

# Online Platforms: Towards an Information Tsunami with New Requirements on Moderation, Ranking, and Traceability

A.R. LODDER AND J. MORAIS CARVALHO\*

*“There must be some kind of way out of here”*

## Abstract

Ideally, online contracts are concluded by informed consumers. For 25 years the European Union is issuing an abundance of information requirements providers of online services have to comply with. We briefly touch upon the previously existing information requirements, and findings on the intersection of behavioral studies and consumer law, but primarily focus on new information requirements against the background of an online platform offering space for businesses to provide their service to consumers. We critically discuss new information requirements from the so-called Omnibus Directive 2019/2161 primarily regarding changes in Directive 2011/83/EU on consumer rights. Also, we analyze amendments to the Directive 2000/31/EC on e-commerce as proposed late 2020 in the Digital Services Act. We focus on what information should be communicated, how this information should be communicated, and at what moment. In our analysis our doubts about the value of all this information is apparent, and we question the need for and interest of consumers for all information. In the end we suggest of what we believe should be directly communicated to the consumer, and what could be available only to those consumers, probably quite few, who are really interested.

## Keywords

Online platforms, consumer protection, information requirements, Digital Services Act

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\* Arno R. Lodder is a Professor of Internet Governance and Regulation, ALTI. Amsterdam – Amsterdam Law & Technology Institute, Vrije Universiteit Amsterdam (The Netherlands), visiting professor NOVA School of Law, and deputy judge at the Amsterdam court, [a.r.lodder@vu.nl](mailto:a.r.lodder@vu.nl), Jorge Morais Carvalho is a Professor of Private Law, NOVA School of Law, Lisbon, Portugal, Researcher at CEDIS & NOVA Consumer Lab. [jorgemoraiscarvalho@fd.unl.pt](mailto:jorgemoraiscarvalho@fd.unl.pt); <<http://www.jorgemoraiscarvalho.com>>. This contribution has been written within the activities of the Jean Monnet Centre of Excellence ‘Consumers and SMEs in the Digital Single Market (Digi-ConSME)’. Co-funded by the Erasmus+ Programme of the European Union.

## 1. Introduction

Online platforms have to comply with a wide series of transparency requirements. In the US these are commonly referred to as disclosure duties, and the European Union calls them: information requirements. Recital 11 of the Directive 97/7 on distance contracts stated:

“Whereas the use of means of distance communication must not lead to a reduction in the information provided to the consumer.”

The first version of this 1997 Directive was drafted in 1991, in a time the internet was not open to the general public yet. It is from a historic perspective interesting to note that the means of distance communication mentioned in Annex I of this Directive do not refer to the internet as such, but did include communication means such as:

- Videophone (telephone with screen);
- Videotex (microcomputer and television screen) with keyboard or touch screen;
- Electronic mail;
- Television (teleshopping).

When the final version of this Directive on distance contracts was published in 1997 internet commerce slowly started to take off. In the 25 years after, and despite it not being mentioned in the Annex, the main application of this Directive (later replaced by Directive 2011/83/EC on consumer rights) has been internet commerce. The just quoted not desired reduction of information provided to the consumer never happened, on the contrary. In 2014 Lodder published *Information Requirements Overload? Assessing Disclosure Duties Under the E-Commerce Directive, Services Directive and Consumer Directive*, and provided an analysis of the abundance of information requirements included in the Directive 2000/31/EC on e-commerce, Directive 2006/123/EC on services, and Directive 2011/83/EU on consumer rights. More than ten years after this last Directive was published, there is new EU legislation in which online service providers are subject to more information requirements. As a consequence, consumers have to process even more information when ordering products and services online.

It is generally known that consumers do not read information, and the confirmation of consumers of the phrase “I have read the terms and conditions” is sometimes characterized as the biggest lie of the century.<sup>1</sup> There is a wide body of literature at the

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<sup>1</sup> J.A. Obar and A. Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services* 23 *Information, Communication & Society* 1 (2020). Also, the Minister of Economic Affairs of Cyprus phrased it at the conference in Nicosia, November 2017: “The statement that someone has read terms and conditions is the biggest lie of the century.”. See A De Hingh and A.R. Lodder, *The Role of Human Dignity in Processing (Health) Data Building on the Organ Trade Prohibition* in T. Synodinou, Ph. Jougoux, Ch Markou, Th Prastitou, (eds.), *EU Internet Law in The Digital Era* (Heidelberg: Springer, 2019).

intersection of behavioral science and consumer law. Almost 50 years ago it was already noted by Scammon based on an experimental study that “(...) increasing amounts of information (...) causing an apparent information overload.”<sup>2</sup> This has not changed over the years, e.g. Helleringer & Sibony state in 2017:

“(...) EU consumer law has evolved into an apparent anti-model of behavioral regulation, featuring a much-criticized load of mandatory information requirements.”<sup>3</sup>

In a similar vein Micklitz, Reisch & Hagen (2011) observed:

