



UvA-DARE (Digital Academic Repository)

Platforms as Contract Partners: Uber and beyond

Domurath, I.

DOI

[10.1177/1023263X18806485](https://doi.org/10.1177/1023263X18806485)

Publication date

2018

Document Version

Final published version

Published in

Maastricht Journal of European and Comparative Law

License

CC BY-NC

[Link to publication](#)

Citation for published version (APA):

Domurath, I. (2018). Platforms as Contract Partners: *Uber* and beyond. *Maastricht Journal of European and Comparative Law*, 25(5), 565-581. <https://doi.org/10.1177/1023263X18806485>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Platforms as contract partners: *Uber* and beyond

Maastricht Journal of European and
Comparative Law
2018, Vol. 25(5) 565–581
© The Author(s) 2018



Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1023263X18806485
maastrichtjournal.sagepub.com

Irina Domurath*

Abstract

This article analyses the recent case law concerning *Uber* and other platforms. Its main objective is to examine the question of whether and under what conditions platforms can be considered the contract partners of the individuals who seek goods and services through the platform's infrastructure. In a first step, the criteria employed by the courts, both the Court of Justice of the European Union and national courts, are identified that characterise the role of platforms in relation to the underlying service provision. In a second step, the article looks at the approach to intermediaries in more traditional consumer contract law. A differentiated image emerges, which underlines the need for legislative clarification.

Keywords

Platform economy, *Uber*, consumer law, EU policy, CJEU

I. Introduction: the platform economy

There is hardly another topic that has prompted regulatory debate as much as the platform economy.¹ Mark Zuckerberg's appearances before the United States' Congress in April and the European Parliament in May 2018 mark the latest highlights in the focus of controversies concerning platforms. The discussions are complex, ranging from privacy policies in the case of Facebook to

1. Parts of this article have been published as I. Domurath, 'Probleme bei der Einordnung von Plattformen als Vertragspartner', in P. Rott (ed.), *Das Recht der Vermittlerplattformen* (Nomos, 2017). I wish to thank Peter Rott for helpful comments on previous drafts. All responsibility lies with the author.

*University of Amsterdam, the Netherlands

Corresponding author:

Irina Domurath, Department of Private Law, University of Amsterdam, Roeterseilandcampus, Building A, Nieuwe Achtergracht 166, 1018 WV Amsterdam, the Netherlands.

E-mail: irina.domurath@posteo.de

impacts on the social fabric of neighbourhoods through AirBnB enabling short-term accommodation with private people.

Uber is probably the most famous platform subject to several court cases. *Uber* is a company that offers peer-to-peer transportation services on demand. What started as a company that offered black luxury car rides developed into one of the most powerful platforms in the platform economy. By now, it offers UberPop or UberX for private rides on demand, UberTaxi for professional taxi drivers, UberBoat for water taxis over the Bosphorus in Istanbul, UberHelicopter for helicopter flights in Sao Paolo, UberEats for food deliveries from participating restaurants, and, most recently, also UberHealth for anonymous transportation from and to medical services.

In general, *Uber* works in the following way: Passengers can book a trip with a private driver by downloading the App, logging on and requesting a ride. From the pool of registered drivers, *Uber* then locates available drivers closest to the passenger and informs them of the request. The driver has 10 seconds to accept the trip before another driver is located. Drivers are discouraged from asking passengers for the destination before pick-up. After arrival at the destination, the passengers swipe the 'Complete Trip' button in the App and the fare is calculated by the *Uber* servers, based on the Global Positioning System data from the driver. If the passenger decides to cancel a trip more than 5 min after it has been accepted by the driver, a cancellation fee is payable, of which *Uber* again takes a percentage.

Uber does not consider itself to be the employer of its drivers or the provider of the transportation service itself. Problems are bound to arise, when there is a possible discrepancy between the terms supplied by *Uber* and how it sees itself on the one hand, and its appearance on the market on the other. Hence, the legal issues arose precisely because of a discrepancy between *Uber's* description of its services in its Terms and Conditions and complaints of taxi companies for unfair competition and complaints of *Uber* drivers concerning their de facto employee status. This article explores further the question to what extent *Uber* case law can be used to regard platforms also as the contractual partners of consumers.

In a first step, we will describe the European Union policy agenda and a proposal for a EU legal framework on the platform economy. Then we will examine the platform-specific case law, both in national and EU law and identify the parameters that are decisive in determining the status of the platform as a service provider or employer. We will then do the same with regard to cases regarding other intermediaries in the field of consumer law, clarifying the issues that arise and the decisive criteria for their solution. Last but not least, we will analyse to what extent the identified criteria can help to us to construct the contractual partnership between the platform and the demander of the goods and services in question. The ultimate aim is to identify the parameters that can be used for determining this contractual relationship as well as the ensuing problems.

2. Platform economy on the EU agenda

The rise of the platform economy has prompted considerable policy activity in the EU. The Digital Single Market Strategy and its mid-term review,² the Commission's Communication on Online Platforms,³ which is a proposal for a Regulation concerning business users of online intermediation

2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for All, COM(2017) 0228 final.

3. Ibid.

services,⁴ and investigations into the effects of Airbnb on the tourism accommodation sector,⁵ are just the tip of the iceberg of the lively policy and legislative activity of the EU in recent years. The main issues investigated by the Commission revolve around market access and the liability of platforms.

In 2016, the European Commission (Commission) published its ‘Agenda for the collaborative economy’ in 2016 (Commission Agenda).⁶ The non-binding Commission Agenda emphasizes new opportunities for consumers and entrepreneurs in the EU and aims at clarifying their rights and obligations in the platform economy. The key issues identified are market access of platforms, their liability for content displayed on their webpages, labour law and the problem of self-employment, and the taxation of the new platform business models.

