

ONLINE PLATFORMS: CONCEPT, ROLE IN THE CONCLUSION OF CONTRACTS AND CURRENT LEGAL FRAMEWORK IN EUROPE

PLATAFORMAS EN LÍNEA: CONCEPTO, PAPEL EN LA CONCLUSIÓN DE CONTRATOS Y MARCO LEGAL ACTUAL EN EUROPA *

JOANA CAMPOS CARVALHO

PhD Candidate and Visiting Professor at NOVA School of Law. Research fellow at CEDIS (Centro de Investigação e Desenvolvimento sobre Direito e Sociedade) and FCT (Fundação para a Ciência e a Tecnologia)

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Abstract: Companies like Airbnb, Amazon or Craigslist have challenged the traditional business models and are altering the way people have access to goods and services. This article explores why the concept of online platform is adequate to analyse this new reality from a contractual point of view. It then challenges the idea that all companies where the product or service is supplied by what appears to be a third-party are online platforms, using the example of Uber. Finally, it provides a brief overview at the current EU framework to provide a reflection on how a regime for online platforms could look like.

Keywords: sharing economy, online platforms, Uber.

Resumen: Empresas como Airbnb, Amazon o Craigslist han desafiado los modelos de negocio tradicionales y están cambiando la forma en que las personas tienen acceso a los bienes y servicios. Este artículo explora por qué el concepto de plataforma en línea es adecuado para analizar esta nueva realidad desde un punto de vista contractual. A continuación, se cuestiona la idea de que todas las empresas en las que el producto o servicio es proporcionado por lo que parece ser un tercero son plataformas en línea, utilizando el ejemplo de Uber. Por último, se aporta una breve visión general del marco actual de la UE para reflexionar sobre cómo podría ser un régimen para las plataformas en línea.

Palabras clave: economía colaborativa, plataformas en línea, Uber.

Summary: I. Introduction. II. In search for an appropriate subject. 1. The concept of online platform. III. Cases where the triangularity is missing. 1. The case of Uber. A. Wathélet Case. B. Uber Spain Case. The Portuguese Law. IV. Platforms: EU regulatory framework. V. Conclusion.

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I. Introduction

1. Companies like Airbnb, Amazon or Craigslist have challenged the traditional business models and are altering the way people have access to goods and services¹.

2. This article aims at analysing some of these new business models from a contract law perspective.

3. We will first discuss why the best concept to use when trying to identify these companies and setting them apart from others that don't share their fundamental characteristics is the concept of online platform. Additionally, we will explore the concept of online platform and try to come up with a definition that is useful for the purposes of our work.

4. We will then proceed to approach some of the questions raised by online platforms from a contractual standpoint. First, we will challenge the idea that all companies where the product or service is supplied by what appears to be a third-party work as online platforms. We will use the example of Uber to explore the concept of intermediary and the triangular structure of online platforms. Secondly, we will take a look at the current EU framework for online platforms to provide a reflection on how a regime for these contracts can look like.

II. In search for an appropriate subject

5. When the first authors² started identifying that some companies were adopting a new business model that was challenging and, in some cases, disrupting traditional commercial sectors, they focused mainly on the fact that these companies were bringing together and harnessing the potential of communities of individuals. Value was created by creating links between people who could get what they needed from other members of the community instead of relying on big companies to cater for their needs. The phenomenon was studied mainly³ under the concepts of collaborative consumption⁴, sharing economy⁵ or collaborative economy⁶.

6. An analysis of what has been written on the subject shows a multitude and dispersion of criteria that render it impossible to settle on a consensual definition for these terms. This difficulty is linked to the fact that this is a rather recent phenomenon. In addition, these terms are now trendy⁷ and companies have realized that being associated with the sharing or collaborative economy links them to an idea of innovation or even disruption that increases the popularity of their brand, which leads them to try to blur the lines of the definitions even more in order to be included⁸. As a result, these concepts do not present the necessary scientific rigor to configure an adequate object of study.

¹ J. GATA, "The Sharing Economy, Competition and Regulation", in *Competition Policy International*, 2015, p. 3, refers to the "sharing economies" as "'disruptive innovations' in that they compete with traditional ways of producing, distributing and consuming goods and services, through the use of technological innovations such as smartphones, digital content and online distribution that may be considered disruptive". J. CAMPOS CARVALHO, "A Proteção dos Consumidores na Sharing Economy", in *I Congresso de Direito do Consumo*, Almedina, Coimbra, 2016, p. 115.

² R. BOTSCHAN; R. ROGERS, *What's Mine is Yours*, 2.^a ed., Collins, London, 2011; RUSSEL BELK, "Sharing", in *Journal of Consumer Research*, 36, 2010.

³ One of the pioneer authors coined the term "The Mesh". However, this term did not gain followers: L. GANSKY, *The Mesh: Why the Future of Business is Sharing*, 2.^a ed., Portfolio/ Penguin, 2012.

