commerce Directive contains three liability exemptions ("safe harbours"), targeted at different types of intermediary services.¹⁶ The exemptions concern a broad range of potential liabilities, including extra-contractual liability, criminal liability and administrative liability.¹⁷ The idea behind the liability exemptions in the E-commerce Directive is that online intermediaries should not be held liable for hosted content if they do not control that content.¹⁸ This should promote the free flow of information on the internet.

- 8 The UCPD did receive some attention in the debate: see most elaborately Reto Hilty and Valentina Moscon, 'Digital markets, rules of conduct, and liability of online intermediaries – analysis of two case studies: unfair commercial practices and trade secrets infringement' [2020] Max Planck Institute for Innovation and Competition Research Papers 20-01. See also recently, specifically in relation to the DSA: Christoph Busch and Vanessa Mak, 'Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation' [2021] EuCML 109.
- 9 Liability is understood broadly in this article. Hence, it is investigated to what extent online marketplaces can be held liable under the UCPD, rather than focusing on the specific type of liability (e.g. the specific administrative, criminal or private law measures that can be taken). The specific type of liability is to a large extent left to Member States: see Articles 11 and (recently introduced by the Modernisation Directive, 2019/2161/EU) 11 a UCPD.
- 10 Some platforms (such as Amazon) also sell their own products. In such a case, it is typically clear that the platform is liable for breaches of EU consumer law, including the UCPD.
- 11 See e.g. Court of Appeal Amsterdam 7 March 2017, ECLI:NL:GHAMS:2017:739 (*Skyscanner*).
- 12 "Information society service" is currently defined in Article 1.1(b) of Directive 2015/1535. It is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services." See on this definition in more detail: Arno Lodder, 'Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market', in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 15, 22-26 and Joris van Hoboken et al, 'Intermediary Services and Illegal Content Online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape' (report for the European Commission DG Communications Networks, Content & Technology 2018), 30-31.
- 13 Recital 18 of the Preamble to the E-commerce Directive and Case C-10/09 *Ker-Optika* [2010] ECLI:EU:C:2010:725, ECR I-12213. See also Christiane Wendehorst, 'Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive' [2016] EuCML 30, 31 and Arno Lodder, 'Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market', in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 15, 29.
- 14 See Chapter II of the E-commerce Directive, with specific information requirements for the online conclusion of contracts in Article 10.
- 15 Section 4 E-commerce Directive. See on this topic also Pablo Asbo Baistrocchi, 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' [2002] Santa Clara Computer & High Tech LJ 111; DLA Piper, 'Legal analysis of a Single Market for the Information Society – New rules for a new age?' (report for the European Commission's Information Society and Media Directorate-General, 2009); Patrick van Eecke, 'Online service providers liability: a plea for a balanced approach' [2011] Common Market Law Review 1455 and Giovanni Sartor, 'Providers Liability: From the eCommerce Directive to the future' (report for the IMCO Committee of the Directorate-General for Internal Policies of the European Parliament, IP/A/IMCO/2017-07, 2017).
- 16 See Articles 12, 13 and 14 E-commerce Directive.
- 17 The exemptions concern a broad range of potential liabilities, including extra-contractual liability, criminal liability and administrative liability. See DLA Piper, 'Legal analysis of a Single Market for the Information Society – New rules for a new age?' (report for the European Commission's Information Society and Media Directorate-General, 2009), 9 and Patrick van Eecke, 'Online service providers liability: a plea for a balanced approach' [2011] Common Market Law Review 1455, 1463. See on the liability exemptions in the E-commerce Directive also Stefan Kulk, *Internet intermediaries and copyright law* (PhD Utrecht University 2018) 103-106.
- 18 See Recital 42 of the Preamble to the E-commerce Directive.

Of the three liability exemptions, the exemption for “hosting” activities (Article 14 E-commerce Directive) is particularly relevant for online marketplaces.¹⁹ Hosting under Article 14 E-commerce Directive is effectively an information society service consisting of the storage of information provided by a recipient of the service.²⁰ Classic examples of hosting services are email hosting (Gmail), file hosting (Dropbox) and web hosting.²¹ Member States must ensure that the provider of the hosting service is not liable for the information stored at the request of a recipient of the service, provided that the hosting service provider either (a) does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information. The safe harbour provided by Article 14 is activity-based. In other words, a company may be exempted from liability in relation to some services but may be found liable for others.²² The extent to which the activities of online marketplaces can invoke the liability exemption of Article 14 E-commerce Directive is discussed below (par. III.4).

Article 14 of the E-commerce Directive does not prevent courts or enforcement authorities, in accordance with the laws of the Member States, to impose injunctions against hosting service providers in order to terminate or prevent an infringement.²³ In fact, Article 18 of the E-commerce Directive requires Member States to introduce measures to rapidly terminate any alleged infringement and to prevent any further infringement of the interests involved. However, according to Article 15 E-commerce Directive Member States may not impose a general obligation to monitor content proactively.²⁴

4. Case Law: Active or Passive Role

The E-commerce Directive was drafted at a relatively early stage of the development of the internet. As a consequence, it did not take into account online services such as social media and online marketplaces.²⁵ This raises the question to what extent online marketplaces can rely on the liability exemption of Article 14 E-commerce Directive. Over the past years, the CJEU has handed down several decisions that provide guidance.²⁶ Most of these judgments relate to the infringement of intellectual property rights (such as trademarks and copyrights) by users of platforms, but can also be relevant to other types of potential liabilities.

In *Google/Louis Vuitton* (2010) the CJEU provides guidance as to the question whether parties that do something different from providing classic storage services (such as email, file and web hosting) can rely on the liability exemption for hosting providers.²⁷ More specifically, the question was raised whether Google could invoke the liability exemption of Article 14 E-commerce Directive in relation to adword advertising which contained infringements of intellectual property rights. The CJEU stresses that in determining whether a party can invoke the liability exemption for hosting activities, it must be examined whether the role played by the service provider “is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data it stores”.²⁸ This CJEU repeated this criterion in later case law, including in the recent *Frank Peterson/YouTube*-judgment (2021).²⁹ The CJEU leaves the final assessment to the national court.

More specific guidance in relation to online marketplaces was presented by the CJEU in 2011 in *L'Oréal/eBay*, which again concerned the infringement of intellectual property

rights via a platform (in this case: eBay).³⁰ The CJEU stresses that “the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31”.³¹ Hence, online marketplaces are not as such excluded from applicability of the liability exemption. At the same time, the CJEU does stress that the liability exemption of Article 14 E-commerce Directive applies only to the opera-

19 Article 14 E-commerce Directive. The other exemptions relate to “mere conduit” (Article 12) and “caching” (Article 13). Those exemptions are not relevant in relation to online marketplaces.

20 Article 14.1 E-commerce Directive.

21 See on the meaning of hosting also DLA Piper, ‘Legal analysis of a Single Market for the Information Society – New rules for a new age?’ (report for the European Commission’s Information Society and Media Directorate-General, 2009), 8-9.

