

Zeynep Ayata  
Işık Önay *Editors*

# Global Perspectives on Legal Challenges Posed by Ridesharing Companies

A Case Study of Uber

 Springer

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A Case Study of Uber



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# Acknowledgements

The volume provides analysis of legal challenges regulators faced in nine jurisdictions. It aims to establish a dialogue between jurisdictions facing the same challenges, as it seems that regulators do have a lot to learn from each other. Legal frameworks applicable to Uber’s activities and Uber’s strategies to navigate within these are in a constant change, and the legal issues are far from being resolved.

The idea for preparing an edited book on legal issues concerning Uber came to us years ago as we were discussing various fields of law, where legal issues could arise pertaining to Uber’s activities. We have suggested it as a common subject of study to the Business Law Research Group organized within the auspices of the Law Schools Global League (LSGL), and it was welcomed enthusiastically by the members of the group. Preliminary findings of research were presented in the annual LSGL meetings held in Mexico City in the summer of 2017 and in the summer of 2018 in Madrid. Since then contributors from other countries joined our group and made it possible for us to cover nine jurisdictions in this volume.

We are indebted to the Law Schools Global League for bringing together legal experts from various jurisdictions and making the publication of this book possible. We would like to thank Mr. H. Bahadır Çolak, research assistant at Koç University Law School, for his able assistantship during the formatting of the chapters. We are also grateful to Ms. Leslie Demir for improving the text and her useful comments.

Zeynep Ayata  
Işık Önay

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# Chapter 1

## Introduction



Işık Önay

The growth of the sharing economy<sup>1</sup> is one of the most significant economic and social phenomena of the last decade. At an almost global scale, people are increasingly choosing sharing economy platforms for the supply and demand of services. Reports show that this growth will continue; for example, a study by Juniper Research stated that the sharing economy accounted for more than 18 billion US dollars in 2017 and was expected to double and reach more than 40 billion by 2022.<sup>2</sup> Another study by PricewaterhouseCoopers predicted that by 2025, sales revenues will reach 335 billion US dollars.<sup>3</sup>

The sharing economy can be defined as the sharing of services and assets between private individuals for a fee or free of charge, mostly through the use of a digital platform or generally the Internet. As Sundararajan puts it, “sharing isn’t new”,<sup>4</sup> but the use of such platforms has created a new phenomenon. The use of digital platforms has facilitated the low-cost expansion and commercialization of sharing economy companies. It has also allowed them to run their operations on a global scale by enabling subscribers to use one account in one application in hundreds of different countries.

One of the most important characteristics of sharing economy platforms is their flexibility. The platforms are conceived for private individuals who wish to utilize

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<sup>1</sup>The terms “collaborative economy,” “gig economy,” “on-demand economy,” “peer-to-peer economy,” and “human-to-human economy” are also used to describe the business model developed by Uber and similar companies. It is referred to as the sharing economy in this book as that appears to be the most commonly used term in the literature.

<sup>2</sup>Juniper Research (2017).

<sup>3</sup>PwC (2015).

<sup>4</sup>Sundararajan (2016).

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their idle assets or unused skills. These individuals may simply be seeking additional income, or the services they provide through the platforms may be their principal employment. Either way, they merely have to be in possession of the necessary tools and/or have the necessary skills to become a provider in the system. This presents an understanding of work, employment, and income that is radically different or opposed to traditional definitions.

The services provided by sharing economy platforms generally do not correspond exactly to existing norms or definitions. In fact, not only is sharing an old phenomenon, but the services provided are also not particularly creative: Sharing economy companies provide transportation, accommodation, cleaning services, and so on. The innovation in this sharing economy is not the product or the service but the business model itself. Sharing economy platforms rely on private individuals, and thus, the system is called peer-to-peer. The sale of goods or services takes place between peers and not between a professional and a buyer or a consumer. The existing norms in markets such as transportation or accommodation are based on contracts between a professional and a non-professional. The terms applicable to such contracts assign different roles and duties to these parties that are usually not considered equal. Furthermore, for the purpose of protecting the weak party (the consumer) or public interest, these norms provide a range of rules that should be applied to the relationship between parties. In other words, they regulate them. Sharing economy companies present a challenge, at least from a legal point of view, at precisely this point. If the users, providers, and recipients of the goods and services are peers, the existing legal norms often become inapplicable.

