THE PRIVATE-LAW ASPECTS OF SHARING ECONOMY AFTER THE "UBER CASE"

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Abstract

The authors analyze the private-law status of on-line platforms in the light of the current legislation and case-law. The focus has been laid especially on the conclusions of the Court of Justice of the European Union in its judgment Asociación Profesional Elite Taxi v. Uber Systems Spain SL. The authors pinpoint various implications of private-law claims arising from the private-law relationships. In addition, the economic aspects and benefits of Uber highlighting the importance of a proper legal regulation concerning the on-line platforms and sharing economy have been considered, as a complex result of which the authors propose certain legislative solutions.

Key words: *sharing economy, on-line platforms, Uber case, de lege ferenda proposals, European Union*

INTRODUCTION

On 20 December 2017, the Grand Chamber of the Court of Justice (hereinafter referred to as "CJEU") issued a pilot judgment concerning one of the most prominent subjects of sharing economy – the Uber platform [Case C-434/15, 2017][1]. The provided service in the matter has been qualified as a transport service. Even though the subject-matter revolved around specific and individually provided services, CJEU has also outlined how it viewed the on-line platforms as legal entities.

CJEU has explicitly declared that the service in question is not an information society service[2], but a service in the strict sense[3] – even though an on-line platform, or rather a company providing a virtual space for provision of services does not actually (physically) provide such a service. In a simple way, Uber company has been "classified" as a taxi service provider even though it has not had any vehicle and has not employed any driver. Needless to say the opinion of CJEU is of a huge importance for any law or a state as such within European Union [Gregor 2016].

Although other, more discussed aspects concerning the provision of these services have emerged lately (e.g. licensing issues for permit to carry out this activity, an obligation to declare income flowing from this activity or the labor law aspects), the private-law aspects, on which the judgment in Professional Elite Taxi v. Uber Systems Spain[4] has undeniable significance, should not be disregarded at all.

For a proper clarification, some of the further described benefits and statistics have been based on data related to the period when Uber was actively operating in Bratislava, Slovakia, for a longer period of time making for a relevant stats pool. However, on March 27, 2018, Uber decided to (shortly) discontinue the operation of its services following the measure ordered by the District Court of Bratislava I in case between Občianske združenie koncesovaných taxikárov and Uber B.V., dated February 16, 2018, File Ref. No. 8CbPv/1/2018 [Case 8CbPv/1/2018, 2018].

The last statement is no longer valid, though. Uber is now again operating in Bratislava since April 25, 2019. This is a result of a partial amendment to the existing legislation on traffic regulation, which has softened the conditions for operation of transport services. Nevertheless, the amendment has not affected the relevance of either the analyzed CJEU judgment or any other provided statements mentioned below in this article concerning also other on-line platforms. In other words, the private-law aspects of on-line platforms remain to be determined yet across the most of EU countries including the Slovak Republic.

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[1] Case C-434/15 concerning a request for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Mercantil n° 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) in connection with the proceedings Asociación Profesional Elite Taxi v Uber Systems Spain, SL. The pertinent proceedings have not been the only proceedings initiated against this platform. There are plenty others as well, e.g. Case C-526/15 Uber Belgium BVBA v Taxi Radio Bruxellois NV (Case C-526/15, 2016), Case C-371/17 Uber BV v Richard Leipold (Case C-371/17, 2018) that were also considered.

[2] Despite the fact that on-line platforms have been considered as an information society service pursuant to Article 1(2) of Directive 98/34/EC amended by Directive 98/48/EC as referred to by Article 2(a) of Directive 2000/31/EC (Directive 2000/31/EC, 2000). The pertinent directives have been, however, repealed and replaced by currently valid and effective Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Directive (EU) 2015/1535, 2015).

[3] That is a service in the field of transport pursuant to Article 2(d) of Directive 2006/123/EC (Directive 2006/123/EC, 2006).

[4] Also abbreviated as the "Uber case" (any necessary grammatical changes shall be made).

1. ON-LINE PLATFORMS AND THE BASICS OF SHARING ECONOMY

The actual mystery of this phenomenon is not just its content, but the very notion of sharing economy also referred to as a collaborative economy. It can be simply defined as a means of economic activity of individuals (peers) motivated to achieve a profit in the digital or rather virtual Internet environment. The subject of "sharing" is an asset, a service, or know-how[5] of one party offered to the other interested party specifically targeting the offer at a place, where the offer is being gleaned. On-line platforms allow for economic interaction (not only) between professional service providers and consumers, which would not have made sense in the recent past due to the transaction costs [Kindl & Koudelka 2017]. To be more specific – the most typical platforms are the ones offering:

a) a transport – either urban (uberPOP) or long-distance (BlaBlaCar);
b) an accommodation (AirBnB);
c) a peer-to-peer financing (Kickstarter, Zonky (CZ), Žltý melón (SR)).

The sharing economy revolves around the factual and economically motivated behavior of subjects of legal-economic relationships that existed before development of the Internet. This long-persisting behavior of people has also found its place on this network thanks to the changes and development of the Internet, and it has been professionalized ever since on a gradual basis by individual subjects.

The sharing economy, unlike a common legal-economic relationship, distinguishes three subjects:

a) a service provider,
b) a recipient of a service; and
c) an on-line platform.

The status of supplier and consumer is relatively obvious in legal-economic relationships, unlike the special status of on-line platform, which was primarily defined only as an intermediary of the provided services. The status and powers of this platform are absolutely crucial for understanding the distinctive features of the relationships arising from sharing economy.

