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PEER-TO-PEER LENDING AND CONSUMER PROTECTION WITHIN EUROPEAN LAW

*Hervé Jacquemin**

Introduction

With peer-to-peer lending (or person-to-person lending), individuals are lending money to other individuals, sidestepping traditional financial institutions (bank, lending company, etc.). Potential lenders and borrowers can connect to each other through online marketplaces, available on the internet. Since 2005, an increasing number of websites have proposed the development of such a service all over the world (Prosper in United States; Zopa in United Kingdom; Boober in The Netherlands or DhanaX in India).

There are two main models of peer-to-peer lending.¹

First, in some marketplaces, people looking to borrow are invited to fulfil online application with the amount required, the duration of repayment and various other information (in particular identification data, credit history, income, etc.), which determines their credit score (A, B, C, etc.). A specific rate, corresponding to this score is consequently proposed to them; logically, the lowest borrowing rates provided correspond to the best ranking. Moreover, potential lenders are invited to choose a rate and the score credit of people they want to lend to. They will lend to a pool of borrowers: for instance, a loan of 1000 EUR is spread across 75 borrowers. So, if one of them failed to reimburse, the financial risk would be reduced.

The second model is similar to an auction-style marketplace. It is a direct lending. People looking for a loan can post a listing which is available on the website. Borrowers indicate the maximum rate that they can afford and the reasons

why they need money (consolidate existing debts, buy a car or finance studies at university). Usually, pictures are also posted. In order to allow the lender to make an informed choice, a rating of the borrower, based on his credit score, his affordability and his stability, is also done. On the basis of these details, lenders can choose the real person to whom they accept to provide the loan money and make an offer for a part of the total amount, at a specific rate. Each offer concerns a small part of the total amount, in order to reduce the risks in case of failure. After a few days, the process is closed and, if the borrower accepts the offered rate, the agreement can be concluded. Only the best offers of lending (with lowest rates) get the loan.

In both the models, peer-to-peer marketplaces usually earn money for each lending agreement concluded with its intermediation (for instance, the borrower has to pay a fixed fee of x EUR and the lender an annual fee of x % of the amount).

The peer-to-peer credit can be interesting for the borrower. In some cases, he can get better lending rates than those offered by traditional credit institutions. Sometimes, a peer-to-peer lending could be provided to people who can not get credit from these institutions, because of their bad credit history (too many credits, no stable work, etc.). As for the lenders, they may get good return, with *a priori* reduced risks and the feeling to help someone.

Taking into account the international scope of the conference, the paper will focus on the European legal framework. In the specific matter of consumer protection, such analysis is particularly recommended, given that many directives have been enacted in this perspective. Anyway, for some features of peer-to-peer lending, specific legal dispositions of national law have to be observed. For instance, in 2007, the Belgian Banking, Finance and Insurance Commission examined the possibility of an Internet platform, on which loan contracts can be entered into between private individual, to operate in Belgium. The Commission decided that, in the specific case that has been submitted, the monopoly on the collection of repayable funds from the public stipulated in Article 4 of the Belgian

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¹. For instance, on Zopa, both these models are used.

Banking Law² prohibited the marketplace to operate in Belgium.³ Indeed, according to this Article, “only credit institutions, other than the electronic money institutions, established in Belgium and credit institutions, others than the electronic money institutions, established pursuant to the law of another EC Member State and eligible under Articles 66 ff. of this Law shall be authorized to solicit deposits or other funds repayable at sight, term or notice from the public in Belgium or accept such deposits or funds from the *public* in Belgium”.⁴ On the platform, the potential borrower should solicit repayable funds from the public, which is not allowed.⁵

Two topics will be examined. The first one is related to the European legal framework which could apply to the agreement concluded between lender and borrower, in particular the existence of the rule aiming to protect those parties when they can be considered as consumers. The second topic concerns the rights and duties of the intermediary (i.e., the p2p service provider).

I. Contract relationship between lender and borrower

Many European directives are dedicated to consumer protection, especially when a *credit agreement* is concluded –

². Act of 22 March of 1993 on legal status and supervision of credit institutions, *Belgian Official Journal – Moniteur belge*, April 19, 1993.

