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## ‘OLD ECONOMY’ RESTRICTIONS IN THE DIGITAL MARKET FOR SERVICES

**Nada Bodiroga-Vukobrat** \*  
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### ABSTRACT

*Freedom to provide services is one of the cornerstones of the EU internal market. Facilitated by the digital technologies, new and innovative service markets are emerging. However, innovations often bump into existing obstacles. Whether constrained by inadequate regulatory environment, or opposition from existing service providers in the market, the fact remains that ‘old economy’ is not ready for innovation. The free movement of services is not so ‘free’ when it is about services in a non-harmonized field or when the particular type of service is for some reason awarded a ‘special’ status in primary or secondary EU law. The services in the field of transport, for example, fall under the EU’s competences in the field of common transport policy and their provision is still, to a large extent, left to the regulation at the Member States’ level. The problem arises when innovative services, such as those associated with ICT and digital economy, are labeled as and molded into existing services, because there is simply no appropriate regulatory framework to recognize their innovativeness. This paper will analyze and critically evaluate the legal challenges of service provision in the online platform economy and offer possible guidelines for the creation of a suitable legal framework for their operation.*

**KEYWORDS:** *free provision of services, EU internal market, digital economy, online platforms*

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## 1. INTRODUCTION

Innovation drives the economies for centuries. This Schumpeterian idea is especially evident in the last decades, with digitalization and technological innovations transforming the traditional business landscapes. This digital revolution and interconnectivity have provided us with the vast array of possibilities. Just as our phones have evolved into smartphones, anything from our cars and houses to whole cities and economy is becoming ‘smart(er)’ every day, powered by the new digital technologies.

The law and regulation can hardly keep up the pace with the accelerated digitalization of society. New legal issues in the digital era arise in all legal fields and entail profound changes of regulatory policies and legislative framework. The digitalization of economy is in full sway, so much that in its broadest meaning, the ‘digital’ economy may encompass practically every aspect of modern economy, because it is more or less affected by digitalization.<sup>1</sup>

Many economists and scholars have tried to define and conceptualize the notion of digital economy. Many different definitions have emerged since 1996 when Don Tapscott called it the “Age of Networked Intelligence”<sup>2</sup> and stressed that the “digital economy explains the relationship between the new economy, new business and new technology, and how they enable one another”<sup>3</sup>. Broadly speaking, digital economy is an economy supported by digital technologies. However, there is no uniform definition. Bukht and Heeks observe that existing definitions are shaped and influenced by specific tendencies which evolve over time, from the first definitions mentioning the Internet to the latest definitions which are placing the accent on new technologies (e.g. mobile networks, cloud computing, big data...)<sup>4</sup>. While the first definitions have been focused primarily on the phenomena of e-commerce, in the last five years the definitions have been more concerned with innovation, rights, cyber-security, and digital literacy.<sup>5</sup> The regulators and scholars are more focused on the policies for the regulation and sustainability of digital economy, then on providing a

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<sup>1</sup> See International Monetary Fund (IMF), *Measuring the digital economy*, Policy paper, February 2018, p. 7, [<https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/04/03/022818-measuring-the-digital-economy>], accessed on 20/08/2018.

<sup>2</sup> See Tapscott, D.: *The Age of Networked Intelligence*, McGraw-Hill, New York, 1995.

<sup>3</sup> Bukht, R.; Heeks, R.: *Defining, Conceptualising and Measuring the Digital Economy*, GDI Development Informatics Working Papers, no. 68, Global Development Institute, The University of Manchester, Manchester, 2017, p. 6.

<sup>4</sup> *Ibid.*, p. 4.

<sup>5</sup> *Ibid.*, p. 8.

clear definition.<sup>6</sup> We can agree that digital technologies are the core part of the digital economy. However, it is difficult to draw the line between the economic activities forming part of the digital economy, and those left outside. For the purpose of our discussion, the definition of digital economy proposed by Bukht and Heeks best explains the digital economy as “that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods or services”.<sup>7</sup> This definition is wide enough to cover future developments in the digital area.

Lacking the common definition of digital economy has prompted economists who attempt to measure its effects to turn to a more ‘palpable’ term of digitalization of economic activity, to depict “the incorporation of data and the Internet into production processes and products, new forms of household and government consumption, fixed-capital formation, cross-border flows, and finance.”<sup>8</sup> The IMF has therefore concentrated on measuring the much narrower ‘digital sector’, which comprises “online platforms, platform-enabled services, and suppliers of ICT goods and services”.<sup>9</sup> This paper will examine the main legal challenges associated with the provision of services created and offered by “producers at the core of digitalization”,<sup>10</sup> particularly platform-enabled services.