On-line platform presents a "technical solution" that mediates and transactionally facilitates a relationship between original actors of the relationship, whilst at the same time it systematically eliminates the potential information constraints on one or both parties [Kindl & Koudelka 2017]. From a legal point of view, an on-line platform is operated by a specific law subject (usually a legal person). Thus, the technical solution actually becomes a subject of social relationships with a strong economic background regulated by law.

2. LEGAL REGULATION OF ON-LINE PLATFORMS

Since an on-line platform clearly provides services in the electronic communications environment, in Slovakia it is regulated by the following law:

a) at European level by Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (hereinafter referred to also as the "Directive") and partly by Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on

[5] These concepts, however, have rather economical than purely legal connotations. This is understandable as we do not have a legal definition for a defined legal area (either national or supranational, i.e. European one).

promoting fairness and transparency for business users of online intermediation services (hereinafter referred to also as the "Regulation")[6]; and
b) at national level by Act no. 22/2004 Coll. on electronic commerce, which transposed the aforementioned Directive.
Under the Directive (and the aforementioned Act), on-line platforms can certainly be considered to fall within a definition of an information society service defined as any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service [Directive 2000/31/EC, 2000][7].
The Directive allows the provision of such services in the Member States of the European Union in accordance with national law, whereas under Article 3(2) of Directive on electronic commerce, Member States may not restrict the free movement of such services[8].
As regards the aforementioned Regulation, it shall require the providers of online intermediation services and online search engines (e.g. Google search) to implement a set of measures to ensure transparency and fairness in the contractual relations they have with online businesses (e.g. online retailers, hotels and restaurants businesses, app stores), which use such online platforms to sell and provide their services to customers in the EU. The Regulation thus shall harmonize transparency rules applicable to contractual terms and conditions, ranking of goods and services and access to data, whereby it shall present the first regulatory attempt in the world to establish a fair, trusted and innovation-driven ecosystem in the online platform economy.
The specific method of concluding a distance contract with an information society service provider has been partially regulated (with the minimum extent of harmonization) in the Directive and very partially in the Regulation (as regards mostly transparency rules), whilst specific regulation of rights and obligations of the providers from the relevant Member State of the Union, including the rules on the conclusion of distance contracts, has been left to national legislation.
However, the Directive (and, on the basis thereof, the transposed legislation) addresses an important regulation concerning the exemptions from liability related to entities that have "only" a status of a provider of an intermediation service. In such cases, intermediaries fulfilling requirements of the so-called channel (mere conduit), caching and hosting provision of service[9] enjoy a status of the so-called safe harbor. Under a safe harbor notion, we understand a provider, whose transmission activity is merely technical, automatic and passive – i.e. the provider does not interfere with the content that is being transmitted [Cholasta et al., 2017]. However, the definition of this concept and its meaning does not follow directly from the Directive, but is defined by case law of CJEU. This court always assesses the conditions of provided

[6] Date of effect of this Regulation has been set out to July 31, 2019.
[7] The definition of an information society service follows from Directives 98/34/EC and 98/84/EC of the European Parliament and of the Council (Directive 98/34/EC, 1998 & Directive 98/84/EC, 1998) .
[8] However, for the purposes of providing information society services in another Member State, a Member State may take measures against a particular service for the reasons and in the manner set out in Article 3(4) of the Directive.
[9] The conditions for the exemptions from liability of such providers are governed by Art. 12-14 of the Directive.

services ad hoc, i.e. by their extent and depending on whether a provider in question may or may not be able to interfere with those services[10].

3. ECONOMICAL ASPECTS AND BENEFITS OF UBER – SOME OF THE REASONS WHY WE SHOULD CARE ABOUT ON-LINE PLATFORMS

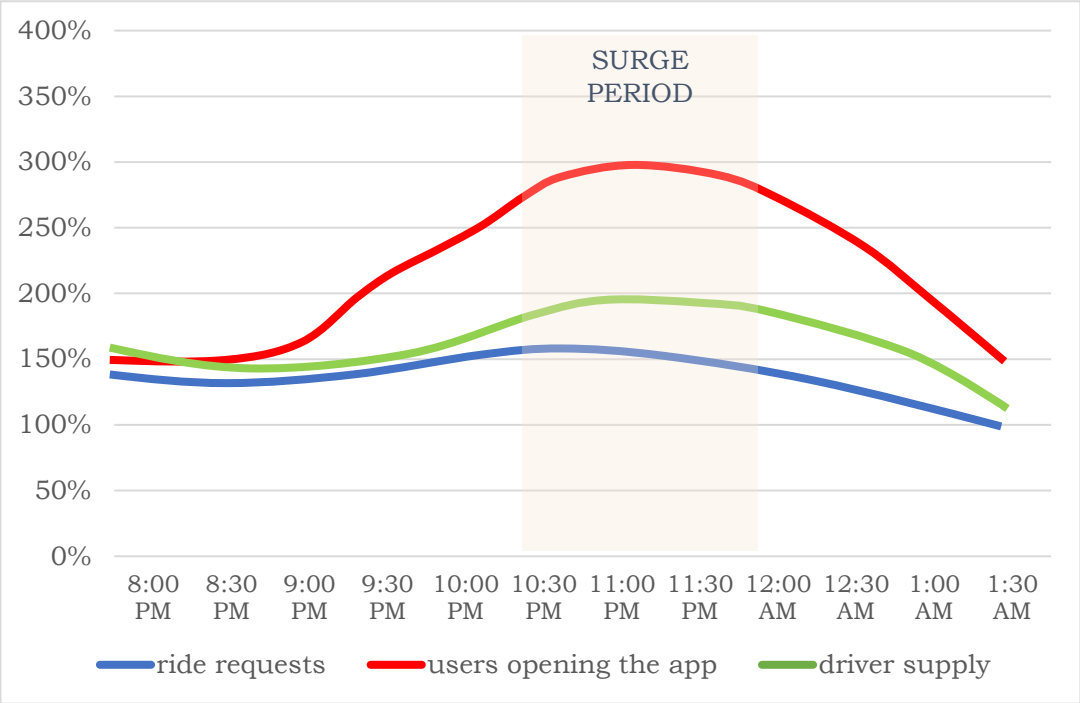
Before proceeding further, it is important to address some of the significant benefits that sharing economy brings to the economy as such. These benefits and economic aspects have been given in relation to the central concept of this article, namely Uber. Uber has grown wildly popular, providing more than a million daily rides as of December 2014 [Cardenas 2014] and was the most valued venture-backed company as of December 2015 [Isaac & Picker 2015]. As specifically regards Bratislava, more than 100.000 registered users have been known to use the application. Illustration of some of these benefits should further lead to the answer why we should be paying more attention to the chosen issue.

