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Is the ‘New Deal’ for Consumers a Big Deal? Consumer Protection and the New Information Duties for Online Marketplaces

Marie Jull SØRENSEN*

Abstract: In 2018, The Commission adopted Communication COM/2018/183 final, titled ‘New Deal for Consumers’. The overall goal was to modernize existing consumer protection legislation to meet new challenges caused by e.g., digitalization. Some of these challenges concern online marketplaces. This article qualifies the roles and functions of the online marketplaces and analyses and discusses the new initiatives regarding online marketplaces in light of the roles of the marketplaces, the existing legal framework and the legal paradigm of consumer protection. It is found that the new rules do not challenge the current paradigm. They do, however, regulate the online marketplaces within general private consumer (contract) law which is a (small) step towards acknowledging the need to regulate the online marketplaces in their role as *intermediaries* of the main contract. The author suggests that this small step could be made bigger by perceiving the marketplace’s business model as more than three separate contracts, and rather as an interrelationship where risk allocation is essential.

Résumé: La « Nouvelle donne des consommateurs » est-elle importante ? Protection des consommateurs et nouvelles obligations d’information pour les marchés en ligne

En 2018, la Commission a adopté la communication COM/2018/183 final, intitulée « Nouvelle donne des consommateurs ». L’objectif général était de moderniser la législation existante sur la protection des consommateurs afin de relever les nouveaux défis engendrés notamment par la numérisation. Certains de ces défis concernent les marchés en ligne. Cet article qualifie les rôles et fonctions des marchés en ligne et analyse et discute les nouvelles initiatives les concernant à la lumière de leurs rôles, du cadre juridique existant et du paradigme juridique de la protection des consommateurs. On constate que les nouvelles règles ne remettent pas en cause le paradigme actuel. Cependant, elles réglementent les marchés en ligne dans le cadre du droit général de la consommation privée (contrats), ce qui constitue un (petit) pas vers la reconnaissance de la nécessité de réglementer les marchés en ligne dans leur rôle d’intermédiaires du contrat principal. L’auteur suggère que ce petit pas pourrait être plus grand en percevant le modèle d’affaires du marché avec plus de trois contrats distincts, et plutôt comme une interrelation où la répartition des risques est essentielle.

Zusammenfassung: Ist die „Neugestaltung der Rahmenbedingungen“ für Verbraucher eine große Sache? Verbraucherschutz und die neuen Informationspflichten für Online-Marktplätze

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Im Jahr 2018 nahm die Kommission die Mitteilung COM/2018/183 final mit dem Titel „Neugestaltung der Rahmenbedingungen für die Verbraucher“ an. Ziel war die Modernisierung des bestehenden Verbraucherschutzrechts, um den neuen Herausforderungen zu begegnen, die u. a. durch die Digitalisierung entstehen. Einige dieser Herausforderungen betreffen Online-Marktplätze. In diesem Artikel werden die Rolle und die Funktionen von Online-Marktplätzen beschrieben und die neuen Initiativen in Bezug auf Online-Marktplätze vor dem Hintergrund der Rolle der Marktplätze, des bestehenden Rechtsrahmens und des rechtlichen Paradigmas des Verbraucherschutzes analysiert und diskutiert. Es zeigt sich, dass die neuen Vorschriften das derzeitige Paradigma nicht in Frage stellen. Sie regulieren die Online-Marktplätze jedoch innerhalb des allgemeinen privaten Verbraucher(vertrags) rechts, was ein (kleiner) Schritt in Richtung der Anerkennung der Notwendigkeit ist, die Online-Marktplätze in ihrer Rolle als Vermittler des Hauptvertrags zu regulieren. Die Autorin schlägt vor, diesen kleinen Schritt größer zu machen, indem das Geschäftsmodell des Marktplatzes als mehr als drei separate Verträge betrachtet wird, sondern vielmehr als eine Wechselbeziehung, bei der die Risikoverteilung wesentlich ist.

1. The New Deal

1. The Commission’s Communication COM/2018/183 final, titled ‘A New Deal for Consumers’, defines the framework for two directives. Of particular relevance to this article is Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the strengthened enforcement and modernization of Union consumer protection rules (the modernization directive).¹ The modernization directive was to be transposed into national law no later than 28 November 2021 with effect from 28 May 2022. It consists of amendments to four existing directives: Directive 93/13/EEC on unfair terms (Art. 1) (the unfair terms directive), Directive 98/6/EC on prices (Art. 2) (the price directive), Directive 2005/29/EC on unfair commercial practices (Art. 3) (the unfair commercial practices directive) and Directive 2011/83/EU on consumer rights (Art. 4) (consumer rights directive). In this article, only the specific provisions regarding online marketplaces in the two latter directives will be presented and discussed. The provisions provide some additional information duties for online marketplaces and concern ranking parameters, seller status, lack of consumer rights and, if relevant, how the obligations of the main contract are divided between the seller and the marketplace. How and when the information is given is also regulated.

1 The second directive is Dir. (EU) 2020/1828 of 25 Nov. 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the collective redress directive), data.europa.eu/eli/dir/2020/1828/oj.

2. Online Marketplaces

2. A definition of ‘online marketplaces’ is added to the consumer rights directive and the unfair commercial practices directive. An online marketplace ‘means 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’.² The definition is slightly updated and made more technologically neutral (e.g., ‘software’ instead of ‘website’ inspired by Regulation 302/2018 on addressing unjustified geo-blocking etc.), but otherwise, the definition is the same as in Regulation 524/2013 on online dispute resolution for consumer disputes (the ODR directive) and Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union.³

3. A very important delimitation of the definition is that only two-sided platforms are covered. Thus, traders with their own website selling goods or services to consumers are *not* included in the definition. There are always three contracts in two-sided platforms: the *main contract* between the two users of the marketplace and two *user contracts*. The main contract concerns the goods and services that one user buys from another user. The user contracts are the contracts the users enter into with the online marketplace (or specifically the trader behind the online marketplace). These contracts concern the terms and conditions of using the online marketplace service. The legal definition clearly states that the online marketplace must provide the option to *conclude* the main contract, which means that platforms are *not* included in the definition of an online marketplace if they only list possible contracting parties without giving the opportunity to *conclude* the contract on the marketplace platform.

