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(How much) more than just Platforms? Online Intermediaries in the Platform Economy

Valerio De Stefano (Osgoode Hall (Canada)) · Monday, January 29th, 2018

On December 20, 2017, the CJEU passed a landmark case on the legal status of Uber. On February 19, KU Leuven's Faculty of Law will hold a conference on the legal status of online intermediaries in the platform economy. Members of the faculty experts in all the relevant branches of the law will comment on these topics in their fields of specialization. This blog was written by Bram Devolder, one of the organizers of the conference.

"People don't want to buy a quarter-inch drill. They want a quarter-inch hole." This famous quote of the late Harvard Professor Theodore LEVITT aptly describes the driving force of the so-called sharing economy. Why should everyone buy a drill, when an average consumer uses this

tool only a few days every year? Consumers can optimize the use of underutilized resources, such as goods, time and skills, by sharing them between peers. A platform, such as BlaBlaCar or HomeExchange, creates a two-sided market and facilitates exchanges by lowering transaction costs. Traditional businesses may still offer goods and services in these decentralized networks, but private individuals increasingly do so as well.

But it's not all about sharing. Online intermediaries enable millions of people to become part-time "entrepreneurs" and top up their incomes by engaging in online transactions. Moreover, economies of scale empower them to compete with well-established incumbents. For every brokered transaction, platforms such as Uber, Airbnb and TaskRabbit, charge a service fee. Why own a fleet of cars, if you can disrupt incumbent taxi companies and generate 2 billion USD quarterly net revenue by facilitating transactions between drivers and users? Why operate a hotel, if you generate 1 billion USD quarterly net revenue by brokering between tourists and home owners or tenants?

By dramatically reducing transaction costs and enabling millions of small-scale transactions globally, platforms are fundamentally disrupting the existing balance between customers and suppliers. Existing legal frameworks fail to coherently address this paradigm shift that blurs established lines between traditional legal categories, such as business and consumer, personal and professional, and worker and contractor. Traditional regulation, which focuses mainly on balancing the interests of two contracting parties, is now confronted with a three-sided contractual relationship between a platform, a supplier and a user. Judges, lawyers and legislators need to develop a framework to address such "*regulatory disruption*". This framework should strike an optimal balance between allowing society to reap the potential benefits of the platform economy, and mitigate its potentially negative consequences.

A Spanish commercial court (*Juzgado de lo Mercantil No 3 de Barcelona*) requested a preliminary ruling from the Court of Justice of the European Union (CJEU) in the context of court proceedings between Elite Taxi, a professional taxi drivers association, and the ride-hailing platform Uber. Elite Taxi claims that the UberPop service amounts to unfair practices since neither the platform nor the non-professional drivers have obtained the licenses and authorizations required under the Barcelona Taxi Regulation. According to the Spanish court, Uber's practices should not be regarded as unfair practices, if the service at issue were covered by the directive on services in the internal market or the directive on electronic commerce. However, if the service were to qualify as a service in the field of transport, it would be excluded from the scope of the freedom to provide services in general, as well as from the abovementioned directives. Instead, the service would be covered by the currently non-existent common transport policy, which gives member states discretion to regulate the activity.

This blog previously stated that speed and customer-driven efficiency, as well as the fact that goods and services are ordered and paid online, can give the wrong impression that services are entirely automized and digital, with humans playing scarce or no role in delivering what we want at the click of a mouse or a tap on our phones. This is especially relevant when assessing the legal classification of the service provided by Uber. In principle, when a user orders an urban transport service through the Uber platform, he requires two distinct services. Firstly, an intermediation service, which makes it possible to locate a driver, with the aid of a smartphone application, for the purpose of supplying urban transport on demand. Secondly, a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. Whereas the first service is provided entirely by electronic means and meets, in principle, the criteria for

classification as an ‘information society service’, the second service is by definition provided offline. The main question to be addressed by the CJEU is whether these two services can be treated independently for the purpose of E.U. legislation (first option), or whether they must be regarded as an overall service that should be treated as an ‘information society service’ (second option) or as a ‘service in the field of transport’ (third option).

On 20 December 2017, the CJEU decided that the third option applies to Uber and ruled that the intermediation service provided by the platform 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’ (C-434/15). According to the CJEU, there would be no market for urban transport services provided by non-professional drivers using their own vehicle, without the intermediation by Uber, since those drivers would not be led to provide transport services, and persons who wish to make an urban journey would not use the services provided by those drivers. Moreover, Uber exercises decisive influence over the conditions under which that service is provided by those drivers.

As stated in an earlier blog post, technological tools are increasingly used to direct and monitor the performance of individual workers in what, rather than a utopian “future of work”, seems to be 20th century Taylorism reloaded. In line with this reasoning, Advocate-General Szpunar concluded that Uber exerts control over all the relevant aspects of an urban transport service: the price, the minimum safety conditions, the accessibility of the transport supply (by encouraging drivers to work when and where demand is high), the conduct of drivers (by means of the ratings system) and, lastly, over possible exclusion from the platform. *“While this control is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.”*

The CJEU ruling addresses the very core of several highly debated questions on the legal status of online intermediaries in the Platform Economy. The classification as an ‘information society service’ does not only, in principle, exclude prior authorization schemes, it is also a prerequisite to gain access to the liability safe harbour for hosting of illegal information enshrined in article 14 of the directive on electronic commerce. In view of the reasoning of the CJEU, other platforms such as Airbnb risk losing the protection of this liability exemption when they exercise “*decisive influence*” over the conditions under which the underlying service is provided. In the case of Airbnb, such decisive influence could potentially be derived from the fact that the platform offers *i.a.* a free photography service, a smart pricing tool, an insurance, and a rating system. In contrast, a U.S. District Court recently granted Airbnb protection against a tort liability claim under Section 230 of the Federal Communications Decency Act of 1996, *i.e.* the U.S. safe harbour for liability, not related to intellectual property claims, of information content providers (La Park La Brea v. Airbnb).

The CJEU ruling follows a line of thought set forth by several employment tribunals confirming the worker status of Uber drivers (*e.g.* U.K. Employment Appeal Tribunal; U.K. Employment Tribunal). When developing a framework to address regulatory disruption by the Platform Economy, a distinction is to be made between mere platforms and intermediaries that go beyond connecting supply and demand. The abovementioned case law suggests that the criterion to make this distinction is the control (by means of innovative technologies) exerted by the platform over

the underlying transaction. In this regard, the North California District Court considered that: "*Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs" (…) it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one.*"

During a conference on February 19, 2018 in Leuven, a panel of international experts in contract law, E.U. law, social law and tax law will assess the implications of the recent CJEU ruling for the legal classification of online platforms in their field of expertise. Registrations are still open. We look forward to welcome you to our conference.

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