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Contractual Relationships in Collaborative Economy Platforms*

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Abstract: The collaborative economy platforms have become part of the lives of many citizens; their number is growing day by day and covers many sectors of the market. However, it is a deregulated sector because the existing regulations are very difficult to apply, due to the complexity of contractual relationships in three bands (platform, provider and user), which causes uncertainties about which of the parties involved should be subject to the rules. This paper seeks to clarify the respective relationships and contractual positions of each of the three parties and, especially, of the platforms, in order to determine what their rights, obligations and responsibilities are. First, the contract between provider and user (the underlying contract by which the goods or service are provided) is studied, whose most notable problem derives from being a contract between strangers, based on data that they themselves have published on the platform website. Next, the contractual relationships of the clients (provider and user) with the platforms are studied, distinguishing three types of platforms, according to the function they perform in the contract between the provider and the user (the underlying contract). The conclusion reached is that the legal position of the first type of platforms is very similar, although with nuances, to which the Internet Service Providers (ISPs) have data hosting. The position of those of the second group is similar to that of an agent. Finally, the position of the platforms of the third type is distinctive since it is obliged to provide a service, but uses a third party (auxiliary or subcontractor) to carry it out.

Résumé: Les plate-formes d'economie collaborative se sont installées dans la vie de beaucoup de citoyens, en augmentent jour à jour et pour couvrir de nombreux secteures du marché. Cependant, il s'agit d'un secteur déréglementé car la législation existante est de trés difficile application, en raison de la complexité des relations contractuelles à trois bandes (plate-form, fournisseur et usager), ce qui provoque des incertitudes sur lequel des intervenants devrait être le destinataire des normes. Dans ce travail, nous essayons de clarifier quelles sont les respectifs relations et positions contractuelles de chacun des trois sujets intervenants dans ce nouveau marché, et spécialement des plate-formes, dans l'objectif de déterminer les droits, les obligations et les responsabilités. Premièrment, le contrat est étudié entre le fournisseur et l'utilisateur (le contrat sous-jacent avec lequel ont donne le bien ou le service), don't le problèbleme le plus notable dérive d'etre un contrat entre inconnues sur la base des donnés qu'els ont eux-mêmes publié dans la web de la plate-forme. A continuation il est abordé les relations contractuelles des clients (fournisseur et usager) avec les plate-formes, en différencient trois

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types de plate-formes, selon la fonction qu'ils jouent par rapport au contrat entre le fournisseur et l'usager (contrat suous-jacent). Les conclusions auquel ont arrive est que la position juridique des plate-formes du premier type est très semblable, cependant avec des nuances, a celles qui présentent les Internet Services Providers de logement de donnés. La position du second type est similaire a celui d'un mandataire. Finalement, la position des plate-formes du troisième type est la propre de qui s'oblige à faire la prestation d'un service, mais qui s'aide d'un tiers (auxiliare ou sous-traitant) pour son accomplissent.

Zusammenfassung: Die wirtschaftlich kollaborativen Plattformen spielen im Leben vieler Bürger inzwischen eine zentrale Rolle. Ihre Zahl wächst ständig und umfasst viele Bereiche des Marktes. Aber doch handelt es bei ihnenum einen nicht regulierten Bereich. Einer der Gründe dafür ist die Komplexität der dreiseitigen, Vertragsbeziehungen (Plattform, Anbieter und Nutzer), da nicht immer klar ist, welcher Teilnehmer Adressant der Normen sein soll. Der vorliegende Beitrag beschäftigt sich mit den vertraglichen Beziehungen und Sonderstellungen der drei Subjekte, die an diesem neuen Markt teilnehmen, und hier insbesonders die Plattformen im Hinblick auf ihre Rechte und Verpflichtungen. Zuerst wird der Vertrag zwischen Anbieter und Nutzer analysiert (also der zugrunde liegende Vertrag, durch den der Vertrieb von Produkten oder Dienstleistungen erleichtert werden soll). Das Hauptproblem dieses Vertrages ist, dass es sich um ein Basisvertrag welche aber Datender Webseite der Plattformen veröffentlicht. Anschliessend werden die Vertragsbeziehungen der Kunden (Anbieter und Nutzer) mit den Plattformen vorgestellt. Man kann drei Arten von Plattformen unterscheiden. Diese hängen von der Funktion der Plattformen in Bezug auf den Vertrag (Basisvertrag) zwischen Anbieter und Nutzer ab. Die Schlussfolgerungen sind, dass die Rechtsposition der ersten Art von Plattformen sehr ähnlich ist, obwohl mit Besonderheiten, mit den Plattformen die Internetdienstleistungen von Daten-Hosting anbieten. Die Position der zweiten Gruppe gleicht der Position eines Beauftragten. Zuletzt, die Position der Plattformen der dritten Gruppe unterscheidet sich dadurch, dass ein Dritter (Erfüllungshilfe oder Subunternehmer) sich zu Dienstleistungen verpflichtet.