22 Olga Batura, ‘Study on redefining ‘hosting’ under article 14 of the e-Commerce Directive’ (report for the Dutch Ministry of Economic Affairs and Climate Policy, 2020), 7.

23 Article 14.3 E-commerce Directive. See also DLA Piper, ‘Legal analysis of a Single Market for the Information Society – New rules for a new age?’ (report for the European Commission’s Information Society and Media Directorate-General, 2009), 9; Arno Lodder, ‘Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market’, in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 15, 52.

24 See elaborately e.g. Joris van Hoboken et al, ‘Intermediary Services and Illegal Content Online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape’ (report for the European Commission DG Communications Networks, Content & Technology 2018), 45-47.

25 Arno Lodder, ‘Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market’, in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 15, 51; DLA Piper, ‘Legal analysis of a Single Market for the Information Society – New rules for a new age?’ (report for the European Commission’s Information Society and Media Directorate-General, 2009), 16.

26 See on the CJEU case law also Cristine Riefa, *Consumer Protection and Online Auction Platforms – Towards a Safer Legal Framework* (Routledge 2015).

27 See on this case also e.g. Irina Domurath, ‘Platforms as contract partners: Uber and beyond’ [2018] *Maastricht Journal of European and Comparative Law* 565, 569; James Bikoff et al, ‘Contributory trade mark infringement liability: a comparison of US and EU law’ [2019] *Journal of Intellectual Property Law & Practice* 842, 847 and Stefan Kulk, *Internet intermediaries and copyright law* (PhD Utrecht University 2018) 103-106. See on the scope of “hosting” also Olga Batura, ‘Study on redefining ‘hosting’ under article 14 of the e-Commerce Directive’ (report for the Dutch Ministry of Economic Affairs and Climate Policy, 2020) (see in particular p. 9-11) and Joris van Hoboken et al, ‘Intermediary Services and Illegal Content Online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape’ (report for the European Commission DG Communications Networks, Content & Technology 2018).

28 Joined Cases C-236-08 to C-238/08 *Google/Louis Vuitton* [2010] ECLI:EU:C:2010:159, ECR I-02417.

29 Joined Cases C-682/18 and C-683/18 *Frank Peterson/YouTube* [2021] ECLI:EU:C:2021:503. Another preliminary reference in relation to YouTube, filed by the Oberster Gerichtshof (Austria), is still pending. See Case C-500/19 *Puls 4 TV GmbH & Co. KG v YouTube LLC and Google Austria GmbH*.

30 Case C-324/09 *L'Oréal/eBay* [2011] ECLI:EU:C:2011:474, ECR I-06011. See on this case e.g. Birgit Clark and Maximilian Schubert, ‘Odysseus between Scylla and Charybdis? The ECJ rules in L’Oréal v eBay [2011] *Journal of Intellectual Property Law & Practice* 880; Patrick van Eecke, ‘Online service providers liability: a plea for a balanced approach’ [2011] *Common Market Law Review* 1455, 1471-1472; Enrico Bonadio, ‘Trade marks in online marketplaces: the CJEU’s stance in L’Oréal v eBay [2012] *Computer and Telecommunications Law Review* 37; Eleonora Rosati, ‘Why a reform of hosting providers’ safe harbour is unnecessary under EU copyright law’ [2016] SSRN < <http://ssrn.com/abstract=2830440> > accessed 6 August 2021, 9-10 and Carina Gommers and Eva De Pauw, ‘Liability for trade mark infringement of online marketplaces in Europe: are they ‘caught in the middle?’ [2020] *Journal of Intellectual Property Law & Practice* 276.

31 Case C-324/09 *L'Oréal/eBay* [2011] ECLI:EU:C:2011:474, ECR I-06011, par. 115.

tor of an online marketplace “if that operator has not played an active role allowing it to have knowledge or control of the data stored”.³² The CJEU specifies that an operator of an online marketplace does play an active role (and thus is not entitled to rely on the liability exemption) if the operator “provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them”.³³ Whether this is the case must be assessed on a case-by-case basis.³⁴

Hence, the CJEU does not rule out that online marketplaces can rely on the liability exemption, but as soon as the platform takes an active role in helping to promote the products, it loses the possibility to do so. So, for example, if the online marketplace highlights a misleading discount offer on its homepage, the platform is most likely not exempted from liability – even if it was not aware (or should have been aware) that the offer was deceptive. Arguably, optimizing the presentation of the sale should be understood to include automated optimisation.³⁵ For example, if a platform is giving certain traders a higher ranking in the search results on the platform on the basis of additional payment by those traders, the online marketplace could be seen as optimizing the presentation of the offers and, as a consequence, is playing an active role in relation to such offers.³⁶ In addition, one should keep in mind that optimizing an offer is not the only way in which an online intermediary can play an active role. For example, it can be argued that an online marketplace cannot invoke the liability exemption under Article 14 E-commerce Directive if it is actively involved in the performance of the sales contract, e.g. when it takes care of the delivery (as Amazon does under the “Fulfillment by Amazon” program).³⁷ However, the CJEU case law is not conclusive on this matter, leaving considerable uncertainty as to the degree to which online marketplaces can invoke Article 14 of the E-commerce Directive.³⁸

5. The Relationship between the Liability Exemption and EU Consumer Law

Importantly, Article 1.3 of the E-commerce Directive clarifies the relationship of that Directive with instruments of EU consumer law. This provision states that “this Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services”. While the last part of this Article is somewhat puzzling,³⁹ Recital 11 of the Preamble to the E-commerce Directive makes clear that the E-commerce Directive is without prejudice to the level of consumer protection as established by a long list of consumer protection directives. This list includes the Misleading and Comparative Advertising Directive, which is essentially the predecessor to the UCPD.⁴⁰ Hence, the E-commerce Directive does not stand in the way of the protection of consumers through the consumer acquis.⁴¹ What this provision means for the liability exemption in the E-commerce Directive in relation to the applicability of the UCPD to online marketplaces will be discussed below.

III. The Liability of Online Marketplaces under the UCPD

1. Introduction

In the previous paragraph it was discussed to what extent online marketplaces can invoke the liability exemption of

Article 14 E-commerce Directive. Now it is time to turn to the UCPD: to what extent can online marketplaces be held liable under this Directive, taking into consideration the liability exemption in the E-commerce Directive? After briefly introducing the UCPD, it will be discussed to what extent online marketplaces are “traders” under the UCPD

32 It has been argued that the CJEU has been wrong in stressing that the liability exemption of Article 14 requires that the intermediary plays an active role. See Patrick van Eecke, ‘Online service providers liability: a plea for a balanced approach’ [2011] Common Market Law Review 1455, 1471-1473 and 1481-1484.

