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Uber law and awareness by design. An empirical study on online platforms and dehumanised negotiations

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Cet article met en lumière les principaux aspects de droit de la consommation de l'économie de partage à travers une analyse empirique des plates-formes en ligne. Compte tenu de la consultation européenne récente dans le but de comprendre (si, ou, plus probablement) la façon de réglementer les plates-formes, il est essentiel que les considérations de droit de la consommation fassent partie des futurs règlements. Par exemple, il est difficilement acceptable que le consommateur agisse dans la conviction que le cocontractant (donc la partie potentiellement responsable) est la plate-forme, alors qu'en réalité, celle-ci décline toute responsabilité et prétend être un simple intermédiaire. Après une analyse critique de la proposition législative italienne sur les plates-formes et de l'économie collaborative, les articles illustrent le cas d'utilisation de Uber, la plate-forme de covoiturage à 60 milliards de dollars, qui agit à la marge des lois en vigueur, ce qui donne lieu à des protestations et des débats autour du monde. Après une évaluation de la décision italienne empêchant Uber de fournir le service de UberPop en Italie, l'examen de ce régime est l'outil idéal pour exposer que le principal motif de préoccupation des consommateurs concerne la connaissance de leurs droits et obligations. Cet article traite de deux facteurs qui sont à la base de cette difficulté : la multitude des contrats et le labyrinthe des entreprises. Dans les conclusions, il sera présenté une proposition pratique ambitieuse, mais réalisable. Il sera suggéré de développer une application mobile qui aide les consommateurs à

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évaluer la qualité juridique des contrats qu'ils souscrivent dans le but d'accéder aux services offerts par la plate-forme. Dans le même temps, cette application, appelée « conscience by Design », devrait contribuer à sensibiliser les consommateurs, créant ainsi une masse critique et à faire comprendre aux plates-formes que la confiance, la transparence et la responsabilité sont des avantages concurrentiels.

This article sheds light on the main consumer law aspects of the sharing economy through an empirical analysis of online platforms. Given the recent European consultation with the purpose of understanding (whether, or, more likely) how to regulate platforms, it is critical that consumer law considerations will be part of future regulations. For instance, it is hardly acceptable that the consumer acts in the belief that the contractual party (thus the potentially liable party) is the platform, but in reality the former disclaims any responsibility and claims to be a mere intermediary, which only seldom actually is. After a critical analysis of the Italian legislative proposal on platforms and collaborative economy, the article moves on to illustrate the use case of Uber, the \$60 billion ride-hailing platform, which is acting at the margin of existing laws, thus giving rise to protests and debate around the world. After an assessment of the Italian ruling preventing Uber to provide the UberPop service in Italy, the use case is the perfect tool to show the main reasons for concern of consumers is the lack of awareness of their rights and obligations. This article deals with two factors of the said lack: the contractual quagmire and the corporate labyrinth. In the conclusions, it is presented an ambitious, albeit feasible, practical proposal. It is suggested the development of a mobile app that helps the consumers to assess the legal quality of the contracts they are entering in order to access the services offered through the platform. At the same time, this app, called 'Awareness by Design', should contribute to raise awareness in consumers, thus creating critical mass and making platforms understand that trust, transparency, and accountability are competitive advantages.

Introduction

In contemporary consumer law, few topics are as pressing as net neutrality, intermediaries' liability, the Internet of Things (IoT), and the sharing economy. They are different, albeit equally intricate, phenomena, which have in common the prominent role of online platforms. Therefore, through this empirical qualitative study on the latter, I aspire to shed light also on the former.

Europe has a growing interest for the regulation of platforms to secure trust. For instance, the European Commission has launched a comprehensive assessment of the role of platforms in the Digital Single Market Strategy.¹ With a consultation closed

¹ European Commission, com. "A Digital Single Market Strategy for Europe" COM(2015) 192 final. Adopted on 6 May 2015, the strategy includes three pillars and sixteen initiatives that ought to be delivered by the end of 2016.

in January 2016,² the Commission has inquired the civil society, businesses, and public bodies to whether and how online platforms ought to be regulated. The focus of the regulation is consumer protection. Indeed, the consultation covers transparency, terms of use, ratings and reviews, the use of information by platforms, the relation between platforms and their suppliers, and the controversial role of online intermediaries. Member States are as active as the Union.³ For example, the United Kingdom and Italy have been collecting evidence to understand if online platforms should be more transparent⁴ and they have recently published the relevant reports.⁵ France, on the other hand, is about to require them *inter alia* to provide loyal, clear, transparent information about the terms of service (ToS).⁶ At any rate, national

² European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015, <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud>. All the URLs of this paper have been accessed on 24 April 2016. The consultation was subject to many criticisms, such as EDRI and Access. Key points for a successful consultation on internet platforms. Letter to the European Commission, 4 September 2015, https://edri.org/files/platforms_consultation20150904.pdf. Cf. S. McLEAN and M. SAMAVI, “EC’s consultation on online platforms proves controversial”, *E-Commerce Law & Policy* 2015, 17(12), 6-8.

³ In this respect, a useful document which has been recently leaked is a joint letter from Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Luxembourg, Poland, Slovenia, Sweden and United Kingdom to the Minister of Economic Affairs of The Netherlands in preparation of the Transport, Telecommunications and Energy and Competitiveness Council meetings 26 May 2016. The full text is available at <https://regmedia.co.uk/2016/05/23/dsm-joint-letter.pdf>. The fourteen Member States stress that “[a]lternatives to regulation should be investigated rather than adding new burdensome regulation of businesses. Any regulatory proposals would have to be considered carefully”. It would seem that this view is shared by the European Commission.

⁴ House of Lords EU Internal Market Sub-Committee, 17 September 2015, www.parliament.uk/business/committees/committees-a-z/lords-select/eu-internal-market-subcommittee/news-parliament-2015/online-platforms-inquiry-launch, and Autorità per le Garanzie nelle Comunicazioni, 11 November 2015, www.agcom.it/documents/10179/2185185/Delibera+357-15-CONS/9de98850-5624-404d-ba47-2c8ca6533556?version=1.0.

⁵ See House of Lords Select Committee on European Union, 10th Report of Session 2015-2016, Online Platforms and the Digital Single Market, April 2016, available at www.publications.parliament.uk/pa/ld201516/ldselect/ldseucom/129/129.pdf, and Autorità per le Garanzie nelle Comunicazioni, Allegato A alla delibera n. 165/16/CONS I Consumer Communications Services, May 2016, available at www.agcom.it/documents/10179/5054337/Allegato+29-6-2016/9d7168c6-6205-47e7-a2d9-23ccdc1df59?version=1.0. However, the latter is just the first of a forthcoming number of reports; it is limited to the messaging mobiles apps.

⁶ See article 22 of the draft statute on a digital Republic on the “Loyalty of platforms” which amends article L. 111-5-1 of the *Code de la consommation* (www.assemblee-nationale.fr/14/projets/pl3318.asp). The *projet de loi pour une République numérique*, output of an extensive online consultation, has been adopted by the *Assemblée nationale* on 26 January 2016 (first reading). The discussion in *séance publique* is set to take place on 26, 27, 28 April and 3 May 2016. The second *alinéa* of article L. 111-5-1 will read: “*tout opérateur de plateforme en ligne est tenu de délivrer au consommateur une information loyale, claire et transparente sur les conditions générales d’utilisation du service d’intermédiation qu’il propose et sur les modalités de référencement, de classement et de déréférencement des contenus, biens ou*

attempts to regulate online platforms are countered by the European Commission, which points out that “in order for Europe to reap the full benefits from the platform economy and stimulate growth in European platform start-ups, self-evidently, there cannot be 28 different sets of rules for online platforms in a single market”.⁷

If the intricacy of online platform were not sufficient, I have decided to pick, as a use case, the most controversial one, that is “Uber”, the ride hailing platform world leader of the sharing economy in the transport sector, present in more than 400 cities, to the value of \$60 billion.⁸

Given the focus of European public actors to ensure trust and transparency in the online platforms’ ToS and the conclusions of a qualitative study on a domotics environment,⁹ I explore the role of Uber’s “legals” (ToS, privacy policy, etc.) in building the customers’ trust and the role of users’ awareness in supporting Uber’s business model.

The study is based on a mixed theoretical and empirical methodology with focus on Italy and the United Kingdom.¹⁰ Alongside a literature, legislative, document,¹¹ contractual review, I have conducted semi-structured interviews with users of the unofficial blog Uberpeople.net and with a Uber customer support agent. Moreover, I have carried out unstructured interviews with several Uber drivers and taxi drivers in London and in Italy and I have liaised with some of the Members of Parliament of Italy responsible for the below-analysed legislative draft on platforms.

services auxquels ce service permet d’accéder. Il fait notamment apparaître clairement l’existence ou non d’une relation contractuelle ou de liens capitalistiques avec les personnes référencées, l’existence ou non d’une rémunération par lesdites personnes et, le cas échéant, l’impact de celle-ci sur le classement des contenus, biens ou services proposés”.

⁷ European Commission, communication “Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe”, (COM(2016)288), 25 May 2016, para. 4. For some critical remarks see J. McNAMEE, “Leaked EU Communication – Part 1: Privatised censorship and surveillance”, available at <https://edri.org/leaked-eu-communication-privatised-censorship-and-surveillance>. See also the Staff Working Document and the synopsis report on the results of the public consultation (SWD(2016) 172 final).

⁸ The source of these data is S. KNIGHT, “How Uber conquered London”, *The Guardian* 27 April 2016 www.theguardian.com/technology/2016/apr/27/how-uber-conquered-london.

⁹ G. NOTO LA DIEGA and I. WALDEN, “Contracting for the ‘Internet of Things’: Looking into the Nest”, *Queen Mary School of Law Legal Studies Research Paper No. 219/2016*, available at SSRN: <http://ssrn.com/abstract=2725913>, L.S. KIN and Y.Z. KIN (eds.), *The Future of Money and Data*, Singapore: Academy Publishing, 2016, 96-148.

¹⁰ For an analysis of the attempts to regulate Uber in Italy, the UK, Belgium, France, and Germany see D. CADBURY *et al.*, “A disruptive influence Regulating Uber and other emerging technologies is not easy”, *Competition Law Insight*, 8 December 2015.

¹¹ It has been extremely useful to access corporate documents obtainable through the Companies House search engine and in Scribd.

The legals have been accessed a first time on 10 December 2015, a second time on 28 April 2016.

Platforms are the strong actors of the sharing economy.¹² As observed in a European report, the first macro-economic factor driving the growth of the sharing economy is “decreased consumer trust in the corporate world as a result of the financial and economic crisis”.¹³ Therefore, I propose the embedment of trust in design and suggest the development of ‘awareness by design’ tools. Indeed, if platforms will not understand that trust and awareness are a competitive advantage, the bubble of the sharing economy may burst.

