
# Sharing Economy in Europe

## Opportunities and Challenges

Edited by: Janja Hojnik

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# Introduction

*It is well established that manufacturing in developed economies is under massive pressure. The story of the deindustrialisation of developed economies started in the 1950s and today the value added by manufacturing as a share of GDP is below 15 percent in most OECD countries. Nevertheless, the financial crisis of 2008 and the following recession have led many people and companies to seek alternative employment and income sources, and made developed economies generally recognise the danger of being over-reliant on financial services. Europe thus needs to* 'rebalance' *the economy. It is believed that* 'an industrial renaissance' *or* 'reindustrialisation' *will be able to bring jobs and growth back to Europe. Nevertheless, surviving in developed economies entails more than simply providing products and it is suggested that companies need to move up the value chain, innovate and create ever more sophisticated services to allow them not to compete on cost alone. Companies are thus increasingly basing their entire competitive strategies on service innovation. In this respect, Oxford Economics conducted an international survey of almost 400 senior executives from industrial sectors which showed the share of companies competing through service contracts or products-as-a-service is expected to rise by more than 150 percent over the next 3 years. A large part of this trend involves the so-called sharing and collaborative economy that has become a true trendsetter in recent years. Nevertheless, considering the economic importance of the sharing economy and its broader impact on society, scholars and practitioners need to respond to this emerging process by examining the related legal, economic and societal challenges. One example is the Europe-wide legal*

*procedures against Uber that have led to two cases for preliminary ruling being referred to the EU Court of Justice. Moreover, other EU institutions are seeking to provide a multi-dimensional response to this development in business, dealing with a variety of infrastructural, leadership, skilling and regulatory aspects.*

*Published under the auspices of ELF, this monograph aims to contribute to this end by presenting academics' and practitioners' responses to the challenges posed by the collaborative economy. It includes ten chapters that are arranged from the more general towards the more specific. It begins with a chapter by the author of this Introduction that briefly examines different business models that build on the concept of the collaborative economy and sharing economy, some* ***endeavours to define and differentiate*** *them, as well as the most pertinent legal challenges associated with those new business models, in particular environmental challenges that are not subsequently dealt with by the other authors. In the second chapter, Tomislav Jurman looks at* ***legislation on the sharing economy that is under preparation in Slovenia****. He notes the sharing economy can obviously be viewed from several perspectives and its limits should be determined accordingly. While such limits will change over time and the sharing economy will become increasingly tailored to the needs of individuals who require a transitional zone before they enter the business world, others might only need an opportunity to earn additional income. His chapter thus shows that not everyone engaged in this field is a multinational giant.*

*The two next chapters deal with* ***on-demand labour****. First, Jan Klesla sets out a more economic view on the topic, saying the so-called social peace is a cherished value that must be retained and that gig-economy platforms allow flexibility in work on one hand but, on the other, do not put enough emphasis on the social system. Second, the chapter by Valentina Franca focuses on the gig economy's implications for employee representatives, showing the issue of how to protect 'gig' workers is considerably affecting the role of trade unions given that gig workers are usually isolated, self-employed, work for several employers and at different workplaces or even simply online.*

*Such implications for labour are followed Nana Šumrada Slavnić's chapter that considers the* ***tax implications*** *of the collaborative economy and highlights the fact sharing economy companies like Uber and Airbnb that use the Internet or digital*

*platforms and mobile applications, as well as other digital economy giants, apart from the cross-border structures of such companies, potentially make huge profits but pay very little tax. This aspect makes them particularly interesting for both national and supranational regulators.*

*Petra Weingerl then focuses on the **consumer implications**, stressing that the sharing economy concept brings several challenges for the existing consumer acquis in the EU and the member states' legal systems because it is not always possible to adequately apply the existing legislation to the legal relationships involved in online transactions.*

*Considering that in many respects Uber is a representative of the collaborative economy, in her chapter Katja Vizjak provides a concise overview of the **principal court decisions** regarding certain legal dilemmas arising from one of the most notable business models in the collaborative economy. More specifically, Łukasz Dąbroś and Mateusz Sabat then examine the regulatory challenges of **ridesharing in Poland**. The attempt to create an environment to regulate ridesharing in Poland sought to allow ridesharing drivers to operate with a simple private hire vehicle licence (far easier to obtain than a taxi licence) and allow them to only pick up passengers who have ordered. However, a public hearing in Poland showed that taxi drivers' organisations vehemently opposed the law, further evidencing the relevance of the private-interest theory for taxi regulations.*

*This is followed by an extensive chapter written by Ana Vlahek and Matija Damjan on the regulatory challenges of **short-term apartment rentals via digital platforms** in Slovenia. They stress the presence of many short-term apartment rentals can disturb regular residents in multi-apartment buildings and negatively impact the housing rental market. Their contribution then outlines how the current Slovenian legislation governs the short-term renting of residential premises and compares this to specific legal regimes of certain European countries. The approach digital platforms take to ensure the law is complied with is analysed. In conclusion, the authors seek to show the deficiencies of the current Slovenian rules in this field and ways they could be improved.*

*Finally, Ana Jereb and Primož Rojac investigate whether the delivery of **legal services** could also be candidate for a sharing economy model. They argue that legal services might benefit from the positive effects of delivery through the sharing model and the*

*model's negative aspects might not actually emerge due to specific checks and balances in the legal sector.*

*With this interesting consideration of certain dimensions of the sharing and collaborative economy, in terms of both substance and geographical spread, it is hoped the monograph will stimulate debates and broaden readers' interest in this new trend in business that is spreading across sectors and around the world like a hurricane.*

**Janja Hojnik**
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Janja Hojnik*

# Collaborative and Sharing Economy: Concepts and a Need for a European Approach

## 1. Introduction

The emergence of fast and powerful ICT like the Internet with its vast reach capabilities is playing a leading role in improving existing business models (Kalakota, Robinson: 2001); Lightfoot et al: 2012). ICT is the key enabler of the so-called sharing or collaborative economy that has recently been on the rise with smartphone applications allowing access to platforms that connect buyers with sellers (Fellander et al: 2015). The services of Internet platforms for ride-sharing or home-sharing have disrupted various sectors like a hurricane hitting a town. The sharing or collaborative economy concept enables goods to be converted into services and underleveraged service assets to be transformed into more valuable ones whereby consumers pay to use them rather than own them (Walker Smith: 2016:385; also see Tietze et al: 2015:50). In economic terms, it is astonishing that some start-up companies providing such services with ICT assistance have received outstanding market valuations at levels previously reserved for just a few large companies, thereby signalling that this is a true social revolution. The digitalisation that enables sharing platforms is thus bringing the greater democratisation of entrepreneurship and innovation by reducing the entry barriers for the creators of applications and providers of

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digital platforms. Yet it is not just about start-up companies since giants like Ikea or Kingfisher are now actively supporting the sharing and sustainable economy. What is seen to lie ahead is thus *"a shift in the dominant business model, one in which all consumer goods will be available as a service and all consumer services will be available on demand"* (Walker Smith: 2016:383). Consumers will simply press a button on their smartphones and service providers will step in to pick up their dirty laundry and bring it back all cleaned or deliver food, thereby saving time for consumers. A recent study shows the five main sectors of the collaborative economy (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music video streaming) hold the potential to lift their global revenues from around EUR 13 billion today to EUR 300 billion by 2025 (PwC: 2015:14).

However, it is important to assure that this modern, technologically-driven way of doing business is appropriately regulated so as to control the associated hazards while enabling the industry to flourish. At the same time, regulation must leave enough flexibility to avoid the law restricting technological progress. As the industry and consumers become ever smarter, the regulatory solutions need to keep pace (Oettinger: 2015) and strike the right balance between safety, liability and competition on one side and innovation and flexibility on the other. Namely, regulatory requirements must both carefully limit the new business models and also encourage them.

This chapter briefly examines different business models that build on the concept of the collaborative economy and sharing economy, certain efforts to define and differentiate them, as well as the most pertinent legal challenges arising from these new business models.

## 2. Platform economy and access-based consumption

Business models consistent with the sharing and collaborative economy concept are based on the philosophy of access-based consumption where, instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. Ownership

is no longer the ultimate expression of consumer desire (Durgee, O'Connor: 1995:89; Lovelock, Gummersson: 2004:20). In this way, consumers can avail themselves of goods they could not otherwise afford or which they would rather not own due to concerns like space limitations or the environment, thereby paying for use rather than ownership (Bardhi, Eckhardt: 2012:881; Walker Smith: 2016:385). While publicly accessing goods such as books in public libraries or public transport has been known for centuries, the Internet facilitates new business models of access-based consumption at a time of global economic crisis when consumers are reconsidering their values and spending habits along with urbanisation and high-density living that create a "critical mass" of supply and demand and support better matches (Hatzopoulos, Roma: 2017:81). Indeed, consumption models have proliferated that enable access through the sharing or pooling of resources/products/services as redefined via technology and peer communities. Examples of access models vary from car- or bike-sharing programmes (Zipcar, Hubway) to online borrowing programmes for DVDs, bags, fashion or jewellery (Netflix, Bag Borrow or Steal, Rent the Runway, Borrowed Bling).

Access-based business models underpin Rolls Royce's "Power-by-the-Hour" model or the models adopted by BMW and Daimler which, on top of car production, offer membership-based car-sharing systems (called Drive now and Car2Go, respectively) with users paying an annual membership fee and a price per kilometre (Gardiner: 2013). Such car-sharing services are today also widely offered by companies that do not produce cars (like Zipcar and Hertz). Moreover, companies such as Uber and Lyft connect car owners and those in need of transport through an online platform (i.e. ride-sharing), with many companies and cooperatives (such as Zipcar or Modo Co-op) offering a membership-based car-sharing system where people pay an annual membership fee and a price per kilometre. Whereas some shops now not only sell tools but also offer to rent them for a short time, Uber-like platforms such as Snap-Goods enable tools and other household items to be rented directly from their owners. Levitt's 1972 statement that "everyone is in service" is thus becoming ever more accurate (Levitt: 1972:20).

## 3. Distinguishing between sharing and collaborative economy

A sharing or collaborative economy is defined as including the renting, bartering, loaning and swapping of assets that are typically underutilised, including a variety of tangible and intangible assets (Fellander et al: 13).

In practice, the terms "sharing economy", "peer economy", "collaborative economy", "on-demand economy" and "collaborative consumption" are often used interchangeably. In 2010, Botsman and Rogers (2011:15) published the first book on the sharing economy, explaining how it may become more than a niche economy (as required from an environmental sustainability perspective) and proposed the following distinction between the different forms:

- Collaborative consumption: an economic model based on sharing, swapping, trading or renting products and services, enabling access over ownership. It reinvents not just what we consume but how we consume.

- Collaborative economy: an economy built on distributed networks of connected individuals and communities versus centralised institutions, transforming how we can produce, consume, finance and learn.

- Sharing economy: an economic model based on the sharing of underutilised assets, from spaces, skills through to items for monetary or non-monetary benefits. It is currently mainly discussed in relation to peer-to-peer (P2P) marketplaces but business-to-consumer (B2C) models also hold the same potential (also see Gansky: 2010; Bauwens: 2005; Sundararajan: 2016).

These definitions may be coupled with Belk's study that distinguishes between "sharing" and "pseudo-sharing", i.e. collaborative consumption. True sharing is associated with lending driven by social concerns and pseudo-sharing with renting out mainly for economic gains (Belk: 2014:18; also see Boecker, Meelen: 2017). This points to the dual or paradoxical character of the sharing economy that is located between alternative economic and traditional capitalist systems.

In a European Agenda for the Collaborative Economy from 2016, the European Commission uses the two concepts interchangeably (SWD(2016) 184 final, ft 7). A collaborative economy is thus defined as including »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«. Transactions in a collaborative economy generally do not involve a change of ownership and can be for profit or not-for-profit and may entail some transfer of ownership of intellectual property. The Commission states the collaborative economy includes three categories of actors:

- service providers that share assets, resources, time and/or skills – these can be private individuals offering services on an occasional basis ("peers") or service providers acting in a professional capacity ("professional service providers");

- the users of these items; and

- intermediaries that connect – via an online platform – providers with users and facilitate transactions between them ("collaborative platforms").

The Commission also states the collaborative economy is a rapidly evolving phenomenon and its definition may develop accordingly. The Slovenian draft law on the collaborative economy from 2018 refers to the Commission's definition of a collaborative economy *(Predlog zakona o delovanju spletnih platform sodelovalnega gospodarstva*, 1 March 2018, proposed by a group of Slovenian parliamentary members), while also providing its own definition in Article 2: *»any business model, where the activity is performed on the basis of Internet platforms for collaboration that enable the temporary use of goods without a change in ownership, or services«*.

## 4. A need for a European approach

Apart from defining the concepts, the central issues concern how the regulators should fundamentally approach the collaborative economy (i.e. leniently

or prohibitively) and the institutional alternatives (i.e. who is competent to regulate such an economy). Both EU institutions and the member states are working on the most appropriate regulatory approaches.

The Commission carried out a public consultation in which the majority of consumer respondents took the view that *"collaborative economy platforms provide sufficient information on service providers, consumer rights, characteristics and modalities of the offer and statutory rights"* (First Brief Results of the Public Consultation: 2016). In line with these results, the Commission's announcement it would give "a chance to new business models" and so avoid Europe becoming *"the only continent which denied new business models"* is a sign of the EU executive's greater support for the sharing economy than has been shown by national governments. Moreover, Commissioner for Industry Elżbieta Bieńkowska made the case for a light regulatory approach, arguing in favour of *"clear guidelines related to existing regulations"*, thereby ruling out specific EU legislation to regulate transactions in the sharing economy (Valero: 2016; Christie: 2016).

The Single Market Strategy adopted in October 2015 (COM (2015) 550 final) declared the Commission *"will develop a European agenda for the collaborative economy, including guidance on how existing EU law applies to collaborative economy business models"*. In this respect, the Commission stated it would seek to identify innovative markets where innovative regulatory approaches could be piloted to verify the feasibility and sustainability of innovative solutions. The collaborative economy also forms part of the Commission's Digital Single Market Strategy (SWD(2015) 100 final) since supporting the collaborative economy is vital to meeting the objectives of the digital single market by providing better access for consumers and businesses to online goods and services across Europe.

Based on these strategic documents, in the summer of 2016 the Commission adopted **"A European agenda for the collaborative economy"** (SWD(2016) 184 final). It asserted that it enables the more efficient use of resources and provides new opportunities for Europe to create growth, jobs and benefits

for consumers. The Agenda provides guidance on how existing EU law should be applied to the collaborative economy, clarifying certain issues faced by market operators and public authorities, such as consumer law, employment relations and taxation, while also pointing out that the agenda's goal is to ensure balanced and sustainable development of the collaborative economy, as announced in the single market strategy. Moreover, the Commission stated the collaborative economy can also encourage greater asset-sharing and the more efficient use of resources, contributing to both the EU's sustainability agenda and the transition to a circular economy. The Commission is therefore not planning to adopt legislation on certain legal aspects of the collaborative economy, instead placing the latter within the existing legal framework.

It is noted that even before the recent single market strategies and the collaborative economy agenda, the Commission had supported several projects to help better understand the sharing economy's potential. These projects ranged from a resource-efficient economy to optimising bike-sharing and car-sharing services in European cities. Optimising Bike Sharing in European Cities (OBIS) is a European Commission project to advance the role and opportunities of bike-sharing as a valuable instrument for fostering clean and energy-efficient sustainable modes of mobility in urban areas (DeMaio: 2009). The More Options for Energy Efficient Mobility through Car-Sharing (MOMO CAR-SHARING) project sought to establish and increase car-sharing as part of the new mobility culture and viewed it as a more intelligent and resource-efficient transport solution than car ownership. The MOMO Car-sharing project raised awareness about car-sharing and made recommendations on how to develop and establish new car-sharing schemes (Hazee: 2015; Katzev: 2003; Prettenthaler, Steininger: 1999).

In June 2017, the European Parliament adopted a **Resolution on the Agenda** (2017/2003(INI)), thereby calling for clearer European guidelines. The Parliament welcomed the communication on a European agenda for the collaborative economy, but stressed that it should be seen as the first step towards a well-balanced, more comprehensive and ambitious EU strategy on the collaborative economy. It noted that, if developed responsibly, the

collaborative economy can create significant opportunities for citizens and consumers who will benefit from the enhanced competition, tailored services, increased choice and lower prices. As growth in this sector is consumer driven, the Parliament believes it also allows consumers to play a more active role. Moreover, it highlights the need to enable businesses to grow by removing the barriers, duplication and fragmentation that hinder cross-border development, thus encouraging the member states to provide legal clarity and not to view the collaborative economy as a threat to the traditional economy. The Parliament contends it is thus important to regulate the collaborative economy in such a way that it is facilitating and enabling rather than restrictive. Nevertheless, the Parliament acknowledges the collaborative economy can significantly impact long-established regulated business models in many strategic sectors such as transport, accommodation, the restaurant industry, services, retail and finance. It is thus up to the member states to respond to the various pressing legal problems arising from the collaborative economy. On the frontline here are the national courts which have been called upon to resolve tensions among different stakeholders affected by the growing sharing economy.

One of the best examples of a collaborative economy platform is Uber which offers an arena for connecting people who offer transport services and those looking for a ride to a certain destination. Across the entire world, Uber has basically made the same statement about its legal status: we are not a taxi company, but a technology company. This assertion was rejected by the EU Court of Justice on 20 December 2017 in *Uber Spain* (Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL, ECLI:EU:C:2017:981) when it ruled the service Uber provides by connecting individuals with non-professional drivers is covered by services in the transport field. Member states can therefore regulate the conditions for providing that service, e.g. licences and authorisations provided under national law. Consequently, Uber cannot rely on the free movement of services that applies to information society services. Based on this, on 10 April 2018 the Court ruled in *Uber France* (Case C-320/16, ECLI:EU:C:2018:221) that member states may prohibit and punish, as a matter of criminal law, the illegal exercise of transport activities in the context of the UberPop service, without notifying the Commission in advance

of the draft legislation prescribing criminal penalties for such activities. As already noted by Advocate General Szpunar, treating Uber primarily as a transport company is justified because Uber controls the economically important aspects of the urban transport service offered on its platform. Four points were made in this respect:

- Uber imposes conditions which drivers must fulfil in order to take up and pursue the activity;

- it financially rewards drivers who make a large number of trips;

- it exerts control, albeit indirect, over the quality of drivers' work, which may even result in drivers being excluded from the platform; and

- it effectively determines the price of the service (Advocate General's Opinion in Case C-434/15, Uber Spain, SL, ECLI:EU:C: 2017:364).

These features combined mean Uber cannot be regarded as a mere intermediary between drivers and passengers. In addition, in the context of the composite service offered on the Uber platform, there is no doubt that transport (namely the service not provided by electronic means) is the main item being supplied and gives the service an economic meaning.

As evident from the above case law, national and local regulators are also slow to respond to the challenges brought by the collaborative and sharing economy, typically by creating institutional boundaries between the sharing and regular economy by putting a cap on sharing activity. For example, an increasing number of cities allow home-sharing for a fixed number of days (e.g. 30, 60 or 90 days) (e.g. in London or Amsterdam – Booth, Newling, 2016). As Frenken and Schor (2017:3-10) note, this 'cap' logic can be applied to the operators of home restaurants and the owners of boats, campers and parking spaces. The principle of a cap thus avoids cases where people purchase goods or houses for the purpose of renting them out on a permanent basis. With such caps, governments solve two problems at once because they meet

the incumbent businesses halfway by creating a clear dividing line between a professional provider and an incidental provider, and they pragmatically solve the tax avoidance practice engaged in by users as the sums gained by incidental providers are small enough that they can be ignored or otherwise fall under the existing tax exemption (except for home-sharing where the tax revenues foregone are sizeable). Nevertheless, the 'cap' rule is hard to enforce since there are many more platforms than just one and providers can easily switch to another platform after they meet the cap on a particular platform.

## 5. Multidimensional legal challenge

Thus far, it is already clear that the sharing and collaborative economy is challenging the established legal system in several ways. Archetypes of the sharing economy such as Uber and Airbnb have come under scrutiny due the effects their business models have had on their competitors and their allegations of unfair competition. It is claimed they avoid certain taxes, professional and safety regulations, and are shifting the burden of risk from the trader to the consumer (Rogers: 2015:85). Airbnb has therefore come under fire from hotel groups and governments across the globe for avoiding the duty to pay the tourist taxes that are typically included in the cost of renting a hotel room, and local safety laws. Airbnb responds by saying that safety inspection is replaced by a peer-to-peer review system (Baker: 2014). In relation to Uber, it is worth noting that it initially offered its services to off-duty taxi drivers who held licences to operate taxi-like services, before expanding to include individuals who did not have a taxi licence but did have cars. This helped Uber to compete on price. Ordinary taxi drivers are now the biggest opponents of Uber, organising protests across Europe. The taxi industry and many cities and states are demanding that Uber comply with the existing taxi regulations, including entry control and price fixing (Posen: 2015). Germany and Spain have tried to ban Uber's services, arguing it undercuts the local competition, and in Paris riots by taxi drivers and the arrest of two Uber executives led the company to suspend its lower cost Uberpop service. Conversely, Uber relies on the notion that the expanded *'ride-sharing'* model

is sufficiently different from a taxi service to make the laws regulating taxis inapplicable. The company's position is that it does not employ anyone – Uber merely connects willing purchasers of rides with willing sellers. Uber hence sees itself as a technology firm rather than a transport firm because it is based on a 'simple' interface and an advanced IT system that conducts big data analytics. This explanation was supported by the High Court in London, which ruled that the driver's smartphone containing the driver's app is not a device for calculating fares, thereby making taxi regulations inapplicable (Transport for London v Uber London Ltd, Case No: CO/1449/2015, judgement of 16 October 2015, [2015] EWHC 2918 (Admin), para. 17).

Further, even before the sharing economy started to attract the attention of managers and public policymakers, it came into the spotlight of scholars concerned with sustainability. It has broadly been claimed that the sharing economy may significantly contribute to sustainable economic growth because it allows an increase in living standards and quality of life using the existing resources while promoting less energy-intensive values than the consumer society (Bonciu, Balgar: 2016:42). It is not just about Airbnb, the online peer-to-peer platform that lets people rent out residential accommodation on a short-term basis, or Uber, the online peer-to-peer platform that provides taxi or "ridesharing" services (Martin: 2016:149), but about an ever longer line of options appearing in a variety of sectors, from time banks, food swaps, makerspace and open-access education (Schor: 2016:66). By shifting the paradigm away from individual ownership to collectivity and sharing, the lower demand for consumer goods may give way to a new economy able to take on problems like pollution and excessive energy consumption (Prothero: 2011:36). As Tukker points out, the renting and sharing of products implies the same product is now used more intensively, which can bring about high impact reductions, in particular if the more complicated access to a product leads to a lower-use situation, or to the more frequent use of more environmental friendly alternatives (Tukker: 2004:256). Car-sharing seems the form of the sharing economy with the most apparent environmental benefits (Böcker, Meelen: 2017:28). The negative environmental impacts of car production and car ownership are well known and it has been repeatedly shown that car-

sharing can help alleviate these problems (Firnkorn, Mueller: 2011:1519). According to Martin and Shaheen, each vehicle in a car-sharing club replaces 9 to 13 privately-owned vehicles, while car-sharing members are shown to use cars 31% less than when they owned their own vehicles, replacing the car with walking, cycling or public transport, thereby significantly reducing carbon emissions (Martin, Shaheen: 2011:1). Sharing thus holds the potential to reduce environmental harm and stimulate reflection on conventional and sometimes wasteful behaviours (Banister: 2008:73). These general warnings against oversimplifying the sustainability issues related to servitisation business models also hold true with respect to the sharing economy. As opposed to 76% of consumers who agreed in a study that the sharing economy is more eco-friendly (Hasan, Birgach: 2016:3), Böcker and Meelen warn that it is still far from clear what the sharing economy's environmental effects will be given that several motivational studies of sharing-economy users found a minor role for the environmental motivators for participating in the sharing economy (Böcker, Meelen: 2017:28). While Vasques and Ono found that services for neighbours' shared use of washing machines and dryers seem to be better accepted when they are promoted for their convenience and comfort at a low price, instead of taking care of the environment (Vasques, Ono: 2016:97), Möhlmann, Moeller and Wittkowski (2015:193) even found environmentalism had no effect on preferring to rent instead of owning a good when surveying accommodation, car-sharing and an online peer-to-peer network. Moreover, it is hard to see why Uber which provides transport services using diesel-powered cars is more environmentally sustainable than, for example, conventional taxis running on bio-gas. Consequently, there is no irrefutable evidence regarding the link between environmental motivations and participation in the sharing economy. The service economy, lease economy and sharing economy are thus not per se environmentally sustainable. As Tukker concludes, the sharing economy is in general no panacea for achieving radical environmental improvements and simply thinking that development of the sharing economy will automatically result in an environmental/economic win-win situation is nothing more than a myth (Tukker: 2004). Most alternative business models are driven by business aspirations and the long-term motivation of both consumers and business owners is needed to align servitisation and sustainability.