33 Case C-324/09 *L’Oréal/Bay* [2011] ECLI:EU:C:2011:474, ECR I-06011, par. 116.

34 See also the 2016 version of the European Commission’s UCPD Guidance: Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ SWD(2016) 163 final, 113, which also notes that the national case law interpreting this criterion often goes in different directions.

35 See in this regard the case note of Spoor in relation to *L’Oréal/Bay*: Nederlandse Jurisprudentie (NJ) 2012/525, par. 14. See similarly Birgit Clark and Maximilian Schubert, ‘Odysseus between Scylla and Charybdis? The ECJ rules in *L’Oréal v eBay* [2011] Journal of Intellectual Property Law & Practice 880, p. 886. In fact, if automated optimisation would not constitute “optimizing the presentation”, internet intermediaries would be exempted from liability in many cases in which their role would clearly not be passive. It is uncertain whether this will also be the view taken by the CJEU. In his opinion in the recent *Frank Peterson/YouTube* case (see footnote 29), Advocate General Saugsmannsgaard Øe essentially argues that *L’Oréal/Bay* should be interpreted strictly, arguing that the optimisation of the presentation of offers only concerns individual assistance and promotion outside of the platform. This strict interpretation is not repeated in the CJEU judgment in the same case.

36 See similarly for comparison websites the French Supreme Court: Cass. Com. 4 December 2012, 11-27729 (*Publicité Sté Pewterpassion.com/Sté Leguide.com*), as mentioned in the 2016 version of the European Commission’s UCPD Guidance: Commission, ‘Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market’ SWD (2016) 163 final, 114. See similarly also Giovanni Sartor, ‘Providers Liability: From the eCommerce Directive to the future’ (report for the IMCO Committee of the Directorate-General for Internal Policies of the European Parliament, IP/A/IMCO/2017-07, 2017), 24. Narciso points out that platforms are also likely to play an active role if they, in the context of presenting consumer reviews for products, place positive reviews at the top of the list of reviews. See Madalena Narciso, ‘The Regulation of Online Reviews in European Consumer Law’ [2019] European Review of Private Law 557, 570-571.

37 Christoph Busch, ‘Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective’ [2021] European Legal Studies Institute Osnabrück Research Paper Series No. 21-01, 17.

38 The active/passive distinction in the CJEU case law still raises questions in terms of the applicability of Article 14 E-commerce Directive, both for online marketplaces and other online intermediaries. See Birgit Clark and Maximilian Schubert, ‘Odysseus between Scylla and Charybdis? The ECJ rules in *L’Oréal v eBay* [2011] Journal of Intellectual Property Law & Practice 880, 886, Annette Kur, ‘Secondary Liability for Trademark Infringement on the Internet: The Situation in Germany and throughout the EU’ [2014] Colum JL & Arts 525, 531 and Joris van Hoboken et al, ‘Intermediary Services and Illegal Content Online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape’ (report for the European Commission DG Communications Networks, Content & Technology 2018), 31-37.

39 See Arno Lodder, ‘Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market’, in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-commerce* (Elgar 2017) 15, 20. Lodder points out – in my view correctly – that the words “in so far as this does not restrict the freedom to provide information society services” do not mean that the freedom to provide information society services prevail over consumer protection.

40 The Misleading and Comparative Advertising Directive remains in force, but only in relation to comparative advertising and B2B misleading advertising.

41 From Recital 11 it also follows that the E-commerce Directive is complementary to the consumer acquis in the sense that the E-commerce Directive adds information requirements to the already established consumer acquis. Article 1.3 E-commerce Directive has so far received surprisingly little attention in legal literature and case law.

and the offers on their platforms as “commercial practices”. After that, possible grounds for liability of online marketplaces under the UCPD are discussed.

2. The Unfair Commercial Practices Directive

The UCPD is the primary legislative instrument in EU consumer protection law regulating marketing, including advertising. The scope of the UCPD is particularly broad, as it covers any business-to-consumer commercial practice.⁴² As confirmed by the CJEU, this essentially includes any type of business-to-consumer advertising and marketing, including one-to-one commercial practices.⁴³ The UCPD contains a mix of general and specific prohibitions of unfair commercial practices. In particular, it contains a general prohibition of unfair commercial practices (Article 5) as well as prohibitions of misleading and aggressive commercial practices (Articles 6 to 9). Apart from these, the UCPD also contains a “black list” of specifically defined commercial practices that are deemed unfair under all circumstances (Annex I to the UCPD).

3. Online Marketplaces as “Traders” and the Offers on Their Platforms as “Commercial Practices”

In order to determine whether the UCPD gives rise to liability of an online marketplace, it must first be determined whether the platform in the specific case acts as a “trader”.⁴⁴ The notion of trader is defined in Article 2(b) as “*any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader*”. This definition does not make explicit whether online intermediaries (such as online marketplaces) are traders. However, operators of online marketplaces are typically legal persons who act for their own business purposes (in particular by charging a commission on each transaction that takes place via the platform⁴⁵), so they typically qualify as traders.⁴⁶ This view is supported by the EC Guidance to the UCPD.⁴⁷

The second step to determine whether the UCPD gives rise to liability of an online marketplace is to assess whether the offer on the online marketplace constitutes a “commercial practice”. This notion is defined in Article 2(d) and is notoriously broad.⁴⁸ It essentially includes any type of commercial communication from a trader to a consumer that is directly connected with the promotion, sale or supply of a product to consumers. Hence, it is hard to imagine that a communication on an online marketplace in relation to a product does not fall under the definition of commercial practice.⁴⁹ However, a restrictive interpretation of “commercial practice” has been advocated on the basis of the CJEU judgment in the *RLvS* case.⁵⁰ In this case, the CJEU found that the publisher of a newspaper did not perform a commercial practice, because the sponsored articles did not promote the newspaper’s products or services, but rather the products and services of other parties. In other words, the practices in question were not connected with the promotion and sale of *its* products.⁵¹ This does provide room for intermediaries to argue that they are in the same position as such publishers: it is not the intermediary which is offering its own product, it is the actual seller. However, while this argument may be convincing for some online platforms such as search engines and social media platforms, which in essence (and similar to a publisher) sell advertising space, this argument seems much less convincing for online marketplaces. Online marketplaces play an important role in how offers are presented

to consumers as well as in the conclusion of the transactions between consumers and third-party sellers. In addition, different from newspaper publishers, online marketplaces typically directly benefit from each transaction that takes place through their platforms, due to the commissions they are entitled to. Hence, it is in my view unlikely that this argument will be successful.⁵²

4. Specific Information Duty for Online Marketplaces

Having determined that online marketplaces typically qualify as traders and the offers on their platforms typically qualify as commercial practices, it is now time to turn to the possible grounds for liability under the UCPD. The first ground of liability that will be discussed is one that was recently introduced to the UCPD by the Modernisation Directive,⁵³ and which specifically applies to online market-

42 Article 2(d) UCPD.

43 Case C-388/13 *UPC* [2015] ECLI:EU:C:2015:225.

44 See also Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1.

45 For example, Amazon typically charges a commission (“referral fee”) of 7-15 % per transaction, depending on the type of product. In addition, sellers pay either a subscription fee or a per-item fee for listing products on the Amazon platform. At Zalando, sellers pay a commission of 5-25 % per transaction, depending on the product type and product price.

