

Digital Platforms and the Role of Shared Economy

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Summary: The shared economy is currently a rapidly developing segment of the economy, which is gaining more and more popularity, especially in cities and highly populated areas. The shared economy is closely linked to digital markets, as it usually uses digital platforms for its operation. This article focuses on shared economy definition as well as digital platform differentiation and related EU primary and secondary legislation, as well as case law.

Keywords: Shared Economy, Digital Platform, Uber, Airbnb, Booking.com, Price Parity Clauses, Czech Competition Authority.

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1. Introduction

The shared economy (or collaborative consumption) is currently a rapidly developing segment of the economy, which is gaining more and more popularity, especially in cities and highly populated areas. The shared economy is closely linked to digital markets, as it usually uses digital platforms for its operation. Within the first chapter will be analysed who is actually involved because digital platforms can be divided into six types, based on the forms of exchange these platforms facilitate. Another discussed problem is enshrined a legally binding definition of shared economy in European union law and related issues. Although shared economy takes a non-negligible part of European markets, and creates new jobs

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and sources of income for a certain part of people, European law does not yet provide any legal definition of this term. From the problematic legal anchoring, we can also get to the inconsistency of the used terminology, a “collaborative economy” may also be known as a “shared economy,” “sharing economy,” or a “peer-to-peer economy.”

Speaking about the European regulations with this field, the assessment of the consequences of collaborative platforms has generated some controversy since it’s needed to adequate them into the current legal framework. One has to know if platforms are service providers *stricto sensu* – submitted to the Services Directive – or providers of “information society services” – and, in this context submitted to the E-commerce Directive. The consequences of subsuming collaborative platforms to one or the other Directive are not negligible. Qualification of shared platforms was appreciated by the European Union Court of Justice. Within this article the *Elite Taxi/Uber* case is analysed, as well as the European Commission’s approach to the issue. One of the questions is whether they should be regulated by specific legislation – and in this case, whether this should be developed by the European Union or, subsidiarily, by the Member States – or, on a different way, only be submitted to the general regime applicable to all sectors of economic activity, such as the general regulation on data protection etc. Another case that is analysed within this article is the *Airbnb Ireland and Airbnb Payments UK* case related to Italian taxation system and an obligation to provide information. Last but not least, the decision of the Czech Competition Authority and Czech courts related to Booking.com and the application of price parity clauses applied in the travel sector is analysed.

2. What are digital platforms and how are they divided?

Digital platforms are business models that use online infrastructure to facilitate interactions between groups. In other words, digital platforms are online ecosystems that connect users, businesses, and services. They facilitate interactions by providing infrastructure, algorithms, and tools to enable seamless transactions. These platforms thrive on network effects; the more users they have, the more valuable they become.¹ They also enable businesses to scale globally with minimal costs compared to traditional brick-and-mortar models. Although those are technical definitions rather than a legal one, digital platforms can be defined

¹ The general idea of a network effects is that an increased number of users improves the value of a good or service.

through their basic features as they have several features that enhance their functionality and appeal. For one, they can grow and accommodate transactions without significant cost increases. That scalability is essential to expanding market reach with minimal business infrastructure. Accessibility is another important feature. Digital platforms operate continuously and are accessible regardless of time zone or geographic location. This boosts user engagement by enabling real-time interactions and transactions. Digital platforms also streamline business processes and automate complex tasks, such as reducing the need for extensive manual labour, minimizing operational costs, and improving resource management. All these features allow digital platforms to generate substantial value.²

There are many different types of online platforms, each with their own unique features and functions. The first group is related to social networks, those are online platforms such as Facebook, Twitter, Instagram, and LinkedIn, where users can communicate with friends, family, colleagues, and others. The second group is related to E-commerce platforms, such as Amazon, eBay, and Alibaba, where users can buy and sell products. The third group is related to freelancing, those online platforms such as Upwork, Fiverr, and Freelancer, where freelancers can find assignments and work for clients. The fourth large group consists of marketplaces, those are platforms such as Etsy and Airbnb, where users can offer and find goods or services. The fifth group consists of online learning platforms such as Udemy, Coursera, and Skillshare, where users have access to courses and educational material. Another group is formed by gaming platforms, such as Steam, Xbox Live, and PlayStation Network, where gamers can play games and communicate with each other. And the last group introduced are crowdfunding platforms, such as Kickstarter and Indiegogo, where users can raise money for projects and ideas. These are just a few examples of online platforms. There are many more types and the number continues to grow as technology advances more and more.³

As already mentioned above, digital platforms are closely linked to digital markets and shared economy as shared economy traditionally uses digital platforms for its operation. In the next part of this article, I therefore consider it necessary to clarify the current definition of shared economy and related legislation, including EU case law.

