

BOLKESTEIN REVISITED IN THE ERA OF THE SHARING ECONOMY

BOLKESTEIN REVISADA EN LA ERA DE LA ECONOMÍA COLABORATIVA

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Summary: I. INTRODUCTION. II. CURRENT STATE OF PLAY: HOW IS EUROPE FACING THE REGULATORY CHALLENGES OF THE SHARING ECONOMY? III. THE WAY FORWARD. IV. CONCLUSIONS.

ABSTRACT: Back in 2015 the European Commission set the Digital Single Market as one of its key priorities. Sharing economy business models were one of the realities that the European Commission assessed last year, with the clear aim to examine whether new regulatory action at the EU level was necessary. After a thorough market study, the Commission concluded that existing EU rules are sufficient and that each type of business as well as each local reality may call for diverging regulatory solutions at the national level. To our mind, this is a sensible approach even if a whole universe of uncertainties remains. The ECJ shall play a crucial role in solving them on a case-by-case basis. For its guidance to be useful, the legal debate should rapidly drop the misleading “sharing” terminology, which does not allow an objective analysis of different realities that may need different regulatory solutions if we want to ensure a true level playing field.

RESUMEN: En 2015 la Comisión Europea estableció el Mercado Único Digital como una de sus máximas prioridades. Los modelos de negocio de la economía colaborativa fueron una de las realidades que la Comisión examinó el año pasado, con el claro objetivo de analizar si era necesaria una nueva aproximación regulatoria a nivel comunitario. Tras un estudio de mercado en profundidad, la Comisión concluyó que la normativa de la UE ya existente era suficiente y que cada tipo de negocio y cada realidad local podían requerir soluciones regulatorias distintas a nivel nacional. En nuestra opinión, esta es una aproximación sensata, aunque todavía queda pendiente todo un universo de incertidumbres. El TJUE jugará un papel crucial para resolverlas caso por caso. Para que sus directrices sean útiles, el debate jurídico debería olvidarse rápidamente de la equívoca terminología de la “colaboración”, que no

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permite un análisis objetivo de las distintas realidades que pueden requerir soluciones regulatorias diferenciadas, si se quiere asegurar un terreno de juego realmente equitativo.

KEY WORDS: sharing economy, collaborative economy, EU, Services Directive, E-commerce Directive, Digital Single Market, Internal Market.

PALABRAS CLAVE: *economía colaborativa, UE, Directiva de Servicios, Directiva de Comercio Electrónico, Mercado Único Digital, Mercado Interior.*

I. INTRODUCTION

In March 2011, Rachel Botsman¹ published pioneering work on the development of some innovative and revolutionary theories about this relatively new phenomenon (back then) called the collaborative economy. Since then, theories have emerged exponentially as new business models constantly arise and challenge former deep-rooted economic concepts and approaches to consumerism in the 21st century.

This new reality in which consumers' needs are rapidly moving from ownership of goods to access to goods generates a fair number of legal challenges.² The core questions are basically whether the current legislation remains valid and, should it need changes, whether amendments must be substantial. From an internal market perspective, this implies, first of all, verifying whether the rules of the Treaty and the Services Directive,³ as interpreted by the ECJ case-law, are useful legal instruments to tackle possible barriers on market access and market performance for these new business models. This is, however, a complex assessment to make since, once at the heart of the issue, the number of uncertainties increases greatly. Any list will always be incomplete, but let us look at the most important among such uncertainties, always from an EU Law angle, concerning the public and private actors involved.

From the public action perspective, there is, first, the question of territoriality, in the sense of deciding which is the authority (i) competent to regulate; and (ii) best placed to regulate. In EU law terms, the internal market being a shared competence of the Union, any regulation necessarily implies a prior assessment of subsidiarity under Article 5 TFEU. At the national, regional and local level a significant number of competences (e.g. urban planning, tourism, passenger transport, tax, labour, etc.) may collide or, at best, interact with EU competences on internal market. Considering the social

¹ BOTSMAN, R., *What's mine is yours: How collaborative consumption is changing the way we live*, HarperCollins Publishers, March 2011.

² For a thorough overview of the main areas of regulatory concern at the EU level, see HATZOPOULOS, V. and ROMA, S, Caring for sharing? The collaborative economy under EU law, *Common Market Law Review*, vol. 54, n. 1, February 2017, pp. 81-128.

³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376 of 27.12.2006, p. 36.

implications of the new business models, all regulators seem interested in having their say.

Looking now at the behaviour of the private parties involved, it is necessary to face and tackle the challenges of the Internet that come along with these new business models. The boundaries of traditional commercial relationships yield to new realities where not only businesses but also individuals interchange goods or services and they do so through an Internet platform. On the one side, it is the Internet that *de facto* allowed individuals to massively become “non-professional traders”. The legal implications of this new concept are still unclear. It is at least doubtful how trading rules (in the broadest sense; i.e. from labour and tax obligations to consumer protection rules) should apply to them. On the other side, it is also the Internet that made a third party emerge in a traditionally two-sided relationship. Intermediaries/platforms are new relevant actors and their role in the commercial relationship is also subject to debate.

This paper looks at how European institutions face these new regulatory challenges and how existing rules may need to be read differently or changed to fit the no longer new reality. The focus shall be on internal market rules and case-law and, in particular, on the Services Directive. To this aim, Section 2 of this paper analyses the current state of play and the views already expressed by the European Commission on this subject; Section 3 considers some challenges ahead; and Section 4 sets out our conclusions. We argue that a holistic review of current regulations may lead to a constructive critique of the actual results of the Services Directive and their use for enhancing the internal market. In any case, our conclusions are preliminary since the regulatory review process is still on-going.