“The supplier faces difficulties in providing all the relevant information and there is significant debate regarding the value of this information provision, particularly concerning the extent to which it actually enhances the consumer decision-making process.”<sup>4</sup>

In this article we do not approach the topic from a behavioral or experimental angle, but provide an overview of recently introduced information requirements and analyze these against the background of consumer and contract law.<sup>5</sup> Our focus is on online platforms, and we start with briefly clarifying the role online platforms play in e-commerce. Subsequently follows a quick recapturing of the existing general information requirements. Next, we discuss the amendments to the Directive 2011/83 as introduced in Directive 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules.<sup>6</sup> First, we elaborate upon the information related to the ranking of offers to the consumer. We include in our discussion Article 5 of Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services since it also covers information related to the ranking of orders. Second, we discuss information related to the distinction between professional and non-professional providers. Finally, the amendments to the Directive 2000/31 on e-commerce, as laid down in the so-called Digital Services Act, is

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<sup>2</sup> D.L. Scammon, *Information Load and Consumers* 4(3) *Journal of Consumer Research* 148–155 (1977).

<sup>3</sup> G Helleringer and A.L. Sibony, *European Consumer Protection Through the Behavioral Lens* 23 *Columbia Journal of European Law* 607 (2017).

<sup>4</sup> H.W. Micklitz, L.A. Reisch and K. Hagen, *An Introduction to the Special Issue on “Behavioural Economics, Consumer Policy, and Consumer Law”* 34 *Journal of Consumer Policy* 271 (2011).

<sup>5</sup> A.R. Lodder, (2014), *Information Requirements Overload? Assessing Disclosure Duties Under the E-Commerce Directive, Services Directive and Consumer Directive* in A Savin and J Trzaskowski, *Research Handbook on EU Internet Law* (Cheltenham: Edward Elgar, 2014); M.Y. Schaub, (2017). *How to Make the Best of Mandatory Information Requirements in Consumer Law* 25(1) *European Review of Private Law* 25 (2017).

<sup>6</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, 18.12.2019, OJ L 328/7.

discussed. We analyze information related to moderation, advertisements, recommender systems, and traceability. We finish our article with a conclusion including a reflection on a way forward.

## 2. Online Platforms

One could doubt whether platforms is an adequate term, because as Schrepel claims what we call platforms are actually aggregators, as they “consolidate all kinds of existing information (including products and services), and sort it out.”<sup>7</sup> Since in popular media, policy documents and academic literature the term platform is commonly used, we stick to this notion. We consider an online platform as a service provider that provides an electronic environment that allows other businesses to provide their services. In the terminology of the Directive 2000/31/EC an online platform qualifies as an information society service.<sup>8</sup> As an information society service provider, the platform has to comply with the information requirements formulated in the e-commerce directive and the consumer rights directive. The businesses that offer their services on an online platform act in a dual role. First, they are recipients of the service delivered by the platform. Second, they are themselves also a provider of a service which is in our analysis delivered to a consumer. At the beginning of this century it was discussed how information requirements could be met by service providers operating on a platform, for instance the traders active on eBay. These providers depend on the tools the platform they are using is offering to communicate the required information to consumers. For instance, the service provider should make directly and permanently available information about their whereabouts such as address and how they can be reached efficiently. This requires a technical environment that facilitates such communication. Not all platforms may offer tools in a way that the service providers on their platform are able to comply with information requirements, but as we will address later Article 22(7) of the proposed Digital Services Act is aimed at remedying this.

This layered model of services being provided was not something thought of at the time the e-commerce directive was drafted. Back then e-commerce was considered to be an online service, delivered by a provider of the service to a recipient, often a consumer. Amazon at the time was just an online bookstore. So, Amazon was the service provider, and the service received by the consumer was having the opportunity to order books online. Over the years this changed. First, the products sold now include almost anything that ordinary warehouses (used to) offer. Second, Amazon

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<sup>7</sup> T Schrepel, *Platforms or Aggregators: Implications for Digital Antitrust Law* 12(1) Oxford Journal of European Competition Law & Practice 1 (2021).

<sup>8</sup> A.R. Lodder, *European Union E-Commerce Directive – Article by Article Comments. Guide to European Union Law on E-Commerce in EU Regulation of E-Commerce. A Commentary* (Elgar Commentaries series 15, Cheltenham: Edward Elgar: 2017).

started to allow vendors on their platform. The new information requirements discussed in this article should be read against this background.

### 3. General Information Requirements and How to Communicate Them

The information requirements from the Directive 2000/31 on e-commerce, Directive 2005/29 on unfair commercial practices, Directive 2006/123 on services and Directive 2011/83 on consumers rights entail a large set of information to be provided to the recipient of the service about the provider, where he is established, how he can be reached, the main characteristics of the service and information about the price and delivery costs. In the discussion of information requirements, the four main aspects are:

1. *What* information should be provided;
2. *How* should the information be communicated;
3. *When* should the information be communicated, and;
4. *Sanctions*, so what happens if the information is not (adequately) provided.<sup>9</sup>

In our discussion of the new information requirements we discuss the first three aspects, because the sanctioning, if existing, is often left to national law. The Directive 2019/2161 brings significant novelties in this respect. For instance, the new Article 13(3) and (4) of the Directive 2005/29/EC states that the maximum amount of the fines shall be “at least 4 % of the trader’s annual turnover in the Member State or Member States concerned” and that if “information on the trader’s annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million”. As can be seen, European Union law has entered into sanctions in a very strong way.

