

Hard Cases

Uber and the Sharing Economy

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Abstract

Sharing economy is an economy system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the internet. It consists of two different business models. The first business model is the offering of goods or services by businesses through internet and/or mobile apps. In the second business model, business entities create a web platform where owners of goods (so called producers) meet and conclude sharing agreements with people who want to share such goods (so called prosumers). In the latter business model producers, with the help of business entities that organize web platforms, are competing with businesses. Such situation, which describes Uber's activity, originates doubts and legal disputes – like the one decided by the courts of Milan on spring-summer 2015 – about applicable rules to the economic relations existing among producers, prosumers and businesses.

I. The Decisions Rendered by the Court of Milan

At the end of spring 2015, several radio taxi associations and taxi unions of Milan, Genoa, and Turin requested a cease and desist order against Uber from the court of Milan.¹ The Plaintiffs asserted that via the 'UberPop' mobile application, the California company was unfairly competing in the taxi market by enabling drivers to sell public transportation services at lower prices, without respecting the mandatory licensing requirements for professional drivers and cars. According to the Plaintiffs, an urgent decision was needed because due to the upcoming World Exposition 2015 in Milan and surrounding areas, there was a concrete risk taxi drivers could suffer considerable losses in profits.

By decision rendered by the court of Milan on 25 May 2015,² and con-

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¹ The claim was filed against Uber international B.V., Uber international holding B.V., Uber B.V., Raiser Operations B.V., Uber Italy S.r.l.

² L. Giove and A. Comelli, 'Il blocco dell'app UberPop: concorrenza sleale nei confronti del servizio pubblico di taxi – Il Commento' *Diritto Industriale*, III, 245-259 (2015); A. Palmieri, 'In tema di autotrasporto di persone: la vicenda di Uber Pop' *Il Foro italiano*, I, 2192-2194 (2015). See also D. Surdi, 'Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce "UberPop"' *Rivista di diritto dell'economia*

firmed on appeal on 9 July 2015,³ the Plaintiffs' request for an injunction was granted and Uber was ordered to immediately stop offering the UberPop service within the Italian market.

In both judgments, the courts rejected the defensive arguments asserted by Uber and several consumer associations, which joined in the proceedings as third parties in support of Uber's position.

Uber's main defensive arguments were:

- i. Uber is only a web platform and does not provide taxi or transport services. It was asserted that the UberPop mobile application merely creates a web community between potential drivers and potential passengers and that Uber does not participate or interfere in these relationships;
- ii. As a consequence of point i), Uber is not competing with taxi drivers and radio taxi services as it is acting in a completely different market;
- iii. Therefore limiting Uber's access to the market would be in violation of the principles of Italian and European competition law.

The Italian courts first noted that the services provided by Uber could not be qualified as a marketplace wherein a matching tool is given to car owners to facilitate car sharing with other passengers. The courts observed that while in car sharing, carpooling or peer-to-peer services, the car is shared by the owner with other passengers who contribute to the costs of using and operating the car (eg, fuel, tolls, etc), UberPop allows drivers to sell transportation services to potential customers for profit. The courts also noted that Uber could not be considered a business entity completely extraneous to its drivers, as the latter are not free to negotiate prices with passengers, but are obliged to apply tariffs calculated by an algorithm (called *Uber Surge Pricing*) which, using a market price mechanism, increases tariffs when demand increases.

Based on this reasoning, the courts of Milan considered it to be undisputable that the market covered by Uber is exactly the same as that covered by taxis: the individual public transportation market where the customers' needs can be satisfied equally by either a taxi booked by radio service or by private cars booked by UberPop.

However, while in order to obtain their licenses and offer their services taxi drivers must bear considerable costs to satisfy the requirements

dei trasporti e dell'ambiente, 375-395 (2015); N. Rampazzo, 'Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso' *Diritto dell'Informazione e dell'Informatica*, 957-984 (2015).

³ A. Palmieri, 'In tema di blocco cautelare di un servizio di trasporto non autorizzato' *Il Foro italiano*, I, 2938 (2015).

provided by law (eg, medical exams, car inspections, insurance, etc), Uber drivers are not subject to these requirements. Therefore, Uber drivers can save costs and offer their services at a better price through predatory conduct which could stimulate the illegitimate poaching of passengers from taxi drivers to Uber drivers.