II. CURRENT STATE OF PLAY: HOW IS EUROPE FACING THE REGULATORY CHALLENGES OF THE SHARING ECONOMY?

1. The sharing economy as part of the European Commission Digital Agenda

On 6 May 2015, the Juncker Commission launched one of its key priorities: the Digital Single Market Strategy.⁴ One of the three pillars on which the Strategy rests is “creating the right conditions and a level playing field for advanced digital networks and innovative services”. There is, therefore, much need for an improved regulatory environment for platforms and intermediaries. This of course is a much broader objective than to regulate the collaborative economy. The latter was nevertheless included in that broader objective back in May 2015.

The Commission undertook to “launch before the end of 2015 a comprehensive assessment of the role of platforms, including in the sharing economy, and of online

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A Digital Single Market Strategy for Europe*, COM(2015) 192 final.

intermediaries, which will cover issues such as (i) transparency e.g. in search results (involving paid for links and/or advertisement), (ii) platforms' usage of the information they collect, (iii) relations between platforms and suppliers, (iv) constraints on the ability of individuals and businesses to move from one platform to another and will analyse, (v) how best to tackle illegal content on the Internet.”⁵

On 24 September 2015, the European Commission launched a public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.⁶ The consultation was closed on 6 January 2016 and the results were published on 2 February 2016.⁷ Three months later, on 25 May 2016, the Commission was ready to issue its package of measures on e-commerce⁸ and, in parallel, a specific Communication on platforms.⁹ Only one week later, on 2 June 2016, the Commission gave stand-alone relevance to a new Communication on the sharing economy.¹⁰

Before going into the details of these Communications, the formal choice of soft law instruments already calls for a first reflection. European institutions trust existing regulations and case-law to tackle this new phenomenon. At the European level, it may suffice for the moment to interpret –and, perhaps, partially amend– the current legal framework. There would seem to be two reasons for this choice. On the one hand, the Commission's investigation led to the conclusion that the sharing economy was difficult to define and embedded an array of different business models for which closed legal concepts may be ill-fitted. On the other hand, regulatory interests and policy choices also diverged among the different local realities analysed and, therefore, again, defining new and closed legal concepts may prove counterproductive.¹¹

⁵ Ibid.

⁶ <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud> (last access on 9 June 2017).

⁷ <https://ec.europa.eu/digital-single-market/en/news/responses-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and> (last access on 9 June 2017).

⁸ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8822&lang=en&title=New-e-commerce-rules-to-help-reap-full-benefit-of-Single-Market (last access on 9 June 2017).

For an overview of the package, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses*, COM(2016) 320 final.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe*, COM(2016) 288/2.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions – *A European agenda for the collaborative economy*, COM(2016) 356 final.

¹¹ The results of the public consultation and the analytical papers commissioned by the European Commission are available at: http://ec.europa.eu/growth/single-market/services/collaborative-economy_en (last access on 9 June 2017).

2. The crucial role of platforms in the sharing economy

The European Commission's Communication on platforms clearly emphasizes the idea that digital platforms and on-line intermediaries are key economic actors in the global economy. EU competitiveness worldwide may depend on how the EU facilitates business opportunities for these actors.¹²

Starting from this premise, the European Commission indicates that there is a high degree of uncertainty as to how the current legal framework applies to these platforms and to what extent. Therefore, it commits to reviewing such uncertainties on the basis of four principles: (i) guaranteeing a level playing field for comparable digital services; (ii) guaranteeing a responsible behaviour of online platforms to protect core values; (iii) enhancing transparency and fairness for maintaining user trust and safeguarding innovation; and (iv) maintaining open and non-discriminatory markets in a data-driven economy. A whole package of rules is either interpreted, revised or currently under analysis on the basis of these principles.

To our mind, the European Commission's most important indications for sharing economy business models regard, on the one hand, the emphasis on the need to guarantee a level playing field and, on the other hand, the country of origin principle applied to platforms and their limited liability for the underlying transaction. Indeed, the need to ensure a level playing field requires an analysis of the role of platforms as providers of information society services ("ISS"), providers of the so-called underlying services (e.g. transport, touristic lodging, etc.) or both. At the end of the day, this assessment means comparing the digital world and the physical world, bearing in mind that the activity of pure intermediary platforms should not be impaired through excessive regulatory requirements, which need not apply to on-line notice boards, as they do not apply to physical notice boards.

One infers from the Communication on platforms and the Communication on the sharing economy that the Commission suggests a two-tier analysis. On the one hand, a decision on the type of service provided (ISS, underlying service or both) is essential to decide whether the platform must abide by regulatory requirements such as authorization or registration schemes, provided that these are justified, adequate and proportionate according to the Services Directive.

In the section on possible market access requirements for platforms, the Commission draws up a list of criteria that may help defining when a platform provides the underlying service and when it does not. The Commission mentions (i) the fixation of prices; (ii) the determination of other key contractual terms, such as mandatory instructions for the provision of the underlying service; and (iii) ownership of key

¹² "In all, online platforms foster digital value creation that will generate economic growth in the digital single market. Their importance implies that facilitating and supporting the emergence of competitive EU-based platforms is both an economic and strategic imperative for Europe." Communication on platforms, *supra* note 9, page 4.

assets.¹³ Interestingly enough, the Commission adds that when “all” criteria are met, the platform probably does control the underlying service, although some other criteria may also play a role. Likewise, the Commission does not automatically rule out control over the service when only some of these criteria are met.