Most information required on the basis of the above-mentioned Directives is similar. For instance, the e-commerce and services directive demand that the provider provide its name. The consumer rights directive refers to the identity, such as its trading name. This information should be easily, directly accessible under the e-commerce directive, just made available under the service directive, and under the consumer rights directive the information should be made available in a way appropriate to the means of distance communication used in plain and intelligible language. These are all slight differences, at its core the principle is that information should be communicated comprehensively. While discussing the new information requirements we will also come across a variety of characterizations that all boil down to providing information comprehensively.

In the Directive 2019/2161 some changes are made to the basic information and how it should be communicated. Article 6(1)(c) of Directive 2011/83 now reads:

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<sup>9</sup> Lodder, *Information Requirements Overload? Assessing Disclosure Duties Under the E-Commerce Directive, Services Directive and Consumer Directive* (2014).

“the geographical address at which the trader is established as well as the trader’s telephone number and email address (...)”

In the original text this was:

“(...) the trader’s telephone number, fax number and e-mail address, where available (...)”

The fax has disappeared as a means to enable the consumer to contact the trader quickly and communicate with him efficiently. It is questionable whether any consumer since 2011 has contacted a trader via a fax, and also if he ever did before. So, it is not surprising that in 2019 the fax is no longer mentioned. Not only is the fax hardly used, but the younger generation likely does not even know it. When in 2021 the Dutch judiciary announced they would stop using faxes in 2022, a news item explained to the readers what a fax is.

The other change is that no longer the phrase ‘where available’ is being used. This phrase never made sense, since there is not a single trader that does not have an e-mail address or telephone number. At least in theory, it did offer a way out for a one-man business who did not like to answer phone calls from consumers that ordered online. This seller could argue that he did not have a phone number available for his business. The removal of the phrase indicates a preference of the opportunity for the consumer to contact the provider via a telephone number over the just mentioned one-man business desire to be left alone as regards phone communication. This also ends the discussion about whether a phone number should be provided. Under the e-commerce directive it was argued that the phrase “details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner.” did not entail the requirement to provide a phone number,<sup>10</sup> only that in addition to an e-mail address at least one other effective communication means should be provided. This could be a telephone number, but also another means like an information form or communication via WhatsApp. The service directive also did not explicitly mention the means but generally indicated “details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means.”

#### **4. Directive 2019/2161: On Ranking Offers and Traders**

Directive 2019/2161, also known as the omnibus Directive, adds an information requirement to the Directive 2011/83 on consumer rights. Article 6a is inserted and deals with “Additional specific information requirements for contracts concluded on

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<sup>10</sup> ECJ 16 October 2008, C-298/07, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV vs. deutsche Internet versicherung AG.

online marketplaces”. The term online marketplace is added to Article 2(17) of the Consumer Rights Directive:

“a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers”

This is an updated definition.<sup>11</sup> For quite some time internet commerce is not only taking place via websites, which is the reason the neutral term ‘software’ is now being used. The definition is, as Recital 25 explains “(...) more technologically neutral in order to cover new technologies”. As examples of software are mentioned websites, part of a website and applications. The latter, applications, primarily refers to the use of apps on smartphones that now is clearly covered by this definition. This is important since there is a lot of internet commerce taking place via apps these days. The general term software that is used in the definition could also be interpreted as meaning an online interface. The advantage of neutral definition is that new developments are likely covered by the definition. There is also a drawback, it is possible that the definition may turn out to be too broad and also covers what you do not want it to cover. This is a delicate balance, and always difficult, but we believe this definition to be adequate.

The new information requirements included in the Consumer rights directive are about ranking of offers and the capacity of the party on the platform: a trader or non-trader. The latter is necessary for consumers to know whether they are protected by consumer law.<sup>12</sup> For all this information it is required it is communicated “before a consumer is bound by a distance contract, or any corresponding offer.” So, these are pre-contractual information requirements. The information should be communicated “in a clear and comprehensible manner”. Also, and this is in particular relevant when apps are used: “in a way appropriate to the means of distance communication.”

#### *4.1. Ranking Offers*

##### *4.1.1. Consumer Rights Directive*

The information that should be communicated based on the new Article 6a Directive 2011/83/EC is about ranking “as defined in point (m) of Article 2(1) of Directive 2005/29/EC”. This reference is confusing in two ways. First, subsection (1) does not exist in Article 2, rather Article 2 defines a series of terms starting with consumer in

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<sup>11</sup> Recital 25 of Directive 2019/2161 states “Online marketplaces should be defined for the purposes of Directives 2005/29/EC and 2011/83/EU in a similar manner as in Regulation (EU) No 524/2013 of the European Parliament and of the Council (11) and Directive (EU) 2016/1148 of the European Parliament and of the Council (12).”

