Insights & Analyses

Uber and Digital Platforms: Private Law Issues

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Abstract

The article explores the theme of new contractual relationships formed in the sharing economy. Countless are open questions that have considerable repercussions in many fields, such as assessing the existence of unfair competition, consumer protection and the protection of the platforms' employees, as recently addressed by the United Kingdom Supreme Court, with its ruling of 19 February 2021.

There is no shortage of first observations on the recent introduction of the decreto legislativo 4 November 2021 no 173, adopted in Italy to transpose Directive (EU) 2019/770.

I. The Distinctive Features of the Sharing Economy

The spread of digital platforms capable of managing trade and services has fostered the emergence of a new market structure, transforming the way of conceiving legal relations between the various actors involved.

New forms of consumption based on temporary access to resources have emerged in recent years. By exploiting the possibilities of coordinating the shared use of the same asset on a large scale, practices aimed at making the best use of the functionality of resources have become widespread.[1]

This growing process of decentralisation and disintermediation of the relationships of supply of goods and services is called the sharing economy.[2] An

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[1] G. Smorto, 'I contratti della sharing economy' *Foro italiano*, V, 222-228 (2015).

[2] On the subject see, *ex multis,* A. Di Amato 'Uber, and the Sharing Economy' *The Italian Law Journal*, 2, 1, 177-190 (2016); Teresa Rodríguez de las Heras Ballet, 'The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' *The Italian Law Journal*, 3, 1, 149-176 (2017); G. Smorto, 'Verso la disciplina giuridica della sharing economy' *Mercato Concorrenza e Regole,* 245-277 (2015); Id, 'I contratti della sharing economy' *Foro italiano,* V, 3 (2015); D. Rauch and D. Schleicher, 'Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"' *George Mason University Law and Economics Research Paper*, 15-01 (2015); C. Koopman, M. Mitchell and A. Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' *The Journal of Business, Entrepreneurship & the Law*, 8(2), 529 (2015); M. Cohen and A. Sundararajan, 'Regulation and Innovation in the Peer-to-Peer Sharing Economy' *University of Chicago Law Review Online*, 82, 116 (2015); V. Katz, 'Regulating the Sharing Economy' *Berkeley Technology Law Journal*, 30(385), 1068 (2015); A. Sundararajan, *The Sharing Economy. The End of Employment and the Rise of Crowd-Based Capitalism* (Cambridge: MiT Press, 2017), 27; Q. Di Sabato, 'La prassi contratto nella sharing economy' *Rivista di diritto dell'impresa,* 451 (2016); A. Quarta and G. Smorto, *Diritto privato dei mercati digitali* (Milano: Le Monnier, 2020),

expression describes those models of economic organisation that use digital tools to manage trade in goods and the provision of services thanks to the intermediation of a platform for coordinating supply and demand.[3]

Legal scholars[4] have made countless attempts to outline the characteristic elements of the sharing economy. Some of these endeavours to come up with a definition regard the sharing economy as a new economic system based on sharing interactions between private individuals through the internet. Others see this as 'a new capitalism' created and managed by electronic platforms.[5]

The development of new atypical types of contracts stems from the need to guarantee savings to users in times of deep economic recession while facilitating the flexibility of services according to the particular requests of individuals, as these may only sometimes be fully met through existing typical contracts.

The increasing relevance of such a phenomenon[6] reflects the consumers' demand for an increasing efficiency of traditional services and the goal of expanding consumption opportunities.

The Uber platform, for example, has introduced a valid alternative to a service often regarded by consumers as unsatisfactory and too expensive. As a result, the company can offer the same service at much lower prices.

By placing itself directly on the network, it does not have to bear particular costs for infrastructure.

A similar argument can be repeated for consumer credit, when banks have shown themselves more cautious in the crisis and have conveyed the moments to *crowdlending* or equity *crowdfunding* platforms with their refusal of credit. In both cases, the platform is a more attractive competitor, offering a better service at a lower cost.[7]

120; V. Cappelli, 'Il mercato dell'energia alla prova della sharing economy' *Nuova giurisprudenza civile commentata,* 1398 (2020); D. Di Sabato, *Diritto e new economy* (Napoli: Edizioni Scientifiche Italiane, 2020), 71.

[3] G. Smorto, 'Towards a legal discipline of sharing mobility in the European Union' *Law & Public Issues*, 17-41 (2020).

[4] Refer to A. Cocco, *I rapporti contrattuali nell'economia della condivisione* (Napoli: Edizioni Scientifiche Italiane, 2020), 17-63, and further bibliography for further information.

[5] A. Ciocia, 'L'economicità e la solidarietà nei contratti della sharing economy', in D. Di Sabato and A. Lepore eds, *Sharing Economy. Profili giuridici* (Napoli: Edizioni Scientifiche Italiane, 2018), 29.

[6] On the economic, social, and technological reasons that led to the spread of collaborative platforms, see V. Hatzopoulos and S. Roma, *'Caring for sharing? Collaborative economy under EU law'Common Market Law Review*, 54, 81 (2018); R. Botsman, 'The Sharing Economy Lacks a Shared Definition', available at www.fastcoexist.com.

[7] To learn more about the topic, see A. Lepore, 'Perspectives, and limits of new alternative financial models: social lending and crowdfunding', in D. Di Sabato and A. Lepore eds, *Sharing economy* n 5 above, 61; A. D'agostini, 'La nuova disciplina europea dei modelli finanziari di crowdfunding: il Regolamento Ue 2020/1503 e la Direttiva Ue 2020/1504' *Comparazione e diritto civile*, 2, 675(2021); M.F. Tommasini, 'Il crowdfunding. Autonomia privata e tutela dei soggetti coinvolti nella raccolta fondi' *Annali Sisdic*, 5, 51 (2020); V. Bancone, 'Crowdfunding as a funding tool for innovative start-ups' *Corti salernitane*, 1-2, 215 (2017); G. Pignotti, 'La

In addition, when platforms such as Uber become central to a community, the space for new entrepreneurs to enter is also considerably restricted, thus determining an important limitation to competition.

