4

The Regulatory Context and Legal Evolution: The Cases of Airbnb and Uber

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Introduction

The collaborative economy as a phenomenon emerged in 1995 and has been widespread across the globe and started to disrupt the traditional business market (Cohen and Munoz 2016). The confusion (Murillo et al. 2017) around the diversity of terms that have been employed in order to describe this emerged economic model was mostly a result of the peer-to-peer (P2P) (Wirtz et al. 2019) activity of these platforms. The model of acquiring, providing, or sharing access to goods and services

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instead of owning (Menor Campos et al. 2019) them that were facilitated by a community-based online platform has created ambiguity about its novelty (Ertz et al. 2016) and its nature (Murillo et al. 2017). Terms such as gig economy (Fisk 2017), platform economy (Cohen 2017), sharing economy (Schor 2016), peer-to-peer economy (Selloni 2017), and collaborative economy (Vaughan and Daverio 2016) have been used widely as an attempt to classify this economic model. The EU Commission has chosen to use the term 'collaborative economy' in its papers, as an umbrella definition, though the term itself can be deceptive since it is evoking the values of altruism and solidarity (Frenken and Schor 2019), while these platforms and their extractive nature are a continuation of the market mechanism.

While there have been many attempts to define and classify this economic activity so as to determine the way of regulating it (Drahokoupil and Fabo 2016), there has been confusion in the effort to pin down this phenomenon. The distinction between the collaborative economy and the commons-based peer production (Bauwens and Pantazis 2018) is crucial in its historicity since it expresses the different economic models with which these two seemingly similar networked and decentralised models of transacting are operating, and why regulation is crucial for the second one.

The primary role of the online platform primarily is to connect providers and users and facilitate the transactions between them (Wirtz et al. 2019). Besides the role of connecting, the platform is also providing the service by itself. In such a scenario, the platform should be deemed a business entity and, specifically, a trader (Busch 2016). According to the European Commission (2016), a case-by-case analysis ought to be performed in order to set the legal nature of the platform's activities. It is now well established from a variety of studies that the collaborative economy employs a diversity of online platforms that can be classified into typologies in accordance with the type of services provided, the labour engaged (Benjaafar et al. 2021) and the idle resources that are utilised. For example, Uber involves local services (Guda and Subramanian 2019) and physical skills (Tomassetti 2016), whereas Airbnb offers global services using local property (Coyle 2016), whilst Mechanical Turk (Drahokoupil and Fabo 2016) offers global services and uses

online global labour force. These platforms have moved away from the initial model of the 'on-demand economy' (Frenken and Schor 2019) that matches demand and supply amongst peers and have evolved into a disruptive business model which aimed purely at profit-seeking (Inglese 2019). That said, the diversity of the platforms in the collaborative economy is at the same time implying a variety of impacts in the labour sector (Berins Collier et al. 2017), re-organising the employment relationships (Degryse 2016), the local labour market and the conditions of self-employment (Echikson 2020).

This chapter will give an overview of the regulatory concept of the collaborative economy in the European Union's law. Regulation of the collaborative economy is developing in the light of the Court of Justice of the European Union case law in the field of transport and accommodation. This raised the need for the analysis of the judgement in the cases of Airbnb and Uber. As a basis for the different approach in these two judgements services and information society services analysis is presented.

Regulatory Development in the European Union's Law

In the midst of these technological innovations and less than a decade after the invention of the Internet, in 1999, the EU attempted to regulate the transnational economic exchanges that were based on the Internet. This regulation effort was twofold. Addressing the collaborative economy from the one hand as an online platform forced the EU to apply the Directive 2000/31/EC on certain legal aspects of information society services, in particular, electronic commerce in the Internal Market (E-Commerce Directive), setting clear limits on liability for digital platforms and in particular electronic commerce in the Internal Market. Platforms were not to be held responsible for illegal material uploaded to their sites; only for taking it down when informed (Echikson 2020). Particularly, Articles 12–15 of the E-Commerce Directive restrict the liability of providers in respect of the assumed functions. Article 15 of the E-Commerce Directive states that providers do not have any obligation

'to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity (Spindler 2017, p. 290). The second Directive that the EU selected as the most applicable for the regulation of the online platforms is the Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and rules on information society services (Information Society Services Directive). This Directive defined information society services as services provided upon a user's request, supplied through an information society service, at a distance and for remuneration.

