

2023 - STUDY QUESTION

RESPONSIBILITY OF ONLINE MARKETPLACES FOR ONLINE INFRINGEMENT OF INDUSTRIAL PROPERTY RIGHTS

National Group: Belgium

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I. CURRENT LAW AND PRACTICE

A. RESPONSIBILITY REGIMES APPLICABLE TO OMS

1. In your jurisdiction, please indicate if the responsibility of OMs for IPRs infringement is subject to the following legislation (please answer YES or NO and cite the applicable texts)

a. the General IP Law regime

Yes.

The responsibility of OMs for IPRs infringements can be based on the following provisions of the General IP Law regime:

- Trademark infringement:
 - Articles 9.2(a) and 9.3(b) of Regulation (EU) 2017/1001 of 14 June 2017 on the European Union trade mark (hereafter, "EUTM Regulation" - [here](#)):
 - "2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trademark, the proprietor of that EU trademark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:
 - (a) the sign is identical with the EU trademark and is used in relation to goods or services which are identical with those for which the EU trademark is registered; [...]
 - 3. The following, in particular, may be prohibited under paragraph 2:
 - (b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder."
- Articles 2.20.2(a) and 2.20.3(b) of the Benelux Convention on Intellectual Property (hereafter, "BCIP" - [here](#)):
 - "2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the registered trademark, and without prejudice to the possible application of ordinary law in matters of civil liability, the proprietor of that registered trademark shall be entitled to prevent all third parties not having his consent from using any sign where such sign:
 - a. is identical with the trademark and is used in the course of trade in relation to goods or services which are identical with those for which the trademark is registered [...]

3. *The following, in particular, may be prohibited under paragraph 2 (a) to (c): [...]*
 - b. *offering the goods or putting them on the market, or stocking them for those purposes, under the sign, or offering or supplying services thereunder.”*
- Design infringement:
 - Articles 19.1 (registered designs) and 19.2 (unregistered designs) of Regulation (EC) 6/2002 of 12 December 2001 on Community Designs (hereafter, “Regulation 6/2002” - [here](#)):
 - “1. *A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.*
 2. *An unregistered Community design shall, however, confer on its holder the right to prevent the acts referred to in paragraph 1 only if the contested use results from copying the protected design.”*
 - Article 3.16 BCIP:
 - “1. *Without prejudice to the application of ordinary law relating to civil liability, the exclusive right in a design shall allow its right holder to challenge the use of a product in which the design is incorporated or on which the design is applied, which has an identical appearance to the design as filed, or which does not produce a different overall impression on an informed user, taking into consideration the designer’s degree of freedom in developing the design.*
 2. *Use shall cover, in particular, the making, offering, putting on the market, sale, delivery, hire, importing, exporting, exhibiting, or using or stocking for one of those purposes.”*
 - Patent infringement:
 - Article XI.29, §1, of the Belgian Code of Economic Law (hereafter, “CEL” - [here](#)):

“§1. *The patent gives the right holder the right to prohibit any third party who has not obtained his consent:*

 - a) *from making, offering, putting into circulation, using, importing or stocking a product which is the subject-matter of the patent;*
 - b) *using a process which is the subject-matter of the patent or, if the third party knows or, in view of the circumstances, it is clear that the use of the process is prohibited without the consent of the proprietor of the patent, offering it for application on Belgian territory;*
 - c) *to offer, put into circulation, use, import or stock a product obtained directly according to the process which is the subject-matter of the patent, or import or stock it for these purposes.”*

These provisions list the acts of exploitation for which third parties need prior authorization from the IPRs holders and which the IPRs holders may prohibit in the absence of such an authorization.

Furthermore, Articles XVII.14, §4, and XI.334, §1, CEL also allow to obtain an injunction against “intermediaries” whose services are used by a third party to infringe any kind of IPR. In this respect, Article XI.334, §1, refers more specifically to persons providing “*services used in acts of infringement on a commercial scale*”, which undoubtedly includes OMs since their services can be used by third parties to offer counterfeit goods for sale. From the outset, it should be noted that the possibility of obtaining injunctions against intermediaries does not imply that they are (co-)responsible for the act of infringement; they are just “actionable” since they are in a position to contribute to the cessation of the infringement committed through the services they offer. This action is available in respect of any IPR infringement (incl. trademark, design and patent infringement).

b. a Special Digital Law regime

Yes.

It should first be stressed that this Special Digital Law regime is not strictly speaking a responsibility regime but rather a regime of exemption from liability.

Article 14 of the Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter, “e-Commerce Directive” - [here](#)) provides that:

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
- (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

In Belgium, the above-mentioned Article 14 was transposed by Article 20 of the Act of 11 March 2003 on certain legal aspects of information society services, which was subsequently repealed and replaced by Article XII.19 CEL, which provides that:

“§1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider is not liable for the information stored at the request of a recipient of the service, on condition:

- 1° that it does not have actual knowledge of illegal activity or information, or that, as regards claims for damages, it is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
- 2° that it, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and provided that it acts in accordance with the procedure laid down in Paragraph 3.*

§2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

§3. Where the provider has actual knowledge of an illegal activity or information, it immediately notifies the public prosecutor, who shall take the appropriate measures in accordance with Article 39bis of the Code of Criminal Procedure.

As long as the public prosecutor has not taken any decision concerning the copying, inaccessibility and removal of documents stored in a computer system, the service provider may only take measures to prevent access to the information.”

For the sake of completeness, this Group notes that the e-Commerce Directive has been amended by Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (“Digital Services Act” - hereafter, “DSA” - [here](#)) and, in particular, that the above-mentioned Article 14 on the exemption of liability of information society service providers has been replaced by Article 6 of the DSA, which reads as follows (for the sake of clarity, this Group indicates in blue the changes made to Article 14 of the e-Commerce Directive):

“1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:

- (a) does not have actual knowledge of illegal activity or ~~information-illegal content~~ and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or ~~information-illegal content~~ is apparent; or
- (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal ~~information-content~~.

2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.

3. Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.

4. This Article shall not affect the possibility for a ~~court~~judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement, ~~nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.~~”

In addition to renewing and harmonizing the (conditional) exemption from liability for intermediary service providers, the DSA introduces new obligations that are applicable to all intermediary service providers. Extensive (and specific) obligations are introduced for online platforms, which include OMs. The DSA expressly provides that each state must ensure that breaches of these obligations are sanctioned in an effective, proportionate and dissuasive manner. In Belgium, it is likely that these sanctions will be applied based on Article 1382 of the (old) Belgian Civil Code (hereafter, “Civ.C.”), which falls under the General Law regime examined below.

The DSA came into force on 16 November 2022, but most of its obligations will not become applicable before 17 February 2024. However, for the largest digital service providers that the Commission will have designated as “very large online platforms” or “very large search engines”, the regulation will in principle become applicable earlier (i.e. four months after such designation).

Since most of the DSA obligations will only apply after the publication of this report, this Group will not take the obligations prescribed by the DSA in this report and will only refer thereto incidentally where relevant.

c. the General Law regime

The responsibility of OMs for IPR infringements can also be based on two provisions of the General Law regime:

- Article 1382 Civ.C., which provides that: “Any act of man which causes damage to another, obliges the person by whose fault it occurred to compensate it.”
- Article VI.104 CEL, which provides for a general prohibition of unfair trade practices among economic actors (undertakings), stating that: “Any act contrary to fair market practices whereby an undertaking causes or threatens to cause prejudice to the professional interests of one or more other undertakings is prohibited.”

