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C. Riefa, Consumer Protection and Online Auction Platforms. Towards a Safer Legal Framework*

Marco B.M. Loos**

This book, already four years old, only recently found its way to my desk. On the one hand that is sad, on the other hand it gives us the possibility to see to what extent recent legislative action sufficiently deals with the specificities of online (auction) platforms.

As regards that recent legislative action: in the recent New Deal Communication (COM (2018) 183 final), page 5), the European Commission indicated that consumers concluding contracts through online platforms often believe they conclude a contract with the platform whereas in reality they may conclude a contract with a third party. In this respect, the distinction made by Riefa (page 3) between two types of online (auction) platforms is relevant. The first type is a scheme by which the platform operates as an intermediary between consumer and seller or service provider (two-sided model), whereas in the second scheme the platform has acquired ownership of the goods traded through the platform and therefore operates as the seller towards the consumer (one-sided model). The latter category, referred to in the book as proprietary platforms, is legally not very challenging, as to contracts concluded through (and with) the platform both the Consumer Rights Directive and the Consumer Sales Directive are applicable. With regard to the first category, however, the position of the consumer is much more uncertain. Currently, the debate on the Modernization Directive or Omnibus Directive (COM (2018) 185 final, discussed by me in *European Review of Private Law (ERPL)* 2019, page 113–134) is coming to a close as the European Parliament and the Council have reached an agreement as to its content. The upcoming directive will lead to a new Article 6a in the Consumer Rights Directive. Paragraph 1 of that Article requires the provider of an online marketplace to indicate in a clear and comprehensible manner and in a way appropriate to the means of distance communication:

1. on the basis of which criteria the order is determined by which the goods, services and digital content are listed,

* Farnham & Burlington: Ashgate Publishing, 2015, xxi +254 p.

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2. whether the third party whose goods, services or digital content may be obtained through the online marketplace is a trader,
3. if the third party is not a trader: that European consumer law is not applicable to the contract;
4. if the third party is a trader: which trader is required to comply with which obligations towards consumers arising from European consumer law.

The Member States are allowed to impose further information requirements on online market places, provided that these are proportionate, non-discriminatory and justified on grounds of consumer protection (paragraph 2). In order to fulfil its obligations under paragraph 1, the online marketplace may rely on the declaration of the third party to the online marketplace, paragraph 1 under (b). The online marketplace is therefore not required to check whether the third party indeed is a trader or another consumer - which is confirmed by recitals (27) and (28) of the preamble to the Modernization Directive. However, this implies that a rogue seller hiding his commercial identity may effectively get away with that, and the online market would in most cases not be liable. In this respect, Riefa indicates (page 176) that Article 14 E-Commerce Directive will offer a defence against consumers' damages claims unless the platform has actual knowledge of the rogue seller's illegal activity or is aware of facts of circumstances from which that illegal activity is apparent and has not taken sufficient action in response to that knowledge or awareness. Riefa (page 179) argues that the online platform should in fact be liable for not only IP infringements, but also for other narrowly defined breaches of consumer protection law by these sellers. It is clear that her plea, which I support, has not yet been taken up by the European legislator.

This also implies that some of her earlier findings will still hold true also when the Modernization Directive becomes applicable to online platform contracts. In her book (page 69), Riefa points out that empirical research she conducted in 2012 shows that consumers concluding contracts through online auction platforms have insufficient information and contact information on the identity of the seller. Moreover, research conducted in 2007 by the Office of Fair Trading, which at that time was the public regulator in the UK, already showed that some businesses trading through online auctions were failing to clearly identify themselves as businesses. Whereas this, at the time, in part was due to the platforms' business models, it was already then clearly against European consumer law. Nevertheless, Riefa's empirical research from 2012 showed that on some platforms not much had changed since (page 72-73). More generally, the online auction industry shows a common lack of compliance with the information obligations under the Consumer Rights Directive and the E-Commerce Directive - and when information was given, it often lacked transparency (page 101). It therefore seems unlikely that the introduction of the new Article 6a of the Consumer Rights Directive will be a

game-changer in this respect - unless of course the public regulators actively enforce compliance.

Riefa does much more in her book. I can only briefly indicate the content of the remaining chapters. In Chapter 4 (page 103-124) she shows how the right of withdrawal functions in the case of online auctions and which problems may arise. Chapter 5 (page 125-146) discusses the control of unfair terms in online auction contracts. Her empirical research shows that online auction platforms impose many unfair terms upon consumers, and she argues that neither private nor public enforcement is likely to clear the market from such unfair terms. I do not see any reasons to assume that this has changed since she wrote her book - but the possibility for regulators to impose high fines on the basis of the Modernization Directive may in the future lead us to a different conclusion *if*, again, action is taken here. Finally, in Chapter 6 (page 147-173), she discusses private redress and public enforcement on online auction platforms. The book closes with some conclusions (page 219-222).

Riefa has written a thorough and thought-provocative book that - notwithstanding its limitation to online auction platforms - is of fundamental importance to all online platform contracts. Clearly, even though it is four years old, the book is far from outdated and should prompt the EU legislator to further regulate the online platform sector.