<sup>12</sup> See recital 26 “Recital 26 “Specific information requirements for online marketplaces should therefore be provided in Directives 2005/29/EC and 2011/83/EU to inform consumers using online marketplaces about the main parameters determining the ranking of offers, and whether they enter into a contract with a trader or a non-trader, such as another consumer”.

Article 2(a) and ending with regulated profession. Second, if you consult Directive 2005/29/EC you will not find sub(m) because this was added via Article 3 of Directive 2019/2161. This is in general a problem with EU legislative instruments, that there is no proper way to refer to either the original text or the amended version. An interesting example in this respect is from the well-known Airbnb case where the Court states “Article 2(a) of Directive 2000/31/EC (...) which refers to Article 1(1) (b) of Directive (EU) 2015/1535.”<sup>13</sup> Obviously, in 2000 it is impossible to refer to a 2015 Directive, but this 2015 Directive is an amended 1998 Directive the e-commerce directive did refer to.<sup>14</sup>

Ranking is defined in (m) as:

“the relative prominence given to products, as presented, organised or communicated (...) irrespective of the technological means used for such presentation, organisation or communication”

Here again the aim for technological neutrality is clear, whatever technology is used for ranking is left open. The information to be communicated concerns the ranking of products. It should be clear what mechanisms are used to turn a query entered by a consumer on a platform (in terms of the directive: an online interface) into a result. Recall that this information should be presented in a clear and comprehensible manner. This is not easy for at least two reasons. First, the algorithms used for ranking normally are quite complex, in particular if they need to be explained to a consumer. Second, the online platform does not want to share trade secrets so should present the information in a way that it informs but does not give too much away. This brings to mind the way patents are formulated, but such an exercise needs specialized people. In particular smaller platforms might have a problem in this respect.

The duty for the platform is to provide “general information, made available in a specific section of the online interface.” This information should be “directly and easily accessible from the page where the offers are presented.” This is difficult to realize when apps are used, but even for web pages where they have over 20 years of experience of providing information like contact details. Article 5 Directive 2000/31/EC on e-commerce the provision requires “easily, directly and permanently”. Permanently is not mentioned here because the information about ranking needs to be provided only: “before a consumer is bound by a distance contract.”

<sup>13</sup> CJEU 19 December 2019, ECLI:EU:C:2019:1112 (Airbnb).

<sup>14</sup> Services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. This in itself was a troublesome reference, see the discussion in Lodder, *European Union E-Commerce Directive – Article by Article Comments. Guide to European Union Law on E-Commerce*: “Directive 98/34/EC did, however, already at the moment of the proposal [of the e-commerce directive] exist for almost half a year. Apparently, the drafting was not well coordinated, also because Directive 98/48 was proposed by the Commission in 1996, whereas the Directive 98/34 it amends was proposed 5 months later. As a consequence, the full name of the Directive 98/34/EC as well as the definition of information society services can only be found in Article 1 Directive 98/48/EC.”

The more information that needs to be communicated “easily and directly”, the more difficult it becomes to accomplish this. If there is just one special section it becomes overloaded with information, but various special sections also make it difficult to find the necessary information. On websites there is so much information communicated (policies, terms, etc.) that getting to information “easily and directly” becomes illusive. If apps are used this is even more difficult, because of the limited space available on a smartphone to communicate information.

So, to provide adequate information to consumers is not easy for traders, and it is doubtful whether consumers are really helped with this information, let alone whether they ever get to this special section and/or the information concerned. What could be a solution for all these issues, is to not provide general information, but offer the option to the consumer to get information of any product in the list why it was listed there. This is a technique sometimes used with advertisements. You are informed why you get this specific advertisement. For consumers this is far more instructive than some general text about these ranking mechanisms. A simple example of the principle of informing “on the fly”, is what Netflix does when suggesting to watch particular series or movies. Netflix indicates they present particular titles because you watched some specific movies and series.

#### 4.1.2. *Unfair Commercial Practices Directive*

The Unfair Commercial Practices Directive also has relevant rules in this area following the amendments introduced by Directive 2019/2161. The new paragraph in Article 7(4a) on misleading omission states that:

“When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a result of the search query and the relative importance of those parameters, as opposed to other parameters, shall be regarded as material”.

In other words, also based on this provision the information on the main parameters determining the ranking of products must be provided to the consumer. The practice consisting of “providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results” is now included in Annex I of Directive 2005/29 as a practice which is in all circumstances considered unfair.

It is striking that the information to be provided in the special section mentioned here is almost identical as the information mentioned in the new Article 6(a) we dis-

cussed before, there are only two slight differences, indicated in bold and between “[ ]”:

“general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the **[query results/offers]** are presented, on the main parameters determining ranking (...) of **[products/offers]** presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters (...);”

The two Articles are from different directives, but they are amended in the same omnibus Directive. How is it possible this was not coordinated? To begin with, they could have used the exact same terms to make it clear for the platforms what information should be in this special section. But, what would have made more sense would have been to include into the Unfair Commercial Practices Directive the following:

“When providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, **general information as described in Article 6(a) of Directive 2011/83/EU**, shall be regarded as material”.