When it comes to what kind of regulation (if any) is essential for these platforms, the most answered that the best solution for the legal problems would be a combination of regulatory and self-regulatory measures (Cohen and Sundararajan 2015), a key issue in all replies relates to platforms' responsibility and liability (Eurobarometer 2018). To address these issues, the EU Commission had in 2016 promulgated its Communication: 'A European Agenda for the Collaborative Economy' where it has advised, i.e., to monitor the regulatory and economic environment of the P2P economy, that would enable following pricing trends as well as to identify obstacles, especially arising from various national regulations. The Commission pointed out the following main tools: Periodic surveys of consumers and businesses on the use of the collaborative economy; Ongoing mapping of regulatory developments in the Member States; Stakeholder dialogue in the framework of the Single Market Forum, with twice-yearly forums to assess sector development on the ground and to identify good practices; and the results of the monitoring of the collaborative economy will be summarised in the Single Market Scoreboard.

The rapid growth of the collaborative economy tourism accommodation sector within less than a decade has bought with its diverse impacts prompting a range of responses from governments across Europe. Cultural attitudes, traditional institutional approaches to regulation, the nature and extent of impacts, and the level of public debate in each city have undoubtedly influenced government responses. The diversity of responses across Europe are challenging the consolidation of the Single Market and has prompted the European Commission to propose

the development of guidance with the aim of fostering competitiveness, maximising the positive effects of growth and jobs, and securing opportunities for innovation in sharing (EU Parliament Report 2015).

Given that in 2015 the EU Commission admitted that 'the rise of the sharing economy also offers opportunities for increased efficiency, growth and jobs, through improved consumer choice, but also potentially raises new regulatory questions' (COM (2015) 550 final, par. 3.3.1.) it was no surprise that the intention was to boost the single market and modernise the legislation through the European Commission Digital Market Strategy. Despite this concrete intention, the European Union (EU) has not provided an ad hoc EU legal framework for the collaborative economy. What has been issued so far, after consultations with various groups and individual stakeholders (Cauffman and Smits 2016), was the policy guidance in the form of a Communication by the European Commission dated June 2016. The document, which was not legally binding, expressed a favourable position towards the new platform-based business models in the hope they may fix some market failures.

The policy agenda sketched by the EU Commission aims to persuade Member States to apply existing EU law to the collaborative economy in a uniform and balanced way. The sought balance is between, on the one side, the protection of consumers and, on the other, an inclusive and prosperous single market. In particular, the Commission emphasised the free access to the market granted to providers of information society services under EU law (E-commerce directive, Article 4) and suggested loosening the grip of the market access requirements also for collaborative economy players for a more inclusive and dynamic digital economy. The aspiration towards market inclusivity and dynamism, which reflected in the Communication, is to be read for the benefit of both online platforms and private users, as the latter—the Communication suggests—should not fall under the category of 'professional service providers'. At the same time, the Commission appeared to be fully aware of the risks and the needed precaution, which come together with the collaborative economy evolutions in the market to guarantee the safety of the public. In this vein, the Communication included reflections on the liability regime to be applied to the collaborative economy platforms

(European Commission 2016a, p. 8) and on the protection of consumers (European Commission 2016a, p. 9), often highlighting the complexity of the legal questions involved and suggesting a case-by-case responsive approach.

As a result, the 'Agenda on Collaborative Economy' of 2016 has one great limit, which is represented by the effort of providing guidance to regulate the collaborative economy phenomenon by applying provisions already existing within the EU legal framework (Cauffman 2016). This means that in addition to its non-binding nature, the Communication left many legal issues unanswered and, thus, broad room for the Member States to develop specific normative responses to the collaborative economy. At the same time, the collaborative economy often raises issues with regard to the application of existing legal frameworks, blurring established lines between consumer and provider, employee and self-employed, or the professional and non-professional provision of services.

Since the beginning of the development of the regulation at the EU level and enacting of the EC Agenda for the collaborative economy, there were no other regulatory activities (Rousseau 2017) in the area of the collaborative economy at the EU level. This is why the impact of the Court of Justice of the European Union (CJEU) is, at the moment, the only legal source (Hacker 2018) for future analysis. The CJEU acted in two sectors: transportation (Colangelo and Maggiolino 2018) and accommodation (Van Cleynenbreugel 2020) since these sectors were highly disrupted (Menegus 2019) by the collaborative economy platforms, and reaction from the EU level was needed.

Case C-434/15 Uber

Uber's Business Model

Uber started as a technology platform (Thelen 2018). Their application is made for smartphones, and it works as an intermediary between partner drivers and users. After the registration, the user is able to order a taxi on a location-service basis, and the nearest partner-driver should

accept a ride and come to the exact location. The user application also displays information on partner-driver, including the name, car brand and the number of the registration table (Hacker 2018).