⁴ R. BOTSCHAN; R. ROGERS, *What's Mine is Yours*, 2011.

⁵ A. STEPHANY, *The Business of Sharing: Making it in the New Sharing Economy*, Palgrave Macmillan, 2015

⁶ C. CAUFFMAN, "The Commission's European agenda for the collaborative economy – (Too) platform and service provider friendly?", in *EuCML - Journal of European Consumer and Market Law*, 6, 2016.

⁷ L. GANSKY, *The Mesh: Why the Future of Business is Sharing*, 2012, p. 47.

⁸ A. STEPHANY, *The Business of Sharing: Making it in the New Sharing Economy*, 2015, p. 13.

7. The European Commission has proposed a definition of the collaborative economy: “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”⁹. Having a definition allows circumvention of the lack of rigor referred to in the previous paragraph. However, although there are some issues that concern only the business models fitting within this definition, we would say many questions concern these but other companies as well¹⁰, leading to the conclusion that this is not a good concept to allow for the study of the phenomenon as a whole.

8. If we look at the phenomenon from the perspective of contract law, we will conclude that the common and truly distinctive factor among all these companies is that they all operate platforms, which can be defined as “modern online marketplaces that allow for concluding, or facilitate the process of concluding contracts”¹¹. These platform operators act as intermediaries, replacing the traditional contractual structure by a triangular structure. We, thus, choose the concept of online platforms for the purposes of this article, regardless of whether they should be considered part of the collaborative or sharing economy. This is in line with what can be observed in the legal field, with an increasing number of authors focusing their attention on the so-called platform economy¹².

III. The concept of online platform

9. Online platforms are virtual spaces that allow for the meeting of two or more groups of users, in a way that generates value for these users, since, without the platform, this meeting would not occur or, at least, would not occur so efficiently¹³. A platform can also be described as an intermediary between two or more user groups that are connected by indirect network effects. This definition stems from the field of economics¹⁴, where this reality has been studied under the concept of two-sided or multi-sided market.

10. Two-sided or multi-sided markets are characterized mainly by three elements¹⁵: i) the existence of at least two separate groups of users, that use the platform as an intermediary; ii) the existence of indirect network effects, which means that the value one user derives from the use of the platform increases according to the number of users in the other group¹⁶; iii) the non-neutrality of the price structure, which means that the platform is able to influence the volume of transactions by increasing the usage price of the platform for one group and decreasing the usage price for the other group. This characteristic justifies that platforms often treat one of the groups as a profit generator and the other as

⁹ 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"*, COM(2016) 356 final, 2016, p. 3.

¹⁰ It particularly it leaves out all situations where there is a transfer of ownership of the goods.

¹¹ A. WIEWIÓROWSKA-DOMAGALSKA, *Online Platforms: How to Adapt Regulatory Framework to the Digital Age?*, Briefing of the European Parliament, 2017, p. 2.

¹² C. BUSCH; H. SCHULTE-NÖLKE; A. WIEWIÓROWSKA-DOMAGALSKA; F. ZOLL, "The Rise of the Platform Economy: A New Challenge for EU Consumer Law", in *EuCML - Journal of European Consumer and Market Law*, 1, 2016; M. FINCK, "Digital Co-Regulation: Designing a Supranational Legal Framework", in *European Law Review*, 43, 1, 2018, p. 48; A. DE FRANCESCHI, "The Adequacy of Italian Law for the Platform Economy", in *EuCML - Journal of European Consumer and Market Law*, 1, 2016; I. KULL, "The Adequacy of Existing Estonian Laws for the Platform Economy", in *EuCML - Journal of European Consumer and Market Law*, 1, 2016; G. SMORTO, "Verso la Disciplina Giuridica della Sharing Economy", in *Mercato Concorrenza Regole*, 2/2015, 2015, p. 12.

¹³ D. S. EVANS, "Background Note", in *Two-sided Markets - Policy Roundtables*, OECD - Competition Committee, 2009, p. 23.

¹⁴ J. C. ROCHET; J. TIROLE, "Platform Competition in Tw-Sided Markets", in *Journal of the European Economic Association*, 1, 4, 2003; D. S. EVANS; R. SCHMALENSSEE, "The Industrial Organization of Markets with Two-Sided Platforms", in *Competition Policy International*, 3, 1, 2007, p. 152.

¹⁵ We use the framework of D. S. EVANS, "Background Note", 2009, p. 29-30.

¹⁶ D. S. EVANS, "Two-Sided Markets", in *Market Definition in Antitrust: Theory and Case Studies*, ABA Book Publishing, 2012, p. 5.

financially neutral or even a loss generator¹⁷. The key role of platforms is to enable the parties to gain by reducing their costs of meeting and interacting¹⁸.