I. – Online platforms and consumer protection

Online platforms can be defined as “undertakings that are capable of facilitating direct interactions between users via online systems and that capitalise on data-driven efficiencies enabled by network effects”.¹⁴ The European Commission points out that “the future Internet cannot succeed without trust of users in online platforms.”¹⁵ Hence, the Commission is committed to develop measures that foster trust, fairness, and awareness, especially regarding collection and use of data. In particular, the areas that need additional transparency are data collection, “the display of sponsored search results, the identification of the actual supplier of services or products, and possible misleading practices including fake reviews.”¹⁶ The areas that the Commission identifies for improvement are ToS that are currently perceived as unfair, the refusal of unilaterally-modified market access conditions, the dual role of platforms as supplier and competitors of suppliers, unfair “parity clauses” with detrimental effects for the consumer, and “lack of transparency notably on platform tariffs, on use of data and on search results, which could result in harming suppliers” business activities.¹⁷

The legal issues relevant to online platforms are umpteen; indeed, “legal disruption is not an accident of the platform economy, it is a core feature”.¹⁸ One need only

¹² Cf. I. GRAEF, “Market definition and market power in data: the case of online platforms”, *World Competition* 2015, 38(4), 473-505.

¹³ K. DERVODEJA *et al.*, *The Sharing Economy Accessibility Based Business Models for Peer-to-Peer Markets*, European Commission Business Innovation Observatory, September 2013.

¹⁴ COM(2016)288, para. 2.

¹⁵ COM(2016)288, para. 5(iii).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ A. STROWEL and W. VERGOTE, *Fix the Economics First, Then Focus on the Right Regulation*, Written evidence (OPL0087), Digital Platforms: To Regulate or Not To Regulate?, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/26643.html>.

consider competition,¹⁹ privacy and data protection,²⁰ contracts,²¹ intellectual property,²² employment law²³ and criminal law.²⁴

This article focuses on the private ordering by platforms and the ways to protect consumers.²⁵

¹⁹ Given the dominant position of the main platforms in the relevant market and the network effect they can leverage, many practices as tie-in, could lead to lock-in and, more generally, be considered abusive. See www.wsj.com/articles/SB10001424127887323324904579041300287558882 for a graph of the relationship between Amazon and the other eCommerce platforms. Given the common business model whereby the user access the platform for free, it is complicated to measure the damage to the consumer in pecuniary terms; as noted by A. STROWEL, “Vers une régulation des plates-formes internet?”, *Journal de droit européen*, juin 2015, 225: “c’est la diminution du choix laissé aux consommateurs qui détermine le potentiel dommage”. For some considerations from a European competition law perspective, see G. LOUGHER and S. KALMANOWICZ, “EU competition law in the sharing economy”, *Journal of European Competition Law & Practice* 2016, 7(2), 87-102; D. ZIMMER and M. BLASCHCZOK, “Most-favoured-customer clauses and two-sided platforms”, *Journal of European Competition Law & Practice* 2014, 5(4), 187-195; I. GRAEF, “Market definition and market power in data: the case of online platforms”, *op. cit.* For a US law & economics point of view see D.S. EVANS, “Attention rivalry among online platforms”, *Journal of Competition Law & Economics* 2013, 9(2), 313-357. A specific application is provided by T. HOPFNER, “Defining markets for multi-sided platforms: the case of search engines”, *World Competition* 2015, 38(3), 349-366.

²⁰ For instance, cross-platform tracking, encryption, lack of clarity on information inputs and outputs, etc. Cf. G. SCHMID and T. GAUSLING, “Data protection and the right of personality with regard to rating platforms: decisions of the German Federal Supreme Court”, *Journal of Intellectual Property Law & Practice* 2016, 11(1), 46-48.

²¹ Some contractual issues related to online platforms are lack of awareness of the other contracting party, distance sales, asymmetry, etc.

²² For instance, machine learning algorithms, geo-blocking, user-generated content, etc. I have dealt with intellectual property and cloud platforms in G. NOTO LA DIEGA, “Le idee e il muro del suono. I programmi per elaboratore nella più recente giurisprudenza europea”, *Europa e diritto privato* 2013, II, 543-596. For some specific perspectives see C. CASALONGA and A. GEVORKIAN, “The liability battle over online video-sharing platforms”, *Intellectual Property Magazine* 2012, Sep, 44-45; T. BASHEER and W. SMITH, “The impact of new streaming platforms on music and IP”, *E-Commerce Law & Policy* 2015, 17(7), 15-16; M. FERRANTE, “E-commerce platforms: liability for trade mark infringement reflections on Chinese courts’ practice and remedies against the sale of counterfeits on the internet”, *Journal of Intellectual Property Law & Practice* 2015, 10(4), 255-261; P. GOLDSTEIN, “Future platforms for copy-right licensing”, *International Review of Intellectual Property and Competition Law* 2015, 46(2), 153-154; L. SCAIFE, “A game of two halves: the issues presented by trading standards law when exploiting image rights via social media platforms”, *Entertainment Law Review* 2013, 24(4), 120-124.

²³ For instance, the issues related to digital labour and the qualification of the workers as “users” to circumvent the employees protections.

²⁴ It is interesting the analysis of multi-player online games and (even child) pornography enabled by virtual reality techniques (VR), as carried out in T. HOEREN, “The European liability and responsibility of providers of online-platforms such as ‘Second Life’”, *Journal of Information, Law & Technology* 2009, 1. For other criminal law aspects, cf. A. FONG, “Dissemination of libel by online social platforms: reinterpreting laws to meet the information age”, *International Company and Commercial Law Review* 2014, 25(2), 39-44; Z. AKHTAR, “Malicious communications, media platforms and legal sanctions”, *Computer and Telecommunications Law Review* 2014, 20(6), 179-187.

²⁵ There are many issues that are not strictly of consumer law, but can nevertheless affect consumers. These aspects will not be covered in this study. See, e.g., J. CRAUGHAN, D. PALMER and E. REID,

My previous research on the IoT²⁶ has shown inter alia how critical is the role of platforms and how the terms of service, privacy policies, end-user licenses agreements, intellectual property notices, acceptable user policies, warranties, etc. (collectively the “legals”) are filling the gaps left behind by legislation. In addition, they are doing so in an inconsistent, opaque, and often unenforceable way.

This can be described as private ordering. I do not mean simple compliance with agreements, or the abuse of contracts in order to elude the law.²⁷ One form of response to technological developments resulting in regulatory lacunae is the use of contracts. As a consequence, looking at the contracts (or more generally at the “legals”) is an inevitable requirement for showing how law operates in the environment of platforms. Indeed, the European, British, and Italian consultations on platforms mentioned above rightly focus on transparency, terms of use, ratings and reviews, the use of information by platforms, the relation between platforms and their suppliers.

Consumers can be harmed by the platforms’ behavior in many ways. As the European Commission put it in the Digital Single Market Strategy, concerns about the growing market power of platforms include “a lack of transparency as to how they use the information they acquire, their strong bargaining power compared to that of their clients, which may be reflected in their terms and conditions”.²⁸ Studying the relevant legals, therefore, should shed light on the features of such imbalance and opaqueness. It will also help to understand the state of the art of consumer protection on some vital issues such as data portability, switching costs, remedies in case of discontinuity of services, unfair commercial practices, unfair terms, takedown arrangements, etc.

More generally, there is a “lack of awareness of consumers about the value and use of their data”,²⁹ through business models that transform them in unwitting labourers.³⁰ A consumer can have the impression of contracting with the platform, whereas in fact another consumer may provide the service; consequently, consumers may believe that they are entitled to consumer law remedies, which do not apply to consumer-to-consumer (C2C) relations.

“Online lending platforms and securitisation: bringing the wholesale market to the individual”, *Butterworths Journal of International Banking & Financial Law* 2015, 30(6), 348-352 and W. MAYCOCK and C. HILL, “New rules enhance clarity for platforms and users”, *Compliance Monitor* 2013, Jun, 14-15.

²⁶ See, for instance, G. NOTO LA DIEGA, *The British perspectives on the Internet of Things. The Clouds of Things-Health use case*, in *Internet of Things: Legal Issues and Challenges towards a Hyperconnected World*, ed. Centre for Law & Public Utilities of the Seoul National University, 2015, 45-99; G. NOTO LA DIEGA and I. WALDEN, “Contracting for the ‘Internet of Things’: Looking into the Nest”, *op. cit.*

²⁷ For a range of possible meanings of “private ordering” see D. CASTLE (ed.), *The Role of Intellectual Property Rights in Biotechnology Innovation*, Edward Elgar, Cheltenham, 2009, 312, especially notes 42-44.

²⁸ European Commission, com. “A Digital Single Market Strategy for Europe”, *op. cit.*, 3.3.1.

²⁹ Commission Staff Working Document, *A Digital Single Market Strategy for Europe – Analysis and Evidence Accompanying*, COM(2015) 192 final, SWD(2015) 100 final, 6.5.2015, 4.5.

³⁰ D. CARDON and A. CASILLI, *Qu’est-ce que le Digital Labor?*, INA, Bry-sur-Marne, 2015, for instance, see the activity of posting as a job that deserves to be remunerated.

Another factor that can affect protection is ownership. More and more commonly, goods are offered “as a service”, rented instead of sold; in addition, the devices of the IoT are an inseparable mixture of hardware, software, and services.³¹ Therefore, even when a user can claim ownership of the hardware component, it cannot do so with regard to the software or service elements. Along with the fact that property is accompanied by a wide range of strong remedies, ownership can affect also consumer protection for instance insofar as some consumer laws apply only if the subject has a general property right in the contractual object.³²

Also the corporate structure can act as a disclaimer. The Uber use case, analysed below, confirms this. Indeed, I asked the customer care of Uber UK what are the legals that I have to read if I want to be a driver. They replied that general User Terms & Conditions apply to the drivers, whereas an inquiry made through an unofficial forum led me to find the contractual documents, where I found out that British drivers negotiate with the Dutch Uber B.V. (which is the reason, I believe, for the reported silence).

One has to say, however, that the European Commission seems to reduce the problem of consumer protection to the issue of “sufficient information”.³³ There is the high risk that imposing obligations of information on the platforms, one merely overwhelms the consumers with too much of information. The way forward is not an overload of information: platforms should be required to use design and existing technologies (predictive analytics, deep learning, etc.) in order to provide less and clearer information. The silver lining of the bulk tracking carried out by many companies could be that, at least, since they know the users and predict their behavior, they can find the better ways to catch their attention on the most sensitive sections of the agreement they are entering into.