³. BANKING, FINANCE AND INSURANCE COMMISSION, *Annual Report 2007*, p. 82 (available at http://www.cbfa.be/eng/publications/ver/pdf/cbfa_2007.pdf) ;MANAGING COMMITTEE OF THE BANKING, FINANCE AND INSURANCE COMMISSION, *Annual Report 2007*, pp. 81-83 (available at http://www.cbfa.be/fr/publications/ver/pdf/cbfa_dc_2007.pdf).

⁴. I underline this word.

⁵. Article 8 of a Royal Decree of July 7, 1999 on public feature of finance operations (*Belgian Official Journal – Moniteur belge*, August 17, 1999), determines in which conditions repayable funds can be considered as being solicited by the *public*. Three criteria are quoted in this Article: the implementation of advertising techniques aiming at more than 50 persons ; soliciting more than 50 persons or the intervention of one (or more) intermediary. In the case submitted to the Commission, the borrowers were soliciting more than 50 persons for repayable fund through the internet marketplace and an intermediary (the internet service provider) intervened.

directive 87/102/ECC concerning consumer credit⁶ and new directive 2008/48/EC on credit agreements with consumers⁷- at a *distance* - directive 2002/65/EC on distance financial services⁸ - and *by electronic means* - directive 2000/31/EC on electronic commerce.⁹ In this first point, I only refer to Articles 10 and 11 of this last directive, which impose information requirements to the providers of information society services.

⁶. Council Directive 87/102/EEC of December 22, 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, *O.J.*, L 42 of February 12, 1987, p. 40.

⁷. Directive 2008/48/EC of the European Parliament and of the Council of April 23, 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *O.J.*, L 133 of May 22, 2008, pp. 66-92. This directive must be transposed by Member States into national law before May 12, 2010 (Art. 27).

⁸. Directive 2002/65/EC of the European Parliament and of the Council of September 23, 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *O.J.*, L 271 of October 9, 2002, pp. 16-24.

⁹. Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *O.J.*, L 178 of July 17, 2000, pp. 1-16. For the ease and the clarity of the analyze, I will not refer to Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, *O.J.*, L 95 of April 21, 1993, pp. 29-34 or Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), *O.J.*, L 149 of June 11, 2005, pp. 22-39. Moreover, the proposal for a directive on consumer rights, adopted by the European Commission on October 8, 2008 (COM (2008), 614 Final), which merges four existing EU consumer directives does not apply to financial services, except “certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation” (Art. 3, § 2, of the proposal of directive). So this proposal of directive will not be studied in the paper. On this point, see also Recital 11 of the proposal of directive.

Taking into account the scope of these directives, they do not have to be applied in many credit agreements concluded through peer-to-peer marketplaces¹⁰ (A). Even so, I think that, *de lege ferenda*, when they can be considered as consumers, borrowers (and also lenders) should be legally protected by specific rules, enacted at European level (B).

A. *Scope of the directives and application to credit agreements concluded through peer-to-peer platforms*

The agreements concluded through peer-to-peer websites are not covered by those directives when – and this is the main hypothesis – lenders and borrowers are consumers (as defined in the directives).¹¹

Directive 87/102/ECC on consumer credit only applies to credit agreements concluded between a *creditor* and a *consumer*.¹² As defined by the directive, a consumer is any “natural person who is acting for purposes which can be

¹⁰. On this point, it is interesting to refer to the literature analysing the relationship between sellers and buyers on online auction websites. Application of directive 2000/31/EC on electronic commerce and directive 97/7/EC of the European Parliament and of the Council of May 20, 1997 on the protection of consumers in respect of distance contracts (*O.J.*, L 144 of June 4, 1997, pp. 19-27), or national law implementing them, is usually examined. See Ch. RIEFA, “La protection des consommateurs sur les plateformes de courtage en ligne : point de vue d’outre-manche”, *Revue européenne de droit de la consommation – European Consumer Law Journal*, 2005/4, p. 333 *et seq.*; FORUM DES DROITS SUR L’INTERNET, *Recommandation : Commerce entre particuliers sur l’internet. Quelles obligations pour les vendeurs et les plateformes de mise en relation*, November 8, 2005, p. 21 *et seq.* (available at <http://www.foruminternet.org/telechargement/documents/reco-pap-20051108.pdf>); F. MAS, “L’esquisse d’un régime spécifique du courtage aux enchères par voie électronique”, *Revue Lamy Droit de l’Immobilier*, 2006/12, n. 367, January 2006, p. 72.