Finally, there is also an increasingly problematic social sustainability dilemma arising from this business model that concerns the danger of making the labour market broadly precarised (Codagnone et al.). Sharing economy services also raise new consumer safety concerns considering that the risk is shifted from the service provider to the consumer. Taxation has also proved to strongly impact the application of sharing-economy schemes which are understandably more greatly used in countries with above-average overall taxes on the ownership of goods. Conversely, in the member states that provide fiscally preferential treatment to private car owners the incentive to rely on car-sharing is low. Moreover, the Big Data revolution is not just about the privacy of humans, but also about data confidentiality. The fundamental issue is to ensure that only authorised entities can access and modify data. This is particularly relevant in the business context where data are a way to safeguard competitiveness (Miorandi: 2012:1505). Although various access-control techniques have been proposed to ensure confidentiality, unauthorised access still occurs and is likely to grow due to the spread of wireless channels that increase the risk of violation. In this respect, the media recently reported that the US Justice Department was investigating a report by Uber that 50,000 of its drivers' names and their licence numbers were improperly downloaded, even though its driver database was only accessible with a digital security key (Menn, Levine: 2015).

## 6. Conclusion

Nearly 40 years ago, Hunnings (1980: 568) was critical of lawyers' old-fashioned thinking when dealing with new technologies, claiming that the *"conceptual blockage which prevents this equivalence being acted upon is the lawyer's reluctance to move from Newtonian physics to quantum physics"*. As we are no longer confined merely to the national legal order, even without taking globalisation into account, in the future we will no longer be able to avoid the impact of digitisation on the law. Even though in most instances regulation at the EU level will be crucial for preventing a myriad of different national approaches that would otherwise create a mess and partition the internal

market, authorities at the national and local levels will need to be involved where this is more appropriate than a supranational response. At the same time, it is also important for this regulatory process to not bypass democratic governance principles, for the industry to be included in the regulatory process, and for self-regulation to replace legislation wherever possible so that only general regulatory requirements are imposed by public authorities and the market defines the technical solutions (Klindt: 2015:100-106). The EU Court of Justice recently made decisions in two requests for a preliminary ruling on the status of Uber under EU law. Yet many more proceedings against this company are underway in the different member state forums driven by the fury of traditional taxi companies. The Internet raises challenging issues relating to the protection of personal data, consumer protection, worker status, tax obligations etc. For a number of issues, we can indeed apply the existing rules, while for others a quick response from both legislators and the courts with an understanding of the peculiarities of the new business models will be needed.

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2.

Tomi Jurman

# The Sharing Economy – Promoting Entrepreneurship and Enabling Additional Income

## 1. Starting points

The discussion of the emergence of different, atypical business models began about 10 years ago. The idea behind such business models is to offer un(der) used assets on the market and thus create additional income. It is a relatively new economic approach. Point Park University (Duverge, 2016) states on its website that Harvard law professor Yochai Benkler already in 2004 suggested in a lecture that people should share the products they own.

The concept of »sharewashing« appeared already in the initial stage of establishing the first such business models, and was used as examples of the sharing economy which, however, should not be categorised as such. The article »What exactly is the sharing economy?« (Rinne, 2017) describes companies trying to take advantage of the trend and provide services by enabling individuals to offer their assets and work through their platforms. Uber is an instance of such a company, connecting thousands of passenger vehicle owners who are willing to offer transport services under a common trademark. It is an example of how modern ICT enables marketing of supply and relatively easy access to a large customer base, but it is not actually an example of the sharing economy.

The abovementioned author also presents several terms which can be easily related to the sharing economy, but actually refer to very different things. The following distinctions can be made:

**The sharing economy** (Rinne, 2017) focuses on sharing underutilised assets. Regardless of whether sharing is monetised or not, the practice has a positive impact on individuals, communities and the environment. It makes sense to further limit the so-called sharing economy to practices in which the assets shared by an individual are owned by them.

Individuals, who are mostly in the centre of discussions on the sharing economy, benefit from additional income and the experience of market participation, reflection and potential subsequent expansion. This already establishes the grounds for entrepreneurship, which can create new jobs.

**The collaborative economy** (Rinne: 2017) is distinguished from the abovementioned form primarily in terms of ownership. It is a related type of economy, which can be described as short-term leasing. The owner or the manager of the assets is usually a company, which is in charge of its relationships with users. Collaborative economy or collaborative consumption in this respect is only a business model, not different from traditional forms of the economy from the perspective of consumer protection. The difference between the sharing economy and collaborative consumption can be explained by observing the relationship between consumer and provider. In the collaborative consumption model, the consumer does not have direct contact with the provider when it comes to determining the terms and conditions and especially the prices of services. It is therefore self-evident that the same consumer protection laws apply as for traditional business models.

In the sharing economy model, the consumer and provider have a direct connection and freely negotiate all the transaction details, including the price and other terms and conditions of the transaction. The platform is therefore only an intermediary for establishing contacts and as such resembles conventional market places where the consumer and provider are always

interacting directly, negotiating the price, quality and other transaction details. The platform establishes some statutory rules, which at least to some extent ensure fair trade practices. Nevertheless, consumers are largely left to decide and choose on their own. Despite a range of modern solutions, market places are still popular for buying certain goods. Consumers report direct contact with the provider as one of the benefits, which gives them a sense of buying goods at the source. Is it then sensible to introduce limits which would distance consumers from providers when digitalising such practices?

The gig economy (Rinne, 2017) or on-demand economy is the third form, often associated with the sharing economy. However, this view is misguided and poses one of the greatest dangers to the development of the sharing economy in general.

The on-demand economy is basically project work, or the supply of knowledge and skills which companies require only occasionally. There is a very thin line between precarious work and the occasional provision of certain knowledge and skills. One needs to consider that some individuals do not wish to be employed because project work allows them greater freedom and opportunities for self-realisation. Research shows that a large percentage of people in the labour market have themselves chosen such a time-limited form of contractual relationships. These were also the findings of a study carried out by the McKinsey Global Institute (Manyika et al.: 2016). At least two-thirds of the survey participants had chosen project work themselves.

The remaining 30% is somehow forced to engage in a form of work which does not provide them with appropriate social security and, obviously, suitable solutions should be found for these individuals. It is worth questioning, however, whether posing limits on the 70% who want this form of work would not harm both groups. It is important to consider whether ultimately individuals should not have the freedom to decide on their own how they will make a living. Would limiting the provision of knowledge and skills through selected platforms not constitute a restriction of the freedom to conduct business?

It may then be concluded that, prior to any discussion on the advantages and disadvantages of the sharing economy, it is necessary to first define the target groups and the objectives.

## 2. Proposed law on the operation of online sharing-economy platforms

Legislation regulating the sharing economy is under preparation in Slovenia. It is necessary to note that activities falling under employment relationships and commercial activities are regulated by the Rules on personal supplementary work in Slovenia. These Rules define which activities can be performed and up to what financial threshold. The threshold is set at three average net monthly salaries within a period of six months, currently meaning about EUR 3,000.

The idea guiding the legislators while drafting the law was to create an environment which would enable:

- additional income up to the monthly income threshold;
- experience to be acquired before entering the labour market;
- acquiring experience before entering the business world;
- the simple payment of taxes (schedular taxation).

This was to be achieved through online platforms which is why the law was entitled the Act on the operation of online sharing-economy platforms.

The law was to enable the optimisation of existing sources by connecting providers and users since the platforms would primarily serve to offer underutilised assets. New products and services could thus be developed without any large investments. This would also be beneficial from an environmental perspective.

Online platforms would be chiefly used by individuals who would contribute to family budgets or improve their social situation by offering their goods or services, which would in turn help increase consumption and economic

standards. Trading on online platforms could also be an excellent opportunity for individuals to test their entrepreneurial ideas and gain self-confidence before entering the business world. Individuals would only need to register on an online platform, which would be connected to the Agency of the Republic of Slovenia for Public Legal Records and Related Services. This would ensure that individuals do not exceed the defined income threshold, and would also simplify the income statement procedure because this would occur automatically.

The proposed limit on trading through sharing-economy platforms was EUR 2,400 per year, which would prevent the providers on platforms from jeopardising existing businesses. According to the assessment, this would not significantly interfere with the labour market. An individual provider could register on several platforms, and the income earned from different platforms would be cumulated via the proposed data synchronisation with the abovementioned Agency.

The novelty proposed in the law is the introduction of a time bank. The time-bank model uses time as a currency. An hour of work equals an hour of work, regardless of which kind of work it is. This allows the participation of individuals in financially worse situations. They can offer their knowledge and skills in exchange for the knowledge and skills they need. A time bank also encourages intergenerational cooperation. Some positive experience with such models has already been recorded abroad, and there have also already been some similar attempts in Slovenia. It is a useful solution for long-term care. Experience abroad shows surprisingly positive results in terms of improving the well-being of time-bank users.

For the purposes of tax records, each platform is supposed to determine the value of an hour in the time-bank system for its own purposes. This would ensure individuals can monitor their income and would also not hinder the basic operating system of the time bank, which is based on an hour of work being the currency for transactions.

The taxation aspect of the law is solved with schedular taxation at the same rate as the current flat-rate taxation for private entrepreneurs. This is an income tax of 4%.

The Act on the operation of online sharing-economy platforms is intended for a wide range of users. The aim is to give them an opportunity to earn extra income, to actively participate in society, and to test their entrepreneurial ideas. They would not have to register anywhere else but on the sharing-economy platform. A reasonable and final tax rate would ensure that the providers on sharing-economy platforms only pay tax on the income they earn. They would not have to worry about the effect of this income on their tax declaration at the end of the year.

However, the Act has not been adopted due to political circumstances, although it provoked some responses which will be valuable in further development of the law.

## 3. Responses to the proposed operation of online sharing-economy platforms

The responses analysed below were submitted orally or in writing at different places. Different individual groups expressed their positions at roundtables and workshops on the sharing economy.

One objection often heard was that the Act would legalise precarious work or even promote such forms of work. The legitimation of such practices is not the intention of the sharing economy, least of all in the scope necessary for the normal operation of the providers of knowledge and skills. Data on average gross salaries in Slovenia can be helpful when considering this. According to the Statistical Office of the Republic of Slovenia (2018), the gross average salary in May 2018 was EUR 1,663.23. The costs of paying out such a salary for an entrepreneur would be EUR 1,931.01. The threshold that was proposed in the framework of the Sharing Economy Act ranged between EUR 200 and EUR 500 per month.

It also needs to be emphasised that the on-demand economy is indeed closely related to precarious work and thus does interfere with workers' rights, but it is necessary to reiterate that this has nothing in common with the sharing economy. Although the platforms are intended to facilitate individuals offering their knowledge and skills, the low income threshold would not allow them to make a living by working through the platforms.

Several economic operators also commented that the providers of services on platforms might represent unfair competition to conventionally organised crafts and companies.

It is understandable that any service or goods providers always try to resist new competition. On the other hand, it also needs to be acknowledged that entering the commercial environment is relatively hard, and that it is a difficult choice for individuals to make. At the same time, Statistical Office of the Republic of Slovenia (2016) data should be considered, showing that over 250,000 people were employed in micro-enterprises in Slovenia in 2016. Any measures that promote entrepreneurship should then be encouraged.

Considering the limitation on the scope of trade and some other legal limits, one can assume that competition with such a small scope would not have a significant impact on the business operation of existing entrepreneurs. The crux of concerns has actually been unequal taxation which, however, is not restricted exclusively to providers operating through online platforms. The same conditions apply to private entrepreneurs with flat-rate taxation.

The Act did not intend to encroach on areas regulated by other legislation. The legislators paid special attention to two groups already recognised as problematic in that environment.

The first is short-term apartment rentals, a sensitive area from at least two perspectives.

The first concerns the fears of hotel owners that making short-term apartment rentals simpler would lead to competition which would be insensitive to the conventional market approaches. The second concerns the question of whether the owners of multi-dwelling buildings agree to short-term apartment rental activities, irrespective of other limitations on such providers. Recognising the disadvantages of short-term apartment rentals, including the rising prices of long-term rentals and disturbance caused to other apartment owners, it seems that the issue of lessor registration procedures is the least problematic.

Consumer protection is an important and controversial issue. This area of course needs to be regulated when considering the business model, in which the consumer communicates with a company that manages and leases the assets. Uber is such an example.

However, one cannot reasonably expect the Consumer Protection Act to protect an individual who, for example, rented skis from his/her neighbour and paid a certain amount in return.

## 4. Final remarks

It is obvious that the sharing economy can be viewed from several perspectives and its limits should be determined accordingly. Undoubtedly, the limits will change over time and the sharing economy will become increasingly tailored to the needs of individuals who require a transitional zone before they enter the business world. Some might only need the possibility to earn some additional income. Society should help both in achieving their goals. In doing so, it would be supporting the efforts of individuals to contribute to a better quality of life for everyone.

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3.

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# The Gig Economy in the Age of AI – Peril of the Working Class or the Promised Future of Work?

## 1. Introduction

The main challenge of the coming wave of artificial intelligence (AI) driven disruption is considered to be the significant alteration of the labour market. Various estimates indicate this change will affect more than half of all current jobs and bring an end to the so-called stable traditional work arrangements. 'Gig work' might therefore prove to be a valuable tool for addressing the upcoming need for more flexible jobs. However, it might also only exacerbate the problems.

The rise of independent and flexible work is a long-term trend seen in the past two decades. The number of people engaged in independent work in one capacity or another has increased in most measures (The Gig Economy Data Hub, 2017). This is closely related to shifts in the economy and trends of globalisation and technological changes that are forcing companies to react quickly to market changes. Independent work is hence a fundamental component of today's economy and fast-paced technological progress and will even further its importance. Companies will continue to push to maximise output per worker and levels of labour productivity.

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More workers will become a contractor on on-demand platforms, not an employee. Many sectors (like taxi/car-sharing) are already dominated by independent contractors based on the nature of the tasks they perform. In the future, this shift will also be seen in industries that still mainly rely on employees to carry out routine work. However, these are likely to first be eliminated by automation place. Since we can expect most jobs in the future not to be routine, contracting will become the preferred contractual form as opposed to being an employee. The platforms of the gig economy may help to divide work into tasks to be performed by humans and those by AI and robots (Drahokoupil 2016).

The rise of contracting via platforms also correlates with decreasing transaction costs. The match of supply and demand through vast marketplaces such as Uber has never been easier or cheaper. But the bargaining power involved this way encounters very negative consequences. A worker can also be easily replaced at minimum transactional costs. A frictionless job market effectively imposes precariousness on workers. The question of cheap labour available via digital platforms is primarily being addressed by trade unions in several Western countries. Yet trade unions are certainly unable to bargain with an algorithm.

Two very important and significant trends in today's labour market will collide, forever changing the nature of work and jobs. The only question is whether the outcome will be positive or negative for workers and all of society.

## 2. Middle-class crisis

AI and robots will open up the labour market and create many new opportunities, with gig-economy platforms assisting to rapidly reshuffle the workforce. However, certain socio-economic groups may be significantly impacted. Even in the highly industrial economies like the Czech Republic with a dominant automotive sector, the original model of the gig economy (Frey 2013) suggests the biggest impact of these trends will be felt by middle-skilled and middle-class workers (Marek 2018). Services will be more deeply affected in quantitative terms than the manufacturing sectors.

Gig-economy platforms allow new markets to open and new forms of employment. Their advocates also perceive the situation as giving work opportunities to a number of people who would not otherwise be employed; for instance, those who cannot or do not want a full-time job (Adamcová 2017). Yet the true potential of the sharing economy still has to be shown in industrial countries like Germany or the Czech Republic, since CEE countries are today not witness to genuine sharing, just the dominance of platforms in basic sectors like transport and accommodation. In the USA, more than one-quarter of workers participate in the gig economy in one capacity or another and more than one in ten workers rely on gig work for their primary income (The Gig Economy Data Hub).

In the near future, we may observe a significant shift of middle-class jobs in all economic sectors from traditional employment to the independent and gig-work models. These will also include middle- and lower-skilled workers, not just specialists, while their low bargaining power will not permit them to maintain the same income level. This may also include creative jobs that are currently relatively protected from the influence of automation because flexible work arrangements involved might alter their position as well. Therefore, all of the middle class will be greatly affected and such changes within this sensitive group may also hold significant political consequences.

Gig workers are becoming the new working class in today's western economies, but without sufficient protection. These jobs are paid considerably less than in the traditional models (Reder 2016) while better income by way of above-average payments in the gig economy is not shown in the 'Uber Index' (IPPS 2017). The flexibility, uncertain payments and weaker social protections may thus mean that middle-class workers will have to rely on their individual ability to cope with the uncertainty and risk entailed. This risk-taking will not be rewarded like it is in the modern business world. This would spell a huge change in society and undermine the current system.

## 3. The social contract revisited

Today's concept of work in the form of (semi-)permanent employment is a relatively young way of organising dating back to the Industrial Revolution. Self-employed work also emerged with the rise of long-term employment in the 19th century as a counterpart to the new form of employment. A number of regulations such as the prohibition of child labour, employee rights protection or the minimum wage have emerged since then. Therefore, there is real question of whether digital platforms and shared work are regressing us 200 years or promising to make the economy more efficient by increasing the economic activity of citizens and adding to the wealth of society as a whole.

However, the so-called social peace is a cherished value that must be kept. In his encyclical Laborem Exercens, Pope John Paul II stated that 'good work' is one that guarantees the worker and their family a living, allows savings and generally overcomes the need to be subsidised by social benefits. On one hand, gig-economy platforms allow flexibility in work but, on the other, have an insufficient emphasis on the social system.

The rise of automation together with gig work will probably change the European models of social security considerably. The debate is quite different in the USA where only a limited safety net exists. However, even in the USA, politicians from both sides of the political spectrum and businessman signed a manifesto of portable benefits in 2015 and called for the renewal of the social contract (Hanauer 2015). The old one that worked for our parents has lost its validity for the millennials who can become caught in their own trap of demanding flexible work without having a stable employer. A new way of working is needed that promotes self-determination, hourly flexibility, and freedom from direct managerial hierarchies. Many people in the middle class underestimate the need for social benefits and pension schemes, especially at a younger age.

This distinction is called the difference between hunters and settlers (Colin 2016). For most of the 20th century, secure middle-class jobs were the norm while switching jobs was the exception. People in between jobs were seen

with suspicion; finding clients was difficult for independent players; learning new skills was close to impossible if you were not prepared to go back to school for months or years. With the abovementioned rise of AI and the move to gig work, this situation will reverse.

The worst solution to the uncertainty of the new age would be to impose strict labour laws for good – it would close the labour market and cause the exodus of companies from smaller economies. We need to find a balanced solution. The aim should not be to demotivate workers so as to gain some sort of flexibility, but to ensure some level of payments to the social security system. Institutional designs have already been put forward concerning to increase workers' income in the new employment context. Occupational licensing artificially caps the number of professionals in certain sectors, thereby improving their bargaining power and making it easier for them to claim a higher income (Colin 2016). However, such a solution always hinders competition and lowers the consumer surplus.

Gig work's biggest negative impact might primarily be on the social system and the principle of solidarity of employee payments. The employment contract is the only way to keep social security functional in its present form. Also, the various forms of progressive taxation help dissuade the owners of capital from claiming too large a share of value added at the expense of workers. However, these tax schemes may undermine further investments and innovation.

The main question is not the flexibility but the profitability of work. The digital economy may shift the delicate balance of the whole system, which today suffers from burdens of the past. The problem of a bad tax system has dragged on since the 1990s. It is necessary to establish fair conditions across the whole system, but it is impossible to make the leap because the fiscal shock could lead to the whole economy dropping.

A key issue of shared work is the tax burden or the unequal burden on employees and independent workers that includes social and healthcare deductions (in fact, direct taxes). For instance, both employers and employees

are now motivated to move to individual contracts in the Czech Republic and digital platforms may facilitate this. Without resolving tax issues, it may not be possible to solve the fundamental issues of gig work.

## 4. Digital New Deal

The only proper solution to construct a new social contract is for companies to see the true nature of middle class as their main consumers and the prime driver of the entire economy. Some therefore call for a voluntary contract between government and companies to identify the right equilibrium and emphasise the need for long-term thinking (Foroohar 2018).

The possibility of the voluntary introduction of minimum wage limits is inspirational. In the wake of the modern Western European socio-market economy, and with reference to the Baťa tradition of employee care, it should largely be digital businesses that provide workers with adequate remuneration and secure other rights, including involvement in the social and healthcare system. Such an approach always has a more positive effect than general government regulation which is adapting ever more slowly to the dynamic environment. This leads to the greater competitiveness of companies and the whole economy while bringing positive effects in the form of loyalty and better work performance.

The basis for regulating individual types of employee relationships is the distribution of the types of platforms according to their involvement in the employee–client relationship. Only a small part of the shared economy entails true sharing, and it turns out that to a large extent it is traditional business activity.

The overall problem has both fiscal and social dimensions. There are various options, but they must be responsive to individual needs and problems. Nevertheless, it must be kept in mind that the issue of gig work in the age of AI is not a problem of technological advances itself and the new economy, but the policies we have implemented and will implement.

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# Work in the Gig Economy: Employees or Independent Contractors?

## 1. Introduction

The gig economy has added to the diversification of the European labour market. New business processes conducted via platforms like Uber, Deliveroo and Foodora are establishing new requirements for workers who in the end cannot be neatly classified as either "employees" or "self-employed". There are various estimations of the extent of gig work, but there is no doubt it is present all around the globe (Lehdonvirta, 2017). According to some research studies (CIPD 2017), there are more than one million gig workers in the United Kingdom. The situation in Slovenia still cannot be compared with other European countries, although there are platforms, such as Beeping, which operate in a similar way. It is therefore crucial we detect these changes, address them and not leave the solutions up to coincidence. In this contribution, first the most burning issues regarding the worker's position in the gig economy are presented and, second, some questions about the role of employee representatives are analysed. The final part is dedicated to conclusions and a proposal for the strategic development of the labour market.

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## 2. Implications for workers

Digitalisation, including work through platforms, has led to numerous changes in labour law. The European Commission (2016) summarised several studies which showed that workers in atypical forms of work encounter less job security and a lower hourly rate, a greater risk of poverty, unemployment and inactivity in the job market, less inclusion in social insurance systems and, thus, lower access to social rights, worse safety at work, bigger stress, worse access to collective rights – all leading to greater inequality in the labour market. It hence is no surprise the academic discussion on gig work focuses on the possible lowering of employment and social standards. The starting point for addressing these challenge is to answer the questions 'who is an employee' and 'who is an employer' because being categorised in these groups holds important implications in terms of labour rights and obligations (Davidov et al., 2015). An employee is usually guaranteed statutory protections, such as regulation of the minimum wage, working time, unfair dismissal and similar. While the term employee is not defined at the European level, there are some recommendations drawn from the European Parliament (2017) and the International Labour Organisation (Employment Relationship Recommendation No. 198, 2006). The European Court of Justice[1] has also tackled the issue and the concept of worker is included in the proposed new Directive on transparent and predictable working conditions in the European Union (2017).[2] Yet, so far, the final decision on the definition of employee and employer is left to national legislators.

The best known platform is Uber, which entered the market as a substitute for taxi drivers. For the end user, the experience is generally pleasant, occurs via the app and typically much cheaper. As the transport sector is usually highly regulated, Uber has become embroiled in several court cases in different countries, even before the ECJ. Although the majority of them have focused on competition law, some also discussed labour and social-related questions.

