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 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. 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.

The liability of online marketplaces for breaches of consumer protection law has already received attention in legal literature. 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. Another complication is that online marketplaces – at least under certain conditions – are exempted from liability under the E-commerce Directive. 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”), 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”). The UCPD regulates business-to-consumer marketing and has a

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

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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. 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. 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.

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. 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. 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. 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.” 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. 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. 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. The E-commerce Directive contains three liability exemptions (“safe harbours”), targeted at different types of intermediary services. The exemptions concern a broad range of potential liabilities, including extra-contractual liability, criminal liability and administrative liability. 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. This should promote the free flow of information on the internet.


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, 2019/261/EU] II 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 (Myspace).

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.


14 See Chapter II of the E-commerce Directive, with specific information requirements for the online conclusion of contracts in Article 10.


16 See Articles 12, 13 and 14 E-commerce Directive.


18 See Recital 42 of the Preamble to the E-commerce Directive.
Of the three liability exceptions, the exemption for "hosting" activities (Article 14 E-commerce Directive) is particularly relevant for online marketplaces. 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. Classic examples of hosting services are email hosting (Gmail), file hosting (Dropbox) and web hosting. 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. 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. 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.

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. 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. 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. 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”. This CJEU repeated this criterion in later case law, including in the recent Frank Peterson/YouTube-judgment (2021). 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). 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/EC.” 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-
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”. 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”. Whether this is the case must be assessed on a case-by-case basis.

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. 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. 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). 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.

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, 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. Hence, the E-commerce Directive does not stand in the way of the protection of consumers through the consumer acquis. 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.
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. As confirmed by the CJEU, this essentially includes any type of business-to-consumer advertising and marketing, including one-to-one commercial practices. 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". 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 platform), so they typically qualify as traders.

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. 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. However, a restrictive interpretation of "commercial practice" has been advocated on the basis of the CJEU judgment in the RLs case. 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. 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.

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, and which specifically applies to online marketplaces.

42 Article 2(d) UCPD.
45 For example, Amazon typically charges a commission ("referral fee") of 7.5% 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.
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 CS26/1, 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 Trusler (ed.) Reasons and Background on EU consumer and contract law (Edward Elgar 2016) 388, 390.
51 Case C-391/12 RLs [2013] ECLI:EU:C:2013:669, 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 RLs case in order to argue that it did not commit an unfair commercial practice: Court of Appeal Amsterdam 7 March 2017, ELCLENL:GAMHS:2017:759 (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.
Directive established an information duty in relation to the directive also introduced other obligations that specifically for online marketplaces, the Modernisation Digital emphasizes that online marketplaces (in as far as they 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 7.4a 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. 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”. 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. 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. 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 marketplaces have a duty to clearly indicate the identity of the trader that is offering the product to the consumer. 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.

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


55 Recital 28 of the Preamble to the Modernisation Directive.

56 See Article 3.4(c) Modernisation Directive, introducing a new Article 7.4a 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.

57 Article 7.4a 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] ECLI: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.

58 Article 3.4(b) Modernisation Directive, introducing a new Article 7.4a 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.


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.


liability. 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 clearly does 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. 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. 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...
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...
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. Despite criticism in legal literature on the liability regime of the E-commerce Directive, the core principles of its liability regime and the prohibition of a general monitoring obligation remain intact. Like Article 14 E-commerce Directive, Article 5 DSA presents a specific liability exemption for hosting. 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.

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. 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 CJUE case law. Rather than referring to the broad understanding of “active role” in L’Oreal/ebay, 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 CJUE 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 marketplace 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 marketplaces 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. This rule seems to be modelled after the CJEU judgment in Watthelet/Bietheres. 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.
3. The Relationship between the DSA and EU Consumer Law

Like the e-commerce Directive, Article 1.3(h) DSA 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. 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).

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 webstructure 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. 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. 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, 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).