² GIBSON, K. *Digital Platforms: What They Are & How They Create Value*, 8 May 2024, [online]. Available at: <https://online.hbs.edu/blog/post/what-is-a-digital-platform> (Accessed: 14 October 2024).

³ *Types of online platforms What online platforms are there?*, 13 May 2022, [online]. Available at: <https://start-platform.com/types-of-online-platforms> (Accessed: 14 October 2024).

3. Is there any legally binding definition of shared economy?

The shared economy is a very fast-growing industry that is becoming more and more popular. At the same time, there is a large number of individuals who actively participate in it is growing, and thanks to that, shared economy is becoming a phenomenon of the 21st century. The shared economy refers to peer-to-peer exchanges of goods and services facilitated by digital platforms. Instead of owning assets, individuals can rent, share, or trade them. Without a doubt, this trend would not be possible without advances in IT that create new ways of communication, new payment options, but also new potential ways of violating the law. In particular, in this context, I would like to draw your attention to the growth of the internet, smartphones and their applications, which significantly shape the way in which the entire society and the economy work. These innovations necessarily lead to situations that might be atypical from the point of view of law, since the character of the shared economy is in some cases different from the regime known by the current law, thus the law is facing new challenges and problems. It is therefore a logical step for states and transnational organizations to try to respond to these facts and create an applicable legal framework that would fill the legal vacuum and uncertainty. I consider it important to mention that the term shared economy (just like the term digital platform) is a rather economic and technical, however it significantly affects a whole range of sectors such as competition law, data and information protection, the right to privacy, system of taxation, liability, labour law and many others.

To sum it up, the shared economy as such is not a new phenomenon,⁴ but due to the use of modern technologies, it is necessary to look at it from a different point of view. And not only legal. As a result of this fact, there is no proper legal definition and comprehensive legal regulation, for instance the European law

⁴ Historically, the first traceable definition of shared economy can be found in the work of Marcus Felson and Joe L. Spaeth from 1978 (FELSON, M., SPAETH, J. L. *Community Structure and Collaborative Consumption: A Routine Activity Approach*. American Behavioral Scientist, 1978, pp. 614–624). Although the authors use the term “collaborative consumption”, it is a similar term that can be used in the sense of shared economy. After all, this aptly shows the large degree of inconsistency even in basic terms, which we are still dealing with nowadays. In their article, Felson and Spaeth state that these are events in which one or more persons consume economic goods or services as part of the process of engaging in joint activities with one or more persons. A different definition is provided by Botsman and Rogers (BOTSMAN, R., ROGERS, R. *What's mine is yours: how collaborative consumption is changing the way we live*. Rev. and updated ed. London: Collins, 2011.) The mentioned authors claim that it is an economic model promoting the use of ownership, which enables the optimization of consumption through the sharing, exchange, renting and lending of goods and services.

does not yet provide any legally binding definition of this term. For example, in 2016 the European Commission tried to modify the concept of the shared economy and offered the following definition:

“For the purposes of this communication, the concept of”, “sharing economy” refers to business models in which activities are facilitated by collaborative platforms that create an open market for the temporary use of goods or services often provided by private individuals. The sharing economy includes three categories of actors:

- *service providers who share assets, resources, time and/or skills – they can be private individuals offering occasional services (so-called “peers”, entities at the same level) or service providers acting in the exercise of their profession (“professional service providers”),*
- *their users and*
- *intermediaries who – through an online platform – connect providers with users and facilitate transactions between them (“collaboration platforms”). Transactions in the sharing economy generally do not involve a change in ownership and can be conducted for profit or not-for-profit”.⁵*

This is the definition that I consider the most relevant from the EU law point of view. However, it is necessary to keep in mind that this is only a definition included in communication of the European Commission, i.e. an act that creates the so-called *soft law*. It is therefore not legally binding and thus does not create a binding legal definition. There are several definitions in use, but a unified definition can not be found at the moment.