Many of the Uber benefits have been interlinked with the dynamic pricing policy of Uber. In times of high demand such as after the end of a musical concert, during a night or during Christmas as well as in times of limited public transport, the Uber algorithm tries to balance a demand with a supply. For that purpose, it uses the so-called "surge pricing", which generally causes several things at once:

- Higher prices affect the number of drivers on the roads. When a "surge period" occurs, Uber sends a series of SMS messages to its drivers and appeals for turning on the application and providing a ride.
- Higher prices make people use Uber even more efficiently. If a customer faces the three-time higher price, whilst knowing that a public transport can reliably drive him home, many of customers change their mind about taking Uber. In this sense, Uber rather does support the traditional means.
- Higher prices ensure the cars are available for emergencies, especially if the customer needs to get to another place quickly and needs a guarantee, whether it is an airport, a maternity hospital or a job interview [CETA 2017].
- From an economic point of view, the Uber algorithm is exceptionally good in balancing a demand and a supply, thus maintaining a constant waiting time (Hall et al., 2015). Let's illustrate the underlying economics by taking a typical example of a surge in action. An example might relate to a sold-out concert. Attendees attempting to get home after the concert (in our illustrative scheme - 10:30 pm) usually cause a large spike in demand. Because of the increased demand relative to the number of available Uber cars in the area, a surge kicks in. The first beneficial effect of a surge is that it increases the number of drivers in the area. This increase in driver supply is a net win for riders in the area because more of them can take advantage of Uber services. The second effect of surge pricing is that it allocates rides to those that value them most. As a result, a supply rises to meet a demand. The third effect is that wait times do not increase substantially. That is to describe the basic economic mechanism, whereof many benefits do arise.

[10] The issue of a safe harbour is defined in several cases e.g. Case C-324/09 L'Oreal v Ebay (Case C-324/09, 2011), Case C-236/08 to C-238/08 Google France (Case C-236/08, 2010), Case C-291/13 Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd et al. (Case C-291/13, 2014), etc.

Fig. 1. Graphic depiction of a surge pricing resulting in a supply rising to meet a demand following a sold-out concert.



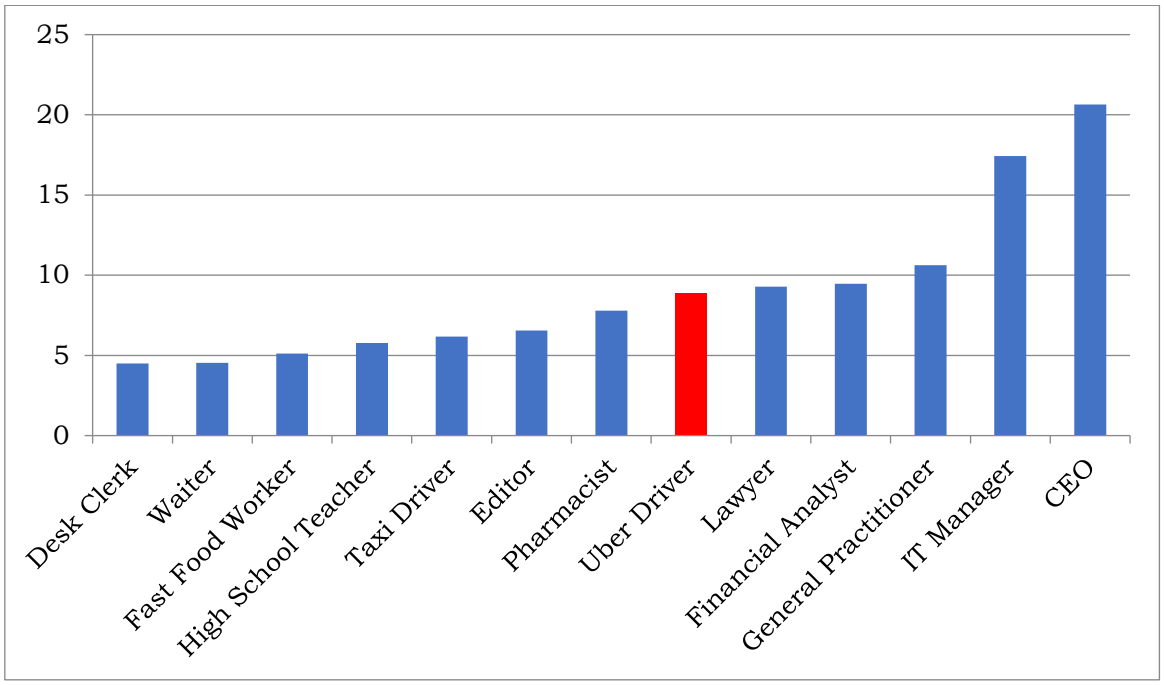
Source: Authors.

