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Bridging the Gap between EU Consumer Law and Platform Regulation

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Putting the Digital Services Act in Context:

Bridging the Gap Between EU Consumer Law and Platform Regulation

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I. Introduction

The proposed Digital Services Act (DSA) aims to place more responsibility on online platform operators to control information published by users on their websites.[1] That is a welcome development in the light of scandals concerning fake news and the surreptitious influencing of voters through social media platforms. Cambridge Analytica was suspected of influencing the U.S. presidential elections and the Brexit referendum in 2016 through information posted on Facebook.[2] Also, online marketplaces such as Amazon and Airbnb would be required to verify the identity of professional users on their platforms. This could significantly improve the quality of online platforms for users.

Despite its selling points, however, the DSA proposal leaves a number of issues untouched. From a consumer law perspective, the proposal could have been more ambitious in particular with regard to effective remedies for misleading information or unsafe products.[3] Instead, the spirit and approach advocated by the proposal seem focused on balancing the dissemination of 'fake news' and hate speech with the fundamental right of free speech. The regulation of online marketplaces and of debates in the public sphere are however two very different issues. It would perhaps have been

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[1] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final. The DSA Proposal was published together with a proposal for a Digital Markets Act (DMA); European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final. On that proposal, see R Podszun, P Bongartz and S Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (2021) 10 EuCML 60.

[2] 'Fresh Cambridge Analytica leak "shows global manipulation is out of control"' (*The Guardian,* 4 January 2020) <https://www.theguardian.com/uk-news/2020/jan/04/cambridge-analytica-data-leak-global-election-manipulation>. See also 'Cambridge Analytica "not involved" in Brexit referendum, says watchdog' (*BBC News*, 7 October 2020) <https://www.bbc.com/news/uk-politics-54457407>. All online sources in this article accessed 15 April 2021.

[3] Compare also BEUC, 'The Digital Services Act Proposal' (*BEUC Position Paper*, April 2021) <https://www.beuc.eu/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf>.

better to regulate them separately, rather than to present a DSA proposal that is aimed at all types of platforms. As it is, we find that the proposal pays too little heed to the needs of economic actors, in particular consumers and small traders, in the platform economy.

Should the proposal have gone further? In this short contribution, we discuss a number of points that we find are missing from the proposal or not sufficiently addressed. They are: the position of the DSA in relation to existing EU law (paragraph 2), the regulation of platform liability for unsafe products (paragraph 3), the protection of economic rights of platform users in particular in the light of consumer protection under the Unfair Commercial Practices Directive (UCPD) (paragraph 4),[4] and the relation of the DSA to the protection of small traders on online platforms, in particular in the light of the EU's 2019 platform-to-business (P2B) Regulation (paragraph 5).

II. The DSA Proposal and the Coherence of EU Law

The DSA proposal states in recital 9 that: 'This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation'.[5] The intention of the EU legislator therefore is for the DSA not to replace existing regulation but for it to reinforce EU law. The goals of the DSA are, according to its recitals, primarily to safeguard and improve the functioning of the internal market (recitals 2 and 4) and the protection of fundamental rights such as the freedom of expression and information, the freedom to conduct a business, and the right to non-discrimination (recital 3).

Interestingly, consumer protection is not mentioned in the DSA's recitals. That is somewhat strange, given that the DSA intends to complement legislation that is part of the EU's consumer *acquis*, as set out in recital 10. The DSA's objectives refer only to consumers in relation to 'having increased choice' as recipients of platform services (recital 2). The overall text of the proposal does refer to consumer protection in many places. However, the exact intentions of the EU legislator are somewhat obtuse as the DSA proposal primarily seems to focus on the protection of fundamental rights. The economic rights of consumers, which are the object of most of the consumer *acquis*, are hardly addressed specifically by the proposal. That omission is all the more striking as the European Parliament had recommended that the DSA should contain provisions, for example, for consumer protection against misleading practices of rogue traders on online platforms.[6] The Parliament had also foreseen regulation of product safety and product liability for products offered on online platforms.[7] We discuss both of these issues in more detail below (paragraphs 3 and 4).

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[4] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (Unfair Commercial Practices Directive).

[5] The reference here is to Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-commerce Directive).

[6] European Parliament, 'Recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market' 2020/2018(INL), para G.

[7] Ibid. The European Parliament notes that the definition of 'illegal content' should include misleading information concerning product safety.