46 See similarly Maria Lilla Montagnani and Alina Trapova, ‘New obligations for internet intermediaries in the digital single market – safe harbors in turmoil?’ [2019] *Journal of Internet Law* 3, 7.

47 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1: “According to a case-by-case assessment, a platform provider may be acting for purposes relating to its business whenever, for example, it charges a commission on the transactions between suppliers and users, provides additional paid services and draws revenues from targeted advertising.” Note that online marketplaces typically satisfy the definition of ‘trader’ because they act for their own business purposes, e.g. because they charge commissions over sales. Hence, in order to qualify a typical online marketplace as a trader, it does not seem necessary to rely on the last part of the definition (i.e., “and anyone acting in the name or on behalf of a trader”).

48 Article 2(d) UCPD defines commercial practice as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. See on the broad scope of the UCPD also Willem van Boom, ‘Unfair commercial practices’, in Christian Twigg-Flesner (ed), *Research handbook on EU consumer and contract law* (Edward Elgar 2016) 388, 390.

49 See also Carsten Ullrich, ‘New Approach meets new economy: Enforcing EU product safety in e-commerce’ [2019] *Maastricht Journal of European and Comparative Law* 558, 575.

50 Case C-391/12 *RLvS* [2013] ECLI:EU:C:2013:669. See also Reto Hilty and Valentina Moscon, ‘Digital markets, rules of conduct, and liability of online intermediaries – analysis of two case studies: unfair commercial practices and trade secrets infringement’ [2020] *Max Planck Institute for Innovation and Competition Research Papers* 20-01, 10. See on the *RLvS* case also Jules Stuyck, ‘The Court of Justice and the Unfair Commercial Practices Directive’ [2015] *Common Market Law Review* 721, 732.

51 Case C-391/12 *RLvS* [2013] ECLI:EU:C:2013:6696, par. 36, 39.

52 See for a court case in which an online intermediary (in this case: a price comparison website for flight tickets) unsuccessfully invoked the *RLvS* case in order to argue that it did not commit an unfair commercial practice: Court of Appeal Amsterdam 7 March 2017, ECLI:NL:GHAMS:2017:739 (*Skyscanner*). A somewhat similar (and possibly more successful) argument could be brought forward specifically in relation to infringements of the UCPD caused by third party sellers on the platform. Here the argument could be that such practices are not commercial practices of the online marketplace or, framed differently, are not a misleading or aggressive practice of the online marketplace. See the discussion in par. III.6 below.

53 Also known as “Omnibus Directive”. Directive (EU) 2019/2161 of the European Parliament and of the European Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L328/7.

places. One of the underlying aims of this directive was to bring EU consumer law (including the UCPD) up to date with technological and societal developments, including the shift from offline to online marketing and purchasing in recent years.⁵⁴ The Modernisation Directive introduced a specific information duty in the UCPD for online marketplaces (Article 7.4(f) UCPD).⁵⁵ For offers on online marketplaces, the online marketplace will have to indicate whether the seller is a trader or not.⁵⁶ The online marketplace can provide this information on the basis of the declaration of that third-party to the online marketplace. Hence, there will not be a duty for the online marketplace to check whether the declaration provided by the third-party is correct.⁵⁷

There can be little doubt that the liability exemption of Article 14 of the E-commerce Directive does *not* preclude liability of online marketplaces on the basis of Article 7.4(f) UCPD. Article 7.4(f) UCPD clearly introduces an obligation for the online marketplace itself, rather than holding the online marketplace liable for storage of information provided by the seller on the platform. In addition, even if Article 14 of the E-commerce Directive would preclude platform liability in this case, it follows clearly from Article 1.3 of the E-commerce Directive that the E-Commerce Directive does not stand in the way of the protection of consumers through EU consumer law.

5. Liability for Other Types of “Own Conduct” of Online Marketplaces under the UCPD

Other grounds of liability in the UCPD can also be relevant for online marketplaces. Firstly, apart from the specific information duty for online platforms, the Modernisation Directive also introduced other obligations that specifically apply to the online context. For example, the Modernisation Directive established an information duty in relation to the ranking of online search results (Article 7.4 a UCPD). When a trader gives consumers the possibility to search for products offered by different traders or by consumers on the basis of a search query, the trader will have to supply general information on the main parameters determining the ranking of the products as presented to the consumer, as well as the relative importance of those parameters as opposed to others.⁵⁸ In other words, the trader will have to inform the consumer how it determines the ranking. In addition, new measures have been introduced for traders that provide access to consumer reviews of products. This includes a duty to inform the consumer “*whether and how the trader ensures that the published reviews originate from consumers who have actually used or purchased the product*”.⁵⁹ While these rules do not refer specifically to online marketplaces, they are clearly also written for online marketplaces.

Secondly, online marketplaces have professional diligence obligations (Article 5 UCPD) tailored to their specific role. The UCPD guidance document of the European Commission (“UCPD Guidance”, last updated in December 2021) provides detailed instructions in this respect.⁶⁰ Although the UCPD Guidance is not binding upon EU and national institutions, it does provide insight into the European Commission’s interpretation of the UCPD.⁶¹ In particular, the UCPD Guidance emphasizes that online marketplaces (in as far as they are “traders” under the UCPD, which, as has been argued above, will typically be the case) have certain obligations towards consumers. In particular, the UCPD Guidance emphasizes that on the basis of Article 5 UCPD online market-

places have a duty to clearly indicate the identity of the trader that is offering the product to the consumer.⁶² In addition, online platforms (including online marketplaces) have a duty to design their web-structure in a way that enables third-party traders to present information to platform users in a way that enables third-party traders to comply with EU marketing and consumer law.⁶³

The UCPD Guidance rightly points out that these obligations concern the “own conduct” of the online marketplace rather than illegal information stored at the request of third parties, and that the platforms can therefore not invoke Article 14 of the E-commerce Directive against

54 See e.g. Recitals 17-29 of the Preamble to the Modernisation Directive. See on the Modernisation Directive also Christian Twigg-Flesner, ‘Bad hand? The “new deal” for EU consumers’ [2018] GPR 167; Marco Loos, ‘The Modernisation of European Consumer Law: a Pig in a Poke?’ [2018] European Review of Private Law 113; Bram Duivenvoorde, ‘The upcoming changes in the Unfair Commercial Practices Directive: a better deal for consumers?’ [2019] EuCML 219; Marco Loos, ‘The Modernization of European Consumer Law (Continued): More Meat on the Bone After All’ [2020] European Review of Private Law 407.