On the other hand, the Commission points out that the platforms’ liability regime as regards the underlying transaction is currently set out in the E-commerce Directive,¹⁴ which distinguishes different levels of liabilities depending on the active or passive nature of the platform (Articles 12 to 15). To put it short, if the platform intervenes in the configuration of the underlying transaction it bears responsibility for any liabilities arising from both the electronic service provided and the underlying transaction. If it does not (i.e. if the activities of the platform are limited to the transmission or storage of information), only the parties to the underlying transaction are liable, the platform being a mere intermediary and, thus, responsible only for the electronic intermediation service.

The ECJ already examined different degrees of liability in a handful landmark cases. In the Google case,¹⁵ for example, it established, by reference to recital 42 of the E-commerce Directive, that “(...) the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is ‘of a mere technical, automatic and passive nature’, which implies that that service provider ‘has neither knowledge of nor control over the information which is transmitted or stored’. Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”¹⁶

On substance, the ECJ considered that the mere fact that (i) Google charged for its referencing system; and (ii) the keyword selected and the search term entered by an internet user were the same was not enough to conclude that Google had knowledge of, or control over, the data entered into its system. Conversely, it might be decisive whether Google helped draft the commercial message, but it was for the national court to take the final decision.¹⁷

In the same vein, the E-bay case further clarified that where the operator provides assistance on how to present or promote sales offers “it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but

¹³ Communication on the collaborative economy, *supra*, note 10, page 6.

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178 of 17.7.2000, p. 1.

¹⁵ ECJ Judgment (Grand Chamber) of 23 March 2010, joined cases C-236/08 to C-238/08 - *Google France SARL and Google Inc. v Louis Vuitton Malletier SA and others*, Rec. 2010 I-02417.

¹⁶ Google Judgment, *supra* note 15, paragraphs 113 and 114.

¹⁷ Google Judgment, *supra* note 11, paragraphs 116 to 119.

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.”¹⁸ Again, the ECJ left it to the national court to decide on the merits.

Once this assessment is made and assuming neutrality exists, the exemption of liability foreseen in the E-commerce Directive is subject to a further condition set out in Article 14(1): the digital platform must not be aware, in factual terms, of the illegal content or activity. If it were, it should immediately remove or disable access to the information through its website. There is, however, no general obligation to monitor content nor a general obligation actively to seek facts or circumstances indicating illegal activity (Article 15(1) of the E-commerce Directive).

Neutrality and limited liability depend, therefore, on control over data or the information stored. Although the distinction is clear on paper, drawing the line in practice may be far more complicated. The same holds true for the theoretical possibility of checking the platform’s factual awareness of illegal content. Leaving aside the obvious paradox that there is no obligation to monitor, how is this awareness supposed to be proven in sharing economy business models? Does prior notice from a single user or a public authority suffice? At this point, the existing case law on trademarks may of course be of help, but it will surely call for further development in this specific area. Some answers may come with the much-awaited preliminary rulings in the Uber cases,¹⁹ which shall be discussed in Section 3 below. For the moment, the Communication on the sharing economy simply calls for a case-by-case analysis.

3. The freedom to provide services and the sharing economy

When analysing the provision of the underlying service, the Communication on the sharing economy also emphasises that the existing legal framework –here, the Services Directive– is sufficient and that there must be a level playing field between old businesses and newcomers.²⁰ Therefore, the classical assessment of State measures as potential barriers to trade, that need to be justified on public interest objectives and hold a necessity and proportionality assessment in order to be acceptable under EU internal market rules, remains valid.

Within this framework, the Commission seems particularly worried about unnecessary burdens on market access. Since new service providers may be non-professional traders, excessive administrative requirements on market access may discourage economic

¹⁸ ECJ Judgment (Grand Chamber) of 12 July 2011, case C-324/09 - *L’Oréal SA and Others v eBay International AG and Others*, Rec. 2011 I-06011, paragraph 116.

¹⁹ C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* (“Uber Spain”, pending); and C-320/16, *Uber France SAS* (“Uber France”, pending). At the time of submitting this paper, both cases are pending. AG’s Opinion on Uber Spain was released on 11 May 2017.

A third preliminary reference coming from Belgium, C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, was recently inadmitted by Order of the ECJ of 27 October 2016 (“Uber Belgium”).

²⁰ Communication on the collaborative economy, *supra*, note 10, pages 3 and 13.

initiative. What is more, most of these businesses do not seem to entail environmental or other hazards that would justify stringent authorization regimes and, therefore, the general rule should be free access to the activity.

Therefore, even if the Commission, aware of overlapping national competences in this area, does not provide clear-cut rules it does guide national authorities to consider the following relevant factors, amongst others, in order to determine the professional nature of a service provider: frequency of the service, profit-seeking motive and level of turnover.²¹ This professional nature of the activity shall trigger, for example, the application of consumer protection rules,²² or the application of other tax or labour obligations.

III. THE WAY FORWARD

1. Is there need for a well-defined legal concept of the sharing economy?

Concepts are essential both for law making and for ensuring a minimal legal certainty when enforcing legislation. The application of tax, labour or consumer rules, for example, may indeed depend on the legal qualification of the activity as a professional business activity, which is provided for remuneration.

In the sphere of the so-called “sharing” or “collaborative” economy, definitions are far from clear. The very name of this new reality is highly controversial, since it encompasses, from a subjective perspective, services involving and not involving electronic intermediaries and, from an objective perspective, services that do not involve an economic remuneration and services where payment does exist, whether it is paid to the final service provider or to or through an intermediary platform. It is thus doubtful that the terms “sharing” or “collaborative” are telling, since there are players both in the digital and the brick and mortar worlds that engage in such activities with a clear commercial and professional aim.