Consequently, another important economic aspect interlinked with Uber is the so-called “consumer surplus”. That is the difference between what customers are willing to pay and what they really must pay to get a service. A calculation of the consumer surplus is quite complex, as the information about the price that customers would be willing to pay is rather subjective and private. Thankfully, extensive data provided by Uber have enabled the economists to conclude as regards the consumer surplus in relation to Uber [Cohen et al., 2016]. The result of the study is that, on average, every € 4 spent by a customer gets the countervalue of € 11. Thus, the consumer surplus amounts to € 7. The sum of € 4 spent by a customer is further distributed in approximately € 3 for drivers and € 1 for Uber itself. From the total value of € 11 generated, Uber receives approximately € 1. Following that, it's also noticeable that Uber drivers were found to earn more than those in traditional taxi services (averaging € 988 per month as regards Slovakia on a blanket basis as further depicted in graph). This is also largely because the Uber software allows drivers to better optimize their time and services.

The above conclusions inevitably evoke a general efficiency of the company. In addition, some of the most prominent economists, Alan Krueger and Judd Cramer, summarize the Uber's advantages in four points [Cramer & Krueger, 2016]:

1) More efficient technology for connecting drivers and customers,
2) Greater size of Uber in comparison to taxi companies,
3) Ineffective taxi regulation,
4) The flexible offer model and the "surge pricing" algorithm, which covers a demand during the day better.

Fig. 2. Average earnings (EUR) per hour in Slovakia including Uber driver's income.



Source: Platy.sk (2018) and Chovanculiak (2018). Note: Own figure.

In addition, a further study from August 2016 showed that Uber's entry to the local market has meant a very important reduction of traffic congestion, as well as it has improved transportability and eventually resulted in significant CO2 reductions [Li et al., 2016].

The aspect of security is essential as well. In that sense, a standard taxi driver usually keeps a larger amount of money, which attracts crimes. Criminologist Marcus Felson states that "Cash is the mother's milk of crime." Uber is, however, fully electronic in this area. The research proved that electronic payments led to a drop of 9,8 % in the overall crime rate and caused the rates of burglary, assault and larceny to fall by 7.9%, 12.5% and 9.6%, respectively [The Economist 2014]. It follows that Uber drivers should be statistically at a lower risk of a crime since they usually do not keep larger amount of money. Likewise, the standard taxi driver picks up customers who he might not know at all. The Uber driver, on the other hand, can rely on customer rating and on the fact that customer has a working credit card, which has been associated with Uber application. If a customer uses a fake card or does not have sufficient funds within it, Uber company guarantees a payment to the driver.

Similarly, in terms of passenger, the drivers who drive dangerously, have a car in an inappropriate state, or behave inappropriately, which all leads to a low rating within the application, are forced out of Uber's driver database. More specifically, in Bratislava there was a limit of 4.5 stars out of five. As regards dangerous driving under the influence of alcohol, this leads to an immediate deactivation of the driver's account right after the first reported and proven incident.

The abovementioned data and information have been further supported by several analyses. Dills & Mulholland (2018) provided the study concerning an impact of Uber's entry to the market on the traffic-related accidents and crimes. Under this study, Uber's entry resulted in 6% drop of traffic-related death rate and in 18% drop

of night-time driving fatality rate. The number of drunk driving has declined by an average of 12-18%.
Following the presented arguments, we believe that Uber brings, from either the point of view of the economic or social level, several notable benefits. The same effect should have other on-line platform providers, which should be considered as the special subject of law and reflected in the legislative level addressed further in this article.

4. ACTIVE VERSUS PASSIVE APPROACH TOWARDS PROVISION OF INFORMATION SOCIETY SERVICES

On-line platforms have their status determined by a range of provided services. The controversy flows primarily from a status of this entity (intermediary) as to whether it is merely a passive or (even) an active one.
The first view, under which the status of platform equals to rather a passive, is justified by the fact that a "contract" between a beneficiary and a provider is concluded without any intervention or other action of an on-line platform, which acts only in a passive way in this case. The on-line platform provides to participants only a "space", whereas it does not interfere with actual content. Should we accept this view, the on-line platform would have fallen within a safe harbor as set out in Article 12(1) of the Directive[11]. However, we can come to this conclusion only if we define and view these platforms as falling within the information society services.
In general, on-line platforms provide the following services:

- an opportunity finding,
- a contract conclusion – they serve as a medium providing for a draft of contract and its acceptance,
- a payment option.

As regards Uber, a range of provided services is even wider – the app offers a driver an appropriate route, whilst it also navigates, sets the charge rates, and automatically calculates price money that the driver receives directly from a customer's credit card. In addition, the app provides a wide range of information about the provided service. Some mandatory information is also provided by the service provider. However, very beneficial in terms of the attractiveness of the offer are references and numerical or verbal evaluations of a particular service provider (but also the ones of a service recipient). Thus, the app systematically eliminates the possible information constraints on one or both parties [Kindl & Koudelka 2017], which are a key pillar for a strict regulation of consumer law effectively offsetting both parties.
Moreover, if a service in question is being performed by a non-professional provider[12], we shall regard this service as a peer-to-peer service, i.e. a service performed by persons acting at the same level as customers, where it is not possible to determine who the weaker party is [Resolution 2017/2003(INI), 2017]. There is no doubt that in a case of peers – i.e. a supplier and a provider of sharing economy service – a legal