The Italian courts also denied that banning UberPop could be considered against the principles of Italian and European competition law. It was underlined that, as provided by Art 41 of Italian Constitution and Art 168 of the Treaty on the Functioning of the European Union, human safety is a value which prevails over the value of the free market. As the purpose of taxi regulation is mainly to protect the health and safety of customers, requirements must be set for taxis. For example, the cars used by the licensee drivers must be periodically controlled; the driver must pass periodical exams to verify his skill and his moral and physical integrity; and an insurance policy with adequate coverage for passengers is required.

The courts further observed that Uber has no such requirements for its drivers and in the agreement signed with passengers, it expressly states the California company is not part of the agreements between drivers and passengers. Moreover, passengers do not receive any information about the conditions of the cars, the age and experience of the drivers, or the level of insurance coverage for the car. Such lack of information – the courts of Milan commented – is worrisome when one considers the majority of Uber customers are young people, who usually tend to rely on the internet for hearing about fraud or other problems. The Italian courts added that the internet community usually becomes aware of the bad condition of a car or the poor skills of a driver only after an accident, when the unlucky passenger discovers the driver does not have proper insurance. This is an unacceptable risk – the Judges of Milan concluded – and demonstrates that the activity of Uber is against the law.

II. ‘Ubergate’

The two decisions rendered by the courts of Milan during spring-summer 2015 are only the Italian chapter of a legal battle which taxi unions, taxi drivers, municipalities and government bodies are fighting against Uber all over the world. In fact, Wikipedia reports Uber is involved in at least one hundred seventy-three lawsuits in the world.⁴

⁴ See ‘Legal status of Uber’s service’, available at https://en.wikipedia.org/wiki/Legal_status_of_Uber%27s_service (last visited 24 May 2016).

In Europe, several courts or municipalities and governmental agencies have banned UberPop (recently renamed UberX).⁵

The Hamburg⁶ and Berlin⁷ courts have ruled that UberPop does not comply with the licensing requirements for taxi services provided by the 'Passengers Transportation Act' (*Personenbeförderungsgesetz*) and that an injunction against Uber does not violate the Trade Regulation Act (*Gewerbeordnung*).⁸

On 9 December 2014, as part of an injunction request by the Madrid Taxi Association, the Commercial Court no 2 of Madrid ordered the suspension and ban of Uber's activities,⁹ affirming that Uber's activities were openly infringing passenger transportation rules.¹⁰

In March 2015, the Geneva Department of Security and Economy banned Uber's services in Geneva, stating Uber qualifies as a taxi dispatching center under Geneva Taxi law and fails to comply with the therein stated rules.¹¹

UberPop was subject to similar decisions in many cities in the United States, where local transportation agencies have ruled against the California company's presence in their local markets. News of injunctive orders has been reported also from cities in Asia and Central and South America.¹²

The worldwide legal disputes involving Uber always have the same content: that Uber creates unfair competition for taxis because the company does not pay taxes or licensing fees; it endangers passengers; its drivers are untrained, unlicensed and uninsured or underinsured; passengers are not covered by insurance and in general, the company breaks the law.

Notwithstanding this adverse environment, Uber's turnover and value are increasing. Its value is estimated presently at sixty-two thousand five hundred billion US dollars, thanks to the revenue from the billions of transactions conducted daily by its one million one hundred thousand drivers

⁵ R. Podszun, 'UBER – A Pan-European Regulatory Challenge' *Journal of European Consumer and Market Law*, 59-60 (2015).

⁶ Verwaltungsgericht Hamburg 27 August 2014, Case 5 E 3534/14, *BeckRS*, 55424 (2014).

⁷ Verwaltungsgericht Berlin 26 September 2014, Case 11 L 353.14, available at Juris.

⁸ L. Wusthof, 'UBER in Germany' *Journal of European Consumer and Market Law*, 60-62 (2015).

⁹ Juzgado de lo Mercantil no 2 Madrid, 9 December 2014 no 707/2014, *Asociación madrileña del taxi v Uber technologies Inc*, available in Spanish at www.poderjudicial.es (last visited 24 May 2016).

¹⁰ B. Conde Gallego, 'UBER in Spain' *Journal of European Consumer and Market Law*, 62-63 (2015).

¹¹ J.K. Sommer, 'UBER in Switzerland' *Journal of European Consumer and Market Law*, 116-118 (2015).