The liability of an OM can therefore always be sought based on the General Law regime in parallel to their possible liability on the basis of the General IP Law regime. A liability dismissal in terms of the General IP Law regime does not necessarily mean a liability dismissal in terms of the General Law regime, and more particularly of the rules of civil liability and/or unfair trade practices. Thus, if the infringement is not established based on the General IP Law regime, it is still possible to invoke the General Law regime, and vice versa (V. FOSSOUL, “La responsabilité des intermédiaires en droit des marques et en droit d’auteur à la lumière de la récente jurisprudence européenne”, T.B.H., 2014/5, p.474; C. DE CALLATAY and S. DEPREUW, “La responsabilité des intermédiaires à la lumière de la nouvelle Directive ‘Digital Single Market’”, in A. STROWEL and J. CABAY, *Les droits intellectuels, entre autres droits*, 1st ed., Brussels, Larcier, 2019, p.129).

d. an alternative/different regime

The responsibility of OMs for IPR infringements is not subject to any alternative/different regime under Belgium law.

2. **If a Special Digital Law regime exists in your jurisdiction (applicable in particular to OMs), is this regime of responsibility more stringent or more liberal (e.g. exemption of responsibility, safe harbor, etc.) for OMs than the General IP Law, in case of IPRs infringement?**

In Belgium, the Special Digital Law regime is more liberal than the General IP Law regime. Indeed, the e-Commerce Directive introduced a “safe harbor” rule for intermediaries in case of passive (i.e. no authority, no control) and neutral (i.e. no knowledge) hosting. This “safe harbor” rule was transposed in Article XII.19 CEL reproduced in Question 1.b. If they fulfill the conditions set out in Article XII.19 CEL, OMs can thus rely on the exemption of liability and not be held liable for the IPRs infringement.

For the sake of completeness, however, this Group notes that as the e-Commerce Directive also provides that *“the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC”* (Recital 40), OMs may find it difficult to strike the right balance between the passivity and neutrality required to benefit from the exemption provided for in Article 14 of the e-Commerce Directive and the somewhat more proactive attitude to prevent any IPRs infringement that seems to follow from Recital 40 of this Directive. Thus, it cannot be excluded that, in certain cases, the technical measures and systems adopted by OMs to prevent IPRs infringements be considered as giving them a certain control or knowledge which could cause them to lose the benefit of the exemption from liability provided for in the Special Digital Law regime in force in Belgium (B. MICHAUX, S. HERMOYE and F. LEJEUNE, “2017: Retour critique sur les régimes de limitation de responsabilité prévus par la Directive eCommerce”, in F. PETILLION (dir.), *Handhaving van intellectuele rechten in België / Respect des droit intellectuels en Belgique*, 1st ed., Brussels, Intersentia, 2017, p.81). Article 7 of the DSA seems to address this potential inconsistency and the risk that may arise for OMs which would be “too” proactive in the fight against counterfeiting. This provision states that: *“Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 4, 5 and 6 solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in this Regulation.”*

3. **If a Special Digital Law regime exists in your jurisdiction, what justifies the application of a Special Digital Law regime to the OMs in relation to IPRs infringement?**

One of the main objectives of the e-Commerce Directive was to develop, as the name suggests, e-commerce sector, which was seen as *“a unique opportunity to create economic growth, a competitive European industry and new jobs”* (see Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, p.6; in this sense, see also Recital 2 of the e-Commerce Directive). Despite the expected positive effects of the development of the e-commerce sector, the European (hereafter, “EU”) legislator was of course aware that, like any “new” sector, it would also be the breeding ground for illegal activities, in this case potentially infringing IPRs. In this context, the EU legislator therefore considered, among others, the question of *“the allocation of liabilities between on-line service providers transmitting and storing illegal information and the persons who originally put such information on line”* (see Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, p.12 - [here](#)).

Even before the EU Commission’s proposal for the e-Commerce Directive (hereafter, “the Commission”), the European Parliament had repeatedly stressed the need to address the issue of (intermediary) liability at EU level. For example, in the Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce (COM(97)0157 C4-0297/97 - [here](#)), the EU Parliament called for the adoption of a liability regime at Union level (see point 14), noting that, given the horizontal nature of the problem, it could usefully be dealt with in the framework of the Directive on information society services (i.e. e-Commerce Directive) currently under discussion at Commission level (see point 16). In addition, during the discussion of the then proposed Copyright Directive (prior to the discussion of the proposed e-Commerce Directive), the

European Parliament noted that various stakeholders had expressed concern about the absence of a liability regime in the Directive under discussion, and called on the Commission to speed up the process of drafting the e-Commerce Directive, in which it was intended to address this horizontal issue.

In response to these multiple concerns, the Commission thus included a liability regime for intermediaries in the e-Commerce Directive. In this respect, the Commission stated the following in the Explanatory Memorandum of the Directive proposal:

“There is considerable legal uncertainty within Member States regarding the application of their existing liability regimes to providers of Information Society Services when they act as ‘intermediaries’, i.e. when they transmit or host third party information (information provided by the users of the service). These activities have been the subject of the different Member States’ initiatives adopted or currently being examined on the issue of liability.

In view of the limited degree of knowledge providers have about the information that they transmit or store via interactive communication networks, the main problem that arises is the allocation of liabilities between on-line service providers transmitting and storing illegal information and the persons who originally put such information on line.

Questions also arise as regards the ability of providers to control the information they transmit or store.

In this context, divergent principles have been adopted in those Member States which have introduced new legislation specifically addressing this issue. Equally divergent approaches are being discussed in those Member States which are assessing the need to legislate. Moreover, despite the limited case-law available in Europe, divergences in rulings and reasoning by the courts can already be noted.

For the internal market these divergences could be the source of obstacles for the cross border provision of Information Society services (for instance if a Member State decides to block access to information stored in the server of a service provider established in another Member State where the applicable liability regime is deemed to be unsatisfactory). In some Member States, this situation may also inhibit activities such as the provision of hosting facilities. Indeed the current situation creates an incentive for providers to establish such activities in Member States with favorable regimes (forum shopping). The situation also leaves different parties (service providers, content providers, persons whose rights have been violated and consumers in general) under considerable legal uncertainty. [...]

Only the activities involved in serving as on-line intermediaries are covered. These activities are characterized by: (i) the fact that the information is provided by recipients of the service and (ii) the fact that the information is transmitted or stored at the request of recipients of the service [...]

Limitations to liability are established in a horizontal manner, i.e. they affect liability for all types of illegal activities initiated by third parties online (e.g. copyright piracy, unfair competition practices, misleading advertising, etc.). It should be clear, however, that the provisions of this section do not affect the underlying material law governing the different infringements that may be concerned. This section is restricted to the establishment of the limitations on the liability. If a service provider fails to qualify for such limitations, the nature and scope of his liability will be established on the basis of Member States legislation.

The distinction as regards liability is not based on different categories of operators but on the specific types of activities undertaken by operators. The fact that a provider qualifies for an exemption from liability as regards [to] a particular act does not provide him with an exemption for all of his other activities” (see Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final - [here](#)).

At a later stage of the legislative process at EU level, it was reiterated that the liability of intermediaries had been regulated in different ways at national level and that this negatively affected the functioning of the internal market, which is why the Commission proposed the regime of Articles 12 to 14 of the e-Commerce Directive. The Commission further indicated that this was a very important and sensitive area, to which particular attention had been paid in the proposal for the e-Commerce Directive in close consultation with the parties concerned, so that a reasonable compromise could be reached, taking due account of all the interests involved.