11. The concept of online platforms includes different categories, such as social media or massively multiplayer online games. However, for the field of contract law the important category is that of the so-called market makers¹⁹, matchmakers²⁰ or marketplaces. These are businesses that help two types of users meet and interact in a mutually beneficial way, facilitating the discovery of appropriate business partners²¹. The category of marketplace includes all platforms that allow for the conclusion of contracts on the platform or at least allow the users to find a counterparty to a contract they will then conclude outside the platform.

12. Marketplaces have drastically changed the structure of transactions. For the purchase of a good or provision of a service, traditionally only one contract was needed – between the supplier and the customer. On online marketplaces, for every transaction, there are three contracts: i) between the supplier and the platform – to regulate the terms of use of the platform by the supplier; ii) between the customer and the platform – to regulate the terms of use of the platform by the customer; iii) between the supplier and the customer – the main contract, which gives reason to the other two.

IV. Cases where the triangularity is missing

13. As a rule, platforms present themselves as mere intermediaries, stating that they do not have any relation to the main contract, which is concluded directly between the users.

14. As an example, we can read in Airbnb's terms of service²²: "When Members make or accept a booking, they are entering into a contract directly with each other. Airbnb is not and does not become a party to or other participant in any contractual relationship between Members, nor is Airbnb a real estate broker or insurer. Airbnb is not acting as an agent in any capacity for any Member, except as specified in the Payments Terms".

15. However, the mere statement by the company that it solely acts as an intermediary is not enough to conclude that such is in fact the case. Full understanding of the situation presupposes interpretation of all statements by the party and not just those included in the terms of use. The conclusion as to the role of the company is linked to how the company presents itself before the client. If someone behaves as the counterparty to a contract and the other party is thus convinced of that fact, then that someone is, in fact, the client's counterparty. Under Portuguese law this general rule stems from article 236 of the Civil Code, according to which a contractual offer is to be interpreted in the way that a "normal" recipient of the proposal, when under the same circumstances as the real recipient of the proposal, would interpret it²³.

16. The point of this part of the article is to show that some companies present themselves as platform operators and as mere intermediaries between the parties, but after a closer look at the situation we conclude that they behave as the actual party to the contract. As mentioned before, under Portuguese law, the fact that someone behaves as a party to the contract and is perceived as such by the other party

¹⁷ J. C. ROCHET; J. TIROLE, "Platform Competition in Two-Sided Markets", 2003, p. 991.

¹⁸ D. S. EVANS; R. SCHMALENSEE, "The Industrial Organization of Markets with Two-Sided Platforms", 2007, p. 158.

¹⁹ D. S. EVANS, "The Antitrust Economics of Multi-Sided Platform Markets", in *Yale Journal on Regulation*, 20, 2003, p. 334.

²⁰ D. S. EVANS; R. SCHMALENSEE, *Matchmakers: The New Economics of Multisided Platforms*, Harvard Business Review Press, 2016, p. 396.

²¹ D. S. EVANS; R. SCHMALENSEE, *Matchmakers: The New Economics of Multisided Platforms*, 2016, p. 396.

²² Available at <https://www.airbnb.com/terms>. In the version in force as of 1/11/2019.

²³ "A declaração negocial vale com o sentido que um declaratório normal, colocado na posição do real declaratório, possa deduzir do comportamento do declarante [...]".

leads to the conclusion that that person is a party to the contract and should be treated as such. We will present a case where, although the terms of use mention that the company acts as a mere intermediary, a closer analysis leads to the conclusion that the company is in fact a party to the contract: Uber. The analysis will be mainly based on the Portuguese legal system.

V. The case of Uber

17. Uber presents itself as a mere intermediary in the contract concluded between the driver and the passenger. The terms of use²⁴ determine that “The Services constitute a technology platform that enables users of the Application and/or the Website to arrange and order Third Party Services such as transportation and/or logistics services with Third Party Providers. [...] You acknowledge that Uber does not provide the Third Party Services including the transportation or logistics services or function as a transportation carrier and that all such Third Party Services are provided by Third Party Providers who are not employed by Uber”.

18. In Uber’s business model, as self-presented, we would have three distinct contracts. First, a contract between Uber and the driver, through which their rights and obligations would be set, namely regarding the availability of the driver, duties of conduct, commissions due to Uber, etc. Second, a contract concluded between Uber and the passenger. This contract would regulate, for instance, the conditions of use of the app. These contracts are pre-formulated standard contracts²⁵. It should be emphasized that, according to Uber, the second contract shall not be confused with the third and main contract, which is concluded directly between the passenger and the driver – for the provision of a certain transport service.