¹² 'Legal status of Uber's service' n 4 above.

operating in three hundred fifty-one cities in sixty-four different countries.¹³

One of the reasons Uber's economic growth does not seem to be affected by its legal disputes is most likely that the company is providing services, different from UberPop, which do not fall – or only partially fall – within the above-described scenario.¹⁴ Moreover, there is a strong consumer movement that supports Uber's activities.

As they have done in the Italian proceedings, consumer associations around the world often join legal proceedings as third parties in support of the California company. They assert that limiting access to the public transportation market is an unjustified 'government-granted privilege'¹⁵ bestowed upon powerful taxi driver lobbies, that it is against the principle of free competition, and that it damages consumers by depriving them of the chance to access alternative and cheaper transportation services.

Consumer associations also allege UberPop is a system that allows people who own a car and have free time to earn money. Thus, Uber is an important source of income in a period where the economic crisis is limiting job opportunities. Additionally, Uber reduces consumers' incentives to purchase automobiles, almost certainly saving them money and reducing environmental damage.¹⁶

It has also been asserted that sharing economy businesses such as Uber create value in at least five ways:¹⁷

- by giving people an opportunity to use others' cars, kitchens, apartments, and other property, it allows underutilized assets of 'dead capital' to be put to more productive use;
- by bringing together multiple buyers and sellers, it makes both the supply and demand sides of its markets more competitive and allows greater specialization;
- by lowering the cost of finding willing traders, haggling over terms, and monitoring performance, it cuts transaction costs and expands

¹³ See, B. Simonetta, 'Effetto Uber sul trasporto pubblico. Ecco l'eredità della startup da 62 miliardi di dollari' *IlSole24ore* (5 February 2016), available at [http://www.ilsole24ore.com/art/tecnologie/2016-02-05/uber-vale-625-miliardi-\\$-e-apre-ad-altre-startup-094803.shtml?uuid=ACDtMEOC](http://www.ilsole24ore.com/art/tecnologie/2016-02-05/uber-vale-625-miliardi-$-e-apre-ad-altre-startup-094803.shtml?uuid=ACDtMEOC) (last visited 24 May 2016).

¹⁴ For example, UberBlack, which provides chauffeur services with rental cars. In Italy, UberBlack was challenged by taxi drivers, but not banned.

¹⁵ T.W. Bell, 'Copyright Porn Trolls, Wasting Taxi Medallions, and Propriety of "Property"' 18 *Chapman Law Review*, 799-814, 808 (2015).

¹⁶ B. Rogers, 'The Social Costs of Uber' 82 *The University of Chicago Law Review Dialogue*, 85-102, 90 (2015).

¹⁷ C. Koopman et al, 'The Sharing Economy and Consumer Protection Regulation. The Case for Policy Change' 8 *Journal of Business, Entrepreneurship & the Law*, 529-545, 531 (2015).

- the scope of trade;
- by aggregating the reviews of past consumers and producers and putting them at the fingertips of new market participants, it can significantly diminish the problem of asymmetric information between producers and consumers;
 - by offering an ‘end-run’ around regulators who are captured by existing producers, it allows suppliers to create value for customers long underserved by those incumbents that have become inefficient and unresponsive because of their regulatory protections.

The above-described movement which supports Uber and, more generally, the sharing economy, has stimulated the enactment of new regulations that cover the area of services offered by the California company and that overcome the issue of the compatibility of such services with competition law.

In Italy, the *Autorità Garante della Concorrenza e del Mercato* (AGCM), the Italian Antitrust Authority, highlighted that with respect to UberBlack,¹⁸ ridesharing or carsharing services should be considered legal, as they promote competition in the individual public transportation market. With respect to UberPop, AGCM observed that the need of protect the safety of passengers should prevail over the competition value, exhorting the legislature to enact a ‘minimum regulation’ for web platforms which allow persons other than professional drivers to offer individual transportation services.¹⁹

Also, the *Autorità di Regolazione dei Trasporti* (ART), the Italian Transportation Authority, observed that services like UberPop are directed at a market partially different from the one where taxis and chauffeurs operate, providing a benefit not only for passengers, but also for the environment and traffic.²⁰ The Authority proposes modifying the existing Italian transport regulations by introducing a new category of transport services provided by persons other than professional drivers via web platforms.

In Europe, on 21-22 January 2014, the European Economic and Social Committee rendered an opinion on ‘Collaborative or participatory

¹⁸ See n 14 above.