Identifying the most appropriate legal framework to regulate the exchange relationships within peer-to-peer platforms becomes decisive in this context.

II. UberPop in the Italian Courts Case-Law

The legal classification of collaborative platforms in the *sharing economy*[8] has significant repercussions. Consider, for example, the Italian Uber case concerning the judgment on the existence of a chance of unfair competition and the more complex ones involving workers and consumers, discussed below.

In Italy, the Court of Milan[9] ruled on the anti-competitive effects of conduct carried out by drivers active in a regulated market who used the Uber platform to convey the offer of urban mobility services.[10]

nuova disciplina italiana dell'equity based crowdfunding' *Diritto e Impresa*, 3, 559 (2016).

[8] On the problem, see A. Savin, 'Electronic services with a non-electronic component and their regulation in EU law'23 *Journal of Internet Law*, 13 (2019); M. Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (Berlino: Springer, 2019); I. Domurath, 'Platforms as contract partners: Uber and beyond' 25(5) *Maastricht Journal of European and Comparative Law,* 565-581 (2018); D. Geradin, *Online Intermediation Platforms and Free Trade Principles - Some Reflections on the Uber Preliminary Ruling Case,* available at urly.it/3rpm9 (2016); P. Hacker, 'UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociaciòn Profesional Elite Taxi Judgment of the CJEU' *European Review of Contract Law,* 14, 80 (2018); M. Finck, 'Distinguishing internet platforms from transport services: Elite Taxi v. Uber Spain' 55 *Common Market Law Review*, 1619 (2018).

[9]Tribunale di Milano 25 May 2015, available at www.dejure.giuffre.it. Tribunale di Milano 9 July 2015, *Foro italiano*, 9, I, 2926 (2015), with a note by A. Palmieri, 'In tema di blocco cautelare di un servizio di trasporto non autorizzato' *Mercato concorrenza e regole*,133 (2015), with a note from D. Surdi, 'Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce "Uber Pop"' *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 375 (2015); V. Turchini, 'Il caso Uber tra libera prestazione dei servizi, vincoli interni e spinte corporative' *Munus,* 1, 115 (2016). See *contra* N. Rampazzo, 'Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso' *Diritto e informatica,* 6, 958 (2015), which considers Uber a mere intermediary. In the present case, some companies that manage radio taxi services and some trade associations, including trade unions, of taxi drivers in Milan, Genoa, and Turin have requested the Court of Milan with an appeal under Art 700 of the Code of Civil Procedure, as a precautionary measure, against the companies of the Uber group, the injunction of the passenger transport service on private cars called *UberPop*, headed by an international holding company and the obscuring of the website and its smartphone application, with the issuance of all the necessary and consequential measures. That action gave rise to the first conviction order set outabove, then confirmed by the second order of 9 July 2015, pronounced in the complaint following Uber's appeal. The Milanese courts sanctioned the competitive illegality of the *UberPop* service. The Court of Turin also followed this approach (see Tribunale di Torino 1 March 2017, n. 1553, *Guida diritto online*) and that of Rome (Tribunale di Roma 7 April 2017, *Guida diritto online*).

[10] See M.R. Nuccio, 'Le metamorfosi del trasporto non di linea: il caso uber' *Rassegna di diritto civile,* 2, 588(2017).

The Court of Milan had wondered whether the UberPop platform integrated a new and lawful type of atypical transport contract used by a community of private individuals or a business activity arising from unfair competition for violation of general rules. Such as offering a transport service at prices significantly lower than those set administratively.

First, the distinctive features of the UberPop service have been identified concerning the so-called car-sharing. Uber drivers do not share the destination and vehicle with passengers but perform a transportation service as independent carriers.

Furthermore, they do not receive a mere contribution to travel expenses but receive a fee from the service operator for using the vehicle in the interest of third parties.

Likewise, considering the administrative penalties provided against persons without a licence, the Court ruled out the possibility that persons could operate a service comparable to taxis without permission.

In both cases, the tools used to match supply and demand for transport services, namely an IT platform and a radio in the other, perform the same function.

The company controls the quality of the vehicle and the drivers previously selected by the same.

According to that approach, the service offered by Uber could not be classified as a mere intermediation service. On the contrary, the App's contribution appears essential for the existence of the transport service and has a decisive impact on the organization.[11]

Uber puts in place a complex of activities that exceed the scope of operation of a simple intermediary. They include organisational and management aspects of the transport service. Indeed, taking into account the formal schematisation of the triangular relationship between the platform, providers, and users,[12] the Court of Milan[13] found that Uber's role is intermediate. In contrast, the transport relationship occurs directly between the entities active on the platform as 'equals'. Drivers can establish the *an* and *quantum* of their business, not being linked to Uber by any employment relationship.

Uber's conduct must therefore be more correctly classified as the operator responsible for the organisation of the transport service: it is, in particular, an indirect role as regards enforcement (provided materially by its auxiliaries) but active as regards the provision of the means necessary for irregular activity.[14]

Therefore, the question of the competition relationship must be evaluated

[11] See *contra* N. Rampazzo, n 9 above, 958.

[12] See point 5 below.

[13] Tribunale di Milano 25 May 2015 n 9 above.

[14] Tribunale di Milano 2 July 2015, available at www.dejure.it. To learn more, see the note to the judgement ofB. Calabrese, 'Applicazione informatica di trasporto condiviso e concorrenza sleale per violazione di norme pubblicistiche' *Giurisprudenza commerciale*, 202, in particular 208 (2017).

concerning the entire system practised by Uber since it is impossible to separate individual drivers' roles from the application operator's organisational part.

The latter, acting as an indispensable intermediary for the contact between customers and drivers, offers a service comparable to that of the radio taxi centre, making itself responsible for acts of unfair competition, according to Art 2598 no 3 Civil Code, to the detriment of ordinary taxi drivers.