4. The definition clearly states that one party to the main contract must be a consumer, and it seems as if the other party can *either* be another consumer (C2C contract) or a trader (B2C contract). It is not evident from the definition’s wording whether the consumer *must* be the buyer. However, this seems to be presumed in the provisions specifically applicable to online marketplaces. The new Article 6a (1) (b-d) of the consumer rights directive refers to ‘the third party offering the goods, services or digital content’. This ‘third party’ is the contracting party to the consumer in the main contract, and thus, these provisions clearly perceive the consumer as the buyer. This perception is in line with EU consumer legislation in general.

5. If the seller is a consumer-seller (and not a trader), the *user* contract with the online marketplace is a B2C contract and is covered by applicable consumer

2 The unfair commercial practices directive Art. 2 (n) and consumer rights directive Art. 2 (e)(17).

3 The modernization directive, recital 25.

protection legislation, as is also the case with the consumer-buyer's contract with the marketplace. It must be presumed that the agreement between a user and an online marketplace is a 'real' contract in accordance with general law of obligations and contract.⁴ Should the acknowledgement of the agreement as a contract in the Member States depend on the user 'paying' for the service, the new Directive, 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (the digital content directive) has now explicitly accepted personal data as counter-performance, which means that under the scope of this directive, consumers can claim remedies for lack of performance when they have used personal data as counter-performance. Personal data is regarded 'counter-performance', unless the information is collected exclusively to supply the digital content or the digital service, or for the sole purpose of meeting legal requirements.⁵

6. As a new feature, and because of the triangular business model, the modernization directive's specific provisions regarding online marketplaces also apply where the main contract is a C2C contract. These contracts are usually not covered by consumer protection legislation. As the new information requirements concern how sellers are ranked and whether they are consumers, it makes sense to make these pre-contractual information duties also apply to main contracts between two consumers. Be aware that no other consumer protection legislation will apply to the C2C main contract - not even other pre-contractual information duties.

7. The modernization directive does not give any guidelines as to how the definition of online marketplaces interacts with Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (e-commerce directive). One must assume that an online marketplace overlaps with the concept of 'an information society service' in some situations, but also encompasses marketplaces that are not 'information society services'. In C-434/15 *Asociación Profesional Elite Taxi* (Uber Spain),⁶ the European Court of Justice (ECJ) ruled that Uber was *not* an information society service because the activity of the drivers was 'inherently linked to a transport service' and was thus classified as 'a service in the field of transport'. Contrary to this, the ECJ ruled in C-390/18 *Airbnb Ireland*⁷ that Airbnb *is* an information society service, presumably based primarily on the fact that Airbnb also provided 'services ancillary to that intermediation service'. As a starting point, there is no

4 The user contracts might not fit the typical contractual model but qualify as service provision contracts, cf. Teresa RODRIGUEZ DE LAS HERAS BALLELL, 'The Legal Autonomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU', 3. *Italian LJ* 2017, p 173.

5 The digital content directive, Art. 3 (1).

6 ECJ 20 Dec. 2017, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, curia.europa.eu/juris/documents.jsf?num=C-434/15.

7 ECJ 19 Dec. 2019, *Airbnb Ireland*, curia.europa.eu/juris/documents.jsf?num=C-390/18.

doubt that the definition of an online marketplace covers both Uber and Airbnb in the modernization directive. Also, app stores are covered.⁸ The legal definition does not dictate what kind of service the online marketplace must supply, as long as two users can conclude a contract on the marketplace platform and the marketplace uses some kind of software to do it. Also, contrary to the concept of ‘information society service’, the online marketplace concept seems not to require the online marketplace to be remunerated for its services. However, the online marketplace must be operated by or on behalf of a *trader*, which means that the online marketplace cannot be a non-governmental organization (NGO) or other non-traders. It must be assumed that a trader aims to profit either through remuneration or otherwise (e.g., selling collected data).

8. The definition of an online marketplace seems to assume that the marketplace acts as an intermediary regarding the main contract and thus, that there is a triangular contractual setup as described above. However, whether the marketplace *is* an intermediary must first be settled, before applying the specific rules. There are no stated clear criteria determining when a platform is an intermediary and not something else such as an employer of the seller-user or the real seller in the main contract. However, in C-149/15 *Wathelet*,⁹ the ECJ stated that platforms can also be regarded as sellers in the main contract when the platform does not sufficiently state that they are not. The decision concerned the old Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees. Unlike other judgments, the consequences of the *Wathelet* judgment were not incorporated into the new Directive 2019/771 on certain aspects concerning contracts for the sale of goods (sale of goods directive).

9. An amendment proposal from the European Parliament¹⁰ seemingly went further than *Wathelet*, as it expanded the definition of a ‘trader’ (in the directive called the ‘seller’) to also include a trader who acts ‘as an intermediary for a natural person’. The amendment proposal was not adapted which might indicate that intermediaries as such are not under the scope of the new sale of goods directive and the digital services directive.¹¹ However, in the *Wathelet* judgment, the question was *not* whether the platform was the seller because it acted on someone else’s behalf. It was rather whether the *lack of information* about their status as an intermediary would make them be regarded as the seller, which ultimately is

8 See Directive 2016/1148 concerning measures for a high common level of security of network and information systems across the Union, data.europa.eu/eli/dir/2016/1148/oj, recital 15.