[1] See C-66/85 Lawrie Blum and FNV (C-413/13) for the definition of worker and C-268/99 Jany for the freedom of establishment.
[2] December 2017; Article 2: "a person who for a certain period of time performs services for and under the direction of another person in return for remuneration".

The biggest problem from the labour law perspective is that the drivers are dealt with as independent contractors, yet in reality this is not always the case. The leading case in which this was shown is Aslam vs. Uber from the United Kingdom (2017), where the Employment Appeal Tribunal confirmed that Uber drivers, who brought the case to court, are workers and deemed to hold certain employment and social rights. In judging whether independent contractors are workers (or employees), several factors must be considered. It is thus not surprising that there are also other rulings saying that Uber is not an employer, for example, the French case of Florian Menard vs. SAS Uber France (2018). It must be considered that not all individuals who work for such platforms are in the same position. The most critical are those whose income totally depends on the work performed for the platforms and/or they choose this form of work because they have no other choice; according to an ILO study, this accounts for around 40% of them (Berg 2016, 11–14). They include many migrants, students or those who have been absent from the labour market for a long time, such as mothers with small children (De Stefano, 2016; Huws, Spencer and Joyce, 2016; European Commission, 2017) – all of whom are often classified as vulnerable categories in the labour market and usually also excluded from the social security system.

The main difference between the work performed in an employment relationship and via platforms is its continuity. With an employment relationship, the employee is continuously included in the organised working process with a more or less known working time. On the other hand, the work via platforms is performed on-demand. The basic idea behind such a business model is that when there is a need for a service (such as a ride, delivery, cleaning and so on), it is published via the online platform, and then person performs it for a price known in advance. In other words, there is relative uncertainty regarding how many hours of work will be needed in a certain period of time and how much money will be earned. Most of these workers are also deprived of employment protection and in the long run their social security is under threat.

One of the major advantages of working via a platform is the flexibility it provides in work time and place, which is also stressed in international research

(for example, Eurofound 2016). However, in many cases there is a regular practice of the platform deactivating 'independent contractors' for not being available in a certain period of time and/or not being unable to perform the service involved, such as rides or deliveries. Therefore, it is quite questionable how much freedom such an 'independent contractor' has and whether it may not entail being 'at work' even for up to 24 hours a day (24/7). With platform work, no contract is signed and independent contractors just accept the terms and conditions set by the platform.

The question is whether to extend employment protection to more of those who work outside the traditional employment relationship. The question is not only limited to platform work, but also to those who work on the basis of other civil contracts, among whom the most critical group are the self-employed. This problem is not recognised just by academics and trade unions, but also by the European Commission which in December 2017 launched a proposal for a new directive on more transparent and predictable working conditions across the European union as part of the follow-up to the European Pillar of Social Rights.

## 3. Implications for employee representatives

The issue of the protection of 'gig' workers is greatly affecting the role played by trade unions. If their membership was once more or less homogenous with mainly the same interests, working for a single employer at its premises for an indefinite period of time, this is not the case anymore. On the contrary, gig workers are usually isolated, organised as self-employed, work for more employers and at different workplaces or even simply online. The work can be done via apps from anywhere, delivering the service to the end user from nearly any part of the world. Knowing how to address this workforce in order to persuade them to take up trade union membership is thus a great challenge for the unions. In doing so, the consideration of which services they are looking at varies greatly. One response to this has been the rise of a different kind of organisation, mainly organised on the Internet, to unite them. One example here is Foodora in Italy (Milan), which has also organised protests

against unfair payment and poor working conditions.

In general, the trade unions' response to gig work is vague. On a declarative level, they are all against digital exploitation and stress the importance of employment protection, yet they have been struggling to define strategies to approach the issue of the diversification of work relations, including gig work. Although the freedom of association is generally not limited to employees (for more, see Vacotto 2013)[3], some trade unions still restrict membership in them to those who are employed.[4] In this regard, the trade unions are not just failing to include non-employed workers in their membership, but have difficulties addressing their special needs, which are different to those found in a 'typical' employment relationship. In the context of the union membership decline faced in nearly all European countries (except the Nordic ones), demonstrating their relevance to the growing number of gig workers seems to be extremely important.

Those who work on the basis of civil law contracts (such as 'gig' workers) are not guaranteed the rights provided in collective agreements. Including them in collective agreements raises the question of competition/anti-trust law as setting the payment for the self-employed may mean setting their price (wage). In this regard, Article 101 of the Treaty of the Functioning of the European Union (2012) must be considered as it prohibits cartel collusion with the aim of restricting competition. In the case of FNV Kunsten Information en Media vs. Netherlands, the Court of Justice of the EU (2014) already ruled that a collective agreement may set minimum tariffs for self-employed service providers if they are disguised self-employed and perform the same activity as employed workers, but on the basis of a civil law contract. Accordingly, some solutions go in the direction of excluding collective agreements if they help meet certain objectives such as contributing to the improvement of working conditions, or to restrict or prohibit a binding collective agreement.

[3] Some countries have limited this right solely to those who have an employment contract. For example, on the initiative of the Polish Trade Union Conference, the Polish Constitutional Court concluded that such a restriction is unconstitutional. Thus, since 2015 self-employed persons or all those who work under civil contracts can join unions. Something smilar applies for 'gig' workers.

[4] In the case of Slovenia for example, this was confirmed by the research of Rakovec and Franca 2017.

Nevertheless, the response of employers' organisations is also scarce. In general, it can be said they are taking business advantage of atypical forms of work but, like the trade unions, they have not adopted a strategy for how to attract (and retain) members. The author's unpublished research suggests that in many cases companies do not want to join an employers' organisation as that would bind them to collective agreements and other internal acts, such as ethical codes and similar.

The trend of having ever more people outside the employment relationship also brings consequences for the system of employee participation. Typically, a person deemed 'not employed' cannot be involved in the system of employee participation, nor exercise individual or collective participatory rights. Something similar applies to agency workers who could exercise their participatory rights in the agency as their employer but where the nature of the sector makes this practically unfeasible.[5] Atypical forms of work, including 'gig' work, are thus eroding the system of employee participation. Given that these changes to the labour market disproportionately affect younger workers, the idea of employee participation is viewed very differently by such workers, who are quite likely not to understand the system at all.

## 4. Concluding remarks

The so-called Uberisation of work has a significant influence on the labour market. It is knocking down the foundations of labour law in terms of both individual and collective rights and suggests there is a need to change the social insurance system. Together with the trend of 'being self-employed more than employed', this poses a serious threat to the existing labour law institutions. A clear strategy on how to approach the diversification of employment relations is needed more than ever.

[5] The German legislator (Works Constitution Act, §7) adopted a different solution: temporary agency workers who have reached the age of 18 can take part in works council elections at the hiring enterprise if they have been working there for at least three months (right to vote), but do not hold passive electoral rights. However, temporary agency workers are taken into account to determine the size of the works council at the hiring enterprise (court case at the German Federal Labour Court in 2013 and the revised Temporary Employment Act).

The scope of employment protection still depends on the definition of worker/employee and employer. Yet, with the emergence of new forms of work, the worker–employer relationship must also be evaluated with regard to the current social and economic situation. When analysing an individual relationship, however, the contemporary form and organisation of work, changes in the organisation of working time and the consequent understanding of the criteria of subordination and autonomy should be considered. This should be interpreted in the light of the current situation. Based on different discussions in the academic literature, professional and political debates as well as general opinion, it will be extremely difficult to curb the new forms of work. Thus, the question of whether to provide employment protection or not also to those who work on a civil law contract basis seems not really relevant. The fundamental question is what kind of employment protection should be guaranteed to 'gig' and other workers who do have an employment contract while at the same time not jeopardising the employment contract as such. Labour law must provide protection to those who need it. Simultaneously, there is a fear that the expansion of labour protection could threaten the existing protection given in the context of an employment relationship. On the other hand, there is a huge risk that a large number of people will experience a significantly worse situation in the labour market. It is therefore reasonable to consider the possibility of excluding collective agreements from the understanding of cartel price negotiations and to adopt legislation that would provide certain employment protection for those performing work under civil contracts, including 'gig' workers. At the same time, it is necessary to elaborate different solutions for the social insurance system to ensure its long-term sustainability and stability.

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# Taxation of the Sharing and Digital Economy: Taxation Models for an Innovative Landscape

## 1. Introduction

The taxation of digital and sharing economies has been sparking the interest of academics and regulators on various levels. When discussing the taxation of digital and sharing economies, it is essential to note, as stated inter alia by Karaman and Erwin, that "[t]he current international tax system was established at a time when the sharing economy did not exist and was not foreseeable. As business models evolve, gov¬ernments are struggling to keep up using laws designed for brick-and-mortar stores"[1]. One consequence is that sharing-economy companies like Uber and Airbnb that use the Internet or digital platforms and mobile applications, as well as other digital economy giants, together with the cross-border structure of such companies, potentially make substantial profits while paying very little tax[2].

There is a consensus that tax laws must accommodate new economic models but there are different views on the taxation of either the digital or sharing economies. While there seems to be agreement at the level of

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[1] Fanny Karaman and Beate Erwin, The Sharing Economy Part 2: Governments Strike Back, Ruchelman Publications, Insights Vol. 4 No. 11 (2017), pp. 17-27, at p. 1, also available at: http://publications.ruchelaw.com/news/2017-11/sharing-economy.pdf.

[2] Ibid. p. 17, and the references therein.

the Organisation for Economic Cooperation and Development ("OECD") and the European Union ("EU") on the challenges and approximate solutions for taxation of the digital economy, sharing-economy taxation remains largely unchartered territory, open to unique solutions by individual jurisdictions. Thus, there is potential that, while digital platforms and digital services as such may be regulated and commonly taxed, operators within the sharing economy may encounter burdens that are distinct from the common regime. This chapter has three parts. First, I briefly comment on the general features of taxation policies developed by governments around the globe and the OECD in response to the digital and sharing economy. Second, I discuss the EU's proposals regarding the digital economy, and the current state of sharing-economy taxation while, finally, I conclude with some proposals with a stress on supporting the innovation economy.

In this chapter, I discuss the proposed corporate direct taxation approaches and not indirect taxation such as value-added tax or other tax measures.

## 2. Digital and Sharing Economies – the Call for a New Regulatory Landscape

The challenges of the digital economy were addressed in 2015 by the OECD's Base Erosion and Profit Shifting (BEPS) Action Plan in the BEPS Action 1 Report[3] ("BEPS Action 1 Report"), noting that the digital economy is characterised by a "cross-jurisdiction scale without mass, an unparalleled reliance on intangibles, especially intellectual property, heavy use of data (notably personal data), and the widespread adoption of multi-sided business models"[4]. The OECD notes in paragraph 248 of the BEPS Action 1 Report that the biggest challenges of corporate income taxation of the industry lie in finding common ground in view of the industry's ability to have a significant presence without being liable to tax, gathering information on cross-border activities and the characterisation of payments[5]. As the

[3] OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report, OECD/G20 Profit Sharing and Base Erosion Project, OECD Publishing, Paris (2015), DOI: http://dx.doi.org/10.1787/9789264241046-en ("BEPS Action 1").

[4] BEPS Action 1, para 32 on p. 24; para 42, pp. 26 and 27.

[5] BEPS Action 1, para. 248 on p. 99, in-depth comments on the challenges tackled on pp. 99-106.

main tax administration challenges raised by the digital economy, the BEPS Action 1 Report lists the identification of taxable activities for tax purposes, determining the extent of activities and the collection and verification of information[6].

A follow-up on the BEPS Action 1 Report was Tax Challenges Arising from Digitalisation – Interim Report 2018 ("Interim Report") that was agreed by members of the OECD Inclusive Framework and published on 16 March 2018[7]. The Interim Report presents an in-depth analysis of the different digitalised business models and features and how they create value, also briefly touching on the use of new technologies such as blockchain and crypto-currencies[8]. It describes the positions held by different countries with regard to these features and their implications, ranging from those countries that believe no action is needed, those that see a need for specific measures, through to others that recognise the need for broadly applicable changes[9]. Members agreed to undertake a coherent and concurrent review of the nexus and profit-allocation rules for the purposes of taxing the digital economy, with the Interim Report underlining that the question of how the right to tax is allocated between jurisdictions has not been addressed[10].

The Interim Report states that developing, agreeing and implementing a global, consensus-based solution will take time, and some governments insist on taking interim measures. The risks and adverse consequences raised by the countries opposed to such interim measures include negative influences on investment and innovation and the growth of such measures, the possibility of over-taxation, distortive impacts on production, increasing the economic incidence of tax on consumers and businesses, and growing compliance and administration costs[11]. The Interim Report notes that such interim measures should therefore be "in compliance with existing

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6 BEPS Action 1, box 7.1. on p. 105.

7 OECD, Tax Challenges Arising from Digitalisation – Interim Report 2018, Inclusive Framework on BEPS, OECD/G20 Profit Sharing and Base Erosion Project, OECD Publishing, Paris (2018), DOI: http://dx.doi.org/10.1787/9789264293083-en ("the Interim Report").

8 OECD, Brief on the Tax Challenges Arising from Digitalisation – Interim Report 2018, also available at: http://www.oecd.org/tax/beps/brief-on-the-tax-challenges-arising-from-digitalisation-interim-report-2018.pdf, ("the Brief") paras. 2, 6 and 23.

9 The Brief, para. 2.

10 The Brief, paras. 3, 5 and 19.

11 The Brief, para. 20.

international obligations, temporary, targeted and balanced, minimise over-taxation, as well as designed to limit the compliance costs and not to inhibit innovation"[12].

An update of the Interim Report is scheduled for 2019, with members working towards a consensus-based solution by 2020[13].

### 2.1. Direct Taxation

As also noted in the Interim Report, parallel to the OECD's efforts, governments around the world have been seeking to respond to the challenges of the new economic models. Karaman and Erwin categorise these approaches in three groups: first, "the Income Tax Approach", "the Indirect Tax Approach" and the "Regulatory Crackdown"[14].

Direct taxation measures "[…] involve […] (i) imposing a penalty tax in case of diversion of prof¬its, (ii) introducing withholding tax on digital services, and (iii) redefining the concept of Service permanent establishment (hereinafter: the 'PE')"[15].

Examples of such regulation of the diversion of profits approach are the UK and the Australian Diverted Profit tax schemes[16].

#### 2.1.1. Withholding Taxes

Withholding taxes on digital services were discussed in the OECD's BEPS Action 1 report, with the OECD noting that a "withholding tax on payments by residents (and local PEs) of a country for goods and services purchased online from non-resident providers" was being considered by the OECD, and the mentioned two options for imposing it: either as a "standalone

[12] The Brief, para. 21.
[13] The Brief, para. 25.
[14] Fanny Karaman and Beate Erwin, The Sharing Economy Part 2: Governments Strike Back, Ruchelman, Insights Vol 4. No. 11, pp. 17-27, on p. 17, also available at: *http://publications.ruchelaw.com/news/2017-11/InsightsVol4No11.pdf* (2017).
[15] Karaman and Erwin, see above, p. 17.
[16] Among various sources, commented on in Karaman and Erwin, note 14, pp. 18-20.

gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered online" or as a "primary collection mechanism and enforcement tool" – that is, "as net-basis taxation".[17]

Withholding tax on digital transactions is also one of the short-term options proposed by the European Commission in the form of a "standalone gross-basis final withholding tax on certain payments made to non-resident providers of goods and services ordered online"[18]. More details have yet to be proposed by the Commission.

Italy plans to introduce a withholding tax on digital transactions and modify the nexus required for source taxation[19].

Withholding taxes such as those described above could work for both digital and shared economy models, thus both by corporate and individual recipients and providers of services transacted via digital platforms.

### 2.1.2. Virtual PE

The European Commission has also advanced virtual PE, significant economic presence taxation, as one of several options for taxing companies which are active in the digital economy in a legislative proposal that is discussed later in this chapter. The directive proposal also considers the ECOFIN suggestions on taking into account the elements mentioned in the OECD's BEPS Action 1 report: revenue-based, user-based and digital factors[20].

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[17] BEPS Action 1, paragraph 292, p. 113 and further at pp. 113-115.

[18] European Commission, Communication from the Commission to the European Parliament and the Council, A Fair and Efficient Tax System in the European Union for the Digital Single Market, COM(2017) 547 final, also available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0547&from=EN*, p. 10.

[19] Georg Köfler, Gunter Mayr and Christoph Schlager, Taxation of the Digital Economy: "Quick Fixes" or Long-Term Solution?, European Taxation, IBFD (2107), pp. 523-532, on p. 326, reference 42, also available at: *https://www.ibfd.org/sites/ibfd.org/files/content/pdf/et_2017_12_e2_1.pdf?utm_source=twitter&utm_medium=social-media&utm_campaign=tweet-week-12&utm_content=pdf/et_2017_12_e2_1.pdf*.

[20] European Commission, Proposal for a COUNCIL DIRECTIVE laying down rules relating to the corporate taxation of a significant digital presence {SWD(2018) 81 final} - {SWD(2018) 82 final}, COM(2018) 147 final 2018/0072 (CNS), also available at: *https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf*, ("COM(2018) 147 final 2018/0072 (CNS)"), on p. 1 and comments on Article 3.

Redefining the concepts of PE has been the subject of discussion of, among others, the Israeli tax authorities. The Israeli tax authorities have commented that a PE of a company may established in Israel if business in Israel is mainly conducted through the Internet "and additional conditions exist, such as: representatives of the foreign company are involved in identifying Israeli customers, in gathering information and managing customer relations of the foreign company, the Internet service provided by the foreign company is adapted to Israeli customers (language, style, currency, etc.)"[21].

Within the EU, Austria has announced it will push for the introduction of a digital PE concept during its Presidency in the second half of 2018[22].

Outside of the EU, Saudi Arabia has introduced a concept of virtual PE for digital services with respect to services rendered by non-residents in the Kingdom of Saudi Arabia, the consequence of which may be the denial of withholding tax (relief claimed by non-residents under the applicable double tax treaties of the Kingdom of Saudi Arabia)[23].

Virtual PE solutions are suitable for addressing digital economic models, not sharing economy models in the sense of the core business provider or recipient taxation.

### 2.1.3. Direct Taxation – Other Measures

The direct tax approach should also refer to those solutions involving personal taxation and social security charges regarding the digital and sharing economy, as well as any specific direct labour charges linked to those economies[24]. Their features are not commented on in this chapter but are mentioned here for the purposes of comprehensiveness.

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[21] Ministry of Finance, Israel Tax Authority, The Israeli Tax Authority published guidelines regarding taxation of foreign corporation activity in Israel via the Internet, 14 April 2016, *https://taxes.gov.il/English/About/SpokesmanAnnouncements/Pages/Ann_11042016.aspx*

[22] Köfler, Mayr and Schlager, see note 19 on p. 525, reference 24.

[23] EY, Global digital tax developments review, Saudi Arabian tax authorities introduce Virtual Service PE concept, pp. 44-45, (2015), also available at: *https://www.ey.com/Publication/vwLUAssets/EY-global-digital-tax-developments/%24FILE/EY-global-digital-tax-developments.pdf.*

[24] On the impact of digitalisation on employment and industrial relations in traditional and digital industries, see Willem Pieter de Groen, Karolien Lenaerts, Romain Bosc and Felix Paquier, Impact of digitalisation and the on-demand economy on labour markets and the consequences for employment and industrial relations, Final Study, European Economic and Social Committee (2017), also available at: *https://www.ceps.eu/system/files/EESC_Digitalisation.pdf*.

### 2.2. Indirect Taxes

Indirect taxation measures qualify business models based on the ultimate services provided "(e.g., transportation or hospitality services, as opposed to internet (platform) services), thereby creating liability to value added tax and sales tax"[25]. I mention the category to ensure comprehensiveness here.

### 2.3. Specific Unilateral Responses

Alternatively, governments use combinations of rules and measures to crackdown on new business models[26]. One can think of the case of Uber, as discussed in the jurisdictions of Germany, Spain (leading to a judgement by the European Court of Justice) and the United Kingdom.

### 2.4. Interim Conclusion

While most of the measures commented on above have been discussed by regulators for purposes of digital economy taxation, taxation of the sharing economy seems not to be tackled by any specific measures. In this regard, authors like Migai, de Jong and Owens refer to "[...] the lack of sharing economy specific regulation exacerbated by the poor visibility of the underlying activity[27]".

## 3. EU Proposals to Address the Digital and Sharing Economies

### 3.1. Proposals for EU Digital Economy Taxation

The EU's take on the digital economy was crystallised on 21 March 2018 when the European Commission issued a package of proposals as part of a fair and effective tax system in the EU for the digital single market,

[25] Karaman and Erwin, note 14, pp. 17, 20 and 21.
[26] Karaman and Erwin, note 14 on p. 17.
[27] Clement Migai, Julia de Jong and Jeffrey Owens, The Sharing Economy: Turning Challenges into Compliance Opportunities for Tax Administrations, upcoming publication in eJournal of Tax Research (2018), pp. 285-317, at p. 286, also available at: https://www.business.unsw.edu.au/About-Site/Schools-Site/Taxation-Business-Law-Site/Documents/The-sharing-economy-turning-challenges-into-compliance-CM-JdJ-JO.pdf.

including a proposed Directive on a digital services tax, a proposed Directive on introduction of a digital PE concept, and Recommendations to member states to implement this concept in their double tax treaties. The proposal consists of two prongs: first, a reform of corporate tax rules to engulf profits reflecting significant interaction with users through digital channels[28]. Second, the proposal establishes an interim tax which covers the main digital activities that are currently not taxed.[29]

The proposal establishes a digital permanent establishment ("digital PE") in a member state if one of the following criteria is met:

- a digital company exceeds the threshold of EUR 7 million in annual revenues in a member state;
- the company has more than 100,000 users in a member state in a taxable year; or
- over 3,000 business contracts for digital services are created between the company and business users in a taxable year[30].

The proposal is conceptualised to contribute to the ongoing work on the OECD level[31]. The regime would apply to EU taxpayers as well as enterprises established in a non-EU jurisdiction with which there is no double tax treaty with the member state in which the taxpayer is identified as having a significant digital presence. The proposed regime does not affect taxpayers established in a non-EU jurisdiction where there is a double tax treaty in force, unless such a treaty includes a similar provision on digital presence[32].

The proposed rules on profit allocation are mainly based on the current OECD framework applying to PEs, the OECD's work on the digital economy[33], and suggest the splitting of profit as the preferred method. In addition, the

[28] European Commission, Brussels, 21 March 2018, Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU, Press release, also available at: *http://europa.eu/rapid/press-release_IP-18-2041_en.html*
[29] Ibid.
[30] COM(2018) 147 final 2018/0072 (CNS), at p. 7.
[31] COM(2018) 147 final 2018/0072 (CNS), p. 3. Also see European Commission, Factsheet on today's proposals, *https://ec.europa.eu/taxation_customs/sites/taxation/files/factsheet_digital_taxation_21032018_en.pdf*.
[32] COM(2018) 147 final 2018/0072 (CNS), at p. 7, and Article 2 of the Proposed Directive.
[33] COM(2018) 147 final 2018/0072 (CNS), at p. 3.

proposal(non-exhaustively) lists economically significant activities that should be taken into account to reflect value creation where users are based and data are collected[34].

The proposed rules on digital economy taxation would eventually be integrated into the scope of the Common Consolidated Corporate Tax Base ("CCCTB")[35] and should also be mirrored by corresponding changes to the OECD Model Tax Convention ("OECD MTC") at the international level[36].

One aspect that has become clearer by virtue of the Commission's proposal is the definition of digital service, which distinguishes "[...] the mere sale of goods or services facilitated by using the internet or an electronic network [from] digital service. For example, giving access (for remuneration) to a digital marketplace for buying and selling cars is a digital service, but the sale of a car itself via such a website is not"[37].

This manifests the judgement delivered by the EU Court of Justice in Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL, of 20 December 2017 in which the Court declared that an intermediation service whose purpose is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys must be classified as "a service in the field of transport" within the meaning of EU law[38].