Digitalization of service provision raises many novel legal issues, not just those limited to data protection and liability of online service providers and online platforms. This paper will analyze whether the existing legal environment in the EU internal market is fit for digitalization of service provision and what legal and factual obstacles hinder the full potential of this sector. This research focuses on the effects of digitalization and innovation in the service provision, and not on the provision of digital services *per se* (such as cloud computing, big data, data mining and analysis or the Internet of Things). The innovative

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<sup>6</sup> *Ibid.*, p. 9.

<sup>7</sup> *Ibid.*, p. 13.

<sup>8</sup> International Monetary Fund, *op.cit.*, p. 1. See also OECD Digital Economy Outlook 2017, OECD Publishing, Paris [<http://dx.doi.org/10.1787/9789264276284-en>], accessed 21/08/2018.

<sup>9</sup> “Platform-enabled services include the sharing economy, whose main components are peer-to-peer short-term property rentals and peer-to-peer labor services (e.g., Uber). Collaborative finance (e.g., peer-to-peer lending) may also be included in the sharing economy. Platform-enabled services to businesses in the “gig economy” include crowdsourcing platforms (e.g., Freelancer, and Upwork).” See International Monetary Fund, *op.cit.*, p. 7.

<sup>10</sup> *Ibid.*, p. 7. On the provision of services in the platform economy see more in: Han, X.; Martinez, V.; Neely, A.: Service in the Platform Context: A Review of the State of the Art and Future Research, in: Smedlund, A.; Lindblom, A.; Mitronen, L. (Eds.): *Collaborative Value Co-creation in the Platform Economy*, Springer Singapore, 2018.

nature of the platform-enabled service provision collides with the traditional, ‘physical’ world barriers. The relation between an online intermediation service and the service which is actually being provided is especially interesting, because it entails the application of concurrent legal regimes. Should such services be treated independently or as composite parts of the same service? In the latter case, it seems that the (inevitable) material component of a certain service may inadvertently bring it back to the analog era and analog restrictions.

## **2. FREE PROVISION OF PLATFORM-ENABLED SERVICES IN THE DIGITAL ECONOMY**

Free provision of services is one of the cornerstones of the EU internal market. Regulatory fragmentation has traditionally been one of the main obstacles in the internal market for services. Digitalization and innovative business models have introduced enhanced possibilities for the provision of services in all economic sectors. However, market access barriers, such as licensing requirements may still apply. It is all a matter of proper classification of a certain service. A provider of a service in the digital environment is faced with obstacles typical for that environment, concerning privacy protection and use of personal data, consumer protection, geo-blocking, liability, specific competition law issues, etc.<sup>11</sup> The position of online intermediation service providers is even more complicated. This is especially the case with the platform-enabled services. A platform may be deemed to be a provider of the underlying service, in addition to providing an information society service.<sup>12</sup> Such providers are then subject to the relevant sector-specific regulation, which in the end means that the provision of such services could be subject to limitations.

### *2.1. LEGAL FRAMEWORK FOR ONLINE PLATFORMS IN THE EU*

Currently, there are no binding EU rules in force specifically addressing and regulating online platforms. However, the policy-making activity is in full sway.<sup>13</sup> The simplest definition of online or collaborative platforms can be dis-

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<sup>11</sup> See, e.g. European Commission, Commission Staff Working Document: A Digital Single Market Strategy for Europe, SWD(2015) 100 final, Brussels, 6.5.2015, p. 53 and further.

<sup>12</sup> See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European agenda for the collaborative economy, COM(2016) 356 final, Brussels, 2.6.2016, p. 6.

<sup>13</sup> The most important Commission’s communications and working documents concerning platform economy include: Communication from the Commission to the European Parliament,

cerned from the 2016 Commission's Communication "A European Agenda for the Collaborative Economy", that such platforms are intermediaries that connect providers with users and facilitate transactions between them.<sup>14</sup> In an earlier Communication from 2015, the Commission seems to rely on a more detailed definition of online platforms as "software-based facilities offering two-or even multi-sided markets where providers and users of content, goods and services can meet", such as communications and social media platforms, operating systems and app stores, audiovisual and music platforms, e-commerce platforms, content platforms and search engines.<sup>15</sup> Platforms 'related to the sharing economy' are included in this taxonomy as 'other types of platforms'.<sup>16</sup>

The versatility of online platforms (they "come in various shapes and sizes")<sup>17</sup> seems to cloud and obviate any attempt to find a suitable legal definition of the term. Instead, online platform service providers are left with the existing legal framework applicable to online intermediation services, which could fall within the scope of 'information society services'; or are otherwise placed under the regime applicable to the underlying service. In other words, platforms as intermediaries provide information society services; but sometimes, platforms are not mere intermediaries. The question is: when and under what circumstances do platforms 'outgrow' their intermediary role and what are the consequences?