Let us observe what the respondents to the European consultation think, since one should expect that the future relevant European acts would build on these responses.³⁴

³¹ This is the thesis of G. NOTO LA DIEGA and I. WALDEN, “Contracting for the ‘Internet of Things’: Looking into the Nest”, *op. cit.*

³² I have started exploring this aspect in G. NOTO LA DIEGA, “Clouds of Things. Data protection and consumer law at the intersection of cloud computing and the Internet of Things”, forthcoming in *Journal of Law and Economic Regulation*. For instance, the Consumer Rights Act 2015 does not apply if being supplied, the goods are not owned by the consumer and ownership is “the general property in goods, not merely a special property” (ss. 4-5).

³³ In the page of the Commission’s website dedicated to online platforms (<https://ec.europa.eu/digital-single-market/en/online-platforms-digital-single-market>), the question of consumers is limited to whether platforms provide sufficient information and safeguards to consumers and to the issue of digital content reuse where they act on their own behalf, or on behalf of their suppliers.

³⁴ “First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy”, 26 January 2016, <https://ec.europa.eu/digital-single-market/en/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

Of the 1036 replies,³⁵ the largest number of responses came from Germany (17%), Belgium (13%) and the United Kingdom (11%), with 49% coming from other 24 Member States and 10% outside the European Union (mostly from the United Kingdom). Most of the responses came from individual citizens (411), organizations representing businesses (195), and businesses, including suppliers using platforms to provide services (124), and online platforms (42).

There is a clear interest for platforms (the relevant section is the one that has received more replies) and there is consensus on their positive potential. Indeed, a large majority of citizens and of businesses recognised the benefits of online platforms, mainly because platforms increase accessibility of information, ease of communication, business opportunities and choice of products and services.

In turn, a most respondents are aware of the downside of platforms. Either they have encountered, or they are aware of problems faced by consumers or suppliers when dealing with online platforms.

Transparency seems to be a primary concern. The majority of businesses and citizens affirmed that platforms should be more transparent about search results, about the actual supplier and about reviews mechanisms. Moreover, there is insufficient information on personal and non-personal data collected and on their terms and conditions. Unsurprisingly, most online platforms think they provide sufficient information. It is striking that in the final and separate section on the collaborative economy, the results are completely different. Indeed, most consumers take the view that collaborative economy platforms provide sufficient information on service providers, consumer rights, characteristics of the provision and statutory rights. This could be due to the smaller number of responses or to some bias. For instance, I may imagine that non-collaborative platforms have not that ideological allure of the collaborative ones; therefore, consumers may tend to trust the latter more easily.

Finally, most citizens and online platforms observe that the above problems should be addressed by a combination of regulatory solutions, self-regulatory and market dynamics. Responses from businesses were evenly divided between purely regulatory measures and a combination of market dynamics, self-regulatory and regulatory measures. It is not clear the role of co-regulation and business models, but this depends on the formulation of the question.

³⁵ An additional 10599 individual contributions were received via one single advocacy association, mostly addressing only some of the questions posed in the consultation. They are not taken into account in the preliminary findings, however it strikes that one single association has been capable to involve such a higher quantity of people. This suggests that the European Commission should change its communication strategy, if it wants to build its policy on a sound empirical basis.

The question of liability is essentially focused on the suitability of the rules set forth by the eCommerce directive³⁶ and the enforcement of intellectual property rights. Views are divided among those who consider the current liability regime still fit for purpose and those who request clarification and guidance for its implementation, or a rebalancing of interests, including the establishment of further categories of intermediary services, besides mere conduit, caching, and hosting.

The European Commission will not take a one-size-fits-all approach. Indeed, it is pointed out “any future regulatory measures proposed at EU level only address clearly identified problems relating to a specific type or activity of online platforms in line with better regulation principles”.³⁷ Moreover, “principles-based self-regulatory/co-regulatory measures [...] can play a role”.³⁸

Now, a large majority of consumers and businesses complain about regulatory issues and other obstacles to the development of the sharing economy. Uncertainty as to the users’ and providers’ rights and obligations is a key hindrance that risks to jeopardise the collaborative economy. Therefore, let us have a look at one of the first attempts to regulate online platforms in the European Union.

II. – The Italian proposed legislation on online platforms

Italy is likely to be in one of the most advanced positions in matters of online platforms,³⁹ via a hard law *ad-hoc* solution.

On 27 January 2016, some members of the lower house of the Parliament of Italy (“*Camera dei Deputati*”) have presented a draft statute on online platforms for the sharing of goods and services and on the promotion of the sharing economy (*proposta di legge* n. 3564, “*Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell’economia della condivisione*”). On 29 March 2016, the *proposta* has been assigned to the parliamentary committees on transport and production (*Commissioni riunite IX Trasporti e X Attività Produttive*), which will have to debate on each article and the whole text and transmit it to the *Camera* alongside a report, after

³⁶ 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 (“Directive on electronic commerce”).

³⁷ COM(2016)288, para. 4.

³⁸ *Ibid.*

³⁹ One has to point out that platforms, which are intermediaries between professional traders and consumers (therefore registered in the *registro delle imprese*) are out of the scope of the *proposta*. Consequently, it does not apply to Uber in Italy. There, Uber drivers must have the same authorisation required to private drivers (*noleggio con conducente, vehicle hire with driver*). Unlike cab drivers, Uber drivers cannot wait for clients on the street: the transport service has to be previously booked and the waiting has to take place in an *ad-hoc* garage.

acquiring the opinion of eight parliamentary committees. On 3 May 2016, the *Commissioni* have started examining the text.

The purpose of the draft statute is to foster the sharing economy and to ensure transparency, tax fairness, fair competition, and consumer protection. As to the latter, the preamble clarifies that the focus is on security, health, privacy, and transparency of the ToS.

The first important provision attributes new powers to the antitrust authority (*Autorità Garante della Concorrenza e del Mercato*), hereinafter AGCM), which will regulate and monitor digital platforms (only those subsumable under the “sharing economy” label, it would seem). The new powers are financially supported by the controlled entities through the payment of a sum non exceeding the 0,08 per mille of the last turnover. The AGCM keeps the free and open access register of the online platforms for the digital economy (*Registro elettronico nazionale delle piattaforme digitali dell'economia della condivisione*) and can oblige the platforms to take out insurance to face the typical risks of the sharing economy. If a platform operates without being in the *registro*, the AGCM issues an injunction to suspend the activity and who does not follow the order can be fined up to the 25% of the annual turnover.

The remedial array is noteworthy. Alongside the said fine, there is a legal presumption of abuse of economic dependence under *legge* 18 June 1998, no. 192,⁴⁰ when the platform and the utente operator (who provides the service or shares the good) agree to refuse the provision of services to current or potential customers under terms that are better than the ones offered to the platform. This *comma* (subsection) goes with proviso “*ingiustificatamente*”, which means that the platform can rebut the presumption by proving that there is a just cause for refusing the said better terms.

Another important provision accompanied by a remedy is Article 4, providing the duty to keep a business policy (*Documento di politica aziendale*) that has to conform to the opinion expressed by the AGCM and, anyway, finally approved by the authority. The *documento* cannot provide or purport to provide, directly or indirectly, e.g. that the *utente operatore* can contract exclusively or under better terms with the platform; the monitoring of the provision of the end-service; mandatory tariffs; the exclusion of the *utente operatore* from the platform (or its penalisation) on non-serious or subjective grounds; the complimentary irrevocable transfer of the *utente operatore's* copyright; the ban, for the said user, to acquire and use the platform's public information that is not protected by adequate technological measures of protection; the duty to advertise the platform's

⁴⁰ Cf., on the legal basis of the domestic legislation, Article 3 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. On the non-sectorial scope of the provision see Corte di Cassazione, ordinanza, 25 November 2011, no. 24906, *Nuova giurisprudenza civile commentata*, I, 2012, 298.

services; the prohibition of critical comments from the *utente operatore* to the platform; the sharing of information with kindred users; the duty to allow the transfer of personal data to third parties.

The AGCM has the obscure power to invite who violates Article 4 to act according to the said provision. Now, the *documento* has to be previously approved by the authority. Therefore, the current wording of the provision seems to limit its applicability to the unlikely scenario where the platform operates without the *documento*. It should provide, in turn, a remedy for the more likely event that, once approved the *documento*, the behaviour of the platform is not consistent with it. Another option is to state openly that the *documento* has contractual nature, and therefore the ordinary remedies for the breach of contract apply. Anyway, the current fine would be a sum amounting up to 10% of the last turnover, plus the suspension of the service until the platform does not fulfil its obligations.

The civil remedy is that the inconsistent sections are void and the nullity does not affect the entire contract. Now, once a judge declares the sections to be void, the contract risks not be enforceable any longer, notwithstanding the provision that saves it. Therefore, the parties will have to renegotiate it and one has to imagine – even though the *proposta* is silent on the point – that the *document* will have to undergo again the approval of the AGCM.

If one wanted to point out other criticisms, they could underline how the focus on the service provider is not minimally offset by a similar protection of the end-user. It can be argued that sometimes small businesses, dependent on the power of big platforms, are as weak as the consumers. Even if this was the case, there is no justification for such an imbalance.

Minor remarks may regard the limitation to copyright, whilst also trade marks, designs, and patents may be at stake. By the by, the ToS usually do not provide the transfer of intellectual property rights, but the exclusive license with right to sublicense, which has basically the same effects of an assignment. Finally, rigidly preventing the *utente operatore* from agreeing to advertise the platform's service might be considered a paternalistic option.

The last notable provision regards data protection and privacy and its violation is fined with a sum of up to €30.000. It is much peculiar that “user data” are defined not only with reference to personal data in the sense of the *decreto legislativo* 30 June 2003, no. 196 (Code of privacy),⁴¹ but also with the data produced by and resulting from the

⁴¹ The *codice della privacy*, lately amended by the *decreto legislativo* 14 September 2015, no. 151, constitutes implementation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and of Directive 2002/58/EC of the European Parliament and of

digital integration of objects, that is, expressly, the IoT. One may infer, thus, that the IoT data would not by default fall under the personal data category, which is not the case.⁴² At the same time, one could think that user data are protected when originating from the IoT even when they are not personal. Given the large amount of data flowing between such devices (big data), protecting non-personal data could prove to be non-feasible or cumbersome for the service providers.

If the platform intends to transmit the users' personal data, it has to inform them previously on how and when the data will be transmitted and allowing the users to erase their data. Now, if the platform outsources, say, cloud storage and redundancy, would the relevant transfer need to be communicated each time beforehand? It does not seem sensible or even feasible. Let us imagine the user receiving a notification every time its data are transmitted. Or let us think to the flow of data slowed down by the system of prior notification. Moreover, it is not clear why the remedy available to the users is to erase the data, and not to deny the consent to the transfer. Furthermore, it would be more important to know the purpose of the transfer, rather than the time or the means.