Looking at its substance, it is striking that the DSA proposal only adds additional rules and regimes to existing EU law. That is a missed opportunity, as the DSA could have been a turning point towards a more coherent approach of EU law with regard to online platforms.[8] We lament in particular the lack of clarification of the distinction between online and offline services. The Court of Justice of the EU (CJEU) grappled with that distinction in its decisions concerning the application of the E-commerce Directive to online platforms. The Directive's definition of providers of 'information society services' does not sit well with platforms that combine an online interface with the provision of offline services. Examples are the taxi services provided by (or through) Uber and the accommodation rental services provided by Airbnb. As the case law shows, the test developed by the CJEU leads to different outcomes for platforms that, in many respects, operate according to similar business models. The current state of play is as follows.

Service providers who provide an information society service fall within the scope of the E-commerce Directive. As a consequence, they are obliged to provide information to users (e.g. name, contact details, and professional registrations) and they can benefit from the host exemption.[9] Importantly, they are also subject to the EU regime for the free movement of services. This means that they are free to offer their services throughout the EU and that, barring certain circumstances, they cannot be subjected to additional national requirements of the EU Member States.[10] National requirements that hinder the free movement of services are only allowed if they are necessary to protect a public policy goal listed in Article 3 of the E-Commerce Directive (e.g. public health, security, or consumer protection), if that goal is prejudiced or at risk of being prejudiced by the actions of a given information society service provider, and if the national measures are proportionate.

Distinguishing between online platforms that fall within the scope of the E-commerce Directive and those that do not therefore results in an unequal playing field. Some platforms will be free to offer their services throughout the EU without having to meet further requirements whilst others can be subjected to national regulations of the EU Member States. Yet, this is exactly the route that the CJEU has set out in its judgments in *Uber Spain* and *Airbnb Ireland*.[11] The DSA proposal, moreover, codifies that case law.[12] One may wonder, however, whether the test developed by the Court fits the needs of platform operators and their users.

The distinguishing test that the CJEU developed in *Uber Spain* holds that a service does not qualify as an information society service if it is an integral part of an overall service whose main component is an offline service, such as in Uber transportation. Whether that is the case depends on two elements: that the service creates a new market, connecting users who would otherwise not have found each other; and that the platform service provider exercises a decisive influence over the conditions under which the

[8] Until now, the European Commission's approach has been focused on self-regulation and co-regulation. Compare also V Mak, *Legal Pluralism in European Contract Law* (OUP 2020) ch 6.

[9] Articles 5 and 14 E-Commerce Directive.

[10] Articles 3 and 4 E-Commerce Directive.

[11] CJEU C-434/15 *Asociación Profesional Élite Taxi v Uber Systems Spain SL*, EU:C:2017:981 (*Uber Spain*); C-390/18 *Airbnb Ireland UC*, EU:C:2019:1112 (*Airbnb Ireland*).

[12] Compare Articles 2 and 5 DSA proposal.

offline service is provided.[13] Applied to Uber, the Court finds that the online platform is indeed part of such an integrated services package, taking account of the fact that Uber sets the maximum price of a ride and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct. By contrast, when applying the same test in *Airbnb Ireland*, the CJEU concluded that Airbnb does not provide a service that is an integral part of accommodation rental. Therefore, Airbnb does qualify as a provider of an information society service and can benefit from the free movement provisions of the E-commerce Directive.[14]

Interestingly, while Airbnb escapes the requirements of national regulation, its users do not. Hosts offering accommodation for rent on Airbnb's website can be subjected to national rules. The CJEU held in *Cali Apartments* that national legislation determining conditions for authorisation of short-term rental is consistent with EU law, in this case the Services Directive,[15] provided that it protects a specified public interest.[16] Seeing that national authorisation schemes are often developed by local city councils in collaboration with Airbnb,[17] it becomes harder to see where the line is drawn between free movement and compliance with national rules.

We had hoped for the DSA to provide guidance on this matter. However, the proposal indicates that the DSA applies to providers of information society services[18] and that it follows the regime laid down in the E-commerce Directive. A distinction will therefore continue to be made between online platforms that are an integral part of an offline service and those that are not.

III. Platform Liability for Unsafe Products

Consumers would benefit also from clear rules on platform liability for unsafe products. Although the DSA proposal contains some provisions aiming to improve the regime for product safety on online platforms, these are small steps only.

1. No Positive Liability of Online Intermediaries

In October 2020, just a few weeks before the European Commission unveiled its proposal for the DSA, the European Parliament adopted a resolution with recommendations for the DSA.[19] In this resolution, the Parliament called on the

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[13] C-434/15 *Uber Spain* (n 11), paras 39 and 40.