Keywords: Digital law, Collaborative economy, liability of providers, users and platforms, types of platforms

Mots clés: Droit numérique, économie collaborative, responsabilité des fournisseurs, usagers et plate-formes, types de plate-formes.

Schlüsselbegriffe: Digitales Recht, kollaborative Wirtschaft, Verpflichtungen der Plattformen, Anbieter und Nutzer, Arten von Plattformen.

1. Preliminary

1. The present study aims to contribute to the regulatory debate on the collaborative economy from the point of view of private contract law, focusing on the analysis of the various contracts that are carried out on collaborative economy platforms; on the one hand, the platform with its clients – suppliers of goods or services and purchasers or users – and, on the other hand, the contract that the provider and

the user conclude with each other. The approach is generalist, that is, it covers the subject with the intention of encompassing the multiple sectors of activity in which this new market is developing or, more precisely, in which this new form of exchange of goods is being developed. Due to the large number of existing platforms, it would be practically impossible to carry out a platform-by-platform study. This does not mean that the studies of sectors of activity are not useful, highlighting those carried out in the areas of lodging and transport, in which the regulatory problems of the collaborative economy are exacerbated due to the impact of local regulations. Generalist analyses like this are valuable to mark guidelines to the legislators in the necessary drafting of a general norm.

2. We must specify what we understand by the collaborative economy. Firstly, we are facing new business models in which goods and services are facilitated through online platforms that, acting as intermediaries, create an open market for the use of goods or services.[1] A digital platform installed on the internet is accessed via the web or through an application, which is what truly gives uniqueness to this market compared to the traditional one, because this is crucial for these platforms to become a massive system to channel contracts, since they allow multiple providers and users to make contact.[2] It is a market with small actors but has had a huge impact on the potential of information technologies.[3] Second, the collaborative economy involves three categories of participants, the supplier or provider of the goods or service, which in the typical case is a private individual that offers services

1 See the definition of collaborative economy made in the Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Agenda for the collaborative economy', COM (2016) 356 final, {SWD 2016) 184 final}, p 3 and in the complementary document Commission Staff Working Document accompanying that Communication on p 5. More abstract, less precise and useful is the idea of collaborative consumption that appears in s. 3.1 of the Opinion of the European Economic and Social Committee 'Collaborative or sharing Consumption: a sustainable model for the 21st century', Opinion of Initiative) (2014/C 177/01).

2 R. Alfonso Sanchez & J. Burillo Sanchez, 'La llamada economia colaborativa', in Alfonso Sanchez & Valero Torrijos (eds), *Retos juridicos de la economia colaborativa en el contexto digital* (Cizur Menor: Thomson Reuters Aranzadi 2017), p 51; V. Katz, 'Regulating the Sharing Economy', 30. *Berkeley Technology Law Journal* Annual Review 2015(4), Art. 8, p 1070; C. Koopman, M. Mitchell & A. Thierer, 'The Sharing Economy and Consumer Protection Regulation', 8. *The Journal of Business, Entrepreneurship & The Law* 2015(2), Art. 4, 5-15-2015, p 540; I. Rodriguez Martinez, 'El servicio de mediacion electronica y las obligaciones de las plataformas de economia colaborativa', in Montero Pascual (ed.) *La regulacion de la Economia Colaborativa, Airbnb, Blablacar, Uber y otras plataformas* (Valencia: Tirant Lo Blanch 2017), pp 124 and 125.

