

15 July 2025

Litigation Trends Online Marketplaces and e- Commerce

Enrique Capdevila

Andrew Linch

James Maton

Claire Temple

Today's speakers

Today's presenters



Enrique Capdevila
ecapdevila@cooley.com
+32 2 486 7534



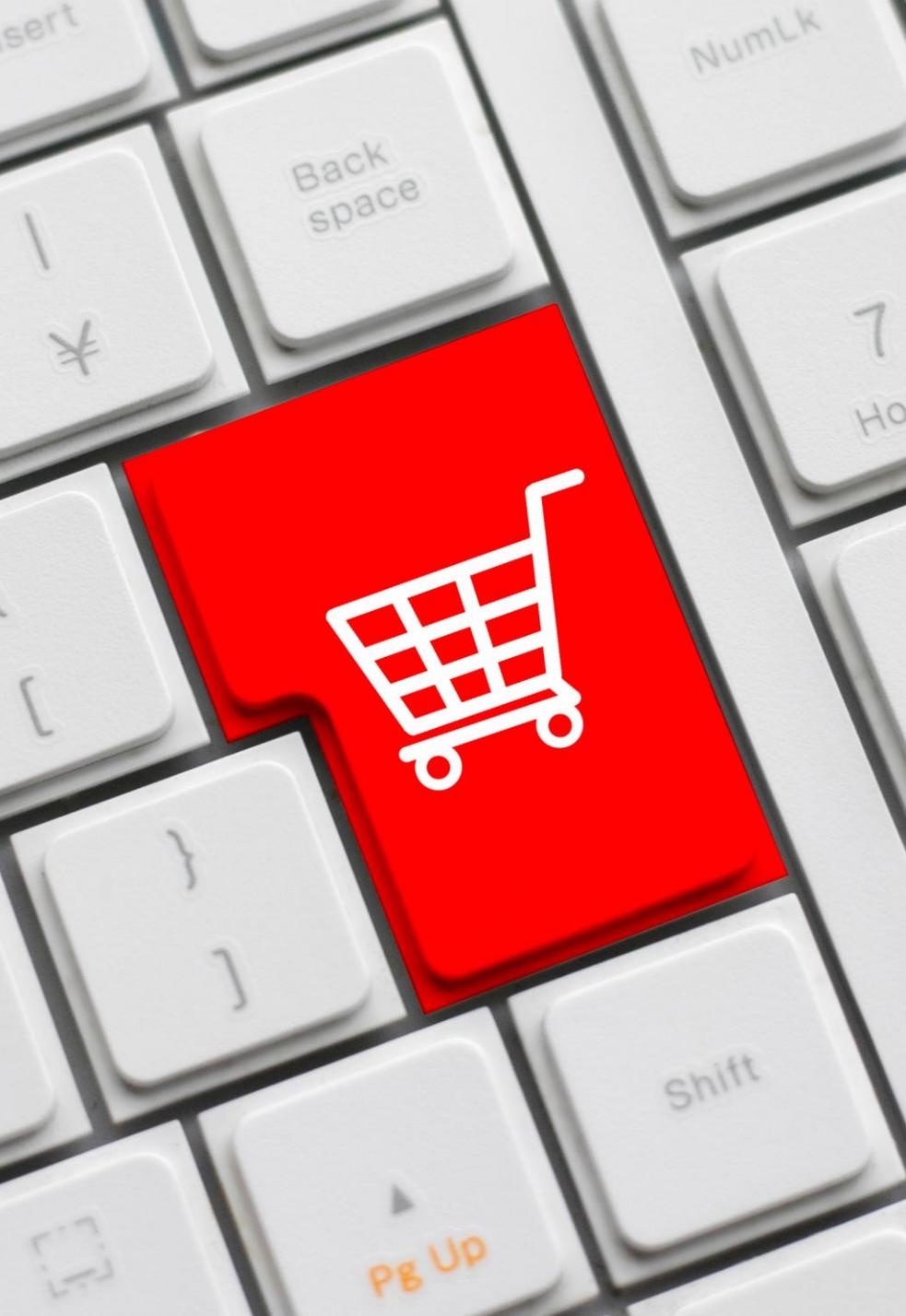
Andrew Linch
alinch@cooley.com
+44 20 7556 4207