Actually, even the Commission had a hard time providing for a definition of the collaborative economy and did not seem to reach a fully satisfactory one. The Commission recognised the evolving nature of the concept and limited its attempt to provide a definition to the purposes of its own Communication:

²¹ Communication on the collaborative economy, *supra*, note 10, pages 9 and 10.

²² Consumer protection obligations foreseen in EU Law only apply to business-to-consumer relationships (B2C), but not to consumer-to-consumer relationships (C2C). Therefore, only the professional nature of the service provider’s activity triggers the application of these rules. See Articles 2 and 3.1 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22–39.

“What is the collaborative economy?”

For the purposes of this Communication, the term "collaborative economy" refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis (‘peers’) or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them (‘collaborative platforms’). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit.”²³

Some voices have therefore emerged calling for a change in terminology.²⁴ The words are said to be misleading since they automatically lead to an image of efficiency, better use of goods and lack of lucrative purposes, which is not always real. Sometimes, platforms may not be pure notice boards with no interest in promoting a particular advertisement in their on-line marketplace and they may also promote parallel services or products giving rise to some competition concerns. Some other times, individuals providing a good or service may also act professionally and with a clear profit-seeking objective and, therefore, the qualification of the activity may indeed be crucial for the application of tax, labour or consumer protection obligations, for example. In these scenarios at least, which are not good or bad per se, the idea of sharing seems somehow misleading and sometimes extended disingenuously.

Therefore, expanding on the Commission suggestion that the existent legal framework is sufficient and the emphasis must be placed at ensuring a level playing field, we contend that there is urgent need to forget about the sharing and collaborative adjectives in the legal debate, since they do not provide a clear picture and hardly serve the purpose of legal certainty (and clarity) much needed in this area.

2. In search of a rational legal approach to platforms in these new business models

Under Section 2 above we have discussed the Commission’s approach to the role of platforms in the “sharing economy.” The Commission distinguishes between (i) criteria that may help determining if platforms must meet market access requirements (i.e. notably who sets the price, who sets relevant contractual terms and who owns key

²³ Communication on the collaborative economy, *supra*, note 9, page 3.

²⁴ See, for example, The rise of the sharing economy, *The Economist*, 9 March 2013, available at: <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy> (last access on 9 June 2017); HERN, A., Why the term 'sharing economy' needs to die, *The Guardian*, 5 October 2015, available at: <https://www.theguardian.com/technology/2015/oct/05/why-the-term-sharing-economy-needs-to-die> (last access on 9 June 2017); or ECKHARDT, G.M., BARDHI, F., The Sharing Economy Isn’t About Sharing at All, *Harvard Business Review*, 28 January 2015, available at: <https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all> (last access on 9 June 2017).

assets); and (ii) criteria that, according to existing case-law, lead to applying the exemption from liability for the underlying transaction of the E-commerce Directive.

As we shall see in this Section, these are, to our mind, two stages of the same analysis. Both sets of criteria seek to determine who controls the configuration of the underlying transaction, under the assumption that such control may be held by the final service provider alone, by the intermediary platform or by both of them. Therefore, in the event that an electronic platform, which is always an ISS provider, is also, solely or jointly, determining relevant aspects of that underlying transaction, it may both be subject to market access requirements and be liable for the services it commercializes.²⁵

Let us look, first, at the current approach to regulatory requirements on platforms. National regulators and judges are already having a hard time deciding whether this new player should or should not fall under existing rules applicable to the services provided through the platform.²⁶ The question is of utmost importance because of the jurisdictional question behind it: if regulatory requirements apply to a platform, the competent authorities of the country of destination may require compliance, to the detriment of the more lenient country of origin principle foreseen in the E-commerce Directive.

The preliminary ruling requested in *Uber Systems Spain*²⁷ concerns an unfair competition dispute. The Barcelona judge specifically asks the ECJ whether the intermediary services of this platform must be qualified as (a) a transport service, excluded from the scope of the Services Directive; or (b) an information society service covered by the E-Commerce Directive. In any alternative, the judge further asks the ECJ to determine whether an authorization requirement for such a business is compatible with applicable EU law. The oral hearing of the case took place on 29 November 2016 and AG's Opinion was released on 11 May 2017. In brief, AG Szpunar

²⁵ According to HATZOPOULOS and ROMA, "a gradation may be established along the following lines: when the platform participates in the provision of the underlying service, the E-commerce Directive is inapplicable; when the platform plays an active role in determining the content of the underlying service (which may be offered by a third party) then the E-commerce Directive may apply, but the exclusion of liability foreseen in Article 14 may not. The exclusion of liability will apply where the platform does neither of the above and has a passive or else neutral role both in the definition and in the provision of the underlying service." HATZOPOULOS, V. and ROMA, S, *op. cit.*, note 2, at pp. 104 and 105.

²⁶ For some reflections on the understanding of the level playing field from a competition law perspective see ORTIZ, A. (ed.), *Internet, Competition and Regulation of On-line Platforms*, Competition Policy International, 2016, available at:

<https://www.competitionpolicyinternational.com/wp-content/uploads/2016/05/INTERNET-COMPETITION-LIBRO.pdf> (last access on 9 June 2017). Inside this online book, as regards the Uber cases, see GERADIN, D., *Should Uber be allowed to compete in Europe? And if so how?*, pp. 109-118; and GERADIN, D., *Online intermediation platforms and free trade principles – Some reflections on the Uber preliminary ruling case*, pp. 119-133.