[14] See C-390/18 *Airbnb Ireland* (n 11).

[15] Directive 2006/123/EC on services in the internal market [2006] OJ L376/36 (Services Directive).

[16] CJEU C-724/18 *Cali Apartments SCI*, EU:C:2020:743 (*Cali Apartments*).

[17] Besides Paris, similar approaches have been taken by Amsterdam and San Francisco. See e.g. on Amsterdam <https://www.dutchnews.nl/news/2020/01/amsterdam-airbnb-hosts-are-in-a-grey-area-after-court-ruling/>. Incidentally, the Dutch Council of State deemed Amsterdam's bylaws on Airbnb rental legally invalid under Dutch administrative law but held that hosts could be fined (and for higher amounts) under the city's general housing regulations. See also *Airbnb v. City and County of San Francisco*, 217 F Supp 3d 1066 (ND Cal 2016) (upholding an ordinance that requires Airbnb to verify that short-term rental hosts have the necessary license issued by the city of San Francisco); for a critical comment on this case, see <https://blog.ericgoldman.org/archives/2016/11/section-230-ruling-against-airbnb-puts-all-online-marketplaces-at-risk-airbnb-v-san-francisco.htm>.

[18] Article 2 (a) DSA proposal.

[19] European Parliament (n 5).

Commission to reinforce the liability regime for online marketplaces in particular with regard to unsafe products.[20] More specifically, the Parliament suggested that the DSA should '*address the liability of online marketplaces when those platforms have predominant influence over suppliers and essential elements of economic transactions.*'[21] It seems this proposal was inspired by Article 20 of the ELI Model Rules on Online Platforms, published by the European Law Institute (ELI) in February 2020, which contains a positive liability rule for 'platform operators with predominant influence'.[22] According to the European Parliament, the liability of online marketplaces with predominant influence should be limited to cases where there is no manufacturer, importer, or distributor established in the Union who can be held liable.

However, the European Parliament's suggestion did not make its way into the Commission's proposal for the DSA. Instead, the DSA adheres to the model of the E-Commerce Directive with its broad liability exemptions for online intermediaries. Thus, as a general rule, providers of online intermediary services shall remain exempt from liability for third-party content. In particular, Article 5(1) DSA stipulates that a hosting provider shall not be liable for information provided by third parties on condition that it 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*'. If a platform operator receives a notice of illegal activity or illegal content, it can avoid liability if it 'acts expeditiously' to take down or block access to the information stored on the platform. Thus, Article 5(1) DSA contains more or less a verbatim copy of Article 14(1) E-Commerce Directive. In its case law, the CJEU has clarified that the safe harbour under Article 14 E-Commerce Directive is only available to online intermediaries that take a 'neutral position' between buyers and sellers, but not to intermediaries that play an 'active role'.[23] The DSA refers to this distinction in recital 18, but makes no effort to add any clarification how to distinguish between neutral and active intermediaries.[24]

2. Online Marketplaces and the Average Consumer

Perhaps the most interesting addition to the existing liability rules is Article 5(3) of the DSA proposal. According to this provision, the liability exemption does not apply with respect to liability under consumer protection law of B2C marketplaces if the design of the marketplace leads an average consumer to believe that the information or products are provided by the marketplace provider itself or a third party 'acting under its authority or control'. Article 5(3) DSA makes clear that the application of the liability exemptions very much depends on how an online marketplace presents itself towards consumers. While this consumer-centric approach should be welcomed, it adds a layer of legal

[20] Ibid, at para 61.

[21] Ibid. Annex, sub VI.

[22] See C Busch et al, 'The ELI Model Rules on Online Platforms' (2020) 9 EuCML 61.

[23] CJEU C-324/09 *L'Oréal SA and others v eBay International AG and others*, ECLI:EU:C:2011:474 (*L'Oréal*); C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA*, ECLI:EU:C:2010:159 (*Google France*).