The business models of the new sharing economy present a case of disruptive innovation as they create a new model that does not fit into the definitions, terms, and processes of the traditional or common models. The disruptive effect is undoubtedly seen on economic and social levels. However, it also has a disruptive effect for law enforcement. The new relations construed by these companies thrive in a regulatory loophole where few or none of the existing norms are applicable. The loophole is usually at the heart of the system: The lack of regulation is what provides the flexibility and the low costs that are desirable for the companies and the users. The challenge for regulators then becomes the striking of a balance among the economic benefits generated by these companies, the need for protection of individuals and the public, and the creation of a level playing field between providers of similar services.

Uber is perhaps the most emblematic company of the sharing economy. According to Schwab, the “tipping point” of the sharing economy is “globally more trips/journeys via car sharing than in private cars”.<sup>5</sup> Uber is therefore the tipping point and definitely one of the symbols of the sharing economy. The emblematic nature of Uber is also evidenced by the use of the term “uberization” in the literature,<sup>6</sup> referring to the transformation of the economy by the increase in sharing economy companies that make use of digital platforms.

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<sup>5</sup>Schwab (2016).

<sup>6</sup>Daidj (2018, pp. 2345–2355), Eder (2017, pp. 159–203).

Founded in San Francisco, the ride-sharing company now provides peer-to-peer transport services in 890 cities in 71 countries.<sup>7</sup> The company provided 6.9 billion rides in 2019 worldwide.<sup>8</sup> The same year, it generated net revenue of about 14 billion US dollars.<sup>9</sup> The estimated value of Uber as of May 2018 was 72 billion US dollars.<sup>10</sup>

Uber is not only emblematic as a success story; for the past few years, it has also been a magnet of sorts for legal controversy. Uber has faced many hundreds of lawsuits in its home country and others. Interestingly, the lawsuits are initiated by various stakeholders, such as local authorities, competitors who are mostly taxi companies and their drivers, and also the Uber users and drivers themselves. The reason why Uber faces so many legal challenges and is in itself a legal challenge is because Uber definitely operates in a regulatory loophole.

Uber owes its success to its ride-hailing smartphone app, UberCar, re-named Uber in 2011. The co-founders introduced UberX in 2012, allowing anyone to drive for Uber using their own cars. Finally, UberPool, an app matching riders with other riders traveling in the same direction and stepping into the territory of public transportation, was launched in 2014. Uber does not provide all of these types of services in all cities of operation. All of the apps/services mimic taxis, but as the co-founder and former CEO of the company has stated on numerous occasions, Uber does not provide a taxi service.

The above outlined features of Uber justify its selection as the object of a case study on the sharing economy. This book furthermore adopts a comparative approach by addressing legal problems with the contributions of legal experts from different jurisdictions. The need for such an approach is obvious as all jurisdictions are dealing with the same problems created by a ride-sharing company operating within a regulatory loophole. This study aims to initiate legal dialogue between different jurisdictions and perhaps in the long term pave the way for a harmonized approach to regulating Uber.

The selection of jurisdictions to be covered in this book was done in such a way as to get the most out of a comparative inquiry on Uber. First, all of the selected countries are major markets for Uber, as it operates in the largest cities of these countries. Sao Paolo and Mexico City, for example, are considered as cities that constitute the largest markets for Uber.<sup>11</sup> The selection also reflects the dichotomy between common law and civil law jurisdictions. Although most of the selected countries follow the civil law tradition, the UK and the USA represent common law approaches, whereas South Africa has a rare hybrid system of law with influences from both the British and the Dutch. Four of the countries were selected from among developed countries (Germany, Italy, Spain, and the UK), whereas the remaining four are representatives of newly industrialized countries (Brazil, Mexico, South Africa,

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<sup>7</sup><https://uberestimator.com/cities>. Accessed 24 May 2020.

<sup>8</sup><https://www.statista.com/statistics/946298/uber-ridership-worldwide/>. Accessed 24 May 2020.

<sup>9</sup><https://www.statista.com/statistics/550635/uber-global-net-revenue/>. Accessed 24 May 2020.

<sup>10</sup><https://www.statista.com/statistics/729049/ride-hailing-gross-revenue-by-key-operator-globally/>. Accessed 24 May 2020.

<sup>11</sup>Valencia (2017).





**Fig. 1** Geographical scope of the study

and Turkey). Last but not least, it is important to note that the selection includes both federal (e.g., Brazil, Germany, Mexico, the USA) and unitary systems (e.g., Italy, Turkey) (Fig. 1).