For a different opinion on platforms and their role in the digital economy see EZRACHI, A. and STUCKE, M.E., *Is your digital assistant devious?*, *Oxford Legal Studies Research Paper No. 52/2016 and University of Tennessee Legal Studies Research Paper No. 304*, 2016, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828117 (last access on 9 June 2017).

²⁷ C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* (pending).

is of the opinion that Uber services ought to be qualified as transport services and, therefore, abide by national requirements.²⁸ In any case, only the final judgment will provide clarification, whose impact will certainly go beyond the specific case and, or so we hope, be a first step towards legal certainty in this field.

Uber Belgium²⁹ was also a case where the national judge sought guidance on definitions. Under the umbrella of proportionality, the Brussels Court asked the ECJ whether UberPOP services qualified as “taxi services” and therefore –one infers from the scarce information available– had to meet the same requirements as the latter. Unfortunately, though, the ECJ considered that (i) the question referred to a hypothetical case since the national regulation covered remunerated services whereas the service that gave rise to the case was non-remunerated (ridesharing services); and (ii) the question was imprecise since the characteristics of the real service being provided were not specified. Therefore, the Court could not ascertain the true implications of the case and declared the preliminary reference not admissible.³⁰

Uber France,³¹ the last of the three pending cases, is also about the dichotomy transport service versus information society service, and the national judge asks the ECJ for guidance. One option or the other in each of these three cases may be decisive for a first approach on whether market access requirements imposed on platforms are admissible under EU Law.

Case-law in these affairs will be extremely relevant since the application of the country of origin principle of the E-commerce Directive –which entails a general prohibition of prior authorizations– is dependent on the nature of the electronic intermediation activity.³² If the platform does something else than pure intermediation –i.e. if it controls the underlying transaction (or part of it)– it may also have to meet market access requirements and it is the criteria for the distinction that are much awaited to arise from these cases.

As discussed at Section 2, the Commission dealt with those same distinguishing criteria in its 2016 Communications, emphasizing the importance of setting prices and key contractual terms, as well as owning key assets. In the Commission’s view, those conditions may cumulatively give rise to control over the underlying service, whereas

²⁸ AG Szpunar highlights the following factors as decisive for his opinion: (i) Uber controls its so-called dynamic pricing system; (ii) Uber imposes minimum safety requirements for drivers and cars; (iii) Uber controls the supply by encouraging drivers to work when and where demand is high; and (iv) it also controls the conduct of drivers and users by means of a rating system and the threat of exclusion from the platform. In his own words, Uber “actually does much more than match supply to demand: it created the supply itself.” AG’s Opinion of 11 May 2017, case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain* (pending), paragraphs 43 to 51.

²⁹ C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV* (inadmitted).

³⁰ Order of the ECJ of 27 October 2016, C-526/15, *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, ECLI:EU:C:2016:830, at 25-30.

³¹ C-320/16, *Uber France SAS* (pending).

³² Articles 3 and 4 of the E-commerce Directive.

none alone may lead to such conclusion and other aspects of the particular business model may also be considered in the analysis.

While ownership of assets is relatively uncommon in sharing economy business models, we could indeed think of many other criteria that may play a role there, even if not expressly mentioned in the Communication; e.g. active marketing and commercialization campaigns, intervention in the presentation of customers reviews, etc. Even more interestingly one could wonder whether control over the relevant technology is a relevant factor in new algorithm-driven transactions. The particularities of each platform aside, when analysing these new digital transactions, checking who sets the price remains relevant indeed, but one may miss the whole picture if control over the technology and the way it influences the price and other transaction conditions are not included in the assessment.

If one thinks of a sharing economy service where both the final service provider (usually a ‘non-professional’ individual) and the intermediary platform intervene in the price-equation (e.g. the former setting an initial fare and the latter setting a fee calculated as a percentage of that fare but also including considerations of supply and demand),³³ control over the final algorithm seems much more relevant than theoretical price fixing, which may intuitively be attributed to the party setting the initial fare. This is not to say that controlling the technology always gives control over the underlying service, since this would be tantamount to eliminating the country of origin regime under the E-commerce Directive. It is not the only relevant factor.

However, in cases where the algorithm does not only match supply and demand and is self-learning from previous purchasing profiles, but it additionally influences the final price in a manner that the initial fare becomes practically irrelevant, control over the algorithm may be crucial for regulatory purposes (i.e. for deciding who should comply with market access requirements, provided they are justified and proportionate). In other words, to our mind, control over the relevant price-fixing algorithm may be a much relevant technicality in these new business models.

Keeping this in mind, it is important to recall the terminology of the Google and E-bay judgments, discussed above. Even if they dealt with the limited liability regime of the E-commerce Directive (arguably a separate issue from the market access regime), the ECJ considered that the key aspect to determine the active or passive role of a platform was “control over data” or information stored on that platform. Therefore, one may legitimately wonder whether, when transposed to a services relationship, “control over the service” or the key aspects of the service should not only determine the disapplication of the liability exemption, but also give rise to the applicability of market access requirements and, in the end, the full application of the Services Directive (i.e. compliance with regulatory requirements that are sufficiently justified, adequate and proportionate to the general interest objective they pursue). To our mind, the grounds

³³ Uber’s surge pricing or dynamic pricing example comes again to mind. As the platform contends, the price for their underlying service is set by the market itself, according to the rules of supply and demand: <https://help.uber.com/h/e9375d5e-917b-4bc5-8142-23b89a440eec> (last access on 9 June 2017).

for applying or not applying one and the other (i.e. market access requirements and the liability exemption) are essentially the same (i.e. control over that underlying service) and, therefore, unifying the criteria would greatly benefit the consistency of the legal assessment.