As mentioned above, the sharing economy is not a new phenomenon, what is revolutionary is the way in which relations between subjects are created. Their implementation is often conditioned by the use of information technology in the form of mobile applications. They create a kind of online platform where a person who plans to use someone else’s property can find a person who will provide it without the need for any personal contact. That is, without these entities knowing each other in any way. Such applications are currently used by Uber, Blabla Car, Booking.com, Airbnb and other platforms.

3.1. Relevant primary EU legislation

Within the European Union, several primary laws (treaties) are relevant to digital platforms and the sharing economy. The key legal foundations include the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’), namely Art. 26

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A European agenda for the collaborative economy. COM/2016/0356 final.

which establishes the internal market, ensuring free movement of goods, services, capital, and persons; Art. 56-62 which guarantee the freedom to provide services across the Union and applies to digital platforms as such; as well as Art. 101 and 102 that are covering competition law, namely preventing anti-competitive agreements and abuse of dominant positions which is important for big tech companies. Art. 114 is related to harmonization of laws for the functioning of the internal market, including digital services; and Art. 169 is providing consumer protection and ensuring fair practices in digital transactions. Besides, the Treaty on European Union (hereinafter 'TEU') includes several provisions relevant to digital platforms and shared economies as well. For example Art. 3(3) promotes a highly competitive social market economy, relevant for balancing innovation and fairness in digital markets; and Art. 5 establishes the principle of subsidiarity.⁶

Last but not least, Charter of Fundamental Rights of the EU guarantees respect for private and family life that might be linked to data protection in digital services,⁷ as well as protection of personal data, relevant for digital platforms handling user information⁸ and freedom to conduct business, supporting digital entrepreneurship.⁹ All of the above mentioned Articles serve as the legal basis for secondary EU legislation.

3.2. Related secondary EU legislation

The assessment of the consequences of collaborative platforms has generated some controversy since it's needed to adequate them into the current European legal framework. One has to know if platforms are service providers *stricto sensu* – submitted to the Services Directive¹⁰ – or providers of “information society services” – and, in this context submitted to the Electronic Commerce Directive.¹¹ Answering this question is essential in order to determine what the internal and relevant national market access requirements are. At the same time, the consequences of subsuming collaborative platforms to one of these directives are not negligible.

Regarding the mutual relationship between the two directives, it is also necessary to clarify, since both directives regulate the area of service provision by

⁶ Meaning EU intervention is justified only if local or national measures are insufficient.

⁷ See Art. 7.

⁸ See Art. 8.

⁹ See Art. 16.

¹⁰ 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, p. 36–68.

¹¹ 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, p. 1–16.

providers who are established in a EU member state. Directive on services in the internal market is a general regulation that applies only in those cases that are not regulated by another special regulation. This is precisely the case with the Electronic Commerce Directive, which applies to information technology services.¹² Specifically Art. 3 para. of the Service Directive which lists the regulations that take precedence. Considering the word ‘in particular’ used and at the same time taking into account the argument of Advocate General M. Szpunar, who calls this a demonstrative list and admits that this interpretation can be extended to those norms that are not explicitly mentioned here.¹³

The basic assumption behind this division lies in what the platform as a service actually provides. The first question that is offered here is whether it is a mere mediation of contact between the passenger and the driver/seller, etc. or it is a complex service consisting of this mediation, but also of the realization of a separate service (transportation, sales, teaching, etc.)?

The implementation of the first – the Electronic Commerce Directive – determines that, the so-called “internal market clause” provided in Art. 3, para 2 of the Directive, which prevents Member States from restricting the free movement of information society services from another Member State, should be respected. In a different way, the regulation of the Services Directive to platforms not covered by the Electronic Commerce Directive determines a subsequent and specific analysis of the services provided through the platform since, in some cases, they may be excluded from the subjective scope of the Services Directive as it does not apply to sectors such as transport, financial services, temporary work and health services. This is a problem that has been discussed in the past by the European Commission in the Communication issued in 2016 entitled ‘*A European Agenda for the Collaborative Economy*’.¹⁴ In this document, the Commission considered that the equalization of a collaborative platform to a provider of the service considered the preliminary inquiry about the level of control or influence exercised over the person that, at the end, performed the service:

This would require compliance with the following conditions:

- price – in this case, it should be the platform to set the final price to be paid by the user as beneficiary of the underlying service.

¹² KRUPA, M. *Dopravní aplikace sdílené ekonomiky a jejich veřejnoprávní regulace*. 1. vydání. Praha, Leges, 2019, p. 37.