The first Commission's report on the application of the e-Commerce Directive (/ * COM/2003/0702 final * / - [here](#)) sheds further light on the rationale for the intermediaries' (exemption of) liability regime:

"4.6. Liability of internet intermediaries

[...]

The limitations on the liability of intermediaries in the Directive were considered indispensable to ensuring both the provision of basic services which safeguard the continued free flow of information in the network and the provision of a framework which allows the internet and e-commerce to develop. Different approaches in the legislation and case law emerging from Member States and the resulting legal uncertainty for cross-border activities gave rise to the risk of obstacles to the free provision of cross-border services. However, Community-level action was limited to what was deemed necessary to prevent such a risk materializing. [...]

Articles 12-14 provide, in a harmonized manner, for situations in which the intermediaries mentioned in these Articles cannot be held liable and Member States may not create additional conditions to be satisfied before an intermediary service provider can benefit from a limitation on liability."

In view of the above, one of the main reasons for exempting intermediaries from liability is therefore the functioning of the internal market: the free flow of services and information must be ensured. The basic services that facilitate this flow must be provided without liability obstacles for intermediaries so that the Internet and e-commerce can also develop. Confirming this, reference can also be made to Recitals 40, 41 and 46 of the e-Commerce Directive.

More recently, the EU Commission noted that *"new and innovative information society (digital) services have emerged"* compared to the services existing on the day of the adoption of this Directive, and that these new services *"have contributed deeply to societal and economic transformations in the Union and across the world"* and that *"the use of those services has also become the source of new risks and challenges, both for society as a whole and individuals using such services"* (see 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, 15 December 2020, COM(2020) 825 final, p.1 - [here](#)).

With this in mind, the EU legislator has adopted the DSA, one of whose main objectives is to strengthen the fight against illegal content, which includes the sale of counterfeit goods and services via OMs (see Art. 3(h)). To this end, the EU legislator decided to maintain the core principle of the (exemption of) liability regime contained in the e-Commerce Directive, while also imposing new obligations in addition to the current regime in order, *inter alia*, to specify the measures to be adopted by information society service providers to continue to be eligible for an exemption regime. In this respect, reference may be made, *inter alia*, to Chapter 3 of the DSA, which imposes due diligence obligations to ensure a transparent and safe online environment. For example: OMs shall facilitate the possibility for any third party to notify them the presence of any alleged illegal content on their platform (Art.16); any notification submitted by "trusted flaggers" shall be processed in priority (Art.22); OMs must implement an internal complaint-handling system and cooperate with out-of-court settlement bodies to resolve any legal issues (Art. 20 and 21); OMs shall publish a transparency report on any content moderation action performed with regard to illegal content (Art.15).

4. If OMs can benefit from an exemption of responsibility/safe harbor, what are the criteria for determining whether an OM is subject to this regime (e.g. active or passive role of the OM, knowledge/control of the presentations of the products, awareness of the IP rights infringement, etc.). Please give examples (case law, etc.).

Before going through the applicable criteria, even if it seems obvious, it should first be stressed that the exemption from liability for OMs only applies when the illegal activities and/or content are attributable to third parties to whom OMs provide their services as an intermediary, and not to OMs' own illegal activities and/or contents (i.e. for which OMs would be recognized as a (co-)author, and not only as an intermediary).

The **first condition** for invoking the exemption from liability provided for in Article XII.19 CEL relates to the activity exercised by the intermediary. Indeed, in order to benefit from this exemption, the **intermediary must provide an information society service**, which is *"any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service"* (cf. Recital 17 of the e-Commerce Directive and Article I.18, 1°, CEL).

The **second condition**, directly related to the first, for invoking the exemption provided for in Article XII.19 CEL, is that the information society service provided must be a **hosting service**. Thus, the exemption from liability under consideration requires not only a certain category of operators (i.e. information society services providers), but also a specific type of activity carried out by these operators (i.e. hosting services), while other activities which may also be carried out by these operators will not be eligible for the exemption. In this respect, reference can be made in particular to the Explanatory Memorandum of the e-Commerce Directive proposal: “*the fact that a provider qualifies for an exemption from liability as regards a particular act does not provide him with an exemption for all of his other activities*” (see Proposal for a Directive of the European Parliament and of the Council on certain legal aspects of electronic commerce in the Internal Market, COM(1998) 586 final, p. 27 - [here](#)).

Regarding OMs, the European Court of Justice (hereafter, “ECJ”) has expressly recognized that they do provide information society services and, in particular, hosting services:

“An internet service consisting in facilitating relations between sellers and buyers of goods is, in principle, a service for the purposes of Directive 2000/31. That directive concerns, as its title suggests, ‘information society services, in particular electronic commerce’. It is apparent from the definition of ‘information society service’, cited at paragraphs 8 and 9 of this judgment, that that concept encompasses services provided at a distance by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services and, normally, for remuneration. It is clear that the operation of an online marketplace can bring all those elements into play” (ECJ, 12 July 2011, C-324/09, *L’Oréal vs eBay*, para. 109).

In a similar case brought by Lancôme against eBay following the advertisement and offer for sale of counterfeit goods by third parties on eBay’s platform, the French-speaking Brussels Enterprise Court ruled that eBay was indeed providing a hosting service when allowing third parties to publish offers for sale on its platform and when hosting such offers for sale (31 July 2008, *R.D.T.I.*, 2008/4, p. 526).

The **third condition** set out in Article XII.19 CEL consists of two alternative conditions, namely that the hosting services provider:

- **does not have knowledge** of the illegal information or activity taking place on its platform (Art. XII.19, §1, 1°, CEL); or
- **upon obtaining such knowledge, acts expeditiously** to remove or disable access to the illegal content (Art. XII.19, §1, 2°, CEL).

In the aforementioned Belgian case *Lancôme vs eBay*, the Court dismissed Lancôme’s claims against eBay, stressing that as an intermediary, eBay could not be required to (pro)actively monitor its platform and that it could only be required to react after being informed of the alleged IPRs infringement taking place on its platform. In this case, immediately after receiving Lancôme’s notification that infringing products were being sold on its platform, eBay carried out some verifications and blocked access to the alleged illegal sales offers that had been made. eBay also responded to Lancôme’s requests for information. The Court ruled that in doing so, eBay had acted as a normally careful and diligent e-commerce player and could therefore benefit from the exemption from liability (31 July 2008, *R.D.T.I.*, 2008/4, p.526).

It is important to note that the mere fact that the OM does not act immediately when it is notified by the IPRs holder of an alleged infringement of its rights does not automatically deprive this OM of the benefit of the exemption from liability regarding the infringement subject to the notification. Indeed, according to the Dutch-speaking Brussels First Instance Court, the notification must be sufficiently detailed for the service provider to be able to identify the alleged infringement on its platform in order to deprive it of the benefit of the exemption in the event that it does not act with sufficient diligence to put an end to the alleged infringement after receiving the notification (2 April 2015, *A.M.*, 2015/5-6, p.399-400). For the sake of completeness, this Group notes that, although the above-mentioned decision concerns copyright infringement and therefore falls outside of the scope of this Group’s report, the Court’s teaching as to the possible impact of notifications to OMs is also relevant from the perspective of industrial property rights infringement.