[11] Even before the CJEU decision in the Uber case, this view had been favoured by J. Kindl and M. Koudelka, who have found it is an information society service within the meaning of Article 2(a) of Directive on electronic commerce in conjunction with Article 1(1) of Directive 2015/1535. Moreover, in their view, the pertinent conclusion has also been supported by Case C-324/09 L'Oreal v eBay (Kindl & Koudelka, 2017).
[12] The view of J. Kindl and M. Koudelka correlates to the view of Advocate General served in Case C-434/2015 dated 11.5.2017 (Case C-434/2015, 2017).

relationship between ordinary natural persons is governed by the provisions of the Civil Code [Civil Code 1964].
The platform itself, however, is a professional service provider and provides, besides the above mentioned functions of service provision, money collection and information point, also the function of a "regulator". That means, it sets out the "game rules" for peers and it creates conditions and environment so as not to breach contractual obligations between the parties. If a breach occurs, the platform should be able to provide the proper conditions for compensation of the entity, whose rights have been breached.
However, if we are to answer whether an on-line platform can provide compensation (redress) resulting from the private-law relationships of the parties to this diversified economic relationship, it is necessary[13] to answer three basic questions:
a) Is an on-line platform a mere intermediary, or more precisely a passive provider of an information society service, which would justify it as a safe harbor, or is it a direct service provider – if so, which precisely?
b) Following the answer to question (a), who shall be liable to an injured person claiming damages and who shall actually indemnify the injured person?[15]
c) Should an on-line platform be liable for damages to the injured person, does a relationship between peers and platform constitute a consumer relationship – is it necessary to apply consumer legislation including provisions on consumer disputes [Code of Civil Contentious Litigation, 2016: Sec. 290 et seq.] then?
Of course, the answer to question a) should determine further answers to questions concerning the status of platform as a provider of services requiring a public regulation (authorization, licensing, tax or fee obligations).
An outline to these questions has been provided by CJEU in case Asociación Profesional Elite Taxi v Uber Systems Spain SL. In the light of this decision, we will try to find answers to the questions raised.

5. JUDGMENT OF CJEU IN CASE C-434/2015

Request for a preliminary ruling was made in proceedings between Asociación Profesional Elite Taxi (hereinafter referred to as "Elite Taxi"), a professional taxi drivers' association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative license or authorization.
Elite Taxi brought an action before the Commercial Court No. 3 in Barcelona, seeking a declaration from that court that the activities of Uber Systems Spain have infringed the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Act No. 3/1991 Coll. on unfair competition) of 10 January 1991. Elite Taxi also claimed that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claimed that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

[13] Under the Slovak law and order.
[15] In legal terminology, it is a matter of an active (a capacity to bring proceedings) and a passive (a capacity to be a party to proceedings) standing, or rather *locus standi*, in civil litigation.

The Commercial Court No. 3 in Barcelona noted that although Uber Systems Spain carried out its activity in Spain, that activity was linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It further observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned had the licenses and authorizations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

In order to determine whether the practices of Uber Systems Spain and related companies (together hereinafter referred to as "Uber") could be classified as unfair practices that infringe the Spanish rules on competition, the Commercial Court No. 3 in Barcelona considered it necessary to ascertain whether Uber requires prior administrative authorization. For that purpose, the court considered that it should have been determined whether the services provided by that company were to be regarded as transport services, information society services or a combination of both. According to the court, whether prior administrative authorization may have been required, depended on the classification adopted. In particular, the referring court took the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber's practices could not be regarded as unfair practices.

To that end, the referring court (in Barcelona) stated that Uber contacts or connects with non-professional drivers to whom it provided a number of software tools (an interface), which has enabled them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber's activity has been for profit.

Consequently, the national court referred the following questions to the Court of Justice for a preliminary ruling:

1) Inasmuch as Article 2(2)(d) of Directive 2006/123 excludes transport activities from the scope of that directive, must the activity carried out for profit by Uber Systems Spain, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources – interface and software application (smartphones and technological platform in the words of Uber Systems Spain) – which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of Directive 98/34?

2) Within the identification of the legal nature of that activity, can it be in part an information society service, and, if so, should the electronic intermediary service benefit from the principle of freedom to provide services as guaranteed in EU law and namely Article 56 TFEU and Directives 2006/123 and 2000/31?

3) If it is confirmed that If the service provided by Uber Systems Spain were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Act No. 3/1991 Coll. on unfair competition of 10 January 1991, concerning the infringement of rules regulating competitive activity, contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorization schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licenses, authorizations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

4) Directive 2000/31 is applicable to the service provided by Uber Systems Spain, are restrictions in one Member State regarding the freedom to provide the electronic

intermediary service from another Member State in the form of making the service subject to an authorization or a license, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute exemptions from Article 3(2) of Directive 2000/31 in accordance with Article 3(4) thereof?

By its first and second questions, which should be considered together, the referring court asks, in essence, whether relevant legal provisions[16] must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a "service in the field of transport" within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31. In other words, CJEU had to legally assess, whether a service provided by Uber was to be regarded as a transport service or as an information society service with all the associated ramifications.

Following the specific issues, CJEU noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wished to make an urban journey was, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an "information society service" within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is "a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

By contrast, non-public urban transport services, such as a taxi services, must be classified as "services in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof [Case C 340/14 and C 341/14, 2015].

