

THE LOST TRADERS? CONSIDERING THE DISTINCTION BETWEEN PROFESSIONAL AND NON-PROFESSIONAL ACTORS IN EU LAW IN THE LIGHT OF NEW TYPES OF ECONOMIC ACTORS

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Since the beginning of the new millennium, the landscape of cross-border commerce has been altered significantly, with more and more individuals having the possibility to engage in commercial activities online, for example through so-called online platforms. This has led to the EU legislator undertaking legislative activities in the field, aimed at creating a safer environment for online commerce and enhancing the internal market. This article discusses the legislation in question in relation to a certain group of economic actors, namely those that operate in the grey area between acting for purely private, non-professional, purposes and those engaging in commerce as a part of a business for professional purposes. The article discusses the way in which EU legislation, applicable to online commerce, draws the line between non-professional and professional actors, in particular with regard to ascertaining the legal position of actors that find themselves on the borderline between professional and non-professional actors, referred to as participants in the gig economy.

1 INTRODUCTION

This article concerns a group of economic actors that has been growing fast in recent years and their legal position under EU law. The actors in question are private individuals – natural persons – that sell products or provide services using the internet as a medium, in particular through so-called online platforms, without having formally established a business or doing so as part of their main profession.

In most commercial relationships, a basic distinction is made between a seller and a buyer. These two economic actors can subsequently be subject to further definitions. For example, a variety of EU legislation, which aims at protecting *consumers*, draws a distinction between parties to a commercial relationship based on whether they are acting in a professional capacity or not. A common feature in such legislation is to impose certain obligations on the business or professional actor for the protection and overall benefit of the non-professional actor. Legislation based on the distinction between the professional and the non-professional has (perhaps) proven to be an effective way of regulating economic actors participating in the traditional economy, where it is relatively easy to determine the professional – for example a large business company – and the non-professional – the private individual buying products for household purposes. However, questions arise as to whether this way of legislating adequately encompasses – and regulates – situations where the non-professional starts engaging in

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commercial activities with increasing regularity and takes on work traditionally dominated by companies and their employees.

The article examines the way in which EU law draws a distinction between a non-professional actor, who engages in online commercial activity, and a professional actor, who engages in commercial activity and is subject to certain obligations in relation thereto, due to his professional capacity. The aim is to contribute to clarifying the legal position of those economic actors that operate in the grey area between acting for purely private, non-professional, purposes and those engaging in commerce as a part of a business for professional purposes. To this end, the article begins by describing the nature of the work of these actors (referred to as gig work) (section 2) before outlining some of the main obligations that EU legislation, governing online cross-border commerce, imposes on sellers of products and service providers (section 3). Subsequently, the article examines the way in which EU law draws the distinction between the private individual, engaging in online commerce, and persons that are acting for the purposes of their business or in a professional capacity (section 4) before offering some concluding thoughts (section 5).

The scope of the article is demarcated in two important ways. First, the article is limited to discussing the legal position of sellers of products and providers of service. It does thus not examine the legal position of *buyers and recipients of services*, although the legal position of such actors will necessarily be mentioned from time to time, particularly when discussing matters falling within the field of EU consumer law. Secondly, the scope of the article is limited to assessing the legal positions of economic actors that are *not* in an employment relationship with online intermediaries (platforms). However, recent legislative developments in this field, i.e., concerning the relationship between online intermediaries (e.g., platforms) and actors using the intermediaries for selling products or as a part of providing services, cannot be wholly ignored, as the legislation in question contributes to clarifying the legal position of users of online platforms under EU law.

2 THE GIG ECONOMY

2.1 EMERGENCE

Technological developments and ever-increasing globalisation have had two interrelated, albeit a bit paradoxical, consequences. First, increasing use of machines (technology) and substituting local workforce for, less expensive, foreign workforce (globalisation) have led to a loss of traditional jobs.¹ Secondly, the internet (technology) and the ability to connect to people all over the world (globalisation) have led to new online working opportunities, i.e., the possibility of leveraging access to the internet and online networks to carry out an economic activity. In that

¹ See e.g. Erik Brynjolfsson and Andrew McAfee, *The second machine age : work, progress, and prosperity in a time of brilliant technologies* (W. W. Norton & Company 2014) 5-6.

way, technological advancements provide new types of jobs and occupations where the internet is used as a medium to match workers and jobs.²

The beginning of the 21st century has seen the internet significantly alter the business landscape in Europe. In particular, online platforms have created new possibilities for individuals for doing business and earning a living outside the traditional role of a company employee. Individuals are able to find work and income through online platforms that match them with buyers of products and services. These developments have given rise to a phenomenon referred to as *gig economy*. Dictionaries describe gig economy as ‘an economic system in which many short periods of work are available rather than permanent jobs’³ and as a ‘way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer [...]’.⁴ Based on such descriptions, the *gig economy* and *gig workers* have existed for a long time. However, rapid technological developments in the online world since the beginning of the new millennium have added to the significance of this part of the economy.⁵

2.2 ONLINE PARTICIPATION IN THE GIG ECONOMY

Different organisations and commentators researching the gig economy have come across the same problem, namely the difficulties that accompany efforts to try to precisely locate, categorise, and define, its main actor – the individual working in gig economy, in particular those that work through online mediums (digitally). As pointed out by the OECD, it is difficult to define self-employed gig economy workers due their wide range of different activities and sectors:

² See e.g. Derek Thompson, ‘A World Without Work’ (*The Atlantic*, July-August 2015 issue) <<https://www.theatlantic.com/magazine/archive/2015/07/world-without-work/395294>> accessed 1 October 2023.

³ See Oxford Learner’s Dictionaries, ‘Gig economy’ <<https://www.oxfordlearnersdictionaries.com/definition/english/gig-economy?q=gig+economy>> accessed 1 October 2023.

⁴ See Cambridge Dictionary, ‘Gig economy’ <<https://dictionary.cambridge.org/dictionary/english/gig-economy>> accessed 1 October 2023. The same definition is used to describe *gig workers* in Chartered Institute of Personnel and Development (CIPD), *To gig or not to gig? Stories from the modern economy Survey report March 2017* (2017) 4. Investopedia explains that the term *gig* derives from the world of music, ‘where performers book “gigs” that are single or short-term engagements at various venues’. See Investopedia, ‘Gig Economy: Definition, Factors Behind It, Critique & Gig Work’ <<https://www.investopedia.com/terms/g/gig-economy.asp>> accessed 1 October 2023.

⁵ As early as 2005, gig workers have been described as accounting for around two to four percent of all workers in the US, see statistics from the U.S. Bureau of Labour Statistics (BLS) and the U.S. Census Bureau in Elka Torpey and Andrew Hogan, ‘Working in a gig economy’ (*US Bureau of Labor Statistics*, May 2016): <<https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm>> accessed 1 October 2023. Further, research by McKinsey has found that 20-30% of the working population have ‘engaged in some form of independent earning’ and that 15% of this independent working population did so by using ‘digital platforms such as Upwork, Uber, Airbnb, or Etsy [and that] these online marketplaces could eventually have a transformative impact by efficiently matching a larger pool of workers with consumers of their services’. See James Manyika et al, ‘Independent work: Choice, necessity, and the gig economy’ (McKinsey Global Institute report, 10 October 2016), 1 <<https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy>> accessed 1 October 2023. Textual editions by Author.