Note that in our rephrasing we run into the same problem we previously described, namely how to refer to amended Directives. Obviously, if you consult Directive 2011/83/EU you never find Article 6(a). A proper way is to refer to “Directive 2011/83/EU as amended by Directive 2019/2161”. This may seem somewhat problematic, because it is self-referring. However, in the final text it would make sense. Hence, in the amended Unfair Commercial Practices Directive, it would be clear where to find this Article 6(a) of the Consumer Directive. A drawback of our text proposal is that when reading the Unfair Commercial Practices Directive you cannot understand the Article without consulting the amended Consumer Directive. This on its turn could be remedied by including a footnote with the text of Article 6(a).

#### 4.1.3. *Regulation 2019/1150 on Promoting Fairness and Transparency for Business Users of Online Intermediation Services*

Article 5 on ranking of Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services is aimed at business to business relations,<sup>15</sup> but contains some elements relevant for our discussion. First, cf. Article

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<sup>15</sup> T. Prastitou-Merdi, *The Notion of “Online Intermediation Services” Found in the New EU Platform Regulation: Who Is Caught After All?* in: T.E. Synodinou, P. Jogleux, C. Markou and T. Prastitou-Merdi (eds.), *EU Internet Law in the Digital Single Market*, 543 (Heidelberg: Springer, 2021).

5 the online platform should describe in their terms of the contracts they conclude with business users

“the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters.”

These parameters could be used when communicating specific information to consumers about the ranking of offers. For the special section mentioned in Directive 2019/2161 at least these parameters should be mentioned, but probably explained more clearly than they will be in the terms for business users of the platform. One of the possible parameters explicitly mentioned in Article 6(3) of Regulation 2019/1150 is the option to pay for better ranking results. For quite some time there is a clear distinction in Google search results between sponsored and other results. On platforms like Amazon this is normally not that clear. Although what exact parameters should be communicated is not specified in Directive 2019/2161 it makes sense that at least the parameters mentioned in Regulation 2019/1150 are communicated. This is equally applicable to the information about ranking referred to in Article 5(5) of Regulation 2019/1150:

“to obtain an adequate understanding of whether, and if so how and to what extent, the ranking mechanism takes account of the following:

- a) characteristics of the goods and services;
- b) the relevance of those characteristics for those consumers;”

In particular from a consumer protection perspective also interesting is Article 5(6):

“Providers of online intermediation services and providers of online search engines shall (...) not be required to disclose algorithms or any information that, with reasonable certainty, would result in the enabling of deception of consumers or consumer harm through the manipulation of search results.”

So, online platforms are not required to disclose information that could deceive or cause harm by manipulating consumers. The phrasing “not required” means that they are allowed to provide this information. At first sight it seems a prohibition would make more sense. However, just like a knife can be used for killing as well as for cutting tomatoes, the same is true for information. Time will tell, but platforms might be able to not provide any information at all about the algorithms and justify this lack of transparency by arguing that manipulation or deceit seems possible. The same is obviously not working as regards informing the consumers. Consumers should also know about parameters or algorithms that allow manipulation or deceit.

#### 4.2. *Traders and Non-traders*

As was discussed above, at the time the e-commerce directive was drafted the internet commerce was restricted to single providers just offering products or services within a particular branch. User generated content (web 2.0) did not exist yet, neither did online platforms that allowed multiple businesses to provide their services. Around the same time, the turn of the century (even turn of the millennium) we already mentioned that eBay became popular. Whereas initially intended as a sort of attic sale or private flea market, over the years more and more professional traders started offering their services via eBay and similar platforms. For some businesses this online marketplace was the only or prime vendor channel.<sup>16</sup> For consumers on these platforms it is not always clear whether they are dealing with other consumers or professional traders, so consumers cannot know whether they are protected by consumer law. In particular the legal right of return is an important consumer right that does not apply to online sale by consumers.

Article 6a(1)(b) of Directive 2011/83 now requires the online platform to provide information about whether the party offering services is a professional party or not. When registering for the platform the sellers should provide this information, since the platform relies on “the declaration of that third party to the provider of the online marketplace.” In addition, the platform should also indicate that consumer law does not apply to non-professional providers (Article 6a(1)(c)). So, the platform should indicate for any party that they either are a professional party or that they are not and as a consequence consumer law does not apply. It is not the other way around, so if a professional party is offering their services the platform does not have to indicate that consumer law does apply. It seems like a warning, “be aware, consumer law does not apply”. How this information should be communicated is not specified, e.g. as some type of warning to the consumer. Just the general phrase “in a clear and comprehensible manner” applies. This information might be a bit thin for consumers to rely on. It would have been better if also the consequences had to be indicated. For instance, it is well imaginable that the consumer believes the right of return is an online thing, and does not realize that this right does not exist if the trader is not professional. So, whereas often the information to be provided is very specific and detailed, here it seems too general for a consumer to be useful.