Therefore, it is clear that, by exploiting the potential of digital technologies, some collaborative business models can generate precarious working conditions for those who want to benefit from the employment opportunities offered. Moreover, hold a significant and potentially harmful competitive advantage over pre-existing market structures.

III. The Legal Classification of the Employment Relationship Between Drivers and Uber, Given the Recent United Kingdom Supreme Court's Judgment of 19 February 2021 and the French Court of Cassation's One of 4 March 2020

In this innovative phenomenon, as the European Commission[15] noted, the distinctions between consumer and service provider, employed and self-employed, provision of services on a professional and non-professional basis are less clear.

The relationship between platform and lender is based on flexibility. The platform is free to choose whom to entrust the engagement to, and the lender is free to decide whether or not to accept the 'call'. The activities required of Uber drivers are of concise duration, fragmented and fungible, and well being carried out by a plurality of people.

Not surprisingly, there is also talk of the disaggregation economy and the gig economy in the context of collaborative platforms.

It is a complex phenomenon in which two different forms of work are generally traced: the so-called crowd work and the work on demand through the App. The first consists of distributing work opportunities to an indeterminate crowd of workers through the platform. They carry out the assigned activities on the network and transmit the result to the end customer through the web. On the other hand, the second takes the form of traditional activities, which require physical presence but are organised through computer applications.

Uber drivers belong to the latter category. This type of work allows the platform to offer users services of a good quality standard, saving a large part of the labour costs, both in pay and contributions. It was found[16] that the precarious condition of digital work is qualitatively different from that attributed to the unstable and atypical 'analogue' position of on-demand work: work performance is

[15] See Communication 'A European Agenda for the Collaborative Economy' of 2 June 2016, COM(2016) 356 final.

[16] F. Bano, 'Lavoro povero nell'economia digitale' *Lavoro e diritto*, 129 (2019).

much more fragmented; rating systems strongly affect the 'digital reputation' and future calls of workers.

The legal classification of the employment relationship between Uber and their drivers is the subject of great debate within legal scholarship.[17]

Comparative case law is oriented towards agreeing that the relationship between Uber's platform and its driver is subordinate.

The French *Cour de Cassation*, Chambre Sociale of 4 March 2020 no 374,[18] qualified the contractual relationship between Uber and the driver as an employment relationship. In doing so, the Court highlighted that the worker is not a commercial partner. On the contrary, at the time of conclusion of the contract, he adheres to a transport service entirely organised by Uber through the digital platform and the algorithmic processing systems which determine its operation.

The driver who uses the App cannot create his customer base or freely determine the applicable rates and, in this way, places his work within a framework of rules specified from an external third party.

The impossibility of occupying an autonomously defined position on the market for transport services seems to result in a condition of economic and contractual dependence. In the approach adopted by the French Court, it cannot integrate subordination on its own. The judgment in question, in fact, enhances the insertion of work in a '*service organisé*' that '*peut constituer un indice de subordination*' only when '*employeur en détermine unilatéralement les conditions d'exécution*'.

When the instrumental and integrated nature of the provider's activity

[17] The theme of work through the network, so-called '*the gig economy*', has been the subject of much debate in doctrine, see *ex multis*: D. Garofalo, 'La prima disciplina del lavoro su piattaforma digitale' *Lavoro nella Giurisprudenza*, 1, 5 (2020); L. Foglia, 'Sharing economy e lavoro: qualificazione giuridica e tecniche di regolazione', in D. Di Sabato and A. Lepore eds, *Sharing economy* n 5 above, 143; S. Bini, 'La questione del datore di lavoro nelle piattaforme', in G. Zilio, G. Grandiand M. Biasi,*Commentario breve allo statuto del lavoro autonomo e del lavoro agile* (Milano: Wolters Kluwer, 2018), 158; M. Miscione, 'I lavori poveri dopo l'economia a domanda per mezzo della rete' *Corriere giuridico*, 6, 815 (2018); F. Lunardon, 'Le reti d'impresa e le piattaforme digitali della sharing economy' *Argomenti Diritto del Lavoro*, 2, 375 (2018); A. Perulli, 'Lavoro e tecnica al tempo di Uber' *Rivista giuridica lavoro*, I, 172 (2017); P. Tullini ed, *Web e lavoro: Profili evolutivi e di tutela* (Torino: Giappichelli, 2017); S. Auriemma, 'Impresa, lavoro e subordinazione digitale al vaglio della giurisprudenza' *Rivista giuridica lavoro,* I, 281 (2017); R. Voza, 'Il lavoro e le piattaforme digitali: the same old story?' *WP CSDLE 'Massimo D'Antona'IT*, 336, 9 (2017); J. Prassi and M. Risak, 'Sottosopra e al rovescio: le piattaforme di lavoro on demand come datori di lavoro' *Rivista giuridica del lavoro*, I, 229 (2017); E. Dagnino, 'Uber Law: prospettive giuslavoristiche sulla sharing/on-demand economy' available an www.bollettinoadapt.it; Id, 'Il lavoro nella on-demand economy: esigenze di tutela e prospettive regolatorie'available at www.labourlaw.unibo.it; E. Mostacci and A. Somma, *Il caso Uber. La sharing economy nel confronto tra common law e civil law* (Milano: Egea, 2016); see in case-law, UK Employment Tribunal, case no 2202550/2015, 28 October 2016; Tribunale di Torino 7 May 2018 no 778, *Lavoro nella Giurisprudenza*, 7, 721 (2018); Corte d'Appello di Torino 4 January 2019 no 26, available at *www.lavorodirittieuropa.it*.

[18] Cour de Cassation 4 March 2020 no 374, available at https://tinyurl.com/3jete5c7 (last visited 31 December 2022).

concerning the economic structure of the company is precise, the presence of indices demonstrating the unilateral determination of the rules intended for workers will be sufficient to reach the threshold of subordination.

