THE PLATFORM ECONOMY

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Unravelling the Legal Status of Online Intermediaries

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PREFACE

> 'The internet in its nature shocks real-space law. That's often great; it is sometimes awful. The question policy makers must face is how to respond to this shock. Courts are policy makers, and they too must ask how best to respond. Should they respond by intervening immediately to remedy the "wrong" said to exist? Or should they wait to allow the system to mature and to see just what harm there is?'
>
> Lawrence Lessig, *The Future of Ideas* (2001)

Today, platforms such as Uber, Airbnb and TaskRabbit enable millions of people to become part-time entrepreneurs and top up their incomes by engaging in online transactions. Economies of scale empower them to compete with well-established incumbents. For every brokered transaction, these online intermediaries 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. Legislators, judges and lawyers across the globe are struggling to determine the legal status of online intermediaries. Is regulatory intervention needed to reap the potential benefits of the platform economy or to mitigate the potentially negative consequences of regulatory disruption? Can platforms be held liable for the proper execution of services provided by others? Does existing national regulation impose disproportionate market restrictions on innovators? Should we rethink labour protection and social security to address the potential loss of social protection of non-standard workers? How can revenue law be improved to tackle elaborate (international) schemes to avoid direct and indirect taxation?

On 20 December 2017 (C-434/15) and 10 April 2018 (C-320/16), the Court of Justice of the European Union passed two landmark cases on the legal status of ride-hailing platform Uber. The Court established that Uber does not merely provide an online intermediation service, but rather offers a full transport service. Without Uber there would be no market for non-professional drivers using their own vehicles. Moreover, the platform exercises a decisive influence over the conditions under which drivers provide their service. These rulings address the very core of several highly debated questions on the legal status of online intermediaries.

In the wake of the first ruling, on 19 February 2018, a group of scholars with an expertise in diverse areas of law gathered for a conference at KU Leuven aimed at mapping out the broader consequences of the position taken by the CJEU. The ideas presented at this conference and further developed during the subsequent peer-review process, ultimately resulted in thirteen thought-provoking contributions that make up the chapters of this volume.

This volume consists of four parts. The first part addresses key issues that transcend specific areas of law. When faced with the emergence of platforms such as Uber, legislators have to consider if regulatory intervention is needed. The second part of this volume specifically focusses on the challenges for EU law. Having issued rulings on Uber, the CJEU is now facing a new request for a preliminary ruling on the legal status of Airbnb (C-390/18). The time is right to assess the current state of affairs and to identify the challenges that lie ahead for the platform economy in the EU. The third part of this volume tackles the impact of the platform economy for social law. The flexible way in which platforms connect supply and demand blurs established lines between self-employed workers and employees. Courts are struggling with applying the "binary logic" of traditional labour law regulations to gig work. The question arises whether we need to rethink labour protection and social security to address such non-standard work. The final part of this volume focusses on revenue law. Platforms rely ponderously on intangibles and often operate on a global scale. They tend to continuously push the boundaries of direct and indirect taxation. This part maps out the challenges for international corporate taxation and value added tax and discusses recent (EU) proposals to tackle those challenges.

In the first chapter of this volume, Alain Strowel and Wouter Vergote asses the conditions under which it would be desirable to administer the behaviour of platforms. Acknowledging that platforms come in many shapes and forms, they first propose a typology of different platforms, before limiting the scope of their contribution to global profit-seeking platforms that grant access to goods and/or services offered by third parties such as online markets or "collaborative economy" platforms. The authors subsequently provide the

reader with an understanding of the economics of digital platforms in order to identify which markets driven by platforms could require policy intervention. The authors conclude by introducing various examples of regulatory disruption by the platform economy that are discussed more extensively in other chapters of this volume. The main argument developed in this chapter is that regulatory interventions should be based on a sound economic analysis of the markets.

In their terms and conditions, platforms such as Uber and Airbnb generally claim that they merely intermediate between independent contracting parties and that only the service provider can be held liable vis-à-vis the user for the ill-performance or non-performance of the underlying service. In reality, however, some platforms are very much involved in the supply of underlying services to users. In the second chapter of this volume, Bram Devolder identifies three situations that may impose limits *de lege lata* on the validity of the contractual framework presented in the said terms and conditions. A first situation where the online intermediary may be exposed to contractual liability is when the platform qualifies as the employer of the service provider. Secondly, even if there is no employment relationship between the platform and the service provider, the way in which a platform presents itself to the user, may give consumers a legitimate expectation that the platform acts as a service provider. Moreover, the CJEU rulings on Uber foster the argument that the economic reality may be taken into account to determine whether the platform is the dominant contracting party in the supply of the underlying services. In addition, this chapter discusses a recent proposal *de lege ferenda* to introduce a specific contractual category for collaborative platforms that takes into account the triangular relationship between the three protagonists in the collaborative economy. There may, however, be limits to these limits to freedom of contract. Safe harbour regimes in both the EU (Art. 14 E-Commerce Directive) and the US (Section 230 CDA) grant immunity from liability claims to online intermediaries that do not take up an active role regarding the provision of the underlying services but rather serve as a passive bulletin board. These liability exemptions were designed at a time when online platforms did not have the characteristics and scale they have today and it may, as a consequence, not always be clear to what extent they apply to collaborative platforms. On a spectrum between an active intermediator and a passive bulletin board, Uber seems to be positioned more closely to the first category. Airbnb, on the other hand, seems to be positioned more in the centre of this spectrum.