Also, the new Article 7(4)(f) of Directive 2005/29 includes among the misleading omissions not to inform the consumer, if the products are offered on online marketplaces:

“whether the third party offering the products is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace”.

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<sup>16</sup> For instance, already in 2005 in a famous Dutch court case (*Lycos/Pessers*, Supreme Court 25 November 2005, ECLI:NL:HR:2005:AU4019) about the duty of intermediaries to provide identifying information of their users, the plaintiff was a trader in stamps making € 350.000 on eBay yearly.

The boundary delimiting the professional nature of an activity, which may define the application of very different legal provisions,<sup>17</sup> is not easy to draw. At the extremes, the solution is clear. Thus, if a person decides to sell through an app the stroller of his son who has grown up in the meantime, he is not carrying out an activity in a professional capacity. However, if the business is buying and selling prams on these apps or renting houses, the professional nature of the activity is clear. More complex is the conclusion in intermediate situations. For instance: the person concerned buys and subsequently sells a pram every six months through an online marketplace (or one per month or every two months). Online marketplaces, besides being a business themselves with great social and economic relevance, enable the existence of many businesses around them. If we think about Airbnb, many people have become professional, even if it is not their main activity, by offering local accommodation services, thus entering into consumer contracts.

When asked to rule on this issue, the CJEU defined in the *Kamenova case*<sup>18</sup> some criteria that may be used to decide a specific case, while noting that these criteria are neither exhaustive nor exclusive: (i) whether the sale on the online marketplace was carried out in an organised manner; (ii) whether that sale was for profit; (iii) whether the seller has information and technical expertise concerning the products it offers for sale that the consumer does not necessarily have, so as to place itself in a more advantageous position vis-à-vis that consumer; (iv) whether the seller has a legal status enabling it to engage in commercial acts and to what extent the online sale is linked to the seller's commercial or professional activity; (v) whether the seller is subject to VAT; (vi) whether the seller, acting in the name of or on behalf of a particular trader or through another person acting in his name or on his behalf, has received remuneration or a share in the profits; (vii) whether the seller purchases new or second-hand goods for resale, thereby conferring on this activity a character of regularity, frequency and/or simultaneity with his commercial or professional activity; (viii) whether the products for sale are all of the same type or of the same value, in particular whether the offer is concentrated on a limited number of products.

The fulfilment of some of the criteria may be sufficient to conclude that one is a trader, but the fulfilment of one or more criteria does not necessarily lead to such a conclusion. Nevertheless, it should be concluded that some criteria, such as purchase for resale, point more clearly in the direction of carrying out a professional activity for this purpose. As we saw, this problem is taken into account in Directive 2019/2161, but in a manifestly insufficient manner. Firstly, no criteria are set out for determining when a person is to be classified as a trader.<sup>19</sup> Secondly, it is proposed that the contracting party itself should indicate to the platform whether or not it is a trader, which is problematic, as the platform takes almost no responsibility for the accuracy of the

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<sup>17</sup> T.J. Dodsworth, *Intermediaries as Sellers – A Commentary on Wathelet 5* EuCML – Journal of European Consumer and Market Law 213 (2017).

<sup>18</sup> CJEU 4 October 2018, Case C-105/17, ECLI:EU:C:2018:808.

<sup>19</sup> C. Twigg-Flesner, *Bad Hand? The «New Deal» for EU Consumers* 15(4) GPR – Zeitschrift für das Privatrecht der Europäischen Union 166 (2018).

information provided. So, while the aim to provide the consumer with information about the capacity of the trader is meaningful, the application in practice faces many difficulties.

## 5. DSA: on Moderation, Advertisements, Recommending Systems, Traceability, and Design

The Digital Markets Act (DMA) proposal<sup>20</sup> focuses on the real big platforms called gatekeepers. For instance, they must have had a 65 billion turnover during the last three years, or a market value of 65 billion in the last year; and they need to have more than 45 million monthly active end users established or located in the Union. The DMA is mainly about competition law, and does not contain relevant information requirements.<sup>21</sup> The accompanying Digital Services Act (DSA)<sup>22</sup> proposal does contain some information requirements relevant for platforms. At its core the DSA is meant as an update of the Directive 2000/31/EC on e-commerce.

### 5.1. Moderation

According to Article 12 the platform should set out in their terms and conditions about policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review. Note that this information does not need to be easily accessible, but should be part of the terms and conditions.

Unlike most, if not all, terms being used in practice, the requirement is that they should be described in “clear and unambiguous language”. A bit redundant is the addition that the terms should be “publicly available in an easily accessible format.” It is doubtful whether any provider on the internet exists that provides the terms in a format that is not easily accessible. However, as far as apps are concerned, it is less common that these are available in an easily accessible format. The information is primarily applicable to social media, where moderation is part of the daily business: there is simply too much information, as well as much information that does not comply with standards set by social media platforms.