This perspective does not for evidence as to whether Uber is exercising employer's powers. Instead, it takes advantage of various characteristics of the relationship, which, taken as a whole, can demonstrate that the organization's owner sets the conditions for the performance of the service.

Similarly, the United Kingdom Supreme Court, ruling on 19 February 2021,[19] decided as to whether Uber drivers shall be considered self-employed or employees. The dispute concerned the employment status of drivers of private rental vehicles who provide their services through the Uber app.

Section 230(3) of the Employment Rights Act 1996 includes in the definition of an employee anyone employed under an employment contract, including certain individual workers who may assimilate to self-employed persons. In particular, the definition includes those instances in which, based on a contract,

> 'the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

In the proceedings, both the Employment Appeal Tribunal and the Court of Appeal held that the applicants met this test and worked under employment contracts for Uber employees.

Uber Bv claimed to have acted solely as a technology provider with its subsidiary (Uber London) as a driver's booking agent.

The company argued that drivers were independent contractors who worked under contracts entered directly with customers, without any direct professional relationship with the company.

In its ruling, the British Supreme Court states that although there is no written contract between the drivers and Uber London, the nature of their legal relationship must be inferred from the parties' conduct.

There is no factual basis for saying that Uber London acted as an agent for drivers. According to the supreme judges, it is necessary to focus on the purpose of labour legislation. That purpose is to protect vulnerable persons who cannot argue about their pay and the working conditions to which they are subject because they are in a subordinate and dependent position vis-à-vis the employer who exercises control over the work performed.

The judgment elaborates criteria according to which the worker applicants are subjected to Uber based on contractual relationships. These criteria are the

[19] Supreme Court of the United Kingdom, 19 February 2021, available at https://tinyurl.com/29kjr5c6 (last visited 31 December 2022).

following.

First, to book a ride through the Uber app, the Uber app sets the fare and determines how much drivers are paid for their work.

Secondly, Uber lays down the contractual conditions under which drivers perform their services.

Third, Uber restricts the driver's choice of accepting or rejecting ride requests once a driver has logged into the App. Finally, the App monitors the rate of acceptance (and cancellation) of travel requests by the driver. In this regard, the Court points out that Uber could impose a penalty in case of refusal or revocation of a number considered excessive (by the App itself) of reservations. In fact, in these cases, the drivers were automatically disconnected from the Uber app for ten minutes, thus preventing the driver from working until he was allowed to reconnect.

Fourth, Uber also exercises significant control over how drivers provide their services. For example, the judgment mentions using a rating system by which passengers rate the driver on a scale of one to five after the journey; any driver who failed to maintain the average rating would receive warnings. His relationship with Uber would eventually terminate if his average rating did not improve.

A fifth significant factor is that Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capacity extending beyond an individual ride. For example, when booking a ride, a passenger is not offered a choice among different drivers, and their request is directed to the nearest driver.

Therefore, based on those criteria, the Court ruled that the drivers are indeed employees of Uber. Consequently, drivers are in a position of subordination and dependence concerning Uber and have little or no ability to improve their economic situation through professional or entrepreneurial skills.

The transport service provided by drivers and offered to passengers through the Uber app is strictly defined and controlled by Uber, including through the rating mentioned above.[20] However, some critical issues[21] about this system can undermine its reliability.

First, individual scores result from essentially subjective assessments of performance. However, personal and aggregate ratings are expressed in a number (one to five stars), effectively creating a deceptive sense of objectivity. Although

[20]To learn more about feedback mechanisms and platform liability profiles, see G. Smorto, 'Reputazione, fiducia e mercati' *Europea e diritto priv*ato, 199 (2016); E. Adamo, 'I meccanismi di feedback nella sharing economy' *Corti salernitane*, 3 (2017); Id, 'I meccanismi di feedback nella sharing economy: situazioni di conflitto e responsabilità della piattaforma on line', in D. Di Sabato e A. Lepore eds, *Sharing economy* n 5 above, 107.

[21] For these surveys, see R. Ducato, 'Scritto nelle stelle. Un'analisi giuridica dei sistemi di rating nella piattaforma Uber alla luce della normativa sulla protezione dei dati personali' *Diritto & questioni pubbliche*, 81-105, and, in particular, see 88 (2020).

the system allows to enter feedback and select the problem encountered from a preset list, these qualitative inputs are limited and not visible to other users.

Moreover, since the user can only assess the performance in its complexity, there is a risk of allowing for more elements of discretion. The voluntary nature of the evaluation is also highlighted. Passengers and drivers are not obliged to evaluate each other's performance at the end of the race, determining some unwanted distortions in the rating. The latter does not consider all the trips made but only those evaluated. It could provide an incomplete reconstruction and not necessarily correspond to reality.

Another important issue concerns the reliability of ratings in general and the possibility that they may become a vehicle for unfair practices. Uber provides a mechanism that obliges the user who has given a negative judgment to justify their choice. However, this remedy operates only for scores equal to or less than three.

These critical issues are very relevant if we consider that the decision to exclude or temporarily suspend the account from the platform risks being based on an automated system that is not entirely reliable. Moreover, these critical issues are accentuated if observed from personal data protection. In the absence of adequate safeguards, aggregate rating systems directly affect the rights or interests of the party receiving the score, risking being a vehicle for prejudice and discrimination.

IV. The Development of Sharing Economy in the Transport and Short-Term Rental Sector at the European Level

As is known, collaborative platforms allow to overcome traditionally centralised and intermediated supply of goods and services by professional actors. They allow for non-professional providers to exchange goods and offer services without the need for the intervention of intermediaries.[22]

[22] Technological innovations have made peer-to-peer exchange between 'prosumers' – producers and consumers – significantly reducing the need for intermediary intervention. On this subject, see A. Cocco, n 4 above, 24, which highlights as a standard feature of all online sharing activities both the dissolution of the boundaries between the figure of the 'producer' and that of the 'consumer' in place of which only 'prosumers' operate. 'Prosumation' appears as an attitude marked by an self-referred principle that each one can produce what is necessary to satisfy his own needs. The strong tendency towards disintermediation and the attitude of today's consumers to be 'co-creators' of the value initially produced by professionals allow private citizens to acquire better opportunities to ask and respond to each other's needs.