Another key question that arises in the context of the platform economy concerns law evasion. In the third chapter of this volume, Nicolas Van Damme argues that Uber evaded the Brussels Taxi Regulation by offering a ride-hailing

platform for non-licensed drivers (UberPOP) and that it in fact still evades that regulation by offering a ride-hailing platform for drivers that operate under a limousine license (UberX). More generally, he demonstrates that no autonomous conception of law evasion is conceivable under Belgian law and that law evasion is to be assimilated to a violation of the law in view of its letter and its spirit. Even if Uber evades the law, however, such evasion could be justified if the evaded law of a member state is contrary to a higher norm of EU law. The author argues, with caution, that the *numerus clausus* principle of the Brussels Taxi Regulation does in fact fail to meet the proportionality test of the freedom of establishment (Art. 49 TFEU).

A perspective that is all too often overlooked in EU and US scholarship, is how Chinese governments regulate the platform economy, and sharing economy platforms in particular. Some of the biggest internet companies are based in China and these companies are investing heavily in the sharing economy. The Chinese central government and the local governments, have been experimenting with different regulatory responses to the growth of this business model that may inspire regulators across the globe. In the fourth chapter of this volume, Liyang Hou first describes some of these responses in specific sharing industries including sharing bicycles, catering sharing, finance sharing and webcasting. The author then focuses on how both the Chinese central government and the local government in Shanghai have introduced regulation on ride-sharing. He concludes that the rather prudent attitude of Chinese regulators might suffice for the time being, but that more research on the destructive features of the sharing economy is necessary before introducing more comprehensive regulation of the growing industry.

In his opinion on the Uber Spain case (C-434/15), Advocate-General Szpunar points out that 'classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law'. In the fifth chapter of this volume, Friso Bostoen elaborates on the highly topical issue of restrictive agreements, abuse of dominance, mergers and unfair competition in the context of peer-to-peer platforms. While competition law enforcement is increasingly targeting the platform economy, peer-to-peer platforms have generally managed to stay out of the spotlight. The author argues that this might be explained in part by an (implicit) recognition that peer-to-peer platforms increase consumer welfare, even when such welfare sometimes seems to detract from that of the peers. Another explanation might be that the traditional framework of competition law does not apply easily to peer-to-peer platforms. Nevertheless, the author believes that competition law is flexible enough to address manifest anti-competitive behaviour.

Another area of EU law that is disrupted by the rise of the platform economy is the consumer acquis. Whereas EU consumer law focuses heavily on a two-party relationship between a seller and a buyer, the platform economy popularizes a triangular contractual relationship, which raises a plethora of questions. In an attempt to address these questions, a group of 35 researchers from 10 different EU countries started drafting European Model Rules for Online Intermediary Platforms within the context of the European Law Institute. Marie Jull Sørensen, who is an active member of the ELI working group, discusses the main ideas set forth in this Model Rules Draft in the sixth chapter of this volume.

One of the main arguments that convinced the CJEU to hold that Uber provides a full transport service, is that the platform exercises a decisive influence over the conditions under which drivers provide their service. The Court finds *inter alia* that Uber exercises a certain control over the quality of the vehicles, the drivers and their conduct. Advocate-General Szpunar further explains in his opinion that: '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.' In the seventh chapter of this volume, Valerio De Stefano and Mathias Wouters examine the impact that the CJEU rulings may have on traditional methods to distinguish between an employment contract and a contract for services. They also point out the strong parallels between the criteria adopted by the CJEU in the Uber cases on the one hand, and the traditional criteria to identify an employment relationship on the other hand. The authors conclude by suggesting two possible ways to move past the traditional employee / self-employed divide. A first approach is to rely on basic principles included in the ILO Declaration on Fundamental Principles and Rights at Work. It would be incoherent to limit social human rights exclusively to workers having the status of an employee. A second approach builds upon the CJEU's finding that intermediation services such as the one provided by Uber form an integral part of the overall service. Qualifying some forms of platform work as private employment services schemes may open the way to provide at least some platform workers with existing labour law protection.