Interesting for the purposes of this investigation is the approach of the Commission concerning the provision of the underlying service. According to the Commission, the degree of control exercised by the platform over the provision of the underlying service plays a pivotal role in the characterization of the platform as the provider of the service, in addition to being an information society service.⁷ Three criteria have to be cumulatively fulfilled in order to establish a high level of control: determination (not mere suggestion) of the price, determination of contract terms including the obligation of users to provide a service, and ownership of goods that are essential to the provision of the service.⁸ The Commission suggests that the fulfilment of these criteria is a strong indication about the significant influence exercised by the platform over the provider of the underlying service, which can in turn indicate that the platform could be considered as providing the underlying service. Additionally, the Commission suggests that – depending on the service in question – the assumption of risks for performance or an employment relationship with the main provider can indicate a high level of control and influence over the provision of the underlying service.

The Research Group on the Law of Digital Services has brought forward a Discussion draft of a Directive on Online Intermediary Platforms (Discussion draft).⁹ It is concerned with contracts concluded between a supplier and a customer with the help of an intermediary platform; see Article 1 para 1 Discussion draft. It raises the issues of payment with data, reputational feedback systems, liability, and the distinction between consumer and broader customer protection. As its scope extends to contracts concluded between a supplier and a customer with the help of an online intermediary platform, it presupposes that the platform is not the contract partner of the customer of the supplier. Article 18 Discussion draft suggests, however, that a platform could be held liable for defects of a good or service jointly with the third provider, if the customer could *reasonably* expect that the platform exercises decisive influence on the service provider. Indicators for the

4. Proposal for a regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.

5. European Commission, ‘Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 member states’, *European Commission* (2018), <https://publications.europa.eu/en/publication-detail/-/publication/ff1e669e-526f-11e8-be1d-01aa75ed71a1/language-en>.

6. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a European agenda for the collaborative economy, COM(2016) 356 final.

7. *Ibid.*, p. 6.

8. *Ibid.*

9. C. Busch and G. Dannemann et al., ‘Discussion Draft of a Directive on Online Intermediary Platforms’, 5 *Journal of European Consumer and Market Law* (2016), p. 164–169.

decisive influence are: the use of the platform's infrastructure for the contract conclusion; the right of the platform to retain payments; determination of contract terms and price; the standardized presentation of service providers; the platform being in the focus of marketing (not the service providers themselves); and, optionally, the promise of the platform provider to monitor the conduct of service providers on the platform. The Discussion draft thus combines two parameters for the liability of a platform for the non-performance of the supplier: decisive control of the platform and transparency from the viewpoint of the consumer.

So, both initiatives, the policy-oriented Commission Agenda and the academic Discussion draft, are concerned with the power exercised by the platforms. The difference lies in the conceptual approach: the Commission considers this power decisive for also assuming a contractual role with regard to the underlying service to be provided, whereas the Discussion draft considers this power within the context of (an exceptional) liability for the performance of the underlying service, which primarily, however, falls upon the main service provider.

3. 'Platform law'

In this section, we will examine some of the national and Court of Justice of the EU (CJEU) case law concerning online platforms. The cases concern the liability of platforms with regard to context displayed on their websites, the possible employment relationship between platforms and individuals offering goods and services through them, and specific competition law problems concerning national licensing requirements and their compatibility with EU market access rules.

A. Platforms' liability as intermediaries: neutrality

Some of the first platform cases in the European legal order questioned their obligations regarding the information transmitted through the platforms and the liability for own actions and the actions of third parties that use the platform for offering their goods and services. The cases often involved the infringement of intellectual property rights through offers on the platform. The contentious provisions in the respective cases are Articles 12 et subs. E-commerce Directive 2000/31¹⁰ concerning the liability of platforms.

Articles 12 et subs. Directive 2000/31 state that platforms are liable for own and foreign content depending on the degree of passivity and activity of the intermediary with regard to the transactions concluded on the platform. Article 12(1) Directive 2000/31 ensures that service providers cannot be held liable for the information transmitted through them, if it does not initiate the transmission, does not select the receiver of the transmission, and does not select or modify the information. Furthermore, Article 14(1) Directive 2000/31 provides that a service provider who stores information is not liable for that information if the provider does not have actual knowledge of illegal activity and the information is not apparent or if the provider acts to remove or disable the content in question promptly upon obtaining such knowledge.

10. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, [2000] OJ L 178/1. Concerning the overlap between the E-Commerce Directive and the Directive on Unfair Commercial Practices, see A. De Franceschi, 'Uber Spain and the "Identity Crisis" of Online Platforms', 7 *Journal of European Consumer and Market Law* (2018), p. 3.

In this context, the CJEU has ruled in a case concerning the platform Ebay that the provider of an online marketplace is not an intermediary service provider, who is subject to the relief from liability under Article 14(1) Directive 2000/31.¹¹ In that case, L'Oréal complained, inter alia, that eBay was liable for the use of its trademark in the unauthorized sale of L'Oréal products, where those marks are displayed on eBay's website and where sponsored links triggered by the use of keywords corresponding to the trademarks are displayed on the websites of search engine operators.¹² The CJEU confirmed that the liability exemption of Article 14 Directive 2000/31 only covers intermediaries who provide a service neutrally by a merely technical and automatic processing of the data provided by its customers; in contrast, an intermediary plays an 'active role' so that it has knowledge of, or control, over those data.¹³

These criteria were developed in *Google France and Google* concerning the display on the internet of advertising links on the basis of keywords corresponding to trademarks. Two companies that produce and market certain brand products complained that Google had infringed their trademarks by allowing advertisers to select keywords for their marketing of imitation products and competitor products, respectively. The CJEU stated that an exemption of liability depends on the neutrality of the role played by the service provider, in the sense that 'its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores'.¹⁴ If the role of the service provider is neutral in this way, the service provider cannot be held liable for data that it has stored at the request of an advertiser, unless it failed to act expeditiously upon obtaining knowledge of the unlawful nature of the data or the advertiser's activities.¹⁵

We can see that in this field the CJEU uses the parameter of neutrality to discern the liability of the platform for displayed content and the possible infringements of intellectual property rights. This understanding is surely the root of the Discussion draft's proposal on the liability of platforms for defective goods and services in its Article 18. The more the platform moves away from neutrality in its actions towards material control of the underlying contractual relationship, the more reasons can be adduced to impose liability on the platform.