On this point, see also D. Di Sabato, *Diritto* n 2 above, 20; G. Ritzer and J. Nathan, 'Production, Consumption, Prosumption. The Nature of Capitalism in the Age of the Digital "Prosumer"' *Journal of Consumer Culture*, 10 (2010), in particular, see 14. Many academic definitions of *prosumer* include neither production nor consumption activities, such as demand response, energy efficiency, and grid services. See H. Van Soest, 'The Prosumer in European Energy Law', available at https://tinyurl.com/3t6zsfft (last visited 31 December 2022), who claims these definitions are examples of a tendency in the literature to expand the concept of *prosumers*. Such activities concern the active consumer rather than the *prosumer*. 'An active

One of the main issues of this growing phenomenon concerns the legal regime applicable to contractual relationships in collaborative platforms offering mixed services.[23] Because of the continuous overlapping of online and offline dimensions, it proves rather complex to classify and regulate these IT platforms.[24]

Recently the Court of Justice has tried to develop interpretative criteria concerning two of the leading platforms linked to the phenomenon of the sharing economy:[25] Uber[26] and Airbnb.[27]

consumer is a consumer who makes operational decisions relating to his energy consumption, that is, a consumer committed to demand management. (...) The *prosumer* is a market participant who produces and consumes energy and consequently engages in supply and demand management. It means that all *prosumers* are also active consumers. On the contrary, all active consumers must undertake production activities to be *prosumers*. There is a clear delimitation between these two concepts based on the need to engage in productive activities. In reality, however, several arguments justify a partial or complete overlap between the idea of active consumer and *prosumer*. First, production and consumption are not two opposite concepts but two sides of the same coin'. For further arguments, see H. Van Soest, n 22 above, 5. For more information, see B. Jacobs, 'The Energy Prosumer' *Ecology Law Quarterly*,43, 519 (2016); K. Huhta, 'Prioritising energy efficiency and demand-side measures over capacitymechanisms under EU energy law' *Journal of Energy & Natural Resources Law,* 35, 7-10 (2017).

[23] Reference refers to services consisting of an element supplied electronically and another feature provided differently. See Case C-380/18 *Airbnb Ireland*, Judgment 19 December 2019, available at www.eur-lex.europa.eu, with a note by N.A. Vecchio, 'La Corte di Giustizia e la (difficile) arte del distinguishing: il caso Airbnb e la revisione del c.d. Uber test' *Giustizia civile* (2020).

[24] See Opinion of the European Committee of the Regions - The local and regional dimension of the sharing economy, 4 December 2015 (2016/C, 051/06).

[25] In the case of Uber, it is the activity carried out exclusively to maximise profit. Above all, since there is no honest sharing with other subjects of underused resources, it would not be entirely correct to speak of *sharing economy*. However, it should be noted that some scholars consider a profit-making objective incompatible with the concept of the economy of sharing. Although, it is essential to distinguish between *profit-oriented* activities and those for which the purpose of profit is not the primary objective. It has been observed that an attempt at identifying the 'real' sharing economy would be a bit sterile; see S. Ranchordas, 'Does Sharing Mean Caring?, Regulating Innovation in the Sharing Economy'16 *Minnesota Journal of Law*, 435 (2015) and G. Smorto, 'Verso la disciplina' n 2 above, 256, to which reference is made for further doctrinal concerns on this point. See E. Caruso, 'Regolazione del trasporto pubblico non di linea e innovazione tecnologica. Il caso Uber' *Il diritto dell'economia*, 95, 1, 223-264 (2018).

[26] See Case C-320/16 *Uber France SAS* v *Nabil Bensalem*, Judgment 10 April 2018, available at www.dejure.it, which considers the activity of Uber regarding the so-called service. *UberPop,* relating to the transport sector rather than information society services and, consequently, also excluded from the scope of Directive no 123/2006 on the free movement of services (for the express provision of recital no 21), falling, on the contrary, within the exception provided for in Art 58 TFEU (1). The criteria laid down by the Court are sufficiently detailed and specific to suggest that the activity provided by Uber about the various services (*UberBlack, UberVan, UberPool*) can instead be traced back to the Directive no 31/2000, presenting itself as an added value for transport services that professional drivers would provide. For these findings, see M. Turci, 'Sulla natura dei servizi offerti dalle piattaforme digitali: il caso Uber' *Nuova giurisprudenza civile commentata,* 7-8, 1088 (2018).

[27] See N.A. Vecchio, n 23 above, 291; and also M. Colangelo, 'Piattaforme digitali e servizi della società dell'informazione: il caso Airbnb Ireland' *Diritto dell'Informazione e dell'Informatica* 35(2), 291-302 (2020), on the Case C-380/18 *Airbnb Irelandn* 23 above. In the present case,

In those cases,[28] the Court of Justice asked whether it could apply the Directive on e-commerce, favouring ICT (information and communications technology) service providers.

For both Uber and Airbnb, the 'connecting' of supply and demand[29] is central since one of the disruptive innovations[30] connected to ICT technologies is just that of allowing responding to any request through an adequate supply.[31]

It is also evident that both platforms are not limited to operating in the virtual dimension but also offer services in the material reality attributable to the underlying offline market.