In any case, it is difficult to ascertain at this moment which of the criteria discussed above are inextricably linked to a pure intermediation activity and which are likely to affect to an appreciable extent the underlying service. By requiring a combination of several relevant factors as cumulative conditions for control over the underlying service, the Commission tacitly manifests its fears of over-regulating platforms to the prejudice of Europe's overall competitiveness as a global actor. Therefore, while acknowledging that different models may exist, it clearly warns national administrations against unnecessary burdens on digital platforms. This warning seems sensible in the wake of some national regulatory decisions or debates that may only tend to protect the existing status quo, with little regard for the rules of both the freedom to provide services and the provision of electronic intermediation services in Europe.

It is only a question of time until further use of Article 267 TFEU or even infringement proceedings³⁴ extend to activities other than passenger transport, such as the rental of touristic dwellings,³⁵ car and/or parking sharing,³⁶ guided tours, teaching, cooking, etc. The so-called "sharing economy" covers virtually any service provision but it is clear now that the existing norms are manifestly insufficient to respond to the new reality. A new actor –the intermediary– has come to stay but it may no longer be a pure intermediary (as is far clearer when the platform is a marketplace for goods) and neither a service provider. Therefore, the ECJ has a difficult choice to make and we submit here that, regardless of this choice, some update of the existing legal framework shall definitely be necessary.

3. Is the level playing field between traditional business models and new business models a useful legal tool in the sharing economy context?

The Commission's plea in favour of a level playing field calls for some reflection. For instance, a frequent interpretation in the touristic lodging sector is that hotels and hostels must meet the same regulatory requirements as touristic dwellings or, in the passenger transport sector, cabs must be subject to the same conditions as private vehicles undertaking in transport activities. As we shall argue, however, this is not necessarily the best regulatory option. While the objective of equality or equivalence of regulatory conditions is undoubtedly sound, claiming that legislation should only regulate on the basis of the nature of the activity (i.e. lodging, transport, etc.) regardless

³⁴ Article 258 TFEU.

³⁵ For example, a Spanish association of touristic dwellings, FEVITUR, challenged several regional regulations before the European Commission: https://www.hosteltur.com/119245_fevitur-denuncia-regulacion-pisos-turisticos-comision-europea.html (last access on 9 June 2017).

³⁶ BlaBlaCar, a car sharing company, already confirmed challenging Spanish regional rules in Madrid before the European Commission: <http://www.expansion.com/economia-digital/companias/2016/10/20/580889f1ca47411c248b460f.html> (last access on 9 June 2017).

of the means of performing that activity (i.e. professional activity, full-time or part time, type of premises, etc.) may give rise to substantial inequalities and undesirable results.

Certainly, by “different means” of performing the activity we do not refer to the brick and mortar versus digital dichotomy, which is already addressed by the limited responsibility regime of the E-commerce Directive discussed in Section 2.2 above. We refer to substantive differences between the activities of different service providers³⁷ and their related externalities. Such differences may have arisen or increased as a consequence of the digital world and technological developments, but one should focus here not on the digital means of celebrating the transaction but on the outcomes –the so-called externalities– of the activity itself. Externalities that activity regulation may try to address in case of market failure.

Let us take the example of touristic lodgings. It is quite evident that the activity does not bear the same externalities when it is performed in a hotel whose owner takes care of cleanliness and maintenance, for example, than when it is performed in an apartment where neighbours need to rest and only a common contribution to common areas guarantees minimal maintenance. Similarly, the aggregated impact of touristic lodging in private dwellings for the local community can diverge substantially from the impact that hotels and hostels generate, simply because the latter concentrate users in particular buildings whereas the former spread them in private homes over the most touristic areas of a city. By themselves, these differences do not tell us anything about the social or economic desirability of one or the other, but they do demonstrate that these are different realities and they may, as we contend, call for different regulatory solutions.

The level playing field objective reminds us of the traditional formulation of the general principle of equality, which always meant treating similar situations alike and dissimilar situations differently.³⁸ Considering that all new business models must follow the rules already applicable to traditional businesses or, conversely, advocate deregulation as the miracle cure for overregulated industries both seem too large generalizations that may sometimes benefit particular economic interests but may not benefit social welfare and, therefore, may neither justify regulatory intervention nor deregulation. Such propositions (i.e. equal regulation or no regulation for all undertakings covering the same demand) may only be sensible if traditional and new businesses are truly comparable and entail similar externalities.³⁹

³⁷ Including platforms in such concept depends on the scope of the platform’s activities as discussed in Section 2.2 above.

³⁸ TRIDIMAS, T., *The General Principles of EU Law*, Oxford EU Law Library, 2nd edition, 2006, Chapter 2.

³⁹ Note that we use the term externalities in an objective manner, without engaging in a discussion on which of those externalities justify intervention and which of them do not. In our view, what is important is the theoretical approach and not the specificities of particular situations. Regulatory intervention may or may not be justified on public interest grounds, provided it complies with the relevant internal market rules and case-law. As widely known, purely economic justifications or protectionist measures that merely try to preserve the status quo to the benefit of traditional business models shall not qualify as sufficient justifications.

To this end, it is essential to identify the different externalities associated to different operators, while at the same time accepting that, indeed, the digital means of concluding a transaction or advertising a service are irrelevant per se. To our mind these are two unavoidable premises under which an authority or a judge may decide if a public interest objective deserves regulatory intervention or is best left to market forces. Conversely, should the competent authorities fail to evaluate different externalities and to meaningfully distinguish different ways of offering the same services, regulation may indeed be redundant for some and unfair for others.