It is appropriate to observe, however, that a service such as that in the main proceedings has been more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. In a situation such as that with which the referring court has been concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offered urban transport services, which it rendered accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organized for the benefit

[16] Article 56 TFEU, together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers.

of persons who wish to accept that offer in order to make an urban journey. The intermediation service provided by Uber has been based on the selection of non-professional drivers using their own vehicle, to which the company has provided an application without which 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. In addition, Uber has exercised decisive influence over the conditions under which that service has been provided by those drivers. On the latter point, it appears, inter alia, that Uber has determined at least the maximum fare by means of the eponymous application, that the company has been receiving that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it has exercised a certain control over the quality of the vehicles, the drivers and their conduct, which could have, in some circumstances, resulted in their exclusion. That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as "an information society service" within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as "a service in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123. This statement has further translated into another judgment of CJEU, where CJEU basically reaffirmed its view [C-320/16, 2018].

That classification is also confirmed by the earlier case-law of CJEU, according to which the concept of "services in the field of transport" includes not only transport services in themselves, but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport [C-338/09, 2010].

Consequently, Directive 2000/31 does not apply to an intermediation service such as that at issue in the main proceedings. Such service, in so far as it is classified as "a service in the field of transport", does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

Moreover, since the intermediation service at issue in the main proceedings was about to be classified as "a service in the field of transport", it has been covered not by Article 56 TFEU on the freedom to provide services in general, but by Article 58(1) TFEU, a specific provision according to which "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport". Thus, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy [C-338/09, 2010].

With regard to non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, the European Parliament and the Council of the European Union have not adopted common rules or other measures based on Article 91(1) TFEU. It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.

On those grounds, the Court (Grand Chamber) ruled:

Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of 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 and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of Council of 20 July 1998, to which Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as "a service in the field of transport" within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.
In view of the answer to the first and second questions, there is no need to answer the third and fourth questions.

6. THE IMPLICATIONS OF THE CJEU JUDGMENT FOR ON-LINE PLATFORMS AND THE ASSERTION OF CLAIMS AGAINST THESE PLATFORMS

6.1. Status of an on-line platform in private-law relationships

It is clear from the abovementioned conclusions that CJEU has been rather reluctant as regards a direct answer to the question concerning a status of on-line platform. Instead, it considers an on-line platform to be a service inherently linked to a transport service and it ad hoc defines it as a service in the field of transport, as is apparent from Article 58 (1) TFEU.
The reason for this decision is that:
a) peers (natural persons or rather non-professional drivers) would not be able to provide any services without the peer-to-peer service,
b) persons interested in a certain service would not have access to such a service,
c) the intermediary has a decisive influence on the conditions under which a service is provided,
d) the intermediary performs quality control and has a right to draw consequences for potential faults by not allowing to provide a service anymore,
e) the intermediary sets a price that the parties cannot influence,
f) the intermediary also fulfills the function of the payment institution.
It is clear from judgment issued in Case C-434/15 and the earlier court's decisions (and from the actual wording of the Directive) that an extent of the activities carried out by the information society service provider, or an extent of control over the provided activities determines, whether an on-line platform constitutes a safe harbor (and thus, whether it shall be exempted liability for the services) or does not constitute it (and thus, whether it shall be liable if necessary). Should an on-line platform constitute a mere intermediary (according to the scope of the services provided) without the possibility of interventions and supervision on the provided services, it would meet the requirements for a safe harbor status and for the exemption from liability for the provided services. In our opinion, that would be the case if an on-line platform was providing either the activities referred to in point (a) and (b), or also the activities referred to in point d) and f), whilst the service in question enjoys the status of a mere intermediation service.

However, if the abovementioned services would consist also in the activities referred to in subparagraphs (c) and (e) (or other non-listed services), the provided service would not equal to a passive provision of services and thus it would not match the safe harbor requirements. In that case, an on-line platform ceases to be an intermediary and becomes a joint service provider, which provides a service jointly with a provider of an offered/demanded service.

The answer to the question whether an on-line platform should be considered as a service provider results from the assessment of an extent of the provided services.

If an on-line platform was providing only a space in the on-line environment through which other entities would have been able to conclude contracts, it would be considered only as an intermediary[17].

However, if an on-line platform provides a wider range of services in the sense it determines the actual content and the way of service provision, it must be considered then as a direct provider of the service.

6.2. Active and passive standing in disputes against on-line platforms

Similarly to the CJEU's case law, we have not reached a definitive conclusion as regards the status of an on-line platform. However, we tend to incline to an ad hoc assessment of both an on-line platform's status and a scope of liability for the provided services, which should be conducted depending on the range of activities it provides (not including its own intermediation service) to one or both parties to the contract.

In principle, there are two kinds of legal relationships involving an on-line platform, where a following liability for provision of certain services may occur:

a) a liability for an intermediation service – i.e. a liability for selecting a contractor and a fulfillment of his/her obligation,

b) a liability resulting directly from an intermediated relationship.

If a party asserts only a claim for intermediation service or other service provided directly by an on-line platform (such as a payment), a liability shall be held without any doubt by the on-line platform (having a passive standing).

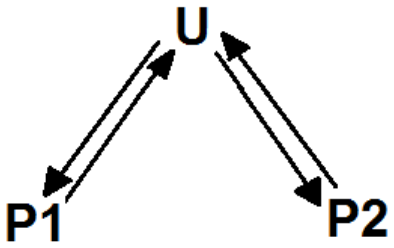
However, if a party asserts a claim from an intermediated relationship, there is currently no legal provision that would justify the liability of a provider of an intermediation service. The only provision, which might analogously resolve such a situation (though only at the level of commercial contractual obligations) is regulated in Sec. 649 (1) of the Commercial Code: "The intermediary shall not be liable for the performance of third persons with whom he negotiated the conclusion of the contract, however, the intermediary may not propose to the client to conclude a contract with a person of whom the intermediary knows, or must know that there is a reasonable doubt that such a person shall duly and in time perform obligations arising from the intermediation contract."