9 ECJ 4 Nov. 2016, *Sabrina Wathelet v. Garage Bietheres & Fils SPRL*, curia.europa.eu/juris/documents.jsf?num=C-149/15.

10 Amendment proposal 45, www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0043/P8_A(2018)0043_EN.pdf.

11 See Dirk STAUDENMAYER, ‘The Directive on Digital Contracts: First Steps Towards the Private Law of the Digital Economy’, *ERPL* 2020(2), p 233.

more a question of who your real contracting party is rather than expanding the scope to intermediaries. However, if the EU wanted to make sure that the *Wathelet* judgment was incorporated into the consumer acquis, it would have been the natural choice to insert that the online marketplace will be regarded as a seller as a consequence of the lack of information from the online marketplace about the status of the seller. As mentioned later, no such consequence is adapted in the modernization directive. It is thus unclear whether *Wathelet* still expresses the current EU interpretation of ‘seller’ in the new sale of goods directive. It is, however, clear that the Member States themselves can expand the scope of application of ‘seller’ if so desired.^{12,13}

10. In ‘A European agenda for the collaborative economy’,¹⁴ the Commission mentions some key criteria for assessing when a collaborative platform is also to be regarded as providing the underlying service. If a platform meets all these criteria, there is ‘strong indication that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service’. As long as there are no clear criteria, the platform will be inclined to define itself as adhering to the business model with the least amount of liability, which for now is an intermediary. We see this with many *labour* platforms. Member State courts have dealt with labour platforms differently regarding their status as either employers or intermediaries.¹⁵ Of course, the consequence of such platforms actually being considered employers of their platform workers would probably make it non-profitable (or at least much less profitable) to run such platforms. Some might also argue that some labour platforms provide work for people who would otherwise not be a part of the labour market, and that these people for several reasons would not be able to be ‘normal’ employees. This discussion might vary depending on the social security system of the Member State and the political stand on issues like the labour market and market competition. The Commission has

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- 12 The digital content directive, recital 18 and the sale of goods directive, recital 23. In Denmark, it follows from the law of obligation and contracts that a party communicating with another party regarding a contract, but not disclosing that they are not the contracting party, will be regarded as the contracting party.
- 13 In the ELI model rules, it is also stated in Art. 19 that the platform is liable as a trader, if it fails to inform the consumer that the platform is not the main contracting party, www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf.
- 14 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, *A European agenda for the collaborative economy*, COM(2016) 356 final.
- 15 Valerio DE STEFANO, Ilda DURRI, Charalampos STYLOGIANNIS & Mathias WOUTERS, *Platform work and the employment relationship*, International Labour Organization working paper (2021), ss 4.1 and 4.2, https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_777866.pdf.

proposed a Directive on improving working conditions in platform work (COM (2021) 762 final), which aims to solve some of the issues regarding the qualification of the platforms and aims to improve the conditions for workers on a platform.

11. When drafting the European Law Institute (ELI) Model Rules on Online Platforms, the discussion about such self-definition resulted in a compromise allocating more risk to the platform regarding the main contract in cases where the platform had predominant influence over the seller but still defined itself as an intermediary.¹⁶ This structuring of the model rules does not protect the platform worker, but it protects the consumer-buyer as if he/she contracted with the platform as an *employer* of a platform worker. The modernization directive does not address this issue.

3. The New Initiatives

12. It is a novelty within general consumer protection that online marketplaces are explicitly regulated as *intermediaries*. Many of the provisions regarding digital platforms also apply to online marketplaces, but not in their role as intermediaries but rather in their roles as *market players* in general or *traders* in the user contracts. The role as intermediary¹⁷ does not (always) fit into the existing legal perceptions of commercial agent¹⁸ or representative.¹⁹ It seems to be an independent concept to be defined legally, depending on the context it is a part of. In consumer protection legislation, not much focus has been on the particular features of the triangular business model involving intermediary platforms (including online marketplaces). Basically, the existing consumer protection applies to the *main* contract, provided that the seller is a trader, and to the *user* contract between the consumer and the platform provided that the platform is a trader. There are no provisions directly linking the online marketplace to the main contract.

13. As mentioned, some of the new provisions specifically target the triangular setup, acknowledging that in order to make an informed choice, the consumer depends on the online marketplace to provide information on how the ranking of offers is produced and whether the main contracting party is another consumer or a trader. In addition, if the main contracting party *is* another consumer, the marketplace must state that EU consumer rights do not apply. In Denmark, however,

16 ELI model rules, Art. 20.

17 See more on the concept of intermediary with references Teresa RODRIGUEZ DE LAS HERAS BALLELL, 3. *Italian LJ* 2017, pp 165 et seq.

18 However unclear, ECJ 24 Feb. 2022, *Tiketa v. M.Š.*, curia.europa.eu/juris/documents.jsf?num=C-536/20 seems to regard Tiketa as an agent acting on behalf of Baltic Music. Hence, both Tiketa and Baltic Music can be classified as ‘trader’ for the purposes of point 2 of Art. 2 of Dir. 2011/83/EU.

19 Teresa RODRIGUEZ DE LAS HERAS BALLELL, 3. *Italian LJ* 2017, p 159.

these consumer rights actually *do* apply because of the Danish intermediary rule. Denmark has chosen to let C2C main contracts intermediated by an active intermediating party be regarded as a B2C contract in most civil law consumer protection legislation, consequently requiring the consumer-seller to comply with all civil law consumer protection legislation as if he/she was a trader.²⁰ The platform still remains outside the main contract but has to comply with some pre-contractual duties along with the seller.²¹

14. As is true of EU consumer protection in general, the transparency rules in the modernization directive have been criticized for not being comprehensive enough and characterized by a piecemeal approach with no overall strategy.²² The various legal measures in the area of platform regulation reflect the many different functions and roles, the online marketplaces have. The measures proposed and adopted in this area can be seen as a response to undesirable conditions that evolved in the somewhat unregulated market of online platforms, which the EU legislator aims to correct mainly through regulating the online marketplaces in their role as market players with a more indirect effect on consumer protection.