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the Council, the European Economic and Social Committee and the Committee of the Regions: *A Digital Single Market Strategy for Europe*, COM(2015) 192 final, Brussels, 6.5.2015; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, COM(2016) 288 final, Brussels, 25.5.2016; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A European agenda for the collaborative economy*, COM(2016) 356 final, Brussels, 2.6.2016, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy: *A Connected Digital Single Market for All*, COM(2017) 228 final, Brussels, 10.5.2017.

<sup>14</sup> See COM(2016) 356 final, p. 3.

<sup>15</sup> SWD (2015) 100 final, p. 52.

<sup>16</sup> SWD (2015) 100 final, p. 52.

<sup>17</sup> COM (2016) 288 final, p. 2. On the main characteristics of online platforms in the sharing/ collaborative economy see Hatzopoulos, V.: *The Collaborative Economy and EU Law*, Hart, Oxford and Portland, Oregon, 2018, p. 8 and further.

### 2.1.1. INFORMATION SOCIETY SERVICES

An ‘Information Society service’ is “a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services” (Article 1(1)(b) of Directive 2015/1535).<sup>18</sup> ‘At a distance’ means that the service is provided without the parties being simultaneously present; ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request (Article 1(1)(b)(i), (ii) and (iii) of Directive 2015/1535). Annex I of the Directive 2015/1535 contains an indicative list of services not covered by this definition. In essence, services not provided ‘at a distance’ are services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices. Services not provided ‘by electronic means’ include services having material content, even though provided via electronic devices; or offline services; or services which are not provided via electronic processing/inventory systems. Services not provided ‘at the individual request of a recipient of services’ involve the so-called ‘point to multi-point’ transmission, such as television or radio broadcasting services. In any case, radio and television broadcasting services are also explicitly excluded from the scope of application of Directive 2015/1535 (Article 1(2) of Directive 2015/1535). Rules relating to matters which are covered by Union legislation in the field of telecommunication services, financial services and rules enacted by or for regulated markets are not covered by the Directive 2015/1535 (Article 1(3), (4) and (5)).

Directive 2015/1535 (colloquially referred to as the “Single Market transparency directive”) has replaced and codified the Directive 98/34,<sup>19</sup> which has

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<sup>18</sup> Directive (EU) 2015/1535 of the European parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015.

<sup>19</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998. Shortly after its adoption, Directive 98/34 was amended to include Information Society services (Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 217, 5.8.1998), anticipating that the development of Information Society and national regulatory activity might give rise to restrictions on the free movement of services and the freedom of establishment and lead to a refragmentation of the internal market, over-regulation and regulatory

been substantially amended several times. Its aim is to prevent the creation of new technical trade barriers by requiring national authorities to inform the European Commission of any draft technical regulations<sup>20</sup> on products and information society services before they are adopted in national law. This allows the Commission to review their compatibility with the internal market rules and to detect potential protectionist measures and barriers to free movement before they are actually adopted and implemented in a certain Member State. In addition, under the so-called 2015/1535 Procedure, the Commission is able to assess the potential need for harmonized rules at EU level. Notified drafts are registered in the TRIS (Technical Regulation Information System) database and published online,<sup>21</sup> thus providing all interested stakeholders with the opportunity to submit their opinion during the standstill period whether the draft rule would present a technical trade barrier.

Given that the term 'technical regulation' covers also the rules on services, the Directive 2015/1535 clarifies what is meant under these rules. They imply a requirement of a general nature relating to the taking-up and pursuit of Information Society service activities, in particular provisions concerning the service provider, the services and recipients of services, excluding any rules which are not specifically aimed at those services (Article 1(1)(e) of Directive 2015/1535). The rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner (Article 1(1)(f)(i) of Directive 2015/1535). Rules affecting Information Society services 'only in an implicit or incidental manner' shall not be considered as specifically aimed at such services (Article 1(1)(f)(ii) of Directive 2015/1535). The most common issue associated with the application of this Directive (and its predecessors) is whether a certain rule can be considered as a 'technical regulation' subject to

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inconsistencies. The notification of technical regulations under Directive 98/34 in turn draw its background from an earlier Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 109, 26.4.1983.

<sup>20</sup> 'Technical regulation' means "technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions [...] prohibiting manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider" (Article 1(1)(f) of Directive 2015/1535).