Claire Temple
ctemple@cooley.com
+44 (0) 20 7556 4170

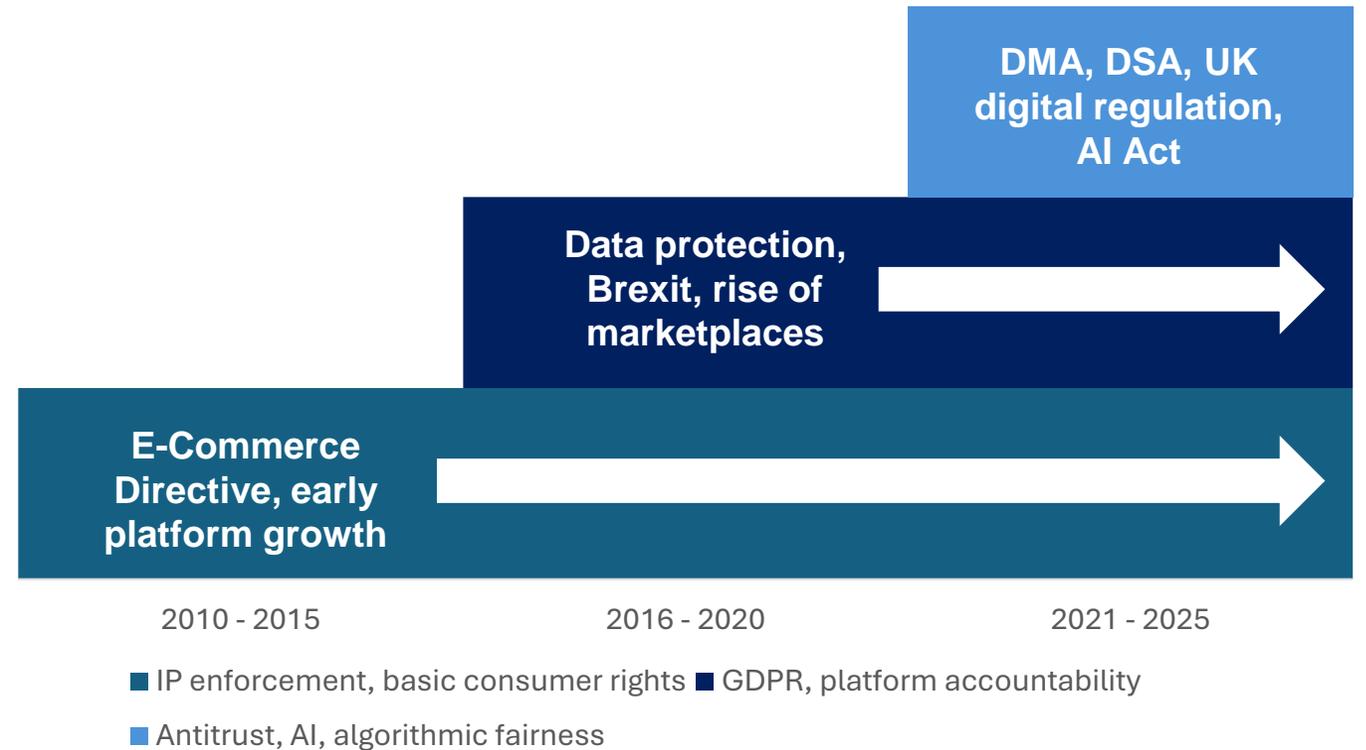


James Maton
jmaton@cooley.com
+44 20 7556 4547



Setting the Scene

Cooley view on changing litigation trends





Agenda

1. Safe harbours – the current status
2. Product safety in light of the New General Product Safety Regulation
3. IP infringement
4. Consumer protection and unfair commercial practices
5. Collective redress / class actions
6. Conclusion
7. Q&A

Safe harbour – the current status

The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition into red and orange. Small, glowing dots are scattered along these lines, creating a sense of motion and depth.

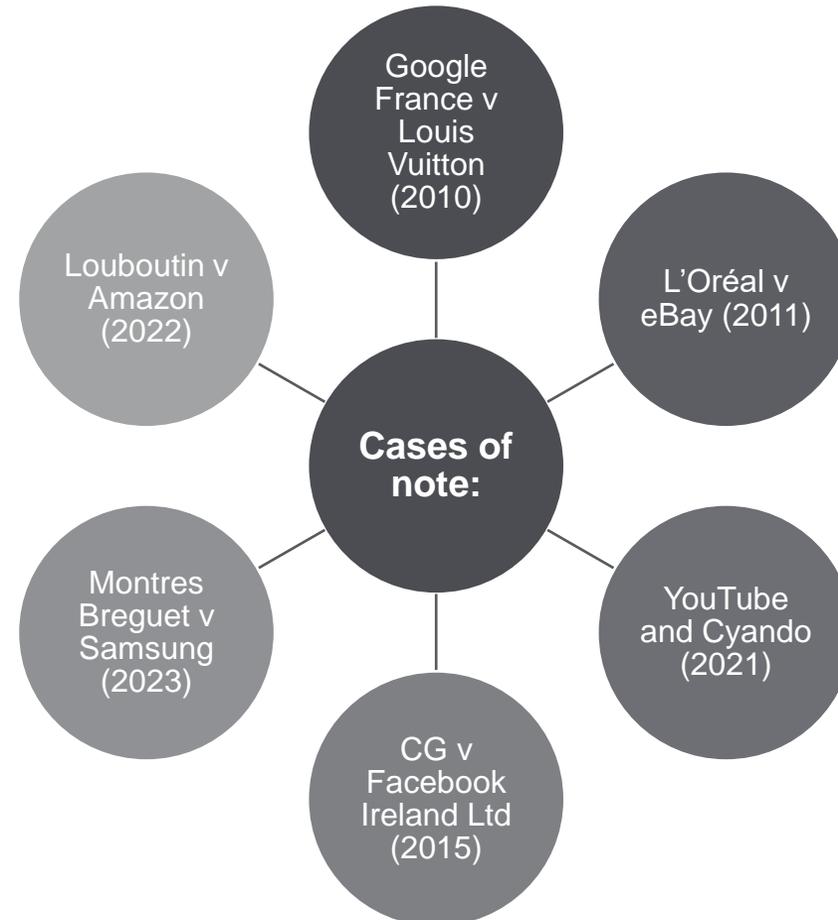
The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange. Small, glowing particles are scattered throughout, particularly concentrated along the lines. The overall effect is one of dynamic energy and movement.