For example, this type of self-employment work includes very small-scale, short-term activities undertaken by individuals (e.g. tasks completed through online platforms such as Task Rabbit), but it also includes collaborative work in online markets (e.g. Amazon Mechanical Turk) and work undertaken by individuals as part of well-resourced networks (e.g. Uber).⁶

The lack of data and information on such online gig economy workers, particularly as to the number of workers and the nature of their work, poses a challenge when comparing this new form of work to existing forms (such as traditional employment) and assessing whether existing legal frameworks fit this new form of work.⁷ However, the EU has taken steps in terms of clarifying the legal position of individuals that work through online platforms, with regard to their employment status and related issues. The recent proposal for a directive on *digital labour platforms* and the research it is based on serves as a tool to further define and categorise participants in the gig economy. The research in question shows that more than 28 million individuals in Europe work via online platforms ‘more often than just sporadically’ and that the majority of those individuals are considered to be self-employed, despite being subordinated to an online platform with a varying degree and thus enjoying limited autonomy as to structuring their work.⁸

2.3 ONLINE PLATFORMS

Online platforms have been described as ‘online intermediaries [that] provide platforms for and facilitate the exchange of goods, services or information in the online environment [and] perform or provide activities such as search, e-commerce [and] social networks and cloud computing [...]’.⁹ The OECD has proposed defining ‘Internet intermediaries’ as entities that bring different actors together and/or facilitate business by giving access to, hosting or transmitting ‘content, products and services originated by third parties on the Internet or provide Internet-based services to third parties’.¹⁰ It has been estimated that in terms of consumption of

⁶ See OECD/European Union, *The Missing Entrepreneurs 2017: Policies for Inclusive Entrepreneurship* (OECD Publishing 2017) 125.

⁷ See *ibid* and Manyika et al (n 5) 15.

⁸ See Egidijus Barcevičius et al, *Study to support the impact assessment of an EU initiative to improve the working conditions in platform work* (Luxembourg: Publications Office of the European Union 2021) 5, and Willem Pieter de Groen et al, *Digital labour platforms in the EU: Mapping and business models* (Luxembourg: Publications Office of the European Union 2021) 10.

⁹ See Martin H Thelle et al, ‘Online Intermediaries: Impact on the EU economy’, 7 <<https://copenhageneconomics.com/wp-content/uploads/2021/12/edima-online-intermediaries-eu-growth-engines.pdf>> accessed 1 October 2023. Textual editions by Author.

¹⁰ See OECD definition of ‘Internet Intermediaries’ in Karine Perset, ‘The Economic and Social Role of Internet Intermediaries’ (*OECD Digital Economy Papers*, 8 April 2010) <https://www.oecd-ilibrary.org/science-and-technology/the-economic-and-social-role-of-internet-intermediaries_5kmh79zszs8vb-en> accessed 1 October 2023. Textual editions by the Author. Examples of online platforms are eBay (e-commerce platform), Facebook (social media platform), Google (search platform), Spotify (entertainment platform), accommodation/transportation platforms, such as AirBnB and Uber (examples taken from figure in Thelle et al (n 9) 8).

goods and services on the internet, 60% of private consumption and 30% public consumption goes through the channels of online platforms.¹¹

It is safe to assume that the participation of many actors in the gig economy is contingent upon the facilitation provided by online platforms.¹² Through such platforms, ‘ordinary people’ have a venue to seek other forms of work than traditional forms and employment.¹³ Precise quantifications and exact numbers aside, it is clear that the online economy has dramatically altered the nature of work for significant parts of the population and the business environment in general. In Europe, it has opened up work and income opportunities for millions of people while increasing the options for those buying products and services (consumers).

When categorising online platforms, an important distinction needs to be made based on whether the platform acts only (or primarily) as intermediary – between a buyer and a seller – or whether the platform acts as intermediary for services requested by consumers that also exercise a certain degree of control over the (natural) person that physically provides the service in question. The latter type of online platforms has been referred to as *digital labour platforms*¹⁴ in recent legislative proposals, which aim at clarifying the legal position of those providing services through the platforms.¹⁵ According to the proposal, aim of the directive is e.g. to ‘ensure the correct determination of [...] employment status’ and provide certain minimum rights (under EU labour law) to those economic actors that are deemed to be in an employment relationship with an online platform.¹⁶

The proposal for digital labour platforms provides that it shall be ‘legally presumed’ that if a platform *controls* the work of a person working through the platform, then the contractual relationship (between the platform and the worker) is an employment relationship.¹⁷ It codifies the criteria established in the case law of the CJEU for determining the status of a worker¹⁸ and for determining whether a platform controls the performance of the work.¹⁹ Among the criteria are the platform deciding (unilaterally) the level of remuneration; setting binding rules for how the work should be carried out; supervising the work; restricting the worker’s freedom (in terms of e.g. working hours and whether to accept or refuse tasks); and restricting the worker’s

¹¹ See Thelle et al (n 9) 9.

¹² As an example, research has showed that the majority (63%) of independent workers that sell goods do so via online platforms, see Manyika et al (n 5) 34.

¹³ See David Gierten and Vincenzo Spiezia, ‘New Forms of Work in the Digital Economy: 2016 Ministerial Meeting on The Digital Economy. Technical Report’ (*OECD Digital Economy Papers*, 21 June 2016), 5 <<https://www.oecd-ilibrary.org/docserver/5j1wnklt820x-en.pdf?expires=1670594099&id=id&accname=guest&checksum=167182FE8E2C5A14AB98315A069C54C1>> accessed 1 October 2023. Textual editions by Author.

¹⁴ See e.g. Willem Pieter de Groen et al (n 8) 7.

¹⁵ See Commission, ‘Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work’ COM (2021) 762 final, Art 2(1)(1).

¹⁶ *ibid*, see e.g. 15 and Art 3.

¹⁷ *ibid* Art 4(1).

¹⁸ See *ibid* Preamble, Recitals (20)-(24). In Case C-692/19 *B v Yodel Delivery Network Ltd* EU:C:2020:288 the ECJ laid down certain parameters for determining whether a self-employed independent contractor, carrying out courier services, should be considered a ‘worker’ for the purpose of applying the directive on the organisation of working time (in particular para 45 of the order).

¹⁹ See Commission, ‘Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work’ COM (2021) 762 final, Preamble, Recitals (20)-(24).

possibilities of building his or her own client base.²⁰ If two or more are fulfilled, according to the proposal, the worker shall be deemed to be in an employment relationship with the platform, which in turn means that the worker enjoys certain minimum rights as a platform worker in an employment relationship with the platform. The proposal does, however, not envision regulating the obligations of workers vis-à-vis the recipients of the service they provide, for example by way of mandating employer liability (in case a worker is considered to be in an employment relationship). Thus, while the proposal helps in terms of clarifying the employment status of many gig economy participants and enhances the rights of some of those participants, it does not specifically address the issue of obligations and liability towards the recipient of the service provided online.

As to the other type of platforms, i.e., commercial non-labour platforms, persons operating through such platforms have been described as enjoying greater autonomy when using platforms ‘to develop their entrepreneurial activities’.²¹ Unlike labour platforms, such platforms are not involved in *organising* work carried out by individuals. Their role is limited to serving as an intermediary between a seller or service provider and the buyer or user of such services.²²

The EU legislator has enacted a regulation on promoting fairness and transparency for business users of online intermediation services (the Online Platform Regulation).²³ Further, a comprehensive legislation concerning online intermediary services has been enacted, which covers both social networks and online platforms that allow traders to conclude contracts (at a distance) with consumers. The legislation in question is in the form of two regulations, named the Digital Services Act²⁴ and the Digital Markets Act.²⁵ The Online Platform Regulation concerns online intermediators – online platforms. Their central role to the European economy is what pushes the EU to make them subject to further regulation. As activities of more than a million economic actors in the EU depend on their products or services being available through online platforms,²⁶ the main aim of the regulation is to limit the possibility for platforms to engage in harmful trading practices to the detriment of their users. Such practices are, for example, changes in the terms and conditions without prior notice or explanation, delisting goods or services or suspending user’s accounts without providing reasoning, non-transparent ranking systems and platforms potentially creating more favourable conditions for their own, competing, goods or services. Thus, the regulation aims at creating a fairer, transparent and,

²⁰ See Commission, ‘Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work’ COM (2021) 762 final, Preamble, Art 4(2).

²¹ See *ibid* 2.

²² *ibid* 24, Recital (18).

²³ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57 (Online Platform Regulation).