The legal challenges posed by Uber are diverse and perhaps the most significant one pertains to market access. The drivers of UberX/UberPOP are private individuals providing transport services with their private vehicles. The vehicles are not registered for commercial use, and the drivers are not professionals who have to abide by certain regulations. The service itself is the same as any taxi service, but legally speaking it is certainly not a taxi service. Hence, the first problem that arises in the context of services provided by Uber is defining the market. The norms and rules applicable to any transaction depend on the definition of it. If Uber is not a taxi service, and it clearly claims that it is not, then how do we define the market and identify the rules applicable to it? How does each jurisdiction tackle this problem? What are the current rules in place for taxi/transportation services? Did Uber's entry into the market lead to a change of regulations regarding transportation services? Is Uber being held subject to these regulations? If so, how does the jurisdiction react when Uber fails to follow the rules? Is it simply banned, or are the drivers being fined for not abiding by the rules? These are the types of questions that each chapter will answer with regard to the concerned jurisdiction.

Many of the lawsuits against Uber have been initiated by Uber drivers. UberX or UberPOP drivers are by definition private individuals. They become service providers when they log on to Uber and transport passengers from one location to another using their personal vehicle or the vehicle of another private person. The relationship that they have with Uber, however, is that of user/provider of service. Uber claims that

it does not enter into an employment relationship with its drivers, depriving them of economic and social benefits and protection. Hence, another legal problem that has been raised in debates and lawsuits about Uber is one pertaining to labor law. Does the concerned jurisdiction see Uber's relationship with its drivers as an employment relationship based on the rules in place? If not, did the legislator take action to include these relationships within the scope of employment contracts, or does it plan to? Would doing so not kill the model's flexibility advantage, or should we think in new and perhaps more creative terms when looking at this relationship?

Uber's operations bear the potential for civil liability. There have been unfortunate incidents in the past where accidents have caused severe harm and injury to passengers, drivers, and third parties. In such cases, numerous questions arise with regard to Uber's liability: Would Uber be liable for damages suffered in such cases? If the answer is affirmative, what would be the basis of liability? Could contractual liability be established, or do we need to resort to rules on extra-contractual liability? Is or should there be a limit to Uber's liability? Are the provisions pertaining to limitation of liability in Uber's terms and conditions valid?

This book starts with a conceptual overview of the legal challenges posed by Uber and concludes with comparative findings based on individual case studies. The remaining chapters are reserved for selected jurisdictions, where the authors deal with the legal issues pertaining to Uber that are most relevant in their respective jurisdictions. As one might expect, the legal challenges faced in different countries are similar. Legal issues tackled throughout the book in addition to those mentioned above include consumer protection, unfair competition, antitrust, and taxation.

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# Chapter 2

## A Conceptual Overview of Legal Challenges Posed by Uber



Zeynep Ayata

### 1 Introduction

In 2009, two entrepreneurs, Garrett Camp and Travis Kalanick, in San Francisco founded a company called Ubercab. The main aim of the company was to provide cheap private transportation. The following year they established an app which allowed people to share rides. The app was officially launched the following year. Eight years later, the platform was estimated to have 75 million users globally.<sup>1</sup> Ever since its official launch, the company's name, the services provided, its structure and many other of its essentials have evolved and transformed. However, the infamous Uber is still perceived as the emblematic company of what is called the sharing economy. So much so that the expansion of such platforms has been at times referred to as the *Uberization* of the economy. This phenomenon is a combination of many things such as the rise of platforms, transformation of service provisions, transformation of employment and even new understandings of trust. Of course, the business model created by Uber has also been described as innovative. Innovation is often associated with disruption: The old or the classic is replaced by the new, and the latter has disruptive effects on the former. Whether Uber may be considered as an innovator from an economic perspective or whether it has had such disruptive effects on markets may be contested. However, the most important effect of Uber has often been on the legal order, and it is certainly possible to say that Uber has had significant disruptive effects on law and regulation. It has led regulators across the globe to question rules or to adopt new ones. Uber has also been the subject of numerous controversial legal proceedings and court decisions in various fields of law. The purpose of this chapter is to discuss the existing and possible disruptive

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<sup>1</sup>Uber (2020).

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effects caused by Uber's business model that has triggered an economic, social and most importantly legal phenomenon. The economic meaning of the sharing economy and crowd-based capitalism will thus be explained with a specific focus on Uber as a ride-sharing company. In the second part of the chapter, the regulatory issues and challenges induced by Uber's business model will be scrutinized. This part will therefore lay out the conceptual framework of the legal challenges that will be examined in the following case-study chapters of this book. The chapter aims to display why Uber should be seen as a legal challenge for market regulation and for various fields of law such as labor law and civil law.