EU

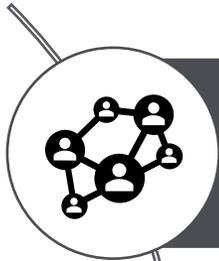
E-Commerce Directive

EU law dating back to 2000

- Intermediary defences: Articles 12-14 ECD/Regs 17-19 ECR
- Prohibition vs general monitoring obligation: Art 15 ECD
- Including hosting defence: Art 14 ECD, Reg 19 ECR



e-Commerce Regime: Hosting Defence



What is a hosting service? – Passive/neutral role:

- Online storage and distribution
- Networking & collaborative production
- Selection and referencing



Defence against what?

- Criminal liability
- Civil liability regarding claims for damages (not injunctions)



How does a service take advantage of the defence?

- No actual knowledge (for criminal liability defence)
- No actual or constructive knowledge (for civil liability)
- If has knowledge, acts expeditiously to remove content

e-Commerce Regime: Key Issues



When does a service stop being passive?

- Technical, automatic, no control over info



What amounts to actual knowledge?

- Sufficiently precise and adequately substantiated
- Apparent/manifest



What amounts to constructive knowledge?

- Aware of facts or circumstances on basis of which diligent operator should have realised content was unlawful



What is the meaning of expeditious?

- Context-dependent

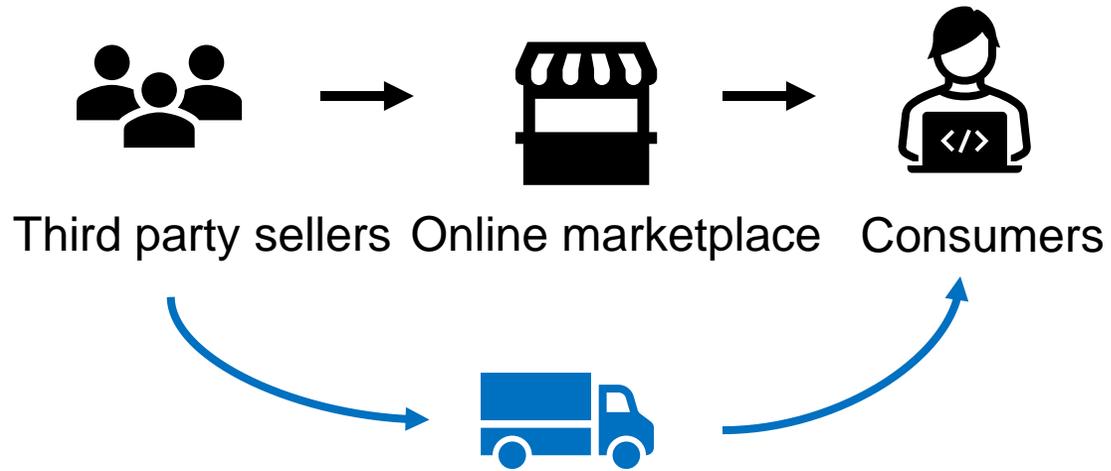


Proactive monitoring

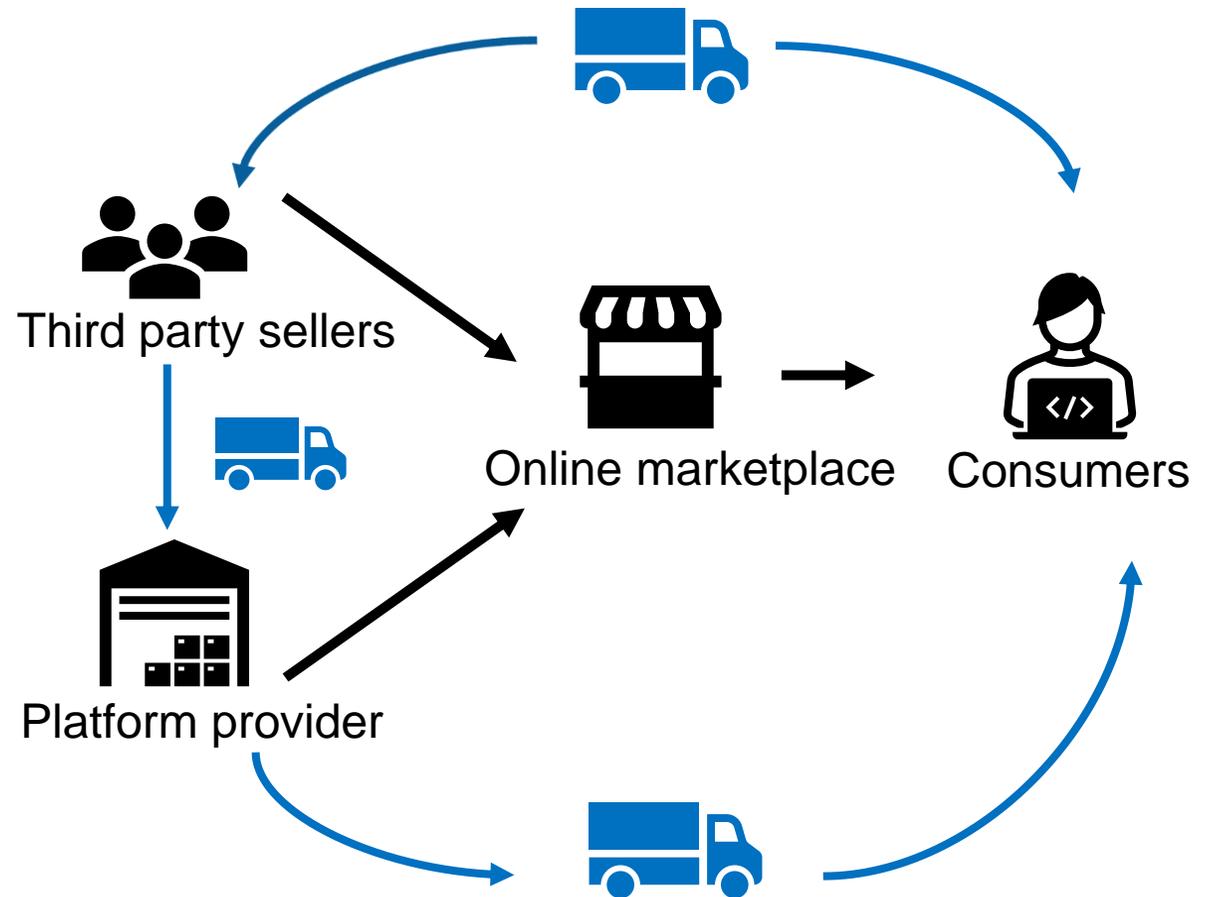
- Art 15 ECD – but specific monitoring obligations are ok
- Risk of losing hosting defence