¹³ Opinion of Advocate General Maciej Szpunar delivered on 11 May 2017, marg. no. 92 [Online]. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=190593&doclang=CS> (Accessed: 15 October 2024).

¹⁴ 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/2016/0356 final.

- ownership of key assets – the collaborative platform would own the key assets used to provide the underlying service.
- other essential contractual conditions.

Thus, it would be for the platform to establish other terms and conditions, apart from price, that determine the contractual relationship between the underlying service provider and the user. For the European Commission, the cumulative fulfilment of these three conditions would determine the qualification of the collaborative platform as the provider of the underlying service, in particular with a view to assure the application of the Services Directive. If not, the platform would be qualified as an “information society service provider” and would therefore be submitted to the Electronic Commerce Directive.

3.3. Related case law

As mentioned above, shared economies and the way they operations significantly affects a whole range of sectors such as competition law, data and information protection, the right to privacy, system of taxation, liability, labour law and many others. In this chapter, some decisions concerning digital platforms and related issues will be analysed in order to show examples of issues with which the Court of Justice of the European Union (but also national courts and authorities) had to deal with.

3.3.1. *Uber case*¹⁵

Qualification of shared platforms was appreciated by the Court of Justice of the European Union (hereinafter ‘CJEU’). The court was answering the question whether the Uber collaborative platform was subject to the Electronic Commerce Directive or to the Services Directive on the other hand.

In this case, the CJEU first considered that Uber could be regarded as an intermediary and, in that case, be described as provider of an ‘information society service’. On the other hand, a non-collective¹⁶ urban transport service, such as a taxi service, should be classified as a ‘transport service’. However, the CJEU noted that a service such as Uber is not limited to intermediation as it

“ [...] simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in

¹⁵ C-434/15 *Elite Taxi/Uber*, ECLI:US:C:2017:981.

¹⁶ Uber Technologies Inc. is an American multinational transportation and mobility company that enables the ordering of transportation by personal car. The company operates under the category “network transport company”. It works to develop, market and operate the Uber mobile application which allows consumers with a smartphone to submit ride requests that are then forwarded to drivers connected to the Uber network using their own cars.

the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.”¹⁷

The existence of the platform/application Uber is, to the CJEU, essential to the activity so that without the application, “ [...] those drivers would not be led to provide transport services and persons who wish to make an urban journey would not use the services provided by those drivers”.

The application can therefore be considered essential for the functioning of the market and Uber can to be considered as a market-maker. According to the CJEU Uber exerts a decisive influence on the conditions of the provision of drivers by applying at least the maximum price of the journey it charges the customer before delivering a part of it to the unprofessional driver of the vehicle and ensures a certain degree of control over the quality of the vehicles and their drivers’ behaviour, which may entail, when appropriate, their exclusion.

The CJEU concluded that Uber forms an integral part of a global service whose principal element is transport. In other words, although a mixed service is involved, the main element in is transport. Uber should therefore be classified as ‘service in the field of transport’ and not ‘information society service’.

As it qualifies as ‘service in the field of transport’, it is not covered by Art. 56 TFEU which concerns the freedom to provide services in general. It is the Art. 58 para.1 TFEU which concerns the principle of freedom to provide services that have to be applied through the implementation of a common transport policy.

According to the CJEU knowing that non-collective urban transport services and services inextricably linked to it, such as Uber intermediary service, did not result in the adoption, by the European Parliament and the Council of the European Union, of common rules or other measures, on the basis of Art. 91 para 1 TFEU and so it is up to the Member States to regulate the conditions for the provision of such services.

In summary, the CJEU applied a test which came to be known as the “Uber test”, which aims to determine whether a given collaborative platform acts as a mere intermediary – consequently covered by the Electronic Commerce Directive – or as service provider – in this case covered by the Services Directive – in the light of which it will be necessary to examine whether the following conditions are fulfilled:

- i. The indispensability of the platform (application) for the provision of the service (market-maker);
- ii. The exercise, by the platform, of a decisive influence on the conditions of the provision of the service, namely, by fixing:
 - Price (for example the maximum price),

¹⁷ C-434/15 *Elite Taxi/Uber*, ECLI:US:C:2017:981, par. 38.

- Control over the quality of the service provided,
- Possibility of exclusion of service providers.

The Uber test will surely be used in the future to be applied to other collaborative platforms such as Airbnb. In that regard, in the Uber conclusions, Advocate General Maciej Szpunar¹⁸ seemed to qualify Airbnb¹⁹ as being part of the information society services.