## **2 The Platform Economy: A Child of the Fourth Industrial Revolution**

Uber, Airbnb, Lyft and TaskRabbit are all companies that are considered as part of the sharing economy. One concept is key to understanding sharing economy companies: the platform economy. In order to understand the rise of the platform economy, we must first turn to the notion of matchmaking. Matchmaking in the market may be defined as an operation of intermediation whereby a profit seeking private person matches two parties that may meet each other's needs. A second pivotal concept in analyzing the platform economy is multi-sided markets. It is the combination of this business model with the expansion of the internet and mobile applications that has led to the rise of the platform economy.

### ***2.1 The Platform Economy***

In their seminal work, Evans and Schlamensee display how matchmaking is, as a matter of fact, a very old business model.<sup>2</sup> Basically, matchmakers build a business model where an intermediary brings together two groups of buyers and/or consumers. The intermediary is neither the producer of a product or the provider of a service nor the consumer or the buyer. Many traditional business models such as agents or commissioners fulfill the same function. The intermediary therefore only facilitates the exchange of goods or services.

Matchmaking, which is an old business model, has seen a tremendous boost with a relatively new means of sales of goods and services, namely the Internet and the possibility of e-commerce. At a very basic level, the Internet connects people regardless of space. The Internet provides a platform on which matchmakers can remotely match the providers and the buyers. It also offers the possibility to do this on a cross-border or global scale; hence, space no longer constitutes an impediment for the transaction either. On the other hand, the spread of wireless Internet combined

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<sup>2</sup>Evans and Schlamensee (2016).

with the technology of smart phones has led to the development of applications, commonly referred to as apps. Apps in turn have become the embodiment of the business model of platforms. Through the use of wireless Internet and app technology, platforms have been able to reach millions or even billions of users on a global scale through devices such as smart phones and tablets.

Platforms present a significant variety in terms of the services they offer and their strategies. However, apart from the use of wireless Internet, smart devices and apps, their business strategy entails certain common basic features. First of all, the business model presents a complex structure as it does not simply aim to link the producer to the buyer. Platforms create two-sided or multi-sided markets. Tirole and Rochet, who have coined the theory of multi-sided markets, define them as “the presence of two distinct sides whose ultimate benefit stems from interacting through a common platform.”<sup>3</sup> The key to the multi-sided platform is the connectedness of the different sides. As a matter of fact, the service or product provided in such markets is only meaningful or valuable in so far as there are various different groups of users of the platform. Hence, demand from different sides of the platform is inter-dependent. The platform can be considered as the mere organizer of this interaction.

According to Evans, this inter-dependent demand is the *raison d'être* of a platform.<sup>4</sup> The number of users on each side of platform and their inter-dependent demand determines the appeal of the platform. The success of one side depends almost entirely on the success of the other. In economic theory, this effect is termed network effects. The network effect is the benefit brought by each user added to the network. The benefit gained by each additional user on the same side of the platform is referred to as the direct network effect. The indirect network effect is the benefit gained on one side of the platform when an additional user joins the other side. Providers of a product or service would have more incentive to join the platform if there are enough buyers on the other side. On the other hand, buyers will have a tendency to use the platform if they know that there is a variety of suppliers available. Hence, indirect network effects are more vital for the platform as they create and strengthen the inter-dependent demand. All platforms operate within a two-sided or multi-sided logic where their main strategy is to increase indirect network effects. The platform is construed on a complex structure that creates almost simultaneously a benefit for different participants.

Platforms may generate revenues through different models. The various models that have been developed have one crucial element in common: Every platform will have one side, where at least some users do not have to pay a fee or a price for using the platform or subscribing to it. The non-paying users are essential to the platform as they will be at the core of the platforms' indirect network effects. By providing usage at zero price, the platform will easily reach a very large community of users on one side which will create incentives for users/providers on the other side. On the other hand, the increase in numbers of paying users will allow the platform to subsidize the non-paying side. This system can support different types of revenue

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<sup>3</sup>Tirole and Rochet (2003, pp. 990–1029).

<sup>4</sup>Evans (2003, pp. 325–382).

models. For instance, the platform may choose to charge subscription fees on one side of the platform or for certain types of users such as professionals. This model is, for example, adopted by Netflix or Amazon Prime where users have to pay a subscription fee in order to gain access. An alternative and very common model is generating revenue through advertisements. This is a business model adopted by some of the largest platforms such as Google or Facebook. Such platforms aim to increase a critical number of non-paying users in order to make the platform attractive for advertisers. Finally, the platform may charge a commission based on the price demanded by the supplier. This is the model adopted by Airbnb, where the platform collects a certain percentage of the fee charged by the host. All these models rely on indirect network effects and in order to achieve a critical mass they will allow access to the platform free of charge to certain users.