Uber has implemented strict rules when it comes to their rights and responsibilities towards partner drivers based on the contractual agreement that regulates terms of use, collection and use of personal data. Uber services are only available for personal, non-commercial use. It is explicitly stated in the contract agreement that Uber Technologies Inc. does not provide transport or logistic services and does not serve as any transport provider and that all services of transport or logistics are provided by an independent Third party who is not employed in Uber or its subsidiaries (Uber 2021).

Taxi-Service Providers vs Uber

Despite its huge popularity among users, other taxi service providers (Berger et al. 2018) were not that welcoming toward the new market competitor. Functioning of the Uber caused legal dispute (Seidl 2020) started by the traditional taxi companies which publicly protested against Uber (e.g., Paris, Torino, Milan, Genova, Napoli, London, Hong Kong, Johannesburg (Sao Paolo, Rio de Janeiro, and Zagreb) (Pollio 2019). The main problem was that Uber is considered to be unfair competition, as in many countries, service was provided by an individual carrier, an Uber partner, who was not required to possess any licenses nor permission that is legally required from traditional taxi service providers (Berger et al. 2018). When providers are not required to possess any licences, it decreases their barriers to entry into the market and enables them to set lower prices for customers. They became a serious competition to traditional taxi-service providers who are not able to set low prices due to all conditions they have to satisfy in order to enter the market. This is the reason why most of the EU Member States' national regulatory (bodies prohibited Uber from cooperating with individual taxi drivers who do not have licences (Rauch and Schleicher 2015; Thelen 2018).

Regarding all issues that competitors in this market segment have with Uber and the way in which it operates, it is not strange that Uber faced

several lawsuits (Ferro 2019) in various countries, which finally ended at the CJEU (Case C-526/15 Uber Belgium, C-434/15 Association Professional Elite Taxi).

In 2014 the Asociacion Profesional Elite Taxi, which is a professional organisation that represents taxi drivers in the city of Barcelona, Spain, brought an action before the national court of the first instance, asking the court to impose penalties on the Spanish company Uber Systems Spain SL. This is the company that belongs to a group managing the Uber platform. Penalties were aimed against the unfair competition toward Elite Taxi's drivers. Elite Taxi maintained that Uber Spain is not entitled to provide UberPop, a non-professional service in the city of Barcelona. Neither Uber Spain nor the owners or drivers of the vehicles concerned have the licence and authorisations required under the city of Barcelona's regulations on taxi services (Case C-434/15 Asociacion Profesional Elite Taxi).

Uber: A Transportation Service or an Internet Service Provider?

In Uber judgement, the CJEU showed a great impact on determining the nature and definition of service that is provided by Uber and the way in which this kind of services should be regulated in the future (Rauch and Schleicher 2015). Decisions made by the CJEU have great importance when it comes to the way in which legal arrangements are made as well as the providing auto taxi services in the EU Member States.

In order to decide whether Uber is solely a technology platform or a transport company, it is needed to represent two different relationships. The most important question that should be answered in order to bring a valuable and legally correct decision is whether Uber provides an 'information society service' in the sense of the Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and rules on Information Society services, which falls under the principle of the freedom to provide services or if it is a transport service that is regulated by the national law according to the Directive 2016/123EC on services in the internal market. The

dilemma was posed in the sense that on the one hand, if the CJEU decides that Uber is an Information Society service provider, Barcelona's license and authorisation requirements may contradict the principle to provide services, while on the other hand, if CJEU decides that Uber is a transport service provider, each Member State would be free in regulating Uber's activity.

According to the definition that is set out in Article 1(2) of Directive 98/34 to which an Article 2(a) of 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 (Directive on electronic commerce), is that the 'service' is any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of the recipient of services. Or, in another case, as a transport service or service in the field of transport for the purposes of Article 58(1) the Treaty on Functioning of the European Union (further: TFEU) and Article 2(2)(d) of Directive 2006/123/EC, 'this Directive shall not apply to the following activities: '(…) (d) services in the field of transport. Including port services, falling within the scope of Title V of the Treaty'.

As Uber makes it possible to locate a driver via a smartphone application and serves as an intermediary between a driver who supplies urban service and a consumer who demands it, it can be seen as a composite service (Thelen 2018). Composite service is a service whereas one part of it is provided by electronic means, and the other one, by definition, is not. General Advocate examined Uber's activity in the light of the considerations related to the composite service to be able to bring the clear proposition in front of the CJEU (Case C-434/15 Asociacion Profesional Elite Taxi).