¹¹. The conclusion is similar if borrowers act in the course of their trade, business or profession (and, for instance, apply for a loan in order to buy an industrial tool for a small company).

¹². In the same way, directive 2008/48/EC only applies to credit agreements whereby a creditor, grants or promises to grants credit to a consumer, in the course of his trade, business or profession (Art. 2, § 1, and Art. 3, a), b), and c), of the directive).

regarded as outside his trade or profession” (Art. 1, and 2, a), of the directive) and a creditor “the natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons” (Art. 1, 2, b), of the directive). *Ratione personae*, the scope of the directive 2002/65/EC on distance financial services is also limited to agreements between a *consumer*, acting for purposes which are outside his trade, business or profession (Art. 2, d), of the directive) and a *supplier*, who is “any natural or legal person, public or private, acting in his commercial or professional capacity” (Art. 2, c), of the directive).

Directive 2000/31/EC on electronic commerce has a wider scope, *ratione personae*. It applies to B2B (when the service provider and the recipient of the service are not acting for purposes which are outside their trade, business or profession) and B2C relationships (when the service provider is acting in the course of his trade, business or profession and the recipient of the service is a consumer). The question is whether to know if Articles 10 and 11 of the directive apply to C2C agreements (consumer to consumer).¹³ The concept of “service provider” has the following meaning : “any natural or legal person providing an information society service” (Art. 2, b). This definition does not prohibit a consumer to provide an information society service; for instance, any natural person could sell on his blog some goods found in his attic, for private purposes. Anyway, taken into account the duties required by Articles 10 and 11 of the directive, it may be argued that the European legislators have not considered that the service provider could be a consumer. Indeed, it looks out of proportion to require that the seller (in the abovementioned example) provides to the recipient of the service information on the “different technical steps to follow to conclude the contract” (Art. 10, 1, a), “acknowledge the receipt of the recipient’s order

¹³. In other words, the question is whether to know if the service provider can be a consumer. According to the definition of the “recipient of service” (Art. 2, c) : “any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible”, this one is not necessarily a consumer.

without undue delay and by electronic means" (Art. 11, 1) or "makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order" (Art. 11, 2). Hence, those Articles of the directive on electronic commerce only apply in peer-to-peer agreements B2C and B2B.

Peer-to-peer credit agreements fall within the scope of these directives when the borrower is a consumer and the lender acts in the course of his trade, business or profession. This specific situation can occur on some peer-to-peer websites where, for example, professionals are invited to lend money through the marketplace as an investment.

Difficulties could arise for two reasons :

First, considering the criterion *ratione personae's* definition, in some cases, it could be pretty difficult to make a distinction between the lenders acting in course of their trade, business or profession or outside these. How many transactions (loans) are necessary to consider that lending is the day-to-day business of a natural person?

Furthermore, in situation where it is easy to determine if the lender acts in the course of his business, most marketplaces are not designed so that, on one hand, professional lenders are directed to a specific part of the website, where protection rules have to be applied when they enter into contracts with consumers and, on the other hand, private lenders are directed to another part of the website. On a peer-to-peer marketplace operating in United Kingdom, a distinction is made between lenders holding a Consumer credit licence issued by the Office of Fair Trading of the U.K. and any other lender who, in particular, can "not be a credit broker or lend money to other persons in the course of any business".¹⁴ According to that

¹⁴. See Zopa principles, n. 2.2 (available at <http://uk.zopa.com/ZopaWeb/public/help/help-faqs-interested.html#principles>). And even in that case, the lender could lie, for tax reasons, for instance.

feature, some rules to be respected are not similar.¹⁵ Furthermore, it may be recognized that it is pretty difficult to design a peer-to-peer website taking into account all possible hypotheses.¹⁶ For instance, in the second model of peer-to-peer, when lenders can choose specific borrowers they want to support, a double distinction should be made between professional and non-professional borrowers and lenders. Protection rules should only be applicable to agreements concluded between professional lenders and borrowers acting as consumers.