Under the proposed directive, however, the intermediation service should be considered as a digital service. This means that the core business in the sense of the goods or services transacted via digital platforms is distinct from the digital platform. This confirms two separate regimes of digital service/ platform providers on one hand, and sharing operators on the other, and

[34] COM(2018) 147 final 2018/0072 (CNS), pp. 8-9, comments on Article 5.
[35] European Commission, Brussels, 21 March 2018, Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the EU, Press release, also available at: *http://europa.eu/rapid/press-release_IP-18-2041_en.html*.
[36] COM(2018) 147 final 2018/0072 (CNS), at p. 6.
[37] COM(2018) 147 final 2018/0072 (CNS), at p. 7 also clarifying minimal human intervention, and Article 3.
[38] Judgement of the Court of Justice of the European Union of 20 December 2017, in Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain SL, ECLI:EU:C:2017:981, paras 41, 46 and 48.

maintains the current sharing taxation solutions adopted by the member states.

The second proposed measure by the European Commission is again mentioned for comprehensiveness as it concerns an indirect tax in the form of a 3% Digital Services Tax[39]. In the Commission's view, the tax would be beneficial because unilateral national responses by member states to the taxation of digital activities could lead to compartmentalisation and damage the single market by means of "a patchwork of national responses"[40].

### 3.2. Sharing Economy Taxation – the State of Play

An initial step has also been taken by the European Commission specifically as to the taxation of the sharing economy. In Communication COM(2016) 356 final published on 2 June 2016[41], the Commission provided the first definition of the sharing economy (referred to in COM(2016) 356 final as "collaborative economy"), and established the key aspects and guidelines member state legislators should consider when drafting domestic legislation. With regard to taxation of the sharing economy, the Commission advanced "[that] Member States should aim at proportionate obligations and a level playing field. They should apply functionally similar tax obligations to businesses providing comparable services. Raising awareness on tax obligations, making tax administrators aware of collaborative business models, issuing guidance, and increasing transparency through online information can all be tools for unlocking the potential of the [sharing] economy"[42].

Individual measures have been introduced by Austria (personal taxation linked to tourism and accommodation, independent of efforts advanced by

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[39] European Commission, Proposal for a COUNCIL DIRECTIVE on the common system of a digital services tax on revenues resulting from the provision of certain digital services, {SWD(2018) 81} - {SWD(2018) 82}, COM(2018) 148 final 2018/0073 (CNS), also available at: *https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_common_system_digital_services_tax_21032018_en.pdf* ( "COM(2018) 148 final 2018/0073"). The Directive would only apply to companies with total annual worldwide revenues of EUR 750 million and EU revenues of EUR 50 million, keeping smaller start-ups and scale-up businesses unaffected, at Article 4 of the proposal and at p. 10.

[40] See COM(2018) 147 final 2018/0072.

[41] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European agenda for the collaborative economy {SWD(2016) 184 final}, COM(2016) 356 final, *https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-356-EN-F1-1.PDF* ("COM(2016) 356 final").

[42] COM(2016) 356 final, at p. 13.

the Austrian Presidency to the Council in 2018), Belgium (personal taxation and social security charges), Denmark (personal tax relief), Estonia (sectoral operator/personal taxation[43]), France (personal taxation and social security charges), Finland (personal tax relief), Ireland (data on tax compliance for sharing-economy operators and service providers[44]), Italy (value-added tax and withholding tax), Sweden (value-added tax and labour charges), United Kingdom (personal taxation relief), regulating various aspects of the sharing economy ranging from data collection, protection of platform users through to tax compliance[45].

While the discussion on digital-economy taxation focuses on the providers of digital platforms, and the corporate and value-added tax regimes applying to them, sharing-economy tax solutions concentrate on the providers of the core business driven by such platforms, who are mostly individuals or entrepreneurs. Here, jurisdictions try to tax as much profit made via the digital platform as possible by way of personal taxation, value-added tax and partly labour law, with certain tax relief being provided to stimulate compliance and curb abuse. EU member states are also tackling the new challenges by applying already existing legislation and policies to the new economic models[46].

The providers of the core business on digital platforms should certainly contribute in the respective jurisdictions, but focusing on these seems to tackle the non-essential question of the overall taxation of the new business models and the biggest players within them.

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[43] Council of the European Union, Opinion of the European Economic and Social Committee, Taxation of the collaborative economy – analysis of possible tax policies faced with the growth of the collaborative economy (exploratory opinion requested by the Estonian Presidency), 13925/17 FISC 247, ECO/434, at para 4.3., also available at: *https://www.parlament.gv.at/PAKT/EU/XXV/EU/16/08/EU_160837/imfname_10759659.pdf*.

[44] Ireland Sharing Economy Centre, *https://www.sharingeconomyireland.com/*.

[45] Comprehensively on measures taken and proposed by Union Member States up to February 2018, European Parliament, The Collaborative Economy and Taxation, Taxing the Value Created in the Collaborative Economy, In-Depth Analysis, EPRS | European Parliamentary Research Service Author: Cécile Remeur, Members' Research Service February 2018 – PE 614.718, European Union (2018), also available at: *http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/614718/EPRS_IDA(2018)614718_EN.pdf*, ("Collaborative Economy and Taxation"), pp. 18-22.

[46] Discussing solutions in Belgium, Denmark, France, Germany, Hungary, Slovakia and Spain, this strategy may be unsuccessful, in Karolien Lenaerts, Miroslav Beblavý and Zachary Kilhoffer, Government Responses to the Platform Economy: Where do we stand?, CEPS Policy Insights No. 2017-30 (2017), also available at: *https://www.ceps.eu/system/files/PI2017-30_Government%20Responses%20to%20the%20Platform%20Economy.pdf*.

## 4. The Way Forward – Digital Sharing and Sharing Digital

With regard to digital-economy taxation, there appears to be an agreement for an EU-level taxation policy, with academics commenting on the appropriateness of the proposed solutions[47]. The call for unanimous action and maintaining a level playing field so that all companies "pay their fair share, whether they are large or small, whether more or less digitalized, EU or non-EU based" would represent a sensible and sustainable commitment[48].

Quite unlike the digital-economy taxation debate on common solutions, a panoply of proposed and applied solutions for taxation of the sharing economy can be found. The resulting multitude of taxation formulas increases volatility and uncertainty in the already dynamic environment of the sharing economy.

Equalisation of some form at the EU level seems necessary. One mechanism is through the obligation of a member state to adopt new regimes that conform with the general rules of the Treaty on the Functioning of the EU, which in this regard may become the subject of scrutiny of the European Court of Justice. However, this does not prevent the existence of multitude of different unilateral solutions across the EU applying to sharing-economy business models.

Alternatively, the intra-EU guarantee of a level playing field should be rethought. In this sense, sharing-economy taxation rules should aim to curb tax abuse and support innovation[49]. These objectives call for transparent and smart rules, responding to the need for great agility, flexibility and a certain taste for tax arbitrage of the new economic models[50]. This may be achieved by rules that ensure "fair working conditions [,] sustainable consumer and social protection"[51] and tax neutrality[52].

[47] Comprehensively in Köfler, Mayr and Schlager, see note 19, pp. 528-531, on the proposed EU direct taxation solutions for the digital economy.

[48] European Commission spokeswoman Vanessa Mock comment, as reported by Joe Kirwin, Estonia Welcomes Chance to Steer in EU Digital Tax Storm, Bloomberg Tax, Bloomberg (2017), at *https://www.bna.com/estonia-welcomes-chance-n73014463073/*.

[49] COM(2016) 356 final, at p. 16, it is noted that EU as a whole "should proactively support the innovation, competitiveness and growth opportunities offered by modernisation of the economy".

[50] Taxpayers' responses to tax laws exhibit boundless creativity, comments Jordan M. Barry, The Sharing Economy as a Case Study, Research Paper No. 18-319 (2018), also available at: Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract = 3091380, at p. 1.

[51] Collaborative Economy and Taxation, note 45, p. 16.

[52] Ibid., discussing tax neutrality.

6.

Petra Weingerl*

# Consumer Protection and the Sharing Economy

## 1. Introduction

The concept of the sharing economy poses several challenges for the existing consumer acquis in the European Union (EU) and in the member states' legal systems since it is not always possible to adequately apply the existing legislation to the legal relationships involved in online transactions. The most salient issue of the sharing economy for consumer protection is the legal nature of the relationships between the parties involved in a transaction through an online platform.[1] Usually, this is a special tripartite relationship involving the online platform, which is the intermediary between the provider of goods or services via the online platform (the provider) and a customer buying goods or services on that online platform (the buyer) (Hatzopoulos 2017, 22). Application of the rules for consumer protection depends on determining the legal nature of these relationships (i.e. online platform – buyer, online platform – provider and/or provider – buyer). In the EU, the rules on consumer protection apply as a *lex specialis* with regard to the general laws of the member states' obligations and can only be considered where contracts are entered into between traders

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[1] See e.g. the Commission (2015), Synopsis Report on the Public Consultation on the Regulatory Environment For Platforms, Online Intermediaries and the Collaborative Economy, available at https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and (31. 8. 2018).

and consumers (B2C). If the legal nature of these relationships cannot be clearly defined, this adds to the uncertainty about the rights and obligations of the persons involved in online platform transactions.

For the EU consumer *acquis* to apply, the first requirement is that the buyer can be qualified as a "consumer". The second requirement is that an online platform and/or the provider of services/goods can be defined as "trader". However, when assessing relationships in actual cases problems quickly arise as the traditional concepts often do not correspond to the new digital reality. In traditional contractual relationships, the role of traders and consumers is clearly defined and delineated. This is a so-called binary classification. Yet, in the digital environment, the dividing lines between trader and consumer are often blurred (see Weingerl 2017).[2] In addition, when concluding transactions via an online platform the buyer usually enters into a legal relationship with two subjects (often unknowingly) – with the online platform and with the provider of the goods or services. The crucial question to be addressed is: when can the buyer rely on the enhanced protection granted by the EU consumer *acquis*? Can the consumer rely on special protection in relation to transport that is arranged via the Uber platform, when the service is provided by an apparent independent contractor? Or when they have concluded contracts with other consumers via online platforms (C2C contracts), being convinced that their contracting parties were professionals?

It is not only the nature of the legal relationships among these three groups of actors of the sharing economy that is uncertain – the nature of the sharing economy itself remains uncertain. For the time being, no definition of the sharing economy has been adopted. In its Communication on a European agenda for the sharing economy, the Commission largely confines itself to contracts relating to services concluded via online platforms ("an open marketplace for the temporary usage of goods or services often provided by private individuals") (Commission 2016, 3). Goods are not for sale but for temporary use only, as "collaborative economy transactions generally do not

[2] See also Commission (2016, 2 fn 6).

involve a change of ownership and can be carried out for profit or not-for-profit" (ibid.). This narrow approach of the Commission is based on a new consumer paradigm – access-based consumption. This chapter focusses also on a sales contract (for second-hand and new goods).

Initially, the sharing economy enabled consumers (peers) to access services via online platforms. However, this was not confined to access-based consumption because consumers also sold their second-hand goods online. They concluded so-called C2C or P2P contracts to which consumer protection does not apply.[3] Later, professional traders also started offering their services and goods via online platforms. It goes without saying that professional traders are bound by consumer protection laws (so-called B2C relationships, when the buyer is a consumer). Today, it is not uncommon for both professional and non-professional sellers to offer their services or goods on the same online platform. This only increases the overall uncertainty in defining the legal nature of the relationships between the different actors of the tripartite relationship and in determining the specific rights and obligations of the parties. This chapter highlights this issue and provides an overview of consumer legislation that the actors involved should consider in their transactions with consumers.

## 2. An online platform as an intermediary or a provider of services/goods – a bilateral or a tripartite legal relationship?

Consumer law and policy in the EU is underpinned by the logic that the consumer is the weaker contracting party in need of special protection, thus justifying the departure from the general contractual principle of the party autonomy. To determine whether the EU consumer *acquis* applies in a concrete case and to assess the rights and obligations of the contracting parties accordingly, it is first necessary to determine who are the parties to a transaction arranged via an online platform. In this section, the chapter discusses the role of online platforms in such a transaction.

[39] On the P2P relationship, see e.g. Commission (2017).

In the sharing-economy business model, the role played by the online platform is somewhere on the spectrum between a completely passive noticeboard on one side and a provider of services/goods in the 'main' transaction with the customer on the other (Katz 2015, 1072). If it acts solely as an intermediary between the third-party provider and the buyer, and is therefore only an IS service provider, this entails fewer obligations for the online platform. First, in such a case, the online platform does not need to obtain licences for the provision of certain services or the sale of certain goods via the online platform (for example, a licence for transport services or a permit to sell alcohol). Second, if the online platform is merely an intermediary in a tripartite relationship, it is in principle not liable for fulfilment of the 'main' contract concluded via the online platform between the provider, which in this case is a third party, and the customer.

If the online platform merely provides IS services, it can rely on the so-called hosting exemption governed by Article 14 of the e-Commerce Directive.[4] It specifies the IS service provider is in principle not responsible for the information provided by the recipient of the 'main' service that is only stored by the IS service provider. The preamble to the Directive states that this exemption only covers cases where the IS service provider's activity is of "a mere technical, automatic and passive nature", implying that the IS service provider "has neither knowledge of nor control over the information which is transmitted or stored on the web platform" (para. 42). Thus, in this case the online platform is neither aware of the content posted on it by a third party, nor does it have any control over it (Taddeo and Floridi 2017, 107). The platform's role relating to the posted content is exclusively passive.

However, the e-Commerce Directive still imposes certain obligations on passive online platforms vis-à-vis other participants in the tripartite relationship. An example of such an obligation is the general information duty provided in Article 5 of the e-Commerce Directive. This article stipulates

[4] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000. See e.g. M. Damjan (2014). Odškodninska odgovornost internetnih posrednikov, in: M. Damjan (ur.), Pravo v informacijski družbi, pp. 15–32. Ljubljana: GV Založba.

that IS service providers must render the recipients of the service and competent authorities certain "easily, directly and permanently accessible" data, including the name of the service provider and information about it. The purpose of this duty is, inter alia, to enable the buyer to determine who is their actual contractual party and to anticipate the extent of legal protection available to them if the contract is not properly fulfilled.

The Court of Justice of the EU (Court) held in Louis Vuitton that it is necessary to examine on a case-by-case basis whether the role played by the IS service provider is actually neutral.[5] As soon as the online platform's role with regard to the content it stores becomes not only passive but starts interfering with the content of the online offer, it can no longer rely on the hosting exemption. This may be the case, for example, when the online platform provides assistance to a third party, in particular with regard to optimising the presentation of offers for sale or their promotion.[6] Thus, the role of the online platform will not be neutral if it assists in drafting the commercial message which accompanies the advertising link or in the establishment or selection of keywords.[7] Moreover, an online platform is not considered an IS service provider if it determines the price of the service or even exercises a certain level of control over the quality of the service.[8] Such a platform cannot rely on the hosting exemption included in the e-Commerce Directive.

An oft-quoted example is Uber, the electronic platform that provides, by means of a smartphone application, a paid service consisting of connecting non-professional drivers who use their own vehicle with persons who wish to make urban journeys. Uber found itself before (inter alia) a Barcelona court because it carried out this service without having a licence or an administrative permit.[9] Uber argued it did not need a licence or permission since it only offers IS services and can rely on the hosting exemption provided in the e-Commerce Directive. In the preliminary ruling procedure, the court

[5] Joint cases C-236/08 to C-238/08, *Google France*, ECLI:EU:C:2010:159 (*Louis Vuitton*), para. 114. See also C-324/09, L'Oréal and others, ECLI:EU:C:2011:474.
[6] *L'Oréal and others*, para. 116.
[7] *Ibid*., para. 118.
[8] See judgement in the Case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:981 (Uber).
[9] *Uber*.

ruled that the transport service is the main component of the whole service within which the intermediation service is merely an integral part.[10] Thus, the service offered by Uber cannot be identified as an IS service, and Uber must provide the licences and permissions required in accordance with national law.[11] Namely, Uber "exercises decisive influence over the conditions under which that service is provided by those drivers".[12] It determines at least the maximum fare, it also receives that amount from the client before paying part of it on to the non-professional driver of the vehicle, and it exercises a certain level of control over the quality of the vehicles, the drivers and their conduct which can, in some circumstances, result in their exclusion.[13] Its role in offering and delivering transport services is therefore anything but passive. In case that Uber could be considered an employer of a driver, who "supplies" transport services and is thus only an apparent independent contractor, it should be established that Uber is the provider of the main service (i.e. transport).

An online platform that falls within the relevant definition of a "trader" must always comply with EU consumer protection legislation (Commission 2016b, 120). For instance, it will have to comply with the Unfair Commercial Practices Directive,[14] which prohibits unfair business practices that are contrary to the requirements of professional diligence (Article 5). It also prohibits misleading acts and omissions (Articles 6 and 7).

The Commission issued special non-binding guidelines concerning the application of the Unfair Commercial Practices Directive that can help the courts interpret the Directive's provisions. In these guidelines, the Commission emphasises that the Unfair Commercial Practices Directive has a very broad scope of application as it covers all business-to-consumer transactions, whether offline or online (Commission 2016b, 109). However, in a concrete case, it will only be used if the online platform qualifies as a

[10] *Ibid*., para. 40.
[11] Transport services are exempt from the Services Directive. Moreover, Article 58 TFEU applies to transport services.
[12] *Uber*, para. 39.
[13] *Ibid*.
[14] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005.

"trader" within the meaning of Article 2(b) of the Unfair Commercial Practices Directive, and has engaged in a business-to-consumer commercial practice towards consumers (Commission 2016b, 34, 111). In this connection the online platform cannot invoke the liability exemption of Article 14 of the e-Commerce Directive where those practices concern its own activities and not the information stored (Commission 2016b, 34). To this end, the Commission states that this condition may be met whenever, for example, "it charges a commission on the transactions between suppliers and users, provides additional paid services or draws revenues from targeted advertising" (Commission 2016b, 119). In this context, an Italian court held that the TripAdvisor online travelling platform is a trader and is therefore bound to comply with consumer law.[15]

Further, the Commission states in these guidelines that online platforms considered to be "traders" should take appropriate measures which "enable relevant third party traders to comply with EU consumer and marketing law requirements and users to clearly understand with whom they are possibly concluding contracts" (Commission 2016b, 114). In this light, the Commission and the EU consumer authorities have recently called on Airbnb to align its terms and conditions with the EU's consumer rules and be transparent when presenting prices, expressly stressing the requirement that Airbnb "clearly identify if the offer is made by a private host or a professional, as the consumer protection rules differ" (Commission 2018). This duty is consistent with the aforementioned general information duty found in the e-Commerce Directive. A clear indication of the capacity of the service/goods provider is extremely important in online transactions where the buyer often does not know who is his/her actual contracting party.

If it is found that the genuine provider of services or goods via the online platform is in fact the platform itself, and not a third party, as stressed in relation to Uber above, the platform will also be bound by other rules of the EU consumer *acquis* in addition to the Unfair Commercial Practices Directive.

[15] Autorità Garante della Concorrenza e del Mercato, decision PS9345, Tripadvisor, 19 Decemeber 2014, paras. 87–89.

Thus, it will have to comply (if applicable) with the Unfair Contract Terms Directive,[16] the Consumer Sales Directive,[17] the rules on alternative dispute resolution[18] and private international law rules which, for example, provide special jurisdiction for consumer disputes.[19] The Consumer Rights Directive, which applies to distance contracts, is also likely to apply (Cauffman: 2016). In this regard, it should be noted that the Consumer Rights Directive can only be used for service contracts when the price is paid for services (Wendehorst: 2016, 30-33). Customers, however, typically use online platforms for free.[20] The ultimate answer regarding application of the Consumer Rights Directive to contracts entered into via online platforms must be given by the Court.

## 3. Liability of an online platform for the non-conformity of goods supplied by third-party providers

If it is found that the online platform acts only as an intermediary in the tripartite relationship, the question is whether it can, in certain cases, be liable for the obligations of the provider offering goods or services via the online platform, i.e. the 'main' contract (secondary liability, see Riordan 2016, 114-116). In other words, should the online platform be liable for the offer of a third-party provider, including non-compliance of goods and non-delivery?

Several concerns have been voiced claiming the expansion of contractual transactions in the digital environment has led to the point where, due to the uncertain legal relationships, consumer protection is underdeveloped. There are instances in which consumers genuinely believe that they are concluding B2C contracts and that, thus, they can rely on the consumer *acquis*. Two bold examples are: (i) when the actual provider of the main service/goods

[16] Directive 93/13/EGS on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993.
[17] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999 (Consumer Sales Directive).
[18] Directive 2013/11/EU on alternative dispute resolution for consumer disputes, OJ L 165, 18.6.2013; Regulation 524/2013 on online dispute resolution for consumer disputes, OJ L 165, 18.6.2013.
[19] Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20. 12. 2012; Regulation 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008.
[20] In C-291/13, Papasavvas, ECLI:EU:C:2014:2209, the Court held that an IS service covers the provision of online information services for which the service provider is remunerated not by the recipient, but by the income generated by advertisements appearing on the website (freemium). This is suggested also by the proposed amendment of the Directive 2011/83, which forms part of the Commission's "New Deal for Consumers" package (published in April 2018).

is the platform itself, e.g. when the supplier of the main service/goods is in fact employed by the platform, as discussed above; and (ii) when a consumer makes an impression that he or she is a professional provider of services/goods.

Since the consumer protection rules only apply to B2C relations, the question arises as to who in fact is a "consumer", i.e. a person who merits special protection in the contractual relationship. Should these rules also protect consumers vis-à-vis natural persons who offer services or goods online ('hybrid' consumers, prosumers) and deliberately create the appearance the contract is concluded with a professional person? If professional traders represent themselves as consumers, their business practices may be considered misleading and thus prohibited by Article 7(2) of the Unfair Commercial Practices Directive. However, these rules do not apply to a natural person who offers services online or sells goods to other consumers and represents himself/herself as a professional person. It is still a C2C relationship, despite the misrepresentation.[21] In such a case, the lacuna in consumer protection in C2C relationships may be partly offset by the online platform's duty to ensure the actual service providers are clearly identified, as discussed in the previous section. If this obligation is met, the consumer/buyer is informed they have concluded a contract with a natural person. If the online platform does not fulfil this information duty, it would be plausible to consider imposing a stricter liability on the intermediary in such cases. Lessons may be learned from the liability model applied in cases of the sale of used cars, i.e. the field of concluding contracts with an intermediary in the 'traditional' environment (offline).

The Court's judgement in *Wathelet* can be of assistance here.[22] This case deals with the second-hand purchase of a car from a professional garage (car dealer). The garage did not adequately inform the buyer of the status and

[21] In September 2018, the Court of Justice of the EU addressed the question whether a natural person who publishes online a relatively high number of sales advertisements for goods of significant value can be regarded as a "trader" within the meaning of the Unfair Commercial Practices Directive. It concluded that such a person must be classified as a "trader", and such an activity can constitute a "commercial practice", only if that person is acting for purposes relating to his or her trade, business, craft or profession. Case C-105/17, *Kamenova*, ECLI:EU:C:2018:808.

[22] Case C-149/15, *Wathelet*, ECLI:EU:C:2016:840.

identity of the actual seller, a natural person. The Court ruled that the term "seller" within the meaning of Article 1(2)(c) of the Consumer Sales Directive covers a trader acting as an intermediary "who, by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold".[23] This interpretation does not depend on whether the intermediary is remunerated for acting as an intermediary.[24] If similar reasoning is also applied to the context of the digital economy, it may be concluded that the contract is concluded with a platform rather than a third party if the online platform does not clearly inform the buyer of the true identity of the main service provider. After all, this duty is imposed, at least implicitly, on the online platform by both the e-Commerce Directive (for a platform as an intermediary) and the Unfair Commercial Practices Directive (for a platform that can be defined as a "trader" and has engaged in a business-to-consumer commercial practice).

Some academics suggest re-qualifying the nature of the relationship into B2C as soon as at least one of the three parties involved in the transaction via the online platform is a "trader" (Hatzopoulos 2018, 51). Such an approach is adopted in Denmark where a contract between two parties, concluded with the intermediation of a third party, is considered to be a consumer contract if the buyer is a consumer (ibid., 52). Others suggest that the liability of online platforms should be governed by a special "Platform Directive" covering the tripartite relationships in transactions by means of online platforms (Busch et al. 2016, 2; Research group 2016, 164).