²⁴ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L277/1 (the Digital Services Act).

²⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1 (Digital Markets Act).

²⁶ See Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services of 26 April 2018’ COM (2018) 238 final (Online Platform Regulation Proposal), 1-2.

consequently, more effective, business environment for trading via online platforms, by protecting their users through imposing obligations on platform providers.²⁷ The Digital Services Act provides rules that aim at creating ‘rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected’.²⁸ As discussed further below, some of those rules concern traders specifically and their obligations vis-à-vis consumers. The scope of the Digital Markets Act is more specific, as it lays down obligations on actors that perform ‘core platform services’, referred to as ‘gatekeepers’.²⁹

3 OBLIGATIONS IMPOSED ON SELLERS AND SERVICE PROVIDERS UNDER EU LEGISLATION

3.1 GENERAL

Cross-border commerce is one of the core economic purposes of the European Union and EU law provides numerous legislative act that might apply to such activities. This sub-section lays down some of the main obligations that EU legislation, applicable to online commerce, imposes upon sellers of products or service providers. This is primarily to give the reader an overview of the obligations that online participants in the gig economy are subject to, *if* they fall under the scope of said legislation. The section thus neither provides an exhaustive list of obligations nor examines all EU legislation concerning online commerce (hereinafter also referred to as *e-commerce*).

An obvious point of departure for such examination is EU legislation that is specific to online commerce, namely directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the E-Commerce Directive)³⁰. Two of the core objectives of the E-Commerce Directive are to enhance legal certainty for concerned actors and increase ‘consumer confidence’.³¹ These objectives fall within the broader aim of increasing the willingness to engage in online, distance (cross-border),

²⁷ Notably, the legislation aims at not only protecting businesses that use online platforms (business users) but also other users for the benefit of ‘all players’. See Online Platform Regulation Proposal (n 26) 2-3: ‘Whilst primarily resulting in impacts for business users, this situation affects all actors in the multi-sided online platform ecosystems, including consumers, which could face a reduced choice of competitive goods and services. [...] The [proposal aims to create] a clear, transparent and stable legal environment for online B2C service providers and their business users, to tackle market fragmentation and to allow all players to tap into the new market dynamics under fair and balanced conditions and with an appropriate degree of transparency’. Textual editions by the Author.

²⁸ Digital Services Act (n 24) Art 1(1).

²⁹ For determining what amounts to ‘core platform service’ the regulation provides the following criteria: The actors whose (market) position is such that they have ‘significant impact’ on the internal market, they serve as ‘important gateway for business users to reach end user[s]’ or they ‘enjo[y] an entrenched and durable positio[n]’. See Digital Markets Act (n 25) Art 3. Textual editions by the Author.

³⁰ Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market of 8 June 2000 [2000] OJ L178/1 (E-Commerce Directive).

³¹ *ibid* Preamble, Recital (7).

commerce to strengthen the provision of *information society services* in the internal market.³² Such services have been defined as meaning services provided for remuneration and at a distance by electronic means, at the request of the service recipient.³³ The directive expressly states that its provisions are without prejudice to other EU law that aims to protect the interests of consumers and public health.³⁴ In this regard, the directive specifically mentions a number of such legislative acts concerning, for example, unfair trading terms (including misleading advertisement) and rules on distance contracts as well as directives on product safety and liability for defect products, which apply ‘in their entirety’ and ‘fully’ to information society services. It follows that Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (the Unfair Commercial Practices Directive),³⁵ Directive 2001/95/EC on general product safety (the Product Safety Directive),³⁶ and Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (the Sales Contract Directive),³⁷ are of relevance for those engaging in online commercial activity.

In recent years, the focus of the EU legislator has been on regulating those acting as intermediaries between, on one hand, sellers or service providers, and, on the other hand, buyers and service recipients. The previously mentioned Online Platform Regulation, the Digital Services Act and the Digital Markets Act, as well as the proposal for a directive on digital labour platforms, are all concerned with laying obligations on such actors, to varying extent. However, their applicability is primarily limited to the relationship between the intermediary and its users rather than the relationship between the user (e.g., seller and service provider) and other users (buyer or recipient of services). The Online Platform Regulation is mainly concerned with imposing obligations on platforms for the protection of sellers or service providers rather than on sellers or service providers as such. Further, the Digital Markets Act is primarily concerned with regulating intermediaries that are of significant importance due to their market position (referred to as ‘gatekeepers’). The Digital Services Act, however, lays down obligations on intermediaries *in relation to* the obligations of sellers or service providers.

³² See e.g. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses of 25 May 2016’ COM (2016) 320 final, 3.

³³ See further discussion in sub-section Terminology in legislation governing online platforms.

³⁴ E-Commerce Directive (n 30) Preamble, Recital (11).

³⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive).

³⁶ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L11/4 (Product Safety Directive), as amended by Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 [2008] OJ L218/30, and Regulation (EC) No 596/2009 of the European Parliament and of the Council of 18 June 2009 [2009] OJ L188/14.

³⁷ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L13/28 (Sales Contract Directive).

3.2 PROVIDING THE BUYER WITH NECESSARY INFORMATION ON NATURE OF OPERATION AND CONTRACT

The first of obligations that are of relevance to those engaging in online commerce are obligations in relation to entering into a commercial relation or agreement. The E-Commerce Directive sets forth general rules on the provision of e-commerce services. In this regard, the directive mandates that a service provider shall make directly and permanently available clear information about itself, including name, location, contact details and whether it is subject to value added tax (VAT) payment obligations,³⁸ as well as making the commercial communication itself clearly identifiable.³⁹ As to a proposed contract, the directive stipulates that the service provider shall make available clear information on the matters such as the necessary steps to conclude the contract, the filing of the contract, possibilities as to correct irregularities with an order, and the obligation to acknowledge the receipt of the order without undue delay.⁴⁰

The aforementioned obligations in the E-Commerce Directive are complemented by the obligations the Digital Services Act imposes on providers of online platforms. More precisely, the Digital Services Act obliges online platforms to ensure the *traceability* of economic actors defined as *traders*, including ensuring that consumers have certain basic information on the trader, including its name, identification documents, payment account details, official trade registration (if available) etc.⁴¹ The information shall be made clearly available on the platform.⁴² Moreover, the platform shall take steps to make sure the information (provided by the trader) is correct and request remedies from the trader, if necessary. If the trader fails to comply the platform shall suspend the services it provides to the trader.⁴³

It follows that while the Digital Services Act does not directly impose obligations on those using intermediaries for selling products or providing services – defined as *traders* in the regulation, it complements the E-Commerce Directive by requiring intermediaries to examine whether traders fulfil their obligations, such as providing consumers with the necessary commercial information and suspending non-complying traders from their platforms. Further, it should be mentioned that the Digital Services Act provides certain rules for the exemption of liability of providers of intermediary services, i.e., situations where the provider (e.g. a platform) cannot be held liable in relation to unlawful acts (or omissions) of the recipient of its service (e.g. the seller).⁴⁴ The potential liability of a provider of an intermediary service does, however, not exclude the liability of the recipient of the service, e.g. a seller of a product, vis-à-vis its counterparty (e.g. the buyer of the product). The Digital Services Act does neither address nor regulate liability in the relationship between a seller and a buyer (or provider and recipient of the service). Neither does the proposal on digital labour platforms, despite laying down rules for determining whether service providers should be considered to be in an employment

³⁸ E-Commerce Directive (n 30) Art 5.

³⁹ *ibid* Art 6.

⁴⁰ *ibid* Arts 10 and 11.

⁴¹ Digital Services Act (n 24) Art 30(1).

⁴² *ibid* Art 30(7).

⁴³ *ibid* Art 30(2)-(3).