In addition, a bit comparable to the transparency reports of Google for the Right To Be Forgotten cases, the providers should publish yearly reports about all content

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<sup>20</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15.12.2020, COM(2020) 842 final, 2020/0374(COD).

<sup>21</sup> L.M. Cabral, J. Haucap, G. Parker, G Petropoulos, T.M. Valletti and M.W. Van Alstyne, *The EU Digital Markets Act: A Report from a Panel of Economic Experts*, Publications Office of the European Union, (Luxembourg, 2021) available at <https://ssrn.com/abstract=3783436>.

<sup>22</sup> 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), Brussels, 15.12.2020, COM(2020) 825 final, 2020/0361(COD).

that has been moderated. This is information most consumers will not be very interested in, but supervisory authorities might be.

### 5.2. *Advertisements*

Article 24 deals with online advertising transparency. The online platforms should ensure that the relevant information about advertisements is communicated in “a clear and unambiguous manner”.

This information should be communicated in real time, so right at the moment an advertisement appears. For each advertisement targeted at the consumer, it should be clear to the consumer that the information communicated is an advertisement and who is paying for the advertisement. This is stated in Article 24(a) and 24(b) and repeats what was already included in Article 6(a) and 6(b) of Directive 2000/31 on e-commerce.

Article 24(c) adds that the online platform should provide

“meaningful information about the main parameters used to determine the recipient to whom the advertisement is displayed.”

This is already done sometimes, that if clicked on an advertisement, or moving the mouse over it, a short text appears informing why this advertisement was displayed. Likely, given the high number of data points data brokers have about each consumer, it will be challenging to provide the explanation in “a clear and unambiguous manner.” It is also questionable whether a consumer is really helped with this information. Assume you are informed that you get the advertisement because they believe you are a beer drinking movie lover. Even if true, the connection between a particular advertisement and this profile will not necessarily be clear.

This issue is also regulated by the Unfair Commercial Practices Directive, with which the DSA should be articulated in this field.<sup>23</sup> As we noticed when discussing ranking offers, not disclosing payment or paid advertisement in this context is considered a commercial practice considered unfair in all circumstances.

### 5.3. *Recommender Systems*

The DSA has additional information requirements for very large online platforms. They are not identical to the gatekeepers of the DMA, but are those platforms “reaching more than 10% of the European Union’s consumers.” The information concerns recommender systems. Article 2(o) defines a recommender system as

“a fully or partially automated system used by an online platform to suggest in its online interface specific information to the service recipients, as a result of

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<sup>23</sup> J. Morais Carvalho, F. Arga e Lima and M. Farinha, *Introduction to the Digital Services Act, Content Moderation and Consumer Protection* 3 RDT 71 (2021).

a search initiated by the recipient included, or otherwise determining the relative order or prominence of information displayed”.

It is recognised in recital 62 that the prioritisation and presentation of the information is an important part of the platform’s business. Examples of such practices include algorithmic suggestions, rankings and the order in which information is presented. Much of the success of these large platforms lies precisely in the way information is presented. This is what consumers most look for.

These systems do not rank information based on user input, but do suggestions based on profiles of the users. So if someone buys a particular book, a recommender system can suggest to add another book usually based on what other buyers in the same profile or buyers of the same book also bought.

Here the information has to be communicated in a “in a clear, accessible and easily comprehensible manner”. It is not sure in what way ‘easily comprehensible’ adds to ‘clear’. The variety in how information should be communicated is striking anyway. Again, the information does not have to be located on a recognizable spot on the website, but should be part of, if wished hidden in, the terms.

The DSA aims to ensure that, with regard to the information presented, consumers are adequately informed about the criteria for presenting it in a particular way. The information concerns the main parameters used in the recommender systems. Subsequently, the consumer should also be informed about how the parameters can be modified or influenced so they can adapt the way the recommendations are presented. There has to be at least one option that is not based on profiling. How the consumer can tweak and tune the parameters is further elaborated upon in Article 29(2):

“functionality (...) allowing the recipient of the service to select and to modify at any time their preferred option for each of the recommender systems that determines the relative order of information presented to them.”

It is not very likely consumers are interested in the working of the recommender systems, let alone how to tune them. The possibilities should be easily accessible. The possibility of these recommender systems being an instrument for the dissemination of fake news or other illegal information means that risk analysis and mitigation measures should also take them into account by very large online platforms (Articles 26(2) and 27(1)).

#### 5.4. *Traceability*

One of the provisions of the Digital Services Act that is most aimed at consumer protection and which may be particularly relevant to consumers is the one that imposes duties on platforms to ensure the traceability of traders (see Recital 49). Article 22 applies only to online platforms that allow consumers to conclude contracts with traders. The platform operator shall ensure that traders can only be present in

the platform if they provide a series of relevant information regarding their identification.