Such a special regulation would not be completely new in EU law since it is also known in the fields of package tours (the Package Travel Directive)[25] and the protection of self-employed commercial agents in relation to their principals.[26] The Package Travel Directive shifts most of the burden to intermediaries. Article 13(1) provides that "Member States shall ensure

[23] *Ibid.*, para. 41.
[24] *Ibid.*, para. 46.
[25] Directive 2015/2302 on package travel and linked travel arrangements, OJ L 326, 11.12.2015 (Package Travel Directive).
[26] Directive 86/653 on coordination of the laws of the member states relating to self-employed commercial agents, OJ L 382, 31.12.1986. See also the Draft Common Frame of Reference (DCFR), Article VI-3:201.

that the organiser is responsible for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers". Moreover, it provides that member states may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package. An important issue to be answered in this context is whether such a solution would also be suitable for online intermediaries, i.e. online platforms.

## 4. Conclusion

New business models in the digital environment offer many options to consumers, but also traps. Since online transactions do not correspond to the traditional binary party relationship, as they are a tripartite relationship, the online platform – the provider – the buyer, the traditional consumer law concepts are not always suitable to regulate these relationships. Where an online services/goods provider is a trader who is also clearly identified as such, the consumer will normally be sufficiently protected. However, problems arise when it is difficult to determine who actually is the 'main' service/goods provider and whether the contracting party is a professional or a consumer. This is important for determining whether the rules of the EU consumer acquis apply in a particular case.

In some other areas of EU law involving an intermediary in the conclusion of transactions,[27] the EU has developed rules that provide an additional level of consumer protection.[28] Yet, it seems there is no real political will at the EU level to regulate these issues also for transactions made via online platforms.[29] Some member states have already adopted rules governing these transactions, while in other member states legislative proposals are in

[27] See e.g. Package Travel Directive and the judgment in the case of *Wathelet*.
[28] And also other customers, see e.g. Package Travel Directive. See P. Weingerl (2017).
[29] See e.g. C. Busch (2016), p. 4; Research group (2016), p. 165; C. Cauffman and J. Smits (2016), The Sharing Economy and the Law: Food for European Lawyers, Maastricht Journal, 23(6), 907. Cf. Z. Dudas (2016), Sharing Economy Think Global, act local? The regulatory challenges of sharing economy, Tilburg: Tilburg University, pp. 27 et seq. C. Koopma, M. Mitchell and A. Thierer (2014), The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change, Mercatus Working Paper, Mercatus Center at George Mason University.

the pipeline. Against this background, it is desirable to adopt uniform general principles for contracts concluded via online platforms on the EU level. This would prevent even greater uncertainty in this area.

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# Uber – An Overview of the International Case Law

## 1. Introduction

This article presents a brief concise overview of the principal court decisions on some legal dilemmas triggered by one of the most notable business models in the area of the collaborative economy. The motto "available locally, expanding globally" clearly illustrates Uber's strategy of global expansion, which is being pursued by its presence in up to 80 countries in the world.[1] Ever since it appeared in the market in 2009, many complaints have been made against this online platform acting as a transportation service intermediary and its infringement of national regulations on transport and taxicab services, such as the absence of proper licences, user protection, data protection rights and the confusion over the contractual relationship between Uber and its drivers. Consequently, Uber is experiencing restrictions[2] in providing its services or even the prohibition thereof in many parts of the world.

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[1] International sites, https://www.uber.com/country-list/. Accessed 20.8.2018.

[2] Predominantly regarding the UberPOP service, as it is primarily intended for users who are transported by persons registered in the application who own a personal vehicle but are not in a contractual relationship with Uber. There is no control in its implementation, and drivers are not obliged to obtain licences that are otherwise required to provide taxicab services.

## 2. Market placement

Uber entered the American market without any obstruction, namely, no permits or licences were required. It could thus further develop its business model and achieve an optimal expansion size before moving from San Francisco to other cities all over the USA. The California Public Utilities Commission (CPUC) classified it as one of the "transportation network companies (TNCs)", which "provide prearranged transportation services for compensation using an online-enabled application or platform (such as smartphone apps) to connect drivers using their personal vehicles with passengers".[3] Later, it began providing services elsewhere, including Europe, where, however, the case law could not uniformly determine whether it is a transportation or information society services provider.[4] This question was recently answered by two well-anticipated judgements of the European Court of Justice (ECJ).

## 3. The judgements of the ECJ

Arising from the special needs of market participants and the specific features of national legislation, Uber is currently present within Europe mostly with its service UberX, which is provided exclusively by licensed taxicab drivers by means of an application and their own vehicles (Gesley: 2016). Uber has complained to the European Commission that the obsolete national regulations of the EU member states violate the legislature of the EU and that its concept of a "ridesharing" model differs from traditional taxicab services to the extent the existing national regulations simply do not apply to it. Due to the lack of legal consideration of Uber, the ECJ recently passed two judgements defining its status as a transport company, thereby setting the guidelines for further regulation within EU. The national courts of the EU member states as well as other courts worldwide had made similar rulings before. For example, in the case of *Uber International B.V. te Amsterdam v Minister van Infrastructuur en Milieu* (Case-14/726, ECLI:NL:CBB:2014:450), the Dutch court highlighted

[3] More on the subject: http://www.cpuc.ca.gov/tncinfo/.

[4] "Information society services" are defined as "any services normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service". Electronic Commerce Directive, Article 2(a).

the fact that considering the court's findings[5] Uber can only be described as taxicab services provider.

### a) The Uber Spain ruling

A professional association of taxicab transportation providers initiated legal proceedings in the case of Uber Spain (Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, ECLI:EU:C:2017:981) before the Commercial Court in Barcelona, demanding that the service UberPOP be prohibited due to unfair competition and unfair commercial practice as neither Uber nor its drivers had acquired the necessary permits under the Spanish national regulations on providing taxicab services. Uber claimed it was providing information society and not transport services, and that the national legislation was contrary to EU law, in particular the provisions of the Electronic Commerce Directive[6] and the Directive on Services in the Internal Market.[7] The Court of Appeal in Barcelona (*Juzgado de lo Mercantil de Barcelona*) decided to send the case to the ECJ for a preliminary ruling. The questions pertained to the definition of Uber's activity, namely whether acting as an intermediary between users of an online platform in one's own commercial interest and using the means of information technology should be considered as a transport or information society service. The Court accepted Szpunar's opinion (Advocate General's Opinion in Case C-434/15, Uber Spain, SL, ECLI:EU:C:2017: 364) that the activity in question should be regarded as a mixed service, part of which is carried out by electronic means and another part by means of the physical provision of the service. The latter could be regarded as an information society service if two conditions were fulfilled, namely, the service not carried out by electronic means was

[5] Case-14/726, para 5.4.1.: »/.../The established factual situation shows that Uber and its drivers have a conscious and close cooperation and in this case Uber plays an important role. Therefore it could actually be considered as a service provider, not only as an intermediary between providers and users. Its opposite claims do not change the following facts: the drivers are chosen by Uber and given access to the application. Passengers also have access to transport providers only if they create an account (including card information)/.../ Payment for driving is done using the Uber application and is made to the driver by Uber. In addition, Uber keeps twenty percent of the fare/.../More completed trips also means more profit for Uber. Therefore we can conclude that Uber's main task is not only to provide technology and the application for connecting the supply and demand of individuals, but also providing transport services and paying the driver for the work done«.

[6] 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, Official Journal L 178, 17/07/2000, pp. 1–16.

[7] 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, 27.12.2006, pp. 36–68.

independent of the service carried out by electronic means, and that the service provider provided the entire service (both parts of it) or exercised a decisive influence on the conditions of the service provision such that both parts form a coherent whole, if all essential elements of the transaction combined are provided by electronic means. Szpunar believed that Uber did not fulfil any of the above-mentioned conditions and was thus to be classified as acting in the realm of transport because it sets preliminary conditions for the drivers' activity, rewards them financially, conducts indirect quality surveillance and defines the actual price for the service. Therefore, the ECJ decided that Uber or any similar intermediation service aimed at connecting unprofessional drivers, using their own vehicles, against payment by means of a smartphone application, with persons seeking transport in town should be considered as inextricably linked to the service of providing transport and therefore classified as a "transportation service" within the meaning of Article 58(1)[8] of the Treaty on the Functioning of the European Union (TFEU).[9] Consequently, such service is excluded from the scope of Article 56 TFEU (Freedom to provide services in the EU internal market), of the Directive on Services in the Internal Market and the Electronic Commerce Directive (Case C-434/15, para 50). Accordingly, Uber does not only act as an intermediary, from an economic point of view it primarily carries out the transport service while secondarily carrying out the service of connecting users by means of an online platform. Pursuant to Article 91 (1) TFEU, the EU must adopt secondary legislation enabling it to ensure the proper provision of private transportation services. As no such EU secondary legislation exists at this stage, establishing the legal regime – issuing permits and regulating transport services – is at the discretion of the EU member states (Case C-434/15, para 47).

### b) The Uber France ruling

In France, even criminal sanctions were imposed on Uber due to its

[8] Article 58 (1) TFEU states that the freedom to provide transport services is governed by the provisions of the TFEU relating to transport – these are the provisions found in Articles 90 to 100. They determine that the objectives of the TEU and TFEU Treaty in the field of transport are pursued within the framework of the common transport policy (EU). However, these common rules have not yet been adopted by the European Parliament and the EU Council. Therefore, the EU member states currently have the power to set the conditions for Uber services in accordance with the general rules of the TFEU.

[9] Treaty on the Functioning of the European Union, consolidated version, OJ C 326, 26.10.2012, pp. 47–390.

unlicensed transportation activity, which led to judicial proceedings in the case of *Uber France* (Case C-320/16, Uber France SAS v Nabil Bensalem, ECLI:EU:C:2018:221). As it had been established that this field would be regulated on the national level, the question appeared of which cases an EU member state must inform the European Commission about. Under the provisions of the Directive laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services[10], the EU member states are obliged to officially inform the European Commission about any intended changes to technical regulations; otherwise, they are not allowed to implement them against service providers within their territory.[11] The Court had to answer the preliminary question submitted by the *Tribunal de grande instance de Lille* for a decision and establish whether – regarding the mixed nature of Uber's services due to the intermediation element – France had violated the above-mentioned Directives. The ECJ again considered Szpunar's opinion (Advocate General's Opinion in Case C-320/16, *Uber France SAS v Nabil Bensalem*, ECLI:EU:C:2017:511) and noted its findings in the judgement *Uber France*. It pointed out that criminal law provisions relating to transport intermediation activities do not need to be notified to the European Commission. The EU member states are allowed to prohibit and penalise the illegal provision of transport services without first notifying Brussels as the latter is only required in case of digital services, whereas Uber's services – according to the previously resolved case of Elite Taxi – are not classified as such.

## 4. Labour lawsuits

Uber also raises a question of workers' protection since the collaborative economy has introduced a new type of employment – crowdsourcing.[12] Namely, a significant number of workers, that is, service providers, who

[10] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance), OJ L 241, 17.9.2015, pp. 1–15. It has repealed and replaced the Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, pp. 37–48.

[11] See also: Case C-194/94, *CIA Security v Signalson and Securitel*, where the conflict of law between a national legal system and European Union law was discussed previously.

[12] *Also crowd work, crowd employment.*

are offered intermediation services on the basis of concluded collaboration contracts, are needed for it to function. Such contracts provide no legal or social security for the service providers. It is unclear whether they are considered as independent contractors, self-employed workers or whether they may be considered as employees and thus eligible for employment rights; however, they might be representatives of an entirely new, original form of employment (Prassl: 2016:2). Over the years, Uber has faced numerous lawsuits where the plaintiffs claimed they have been unjustly classified as independent contractors and demand to be re-classified as employees. In that event, they would become eligible for benefits like the minimum wage, reimbursement of fuel costs, overtime payment and a satisfactory level of social security and social security cover (Rogers: 2015:98). Such a position was also promoted in various judgements; in the first resounding proceedings in the USA, *Uber vs. Berwick* (Case No. 11-46739 EK, *Uber Technologies Inc., a Delaware Corporation v Barbara Berwick*, 2015), the court decided the plaintiff was employed and not an independent contractor because Uber "took part in every single aspect of her business activity". A similar decision was made this year in the state of New York in *NYTWA* vs. Uber (Case No. 1:16-cv-04098, *Uber Technologies Inc. et al. v New York Taxi Workers Alliance*, 2018), where the court stated "the overriding evidence establishes that Uber exercised sufficient supervision, direction, and control". Two courts in the states of Pennsylvania (Fair: 2018) and California (DePillis: 2018) also reached similar conclusions and awarded the workers the right to an unemployment allowance. In the London case, Aslam vs. Uber (Case No. 2202551/2015, *Aslam, Farrar and Others v Uber B. V. and Others*, 2016), upon assessing the actual nature of the relationship between the parties the court also awarded the plaintiffs the employee status, starting from the moment they actually offer transportation in the previously determined territory and are ready and capable to accept such transport. Although it has eventually acknowledged most of the above-mentioned employment relationship rights for its drivers, Uber has so far avoided classifying them as its *employees* (Hatzopolous: 2017:90). Similarly, in the USA, the Florida Department of Economic Opportunity (DEO) also adopted the position that the drivers were independent contractors and thus not eligible for national

unemployment insurance.[13] A comparable decision was made by a French court in the case of Menard vs. Uber (Case No. F 16/11460, *Florian Menard v SAS Uber France*, *Uber BV*, 2018). In February 2016 at the District Court in Philadelphia, in the case of *Razak v Uber* (Case No. 2:16-cv-00573, *Razak et al. v Uber Technologies*, *Inc.*, *et al.*, 2018) the drivers demanded the payment of minimum wages and overtime worked under the *Fair Labor Standards Act* governing the employee status. Judge Baylson decided that the drivers were freelancers and not employees according to federal law. Allegedly, Uber was not exercising sufficient supervision over the drivers for them to be classified as employees – this was the first decision of its kind concerning the provisions of federal law on one of the key questions, and was mainly due to the preliminary decision in *GrubHub Inc.* (Case No. 3:15-cv-05128, *Lawson v. GrubHub Inc*, *9th U.S. Circuit Court of Appeal*, 2018), in which Judge Corley stated that "with the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy". It follows from the above that the findings of legal practice have so far been inconsistent since no common legal regime in the employment policy field exists at this stage and judgements are based on various existing national or federal legal bases.

## 5. Restrictions and prohibitions of service provision

In December 2015, the British governmental organisation Transport for London applied for a judicial review of Uber's business activity. The main question was whether a smartphone application could be considered a taximeter, which was otherwise not allowed in private vehicles carrying passengers.[14] The British court ruled in favour of Uber and stated in its decision, *"A taximeter is not a device which would receive GPS signals during driving periods and transmit*

[13] The press release stated inter alia: "/.../None of these platforms could operate without goods and the service providers that use the platforms; yet this does not mean that the service providers are directly employed by the cooperative platform/.../Uber, in fact, sets some conditions for the drivers (including the age of the vehicle which cannot exceed 10 years), but the driver is independent of the essential elements of the arrangement, such as the time frame for providing transport services, vehicle brand, passenger choice, ... /.../ It is difficult to imagine an employer that would offer such freedom to its workers ...«. Summarized by: Ray R., DEO rules Uber drivers are independent contractors for employment purposes, FPL, 2015 and Manatt Phelps & Phillips LLP, Uber's Legal Issues Continue with drivers in California and Florida, Lexology, 2016.

[14] A taximeter is allowed solely in black London taxis, for which a licence is required. See Chapter 11 of *The Private Hire Vehicles (London) Act* from 1998.

*them to a distant server outside the vehicle, which would calculate the fare on the basis of the distance and the time and send the calculation back to the device"* (Case No. CO/1449/2015, *Transport for London v. Uber, High Court of Justice, Queen's Bench Division, Administrative Court*, para 49 – final statement). Thus, a smartphone with an Uber application does not correspond to the concept of a taximeter. This was Uber's first significant victory in national courts across Europe (Topham: 2015). At the end of July 2018, Uber managed to acquire a temporary, 15-month licence to continue providing services in London after having failed to renew a regular 5-year licence. In Belgium, an action against Uber was brought by Taxi Radio Bruxellois, within which operates one of the two largest providers of taxicab services, Taxis Verts. Due to their legal form, neither Uber nor Taxis Verts are subject to Belgian regulations on taxicab service provision but, unlike Uber, Taxis Verts assigns rides to professional taxicab drivers who must fulfil all statutory conditions regarding the transport of persons. It claimed Uber was engaging in an unfair commercial practice as it was offering an identical service, but Uber's drivers did not possess the statutory licences for the transport of persons. Uber argued its drivers actually received reimbursement for expenses incurred by the transportation, but this was not payment for providing a transport service. The Brussels Commercial Court (*Rechtbank van Koophandel*) did not agree with Uber's explanation and found that Uber was offering unlicensed taxicab services against payment, which was considered regular payment for the services provided because it exceeded a driver's expenditure actually incurred. Consequently, it prohibited the provision of the UberPOP service and imposed financial penalties. Nevertheless, it referred one question (Case C-526/15, Request for a preliminary ruling from the Rechtbank van Koophandel Brussel - Uber Belgium BVBA and others v Taxi Radio Bruxellois NV and others, OJ C 429) for a preliminary ruling to the ECJ regarding the compliance of the provisions of the Ordinance[15] with the provisions of the Charter of Fundamental Rights[16], TEU (Article 5)[17] and TFEU (Articles 28 and 52). The ECJ later dismissed the request for procedural reasons. In France, after a few years of Uber's presence in the

[15] Ordonnantie betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur, 27.4.1995.
[16] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407, Arts. 15, 16, 17 and 52.
[17] Treaty on European Union, consolidated version, OJ C 202, 7.6.2016, pp. 35–35.

market, the government prohibited the use of taxicab marking for all vehicles with the exception of official taxicab providers; it restricted the conditions and requirements for the drivers and imposed sanctions for providing illegal transportation. Uber's business activity received an even harder blow by a law adopted by the French Assemblée nationale in September 2014 (Loi Thévenoud)[18] which, inter alia, contained a prohibition on providing passenger transport services by unlicensed drivers and a compulsory 15-minute waiting time between the reservation of a vehicle and the actual start of the ride.[19] Uber appealed to the French Constitutional Court due to a violation of the principle of the freedom to conduct business, the principle of equality before the law and the right to property, but the Court rejected the complaint and prohibited the UberPOP service (Case ECLI:FR:CCASS:2015:CO00376, No. of appeal: 14-40054, Cour de cassation). There was a similar situation in the Netherlands; due to apprehensions of drivers, impoundments of vehicles and imposing of penalties, Uber applied to the Dutch Commercial Court of Appeal for an interim measure against the decision of the Dutch Ministry of Environment and Spatial Planning on the imposition of a penalty. In December 2014, the appeal was rejected and UberPOP was prohibited (Case C-14/726, *Uber International B.V. te Amsterdam vs. Minister van Infrastructuur en Milieu*, ECLI:NL:CBB:2014:450).[20] In Germany, where the UberPOP service was found in all major cities, the District Court in Frankfurt am Main prohibited the service in August 2014 with a preliminary order (Case 2-03 O 329/14. PE 558.777 143, Landgericht Frankfurt am Main court ruling) due to non-compliance with provisions of the national Public Transport Act.[21] In September 2014, by means of administrative decisions (VG Hamburg, 5 E 3534/14 and OVG Hamburg; VG Berlin, VG 11 L 353.14 and OVG Berlin-Brandeburg, OVG 1 S 96.14) two courts in Hamburg and Berlin confirmed the decision of the Frankfurt court and prohibited Uber's services within their jurisdictions, explaining that it not only acts as an intermediary between the drivers and

[18] Loi n° 2014-1104 du 1er octobre 2014 relative aux taxis et aux voitures de transport avec chauffeur, »Loi Thévenoud«, JORF n°0228 du 2 octobre 2014 page 15938 texte n° 1, 2.10.2014. Prohibitions include, inter alia, the use of GPS, pricing, the use of a mobile phone etc.

[19] According to the French Competition Authority, this requirement was discriminatory because it was not in line with Uber's core business policy.

[20] Note: it has been fully operational again since January 2016.

[21] Personenbeförderungsgesetz (PBefG), BGBl. 1961 I S.241., 21.3.1961.

the users, but also concludes contracts with the users and deals with the payments, while simultaneously entering into contracts with the drivers by determining the price of the transport and coordinating tasks via the UberPOP application. Upon Uber's constitutional appeal, the decision of the court in Hamburg was also confirmed by the Berlin-Brandenburg Court of Appeal (*Bundesverfassungsgericht*). In March 2015, the District Court in Frankfurt then declared the UberPOP service illegal and issued a national prohibition on its implementation (Case No. 3-08 O 136/14, Landgericht Frankfurt am Main court ruling). It is important to stress that, besides these rulings regarding the UberPOP service in Germany, a reference for a preliminary ruling on UberBLACK is still pending (Case C-371/17, *Uber BV vs. Richard Leipold*, request for a preliminary ruling from the Bundesgerichtshof lodged on 19.6.2017). In Italy, after successfully avoiding the national regulation of taxicab services (*Codice della strada*) for quite some time, a legal action (Case 16612/2015 R.G., *Taxiblu S.C. v Uber*, Tribunale di Milano) was brought against Uber by the association of Italian taxi drivers in April 2015 and the Circuit court in Milan issued a national prohibition of UberPOP only a month later; its decision was confirmed upon appeal by the Milan Court of Appeal (Cases R.G. 35445/2015 and RG 36491/2015). UberPOP met with the same fate in a 2015 Bulgarian ruling (Case 540, CPC 227/2015, *Uber B. V. and Rasier Operations B. V.*) as the latter had come after a legal amendment obliging drivers who transport passengers for money to hold a taxi licence. In February 2018, the High Court for Misdemeanours in Croatia (*Visok prekršajni sud Republike Hrvatske*) imposed financial penalties on Uber's drivers who had no licences, marked vehicles and taximeters.

## 6. Other areas of dispute

Beside lawsuits regarding unfair competition and labour law, legal actions have been brought against Uber in other areas. For example, due to inappropriate advertising, an association of taxi drivers commenced proceedings in the U.S. District Court in San Francisco against Uber, complaining about its misleading advertising practice and stating that Uber was violating the 1946 Lanham Act that prohibits false advertising (Ferrell: 2017:499). A significant claim

due to false advertising statements was also brought against Uber in the case of XYZ vs. Uber (Case No. 1:15-cv-03015, *XYZ Two Way Radio Service vs. Uber Technologies, Inc. et al.*, 2017), but in none of the above-mentioned cases did the plaintiffs manage to prove that the company Uber had made any false declarations amounting to inappropriate advertising. On the other hand, in the field of public safety, Uber has had to either fulfil strict regulatory requirements[22] or face a full (or partial) ban and has therefore been forced to leave the markets of many countries in the world.[23] We have also encountered examples of legal proceedings due to inadequate safety standards, specifically due to sexual harassment, with two in the USA and one in India;[24] in San Francisco, there was a legal action due to inducing a child's death as a result of negligence. Again, the question was raised of who and to what extent is responsible for the actions of freelance drivers; therefore – in order to re-establish its public reputation – Uber has introduced an additional safe ride checklist and formed a group of experts to identify the drivers (DFE: 2015).

## 7. Follow-up: new national legislation

Countries around the world, including in the EU, have recently started amending their national legislation either in support or against Uber in order to avoid future judicial battles. For example, the new Croatian Road Transport Act[25] now equalises the status of carriers (Uber's drivers and taxi drivers) so that, in order to be allowed to carry out passenger transport, all drivers must possess a valid driver's licence for the transport vehicle, but the acquisition of the licence is cheaper and simpler. New, more favourable legislation for road transport is also being prepared in Brazil; the services will still be monitored, but the drivers will not be required to hold permits (Adghirni: 2018). In Belgium, the process of adapting the existing legislation to alternative taxi

[22] E.g. adequate insurance and regular examination of the vehicle.

[23] Uber services are currently banned in Alaska, Oregon (with the exception of Portland), Vancouver, Bulgaria, Italy, Denmark and Hungary, and limited in France, Germany, the Netherlands, the Northern Australian Territory, Victoria and New South Wales, in Japan, India and Taiwan.

[24] In India, the second-largest Uber market (first being the USA), the charge of sexual violence in New Delhi has led to the prohibition of taxicab services based on web applications.