¹⁹ *Autorità Garante della Concorrenza e del Mercato*, 29 September 2015 *Parere AS1222, Legge quadro per il trasporto di persone mediante autoservizi pubblici non di linea*.

²⁰ *Autorità di Regolazione dei Trasporti*, 21 January 2015, *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*.

consumption, a sustainability model for the 21st century²¹ which highlights that: ‘collaborative or participatory consumption (...) represents an innovative complement to a production economy in the form of a use-based economy offering economic, social and environmental benefits. It also offers a way out of the economic and financial crisis, by enabling people to exchange things for others that they need (...). Given the complexity and importance of the emergence of collaborative or participatory consumption, the relevant institutions need, on the basis of the necessary studies, to regulate the practices carried out within these forms of consumption, in order to establish the rights and responsibilities of all the stakeholders involved. Firstly, collaborative or participatory consumption can meet social needs in situations where there is no commercial interest and, secondly, it can help, as a for-profit activity, to create jobs, while complying with the rules on taxation, safety, liability, consumer protection and other essential rules’.

Legislation has been adopted both to prevent and regulate the new transportation services.

Some of these laws are very strict and do not work in favor of Uber. On 1 October 2014, the French Government promulgated the *Thévenoud* Law,²² which recognizes ‘Transportation Service with Driver’ as a distinct category from ‘taxi service’, but imposes heavy restrictions on companies that organize shared service transportation, making it an offense to organize a for-profit shared transportation service using drivers who are not taxi or professional drivers. On the basis of this law – whose compatibility with competition law has been contested by Uber to the European Commission – drivers providing UberPop services have been arrested and fined, and UberFrance’s offices have been searched by twenty-five policemen.²³

There is also legislation in the United States whose content is more favorable for Uber, including laws in Milwaukee, Seattle and California.²⁴

III. The Business Models of the Sharing Economy

²¹ European Economic and Social Committee 21-22 January 2015, 495th Plenary Session, *Rapporteur B. Hernández Battaler* 2014/C 177/01. See also European Parliament – Directorate-General for Internal Policies – Policy Department Structural and Cohesion Policies – Research for Tran Committee – Tourism and the Sharing Economy: Challenges and Opportunities for the EU 2015.

²² Loi 1 October 2014 no 204-1104, relative to ‘aux taxis et aux voitures de transport avec chauffeur’.

²³ P. Jouglaux, ‘UBER in France’ *Journal of European Consumer and Market Law*, 112-113 (2015).

²⁴ E. Mitchell, ‘Uber’s Loophole in the Regulatory System’ 6 *Houston Law Review*, 75-97, 94 (2015).

It is a common view that the internet and the sharing economy create new ways to do business, which cannot be understood and governed with classic economic concepts.²⁵

It is noted that the traditional mechanisms of market distribution have been completely changed by the internet. The time and costs business firms bear to offer products and services to their customers have dramatically decreased. At the same time, customers benefit from an enormous quantity of information – including the important role played by customer reviews – which drive purchases and are easy to access.²⁶

These aspects have exploded with the advent of mobile web applications that have made cellular phones and tablets efficient tools for searching and purchasing, hiring, lending, sharing, selling, exchanging, or bartering goods and services. This phenomenon has seen the advent of an ‘economy system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the internet’.²⁷

The idea that goods – mainly long-lasting goods with an idling capacity, as they do not need to be constantly used by owners – can be shared by different people with an access-based consumption model has been used for years in the timeshare market, which inspired Directive 94/47/EC of the European Parliament and the Council of 26 October 1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

However, in recent times, mobile web technologies have made it extremely easy for owners to get in contact with consumers interested in paying a fee for sharing the utilization of properties or services so that, now, access has become the new form of ownership.²⁸

It has been underlined that: ‘collaborative or participatory consumption practice can apply to any aspect of daily life, such as:

- mobility (car-sharing, the rental and shared use of vehicles, including taxis, bicycles and parking places, and carpooling, which means filling empty car seats with other passengers going in the same direction),

²⁵ J. Kassan and J. Orsi, ‘The Legal Landscape of the Sharing Economy’ 27 *Journal of Environmental Law and Litigation*, 1-20 (2012); P. Aigrain, *Sharing: Culture and Economy in the Internet Age* (Amsterdam: Amsterdam University Press, 2012).