In other words, we would caution against equating a level playing field with providing the same regulatory environment for different activities, even if such activities cover the same consumer needs. Demand substitutability analyses are essential for Competition Law purposes and are indeed relevant for an initial approach to activity regulation. However, the latter may call for a more nuanced examination of different externalities, both positive and negative, arising from different ways of performing the same activity. Addressing them may be the very purpose of taxation, labour law or market access authorizations. To this end, equal treatment of similar situations seems a more effective legal tool for evaluating the reasonableness of regulation than calling for a level playing field that tends to limit the analysis to competition parameters. Yet, such regulation shall be adequate, proportionate and respect the minimum distortion principle, but this is a separate and subsequent step of a multi-layer evaluation.

4. Are current market access and market performance requirements in line with existing EU Law?

The Services Directive provides for an open list of overriding reasons relating to the public interest that may justify national measures restricting the freedom to provide services,⁴⁰ provided that they are suitable and proportionate. However, some of the justifications that national, regional and local authorities advance to defend their restrictive measures may not fit well into any of those categories, unless we artificially broaden the scope of the oft-used public order justification.

Think, for example, of the recurrent allegation of housing shortages in touristic cities such as Amsterdam, Berlin or Barcelona.⁴¹ Is there a social need to address housing shortages in the European market economy model? Is there a legitimate social objective to certain local authorities' search for equilibrium between residents and tourists? At the other end of the logical reasoning, should the market freely determine which cities should be devoted to tourism and which others are fit for living?⁴² Should the impact of

⁴⁰ Article 4(8) of the Services Directive.

⁴¹ *Impulse Paper on the business authorisation/licensing requirements imposed both on peer-providers and platforms: Barcelona, Berlin and Amsterdam*, Rating Legis, May 2016, available at: <http://ec.europa.eu/DocsRoom/documents/16948/attachments/1/translations> (last access on 9 June 2017).

⁴² Sometimes a pure economic debate (i.e. regulatory intervention is only needed in case of market failure) in competition law circles leaves aside other socially desirable goals. The discussion seems to re-establish the traditional dichotomy between free market and regulated industries and common ground is yet to be found. We would, however, advocate for this common ground as a natural outcome in cases

tourism on communal areas (e.g. reduction of local commerce, intensive use of public spaces, etc.) be compensated, merely and at most, through heavier tax burdens?

For the moment, responses to those questions are unclear and, again, either the justification is specifically analysed by the ECJ in a preliminary ruling (Uber cases, but also future cases yet to be asked for) or its admissibility or plain rejection clarified through secondary legislation. In this specific case, we contend that the first option is better since local disparities may not justify general secondary legislation and, what is more, such legislation might be ill-adapted to new developments of these businesses. Furthermore, national authorities still have the possibility to advance public interest objectives other than those specifically cited in the Services Directive,⁴³ and they may indeed choose to explicitly cite them in national regulations.

Turning now into the adequacy and proportionality of regulatory measures, it is evident that this case-by-case analysis can be even more controversial since it departs from the above generalities to land on the specific regulatory options of each administration. The principles of necessity, proportionality and minimum distortion, to be applied by national authorities on a case-by-case basis, have the virtue of being sufficiently broad to adapt to the specificities of each case, but they may prove too indefinite to help national authorities vis-à-vis this completely new phenomenon.

One thing seems indisputable. The current regulatory models need an update. Either requirements result in discriminatory outcomes or they do not serve the purpose of protecting the legitimate public interests they seek to preserve. Some national authorities are currently trying to adapt the existing legal framework, either ex officio or following complaints by both market participants and end users. Evident as it is, their difficulty from a legal perspective may consist of discerning which arguments do merit intervention and which others only seek the maintenance of an out-dated status quo.

Given this reality, innovative initiatives and proposals are emerging and they are most welcome. Leaving aside the de-regulation proponents, some voices call for dynamic regulatory options that may best match the rules of supply and demand with the social interests at stake.⁴⁴ These propositions, each one of them in its particular manner,

where competition law and internal market rules coexist. For a thorough reflection in this respect see EZRACHI, A., *Sponge*, *Journal of Antitrust Enforcement*, 2016, pp. 1-26.

⁴³ Some examples of this approach already exist in the case law. For example, ECJ Judgment of 8 May 2013, joined cases C-197/11 and C-203/11 - *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering*, ECLI:EU:C:2013:288, paragraphs 49 to 52 (on social housing as a public interest objective); or ECJ Judgment of 1 June 1999, case C-302/97 - *Klaus Konle v Republik Österreich*, ECLI:EU:C:1999:271, paragraph 40 (on country planning as a public interest objective).

⁴⁴ See, for example, MILLER, S.R., *Transferable Sharing Rights: A Theoretical Model for Regulating Airbnb and the Short-Term Rental Market*, 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514178 (last access on 9 June 2017); EZRACHI, A. and STUCKE, M.E., *Virtual Competition: The promise and perils of the algorithm-driven economy*, Harvard University Press, 2016, pp. 212 et seq.; or *A dynamic regulation in the field of tourist accommodation*, Autoritat Catalana de la Competència (Catalan Competition Authority), December 2016, available at:

basically call for applying technology developments to regulation and therefore adapt such regulation to different digital realities and their corresponding externalities.