European Commission's response

The emergence of collaborative platforms has resulted in a kind of 'spontaneous liberalization' in the European Union and in the Member States. One of the questions is whether collaborative platforms should be regulated by specific legislation – and in this case, whether the regulation should be adopted by the European Union or, subsidiarily, by the Member States – or in a different way, only a general regime applicable to all sectors of economic activity should be submitted, e.g. the General Regulation on Data Protection.²⁰

The signals given by the European Commission allows to anticipate that the Commission did not want to intervene directly in the sector by adopting a *stricto sensu* regulation of some platforms operating collaboratively but choose a strategy that some call 'wait and see' instead. This strategy can be understood in light of the principle of conferral powers on the one hand and the principle of subsidiarity on the other. There are activities for which the European Union has no powers and in other cases, the principle of subsidiarity may require the Member States to exert regulatory jurisdiction, as explained by the CJEU in the case of *Elite Taxi/Uber vis-a-vis the transport sector*. The neutrality followed by the European Commission makes it possible to move away from fracturing discussions around collaborative platforms, while ensuring *de jure* the essential legal regulation of collaborative platforms. This particular strategy for collaborative platforms and its specific regulation may be also understood because many of the questions raised can be addressed

¹⁸ Opinion of Advocate General Maciej Szpunar delivered on 11 May 2017, marg. no. 92 [Online]. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=190593&doclang=CS> (Accessed: 15 October 2024).

¹⁹ Airbnb is a global group which operates the eponymous property intermediation platform on the internet, facilitating the connection, on the one hand, of lessors who have accommodation and, on the other hand, persons seeking that type of accommodation, Airbnb collects the payment for the provision of the accommodation from the customer before the start of the rental and transfers that payment to the lessor, if there has been no challenge on the part of the lessee.

²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4. 5. 2016, p. 1–88.

through already existing legal instruments, such as competition law or legislation, such as the Services-Directive²¹, the Electronic Commerce-Directive²², the Payment Services Directive²³ or the General Regulation on Data Protection²⁴. Incidentally, in April 2018 the Commission submitted a proposal for a Regulation on promoting fairness and transparency for business users of on-line brokering services²⁵. However, this proposal does not apply to collaborative platforms but only the ‘services of online intermediation’.

3.3.2. *Airbnb Case*²⁶

A 2017 Italian law establishes a new tax regime for short-term property rentals outside a commercial activity. That law applies to contracts for the rental of residential property by natural persons outside a commercial activity for a maximum period of 30 days, whether concluded directly with the lessees or through the involvement of property intermediaries, which include persons who, like Airbnb, operate online platforms. As from 1 June 2017, income from such rental contracts is – where the owners concerned have opted for that preferential rate – subject to a withholding tax at a rate of 21 % owed to the Treasury and data relating to the rental agreements must be transmitted to the tax authority. When they receive rents, or take part in their collection, persons who act as property intermediaries must, as tax collectors, withhold 21 % of the amount of the rents and pay it to the Treasury. Non-resident persons who do not have a permanent establishment in Italy are obliged to appoint, in their capacity as persons liable to pay the tax, a tax representative.

Airbnb Ireland UC and Airbnb Payments UK Ltd, which belong to the global Airbnb group, brought an action seeking the annulment of the decision of the

²¹ 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, p. 36–68.

²² 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, p. 1–16.

²³ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC. OJ L 337, 23. 12. 2015, p. 35–127.

²⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4. 5. 2016, p. 1–88.

²⁵ 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.

²⁶ C-83/21 *Airbnb Ireland and Airbnb Payments UK*, ECLI: ECLI:EU:C: 2022:1018.

Director of the Tax Authority implementing the new tax regime. Seized of the appeal brought by Airbnb against the ruling dismissing that action, the Consiglio di Stato (Council of State, Italy) asked the Court to interpret several provisions of EU law in the light of the obligations imposed by national law on intermediaries facilitating the short-term rental of immovable property.

The CJEU holds that the three obligations introduced in 2017 into Italian law fall within the field of taxation and are therefore excluded from the scope of certain directives relied on by Airbnb. Thus, the CJEU examines the lawfulness of the three measures solely in the light of the prohibition on restrictions to the freedom to provide services within the EU laid down in Art. 56 TFEU.