⁴⁴ *ibid* Art 30(2)-(3), Preamble, Recital (17), and Arts 4-6.

relationship with a digital platform. In other words, the proposal does not address the issue of whether the individual service provider is or can be exempt from liability (vis-à-vis the service recipient), e.g. because of a breach of EU commercial laws, based on the fact that he or she is an employee of an online platform. The eventual liability of a platform, based on controlling the activities of the service provider to the extent that it is deemed to be an employer of the provider, is therefore *in addition* to any liability of the provider, as opposed to excluding the liability of the provider.

3.3 PROHIBITION ON ENGAGING IN UNFAIR COMMERCIAL PRACTICES

The purpose of the Unfair Commercial Practices Directive is to ‘achieve a high level of consumer protection by approximating [national laws] on unfair commercial practices harming consumer economic interests’.⁴⁵ The essence of the directive is to prohibit certain types of commercial practices deemed to be unfair for the consumer and detrimental to their economic interests. Naturally, these practices can be of various kinds and degrees. The Unfair Commercial Practices Directive does not provide an exhaustive list of such unfair practices. Instead, the directive opts for a general description as well listing some practices that should always be considered as unfair.⁴⁶ A commercial practice shall be deemed unfair if it goes against requirements of professional diligence and materially distorts, or is likely to distort, the ‘economic behaviour with regard to the product of the average consumer whom it reaches’. Particularly, misleading or aggressive practices (as further outlined in the directive) are to be considered as unfair.⁴⁷

It should be noted that many (if not all) of the commercial practices which the directive describes as unfair are of such nature that they are likely to be captured by national contract and sales laws and not only by national law specific to consumers. Communicating false or otherwise untruthful information when transacting (misleading) or using threatening language to complete a transaction (aggressiveness) are two examples of such practices, as are many of the practices listed as being unfair in all circumstances.⁴⁸ As a result, it is quite reasonable for a gig economy participant to expect to be subject to legal rules prohibiting unfair commercial actions, irrespective of whether such rules stem from EU consumer legislation or from national law. Further, none of the new legislation applicable to online platforms and their users provides rules that exclude or limit the liability of such economic actors, for example based on the determination that they are in an employment relationship with the platform.

As to the consequences of carrying out a prohibited commercial practice, the Unfair Commercial Practices Directive leaves it for the Member States to put in place effective legal means and remedies to combat such practices. This includes, for example, access to

⁴⁵ Unfair Commercial Practices Directive (n 35) Art 1. Textual editions by Author.

⁴⁶ *ibid* Annex I, which lists commercial practices that are in all circumstances considered unfair, including the trader falsely claiming to be a signatory to a code of conduct or claiming that the good sold has been approved by public authorities.

⁴⁷ *ibid* Art 5(2)-(4).

⁴⁸ *ibid* Annex I.

administrative authorities and courts, availability of remedies such as interim measures and making damage claims, as well as laying down penalties for infringements.⁴⁹

3.4 OBLIGATIONS RELATION TO THE SAFETY AND QUALITY OF PRODUCTS

The Product Safety Directive aims to contribute to the free movement of goods (and related services) by harmonising rules on the safety of products and obliging economic operators to market products that are safe, in particular for the protection of consumers.⁵⁰ The main purpose of the directive is to ensure that ‘products placed on the market are safe’ and its essence lies in imposing obligations on producers and distributors of products. The Product Safety Directive imposes several obligations on distributors as to the safety of products they sell, including the obligation to act with due care and help with ensuring that safety requirements are complied with. Distributors are prohibited from supplying products they know, or should know, that do not comply with applicable requirements. Presumed knowledge is directly tied to standard of knowledge expected of a professional in the field in question.⁵¹ Additionally, distributors shall participate in monitoring the products on the market, for example by providing information on product risk, make sure that they have all information required for locating product origin and collaborate with producers and authorities with respect to risk-avoiding measures.⁵² If distributors become aware of – based on their knowledge as professionals – that a product places consumers at risk they are obliged to take immediate action by contacting relevant authorities and providing assistance to prevent the product from causing harm to the consumer.⁵³ The obligations the directive imposes on manufacturers and distributors only become relevant in case of products marketed for consumers in the course of commercial activity, irrespective of whether the product is new or used.⁵⁴ Given that the economic actors discussed in this article (participants in the gig economy) are commonly not manufacturers of products (as manufacturing usually requires a firmly established and ongoing economic operation), the Product Safety Directive is arguably mostly relevant to them in their capacity as *distributors* of products. The directive defines distributors as ‘any *professional* in the supply chain whose activity does not affect the safety properties of a product [...]’.⁵⁵ The directive does not define the term *commercial activity* nor does it provide any elements or parameters for determining when a person has reached the status of a *professional* distributor.

The Sales Contract Directive⁵⁶ lays down two overarching aims, to enhance cross-border trade in the internal market by ‘[striking] the right balance between achieving a high level of

⁴⁹ Unfair Commercial Practices Directive (n 35) Arts 11-13.

⁵⁰ Product Safety Directive (n 36) Preamble, Recitals (2)-(4).

⁵¹ *ibid* Art 5(2).

⁵² *ibid* Art 5(2).

⁵³ *ibid* Art 5(3).

⁵⁴ With the exception of ‘[...] second-hand products supplied as antiques or as products to be repaired or reconditioned prior to being used [...]’, to which the directive does not apply. See Product Safety Directive (n 36) Art 2(1)(a), second paragraph.

⁵⁵ Product Safety Directive (n 36) Art 2(1)(f). Textual editions by Author.

⁵⁶ Sales Contract Directive (n 37).

consumer protection and promoting the competitiveness of enterprises [...]'.⁵⁷ The directive puts particular emphasis on the significance of e-commerce with the preamble stating that such commerce is the 'key driver for growth within the internal market [...]' and that the '[...] full potential of the internal market can only be unleashed if *all market participants* enjoy smooth access to cross-border sales of goods including in e-commerce transactions'.⁵⁸ The Sales Contract Directive imposes certain requirements and obligations on sellers of goods. Some of the requirements are restatements of rules that were already part of EU consumer legislation under the (repealed) Consumer Rights Directive (albeit differently formulated, as the Sales Contract Directive aims to increase the level of consumer protection offered in the Consumer Rights Directive).⁵⁹ Among such rules are the requirement of goods being in full conformity with contract law and fit for (both) particular use and for what similar goods are generally used for, a consumer right to repair or replacement, and provisions on seller's guarantees.⁶⁰ Significantly, the directive includes a complete set of remedies that shall be available for a consumer in case of default by the seller of his obligations under a sales contract.⁶¹ These remedies include the right – and corresponding obligation for the seller – to have the product repaired or replaced, the price reduced, and the right to terminate the contract. The directive also includes provisions that add legal clarity for the benefit of both parties to a sales contract, including on how to determine the time for establishing whether a good is in conformity with contract and time limits for consumer demanding remedies.

4 DRAWING A LINE BETWEEN PROFESSIONAL AND NON-PROFESSIONAL ACTORS

4.1 GENERAL

EU law does not provide single uniform definitions for parties to a commercial relationship, such as seller and service provider or buyer and service recipient. Neither does EU law provide a uniform definition of the terms of such as *business* or *consumer*.⁶² The scope of the legislation discussed in section **Error! Reference source not found.** above – and the obligations it imposes on sellers and service providers – is marked by defining the actors providing products and/or services based on whether they act in a business or professional capacity. A seller, as an example, does not fall within the scope of the Unfair Commercial Practice Directive, unless he or she fulfils one or more elements of the definition of the term *trader*. A seller that is not a *trader* is therefore not subject to the obligations in the directive.

⁵⁷ *ibid* Preamble, Recital (2). Textual editions by Author.

⁵⁸ *ibid* Preamble, Recital (4). Textual editions by Author.

⁵⁹ *ibid* Preamble, Recital (10).

⁶⁰ *ibid* Arts 5-7, 13-14 and 17.

⁶¹ *ibid* Art 13.

⁶² See James Devenney and Mel Kenny, *European consumer protection: theory and practice* (Cambridge University Press 2012) 125. See also Jarmila Lazíková and Eubica Rumanovská, 'The Notion of Consumer in the EU Law' (2016) 5(2) EU Agrarian Law 1, 1-2.