Finally, although it is not actually identified as a **fourth condition**, Article XII.19, §2, CEL states that OMs cannot rely on the exemption “*when the recipient of the service is acting under the authority or the control of the provider*”. According to a well-established case-law of the ECJ, the OM must thus remain **neutral or passive regarding the content hosted** on its platform. In this respect, the ECJ held that:

“114. It is clear from the documents before the Court and from the description at paragraphs 28 to 31 of this judgment that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimize or promote certain offers for sale.

115. As the United Kingdom Government has rightly observed, the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (see, by analogy, *Google France and Google*, paragraph 116).

116. Where, by contrast, the operator has provided assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31” (ECJ, 12 July 2011, C-324/09, *L’Oréal v. eBay*, para. 116).

To conclude this Question 4, reference can be made to the legal saga *Christian Louboutin vs Amazon*, in which, alongside the question of the OM’s neutrality or passivity, was also raised the question of how the consumer perceives acts of advertising and offering for sale carried out by third parties on the OM’s platform and, more specifically, whether, given the circumstances, the consumer is likely to perceive these acts as being carried out by or on behalf of the OM (a question which is in fact closely related to the question of neutrality as it relates to the degree of the OM’s involvement in the acts considered).

In this saga, Christian Louboutin sought an order that Amazon cease using, in the course of trade, a sign identical to its “red sole” trademark for goods identical to those for which the sign had been registered, both for goods offered for sale directly by Amazon and for goods offered for sale, via Amazon’s platform, by third parties. While the debate was relatively easy with regard to the first question (i.e. sale directly by Amazon), it was quite more difficult regarding the second question (sales, on Amazon’s platform, by third parties).

In a judgment of 7 August 2019, the French-speaking Brussels Enterprise Court held Amazon liable for IPRs infringement, without distinguishing between products offered for sale directly by and on behalf of Amazon or by and those offered for sale on behalf of third parties making use of the OM’s services made available by Amazon (*R.A.B.G.*, 2019, pp.1742 et seq.). In reaching its decision, the Court emphasized in particular the (pro)active role played by Amazon in, *inter alia*, the presentation of third-party offers on its platform and the subsequent perception by the consumer of these offers likely to originate from Amazon.

The Brussels Court of Appeal partially reversed the first instance decision, holding that Amazon was only liable for advertisements for its own products, while “*the use of the trade mark in an advertisement for the sale of infringing goods by a third-party seller is not attributable to the operator of the online marketplace - even if the latter’s identity is visible - because it is not part of the operator’s own commercial communication*” (25 June 2020, *I.R.D.I.*, 2020, pp.238 et seq).

Only a few months after the judgment of 7 August 2019, and only a few days after Amazon filed an appeal against it, Christian Louboutin filed a new action before the French-speaking Brussels Enterprise Court, in which it reiterated almost the same claims as those made in the parallel proceedings, but against other companies within the Amazon group. The French-speaking Brussels Enterprise Court decided to refer the following preliminary question to the ECJ:

“Must Article 9(2) of [Regulation 2017/1001] be interpreted as meaning that the use of a sign identical with a trademark in an advertisement displayed on a website is, in principle, attributable to its operator if, in the perception of a reasonably well-informed and reasonably observant internet user, that operator has played an active part in the preparation of that advertisement or if that advertisement may be perceived by such an internet user as forming part of that operator’s own commercial communication?

Will such perception be influenced:

- by the fact that that operator is a well-known distributor of a wide range of goods, including goods in the category of those featured in the advertisement; or

- *by the fact that the advertisement thus displayed presents a heading in which the service mark of that operator is reproduced, that mark being well known as a distributor's trade mark; or*
- *furthermore, by the fact that, as well as displaying that advertisement, that operator offers services traditionally offered by distributors of goods in the same category as that to which the goods featured in the advertisement belong?"*

On 22 December 2022, the ECJ responded to the above preliminary question as follows:

“Article 9(2)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark must be interpreted as meaning that the operator of an online sales website incorporating, as well as that operator's own sales offerings, an online marketplace may be regarded as itself using a sign which is identical with an EU trade mark of another person for goods which are identical with those for which that trademark is registered, where third-party sellers offer for sale, on that marketplace, without the consent of the proprietor of that trade mark, such goods bearing that sign, if a well-informed and reasonably observant user of that site establishes a link between the services of that operator and the sign at issue, which is in particular the case where, in view of all the circumstances of the situation in question, such a user may have the impression that that operator itself is marketing, in its own name and on its own account, the goods bearing that sign. In that regard, the following are relevant: the fact that that operator uses a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace; the fact that it places its own logo as a renowned distributor on all those advertisements; and the fact that it offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods” (ECJ, 22 December 2022, joined cases C-148/21 and C-184/21).

In view of the above ruling and of the position taken in its decision of 7 August 2019, it is likely that the French-speaking Brussels Enterprise Court will uphold Louboutin's claims and condemn Amazon both for goods offered for sale directly by Amazon and for goods offered for sale, via Amazon's platform, by third parties.

B. THE IMPLEMENTATION OF THE OMS RESPONSIBILITY REGIMES

General IP Law regime (if applicable to OMs)

5. **In your jurisdiction, under what conditions can an OM be held responsible for IP rights infringement or, on the contrary, to be exempted from responsibility for an IP rights infringement in each of these cases?**
 - a. **in patent law**
 - b. **in trademark law**
 - c. **in design law**

5.1. Conditions for liability for IPRs infringement under General IP Law regime

Firstly, a distinction should be made between: (i) the concept of “being held responsible” or “liable” directly or indirectly and (ii) the fact that it shall be possible to require OMs to comply with specific measures in case of IPRs infringements regardless of whether they are responsible or not. In the latter case, OMs would be “actionable”, i.e. IPRs holder may obtain an injunction against such OMs to stop the infringement being committed on their platform, but they would not be liable for damages as long as they comply with the injunction order (see also response to Question 1.a, last paragraph, where reference is made to Articles XVII.14, §4, and XI.334 CEL under which injunctions against intermediaries may be adopted irrespective of their liability). In the present Question 5.1, we shall limit our answer to the concept of being held responsible (directly or indirectly).

a. Patent law

This Group is not aware of any cases that would have been brought against OMs for alleged patent infringements.

To be liable for a patent infringement an OM would have to:

- manufacture, offer, put into circulation, use, or import or stock for this purpose a product covered by the patent;
- offer, put on the market, use, or import or stock for this purpose a product obtained directly by the process to which the patent relates.

Depending on the extent of the role which the OM plays in the offering of goods on its platform, it could potentially be considered to be itself liable, in particular if the OM takes an active role in the offering and promoting third party products on its platform and/or the storage thereof. Nevertheless, its liability can be exempted in case it can benefit from the safe harbor under the Special Digital Law regime (see below the response to question 7).

Given that no Belgian case law seems to have applied these general principles in practice for OMs, it is difficult to determine exactly how the conditions will be interpreted and applied in practice. Possibly, some learnings from cases involving trademark infringements could be applied by analogy. However, this may only be to the extent that patent and trademark law share similar concepts, such as “offering”, “putting on the market” or “stocking” infringing products (and even in these cases, these concepts may be interpreted somewhat differently). On the other hand, patent law does not use concepts such as the perception of the user which plays an important role in the assessment under trademark law (see below).

b. Trademark law

A number of ECJ’s rulings have provided useful criteria for assessing whether an online intermediary service provider can be held liable for an unauthorized use of a trademark by a third party on its platform (in which case it will have to be established that the use took place in the course and for the purpose of the OM’s commercial activities) or whether it can instead rely on the fact that the use was made by a third party using its platform and that it cannot therefore be held liable.