B. Uber as employer

Whereas the solution of the liability cases could draw on a clear legal basis with assessment criteria in the E-Commerce Directive, the cases concerning *Uber* required a broader assessment of the situation. The first sensational *Uber*-case regarded its characterization as an employer. For example, in 2016, two *Uber*-drivers had brought claims before the Central London Employment Tribunal (Tribunal) under the Employment Rights 1996, mainly for failure of *Uber* to pay minimum wage and to provide leave.¹⁶

The contentious issues arose because of a discrepancy between the *Uber* Terms and conditions (*Uber* T & C) and the *Uber* Partner Terms and the actual control of the drivers. The *Uber* T&C state

11. Case C-324/09 *L'Oréal SA et al v. eBay International AG*, EU:C:2011:474.

12. *Ibid.*, para. 38.

13. *Ibid.*, para. 112–113.

14. Joined Cases C-236/08 to C-238/08 *Google France and Google v. Louis Vuitton et al*, EU:C:2008:389, para. 114.

15. *Ibid.*, para. 120.

16. (UK) *Mr Y Aslam, Mr J Farrar & Others v. Uber B.V., Uber London Ltd., Uber Britannia Ltd*, Employment Tribunal Case No. 2202550/2015, para. 7.

that the drivers are considered self-employed for tax purposes and must meet all expenses associated with licensing and running their vehicles.¹⁷ They are allowed to work for other undertakings, including competitors. In this vein, Para 2.2.1 of the Uber T&C stipulates that

Uber does not and does not intend to exercise any control over the driver – except as provided under the [Partner] Agreement and nothing in the [Partner] Agreement shall create an employment relationship between Uber and the Partner and/or Driver or either of them an agent of Uber (. . .)

At the same time, the Uber T & C make certain requirements with regard to identity of the drivers and the payment of the transportation fee. The Uber T&C stipulate that passengers must be 18 years old over and that drivers must be 18 years or older and in possession of a valid driver's licence. The fare calculated by *Uber* is technically only 'recommended', however, if the driver – despite discouragement – charges a lower fare, *Uber* remains entitled to its 'service Fee' calculated on the basis of the recommended amount. The passenger pays the fare to *Uber*, who generates an invoice for the driver addressed to the passenger. Moreover, on a weekly basis, *Uber* distributes to the drivers the fare earned, less a 'Service Fee' of currently 25%. Moreover, paragraph 2.6.2 of the Partner Terms states that in order to

continue to receive access to the Driver App and the Uber Services, each Driver must maintain an average rating by Users that exceeds the minimum average acceptable rating established by Uber for the Territory, as may be updated from time to time by Uber in its sole discretion. (. . .) In the event a Driver's average rating falls below the Minimum Average Rating, Uber will notify Customer and may provide the Driver in Uber's discretion, a limited period of time to raise his or her average rating (. . .) if such Driver does not increase his or her average rating above the Minimum Average Rating within the time period allowed (if any), Uber reserves the right to deactivate such Driver's access to the Driver App and the Uber Services. Additionally, Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of (sic) the Driver App.

The Tribunal ruled that *Uber*-drivers are to be treated as employees with the right to minimum wage and vacation.¹⁸ The two complainants had provided documents from the so-called Welcome Package that showed that *Uber* monitors driver ratings, comments, and feedback and pushes drivers to accepting trip requests.¹⁹ They also proved that drivers are not at liberty to exchange contact details with passengers, not only for privacy concerns of the passenger but also because of prohibited solicitation by the driver.²⁰ Moreover, the complainants could show that *Uber* sends documents to their drivers stating that drivers 'should accept at least 80% of trip requests' to retain their account status and that drivers are forcibly logged off the App by *Uber* for 10 min if they decline three trips in a row.²¹

17. Based on considerations in *ibid.*

18. *Ibid.*, para. 23.

19. *Ibid.*, para. 48.

20. *Ibid.*, para. 50.

21. *Ibid.*, para. 51–52.

The Tribunal ruled that the drivers are working for *Uber* when the App is switched on for several reasons. First of all, the tribunal was struck by the ‘remarkable lengths’ to which *Uber* has gone in its analysis of the legal relation between the drivers and passengers. The judges also considered impossible to deny that *Uber* is running a transportation service: all marketing is done on behalf of the company; all products are *Uber*’s; drivers are offered and accept rides strictly on *Uber*’s terms, without knowing the identity of the passenger or the desired destination.²² ‘The notion that *Uber* in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous’.²³ The tribunal considered the contract between driver and passenger to be ‘pure fiction’.²⁴ As a consequence, *Uber* runs a transportation business, for which ‘drivers provide skilled labour through which the organisation delivers its services and earns its profits’.²⁵

The criteria that can be derived from this case are the considerable or determining control of the drivers’ work and their relationships to their passengers. Drivers need to accept rides at a quota of at least 80%; they are prohibited from soliciting rides themselves; and need to keep their ratings high. With regard to the contractual implications in regard to the passenger, it would be logical to assume that, if the *Uber* drivers are considered employees, the underlying transportation agreement is concluded between the passenger and *Uber* itself.