²⁶ G. Smorto, ‘Verso la disciplina della sharing economy’ *Mercato, concorrenza e regole*, 245-277, 267 (2015).

²⁷ See, eg www.oxforddictionaries.com/definition/english/sharing-economy (last visited 24 May 2016) stating: ‘thanks to the sharing economy you can easily rent out your car, your apartment, your bike, even your wifi network when you don’t need it’.

²⁸ S. Ranchordas, ‘Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy’ 16 *Minnesota Journal of Law, Science & Technology*, 413-475, 416 (2015).

- energy efficiency (shared use of household utensils),
- accommodation and areas for growing food (rental of rooms, shared housing, and urban and rural allotments),
- business (co-working or shared office space),
- communications (mobile platforms where users can buy and sell goods and services to people living in the same community),
- work (micro-tasks, hiring people for specific jobs, or ‘handymen’, where the best bidder is given tasks ranging from hanging pictures to assembling items of furniture),
- culture (bookcrossing and book bartering, and promoting cultural exchanges among young people from different countries),
- education (digital communities for learning languages),
- time and skills (time banks),
- leisure (sharing digitalized content),
- finance (loans between individuals, direct loans from individuals to small and medium-sized enterprises, crowdfunding or collective financing, crowdfunding for crowdbenefits),
- tourism (dining experiences in private homes), and peer-to-peer food swapping,
- art and also markets for bartering and donating clothing and items for children, repair and recycling of objects, ...,
- promoting the use of renewable energies, where possible sharing energy surpluses through smart networks’.²⁹

The sharing economy, regardless of the area of life where it is utilized, consists of two different business models, depending on who is offering the goods or the services and who is organizing the web platform where the goods or the services are offered.

The first business model is the offering of goods or services by businesses through the internet, mobile apps, or both. This model has become very popular for cars and bicycles. In this model, there are two parties, the users and the businesses, and one agreement between them.

In the second business model, business entities create a web platform where owners of goods (or performers of services) meet and conclude sharing agreements with people who want to share such goods (or services).

UberPop falls in the latter business model of the sharing economy.

The California company is defined as a transportation network company that enables ride-sharing transactions between drivers and customers, without owning any vehicles; rather, it connects passengers with nearby

²⁹ ‘Collaborative or participatory consumption, a sustainability model for 21st century’, Opinion of the European Economic and Social Committee, 21-22 January 2015.

drivers through a mobile phone application, much like a taxi dispatcher does.³⁰

In such scenarios, business entities – like Uber – play the role of intermediary and their success is linked to the web platform. Because they charge a fee for each transaction between owners and users, the faster and more secure and precise the platform is in letting the customers find and obtain the goods or services, the more profits the company makes. In this model, there are three parties involved: the businesses which run the web platform, the owners of the goods to be shared, and the users of such goods. There are also three agreements: the agreement between the businesses and the users, the agreement between the businesses and the owners, and the agreement between the owners and the users.

The first business model does not create new legal issues. The service agreement concluded by the two parties is a B2C agreement that falls under consumer law, unless the fee paid by the user is lower than the minimum required to cover costs of the sharing organization. For example, several municipalities consider bike sharing an important tool to reduce pollution and traffic within the city³¹ and qualify such services as public transportation, the price of which is fixed according to social and not economic criteria.

The application of the law to the second business model is more complex. One relevant legal issue concerns the liabilities suffered by the organizer of the web platform. Another legal issue concerns the rules of the agreement signed between the user and the owner of the good shared.

IV. Uber's Liability towards Passengers and Third Parties

In its proceedings around the world, Uber always claims to be completely independent from its drivers and consequently denies any liability towards passengers and third parties for illicit activities committed by its drivers.

Terms and Conditions of the agreement proposed by Uber to its passengers reads as follows: 'To avoid any doubts: Uber, itself, does not provide transport services and Uber is not a transport company. It is up to the service provider to offer transport services, which can be requested through the use of an application and/or service. Uber acts solely as an intermediary between you and the service provider. The transport services

³⁰ J. Davis, 'Drive at your own risk: Uber violates unfair competition laws by misleading Uberx Drivers about their insurance coverage' 56 *Boston College Law Review*, 1097-1142, 1103 (2015).

³¹ See <http://www.roma-n-bike.com/progetto.asp> (last visited 24 May 2016).

on the part of the service provider are, therefore, governed by the contract (to be) concluded between you and the service provider. Uber will never be a part of that contract’.