19. However, this threefold layout does not hold up once we start to thoroughly analyse the interactions between all the players. In the case of the service UberX, the passengers access the app and after filling in the intended destination, Uber presents them with a contractual offer. The screen will display the time the car will take to arrive to the pickup location and the estimated price-range. If the passenger agrees with the contractual offer he or she can accept it, by pressing the button “Request UberX”. Once the offer is accepted by the passenger the contract is concluded. The app is entirely managed by Uber, who will, then, send a message to the closest driver, requesting them to, if willing, accept the ride. It should be noted, thus, that, at the moment of the conclusion of the contract, not even Uber knows yet which driver will perform the ride. At the moment where they accept the ride, the drivers are still unaware of the destination intended by the passenger. In addition, Uber only allows the drivers to reject a certain number of rides. This description demonstrates that all interactions at the moment where the contract is concluded happen between Uber and the passenger. The driver has no intervention (nor is he or she already determined).

20. If the contract is not concluded by the driver directly, in order to sustain Uber’s position that the driver is a party to the main contract, we could design the situation as an agency. The drivers would grant Uber powers of representation, allowing it to conclude contracts on their behalf, to set the price in each of these contracts, and to collect the payments. In theory, this design is entirely possible and would be accepted by the Portuguese legal system. We would have a contract of mandate, concluded between Uber and the driver, according to article 1157 of the Portuguese Civil Code, through which Uber would

²⁴ Available at <https://www.uber.com/legal/terms/en-pt/> - version in force on 6 December 2019.

²⁵ This means that the Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts, is usually applicable. In Portugal, this matter is regulated by Decree-Law nr. 446/85 of 25 October, on contractual standard terms. This Decree-Law regulates, however, not only unfair terms but also other issues related to non-negotiated contractual terms, such as the conditions for their effective inclusion in individual contracts. Additionally, it is interesting to note that this law is applicable not only to B2C contracts but also to B2B or P2P contracts. J. MORAIS CARVALHO, "Uber in Portugal", in *EuCML - Journal of European Consumer and Market Law*, 1-2, 2015, 65, notes that, bearing in mind the usual lack of adequate communication and clarification of the terms done by the platforms, terms included in the Terms of Use are, according to Portuguese law, many times excluded from the individual contracts.

be obliged to conclude contracts in name and on behalf of the driver. The fact that Uber, in fulfilment of the contract of mandate, would set the price in each of the contracts concluded on behalf of the drivers does not pose any problems from a civil perspective. The scope of the contract of mandate is variable under Portuguese law and can include a vast or more reduced set of powers granted to the agent. Bearing in mind the principle of freedom of contract, foreseen in article 405 of the Portuguese Civil Code, and the lack of a rule that forbids it, the principal may authorise the agent to define the price of the rides, freely or within certain guidelines²⁶.

21. However, in order for the contracts concluded by the agent to bind the principal, the agent needs to act, not only on behalf, but also under the name of the principal (articles 1178 e 258 of the Portuguese Civil Code). This is where the qualification of Uber as an agent for the drivers fails. Acting for another person and invoking that circumstance are basic premises of the agency relationship under Portuguese law²⁷, which means that, in order to act as an agent, it is necessary to inform the other party that one is acting as an agent for someone else²⁸.

22. When the passengers conclude the transport contract, Uber does not inform them that it is acting as an agent, namely representing a certain driver (Uber does not even know yet who the driver for that ride will be). Uber informs the passenger about the driver's identity after the conclusion of the transport contract, but even then, does not clarify that the contract was concluded in the name of that driver²⁹. Uber does not state expressly that it acts as an agent and an average person does not deduce it from Uber's behaviour³⁰.

23. It is a fact that Uber's terms of use include a clause establishing that the "transportation or logistics services [...] provided by Third Party Providers who are not employed by Uber". However, these terms of use are not presented to the passenger when the contract is concluded, but only at the initial moment, when the passenger downloads and subscribes to the app. More importantly, the mere inclusion in a set of standard clauses is not sufficient for the average person to be informed that they are not concluding a contract with Uber³¹. Additionally, even if the terms of use were considered sufficient, they do not include the identity of the principal, nor does Uber inform the passenger, prior to the conclusion of the contract, who the principal is. We conclude that one of the key elements of the agency institute is missing, and therefore there is no agency relationship.

24. Another possible way to design the triangular structure would be to consider the transport contract a contract for person to be nominated (*Vertrag mit Benennungsrecht eines Dritten, contratto per persona da nominare or contrato para persona a designar*). According to article 452 of the Portuguese Civil Code "when entering into a contract one of the parties may reserve the right to later appoint a third party that will acquire the rights and take on the obligations arising from said contract".

25. The conclusion regarding this solution is, however, similar. At the moment of conclusion of the contract, Uber does not reserve the right to later appoint a third party that will acquire the rights and

²⁶ C. FERREIRA DE ALMEIDA, *Contratos II*, 4.^a ed., Almedina, Coimbra, 2016, pp. 175-176, claims that the "extent of the mandate [...] can be broader or more narrow [...]; in any case, it can include or dispense with elements such as price, or revenue (certain, maximum or minimum), characteristics of the counterparty, time limits or other circumstances" (freely translated from the Portuguese).