3 K. Zale expresses it thus ('When Everything is Small: The Regulatory Challenge of Scale in the Sharing Economy', 53. *San Diego Law Rev.* 2016, pp (949–1016) at 952 and 956), that is to say, that the identity of the collaborative economy lies in its smallness and is often presented in this way in the marketing of the platforms, because the collaborative economy is not about what two people do, but about what millions of people are doing.

occasionally – without excluding traders, whose presence has been growing,[4] – the user, who is the purchaser of the goods or service, and the intermediary, the company that owns the online platform. It must be made clear that, unlike common commercial websites, collaborative economy platforms do not facilitate or directly provide the goods or service, but rather their function is to allow purchasers or users to connect and contract with suppliers, which are the ones that provide the goods or service.[5] Third, as the name 'collaborative economy' most commonly used (also called 'the sharing economy' or '*peer to peer* economy'), implies, another characteristic of these business models is that it is about channelling underused assets, goods or skills among individuals, compared to the traditional *business to consumer* market[6] However, it is difficult to talk about collaborative or sharing economy when the providers do not do it on an occasional basis, but do so regularly, because in that case they become – or perhaps they were before – traders and should be treated as such by the law. It may be that at the beginning collaborative economy platforms were thought of as an instrument for individuals (*peer to peer*) and were idealized, rather utopian, as an alternative market against uncontrolled businesses and consumerism.[7] Today many platforms are also used

4 V. Katz, 30. *BTLJ* 2015, pp 1073 and 1074 states that although collaborative platforms generally seek to exclude traders, data from short-term rental and transportation platforms suggest that a certain percentage of providers permit a substantially higher volume; in n. 40 he cites a report from the New York Attorney General and other studies that show that although most of those listed on the Airbnb rental lists are occasional hosts, a small minority of commercial hosts are responsible for the largest number of accommodation reservations and it happens similarly with transport platforms such as Uber; in the same sense, see M.I. Grimaldos Garcia, 'El contrato de intermediación entre las plataformas colaborativas y los usuarios', in Alfonso Sanchez & Valero Torrijos (eds), *Retos juridicos de la economia colaborativa en el contexto digital* (Cizur Menor: Thomson Reuters Aranzadi 2017), pp 372 and 373.

5 Communication of the Commission to the European Parliament, COM (2016) 356 final p 6; V. Katz, 30. *BTLJ* 2015, p 1071.

6 V. Katz, 30. *BTLJ* 2015, p 1073; C. Koopman, M. Mitchell & A. Thierer, 8. *TJBEL* 2015, p 531; C. Busch, 'Crowdsourcing Consumer Confidence. How to Regulate Online Rating and Review System in the Collaborative Economy', in De Francheschi (ed.), *European Contract Law and the Digital Single Market. The Implication of the Digital Revolution* (Cambridge-Antwerp-Portland: Intersentia 2016), p 225..

7 D. Dedgre, 'Policy and regulatory challenge in the tourism collaborative economy', Chapter 6, in Dredge and Gyimoythy (eds), *Collaborative Economy and Tourism: Perspectives, Politics, Policies and Prospects* (Hiedelberg, New York, Dordrecht, London: Springer Verlag 2017), pp 2 and 3. This shows that rather than the friendly face of the collaborative economy as an attempt to restore personal exchange, to separate society from consumerism and achieve a more efficient and sustainable use of resources, the reality is that what is behind the main sectors of the collaborative economy are large groups of capital and investors with extraordinary power that have nothing to do with NGOs. See also M.A. Cherry, 'The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches', 85. *George Washington Law Review* 2017, p 1812 ('Despite their shared roots, the irony is that many of these newest services or marketplaces are for-profit entities that are highly commodiefied; everything and anything is now being monetized,

by traders as providers and, as has been pointed out, in volumes considerably higher than private individuals, so from now on we can assume that the provider is not occasional, nor can he be considered a consumer (compared to the platform), nor will the contract entered into with the user be a contract between peers, but a *B2C* contract, with all that this implies legally, as will be seen shortly. It should also be understood that behind some platforms there are important capital groups with extraordinary power to direct, manipulate and even ignore policies and regulatory arguments [8] and that are able to control the underlying service and suppliers, which means in practice they operate as a direct service provider.[9]