Acting in a business or professional capacity serves to mark the scope of applicability of EU consumer law. While EU consumer law is a field marked by a vast number of enacted legislative acts (mainly in the form of directives),⁶³ most of the legislative acts contain the following elements as part of the core of defining a *consumer*: A consumer is a *natural* person who is acting for purposes *outside* his or her trade, business, or profession.⁶⁴ Conversely, the commercial counterparty of the consumer *is* acting for the purposes of his or her trade, business or profession. This section describes and discusses the terminology used in EU legislation for determining when a seller or service provider acts for the purposes of his or her business or in a professional capacity.

4.2 COMMON TERMS USED FOR DETERMINING THE EXISTENCE OF THE PROFESSIONAL

In the E-Commerce Directive, ‘Service providers’ are defined as ‘any natural or legal person providing an information society [service]’.⁶⁵ Information society services are, in turn defined, as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of service[s]’.⁶⁶ The preamble to the directive further explains that information society services cover ‘a wide range of economic activities which take place on-lin[e]’, including selling and delivering products and providing services.⁶⁷ However, the directive carves out certain activities that should *not* be defined as informational society services, and thus lie outside the scope of the directive. As to individuals engaged in e-commerce, the preamble states that ‘[the] use of electronic mail or equivalent individual communication [...] by natural person acting outside their trade, business, or profession including their use for the conclusion of contracts between such persons is *not* an information society service [...]’.⁶⁸ As can be seen, there are two main conditions for this exemption from the scope of the directive. The exemption applies to *natural persons* that are acting outside their *trade, business* or *profession* but only in cases where the persons in question engages in commercial activity through email or *equivalent* individual communication. Such *non-professional* persons are therefore not subject to the obligations of providing certain basic information about themselves and the contract that is

⁶³ See e.g. Jana Valant, ‘Consumer protection in the EU: Policy overview’ (2015), 5 <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf)> accessed 1 October 2023.

⁶⁴ See also Devenney and Kenny (n 62) 124, and Valant (n 63) 3.

⁶⁵ E-Commerce Directive (n 30) Art 2(1)(b). The directive defines ‘Informational Society Services’ as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

⁶⁶ *ibid* Art 2(1)(a), which refers to a definition in Art 1(1)(2) of the now repealed Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services [1998] OJ L204/37. That directive was repealed and replaced by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L241/1, which provides the same definition of *information society services* in Art 1(1)(b). Textual editions by Author.

⁶⁷ E-Commerce Directive (n 30) Preamble, Recital (18). Textual editions by Author.

⁶⁸ *ibid* Preamble, Recital (18). Textual editions by Author.

being entered into (see discussion in sub-section Providing the buyer with necessary information on nature of operation and contract). If a person offers a product to sale by online advertisement to an undisclosed group of recipients through an online platform the person is arguably *not* acting exclusively by way of individual communications, irrespective of whether any eventual contract is concluded by way of such communication. Following this interpretation, the person in question is *not* exempt from the obligations in the directive and needs to provide its counterparty (the buyer) with certain basic information about itself and regarding the necessary steps to conclude a contract, despite having the position of a non-professional.

The newly enacted Digital Services Act complements the E-Commerce Directive. The obligation it imposes on online intermediaries, in relation to sellers or service providers, is, however, demarcated only based on whether these actors are defined as *traders*. The term trader is defined as meaning ‘any natural person, or any legal person irrespective of whether it is privately or publicly owned, who is acting, including through any person acting in his or her name or on his or her behalf, for purposes relating to his or her trade, business, craft or profession[...]’.⁶⁹ The result is that the Digital Services Act does not complement the E-Commerce Directive as to obligations imposed on non-professional actors that use online platforms to engage in commerce in a public manner, i.e. not only through individual communication.

The *Unfair Commercial Practices Directive* applies to business-to-consumer commercial practices – the communications (for example advertising and other marketing) and other behaviour of businesses towards consumers in the course of promoting and selling a product.⁷⁰ The scope of the directive is not limited to goods – the directive also covers services.⁷¹ In terms of drawing the line between businesses and consumers, the directive uses the term *trader* to describe the person engaged in selling a good or providing a service. A trader, within the directive, ‘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[...]’.⁷² ‘Business-to-consumer commercial practices’ are in turn defined as any act or omission (including commercial communication in the form of advertising and marketing) that is ‘directly connected with the promotion, sale or supply of a product to consumers[...]’.⁷³ The Directive on Misleading and Comparative Advertising⁷⁴ provides an almost identical definition of a *trader*, without however, the additional demarcation of defining business-to-consumer commercial practices.⁷⁵ This is understandable,

⁶⁹ Digital Services Act (n 24) Art 3(1)(f).

⁷⁰ Unfair Commercial Practices Directive (n 35) Art 3.

⁷¹ *ibid* Art 2(1)(c).

⁷² *ibid* Art 1(2)(c). Textual editions by Author.

⁷³ *ibid* Art 2(1)(d). Textual editions by Author.

⁷⁴ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21 (Directive on Misleading and Comparative Advertising).

⁷⁵ *ibid* Art 2(1)(d): “‘trader’ means any natural or legal person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader’.

since the aim of the directive is not to protect consumers but traders (against misleading advertising).⁷⁶ The directive thereby concerns business-to-business relationships.

When compared to the Consumer Rights Directive – applicable at the time but since repealed by the Sales Contract Directive⁷⁷ – the definition (in the Unfair Commercial Practices Directive) includes the term *craft* as one of the elements that can define a person as a *trader* and thereby bringing that person within the scope of the directive. The initial proposal for the directive by the Commission⁷⁸ followed the then applicable Consumer Rights Directive definitions. The word *craft* was added under the legislative procedure, most likely in response to the position of the European Parliament, which had argued for a much wider definition of the term *trader*. The view of the Parliament was that persons offering or selling products or services under (any) commercial activity on a non-profit basis should fall within the definition, thus including every person offering goods or services for whatever purpose.⁷⁹ However, there was no agreement on adopting such a wide definition, with the eventually adopted directive adding the word *craft*, as one of the constitutive elements in the definition of a *trader*.

Broadly speaking, the Sales Contract Directive builds on the same traditional distinction between a seller and a consumer as the Consumer Rights Directive it repeals, albeit with a bit more detailed definition of the term seller,⁸⁰ which follows the definition provided in the Unfair Commercial Practices Directive, discussed above. Under the Sales Contract Directive, a seller ‘means any [...] person [...] that is acting, including through any other person acting in that natural or legal person’s name or on that person’s behalf, for purposes relating to *that person’s trade, business, craft or profession* in relation to contracts covered by this Directive[...].’⁸¹ As was the case with the Unfair Commercial Practices Directive, with the criterion *craft* added to the definition in the later stages of the legislative procedure in order to satisfy the demands of the European Parliament, which pushed for a more encompassing definition.⁸²

⁷⁶ Directive on Misleading and Comparative Advertising (n 74) Art 1.

⁷⁷ See further discussion in sub-section Obligations relation to the safety and quality of products.

⁷⁸ Commission, ‘Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) of 18 June 2003’ COM (2003) 356 final.

⁷⁹ See Report on the proposal for a European Parliament and Council directive concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) (COM(2003) 356 – C5-0288/2003 – 2003/0134(COD)) final A5-0188/2004, 12/87, Amendment 14, Art 2, point (c), which read as follows (suggested additions to the proposal marked *in italics*): ‘(c) “seller or supplier” (hereinafter referred to as “trader”) means - any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business or profession, *or with a view to achieving his statutory objective; the trader shall be held responsible for an action which he deliberately promotes by means of his own behaviour or which he makes possible in the first place; [...]* - the persons who, whether in their own name or in the name or on behalf of a third party which may or may not have legal personality, on a profit- or non-profitmaking basis, carry on a commercial, financial or industrial activity and offer for sale or sell products or services.’ Other textual editions by the Author.