²⁷ M. H. BRITO, *A Representação nos Contratos Internacionais: Um Contributo para o Estudo do Princípio da Coerência em Direito Privado Internacional*, Almedina, Coimbra, 1999, pp. 91-94.

²⁸ C. FERREIRA DE ALMEIDA, *Contratos I*, 6.^a ed., Almedina, Coimbra, 2017, p. 175.

²⁹ In addition, in Portugal, Uber's partners are companies that in turn hire the driver and not the drivers themselves. In this case, the counterparties to the passengers would not be the drivers but the companies for which they work. This means that the passenger would not know the identity of their counterparty until they get the invoice, after the ride has been concluded.

³⁰ In his opinion, Advocate General Szpunar (Case C-434/15 Asociación Profesional Elite Taxi vs Uber Systems Spain SL, May 2017) sustained that the "service is provided, from an economic standpoint, by Uber or on its behalf. The service is also presented to users, and perceived by them, in that way".

³¹ J. MORAIS CARVALHO, "Uber in Portugal", 2015, p. 64.

take on the obligations, as it does not expressly state it nor does it result from Uber's behaviour. Even if we were to conclude that Uber reserves that right, the appointment of the driver would not fulfil the formal requirements imposed by law. Article 453 of the Portuguese Civil Code determines that, in order to be effective, the appointment shall be presented to the other party in writing (nr. 1) together with the instrument of ratification of the contract (nr. 2). Although debatable, we could argue that the message the passenger receives on the app, identifying the driver and the licence plate of the car, could be accepted as a written declaration of appointment. However, that message does not include a written ratification of the transport contract by the driver. Considering the foregoing, we conclude that, even if it could be framed as a contract for person to be nominated, which we do not sustain because Uber does not reserve the right to appoint another person, the appointment of the driver would be ineffective under Portuguese law, which would lead to the transport contract producing its effects regarding the original party, i.e. Uber (article 455-2 of the Portuguese Civil Code).

26. As we mentioned before, the role of someone in a contract has to be deduced from its behaviour seen as a whole. In this case, it seems clear that someone with average capacities when under the same circumstances as the real recipient of the proposal, would think that Uber (and not the driver) is its counterparty in the transport contract.

27. This conclusion gets reinforced when we analyse the way Uber behaves and presents itself. Uber is a strong brand³², that seeks to unite and unify all the drivers at its service³³. The drivers' performance is similar in every ride: e.g. they ask whether the temperature is pleasant and which radio station the passenger prefers. Uber defines a common price policy and excludes the drivers that have ratings under 4.5 from the platform. Another fact that points in the direction of a centralized control by Uber is the way payments are handled: Uber collects the payment from the passenger, retains its commission and transfers the remaining value to the driver (the invoice is issued by the driver or the driver's company but sent by Uber to the passenger).

28. Even in everyday language the way Uber is perceived also becomes evident. It has become common to say "order an Uber". No one says "I will order a driver through Uber" like they say "I will book a hotel through Booking".

29. The transport contract shall be considered as being concluded between Uber and the passenger, which means that Uber is responsible, as a party, for the fulfilment of the contractual duties³⁴.

VI. Wathelet Case

30. The decision of the European Court of Justice in Case C-149/15 (Wathelet) is worth mentioning as it provides arguments in favour of our position. This case concerned the sale of a second-hand car, which belonged to a private individual. The buyer purchased the car in a garage and the referring court stated that there was "strong, specific and consistent circumstantial evidence indicating that [the buyer] was not informed that it was a private sale", being thus convinced that she was buying the car from the garage, a trader, and that she would have the protection granted by consumer legislation.

31. The ECJ decided that "the concept of 'seller', for the purposes of Article 1(2)(c) of Directive 1999/44, must be interpreted as covering also a trader acting as intermediary on behalf of a private individual who has not duly informed the consumer of the fact that the owner of the goods sold is a

³² J. MORAIS CARVALHO, "Uber in Portugal", 2015, 64, claims that "the strength of Uber's business is linked to the brand and the application, while the service providers have no notoriety".

³³ Regarding the drivers, Advocate General Szpunar in his Opinion (Case C-434/15 Asociación Profesional Elite Taxi vs Uber Systems Spain SL, May 2017), sustains that Uber "does much more than match supply to demand: it created the supply itself. It also lays down rules concerning the essential characteristics of the supply and organises how it works."

³⁴ J. MORAIS CARVALHO, "Uber in Portugal", 2015, p. 64.

private individual”. The ECJ did not address the question from a contract law point of view. However, the decision clearly indicates that the one who creates the idea of being the seller to the sales contract should bear the effects of the contract like the seller. The main argument of the court is that any other interpretation would allow for the circumvention of Directive 1999/44. Because the directive only applies to contracts concluded between a trader and a consumer, a trader would be able to avoid the consumer’s protection granted by the Directive by acting as the seller but selling things owned by private individuals. It seems adequate and fair that a trader cannot act in a way that creates “confusion in the mind of the consumer”, leading him to believe that he is the seller, and thus creating a sense of trust, and then deny that quality in order to avoid liability towards the consumer.