55 An “online marketplace” is defined as “*a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers*”. See Article 3.1 Modernisation Directive, adding a new point (n) to Article 2.1 UCPD.

56 See Article 3.4 Modernisation Directive and the new Article 7.4(f) UCPD. The information duty will apply for product offers constituting an “invitation to purchase”. An offer usually qualifies as an “invitation to purchase” as soon as the offer concerns a specific product and either indicates a price or an opportunity to place a bid. See Case C-122/10 *Ving* [2010] ECL:EU:C:2011:299, ECR I-03903. See more elaborately Bram Duivenvoorde, ‘The upcoming changes in the Unfair Commercial Practices Directive: a better deal for consumers?’ [2019] EuCML 219, 223.

57 Recital 28 of the Preamble to the Modernisation Directive.

58 Article 3.4(b) Modernisation Directive, introducing a new Article 7.4 a UCPD. A definition of “ranking” will be introduced in Article 2.2(m) UCPD. “Ranking” will mean “*the relative prominence given to products, as presented, organised or communicated by the trader, irrespective of the technological means used for such presentation, organisation or communication*.” See Article 3.1(b) Modernisation Directive.

59 Article 3.4(c) Modernisation Directive, introducing a new Article 7.6 UCPD.

60 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1. See on the previous (2016) version of the UCPD Guidance and platform liability also Alberto De Franceschi, ‘Uber Spain and the “Identity Crisis” of Online Platforms’ [2018] EuCML 1, 3 and Maria Lillà Montagnani and Alina Trapova, ‘New obligations for internet intermediaries in the digital single market – safe harbors in turmoil?’ [2019] Journal of Internet Law 3, 5-6. Montagnani & Trapova point out that the UCPD Guidance is one of the legal instruments at the EU level which emphasizes the responsibilities of platforms, contradicting the basic idea underlying the E-commerce Directive that internet intermediaries should, in principle, be exempted from liability. Montagnani & Trapova mention two other legal instruments in this regard: the new Audiovisual Media Services Directive and the Digital Single Market Directive.

61 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1, 5. Indeed, the CJEU does not always follow guidance documents published by the European Commission. See e.g. Case C-113/15 *Breitsamer Imkergold* [2016] EU:C:2016:718. Also note that the UCPD Guidance (p. 5) emphasizes that the document is prepared by the Commission services and does *not necessarily* reflect the views of the European Commission. Hence, the European Commission reserves the right to argue for a different interpretation in the future, or in specific cases.

62 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.2.

63 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1.

liability.⁶⁴ In other words, the online marketplace has an active role, rather than merely being held liable for information stored on its platform by a seller. In addition, even if this argument would not rule out invoking Article 14 of the E-commerce Directive, it is again relevant that the E-commerce Directive (see Article 1.3) does not stand in the way of the protection of consumer interests on the basis of EU consumer law. The same applies to the obligations in relation to the ranking of search results and online reviews, as introduced by the Modernisation Directive.

Arguably, if the online interface of the platform is unclear, this could (apart from being a breach of Article 5 UCPD) also constitute a misleading action or omission of the platform under Articles 6-7 UCPD.⁶⁵ For example, if the platform interface is not sufficiently clear to make the average consumer understand that a product is sold by a third-party (rather than by the platform itself), this could constitute a misleading omission by the online marketplace.⁶⁶ Similarly, if on the basis of the platform interface the consumer is under the false impression that the stated product prices include shipping costs, this may constitute a misleading omission by the platform.⁶⁷ Again, the online marketplace will not be exempted from liability under Article 14 of the E-commerce Directive, taking into consideration that it will be liable for its own conduct rather than for information stored by its users.⁶⁸

6. Liability of Online Marketplaces for Breach of the UCPD Caused by the Seller

So far we have focused on grounds for liability of online marketplaces in relation to the “own conduct” of the online marketplace. But what if the breach of the UCPD is caused by the seller on the platform, for example because it included false or misleading information in the offer? Here, the legal situation is uncertain, but we can at least try to gain some clarity, depending on the scenario at hand. Three scenarios will be discussed.

In scenario 1, the breach of the UCPD is caused by the seller (e.g. by providing misleading product information), but the online marketplace either was co-responsible for the breach, or was aware of the breach but did not take steps accordingly. In this situation, the online marketplace can essentially be seen as negligent, which makes it feasible to conclude that the online marketplace is acting contrary to professional diligence (Article 5 UCPD) or, if co-responsible for misleading the consumer, is liable for conducting a misleading commercial practice (Article 6 UCPD).⁶⁹ For example: a third-party seller is offering facial masks through an online marketplace. It praises the masks for having “the highest level of protection against Covid 19”, while the facial masks in reality provide inferior protection compared to most masks on the market. The online marketplace is co-responsible (and therefore liable under Article 6 UCPD) if it adds a label stating “Best choice for high protection!”. Similarly, the online marketplace could be liable if it receives consumer complaints about the inferior quality of the products, but does not take action accordingly (potentially raising liability under Article 5 UCPD). The liability exemption in the E-commerce Directive clearly does not preclude liability on the basis of the UCPD in this scenario, since the online marketplace either had an active role, or has actual knowledge of the breach (see Article 14 E-commerce Directive).⁷⁰

In scenario 2, the breach of the UCPD is caused by the seller (e.g. by providing misleading product information), and the online marketplace was neither involved in nor is aware of the breach. However, the platform did play an “active role”, as

defined in the CJEU case law on Article 14 E-commerce Directive (see par. II.4 above). Because of the active role of the online marketplace, it is clear that the liability exemptions in the E-commerce Directive do not preclude liability of the online marketplace on the basis of the UCPD. Hence, the potential liability of the online marketplace should be determined on the basis of the UCPD itself. Interestingly, one could argue on the basis of the text of the UCPD that an online marketplace that plays an “active role” can *always* be held liable for misleading or aggressive commercial practices on its platform. As explained above, online marketplaces typically qualify as “traders”, and the offers on their platforms as “commercial practices”. In addition, Articles 6-9 UCPD (prohibiting misleading and aggressive commercial practices) do *not* require that the trader (in this case: the online marketplace) acts contrary to professional diligence in order to be held liable.⁷¹ In particular, the CJEU has confirmed that if a travel agency is offering “exclusive” accommodation, it is committing a misleading commercial practice if it turns out that the accommodation is also offering its services to others – also if the travel agency has taken the usual steps in order to secure exclusivity and was not aware that the accommodation allowed others to make bookings.⁷² This essentially confirms that negligence is not required in order to hold a trader liable under Articles 6-9 UCPD, opening the door to liability of the online marketplace. However, there are also arguments *against* holding online marketplaces liable in this scenario. In particular, while online marketplaces are typically traders in the context of the UCPD and the offers on their platforms are typically commercial practices, one could argue that this scenario does not give rise to a commercial practice of the online marketplace or, framed differently, is not a misleading or aggressive practice of the online marketplace. The UCPD – adopted in 2005, before the

64 Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1. A different view is taken by De Franceschi. He argues that it is questionable whether the professional diligence obligations of online intermediaries, as discussed in the UCPD Guidance, are reconcilable with Article 14 UCPD. He argues that this interpretation of Article 5 UCPD constitutes a “duty of activation”, which could result in a general obligation to monitor or carry out fact finding. See Alberto De Franceschi, ‘Uber Spain and the “Identity Crisis” of Online Platforms’ [2018] EuCML 1, 3. In my view the UCPD Guidance does not go as far, since it is limited to the own obligations of the online marketplace towards the consumer (rather than having to monitor potential infringements by the sellers on the platform).