[24] See CANMY Cauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' [2021] European Journal of Risk Regulation 7, doi:10.1017/err.2021.8.

uncertainty as it combines the controversial debate about neutral vs. active platforms with the no less controversial debate about the concept of the 'average consumer'.[25]

For the sake of legal certainty, it might be helpful to add a list of indicative criteria that will be taken into account for determining whether a marketplace operator appears to exercise control over third-party sellers. In this perspective, a source of inspiration could be Article 20(2) of the ELI Model Rules on Online Platforms, which contains a list of indicative criteria for determining whether a consumer can reasonably rely on the platform operator's 'predominant influence'.[26] According to this provision, the liability of a platform operator depends, inter alia, on whether the terms of the contract concluded between the consumer and third-party supplier are essentially determined by the platform operator. Another aspect to be taken into account is whether the platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the consumer to the supplier. Following the subjective approach of Article 5(3) DSA, these criteria would have to be assessed from the point of view of an average consumer. It remains to be seen, however, whether Article 5(3) DSA will be amended accordingly during the legislative process.

3. Product Liability of Online Marketplaces

Unfortunately, the DSA also takes no clear position on the question whether marketplace operators can be held liable under product liability rules for damages caused by defective goods sold by third-party sellers via the online marketplace. Apparently, the European Commission wants to leave this issue for the upcoming review of the Product Liability Directive or the General Product Safety Directive. This is regrettable as the EU is already lagging behind recent developments of product liability law on the other side of the Atlantic. In the United States, the question whether Amazon can be held liable for products sold by merchants via Amazon Marketplace, has been the object of a string of court decisions and a growing scholarly debate.[27] So far, the answer given by the courts has been split.[28] While the first wave of court decisions followed Amazon's line of argument, that it was merely a facilitator that thus could not be held liable under strict product liability rules, more recently the tide seems to turn. In August 2020, an appeals court in California in *Bolger v Amazon* affirmed Amazon's liability for a defective laptop battery sold by a Marketplace seller and shipped from an Amazon fulfilment centre.[29] Another case is currently pending before the Supreme Court of Texas.[30]

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[25] See e.g. H Schebesta and K Purnhagen, An Average Consumer Concept of Bits and Pieces, in L de Almeida et al (eds), *The Transformation of Economic Law – Essays in Honour of Hans-W Micklitz* (Hart Publishing 2019) 13-28.

[26] See C Busch et al (n 19). The full text of the ELI Model Rules on Online Platforms is available at <https://perma.cc/PDL8-5TJ9>.

[27] For a comparative analysis of EU and US law see C Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' [2021] <https:/ssrn.com/abstract=3784466>.

[28] For an overview of recent US caselaw see S Bender, 'Product Liability's Amazon Problem' [2021] 5 Journal of Law and Technology at Texas (forthcoming) <https://ssrn.com/abstract=3628921>.

[29] *Bolger v Amazon.com*, 53 Cal App 5th 431 (Cal Ct App 2020); see also *Oberdorf v Amazon.com*, 930 F3d 136 (3d Cir 2019).

[30] *McMillan v Amazon.com*, No 20-20108 (5th Cir 2020).

From a European perspective, it is unclear whether an online marketplace operator could be held liable as an importer under Article 3(2) Product Liability Directive in a case similar to *Bolger v Amazon*.[31] Moreover, with regard to the DSA the question arises, whether Article 5 of the DSA proposal would shield the marketplace operator from liability. Similarly, in the United States, Amazon has argued that product liability claims are barred by Section 230 of the Communications Decency Act (CDA).[32] However, with regard to Article 5 DSA, one could argue that the 'hosting exemption' shields online intermediaries only from liability related to information stored *online*, but not from liability related to their involvement in the physical distribution of dangerous products that takes place *offline*. This interpretation finds support in the wording of Article 5 DSA which stipulates that hosting providers shall be exempted from liability 'for the information stored' at the request of platform users. Such a restrictive reading of Article 5 DSA would be in line with the above-mentioned, recent US court decisions that have declined to apply section 230 CDA to strict product liability claims.[33] By not addressing these issues, the DSA proposal has missed an opportunity to clarify the responsibility of online marketplaces.

IV. Consumer Remedies for Missing or Misleading Information

Another important issue concerning the responsibility of online platforms relates to consumer remedies for misleading information. In the tripartite relationship between consumers, third-party traders and online platforms it is often not clear for consumers who their counter-party is, nor which rights they have against this party.

The Unfair Commercial Practices Directive (UCPD) is generally an important instrument for the protection of consumers against missing or misleading information. However, its application to tripartite relationships is unclear. For example: can a platform operator be held liable for misleading information that business users publish on the platform's website? How are information duties and liability divided in the tripartite relationship between a platform, a trader, and a consumer? Unfortunately, there is no clear answer to these questions. Whether, and under what circumstances, liability can be directed to a platform operator depends in large part on the implementation of the UCPD in national law. The DSA proposal adds some new rules to the existing framework in relation to the verification of traders' identities by platforms – so-called 'know your business customer' rules – but it leaves this problem unresolved. A brief analysis with reference to Dutch and German law can illustrate the gap that exists in current regulation (paragraph 4.a). We also suggest how the DSA proposal could be improved in order to fill this gap (paragraph 4.b).