VII. Uber Spain Case

32. In the case of *Asociación Profesional Élite Taxi against Uber Systems Spain SL (C-434/15)*³⁵, the ECJ was called to decide whether a service like the one provided by Uber in Spain should be qualified as an “information society service”, within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31, or as a “service in the field of transport”, within the meaning of Article 58(1) Treaty on the Functioning of the European Union. The purpose of the question was to conclude whether Uber was covered by the freedom to provide services, under article 56 of the Treaty on the Functioning of the European Union, or not, in which case the Member States were allowed to regulate its activity. It is also worth mentioning that the service provided by Uber in Spain was Uber Pop, which is different to the service UberX that we analysed above, in that in Uber Pop the service is provided by peers and not professional drivers.

33. The ECJ stated that the service provided “meets, in principle, the criteria for classification as an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31” (§ 35). However, it is not only an information society service. The role of Uber is not limited to the provision of a service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver” (§ 33). It includes other components³⁶. On the one hand, Uber provides an “application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers”. On the other hand, Uber “exercises decisive influence over the conditions under which that service is provided by those drivers” (§ 39)^{37/38}.

34. The court thus concluded that the intermediation service forms part of an overall service that is much broader and whose main component is the transport service, which means that the service should not be classified as “an information society service’ for the purposes of Directive 2000/31, but rather as “a service in the field of transport”, within the meaning of Article 2(2)(d) of Directive 2006/123.

³⁵ After this case, the ECJ was also called to decide Case C-320/16 (*Uber France*). The conclusions of the court have been similar in both cases, which is way we will focus only on the first one – Uber Spain.

³⁶ C. BUSCH, “The Sharing Economy at the CJEU: Does Airbnb Pass the ‘Uber Test’? – Some Observations on the Pending Case C-390/18 – Airbnb Ireland”, in *EuCML - Journal of European Consumer and Market Law*, 7, 2018, p. 173, refers to the reasoning of the ECJ as the “Uber test”, which includes two criteria and can be applied to other business models: i) the company is a market maker; ii) the company exercises decisive influence over the supplier. M. FINCK, “Distinguishing internet platforms from transport services: *Elite Taxi v. Uber Spain*”, in *Common Market Law Review*, 55, 2018, includes a third criterium in the court’s test: “whether the platform selects those carrying out the contracted service in the real world”.

³⁷ The ECJ presented a few examples of this decisive influence: determining at least the maximum fare by means of the eponymous application; receiving that amount from the client before paying part of it to the non-professional driver of the vehicle; exercising a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

³⁸ Advocate General Szpunar mentions in his Opinion on this case also that “when users decide to use Uber’s services, they are looking for a transport service offering certain functions and a particular standard of quality. Such functions and transport quality are ensured by Uber”.

35. The court analyses the question from a regulatory point of view and, thus, does not approach the subject of the parties to the transport contract³⁹. However, we can gather by the conclusions of the court, that Uber should not be regarded as a mere intermediary. The role of the company expands further than just the role of facilitating the meeting of two people, which at least hints at the conclusion that its responsibility should also be more significant than that of a mere intermediary.

VIII. The Portuguese Law

36. Law 45/2018, 10 August⁴⁰, regulates the services offered on digital platforms, that consist of the individual and remunerated transport of passengers in uncharacterized vehicles (TVDE). It is interesting to note that the Portuguese regime requires the existence of an additional actor. Apart from the passenger, the platform and the driver, the law mentions the existence of TVDE operators. These are companies that hire the drivers, so that there is no direct relationship between the platforms and the drivers. The drivers work for the TVDE operators, which in turn work for the platforms. We use the word “work” here in a broad sense, without taking position regarding the nature of the relationships formed in either of these two cases. It is the TVDE operator that is required to have a licence from the Portuguese authorities in order to engage in this transport activity.

37. The position of the Portuguese legislator regarding the role of the digital platforms is not entirely clear. Article 16 points in the direction of a mere intermediation, setting forth that digital platforms are electronic infrastructures that provide the intermediation service between users and TVDE operators. However, other rules imply the provision of services that go beyond a mere intermediation. For instance, article 19, 1, a) establishes an obligation for platforms of providing information “on the terms and conditions of access to the market organised by them”. According to this article, platforms not only provide intermediation services, but they organize a market.

38. According to article 20, the “platform operator is jointly liable for the performance of all the obligations resulting from the [transport] contract”. This rule shows that the law acknowledges that the platform, given the role it plays in the relationship with the passenger, has to take the risk arising from the transport contract. In our opinion, although this rule points in the right direction, the law could have gone further, clarifying that the reason for this assumption of risk stems from the fact that these platforms create trust in the passengers, convincing them that they are entering into a contract with the platform. Following what we mentioned above, under Portuguese law this would mean that the transport contract is deemed concluded between the platform (because it presents itself as the party to the contract) and the passenger.