Intermediary -v- Hybrid business model

Intermediary



Hybrid





EU Digital Services Act

- EU law came into force November 2022 (in phases)
- Focus in on safety and transparency for users of online services
- Content moderation obligations feature heavily
- Essentially restates the intermediary defences from the ECD regime – but with a few important qualifications

Other laws of relevance

Copyright:	Data Protection:	General Product Safety Regulation:
<ul style="list-style-type: none">• Important qualification to hosting defence• Online content-sharing service providers can be primarily liable for copyright-infringing user content• Unless obtain authorisation, or make best efforts to filter infringing content out, or take down expeditiously	<ul style="list-style-type: none">• Data controller and content host are in principle different concepts• Obligations to erase data can be used in takedown requests• Lack of clarity as to interaction between GDPR and ECD regimes	<ul style="list-style-type: none">• New specific role of "online marketplace"• Cross referencing certain obligations in DSA, particularly around Notice and Action (takedown requests) pro

X v Russmedia Digital SRL

- Pending **CJEU** case
- **Key questions** include:
 - Application of **E-Commerce Directive**
 - **GDPR** obligations
- **Advocate General delivered his opinion** on February 6, 2025:
 - operator of an online marketplace acts as a processor of personal data contained in ads and is not obliged to check their content.
 - However, with respect to personal data of registered user advertisers, the operator acts as a controller and must verify the identity of the user advertisers
- **Potentially pivotal**



The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange. Small, glowing particles are scattered throughout, particularly concentrated along the lines. The overall effect is a sense of dynamic energy and movement.

UK

UK: safe harbour under pressure for 3P marketplaces and other qualifying entities

- Legislation imposing new obligations and enforcement that cut across safe harbour e.g. product safety and unfair commercial practices
- Processes addressing those obligations mean a marketplace may have actual knowledge of issues creating liabilities
- Or they are said to be inconsistent with an automated, passive, technical role
- Regulators & claimants rely on a 3P marketplaces involvement in the marketing and sale process to expand jurisdiction and liability
- Risks increase with involvement in curating, ranking, presenting and promoting items for sale

EU prohibition against imposing general monitoring obligations was not implemented in the UK regulations implementing the EU Directive, and therefore may no longer be part of UK law, save in Northern Ireland (although it is an interpretative aid to the substantive defences)



UK Online Safety Act

- UK law came into force October 2023
- Staged implementation, regulator plays central role in designing detailed obligations
- Key obligations include systems to identify and remove criminally illegal content, and easy to use notice and takedown processes
- Focusses on systems and processes, not individual content disputes
- But potential to undermine liability position in respect of individual content

The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange, creating a sense of motion and energy.

Product Safety in light of the new General Product Safety Regulation

2019 – 2024

Unprecedented EU Product Regulatory reform

Market Surveillance Regulation	General Product Safety Regulation	Digital Services Act	Revised Product Liability Directive	Representative Actions Directive	Revised Blue Guide
AI Act	RED Common Charger	RED Delegated Act on cyber	Cyber Resilience Act	Cybersecurity Act	NIS2 Directive
Directive empowering consumers for the green transition	Right to Repair Directive	Ecodesign for Sustainable Products Regulation	Delegated Acts under energy labelling + old ecodesign frameworks	Packaging and Packaging Waste Regulation	Batteries Regulation
Data Act	Accessibility Act	Sale of Goods Directive	Digital Content Directive	Consumer law omnibus Directive	Machinery Regulation
Revised Construction Products Regulation	REACH restrictions (e.g. PFHxA, formaldehyde etc.)	Amendments to POPs Regulation	Revised CLP Regulation	WEEE targeted amendments	Revised Waste Shipments Regulation
Critical Raw Materials Act	Revised Environmental Crime Directive	Ban on products made with forced labour	Deforestation Regulation	Corporate Sustainability Reporting Directive	Corporate Sustainability Due Diligence Directive

2025 onwards

What's next?