65 This finds support in the UCPD Guidance (par. 4.2.1). The UCPD Guidance emphasizes that platforms must always comply with EU consumer and marketing law (and in particular: the transparency requirements of Article 6 and 7 UCPD) as far as its own commercial practices are concerned.

66 This could constitute a misleading omission of essential information under Article 7.1 UCPD.

67 See Article 7.4(c) UCPD.

68 And again: even if this argument would not stand in the way of invoking Article 14 E-commerce Directive, Article 1.3 E-commerce Directive comes to rescue.

69 Note that this situation is difficult to distinguish from liability for “own conduct” as discussed above, and could be seen as such. The main difference to the situations described above is that the breach is essentially caused by the third party seller, rather than by the online marketplace.

70 Actual knowledge is acquired in the context of consumer complaints if the complaint is sufficiently precise and adequately substantiated. See Case C-324/09 *L’Oréal/Bay* [2011] ECLI:EU:C:2011:474, ECR I-06011, par. 122. See on the notion of actual knowledge e.g. Joris van Hoboken et al, ‘Intermediary Services and Illegal Content Online – An analysis of the scope of article 14 ECD in light of developments in the online service landscape’ (report for the European Commission DG Communications Networks, Content & Technology 2018), 37-40.

71 Case C-435/11 *CHS Tour Services v Team 4 Travel* [2013] ECLI:EU:C:2013:574.

72 Idem.

rise of online marketplaces – has clearly not been written to provide clarity on this matter. From the perspective of legal certainty it is unfortunate that the 2019 Modernisation Directive has not filled this gap.⁷³

In scenario 3, the breach of the UCPD is caused by the seller (e.g. by providing misleading product information), and the online marketplace was *not* involved in or aware of the breach. In addition, the platform did *not* play an “active role”, as defined in the CJEU case law on Article 14 of the E-commerce Directive. Here, the relationship between the UCPD and the E-commerce Directive becomes particularly relevant, and it seems likely that the liability exemptions in the E-commerce Directive (at least indirectly) preclude liability of the online marketplace on the basis of the UCPD. This is also the position taken by the European Commission in the UCPD Guidance. In essence, the European Commission argues that the UCPD should be interpreted in a way that is in line with the regime of liability exemptions of the E-commerce Directive and the underlying CJEU case law.⁷⁴ In addition, the UCPD Guidance stresses that platforms that do not play an active role should take appropriate measures on the basis of the UCPD, without amounting to a general obligation to monitor or carry out fact-finding on the basis of Article 15 E-commerce Directive.⁷⁵ Hence, arguing that online platforms can always be held liable for breaches of the UCPD on their platform is not likely to be successful in this scenario. At the same time, Articles 14 and 15 of the E-commerce Directive do not *per se* stand in the way of holding online marketplaces liable for breaches of the UCPD on their platform. If the UCPD is interpreted to the effect that online marketplaces are liable for *any* misleading or aggressive commercial practice on their platforms, one could argue that the UCPD would simply provide further protection – for which Article 1.3 E-commerce Directive provides room. Still, this is not the most likely interpretation of the UCPD, taking into consideration that the EU has a clear policy of exempting online intermediaries from liability if they do not play an active role.⁷⁶

Both in scenario 2 and scenario 3, the problem remains that, on the basis of the CJEU case law, the notion of “active role” remains quite unclear. As indicated in par. II.4, it is clear from the CJEU case law that the online platform is not exempted from liability if it optimizes the presentation of the offers for sale or promotes them, but it is much less clear when this is the case. Clarification of this notion (either by the CJEU or through new legislation) would be highly welcome, also to better understand the position of online marketplaces under the UCPD.

7. Future Changes

On the basis of the analysis so far, it has become clear that the E-commerce Directive (due to its Article 1.3) does not as such preclude liability of online marketplaces under EU consumer law, even if Article 14 of the E-commerce Directive would normally preclude such liability. As a result, the E-commerce Directive does not stand in the way of future changes that establish further-reaching liability of online marketplaces (see also the discussion in par. V).

IV. The Liability of Online Marketplaces under the Digital Services Act

1. Background

On 15 December 2020, the European Commission published the proposal for the Digital Services Act (“DSA”).⁷⁷ Presented

together with the Digital Markets Act, the DSA is an ambitious attempt to regulate online intermediaries.⁷⁸ The DSA will introduce new obligations for online intermediaries, some of them applying specifically to online marketplaces.⁷⁹ In addition, and relevant for this article, the DSA will update the system of liability exemptions that is currently part of the E-commerce Directive. The European Parliament approved the proposal in its first reading on 20 January 2022, making a large number of amendments to the original proposal.⁸⁰ Until the DSA is adopted, the E-commerce Directive (including its regime of liability exemptions) will remain applicable. This paragraph will discuss to what extent the liability of

⁷³ As indicated above, the Modernisation Directive has only introduced the specific duty for online marketplaces to indicate whether the seller is a trader or not.

⁷⁴ See Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1. Interestingly, the UCPD Guidance refrains from making explicit how the E-commerce Directive and the UCPD exactly relate. The UCPD Guidance merely refers to Article 1.3 E-commerce Directive and states that “*the e-Commerce Directive and relevant EU consumer acquis apply in principle in a complementary manner*”.

⁷⁵ Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market [2021] OJ C526/1, par. 4.2.1.

⁷⁶ Another way to look at the issue would be to argue that since the UCPD is not explicit on its applicability to online intermediaries, it is up to the Member States to determine (under national law) whether online marketplaces can be held liable for breaches by sellers on their platforms. See in this sense Christoph Busch and Vanessa Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation’ [2021] EuCML 109, 112-113. The argument would be that since the UCPD essentially leaves the way in which the UCPD is enforced to Member States (see Article 11 UCPD), it also leaves the decision whether intermediaries can be held liable to Member States. In my view this approach is not likely to be followed by the CJEU. The UCPD does harmonize the definition of “trader” and thus what parties can be held liable under the UCPD. It also harmonizes to what extent traders (including online marketplaces) can be held liable. Hence, while the type of liability (e.g. liability for damages under private law or a fine under administrative law) is left to the Member States, the question who is liable and for what is harmonized under the UCPD.