1. Remedies for Unfair Commercial Practices

Article 2 of the UCPD provides that 'trader' means 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 provision is copied verbatim in Article 6: 193a paragraph 1 sub b of the Dutch Civil Code. However, when applied to platforms and their users, this provision

[31] See P Verbruggen, 'Online platformen en onveilige producten' [2020] *Tijdschrift voor Consumentenrecht en handelspraktijken* 255.

[32] See e.g. *Oberdorf v Amazon.com* (n 29), at 151-52.

[33] *Bolger v Amazon.com* (n 29); see also *Erie In Co v Amazon.com*, 925 F3d 135, 140 (4th Cir 2019).

does not entail that an online platform that enables business users to post information on its website is by definition liable for misleading information on the same terms as that trader. The platform may qualify as an entity that acts 'on behalf of a trader'. However, whether it does qualify, depends on its qualification under national law. The legislator refers to the general rules on intermediaries and agency for determining which responsibilities rest on a trader and those trading on their behalf.[34] Third-party liability not covered by those rules is as a rule determined on the basis of tort law principles.[35]

In tort law additional requirements of causality and attribution determine whether the platform can in fact be held liable if it is classified as 'acting in the name or on behalf of the trader'.[36] For example, as an analogy, can car dealers in the offline world be held liable for unfair commercial practices in Volkswagen's emissions scandal? Pavillon and Tigelaar have argued that a distinction can be made between certified car dealers and non-certified dealers. To the first category harm can be attributed, as they take the risk that the producer that supplies cars to their shop is liable for an unfair commercial practice. The second category, non-certified dealers, may defend themselves on the ground that damage caused by the producer's actions cannot be attributed to them.[37]

This approach differs from the Consumer Rights Directive (CRD) and the Digital Content Directive (DCD).[38] Both Directives place equal responsibility on traders and on those trading on their behalf.[39] Although the UCPD uses similar wording in its trader definition,[40] the Directive leaves room for diversity with regard to the duties and liabilities that can be attached to the status of 'trader'.

The reason that national law determines the conditions under which a platform can be held liable for unfair commercial practices of a trader is that the UCPD has not fully harmonised the remedies available to consumers. The original Directive of 2005 prescribed that the Member States should ensure that 'adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers'.[41] The 2005 UCPD leaves it to

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[34] *Kamerstukken I* 2007/2008, 30928, C, 9. Compare DWF Verkade, *Oneerlijke handelspraktijken jegens consumenten. Monografie BW nr B49a* (Kluwer 2016) nr 16.

[35] On third-party liability in the Netherlands see e.g. TFE Tjong Tjin Tai, *Mr C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel IV. Opdracht, incl. de geneeskundige behandelingsovereenkomst en de reisovereenkomst* (Wolters Kluwer 2018).

[36] See also European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' SWD(2016) 163 final, 30, noting that under Article 2(b) UCPD '*in conjunction with relevant national laws on liability and sanctions, a trader can be held jointly liable with another trader for infringements of the UCPD committed by the latter on his behalf*'.

[37] CMDS Pavillon and LBA Tigelaar, 'Vernietiging van de overeenkomst bij een oneerlijke handelspraktijk; een hanteerbare sanctie?' [2018] *Contracteren* 78.

[38] Directive 2011/83/EU on consumer rights [2011] OJ L304/64 (Consumer Rights Directive), and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (Digital Content Directive).

[39] See MY Schaub, 'Nieuwe regels voor de consumentenkoop en overeenkomsten met betrekking tot digitale inhoud' [2019] *Nederlands Tijdschrift voor Europees Recht* 247.

[40] See also C-105/17 *Kamenova* EU:C:2018:808, para 27 and following.

[41] Article 11 sub 1 UCPD.

the Member States to determine whether such means are provided in the form of legal actions by consumers or competitors or sanctions by administrative authorities. The amendments to the UCPD's remedial scheme proposed by the 2019 Modernisation Directive impose a duty on member states to ensure that individual consumer remedies are available alongside collective enforcement.[42] Still, the form and substance of such remedies is left to national laws. Article 11a determines that '[c]onsumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract.' However, the provision also states that 'Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.' One will therefore have to fall back on national laws to determine in what circumstances a platform can be held liable for misleading information posted by, or concerning the status of, business users. In particular, the requirements of causality and attribution will determine the scope for liability and may limit the effectiveness of the remedies in practice.