Work to implement recently passed laws (secondary legislation, guidance etc.)	Increased enforcement	E-commerce Communication (policy document)	Proposed Customs Reform Package (carried over)	Proposed AILD ?
Proposed revision of the Waste Framework Directive including producer responsibility for textiles (carried over)	Proposed Toy Safety Regulation (carried over)	Proposed Green Claims Directive ?	Proposed omnibus package for sustainability reporting (CSRD, CSDDD)	Proposed omnibus package to remove certain paper requirements in product legislation
Fitness check digital area + proposed Digital Package (simplification legislation potentially cyber, DSA, AI Act)	Expansion of the Common Charger	Proposed REACH Revision	Proposed "universal" PFAS restriction under REACH	Proposed restriction on 1000+ skin sensitisers in clothing and textiles under REACH (carried over)
Continuation of other ongoing work on chemicals	Proposed revision of the Textile Labelling Regulation	First product specific Delegated Acts under ESPR (textiles and steel)	Potential horizontal Delegated Act under ESPR on reparability (incl. repair score)	Potential horizontal Delegated Act under ESPR recyclability and recycled content (EEE)
Continuation of ongoing work for certain product groups under energy labelling + previous ecodesign frameworks	Proposed Delegated Acts to expand the Right to Repair Directive	Proposed RED Delegated Act on reconfigurable radio systems (upload of software)	Proposed Digital Networks Act	Proposed Consumer Agenda 2025-2030 + Action Plan on Consumers in the Single Market (policy document)
Proposed Digital Fairness Act (consumer law)	Proposed Circular Economy Act	Potential proposal / policy arising from study on product safety and the circular economy?	Potential revision of the CPC Regulation, incl. more centralised enforcement powers for the Commission?	Potential proposal arising from study on third party litigation funding?

EU General Product Safety Regulation (GPSR)

Key changes seeking to modernise product safety rules

1 Aligns requirements for non-harmonised and harmonised products (i.e. CE marked)

2 Makes updates to deal with risks of new technologies

3 Makes updates in light of circular economy activities

4 Introduces new requirements for online sales

5 Introduces obligations on online marketplaces

6 Introduces mandatory accident reporting

7 New mechanism for consumers + other “interested parties” to report issues

8 Introduces requirements for recalls

9 Expands the role of Safety Gate

10 Stronger enforcement

The GPSR started to apply from 13 December 2024

EU GPSR litigation risk



Increased obligations for both online marketplaces and e-tailers + enhanced enforcement measures (Member State specific) = increased risk of regulator enforcement



Enhanced consumer rights + recalls = increased risk of consumer claims



Higher volume of information about accidents + product liability directive = increased risk of product liability claims



GPSR is one of the (many) regulations to which the new collective redress regime applies

EU GPSR: software + apps

When does the GPSR apply?

- The GPSR applies to all types of products (physical or **digital products** too, including **software**) that are placed or made available on the EU Single Market, as long as there are no specific provisions with the same objective under Union law which regulate the safety of the products concerned (e.g. childcare articles, furniture, gymnastic equipment, etc.).

Source: FAQs document on the GPSR [published](#) by the European Commission

Which products fall under the GPSR?

The **GPSR** covers products that are **tangible, non-tangible** or of mixed nature, including **apps and software products**. It also applies to products placed or made available on the market whether new, used, repaired or reconditioned.

Source: European Commission's [webpage](#) "Product safety legislation"

EU GPSR: software + apps (cont.)

2.9 Does standalone software fall within the definition of 'product' as defined in the GPSR?

Answer: The GPSR obligations apply to **standalone software** being as a **"product"** and as it does not fall into the categories of exceptions enumerated in Article 2 GPSR. The definition of 'product' in the Regulation has a wide scope so as to cover also intangible items such as standalone software, stating: *'any item, whether or not it is interconnected to other items, supplied or made available, whether for consideration or not, including in the context of providing a service, which is intended for consumers or is likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them.'* **The GPSR nevertheless is not to be seen as a software regulation as such, it regulates only the safety aspects of software.**

Source: FAQs document on the GPSR [published](#) by the European Commission (updated March 2025)

UK Product Regulation and Metrology (PRAM) Bill



Creates powers to take measures through Regulations to protect businesses and consumers, and improve compliance and enforcement



Enables the UK to respond to changes in EU law, and either converge or diverge

**EXPECT OBLIGATIONS FOR ONLINE MARKETPLACES
ASAP**



Enables the UK to regulate and address emerging technologies & associated risks



Aims to give businesses and consumers confidence in what they are purchasing

Awaiting Royal Assent ... any day now

IP Infringement

The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange. Small, glowing particles are scattered throughout, particularly concentrated in the lower right quadrant, creating a sense of motion and digital energy.