<sup>21</sup> European Commission, TRIS database, [<http://ec.europa.eu/growth/tools-databases/tris/en/>], accessed 30/8/2018.



the notification obligation. For example, in a recent case C-255/16, the Court of Justice of the EU<sup>22</sup> adjudicated that a national provision which provides for criminal sanctions where an unauthorized offer is made of gaming, lotteries or betting on the national territory does not constitute a technical regulation. However, a national provision which provides for sanctions in the event of advertising for unauthorized gaming, lotteries or betting, does constitute a technical regulation subject to the notification obligation, because the object and the purpose of the latter rule is to extend a pre-existing prohibition on advertising to cover online gaming services.<sup>23</sup> The object and the purpose of the disputed rule, however, were not readily discernible from the national rule itself, but from the *travaux préparatoire* which has led to its adoption. Consequently, the wording of the national provision does not necessarily have to refer specifically to information society services, if this conclusion may be drawn by applying the relevant national rules of interpretation.<sup>24</sup>

A similar problem arose in the case *Uber France*,<sup>25</sup> where the national court was in doubt whether the national rules regulating the provision of taxi services could fall under the term ‘technical regulation’ subject to the notification obligation. This case brings us to the next issue, whether online sharing platforms can be considered as providers of information society services.<sup>26</sup>

### 2.1.2. ONLINE SHARING PLATFORMS AS PROVIDERS OF INFORMATION SOCIETY SERVICES?

The first case in which the CJEU had to decide on the nature of services provided by the infamous ride-sharing platform Uber was the *Uber Spain* case.<sup>27</sup> The case started as a complaint about alleged infringement of the Spanish law on unfair competition, initiated by a professional taxi drivers’ association in Barcelona against Uber Systems Spain. At the center of the dispute was the innovative online platform business model, which has caused a similar disruption

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<sup>22</sup> Hereinafter referred to as ‘CJEU’.

<sup>23</sup> CJEU, Case C-255/16, Criminal proceedings against Bent Falbert and Others, EU:C:2017:983, para. 37.

<sup>24</sup> In this case, the wording of the Paragraph 10(3)(3) of the Danish Law on gaming (prohibition of advertising for unlicensed gaming) was such that it neither explicitly referred to information society services, nor has drawn any distinction between services provided offline and services provided online. See Case C-255/16, para. 31.

<sup>25</sup> CJEU, Case C-320/16, Criminal proceedings against Uber France, EU:C:2018:221.

<sup>26</sup> This case will be further discussed in the next section (2.1.2.) of this paper.

<sup>27</sup> CJEU, Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain, SL, EU:C:2017:981.

in the traditional taxi sector all around the world. That business model relies on the provision of platform enabled-service which connects drivers with passengers in need of a ride in real time, through smartphone application, in a completely cashless transaction (online payment of a fare is made through the platform, which keeps its fee and transfers the rest to the driver). The model creates a triangular relationship between a driver, a passenger, and a platform, whereby the platform acts as an intermediary between the driver and the passenger.<sup>28</sup> The problem was that neither the drivers nor the platform possessed any administrative license or authorization for such passenger transport.<sup>29</sup> Without going into further details about the innovativeness of the business model or the technology which facilitates it, it is clear that it was bound to disturb the usual ways of doing business and put the national licensing requirements, along with the functioning of the internal market for services to the test. According to the CJEU, an intermediation service that enables the transfer, by means of smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver using his/her own vehicle in principle meets the criteria for classification as an information society service. If classified as an information society service, Uber's platform-enabled service would benefit from the full scope of the free provision of services in the internal market, in accordance with Article 56 TFEU, Directive 2006/123 (Services directive<sup>30</sup>), Directive 98/34 (now Directive 2015/1535, Single market transparency directive) and Directive 2000/31 (E-commerce directive<sup>31</sup>). Any derogation of the free provision of such services has to be justified in light of the legitimate public policy objectives and proportionate. However, if it is something more than a mere intermediation service, it could be subject to the different legal regime. Since Uber connects passengers with drivers offering non-public urban transport services, such as taxi transport, this would be the legal regime for services in the field of transport. Services in the field of transport are exempt from the internal market rules on the free provision of services and fall under the common transport policy.<sup>32</sup> This means that where there is no common legal framework in the

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<sup>28</sup> See Hatzopoulos, V.; Roma S.: *Caring for Sharing? The collaborative economy under EU Law*, CML Rev (2017) 54:81-128, p. 95.

<sup>29</sup> Case C-434/15, para. 14.

<sup>30</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006.

<sup>31</sup> 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, OJ L 178, 17.7.2000.

<sup>32</sup> Article 58(1) TFEU. See more in Bodiřoga-Vukobrat, N.; Martinović, A.: *Disruption and the Law in the Digital World: Some Thoughts on the CJEU Uber Spain Judgment*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci (forthcoming).