3. These are the profiles of the collaborative economy. The issue that arises in relation to this market is that there is a legal vacuum that affects many areas of law and that causes uncertainties about who are the recipients of the rules in that tripartite contractual relationship – triangular, as has been stated[10] – and what is more serious, who avoid the application of the rules.[11] This is because these platforms do not fit clearly into either the category of Internet Service Providers (ISPs) or the normal web of commerce. Being in the shadow of the law facilitates the circumvention of the rules and that is why most of the doctrine favours regulation of the collaborative economy.[12] We believe, however, that the general law of contracts can help to clarify this uncertain panorama.

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to what were formerly shared or open access resources.'). J.B. Schor, 'Does the Sharing economy increase inequality within the eighty percent?: Findings from a qualitative study of platform providers', 10. *Cambridge Journal of Regions, Economy and Society* 2017, p 269) shows a more radical approach, on pointing out that the great fortunes achieved by the founders and investors of the sharing sector have been achieved by taking advantage of the economic crisis, contributing to job insecurity – especially of young unemployed people – and they are also appropriating a large amount of value from the providers and users of that market, so contributing to inequality.

8 D. Dedgre, in *Collaborative Economy*, p 2 adds p 4 that certain platforms have established networks in Silicon Valley to create knowledge, research and support the benevolent interpretations of the collaborative economy. Airbnb and Uber have globally two of the three highest valuations of private capital corporations (K. Zale, 53. *SDLR* 2016, p 952 and n. 7). The founders of Airbnb became billionaires in 2015, https://www.forbes.com/sites/alexkonrad/2014/03/20/airbnb-cofounders-are-billionaires/#4a30c6c473e1) and the founder of Uber is also going to enter into that exclusive group (https://www.forbes.com/sites/stevenbertoni/2014/06/06/uber-ceo-kalanick-likely-a-billionaire-after-18-2-billion-valuation/#6ba5113f7a22).

9 V. Katz, 30. *BTLJ* 2015, p 1070.

10 As C. Busch states in 'European Model Rules for Online Intermediary Platforms', *Nomos* 2018, p 2; Working Group on the Collaborative Economy, *Impulse paper on specific liability issues raised by the collaborative economy in the accommodation sector*, University of Groningen (1 March 2016), p 13; I. Rodriguez Martinez, in *La regulacion de la Economia*, p 129.

11 V. Katz, 30. *BTLJ* 2015, pp 1072, 1070 echoes some criticisms levelled in the United States that do not differentiate the collaborative economy from traditional suppliers and paint it as a cunning stratagem to avoid regulation.

12 The arguments put forward are that important public policies and the rights of vulnerable groups may be undermined. From tax regulations, city planning, competition and the environment, the

4. In the collaborative economy, a series of contractual relationships is formed in three bands. Firstly, there is the contract that binds the provider (or supplier) with the user – which we could call the **underlying contract** – but which, nevertheless, is the **main contract** because based on it, the good or service is provided and obtained. In the collaborative economy it is said that we are facing new business models, but carefully looked at, this first contractual relationship constitutes a contemporary version of already well-known businesses[13] or, to put it technically more accurately, we are facing the same traditional typical contracts (sale, rent, exchange, transportation, services, etc.) made between two people. Secondly, we have other contracts, those that link the platform with the provider and those that link it with the user. For these contracts the platform assumes an intervening or managing function of the main contract as a third party. None of these contracts constitute categories foreign to the general law of contracts. But where the singularity of the collaborative economy does appear, it is because that third party is an interactive web platform, which provides additional services in the field of the information society. The latter is what legally complicates the qualification of the subject under study, because this type of platform does not have a clear fit, either in the new eCommerce Law or in the general contract law.[14] We will examine each of these contractual relationships separately, beginning with the main or underlying contract.