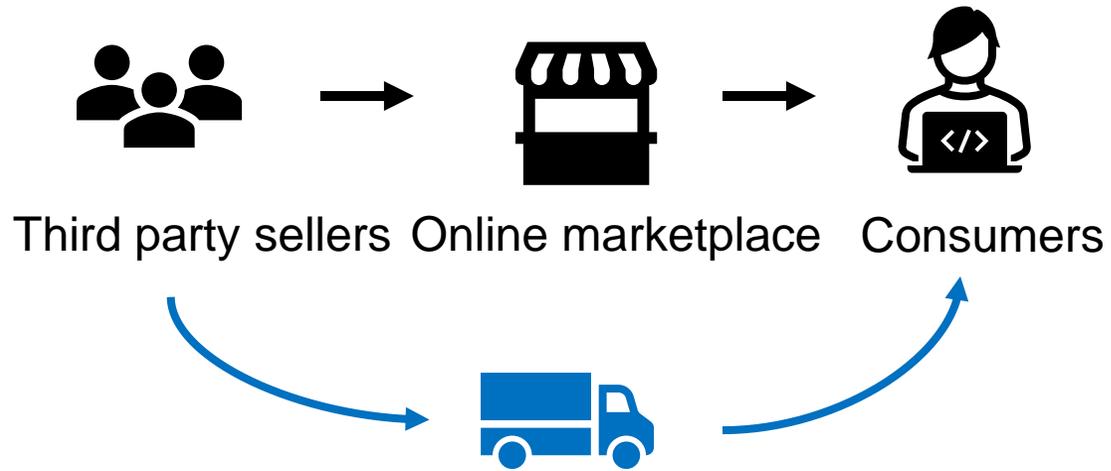
Trade mark “use” by online marketplaces



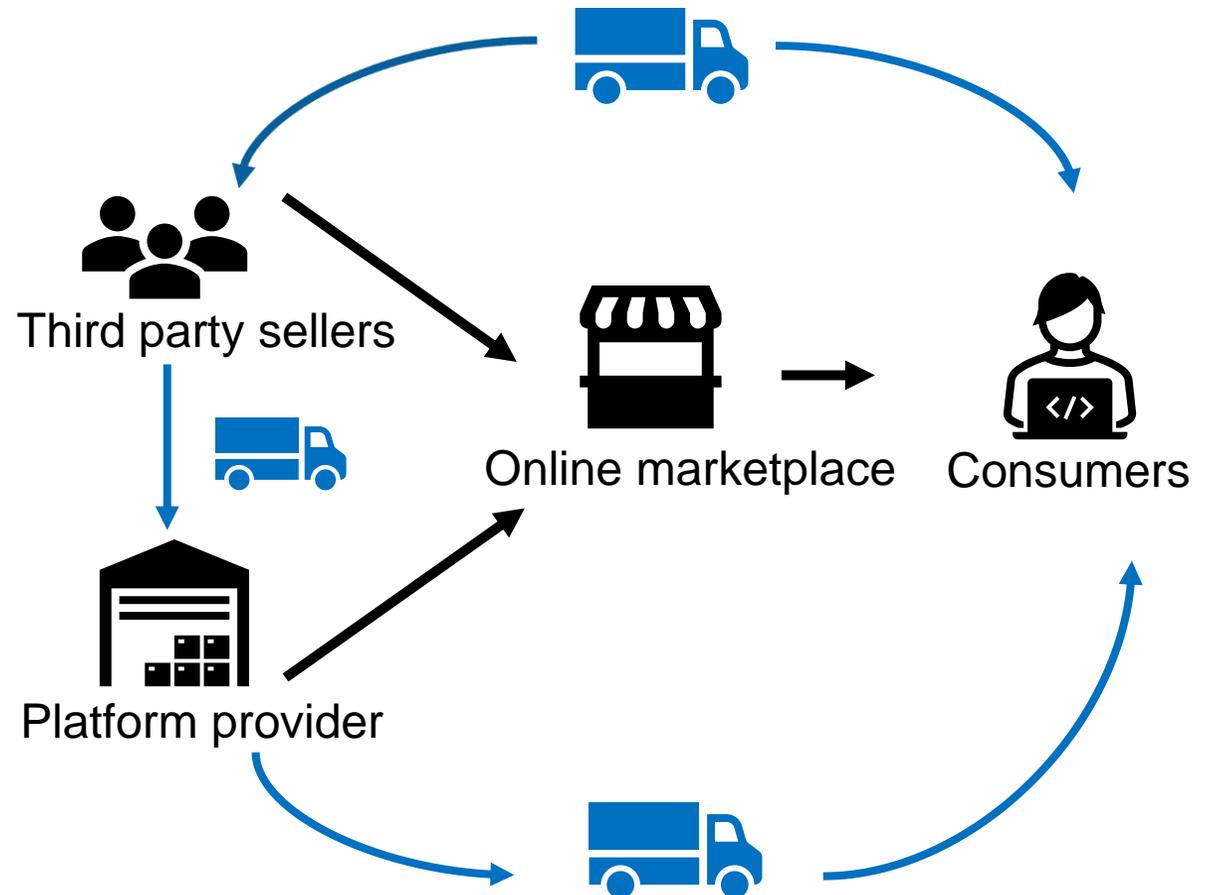
Top 6 UK online marketplaces by visitor numbers, 2025

Intermediary -v- Hybrid business model

Intermediary



Hybrid



Louboutin -v- Amazon (CJEU)

Louboutin's EU trade mark



Source: EUIPO trade marks register

Goods and services

English (en) ▾

25 High-heeled shoes (except orthopaedic footwear).

Description

English (en) ▾

Description The trademark consists of the colour red (Pantone 18.1663TP) applied to the sole of a shoe as shown (the outline of the shoe is therefore not part of the trademark but serves to show the positioning of the trademark).

Colour Red (Pantone 18-1663TP)

Louboutin -v- Amazon (CJEU)

The test to determine “use” of a trade mark

“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 case where, in view of all of the circumstances of the situation in question, such a user may have the impression that the operator itself is marketing, in its own name and on its own account, the goods bearing that sign”

Para 54, *Louboutin -v- Amazon*, CJEU (join cases C-148/21 and C-184/21)

Louboutin -v- Amazon (CJEU)

Factors contributing to a finding of “use”



Uniform presentation



Active advertising



Logistics services

Paras 51-53, *Louboutin -v- Amazon*, CJEU (join cases C-148/21 and C-184/21)

Beyond Louboutin

What can we expect next?