In the Netherlands, the legislator has opted for legal actions in tort law for consumers and competitors,[43] and for administrative sanctions by the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt (ACM)*). For consumers the available remedies are damages in tort or the rescission of a contract concluded under the influence of an unfair commercial practice.[44] The contractual remedy was added in 2014. The provision sits somewhat uneasily with the UCPD's aim to leave contract law unaffected (Article 3 UCPD), but it provides an effective tool for consumers to recover the price paid under the contract.[45] Saliently, the application of these remedies in tripartite situations is not specified in the part of the Dutch civil code dealing with unfair commercial practices, as was seen at the beginning of this section.

Germany has yet to introduce individual consumer remedies for unfair commercial practices. The UCPD is implemented in the German Act on Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*; UWG). To comply with Article 11a of the 2019 Modernisation Directive a new provision will be introduced that gives consumers a right to damages (§ 9(2) UWG).[46]

There is therefore a gap in the existing regulation of unfair practices. The UCPD is not tailored to deal adequately with tripartite relationships involving platforms. As a result, platform liability for missing or misleading information is dependent on rules of national laws. Moreover, the conditions for liability can put up a high threshold for consumers to claim remedies, as the example of Dutch law has shown.

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[42] Directive (EU) 2019/2161 as regards the better enforcement and modernization of Union consumer protection rules [2019] OJ L328/7 (Modernisation Directive), Article 11a.

[43] Article 6:193b Dutch Civil Code (DCC), and Article 194 DCC.

[44] Article 6:193j para 2 and 3 DCC.

[45] Pavillon and Tigelaar (n 37).

[46] See Entwurf eines Gesetzes zur Stärkung des Verbraucherschutzes im Wettbewerbs- und Gewerberecht (Draft Act for Strengthening Consumer Protection in Competition and Trade Law) (24 March 2021) Bundestag Printed Paper 19/27873.

2. Strict(er) Liability?

The DSA proposal does not improve the availability of consumer remedies for missing or misleading information posted on platforms. In line with the general approach taken by the proposal, the protection of consumers against false information is pursued through a 'know your business customer' obligation for platform operators. With respect to the verification of information provided by traders the DSA focuses on the traceability of traders.[47] It requires the platform to obtain the trader's contact details, a copy of their identification documents, their bank account details, and their registration number in a trade register or a similar public register. A platform would be obliged to 'reasonably' verify whether the information concerning identity and status provided by traders is correct. Also, platforms should set up their websites in such a way that compliance with EU consumer law is promoted. However, responsibility for the information provided lies with the trader.[48] Furthermore, these obligations do not apply to small or micro-sized enterprises.[49]

Although this approach could be seen as a diversion from existing rules of EU consumer law,[50] one could also regard it as entirely consistent with the consumer *acquis*. By way of comparison: in accordance with the Modernisation Directive, a platform operator is obliged to indicate to consumers whether a trader deals in a professional capacity or not. This is essential information that would constitute a misleading omission if the platform operator fails to provide it. At the same time, however, there is no active obligation for the platform operator to investigate.[51] Therefore, a platform operator cannot be held liable by consumers for misleading information posted by (or concerning the status of) business users, barring additional circumstances determined by national law such as attribution in tort law.

The existing *acquis*, therefore, places the main responsibility with the trader to provide correct information concerning their status. The platform operator can be held liable if he omits this information, as it is considered essential information under the UCPD, but the availability of remedies is determined by national law. If the platform operator provides information concerning the status of the trader and that information turns out to be false or misleading, a consumer could likewise have an action under the UCPD. The basis could in that case be an infringement of Article 6(1)(f) if the trader qualifies as an agent of the platform, or an infringement of professional diligence under the general unfairness test laid down in Article 5(2)(a) UCPD. One would also have to turn to national law to determine whether the unfair practice can be attributed to the platform operator. We do not believe that Article 11a of the Modernisation Directive changes this approach, as it leaves it to the Member States to determine the conditions for the application and effects of individual consumer remedies.

It may nonetheless be *desirable* to introduce a liability rule for online platforms with regard to information posted by, and information concerning the identity of traders. The

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[47] Article 22 DSA proposal.