[25] Zakon o prijevozu u cestovnom prometu, Narodne novine br. 41/18, 3.5.2018. Access: https://narodne-novine.nn.hr/clanci/sluzbeni/2018_05_41_784.html

service providers like Uber is underway, with which the Belgian government wishes to prevent unfair competition and social dumping. Meanwhile, in the USA Uber has managed to obtain several laws that protect its interests; 41 state legislatures have so far passed legislation protecting transportation companies from regulation (Schriever: 2018).[26]

However, the situation differs considerably from one country to another. For example, after 3 years of operating, in 2017 Uber withdrew from Denmark because of its overly demanding newly adopted rules requiring cabs to be fitted with seat occupancy sensors and fare meters. In the same year, it had to abolish certain services in Norway and Finland in anticipation of changes to the national legislation; the same happened in Morocco in 2018. Hungary adopted a law fully prohibiting the use of applications providing taxicab transportation. Due to allegations of experiencing an unfair business practice, new regulations were issued in Turkey this year: they restrict the requirements for the issue of licences while impeding potential drivers' signing in to an application at the same time.

## 8. What are the prospects?

In this overview of the most important cases facing the courts around the world over the years in question, we encountered many issues regarding this newcomer operator in the taxicab industry. This is not a new situation since conflicts over regulation usually arise when a new economic model emerges. In the past few years, Uber has been engaged in considerable litigation entailing either adapting to the existing legislations or, upon withdrawing from a country, striving for more favourable regulations to be adopted. It appears that legislators are prepared only to a limited extent to introduce encouraging regulations that are friendly to the new models. More often, attempts are seen to make these models subject to the existing regulations governing comparable models or services; these may be similar, but not necessarily compatible; in

[26] Schriever L. A., Uber and Lyft Lobby their Way to Deregulation and Preemption, The Regulatory Review, University of Pennsylvania Law School, 28.6.2018.

other words, there are many significant differences among them, making such a method not always justifiable, albeit it is decidedly simpler. In this field, there is a lack of progressive legislative policy; and as far as the European Union is concerned, a lack of secondary EU legislation and mutual harmonisation of bodies of national legislation. The European Commission has been avoiding propositions regarding new legislation and merely offered some guidance[27] to the EU member states on how the existing rules may be applied to these new forms of services. Today, the two ECJ judgements looked at in this article are somehow blocking the way to any consistent regulation of Uber's business activity in Europe. Given that it has been classified as a transport company, it will be subject to the shared jurisdiction of the EU and the member states in the field of local transport. As stated above, secondary legislation does not yet exist on the EU level, whereas the EU member states are regulating the matter through local transport rules. However, it is true that from the outset countries across Europe have been regulating Uber mostly according to the provisions governing transport companies. With its judgements, the ECJ thus followed the national case law and not the criteria[28] issued by the European Commission for this exact purpose. It seems like a thorough reform of the existing provisions for all taxicab providers, ensuring the efficiency of the new operators, the quality of services and preventing discrimination of any kind, is more than needed.

[27] European Commission, A European agenda for the collaborative economy, COM(2016) 356 final, Brussels, 2016.

[28] According to the European Commission, three key criteria should be met in order to consider the collaborative platform as providing the underlying service in addition to an information society service: setting the price, setting the terms and conditions of the service and the ownership of key assets. Yet the ECJ has only established two criteria; the creation of a new market and a crucial influence on the terms and conditions of the service.

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# Ridesharing and Regulatory Changes – the Case of Poland

## 1. Introduction

This chapter aims to present the challenge posed to 'traditional' taxi regulations by ridesharing firms and discuss the regulatory frameworks that can be used to accommodate the disruptive change they bring. For this reason, the article contains three parts – the first chapter will describe the economic rationale and consequences of taxi regulation while the second will consider whether the new ridesharing enterprises show the need for strict regulation. Part three of the article will analyse proposed and actual attempts to create the legal environment for ridesharing while describing our experiences of working on the draft of a proposed ridesharing law in Poland and participating in appropriate public hearings. Finally, conclusions will be presented.

## 2. Taxi regulations and economic theory

The legal situation of the taxi sector in developed countries may be described as paradoxical. It is not startling to say the very idea behind the business is straightforward – a driver uses his/her car to drive passengers to the

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requested destination for an appropriate fee. Despite this notion, taxi firms and drivers operating in Western cities must comply with detailed regulations. Aarhaug (2014) proposes these regulations can be divided into three groups: quantitative (a cap on the number of taxicabs allowed to operate in a city), qualitative (obligatory theoretical and/or practical examinations for would-be taxi drivers as well as technical requirements for the car) and economic (price caps or even fixed prices). Moreover, taxi regulations have really long traditions – the earliest attempts to regulate horse-drawn carriages operating for a profit were made in London in the 17th century and in the 1920s in the USA (Dempsey 1996). This paradox, however, can be explained by the economic theory of regulation and its two principal concepts (Garoupa 2004; Hertog 2010; Philipsen 2009; Posner 1974) – the public interest and private interest approaches to regulation.

## 3. The public interest approach

The public interest theory of regulation derives from the first theorem of welfare economics saying that free markets lead to a socially Pareto-optimal outcome (Arrow 1985; Jones 2005). Yet, in order to obtain optimal results, the market must fulfil certain conditions such as perfect competition, full information and a perfect price mechanism including both private and social costs. If these conditions are not met, the market outcome is suboptimal as a result of market failures (Stiglitz 2000:77). Consequently, public interest theories assume that a benevolent government can impose regulations to eradicate or decrease such deficiencies and improve the outcome of the market processes (Noll 1989). The public interest approach perceiving regulations as a weapon against market failures can in theory (Aarhaug 2014; Dempsey 1996; Harding, Kandlikar, and Gulati 2016; OECD and European Conference of Ministers of Transport 2007) be used to explain the rules governing taxi businesses as the transport market is indeed particularly prone to market failures.

First and foremost, the taxi market is characterised by strong and self-evident market asymmetries. A passenger who is about to take a ride has very limited knowledge of the skills and trustworthiness of his/her driver as well as the

safety of the car (especially when hailing a taxi on the street). It is impossible or time-consuming (people take taxi rides because they are in a hurry) to compare the services offered by different providers. Moreover, as taxis are often used by people coming from other places who have very limited knowledge of the topography of the visited city, taxi drivers have strong incentives for opportunistic behaviour such as choosing unnecessarily long routes in order to increase the fee paid by passengers unable to realise they are being cheated. As shown in the seminal article of Akerlof (1970), asymmetric information can spoil the market as consumers unable to distinguish between good and bad quality sellers/service providers are likely to withdraw from the market or demand low prices to compensate for the risk of buying a low-quality product. In consequence, high-quality sellers also leave the market unable to compete if prices are artificially low. In the taxi market this would be represented by bad quality taxi drivers pushing good quality drivers out of the market (Shreiber 1975).

Second, the problem of externalities is also clearly present in the taxi market. Taxi traffic creates social costs such as additional road congestion and air pollution. Moreover, it should be remembered that a taxi ride (from and to an airport/train station) is often the first and last stage of a visit to a city – bad experiences of guests can tarnish the city's reputation and affect other hospitality businesses such as hotels and restaurants (Dempsey 1996; Shreiber 1975).

Finally, the taxi market is affected by market-specific inefficiencies such as unequal distribution of taxis that are likely to circulate in areas with a high probability of finding a passenger (city centres, airports and train stations). Further, taxi drivers may be reluctant to take a ride to remote districts of a city due to the small chances of taking a passenger on their way back (Dempsey 1996).

Given these arguments, measures imposed to regulate the market can be perceived in theory as justified and intended to alleviate the market failures described above. Compulsory examinations and background checks for drivers as well as quality requirements for their cars can protect passengers from incompetent and dishonest drivers and their faulty cars and ensure proper quality. Moreover, the threat of a licence revocation in case of

repeated complaints may work as a disciplinary measure discouraging drivers from cheating their passengers (should licences not exist, the unfortunate passenger would have to file a lawsuit whose cost would exceed the value of the rip-off). Finally, restrictions on the number of taxis can be used to mitigate the externalities resulting from an excessive number of cabs as well as to avoid a 'race to the bottom' in prices with drivers increasing incomes and cutting costs and prices by driving unsafe cars or taking long shifts that may result in tiredness that poses a threat to traffic security (Harding et al. 2016; OECD and European Conference of Ministers of Transport 2007).

While discussing the economic case for taxi regulation, we should also keep in mind that the taxi market is not uniform because taxicabs can be requested not only by hailing or picking them up from a taxi stand but also pre-booked by calling a dispatch centre or using smartphone apps. In case of pre-booking, the market failures caused by asymmetric information are partially alleviated – a would-be passenger can choose the taxi company to provide them with a ride and their choice can be based on their previous experiences, reputation as well as third-party advice. For this reason, in some regulatory environments (e.g. in London and Poland) there exist separate licences for Private Hire Vehicle (PHV) drivers that are easier to obtain than regular taxi licences but prohibit taking passengers directly from the street or a taxi stand – all PHV rides must be pre-booked. Such an approach is called a two-tier system (OECD and European Conference of Ministers of Transport 2007). However, in some EU countries there are other restrictions imposed on PHVs such as the obligation to return to the garage after each ride (France) or the requirement that all PHV contracts should be signed in the office of the provider (Germany) (Frazzani, Grea and Zamboni 2016).

## 4. The private interest theory

The private interest theory of regulation reflects a far more pessimistic worldview compared to the public interest theory described above by stating the true beneficiaries of regulations are not customers (protected from bad quality and dishonesty) and third parties (protected from externalities)

but the incumbent sellers (in this case, taxi drivers) (Hertog 2010; Philipsen 2009). Laws that artificially limit entry to the taxi market (e.g. by putting a cap on the number of taxis in a city or requiring a prohibitively difficult exam) help increase the market prices, thereby allowing incumbent drivers to reap extraordinary profits known in economics as regulatory rents. These rents are, however, extracted from taxi passengers who have to pay more than they would have to pay if the barriers were lower.

Moreover, economic theory can explain why policymakers create laws that have a detrimental effect on the market and allow rent extractions. The solution to this problem was proposed by Downs and Olson who showed that sellers have strong incentives to engage in lobbying for stronger regulation and protesting against attempts to liberalise the market – for instance, in Poland taxi drivers opposed the government's plans to lower the entry barriers by blocking roads in the capital city of the country (Interia Fakty 2012). For them, stricter laws mean a significant increase in their profits. As the benefits are concentrated and the costs are dispersed (because there are far more taxi passengers than taxi drivers in the market), passengers have very few incentives to oppose strict regulations – the alternative cost of such activity exceeds the expected profit (Downs 1957; Olson 1965). In addition, we should keep in mind the fact that many taxi users come from abroad so they have no possibility of influencing lawmakers.

The private interest approach to the problem of taxi regulation is in fact supported by the majority of the available empirical research collected by Moore and Balaker (2006). Out of 28 articles assembled by those authors, 19 point to a positive impact of limiting political interference in the profession of taxi driving, 7 show negative consequences and 2 have mixed results. Yet, it should be noted that the research presenting the negative results of taxi liberalisation deal predominantly with price liberalisation and not lowering the barriers to entry.

The results reported by Moore and Balaker are no answer to the problem of the market failures described in the previous section. It seems, however, that

in the taxi market government failures created by regulations that allow rent extraction can do even greater harm. For this reason, research points to the need to deregulate the market.

## 5. Ridesharing as a business model and (de)regulatory rationale

Due to the widespread media coverage, we believe it is unnecessary to present in detail the way ridesharing firms operate or their history and scope. Yet, for the sake of clarity we should recall that Uber, Taxify and similar platforms connect passengers seeking a ride with available drivers. After a passenger decides to request transport (using a mobile application), his/her location is advised to drivers who accept the request, pick up the client and drive him/her to the desired place. The fee is calculated automatically and independently of the driver by the application using GPS positioning and the payment is collected from the passenger's account. Finally, having concluded the journey, the passenger can rate the driver (using the mobile app) and the driver can rate the passenger. Moreover, it should be mentioned that ridesharing apps use a so-called surge pricing mechanism. This mechanism increases the prices (and the drivers' profits) for rides starting in areas with high demand (would-be passengers are informed) in order to attract more drivers to that place.

The description of the technology used by disruptive innovators like Uber and Taxify shows that in their case the market failures related to taxi markets are alleviated. First of all, the problem of asymmetric information is tackled by the fact that all rides are pre-booked and after each ride passengers can rate the driver using the app. Consequently, drivers who are incompetent, impolite or dishonest are removed from the system by the operator so as not to damage the reputation of the service. Moreover, dynamic surge pricing (despite its criticism) creates incentives for drivers to move to areas where the demand for rides is particularly high (Harding et al. 2016).

For the reasons stated above, there is no economic rationale behind attempts to regulate this type of transport to the extent seen in the case of 'traditional' taxi services. The market failures that create the rationale for regulating

conventional taxicabs (asymmetric information in particular) are addressed by the features of the apps used by ridesharing systems – the notion that IT solves this market failure better than regulations imposed by the government can be found in the literature. Consequently, there is no need to limit entry to the profession so as to protect clients from incompetent or dishonest drivers – they are removed from the market by the system itself. For this reason, we can recommend that lawmakers intending to regulate new transport services in an efficient way should avoid introducing barriers to entry at the same level as for traditional cabs (provided that the ridesharing service can only be pre-booked with a designated app). Instead, regulators should concentrate on creating a level playing field in taxation to avoid distortions benefitting either taxi or ridesharing drivers – the final decision on the preferred mode of transport should be based on customers' individual preferences. This approach is also advocated by other authors (Geradin 2015; Harding et al. 2016).

Moreover, the recommendation is supported by the data. According to a study commissioned by the European Commission, European consumers tend to be more satisfied with the service provided by ridesharing firms (even though there are no 'quality control' regulations imposed by the state) than by the services provided by heavily regulated taxi drivers (Frazzani et al. 2016). Moreover, available evidence from Chicago and New York shows that the growing popularity of Uber is leading to a decline in the number of customer complaints about substandard traditional taxi services, suggesting that growing competition in the transport market is forcing traditional service providers to improve their quality (Wallsten 2015). Finally, Uber drivers (probably thanks to the technology) tend to spend a higher share of their time and more of their trips involve passengers on board (Cramer and Krueger 2016). This shows the spread of ridesharing services has a positive impact on the market and that there is no reason to curtail it.

## 6. Attempts to regulate ridesharing in Poland

The previous section presented arguments showing the mechanisms used by ridesharing systems actually tackle the market failures often described as the

rationale behind taxi regulations. The goal of this chapter is to outline the struggle to bring in effective laws to introduce ridesharing in Poland.

Since its arrival in Europe, Uber has been causing regulatory upheaval as well as protests by taxi drivers afraid of the new competition which (as just shown) offers higher quality services and lowers their regulatory rents. Such protests have occurred e.g. in Paris, Rome, London and Madrid. As a result of these actions, the services have been banned in Denmark and Hungary whereas in France, Italy and Germany their operations are restricted. The regulatory pushback against Uber and other companies has been strengthened by the European Court of Justice's ruling that such firms are in fact taxi companies and member states are free to regulate them (Judgement in Case C-434/15, 20.12.2017).

In the EU, however, some countries oppose this trend to eradicate or limit ridesharing services and are instead creating regulations intended to allow them to compete with traditional taxis on a level playing field. The most visible example is Estonia which in 2017 adopted a law allowing ridesharing services to operate freely as long as trips are ordered online and the passenger learns about the price before the ride starts, with an opportunity to reject it. In such cases, drivers are, moreover, not obliged to have a taximeter and their services are exempted from the price limits set by local municipalities. Further, the 2017 law abolished compulsory training for taxi drivers (Cavegn 2017). In 2018, a similar regulation was adopted by the Latvian parliament (Labs of Latvia 2017).

A less liberal approach is used to regulate ridesharing in London. Under local law, ridesharing drivers are obliged to register their vehicles as Private Hire Vehicles and apply for a 'lighter' type of licence than for 'traditional' taxi drivers operating in the capital of the UK. In particular, PHV drivers do not have to pass a practical exam on the topography of the city.

The regulations put in force in these two Baltic countries may be praised for being a reasonable approach to the challenges posed by new technologies

in passenger transport. They allow ridesharing drivers to operate freely as long as asymmetric information on the price does not exist, which is not the case since the passenger must accept the price before the ride. Moreover, the Estonian law lowered barriers to entry in the traditional taxi market – such a measure may be described as reasonable given the aforementioned research showing that entry deregulation has a positive impact on the market.

The authors of this chapter drew up a piece of legislation to create the legal framework for ridesharing that was submitted to the Polish Parliament by the Nowoczesna Party in May 2017 (as an opposition project, the law has yet to be sent to the Parliament, it remains stuck in the parliamentary Committee of Transportation). We prepared this law due to the huge popularity of transport services operating under the sharing-economy model: using Internet and mobile apps to connect passengers interested in rides with professional drivers available at the same moment. Although there is no legal framework for such services in Poland, a few companies are operating according to that business model. Moreover, such services are more and more popular among young citizens, for example 1/3 of people born between 1980 and 1995 ('millennials') (Marketing Przy Kawie 2016) and living in big Polish cities were registered Uber users in 2016. The service has become even more popular since that survey. At the same time, regular protests by taxi drivers have been organised and Uber drivers have been caught by the police or ITD (Road Transport Office) and required to pay fines.

Public hearings have shown that the current absence of a legal framework keeping pace with the development of technology and new business models has been bad for all stakeholders in this market. For companies operating according to the sharing-economy model, this means constant uncertainty about the legal rules. That may result in weaker incentives for developing companies and making new investments. For passengers, it means there is no clear path to getting compensation in the event of injury caused in a traffic accident or fraud. For the state, it limits the possibility of supervising the market. This lack of clear rules is also harming the 'traditional' companies offering rides. They may be subject to unfair price competition from those companies

operating under the new business models. The competitive advantage of the new companies might not be the result of better management and effective use of technology, but the outcome of evading taxes and licences by their drivers. Despite this, taxi drivers' associations participating in the hearings have called for a full ban on ridesharing instead of creating a flexible regulatory environment – they presented claims (not supported by the research we mentioned) that ridesharing services pose a risk to consumer safety due to their alleged substandard quality.

The existing legislation in Poland establishes three categories of carriers in the context under discussion: occasional transport, passenger car transport, and taxis. The last option is the most regulated. A taxi driver in Poland needs to buy a licence to operate a taxi and pass an exam on the topography of a particular city. A taxi driver also needs to have a driving licence, to pass a medical and psychological examination, hold a good conduct certificate and a few other documents. The transportation organiser (e.g. a taxi corporation) must have a proper licence from the government to operate. Finally, the price of the rides is fixed and regulated by city councils. The two other models have lower barriers to entry and are more flexible, but also do not allow drivers to benefit from taxi privileges: the possibility to pick up a passenger from the street, to use a cab rank and drive in a bus lane.

Assuming that the piece of legislation we drafted does find its way into the existing Transportation Act, two new definitions would become relevant: "online ride broker" and "the professional beneficiary of an on-line ride broker". The first of these refers to a company that links prospective passengers with drivers in real time, providing an online mechanism to order and pay for the ride. For that, it uses information society tools, e.g. a mobile app. This would mean that the company is not an organiser of the carrier in a strict sense. It does not provide a ride service, does not hire professional drivers and does not own its car fleet. The second term defines the driver (entrepreneur) who is actually providing a ride and cooperates with the online ride broker to obtain details of the passenger and to receive payment for the service. In the legal framework we anticipate, the business activity of the driver is based on an existing category in

the Polish Transportation Act – passenger car transport. It is a far more liberal and flexible institution than a taxi licence. The ratio legis of the draft legislation in fact separates the actual ride service that is strictly regulated from the information services that are present in the market and are wrongly classified as taxi corporations that organise the entire transport process.

## 7. Conclusion

In this chapter, we shown that the rigid regulation of taxi markets can be attributed in particular to the rent-seeking activities engaged in by incumbent taxi drivers willing to extract rents caused by limited supply. Even though a theoretical economic rationale exists for regulating (market failures), empirical research shows that entry barriers are counterproductive and have a negative impact on the market – in this case, we have found it is likely that the social cost of regulation is higher than the losses caused by the market imperfections. Moreover, we provided support that the business model adopted by ridesharing firms deals with the key economic reason for regulating taxis – market asymmetry. Consequently, attempts to regulate this type of business are irrational and lend extra support for the public interest approach to transport regulations – it is taxi drivers who are pushing for stricter ridesharing laws. In addition, we showed the mode of regulation adopted by the parliaments of Estonia and Latvia may be described as appropriate – the lawmakers there realised the problem of asymmetry does not exist and have allowed innovative businesses to operate freely in compliance with the law.

The attempt to create a regulatory environment for ridesharing in Poland made by the Nowoczesna political party (liberals) follows the measures taken by the Estonians as well as the regulations found in London – the legislators intended to permit ridesharing drivers to operate using a simple private hire vehicle licence (far easier to obtain than a taxi licence) and allow them to take only passengers who have made an order. However, the public hearings showed that taxi drivers' organisations are vehemently opposed to the law, providing additional evidence in support of the private interest theory applying to taxi regulation.

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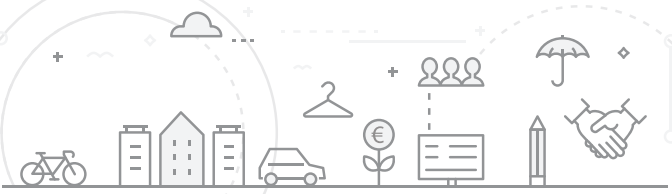

Ana Vlahek*, Matija Damjan**

# Slovenian Regulation of Short-Term Apartment Rentals via Digital Platforms

## 1. Introduction

Digital platforms for property rental serve as intermediaries between the owners of different types of lodgings who wish to rent them out, and visitors (typically tourists) looking for short-term accommodation. Accessible via a website and mobile application, the digital platform allows owners to present their residential premises (individual apartments, entire houses, holiday cottages, single or shared rooms) and the per-night prices for their use. Prospective renters can contact the homeowner through the platform and make a reservation for their selected option. Platform operators usually charge a service fee in the form of a commission on each booking made.

This relationship may be described as a collaborative economy in which individuals temporarily rent out their residential property for a period in which they do not intend to use it themselves (e.g. during a longer absence abroad), or let out unoccupied rooms in their own home to other individuals, both of which can be described as a peer-to-peer relationship. However, digital platforms are also seeing increasing use by owners who do not use

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the property to live in but invest in it mainly for the purposes of renting it out to tourists, namely, as their supplementary economic activity. With the growth of tourism in Slovenia and elsewhere in Europe, the occurrence of such semi-professional hosting services offered via digital platforms is rapidly rising, making for an important alternative to hotels and other tourist accommodation providers. Yet, many homeowners still rent out their apartments to short-term visitors on the basis of general provisions of housing legislation originally drafted with a focus on long-term tenancy relationships and not designed to regulate the area of short-term tourist accommodation. Accordingly, the special conditions the law prescribes for performing economic activity in an apartment in condominium ownership are often not complied with by such short-term rentals.

In practice, this increase in short-term rentals raises several legal questions relating to, for example, the relationships with neighbours in multi-apartment buildings, consumer protection, taxes, safety and health standards etc. This article looks at the legal issues and challenges in the field of housing legislation. These are most acute when short-term tourist rentals regularly occur in multi-apartment buildings since these visitors' frequent arrivals and departures can disturb the regular residents of the building and excessively burden the common areas of the building. This is particularly disturbing if an apartment in an otherwise quiet building in a city centre is transformed into a rental space for throwing all-night parties or other noisy or crowded events (Scanlon 2017: 564). When short-term apartment rentals in a particular part of a city grow considerably, this also impacts the housing policy by reducing the availability of rental housing for city residents and increases the market price of apartments (Santolli 2017: 675).

The purpose of this chapter is to analyse the conditions for the short-term rental of apartments in the current Slovenian legislation and to present the approach taken by digital platforms to ensure compliance with those conditions. We point out where the current rules are unclear or inadequate and how they could be improved. In view of the possible amendments to the regulation, we also describe some legal measures concerning

short-term tourist rentals that were recently adopted in other European countries.