15. In the next section of the article, each new measure in the modernization directive relevant for online marketplaces will be presented. The measures are divided into information about the contracting party and about ranking. According to recital 27 of the modernization directive, this information must be provided in a clear and comprehensible manner. It is not sufficient to provide this information in contractual documents such as the terms and conditions.

3.1. Information About the Contracting Party

3.1.1. A Consumer?

16. The modernization directive introduces a duty to inform the consumer of the status of the main contracting party, both in the unfair commercial practices directive Article 7(4)(ii) littera f and in the new Article 6a(1) littera b of the consumer rights directive. If the seller is *not* a trader, according to the new

20 Marie Jull SØRENSEN, 'Sharing economy: A private law perspective', in Gemma Rubio GIMENO & Antonio Orti VALLEJO (eds), *Propuestas de regulación de las plataformas de economía colaborativa: perspectivas general y sectoriales* (Spain: Thompson Reuters Aranzadi 2019), pp 57-79; Marie Jull SØRENSEN, 'Digitale formidlingsplatforme - formidlingsreglen i dansk forbrugerret', 119. *UfR (Ugeskrift for Retsvæsen)* 2017, Karnov, pp 119-128.

21 See e.g., Sø- og Handelsretten [The Danish Maritime and Commercial Court] 18 Jun. 2009, case N-1-07.

22 Christoph BUSCH, 'Self-Regulation and Regulatory Intermediation in the Platform Economy' (30 Nov. 2018), in Marta Cantero GAMITO & Hans-Wolfgang MICKLITZ (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar 2019), p 2 (paper edition).

Article 6a(1) littera b of the consumer rights directive, the marketplace must inform the consumer-buyer that EU consumer protection law does *not* apply to the main contract. According to recital 27, based on the principle of proportionality, these information obligations do not require the marketplace to list *specific* consumer rights that do not apply.

17. The reason for these information duties is that the consumer may not clearly understand who their contracting party is, and how their rights are affected.²³ The information about the status is based on a declaration from the seller herself/himself. Correct information about the status of the main contracting party is clearly useful information, as this defines the contract as either a B2C or a C2C contract. However, it is a well-known problem that establishing this status is not always easy – including for the seller himself/herself.²⁴ Firstly, Member States may have slightly different definitions of the concept of consumer.²⁵ In Denmark for example, both legal and natural persons can be consumers, and as long as the consumer acts *mainly* outside their trade or business, he/she is considered a consumer. It should be mentioned that this author believes that Denmark is contrary to EU law by including legal persons in the *definition* of consumers.²⁶ Such an expansion of the scope of application of consumer protection legislation should be done independently of the consumer definition. Secondly, it is not clear what constitutes a consumer, specifically where the consumer sells several goods (or services) as was the case in C-105/17 *Kamenova*.²⁷ Even though the EU has suggested some relevant factors to evaluate,²⁸ the evaluation is still done on a case-by-case basis, and it has proven difficult in some cases to establish whether a person is a consumer.²⁹ The result might be that the information about status is wrong in

23 The modernization directive, recital 24.

24 Christian TWIGG-FLESNER, ‘Bad Hand? The “New Deal” for EU Consumers’ (14 May 2018). Final version published, 15. *GPR (European Union Private Law Review)* 2018, pp (166-175) at 15 et seq. (paper edition).

25 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, A European agenda for the collaborative economy, COM(2016) 356 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A356%3AFIN>, s. 2.3.

26 Marie Jull SØRENSEN, ‘Forbrugerbegrebet: udvalgte problemstillinger, Procesretten vs. civilretten, den danske udvidelse og synbarhedskravet’, 53. *UFR (Ugeskrift for Retsvæsen)* U2022B, s. 4.

27 ECJ C-105/17, 4 Oct. 2015, *Komisija za zaštitu na potrobitelitate v. Evelina Kamenova*, curia.europa.eu/juris/documents.jsf?num=C-105/17.

28 *Commission Notice – 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* C/2021/9320, [eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC1229\(05\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC1229(05)).

29 This conclusion is based on an analysis of the sparse Danish case law and the last 10 years of practice from *Forbrugerklagenævnet* [The Danish Consumer Complaints Board] regarding the concept of ‘consumer’, see Marie Jull SØRENSEN, 53. *UFR* 2022, pp 53 et seq.

some cases - perhaps based on some homemade criteria of the online marketplace, in order to make it easier for the consumer-seller.

18. Some legal scholars suggest that if it is possible for lawmakers to construct an indicative list, it might have been preferable to introduce such a list in the modernization directive.³⁰ Then, based on the parameters listed, the online marketplaces might be able to set up automatic procedures to suggest which status the seller has, both when initially entering the marketplace and on an ongoing basis - performing its function as regulatory gatekeeper.³¹ However, the accuracy of such an automated output requires the consumer-seller to only use this one platform, and that the parameters are of an objectively measurable nature.

19. In line with the absence of an obligation for the platform to monitor the content provided by its users in the e-commerce directive and in the proposal for the digital service act, there is no legal obligation for the marketplace to check or otherwise attempt to verify the accuracy of the status declaration provided by the seller.