39. Our purpose for this part of the article was to use the example of Uber to show that there is not always a real triangular structure when there are contracts concluded through online structures. A thorough analysis is needed for each concrete business in order to conclude whether the company is an intermediary or the party to the contract.

IX. Platforms: EU Regulatory Framework

40. Online platforms, and specifically marketplaces, have changed the way people have access to goods and in doing so have challenged the legal regimes that so-far have regulated these transactions. In particular contract law is designed around the idea of two parties entering into a contract to exchange

³⁹ Advocate General Szpunar seems to have gone a little further than the court in his Opinion having sustained that “Uber’s activity comprises a single supply of transport in a vehicle located and booked by means of the smartphone application and that this service is provided, from an economic standpoint, by Uber or on its behalf. The service is also presented to users, and perceived by them, in that way.”

⁴⁰ Rectified and republished by the Declaration of Rectification 25-A/2018, 10 August.

something. Of course, there are some rules concerning the intervention of third parties (like the rules on agency), but even these are designed for a reality that is not the one created by these marketplaces.

41. The European Union has acknowledged the need to study the problems surrounding online platforms to figure out whether an intervention is necessary and what kind of approach should be followed⁴¹. This was identified in the “Digital Single Market Strategy for Europe”⁴², where the Commission recognized the need to take action towards the development of a “fit for purpose regulatory environment for platforms and intermediaries”. Two further communications identified some of the problems and provided guidance for Member-States: “A European agenda for the collaborative economy”⁴³ and “Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe”⁴⁴. There is also an interesting document prepared by the European Commission that provides “Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices”⁴⁵. This document contains a chapter on the application of the Unfair Commercial Practices Directive to online platforms, including an analysis on the relation between this Directive and articles 14 and 15 of the E-commerce Directive⁴⁶.

42. More recently, the European Union has started handling some aspects related to online platforms also through legislation⁴⁷.

43. Directive (EU) 2019/770, on certain aspects concerning contracts for the supply of digital content and digital services (DCD)⁴⁸, and Directive (EU) 2019/771, on certain aspects concerning contracts for the sale of goods⁴⁹ do not regulate specifically contracts concluded through online platforms, although the DCD applies to a part of the services provided by platforms, whenever they can be qualified as digital services. However, both Directives include the same interesting recital: “Platform providers could be considered to be traders[/sellers] under this Directive if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the supply of digital content or a digital service[/ the sale of goods]. Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a trader[/ seller under this Directive]” (recitals 18 of Directive (EU) 2019/770 and 23 of Directive (EU) 2019/771). These recitals open the door for Member-States to adopt national rules on the liability of online platforms⁵⁰, namely through a broader transposition of articles 11 and following of the DCD and articles 10 and following of Directive 771/2019.

⁴¹ C. TWIGG-FLESNER, “The EU’s Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond”, in *EuCML - Journal of European Consumer and Market Law*, 6, 2018, p. 225.

⁴² COM(2015) 192 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

⁴³ COM(2016) 356 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

⁴⁴ COM(2016) 288 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.

⁴⁵ SWD(2016) 163 final: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A comprehensive approach to stimulating cross-border e-Commerce for Europe’s citizens and businesses.

⁴⁶ 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.

⁴⁷ About the necessity for the EU policy to not rely only on legislation, CHRISTOPH BUSCH, “Self-Regulation and Regulatory Intermediation in the Platform Economy”, in *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, Edward Elgar, 2019. For an overview of these new pieces of legislation see C. CAUFFMAN, “New EU rules on business-to-consumer and platform-to-business relationships”, in *Maastricht Journal of European and Comparative Law*, 26, 4, 2019.

⁴⁸ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

⁴⁹ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

⁵⁰ J. MORAIS CARVALHO, “Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771”, in *EuCML - European Journal of Consumer and Market Law*, 5, 2019, p. 196.

44. The Commission has also proposed a Directive⁵¹ (Omnibus Directive), included in the New Deal for Consumers⁵², that has already been approved and published (Directive 2019/2161, 27 November 2019)⁵³. This Directive includes some information duties for the providers of online marketplace (insertion of article 6a in Directive 2011/83/EU), such as informing about the main parameters determining the ranking of offers presented to the consumer as result of the search query or “whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the online marketplace”. The new Directive also amends Directive 2005/29/EC, regulating some aspects related to the commercial practices of online marketplaces.

45. Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation)⁵⁴ will be applicable on the 12 July 2020⁵⁵. One of the objectives of that Regulation is to contribute to the smooth functioning of the internal market through rules aimed at ensuring that professional users of online intermediation services benefit from due transparency, fairness and effective remedies.