Under that provision, the intermediary shall not have a liability at all – which further implies that he is not liable for a fulfillment of obligations of a person with whom he negotiated the conclusion of a contract. This is particularly true, if he does not propose to enter into a contract with persons rising doubts about their fulfillment of an obligation – and that is a circumstance, which on-line platforms are usually focused on (by means of providers' rating and provided services' rating).

[17] At the same time, however, we cannot forget that the intermediary acts not only for one, but for both parties, which is not rather common for an intermediary.

Nonetheless, a substantive or procedural law currently does not address the situation where a joint responsibility of peers and on-line platforms could be established. As regards a status of platform, it is true that a platform performs a contractual obligation (a service or a reward for it) jointly and severally[18] with a peer in a way that a peer commits to an on-line platform to perform an obligation properly and in a timely manner. The on-line platform (further designated as U – Uber) is to be found on both sides of the legal relationship - that is, together with peer 1 (P1), it provides the service to providers. Also, together with peer 2 (P2), it remunerates the providers of the service. We can graphically depict the relationship as follows:

Fig. 3. Relationship between the Uber and the peers



Source: Authors.

It is clear from the graphical depiction that a relationship between Uber and peers is as follows:
a) the provider (P1) undertakes to provide a performance to particular beneficiary (P2), whilst doing so via (U) platform, which means the provider provides a performance primarily to (U) platform;
b) the beneficiary (P2) is obliged to provide a payment to the provider (P1), but only via (U) platform, which means the beneficiary provides a performance primarily to (U) platform.
We can infer from the statements that if any of the above legal entities (P1 or P2) infringe an obligation, the on-line platform shall have a right to assert its claim against the infringer.
On the other hand, it is also necessary to consider the fact that the on-line platform (even in case it enters into a legal relationship) is just "an intermediary". If it is possible to determine who the provider or the recipient of a service in a relationship is, then the injured person may assert a claim directly against such an individual entity without the platform being a party to the dispute.
However, if there is not a single entity (or one just cannot be identified) that could be liable[19], whilst an on-line platform can be considered as a service provider at the same

[18] We follow the conclusion of CJEU set out in paragraph 40 of the Uber case, in which CJEU expressly stated that "that intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service". It is clear from that conclusion that, in the present case, the two entities provide a joint service consisting of two different activities.
[19] It is also necessary to emphasize that an on-line platform shall verify the identity of the persons entering the legal relationship. It shall also act in accordance with the general preventive obligation to prevent damage. In order to comply with the preventive obligation, an

time; an on-line platform shall have a passive locus standi with respect to the analyzed CJEU judgment. Moreover, an on-line platform shall be jointly and severally liable. Such a liability can be inferred from Sec. 511 (1) of the Civil Code, under which a joint debt arises even if it results from the nature of the performance (which is undoubtedly fulfilled in this regard since if it would not contain any element of that legal relationship, the provision of such a service would not be actually feasible). The conclusion regarding a joint liability is also justified by Sec. 438 of the Civil Code, since in the present case the damage was caused by two jointly operating entities.

On the other hand, the issue of active locus standi is more complex, as there is no legal provision, which would confirm or rule out the liability of an on-line platform. Although it stems from the peers and on-line platform relationship that the "provider" as a peer provides a performance to the platform on behalf of the beneficiary of the performance, it is necessary to take into account Sec. 512 (2) of the Civil Code[20] regulating the indivisible joint claims, or Sec. 513 of the Civil Code[21], regulating the joint claims.

It is true that the entities shall perform directly the intermediation contract. Therefore, if the "customer" peer (who is the beneficiary of the performance) claims and demonstrates that there is a contractual obligation between him and the "provider" peer, which exists due to the on-line platform, the "customer" peer shall have an active locus standi (taking into account the pitfalls referred to in the aforementioned legal provisions).

If an on-line platform that acts as the creditor of a legal relationship had an active locus standi, it would be necessary to distinguish whether it acts only as an intermediary or even as a beneficiary of the service. In case an on-line platform acts both as an intermediary and as a beneficiary of the service (a person to whom the "provider" peer such as a driver or a landlord is obliged to perform his obligation), the platform as one of the creditors shall be also entitled to claim a performance.

However, if an on-line platform acts only as an intermediary, it does not have a legal title to assert the claims arising from a breach of its "client's" obligations under the current legal regulation. In that sense, the client is a person to whom the requested

on-line platform shall also identify and notify the identity of the pertinent entities to the other party for the purposes of assertion of the claims.

[20] Under Sec. 512 (2) of the Civil Code "Where an indivisible performance for several creditors is concerned, the debtor is entitled to pay any of the creditors, unless agreed otherwise. Upon the repayment to one of the creditors the debt shall be extinguished. The debtor is not obliged to pay one of his joint creditors without the consent of the other joint creditors. If no agreement is reached by all the joint creditors, the debtor may deposit the subject of the debt into the custody of the court." In the present case, if the outcome was an indivisible joint claim, the specific situation should be solved between a peer and an on-line platform. Such an obligation should be agreed upon either in the specific agreement or in the general terms and conditions, whereas a consideration should be given to the mutual benefit of requiring a payment by one entity only. In case of a joint claim, the debtor shall be obliged to perform always to the other peer given the nature of the obligation. However, if this was not possible and there was a co-creditors' agreement in the sense of a previous sentence, the debtor's obligation would also extinguish by providing to the on-line platform. This, of course, applies in the case of obligations, in which the duty to perform does not cease to exist through the inability to perform within the meaning of Sec. 575 et seq. of the Civil Code.