In the first place, it observes that the obligation to collect and communicate to the tax authorities data relating to rental contracts concluded following property intermediation applies to all third parties, whether they are natural or legal persons, whether or not they are resident or established in that territory, and whether they act via digital means or via other means of putting the parties in contact. The Court infers, in accordance with the case-law,²⁷ that such an obligation does not contravene the prohibition laid down in Article 56 TFEU since it is applicable to all operators exercising their activity on the national territory.

In the second place, the obligation to withhold tax at source is also incumbent both on providers of property intermediation services established in a Member State other than Italy and on undertakings which have an establishment in Italy. The Court therefore rules out that that obligation may be regarded as prohibiting, impeding or rendering less attractive the exercise of the freedom to provide services.

In the third place, the obligation to appoint a tax representative in Italy applies however, for its part, only to certain providers of property intermediation services without a permanent establishment in Italy. Since that obligation requires them to take steps but also to bear the cost of paying that representative, such constraints cause, for those operators, a hindrance of such a kind as to deter them from providing property intermediation services in Italy, in any event in the manner they wish to do so. That obligation must thus be regarded as a restriction on the freedom to provide services prohibited, in principle, by Article 56 TFEU. Although that tax measure pursues the legitimate objective of ensuring the effective collection of tax, which may be capable of justifying a restriction on the freedom to provide services, it nevertheless exceeds what is necessary to achieve that objective. That measure applies without distinction to all providers of property intermediation services without a permanent establishment in Italy who have chosen, in the context of providing their services, to collect rents or consideration

²⁷ C-674/20 *Airbnb Ireland*, ECLI:EU:C:2022:303.

relating to the contracts covered by the 2017 tax regime, or to intervene in the collection of those rents or consideration. However, that measure makes no distinction based on, for example, the volume of tax revenue collected or liable to be collected annually on behalf of the Treasury by those providers. Moreover, the fact that the tax authority has already received information concerning the taxpayers is such as to facilitate its supervision and, therefore, contributes to the disproportionate nature of the obligation to appoint a tax representative. It follows that the obligation to appoint a tax representative is contrary to Article 56 TFEU. To sum it up, EU law does not preclude the requirement to collect information or to withhold tax under a national tax regime. However, the obligation to appoint a tax representative constitutes a disproportionate restriction on the freedom to provide services.

3.3.3. Booking case

The decision-making practice of several competition authorities seems to go in the opposite direction than the above mentioned approach of the Commission ‘wait and see’. Several national competition authorities (e.g. in the UK, Germany, France, Sweden or Czechia) considered recently in cases involving online travel agencies (such as Booking.com²⁸ or Expedia²⁹) that they did not act as mere intermediaries, as they impose conditions essential for the definition of the price, in particular by means of tariff parity clauses.³⁰ For example, in April 2024, the Czech Supreme Administrative Court issued a final decision³¹ upholding the fine of 8,336 million CZK (approx. 330,875 EUR) imposed by the Czech Competition Authority (hereinafter the ‘CCA’). According to the CCA’s 2018 decision³², Booking entered into vertical agreements with short-term accommodation providers between 2009 and 2015, requiring them to ensure price and availability parity as part of the service’s general terms and conditions. Furthermore, the accommodation providers could only offer more favourable

²⁸ Booking.com is one of the world’s largest travel platforms that enables properties from around the world to reach a global audience and grow their business, whether they are established companies or private properties of various sizes.

²⁹ Expedia Group, Inc. is a travel technology company that owns and operates travel price aggregators and travel metasearch engines, including Expedia, Hotels.com, Vrbo, Travelocity, Hotwire.com, Orbitz, Ebookers, CheapTickets, CarRentals.com, Expedia Cruises, Wotif and Trivago.

³⁰ Basically, price parity clauses in the travel sector restrict hotels from offering rooms on their own websites at rates lower than what they’re offered on an online platform like Booking.com. Depending on how they’re written, they can also restrict the price at which hotels offer their rooms on other online platforms.

³¹ Decision of the Czech Supreme Administrative Court 6 n. As 35/2022–54 of 17th April 2024.

