Editorial

Uber Spain and the "Identity Crisis" of Online Platforms

Business models like *Uber*, *Amazon* and *Airbnb* have struggled since their inception with a question that impacts on the equilibrium of the EU digital market: should they be qualified as mere intermediaries or rather as providers of goods and services?

Most platforms present themselves as mere passive facilitators rather than as sellers or suppliers.[1] This is, for instance, the case of *Uber*[2] and *Airbnb*,[3] which repeatedly point out in their terms and conditions that they act as mere intermediaries between the service provider and the recipient. Nevertheless, such platforms are often much more than mere facilitators between the supplier and the user of goods, digital content or services, as many of them determine the terms and conditions, the price, manage the payment service, often taking a percentage as a processing fee. Other platforms play an even more active role, such as platforms dealing with 3D printing. They allow designers to publish their works (i. e. their CAD files) on the platform, where interested recipients can order the physical item. The online platform will then process the order, 3D print the item and dispatch it directly to the recipient.[4]

Already in its Communication on a European agenda for the collaborative economy of June 2016,[5] the EU Commission underlined that whether an online platform also provides the underlying service has to be established on a case-by-case basis. In this regard, several factual and legal criteria play a role, indicating the level of control or influence that the collaborative platform exerts over the provider of such services. According to the Commission's reasoning, the key criteria to be considered are: (i) the circumstance that the collaborative platform sets the final price to be paid by the user; (ii) the fact that the platform sets other key contractual terms; and (iii) the fact that the platform owns the key assets used to provide the underlying service.[6]

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1 C. Busch, H. Schulte-Nölke, A. Wiewiórowska-Domagalska and F. Zoll, The rise of the platform economy: A new challenge for EU consumer law?, EuCML 2016, 3 ff.

2 M.J. Sørensen, Private law perspectives on platform services: Uber – a business model in search of a new contractual legal frame?, EuCML 2016, 15 ff. Cf. the reports from 13 EU-Member States published in EuCML issues 1-2/2015, 3/2015 and 4/2015.

3 V. Mak, Private law perspectives on platform services: Airbnb – Home rentals between AYOR and NIMBY, EuCML 2016, 19 ff.

4 C. Twigg-Flesner, Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law, in A. De Franceschi (ed.), European Contract Law and the Digital Single Market – The Implications of the Digital Revolution, Intersentia 2016, 30.

5 COM(2016) 356 final. See C. Cauffman, The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?, EuCML 2016, 238; G. Smorto, Critical Assessment of European Agenda for the Collaborative Economy – In-Depth Analysis for the IMCO Committee, 2017, 5, 18; K. Tonner, Verbraucherschutz in der Plattform-Ökonomie, VuR 2017, 162.

6 COM(2016) 356 final, 6. See K. Tonner, supra note 5, 162, who makes an interesting reference to Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements.

Such "guidelines" now find further concretisation in the CJEU *Uber Spain* judgement of 20 December 2017,[7] where the Court declared that an intermediation service such as *Uber*, the purpose of which 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 regarded as being inherently linked to a transport service and, accordingly, must be classified as "a service in the field of transport" within the meaning of EU law. In particular, the CJEU takes the view, first of all, that the service provided by *Uber* is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make a journey. Indeed, in this situation, the provider of that intermediation service simultaneously offers transport services, which it renders accessible in particular through software tools and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make a journey. In this regard, the CJEU notes that the application provided by *Uber* is indispensable for both the drivers and the persons who wish to make an urban journey. It also points out that *Uber* exercises decisive influence over the conditions under which the drivers may provide the service. Therefore, the Court finds that such an intermediation service must be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as "an information society service" but as "a service in the field of transport".[8] Consequently, such a service must be excluded from the scope of the freedom to provide services in general as well as from the scope of application of Directive 2006/123/EC on services in the internal market[9] and of Directive 2000/31/EC on electronic commerce.[10] It follows that it is for the Member States to regulate the conditions under which such services are to be provided in conformity with the general rules of the Treaty on the Functioning of the European Union.

If compared with the above-mentioned Communication on the collaborative economy, in *Uber Spain* the CJEU moves a step forward towards an enhanced liability level for platforms. In the Communication, indeed, the Commission lists three criteria (decisive influence on the final price paid by the consumer, decisive influence on the key contractual terms, and ownership of the key assets used in order to provide the underlying service), which have to be "all met" in order to qualify the platform as a provider of the underlying service.[11] Now, for the same purposes, in order to qualify *Uber* as a transport service provider, the CJEU does not consider as essential the ownership of the key assets used to provide the underlying service. This position is worthwhile to be welcomed, because in order to assess the contractual role of the platform, the focus has to be put on the amount of influence in the process of formation of the agreement rather than on other elements.

From a systematic point of view, this approach shows the tendency to call for an increased level of clarity, for a more responsible behavior of online platforms, and in general for drawing back the veil used by platforms – even more in the rising world of blockchain technology – in order to conceal their true contractual role. Should online platforms be qualified as providers of information society intermediary services, they are, under certain conditions, exempted from liability for the information they store according to the "hosting exemption" contained in Art. 14 of the E-Commerce Directive.[12] For this purpose, their conduct must be merely technical, automatic and passive.[13]

Nevertheless, the wind is changing and for online platforms compliance with the above-mentioned provision may not be enough in order to be considered on the safe side. Indeed, in its communication concerning a European agenda for the collaborative economy, the EU Commission analyses the requisites for the applicability of the "hosting exemption" regulated in Art. 14 of the E-Commerce

7 CJEU, 20.12.2017, Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, ECLI:EU:C:2017:981.
8 Cf., for similar conclusions, Consiglio di Stato (Italian Supreme Administrative Court), 23.12.2015, Section I, No 3586/2015 <https://giustizia-amministrativa.it> accessed 31.1.2018.
9 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
10 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.
11 COM(2016) 356 final, 6.
12 Art. 14 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market.
13 Cf. CJEU, 23.3.2010, C-236/08 and C-238/08, *Google France v. Louis Vuitton*, ECLI:EU:C:2010:159; CJEU, 19.7.2010, C-324/09, *L'Oreal v. eBay*, ECLI:EU:C:2011:474.