⁸⁰ The repealed Consumer Rights Directive built on a distinction between *seller* and *consumer*. The directive applied to sale of goods by a seller to a consumer (consumer good), with the seller defined as follows: ‘[Seller] shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession.’

⁸¹ Sales Contract Directive (n 37) Art 2(1)(c). Textual editions by the Author.

⁸² See discussion above.

4.3 TERMINOLOGY IN LEGISLATION GOVERNING ONLINE PLATFORMS

As explained in sub-section 2.3, *the Online Platform Regulation* aims to offer protection to users by putting in place transparency obligations imposed on online platforms as well as an effective redress mechanism. The proposal for the regulation limited the scope of the regulation to *business users*, outlined as ‘[...] any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession[...]’.⁸³ Accordingly, the proposal used the same terminology as the Unfair Commercial Practices Directive, the Sales Contract Directive and, to an extent, the E-Commerce Directive and the Directive on Misleading and Comparative Advertising, for determining its scope vis-à-vis economic actors. This approach (by the Commission) is somewhat surprising in light of its prior statements on the vastness of online economy and its participants.⁸⁴ If accepted, it would arguably have led to the exclusion of a significant part of users of online platforms, the scope of the regulation, and thereby the protection it affords *to users* of online platforms.

The definition proposed by the Commission was rejected under the legislative procedure. The enacted regulation defining *business users* as meaning ‘any private individual acting in a *commercial or professional* capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession[...]’.⁸⁵ As can be seen, the definition captures private individuals using online platforms to commerce *in addition* to the individuals that use online platforms *for the purposes of their profession*. This way of defining the constitutive elements of *business users* allows for a distinction between the professional users, using a platform as a part of its ongoing business operation, and the non-professional ones, who certainly use the platform to commerce, albeit not necessarily as part of their profession. The widening of the regulation’s scope under the legislative procedure can certainly be explained by the fact that, unlike other legislation discussed in this section, the Online Platform Regulation provides rules for the protection of those using platforms to engage in commerce, as opposed to imposing obligations on them.

By means of comparison, although the Digital Services Act certainly aims at creating a safe and predictable online environment for all actors concerned, it is *neither exclusively nor specifically* aimed at protecting those that use the service *for selling products or providing a service*. Accordingly, recipients of services of providers of intermediary services (e.g. online platforms) are defined in a broad manner as ‘any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it accessible[...]’.⁸⁶ Intermediary services, in turn, involve the transmission and/or storage of information in different forms, further

⁸³ See Online Platform Regulation Proposal (n 26) Art 2(1)(1).

⁸⁴ In its proposal, the Commission had described the vastness of this online economy, inter alia by stating that ‘more than a million EU enterprises trade through online platforms to reach their customers [...]’. See Online Platform Regulation Proposal (n 26) 1.

⁸⁵ Online Platform Regulation (n 23) Art 7.

⁸⁶ Digital Services Act (n 24) Art 3(1)(b). Textual edition by Author.

denominated as ‘mere conduit’, ‘caching’ and ‘hosting’,⁸⁷ which fall within the umbrella term of *information society service*.⁸⁸

As previously discussed, the Digital Services Act does not impose obligations upon those using an online platform to sell products or provide services. However, the regulation imposes obligations on the online platform *in relation to* the obligations sellers or service providers are under as a result of other EU laws, in particular obligations of an actor to identify themselves before engaging in commercial transactions.⁸⁹ In this regard, the scope of the platform’s obligations is limited to *traders*, defined in the same way as in other EU legal acts on online commerce (discussed in sub-section 4.22 above), namely as persons acting for purposes relating to their trade, business, craft or profession. This can be said to be in accordance with the complementary nature of the Digital Services Act.⁹⁰ As the provisions in the relevant chapter are primarily intended to create a safer environment for online commerce and to protect the buyer of products and recipient of services (the consumer), it is notable that the EU legislator has opted for applying the common way for defining *trader* and drawing the line of applicability based on consumer protection considerations. The result is that an online platform is only obliged to ensure that *traders* are sufficiently identified (traceable), as opposed to defining traders as *all* other actors that engage in information society services through the platform.⁹¹

4.4 GIVING AN ACTOR THE STATUS OF A PROFESSIONAL BASED ON CONSUMER PROTECTION ARGUMENTS

Determining whether an economic actor has the legal position of a professional needs to be assessed on a case-by-case basis. There might be cases where an actor appears to fulfil the constitutive elements of a consumer but has in fact the legal position of a trader.⁹² Indeed, examples in CJEU case law show that the court has not been restrictive in its approach in terms of giving individuals the status of a professional with the effect that the individual in question

⁸⁷ Digital Services Act (n 24) Art 3(1)(g).

⁸⁸ Defined as in the same manner as in the E-Commerce Directive (n 30), namely as ‘any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient’. See Digital Service Act, Preamble, Recital (5).

⁸⁹ See discussion in sub-section 3.13.2.

⁹⁰ The preamble of the regulation clearly states that it does not replace, but complements, EU legislation concerning online commerce, including EU consumer protection law and legislation such as the Product Safety Directive and the Unfair Commercial Practices Directive. See Digital Services Act (n 24) Preamble, Recital (10).

⁹¹ See, in this, regard, Digital Services Act (n 24) Preamble, Recital (24): ‘In order to ensure the effective protection of consumers when engaging in intermediated commercial transactions online, certain providers of hosting services, namely online platforms that allow consumers to conclude distance contracts with traders, should not be able to benefit from the exemption from liability for hosting service providers established in this Regulation, in so far as those online platforms present the relevant information relating to the transactions at issue in such a way as to lead consumers to believe that that information was provided by those online platforms themselves or by traders acting under their authority or control, and that those online platforms thus have knowledge of or control over the information, even if that may in reality not be the case. Examples of such behaviour could be where an online platform fails to display clearly the identity of the trader, as required by this Regulation, [...]’. Textual editions by the Author.

⁹² See Commission Notice – Guidance on the interpretation and application of Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market C/2021/9320 [2021] OJ C526/1 (Guidance on Unfair Commercial Practices), 27.

cannot invoke legal rules aimed at protecting consumers. Actions such as preparing the sale of a business (i.e., an activity that is not the core activity of the business under sale)⁹³ or starting a future business⁹⁴ fall within the definition of a trader and are thereby outside the consumer definition, even if the actor in question is acquiring services from another professional in relation to said activities. The ECJ has also declined to extend the scope of protection under relevant EU consumer legislation to those undertaking guarantees on behalf of traders, even though the guarantors were not traders themselves.⁹⁵ The court has held the same to apply in cases where a guarantor has close professional ties with the primary debtor, such as being its executive director or a controlling shareholder.⁹⁶ Furthermore, consumer protections cannot be invoked if products bought are for ‘trade or professional purposes’ even if they are also intended for private (family) use.⁹⁷

In the aforementioned cases, the ECJ finds a correlation between the *trader* and the *consumer* concepts – when a party fulfils the constitutive elements of the *trader* definition the party is most likely not a *consumer*. This can be said to be in accordance with the core rationale of consumer law, i.e. the notion that the private individual buying products or services – the consumer – is in a weaker position as compared to its counterparty (the commercial actor).⁹⁸ Indeed, the CJEU has repeatedly cited this as one of the main arguments behind EU rules protecting consumers, holding that the consumer is in a weaker position both economically and with regard to other matters such as knowledge and experience of the legal rules – than its commercial counterparty.⁹⁹ This, of course, is premised upon the consumer engaging in such activity for private purposes (e.g. in relation to household or family life) and its counterparty engaging for purposes related to business or profession. In such a commercial relationship, legislators have generally presumed

⁹³ See case C-361/89 *Criminal proceedings against Patrice Di Pinto* EU:C:1991:118, in particular para 16.