B. Consequence of the directives' scope on the protection of consumer

If the peer-to-peer credit agreement remains out of the scope of the abovementioned directives, the protection rules – information requirements,¹⁷ formal requirements,¹⁸ obligation to assess the creditworthiness of the borrower¹⁹ or right of withdrawal²⁰ – do not have to be respected. In these directives, the *ratio legis* of the protection measures lies in the specific

¹⁵. See Zopa principles, n. 4.6 and 4.7 (available at <http://uk.zopa.com/ZopaWeb/public/help/help-faqs-interested.html#principles>).

¹⁶. Moreover, *ratione materiae*, directive 2008/48/CE on credit agreements for consumers, for instance, does not apply to "credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building" (Art. 2, § 1, b). The purpose of the loan, in the second model of peer-to-peer lending, could be to buy a garage.

¹⁷. See e.g., Art. 4, § 2, of the directive 87/102/ECC on consumer credit; Art. 5 and 10 of the directive 2000/31/CE on electronic commerce; Art. 3-4 of the directive 2002/65 on distance financial services; Art. 4-6 and 10-11 of the directive 2008/48/EC on credit agreements for consumers.

¹⁸. See e.g. Art. 4, § 1, of the directive 87/102/ECC on consumer credit; Art. 11 of the directive 2000/31/CE on electronic commerce; Art. 5 of the directive 2002/65 on distance financial services; Art. 10, § 1, of the directive 2008/48/EC on credit agreements for consumers.

¹⁹. Art. 8 of the directive 2008/48/EC on credit agreements for consumers.

²⁰. Art. 14 of the directive 2008/48/EC on credit agreements for consumers.

weakness of the consumer.²¹ European Legislator supposes that consumers (borrowers) suffer from a lack of information on legal or factual data related to the agreements and do not have the same bargaining power as the other contract party (the creditor). In particular, the urgent need of money could lead the borrower to conclude an unbalanced agreement. The protection rules aim to guarantee an informed consent and to prevent from any potential frauds or abuse of borrower's weakness from the creditor. In peer-to-peer lending, agreements are concluded at a distance, i.e., without the simultaneous presence of the supplier and the consumer, and by electronic means. Parties can not discuss as they can do in a creditor's office. The only mean of communication is the website and the information provided on it must be sufficient to ensure an informed consent. Moreover, some people could not be familiar with the use of internet. This is the reason why, in particular, the directive 2000/31/EC on electronic commerce requires on the website the availability of technical means to identify and correct input errors of the recipient of the service (Art. 11, 2).

In my opinion, when they conclude a peer-to-peer lending with other consumers, borrowers (consumers) should be legally protected. Indeed, they are as vulnerable or in a weak position as the consumers who have entered a contract with creditor acting in the course of his trade, business or profession. Their weakness is not only the consequence of the strength of the creditor acting in the course of his business (who is fully informed and has a strong bargain power). *In abstracto*, the borrower in a peer-to-peer lending is also vulnerable because of the service subject to the agreement – a loan, which could be motivated by a potential bad financial situation–, the way contracts are concluded (by electronic means) and, in general,

²¹. On the weakness of a contract party, see F. LECLERC, *La protection de la partie faible dans les contrats internationaux (Etude de conflits de loi)*, Bruxelles, Bruylant, 1995 ; M. FONTAINE, « La protection de la partie faible dans les rapports contractuels (Rapport de synthèse) », J. GHESTIN et M. FONTAINE (sous la dir. de), *La protection de la partie faible dans les rapports contractuels. Comparaisons franco-belges*, Paris, L.G.D.J., 1996, p. 616 et seq. ; Ch. BOURRIER, *La faiblesse d'une partie au contrat*, Louvain-la-Neuve, Bruylant, 2003.

the supposed lack of information suffered by any average consumer. The negative consequences of the non application of protection rules can be underlined. According to the Article 8 of the directive 2008/48/EC on credit agreements for consumers, the creditor has to assess the consumer's creditworthiness before the conclusion of the contract. This rule prevents the borrower from overrunning into debt. In peer-to-peer lending between consumers, this protection rule does not have to be respected. Contrariwise, in the second model of peer-to-peer lending, where potential borrowers explain the reasons why they apply for a loan, many of them seem to have already many ongoing credit agreements. Indeed, most purposes are to consolidate existing debts. If the rate of the peer-to-peer lending is pretty high, it could be even more difficult for them to recover a balanced finance situation.