The Italy Data Protection Authority (*Garante per la protezione dei dati personali*, hereinafter "*Garante*") will regulate this mechanism, but a past experience can teach us something. As from 2 June 2015, websites have to inform users about the use of cookies and ask for their consent.⁴³ It is common experience that these notices are not user-friendly, especially in the mobile version they impede the user from accessing the content and, what is more important, they do not leave any actual freedom to decide if to consent or not, since they are usually based on the assumption that the use of the service equals the consent to the processing of data.

The draft law, then, imposes on platforms obligations to enable the users to double-check, edit, delete, erase, and access their data with a high degree of granularity. Moreover, they shall be entitled to erase all the data of the users' profiles through a single input.

Finally, it is not allowed to analyse automatically the content of the users' data, of the documents and of the messages texted by the users. One could infer, thus, that non-automated analysis is allowed, which may mean every analysis that is not carried out via bots and similar tools. The provision goes with the proviso of the operations spontaneously demanded by the users and subject to an ad-hoc contractual approval. The refusal to agree (were not

the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). See now the general data protection regulation (*infra*, note 116).

⁴² *Cf.*, e.g., UK Government Chief Scientific Officer, *The Internet of Things: making the most of the Second Digital Revolution*, 18 December 2014.

⁴³ See *Garante per la protezione dei dati personali, provvedimento* 8 May 2014, no. 229 "Simplified Arrangements to Provide Information and Obtain Consent Regarding Cookies". *Cf.* The Privacy and Electronic Communications (EC Directive) Regulations 2003.

they spontaneously requested by the users?) shall not bring prejudice to the full access to the service. It would seem, but the provision is not straightforward, that the automated analysis of data is allowed in the context of operations requested by the user itself. When one launch the Uber app to request a car, are they spontaneously requesting an operation? So it would seem. Should they enter a new contract every time they launch the app?

Most importantly, it would have been better to dedicate an ad-hoc *comma* or even article to one of the main problems of Internet consumer transactions. I mean the fact, confirmed by the Uber use case, that consumers have absolutely no bargaining power. If they do not agree with the terms imposed by the business (be it the platform or the final provider), they have only one choice: leave immediately the platform and not to access the service.

Overall, it may be a good law, but there is an excessive focus on the business user of platforms (*utente operatore*), and a limited attention for the consumer, touched only by the provision on data protection. Besides, the proliferation of sector-specific isolated laws does not seem to be the best policy option. Probably, some amendments to the code of consumers⁴⁴ (for the B2C relations) and the law on the economic dependence⁴⁵ (for the B2b ones) would be preferable.

III. – The legal controversy revolving around Uber

Uber is a user-to-user drivers' service mediated by an online platform. Even though low-cost real-time ridesharing startups such as Lyft and Sidecar are spreading, Uber is still the main actor at a global level and the economic and social transformation that has followed, has taken the name of "Uberification".⁴⁶ Recent evidence has been provided in mid-April 2016 by the fact that, in the span of 24 hours, Universal and Fox have paid several millions to develop two Uber-themed comedies.⁴⁷

The platform's ToS configure the relationships between Uber and the users (drivers-partners, riders, business users), as well as the relationship between the users. The

⁴⁴ *Decreto legislativo*, 6 September 2005, no. 206, *codice del consumo*, as recently amended by *decreto legislativo* 15 January 2016, no. 8.

⁴⁵ *Supra*, note 28.

⁴⁶ On 24 February 2015, the term has entered the French Wiktionary, which now defines it as the adoption of a commerce model where one provides resources to the clients via their smartphones on demand and real-time. However, the wording "uberisation" is more common in France. For some legal issues related to the "uberification", see N. SYED, "Regulating Uberification", *Computer and Telecommunications Law Review*, 2016, 22(1), 14-25.

⁴⁷ T. SIEGEL and B. KIT, "Hollywood Studios Race to Release Uber Themed-Comedies", *The Hollywood Reporter* 20 April 2016 (9 April of the hard copy), www.hollywoodreporter.com/news/competing-uber-themed-comedies-works-885647.

latter is particularly relevant for determining how trust is built and sustained. The focus on users' awareness is an essential feature for the development of online platforms through a non-paternalistic regulation.⁴⁸

Uber is facing lawsuits and protests all around the world.⁴⁹ Taxi drivers argue that Uber's competition is an unfair one and that all the drivers should be bound to taxi regulations.⁵⁰ Drivers would like to be paid more fairly⁵¹ and, most importantly, treated as employees, rather than independent contractors⁵² (with a suit settled on 21 April 2016 for US\$100 million).⁵³ In turn, riders claim that the platform should be

⁴⁸ C. BLACKMAN *et al.*, *Towards a future Internet: Interrelations between technological, social and economic trends*, Final Report for DG Information Society and Media, November 2010, http://cordis.europa.eu/fp7/ict/fire/docs/tafi-final-report_en.pdf.

⁴⁹ *Cf.*, for instance, S. BARRATT and J. MORGAN, "Uber and above?", *Journal of the Law Society of Scotland* 2016, 61(3), 26-27; N. BROWN, "Uber: TFL and the taxonomy of taximeters", *Computers & Law* 2015, 25(4), 23-26; N. SYED, "The rise of Uberification: getting the go-ahead in London" *Practical Law Companies*, 2015, 26(10); J. VAN DER LUIT-DRUMMOND, "Defining a driver as an employee or a 'partner'", *Solicitors Journal* 2015, 159(30), 8; F. HEINEMANN and M. SHUME, "Uber, Airbnb, Netflix... Australia's steps to tax the sharing and digital economies", *T.P.I.I.T.* 2015, 13(7), 13-15; V. BARNETT and L. TOMLINSON, "The Uber app: the legal background to the outrage", *E-Commerce Law & Policy* 2014, 16(10), 8.

⁵⁰ See, e.g., the protest of taxi drivers in Budapest on 26 April 2016 and in Rio de Janeiro on 1 April 2016. Below, I will analyse an Italian case regarding the qualification of Uber services as taxis.

⁵¹ Whereas according to the company, Uber drivers earn more than \$100,000, it has been estimated that they actually earn \$8.77 per hour after expenses. *Cf.* D. MACMILLAN, "Uber Cuts Deals to Lower Car Costs", *The Wall Streets Journal Blog*, 25 November 2013, and C. O'DONOVAN and J. SINGER-VINE, "How Much Uber Drivers Actually Make Per Hour", *BuzzFeed*, 23 June 2016.

⁵² On 3 June 2015, in *Uber Technologies, Inc., v Barbara Berwick (15-546378)*, the California Labor Commission has qualified the drivers-Uber relationship as employment and has therefore ordered the defendant to pay plaintiff the sum of \$4,152,20, pursuant to Labor Code § 2802 and § 2802(b). The order is available at www.scribd.com/doc/268946016/Uber-v-Berwick. The platform has replied that "[t]he California Labor Commission's ruling is non-binding and applies to a single driver. Indeed it is contrary to a previous ruling by the same commission, which concluded in 2012 that the driver 'performed services as an independent contractor, and not as a bona fide employee'. Five other states have also come to the same conclusion" (J. CROOK, "Uber Driver Deemed Employee By California Labor Commission", *TechCrunch* 17 June 2015, <http://techcrunch.com/2015/06/17/uber-drivers-deemed-employees-by-california-labor-commission/#.54akta:pR7C>). Uber appealed the commissioner's ruling in state court and argued that Berwick's dispute belonged in arbitration. On 21 September 2015, A San Francisco state judge decided that Uber could not force Ms Berwick into arbitration, being the relevant clause unenforceable. Uber drivers are employees also in *Douglas O'Connor et al v Uber Technologies, Inc., et al (C-13-3826 EMC)* of 31 March 2015 (see also the orders issued by US District Judge Edward M. Chen, in the same case, on 1 September 2015 and 9 December 2015). This issue is not limited to Uber, but it regards at least several platforms for on-demand services, as reported by D. ALBA, "Even More Labor Complaints Filed Against On-Demand Companies", *Wired* 24 September 2015, www.wired.com/2015/09/doordash-grubhub-caviar-labor-suits. On the problem of increasing arbitration and employment see J. SILVER-GREENBERG and R. GEBELOFF, "Arbitration Everywhere, Stacking the Deck of Justice", *The New York Times* 31 October 2015, www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0.

⁵³ See *Growing and growing up*, 21 April 2016, <https://newsroom.uber.com/growing-and-growing-up>. In exchange of the status of independent contracts, drivers will receive \$84 million and, sub-

responsible for the drivers' behaviour.⁵⁴ Moreover, questions of misleading commercial practices,⁵⁵ tax issues,⁵⁶ and insurance questions⁵⁷ are not uncommon. Indeed, it is impossible to foresee all the potential legal and regulatory issues involved when it comes to Uber.⁵⁸

Recently, Uber has carried out a rebranding strategy (e.g. the shift from the black-and-white "U" icon, to the bit-like square), reportedly for developing new products, thus attracting new customers.⁵⁹ Mischievous commentators may think that this change is aimed to use the brand to provide new services, without evoking the controversies revolving around Uber.

It is impossible to take into account all the disputes somehow affecting⁶⁰ the transport platform, therefore, I will give brief account only of the Italian ruling(s) against "Uberpop".⁶¹ The conclusions, as will be soon clear, are rather different from those of *Transport for London v Uber London Ltd*,⁶² where the app was not qualified as a taxi-

sequently, \$16 million if Uber goes public. The settlement regards the *O'Connor* case and *Hakan Yucesoy et al v Uber Technologies, Travis Kalanick, and Ryan Graves* (4:15-cv-00262-EMC). On the issue of the qualification as an employee see, e.g., J. VAN DER LUIT-DRUMMOND, "Defining a driver as an employee or a 'partner'", *Solicitors Journal* 2015, 159(30), 8. More generally on the decline of employment contracts (with express reference to Uber), see S. NESBITT, "Is employment becoming obsolete?", *Employment Law Journal* 2016, 169(Apr), 14-16.

⁵⁴ On the topic of liability see S. BARRATT and J. MORGAN, "Uber and above?", *Journal of the Law Society of Scotland* 2016, 61(3), 26-27.

⁵⁵ Cf., for instance, C&R, "Uber under threat of ban in France and at home for breach of regulations", *Compliance & Risk* 2015, 4(4), 1,15.

⁵⁶ Cf. F. HEINEMANN and M. SHUME, "Uber, Airbnb, Netflix... Australia's steps to tax the sharing and digital economies", *T.P.I.I.T.* 2015, 13(7), 13-15.

⁵⁷ See, e.g., F. NYMAN, "Innovation Uber allies", *Post Magazine* 2015, May 14, 28-30.

⁵⁸ For a first recon, cf. N. SYED, "Regulating Uberification", *Computer and Telecommunications Law Review* 2016, 22(1), 14-25; from some insight in the company and the work of its in-house department see K. DOWELL, "Along for the ride", *Lawyer* 2016, 30(8), 12-13.