The screenshot shows the Amazon.co.uk product page for the book "A New Framework for Intermediary Liability: Copyright, Causation and Control on the Internet" by Kylie Pappalardo. The page includes the Amazon logo, navigation links, a search bar, and a "Last shot at summer favourites" banner. The book's cover is displayed on the left, along with a "Read sample" button. The main content area features the book title, author, and a detailed description. The right side of the page shows the price (£76.66), a 19% discount from the RRP (£95.00), and delivery information. At the bottom, there are buttons for "Add to Basket" and "Buy Now", along with a quantity selector and a "Report an issue with this product" link.

amazon.co.uk Deliver to Andrew London SW19 4 All Search Amazon.co.uk Hello, Andrew Account & Lists Returns & Orders Basket

All Rufus Prime Video Grocery Buy Again Browsing History Last shot at summer favourites

Books Advanced Search Best Sellers & more Top New Releases Deals in Books School Books Textbooks Books Outlet Children's Books

amazon fresh Save on your weekly grocery shops Shop now

Books > Business, Finance & Law > Law

A New Framework for Intermediary Liability: Copyright, Causation and Control on the Internet Hardcover – 21 Mar. 2023
by Kylie Pappalardo (Author)

A New Framework for Intermediary Liability presents a step-by-step framework for determining when internet intermediaries ought to have a duty to act to prevent copyright infringement on their platforms and services.

This timely book argues that intermediary liability for copyright infringement should be focused on an intermediary's actual responsibility for primary infringement and not simply its capacity to assist copyright owners in challenging infringement. Drawing on long-standing principles in the law of negligence, Kylie Pappalardo argues for a brand-new way to understand intermediary copyright liability and offers a means

Print length 236 pages Language English

Hardcover £76.66
Other Used and New from £76.66
-19% £76.66 RRP: £95.00
FREE delivery 18 - 21 July. Order within 8 hrs 18 mins. Details
Deliver to Andrew - London SW19 4
Only 12 left in stock.
Quantity: 1
Add to Basket Buy Now
Dispatches from BOOKS etc
Sold by BOOKS etc
Returns Returnable within 30 days of receipt
Payment Secure transaction
See more

A callout box containing a magnifying glass icon and two buttons: "Add to Basket" and "Buy Now". Below the buttons are four rows of text: "Dispatches from BOOKS etc", "Sold by BOOKS etc", "Returns Returnable within 30 days of receipt", and "Payment Secure transaction".

Add to Basket

Buy Now

Dispatches from BOOKS etc

Sold by BOOKS etc

Returns Returnable within 30 days of receipt

Payment Secure transaction

The background features a dark blue gradient with numerous thin, curved lines of light in shades of blue, purple, and red. Small, glowing particles are scattered throughout, creating a sense of motion and depth.

Consumer Protection and Unfair Commercial Practices

The NEW UK consumer law landscape

Consumer Rights Act 2015

- Part 2 of CRA includes unfair terms in consumer contracts and notices

Digital Markets, Competition and Consumers Act 2024 (DMCCA)

- Part 4, Chapter 1 covers unfair commercial practices (UCPs)
- Replaces Consumer Protection from Unfair Trading Regulations 2008
- New rules on subscription contracts (coming into force in 2026), drip pricing and fake reviews
- New rules on ADR in consumer contracts

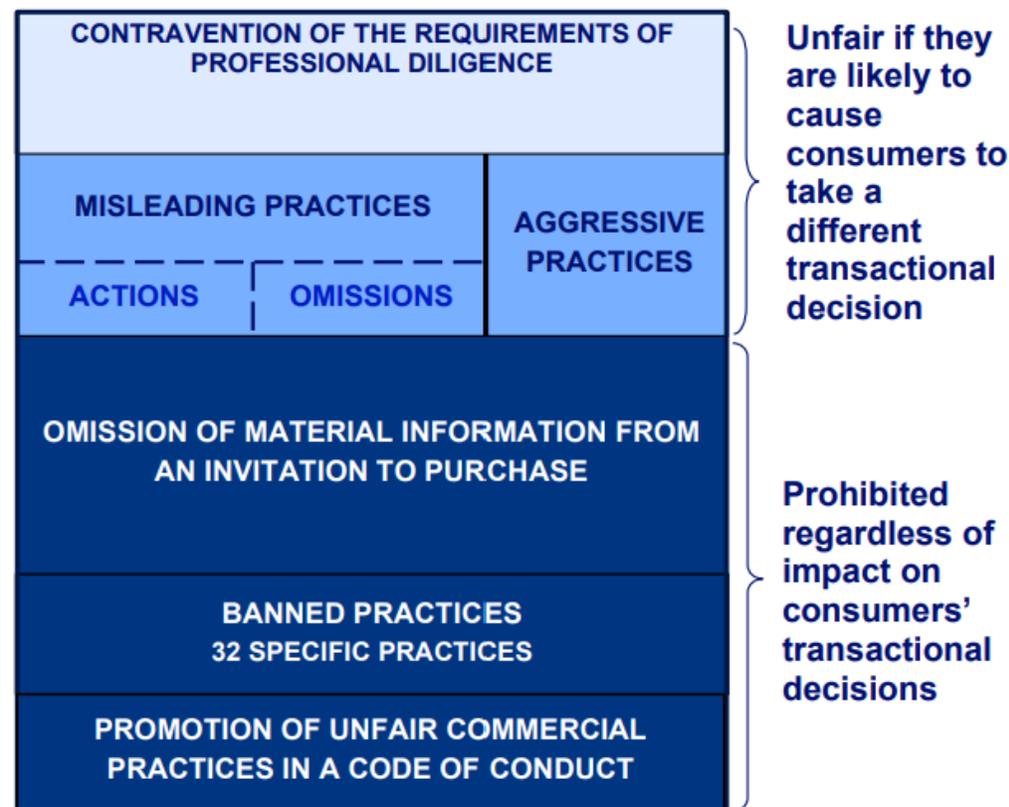
Other existing consumer law

- Consumer Contracts Regulations 2013
- Consumer Credit Act 1974
- Sale of Goods Act 1979
- Business Protection from Misleading Marketing Regulations 2008
- Payment Surcharges Regulations 2012
- Electronic Commerce Regulations 2002
- Other regulations for sector-specific activities