On the other hand, lenders (consumers) also take risks in case of failure from the borrower. Without prior information, they could believe their loan is 100% guaranteed, which is not the case. According to the main models, risks are reduced : the consumers usually lend small amounts to a lot of borrowers.

Even if main directives aiming to protect the consumers do not have to be observed in many peer-to-peer agreements, general contract law, in each Member State, has to be observed (information requirements, good faith, consent, rules of proof, etc.).²² Nevertheless, usually, those rules do not take into account the specific weaknesses of the contracting parties. They are supposed to be equal. So, the rules are not sufficient to protect the consumers (lenders or borrowers). *A contrario*, if general contract law was sufficient, specific directives would not have been enacted to protect the consumer.

In my opinion, a new legal framework, aiming to protect consumers contracting with other consumers in peer-to-peer agreements, should be adopted. Both borrowers and lenders have to be protected even if the first ones should be the

²². On the application of general contract law to C2C relationships on online auction websites, Ch. RIEFA, "La protection des consommateurs sur les plates-formes de courtage en ligne : point de vue d'outre-manche", *Revue européenne de droit de la consommation – European Consumer Law Journal*, 2005/4, pp. 336-340.

main beneficiaries of the rules. The debtor of those duties can not be the other contracting party (who could also be a consumer). In consequence, the obligations should rely on the peer-to-peer service provider (*infra*, point II).

II. Rights and duties of the peer-to-peer lending service provider

At this point, the relationship between the peer-to-peer lending service provider and the loan contracting parties (the lender and the borrower) will be examined. We can wonder if information requirements, on the risks or consequences of the credit (for both lender and borrower) or related to the way agreements are concluded (by electronic means), are imposed on him (A). Moreover, he could be held liable, for instance if frauds occur. The question is to know if, as a hosting service provider, the intermediary could benefit from the liability exemption prescribed by the directive 2000/31/EC on electronic commerce (B).

A. Duties of the peer-to-peer service provider

The peer-to-peer lending service provider (the administrator of the marketplace) operates as an intermediary between potential lenders and borrowers.²³ He provides a

²³. On this point, it is also interesting to refer to the literature analysing the relationship between online auction website, on one hand, sellers and buyers, on the other hand (and application of directive 2000/31/EC on electronic commerce, directive 97/7/EC on distance selling, or national law implementing them). See Ch. RIEFA, "La protection des consommateurs sur les plates-formes de courtage en ligne : point de vue d'outre-manche", *Revue européenne de droit de la consommation – European Consumer Law Journal*, 2005/4, p. 313 *et seq.* and p. 320 *et seq.*; FORUM DES DROITS SUR L'INTERNET, *Recommandation : Commerce entre particuliers sur l'internet. Quelles obligations pour les vendeurs et les plates-formes de mise en relation*, November 8, 2005, p. 21 *et seq.* (available at <http://www.foruminternet.org/telechargement/documents/reco-pap-20051108.pdf>); F. MAS, "L'esquisse d'un régime spécifique du courtage aux enchères par voie électronique", *Revue Lamy Droit de l'Immatériel*, 2006/12, n° 367, January 2006, p. 61 *et seq.*

virtual interface to connect them but he is not a contracting party of the lending agreement. The first principle of Zopa, a marketplace launched in 2005, clearly indicates that : "The Zopa Lending Platform is an internet marketplace for putting Lenders and Borrowers in touch with each other. These Principles regulate the relationship between Zopa and Zopa Members. The relationship between Lenders and Borrowers is also regulated by these Principles except in relation to lending, which is regulated by a Loan Contract. Zopa Limited is not a party to any Loan Contracts between Lenders and Borrowers. Our function is to operate the Lending Platform".²⁴

Even if the marketplace is not a party to a loan contract, we can wonder if as a technical intermediary, it has to respect some of the abovementioned directives, especially in its relationships with lenders and borrowers.