EU for specific transport services, Member States are free to regulate the conditions under which such services (including intermediation services forming part thereof) are to be provided.<sup>33</sup> The CJEU concluded that the intermediation service provided by Uber must be regarded as forming an integral part of an overall service whose main component is a transport, and therefore has to be classified as a ‘service in the field of transport’ and not as an ‘information society service’.<sup>34</sup> The CJEU relied on two main arguments to substantiate its conclusion that the ‘physical’, transport service prevails over ‘digital’, intermediation service: (i) without Uber, there would be no transport service (i.e. a new market is created); and (ii) Uber has a decisive influence over the conditions under which the service is provided.<sup>35</sup>

From this judgment on, platform-enabled services ‘slipping’ from the digital into the ‘real’ world are to be regarded as complex, composite services. Which regime is going to prevail will depend on the facts of the case and the guidelines provided by the CJEU’s case-law.<sup>36</sup>

In the subsequent Uber France case,<sup>37</sup> the question was whether the French national legislation prescribing the terms for performance of non-public urban passenger transport, i.e. taxi services, should have been notified to the Commission before it was adopted, in accordance with (at the time applicable) Directive 98/34 on information society services. The provision of a national law laid down criminal penalties for the organization of a system for putting customers in contact with persons carrying passengers by road for remuneration using vehicles with fewer than 10 seats, without being authorized to do so.<sup>38</sup> The service in question consisted of putting, by means of a smartphone application and for remuneration, non-professional drivers in contact with passengers. Following the legal classification of the same service from the earlier Uber Spain case,<sup>39</sup> the CJEU concluded that such a service is more than an intermediation service, since the provider of that service fixes the rates and collects the fare for each journey from customer before transferring it to the driver of the vehicle. As such, it is part of an overall service, with transport being its main component. It was therefore deemed as a ‘service in the field of

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<sup>33</sup> Case C-434/15, para. 47.

<sup>34</sup> Case C-434/15, para. 40.

<sup>35</sup> Case C-434/15, para. 39. For further analysis, see Bodioga-Vukobrat, N.; Martinović, A., *op.cit.*

<sup>36</sup> This issue will be discussed in the next section (2.2.) of this paper.

<sup>37</sup> Case C-320/16.

<sup>38</sup> C-320/16, para. 15.

<sup>39</sup> Case, C-434/15.

transport', which means that neither Directive 98/34 nor Directive 2006/123 on services was applicable in this case.

As far as the CJEU is concerned, the fate of Uber's platform-enabled service is sealed.<sup>40</sup> For other online platforms enabling services, the degree of control exercised by the online platform over the underlying service will be crucial for classifying the service provided by the platform either as an information society service, or as another type of service, depending on the nature of the material service performed.

## 2.2. DETANGLING COMPOSITE SERVICES

When online platforms enable the provision of other services (e.g. transport, accommodation, housework, or even intellectual services), we are faced with the problem of composite services. The concept of composite services is rather self-explanatory, but it is not a legal term. Advocate General Szpunar refers to composite services as those "comprising electronic and non-electronic elements".<sup>41</sup> According to him, when the electronic or online element has no self-standing economic value, or in the case of Uber, when the online platform service has no economic meaning without the transport component, it should be considered as a service in the field of transport. We agree with Adamski who states that this classification of online intermediation services as 'composite services' "leads to far-reaching fictions".<sup>42</sup>

However, the CJEU in its Uber Spain and Uber France judgments seems to avoid using the term 'composite service' and instead refers only to Uber's intermediation service as "integral part of an overall service whose main component is transport service".<sup>43</sup> The CJEU substantiates this conclusion by relying on its earlier case-law interpreting what is meant under the concept of services in the field of transport ('any service inherently linked to any physical act of moving persons or goods from one place to another by means of trans-

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<sup>40</sup> Another preliminary reference concerning Uber's services Germany, which involved licensed drivers, but where the platform-enabled transport service contravened the German law on the transport of passengers was lodged by the German Bundesgerichtshof on 19 June 2017. However, following the Uber Spain judgment, the German court has decided to withdraw its request. See CJEU, Case C-371/17, *Uber BV v Richard Leipold*, Order of the President of the Court of 12 April 2018, EU:C:2018:313.

<sup>41</sup> Case C-434/15, Opinion of Advocate General Szpunar, EU:C:2017:364, para. 33.

<sup>42</sup> Adamski, D.: *Lost on the digital platform: Europe's legal travails with the digital single market*, CML Rev (2018) 55:719-752, p.743.