The most important advantage that platforms provide for providers or entrepreneurs is low transaction costs. Platforms offer reduced transaction costs in two ways: by matching users with different demands at lower costs and by providing easier and perhaps better access to information. Digital platforms are capable of operating without space limitations. Successful platforms easily reach a global community of users by use of advanced technology. Apps or Web sites that are accessible and are not constrained by space allow buyers to find providers by the simple use of mobile devices or the Web. Furthermore, sophisticated algorithms and artificial intelligence tools increase the precision of the search and of the match. The transaction cost of the search and the finding of a buyer for the provider is therefore significantly reduced.

The other characteristic of platforms which lowers transaction costs is perhaps the more novel use of feedbacks. According to Coase,<sup>5</sup> every deal entails a pre-deal, a deal-making and post-deal phase. The cost of each phase is increased due to information asymmetry. In traditional markets, especially the buyer has to undertake the cost of acquiring knowledge with regard to the product or the service that is being offered. This transaction is very costly, and the information asymmetry may never be completely overcome. Platforms have introduced user feedbacks. Each user is allowed and encouraged to review the providers, and the information is then made public. The feedback system diminishes the information asymmetry between the provider and the buyer. This in turn helps reduce the transaction cost of the pre-deal and the deal-making phases. It is a very important step towards dealing with lower transaction costs and also towards increasing consumer satisfaction through transparency.

The use of artificial intelligence and algorithms in digital applications not only ensures better matching at low transaction costs but also leads to precision in matching and in pricing of the products or services provided. Algorithms can rapidly learn the searches of users and adapt the results provided by the app or the Web. The algorithms' learning and adapting capacity will be enforced through the feedback system. This capacity immediately enables better precision in terms of search results. The precision can encompass the quality, quantity, type, etc. of product or service,

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<sup>5</sup>Coase (2013, pp. 837–877).

but it can also prioritize prices that are affordable for the searcher. The app or the Web will therefore better suit the demand of users. This in turn proffers the supplier the possibility to adapt its production or provision. Hence, supply may meet demand with better precision by use of digital platforms.

Another important characteristic of platforms in digital markets is their capacity to grow to scale more easily than other businesses. According to Parker, Alstynne and Choudary, this capacity is mainly due to the fact that platforms do not need to “deploy capital and manage physical assets”<sup>6</sup> which are significant constraints for traditional business models. Digital platforms can be established with no physical asset and require very limited capital. A majority of the most successful digital platforms like Facebook or Google were launched by the development of a Web site which necessitated very little human capital and the acquisition of a domain name. The lack of capital and physical assets is not an impediment for growth. On the contrary, if the platform is successful in reaching a critical network effect, it can grow to scale at a greater speed than traditional business models. This in turn will feed the network effects of the platform creating incentive for more users to join.

The lack of physical assets or capital owned by the platform itself brings us to another important characteristic of these platforms which holds particularly in the context of sharing economy platforms. The emergence of this business model in digital markets also blurs the traditional distinctions between producers, consumers and owners. As a matter of fact, most platforms do not produce or provide the services they have created, nor do they deploy their own physical assets in the production or provision of what they offer. The platform may be the meeting point of an actual producer and a buyer, but it may also be the matcher of a person who is not necessarily a producer or a professional provider with a buyer. Sharing economy platforms in the true sense are the perfect example of platforms that allow for the commodification of private goods or property that is otherwise an idle asset. Private property owners or non-professional private persons that we normally qualify as consumers may become providers once they join the platform. This according to Lobel “radically changes the traditional equilibria of supply and demand.”<sup>7</sup> The traditional dichotomy of associating the professional/producer with the supplier does not necessarily hold in the context of platforms. What is personal or private often becomes part of what is accessible or even commercial.<sup>8</sup> The blurring or disappearance of these dichotomies leads to important shifts in economic analysis as it changes production cycles and the behavior of economic actors. It also renders norms based on traditional business models and economic framework obsolete or inapplicable. The emergence and rise of platforms beg for the questioning of traditional economic and legal understanding of markets.

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<sup>6</sup>Parker et al. (2016).

<sup>7</sup>Lobel (2016, pp. 87–166).

<sup>8</sup>Ibid., p. 90.

## 2.2 *Impact of the Platform Economy*

Many of the common characteristics of the platform economy have had disruptive and transformative effects on traditional markets. These effects present both economic and legal aspects. Disruption at the legal level is mostly due to the fact that existing legal norms have been grounded on definitions and parameters set by traditional economics. When those parameters are shaken, the legal norms are naturally also questioned. It is therefore necessary to examine the transformative and disruptive effects of the platform economy in order to understand why companies such as Uber have created such legal controversy.