If he only acts as a technical intermediary and remains a third party to the loan agreement, the peer-to-peer service provider can not be considered as a creditor, in the meaning of the directive 87/102/ECC on consumer credit (Art. 1, 2, b) or the directive 2008/48/EC on credit agreements for consumers (Art. 3, b). Indeed, he does not grant or promise to grant credit to the borrower. It is only the lender who does so. In some specific cases, the peer-to-peer service provider could be considered as a "credit intermediary". This one is "any natural or legal person who is not acting as a creditor and who, in the course of his trade, business or profession, for a fee, which may take a pecuniary form or any other agreed form of financial consideration :

- (i) presents or offers credit agreements to consumers;
- (ii) assists consumers by undertaking preparatory work in respect of credit agreements other than as referred to in (i); or
- (iii) concludes credit agreements with consumers on behalf of the creditor" (Art. 3, f), of the directive 2008/48/EC on credit agreements for consumers).

²⁴. See Zopa principles, n° 1.1 (available at <http://uk.zopa.com/ZopaWeb/public/help/help-faqs-interested.html#principles>).

According to this definition, a person could be considered as a credit intermediary even if he/she is not a party to the credit agreement (see in particular point ii). Anyway, a credit agreement (as defined in Art. 3, c), of the directive 2008/48/EC on credit agreements for consumers) must be granted or promised to be granted. This is only the case when the lender is a creditor (as defined in Art. 3, b), of the directive 2008/48/EC on credit agreements for consumers) and the borrower a consumer (as defined in Art. 3, a), of the directive 2008/48/EC on credit agreements for consumers). If both lender and borrower are consumers, no credit agreement in the meaning of the directive 2008/48/EC is granted and the peer-to-peer service provider can not be considered as a credit intermediary.

Regarding the peer-to-peer credit agreement, the platform is not the "supplier" of a distance financial service, in the sense of the directive 2002/65/EC on distance financial services. The intermediary is not "the contractual provider of services subject to distance contracts" (Art. 2, c), of the directive), in this case the loan contract. The main service provided by the platform is pretty technical : through the marketplace, lenders and borrowers can be put in touch with each other. The question is whether to know if it is a financial service. Is it "any service of a banking, credit, insurance, personal pension, investment or payment nature" (Art. 2, b), of the directive)? The service is closely related to the granting of a credit, especially if tools aiming to assess the stability or the affordability of the potential borrowers are available. However, *stricto sensu*, the marketplace does not grant any credit. This directive only applies if the recipient of the service is a consumer. As we know, lenders and borrowers could be or not be consumers. If they are, protection rules have to be observed (information requirements, right of withdrawal, formal requirements, etc.).

The lending marketplace can be considered as the provider of an information society service (Art. 2, a), of the directive 2000/31/EC on electronic commerce), which is "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of

services".²⁵ The service of the marketplace is *normally provided for remuneration*. On Zopa for instance, the borrower has to pay a fee of £94.25 and the lender an annual 1% fee on the amount lent.²⁶ The *distance* and the *use of electronic means* are indisputable. The borrower and the lender are recipients of the service (whether they are consumers or not) and the service is provided at *their individual request*. Consequently, the protection rules prescribed by this directive have to be observed. For instance, pursuant to Article 5, general information aiming to identify the service provider (name, geographic address, details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner, etc.) has to be rendered easily, directly and made permanently accessible to the recipients of the service and competent authorities.

It must be stressed that, if protection rules have to be observed by the lending platform towards the consumer, these rules are justified by the conclusion of the contract at a distance, by electronic means (directive 2002/65/EC on distance financial services and directive 2000/31/EC on electronic commerce). In

25. On this condition, see also the Recital 18 of the directive 2000/31/EC on electronic commerce : "Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services [...]"

26. Even without such fees, the lending marketplace could provide information society services if its remuneration is coming from advertising available on the website.

many cases, protection measures of directives 87/102/ECC or 2008/48/EC on credit agreements to consumers (assess the creditworthiness of the borrower, for instance) do not have to be applied.

B. Could the intermediary benefit from a liability exemption, as a hosting service provider?

For some activities of online auction websites, which can be compared, on many features, to peer-to-peer marketplaces, exemption of liability, prescribed by Article 14 of directive 2000/31/EC on electronic commerce, could be called for.²⁷ We shall examine the scope of this exemption, before seeing if it could be applied to activities carried out by lending platforms.