<sup>43</sup> Case C-434/15, para. 40.

port')<sup>44</sup>. It makes sense to avoid the argument concerning the self-standing economic value of the electronic component of the online intermediation service. It is really difficult to argue that the online intermediation service offered by Uber or similar platform has no economic meaning, because that argument simply cannot be substantiated through interpretation of the legal definition of information society services. A part of the definition of information society service is that it is provided 'by electronic means'. A service is provided by electronic means if it is "sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and *entirely* [emphasis added] transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means" (Article 1(1)(b)(ii) of Directive 2015/1535). An online intermediation service, whether it enables transport, accommodation, small home repairs, delivery or any other service actually *is* entirely transmitted electronically, as it represents an entirely new type of service (and market). The value lies in the service which enables another service.<sup>45</sup> It is valuable for the service recipients, as it makes it easier and more efficient to search for, book and pay for another service. It is valuable for the service providers, because it enables them to expand their market. So, it could be a win-win situation. The regulatory restrictions concerning the access to and conditions for the provision of services may still continue to apply on service providers, but not on the platform itself. By making the online connection subject to the legal regime applicable to the underlying 'physical' service, the digitally-enhanced innovation is annihilated.

### *2.3. THE NEXT STEP: PLATFORM-ENABLED ACCOMMODATION SERVICES*

Uber Spain case will certainly be tested in an interesting case concerning another online platform, which is currently pending before the CJEU.<sup>46</sup> It concerns Airbnb, a digital platform connecting providers and recipients of short-term lease services. The Tribunal de grande instance de Paris has lodged the

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<sup>44</sup> Case C-434/15, para. 36. The CJEU refers to its judgment in Case C-168/14 where it was found that the Services directive does not apply the activity of vehicle roadworthiness testing centres as it is ancillary, but indispensable to the exercise of the transport service. See CJEU, Case C-168/14, Grupo Itevelesa SL and Others v Oca Inspección Técnica de Vehículos SA and Generalidad de Cataluña, EU:C:2015:685, paras. 45 and 46.

<sup>45</sup> See more on this issue Schaub, M.Y.: *Why Uber is an information society service*, EuCML 3(2018), pp. 109-115, p. 113.

<sup>46</sup> CJEU, Case C-390/18, Criminal proceedings against YA and AIRBNB Ireland UC, Application, OJ C 294, 20.8.2018. See also Busch, C.: *The sharing economy at the CJEU: Does Airbnb pass the 'Uber test'?*, EUCML 4(2018), pp. 172-174.

preliminary reference to the CJEU on 13 June 2018, asking, primarily, whether the services provided in France by Airbnb Ireland via its electronic platform, which is operated from Ireland, fall under the freedom of services guaranteed by Article 3(2) of Directive 2000/31/EC (E-commerce directive).<sup>47</sup> The case originated from a complaint made by the Association pour un hębergement et un tourisme professionnel (Ahtop) to the Public Prosecutor's Office that Airbnb is violating the rules of the French law regulating the activities of real estate brokers. The disputed rules prescribe criminal sanctions for entities that perform real estate brokerage activities without holding a proper license and adhering to other obligations prescribed under that law.<sup>48</sup> Airbnb claims that its activities do not represent a real estate brokerage and that the application of that French law would contravene with the E-commerce directive. Under the E-commerce directive, Member States may not restrict the freedom to provide information society services from another Member State.<sup>49</sup>

Airbnb is an online platform for accommodation services, connecting hosts with guests in need of accommodation. Virtually everyone can create a profile and use the Airbnb services as a host or guest, or both. Again, a triangular relationship between the host, the platform and the guest is created. A host is the non-professional accommodation service provider, who can list his or her space (entire home or room) for free at the Airbnb online platform in just a few easy steps.<sup>50</sup> The host controls availability, prices,<sup>51</sup> house rules, check-in time, model of interaction with guests, etc. For its services, Airbnb charges host and guest service fees. The responsibility for complying with the local rules, conditions or restrictions for short-term rentals lies entirely on the individual host.<sup>52</sup> Like Uber, this business model has also provoked tectonic changes in the industry. In the case of Airbnb, the accommodation sector of the hospi-

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<sup>47</sup> Case C-390/18.

<sup>48</sup> See Busch, C., *op.cit.*, pp. 172-174. The facts of the case presented here are based on Busch's account in the above mentioned comment, as there was no other available information on this case at the time of writing of this paper.

<sup>49</sup> Article 3(2) Directive 2000/31. E-commerce directive refers to the definition of information society services from Directives 98/34/EC and 98/48/EC (now Directive 2015/1535).

<sup>50</sup> Airbnb official website, [[https://www.airbnb.com/host/homes?from\\_footer=1](https://www.airbnb.com/host/homes?from_footer=1)], accessed 28/8/2018.

<sup>51</sup> The host can choose to apply the Airbnb Smart Pricing tool, which is based on the type and location of the listing, season, demand, nearby events and other factors, and which allows for automatic raising or lowering the prices based on changes in demand for similar listings.