⁵⁹ J. HEMPEL, "The inside story of Uber's radical rebranding", *Wired* 2 February 2016, www.wired.com/2016/02/the-inside-story-behind-ubers-colorful-redesign/?mbid=nl_ozy.

⁶⁰ There are many disputes that can indirectly affect Uber. See, for instance, *Patrick Cotter et al. v Lyft, Inc, et al*, case no. 3:13-cv-04065, available at <https://assets.documentcloud.org/documents/2796429/Chhabria-Rejection.pdf>.

⁶¹ Tribunale di Milano, Sezione specializzata in materia di impresa "A", *ordinanza*, 25 May 2015, available at www.giureta.unipa.it/Trib_Milano_25052015.pdf and Tribunale di Milano, Sezione specializzata in materia di impresa "A", *ordinanza*, 2 July 2015 (the appeal, *reclamo*), available at www.dimt.it/wp-content/uploads/2015/07/ordinanza-su-reclamo-Uber.pdf. There is a another (unpublished) order, where Judge Marina Tavassi, President of the deciding court, has rejected the claim with which Uber asked the suspension of the blocking of the app, while one waited for the final decision on the *reclamo*. For a deeper analysis of the first case, see D. SURDI, "Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce 'UberPop'", *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente* 2015, 375.

⁶² *Transport for London v Uber London Ltd and others* [2015] All ER (D) 137 (Oct). Cf. V. BARNETT and L. TOMLINSON, "The Uber app: the legal background to the outrage", *E-Commerce Law & Policy* 2014, 16(10), 8; N. SYED, "The rise of Uberification: getting the go-ahead in London" *Practical Law Compa-*

meter, thus saving Uber and its drivers from the alleged violation of the Private Hire Vehicles (London) Act 1998 s.11(1).

The taxi companies of Milan, Turin, Genoa, some taxi drivers, and some taxi trade unions sought an interim prohibitory injunction (*inibitoria in via cautelare* under art. 700 of the code of civil procedure) against Uber International B.V., Uber International Holding B.V., Uber B.V., Raiser Operations B.V., Uber Italy s.r.l. and the Uber driver who used Uberpop in violation of the administrative regulations on private hire. They were asking the blocking of Uber website and app in order to prevent them to provide the Uberpop service.

According to the claimants, the provision of taxi-like services without conforming to the taxi regulations would constitute unfair competition under art. 2598 no. 3 of the civil code,⁶³ since Uber drivers and the company itself do not have to bear the costs attached to the said administrative regulation. In order to obtain an interim injunction, it is necessary to prove the *periculum in mora*, which in the case is the damage to goodwill deriving from the likelihood that the end-users will pick Uber over the traditional taxi out of cost-effectiveness reasons. The diversion of profits would have been even greater, given the concurrence of Milan Expo 2015.

The defendants asked the dismissal of the action and, in the alternative, a limitation of the effects of the injunction to the Uberpop service and to the requests arriving from devices located in Italy. It will shown below the importance of the intricate corporate structure of Uber, but this dispute anticipates the issues, since the defendants claimed the lack of locus standi for Uber Italy s.r.l., Uber International B.V., and Uber International Holding B.V. Allegedly, the first is a mere consultancy, the international ones would not be involved in the service. The defendants maintain that it is not a taxi-like scenario, it is a new concept, a collaborative community where private citizens share their goods to lower the relevant costs, as well as the environmental impact. The platform would have the exclusive goal of enabling a more efficient sharing in a context of private transport. Some differences. Uber drivers can decide not to accept a ride request, which is inhibited to cab drivers. The former, together with the end-users/riders, are part of a closed community,⁶⁴ whereas taxi drivers offer a service to the public. Uber drivers, finally, gain a mere reimbursement of the travel expenses and the relevant costs, whereas taxi drivers receive a remuneration through a system of

nies, 2015, 26(10); N. BROWN, "Uber: Tfl and the taxonomy of taximeters", *Computers & Law* 2015, 25(4), 23-26; P. BROWN, "Public law update", *CILEx Journal*, 2016, Jan, 28; LGL, "Uber app 'lawful' High Court rules", *Local Government Lawyer* 2015, Oct 16.

⁶³ The said provision considers unfair competition the behaviour of who makes use of means contrary to the professional diligence and capable of damaging other undertakings.

⁶⁴ If it were a closed community, it would be growing incredibly fast. Let us just say that every week in London thirty thousand people download Uber app and book a ride for the first time. The source of these data is S. KNIGHT, "How Uber conquered London", *op. cit.*

public tariffs. The consequence would be that the relationship between Uber and the users (both drivers and riders) is an atypical contract under art. 1322 of the civil code, not a public transport service, falling under the relevant public regime. Moreover, there would be no unfair competition, since this could not automatically follow from the violation of the said public regime (operations depending on public licences) and, anyway, the taxi drivers could offer discounts and prices below the tariffs. Furthermore, the action of the claimants would be contrary to the freedom of enterprise (art. 41 of the *Costituzione*) and the European competition freedoms, therefore, the current domestic legal system should be interpreted in an evolutive way.

Once clarified that the current public regime is consistent with the European treaties (the freedom of enterprise can be limited for public policy reasons), the Tribunale di Milano moves to assess if there is a relationship of competition between Uber and the taxis. The conclusion is that Uber actually interferes with the taxi service, because the mechanism of the app is similar to “radio taxi” and, through the ‘surge’ pricing system, Uber drivers do not receive a mere reimbursement of the expenses, it is a proper payment, along the lines of the one received by cab drivers. It is held immaterial that the former do not have to accept the riders’ requests, while it is maintained that the purpose of Uber is to provide a more cost-effective alternative to taxis.

The Tribunale, then, considers irrelevant the alleged private character (of the community, and thus) of the service. Whoever wants to ride a Uber car, needs only to download an app. At any rate, the existence of a community does not lead to the legality of a private car offering the transport service to people “*in piazza*” (in the streets) without the licence required by art. 8 of the *legge* 15 January 1992, no. 21.⁶⁵ It is, anyway, a private car used by third parties under art. 82 of the *codice della strada*.

It is, then, noteworthy the rejection of the ground whereby Uber would represent a new concept of private sharing for purposes of cost reduction and environmental impact. The Tribunale draws a line between the proper car sharing (*à la* BlaBlaCar) and phenomena such as Uber. With car and ride sharing, the driver has to go from A to B and shares the costs of petrol and toll, whereas an Uber driver has not an own interest in going from A to B, and he rider pays a proper fare. Moreover, the defendants fall short in proving the effect of reduction of environmental impact. In turn, Uber may stimulate a more intensive use of private cars, rather than public transport, bicycles, etc.

Is Uber a mere intermediary? The activity carried out by Uber drivers fall under the public law regime imposed to taxi drivers. However, the former are undertake merely the factual and final behaviour that is prohibited by the law. Indeed, the defendants are

⁶⁵ Art. 86 of the *codice della strada* (code of road traffic, decreto legislativo 30 April 1992, no. 285) refers to art. 8 of the *legge* 15 January 1992, no. 21 (“*Legge quadro no. 3 of the codice civile per il trasporto di persone mediante autoservizi pubblici non di linea*”, on taxi and private hire vehicles).

aware that their drivers have no licence, and without the organisation they have created and based on a mobile app, the drivers would not be able to provide the service. Before the launch of the app, the phenomenon did not exist (or existed in forms economically and socially irrelevant) and the defendants set the fares and their variations. They provide an “essential and irreplaceable contribution to the development of illegal behaviours, which are capable of damaging the claimants”.

Therefore, Uber International B.V. and the other companies of the intricate corporate world of Uber benefit directly from the drivers’ behaviours and cannot be considered as mere intermediaries. Consequently, Uberpop – but not Uber itself – falls under the antitrust tort provided by art. 2598 no. 3 of the civil code. The driver that had been sued, on the other hand, is not found liable, in consideration of the sought remedy (the prohibitory interim injunction).

On 25 May 2015, given the unfair competition, the Tribunale issues an interim injunction banning the use of the Uberpop service in Italy, as well as of kindred services, no matter how they are advertised or called. The Piedmontese court, then, sets a penalty for the delay in giving effect to the injunction (€20.000 a day after the fifteenth day). Furthermore, the Tribunale orders the publication of the injunction on Uber’s website and orders to pay for the trial costs.

The order has been appealed by both the claimants and the defendants. The taxi trade unions’ *reclamo* aimed at include the single Uber driver in the injunction (and will not be analysed here), the Uber’s one regards the rest of the *ordinanza*. The Tribunale rejects the latter’s *reclamo* (thus confirming the above analysed *ordinanza*) and partly accedes to the former’s one by preventing the single driver to provide the Uber pop service.

Uber’s *reclamo* was based on the following grounds. i. Uberpop is different from the taxi service, since it is a technological platform; ii. There is no competition between the former and the latter; iii. Uber does not directly benefit in terms of reduction of costs; iv. There is no *periculum in mora*, since it is not proved that the entrance into the market of Uber has caused a decrease of the demand for taxis. Let us touch on the first claims, which is the most relevant to the issues involved in this article.

According to Uber, Uber pop is merely an app for shared and spontaneous transport, entirely different from taxis, and carried out directly from the users, who are part of a closed group, that is a community. Uber, allegedly, is a matching marketplace concerning private transport, reserved to a private community and it is not responsible for the allocation of the options or for the setting of volumes and prices of the exchanges, “if not *ex ante* through the development of the [surge] algorithm”. Something that is, therefore, utterly different from a radio service, since Uber is not, assumedly, using human resources in the execution of the transaction, nor is he investing the relevant financial means.

The court confirms the representation proposed by the first judge and clarifies further the relevant framework. An app that connects demand and offer in the transport service is not to be treated differently from the traditional taxi service where one calls the central station that allocates the requests. It is immaterial that Uber, unlike taxis, does not make use of human resources:⁶⁶ what matters is the final service, regardless the use of call centres or algorithms.

The court, then, move on to reiterate the difference between Uber, on the one hand, and car sharing, car pooling, and peers-to-peers, on the other hand. With Uber, there is no sharing of facilities by a person who would go from A to B to realise their own interest and the cost is not agreed between the driver and the rider.

What does not show from the *ordinanza* of May is the importance of the contracts. On the contrary, the court now points out the relevance of the contracts between Rasier BV and the drivers, that is exactly the contract that is not publicly available. These contracts show that Rasier sets the tariffs unilaterally; driver and rider cannot do anything but obey.

The surge pricing system has nothing to do with bartering or other forms of sharing economy. Uber pop does not have transparent rules for the fares and their application is unforeseeable. This is of sure detriment to the consumers. Moreover, the contracts show that the increases of the fares (up to 500%) do not benefit the drivers: they serve only Uber's profit.