Despite Uber’s position and its Terms and Conditions, many courts, including the courts of Milan, have affirmed that Uber cannot be considered extraneous to the agreement signed between the drivers and the passengers and, for this reason, have concluded Uber is acting in the same market as taxis, as its intermediary services are part of the transportation service offered by its drivers.

The conclusion reached by the Italian Judges is correct.

It is a commonly accepted principle that, in the application of entrepreneurial risk, business entities are liable for the damages to customers and third parties caused by the activities of employees and outsourced entities that operate under the entity’s control and instructions.³²

For many years, European case law has held that when a business entity ‘works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter’s undertaking, who must carry out his principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking’.³³

While it is true that Uber does not take part in the decision of drivers and passengers to conclude the transportation agreement, it is also true that the content of such agreements and the conduct of drivers are substantially affected by Uber’s instructions.

Uber fixes the method of payment (credit card), which is considered the hallmark of the company. Tariffs are not freely agreed by drivers and passengers but imposed by the California company and calculated by an algorithm, *Uber Surge Pricing*, created by Uber itself. Uber even has a policy that passengers need not tip the drivers.³⁴

Even if Uber’s hierarchical position to its drivers could not be considered as sufficient to recognize employee status,³⁵ it seems undisputable that

³² P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961).

³³ Case 40/73 *Suiker Unie and others v Commission of the European Communities* (European Court of Justice 16 December 1975) available at www.eur-lex.europa.eu.

³⁴ On the Uber website it reads: ‘When you arrive at your destination, just hop out – we’ll automatically charge the credit card on file. And there’s no need to tip’.

³⁵ On the website www.uberlitigation.com it is stated that ‘*O’Connor et al v. Uber Technologies, Inc.*, C.A. No. 13-03826-EMC (N.D. Cal.) is a pending lawsuit against Uber Technologies, Inc. (“Uber”) that has been filed by four drivers who have used the Uber App (the “App”) on behalf of a Class of drivers who have used the App in California. The plaintiffs in the lawsuit allege that they and other drivers in California should be classified as employees, and that Uber has therefore violated sections of the California Labor Code by not reimbursing drivers for certain expenses and not passing along to drivers the part of the fare that they allege represents a tip. The court has certified a class

Uber is liable for the damages to passengers and third parties by its drivers as the drivers are part of the business organization set up and guided by Uber.³⁶

A claim filed against Uber by the parents of a six-year-old pedestrian killed in San Francisco by an Uber driver – who did not have a passenger but was logged into the app and searching for fares – was settled.³⁷ However, because of this incident Uber had to review its insurance coverage. Originally, it only covered drivers after they had accepted a ride request and while they were transporting a passenger. Since then, Uber has expanded it to cover drivers during their entire time on duty under certain circumstances.³⁸

V. The Relation between Passengers and Uber Drivers and Their Duty of Good Faith

An additional interesting and uncertain legal issue of the sharing economy is identifying the rules that govern the agreement concluded by the owner of the shared goods and the user when – like the drivers of UberPop – the owners are not a business entity.

Under definitions provided by Art 1.b of the Council Directive 93/13/EEC of 3 April 1993, on ‘unfair terms in consumer contracts’ and by Art 2.2 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011, on consumer rights, the owner of the shared goods cannot be said to qualify as a producer or seller or trader as he is not ‘acting for purposes relating to his trade, business or profession’.

Scholars refer to such subjects as *producers* while the users of their goods are called *prosumers*.³⁹ It is also observed that when *prosumers* pay a fee to *producers* for sharing their goods, a capitalist act between consenting adults takes place.⁴⁰

Until the enactment of regulations or the advent of self-regulation,⁴¹ such sharing agreements will fall in the category of C2C or P2P agreements

to pursue the reimbursement claim (as to vehicle-related and phone expenses, but not other expenses) and the tips claim, which include the misclassification question (ie, whether drivers are or are not Uber’s employees).

³⁶ M. Macmurdo, ‘Hold the Phone! “Peer-to-Peer” Ridesharing Services, Regulation and Liability’ 76 *Louisiana Law Review*, 307-353, 332 (2015).

³⁷ J. Davis, ‘Drive at your own risk: Uber violates unfair competition laws by misleading Uberx drivers about their insurance coverage’ 56 *Boston College Law Review*, 1097-1142 (2015).