C. *Uber as a transport service provider*

Uber has also been party to court cases concerning market access, competition and national licensing requirements. The problem here is that regulators can impose licensing requirements on traditional taxi service companies, which are usually attached to the fulfilment of certain criteria with regard to the qualifications of drivers. In contrast, *Uber* drivers, not being traditional taxi drivers, transports passengers without such license and without having to demonstrate a certain education or expertise. Again, the issue in the judicial proceedings was a possible discrepancy between the self-conception of *Uber* and its actions on the market. The *Uber* Rider Terms make clear this self-conception of the company, as paragraph 2 of Part 2 of the Rider terms state that *Uber*

does not provide transportation, logistics, delivery or vendors services or function as a transportation provider or carrier and that all such transportation, logistics, delivery and vendors services are provided by independent third party contractors who are not employed by *Uber* or any of its affiliates.

Similarly, paragraph 2.1.1 of the Partner Terms declares that

Uber does not provide any transportation services and that *Uber* is not a transportation or passenger carrier. *Uber* offers information and a tool to connect Customers seeking Driving Services to Drivers who can provide the Driving Service (...). By providing the Driving Service to the Customer, the Partner accepts, agrees and acknowledges that a direct legal relationship is created and assumed solely between the Partner and the Customer (...)

22. *Ibid.*, para. 87–91.

23. *Ibid.*, para. 90.

24. *Ibid.*, para. 91.

25. *Ibid.*, para. 92.

1. National competition law: degree of control

Several national taxi companies have contested this own description of *Uber* as a sole provider of a connecting platform and have successfully sought the prohibition of *Uber* transportation services due to violations of respective licensing requirement and the resulting unfair competition. For example, Taxi Radio Brussels argued that *Uber* drivers do not have the license necessary for the transportation of customers, while *Uber* claimed to act as a mere intermediary and not a competitor of Taxi Radio Brussels, and, therefore, did not need a license. The Commercial Court questioned the compatibility with the rights and freedoms guaranteed in Articles 15, 16 and 17 of the EU Charter of Fundamental Rights if the Brussels taxi regulation was interpreted so as to demand a license of drivers acting for non-professional purposes.²⁶ The CJEU did not accept the reference.²⁷

Similar cases have been dealt with the courts in Germany. The Higher Administrative Court of Hamburg (OVG Hamburg) has prohibited the service *UberPop*.²⁸ It stated that *Uber* was the provider of transportation services in terms of § 2, para 1, sentence 2 of the Passenger Transportation Act. The OVG Hamburg pointed at the considerable degree of control that *Uber* exercised over the transportation fees, invoicing, and other conditions of services such as the age of drivers or the discouragement of tips. Moreover, the court referred to direct payment of the transportation fee directly to *Uber* and the payments of *Uber* to drivers. As a consequence, *Uber* was not considered a mere facilitating intermediary. For similar reasons, the Higher Regional Court Frankfurt (OLG Frankfurt) also prohibited *UberPop*.²⁹ It recognized that it was anti-competitive behaviour on behalf of *Uber* to enable transportation services of drivers who did not have the respective license under the Passenger Transportation Act. Furthermore, the Court of Appeal Berlin prohibited the service *UberBlack* because *Uber* had incentivized drivers to stay around the location of bigger events, which in the eyes of the Berlin judges constituted an anti-competitive violation of § 49(4) Passenger Transportation Act, according to which transportation requests have to first arrive at the company domicile before being forwarded to the drivers instead of arriving at the company and the driver simultaneously.³⁰

The Berlin case was referred to the CJEU by the German Supreme Court, asking whether the *Uber* service was a transportation service for which competence lies with the Member States to regulate the activity as they deem fit or whether it falls under the freedom to provide services, in this case as regulated under the E-Commerce Directive 2000/31. In light of the CJEU's judgment in C-434/15 from 20 December 2017, the referral was withdrawn.³¹

2. CJEU case law on information society services: inseparable service

Uber cases have reached the CJEU because of their internal market dimension, as national licensing requirements can be considered a restriction of the free movement provisions – especially the

26. Case C-526/15 *Uber Belgien BV- BA v. Taxi Radio Bruxellois NV*, EU:C:2016:830, para. 15; see also: E. Terryn, 'The Sharing Economy in Belgium – a Case for Regulation?', 5 *Journal of European Consumer and Market Law* (2016), p. 45–51.

27. The preliminary reference to the CJEU was dismissed as 'hypothetical' and inadmissible: Case C-526/15 *Uber Belgien BV-BA v. Taxi Radio Bruxellois NV*.

28. (DE) OVG Hamburg, judgment of 24 September 2014, *NVwZ* 2014, 1528.

29. (DE) OLG Frankfurt, judgment of 9 June 2016, 6 U 73/15.

30. (DE) Landgericht Berlin, judgment of 9 February 2015, 101 O 125/14; KG, 11.12.2015, 5 U 31/15.

31. (DE) German Supreme Court, Order of 29 March 2018, 1 ZR 3/16.

freedom of services protected by Article 56 Treaty on the Functioning of the EU (TFEU), unless they are exempted by Article 58 TFEU. This possible exception was the point at issue in two recent cases from Spain and France.