Furthermore, even in the unlikely event of some savings for the consumer, the balance with security must favour the latter.⁶⁷ One might argue that a balance should be struck with another public interest, the protection of the environment through the reduction of traffic. However, firstly, there is no evidence that Uber's clients are diverted from the taxi drivers. Most importantly, it is sensible to affirm that, if Uber did not existed, those clients would make us of public transport vehicles, bicycles, city cars, and kindred forms of transport that, unlike Uber, combat pollution.

It is notable that the court takes a technology neutrality approach. Indeed, the Queen's Bench Division, Administrative Court per Ouseley J had concluded that:

“A taximeter, for the purposes of Section 11 of the Private Hire Vehicles (London) Act 1998, does not include a device that receives GPS signals in the course of a journey, and forwards GPS data to a server located outside of the vehicle, which server

⁶⁶ This is one of the defenses of Uber and it does not seem to be contested, but it is contrary to the factual truth.

⁶⁷ The public regime of taxis, which revolves around the licence, is seen as a means to ensure security. It does so through the required guarantees of efficiency of the cars (e.g. tests at a regular interval), guarantees of suitability of the drivers (e.g. age limits), and insurance (e.g. adequate ceilings).

calculates a fare that is partially or wholly determined by reference to distance travelled and time taken, and sends the fare information back to the device”.⁶⁸

On the contrary, the Tribunale does not take this rigid approach, it rather prefers to look at the actual service, which appears indeed hardly distinguishable from the one provided by taxi drivers.

In conclusion, Italy seems to prevent Uber from offering UberPop on the grounds of public interest, and in particularly security and environment. These public interests are at the basis of the public law regime that impose administrative and financial burdens on taxi drivers. Similar services, be they called UberPop or not, shall be subject to the same regime and shall not be provided by companies that hide themselves under the appealing, albeit sometimes inappropriate, label of the sharing economy.

The Parliament and the regulators have not intervened yet. However, in November 2015 an important letter of the President of AGCM has been published.⁶⁹ The anti-trust authority wishes an essential regulation to be adopted in order to strike a balance between competition and security.⁷⁰ In particular, there would be the need of a third category to juxtapose to taxies and private hire vehicles: “online platforms that connect riders and non-professional drivers”.

IV. – Uber legals

To give an account of the complexity of the ecosystem, a look at the legals can be useful. Limiting the analysis to the legals applicable to users in the United Kingdom⁷¹ and listed in the ad-hoc section of Uber.com,⁷² these are:

⁶⁸ *Transport for London v Uber London Ltd and others*, supra, note 49, at 49.

⁶⁹ Autorità Garante della Concorrenza e del Mercato, *AS1222 – Legge quadro per il trasporto di persone mediante autoservizi pubblici non di linea*, 29 September 2015, www.agcm.it/component/joomdoc/allegati-news/AS1222.pdf/download.html.

⁷⁰ AGCM believes, together with Uber, that the use of the app can help the environment.

⁷¹ One is targeted only at users in China, that is “Fraudulent activity” (www.uber.com/legal/other/china-fraud). One could hardly understand why Uber recalls the importance of the relationship of trust between the platform and the users only in a document reserved to the said country (and with no translation from Mandarin). It is interesting also that there is “Russia jobs” that states “Due to recent changes in data privacy laws in Russia, we are unable to accept online applications from candidates in your country through our careers page. However, we would still love for you to apply! Please email russia-recruiting@uber.com” (www.uber.com/legal/other/russia-jobs). Some legals are specific to the US, e.g. the Driver Deactivation Policy (www.uber.com/legal/other/driver-deactivation-us-english/); California TNC (www.uber.com/legal/other/ca-tnc/) and Chicago TNP (www.uber.com/legal/other/chi-tnp/).

⁷² The list of legals available if one accesses the service from the app (which is the actual only way to book a ride) is by far shorter. Launched the app, one has to spot “About” (in grey and smaller than the other functions) and then go to “Legal”, where they will find “Copyright”, “Terms & Conditions”, “Privacy policy”, and “Software Licences”.

- a) the Terms and Conditions (T&C) bipartite into Booking Service Terms and Terms of Use;⁷³
- b) the User Privacy Statement;⁷⁴
- c) the Driver Privacy Statement (non-US);⁷⁵
- d) the Cookie Statement (Global);⁷⁶
- e) the Uber Copyright Policy;⁷⁷
- f) the Zero Tolerance Policy;⁷⁸
- g) the Non-Discrimination Policy;⁷⁹
- h) the Firearms Prohibition Policy;⁸⁰
- i) the Guidelines for Law Enforcement Authorities;⁸¹
- j) the Guidelines for Third Party Data Request and Service of Legal Documents;⁸²
- k) the Promotion Terms and Conditions;⁸³
- l) the Promotion Agreement Cover Sheet;⁸⁴
- m) the Accessibility Certification;⁸⁵

⁷³ Last updated on 11 January 2016, the T&C are available at www.uber.com/legal/terms/gb. It is noteworthy that the previous version was of 4 December 2015: the good practice of leaving the previous versions of the legals available would have enabled us to understand the need to change after such a short time. The US version has been updated on 2 January 2016, whereas the previous version, not available any longer, was of 8 April 2015 (www.uber.com/legal/terms/us).

⁷⁴ Last updated on 15 July 2015, see www.uber.com/legal/privacy/users/en.

⁷⁵ Effective as of 15 July 2015, see www.uber.com/legal/privacy/drivers-non-us/en.

⁷⁶ Effective as of 15 July 2015, www.uber.com/legal/privacy/cookies/en.

⁷⁷ www.uber.com/legal/copyright/global/. There are three versions: global, US, and Germany.

⁷⁸ www.uber.com/legal/other/zero-tolerance-policy.

⁷⁹ www.uber.com/legal/other/non-discrimination-policy.

⁸⁰ www.uber.com/legal/other/firearms-prohibition-policy.

⁸¹ www.uber.com/legal/other/guidelines-for-law-enforcement.

⁸² www.uber.com/legal/other/service-of-legal-documents. In the version read on 10 December 2015, there was no reference to the service of legal documents.

⁸³ Last updated on 14 February 2016, www.uber.com/legal/commercial/promotion-tnc-non-us-english/2016-02-04. This document did not exist during the study conducted on 10 December 2015. Alongside the Promotion Terms and Conditions, the US users should take into account also UberEATS General Terms and Conditions, www.uber.com/legal/commercial/uberEATS-tnc-us/eats-tnc-2016-02-24.

⁸⁴ The Promotion Terms and Conditions open by saying “These Promotion Terms and Conditions (‘Promotion Terms’) are expressly incorporated into and made a part of the Promotion Agreement Cover Sheet (‘Cover Sheet’)”. The Cover Sheet, however, is not publicly available.

⁸⁵ Last updated on 2 February 2016, www.uber.com/legal/other/accessibility-statement. In the list of “other documents” the name is “Accessibility Statement”. This document did not exist during the study conducted on 10 December 2015.

- n) the Android App Permissions;⁸⁶
- o) the iOS App Permissions;⁸⁷
- p) Bug Bounty Program Terms.⁸⁸

Until at least 10 December 2015, there were also the Unsolicited Idea Submission Policy⁸⁹ and the security policy. Apparently, the latter has been outsourced to a platform created by security leaders from Facebook, Microsoft and Google.⁹⁰

It is not clear if the drivers-partners (as Uber calls the users who drive) have their own T&C, since the User T&C does not refer expressly to them, but to the “Transportation providers”. By searching for “Uber drivers terms”, one finds UberMarketplace T&C,⁹¹ which is a different service, operated by Uber B.V., the subsidiary of Uber in the Netherlands. It is designed to help partner-drivers rent and purchase vehicles, as well as get deals on insurance.

Reading the “legals”, the user-rider does not understand what is its relationship to the driver and, most importantly, the one between the latter and the Company. After having been substantially misled by the customer support and digging into an unofficial forum,⁹² I have eventually found the relevant legals.⁹³

Every city, then, has its own rules for licensing. For instance, in London they vary according to the dimension and luxury of the car, and the experience of the driver.⁹⁴ One would expect to find the Developers Terms of Use (ToU) alongside the other legals. This is not the case. One has to visit a separate website to find the Developer ToU⁹⁵ and the Earn with Uber ToU.⁹⁶

⁸⁶ www.uber.com/legal/other/android-permissions. This document did not exist during the study conducted on 10 December 2015.

⁸⁷ www.uber.com/legal/other/ios-permissions. This document did not exist during the study conducted on 10 December 2015.

⁸⁸ Last updated on 8 April 2016, www.uber.com/legal/other/bug-bounty-program-terms. This document did not exist during the study conducted on 10 December 2015.

⁸⁹ www.uber.com/legal/unsolicited-idea-submission-policy. The page is no longer available.

⁹⁰ Until 10 December 2015, the Security Policy/Responsible Disclosure Policy was available at www.uber.com/security. If one visits this URL on 28 April 2016, they get redirected to <https://hackerone.com/uber>, where Uber invites hackers to expose vulnerabilities. It is interesting that only today three bug reports have been resolved, which means that cybersecurity is a real issue.

⁹¹ <https://drive.uber.com/ukmarketplace/terms-and-conditions>.

⁹² Uberpeople.net.

⁹³ Uber B.V. Services agreement, https://s3.amazonaws.com/uber-regulatory-documents/country/united_kingdom/Uber+BV+Driver+Terms+-+UK+Preview.pdf and Driver Addendum, https://s3.amazonaws.com/uber-regulatory-documents/country/united_kingdom/Uber+BV+Driver+Addendum+-+UK+Preview.pdf (both of 20 October 2015).

⁹⁴ www.driveuberuki.com/our-cities/london/#1446505645212-909d428a-7b15.

⁹⁵ Updated on 12 January 2016, <https://developer.uber.com/docs/terms-of-use> (the version studied on 10 December 2015 had been updated on 17 March 2015).

⁹⁶ <https://developer.uber.com/docs/affiliate-terms-of-service>. These ToU regulate the Affiliate Program whose purpose is to allow participants to make referrals from their apps to the Uber platform for requesting on-demand transportation and logistics services.