<sup>52</sup> However, Airbnb may be responsible for advertising unregistered holiday rentals; see "Airbnb fined 300,000 euros by the Balearic government", [<https://majorcadailybulletin.com/news/local/2018/02/19/50973/airbnb-fined-300-000-euros-the-balearic-government.html>], accessed 28/8/2018.

tality industry is now, in principle, open to any homeowner. The downside is that the profitability of short-term holiday rentals has an adverse effect on the housing markets, as it reduces the number of available long-term housing at affordable prices. This concern has led many communities to impose strict(er) rules on short-term rentals.<sup>53</sup>

At first glance, the service provided by Airbnb is a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. Therefore, it easily fits within the scope of ‘information society services’, to be provided freely and without obstacles, subject to the notification obligation of new technical rules. However, if we remember the reasoning applied in the Uber Spain judgment, we have to take a look whether the service offered by Airbnb is more than a mere intermediation service. In other words, is it a composite service? To answer this question, the CJEU will probably apply the ‘new market’ and the ‘decisive influence’ or degree of control test developed by the CJEU in the Uber Spain judgment.<sup>54</sup>

It is important to note that accommodation, which is the underlying service here, is not subject to any special legal regime in EU law. It falls under the free provision of services in the internal market, subject to primary<sup>55</sup> and secondary<sup>56</sup> EU law sources. A recently published study on the legal framework applicable to accommodation sector in the collaborative economy in the EU Member States has revealed that this sector is governed by “a range of pre-existing regulatory frameworks which have not been tailored to the collaborative economy”.<sup>57</sup> In other words, national authorization or registration requirements concerning accommodation service providers and concerning the collaborative platforms are not adapted to new business models in the digital economy environment.

And what about other services, such as delivery? For example, online platforms are increasingly used for delivery services, for anything from food<sup>58</sup>

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<sup>53</sup> For an overview of applicable restrictions in the major tourist hot-spots see “*What Airbnb really does to a neighbourhood*”, [<https://www.bbc.co.uk/news/business-45083954>], accessed 28/8/2018.

<sup>54</sup> Case C-434/15, para. 39. For a further discussion on this case see Busch, C., *op.cit.*

<sup>55</sup> Articles 56 – 62 TFEU.

<sup>56</sup> Primarily the Directive 2006/123 on services.

<sup>57</sup> For a detailed account of the regulatory framework applicable to collaborative economy in the accommodation sector in the EU Member States see European Commission, Study on the assessment of the regulatory aspects affecting the collaborative economy in the tourism accommodation sector in the 28 Member States (580/PP/GRO/IMA/15/15111J), 2018, p. 154, [<https://publications.europa.eu/en/publication-detail/-/publication/784303f0-5271-11e8-be1d-01aa75ed71a1/language-en/format-PDF>], accessed 26/8/2018.

<sup>58</sup> Such as Deliveroo, Foodora, Doordash, etc.

to marijuana.<sup>59</sup> 'New' online-food delivery platforms are creating new markets,<sup>60</sup> as they include restaurants that do not have traditional delivery and customers who might not order a takeaway were it not so readily available by means of a smartphone application. Many of these platforms set delivery prices and provide their driver partners with high-quality gear like phone holders, protective clothing, helmets and lights, all with the platform's distinctive colors and logo attached.<sup>61</sup> It seems that none of these platforms would pass the CJEU's Uber test.

### 3. PLATFORMS AS PROVIDERS OF ONLINE INTERMEDIATION SERVICES

In April 2018 the Commission has prepared the proposal for a Regulation of the European Parliament and the Council on promoting fairness and transparency for business users of online intermediation services.<sup>62</sup> The general objective of the draft Regulation is "to establish a fair, predictable, sustainable and trusted online business environment, while maintaining and further encouraging an innovation-driven ecosystem around online platforms across the EU".<sup>63</sup> The Commission acknowledges that online intermediation services can be crucial for the commercial success of undertakings that use and depend on such services to reach their customers.<sup>64</sup> The proposal therefore aims to regulate platform-to-business (P2B) relations, in particular to ensure appropriate transparency through various requirements concerning the terms and conditions of use of such platform services and effective redress possibilities. Online search engines are also covered by the scope of the draft Regulation.

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<sup>59</sup> In countries where marijuana is legalized for medicinal purposes, such as Eaze, Green-Rush, Baker, etc.

<sup>60</sup> See Hirschberg, C. *et al.*: *The changing market for food delivery*, [<https://www.mckinsey.com/industries/high-tech/our-insights/the-changing-market-for-food-delivery>], accessed 25/8/2018.

<sup>61</sup> See for example [<https://deliveroo.co.uk/apply?utm-campaign=ridewithus&utm-medium=organic&utm-source=landingpage>] or [<https://www.doordash.com/dasher/signup/>], accessed 26/8/2018.

<sup>62</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, Brussels, 26.4.2018.

<sup>63</sup> COM(2018) 238 final, p. 7.