[21] Sec. 513 of the Civil Code stipulates that "if the debtor is obliged to provide the same performance to several creditors that are entitled to the performance from him jointly and severally by law, by the court's decision or by contract, then any of the creditors may require the debtor to provide the entire performance and the debtor is obliged to provide the entire performance to the first creditor that requests performance."

service is provided. It follows that a passive standing of an on-line platform excludes not only a liability, but also a possibility of claiming a performance flowing from the potential breach of obligation by the service provider, who has been obliged to provide a performance to the other party via the on-line platform. Thus, the on-line platform may not claim a provision of neither transportation nor accommodation or any damages, since a service in question is being provided to another person.
Nonetheless, an on-line platform can acquire the right to claim performance by means of the right of recourse in case it incurs a damage as a result of a breach of the obligations on the part of the service provider, or in case it has already fulfilled the obligation of the "provider" peer instead of him even though an on-line platform was supposed to act only as an intermediary (the issue of unjust enrichment under Sec. 454 of the Civil Code).

6.3. Judicial assertion of claims against an on-line platform

In all the aforementioned cases, we refer to the relevant provisions of the national law as we simultaneously assume that the provisions of national law apply to relationships between peers and on-line platform. Here, as in other cases, it is also necessary to consider what substantive law shall apply for a specific contractual relationship, based on the Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations[22] (Rome I)[23] or the Act No. 97/1963 Coll. on international private and procedural law.
As regards procedural law governing the providers within EU law jurisdiction, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shall apply and namely its Article 7. Pursuant to this Article, a person domiciled in a Member State may be sued in another Member State in matters relating to a contract, in the courts for the place of performance of the obligation in question, whereas the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

[22] In case a company provides information society services within the European Union, the registered office of that company must be assessed within the meaning of paragraph 19 of Directive on electronic commerce, under which "the place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service."
[23] Should a service in question be provided by the on-line platform falling under the EU law jurisdiction (e.g. AirBnb operating in Ireland as further proven by company's general terms and conditions) and also by the Slovak entities, Slovak law shall prevail and govern that relationship pursuant to Article 4 (3) of the Rome I Regulation. In such a scenario, further consideration regarding a private-law regulation and discrepancies between civil and commercial relations might be taken into account [Straka 2018].

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

In matters relating to tort, delict or quasi-delict, the court having jurisdiction is a court, where the harmful event occurred or may occur. As regards a dispute arising out of the operations of a branch, agency or other establishment, the court having jurisdiction is a court, where the branch, agency or other establishment is situated. Besides that, the prorogation of jurisdiction under Article 25 is also feasible and may be concluded even in an electronic form.

Thus, the provision of services or the supply of goods to Slovak entities shall be governed by Slovak legal order, whereas the Slovak courts shall have a jurisdiction.

Last but not least, it is also necessary to point out that a relationship between an on-line platform and a natural person shall be considered a consumer relationship governed by consumer legislation including the rules regulating consumer disputes [Code of Civil Contentious Litigation, 2016: Sec. 290 et seq.]. This is because an on-line platform acting as a supplier of goods or services enters into contract with a natural person acting as a consumer.

CONCLUSION – ON-LINE PLATFORMS IN THE PRIVATE-LAW RELATIONSHIPS FROM DE LEGE FERENDA PERSPECTIVE

We have attempted to argue that even though there is currently insufficient national or international (supranational) legal regulation, the issue of private-law (especially) liability relationships regarding the provision or acceptance of on-line platform services is certainly not irresolvable. On the other hand, taking into account the current civil law regulation, the legal relations occurring in the sharing (collaborative) economy have been many times realized in the so-called "grey zone" – outside the legal framework governing these specific relationships. We might expect, though, that such a way of providing services will only have an increasing tendency. As a matter of fact, that tendency should find its reflection in legislation sufficiently generalizing and flexible so that it would not need to address all the nuances that might occur as a consequence of a different manner and scope of the provided services. In our deepest belief, however, that shall be a function of objective law in the 21st century, which faces previously unseen challenges brought about by unprecedented expansion of technology and the surge of new economic relations regulated by law.

This article highlighted the bottlenecks of the current legislation, which must be addressed by means of legislative interventions[24]. In that sense, the interpretation of the current legislation probably does not suffice, because there is literally nothing to interpret at this time – the legal regulation of relationships brought about by a sharing economy does not exist yet.

The changes should concern and involve:

[24] It might seem that politicians' natural response to addressing a real or many times just a hypothetical problem is to simply come up with a new regulation. However, according to a study [Coffey et al. 2016], gross domestic product of the USA would have been 25% higher provided the federal regulation had not been constantly increasing since the 1980s. We can find many benefits of deregulation all over the world. E.g. air traffic [Thompson 2013] and logistics deregulation [Button & Christensen 2014] in the US have boosted the economy and created a solid economic background for many of the services we now see as obvious, such as Amazon. Nevertheless, we believe that in this case it is not appropriate to completely abandon the regulation idea.

- a proper legal adaptation of the intermediation contract, which would address the provision of a service provided with a different than intended purpose, which, when provided jointly, de facto fulfills the definition of a particular service,
- a legal regulation of the legal status of the entities providing the services jointly, which per se amounts to the provision of a specific, united service,
- an explicit transfer of a liability for a provided service from an unidentifiable or indeterminable subject to a subject liable for intermediation service (liable for selecting a contractor which happens to be unidentifiable), which provides the service jointly.

We attempted to outline the basic aspects of private-law relationships arising from the sharing economy. However, since this is obviously just a "white paper", or rather a pure, unpublished sheet of paper, a wider whole-society discussion would not only be more than welcome, but also beneficial. In that sense, the authors of this paper hope this article will contribute to that as well.

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