[48] Recitals 23 and 50 DSA proposal.

[49] Article 16 DSA proposal.

[50] Cauffman and Goanta (n 24) discuss this point in relation to transparency obligations of traders.

[51] Directive (EU) 2019/2161 as regards the better enforcement and modernization of Union consumer protection rules [2019] OJ L328/7 (Modernisation Directive).

ELI Model Rules on Online Platforms have suggested that platforms operators should be liable for damage caused to customers or suppliers by misleading statements made 'about suppliers or customers, about goods, services or digital content offered by suppliers, or about any other terms of the supplier-customer contract'.[52] This rule can be read as strict liability for the platform operator, as it would lead to liability even in cases where the platform relied on false information provided by a third-party trader.[53] It is complemented by Article 14(3) of the ELI Model Rules, which obliges platforms to check the veracity of a trader's identity.[54]

Even if the European legislator would not wish to go that far, an improvement of the DSA proposal could be to connect Article 22 to Article 5(3). As discussed above,[55] that provision makes an exception to the host exemption laid down in Article 5(1), which the DSA proposal copies from the E-commerce Directive. Whereas platform operators are generally not liable for illegal activity or illegal content posted by users, they can be held liable if an average and reasonably well-informed consumer would believe the information to have been provided by the platform or by someone acting under its authority or control. Liability would most likely be for damages in tort. However, attribution would in this case not be an obstacle to platform liability, as the rule laid down in Article 5(3) of the DSA proposal places strict liability on platform operators. The rule resembles the liability rule that the CJEU applied in *Wathelet* to intermediaries who fail to inform a consumer-buyer of the non-professional status of the seller. In that circumstance, the intermediary is liable for the remedies that the seller would have to provide for non-conformity under the Consumer Sales Directive.[56]

We would welcome an amendment of the DSA proposal to this effect. It would enhance consumer protection by providing individual remedies in cases where a consumer is misled by information posted on an online platform. Even in cases where the platform operator was not at fault, but relied upon false information provided by a third-party trader, liability could be justified. Consumers are generally the weaker party in transactions conducted through platforms and moreover, unlike the platform operator, are not in a position to verify information provided by third-party traders. It seems fair, therefore, to protect them by placing strict liability on platform operators, who may also seek redress on traders.[57]

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[52] Article 22 ELI Model Rules (n 26).

[53] Compare the notes to Article 22 of the ELI Model Rules on Online Platforms (n 26).

[54] Loos and Luzak recommended the introduction of such an obligation in their report concerning the revision of the Unfair Contract Terms Directive (UCTD). See MBM Loos and JA Luzak, 'Update the Unfair Contract Terms Directive for Digital Services', Study for the JURI Committee of the European Parliament (February 2021), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/676006/IPOL_STU(2021)676006_EN.pd.

[55] See para 3.

[56] C-149/15 *Sabrina Wathelet v Garage Bietheres & Fils SPRL*, ECLI:EU:C:2016:840 (*Wathelet*), on Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

[57] In a similar vein, comments to Article 22 of the ELI Model Rules on Online Platforms (n 26).

V. The DSA and the P2B Regulation

Tensions between the DSA proposal and its regulatory context are also evident in the relationship with the P2B Regulation (EU) 2019/1150. The P2B Regulation aims at promoting fairness and transparency in the relationship between online platforms and businesses, which are often small traders using a platform to reach a broader audience of consumer-buyers. The Regulation has in many ways been a model for the DSA. At the same time, there is a number of overlaps and inconsistencies between the two regulatory instruments. The DSA proposal therefore, as with consumers, misses an opportunity to align the protection of small traders across the EU *acquis*.

1. Complaint Handling and Online Dispute Regulation

The close links between the DSA and the P2B Regulation are particularly visible in the provisions on complaint management and out-of-court dispute resolution.[58] By stipulating an obligation to set up an internal complaint management system and, as a second escalation level, an ADR procedure, the DSA follows a general trend towards a 'proceduralisation' of intermediary responsibility.[59] The concrete model for Articles 17 and 18 DSA were apparently Articles 11 and 12 of the P2B Regulation, which also require online intermediaries to set up an internal complaint-handling system and to offer a mediation procedure as a means of dispute resolution.