46. In line with this objective, the regulation is concerned only with one side of the relationship between the parties - the provision of online intermediation services - and not with the obligations assumed by the user of those services. It also does not define or use the concept of online platform or online marketplace, choosing to focus only on the nature of the services provided. Insofar, this Regulation does not regulate the contract between the two parties, but only a part of it. It helps in the design of a contractual figure, insofar as it defines 'online intermediary service', but it is not sufficient, as it is silent on the obligations of the other party.

47. It is interesting to notice that this Regulation represents a shift in paradigm. The protection of the balance of the market was traditionally achieved by introducing rules on consumer protection, as the consumer was viewed as the weaker party in the relationship. This Regulation also introduces rules to protect one of the parties, in an attempt to achieve a balance in the relationship, but that party is not a consumer, but a trader. This Regulation recognizes that not all traders are the same and that some may need protection in their relationship to others that are clearly more powerful, such as the providers of online intermediation services.

48. Although it is not a legislative initiative, it is worth also mentioning the Draft Model Rules on Online Intermediary Platforms⁵⁶. These were created as a result of a project of the European Law Institute, whose aim was to develop a set of rules that could “set out a balance between conflicting policy options, and demonstrate what potential regulation at EU or national level could look like”⁵⁷. The most interesting rule is, in our opinion, the one concerning the liability of the platform operator. It sets forth that if the customer can reasonably rely on the platform operator having a predominant influence over the supplier, then the platform operator will be jointly liable for the non-performance of the main

⁵¹ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules.

⁵² https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en

⁵³ Directive amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

⁵⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁵⁵ For a critical analysis of the Regulation see C. TWIGG-FLESNER, "The EU's Proposals for Regulating B2B Relationships on online platforms – Transparency, Fairness and Beyond", 2018.

⁵⁶ Although the final version is not yet published a former version of the rules can be found in RESEARCH GROUP ON THE LAW OF DIGITAL SERVICES, "Discussion Draft of a Directive on Online Intermediary Platforms", in *EuCML - Journal of European Consumer and Market Law*, 4, 2016.

⁵⁷ <https://www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/online-platforms/>.

contract. The concept of predominant influence is assessed on a case-to-case basis, using a set of criteria that each (although not sufficient on its own) may hint at the existence of a predominant influence. These criteria are for instance that “the supplier-customer contract is concluded exclusively through facilities provided on the platform”, “the platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract” or “the terms of the supplier-customer contract are essentially determined by the platform operator”.

49. What we would like to highlight from this brief overview is that it has already become clear that the contracts concluded through online platforms will not be regulated by a sole regime on a European level. Platform operators run modular business models. All platforms are different, they provide different services, create different levels of trust in consumers and control the activity going on on the platform to different degrees. The approach of the European legislator has been to regulate different aspects through different approaches, and it is up to the one applying the law to decide, in each case, bearing in mind the specificities of that concrete platform, which rules apply. For each platform a puzzle with different rules will apply.

50. From a national law perspective, this leads us to question the possibility of creating types of contracts (tipos contractuales) - one for each side of the triangle - and, thus, three single regimes when online platforms are concerned. Online platforms all share some characteristics, namely the ones we identified above when analysing the concept. However, we have doubts that those characteristics are sufficient to allow for the creation of contractual types because there are many more characteristics that are not shared between all platforms and that cause them to be unfit to share a single legal regime. A modular approach, where there are different sets of rules that apply to some online platforms but not to others could help overcome this diversity.

X. Conclusion

51. When it was first noted that companies like Uber and Airbnb were changing the way people accessed goods and services, the phenomenon was studied under the concepts of the collaborative economy or the sharing economy. However, these concepts lack in certainty – because there is no consensus around their meaning – and are increasingly used as buzzwords by companies wishing to be associated with terms which can increase their popularity.

52. We therefore opt to leave these terms aside and focus on the concept of online platform, instead. Platforms or bilateral/ multilateral markets have been studied in depth by economics and can be defined as intermediaries between two or more user groups that are connected by indirect network effects. Particularly the online platforms that allow for the conclusion of contracts on the platform or at least allow the users to find a counterparty to a contract they will then conclude outside the platform fall under the category of online marketplace.

53. The mere statement by the company that it is an online platform and thus acts solely as an intermediary is not enough to conclude that such is in fact the case. Full understanding of the situation presupposes interpretation of all statements by the party and not just those included in the terms of use. The example of Uber shows that in some cases the company is in fact the counterparty to the main contract because it presents itself in a manner that leads the client to believe that he or she is entering into a contract with the company.

54. The last years have made clear that the current rules governing contracts are not sufficient to deal with all questions related to online platforms. The European Union has already acknowledged this and begun to regulate. The first sets of rules show that it won't be possible to have a sole regime applicable to all platforms. Platforms are all different regarding the types of services, the levels of trust they create and the level of influence over the suppliers. This diversity can be taken into account by a modular approach, with different sets of rules that apply depending on the concrete business model.