⁹⁴ See Case C-269/95 *Francesco Benincasa v Dentalkit Srl* EU:C:1997:337, e.g. paras 16-17: ‘only contracts concluded for the purpose of satisfying an individual’s own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically’.

⁹⁵ See Case C-45/96 *Bayerische Hypotheken- und Wechselbank AG v Edgard Dietzinger* EU:C:1998:111. Reference can also be made to Case C-208/98 *Berliner Kindl Brauerei AG v Andreas Siepert* EU:C:2000:152. In this case the ECJ also declined to extend the scope of protection under EU consumer legislation (a directive on credit agreements) to a guarantor, albeit not on the basis that the primary debtor was acting for trade purposes but on the basis that the directive did not cover *guarantees* as financial instruments.

⁹⁶ See case C-419/11 *Česká spořitelna, a.s. v Gerald Feichter* EU:C:2013:165.

⁹⁷ See case C-464/01 *Johann Gruber v Bay Wa AG* EU:C:2005:32, in particular para 40-41. Notably, the EU law aspect of the dispute mainly revolved around a jurisdictional issue, i.e., whether a farmer could rely on an exemption in EU consumer law on procedural matters, which afforded consumers the option of bringing proceedings before a court in their home jurisdiction instead of having to go before a court in the defendant’s jurisdiction.

⁹⁸ See Norbert Reich et al, *European consumer law* (Ius Communitatis: 5, Intersentia 2nd edn 2014) 48.

⁹⁹ See e.g. Case C-269/95 *Francesco Benincasa* (n 94) para 17, Case C-240/98 *Océano Grupo Editorial and Salvat Editores* EU:C:2000:346 para 25, and Case C-464/01 *Johann Gruber* (n 97) para 34. See also the following reasoning in Opinion of AG Mischo in Joined cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl (C-541/99) and Idealservice MN RE Sas v OMAI Srl (C-542/99)* EU:C:2001:337 paras 13-16: ‘[The system of consumer protection is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms [...] By contrast, legal persons and companies do not generally find themselves in that weaker position and there is therefore no reason to grant them protection which, as an exception to contractual freedom, must, moreover, be strictly interpreted’. Textual editions by the Author.

that the natural person is in a weaker position vis-à-vis business companies in terms of matters such as economical position (strength of resources), legal knowledge, professionalism, and access to (and possession of) information of importance to the transaction at hand, while also (potentially) acting under economic pressure.¹⁰⁰

The judgment in *Zentrale zur Bekämpfung unlauteren Wettbewerbs*¹⁰¹ is another example of a case where the legal position of one actor is determined based on its counterparty being a consumer. In this case, BKK Mobil Oil, a public health insurance fund in Germany, had been charged by the German competition authorities for disseminating misleading information to its members, in breach of, *inter alia*, the provisions of the Unfair Commercial Practices Directive. It was not disputed that BKK members were consumers. BKK argued that it should not be defined as a trader or business as it was a non-profit public law body. Based on the wording of the directive, the court found that ‘the EU legislature has conferred a particularly broad meaning on the term “trader”, which refers to “any natural or legal person” which carries out gainful activity [...]’, including public law bodies.¹⁰² The court further stated that the full meaning of the term *trader* could not be determined by such reasoning and in isolation, but has to be done in direct ‘relation to the related but diametrically opposed concept of “consumer”’.¹⁰³ Relying on the fact that BKK members were consumers and the importance of granting consumers – as the weaker party in a commercial relation – certain protection, the court concluded that BKK had to be considered as a *trader* within the meaning of the directive.¹⁰⁴ According to the court, this was the only way to ‘to give full effect to the Unfair Commercial Practices Directive, by ensuring that, in accordance with the requirement of a high level of consumer protection, unfair commercial practices are effectively combatted’.¹⁰⁵

4.5 ADDITIONAL FACTORS AND PARAMETERS FOR DETERMINING THE EXISTENCE OF A PROFESSIONAL

The case law discussed above shows the importance the ECJ attaches to the position of actors buying products or service in determining whether their counterparty is a *professional* and thereby subject to certain obligations for consumer protection. In terms of determining the existence of a professional without necessarily assessing the legal position of its commercial counterparty, the Commission has stated that it will consider whether a seller has a profit motive, the number

¹⁰⁰ See Lazíková and Rumanovská (n 62) 1-2, who also point out that these factors, as part of determining strength of position in a contractual relationship, are not undisputed and that the business-consumer relationship is dynamic and subject to change over time. As an example, the presumption of the consumer’s weak position, and the enactment of corresponding protection legislation, stems from a period in the 20th century when consumer’s access to information was much less than what it is today, in which is to a large part due to the internet.

¹⁰¹ Case C-59/12 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* EU:C:2013:634.

¹⁰² *ibid* para 32. Art 1(2)(c) of the Unfair Commercial Practices Directive (n 35) defines *trader* as ‘any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession [...]’. Textual editions by the Author.

¹⁰³ Case C-59/12 *Zentrale* [n 101] para 33.

¹⁰⁴ *ibid* paras 34-38.

¹⁰⁵ *ibid* para 39.

and frequency of their transactions, sales turnover and whether he or she is involved in buying products to resell them.¹⁰⁶ Hence, more frequent transactions and bigger turnover are more likely to result in one being in the position of a trader, and thus falling within the scope of the Unfair Commercial Practices Directive and its obligations to refrain from certain unfair practices. The Commission attempts to clarify the situation as to the potential, and, indeed, likely application of the directive to online gig economy actors, by stating that persons ‘whose main activity is to sell products online on a very frequent basis, purchasing products to resell them at a higher price, could for example fall within the definition of trader’.¹⁰⁷

In this context, it is also of relevance to mention that the Study Group on a (proposed) European Civil code and the Research Group on EU Private Law published a draft to a common frame of reference (DCFR) containing common principles, definitions and models for application and implementation of EU contract law.¹⁰⁸ The DCFR suggested the following as the common definition of a *business* for future application of EU commercial law. A business, according to the DCFR, should mean ‘any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity’.¹⁰⁹ In explanatory notes, the DCFR outlines a few factors that are of relevance when determining whether a certain activity amounts to a business. A *Business* has to be carried out on a ‘somewhat regular basis’ in return for some kind of compensation.¹¹⁰ It does not matter, however, whether the activity is for profit or not, or whether the activity is the main activity of the person in question (or whether it is only ancillary or temporary). As to intermediaries (between the consumer and the business), the DCFR proposes that the intermediary the consumer uses to finalise a transaction (for example an agent or broker) should be bound by consumer protection obligations. By contrast, the DCFR proposed that intermediaries in the form of online platforms should not be bound by consumer protection obligations.¹¹¹ The Digital Services Act did not follow this approach, as evidenced by the obligations it imposes on platforms in relation to the traceability of traders vis-à-vis consumers.¹¹²

The factors and parameters discussed here are part of criteria used to determine whether an actor has the legal position of a *professional* (or trader, business etc.). If an actor has such status,

¹⁰⁶ See Guidance on Unfair Commercial Practices (n 92) 27. Textual editions by Author.

¹⁰⁷ *ibid.*

¹⁰⁸ See Christian von Bar and Eric Clive (eds), *Principles, definitions and model rules of European private law : draft common frame of reference (DCFR)* (2010) 3-7.

¹⁰⁹ See *ibid.*, I. – 1:105. Textual editions by Author.

¹¹⁰ See *ibid.*, I. – 1:105.

¹¹¹ See *ibid.*, I. – 1:105: ‘The extension of consumer protection should not include person to person trading platforms, e.g. online market places, where the platform provider is not involved in the conclusion of the contract.’ The DCFR proposal focus on the importance of being involved in the contract at hand is in line with the position of European Consumer Protection Cooperation Network on online app stores, see Guidance on unfair Commercial Practices, 30: “[...] although liability for the content of an app primarily rests with the app developer, an app store provider could also be held responsible for ensuring that games on their platforms do not contain direct exhortations to children’.