2. The Contract Between Provider and User. The Different Regime of Occasional Providers and Trader or Habitual Providers

5. We have just stated that the collaborative economy introduces no novelty to the underlying contract, because the usual and known contractual types are used by means of which individuals exchange and have always exchanged goods or services[15] That is,

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deregulation of the collaborative economy can threaten data protection, labour rights, consumer rights and those of the disabled. Cf. D. Dedgre, in *Collaborative Economy*, p 14; V. Katz, 30. *BTLJ* 2015, pp 1092–1098; K. Zale, 53. *SDLR* 2016, pp 954 and 955). Conversely, C. Koopman, M. Mitchell & A. Thierer, 8. *TJBEL* 2015, pp 542–544, advocate self-regulation through the mechanisms provided by the internet, the so-called reputation systems, pointing out that it is precisely the intervention of the collaborative economy that highlights the convenience of lessening the regulation of markets because when all is said and done, regulation is an enemy of the competitiveness of companies, of innovation and of the entrance of new parties into the market to the detriment of the consumer. In this sense K. Zale, 53. *SDLR* 2016, p 1000) refers to the example of the taxi business as being excessively protectionist, resulting in it taking over the industry.

13 Sanchez, 'La controvertida cuestion reguladora en la economía colaborativa' in Alfonso Sanchez & Valero Torrijos (eds) (Cizur Menor: Thomson Reuters Aranzadi 2017), p 143; K. Zale, 53. *SDLR* 2016, p 951.

14 As V. Katz, 30. *BTLJ* 2015, p 1080, says, those tripartite relationships distort the common law schemes.

15 The services provided through these platforms are similar to those that already exist (V. Katz, 30. *BTLJ* 2015, p 1076) and as a consequence the services provided are not innovative..

the issue of determining the legal regime applicable to the relationship between the provider and user, does not pose, in principle, particular difficulty: we will have to apply the rules of the respective contractual type and in particular, in what matters, the obligations and responsibilities required of each contracting party according to the corresponding type. In most cases we will be dealing with reciprocal ? contracts, because the normal thing is the *do ut des*,[16] although there are also platforms in which provider and user make a free contract,[17] for example, free temporary stay in a dwelling or room (to which the rules of bailment[18] or precarious loan would apply) or a free service, for example, as an escort or tourist guide, which is rather a mere social activity, not economically and legally relevant).[19] The existence of a consideration or remuneration being normal for the goods or service provided can pose problems of legality in certain services between individuals, unless it is to share the expenses that are generated by the common use of a thing.[20] This is what happens particularly in the case of transport, because in most countries the transport contract between individuals is forbidden, that is, it is illegal. Shared use is only allowed when the payment requested by the driver does not exceed the operating cost of the journey, because otherwise it would be subject to a transport permission license.[21] Regardless of its illegality, from the civil point of view it might lead to a possible nullity of the contract; but if it is valid, the position of the vehicle provider would be aggravated, since when considered as a carrier, he would have to fulfil the exact terms of the service (consider the problem of a delay in the journey). The issue arises as to whether the platforms should control that the amounts received by the providers do not exceed the cost of transport, because if they do, the drivers should be subject to licensing, with everything that involves. In that supposition, it is illegal and in civil law would involve additional liability for carrying out the journey correctly without immediately

16 It will be a contract for the sale of goods, a contract for the transfer of the use of a thing or a service contract, among which, obviously, the exchange, applicable to the platforms for the exchange of goods, e.g. must include those that allow exchanges of homes or apartments (guesttoguest or lovehomeswap).