3.1.2. *Wrongful Information Provided by the Seller*

20. It must be presumed that wrongful information cannot be to the detriment of the consumer-buyer, however, this is not addressed in the modernization directive and is probably left to the Member States. Thus, if a seller declares himself/herself to be a trader, the main contract will be a B2C contract even if it later turns out that the seller is in fact not a trader. This will presumably at least be the case if the seller *deliberately* lies about his/her status to make the consumer more inclined to enter into a contract with him/her, which will probably only happen for new small businesses ('hobbyists').³²

21. Apart from the new rules, false information given by a seller about consumer status is addressed in no 22 of the annex to the unfair commercial practices directive, and false information about consumer rights will probably be covered by the unfair commercial practices directive Article 6(1) littera g.³³ However, this directive only applies to B2C commercial practices, which means it will only apply if the seller is a trader. New remedies have been added to the unfair commercial practices directive by the modernization directive. So now, the consumer gets an explicit right to a price reduction or termination of the contract or compensation for damage, if the consumer is 'harmed' by unfair commercial practices. It is up to

30 Christian TWIGG-FLESNER, 15. *GPR* 2018, pp (166-175) at 12 (paper edition).

31 Christoph BUSCH, in *The Role of the EU in Transnational Legal Ordering*, pp 9-10 (paper edition).

32 Regarding the reference to 'hobbyists': Marco B.M. LOOS, 'The Modernization of European Consumer Law (continued): More Meat on the Bone After All', 2. *ERPL* 2020, p 418.

33 Christian TWIGG-FLESNER, 15. *GPR* 2018, pp (166-175) at 12 (paper edition).

the Member States to determine the conditions for the application of these remedies, so it is not clear what qualifies as ‘harm’. However, it must be assumed that, if the consumer would *not* have entered into a contract had he/she been given the correct information, the consumer is harmed. Thus if, contrary to the truth, a trader declares that he/she is a consumer-seller, the consumer-buyer can claim remedies if he/she has been harmed. However, it seems unlikely that a consumer-buyer would actually be harmed if he/she later finds out that the contract he/she entered into is actually a B2C contract and not a C2C contract unless, of course, it prevented him/her from using his/her rights as a consumer.

22. To summarize, it seems less relevant to apply the unfair commercial practices directive on the main contract, unless the unfair commercial practices directive would also apply when a consumer-seller wrongfully *claims* to be a trader. The unfair commercial practices directive does not address how to apply the directive in cases where, contrary to the facts, a seller *appears* or claims to be a trader.³⁴

3.1.3. *Wrongful Information Provided by the Online Marketplace*

23. The above-mentioned rules in the unfair commercial practices directive apply to the parties to the *main* B2C contract. There are no additional provisions regarding liability of the *online marketplace* for the wrongful information emanating from the seller.³⁵ One could argue that, if the marketplace becomes aware of a false status or receives information that indicates this, the marketplace should be obligated to take some kind of action, e.g., preventing the seller from appearing in the search results³⁶ or launching further inquiry.³⁷

24. Several EU directives apply not only to a trader but also to anyone ‘acting in the name or on behalf of the trader’.³⁸ The Commission Notice – Guidance on the interpretation and application of unfair commercial practices directive³⁹ does not provide clear guidance to what this entails in regards to online marketplaces, so it might be up to the Member States to determine this.⁴⁰ Within the concept of intermediary, one might claim that there is no intention of acting on behalf of any

34 Compare for the impact of ‘appearance’ in Denmark regarding the concept of consumer in Marie Jull SØRENSEN, *UFR* 2022, p 53, s. 5.

35 See also Marco B.M. LOOS & Christina RIEFA, ‘Consumer Protection and Online Auction Platforms. Towards a Safer Legal Framework’, 4. *ERPL* 2020, pp 977-980.

36 Marco B.M. LOOS, 2. *ERPL* 2020, p 418.

37 Marco B.M. LOOS, 2. *ERPL* 2020, p 418.

38 The Unfair Commercial Practices Directive 2(b).

39 Commission Notice – *Guidance on the interpretation and application of Directive 2005/29/EC*.

40 Christoph BUSCH & Vanessa MAK, ‘Putting the Digital Services Act into Context: Bridging the Gap between EU Consumer Law and Platform Regulation’, 3. *European Legal Studies Institute Osnabrück Research Paper Series* 2021, p 8.

of the users in any of the aspects of being an intermediary. Providing standard contracts, payment systems, feedback systems etc. does not entail acting on anyone's behalf. Complying with information duties stemming from various provisions regulating digital service providers will also not constitute acting on behalf. However, one might imagine that requirements of pre-contractual information imposed upon the seller in the main contract in the triangular business setup *could* be imposed upon the online marketplace as acting on behalf of the seller, if the marketplace does not offer an opportunity for the seller to provide this required information himself/herself. If the online marketplace was to be perceived as acting in the name or on behalf of the trader, there is no indication that the marketplace will be liable or sanctioned for anything *other* than not applying with the information duties. Thus, the online marketplace will most likely not be liable for sanctions under civil law for not informing on e.g., the right of withdrawal. Even though the proposal of the digital service act addresses various issues regarding intermediary platforms, there do not seem to be provisions covering liability of the marketplace for wrongful pre-contractual information either. Article 20 (1) regarding illegal content on larger platforms does not seem to be relevant.

3.1.4. *Consequences of Wrongful Information for the Main Contract*

25. The information about the status and the consequential information if the seller is a trader raises a challenge regarding how this requirement relates to the main contract. Regarding information duties in general, there seems to be a gap in the existing regulation regarding intermediated contracts regarding to which these requirements apply.⁴¹ Because the new rule explicitly regulates the information duties of online marketplaces in their role as intermediaries, it is clear that this information must be provided by the online marketplace. But when required information relevant to the *main* contract is given (or omitted) by an intermediary party, it raises the question of what consequence false or omitted information should have for the main contract. Part of the answer is to be found in the new Article 6a (1) of the consumer rights directive, but only regarding the new information duties. Here, it is stated that 'Before a consumer is bound by a distance contract ... on an online marketplace, the provider of the online marketplace shall ... provide the consumer with the following information'. The information referred to is i.a. information on the status of the seller and information on the lack of consumer rights when the seller is a non-trader.