In the preliminary reference from Spain,³² the *Juzgado Mercantil n° 3 de Barcelona* essentially asked the CJEU whether the *Uber* service through its app falls under the freedom to provide services under Article 56 TFEU, Article 2 (a) and (h) E-Commerce Directive with reference to Article 1 Nr. 2 Directive 98/34/EC³³ or a transportation service exempt from the freedom to provide services under Article 58 TFEU and Article 2(2)(d) Directive 2006/123. Reason for the referral was a complaint by the Professional Taxi Association Barcelona because of unfair competition. The CJEU stated that *Uber* was not a mere intermediary service provider but the provider of inner-city transport services.³⁴ It considered that *Uber* not only exercised decisive control over the conditions of transportation and price limits, but also was the receiver of payments. As a consequence of this business model, the intermediation service forms an integral part of a complete package, of which the transportation of a customer is the main service.³⁵ Here, the CJEU closely followed the argumentation of Advocate General (AG) Szpunar, who argued that *Uber* provides a mixed service; the connection of potential drivers and passengers is dependent on the performance of the transportation service, and vice versa.³⁶

The CJEU followed a similar reasoning, again with reference to AG Szpunar's opinion, in the *Uber France* case on criminal proceedings against *Uber*.³⁷ In the underlying case, *Uber* was disputing the application of a provision in French criminal law, which prohibits the connection of customers who wish for a transportation service with persons who do not have the required license for such services. *Uber* argued that the provision was not enforceable because it constituted a 'technical regulation' of services in terms of Art 1 para 5 of Directive 98/34/EC, which should have been notified to the European Commission according to Article 8 para 1 Directive 98/34/EC. AG Szpunar did not follow this argumentation. He referred to his opinion in the *Uber Spain* case that the *Uber* services are not services that fall under the definition of information society service of Article 1 para 1 lit b of what is now Directive 2015/1535.³⁸ He sees a clear difference between 'classical' booking platforms for flights or hotels: hotel and flight operators function in accordance with sector-specific rules and completely independently of any intermediary platform; platforms

32. Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain, S.L (Uber Spain)*, EU:C:2017:981.

33. Directive of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, [1998] OJ L 204/37, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 217/18. Directive 98/34 was repealed on 7 October 2015 in accordance with Article 11 of Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, [2015] OJ L 241/1. It applies *ratione temporis* to the facts in the proceedings Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain, S.L (Uber Spain)*.

34. Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain SL (Uber Spain)*, para. 38.

35. *Ibid.*, para. 39–40.

36. Opinion of Advocate General Szpunar in Case C-434/15 *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*, EU:C:2017:364, para. 63.

37. Case C-320/16 *Criminal Proceedings against Uber France SAS*, EU:C:2018:221.

38. Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services, [2015] OJ L 241/1.

are just one way of marketing and do not determine the conditions under which the services are provided. Furthermore, he argues that other platforms offer a 'real choice' between several service providers with different offers and conditions, whereas *Uber* determines the conditions and offers itself.³⁹ AG Szpunar also explained that French criminal law only referred to prohibited services and, as a consequence, only incidentally concerned the activities of an intermediary. The CJEU followed this reasoning and referred to its assessment of *Uber*'s services as transportation services in the *Uber Spain* case.⁴⁰ In the end, this means that the contested provision of French criminal law cannot be classified as a rule on information society services and, thus, is not subject to the notification requirement.⁴¹ The rule in French criminal law prohibiting unlicensed transportation services must, hence, be applicable.

D. Interim conclusions

We can see that the courts are unequivocal in their assessment of the *Uber* services as being directly involved in the provision of the underlying services. In both labour law and administrative law, the courts based their arguments on the decisive control that *Uber* exercises over the drivers and the conditions for their participation in the platform, the cars and payment methods. As a result, *Uber* is considered the employer of its drivers and the addressee of administrative licensing requirements. This reasoning in national case law is well in line with EU law. The CJEU has ruled that *Uber* services are not services in the information society under now Directive 2015/1535, but transportation services that fall outside of the scope of the freedom of services according to Article 58(1) TFEU. As a consequence, *Uber* is subject to the requirements Member States impose on service providers in order to regulate their transportation sectors (i.e. licensing requirements).

In its *Uber* judgments, the CJEU did not follow strictly the criteria proposed by the Commission. For example, it did not consider the ownership of key assets (such as the car of the *Uber* driver) as essential for the characterization as *Uber* services as a significant influence over the transportation service. The focus of the working activity of *Uber* in order to establish influence can be welcomed.⁴² This reasoning would be in line with Article 18 Discussion draft, which is based on the rationales of liability rules under the E-Commerce Directive: the more active platforms are, with regard to the content on their websites and the provision of the service respectively, the more they can be held liable for this content and the provision of the service respectively.

4. Intermediaries in EU consumer law

A different approach to intermediaries and their role in the provision of goods and services can be found in consumer law.

A. Platforms and consumer law

Consumer law follows a conceptually different approach. In consumer law, the cases concerning the role of intermediaries mainly concern the interpretation of the term 'trader' or 'professional'

39. Opinion of Advocate General Szpunar in Case C-320/16 *Uber France SAS*, EU: C:2017:511, para. 59–60.

40. Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain, S.L.*, para. 21–22.

41. *Ibid.*, para. 26.

42. Thus, A. De Franceschi, 7 *Journal of European Consumer and Market Law* (2018), p. 3.

within the various directives. Assuming that we are dealing with two contractual partners, the definition of ‘trader’ is rooted in the distinction between consumers and professionals. The use of intermediaries can unsettle this distinction.

This is exemplified by Article 2(2) of the Consumer Rights Directive 2011/83/EU (CRD), which defines a trader as a

natural or legal person, (...) who is acting, including through any other person acting in his [or her] name or on his [or her] behalf, for purposes relating to his [or her] trade, business, craft or profession in relation to contracts covered by the Directive.