⁷⁷ See for the original proposal: Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC’ COM2020 825(final). The Digital Services Act forms part of the “Digital Services Act Package”, which also includes the proposal for the Digital Markets Act, see Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)’ COM2020 842(final).

⁷⁸ See on the DSA also e.g. M. Eifert et al, ‘Taming the giants: The DMA/DSA package’ [2021] Common Market Law Review 987; Dessislava Savova, Andrei Mikes and Kelly Cannon, ‘The Proposal for an EU Digital Services Act – A closer look from a European and three national perspectives: France, UK and Germany’ [2021] Computer Law Review International 38; Andrej Savin, ‘The EU Digital Services Act: Towards a More Responsible Internet’ [2021] Journal of Internet Law (forthcoming), available at SSRN < <https://ssrn.com/abstract=3786792> > accessed 6 August 2021; Caroline Cauffman and Catalina Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ [2021] European Journal of Risk Regulation 1; Christoph Busch and Vanessa Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation’ [2021] EuCML 109 and Sara Tommasi, ‘The Liability of Internet Service Providers in the Proposed Digital Services Act’ [2021] ERPL 925-944.

⁷⁹ In particular, online marketplaces will have to trace the traders that are active on their platforms (“know your business customer”; see Article 22 DSA).

⁸⁰ European Parliament, ‘Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM (2020)0825’ – C9-0418/2020 – 2020/0361(COD))’ P9_TA (2022)0014. This article refers to the provisions as approved by European Parliament. Note, however, that it is not certain whether the amendments made by the European Parliament will make it into the final version of the DSA.

online marketplaces under the UCPD will change when the DSA is adopted.

2. The Liability Exemption in the Draft Digital Services Act

While part of the E-commerce Directive will remain in force after the DSA is adopted, the regime of liability exemptions will be moved to the DSA and will be updated.⁸¹ Despite criticism in legal literature on the liability regime of the E-commerce Directive,⁸² the core principles of its liability regime and the prohibition of a general monitoring obligation remain intact.⁸³ Like Article 14 E-commerce Directive, Article 5 DSA presents a specific liability exemption for hosting.⁸⁴ The text of Article 5 DSA is essentially the same as Article 14 of the E-commerce Directive. Busch and Mak rightly point out that this is a missed chance: the open questions in terms of the regime of liability exemptions (such as on the exact meaning of the “active role”) remain unanswered.⁸⁵

On the basis of the text of the DSA, it looks like the liability exemption for hosting providers (including online marketplaces) will remain the same as it currently is under the E-commerce Directive. However, this is not entirely sure. Cauffman and Goanta refer to Recital 18 DSA in this respect, which restates the existing case law on the liability exemption for hosting.⁸⁶ After repeating that the liability exemptions do not apply where the online intermediary plays an active role (rather than confining itself to providing the services neutrally, by a merely technical and automatic processing of the information provided by the recipient of the service), Recital 18 states that the liability exemptions “*should accordingly not be available in respect of liability relating to information provided not by the recipient of the service but by the provider of intermediary service itself, including where the information has been developed under the editorial responsibility of that provider.*” Hence, Recital 18 stresses that the liability exemption for hosting providers will not apply if the information is provided by the intermediary service itself or has been developed under editorial responsibility of the platform. While the statement in itself is correct under the current CJEU case law, this clarification could possibly be understood as interpreting the hosting exemption more narrowly than is currently the case under the CJEU case law. Rather than referring to the broad understanding of “active role” in *L’Oréal/Bay*, Recital 18 refers only to the example where the information is provided by the intermediary service itself or has been developed under its editorial responsibility. Perhaps the draft will be clarified before the DSA is adopted – otherwise we will have to wait for the CJEU to provide further guidance.

While the core principles of the regime of liability exemptions remain intact, the DSA does present a specific rule as part of the liability exemption for hosting providers, which is specifically directed at online marketplaces. According to Article 5.3 DSA, an online marketplaces will *not* be exempted from liability if it “*presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead a consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.*” Hence, if the consumer is led to think that he is contracting with the online platform rather than the third-party seller, the online platform is not exempted from liability. This confirms that there is room for liability of online market-

places under the UCPD, if it is unclear to the consumer whether a product is sold by the platform itself or by a third-party seller.⁸⁷ This rule seems to be modelled after the CJEU judgment in *Wathale/Bietheres*.⁸⁸ In this judgment, the CJEU ruled that a car trader was liable under the Consumer Sales Directive *as a seller*, taking into consideration that the car trader failed to duly inform the consumer that he was acting as intermediary on behalf of a private individual, who was the owner of the car. Similarly, under Article 5.3 DSA, an online marketplace will not escape liability towards the consumer if the consumer is under the impression that he is contracting with the online platform, rather than with a third-party seller.⁸⁹

81 See Articles 3-7 DSA. See also Dessislava Savova, Andrei Mikes and Kelly Cannon, ‘The Proposal for an EU Digital Services Act – A closer look from a European and three national perspectives: France, UK and Germany’ [2021] *Computer Law Review International* 38, 38-39.

82 See e.g. Giovanni Sartor, ‘Providers Liability: From the eCommerce Directive to the future’ (report for the IMCO Committee of the Directorate-General for Internal Policies of the European Parliament, IP/A/IMCO/2017-07, 2017) and Sophie Stalla-Bourdillon, ‘Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well’ in Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers* (Springer 2019) 275.

83 See also Dessislava Savova, Andrei Mikes and Kelly Cannon, ‘The Proposal for an EU Digital Services Act – A closer look from a European and three national perspectives: France, UK and Germany’ [2021] *Computer Law Review International* 38, 39.

84 Article 5.1 DSA reads: “*Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on condition that the provider: (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.*”

85 Christoph Busch and Vanessa Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation’ [2021] *EuCML* 109, 111.

86 Caroline Cauffman and Catalina Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ [2021] *European Journal of Risk Regulation* 1, 8.

87 As explained in par. III.4 and III.5, the UCPD obliges online platforms to indicate on the basis of the declaration of the seller whether the seller is a trader or not (Article 7.4(f) UCPD) and must enable third party traders to clearly indicate towards consumers that they act as traders (Article 5 UCPD, see the UCPD Guidance). In addition, if the online interface of the platform is unclear, this could also constitute a misleading action or omission of the platform under Articles 6-7 UCPD. Note that the room for liability under the UCPD is also provided by Article 1 a.3(h) DSA, see par. IV.3.

88 Case C-149/15 *Wathelet v Bietheres* [2016] ECLI:EU:C:2016:840. See on the potential relevance of this case for platforms also Paola Iamiceli, ‘Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity’ [2019] *ERCL* 417-418.