Furthermore, according to the Advocate General, Uber should not be referred to as an Information Society service as it does not operate independently from the transport service and transport services are not provided via electronic means. If Uber is to fall within Article 2(a) of Directive 2000/31, it would mean that it serves as an intermediary that connects supply and demand via the mobile application, while all Terms

and Conditions of performing transport service are set by the exact service provider. But, as is stated before, Uber exercise high control.

The main question is whether the collaborative economy is part of the information society services and, if so, whether such activities are protected under EU law to provide services freely or under the national law of a specific sector of the Member State in which they operate. For the decision on this issue, it is necessary to analyse the activity of the platform and the connection of the electronic and non-electronic elements of their business. In the case of composite services, services involving electronic and non-electronic elements, it can be considered that the service is entirely provided by electronic means when the supply which is not provided by electronic means is economically independent of the service provided by such means. This is particularly the case when the intermediary service provider facilitates commercial relations between users and independent service providers. An example of this case may be the platforms for airline tickets or hotel reservations. In those cases, the intermediary service has real value-added for the consumer and trader but remains economically independent as the trader independently pursues out his business activity (Szpunar 2017).

Case C-390/18 Airbnb Ireland

When the case Airbnb was brought in front of the CJEU, the general public thought that the reasoning would follow the reasoning from the Uber cases. The Opinion was given by the same Advocate General (AG) Szpunar. It was a surprise when he, in his Opinion of Airbnb Ireland, concluded that Airbnb provides an information technology service in accordance with Article 2(a) of the E-Commerce Directive, read in conjunction with Article 1(b) of Information Society Services Directive. Para 41 of the Opinion to illustrate his point, AG Szpunar highlights that, 'AIRBNB Ireland does not physically meet the recipients of its services: neither the hosts nor the guests. As is apparent from the preliminary observations concerning AIRBNB Ireland's activities, hosts are not required to approach AIRBNB Ireland in person in order to publish their accommodation on the platform. Furthermore, a user of the platform

managed by AIRBNB Ireland may rent accommodation at a distance without having to be physically in contact with that service provider. However, it is clear that the connection of users of the platform managed by AIRBNB Ireland results in the use of an accommodation, which may be regarded as a non-electronic component of the service provided by that company'. In its Opinion para. 53 AG Szpunar quotes the conclusion from the judgements in Asociación Profesional Elite Taxi and Uber France where the CJEU established two criteria to be applied in order to determine whether a service provided by electronic means that, taken separately, *prima facie* meets the definition of an 'information society service' is separable from other services having material content (Busch 2018), namely the criteria relating to the fact that the service provider offers services having a material content and to the fact that the service provider exercises decisive influence on the conditions under which such services are provided (Dredge et al. 2016). The grounds for the analysis of the AIRBNB Ireland case lies in satisfying these two criteria.

Regarding the first criteria, AG Szpunar concludes that AIRBNB does not create an offer in the meaning of the Elite Taxi and Uber France case. He explains that the accommodation services are not inseparably linked to the service provided by AIRBNB Ireland by electronic means, in the sense that they can be provided independently of that service. Those services retain their economic interest and remain independent of AIRBNB Ireland's electronic service. Regarding the second criteria of the relationship between the creation of an offer of services and the exercise of control over those services, AG Szpunar para. 65 of his Opinion concludes that service provider not only has to create a new supply of services that are not provided by electronic means but that the creation of those services must be followed by the maintenance, under the control of that provider, of the conditions under which they are provided. AG Szpunar analyses the determination of whether AIRBNB Ireland exercises control over the conditions governing the provision of short-term accommodation services. As the result of his analysis para 87, he concludes that 'consider that the services having a material content, which is not inseparably linked to the service provided by electronic means, are not capable of affecting the nature of that service. The service

provided by electronic means does not lose its economic interest and remains independent of the services having a material content'.

Motivating his interpretation, he explained that the service provided by Airbnb has to be interpreted as an 'information society service' as explained para 89 of his Opinion 'that a service consisting in connecting, via an electronic platform, potential guests with hosts offering short-term accommodation, in a situation where the provider of that service does not exercise control over the essential procedures of the provision of those services, constitutes an information society service within the meaning of those provisions'.

According to the European Union's legislation, platforms are exempted from liability (European Parliament Research Service 2021) for the information they are storing under certain circumstances. The applicability of this exemption will depend on legal and factual circumstances, and according to Article 14 of the EU E-Commerce Directive, platforms will be exempt from liability when providing hosting services. Hosting services are services whose activities are passive, technical and automatic, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored. The Commission, at the same time, encourages responsible behaviour and voluntary action by all types of online platforms, for example, to help tackle the important issue of fake or misleading reviews. Such voluntary measures are taken to strengthen trust and to offer a more competitive service (European Commission 2016).