<sup>64</sup> See Recital 2 to the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services 2018/0112(COD).



However, the platforms as providers of online intermediation services covered by this initiative include in principle online e-commerce market places, online software application stores and online social media. Their main common features identified by the Commission are that they allow for an online presence of business users that offer goods and services to customers, without those business users being required to operate their own website and that they frequently facilitate direct communications between individual businesses and consumers, through an embedded online communications interface.<sup>65</sup> In this context, it is interesting to analyze the new legal definition of ‘online intermediation service’ from Article 2(2) of the draft Regulation. According to that provision, ‘online intermediation services’ means services which cumulatively meet all of the following requirements: (a) they constitute information society services within the meaning of Article 1(1)(b) of Directive 2015/1535; (b) they allow business users to offer goods and services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and (c) they are provided to business users on the basis of contractual relationship between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services.<sup>66</sup> ‘Business user’ means any natural or legal person which through online intermediation services offers goods and services to the consumers for purposes relating to its trade, business, craft or profession.<sup>67</sup>

The intention was to define online intermediation services “in a precise and technologically-neutral manner”<sup>68</sup>; the accent is on the fact that they involve information society services which aim to facilitate direct transactions between business users and consumers, regardless whether the transaction is ultimately concluded on the online portal of the provider of online intermediation services or of the business user; or offline. Examples, as included in Recital 9 of the draft Regulation, include “online e-commerce market places, *including collaborative ones in which business users are active* [...]” (emphasis added).

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<sup>65</sup> COM(2018) 238 final, p. 1.

<sup>66</sup> Article 2(2) of the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services 2018/0112(COD).

<sup>67</sup> Article 2(1) of the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services 2018/0112(COD).

<sup>68</sup> See Recital 8 to the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services 2018/0112(COD).

Regulation does not apply to online advertising serving tools or online advertising exchanges or to online payment services.<sup>69</sup>

It is not entirely clear what is meant under the inclusion of collaborative market places on which business users are active. It certainly involves collaborative platforms for the sale of handmade goods, such as Etsy, Amazon Handmade, but what about collaborative platforms for the provision of services? Since the definition of 'online intermediation service' refers and depends on the existence of 'information society service', we will be left with the CJEU's Uber line of case law to deal with this issue.

#### 4. CONCLUSION - "OLD" RESTRICTIONS OR NEW CHALLENGES

From all of the above, it seems that 'real' online intermediation services will be rare in case of platforms acting as intermediaries for services.<sup>70</sup> This is unsatisfactory for all the reasons presented above. It is inherent in the nature of intermediation services to be closely related with the underlying service. Despite the limitation of liability for the performance of the underlying service itself, a platform will have to establish and keep a certain degree of influence over its providers, because its business model rests on the trust of service recipients that the platform is the easiest way to connect with the reliable service providers.<sup>71</sup> However, that does not mean that platforms should be treated as the providers of underlying services. For sharing platforms, the online intermediation is not just a part of the service or model of operation, it is the main economic reason for their existence. Both service providers and service recipients pay a fee for this service. The technology has enabled a quick and

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<sup>69</sup> Online advertising serving tools or advertising exchanges do not aim to facilitate direct exchanges between businesses and consumers, whereas online payment services are auxiliary to the transaction for the supply of goods and services to the consumers. See Recital 9 to the Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services 2018/0112(COD).

<sup>70</sup> Advocate General Szpunar mentions platforms for the purchase of flights or hotel bookings as examples of 'real' online intermediary services, where the "supply made by the intermediary represents real added value for both the user and the trader concerned, but remains economically independent". Opinion of Advocate General Szpunar in Case C-434/15, para. 34. However, if this argument is accepted, it would mean that only platforms that create virtual marketplaces for e-commerce would be online intermediaries, while platforms creating new markets would not.

<sup>71</sup> Codagnone and Martens present a systematic review of literature concerning the real motivation of consumers for participating in sharing platforms, see Codagnone, C.; Martens, B.: *Scoping the sharing economy: Origins, definitions, impact and regulatory issues*, Institute for prospective technological studies, Digital economy working paper 2016/1. JRC100369, 2016, p. 19 and further.

more efficient way of connecting service recipients with service providers. Assimilation of new, innovative digital services with the 'old', physical services means applying 'old' restrictions under the existing legal framework to them. It is necessary to adopt new legal instruments capable of dealing with emerging challenges associated with new technologies. This is indispensable if the EU is to deliver on its promise of unlocking the full potential of the digital single market. We believe that, in the case of platforms such as Uber, Airbnb, etc., the legal framework regarding the liability of platforms to ensure that providers of services possess the necessary licenses and authorizations should be strengthened. However, even under the existing legal framework, as argued above, it is not plausible to treat these platforms as providers of transport or accommodation services.

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