## 2. Short-term apartment rental via digital platforms

### 2.1 Characteristics of the main platforms

The best-known digital platform for the short-term rental of accommodation is Airbnb (www.airbnb.com), whose name is often synonymous for all services of this type. The company was founded in San Francisco in 2008. Its platform allows visitors to rent out different types of short-term accommodation – entire apartments, holiday cottages, individual rooms in a host's home or shared rooms as well as hotel accommodation. Reservations in restaurants and bookings for organised tours or other tourist experiences can also be made. The company does not own residential premises and does not organise any trips itself but only acts as an online broker providing its services in electronic form via a website and mobile applications. It is free for users to register and create an account, but Airbnb charges a host a service fee for every reservation made (usually 3%), and sometimes also a guest service fee (between 0% and 20%).[1] A very similar business model to Airbnb's is employed by the German short-term rental platform Wimdu (www.wimdu.com), operating since 2011, which offers listings of lodgings located mainly in Europe.

A somewhat older platform is VRBO – Vacation Rentals by Owner (www.vrbo.com), established in 1996.[2] It differs from Airbnb and Wimdu in that it only rents out unoccupied vacation properties (holiday houses and apartments) and does not offer overnight stays in a host's home (homestays). The guests pay a service fee for every booking made via the platform and the owners of the accommodation can pay either an annual subscription fee or a fee for each reservation separately. A very similar business model is used by HomeAway (www.homeaway.com), which is the parent company

[1] https://www.airbnb.com/help/article/1857/what-is-the-airbnb-service-fee (9.9.2018).
[2] This makes it 'ancient' in Internet terms.

of VRBO and manages several other connected short-term rental platforms. The Flipkey platform (www.flipkey.com), owned by TripAdvisor, also does not offer shared rooms or homestays, only private rooms or entire properties.

On the other hand, the Couchsurfing (www.couchsurfing.com) and Homestay (www.homestay.com) platforms focus on offering hosted overnight stays at a host's home. Couchsurfing only allows non-commercial offers and prohibits hosts from charging their guests for the accommodation provided. Guests, however, must pay an annual fee (verification) to the platform, unless they themselves have hosted other guests in their home during the last three months. Hosts on the Homestay platform may charge their guests for the accommodation, with the guest paying directly to the host, whereas the platform only receives a fee which the guest pays upon reservation.

The OneFineStay platform (www.onefinestay.com) specialises in offering high-end and luxury homes when not occupied by their owners. The offer is selective since company representatives first visit the property and assess whether it meets their requirements. OneFineStay not only acts as a booking service but takes over all the communication with the guest and prepares the premises for them, e.g. by arranging for the apartment to be cleaned before the guests' arrival and after they leave, and by providing them with fresh linen and towels. The owner of the property must only notify the platform of the period the property is available for rent. Guests pay the platform for the accommodation and the platform transfers the money to the property owner after deducting its commission.

Quite a few other, digital short-term rental platforms can be found on the Internet, but the above-mentioned form a sufficiently representative sample. Considering the circumstances relevant from the housing law perspective, platforms may be divided into general ones that provide for all types of accommodation (such as Airbnb), platforms specialising in homestay accommodation (such as Couchsurfing), and platforms that, in addition to bringing property owners and visitors together, themselves provide additional services related to use of the property (such as OneFineStay).

## 2.2 The platforms' terms of service

Analysis of the terms of service of the presented platforms shows the platform operators generally tend to avoid any obligation to ensure the rental services comply with legal requirements that may be prescribed by the local housing laws or zoning regulations for short-term tourist rentals. The responsibility for taking care of the legality of the rental is left to the hosts. Terms of service typically stipulate that the platform acts only as an intermediary between the guest (the tenant) and the residential property owner (the landlord or host) and is not party to the contractual relationship between them. By accepting the terms of service, the property owner pledges, more or less expressly, that the lodging is rented out in accordance with the local zoning laws and with the neighbours' consent, if required, and that all administrative permits have been obtained that may be prescribed for short-term tourist rentals.

Airbnb's Terms of Service[3] are most unambiguous in this regard since they expressly state in the introductory part that hosts alone are responsible for identifying, understanding and complying with all laws, rules and regulations that apply to their listings and host services. The terms point out that, for example, some cities restrict the provision of hosted services for short periods or require registering or obtaining a permit before providing certain host services, whereas some types of host services may be prohibited altogether. Under section 7.2.3 of Airbnb's Terms of Service, the host represents and warrants that any listing posted, any booking made or any guest's stay at the accommodation will not breach any agreements between the property owner and any third parties such as homeowners' association, condominium or other agreements, and that it will comply with all applicable laws (such as zoning laws), tax requirements, and other rules and regulations (including having all the required permits, licences and registrations). Section 14.1 further provides that the hosts are solely responsible for compliance with any and all laws, rules, regulations, and tax obligations that may apply to

[3] www.airbnb.com/terms (9.9.2018).

their use of the Airbnb platform. Comparable provisions may be found in the terms of service of the VRBO[4] and Flipkey platforms.[5]

The Couchsurfing platform encounters fewer potential problems with ensuring the legality of hosting services since the accommodation offered there is always provided in the host's home and free of charge. Namely, having occasional home guests is an activity not normally restricted by legislation nor subject to special taxation since it is clearly not a commercial activity. For this reason, under section 4.2 (g) of the Couchsurfing Terms of Use hosts are prohibited from using the platform's services for any commercial purpose whatsoever, unless with the prior written consent of Couchsurfing. Section 3.3 of the Terms and Conditions of the Homestay platform[6] which allow the host to charge for the provision of accommodation provides only that the website or any material contained therein may not be used for any purpose that is unlawful or prohibited by the Terms.

One might expect that the OneFineStay Platform, whose service is more similar to classic hotel services, would take on a more active role in ensuring the compliance of the housing rental services with the local legislation since the operator directly engages with the guests and provides them with additional services. However, its terms of business (different versions of the terms apply in the United States, Great Britain, France and Italy)[7] clearly state the platform is not a party to the accommodation agreement concluded between the homeowner and the guest but acts solely as the homeowner's agent, whereas any services provided to the guest in the accommodation itself are subject to a separate guest service agreement. The responsibility for ensuring the accommodation rental is in accordance with the local housing and zoning legislation remains with the homeowner. The French version of the accommodation agreement is most explicit in this regard as it provides in section II for an express statement by the homeowner that they have the capacity to put the residence up for rental, and that the residence's rental is consistent with the building's co-ownership regulations.

[4] www.vrbo.com/info/terms-and-conditions (9.9.2018), §§ 1 and 24.
[5] rentals.tripadvisor.com/en_US/termsandconditions/owner (9.9.2018), §§ 2.2 and 2.4.
[6] www.homestay.com/terms-and-conditions (9.9.2018).

# 3. Slovenian legal framework for short-term apartment rentals

## 3.1 General rules on apartment rental

The basic Slovenian legislation regulating apartment rentals is the Housing Act of 2003 (Sl. Stanovanjski zakon (SZ-1)[8]). The rules on apartment rentals are found in Chapter VI of the Act (Articles 83–114). Renting an apartment is determined as a basic right of its owner.[9] Before renting an apartment out, the owner need not, in principle, acquire consent from other owners of apartments in the multi-unit building.[10]

It is clear from the Housing Act's provisions that when drafting the rules on apartment rentals the legislator primarily had traditional long-term leases in mind rather than short-term arrangements of the Airbnb type. For example, the Housing Act stipulates the owner must promptly notify the building administrator of the conclusion and any amendment to the rental contract, and inform him or her of the tenant's name and the number of persons indicated in the rental contract as this is key to exercising the tenants' rights and obligations.[11] Further, the essential elements of the rental contract, as listed in the Housing Act,[12] and the provisions on the rights and obligations of both owner and tenant (e.g. on the owner's right to enter the apartment twice a year, and also for the purposes of repairs and improvements; on the

[8] Official Gazette of the Republic of Slovenia, No. 69/03, with further amendments.

[9] See Article 84 of the Housing Act. Cf. § 13 of the German Law on Apartment Ownership (Ger. *Wohnungseigentumsgesetz* (WoEigG), Federal Law Gazette, No. 13/1951, with further amendments) and Article 81/1 of the Croatian Law on Ownership and Other Property Rights (Cro. *Zakon o vlasništvu i drugim stvarnim pravima* (ZVSP), Official Gazette of the Republic of Croatia, No. 91/96, with further amendments).

[10] According to Slovenian law, apartment ownership is the most common type of so-called shared, condominium, or strata title ownership (Sl. *etažna lastnina*), defined as ownership of an individual unit in a multi-unit building (an apartment or business premises), coupled with shared (undividable) ownership of the common areas of the building. The rules on apartment ownership are found in the Property Law Code (Sl. *Stvarnopravni zakonik* (SPZ), Official Gazette of the Republic of Slovenia, No. 87/02, with further amendments), and in the Housing Act.

[11] Article 24/4 of the Housing Act.

[12] Article 91. It would be interesting to see to what extent owners who rent their apartments via Airbnb and similar platforms pay due regard to the housing legislation. It would be particularly interesting to see whether they are concluding rental contracts as required by the Housing Act. Article 91 of the Housing Act, for example, provides for a written rental contract. Legal theory interprets it as required for protection of the tenant being the weaker party, as well as for registration purposes. See: M. Juhart (2003), Stanovanjski zakon (SZ-1), Uvodna pojasnila, Ljubljana: GV Založba, p. 56, where it is stated that the tenant may claim the existence of a rental contract also in the absence of a written contract if the legal relationship has in fact been exercised by the tenant and the landlord. This corresponds to the institute of convalidation set out in Article 58 of the Obligations Code (Sl. *Obligacijski zakonik* (OZ), Official Gazette of the Republic of Slovenia, No. 83/01, with further amendments). The following judgements confirm this position: Supreme Court of the Republic of Slovenia, No. RS II Ips 47/2014 of 8 October 2015; High Labour and Social Court, No. Psp 328/2015 of 29 October 2015; High Court of Ljubljana, No. I Cp 1403/2013 of 2 October 2013 (Damjan 2017).

tenant's possibility to inform the housing inspection of irregularities with the apartment; on acquiring the owner's consent if third persons not listed in the rental contract use the apartment for over 60 days in a period of three months; on the extension of the fixed rental period, where the tenant must acquire the owner's consent at least 30 days before the fixed rental period expires; on the acquisition of an administrative permit by the tenant if so required by the law; on the tenant's investments in the apartment; on the 90-day notice period) indicate the Housing Act's provisions on apartment rental were not drafted to cover situations of frequent exchanges of tenants. Short-term leases, especially those occurring on a continuous basis, are more disturbing for other apartment owners or residents in the building than long-term leases where the tenant is more integrated into the community of the apartment building's residents and uses the apartment as if he or she were its owner. Short-term rentals are usually performed as an economic activity and may thus be subject to the Housing Act's rules prescribing the conditions for performing economic activities in apartments (Article 14 of the Act). They may also amount to hospitality services as defined by the Hospitality Industry Act (Sl. Zakon o gostinstvu (ZGos)).[13] These specific rules on performing such activities in apartments of multi-unit buildings will be analysed in the following subchapter. The general legal framework for restricting the use of apartments according to autonomous decisions by apartment owners in a multi-unit building will then be presented and applied to the restrictions on short-term rentals. Finally, options for prohibiting short-term rentals by way of municipal decisions will be examined.

### 3.2 Special rules on performing economic activities in apartment buildings

Article 14 of the Housing Act defines the prerequisites for performing a permitted economic activity in part of an apartment of a multi-unit apartment building. The owner may use their apartment to perform an economic activity if the activity does not disturb the multi-unit building's residents in their peaceful enjoyment of their dwellings, and if it does not excessively

[13] Official Gazette of the Republic of Slovenia, No. 1/95, with further amendments.

burden the common areas of the building (i.e. staircases, elevators, lobbies, playgrounds, parking lots etc.). The law explicitly stipulates that such use of an apartment, i.e. the use of part of an apartment to performing an economic activity, does not change the »purpose of housing« or the »use of housing«.[14]

In order to carry out activities within the meaning of Article 14 of the Housing Act, the apartment owner must (in principle, see infra) obtain the approval of more than three-quarters of the shares of all the apartment owners and the mandatory consent of the apartment owners right beside and beneath the apartment in question.[15] Upon starting this economic activity, the owner must inform the building manager about it. In the event the apartment owner performs the activity contrary to the Housing Act, the housing inspector shall prohibit them from performing it. The law also stipulates that, in the case of the transfer of the apartment's ownership, the right to perform an activity in the part of the apartment shall not be transferred. Article 14 of the Housing Act applies mutatis mutandis to the tenant of an apartment wishing to perform an economic activity in it. This also requires the written permission of the apartment owner. If the tenant performs the activity without such authorisation or in contravention of it, the landlord may terminate the contract for reasons of culpability on the side of the tenant.[16]

While drafting Article 14 of the Housing Act, the legislator obviously aimed to regulate cases in which the owner (or tenant) of an apartment continues to live in the apartment while also using another part (a living room for example) to carry out his or her economic activity (e.g. legal counselling, accounting services, sewing clothes, producing flower pots, repairing shoes) which could result in various externalities (loud operation of a sewing machine for instance), as well as in visits of clients and, thus, more intensive use of

[14] These terms are germane to the application of some focal provisions of the Housing Act and the Property Law Code. The legislation, however, does not provide clear definitions of these terms, making it somewhat difficult to understand and apply them.

[15] The original wording of Article 14 of the new Housing Act (i.e. before being amended in 2008) listed different prerequisites for performing an activity in an apartment. It required the consent of the state or local authority. This consent was issued if: (i) the applicant had obtained the consent of other apartment owners holding more than one-half of all co-ownership shares in the common areas of the building; and if (ii) the activity would not disturb the residents in their peaceful enjoyment of their apartments and not represent an excessive burden on the common areas of the building. The old Housing Act of 1991 required the consent of all apartment owners and of the local authority whereby the giving of consent could only be refused if the activity would disturb the residents in their peaceful enjoyment of their apartments or represent an excessive burden on the building's common areas.

[16] See Article 103/1/2,5 of the Housing Act.

common areas of the building by unknown third persons. It follows from the wording of Article 14 of the Housing Act that it is activated in the event of performing any kind of activity, even if it might not actually be disturbing for other residents and might not burden excessively the common areas of the building (if the owner was, for example, writing legal opinions without any clients visiting him or her for legal counselling). In practice, however, such non-disturbing economic activities are sometimes deemed allowed without having obtained any approval from other apartment owners or local authorities as is otherwise required (Hegler 2007). There is unfortunately no case law available in public databases to clarify this dilemma. The Housing Act of 1991[17] regulated this issue less unambiguously. Namely, the provision requiring an owner wishing to pursue an economic activity[18] to obtain the written consent of the landlord and other apartment owners added that the latter (as well as the local authority, which also had to give its consent under the Housing Act of 1991, as well as under the original Housing Act of 2003) could refuse consent if the activity would interfere with peaceful enjoyment of the dwellings, or would excessively burden the common spaces, parts, facilities and installations of the multi-unit building. We can conclude from this that, except when these circumstances exist, other apartment owners could not refuse to give their consent (cf. Becele 1991: 86). A similar conclusion may be drawn for the current legislation: although there is no express provision in the current Housing Act of 2003 on whether and when such consent may be refused by other apartment owners, the parties wishing to perform an economic activity in an apartment might try referring to the general principle of the prohibition on the abuse of rights if their neighbours refuse to give the required consent.[19]

It is clear that Article 14 of the Housing Act was not drafted with Airbnb and similar activities of short-term apartment rentals in mind, but only those

[17] Official Gazette of the Republic of Slovenia, No. 18/91-I, with further amendments.

[18] The relevant provision spoke only of tenants of apartments who wished to perform economic activities in them but was also applied *mutatis mutandis* to the owners of apartments (Becele 1991: 86).

[19] See Article 12 of the Property Law Code and the commentary on it by Berden in Juhart, Tratnik, Vrenčur 2004:93-109; Berden 2013:107–115. See also Article 7 of the Obligations Code (Sl. Obligacijski zakonik (OZ), Official Gazette of the Republic of Slovenia, No. 83/01, with further amendments) and the commentary on it in Juhart, Plavšak 2003:104–115; Cigoj 1984:77–83.

where the owner (or their tenant) remains in the apartment, continues to use it as an apartment but simultaneously performs an economic activity in the apartment[20] (also see Šinkovec and Tratar 2003: 76). Although with short-term rentals, the person performing the economic activity does not remain in the apartment, and even if in such cases, the apartment is still used for the purposes of living (albeit by way of short-term tenants, not the owner), it remains reasonable to also apply Article 14 to such cases at least until special legislation on short-term rentals is enacted in Slovenia. Namely, such rentals can be equally or even more burdensome for of a multi-apartment building's residents than other economic activities that clearly fall within the definition of Article 14 of the Housing Act. If consent to perform an economic activity in an apartment is required by someone writing legal opinions or doing accounting services without any clients visiting them for that purpose, this is all the more so in situations where an apartment is being rented out on a continuous and short-term basis to unknown third persons. In practice, such persons are not accustomed to, perhaps even do know of, the standards of living in a particular multi-unit building and might not obey or even not be aware of the rules of conduct in the building. They tend to bring (especially on wheels) luggage in and out of the building, making noise day and night. If the guests are not familiar with the building rules or cannot reach their landlord, they tend to disturb other residents. As short-term tenants are usually tourists, they also tend to use the rented apartments as vacation premises, staying up or returning late in the night etc. The effects of having short-term tenants in an apartment are thus closer to those activities within Article 14 of the Housing Act that typically produce noise and other emissions.

When assessing the framework for performing apartment rental activity, the focus must also be placed on the Hospitality Industry Act that regulates

[20] In principle, such economic activity must be registered. It is unclear if there is any difference at all between renting an apartment as part of a (business) activity, and renting an apartment which does not (yet) amount to an activity (for example, when a natural person rents their apartment once or twice). The criteria for performing a renting activity (such as its continuity and frequency, length of rentals, amount of rent, the style of offering the apartment to potential guests) are not set out. If, for example, a natural person rented out their apartment once and this did not amount to an activity under Article 14 of the Housing Act, they would not have to obtain the consent required by that article, but would probably pay higher taxes than persons renting their apartments out as part of their economic activity.

the performance of hospitality services. These include the preparation and serving of food and drinks, and accommodation of guests. They may be carried out by: (i) legal persons and sole traders registered for the purposes of performing hospitality services; (ii) associations with hospitality activities specified in their acts of establishment, provided they meet the conditions prescribed by the law; and (iii) private individuals if they are categorised as »a landlord« (Sl. sobodajalec) or »a farmer« and meet the conditions of the law.[21] As a type of hospitality services under the Hospitality Industry Act, »landlord services« may be provided by a natural person, sole trader or legal entity that offers guests accommodation with or without breakfast in their own or a rented apartment or holiday house (or in other premises if the local authorities approve). A natural person may perform such services if they perform the activity only occasionally (in total no more than five months in a calendar year), if they offer up to 15 beds and are entered in the Business Register of Slovenia as a "landlord« (FURS 2017: 29).[22] The premises in which any landlord (a natural or legal person) intends to perform hospitality services must have a valid usage permit according to the law governing the construction of buildings. The Hospitality Industry Act also sets out technical and other sets of conditions for the provision of hospitality services. It is interesting that the act makes the performance of landlord services by a natural person conditional on whether the activity is carried out only occasionally (and up to five months a year) whereas otherwise (i.e. if performed continuously) landlord services may only be pursued by a legal person. It is unclear whether this is in fact a delimiting factor for activation of Article 14 of the Housing Act. As the Housing Act speaks generally of an economic activity (one that is not limited being carried out by legal persons or sole traders), and as landlord activities are hospitality services irrespective of who is performing them, it appears that Article 14 of the Housing Act and its prerequisites apply to all types of apartment rentals, i.e. also to those performed by natural persons (a different conclusion in Uršič 2016).

[21] Articles 2(1)(2) and 14 of the Hospitality Industry Act.
[22] Article 14(2) of the Hospitality Industry Act.

The 2008 draft law amending the Housing Act of 2003 stated explicitly that landlord activities represent a "change in the use" of an apartment[23] and thus require the consent of all apartment owners in a multi-unit building as required by Article 29(2) of the Housing Act (and not only three-quarters of the shares of all the apartment owners and the mandatory consent of the apartment owners right beside and beneath the apartment in question as set out in Article 14 of the Housing Act for activities that do not represent a change in the use or a change in the purpose of the apartment).[24] Unfortunately, no case law is available to clarify the question of the majority required for performing landlord activities. This ambiguity further confirms that the existing system does not provide a clear framework for conducting the activity of apartment rental (not only on a short-term basis, but also by way of a long-term lease), and does not guarantee sufficient legal certainty for the stakeholders in the process of such activities (cf. Kodrič 2016: 20). Finding optimal solutions for regulating these activities is no doubt a difficult task having regard to the different and somewhat diametrically opposed interests.

### 3.3 Restriction of apartment rentals by decisions of owners in multi-unit buildings

As already outlined, the right to rent an apartment out pertains to its owner pursuant to the general rules of the Housing Act and exercising this right does not call for acquiring the consent of other apartment owners. However, when renting an apartment is perceived as performing an economic activity, the owner is limited by certain special provisions, including Article 14 of the Housing Act (which, as mentioned, requires the approval of a specified majority of the shares of other apartment owners). Additional protection of apartment owners is entailed in Article 14 of the Housing Act, prescribing that the exercise of such activity may not disturb the inhabitants of a multi-dwelling building in their peaceful enjoyment of their dwellings, and may not

[23] Albeit not a "change in the purpose" of the apartment that would trigger application of a further special set of rules.
[24] Sl. *Predlog Zakona o spremembah in dopolnitvah Stanovanjskega zakona*, EVA: 2007-2511-0036, No. 00719-6/2008/40, Ljubljana, 27 March 2008, p. 22.

excessively burden the common areas of the building. If these demands are not met, the inspection body may order the cessation of the renting activity. To protect their status, apartment owners can also rely on the general provisions concerning the enjoyment of apartment ownership (Article 13 of the Housing Act), prohibited emissions (Article 75 of the Property Law Code), and actions for the exclusion of apartment owners from the multi-unit building by selling their apartments (Article 123 of the Property Law Code) etc.

However, it is not entirely clear whether and how apartment owners are able to restrict the renting of apartments in advance by means of a contract on mutual relations (Sl. pogodba o medsebojnih razmerjih) or other legal acts.

Article 27 of the Housing Act stipulates that apartment owners owning more than half the co-ownership shares in the whole multi-unit residential building may adopt house rules (Sl. hišni red) that determine the basic rules of neighbourly coexistence in the building. We believe that the said house rules cannot regulate the question of the right to rent apartments (cf. Janevski 2004: 63, 187). Such a limitation of property rights in individual parts of a multi-apartment residential building would namely go beyond the regulation of fundamental neighbourly coexistence (cf. Juhart 2003: 30-31).

Apart from that, Article 29(2) of the Housing Act lists: (i) specific restrictions on the use of individual parts; and (ii) the use of an apartment for other purposes, including transactions that extend beyond the regular management framework and thus require the consent of all apartment owners.[25] As the law does not provide any definitions of these two categories (nor of "change in use of the apartment", a term used by the legislator in Article 14 of the Housing Act, as well as in the 2008 draft law amending the Housing Act of 2003), it is unfortunately unclear if limiting the possibility of renting apartments out on a short-term basis falls within one of them (see Šinkovec

[25] If the consent is not acquired, the apartment owners holding more than one-half of co-ownership shares may request the court to decide on the matter in non-litigious proceedings. In its decision, the court must pay due regard to the type and effects of the subject transaction.

and Tratar 2003: 104; Janevski 2004: 136). According to the 2008 draft law amending the Housing Act of 2003, landlord activities represent a change in use of an apartment and thus require the consent of all apartment owners of the multi-unit building. In accordance with the Property Law Code as well as the Housing Act, the determination of: (i) any specific restrictions on the use of individual parts; (ii) the purpose of the use of individual parts; and (iii) the use of individual parts for special purposes can all form part of a contract on mutual relations (which requires a minimum of 75% approval), while the Housing Act stipulates that decisions that require the approval of all apartment owners (arguably also including the decision on specific restrictions on the use of individual parts) are adopted by the owners through a special written document).[26] In view of the above, the ex-ante limitation of renting would be possible with the consent of all owners, either when establishing ownership relations in a multi-unit residential building, by adopting such a limit in a contract on mutual relations, by a special written document for that purpose, or with a subsequent agreement of the apartment owners (Janevski 2004: 31). The same majority would therefore be required to obtain consent under Article 14 of the Housing Act.