26. So, it seems that, if the required information is not provided by the marketplace, the consumer can claim that the main contract does not bind the consumer, both in cases where the main contract is a C2C contract and cases where it is a B2C

41 Christoph BUSCH & Vanessa MAK, 3. *European Legal Studies Institute Osnabrück Research Paper Series* 2021, p 9.

contract. The provision does not address that the consumer has experienced a loss or otherwise been harmed, or that the false or absent information has caused/influenced his/her transactional decision. It is not clear how to apply this ‘remedy’. Will the consumer be able to make this claim several days after the contract has been concluded – or maybe years later, when the consumer wants to claim some consumer rights that turn out not to apply? Whatever the answer, the rules do not state that the *online marketplace* has any liability regarding this remedy. This seems to be a dispute between the parties to the main contract only. There is no doubt, however, that the online marketplace can be sanctioned with fines for breach of the specific information duties for online marketplaces laid down in both the unfair commercial practices directive and the consumer rights directive. This *might* be a novelty/rarity because (1) as mentioned, there seems to be some doubt as to who the general information duties apply to when a normal B2C contract is intermediated by a third party and (2) the information duty applies both when the main contract is a B2C and a C2C contract.

27. One could argue that the above mentioned interpretation of ‘(b)efore a consumer is bound by’ which also applies to other information duties in the consumer rights directive is too literal. In Denmark, this opening sentence is interpreted as all information must be provided before *entering* into a contract leaving out any contractual consequences of not providing the information. It is not clear from the new information duties in the modernization directive or the (old) information duties in the consumer rights directive whether such contractual consequences cannot be derived from the wording of the opening sentence despite the clear wording. Admittedly, deeming the contract not binding is a far-reaching consequence of not complying with certain information duties and the lack of discussion in the recitals about the implications of this consequence might indicate that it should not be read literally. Also, the fact that the lack of information on the right of withdrawal has its own consequence of extending the right for a year indicates that the consumer is bound by the contract even though he/she did not receive the required information. On the other hand, and from the perspective of the goal of a high level of consumer protection, it would make sense to draw a contractual consequence of not getting the information that presumably is important for the consumer to take an informed decision. The information paradigm of consumer protection would lose much of its value if the only sanction for not giving the required information is a fine.

3.1.5. Information About Allocations of Obligations: If Relevant

28. If relevant, according to the new Article 6a (d) in the consumer rights directive, the online marketplace must also inform the consumer of how obligations related to the main contract are shared between the seller and the marketplace. It must be presumed that, if the consumer is informed that the marketplace takes on some of the liability for the main contract, this will be binding for the marketplace.

3.2. *Ranking*

29. In the consumer rights directive Article 6a (1) littera a and in the unfair commercial practices directive Article 7 (4a), the modernization directive inserts the duty to inform about ranking on online marketplaces. ‘Ranking’ is defined as a ‘relative prominence given to products, as presented, organised or communicated by the trader’. It is integrated into the business model of the online marketplace that the consumer will search for a product and the marketplace will provide ‘hits’ for the search. These hits can be ranked in various ways, depending on how the marketplace has programmed the ranking algorithm. Because ranking has a great influence on consumer choice, the modernization directive provides a duty of the marketplace to inform of the main parameters determining the ranking. In addition, the information must also disclose the relative importance of those parameters as opposed to other parameters. The marketplace does not need to reveal the algorithm code but must give general information about the parameters and their interrelation. The information must be provided in a clear and comprehensible manner ‘available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented’.

4. *The Paradigm(s?)*

30. The modernization directive presents two novelties (or at least rarities) regarding online marketplaces. Firstly, as part of the ‘New Deal’, the modernization directive specifically targets the online marketplaces in their *role as intermediaries*. The provisions are not many, and further clarification of the interplay between the rules applicable to the marketplace and the existing B2C protection rules is still needed. Secondly, with the modernization directive, the concept of an ‘online marketplace’ is brought into the existing *general* private and public consumer protection law, which has been long awaited. These two novelties, however, do not seem to have brought with them any change in the *type* of means used, or in the *allocation of risk* in the triangular business model.

4.1. *Information Duties: An Oldie ...*

31. ‘The dark side of consumer information is well-known and well-researched’.⁴² This statement might sound darker than intended, but it expresses the fact that many scholars (legal and other) have documented that consumers are not necessarily protected by being provided with various pieces of information. However, EU consumer protection in the EU is based on exactly that, information – also referred

42 Alan MATHIOS, Hans-Wolfgang MICKLITZ, Lucia A. REISCH, John THØGERSEN & Christian TWIGG-FLESNER, ‘A Forward Looking Consumer Policy Research Agenda’, 43. *Journal of Consumer Policy* 2020(1-9), p 5.

to as the ‘information paradigm’.⁴³ In the oft-referenced C-362/88 GB-INNO-BM Confédération du Commerce Luxembourgeois [1990] ECR I-667, the ECJ emphasized information as a principle requirement and ruled that the ‘before price’ had to be disclosed, even if a reasonable argument against this is that the consumer can make a better choice weighing the price against the product *without* being distracted by how much money he/she would presumably ‘save’. In the Treaty of Amsterdam, information was elevated from a ‘method’ to a ‘right’⁴⁴ and considering the landscape of consumer protection, there is no doubt that the duty to provide information is the main approach taken to protect consumers. The goal is not the information itself but rather, through this information, to create transparency and thus make it possible for consumers to make informed choices.⁴⁵ Thus, consumer protection law contains various information duties along with provisions on how to secure that the information provided is understandable, available and truthful. In the ‘New Deal’, it is emphasized that more knowledge leads to greater trust⁴⁶ and trust is important in a market. The greater the trust the greater the business! However, information does not always result in knowledge.