This above-seen jungle applies to business-to-consumer relations. Business-to-business ToS were not publicly available when I started this research. One had to register first as a business user to obtain the International (non-U.S.) Terms and Conditions of Service (Business T&C), which inter alia referred to a code of conduct whose page could not be found.⁹⁷ They are now available,⁹⁸ but no reference is made to the code,⁹⁹ which can be found in the miscellaneous list of “other documents”.¹⁰⁰ However, the current situation is better than the initial one, when the code of conduct was limited only to business clients, whereas there was no link to it in the User T&C.¹⁰¹

Some services are available to riders, e.g. the fares calculator, but from a website which is not operated by Uber and comes with its own privacy policy.¹⁰² To add to the complexity, when users download the app, they are bound by the “legals” of the app stores; e.g. if they are using Android they are subject to Google’s Play policies.¹⁰³ In this case, they are also transacting with Google Payments and agreeing to their ToS¹⁰⁴ and Privacy Notice.¹⁰⁵

The app downloaders must give their permissions. Twenty-five permissions to control your data and your smartphone (against the average, which is five).¹⁰⁶ Moreover, the legals of the mobile versions are different from the homologous of the laptop version above reported. The mobile legals include only the Copyright Policy, User T&C, Privacy Policy, and Software Licences. Surprisingly, the software licences¹⁰⁷ are included only in the mobile version and not in the desktop one.

⁹⁷ Much peculiarly, the hyperlink did not work, since it sent the user to www.uber.com/safety/code-of-conduct.

⁹⁸ International Terms and Conditions of Service, last updated on 11 December 2015, available at www.uber.com/legal/business/international/en.

⁹⁹ www.uber.com/legal/other/code-of-conduct.

¹⁰⁰ www.uber.com/legal/other.

¹⁰¹ Updated on 8-Apr-2014, <http://2q72xc49mze8bkcg2f01nlh.wpengine.netdna-cdn.com/wp-content/uploads/sites/14/2015/05/UberRUSH-Terms-4-8-141.pdf>.

¹⁰² <http://uberestimate.com/privacy.php>.

¹⁰³ https://play.google.com/intl/ALL_uk/about/play-terms.html.

¹⁰⁴ The Terms of Service – Buyer are effective as of 5 August 2013, https://payments.google.com/termsOfService?hl=en_GB.

¹⁰⁵ The Google Payments Privacy Notice, last modified 29-Jun-2015, is available at https://payments.google.com/legaldocument?family=0.privacynotice&hl=en_GB.

¹⁰⁶ K. OLMSTEAD and M. ATKINSON, “Apps Permissions in the Google Play Store”, 10 November 2015, www.pewinternet.org/files/2015/11/PI_2015-11-10_apps-permissions_FINAL.pdf.

¹⁰⁷ Software licenses regard Evox Images, Libphonenumber, TITokenField, RRFPSBar, and Google Maps SDK for iOS.

V. – Corporate labyrinth and intricate supply chain

The intricacy of online platforms depends also on the complexity of the corporate structure,¹⁰⁸ since Uber Technologies, Inc.¹⁰⁹ has sixty subsidiaries in the US and seventy-five or more around the world.¹¹⁰

Accepting the User T&C, one is contracting with four companies, Uber London,¹¹¹ Uber Britannia,¹¹² Uber B.V.,¹¹³ and Uber NIR.¹¹⁴ They are controlled by Uber Technologies, Inc., which does not appear in the contract. Most of the T&C, however, refers to a non-existent¹¹⁵ company called Uber UK, which “shall mean each of Uber London, Uber Britannia, and Uber NIR.” In a lawsuit, who would be the defendant?¹¹⁶ Are they genuinely separate companies, since the director is the same?¹¹⁷ British companies are not the direct subsidiary of the US parent. Users who read the T&C, then, may think that Uber B.V. plays a role only as the provider of the app. UberMarket website, however, specifies that the Dutch subsidiary operates it.¹¹⁸ The Registrar of

¹⁰⁸ We are not referring now to the three categories of users, neither to all the actors providing complementary services (cloud storage, redundancy, etc.), nor to all the actors related to the apps that interoperate with Uber.

¹⁰⁹ As one can read searching this company in the registry held by the California Secretary of State, the company filed the application on 9 August 2010, is not registered under no. C3318029, and falls under the Delaware jurisdiction (the search engine is available at <http://kepler.sos.ca.gov>).

¹¹⁰ <http://fortune.com/2015/10/22/uber-tax-shell>. It is impossible to have a precise number of subsidiaries, affiliates, etc. For instance, according to other sources the US parent has incorporated more than thirty different foreign subsidiaries since 2012 (www.scribd.com/doc/232316744/Uber-Ireland-2-of-4).

¹¹¹ In respect of the Private Hire Vehicles (London) Act 1998, Uber London is the holder of the relevant private hire vehicle (PHV) operator’s licence.

¹¹² In respect of the Local Government (Miscellaneous Provisions) Act 1976, Uber Britannia is the holder of the relevant PHV operator’s licence in each of the district councils (other than the Metropolitan Police District and the City of London) in which it operates. In respect of the Civic Government (Scotland) Act 1982, Uber Britannia is the holder of the relevant booking office licences.

¹¹³ Uber B.V. provides the software application and related services.

¹¹⁴ In respect of the Taxis Act (Northern Ireland) 2008, Uber NIR is the holder of the relevant operator’s licence.

¹¹⁵ By using the search engine of the UK Companies House, one finds Uber UK Limited, which has no relation to the company here analysed. More information on the former can be found at www.uber-uk.com/aboutus.

¹¹⁶ It may seem that the main defendant should be Uber Technologies, Inc. (<http://blogs.wsj.com/law/2014/10/17/uber-technologies-fights-french-court-ruling>).

¹¹⁷ www.licensedtransportuncovered.com/uber-manchester-and-the-global-paper-trail.

¹¹⁸ UberMarketplace.co.uk (the “Marketplace”) is operated by Uber B.V. (“Uber”), a company registered in the Netherlands under number 56317441 with a registered address of Vijzelstraat 68, 1017 HL Amsterdam. Use of the Marketplace will constitute acceptance of these Terms and Conditions... The Marketplace enables Uber partner-drivers, who are independent contractors using the Uber Platform in the United Kingdom, as well as new drivers not yet on the Uber platform but that intend to join the Uber platform (“Drivers”) to be eligible to receive certain products, services and/or discounts

Companies for England and Wales shows that Uber London is owned by a Netherlands private partnership called Uber International Holdings B.V.¹¹⁹ What is this Uber International B.V.? It is owned by a type of Dutch partnership known as a *Commanditaire Vennootschap*. Uber International B.V has no establishment in Europe and its headquarters are in Bermuda.¹²⁰

It is not entirely clear, finally, whether companies such as Uber Technologies Limited,¹²¹ Uber Cab Limited,¹²² Uber Cars Limited,¹²³ and Uber Vehicle Rental¹²⁴ have any relation to the Uber group.

Anyway, one should not believe that the here presented picture is complete. While gathering information on the current director of Uber UK and Uber Britannia, I have found out that she has been director of another company hitherto unknown, Uber Nir Limited, whose field of activity is “to be provided on next annual return”. It has one share whose value is one pound; its owner is Uber International Holding BV. Uber companies pop up constantly and everywhere; it is impossible to track them all.

To add to the complexity, one may consider all the supply chain, that is all the third parties Uber negotiate for some of its services. From AudioEye, Inc., a provider of web accessibility testing and monitoring to HackerOne, for security purposes. Indeed, the Privacy Statement reads that the platform may share the users’ information with “Uber subsidiaries and affiliated entities that provide services or conduct data Uber”.

Finally, there are subjects who are not stable partners of Uber, but whose software or hardware is interoperable with the platform. For instance, the users can choose to link, create, or log in to their Uber accounts with a payment provider (e.g., Google Wallet) or social media service (e.g., Facebook), or engage with a separate app or website that uses Uber’s API or whose API Uber uses. In all these cases, Uber may receive information about the users or their connections from that site or app.

provided by third parties when using the Marketplace as set on this Uber Marketplace website, being: www.UberMarketplace.co.uk.

¹¹⁹ www.scribd.com/doc/232316543/Uber-London-Limited-Annual-Return-2013?in_collection=4596500.

¹²⁰ <http://www.licensedtransportuncovered.com/uber-manchester-and-the-global-paper-trail>.

¹²¹ Company number 09412838, incorporate on 29 January 2015 (<https://beta.companieshouse.gov.uk/company/09412838>).

¹²² Company number 09383213, incorporated on 12 January 2015 (<https://beta.companieshouse.gov.uk/company/09383213/filing-history>).

¹²³ Company number 09409840, incorporated on 28 January 2015 (<https://beta.companieshouse.gov.uk/company/09409840>).

¹²⁴ Company number 09129368, incorporated on 14 July 2014 (<https://beta.companieshouse.gov.uk/company/09129368>).

Conclusion: Awareness by design and shared regulation

The fact that the legals of the platforms are not read or understood is “a general phenomenon that relates to the behaviour of human beings when confronted with standard form agreements”.¹²⁵ However, I do not agree with those who “wonder whether the complimentary character of the service would justify a lower protection level for these kind of services compared to other contracts where consumers actually pay an amount of money”. Differentiate contracts for the “professional”, “for business”, “work” version of the services already exist and they offer some room for negotiation and customisation.¹²⁶ However, on the one hand, business customers are more likely to read and understand the legals; on the other hand, what the consumers do not pay in a pecuniary way, they do pay in terms of consent to process and resell personal data and, more generally, in their capacity as digital labourers. Therefore, it would be preposterous according a lower protection to the proletariat 2.0.

One could never expect that downloading an app may have, as an effect, the submerision under the cascade of twenty-seven legals (some unavailable publicly) and twenty-five permissions. The system appears opaque and therefore untrustworthy even before analysing the content of this contractual quagmire, also due to the very intricate supply chain. Uber should simplify and review its legals, for instance taking into account that the EU Court of Justice has declared invalid the Safe Harbour decision¹²⁷ and that now we have the EU-US Privacy Shield.¹²⁸

¹²⁵ E. WAUTERS, “Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites”, *Int J Law Info Tech* 2014, 22 (3): 254, 293. The authors underline that stickiness and network effects of social network services may reinforce the belief that the legals are simply “part of the deal” as a user. Even though these factors do not apply to all the online platforms, the oligopolistic structure of the market, the increasing illiteracy of consumers, the timings of online transactions, alongside other rational and less rational reasons, explain the application of the problem also beyond the realm of social networks.

¹²⁶ Cf., e.g., S. BRADSHAW, C. MILLARD, and I. WALDEN, “Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services”, *Queen Mary School of Law Legal Studies Research Paper No. 63/2010*. Available at SSRN: <http://ssrn.com/abstract=1662374>.

¹²⁷ Schrems (Judgment) [2015] EUECJ C-362/14 (6 October 2015) [2016] 2 CMLR 2. Unlike several providers, Uber does not refer expressly to the Safe Harbour. Indeed, the Privacy Statement reads that the user’s information may be transferred to “the United States and other countries, some of which may have less protective data protection laws than the region in which you reside. Where this is the case, we will take appropriate measures to protect your personal information in accordance with this Statement”. A clear streamlining to the Privacy Shield would be more appropriate.