On the one hand, this suggests that, in triangular relationships, the only contract governed by the CRD is the supply contract, not the relationship between the ‘intermediary’ and the consumer. On the other hand, the information requirements in Article 6 CRD mention the obligation of the trader to inform the consumer about, inter alia, ‘the identity of the trader on whose behalf he [or she] is acting’. So, there is the concept of another trader included in the CRD. It has been argued these provisions are not clear with regard to the possible characterization of an intermediary as a ‘trader’ within the scope of the CRD and that the inclusion of online intermediary platforms in the concept of trader would run counter to the wording of the CRD.⁴³

Furthermore, the platform economy is problematic for consumer law, because problems concerning the characterization of providers of goods or services become amplified due to the anonymity traders enjoy on platforms.⁴⁴ Reputational feedback systems that are habitually employed by platforms to create trust amongst its anonymous users do not indicate whether a user is offering goods and services in the capacity of a professional or as a consumer. In order to avoid this problem, Danish law, for example, attaches considerable legal consequences to the involvement of intermediaries. A contract between a seller and a buyer is considered a consumer contract with a professional when the contract is concluded with the assistance of an active third intermediary party.⁴⁵ The underlying reason is that the platform is a for-profit business that engages actively in the provision of the service, including payment collection or drawing up the underlying contracts. This means that a transportation contract between an *Uber* driver and a passenger is automatically regarded as a B2C-contract. Even though this approach certainly aims at a high level of consumer protection, it is disputed.⁴⁶

These problems would be circumvented if it was possible to regard the platform as the primary contract party and not as a pure intermediary. Then, the platform would qualify as a ‘professional’ and would be the addressee of all consumer complaints. In fact, consumer law could already offer criteria for intermediaries to be regarded as primary contract parties. Instructive is a look into the law on consumer sales and travel packages.

43. See discussion in C. Wendehorst, ‘Platform Intermediary Services and Duties Under the E-Commerce Directive and the Consumer Rights Directive Platform Intermediary Services and Duties Under the E-Commerce Directive and the Consumer Rights Directive’, 5 *Journal of European Consumer and Market Law* (2016), p. 32–33.

44. See E. Terry, 5 *Journal of European Consumer and Market Law* (2016), p. 48 et seq.

45. M.J. Sørensen, 5 *Journal of European Consumer and Market Law* (2016), p. 17.

46. For example by C. Cauffman, ‘The Commission’s European Agenda for the Collaborative Economy - (Too) Platform and Service Provider Friendly?’, 5 *Journal of European Consumer and Market Law* (2016), p. 243.

B. Sales intermediaries

The Consumer Sales Directive 1999/44 (CSD) (Directive)⁴⁷ distinguishes between consumers, professionals, and traders, without referring to a trader on whose behalf someone is acting, see Article 1 CSD. This allows for a characterization of the platform as ‘trader’.

The latest prominent case concerning triangular relationship was a Belgian case concerning a dispute between Ms Wathelet and the Bietheres garage.⁴⁸ In 2012, Wathelet had acquired a second-hand vehicle from Bietheres for 4000 EUR. There was no written purchase agreement or proof of payment. When the engine of the vehicle failed three months later, Wathelet took the vehicle to Bietheres for repair. Bietheres issued an invoice over 2000 EUR for the repair works. Wathelet refused to pay, claiming that the costs should be borne by Bietheres as the seller of the vehicle. Now, for the first time, Bietheres informed Wathelet that it had sold the car on behalf of a third private party and that it acted only as an intermediary without any obligations for the repair of the vehicle. Later that year, Bietheres sued Wathelet for payment of the repair invoice plus statutory interest.⁴⁹ The second instance court referred the case to the CJEU, asking whether the term ‘seller’ within the meaning of the CSD must be interpreted as also covering intermediaries for a third non-trader party and whether a possible remuneration or disclosure of roles should be considered for the interpretation.

The CJEU noted that, even though the term ‘seller’ does not cover ‘intermediaries’ as such, the wording of Article 1 (2) lit c) of Directive 1999/44 does not exclude that a trader who acts on behalf of a third party could nevertheless be considered ‘seller’ under the Directive.⁵⁰ What matters is that the consumer be informed about the identity of the seller in order to be able to enforce rights under the Directive against the correct person; this is required by the objective of a high level of consumer protection and consumer confidence.⁵¹ Thus, a teleological interpretation supports a meaning of ‘seller’ that encompasses traders who act on behalf of a third party, if they present themselves as the seller from the point of view of the consumer. Otherwise, a significant imbalance concerning information about the identity of the seller persists. This means that intermediaries can be treated as sellers under Article 1 (2) lit c) of Directive 1999/44, if – as is the case in *Wathelet* – they create the likelihood of confusion in the mind of the consumer to the effect that the latter believes the former to be the owner of the good in question.⁵² Consequently, it does not matter whether the intermediary receives remuneration or not.⁵³

By taking the consumer perspective into account, the CJEU in *Wathelet* builds on its case law in the field of consumer law, which is largely based on the transparency of transactions as the main tool of consumer protection. Information asymmetries are to be remedied through pre-contractual information. This approach is to enable consumers to enforce their rights and, incidentally, make EU law effective. In this way, the judgment closes a protective gap that emerged in cases in which

47. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12.

48. Case C-149/15 *Sabrina Wathelet v. Garage Bietheres & Fils SPRL*, EU:C:2016:840, para. 10-23.

49. During the proceedings, Wathelet brought a counter-claim seeking rescission of the sale and re-imburement of the purchase price. The tribunal of first instance ordered Wathelet to pay the repair invoice and dismissed her counter-claim.

50. Case C-149/15 *Sabrina Wathelet v. Garage Bietheres & Fils SPRL*, para. 34.

51. *Ibid.*, para. 36–37, 42.

52. *Ibid.*, para. 41.

53. *Ibid.*, para. 45.

the consumer was under the false assumption that the trader with whom he or she interacts is also the seller of the good in question. Thus, *Wathelet* introduces the parameter of transparency, according to which the trader is the ‘seller’ under Directive 1999/44, if the trader has not made clear to the consumer his or her mere intermediary role.