Even though the premises were identical,[32] the Court regarded the activity

the Grand Chamber of the Court of Justice called upon to rule under Art 267 TFEU by the Paris Court of Great Instance, ruled that the services offered by *Airbnb* (through its subsidiaries, *Airbnb Ireland UC* and *Airbnb Payments UK*) constitute an 'information society service'. It follows that it is fully applicable to the service of the discipline provided for by Regulation (EEC) No 2000/31 on electronic commerce, including the limited derogation from their 'free movement' (Art 3(2) of Directive 2000/31), which is doubly subject to compliance with specific substantive and procedural requirements (article (a) and (b) of Art 3(4) of Directive 2000/31). About tax law in Italy, see Tribunale amministrativo regionale Lazio-Roma 18 February 2019 no 2207; Consiglio di Stato 18 September 2019 no 6219; Consiglio di Stato 26 January 2021 no 777; Case C-83/21 *Airbnb Ireland UC, Airbnb Payments UK Ltd* v *Agenzia delle Entrate*, Judgment 15 May 2021, available at www.eur-lex.europa.eu, request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 9 February 2021.

[28] Case C-320/16 *Uber France* n 26 above; Case C-434/15 *Asociación Profesional Elite Taxi* v *Uber Systems Spain SL*, Judgment 20 December 2017, *Rivista di diritto dell'impresa*, 2, 471 (2018), with a note by M.R. Nuccio, 'Il trasporto condiviso al vaglio della Corte di Giustizia' *Foro italiano*, IV, 95 (2018). See also M. Y. Schaub, 'Why Uber is an information society service? Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)' *Journal of European Consumer and Market Law* 3, 109 (2018).

[29] See Case c-390/18 *Airbnb Ireland* n 23 above, highlighting, in particular, how *Airbnb* allows the *match* between 'potential tenants with landlords, professional or not, who offer short-term accommodation services'. See also G. Pignataro, 'Pacchetti turistici su digital platforms: la sharing economy' *Comparazione e diritto civile*, 2, 449 (2020).

[30] A good, a service, or an innovative production model are defined as 'disruptive' where they prove capable of rapidly changing the economic relations consolidated in the social fabric, unpredictably determining, at the same time, the emergence of new productions more useful for consumers (or efficient for producers) and the overcoming of previous industrial structures. See G. Basini, 'Innovazione disruptive e limiti dell'azione di concorrenza sleale per violazione di norme pubblicistiche, dopo il caso uber' *Responsabilità civile previdenziale*, 3, 1028 (2108). In the case of technological services for mobility, the Consiglio di Stato 23 December 2015 no 3586, noted that: the regulation of the public non-scheduled transport service shows the signs of time and the development of technological innovation, so the problem arises of verifying whether the new types of non-scheduled passenger transport are admitted or prohibited and, in the first case, whether the principles of the framework law — with the related penalties — apply to them or whether they are an expression of the contractual freedom of the parties. This uncertainty will persist until the legislator intervenes with a discipline that can include under its validity all the possible range of transport services, whether they are to be classified as public or private, about their concrete methods of carrying out. See M. Massavelli, 'Il servizio di trasporto c.d. Uber: qualificazione giuridica e sanzioni applicabili' *Disciplina del commercio e dei servizi*, 2, 5-44 (2016); P. Manzini, 'Uber: tra concorrenza e regolazione del mercato' *Diritto e trasporti*, 79-92 (2017).

[31] Case c-390/18 *Airbnb Ireland* n 23 above.

[32] See G. Basini, n 30 above, 1028.

of the Airbnb platform as an information society service, allowing it to benefit from the principle of freedom to provide services[33] and the applicability of Directives on electronic commerce.

On the other hand, in the two previous judgments,[34]Uber was defined as a transport service[35] excluded both from the scope of the Directive on e-commerce and the Bolkestein Directive,[36] with the obligation to comply with the more restrictive access requirements laid down by the sectoral regulations remit to the Member States.[37]

The Court found that the service offered by Uber is not merely an intermediation service consisting of connecting, through an app, a non-professional driver using his vehicle and a person wishing to make a journey in an urban area. On the contrary, however, it also generates an offer of transport services whose organisation and general operation it manages for the benefit of the users who wish to use them, thus exerting a decisive influence on the conditions of drivers' performance.

Since that application is indispensable for drivers and users who use the offer, the Court considers Uber's intermediation subsistent. In addition, however, it exists to be an integral part of an overall service in which the main element is a transport service and, consequently, meets the classification, not as an information society service[38] but as a service in the transport sector, under Art 2(2)(d) of the Bolkestein Directive.[39]

That classification is also supported by the concept of service in the transport field[40] developed by European case law itself. It covers transport services regarded as such and any service intrinsically linked to a physical act of transfer of persons or goods from one place to another through transport.[41] It should also be emphasised that the Court of Justice has also increased the scope of

[33] Guaranteed by Art 56 TFEU.

[34] Case C-434/15 *Asociación* n 28 above, and Case C-320/16 *Uber France* n 26 above.

[35] Arts 58 and 90 to 100 TFEU.

[36]Art 2(2)(d) of Directive 2006/123.

[37] See Case C-434/15 *Uber Spain* n 34 above.

[38] Under Art 1, (2), of the directive 98/34, to which Art 2, letter a), of the directive 2000/31.

[39] See Case C-320/16 *Uber France* n 26 above.

[40] 'Transport services' include not only taxis but also roadworthiness tests for vehicles, *ie,* services related to 'urban transport', a concept which can also absorb Uber, to be considered, if not as a carrier in the strict sense, at least as an 'organiser of transport services'. To that effect, see Case C-168/14 *Grupo Itevelesa SL and Others v Oca Inspección Técnica de Vehículos SA e Generalidad de Cataluña*, Judgment 15 October 2015, *Foro amministrativo*, X, 2455 (2015). Otherwise, see the Opinion of the Advocate General in Case C-62/19 *Star Taxi App s.r.l.c. Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General e Consiliul General al Municipiului Bucureşti*, Judgment10 September 2020, available at *www.curia.europea.eu.*

[41] Thus R. Lobianco, 'Servizi di mobilità a contenuto tecnologico nel settore del trasporto di persone con conducente: brevi riflessioni sulla natura giuridica del fenomeno "Uber" ' *Responsabilità civile e previdenza*, 1046 (2018). See Case C-434/15, *Asociación* n 28 above, para 41.

intervention of individual Member States, adopting sanctioning rules against companies that provide an intermediation service in case of abusive exercise of passenger transport activities with the driver.