CMA has ability to enforce directly

DMCC unfair commercial practices

- DMCC replaces the Consumer Protection from Unfair Trading Regulations 2008
- Much of the law remains the same:
 - Some practices considered unfair in all circumstances
 - Some practices unfair if they are likely to cause the average consumer to take a different transactional decision



More muscular enforcement powers

01 

Direct infringement notices to traders in suspected breach of consumer law

02 

Fines:

- Up to 10% of annual global turnover
- Personal fines of up to £300,000 to persons who are an 'accessory' to substantive consumer law infringements by a business

03 

Enhanced consumer protection measures:

- Online interface notices
- Redress orders
- Compliance orders
- Choice measures

What can we expect from the CMA?

CMA's priority for the next 12 months will be on stopping and remedying most egregious breaches

Aggressive sales practices that prey on vulnerable consumers

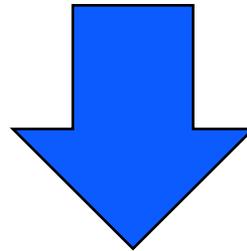
The provision of objectively false information to consumers

Fees hidden until late in the buying process

Clearly unbalanced and unfair contract terms, including those imposing unfair exit charges

Conduct the CMA has previously determined to be unfair

Practices where the law is clear that they are always unfair



Early cases will focus on stopping problematic behaviour rather than setting high fines
Areas of household essential spend will likely face significant scrutiny



DMCC = unfair commercial practices increased litigation risk?

- CMA powers to enforce consumer protection law for first time
- Direct penalties
- More action from CMA = more info in public domain = more follow-on litigation
- Consumer rights of redress including right to damages in respect of financial loss, distress or physical inconvenience or discomfort

EU position

Patchwork of regimes: not fully harmonized on the EU level, but EU-wide consumer protection provisions include:

- Prohibition on unfair practices (including fake reviews)
- Pre-contract information
- 14-day cooling-off period
- Fines of at least 4% of annual turnover

Proposed EU Digital Fairness Act to adapt framework to digital age

- Commission currently drafting proposals
- Expected Q3 2026
- Potential areas to be addressed: in-app purchases, contracts concluded with AI assistants, influencer marketing, digital subscriptions, dark patterns and addictive design, unfair personalisation, digital contracts and dynamic pricing

Collective Redress / Class Actions

The background features a dark blue gradient with numerous thin, curved lines of light in shades of blue, purple, and red. These lines appear to be light trails or data paths, creating a sense of motion and connectivity. Small, glowing particles are scattered throughout the scene, particularly concentrated in the lower right quadrant where the red light trails are more prominent.

Class action risk is increasing in Europe: Why?

New substantive
consumer rights

Availability of collective
procedures

Regulatory
action/inaction

Consumer activism =
willing representatives

Specialist claimant bar
and funding, testing
boundaries

Exporting US theories
and facts

Class Actions - Collective Redress Directive

- **The Collective Redress Directive (“CRD”)**
 - Introduced because actions for ‘collective redress’ vary considerably amongst Member States.
 - Deadline for transposing the Directive into national law was 25 December 2022.
 - Explicitly allowing for cross-border claims
 - Introduces a heightened litigation risk for online marketplaces, as "qualified entities" across the EU can now bring representative actions on behalf of consumers, potentially exposing platforms to cross-border claims for damages linked to illegal or misleading third-party listings.
 - “Qualified entities” will include consumer protection associations, and will be able to:
 - bring representative claims on behalf of consumers against “traders.”
 - obtain both injunctive relief and other forms of redress such as compensation.



Class Actions - Collective Redress Directive

- Member States are required to designate at least one Qualified Entity (QE) authorized to bring both domestic and cross-border representative actions.
- **Criteria for Cross-Border QEs:**

Must be a legal person constituted in accordance with national law.	Operate on a non-profit basis.	Have a legitimate interest in protecting consumer interests.	Demonstrate 12 months of public activity in consumer protection prior to designation.	Be independent and not influenced by persons other than consumers.	Establish procedures to prevent conflicts of interest.	Make publicly available information demonstrating compliance with these criteria.
--	---------------------------------------	---	--	---	---	--

- Nearly 70 entities have been designated as QEs for cross-border actions representative-actions-
noyb (European Center for Digital Rights): Designated as a QE in both Austria and Ireland, enabling it to bring representative actions across the EU.
Test-Achats/Test-Aankoop: Belgium's primary consumer protection organization, actively involved in filing class actions under the new regime

Conclusion

The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange. Small, glowing particles are scattered throughout, particularly concentrated in the lower right quadrant, creating a sense of motion and depth.



Conclusion

- Safe harbour remains – but element of erosion, and lack of clarity in the UK in light of OSA meaning potentially less reliable as a shield
- Product safety law has evolved to try and address perceived risk of products sold via online marketplaces and via eCommerce – increasing litigation exposure
- IP infringement remains high on litigation risk radar
- Unfair commercial practices adding to consumer rights litigation risk landscape
- Class actions / collective redress remain a strong theme

The background features a dark blue gradient with numerous thin, curved lines of light. On the left, the lines are primarily blue and purple, while on the right, they transition to red and orange. Small, glowing particles are scattered throughout, particularly concentrated along the lines. The overall effect is a sense of dynamic energy and movement.

Questions?