The question concerning the possibility of restricting the use of apartments by the decisions of owners in a multi-unit building is whether the owners can agree on any restrictions or conditions for the use of apartments. The relevant issue at hand is whether owners have the right to agree on a total ban on renting. Can they prevent short-term and allow long-term renting or decide that renting is allowed solely for a limited time per year or that only part of an apartment may be rented out. Judging from experience abroad, there are many potential ways to limit the renting out of apartments. According to the available data, our courts have yet to build any case law on these issues. Academics, in contrast, have been somewhat more vocal on the question, albeit expressing overly general opinions, and only exceptionally dealing with the specific problems of short-term tourist leases.

[26] See Article 116 of the Property Law Code and Articles 32 and 33 of the Housing Act.

Denying the autonomy of apartment owners to regulate their relations in accordance with their will seems inappropriate (Juhart 2003: 26), the more so if the consent of all owners is required for that, as in the case of specific restrictions on the use of individual parts under the current Slovenian legislation. According to Juhart, a contract on mutual relations can, for example, determine the activities that can be performed in apartments or prescribe the obligation to obtain the consent of the apartment owners (Juhart 2000: 68).

In his commentary on the Property Law Code (emphasising that a contract on mutual relations can deviate from the legally stipulated arrangement), Juhart wonders whether there are limits to the contractual freedom of owners. He opines that the limit is set by Article 38 of the Property Law Code, whereby the property right may be limited to any purpose that is not prohibited. He thus believes that the scope of potential limits that may be set by the owners themselves is quite broad. We agree with him that only restrictions that contravene the nature and content of the right of ownership (e.g. a general prohibition of the disposition of apartment ownership) or breach compulsory regulations or moral principles may be deemed inadmissible (Juhart in Juhart, Tratnik, Vrenčur 2016: 684).

Regarding the first set of restrictions, Juhart refers to Rijavec's example of a total ban on entering into rental contracts (Rijavec in Juhart, Tratnik, Vrenčur 2004: 559) resulting in the nullity of such clauses, also in line with German and Austrian case law (Westermann 1998: 553). As for the second and third sets of restrictions, he lists examples of a ban on renting to same-sex couples, certain ethnic group members and other discriminatory provisions that conflict with general ethical principles (Juhart in Juhart, Tratnik, Vrenčur 2016: 684). Such provisions are void and have no legal effect (Juhart in Juhart, Tratnik, Vrenčur 2016: 684).

On the other hand, Juhart enumerates various limitations on the use of apartments as permissible restrictions, for instance a prohibition on carrying out an economic activity in an apartment, even if it was

not burdensome, or a provision that only elderly may reside in an apartment (Juhart in Juhart, Tratnik, Vrenčur 2016: 685). German theory also mentions a permissible prohibition relating to keeping animals in apartments (Westermann 1998: 553). As an example of a valid contractual restriction (or a restriction determined by a unilateral act of the original owner of a multi-apartment building), Croatian theory offers a stipulation that individual units cannot be rented out to perform certain economic activities as this could interfere with other owners' interests (Belaj in Gavella 2007: 767).

Rijavec deals with the issues of restricting short-term apartment rentals most directly. For her, owners may agree in a contract on mutual relations (within the framework of the agreement on the use of individual parts) to prohibit uses for certain purposes (e.g. that it is not allowed to change the intended use of a unit from a dwelling into a commercial space) and to determine the permissible use for certain purposes (for example, performing a quiet craft, no more than twice a week or not on weekends) (Rijavec in Juhart, Tratnik, Vrenčur 2004: 559). In her opinion, a complete ban on renting is null and void, yet the apartment owners can stipulate in such a contract that apartments cannot be used as hotel or a similar holiday accommodation (Rijavec in Juhart, Tratnik, Vrenčur 2004 :559).

## 4. Special short-term tourist housing rental arrangements in some EU member states

Legal issues regarding the definition of the permissible extent of short-term tourist rentals are topical throughout Europe. Particularly in cities with mass tourism, there is a tendency to limit the number of days in a year for which an apartment may be rented out under short-term rental contracts, as this form of providing tourist accommodation can constitute unfair competition to the traditional hospitality industry, while also adversely affecting the availability of rental housing for local residents. Specific rules on the provision of short-term tourist accommodation rentals (often described as an 'Airbnb regulation') are typically set at the local or regional level of government.

The Municipality of Amsterdam, for example, introduced a rule that a private home can be rented out for a short term for a maximum of 60 days per calendar year, with a maximum of four guests at the same time in a rental unit. This limitation does not apply if a single room or less than 40 per cent of the living area of an apartment is rented out.[27] Starting in 2019, the time cap on short-term tourist rentals will be reduced to 30 days a year. A condition for the legality of a short-term tourist rental is that the apartment owner pre-registers with the city authorities as a tourist landlord and arranges for the payment of tourist tax for each guest (Paganini 2018). At the beginning of 2017, the Municipality of Amsterdam entered into an agreement with Airbnb under which the platform will help enforce the existing regulation by automatically capping the possibility of renting out a lodging to a maximum of 60 nights per calendar year.[28]

In 2011, the province of Catalonia in Spain introduced a special permit that each owner of a dwelling offered for paid short-term tourist rental must obtain from the municipality (vivienda de uso turístico). The status of a private tourist dwelling can only be acquired by a secondary apartment in which no one permanently resides and is rented out in its entirety (not as single rooms) at least twice a year (Santolli 2017: 692). Tourist rental encompasses any rental of a dwelling that lasts less than 31 days or is considered an economic activity due to the provision of additional guest services, such as daily room cleaning, changing of linen and towels etc. A municipal permit is not required for the long-term rental of housing, which must last 31 days or more. Yet, to obtain the permit for short-term tourist rental the apartment must hold a certificate of habitability and may not accommodate more people than allowed by the certificate. The interior of the apartment must be furnished and in a perfect state of hygiene, and must contain all the utensils required for living in it. Either the owner directly, or the agency managing the flat, must provide the tenants or neighbours with their phone number so they can immediately deal with and resolve any queries or incidents relating to their flats. They must also ensure there is a care or maintenance service for

[27] *https://community.withairbnb.com/t5/Hosting/Some-news-on-how-Airbnb-will-now-have-to-enforce-existing/m-p/272415* (9.9.2018).
[28] *www.airbnb.com/help/article/1624/i-rent-out-my-home-in-amsterdam--what-short-term-rental-laws-apply* (9.9.2018).

any incident.[29] In 2014, the city of Barcelona stopped issuing new permits for short-term tourist rentals within the historic city centre, meaning the number of apartments available for short-term rental via digital platforms is now limited (Oltermann and Burgen 2018). It is estimated, however, that at least 7,000 illegal short-term tourist rentals are available in the city (Santolli 2017: 695), showing the effectiveness of the limitation is dubious.

The city of Berlin temporarily banned short-term rentals of entire dwellings in 2016 in order to maintain the availability of rental housing for the local population. In 2018, short-term rentals were again allowed provided the owner of an apartment acquires a special permit for which a fee of EUR 250 is paid. A primary apartment in which the owner resides can, in certain conditions, be rented out without a time limit, while a secondary apartment in which the owner does not reside can be rented out for short-term rental for a maximum of 90 days in a calendar year. The city authorities require digital platforms to display in their listings the licence number on the basis of which a particular property is rented out for a short period (Oltermann and Burgen 2018).

Since 2017, the city of Paris also requires the mandatory registration of dwellings in short-term rental via digital platforms and that registration number of the dwelling be displayed in online listings. This should allow authorities to monitor implementation of the rule according to which homeowners can rent out their primary apartments located in the city's central districts under the short-term tourist rental regime for a maximum of 120 days per calendar year.

In Denmark, however, legislation is being prepared that should establish the conditions for the short-term tourist rental of dwellings depending on the relevant digital platform's willingness to cooperate with the Danish authorities in enforcing the national housing and tax legislation. Thus, the limit on non-taxable earnings from renting out a permanent residence in

[29] http://meet.barcelona.cat/habitatgesturistics/en (9. 9. 2018).

which the homeowners live themselves will amount to 28,000 Danish crowns (40,000 crowns for holiday homes) on the condition the property is rented out via a digital platform that provides information about the rentals to the tax authorities. If the transaction is concluded through a platform that does not cooperate with the authorities, the limit of taxable income will be set at 11,000 Danish crowns. The amount of days for renting out one's home for a short period will be capped at 70 per year, with local communities able to increase this threshold to 100 nights a year. For landlords on other platforms, a 30-night cap per year should apply (The Local 2018).

## 5. Restriction of short-term apartment rentals by decisions of local authorities

The Housing Act of Slovenia also provides the local community with certain competences in the area of housing. Article 155 stipulates that the local municipality may, by decree, inter alia, prescribe general rules for the use of apartments and residential buildings. It is not entirely clear whether such decrees can also include restrictions on the short-term rental of apartments, similar to the cases of Amsterdam, Berlin, Barcelona or Paris. We were unable to find any case law interpreting the relevant provisions in this regard in publicly accessible databases. Cities abroad that have adopted such restrictive provisions have defended their decisions by referring to the preservation of the capacities, quality, character and charm of existing accommodation boroughs[30] and pointing to taxation and/or public security reasons (Jefferson-Jones 2015: 572-574).

If one were to conclude that the local municipality's decisions regarding the possibility of carrying out an economic activity in apartments are covered

[30] In Santa Monica, the following explanation has been given: *»Santa Monica's primary housing goals include preserving its housing stock and preserving the quality and character of its existing single and multi-family residential neighbourhoods. The City must preserve its available housing stock and the character and charm which result, in part, from cultural, ethnic, and economic diversity of its resident population; the City affords a diverse array of visitor-serving short term rentals, […], not all of which are currently authorized by local law; operations of vacation rentals, where residents rent-out entire units to visitors and are not present during the visitors' stays are detrimental to the community's welfare; the presence of such visitors within the City's residential neighbourhoods can sometimes disrupt the residential character of the neighbourhoods; with the recent advent of the so called sharing economy, there is a long standing practice of »home-sharing«, whereby residents host visitors in their homes, for compensation, while the resident host remains present throughout the visitors' stay; home-sharing does not create the same adverse impacts as unsupervised vacation rentals because, among other things, the resident hosts are present to regulate their guests' behaviour […]«* (DiMatteo 2016:101–102).

by Article 155 of the Housing Act, an interesting question arises as to the compatibility of restrictions on apartment rentals with the Constitution of the Republic of Slovenia since they may constitute an interference with the right to ownership.[31] Can a municipality decree limit the right to ownership in such a manner (Jefferson-Jones 2015: 557-575)? If yes, should vanilla-type renting be regulated differently than short-term leases? Juhart underscores that the interventions described in the said article (i.e. use of apartments and residential buildings, obligations and conditions for renovation, improvements and the appearance of apartments and residential buildings) undoubtedly constitute an encroachment on the right to ownership because they determine the conditions for the use and enjoyment of the property. He further notes that such interventions are only permissible on the basis of Article 67 of the Constitution of the Republic of Slovenia, i.e. if they are contained in a parliamentary act and guarantee the economic, ecological and social function of property. He believes that since Article 155 of the Housing Act allows the restriction of property rights by a municipal decree which is lower than a parliamentary act in the hierarchy of legal sources, the municipality's powers must be interpreted restrictively. They may set out only those restrictions of use that are in line with a purpose explicitly defined by a provision of a parliamentary act. Juhart nonetheless acknowledges that the scope and wording of the said provision of the Housing Act are relatively broad (Juhart 2003: 69). It is precisely this breadth and looseness of the wording of Article 155 that cast doubt on its alignment with the Constitution of the Republic of Slovenia (and also with Article 37 of the Property Law Code which explicitly stipulates that restrictions on the use, enjoyment and disposal of property rights can only be determined by law (cf. Janevski 2004: 29-30; Berden in Juhart, Tratnik, Vrenčur 2004: 213-221; Berden 2013: 71-105)). Namely, it transfers the jurisdiction for content reserved for parliamentary legislative acts into the hands of municipal government.

It should, however, be noted that, according to the legislature (as explained in the 2008 draft law amending the Housing Act of 2003), despite its broad wording,

[31] And other acts guaranteeing the right to ownership, as well as EU law on freedom to provide services.

Article 155 of the Housing Act is not even relevant to the carrying out of activities in an apartment. This conclusion is based on analysis of the legislative history of the relevant articles of the Housing Act. Namely, the original wording of Article 14(5) of the Housing Act of 2003 included a rule that a municipality can prescribe the activities that can be carried out in part of an apartment by a decree. Accordingly, Article 154(1) of the Housing Act included determination of the permitted activities as one of the competences and tasks of a municipality in the field of residential housing. This indent was deleted in 2008 alongside the deletion of the contents of the original Article 14(5) of the Housing Act. Yet, it is not entirely clear from this amendment of the statutory provisions whether they are to be interpreted as the legislator's intention to exclude from the scope of municipal regulation the determination of the permitted activity in residential apartments and show that regulation of this issue does not fall within the scope of Article 155. Namely, it could also be argued that regulation of this question is covered by Article 155 and does not require any special provisions (cf. Starič Strajnar 2003: 66; Šinkovec and Tratar 2003: 263). A clear answer to these questions may, however, be found in the 2008 draft law amending the Housing Act of 2003, which elucidates that the proposed amendment follows the principle of eliminating administrative barriers as it aims to abolish the consent of the state or municipal authority (instead, the minimum 50% consensus of co-owners was substituted by a minimum 75% one). The draft also took a position on the hospitality services of landlords: as such services change the use of an apartment, they acquire the consent of all apartment owners in the multi-unit building. Regarding the amendment to Article 154 of the Housing Act, namely the deletion of the indent which included as one of the municipality's competences the determination of the activity that can be performed in the part of the apartment, the draft explained that municipalities have ceased issuing permits following the elimination of administrative obstacles, leaving it up to apartment owners to decide whether and which activities can be exercised in part of the apartment.

## 6. Conclusion

The concept of short-term tourist rentals of residential premises is not a complete innovation in the legal sense. Digital platforms have, however,

significantly facilitated the establishment of contact between potential hosts and guests, thus enabling homeowners to regularly rent their dwellings out to tourists as a source of additional income. As this has coincided with rapid growth in global tourism, especially in the cities, the phenomenon has become so widespread that the existing legal framework does not address it suitably. The Slovenian legislation does not provide clear answers regarding the conditions for the short-term rental of apartments; in particular, there is no clear boundary between 'regular' housing rental and short-term tourist rental that is performed by way of the homeowner's independent economic activity.

Similar uncertainties are also seen in other European countries, especially in cities attracting mass tourism. Given that housing rentals through digital platforms have become an important part of tourist accommodation, it would not – despite certain negative effects they bring – be practical to prohibit them altogether, particularly because it would be hard to effectively enforce any ban in practice. It is more appropriate to lay down special rules for the short-term tourist rental of lodgings that on one hand should provide homeowners with a straightforward way of complying with the formal requirements for such rentals and, on the other, guarantee other residents of the multi-unit building the peaceful enjoyment of their apartments. To this end, the legislator must decide on the following questions:

- where to place the dividing line between the regular and short-term rental of apartments, or between the ordinary use of apartments and the pursuit of (economic) activities in them;
- whether to prescribe the minimum or maximum duration of each rental, or to cap the total number of days of short-term rental of a dwelling in a calendar year;
- whether to give local communities the competence to impose such restrictions on short-term tourist rentals; and
- what majority of co-ownership shares in a multi-apartment building is required to approve the letting out of an apartment under a short-term rental.

When drafting such rules, it should of course be considered that they may encroach on a constitutionally protected property right. It is therefore necessary to strike a balance between the property owner's interests on one hand, and the interests of other residents in the building as well as the public interest on the other.

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10.

Ana Jereb*, Primož Rojac**

# The Future of Law: Why Legal Delivery is Fit for the Sharing Economy

We are living in the age of the sharing economy. Its mind-set of 'why own or rent if you can share and have it when you need it' is permeating various aspects of the delivery of goods and services. Companies like Booking.com, Uber, Airbnb and others have transformed the way we commute, go on holidays etc. Their common underlying model may be described as harnessing technology and social media to provide information that optimises resources through the redistribution, sharing and re-use of excess capacity regarding goods and services. New companies are emerging every day, promoting a "like Uber, except for ..." business model for different industries. This chapter aims to investigate whether the delivery of legal services is a candidate for the sharing-economy model. In fact, we argue that legal services could exploit the positive effects of being delivered through the sharing model (matching the need to supply by making services more convenient and affordable), while the negative aspects of the model might not ultimately emerge due to the specific checks and balances built into the legal sector.

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## 1. Characteristics of the legal profession that make it a perfect candidate for the sharing-economy model

Central to the sharing-economy approach is the notion that providers have available resources that can be put to productive use if only they can find a willing consumer of these goods and services. In the area of legal services, a lawyer makes him- or herself available to an array of clients and serves them within his or her capacity. As such, traditional legal services today already reveal some features of the sharing economy. But there is still room for improvement that might significantly alter the access to and delivery of legal services.

The sharing-economy approach looks at the provision of services from two angles. First, what are clients' potential legal needs? Second, what is the best way to deliver services to meet those needs in a timely and efficient manner? Key features that might appear in a sharing-economy approach to the delivery of legal services and would promote its efficiency and access include the following: (a) an independent workforce that does not fit within the traditional employer–employee relationship; (b) a matchmaking function – directly connecting a consumer with a willing provider by virtue of technology-enabled platforms; (c) an optimised process for identifying clients' legal needs so as to find their perfect match among legal service providers; (d) lawyers becoming specialised to meet clients' specific needs to ensure the most efficient and streamlined delivery of services possible; and (e) the need to balance innovation with regulatory oversight and the desire to instil consumer trust.

The presumption of the sharing-economy approach is that a Just in Time/Just Enough response to the demand for legal assistance would provide exactly the right level of services, at the appropriate time, to the appropriate client. The proposed features are considered more closely below.

### a) A Network of Independent Lawyers

The delivery of legal services has a substantial problem with distribution. While (too) many graduate lawyers find themselves unemployed or underemployed, there are ever more people around the world who face legal problems and have no qualified legal help. What a sharing-economy approach could do for the industry is to match demand with supply by making services more convenient and affordable. A sharing approach connects different independent lawyers, specialists in various legal areas, within a network (usually a platform) through which they can offer their services (as many types as they want) to prospective clients. For a client, the network would operate like a big law firm, able to deal with all sorts of legal or business problems. For lawyers, this way of delivering their services would give them independence and allow them to set their own pace of work (since younger workers increasingly seek a work–life balance as an important aspect of work, such sharing companies are more appealing to them than traditional law firms). It also gives them the opportunity to specialise their practice through the process of client selection (as explained in greater detail below).

### b) New Technologies

What is new about the sharing economy is its creative use of Internet and mobile technologies to directly connect consumers with providers, at the click of a mouse or tap on a smartphone. Such technology-enabled services take the responsibility of marketing and matchmaking away from individual providers, meaning they can devote their efforts and energies to supplying the service on offer. As a result, they can spend less time building their brand and finding customers and more productively use their time and assets.
What is more, technology can further improve the customer experience during the performance of the legal service. It facilitates the use of different communication channels, video conferences, process tracking, document sharing or document formation tools – means that are (with the exception of a few bigger law firms) rarely employed by law firms today.

### c) A Triage

To optimise the legal services delivered via the sharing-economy model, the process of identifying a client's legal needs deserves special attention. This process distinguishes the different stages along on the continuum of legal services, such as: delivering information, making pre-prepared forms available, providing brief advice and assistance, making unbundled services available, and furnishing full and direct representation. By identifying a client's legal needs (depending on the complexity of their legal problem), the client would be directed to the appropriate stage to provide the services required. This feature relies on the assumption that not all legal problems call for the same level of services. There are areas in which written information, forms and quick legal advice are able to satisfy a large number of clients. By building on economies of scale, legal providers can cut the costs of such services considerably. For clients who need full representation, the sharing-economy approach would provide a network of trusted attorneys with appropriate, in-depth knowledge of a certain legal field. The premise of the sharing-economy approach is that it reduces information asymmetries and finds a better lawyer (or other legal service) for a client than they would be able to find themselves (which usually occurs through word-of-mouth referrals).

### d) A Specialisation

Another aspect of the sharing-economy approach is that lawyers and legal staff will be able to develop deep expertise in a particular area of law, enabling them to offer more streamlined services at a lower price because they can spend less time researching each client's predicament. By focusing on just a few areas of law, lawyers would be able to become highly proficient in these areas, meaning they could serve more clients since they would need to spend less time researching what for them are new areas of law.

### e) Trust

One feature common to the sharing economy is that providers (i.e. platforms) need to generate trust. Without doubt, this also holds for legal service providers. According to interviews we conducted with our clients, they all value trust over a lawyer's specialisation. A network for the sharing of legal services should therefore establish an entry check for all prospective legal service providers. A certain degree of monitoring of the services they offer would also be needed to ensure quality. As recognised by similar platforms, client feedback offers important quality guidance for future users. It would be beneficial to give feedback to providers according to specific metrics – responsiveness to client questions, thoroughness of advice, ability to anticipate problems etc. This sort of review is rarely accepted by lawyers in today's legal services market. However, in comparison to some other sharing-economy models, the legal services industry already contains particular safeguards to protect consumers from the risks that are present in the sharing economy generally. Such quality assurance measures are monitoring entry to the field (bar admission), policing abuses and disciplining bad actors (so long as the ultimate legal service providers are attorneys-at-law). These checks and balances make the legal industry a perfect candidate for a sharing-economy model and sets it apart from others where such approaches are testing the limits of the existing regulatory and administrative regimes.

## 2. The rise of alternative legal service providers

As shown above, the delivery of legal services could be structured to fit with the sharing-economy model. Companies already exist whose business model is somewhere along those lines. Some operate as a peer-to-peer marketplace, giving clients a mere opportunity to find an attorney who practises in the area of their legal question (i.e. Lexoo in the UK, Upcounsel, Priori Legal and others in the USA or Advocado in Germany), while others are offering new, alternative forms of legal service delivery. Axiom Law, for example, offers agile teams of lawyers and other specialists to serve as in-house lawyers for limited time periods. Another set of alternative legal

service providers specialises in tech solutions, developing programmes for intelligent document automation (like Neota Logic), document review or similar. The market of alternative legal service providers is evolving at such a pace that the term "alternative" might not correctly describe some of them anymore due to their mainstream role, with the term "law companies" perhaps being more appropriate. IURALL is the first law company in the CEE region. It has developed a tech-supported triage process for identifying clients' legal needs and offers a network of legal practitioners to transparently meet those needs.

## 3. A sharing legal system of the future

A technology-enabled, sharing-economy approach to the delivery of legal services can improve the provision of legal services for both consumers and the legal profession. First, it promises to reduce costs for the consumer, enhance the accessibility of legal services, and improve access to justice. By making legal services both less expensive and easier to access than offered by traditional law firms, consumers could utilise them earlier in the life cycle of a legal problem, catching them before they spiral out of control, meaning such problems would likely be less costly to address. Second, it holds the possibility of making client acquisition easier for lawyers, allowing them greater flexibility in their work schedules, and enabling them to focus on the actual legal work. Third, and most importantly, unlike other entrants to the sharing economy, the legal profession has pre-existing tools for monitoring entry to the field, policing abuses and disciplining bad actors, which should ensure a certain level of quality control and enhance trust among users.

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Business models consistent with the **sharing and collaborative economy** concept are based on the philosophy of access-based consumption where, instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them. A recent study shows the five main sectors of the collaborative economy (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music video streaming) hold the potential to lift their global revenues from around EUR 13 billion today to EUR 300 billion by 2025 (PwC: 2015). However, it is important to assure that this modern, technologically-driven way of doing business is appropriately regulated so as to control the associated hazards while enabling the industry to flourish. At the same time, regulation must leave enough flexibility to avoid the law restricting technological progress. As the industry and consumers become ever smarter, the regulatory solutions need to keep pace and strike the right balance between safety, liability and competition on one side and innovation and flexibility on the other.

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