³² Decision of the Czech Competition Authority n. S0664/2015/KD-37030/2018/830/DK1 of 12th December 2018.

conditions to customers who booked their accommodation through the Booking platform. As a result, customers using the Booking platform would always pay a lower price than if they had used another booking method or contacted the provider directly. This practice was confirmed by hundreds of accommodation establishments in Czechia. At the end of 2019, the CCA's decision was upheld by the CCA's Chairman in the appellate proceedings³³. In its appeal, Booking disagreed with the definition of the relevant product market, claimed there were no anticompetitive effects and that its practices were covered by the VBER³⁴ (then applicable Regulation 330/2010, no longer in force, valid till the end of May 2022). The Chairman, however, found none of the objections to be justified. Booking filed a lawsuit with the Regional Administrative Court in Brno, which dismissed it³⁵, agreeing with the conclusions of the CCA and its Chairman. With reference to the German Competition Authority's decision, the court held that the parity agreements did not fall within any block exemption. Finally, the Supreme Administrative Court upheld the first-instance court's decision and the fine in its entirety, agreeing that Booking prevented the development of effective competition in the market. The Supreme Administrative Court's judgment was final.

As mentioned above, the CCA is one of the few EU competition authorities to find Booking's conduct in breach of competition law, and subsequently imposing a fine for it.

Furthermore, within the context of the Booking.com case, the Rechtbank Amsterdam (District Court in Netherlands) has sought a preliminary ruling³⁶ – in particular on how the relevant market should be defined and whether parity clauses constitute an ancillary restraint under Art.101 para. 1 TFEU. Importantly, the CJEU held that price parity clauses in this context – both wide and narrow – are not 'ancillary restraints' and therefore will not fall outside the scope of the prohibition against anticompetitive agreements set out in Art. 101 para 1 TFEU. In particular, the inclusion of a price parity provision in such agreements is not indispensable to the main operation of the agreement – i.e., the operation of Booking.com is not rendered 'impossible' without inclusion of the price parity provision. Consequently, any price parity provision in a Booking.com agreement must be individually assessed for compliance with Art.101 para 1. Price parity

³³ Decision of the Czech Competition Authority n. j. ÚOHS-R0219/2018/HS-29914/2019/310/Aš of 1st November 2019.

³⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102, 23. 4. 2010, p. 1–7.

³⁵ Decision of the Regional Administrative Court in Brno n. 30 Af 2/2020–135 of 31st of January 2022.

³⁶ C-264/23 *Booking.com BV and Booking.com (Deutschland) GmbH v 25hours Hotel Company Berlin GmbH and Others*, ECLI:EU:C:2024:764.

restrictions may still be compatible with EU competition rules if they either benefit from a safe harbour under the Vertical Agreements Block Exemption Regulation³⁷ or qualify for individual exemption under Art. 101 para 3. In practice, wide price parity provisions will not benefit from a safe harbour under the VBER (which treats wide parity restrictions as “excluded”, meaning they require individual assessment), and the bar for demonstrating efficiencies under Art. 101 para. 3 is high.

To sum it up, this CJEU decision represents an important development in the context of the assessment of price parity clauses under EU competition rules. The Court’s decision does not mean all price parity provisions will infringe competition law, and any form of price parity could still comply, depending on the facts in each case.

4. Conclusion

Overall, many people support and encourage digital platforms and shared economy because of the benefits they bring to consumers, in particular because of the prices and innovation that underlie them. Many others criticize them for, among other reasons, calling into question typical traditional business models (e.g. taxis); for contributing to speculation and removal of local populations in large urban centres (e.g. Airbnb) or even for being anti-democratic by qualifying platforms that aggregate data. Whether you belong to one group or the other, one thing is for sure, development cannot be stopped and probably should not be slowed down. The European Union and its institutions are facing a milestone.

As already mentioned and demonstrate on case law, a strategy for collaborative platforms and its specific regulation may be addressed through already existing legal instruments, such as competition law or other relevant legislation.

Specifically speaking about the personal transport sector, in the case of taxis, licensing regulation was understood as a response to market failures and ensuring quality. The practice of regulated prices, to the adjustment of ex ante demand, is a way to avoid congestion in cities and, in the end, to protect consumers. However, in the opposite way, many say that regulation only allowed the interests of incumbents to be safeguarded, generating an inability to increase competition. In this last dimension, the emergence of electronic platforms helped to enhance

³⁷ Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11. 5. 2022, p. 4–13.

competition and the welfare of consumers and, doing so, raised the quality of the services provided and introduced better price adjustments and more innovative offerings.

In addition, there is one more important fact, Europe currently lags behind North America and Asia when it comes to digital tech industry. If we want to gradually change this situation (and if it is even possible to change this situation and catch up with the European lag), we have to change the way we think and the way we understand regulation in general.

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