The most crucial disruptive effect of the platform economy is the change and transformation of the supply and demand relations. Traditional economic analysis relies on the assumption that for each transaction, the supplier and the consumer can be clearly separated. This assumption also entails that the consumer is the non-professional party of the transaction, meaning that it is the party that does not have full information. Furthermore, the analysis supposes that the goods or services that are exchanged are commercial. Finally, the transaction entails a transfer of property, particularly in the case of goods, or generally a user right.

The platform economy, especially in the context of the sharing economy, changes these old assumptions. As stated earlier, the platform enables non-professional private parties to sell goods or services that were not designed or perceived as commodifiable. The goods that are offered on these platforms are often the private property of individuals who have bought them for their personal use. Similarly, individuals may offer certain services for which they are not fully professionally qualified. Such use of idle assets may of course generate additional income and contribute to economic efficiency. If such transactions are not done on a regular basis, they may be seen as singular one-time sales and purchases.

However, if the transactions follow a recurring pattern and become at least half regular, we may start to see a shift in our traditional understanding of the demand and supply relation. Economic analysis that looks into these relations in the context of the sharing economy may have to be more flexible and adaptive. Analysis of multi-sided markets may also lead us to adopt a more complex rather than linear understanding of the value created in the supply of goods and services.<sup>9</sup> It would perhaps be necessary to look at each particular transaction to see the source of supply and demand and their relation rather than generalizing market relations.

Whether such flexibility and adaptation would be possible for legal norms is another question. Legal norms are usually more rigid than economic factors. Moreover, legislation is a slow and complicated process. Rules aim to be general rather than particular. It is therefore difficult to envisage rules that allow enforcers to look at each transaction as a specific case and provide flexible solutions for each legal problem.

From an eco-legal point of view, this difficulty draws our attention to the diminishing of information asymmetry. Many legal rules that govern market relations and

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<sup>9</sup>Parker et al. (2016, p. 9).



often constrain the behavior of professionals/sellers are designed to protect the party that has less information. The consumer is an actor who is always assumed to be at a disadvantaged position due to a lack of information. Indeed, all free market economy countries have extensive legal norms that seek to protect the consumer as the weak/weaker party. Platforms change this presumption in two ways. Firstly, they allow the consumer to be the provider. A person who does not produce becomes able to sell idle assets or skills. This sale may become somewhat regular without the person being considered a qualified professional provider of the service or the product. It therefore creates a new type or chain of supply. For such transactions, the person who is normally considered a consumer may become the supplier. Evidently, the consumer, who is now a seller, would have more information than the other party with regard to the good or the service provided and would have lost the weak party entitlement. On the other hand, buyer feedback provided in the platforms gives the consumer immediate and experience-based information on the good or the service that is offered. As already explained, the feedback system significantly reduces information asymmetry which is at the heart of consumer protection policies. When the most important reason for consumer protection, the weakness of the consumer, is no longer applicable, policies and rules developed for this purpose may become obsolete. These rules generally rely on the separation between the professional and the consumer. It may then be argued that the consumer who is not a professional but has more and better information on the good or service should not be entitled to protection. Transactions and exchanges within platforms may therefore challenge the system of such protections by leading us to question the qualification of a person as a consumer.

There may also be significant changes in ownership in the context of platforms. In our traditional understanding of market transactions, a producer who produces and therefore has ownership of a good sells it to a buyer by transferring ownership rights. Platforms, however, are not the supplier or the owner of the good. They act as intermediaries between the supplier and the buyer. Transfer of ownership rights may happen through the platform but usually the platform does not acquire the good at any point during the transaction. On the other hand, owners of the goods are users of the platform and so they gain another identity through it. Most legal frameworks would provide rules applicable to agents or commissioners that act as intermediaries. However, there is an ongoing debate as to whether digital platforms should be considered intermediaries in terms of the provision of goods and services. If they are mere intermediaries, determining their obligations is a rather easy task. However, many platforms also have control over essential elements of the sales transaction such as price or terms of delivery. If platforms set some of the essential elements of the contract, they can no longer be considered an agent in the pure sense. Although platforms are not owners of the goods offered, they allow access to the goods.<sup>10</sup> Hence, the value created by the platform is not the transfer of the ownership but the access to the good or the service. Then, the critical question also shifts: instead of determining who the owner is, law makers will have to look at the transaction and

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<sup>10</sup>Lobel (2016, p. 110).

the value of providing access. The problem would become more complicated when factoring in the fact this value, which may be close to the concept of usufruct, is not created by the owner but by the platform. Hence, platforms may be creating a new form of transaction and value which may not be defined precisely in a legal norm or framework.