The greater flexibility of "atypical work" in the platform economy also challenges social security regimes. In the eighth chapter of this volume, Paul Schoukens, Alberto Barrio and Saskia Montebovi examine how different systems in Europe (Germany, France, The United Kingdom, The Netherlands, and Belgium) try to incorporate platform work in their national social security laws. They

find that minimum thresholds of different types are introduced to exempt or exclude platform workers from compulsory social insurance, or to restrict access to benefits. They conclude that a comprehensive strategy needs to be developed to fundamentally rethink the current design of work-related schemes, starting from the realities in which platform workers function – an approach that does not seem to be followed by most national systems at the moment. In the ninth chapter of this volume, Yves Stevens further elaborates on the challenges for social security by scrutinizing the specific situation in Belgium. The author concludes that the platform economy 'is both a paradox and a dilemma from a social protection point of view'. The paradox is that new types of platform work seem to contradict the very essence of social protection schemes and necessitate to alter social security. The dilemma for society is that everybody wants to use platforms but not everybody will or is willing to work in them.

To the extent that platform workers would be qualified as independent workers rather than as employees, they risk losing the limited liability exposure, the fair wage and the limited working time that labour law provides for. In the tenth chapter of this volume, Wouter Verheyen and Fiona Unz argue that this does not mean that such workers necessarily end up 'in the far west of contract law.' They establish that on specific issues, transport law could provide an equivalent protection mechanism to that of labour law. In practice, however, platform workers that qualify as independent contractors will not benefit from such equivalent protection, because the scope of most protective instruments is not fit for the specific characteristics of their work. The authors conclude that legislative intervention is necessary to provide adequate protection and that minor legislative changes could already allow for a significant improvement of the platform worker's position.

The platform economy is testing the limits of the current international tax framework. Digital companies such as platforms often manage to escape taxation at the location where the underlying services are provided, as existing legislation generally requires a degree of physical presence in a market country for that country to have taxing powers. Moreover, certain countries apply a beneficial tax treatment to income from intangibles. Platforms rely heavily on intangibles and often operate on a global scale, which allows them to escape high tax burdens. In the eleventh chapter of this volume, Dina Scornos and Niels Bammens tackle the outdated nature of certain concepts of international corporate income tax and focus on which state should be entitled to tax the income generated from operating a digital platform. Their contribution analyses two proposals that the European Commission published on 21 March 2018: a short-term solution of introducing a new digital services tax (DST) and a long-term solution (that should replace the short-term solution) of amending the

traditional concept of permanent establishment in order to capture significant digital presence (SDP) in a market country. The authors also comment on the recent OECD report Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS. The chapter concludes that it remains to be seen whether countries will reach a consensus-based solution, given the particularities of the digital economy, the degree to which the digital economy is interwoven with the 'traditional' economy and the conflicting interests of the countries involved.

The rise of digital platforms does not only challenge international corporate income taxation, but also the application of existing VAT rules. In the twelfth chapter of this volume, Eduardo Traversa and Marie Lamensch establish that variations in the VAT treatment of transactions performed by and through digital platforms may significantly impact the profits generated by intermediation between a supplier and a customer. Accordingly, VAT plays an important role in the design of digital platforms strategies regarding the structuring of the relations with both clients and providers. However, the EU VAT Directives and related case-law offer insufficient guidance to guarantee a coherent and comprehensive VAT treatment of transactions involving platforms across the Member States. The new collection and reporting obligations for platforms that the EU VAT legislator recently imposed, are considered insufficient because there remains uncertainty regarding its scope of application and such approach creates a substantial additional compliance burden for the platforms. The authors conclude that the development of a EU external policy is a necessary step in the European tax harmonisation process. In doing so, European states should be able to reap the fruits of globalization and allow their social systems to remain financially sustainable. In the final chapter of this volume, Kenneth Vyncke illustrates the challenges for VAT legislation through an analysis of Uber's approach to VAT. According to the platform, it is not required to charge VAT on the taxi services provided to the passengers, only on the agent services rendered to its driver. The author identifies three potential threats that could undermine Uber's approach to VAT and concludes that this approach may successfully be challenged. In line with the rulings of the CJEU on Uber, there are strong arguments that suggest that Uber itself supplies the taxi services to the passengers and should collect VAT on the fares paid by them.

The emergence of the platform economy has challenged diverse areas of the law. In formulating adequate responses to the many questions surrounding the legal status of online intermediaries, policymakers should not in any way feel restricted by the pre-existing boundaries of their discipline. More than ever, an intra- and interdisciplinary perspective is imperative, as solutions developed in

one domain may guide the discussion in another. The CJEU rulings on Uber strikingly illustrate this. By holding that Uber offers a full transport service rather than a mere online intermediation service, the Court did not only address a question on the limits of the freedom to provide services in the European internal market. The view taken by the Court also sparked new arguments in ongoing debates regarding the legal status of intermediaries in other areas of the law, including competition law, contract law, consumer law, labour law and revenue law. The intra- and interdisciplinary debate reflected in this book brings us one step closer to unravelling, once and for all, the thorny knot of formulating an adequate response to the many questions that the platform economy has brought about – until the next big thing shocks real-space law.

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