17 The typical example of free services is *couchsurfing.*

18 Working Group on the Collaborative Economy, *Impulse Paper*, p 101.

19 Working Group on the Collaborative Economy, *Impulse Paper*, pp 34 and 124.

20 Examples are platforms such as BlaBlaCar for intercity transport and EasyPiso for accommodation.

21 Cf. in France, Art. L 3132-1 of the Code des Transports that regulates covoiturage, understood as the use of a vehicle by a driver and one or several passengers carried out on a non-commercial basis, except for expenses. Also in a similar sense the Taxi Regulations Act 2013 of the Republic of Ireland, which in no. 56.2, excludes from licence requirements private transport that does not exceed the cost of the journey. In Germany the Personenbeförderungsgesetz & 1, s. 2 applies and in Spain, Law 16/1987 on the Regulation of Land Transport provides that private transport is dedicated to satisfying the personal or domestic travel needs of the owner of the vehicle and his close associates and that does not give rise to receiving direct or indirect monetary remuneration, except for the cost of any meals, accommodation or travel expenses for the owner (Art. 101, a).

considering consumer protection law, since asking for more money that just the costs, it would result in the driver being considered as a professional (in fact, at least.)

6. In effect, going further, we must ask ourselves in what cases the strict requirements of the consumer protection regulations should apply to the contract between the provider and the user, assuming that the user has the status of consumer, as will be usually be the case. Consider the person who sells a thing using a platform dedicated to that activity. If consumer regulations are applied, and without being exhaustive, the obligation of pre-contractual information required for a distance contract would be the responsibility of that seller (under Article 97.1 of the Spanish Revised Text of the Consumer Law RDL 1/2007 (hereafter TRLGDCU)); (i) the buyer would have the right to withdraw; (ii) the control of inclusion would apply to the unfair terms of the contract, whether it was he or the platform that had required them; (iii) the period to respond for lack of conformity would be one year (if the goods are used) or two (if new), without the possibility of exoneration from liability; and, in addition, (iv) he would have to be liable for all the damage and losses caused by the defect. The hosting platforms or the transport platforms would be in a similar position; additional obligations for the supplier would also be required resulting from consumer regulations and the liability regime would be stricter. On the contrary, consumer regulations would not be applicable when the contract is between private individuals, because the supplier is not a business person or entrepreneur. Furthermore, the justification for protecting the consumer as a weak party must be taken into account because it does not exist in the relationships between equals, because the provider is also weak or is exposed to the risk of damage and, if possible, to a greater extent than the user, in certain cases.[22] For consumer regulations to be applicable, not only must the user be a consumer, but the supplier has to be a trader or entrepreneur. We already know that although, typically, the collaborative economy is between individuals (*peer2-peer*), many platforms do not exclude traders.[23] In view of the important differences in the regime applicable to the contract, depending on the whether the provider is a trader, it is of utmost interest to all the players on the platform, but especially to the user, to have truthful information in this regard. The consumer who knows in advance that the party who provides the service or who sells him goods is a trader, will know that he will enjoy more protection. However, if a provider is attributed the status of trader without being so, could the platform be held responsible for

22 V. Katz, 30. *BTLJ* 2015, p 1100 points out that suppliers as well as users are exposed to risks and can be equally vulnerable, e.g. on transport platforms, drivers can suffer the same damage as passengers and the same can happen to those who rent out their apartment or room.

23 In Spain, e.g. urban transport platforms, such as Uber, are not allowed to admit non-professional drivers, as a consequence of judicial decisions and today they can only be incorporated into this platform as drivers and provide transport service if they have a *VTC* Licence (Tourist vehicle licence with driver).

controlling this aspect and considered liable for the consequences harmful to the consumer? We will deal with this later when discussing the contractual relationship of the platform with the user.