While the DSA provisions on complaint handling and dispute resolution apply to all platform users, businesses and consumer alike, the P2B provisions only apply to businesses who offer their goods and services via the respective platform. The partially overlapping scope of application of both regulatory instruments raises the question of whether the DSA and the P2B Regulation are applicable alongside each other or whether the P2B Regulation takes precedence as the more specific set of rules. Article 1(5)(g) DSA merely states that the DSA 'is without prejudice to the rules laid down by […] Regulation 2019/1150'. This could mean that both regulations are applicable side by side. However, this would have the consequence that a business whose user account is blocked by the operator of an online marketplace would have two parallel ways to initiate a complaint procedure with somewhat different procedural rules. It would probably make more sense to give priority to the more specific procedure under the P2B Regulation in these cases.

2. Transparency of Algorithmic Rankings – Too much of a Good Thing?

Another area where overlaps and inconsistencies between the DSA and the P2B are visible is transparency of algorithmic rankings. Article 29 DSA requires very large online platforms (VLOPs) to disclose 'the main parameters used in their recommender systems'. Furthermore, there must be at least one option to use the recommender system without user profiling. The broad definition of recommender systems in Article 2(o) DSA also covers automated product rankings and lists of search results displayed by a search engine. As a consequence, Article 29 DSA overlaps with Article 5 P2B Regulation which also contains transparency requirements for the ranking of products

[58] Articles 17 and 18 DSA proposal.

[59] See F Hoffmann, 'Prozeduralisierung der Haftungsvoraussetzungen im Medienrecht – Vorbild für die Intermediärshaftung im Allgemeinen?' [2017] Zeitschrift für Urheber- und Medienrecht 102; C Busch, 'The P2B Regulation (EU) 2019/1150: Towards a "procedural turn" in EU platform regulation?' (2020) 9 EuCML, 133; see also R Van Loo, 'Federal Rules of Platform Procedure, University of Chicago Law Review' (forthcoming) <https://ssrn.com/abstract=3576562 >.

and search results. On top of that there are further partial overlaps with transparency requirements for rankings which were recently inserted into the UCPD[60] and the CRD[61] by the Modernisation Directive.

While all the provisions mentioned above deal with the transparency of rankings, they pursue different regulatory purposes.[62] Article 5 P2B Regulation primarily intends to promote fairness and transparency in the relationship between platform operators and commercial users. In this context, knowing the main ranking parameters is necessary if a business wants to adjust a product listing in order to optimize its ranking. In contrast, the transparency requirements under the UCPD and the CRD primarily aim at protecting consumers against misleading rankings. It is less than clear how the new transparency requirements under Article 29 DSA fit into this regulatory context. The regulatory landscape becomes even more confusing if one takes also national transparency rules into consideration, such as Section 93 (1) sentence 2 of the German State Media Treaty,[63] which formulates additional requirements for the transparency of search engine rankings. In summary, there seems to be still a considerable need for consolidation in order to prevent an 'overkill' of algorithmic transparency rules which are currently in vogue.

VI. Summary

In sum, we find that the DSA proposal promises a big step towards regulation of online platforms, but that it could be strengthened when it comes to protecting individual consumers and small traders. An important issue to be evaluated is the definition of 'information society services', which determines the scope of applicability of the E-commerce Directive. The current application leads to different outcomes depending on the business model of a platform, as was seen in the *Uber Spain* and *Airbnb Ireland* decisions of the CJEU. The distinction between platforms on this ground leads to uncertainty, and potentially to unjustifiable distinctions between platforms.

Another concern is that the DSA proposal is rather weak on providing remedies or tools for enforcement for individual consumers. We have highlighted problems related to product liability and to misleading statements posted by third-party traders on an online platform. The DSA proposal could be strengthened, for example, by connecting Article 22 to Article 5(3), which introduces strict liability for platforms in cases where a platform operator has led the average consumer to believe that information was posted by the operator or under his authority.

Finally, we observe that the DSA proposal introduces another layer on top of existing regulation, thereby subjecting platforms and their users to numerous regimes of information duties and/or algorithmic control. Now would be the time to realign those regimes and to ensure consistency between the EU consumer law *acquis* and platform regulation.

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[60] Article 7 para 4a UCPD and No 11a Annex I UCPD.

[61] Article 6a para 1 lit a CRD.

[62] See C Busch, 'Mehr Fairness und Transparenz in der Plattformökonomie – Die neue P2B-Verordnung im Überblick' [2019] Gewerblicher Rechtsschutz und Urheberrecht 792 and following.

[63] State Treaty on the Modernisation of the Media Order in Germany of 28 October 2020 <https://www.gesetze-bayern.de/Content/Document/MStV/true>.