¹²⁸ On 2 February 2016, the EU and the US have agreed on a new framework for transatlantic data flows: the EU-US Privacy Shield. The College of Commissioner has mandated Vice-President Ansip and Commissioner Jourová to prepare a draft adequacy decision, which should be adopted by the College after obtaining the advice of the Article 29 Working Party and after consulting a committee composed of representatives of the Member States. In the meantime, the U.S. side will make the necessary preparations to put in place the new framework, monitoring mechanisms and new Ombudsman. The draft adequacy decision (<http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy->

The findings of this research are confirmed by an empirical study, which concludes that “Uber’s digitally and algorithmically mediated system of flexible employment builds new forms of surveillance and control into the experience of using the system, which result in asymmetries around information and power for workers”.¹²⁹

Future research shall focus on the differences of treatment between the three categories of users (normal riders, businesses, drivers-partners). I will look into the code of conduct, the law enforcement policy,¹³⁰ and the “non-legal” representations,¹³¹ since they are fundamental to build transparency and therefore trust.

Inspired by the “data protection by design”¹³² approach of the long overdue European general data protection regulation,¹³³ my main recommendation is to introduce tools of ‘awareness by design’ based on an empirical research on the legal and legal representations made by online platforms. By “awareness by design”, I mean the use of technologies (especially design) to empower the user and make them aware of risks, rights, and obligations. One need only think, for instance, how many times one flags the “I agree” box of the ToS without even attempting to read the “contractual quagmire”¹³⁴ at hand. There are technical means to assess if the consumer is flagging without reading, for instance assessing how long does it take them to scroll the ToS page. Prohibiting to flag under these circumstances might be seen as paternalistic, since it is part of the right to self-determination to agree without reading a contract. Therefore,

decision_en.pdf) and the text of the Privacy Shield (http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision-annex-2_en.pdf) have been presented on 29 February 2016.

¹²⁹ A. ROSENBLAT and L. STARK, “Uber’s Drivers: Information Asymmetries and Control in Dynamic Work” (October 15, 2015). Available at SSRN: <http://ssrn.com/abstract=2686227>.

¹³⁰ It is commendable that Uber has published a Transparency Report providing an overview of information that was provided to U.S. state and local regulators and law enforcement agencies between July and December 2015. Uber has received 613 requests for law enforcement purposes (more than 3 requests a day), in 84.8% of the requests some data were produced. It is interesting that whereas in the event of requests for other purposes (e.g. from regulatory authorities), the tables show that in some cases Uber has resisted and negotiated, when it comes to law enforcement the only cases when Uber does not hand over the users’ data is when the LEA withdraw the requests or if no data are found (which happens only in 15.4% of the requests.) See more at <https://transparencyreport.uber.com/> (last updated on 15 April 2016).

¹³¹ There is not always consistency between the obligations emerging by the “legals” and how the platforms actually behave, as emerges, for instance, from blogs and forums.

¹³² Privacy and data protection by design are increasingly subject to deep and original research. For a recent example see L. URQUHART, *Privacy by Design and the Internet of Things: From Rhetoric to Practice using Information Privacy Cards*, Paper accepted at the Bileta Annual Conference 2016, Hatfield, 11-12 April 2016.

¹³³ See the European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)).

¹³⁴ G. NOTO LA DIEGA and I. WALDEN, “Contracting for the ‘Internet of Things’: Looking into the Nest”, *op. cit.*

one might prefer a “nudge” approach and, say, set as a default option a ‘I have not read’ box. Thus, consumers who flags automatically the said box without reading will receive an error message who draws their attention to this fact.

Practically, I suggest to develop a mobile app comparing standard terms and alerting a user to any peculiar terms in the contract. The consumers themselves will be engaged and will rate the legal quality and transparency of the legals; an algorithm will produce the final rating combining the output of the said empirical research and the opinions of the consumers. The impact will be measured via the reviews to the app. A second step may be to invite the consumers to join a private group on an existing social platform,¹³⁵ where they could interact, create critical mass, share information on their rights and on their experience as consumers, network, etc. In other words, consumers would be protagonist of a collective awareness movement.¹³⁶ That collective awareness is the way forward is shown, among other things, by a recent turn of the Uber movement. Apparently, in February 2016, the company had decided to impose Uber-Black drivers (luxury cars) to accept riders on UberX (the low-cost option). When the policy was scheduled to become effective, the drivers caravanned to Uber’s office in Dallas; after a three-days standoff, Uber allowed them to opt out of the policy.¹³⁷ One must point out that the fact that the app does not allow communication between users (both drivers and riders) is not helping awareness, trust, and accountability.

Future developments of the “awareness by design” app may make full use of big data, predictive analytics and machine learning, in order to be able to become a decision-making tool. I imagine that when the consumer is about to buy a product, they launch the app that analyse and compare the quality of the legals and tells the consumer not only which product comes with the best legals, but also which legals are the best for the consumer. Prosumers, for instance, have different needs, if compared with traditional consumers.

It might be said that consumers are not actually concerned about their rights and obligations. For instance, in 2014 it has been forecast that “European users or consumers will not be inclined to bring large, powerful (social network service) providers to court, in order to establish clarity as to the validity and enforceability of the existing provisions”.¹³⁸ It could be observed that the action brought by Maximilian Schrems

¹³⁵ I would disregard the option to create an ad-hoc platform, since consumers would hardly participate, given the oligopolistic structure of the market and the relevant network effect.

¹³⁶ See the EU Commission Research Program on H2020 on Collective Awareness Platforms. Cf. S. McLEAN and M. SAMAVI, “EC’s consultation on online platforms proves controversial”, *op. cit.*

¹³⁷ N. SCHEIBER, “Uber Drivers and Others in the Gig Economy Take a Stand”, *New York Times* 2 February 2016, www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html.

¹³⁸ E. WAUTERS, “Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites”, *op. cit.*, 254.

against Facebook¹³⁹ has proved the assertion wrong. Most importantly, the “awareness by design” app may be a tool to verify if the fact that consumers do not read the ToS depends on the fact that they find it cumbersome and opaque or on an actual carelessness. Beware, however. The consumers might not care because they think that they have no bargaining power, but another result of the proposed system is to create critical mass through collective awareness, whose ultimate result should be a change of approach on the side of businesses. Indeed, the authors of the wrong prediction pointed out two solutions to the said problems: to develop efforts to incentivise service providers to adopt consumer-friendly ToS and to raise the awareness of users with regard to the content of ToS. This work presumes to have given a contribution in both the directions.

One ought not to think, however, that one can rely exclusively on technology. The legal systems have to evolve accordingly. Just to make a suggestion, the consumers should have appropriate means not to be bound by the strict alternative between either agreeing or not using the service,¹⁴⁰ thus rehumanising a dehumanised contract.¹⁴¹

Legislators cannot ignore that there is a need for some sort of regulation. The fact that it is impossible to keep up with all the lawsuits involving Uber is the best evidence of this.¹⁴² Nor legal uncertainty and opaqueness are helping the consumers, nor the relevant market can grow under these conditions. In Italy and elsewhere,¹⁴³ legislators and regulators are making proposals to take a stand.¹⁴⁴ Further empirical evidence is

¹³⁹ Schrems (Judgment) [2015] EUECJ C-362/14 (6 October 2015) [2016] 2 CMLR 2.

¹⁴⁰ www.snapchat.com/terms; www.whatsapp.com/legal/; www.spotify.com/us/legal/end-user-agreement/plain/; www.apple.com/legal/internet-services/itunes/.

¹⁴¹ According to N. IRITI, “Scambi senza accordo”, *Rivista trimestrale di diritto e procedura civile* 1994, II, 347, the decline of the agreement, stemming from the crisis of the word and of dialogue, dilutes the contract and transforms it into the mere combination of two unilateral acts. However, cf. G. OPPO, “Disumanizzazione del contratto”, *Rivista di diritto civile* 1998, I, 525.

¹⁴² While I am finalising this article, I am reading that, on 26 April 2016, in *Powers et al v Richard et al*, the 24th Judicial District Court has dismissed a lawsuit from Jefferson Parish taxi drivers who claimed that Uber drivers had carried out unfair trade practices. W.P. NOBLES, “In Uber challenge, taxi drivers lose Jefferson Parish lawsuit”, *The Times-Picayune* 26 April 2016, www.nola.com/crime/index.ssf/2016/04/uber_jefferson_parish_drivers.html, informs as well that there is a similar suit in New Orleans between cab drivers and UberX drivers, and a pending Jefferson Parish government suit against the company for allegedly violating parish ordinances.

¹⁴³ D. CADBURY *et al.*, “A disruptive influence” *Competition Law Insight*, 2015, 14(12), 13-15, examine how the United Kingdom, the European Union, Belgium, France, Germany and Italy are attempting to regulate Uber.

¹⁴⁴ Alongside the analysed legislative proposal on online platforms and the letter of the AGCM, further research is needed on the activity of regulators. For instance, see Autorità di regolazione dei trasporti (Transport Authority), *Atto di segnalazione al Governo e al Parlamento sull'autotrasporto di persone non di linea: taxi, noleggio con conducente e servizi tecnologici per la mobilità*, 21 May 2015, (http://www.autorita-trasporti.it/wp-content/uploads/2015/06/Atto-di-segnalazione_signed.pdf). On car pooling, see, e.g. decreto ministeriale 1 February 2013 (Ministero delle Infrastrutture e dei Trasporti) on “Diffusione dei sistemi di trasporto intelligenti (ITS) in Italia”, which implements directive 2010/40/EU on the framework

needed to choose between hard law, soft law, co-regulation, self regulation, etc. I am convinced that it is necessary to strike a balance between two needs: avoiding a one-size-fits-all approach and shying away from sector-specific “laws of the horse” or even “Uber laws” (let us imagine what would happen in terms of overlaps if someone had three laws for online platforms, sharing economy, and liability of intermediaries). Therefore, I have the impression that a co-regulatory approach might help in this respect. “A shared regulation for the shared economy”, one may be tempted to say. In addition, co-regulation should be coupled with a strengthened coordination between the regulators, since the market of platforms is heterogeneous and liable to be regulated by different authorities.

Nonetheless, given that the law is a hysteretic system,¹⁴⁵ I hope that, in the meantime, the development of “awareness by design” tools brings companies to modify their business models and their attitude towards consumers, once they will understand that legal clarity, trust, and accountability are competitive advantages.

for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport. The *decreto* invites local communities to favour car pooling in a context of smart mobility.

¹⁴⁵ See, more broadly, G. Noto LA DIEGA, “In light of the ends. Copyright hysteresis and private copy exception after the British Academy of Songwriters, Composers and Authors (BASCA) and others v Secretary of State for Business, Innovation and Skills case”, *Quaderni di Diritto Mercato Tecnologia*, 2015, II.