### **3 The Sharing Economy: Innovation, Disruption and Transformation**

The sharing economy is a business model that is growing rapidly throughout the globe. It has also become a significant economic development across the globe. Its growth is estimated to continue in the future and reach 335 billion US dollars within the next five years.<sup>11</sup> It is a business model that presents economic and societal benefits as it provides new services, creates creative and flexible employment and therefore generates new income. However, the sharing economy also entails new legal challenges as it renders traditional legal rules insufficient and/or inadequate.

#### ***3.1 Understanding the Sharing Economy***

The sharing economy is a term used to characterize digital platforms that allow their users to exchange goods or services. At the heart of the sharing economy lies the motivation to put to use idle assets. Sharing economy companies set up platforms where private persons are enabled to share, exchange their idle assets or skills. Sharing economy platforms are very diverse; however, they all aim to build a community where private persons may offer their personal skills or products in return of another good or service or a remuneration. The sharing economy therefore creates new markets and new services. Furthermore, it encourages private persons to use their property, their belongings or their skills to their full capacity. The purpose is to generate further economic efficiency and at times to provide additional income. It may also create other positive externalities such as energy and resource efficiency, encouraging socialization and building trust. However, it should be noted that in its current form, sharing is not mere exchange of goods or services. Its commercial and revenue generating aspects have become dominant.

Like other digital platforms, sharing economy companies rely on network effects. The platform has to reach a critical mass of providers on side for there to be incentives for other users to join and vice versa. Hence, sharing economy companies are often associated with crowdsourcing. Crowdsourcing entails gathering information or revenue for a specific service or task from large numbers of people. It is widely used for project financing or for start-ups. Sharing economy platforms aim to create

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<sup>11</sup>Rinne (2019).

“crowd-based networks”<sup>12</sup> that comprise diverse users. Certain platforms, like Uber, may focus on one type of service, while others, like TaskRabbit, may offer a variety of different services under the same terms. This business model is very different from the traditional firm structure which often has a centralized and possibly hierarchical structure.<sup>13</sup> As Sundararajan argues, sharing economy companies adopt a decentralized structure where the platform operates with crowds that are not constrained by space or time. The platform does not exercise a strict hierarchical control over the activities of the users. The control mechanism may be embedded in the feedback system which would suggest self-regulation rather than a top-down approach.<sup>14</sup> Hence, sharing economy platforms emerge as community-based decentralized structures.

An important effect of the sharing economy is lowering barriers to market entry.<sup>15</sup> This may be valid for many platforms as they require very little initial capital and usually no physical asset. However, as far as the sharing economy is concerned, there are low barriers to entry not just for the platform but also for the users who supply. It is normally rather difficult to find buyers for a good or service if you are not a professional provider in that sector. This difficulty may have its roots in various reasons such as licenses, inability to find buyers, space and time constraints, etc. which all constitute transactional or financial costs. Sharing economy platforms allow private persons to offer their products and services to an in-built community at low cost and little or no additional charge. It can therefore be argued that these platforms contribute to product diversification and consumer choice in the market. Expansion of choice does not only apply to consumers; it is also equally true for the suppliers. Platforms provide flexibility and choice as to when, what and how much the users are going to supply.<sup>16</sup> Traditional labor markets, for instance, are evidently more rigid and entail stricter rules. Sharing economy platforms allow for more flexible work and commerce, which is why they are often described as on-demand economy platforms.

### ***3.2 The Disruptive Effects of Sharing Economy Platforms***

The most important reason why traditional markets are more rigid and costly is regulation. Rules are designed to protect a weak party such as the consumer or the worker or to protect public interest. All these rules come at a financial or transactional cost for the provider. However, in order for the rules to apply, the activity that is being provided has to fit into the definition that is provided in the norm. The definition of the consumer, the worker, the professional is set by a norm. Though the norm may change and evolve over time, the essence of the definition will remain the same. Most sharing

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<sup>12</sup>Sundararajan (2016).

<sup>13</sup>Ibid., p. 27.

<sup>14</sup>Ibid.

<sup>15</sup>Lobel (2016, p. 110).

<sup>16</sup>Prassl (2018).

economy companies notoriously deny that the products or services they provide fit into the existing normative definitions. Airbnb, for example, claims that it does not provide an accommodation service; the platform merely matches private persons who are looking for an accommodation with those who can offer one. Refusing to accept the applicability of the regulatory structure leads to the lowering of costs. As Lobel argues “even when we recognize the economic logic of reducing transaction costs, we still need to answer whether a platform company is either competing within an existing industry or carving out a new market.”<sup>17</sup> Such platforms are thus said to develop, operate and thrive in regulatory loopholes. An important debate that emerges from this claim is whether regulatory loopholes stimulate innovation or whether platforms use and abuse regulatory loopholes in order to lower their costs and increase their profits. Proponents of the former would be inclined to argue that platforms should not be regulated, they should be allowed to operate at low transaction costs for the sake of innovation, efficiency and employment they create. Proponents of the latter would maintain that not applying existent rules to these platforms leads to economic and legal uncertainty, creating risks and inequality.