In particular, the cases *L’Oréal vs eBay* (C-324/09), *Coty vs Amazon* (C-567/18) and *Louboutin vs Amazon* (joined cases C-148/21 and C-184/21) are relevant for the assessment of the conditions under which OMs can be held responsible for IPRs infringements committed on their platforms as a result of the unauthorized use of registered trademarks by a third party.

In short, an OM can be held responsible for the unauthorized use by a third party on its platform of a sign identical to a registered trademark for goods identical to those registered under that trademark if the following conditions are met:

- the OM offers its own services through its platform in addition to the services offered by third-parties;
- the offer for sale by third-parties is made without the prior consent of the trademark owner; and
- a well-informed and reasonably observant user of the online platform may believe that the OM is marketing in its own name and own account the goods bearing this trademark. In that regard, the following can be relevant: the OM uses a uniform method for presenting all the offers published on its platform, incl. both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party; the OM places its own logo as a renowned distributor on all those advertisements; and the OM offers third-party using its platform, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and/or shipping of those goods (ECJ, 22 December 2022 *Louboutin vs Amazon*, joined cases C-148/21 and C-184/21, ECLI:EU:C:2022:1016).

c. Design law

Similarly to patent law, it does not appear that any case law has been rendered by Belgian courts regarding the liability of OMs for design rights infringement. Therefore, it is not clear how the principles and concepts from the statutory provisions (see Question 1.a) and case law on liability of other infringers shall be applied to OMs.

Once again, it is possible that elements of the cases in trademark law (discussed above) can be applied by analogy. This may be more straightforward than for patent law, given that the concepts of design law and trademark law are generally considered more similar than is the case between those of patent law and trademark law. For instance, design law also utilizes a concept of “user”, albeit an “informer user” instead of the “average user” which is applied in trademark law.

5.2. Conditions for exemption from liability under General IP Law regime

The General IP Law regime does not provide for a specific rule of exemption from liability.

That being said, and for the sake of good order, this Group recalls that, as indicated in Question 4, the exemption regime set up by the e-Commerce Directive is intended to apply horizontally and may therefore be invoked by an OM to escape possible liability in the event of IPRs infringement, irrespective of the IPR concerned.

6. **Please indicate under what circumstances an OM can be considered an IP infringer, co-infringer / joint tortfeasor, accomplice, or a contributory infringer.**

In Belgium, the concepts of IPRs co-infringer, joint tortfeasor or contributory infringer do not exist as such (see also the response of the Belgian group to Q204 - B. MICHAUX, G. PHILIPSEN, C. MEYERS, N. D’HALLEWEYN, M. DEMEUR and E. DE GRUYSE, “Liability for contributory infringement of IPRs” - and to Q264 - B. DE LANGE, T. DUBUISSON, D. GLORIEUX, O. HOTTAT, S. LENS, D. OP DE BEECK and B. VANBRABANT, “Joint liability for IP infringement”).

Some provisions do evoke concepts close or similar to those. In this respect, this Group already mentioned Articles XVII.14, §4, and XI.334 CEL which permit to obtain an injunction against “intermediaries” whose services are used by a third party to infringe an IPR. However, for an OM to be considered as strictly liable (and not only “actionable”), it must meet the conditions set out above in the response to question 5.

It is possible that more than one person is considered liable if they each have committed an act which is subject to the authorization of the IPRs holder. In such cases, they will likely be considered as liable *in solidum*. This means that each of the infringers can be held responsible for the full amount of the damage suffered by the IPRs holder, and the latter can pursue any one of them for payment of the entire damages. If, for instance, both the OM and vendor who offered the infringing products for sale are considered to be liable under the General IP Law regime, the IPRs holder can seek compensation for all harm it has suffered from both the OM or the vendor (provided of course, that it cannot obtain more than the actual damage it incurred and can only be compensated once). If compensation is sought from the OM, the latter may try to seek indemnification from the vendor (for instance, based on the general terms of the OM, which the vendor will likely have accepted when placing an offer on the OMs platform).

Special Digital Law regime (if such a regime is applicable to OMs)

7. **In your jurisdiction, what are the conditions for an OM to be held responsible on this basis? What obligations must the OM fulfill in order to be exempted from responsibility for an IP rights infringement? If possible, please give examples for each IPR separately.**

See this Group’s response to Question 4. As a reminder, the Special Digital Law regime mainly provides an exemption from liability under the General IP Law or General Law regimes and does not aim to create additional liability for OMs.

In addition to the answer to Question 4, this Group notes that, to its knowledge, to date, the exemption from liability provided for in Article XII.19 CEL has only been applied to OMs in the case of infringement of trademark rights (or copyright, but these are not covered by this report), and not in the case of infringement of industrial property rights (patents and designs).

General Law regime (if this regime is applicable to OMs)

8. **In your jurisdiction, what are the conditions for an OM to be held responsible on this basis? What obligations must the OM fulfill to be exempted from responsibility for an IP rights infringement? If possible, please give examples for each IPR separately.**

8.1. Conditions for liability for IPRs infringement under General Law regime

The conditions for responsibility of OMs for IPRs infringement under the General Law regime are the same as for any other liability established under this regime. This means that the conditions of either or both the

provisions for civil liability set out in Article 1382 Civ.C. and those for unfair market practices set out in Article VI.104 CEL must be assessed:

- The establishment of liability under Article 1382 Civ.C. requires (i) a wrongful act, (ii) a damage and (iii) a causal link between the fault and the damage. The fault can consist of the mere violation of a legal provision or the general standard of care. These general principles apply fully in relation to OMs and online IPRs infringement.
- Article VI.104 CEL contains the general prohibition on unfair market practices between undertakings. It stipulates that undertakings cannot commit acts contrary to fair market practices which (threaten to) cause harm to the professional interests of other undertakings. In essence, this concerns the application of the general standard of care as discussed above to the relation between undertakings.

If OMs commit an IPRs infringement, this constitutes a fault *per se*, without it being necessary to prove a moral element on the part of the infringer. Therefore, OMs that are found liable under the General IP Law regime, can also be held liable under the General Law regime (of course, the harm suffered by the IPRs holder can only be compensated once).

Even if no IPRs infringement has been committed, it is still possible to invoke the General Law regime. This will be the case if OMs infringed upon another legal provision or their general duty of care. In order to evaluate an infringement upon the general duty of care, OMs' behavior is compared to that of a reasonably foreseeing and careful person in similar circumstances. Though this is theoretically possible, to this Group's knowledge, OMs have not yet been found liable based on the General Law regime without also committing an IPR infringement. This could perhaps be the case if an OM would not provide for possibilities to report alleged infringements committed on their platform or if they do not act expeditiously to put a stop to such infringements when notified by IPR holders.

8.2. Conditions for exemption from liability under General Law regime

The General Law regime does not provide for a specific rule of exemption from liability.

Other liability regime (if applicable to OMs)

9. **In your jurisdiction, what are the conditions for an OM to be held responsible on this basis? What obligations must the OM fulfill to be exempted from responsibility for an IP infringement? If possible, please give examples for each IPR separately.**

9.1. Conditions for liability for IPRs infringement under other liability regime

The responsibility of OMs for IPR infringements is not subject to any alternative or different liability regime under Belgium law.