The implications of this transparency requirement for the platform economy cannot be understated. It could imply that platforms such as *Uber* can be considered the contract partner of the passenger, if the customer could reasonably assume it to be. The rationale of consumer protection in this field is, as *Wathelet* demonstrates, to diminish confusion of the consumer created by or attributed to the seller. In the platform economy, the danger of confusion of the consumer is similar. Especially platforms that are very engaged in the transactions concluded on their platforms can play a prominent role in the perception of the consumer about the nature of transaction and the ensuing rights and obligations. In such view, it would not matter if platforms such as *Uber* received some kind of remuneration or if they were the owners of key assets or if they exercise some control over the underlying transaction.

That being said, we have to be aware that there are differences within the field of consumer law as well. We have seen that a literal interpretation of the wording of Article 6 CRD seems to exclude the possibility of platforms becoming the contract partners of consumers, whereas in the field of the CSD, where a provision similar to Article 6 CRD is missing, the CJEU could include intermediaries into the definition of ‘trader’ and, as a consequence, make the intermediary the contract partner of the consumer.

C. Travel intermediaries: organization

Also in the travel sector, Member States have started to investigate the activities of platforms, such as Booking.com or Expedia. These investigations have, however, usually concerned anti-competitive behaviour not in form of licencing requirements and market access of the platform but in the form of market entry barriers for other platforms posed by ‘best price’ clauses of platforms with a high market share.⁵⁴ Regardless of these issues, the problem of the role of intermediaries in the provision of the underlying services also forms part of travel law in the EU.

For example, the problem of intermediaries is addressed in the law on package travels in the EU. The new Package Travel Directive⁵⁵ attempts to address the problems consumers face when booking a package travel through the Internet. The CJEU has long held that package travels are also those that are organized by a travel agency at the request of and according to the specifications of a consumer or a defined group of consumers and put together at the time when the contract is concluded between the travel agency and the consumer.⁵⁶ The open question remained, however, who can be regarded as the ‘organizer’ of a travel within the Article 3 (8) Travel Package Directive. According to this provision, an ‘organizer’ is a ‘trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader, or the

54. For a discussion, see: M. Colangelo and V. Zeno-Zencovich, ‘Online Platforms, Competition Rules and Consumer Protection in Travel Industry’, 5 *Journal of European Consumer and Market Law* (2016), p. 75–86.

55. Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No. 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, [2015] OJ L 326/1.

56. Case C-400/00 *Viagens e Turismo SA v. Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viagens Ld^a*, EU:C:2002:272, para. 16, 20.

trader who transmits the traveller's data to another trader'. Article 3 (2) lit b) Travel Package Directive makes clear that this also covers separate contracts if they are purchased and chosen by the consumer from a single point of sale, offered at an inclusive or total price, or advertised or sold under the term 'package' or under a similar term.

These parameters also show a concern for the degree of involvement of the intermediary in the underlying agreement concerning goods or services and the way the purchasing consumer could understand this involvement. The defining criterion for the offering of a travel package contract is the combination of single parts of the travel in a way that implies sufficient involvement of the offering party.

The question is whether these rules, irrespective of the controversy surrounding them,⁵⁷ could help to find answers to the characterization of platforms as contract partners more generally. Some call for scepticism, because of the different reasons for regulation. When focussing on the market power of platforms in order to justify a regulatory approach hingeing on the control of the platform of the underlying transaction (although in the field of travel intermediaries, such market power does not usually exist),⁵⁸ a parallel is less likely. In his opinion in the *Uber France* case,⁵⁹ AG Szpunar specifically emphasized that platforms such as *Uber* are different from 'classical' booking platforms for travels in that flight and hotel operators function independently of any platform, which are just one way of marketing for them.

However, if we consider the rationale to be the understanding of the involvement of the platform in the underlying agreement from the viewpoint of the consumer, then there is more room to assume a direct contractual obligation of a platform.⁶⁰ The determining requirement would be the consumer's reasonable understanding of the platform's activity. In this sense, the Travel Package Directive could be a model for regulating platforms more generally.⁶¹

5. Constructing contract partnership of platforms

When looking at the criteria we have found in platform-specific cases and in consumer cases, a differentiated image emerges.

With regard to the *Uber* case law, we have seen that the parameters used by the European courts to identify *Uber* as the employer or the transportation service provider are mainly those of the activity and control of the platform with regard to the provision of the underlying service. On the one hand, the precise character of *Uber* with respect to the relationship with the passenger is not yet clear, as the cases have not yet involved this particular question. On the one hand, the arguments for preserving or creating unity in the legislative framework would imply that if *Uber* is the addressee of licensing requirements for transportation service providers in the same way as

57. Tonner points at the incompleteness of the directive, whereas others have assessed positively the approach of the Directive in contrast to other travel regulations, see K. Tonner, 'Does the New Package Travel Directive Respond to the Challenges of the IT World?', 5 *Journal of European Consumer and Market Law* (2016), p. 117–118; A. de Vries, 'Travel Intermediaries and Responsibility for Compliance with EU Travel Law: A Scattered Legal Picture', 5 *Journal of European Consumer and Market Law* (2016), p. 119–125.

58. K. Tonner, 'Der Vertrieb von Reiseleistungen über Online-Reiseportale', in P. Rott and K. Tonner (eds.), *Online-Vermittlungsplattformen in der Rechtspraxis* (Nomos, 2017), p. 129.

59. Opinion of Advocate General Szpunar in Case C 320/16 *Uber France SAS*.

60. C. Busch et al., 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?', 5 *Journal of European Consumer and Market Law* (2016), p. 8.

61. Also A. de Vries, 5 *Journal of European Consumer and Market Law* (2016), p. 125.

taxi companies and obliged to comply with labour law standards in the same way as ‘ordinary’ employees, it must also be considered to be the primary contract partner of the passengers. Indeed, this is why the Commission Agenda mentions the existence of an employment relationship as a possible factor for the platform’s characterization as the provider of the underlying service.