Indeed, the disruptive effect of sharing economy platforms in the regulatory context lies in the defiance of legal definitions. These platforms claim that they are intermediaries and should therefore not be legally qualified as a producer, an employer or a provider. The intermediary is not bound by many rules that the producer, employer and provider have to abide with. These norms are deemed necessary for the protection of private and public interests; but they undeniably raise costs. When Airbnb refuses to associate itself with the hotel business, it does not have to follow the safety measures that are provided by local administrations. When Uber does not qualify itself as an employer, it does not have to cover the security and insurance costs of the drivers. Hence, platforms generally and sharing economy platforms specifically reduce costs also by evading regulations. This problem is at the heart of the legal controversies created by companies such as Uber and Airbnb.

Fleischer defines this behavior as regulatory arbitrage which is “the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory.”<sup>18</sup> According to Fleischer, companies face a trade-off between transaction costs in the Coasean sense and regulatory costs.<sup>19</sup> When establishing their business, parties can plan their corporate model or business model to minimize regulatory costs. This strategy, Fleischer argues, does not create any new value in the market.<sup>20</sup> If platforms develop business strategies that rely on such regulatory arbitrage, then we would have to accept that although they lower transaction costs, they evade regulatory costs. They undermine or deny antitrust rules, tax laws, consumer protection regulations and employment laws. This evasion further reduces transaction costs and lowers barriers to entry, but this economic efficiency is created at the cost of challenging private and public interests.

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<sup>17</sup>Lobel (2016, p. 112).

<sup>18</sup>Fleischer (2010, pp. 227–290).

<sup>19</sup>See Footnote 18.

<sup>20</sup>Ibid., p. 234.

In that case, platforms may be increasing what Prassl refers to as social costs.<sup>21</sup> Prassl explains how platforms ignore the time lost or the cost incurred by the users. As they do not accept any liability for the users by refusing to qualify them as workers or to own the service that is provided. They do not cover the loss that is endured by the users when they are staying connected and looking for a match for their good or service. For example, in the case of Uber, the drivers that are connected to the app have to drive around the city and look for a matching customer. During this time however, they are consuming time and petrol. This loss has to be covered entirely by the driver. It furthermore increases pollution in the city.

The business model adopted by the platforms based on creating network effects may also have adverse effects on the market and on the users. Digital platforms generate and feed on data more than anything else. Every user of any digital platform, whether they consume the good or service or provide them, constantly creates data, the new most valuable commodity in the world. This process of collecting and using data, has led, over the last decade, to a shift in our understanding of market structure and market power. Digital platforms can aggregate large quantities of data very rapidly, and they do so every second. This creation of Big Data has changed dramatically the market structure in every industry. Data-based platforms such as Google, Facebook and Amazon are creeping up in the lists of companies with highest revenues. Data in itself is considered a commodity, and maintaining and using Big Data is increasingly considered as a dominant position in the sense of competition law. If holding data constitutes market power, use of data may therefore constitute an abuse of dominant position (monopolization). It is often argued that digital platforms, as a result of low transaction costs, are able to charge lower prices leading to consumer efficiency. However, once they reach a monopoly power based on data, they may also charge monopoly prices. As a matter of fact, dynamic pricing through sophisticated algorithms allows both for price discrimination and for increasing prices to almost monopoly levels when demand is high.

Data has also become an important factor in understanding consumer behavior and thus an important concern for legislators. Data privacy terms, especially with the entry into force of the General Data Protection Regulation in the European Union (EU), is perceived as an essential element of the good or service that is provided by digital platforms. Data privacy is a non-price element but can be considered as part of the quality of the product. The use of data by the firm and the terms of privacy that are being offered can constitute the quality of the product. If the platform chooses to offer inadequate or little data protection or if it chooses to evade such regulations through regulatory arbitrage, the quality of the product or the service will be affected. This problem could of course occur in other fields of law and types of regulation. If the platform evades rules that are designed to protect the buyer or the consumer, the terms of sale and the product or service itself may be deemed of lower quality. However, problems relating to data protection are particularly pertinent as digital platforms could easily be undermining their users' privacy through invasive data collection.

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<sup>21</sup>Prassl (2018, pp. 21–22).