89 Article 5.3 DSA therefore has the effect envisaged in Articles 13 and 19 of the ELI Model Rules on Online Platforms. See Christoph Busch et al, *Model Rules on Online Platforms* (Report of the European Law Institute, 2019). The text of Article 5.3 DSA suggests that the consumer must actually believe that he is contracting with the platform or someone who is acting under the platform’s authority or control. As a result, Article 5.3 DSA does not seem to be applicable merely if the online marketplace has an important role in the execution of the contract (e.g. by taking care of the delivery of the product through its own warehouse). Still, it could of course be argued that such platforms play an active role and are therefore not exempted from liability. However, Article 5.3 DSA could be applied if the online marketplace has such a dominant role that the supplier of the product is seen by the consumer as acting under the platform’s authority or control. In this sense, Article 5.3 DSA also comes close to Article 20 of the ELI Model Rules on Online Platforms, which proposes liability of a platform if the customer can reasonably rely on the platform operator having a predominant influence over the supplier. It seems that this situation will not often apply to regular online marketplaces but could potentially be applicable to platforms like Uber.

3. The Relationship between the DSA and EU Consumer Law

Like the E-commerce Directive, Article 1 a.3(h) DSA⁹⁰ makes clear that the DSA is without prejudice to EU consumer protection law. Hence, as is currently the case under the E-commerce Directive, the DSA does not preclude the consumer acquis (including the UCPD) from extending further protection to consumers.⁹¹ The relationship between the DSA and the consumer acquis is therefore the same as that between the E-commerce Directive and the consumer acquis. In particular, the DSA does not stand in the way of holding online marketplaces liable under EU consumer law – be it under the currently applicable rules or through future changes.

4. The Relationship between the DSA and the UCPD

Taking into consideration that the liability exemption for hosting services will essentially remain the same and that the DSA, like the E-commerce Directive, is without prejudice to EU consumer law, it looks like the picture of the liability of online marketplaces under the UCPD as set out in par. III of this article will also be applicable under the DSA. This could be different if, as suggested by Cauffman and Goanta, the hosting exemption would be interpreted more narrowly under the DSA than is currently the case under the E-commerce Directive. While this would not have an impact on the liability of online marketplaces for their “own conduct” (see par. III.4 and III.5), it could under circumstances have an impact on the liability of online marketplaces for breaches of the UCPD caused by sellers (see par. III.6).⁹²

V. Conclusion and Discussion

This article addressed the question to what extent online marketplaces can be held liable under the UCPD, taking into consideration the liability exemption in the E-commerce Directive and the upcoming changes under the DSA. It has shown that the UCPD provides significant room to hold online marketplaces liable, especially in scenarios in which the breach of the UCPD can be regarded as the “own conduct” of the online marketplace. For example, an online marketplace may be held liable if it fails to clearly indicate the identity of the third-party seller or fails to design its web-structure in a way that enables third-party traders to present information in a way that complies with EU marketing and consumer law. The E-commerce Directive (and in the future, the DSA) does not stand in the way of such liabilities. The picture is more complex in relation to breaches of the UCPD caused by third-party sellers. If the online marketplace is either co-responsible for the breach or was aware of the breach (without taking steps accordingly), the online marketplace could be held liable under the UCPD. Arguably, an online marketplace could also be liable without being co-responsible or being aware of the breach, if the online marketplace plays an “active role” as defined in the CJEU case law on Article 14 of the E-commerce Directive. If the online marketplace does not play an “active role”, it seems likely that the online marketplace will escape liability on the basis of the UCPD.

The analysis reveals two major uncertainties under the applicable law. Firstly, while it is clear from the CJEU case law that an online marketplace is not exempted from liability under Article 14 of the E-commerce Directive if it optimizes the presentation of the offers for sale or promotes them, it is

much less clear when this is the case. Clarification of the notion of the “active role” would be highly welcomed, either through the CJEU case law or in the process of adoption of the DSA. Secondly, while the Modernisation Directive has introduced a specific information duty for online marketplaces (i.e. the obligation to make clear whether the seller on the platform is a trader or not), it has not provided any clarity as to the potential liability of online marketplaces for breaches of the UCPD by third-party sellers. Again, clarification in the CJEU case law or through future reform of the UCPD would be highly welcomed.

While the exact meaning of the notion of “active role” remains unclear, both under the E-commerce Directive and the DSA, this article has shown that neither the E-commerce Directive nor the DSA as such preclude liability of online marketplaces under the UCPD. Both the E-commerce Directive and the DSA allow for a sectoral approach for consumer law to further address issues in relation to online intermediaries.⁹³ Hence, despite the fact that the DSA presents a new legal framework for online intermediaries, this framework is by no means the final answer in terms of consumer protection in relation to the sale of products through online marketplaces.⁹⁴ This makes sense. While the DSA provides a general framework for a broad range of online intermediaries in relation to any type of illegal content, the DSA is not the all-encompassing answer to all possible issues in relation to online intermediaries. Hence, while the DSA has been criticised for not providing sufficient additional protection to consumers,⁹⁵ the good news is that the door to more protection via the consumer acquis will be open. This is an important point, not just in terms of the UCPD but for EU consumer law in general. The advantage of such a sectoral approach is that it can focus on specific problems in the market. A sectoral approach may also be more suitable to regulate specific types of online intermediaries (such as online marketplaces), rather than the DSA’s approach to regulate broad categories of online intermediaries (such as online platforms). ■

90 Note that this provision was re-numbered as part of the amendments made by European Parliament in its first reading of the DSA proposal. In the original proposal of the European Commission, this was Article 1.5(h).

91 See Recital 10 DSA, which explicitly mentions the UCPD.

92 In particular, this would extend the practical importance of scenario 3: online marketplaces would most likely not be liable for breaches of the UCPD caused by sellers if the role of the online marketplace is limited to optimization of offers which does not entail that the content is developed under editorial responsibility of the platform.

93 See on horizontal versus sectoral approaches of regulating online intermediaries Carsten Ullrich, ‘Standards for Duty of Care: Debating Intermediary Liability from a Sectoral Perspective’ [2017] JIPITEC 111 and Carsten Ullrich, ‘New Approach meets new economy: Enforcing EU product safety in e-commerce’ [2019] Maastricht Journal of European and Comparative Law 558. A sectoral approach to regulating online intermediaries has also been advocated by Stalla-Bourdillon. See Sophie Stalla-Bourdillon, ‘Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well’ in Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers* (Springer 2019) 275, 292. See similarly Paola Iamiceli, ‘Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (pierced) Veil of Digital Immunity’ [2019] ERCL 417-418.

94 See similarly for product safety issues: Christine Riefa, ‘Consumer protection and electronic commerce: protection against unsafe products bought online’ (report for the Confederal Group The Left 2018), 30-31, 107, 156.

95 See Christoph Busch and Vanessa Mak, ‘Putting the Digital Services Act in Context: Bridging the Gap Between EU Consumer Law and Platform Regulation’ [2021] EuCML 109 and Caroline Cauffman and Catalina Goanta, ‘A New Order: The Digital Services Act and Consumer Protection’ [2021] European Journal of Risk Regulation 1.