9.2. Conditions for exemption from liability under other liability regime

To this Group's knowledge, there is no rule allowing the exemption of OMs' liability in case of IPRs infringement on their platform other than that provided for by Article XII.19 CEL, which is part of the Special Digital Law regime (see Questions 4 and 7).

C. **SANCTIONS THAT CAN BE IMPOSED ON OMS**

General IP Law regime (if applicable to OMs)

10. **In your jurisdiction, what are the sanctions that can be imposed on an OM when the conditions of its responsibility are met?**

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (hereafter, "Directive 2004/48" - [here](#)) provides for various sanctions that can be applied to infringers, and for some of them also to intermediaries (thus OM). These provisions have been transposed into Books XI and XVII of the CEL and into the BCIP. In addition, the EUTM Regulation and Regulation 6/2002 also provide for sanctions, respectively for trademark and design infringement.

OMs may be sanctioned differently depending on the role they play in the act of infringement. In this respect, as indicated above, a distinction must be made between the OM that has committed the infringement itself (10.1) or the OM that acts as an intermediary whose services are used by a third party to commit the infringement (10.2).

10.1. The OM qualifies as infringer

Where the OM is found to be liable of IPRs infringement, the following measures and sanctions may be taken against it:

- The Directive 2004/48 provides for the possibility of ordering the **production of evidence** that is under the control of the other party:
 - Article 6: *“on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information”*.
 - Article 7.1: *“Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto”*.

Depending on the IPR infringed, the timing and the nature of the request, this type of measure may be requested on the basis of (i) Article XI.334 or Article XVII.16 CEL, (ii) Articles 19.3, 871 and/or 877 of the Belgian Judicial Code (hereafter, “Jud.C.”), or (iii) Article 1369bis/1 or Article 584 Jud.C.

- Courts can order **provisional and protective measures** under Articles 2.22 BCIP (trademarks), 3.18 BCIP (designs), XI.334 CEL (patents) and XVII.14 CEL (all IPRs in the context of injunctive relief proceedings conducted in the form of summary proceedings), all of which transpose Article 9 of Directive 2004/48 (which is also echoed in Articles 131 of EUTM Regulation and 90 of Regulation 6/2002).

Article 9 of Directive 2004/48 states that these measures may consist of:

- *“an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder”*;
- *“the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce”*; and
- in the case of an infringement committed on a commercial scale and if the injured party demonstrates circumstances likely to endanger the recovery of damages *“the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information”*.

These measures can “*in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.*”

- Articles 2.22 and 3.18 BCIP and Articles XI.334 and XVII.14 CEL, which transpose Article 11 of Directive 2004/48, Article 130 of the EUTM Regulation and Article 89 of Regulation 6/2002, set out the possibility for the courts to issue against the infringer an **injunction** aimed at prohibiting the continuation of the IPR infringement. Such relief is also possible against an intermediary, as it will be seen below.
- Articles 2.22 BCIP, 3.18 BCIP, XI.334 CEL and XVII.16 CEL, transposing article 8 of Directive 2004/48, provide that the Court, where it is justified and proportionate can **order the infringer** (and/or any other person, such as intermediaries, as we will see below) **to provide** the right holder with **all information available** concerning the origin and distribution networks of the goods and services which have infringed the trademark/design/patent and with all the data relating thereto.

For the sake of completeness, this Group notes that to obtain information about an IPR infringement that has not yet been established, the action cannot be based on Articles XI.334, §3, or XVII.16 CEL (which provide that the Court may order the communication of information if it “*establishes an infringement*” in the context of the ongoing proceedings), but only on Articles 19.3, 871 and 877 Jud.C. or on Article 1369bis/1 Jud.C. (see above). In this sense, the Antwerp Commercial Court has ruled that the IPRs owner could not request that an Internet service provider be ordered to communicate information on customers (possible infringers) on the basis of Article XI.334 CEL because the infringement had not yet been established, but that such measure was however possible under Article 877 Jud.C. (Comm. Antwerp, 19 January 2017, A/16/5641, HOR 2017, p.81).

- Pursuant to Articles 2.22 BCIP, 3.18 BCIP and XI.334 CEL, which transpose Article 10 of Directive 2004/48, the judge may take “**corrective**” **measures** where they are likely to contribute to the cessation of the infringement. These measures can consist of reparation *in natura*, such as the recall from the channels of commerce, the definitive removal from the channels of commerce or the destruction of goods which infringe a trademark/design right, as well as, in appropriate cases, materials and instruments principally used in the manufacture of those goods. Those measures shall be carried out at the expense of the infringer, unless there are particular reasons for not doing so.

Another corrective measure that can be ordered is the posting of the judgment or a summary thereof, for a period determined by the judge, both outside and inside the infringer’s establishments, and/or the publication of the judgment or summary thereof in newspapers or in any other way, all at the infringer’s expense.

Corrective measures can also be ordered in the context of an infringement action itself, for example following an infringement of an EU trademark, by combining Article XVII.16 CEL and Article 130 of Regulation 2017/1001. An action for an injunction in summary proceedings can indeed be brought in case of infringement of any intellectual property right (Articles XVII.14 to XVII.20 CEL).

- The infringer may be ordered to pay **damages**, under Articles 2.21 BCIP, 3.17 BCIP and XI.335 CEL, that transpose Article 13 of Directive 2004/48, Article 130 of the EUTM Regulation and Article 89 of Regulation 6/2002.

The principle of compensation is that of “full reparation” of the damage suffered, which means that the compensation must be equivalent to the actual damage suffered by the injured party. The aim is to “*restore the injured party to the state he would have remained in if the fault had not been committed, which implies that reparation is supposed to fully compensate all aspects of the damage suffered by the victim, without, however, procuring him any enrichment*”.

The law does not establish any rule for quantifying the damage suffered. The assessment of the damage is therefore based on case law, which has laid down certain guidelines for assessing the damage suffered. The calculation of the amount of damage is based on the loss of profit (i.e. the profits that the IPR owner could have made if there had been no infringement) and the losses incurred (i.e. the costs of discovering, establishing, prosecuting and terminating the infringement, as well as moral damage). But most of the time - and although this method should be applied only if no other more precise method of calculation is available - the courts proceed to an “*ex aequo et bono*” assessment of the damage.

There are two exceptions to the principle of the prohibition of exceeding the level necessary for the full reparation of the damage suffered, which are applicable when the infringer is in bad faith. The first exception is an order to surrender the profits made because of the infringement (see Articles XI.335, §2, indent 3, CEL, 2.21.4 BCIP and 3.17.4 BCIP). The second exception is the confiscation of the infringing goods (designs - Article 89 of Regulation 6/2002; patents - Article XI.335, §3, CEL).