³⁸ T.G. Locks, ‘Travelers Beware: Tort Liability in the Sharing Economy’ 10 *Washington Journal of Law Technology & Arts*, 329-342 (2014-15).

³⁹ G. Smorto, n 26 above, 264.

⁴⁰ B. Rogers, n 16 above, 87.

⁴¹ H.A. Posen, ‘Ridesharing in the Sharing Economy: Should Regulators Impose

(eg agreement between private parties)⁴² and will be governed by common contract law rather than consumer law.

Without detailed rules, the content of the obligations of the parties will be covered by blanket clauses, among which the duty of good faith will play an essential role.

The duty of good faith will impose that the private owners of goods provide users with adequate information about the quality of the goods, in order to let them decide whether to pay a sum to share it. A *producer* cannot be asked to provide the technical information of the goods, as required by consumer law. At the same time, he will have to transparently share any sensitive information about the goods that he knows (for example if he shares his home, if there is something material not working).

It is questionable if the duty of good faith also affects the required conduct of the *prosumer*. While consumer law does not create any specific duty for the consumer, there is a question whether the nature of the sharing agreements and their collaborative scope impose a duty to users to issue a review of the good or service.

A review is defined as ‘a consumer’s opinion and/or experience of a product, service or business’. Reviews can be found on specialist websites and on the websites of many retailers, retail platforms, booking agents, and trusted trader schemes (schemes helping consumers to select a trader).⁴³

Recent studies have described the important function played by reputational feedback mechanisms – such as reviews or ratings –⁴⁴ in an internet economy.⁴⁵

Other possible benefits of online consumer reviews include:

- enabling consumers to make faster and better buying decisions;
- ensuring (or boosting) competition among businesses regarding products and services that consumers value and therefore indirectly – with the feedback provided by consumers online – help bring up their quality;

Uber regulations on Uber?’ 101 *Iowa Law Review*, 405-433 (2015).

⁴² G. Smorto, ‘I contratti della sharing economy’ *Foro italiano*, V, 222-228 (2015).

⁴³ J. Valant, ‘Online consumer service. The case of misleading or fake reviews’, 2, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571301/EPRS_BRI\(2015\)571301_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571301/EPRS_BRI(2015)571301_EN.pdf) (last visited 24 May 2016).

⁴⁴ Other monitoring mechanisms has been developed to ensure quality. Uber allows passengers to see the GPS path of their rides so they can independently verify the driver took the shortest route. The firms also have the address and credit card information of every customer, which helps to ensure the safety of the drivers. This also permits all transactions to be cashless, reducing the incentive for theft. The result is more fully informed and empowered customers (C. Koopman et al, n 17 above, 542).

⁴⁵ G. Smorto, ‘Reputazione, fiducia e mercati’ *Europa e Diritto Privato*, 199-218 (2016).

- allowing consumers to narrow their search and identify reviews of particular relevance to them (for instance reviews filtered by age, social status or other criteria);
- bringing consumers' attention to a wider range of products and services that they might otherwise not have been aware of (and thus also allowing new business entrants and small businesses to benefit from online visibility).

It has been observed that 'information technology has facilitated the creation of countless reputational feedback mechanisms across the online ecosystem – such as product rating and review systems – that give consumers a more powerful voice in the economic transactions'.

Until now, the research has focused mainly on misleading or fake reviews originated by businesses and the way web platforms should handle these, so as to recognize reviews that are not genuine.

There has also been discussion on how to protect consumers from legal actions filed by businesses in the event of negative reviews and what actions businesses entities can adopt in the event of negative reviews.

However, in the internet economy, once it is ascertained that reputational information represents 'a secondary invisible hand' which can promote a more transparent and efficient market, it should be ascertained whether a review is not only an option but also a duty arising from the duty of good faith.

This conclusion seems to be even more correct for the sharing economy where the imbalance of power between a stronger party (business or professional) and a weaker party (consumer) is missing, as both parties – owner and user – are operating on a level playing field.

This is the concept of the sharing economy, which is grounded on relations inspired by collaboration instead of exchange or profit purposes, and which enhances the value of the reviews as a way to maximize the economic and, mainly, social value of the goods shared.

Until now, courts have been reluctant to find private users liable for bad reviews. However, if it is true that the success of the sharing economy depends on these reputational feedback mechanisms, reviews should be promoted also by affirming the liability of the users who do not fulfill the duty to provide a correct review.