Apart from this duty, the platform operator shall also “make reasonable efforts” to assess whether the information is reliable, request the trader to correct the information that is inaccurate or incomplete, and suspend the trader until that correction is made. The information shall be stored for the duration of the contractual relationship between the parties. The consumer has the right to access this information “in a clear, easily accessible and comprehensible manner”. This information can be very important for the consumer to be able to exercise his rights against the trader.

### 5.5. *Platform Design*

Lost in Article 22 is a provision that does not deal not with traceability but with the interface design of digital platforms. Article 22(7) stipulates that the online interface of the platform shall be designed and organised “in a way that enables traders to comply with their obligations regarding pre-contractual information and product safety information under applicable Union law”.

We are talking about the information duties that are basically contained in the consumer law directives. Recital 50 expressly refers, as an example, to articles 6 and 8 of Directive 2011/83/EU (consumer rights), article 7 of Directive 2005/29/EC (unfair commercial practices) and article 3 of Directive 98/6/EC (indication of the prices). The platform is intended to make it easier for the trader to comply with these information duties, thus ensuring that consumers have easier access to the information in question. This is a meta-standard on information. One issue that seems to be left open here is that of the consequences if platforms fail to comply with this obligation. Also, what is missing in the list of Directives mentioned in recital 50 are i.a. the e-commerce directive and services directive. However, the recital indicates for the Directives that are mentioned “in particular”, so we can assume this also applies to other directives. Moreover, despite the different ways the directives refer to how to communicate information, at its core it is similar, it should allow the consumer to easily assess this information.

## 6. Conclusion

We discussed information that has to be communicated by online platforms and in particular their business users offering online services, which includes the online selling of products, to consumers. We restricted ourselves to new information requirements, from both the Directive 2019/2161 and the 2020 proposal for a Digital Services Act. This information adds to what was already required and based on the Directive 2000/31 on e-commerce, Directive 2006/123 on services, and Directive 2011/83 on consumer rights.<sup>24</sup> As comprehensive as this information already was, reason it was

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<sup>24</sup> Lodder, *Information Requirements Overload? Assessing Disclosure Duties Under the E-Commerce Directive, Services Directive and Consumer Directive* (2014).

referred to as information requirements overload, back then and also now we could not cover all information requirements. For instance, we did not discuss Article 6(1) (ea) Directive 2011/83 on information about personalised pricing based on automated decision-making (Vale 2020).<sup>25</sup> We focused on ranking and recommending systems, advertisements, the capacity of the trader, moderation and traceability. Another requirement we did not discuss is information about the EU ODR platform.<sup>26</sup> Hardly anyone knows this platform existing for already 5 years now, while each information society service provider, so all the businesses discussed in this article, has to provide information about this platform. It appears that in practice 0-20 % of the top 100 e-commerce providers of a country comply with this information requirement. Finally, the amount of information the controller has to provide based on Article 12-14 General Data Protection Regulation is enormous.

For over 20 years e-commerce services are offered to consumers, and in particular in the last 10 years the online consumer market increased significantly. The traders have experience in how to communicate information. A nice common characterization of how to communicate information is Article 12(1) GDPR: “to provide any information (...) in a concise, transparent, intelligible and easily accessible form, using clear and plain language”. It sets a golden standard, but at the same time illustrates the impossible nature of the duties online providers are faced with. First, easily accessible is already problematic given the amount of information that has to be provided. Say five pieces of information might be easily accessible, but for the current dozens this is practically impossible. Second, conciseness is another problem. We do not defend the purposely unreadable lengthy terms attorneys draft, but several topics discussed in this paper are complex and they cannot be explained concise and clear at the same time. Third, most consumers are not interested at all in all this information. This is an old problem. Nobody ever read, or even had a copy, of general terms applicable to purchases in brick and mortar stores. Practically this is not a big issue, since these terms only can become relevant if something does not work out well and mostly this is not the case.

What do we suggest? There should be a distinction between essential information and non-essential information. All information discussed in this article we would consider non-essential information. This information should be available in case a consumer is interested in it, but most consumers will not be. So, you should not bother the average consumer, instead you should offer the option for interested consumers to assess this information. Probably in this special location in an app or on a website we discussed. Besides all non-essential information, essential information is in particular:

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<sup>25</sup> S.B. Vale, *The Omnibus Directive and Online Price Personalization: A Mere Duty to Inform?* 2 European Journal of Privacy Law & Technologies 92 (2020).

<sup>26</sup> P Cortes and A.R. Lodder, *Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress* 1 Maastricht Journal of European and Comparative Law 14 (2014); J. Morais Carvalho and J. Campos Carvalho, *Online Dispute Resolution Platform – Making European Contract Law More Effective* in A De Franceschi (ed.) *European Contract Law and the Digital Single Market*, 245 (Oxford; Intersentia, 2016).

- The price, including additional costs like delivery;
- The main characteristics of the product or service;
- Guarantees and right of return.

You can compare it to the offline situation. That is background against which the distance selling directive we started this article with was drafted. To create at a distance, now primarily online, a similar position for the consumer as he would have had in a brick and mortar shop. What is interesting if you buy something? What you are buying, what it costs, and eventual guarantees and right of return.