10.2. The OM qualifies as an intermediary

Intermediaries can be relied upon to contribute to bringing an end to infringements committed by third parties using their services, regardless of their liability. The following measures can be ordered against them:

- **Provisional and protective measures:** As mentioned above, Articles 2.22 BCIP, 3.18 BCIP, XI.334 CEL and XVII.14 CEL transpose Article 9 of the Directive 2004/48. These measures can also be taken against intermediaries under Articles 131 of EUTM Regulation and 90 of Regulation 6/2002. Article 9 of Directive 2004/48 provides that *“an interlocutory injunction may be issued against an intermediary whose services are being used by a third party to infringe an intellectual property right”*. This interlocutory injunction is intended *“to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder”*.
- The **obligation to provide information** can be ordered against certain intermediaries (and thus OMs) based on the same provisions as those applicable to IPRs infringers. The intermediary against whom this obligation can be imposed is the one who, on a commercial scale, was found in possession of the infringing goods, was found using infringing services or was found providing services used in infringing activities. The intermediary can then be asked to provide all information in their possession concerning the origin and distribution networks of the infringing goods or services and to communicate all related data, provided that this is a justified and proportionate measure. The reason for the demand for information against the intermediaries is that they often possess information that is useful not only for stopping the infringement, but also for determining the extent of the damage, such as the origin of the distribution channels of the infringements.

For instance, the President of the Dutch-speaking Brussels Enterprise Court ordered the producer and distributor of counterfeit electrical appliances following an injunction action to provide the opposing party with (i) the origin of the infringing products, the full contact details of the manufacturers and suppliers and (ii) an exhaustive list of the countries and distribution channels where the infringing products are offered for sale (President of the Dutch-speaking Brussels Enterprise Court, 28 December 2017 XX).

- Article XVII.14, §4, CEL allows for an **injunction** to be obtained against intermediaries whose services are used by a third party to infringe any IPR in the context of an action for an injunction conducted in the form of summary proceedings. Such proceedings are heard in an accelerated manner. The President of the Court can provide the intermediary a period of time to end the unlawful activity, can order the **publication of the decision** and can impose any **other measure relevant to contribute to the cease and desist** of the infringement (such as penalty payments). Based on Articles 2.22 BCIP, 3.18 BCIP and XI.334 CEL, an injunction can be ordered against intermediaries in the context of a “classic” infringement action. These articles transpose Article 11 Directive 2004/48.

Special Digital Law regime (if such a regime is applicable to OMs)

11. In your jurisdiction, what are the sanctions that can be imposed on an OM when the conditions of its responsibility are met?

The Special Digital Law regime examined in Question 4 clarifies the conditions under which an OM is exempted from liability for IPR infringement but does not itself impose sanctions. If the OM does not meet the requirements to be exempted from liability under the Special Digital Law regime, the OM can then be held liable - and sanctioned - based on the General IP Law regime or of the General Law regime (see, respectively, Question 10 and Question 12).

Nevertheless, the law provides for administrative and criminal sanctions on OMs that do not comply with their obligations, as for example:

- Article XV.31 CEL introduces a warning procedure whereby the Economic Inspection can urge the online service provider (thus the OM) to end the unlawful activity within a certain period. If no action is undertaken within this period, the case can be transferred to the public prosecutor which can start a criminal investigation.
- Pursuant to Article XV.118 CEL, OMs can be subject to criminal sanctions for not complying with an injunction or for refusing to cooperate in relation to illegal activities performed on their platform.

For the sake of completeness, and although the DSA is only applicable as of 17 February 2024, this Group notes that in addition to renewing and harmonizing the principle of exemption from liability contained in the e-Commerce Directive (cf. Question 1.b and 3), the DSA introduced new obligations applicable to intermediary service providers (thus to OMs) and accompanied them with strict sanctions in case of non-compliance (including fines up to 6% of their global turnover). However, as the DSA is not yet in force and, in any event, this report is limited to examining the sanctions that can be imposed on OMs for IPRs infringement, these sanctions are not directly relevant in this case and will therefore not be examined in this report.

General Law regime (if this regime is applicable to OMs)

12. In your jurisdiction, what are the sanctions that can be imposed on an OM when the conditions of its responsibility are met?

As discussed above, the two relevant General Law regimes are the tort liability of Article 1382 Civ.C. and the general prohibition of unfair trade practices among economic actors of Article VI.104 CEL.

Nevertheless, the sanctions are very similar as those that can be imposed pursuant to the General IP Law regime:

- Production of evidence;
- Making available of information;
- Provisional and protective measures, including an interlocutory injunction (which cannot be imposed for a general unlawful act, but which can be used to cease and desist an unfair trade practice);
- Damages;
- Reparation *in natura* (including corrective measures like the recall, removal or destruction of goods);
- Publication of the cease and desist order is also a possible sanction for committing unfair trade practices, to the extent the judge considers that the publication of the order would contribute to the cease and desist of the unfair practices.

Other liability regime (if applicable to OMs)

13. In your jurisdiction, what are the sanctions that can be imposed on an OM when the conditions of its responsibility are met?

N/A

II. POLICY CONSIDERATIONS AND PROPOSALS FOR IMPROVEMENTS OF YOUR GROUP'S CURRENT LAW

14. Could your Group's current law or practice relating to the responsibility of online marketplaces for online infringement of industrial property rights be improved? If YES, please explain.

YES, but only to a certain (limited) extent.

While the very possibility of improvement is, *in per se*, always desirable, in this case, this Group considers that its current law and practice regarding the liability regime applicable to OMs is quite satisfactory, particularly given the fact that the ECJ case law has already provided numerous clarifications and nuances in

this area, which have made it possible to better circumscribe the scope of the intermediaries' liability and safe harbors.

In the opinion of this Group, the current law is therefore rather adequate and provides a flexible framework to address most situations in a reasonable manner. For example, the possibility to obtain injunctive relief relatively easily against intermediaries such as OMs, even when they cannot be held strictly liable, provides IPR holders with an effective means to stop an ongoing infringement.

However, the Group identifies below some specific points where it believes that it might be worthwhile to improve the current law.

15. Could any of the following aspects of your Group's current law relating to responsibility of online marketplaces for online infringement of industrial property rights be improved? If YES, please explain.

a. The regime of responsibility applicable to OMs?

YES, but only to a certain extent.

The Special Digital Law regime as provided in Articles 14 of the e-Commerce Directive and XII.19 CEL could be improved regarding the difficulty for OMs to find the right balance between the passivity and neutrality required to benefit from the exemption and the somewhat more proactive attitude to prevent IPRs infringement.

In a judgment of 22 June 2021, the ECJ expressly ruled that the implementation by a hosting service provider of measures to detect illegal content on its platform should not automatically mean that the operator plays an active role giving it knowledge of the illegal content (22 June 2021, C-682/18 and C-683/18, *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG*, para 109). Although this judgment concerns allegations of copyright infringement and did not concern an OM as such (which, strictly speaking, excludes this judgment from the scope of this report), the ECJ's teaching as to the possible impact of the implementation of measures aimed at detecting copyright's infringement could arguably be relevant from the perspective of industrial property rights infringement. Indeed, this judgment gives some indication on the question whether the operator of an online platform can benefit from the exemption from liability when it implements measures to detect IPRs infringements on its platform, which could potentially also be applicable in the case of an OM. To the knowledge of this Group, there is however no similar case law in the field of industrial property rights, so that this question remains undecided.

Be that as it may, this Group notes that this issue will most probably disappear with the entry into application of the DSA (for reminder, 17 February 2024), and more particularly of Article 7, which provides that "*providers of intermediary services shall not be deemed ineligible for the exemptions from liability [...] solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in this Regulation*" (see also Recital 26). Indeed, some of the obligations of the DSA provide for better risk mitigation on OM (e.g. obligation of traceability of traders, compliance by design, risk assessment etc.).

b. The implementation of the responsibility regimes applicable to OMs?