V. Sharing Economy and Consumer Protection: The E-commerce Directive and First Observations on the Changes Made to the Consumer Code by Decreto Legislativo 4 November 2021 no 173

In the cases noted, the Court of Justice has used the criterion of decisive influence to resolve the issue. Using an approach that, looking at the specific point, aims to exclude the applicability of the Directive on electronic commerce whenever the IT platform determines or, in any case, exercises significant control over the contractual conditions under which the underlying non-digitise service is offered.[42]

Following that approach, the service IT platforms, characterising the sharing economy business element, would have an utterly marginal relevance for determining the applicable rules.[43]

From this point of view, it is clear that consumers would suffer an adverse effect since they could not take advantage of the protection instruments provided by the E-commerce Directive, which defines the transparency requirements and the content of contracts concluded *online*. The Directive predisposes consumer protection instruments precisely to compensate for information asymmetry in which they find themselves concerning the service provider. The complex system of safeguards provides a detailed list of the information made easily accessible by service providers to users and the information required to be delivered in commercial communications. Also, a discipline dedicated to the content of contracts concluded electronically specifies the knowledge, clauses, and general conditions to be communicated to the consumer before placing the order.

The Directive also requires more excellent consumer protection than 'free' digital services, for which consumers do not pay an amount of money but provide personal data. Data increasingly represent the new currency of exchange.[44] Users grant their data, often required for registration, as a counter-performance for

[42] See G. Pignataro, n 29 above, 427; M.R. Nuccio, 'Le metamorfosi' n 10 above, 588; 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' *Journal of European Consumer and Market Law*, 4, 172 (2018); A. De Franceschi, 'Uber Spain and the Identity Crisis of Online Platforms' *Journal of European Consumer and Market Law*, 1, 1 (2018).

[43] See V. Cappelli, n 2 above, 1398.

[44] On the subject, see C. Perlingieri, 'Data as the object of a contract and contract of epistemology' *The Italian Law Journal*, 5, 615-631 (2019); G. Resta, 'I dati personali oggetto del contratto. Riflessioni sul coordinamento della Direttiva (UE) 2019/770 e il Regolamento (UE) 2016/679' *Annuario del contratto*, 142 (2018).

obtaining the service, unknowingly restricting the area of their confidentiality.[45]

It should be noted, among other things, that with the decreto legislativo 4 November 2021 no 173, the Italian legislator implemented Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the supply of digital content and digital services. However, the new regulation did not address the problem of the legal classification of the agreement based on which the consumer allows access to personal data as a non-pecuniary consideration for the supply of digital content and digital services.

Nevertheless, it has extended to the latter the protections provided by the consumer legislation for lack of conformity and non-supply.

According to paras 3 and 4 of Art 135-*octies,* the provisions of Chapter I-*bis* apply to any contract in which the trader supplies, or undertakes to supply, digital content or digital service to the consumer. The consumer pays or undertakes to pay the price, or if he gives or undertakes to provide personal data.

This last hypothesis poses considerable coordination problems with the discipline for protecting personal data outlined by Regulation (EU) 2016/679 (GDPR). Moreover, by recital 24 of Directive (EU) 2019/770, a margin of discretion has been left to the Member States on the subject of the use of personal data for consideration. Since it is not clear whether this type of agreement can meet the contract formation requirements laid down by the various national legislations, therefore each country must be able to decide for itself on point.[46]

Therefore, it is clear that the European volition does not make personal data similar to consideration but guarantees, even in these situations, increasingly frequent in practice, the same legal protections provided for contracts to supply digital content or services.

However, in the Italian legal system, the interpretative problems concerning the legal nature of that agreement were not addressed by the national legislature when transposing the Directive. On the contrary, the Italian legislator has limited himself to the mere transposition of the letter of the Directive into internal law. He left open the question of how to coordinate this type of agreement with the general contractual discipline of the Civil Code and with the remedies provided for by the same legislation just introduced.

Beyond Arts 135-*octies* (4) 135-*novies* (6) (the latter affirming the prevalence

[45] In this regard, see G. Malgieri and B. Custers, 'Pricing Privacy: The Right to Know the Value of Your Personal Data' *Computer Law & Security Review*, 34, 289 (2018); A. De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', in A. De Franceschi ed, *European Contract Law and the Digital Single Market. The implications of the Digital Revolution* (Cambridge: Intersentia, 2017), 8.

[46] According to the Directive (EU) 2019/770, recital 24: 'This Directive should apply to any contract where the consumer provides or undertakes personal data to the trader. (...) Member States should, however, remain free to determine whether the requirements for a contract's formation, existence, and validity under national law are fulfilled'.

of the GDPR over the provisions of the new Chapter I-*bis* in the event of a conflict), the case of the use of personal data of the consumer as consideration has not been subject to further review.

These protections do not replace those covered sectors, such as electronic commerce. However, they are in addition to the latter to ensure the highest possible consumer protection level. A fortiori, if we consider the increasing diffusion of these new contractual schemes.

Therefore, it is considered that classifying platforms offering mixed services as *internet service providers* does not hinder their simultaneous qualification as providers of the underlying services that cannot be digitised.

On the contrary, making the most of the dual nature of those interests in identifying the applicable rules would make it possible to balance reasonably all the stakes involved, not only the conflicting interests of traditional operators and collaborative platforms but, at the same time, also those of consumers who would be guaranteed a high level of protection.[47]

To this end, it is, therefore, necessary to analyse the structural dimension of contractual relationships in collaborative platforms.