Directive, stressing the point that it depends on the legal and factual circumstances of the case whether the collaborative platform can benefit from the hosting exemption under that provision. At the same time, the Commission encourages "responsible behavior" by all types of platforms in the form of voluntary action and highlights that the liability exemption remains limited to the provision of hosting services and does not extend to other services or activities eventually performed by a collaborative economy platform.[14] However, the "active behavior" put forth by the EU Commission could entail risks for collaborative platforms (which could no longer benefit of the above-mentioned exemption) and sensibly lower the predictability of the liability regime.[15]

Further indications in this regard are contained in the EU Commission Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices. According to this guidance, online platforms which are considered "traders", should take appropriate measures that enable users to clearly understand with whom they are possibly concluding contracts.[16] This already derives from the general prohibition of unfair commercial practices contained in Art. 5 of Directive 2005/29/EC on unfair commercial practices (UCPD).

In order to encourage platforms to introduce effective control mechanisms and self-regulation measures it would be therefore important to bring about greater clarity concerning the consequences of such controls and measures enacted by the platforms in respect to the liability exemption for platforms in the framework of the above-mentioned Directive.

At the national level there is already a widespread trend to qualify as "traders" not only "transaction-platforms",[17] but also "rating-platforms",[18] which actually could instead be qualified as "hosts" in the sense of the E-Commerce Directive. From this qualification arises a stringent due diligence obligation, which actually is not easily reconcilable with the traditional liability exemption according to the E-Commerce Directive.

In this regard it is, for example, questionable how the liability exemption contained in Art. 14, para. 1, E-Commerce Directive can be reconciled with the due diligence contained in Art. 5 UCPD: from the latter emerges a "duty of activation", which could find concretisation in a general obligation to monitor or carry out fact finding.

The increasing overlap between the E-Commerce and the UCP Directives makes it therefore possible to significantly reduce the liability exemption for hosts.

Even for several platforms which merely provide the rating of good and services sold or supplied by other subjects, it may be difficult to prove the liability exemption granted by the E-Commerce Directive: to the extent they are to be considered "traders", they have a general duty to actively seek facts or circumstances indicating, e. g. misleading reviews uploaded by the users.[19]

Therefore, the time may have come for an effective "Fitness Check" of the E-Commerce Directive, so to verify whether it still adequately responds to the increasing dimensions and conundrums of the digital environment, and how it could safely interact with other overlapping legislation as with the UCPD.

The CJUE *Uber Spain* finally stresses that the application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy. At the same time, the Court notes that non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the

14 COM(2016) 356 final, 8.
15 C. Cauffman, supra note 5, 239. In its 2017 Mid-Term Review on the implementation of the Digital Single Market Strategy, the EU Commission underlined the need to maintain a predictable liability regime for online platform: see COM(2017) 228 final.
16 European Commission, *Guidance on the Implementation/application of Directive 2005/29/EC on unfair commercial practices*, SWD (2016) 123 final, 122.
17 See e. g. Italian Competition Authority, 9.3.2016, No. 25911, *Amazon-Marketplace-Garanzia legale, Bollettino* 11/2016, 38.
18 Cf. Kammergericht Berlin, 8.4.2016, *MultiMedia und Recht* 2016, 601.
19 Cf. C. Busch, Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy, in A. De Franceschi (ed.), European Contract Law and the Digital Single Market – The Implications of the Digital Revolution, supra note 4, 223 ff. Cf. H. Masum and M. Tovey (eds.), The Reputation Society: how online opinions are reshaping the offline world, MIT Press, 2012.

main proceedings, has not given rise to the adoption by the EU of Common Rules or other measures based on Art. 91, para. 1, TFEU. As a consequence, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.[20] In light of the cross-border dimension of transport platforms (and in general of all platforms) and of the issues to which they give rise, it may be now time to reconsider the competence of the EU Member States to regulate the conditions under which intermediation services such as *Uber* are to be provided.

Even though the CJEU provides in *Uber Spain* for some more clarity concerning the blurred border between mere intermediaries and service providers, this is just a part of the picture.

Several questions call for urgent answers, in particular concerning market access requirements, protection of users, status of self-employed workers and taxation. In order to give more clarity to the blurred borders of the liability exemption for "hosts", it may be time for a refit of the E-Commerce Directive, which was conceived in the Internet's "pre-history" and whose provisions have now been shattered by the disruption brought by new business models as well as by the overlap with further pieces of EU legislation, as e. g. the Directive on unfair commercial practices. *Uber* and other online intermediary platforms represent a pan-European regulatory challenge and impact on established legal paradigms.[21] Therefore the related regulatory questions need proper answers at the EU (and possibly not at the national) level,[22] so that the CJEU is not forced to take on the mantle of the legislator and in order to ensure a safe, consistent and harmonised legal framework for all market players.

*Alberto De Franceschi**

20 CJEU 20.12.2017, Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, paras 45-47.
21 See R. Podszun, UBER – A Pan-European Regulatory Challenge, EuCML 2015, 59.
22 For a first significant result in this direction, see Research Group on the Law of Digital Services, Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 2016, 164-169.

* Dr. Alberto De Franceschi, Assistant Professor of Italian Private Law and of European Contract Law, University of Ferrara, Department of Law, Corso Ercole I d'Este 37, 44121, Ferrara (Italy). Email: alberto.defranceschi@unife.it.