See above answer to Question 15.a.

c. The sanctions that can be imposed to OMs

N/A

16. Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

N/A

III. PROPOSALS FOR HARMONISATION

17. Do you believe that there should be harmonization in relation to the responsibility of online marketplaces for online infringement of industrial property rights?

Yes.

Harmonization is needed to provide the industry with access to a harmonized market and to provide consumers or recipients of OMs' services with similar protection and cross-border measures.

A. RESPONSIBILITY REGIMES APPLICABLE TO OMS

18. In case of IP rights infringement, should OMs be subject to:

- a. the General IP Law regime,
- b. a Special Digital Law regime, e.g. an exemption of responsibility (safe harbor),
- c. the General Law regime,
- d. an alternative/different responsibility regime.

OMs should be subject to the General IP Law regime, the Special Digital Law regime and the General Law regime, as it's currently the case under Belgian law. We do not see a reason to apply any alternative/different responsibility regime.

To assess the liability of OMs, first it should be assessed whether the litigious act committed on the OM's platform falls under the exclusive rights of IPR holders as provided by the General IP Law regime and/or whether it falls under the General Law regime. If this is the case, subsequently it should be determined whether the OM could be (entirely) exempted under the Special Digital Law regime.

In any event, this Group insists on the need to maintain, in case of IPR infringement, an exemption regime alongside the liability regime so as, on the one hand, to allow an information society services provider (as an OM), although the infringement has been committed through its services, to benefit from an exemption from liability (if it fulfills the conditions to that effect), while ensuring, on the other hand, that the IPRs holder has the possibility to seek (and obtain) injunctions against that provider to quickly stop the infringement. This ensures a balance between the interests of information society services providers, whose role is essential for the development of the e-commerce sector and for the free movement of goods and services, and of the IPRs holders, who must be able to benefit from tools to ensure the effective protection of their exclusive rights.

19. If OMs should benefit an exemption of responsibility/safe harbor, what should be the criteria for determining whether an OM should be subject to this regime (e.g. active or passive role of the OM, knowledge/control of the presentations of the products, awareness of the IP rights infringement, etc.)?

In line with the Belgian current law, OMs should be able to benefit from an exemption from liability when:

- Although permitted or facilitated by the OM's platform, the act of infringement in question is not carried out by the OM for its own account, but by and on behalf of a third party;
- The OM has a passive and neutral role, limited to the mere provision of intermediary services, and does not have, or cannot have had, in the circumstances of the case, knowledge of the infringing nature of the disputed act taking place on its platform;
- The OM has complied with its general duty of care and other obligations provided for under the DSA as soon as it enters into force;
- Once it gains knowledge of the illegal activity taking place on its platform, the OM acts expeditiously and takes all reasonable measures to put an end to the infringement and to prevent any identical or similar infringement in the future (i.e. remove or disable access to the illegal content).

Although the additional obligations for OMs under the DSA are not yet applicable and therefore this Group cannot yet judge of their effectiveness, these obligations aiming at setting up a mechanism for notification of allegedly illegal content, dealing with possible complaints and verifying and conserving information

provided by third parties using its platform, also appear to be desirable measures in the context of the considered harmonization.

B. THE IMPLEMENTATION OF THE OMS RESPONSIBILITY REGIMES

General IP Law regime (if this regime should be applicable to OMs)

- 20. Under what conditions should an OM be determined to be an IP infringer or, on the contrary, be exempted from responsibility for an IP rights infringement?**

The conditions as provided under the current law (as described in Section I, Question 5) should be used to determine whether an OM can be considered as an IPR infringer.

Additionally, even if an OM would not be considered as “liable” for an IPR infringement, it should still be “actionable”, *i.e.* IPR holders should be able to obtain injunctions requiring OMs to stop infringements being committed using their platforms.

Special Digital Law regime (if this regime should be applicable to OMs)

- 21. Under what conditions an OM should be held responsible on this basis? What obligations should the OM fulfill to be exempted from responsibility for an IP rights infringement?**

The conditions as provided under current law (as described in Section I, Questions 4 and 7) should be used to determine whether an OM can benefit from an exemption from liability under the Special Digital Law regime.

General Law regime (if this regime should be applicable to OMs)

- 22. Under what conditions an OM should be held responsible on this basis? What obligations should the OM fulfill to be exempted from responsibility for an IP rights infringement?**

The conditions as provided under current law (as described in Section I, Question 8) should be used to determine whether an OM can be considered responsible based on the General Law regime.

Other liability regime (if this regime should be applicable to OMs)

- 23. Under what conditions an OM should be held responsible on this basis? What obligations should the OM fulfill to be exempted from responsibility for an IP rights infringement?**

This Group does not believe that any other liability regime should be applicable to OMs.

C. SANCTIONS THAT SHOULD BE APPLICABLE TO THE OMS

General IP Law regime (if this regime should be applicable to OMs)

- 24. What should be the sanctions that should be applicable to an OM when the conditions of its responsibility are met?**

This Group believes that the current law allows for a proportionate sanctioning of OMs, whether they are considered as an infringer or as an intermediary whose services are used by a third party to commit counterfeit acts, and that the sanctions provided under the current law should thus be used within the framework of the considered harmonization.

Prior to the e-Commerce Directive, intermediary service providers (as OMs) could be held liable - and were thus sanctioned - when a third party using their platform for the purpose of infringing someone’s IPRs was not identified, and this even if the intermediary was not aware of the infringing nature of the contested act, did not know the identity of the third party or could not moderate the content placed on its platform for technical or practical reasons. Intermediary service providers were then left without legal protection and the risk was that they would start taking measures to limit the content placed on their platform on their own initiative,

which could pose a threat not only to the nascent internet industry, but also to freedom of expression. By analogy, one could imagine that if OMs were to be too easily or heavily sanctioned as intermediaries (because held liable, or even actionable), this could pose a threat to the free movement of goods and to free competition.

Special Digital Law regime (if this regime should be applicable to OMs)

- 25. What should be the sanctions that should be applicable to an OM when the conditions of its responsibility are met?**

This Group believes that the system currently in place should serve as a basis for the envisaged harmonization: if the OM complies with the conditions for exemption, it is exempt from liability, but can still be ordered to stop the IPR infringement taking place on its platform. If the OM does not, or no longer, comply with the conditions for exemption, it can be found liable for the IPR infringement taking place on its platform and sanctioned as such.

General Law regime (if this regime should be applicable to OMs)

- 26. What should be the sanctions that should be applicable to an OM when the conditions of its responsibility are met?**

This Group believes that the current law allows for a proportionate sanctioning of OMs under the General Law regime, and that the corresponding sanctions should thus be used within the framework of the considered harmonization.

Other liability regime (if this regime should be applicable to OMs)

- 27. What should be the sanctions that should be applicable to an OM when the conditions of its responsibility are met?**

This Group does not believe that any other liability regime - and corresponding sanctions - should be applicable to OMs.

Other

- 28. Please comment on any additional issues concerning any aspect of the responsibility of online marketplaces for online infringement of Industrial Property Rights you consider relevant to this Study Question.**

N/A

- 29. Please indicate which sectors' views provided by in-house counsel are included in your Group's answers to Part III.**

Food and beverages/FMCG: the current regimes and conditions to establish liability should be harmonized, in particular given that OMs can be used to offer goods in multiple jurisdictions, even worldwide. In addition, injunctive measures should flexibly be available to require OMs to put a stop to infringements made using their platforms, even if the OM itself is not responsible for the IPR infringement.