32. As the initial, ominous quote indicates, there are several challenges and problems related to this information paradigm. Without going into too much detail (as this is well-known and well-researched), the challenges can be divided into two interconnected parts: the information itself and the receiver. The ‘what, how and when’ of the information should be based on the need for information and the decision-making of the receiver. In the information paradigm, the receiver is perceived as a rational person, and the consumer benchmark of *understanding* the information is the ‘average consumer’ who is reasonably well-informed and reasonably observant and circumspect.⁴⁷ Thus, the ‘what, how and when’ of the information requirements are now a widespread set of somewhat detailed (and somewhat piecemeal and overlapping) rules made to protect the rational, average consumer. The obvious critique is that consumers are not rational and rarely live up to the standard of the average consumer.⁴⁸ The suggested alternative to the

43 In Trumbull’s identification of consumer policy models, the EU policy can be classified as the information model with a hint of the protection model, see presentation in Marthe Hårvik AUSTGULEN, ‘Understanding National Preferences in EU Consumer Policy: A Regime Approach’, 43. *Journal of Consumer Policy* 2020, p (767) at 771 with references.

44 Christina RIEFA, *Consumer Protection and Online Auction Platforms. Towards a Safer Legal Framework* (London: Routledge, 1st edn 2016), p 67, n. 1 with references.

45 Christina RIEFA, *Consumer Protection and Online Auction Platforms*, p 67.

46 Commission’s Communication COM/2018/183 final, *A New Deal for Consumers*, eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A183%3AFIN, p 3.

47 See e.g., the unfair commercial practices directive, recital 18.

48 See e.g., Study for the Fitness Check of EU consumer and marketing law, Final report Part 1 – Main report, 2017, op.europa.eu/en/publication-detail/-/publication/f7b3958b-772b-11e7-b2f2-01aa75ed71a1/language-en, p 43.

rational consumer has been to look to behavioural science. And if one is not willing to let go of the information paradigm or if full-blown adoption of behavioural science proves too difficult, behavioural science could at least help select the right information and the right time.⁴⁹ One must assume that the possibilities of choice architecture based on behavioural science in an online environment are already greatly exploited by the online marketplaces, so this calls not only for regulation of information but also on regulation of the architecture of the environment in which information and thus choices are presented.⁵⁰

33. The new provisions in the modernization directive specifically applicable to online marketplaces fit well into the existing information paradigm. They seem to include important information, but as with all information it only has effect if the consumer actually reads it, understands it and takes it into consideration. The provisions also regulate how and when the information is given, which is also in line with existing information duties and seems to be based on the existing notion of the receiver. Unlike most information duties but similar to the right of withdrawal, a (civil law) sanction for omitting the information is attached to the information requirement (if the provision is read in a literal way). If the lawmakers were to take the approach of regulating the choice architecture instead of, or alongside, the information approach, defining the ranking parameters and their weighting could be one way to go. Such an intervention would probably seem too invasive, but if behavioural science was able to pinpoint how a ranking algorithm should be coded to create the most consumer choice-friendly ranking, or if certain misleading ranking parameters were banned, then the ranking itself might protect the consumer more than the mere information on how the (potentially manipulated) ranking is created. There have been some steps towards this regarding the regulation of reviews.⁵¹

4.2. Allocation of Risk

34. Consumer protection is built on the presumption that the consumer is the weak party vis-à-vis the trader in terms of information about the product and their rights and bargaining power. Consequently, the consumer thus bears the risk in the contractual relationship with the trader. The risk entails both the risk of entering into a non-beneficial contract and the risk of not being able to pursue his/her rights, due to either a lack of resources or a lack of knowledge of these rights and how they are pursued. In a B2C contract, several measures have been taken to even

49 Study for the Fitness Check of EU consumer and marketing law, Final report Part 1 - Main report, 2017, p 225.

50 Also see Marco B.M. Loos, 2. *ERPL* 2020, p 414.

51 See e.g., the modernization directive Art. 3, adding para. 6 to Art. 7 of the unfair commercial practices directive, in addition to expanding the blacklist.

out this imbalance. The information paradigm entails providing information to the consumer to try to reduce the imbalance of information. In addition, specific rights such as the right not to be bound by a contract, the right of withdrawal and the remedies when there is a lack of performance transfer some of the contractual risks to the trader. However, it is still the consumer, who will have to invoke these rights, which of course presupposes that he/she knows them and have the resources and willingness to invoke them. One of the more controversial measures to reduce both the procedural and contractual risk of the consumer is the ECJ's repeated demand that the national court must apply consumer protection *ex officio*.⁵²

35. As discussed earlier, there are no provisions specifically designating contractual risk for the main contract within the triangular business model. Consumer protection law applies to the user contract and the main contract, respectively. The new provisions do not change this. On the contrary, they underline that even when the online marketplace is specifically given a duty to disclose information related to the main contract, no risk is imposed on the marketplace. The risk, however, is placed partly with the seller (trader or consumer) and partly with the consumer. The risk for the seller is that omitted information will lead to the consumer claiming that the contract is non-binding if the provision is read in the literal way. The risk for the consumer is that he/she has to *claim* this 'remedy'.

36. In line with the ELI model rules, the Parliament suggested that the digital service act should address the liability of online marketplaces when the marketplaces have predominant influence over the sellers on the platform.⁵³ This has, however, not yet been addressed in the digital service act. Allocating the risk to the online platforms is one of the most innovative and controversial rules in the ELI model rules, as it can be regarded as a breach of the principle of relativity and has the potential to be very burdensome for the platforms. However, the rule only applies if the platform has predominant influence over the seller, and the rule is supplemented with a right of redress towards the seller. The ELI model rules state that the marketplace and the seller are jointly liable for the main contract.⁵⁴ A list of elements to be considered is added to help establish the 'predominant influence'. Such a liability rule will, to some extent, solve the challenge regarding labour platforms mentioned above. If an online marketplace has a business model very

52 See Marie Jull SØRENSEN, 'In the Name of Effective Consumer Protection and Public Policy!', 5 *ERPL* 2016, pp 791-822.