In the sharing economy, there are several specific negotiating schemes: 'one to many' is a model in which a single supplier provides goods or services to multiple users; 'many to many' in which there are numerous suppliers and many other users and finally, the so-called 'peer to peer' model, in which all the negotiating relationships of supply and access to goods or services are established between private citizens, devoid of any professional competence.[48]

Since the digital platform is the meeting place between the parts of the store, there is a triangular training[49] of the subjects involved: the owner of the platform, the user supplier, and the user. Generally, the platform maintains unique relationships with each user without appearing as a part of their relationship. Consumers are part of a broader contractual relationship that is composed, in turn, of three different contracts:

- the contract between the platform and the consumer, relating to the

[47] Promoters of an interpretative technique always attentive to the balancing of principles and the comparative evaluation of interests: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), II, passim; Id and P. Femia, *Nozioni introduttive e princípi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 21; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), passim; Id, 'Venticinque anni della Rassegna di diritto civile e la «polemica sui concetti giuridici». Crisi e ridefinizione delle categorie', in P. Perlingieried, *Temi e problemi della civilistica contemporanea*, (Napoli: Edizioni Scientifiche Italiane, 2005), 543; Id, 'Il patto di famiglia tra bilanciamento dei princípi e valutazione comparativa degli interessi' *Rassegna di diritto civile*, 146(2008). Moreover, E. Betti, *Interpretazione della legge e degli atti giuridici (Teoria generale e dogmatica)* (Milano: Giuffrè, 1949), 181.

[48] See A. Cocco, n 4 above, 23.

[49] On the triangular structure of contractual relationships referable to the *sharing economy*. O., Vallejo, 'Contractual relationships in collaborative economy platforms' *European Review of Private Law* 5, 995 (2019); I. Domurath, n 8 above, 565–581.

provision of the digital interconnection service;

- the contract between the platform and the provider of the non-digitised service, which is also inherent in the digital service, allows the provider to offer its service through the platform's IT tools;

- the contract between the supplier and the consumer to provide the non-digitised service.

The relations of suppliers and consumers with the platform form a separate contract – autonomous and independent of that between consumers and suppliers concerning the underlying service – which must comply with the transparency and content requirements of the Directive on electronic commerce.[50]

Consequently, those contracts are not to be understood according to conflictual relationship, which seeks to exclude the applicability of the E-Commerce Directive or sectoral legislation based on the relevance of the control exercised by the platform over the conditions of the service provided to the provider. On the contrary, it is necessary to consider such contractual relationships in a broader triangular relationship. Two different services are provided, the online and the offline, subject to two other disciplines, which are not mutually exclusive but can coexist, oriented towards achieving different objectives. At the heart of this triangular scheme, the platform undoubtedly constitutes a necessary intermediation tool that allows consumers to relate and conclude agreements with the supplier.[51]

VI. Concluding Considerations *de iure condito* and *de iure condendo*

In light of the above, it is considered that the distinctive feature of contractual relationships arising in sharing economy context does not lie only in the content and nature of the service but in how it is provided to consumers.

The intermediation activity determines the new decentralised market structure through collaborative platforms that are inevitably reflected in conceiving the legal relations between the various actors involved. The fact that the services are provided through digital platforms makes them completely different and not comparable with those offered with traditional offline means.

Therefore, consumers do not consider the importance of the control exercised by the platform on contractual conditions under which the underlying service is offered. Consumers also rely on the intermediation activity between them, and the non-professional suppliers carried out by the platform itself, without which even those contractual relationships would not arise.

In conclusion, it is necessary to elaborate on a valid criterion to identify the legal regime applicable to market relations in the context of the sharing economy. Furthermore, it is essential to consider all the interests at stake and, in particular,

[50] See V. Cappelli, n 2 above, 1400.

[51] See on the triangular structure of contractual relationships in the context of the collaborative economy, I. Domurath, n 8 above, 578; A.O., Vallejo, n 49 above, 995.

the pre-eminent role of IT platforms, in the absence of which no contractual relationship is established.

Recognising the dual qualification of collaborative platforms – as information society service providers in any case and, at the same time, as providers of offline services by a concrete assessment to be carried out on a case-by-case basis – would make it possible to ensure a homogeneous framework of consumer protections, without neglecting the relevance of licenses, authorisations, and requirements under sectoral regulations.

Therefore, it is necessary to rethink the traditional ways of managing contractual relationships in the context of the sharing economy. The need to devise protection instruments at a higher level is becoming increasingly apparent. The multiplicity of offline services offered through collaborative platforms does not achieve, in practice, a reduction in the protection instruments envisaged in favour of consumers.

In such a context, the E-commerce Directive would appear to be the most appropriate instrument to ensure consumer protection for all collaborative platforms. On the other hand, from a *de iure condendo* perspective, an *ad hoc* legislative intervention has been repeatedly called for, also at the European level,[52] to provide a 'univocal and updated legal framework' of the sharing economy starting from consumer protection. In the doctrinal debate[53] on the regulation of this phenomenon, there are mainly three different attitudes: the first consist of subjecting the services provided through IT platforms to the existing discipline; a second is aimed at deregulating their activity or at subjecting them to a minimum regulation; finally an 'intermediate' third, consisting in the introduction of an *ad hoc* regulation for new services, made up of rules lighter than those to which traditional operators are subject.[54] Nevertheless, it remains impossible to disregard a concrete assessment to be carried out on a case-by-case basis that considers the peculiarities of the reference sector and the type of on-demand services established in that particular market. In particular, in the regulatory choices, it is necessary to consider the distinction between activities in which the collaborative component is prevalent and for-profit activities in which the innovative element is represented almost exclusively by a new way of doing business.[55]

[52] See the Opinion of the European Economic and Social Committee on 'Collaborative or participatory consumption, a sustainability model for the 21st century' (2014/C 177/01).

[53] See G. Smorto, 'Verso la disciplina' n 2 above, 17; Id, 'The Sharing Economy as a Means to Urban Commoning' *Comparative Law Review,* 9 (2016).

[54] To deepen the different approaches that emerge from the doctrinal debate on the sharingeconomy regulation, see E. Caruso, n 25 above, 259; G. Smorto, 'Verso la disciplina' n 2 above, 17.

[55] See E. Caruso, n 25 above, 259.