Liability of online auction websites, such as eBay, could be held if some goods are sold through the platform, violating Intellectual Property rules (false perfume of a famous trademark) or Competition Law. These cases are brought before the courts of justice and the qualification of the website as a host service provider, as well as the possible exemption of

27. On the application of liability's exemption to online auction websites, see Ch. RIEFA, "La protection des consommateurs sur les plates-formes de courtage en ligne : point de vue d'outre-manche", *Revue européenne de droit de la consommation – European Consumer Law Journal*, 2005/4, p. 317-320; FORUM DES DROITS SUR L'INTERNET, *Recommandation : Commerce entre pArticuliers sur l'internet. Quelles obligations pour les vendeurs et les plates-formes de mise en relation*, November 8, 2005, pp. 10-13; E. MONTERO, "Sites de vente aux enchères et offres de vente illicites", comment of Commercial Court of Brussel, decision of 30 July 2008, *Revue du droit des technologies de l'information*, 2008, p. 528 et seq. (on this decision, see also H. CROUX and O. SASSERATH, "Belgium : Sale of Counterfeit Goods on eBay", *CRI*, 2008/5, p. 152); G. TEISSONNIERE, "Quelle responsabilité appliquer aux plates-formes de commerce en ligne et autres intermédiaires de contenu", *Revue Lamy Droit de l'Immatériel*, 2008/35, n° 1165, p. 21; M. SCHAFFNER and A. ABELLO, "LVMH c. eBay : une synthèse des questions relatives à la responsabilité des plates-formes d'enchères", *Revue Lamy droit de l'immatériel*, 2008/41, n° 1372, p. 75. On liability of online auction website in general, see also A. GUADAMUZ GONZÁLEZ, "eBay Law : The legal implication of the C2C electronic commerce model", *Computer Law and Security Report*, 2003, p. 468.

liability, pursuant to Article 14 of the directive 2000/31/EC on electronic commerce, are usually discussed. The following principles can be set out. In order to determine if an intermediary can be considered as a host service provider, the activities he is carrying out have to be examined. Exemptions of liability do not apply to "categories of service providers or types of information".²⁸ From this viewpoint, an online auction web site could receive the qualification of host service provider for some of its activities corresponding to the definition of Article 14 of the directive (i. e., consisting in the storage of information provided by a recipient of the service). For instance, the platform is storing the listings of items that people want to sell. For some of other activities it is carrying out, the marketplace can not be considered as a host service provider; consequently, the exemption of liability is excluded. For example, this is the case for the assessment of the sellers or the help granted to create better listings.

For several reasons, the peer-to-peer lending platform could be held liable if some damages occur to loan contracting parties. If a borrower fails to reimburse, the lender could lodge a complaint against the marketplace because the score credit granted to him was not accurate (because his creditworthiness was no checked carefully).²⁹ Moreover, if the identity of the borrower has not been verified, the lender could consider the platform is liable if the borrower fails in his commitments. Anyway, in these cases, the intermediary can not be considered as a host provider. So, he can not benefit from the exemption of liability.

The lending marketplace could only be considered as a host provider when, for instance, the contents of the listings,

28. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee - First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), November 21, 2003, COM (2003) 702 Final, p. 13.

29. Anyway, the lender can not lodge a complaint against the marketplace only because the borrower fails with his commitments and does not reimburse.

written by the borrower to convince potential lenders to offer money to loan, are libellous.

III. Conclusion: Propositions to improve the protection of peer-to-peer lending parties

For consumers who are parties to credit agreements concluded at a distance, by electronic means, with creditor acting in the course of their trade, business or profession, many protection rules have been enacted by European legislator. If consumers get loans through peer-to-peer websites, these protection rules do not have to apply, except if the other party is not a consumer. Even in that case, in practice, most agreements are not concluded taking into account those rules and, *de facto*, despite his weakness, the borrower is not protected.

On the other hand, if the intermediary has to fulfil various duties prescribed by the directives when they enter contracts with consumers, in the main cases, the obligations are related to the service provided (administrate the platform) and are independent of the credit agreement concluded by the parties. However, loan agreement's features would be enough to justify the adoption of specific rules aiming to protect the parties.

Consequently, in my opinion, a specific legal framework should be enacted at European level in order to protect individuals contracting with other individuals on peer-to-peer lending marketplaces. In particular, it could be required that intermediaries provide information to borrowers and lenders; assess the creditworthiness of the borrower and prevent them from overrunning into debt. Professional skills should also be required from the intermediary.