53 European Parliament, Recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market, 2020/2018(INL), annex to the resolution, sub VI, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020IP0272.

54 ELI model rules, Art. 20.

similar to an employer/employee relationship, it will most likely be covered by this liability rule.

37. Some legal scholars go as far as to wish for strict liability (with a right of redress) for the online platform regarding information as they claim that the platform is in a position to verify information provided by the sellers.⁵⁵ In the e-commerce directive and in the proposal for the digital service act, liability for illegal content is partly based on the activity of the platform which has the same idea as the ELI liability rule. Such an activity requirement is also found in the Danish intermediary rule. If the intermediary actively takes part in concluding the main contract, the main contract is a consumer contract regardless of the status of the seller. The very limited case law in the area of intermediated (consumer) sales has developed the elements to be considered in order to establish that the platform has been active. As with EU consumer protection, the Danish intermediary rule does not allocate risk to the platform. The contractual risk for the main contract stays within the parties of the main contract.

5. And So What?

38. One might claim that the new market of online marketplaces has to some extent been given a chance to develop on its own for some time, ‘only’ regulated by existing legislation. Presumably, the market has failed as a need for regulation has been detected. The ‘New Deal’ has been criticized for missing the opportunity to provide substantive rules for the relationship between the consumer and the platform.⁵⁶ It is a bad hand and not much of a ‘new deal’.⁵⁷ In addition, it is claimed that if the problem is platforms’ failure to comply with existing information duties, it is no gamechanger to introduce more of the same requirements.⁵⁸ Online marketplaces do not fit well into the transaction-based regulation of B2C contracts, as this regulation does not capture the ‘institutional dimension’ of the marketplace.⁵⁹ Nor is the regulation of platforms as service providers sufficient to cover the peculiarities of intermediation. From the perspective of the marketplace in the role as an intermediary, there is a need to address the interrelations in the triangular setup and not just the contractual infrastructure consisting of three two-party contracts. A good thing about the modernization directive in the ‘New Deal’ is that it *does* regulate online marketplaces as intermediaries, which is

55 Christoph BUSCH & Vanessa MAK, 3. *European Legal Studies Institute Osnabrück Research Paper Series* 2021, p 11.

56 Marco B.M. LOOS, ‘The Modernization of European Consumer Law: A Pig in a Poke?’, 1. *ERPL* 2019, p 134; Marco B.M. LOOS, 2. *ERPL* 2020, p 422.

57 Christian TWIGG-FLESNER, 15. *GPR* 2018, pp (166-175) at 16 et seq. (paper edition).

58 See Marco B.M. LOOS & Christina RIEFA, 4. *ERPL* 2020, pp 977-980 and Christina RIEFA, *Consumer Protection and Online Auction Platforms*, pp 68 et seq.

59 Teresa RODRIGUEZ DE LAS HERAS BALLELL, 3. *Italian LJ* 2017, p 174.

welcomed. That said, the relevant provisions *do not* challenge the information paradigm, and the welcomed sanction of not providing the information is *still* only connected to the main contract (if there at all). Thus, the new rules do not challenge the contractual infrastructure of the business model in order to allocate risk outside the three contracts.

39. Provided with the somewhat narrow and seemingly operational definition of online marketplaces, an intervention in the triangular business model should be feasible. This intervention can be approached in different ways. One approach could be to acknowledge that the parties in the triangular business model are interconnected and depend on each other economically. Risk is thus a factor that should be distributed accordingly between the parties. From this perspective, having one party (the marketplace) in the triangular setup with almost no contractual risk would not be ‘fair’ – at least regarding some marketplaces. Thus, risk could be allocated through a liability regime consisting of provisions on e.g., notice and takedown systems, joint or strict contractual liability etc.⁶⁰ Some measures can be found in the Digital Services Act and Digital Market Act and risk allocation is also attempted in the ELI model rules.

40. A presumably less invasive approach might be to regulate platforms with meta regulation as suggested by Busch.⁶¹ The meta regulation is to provide guidelines for the existing vast self-regulation that exists on the platforms. This should be a normative set of rules that is applicable alongside the principle-based technology-neutral regulation of, for example, the unfair commercial practices directive. Howells, Twigg-Flesner and Wilhelmsson suggest a more fundamental recast of EU Consumer Law.⁶² Such a recast would be welcomed as this article has clearly shown that the legal framework of online marketplaces is unclear and complex and might also need a more structured approach to identifying the functions and roles of the marketplace in order to make politically and regulatory sound legislation. So, to sum up: The ‘New Deal’ regarding online marketplaces is better than no deal, but much more can be done to approach regulation of the important roles and functions of online marketplaces.

60 Inspired by Teresa RODRIGUEZ DE LAS HERAS BALLELL, 3. *Italian LJ* 2017, p 176.

61 Christoph BUSCH, in *The Role of the EU in Transnational Legal Ordering*, pp 10–11 (paper edition). For an in-depth analysis of meta-organizing, also see Heloise BERKOWITZ & Antoine SOUCHAUD, ‘(Self-)Regulation of Sharing Economy Platforms Through Partial Meta-organizing’, 159. *Journal of Business Ethics* 2019(4), pp 961–976.

62 Geraint HOWELLS, Christian TWIGG-FLESNER & Thomas WILHELMSSON, *Rethinking EU Consumer Law* (London: Routledge 2017), Ch. 9.