In an algorithm-driven digital economy it actually does not seem unreasonable to think of algorithm-driven regulations.⁴⁵ Let us bring again the example of touristic lodging and its allegedly negative externalities in certain cities. One might think about a digital tool that enables administrative authorities to know exactly when and how a particular level of supply affects some areas of a city and in which exact moment intervention is desirable. Of course, purely economic goals (i.e. determining a market turnover threshold, for example) would never stand up to an internal market analysis, and there seems to be no sound reason for a change in this well-established case law. However, one may well think of other socially desirable goals (e.g. addressing housing shortages or ensuring minimum maintenance of common areas) leading cities to use such an “administrative algorithm” as a means of achieving that purpose.

It is too early to know if these proposals will manage to find their way through static and traditional administrative systems, which are sometimes at odds with that concept of dynamism. However, one thing is to admit that the Law always lags behind reality and quite a different one is to perpetuate and aggravate this gap. To our mind, the more new regulatory proposals emerge, the more likely it is to find an innovative legal solution for innovative economic initiatives.

IV. CONCLUSIONS

As some operators suggested during the public consultation on platforms,⁴⁶ the Digital Single Market builds on well-known legal concepts that have been developing for decades and need not be obliterated just because new business models emerge. In other words, the single market construction shall need to be adapted to the collaborative economy but not radically reformed by policy makers. Adaptation is precisely what the European Commission has chosen to do, and this is, to our mind, a valuable and sensible choice made by the appropriate authority.

http://acco.gencat.cat/web/.content/80_acco/documents/arxiu/actuacions/20161220-ob-31-regulacio-dinamica-eng.pdf (last access on 9 June 2017).

⁴⁵ The application of the algorithm logic to consumers’ digital assistants (also called digital butlers) and its implications for Competition Law purposes has been the subject of a thorough study in GAL, M., ELKIN-KOREN, N., Algorithmic consumers, *Harvard Journal of Law and Technology*, Vol. 30, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876201## (last access on 9 June 2017).

Building on this proposition, we would also suggest undertaking a competition and internal market analysis of the potential harms and benefits of regulatory intervention through digital tools. Such an analysis is beyond the scope of this paper but we would intuitively contend that the results of regulation may in that case be better matched with the public interest objectives sought and, arguably, the disparities of the playing field as regards the treatment of different actors may also be substantially reduced.

⁴⁶ See A-Digital’s “*Additional comments on Digital Single Market: Digital platforms*”, available at: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=13823 (last access on 9 June 2017).

Nevertheless, there are still plenty of legal uncertainties to address. First of all, the role of platforms in this wholly new phenomenon is far from clear. While some competition law commentators advocate for a non-differentiated approach to on-line services in substitutability analyses,⁴⁷ this differentiation may however be necessary from an internal market perspective when social interests other than pure economic welfare are at stake.

Furthermore, it is nowadays clear that not all platforms act alike in the online market. Some of them act as pure notice boards that limit their activities to matching supply and demand, while some others do intervene in the configuration of a product or service. This distinction was already at the core of the discussion about the liability exemption under the E-commerce Directive. So, again, there is no need to reinvent the wheel, but to resort to existing Law and case law. However, it is essential to clarify the factors that may help regulators distinguish pure intermediaries from other types of platforms. Neither the Google, E-bay and similar cases gave enough guidance to this end, nor did the Commission provide sufficient elements of distinction in its recent Guidelines. As contended in this article, some other factors may also be relevant and, in any case, solutions will have to come on a business-by-business basis.

Secondly, the online environment has boosted some economic activities to unprecedented dimensions, since private individuals have become large-scale market players. Again, we should distinguish those individuals who perform a professional economic activity from those who only offer goods or services sporadically and/or free of charge. This distinction implies that we should urgently forget the “collaborative” and “sharing” concepts that may well explain a sociological reality but definitely provide a turbid image for regulators and judges.

Just in the same way as we never regulated the “traditional economy” as a whole, the new “sharing economy” or even the “digital economy” cannot be regulated or deregulated once and for all. Taking account of the nuances of the different business models, the different social realities and the different ways the market players compete for the same demand is essential for a sound and useful regulatory approach to this new reality.

Once this is accepted, resorting to the Services Directive and the national implementing laws may (i) call for extending the list of public interest objectives that may justify regulatory requirements; and (ii) require a revision of current regulatory measures that may be ill fitted to attain the public interest objectives theoretically justifying them. Both analyses will develop on a case-by-case basis, in which the ECJ will have an essential role to play. We agree therefore to take this examination as an opportunity to

⁴⁷ O’CONNOR, D., *Understanding Online Platform Competition: Common Misunderstandings*, in ORTIZ, A. (ed.), *op. cit.*, n. 26. The author emphasizes the need to “focus on who companies compete with, not how they do it”. In the end, this is the traditional substitutability approach in Competition Law analyses. However and without prejudice to the reasonableness of this approach, the way companies compete may indeed play a role on the evaluation of positive and negative externalities of their activities. This might be a relevant factor vis-à-vis the need to preserve other social welfare goals.

improve regulation,⁴⁸ and beware of opportunistic generalizations that prevent an objective legal analysis of social and political choices.

⁴⁸ MAUDES, A., SOBRINO, M. and HINOJO, P., Economía colaborativa, eficiencia y competencia, *Blog New Deal*, 6 June 2017, available at: <http://blognewdeal.com/maudes-sobrino-hinojo/economia-colaborativa-eficiencia-y-competencia/> (last access on 9 June 2017); RUSSO, F. and STASI, M.L. Defining the relevant market in the sharing economy, *Internet Policy Review, Journal on Internet Regulation*, vol. 5, n. 2, 30 June 2016, available at: <https://policyreview.info/articles/analysis/defining-relevant-market-sharing-economy> (last access on 9 June 2017).