¹¹² As outlined in sub-section 3.13.2.

he or she falls within the scope of the relevant EU legislation, which might lead to the application of its provisions to a single transaction.¹¹³

In *Kamenova*,¹¹⁴ the ECJ reiterated that even though a certain practice might be considered commercial, the national court still needed to determine whether the actor involved had the legal position of a trader. Otherwise, the actor in question – and his activities – would not fall under the scope of the relevant EU legislation. In this case, an economic actor (*Kamenova*) had been fined for breaching (Bulgarian) national laws, which incorporated the Directive on Unfair Commercial Practices, when selling products via online platforms.¹¹⁵ The disputed commercial activity consisted of publishing *simultaneously* eight advertisements for the sale of new and second-hand products on an online platform.¹¹⁶ The question arose whether *Kamenova* could be held liable for said breaches based on having the legal position of a *trader* or solely based on the commercial activity in question. As to the activity in question, the court held that while it was commercial in nature, it did not amount to a *commercial practice* within the meaning of the directive unless it *originated from a trader*.¹¹⁷ It follows that even though *Kamenova* engaged in commercial activity and her counterparty had the legal position of a consumer, she would not fall within the scope of the directive unless she herself could be defined as a trader. As to the term trader, the ECJ reaffirmed that the directive defines the term very broadly.¹¹⁸ Yet the term only refers to actors that engage in commerce *for purposes that are related to trade, business, craft or profession*.¹¹⁹ The court subsequently lists the criteria that are relevant for determining whether an actor is a *trader* within the meaning of the directive. Among the criteria are whether the activity (sale) was organised, whether it was done with a profit motive, and whether the seller had superior technical information and expert knowledge vis-à-vis the consumer.¹²⁰ The court added that the criteria put forward were ‘neither exhaustive nor exclusive’, meaning that fulfilling one or more of the criterion does not automatically lead to an economic actor being defined as a *trader*.¹²¹ The court concluded that the commercial activity of simultaneously advertising eight watches for sale on an online platform, with the intention of making profit, was *not* sufficient to determine that

¹¹³ See e.g. C-388/13 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország kft* EU:C:2015:225, in particular paras 32-35. In this case, the ECJ invoked the legislative aim of ‘ensuring a high level of consumer protection’ when coming to the conclusion that a trader (a provider of cable television services) provided wrongful information, which constituted a ‘misleading commercial practice’ even though it was only directed at one single consumer. The ECJ held that the Unfair Commercial Practices Directive ‘is characterised by a particularly wide scope *ratione materiae*’ and cited Article 2(d) of the directive, holding that ‘the sole criterion referred to in that provision is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers’.

¹¹⁴ Case C-105/17 *Komisija za zaštita na potrobitelice v Evelina Kamenova* EU:C:2018:808.

¹¹⁵ *Kamenova* was fined for, *inter alia*, failing to provide sufficient information on herself and the product sold as well as for failing to inform the consumer of his rights (including the right to withdraw from the contract), see further Case C-105/17 *Kamenova* (n 114) paras 13-16.

¹¹⁶ See further Case C-105/17 *Kamenova* (n 114) para 37.

¹¹⁷ See further *ibid* paras 41-42.

¹¹⁸ See further *ibid* para 30.

¹¹⁹ See further *ibid* paras 32-34.

¹²⁰ For full list of the relevant criteria, see *ibid* para 38.

¹²¹ See further *ibid* paras 39-40.

Kamenova was a *trader*, unless it was determined that she did so ‘for purposes relating to [her] trade, business, craft or profession’.¹²² This was left to the referring national court to determine.

5 CONCLUDING REMARKS

Since the beginning of the new millennium, the landscape of cross-border commerce has been altered significantly. Technological developments have opened the door for individuals to engage in commercial activities at a distance through online platforms. The EU legislator has followed these developments by taking legislative acts aimed at regulating various aspects of online commerce. However, the primary focus of the legislative activities in question has *not* been on clarifying the legal position of online participants in the gig economy *vis-à-vis their counterparties, i.e., buyers or recipients of services*. Instead, the focus has been on (i) clarifying the relationship between such economic actors and the online intermediaries they use to engage in commerce (e.g., by providing criteria for determining whether the actors are under the control of the intermediary and thereby in an employment relationship) and (ii) regulating intermediaries, for example by imposing obligations on them *vis-à-vis* their users.

As an example, insofar the Digital Services Act does provide rules that concern the relationship between a seller or service provider, on the one hand, and a buyer or service recipient, on the other, the rules are imposed *on online intermediaries* with the aim of clearly identifying *a trader* to a potential *consumer*. Furthermore, the new proposal for a directive on digital labour platforms is concerned with clarifying whether providers of services are in an employment relationship with the platform they use and, if that is the case, providing said workers with certain minimum rights (*vis-à-vis* the platform). The proposal does not address or otherwise regulate whether an eventual employment relationship affects the liability of a worker (service provider) *vis-à-vis* its counterparty (service recipient). Further, although both the Online Platform Regulation and the Digital Services Act provide rules on liability, the rules are confined to liability of online intermediaries and platforms and do not address, let alone limit, the liability of the user (a seller or service provider) towards another user (a buyer or service recipient).

In terms of providing rules for the protection of those using online intermediaries for engaging in commerce, the Online Platform Regulation provides a wide definition, which encompasses everyone using a platform for commercial *or* professional activity. In terms of obligations and liabilities, imposed on sellers of products or providers of services *vis-à-vis* their counterparties, and the obligations of online intermediaries in relation to the same, the scope of the relevant EU legislation is still based on a traditional definition of the concepts of *trader* and *consumer*. Accordingly, ascertaining the legal position of economic actors that participate in the gig economy online is still primarily based on whether they fall within the definition of a *trader*. The E-Commerce Directive, enacted in 2000, is an exception in this regard, as it arguably covers individuals engaging in online commerce without having the status of a trader, *i.e.*, in cases where activity of such non-professional actors is not limited to emails or other individual communication.

¹²² See further Case C-105/17 *Kamenova* (n 114) paras 44-45. Textual editions by the Author.

It follows from the above that a key matter for any person engaging in online commerce within the EU is to determine whether his or her activities are of such nature that they fall within the definition of a trader, i.e., whether they are acting for purposes relating to their *trade, business, craft or profession*. As evidenced by these definitional elements and the case law of the CJEU, the term *trader* is wide and encompasses various forms of commercial activity. Further, the CJEU has pursued an effect-based approach when determining whether an actor falls within the definition - the fact that one of the parties to a commercial relationship has the legal position of a consumer has been used as an argument for determining that the other party has the legal position of a trader.

However, the concepts trader and consumer are self-standing and individual terms, with the effect that although one party might fulfil the definitional requirements of being a consumer that does not automatically mean that the other party has the legal position of a trader. As articulated by the ECJ in *Kamenova*, whether an online seller of products has the position of a trader is based on different factors, such as the activity in question being organised (e.g., established and/or regular), and whether the activity is carried out with a profit motive, or whether the actor is in a superior position vis-à-vis its counterparty. However, these are only examples of the factors that can lead to the definition of a trader – the factors are neither exhaustive nor exclusive.

The legislative steps that have been taken with regard to obligations imposed on online intermediaries have led – or are likely to lead (depending on whether legislative proposals are enacted as legislation) – to added clarity for actors operating in the grey zone between professional and non-professional actors *as regards their relationship with intermediaries*. As a result, the legal position of those participating in the gig economy online is arguably clearer as regards their relationship with online platforms and their rights in that respect. As regards the relationship between gig economy participants and their commercial counterparties (buyers or recipient of services), determining the legal position is still based on a case-by-case assessment on whether gig participants should be considered as traders, inter alia by taking into account the position of the counterparty. It remains to be seen whether the EU legislator finds it necessary to provide further clarity to online participants in the gig economy on their legal position under EU law, for example in the legislative procedure regarding the proposal for the directive on online labour platforms.

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