In order to analyse whether the established relationship falls within the scope of EU consumer protection law, another relevant aspect is the distinction between freedom of establishment and free provision of services. Generally speaking, the establishment of a business is considered as something permanent, while the provision of a service is rather deemed a temporary activity. Both are provided by professionals who pursue an economic purpose. While analysing the collaborative economy phenomenon, these criteria may help to distinguish the professional trader, as a provider of the collaborative economy service, from the non-trader. This seems to reflect the European Commission's approach from its 'Agenda on Collaborative Economy' supporting analysis, inasmuch it differentiates the long-term profit-seeking business activity from the

occasional service, which could also be without remuneration. Highlighting the enduring legal uncertainty surrounding such definition is the case of Airbnb, an online platform that does not provide a service by itself but is, however, deemed a professional trader (Codagnone et al. 2018).

Summary

Despite all the advantages and facilitation the collaborative economy has created, and despite being openly embraced by society, the rise of platforms such as Uber and Airbnb (Coyle 2016), allowing non-professionals to offer their services, has given rise to some legal and social issues. In many European cities, taxi drivers have engaged in various protests against Uber, arguing its legality. The reason for that is obvious internet companies that only exist online are subject to one set of regulations, while transportation companies such as taxis are subject to other, much more demanding laws. Hence, the governments may not remain indifferent on all the issues collaborative consumption has developed. In Europe, since the very beginning of the sharing apps' functioning, the policies for Uber and Airbnb have been vigorously discussed and been subject to various rulings of the CJEU, as well as member states courts (Grotkowska 2020).

In the case of Uber, the CJEU clearly distinguished digital platforms and transportation service providers, This reaffirmed the solid basis for the application of national rules instead of voicing the need for developments of EU law addressing the CE phenomenon. In case of a reversed judgement, in fact, thus meaning if Uber had been deemed a digital platform and not a transportation service provider, the Service Directive, as well as the E-commerce Directive, would have found application.

Returning to the question posed at the beginning of this chapter, of whether the top-down EU regulatory approach towards the collaborative economy, along with the CJEU diverse judgements in the case of Airbnb and Uber, consists of the best applicable regulation for this disruptive economic phenomenon. As it was analysed above, the first EU response to the expansive phenomenon of the collaborative economy

was an effort to create an inclusive definition that would cover the diversity of the online platforms. For the legal problems that a wide range of online platforms, from Uber to Airbnb and Amazon Turk, that fall under the umbrella term collaborative economy, the EU initially applied the E-Commerce Directive 2000/31/EC and the information Services Directive (EU) 2015/1535. In 2016 the European Commission published a Communication on the collaborative economy, policy guidance that is not legally binding and is leaning towards the revival of the European Single market through these new business platforms. An implication of the EU response was that it did not classify the platforms as professional service providers, nor did it clarify the issues around the liability regime, the consumer rights, and the employment condition specifics.

The second regulatory evolution that defined the European landscape of collaborative economy was CJEU judgements on the cases of Uber and Airbnb. In the case of Uber, the CJEU asserted the platform is providing transportation service and is not an intermediate providing an information society service. Airbnb, on the other hand, was classified as an information technology service in accordance with Article 2(a) of the E-Commerce Directive. These contradictory CJEU judgements based on the two EU Directives the E-Commerce and the Information Services, respectively, illustrated the necessity for applying the national legislation instead of the EU directives that attempt to foster the Digital Single Market, as a core part of the EU's Agenda for the digital economy, helping European companies to grow globally.

Several questions and legal implications still remain to be answered. Nevertheless, the common denominator of the disruptive effect that collaborative economy has brought is the transformation of the work and the very definition of employment. The structure of employment that been re-organised and the labour is brought into a blurry state of self-employment, while it has created unfair completion to licensed professions, is one of the main, yet the only one, issues that require further regulation. The national employment law and the casualisation of work are at stake, particularly in the post-covid era. If these platforms have managed to bypass the International Labour Organisation conventions, then it is crucial for the EU to re-open a pan-European,

consultation that will engage the national legislators, the trade unions, and the workers' collectives in order to respond to this crisis.

Lastly, the two very recent legislative initiatives of the European Commission to upgrade the rules governing digital services in the EU, the Digital Services Act (DSA) and the Digital Markets Act (DMA), create a consultation space for the consumers' protection as users of the digital service implications, and the data protection in a collaborative economy that becomes more and more a data-driven one.

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