Similarly, it would hardly be explicable if *Uber* was a transportation service in administrative law and subject to licensing requirements as the provider of the transportation service, but not the contract partner of the passenger. Characterizing platforms as contracts partners along these lines, would be in accordance with the parameters developed with regard to the liability for platforms in the E-commerce Directive and similar to the parameters to characterize the ‘organizer’ of a package travel service (notwithstanding the problems involved in drawing parallels with that field of law). Criteria would be, again, the decisive control exercised over the drivers and the transportation relationship. It would then have to be decided on a case-by-case analysis whether the platform is more active or more neutral in terms of the content and quality of the services provided through its website. In this vein, it has already been elicited whether other platforms such as *AirBnB* could also be subject to certain obligations as far as it is involved in the rental agreement between host and guest.⁶²

Constructing contract partnership of platforms based on the solution in EU consumer sales law would be different. The CJEU approach in *Wathelet* was to rule in favour of consumers in cases in which they assume or can reasonably assume that a platform is more than a mere intermediary service provider but actually their contractual partner. This transparency approach, rooted in the way in which consumers understand or could understand the behaviour of the intermediary, is definitely protective and puts more responsibility on the platform to make clear its relationship to the consumer. The advantage of such an approach would be its simplicity. We would not need to engage in weighing the different parameters in each and every individual case, but rather focus on the consumer perspective with a view to ensuring a high level of consumer protection in the EU. Relying not only on the presentation of the platform but also the reasonable perception of the platform activity from the viewpoint of the consumer would make it harder for platforms to exculpate themselves through mere blanket statements, such as the one in the *Uber* T&C claiming that the platform is supposedly a mere intermediary and not involved in the provision of the underlying service.

Thus, we can conclude that there is substantial confusion about the legal position of the platform operators in different fields of law. The assessment of contractual partnership based on the transparency principle in consumer law is different from the approach taken in the labour and competition law cases concerning *Uber*. A formal principle of transparency is certainly a different regulatory approach than the more material assessment of the degree of control exercised by the platform. This problem is not solved by the non-binding criteria in the Commission Agenda. The application of those criteria seems to be weakened by the CJEU not following them strictly, cumulatively, and ignoring the aspect of ownership of assets used for the provision of the service. Here, it must be borne in mind that the Commission Agenda is, in line with EU law in general, concerned with market access and the abolishment of barriers for the internal market rather than

62. V. Mak, ‘Private Law Perspectives on Platform Services Airbnb: Home Rentals between AYOR and NIMBY’, 5 *Journal of European Consumer and Market Law* (2016), p. 19–25.

establishing the contractual character of the interacting parties.⁶³ Therefore, clarification by the EU legislator has been called for.⁶⁴

Other criteria to establish contract partnership of platforms should be discussed as well. For example, ‘assumption of risk for performance’ is included in the Commission Agenda as an indication for substantial control of the platform, which could indicate a substantive interest in the performance of the underlying service. Such an interest of platforms is evident, when we consider the importance of customer ratings and feedback for the functioning of the platform. It is not for nothing that *Uber* asserts, in its terms and conditions, that it reserves the right to deactivate the access of an *Uber* driver in the case that said driver does not maintain an average rating that exceeds the minimum average acceptable rating established by the *Uber* for the respective territory.

If contract partnership of the platforms is not constructed along the lines of the platform-specific case law or the cases on intermediaries in more traditional consumer sales, the only possibility to make platforms as intermediaries liable somehow for the performance would then be according to Article 18 Discussion draft, which is based on the considerations on liability in the E-Commerce Directive. This might be, on the one hand, less controversial, as it is already known in the legal order. On the other hand, it could lead to more confusion on behalf of the consumer, who might not know the relevant addressee of claims in specific cases.

6. Conclusions

This article has sought to ask the question whether platforms such as *Uber* or *AirBnB* can be regarded as the contract partner of the consumer of the underlying goods and services. We have seen that different approaches are possible.

The platform-specific case law on platforms and intermediaries could provide useful guidance based on considerations of unity of the legal system: since platforms can be considered employees of the persons rendering the underlying service and the addressee of licensing requirements with regard to fair competition with other service providers, it would be only logical to extend this reasoning to the field of contract law. Thus, the determining criterion would be the decisive influence or control exercised by the platform on the rendering of the underlying service. However, this approach would need further clarification with regard to the precise parameters used to determine whether the platform exercises such decisive influence. The criteria in the Commission Agenda are, on the one hand, narrower than the case law, because they have to cumulatively satisfied, but also broader on the other, as the Commission also allows for parameters such as the distribution of economic risk to be considered.

The answers in the field of consumer law are different. Here, the pivotal perspective is that of the consumer and the consumer’s reasonable understanding of the platform’s activity. The advantage of this approach would be to avoid confusion for the consumer. Nevertheless, this approach would also need clarification, because consumer law seems to allow for different interpretations depending on the legal basis, as we have seen with regard to the CRD and CSD. Furthermore, the Travel Package Directive seems to follow a similar approach as in the platform-specific case law,

63. For a critique see C. Cauffman, 5 *Journal of European Consumer and Market Law* (2016), p. 243 et seq.

64. C. Wendehorst, 5 *Journal of European Consumer and Market Law* (2016).

because it relies on the involvement of the travel intermediary in the compilation of the travel package.

What we can clearly deduce from this differentiated picture is that the description of the platform itself through its terms and conditions, and the way it characterizes its market behaviour, do not play a role. In this sense, the possibilities of platforms to determine their own appearance on the market merely through their terms and conditions have become more limited. A realist perception of the disruptive effects that platforms have on the market relations of economies surely have contributed to this development.