7. More problematic still is to determine whether the consumer regulation is applicable to the contract between the provider and the user when the provider of goods or services has converted his activity on the platform into a regular source of income without being formally a trader (or self-employed person) or, as we saw before in transport, he behaves in fact like a trader because the consideration exceeds the mere sharing of expenses, which is the only transport allowed between individuals and therefore exempt from licensing. The answer to this question must be positive. Contracts with these suppliers (traders in fact) will have to apply consumer regulations because otherwise it would be fraudulent. However, applying this to these traders has serious drawbacks.[24] One is to identify them. Another is to determine what conditions have to be satisfied or what volume of transactions determines that an occasional provider becomes habitual.[25] Regarding the first, nobody except the platform has the technical capacity to detect when a supplier goes from acting in a merely casual manner, namely, sporadically putting goods, underutilized assets or personal skills on the market, and becomes a 'trader' (in fact). Would it be necessary to require platforms to supervise these suppliers and demand that they regularize their situation as entrepreneurs or traders? That too is a question that we shall leave for later. But, what is really problematic is to set the limit in which one goes from occasional to habitual, that limit that determines that an occasional activity that optimizes an underutilized resource (the true essence of the collaborative) becomes a trader. So, in the case of a seller, what volume of sales or revenue or, in the case of rental accommodation, what periods would mark the

24 R.H. Weber, 'The Sharing Economy in the EU and the Law of Contracts', 85. *George Washington Law Review* 2017, p 1800 warns that 'the traditional term consumer protection can lose its deliniation in the share economy because a consumer has an easy possibility to become a trader; even if, e.g. the business of a house owner offering a room through Airbnb to tourists might not be overtly commercial, such an individual can hardly still be considered a consumer.

25 The European Agenda for the Collaborative Economy COM (2016) 356, pp 6 and 7 highlights that EU legislation does not establish when a consumer becomes a trader. The Member States – it continues – use different criteria to distinguish between trader services and peer services; some define trader services as services provided in exchange for remuneration, compared to peer services, which are intended to compensate only the expenses actually incurred by the service provider. Other States have differentiated by using thresholds, either annual income or, in the case of accommodation services, a number of days per year. R.H. Weber, 85. *GWLR* 2017, p 180, wonders 'under what circumstances are so-called peer-to-peer services considered commercial and the supplier of the respective services no longer a consumer? Possible factors of consideration can be (i) the yearly turnover, (ii) the profit orientation, and (iii) the frequency of the services offerings.'

limit? The same could be asked in relation to transport, what number of journeys or sharing expenses is exceeded and makes the driver a trader transporter?

8. As an example of this problem of setting thresholds that determine whether the activity is occasional or not habitual, accommodation platforms are particularly illustrative. Due to the profound impact of tourist lettings,[26] many countries, including Spain, have enacted legislation to regulate them at state and local levels, aimed at curbing their increase. It is matter of submitting them to the same or similar regulatory requirements as the hotel industry. We cannot go in depth into the problem of accommodation platforms and their impact on tourist rentals because of the general purpose of this study.[27] Suffice it to say that in Spain after the *Ley de Arrendamientos Urbanos* (hereafter *LAU*) (Law of Urban Lettings) that introduced the unfortunate reform of Article 5 by adding new letter e) excluding these lettings, the majority of the Autonomous Communities have promulgated rules to subject them to regulation parallel to that of hotel establishments. Leaving aside the taxation and administrative problems posed by tourist lettings, what matters from the standpoint of private law is the legal regime applicable to such contracts. Regarding the type of contract, it can only be either a tenancy agreement or a lodging contract and that will be determined exclusively by the services performed by one party in favour of the other; if it is a mere assignment of a house or room it will be a tenancy agreement and if, in addition, other services are provided (cleaning, custody of goods, food, etc.) it will be a lodging. But much more important and independently of the above, is to determine whether the rules of contracts with consumers would be applied as this can be helpful in interpreting

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26 Tourist lettings affect the planning and organization of the cities, neighbourhood coexistence and the protection of tourists' health and safety (N. Fernandez Perez, *El alojamiento colaborativo* (Valencia: Tirant Lo Blanch 2018), p 53 and K. Zale, 53. *SDLR* 2016, pp 985 and 986), considering it as unfair competition with the hotel industry (Working Group on the Collaborative Economy, *Impulse Paper*, pp 63 and 64) and to the rental housing market. In relation to the latter, tourist lettings discourage long-term rental for the greater profit it brings to home-owners, to the detriment of those who need a residence. The incidence of the problem in Spain occurs particularly in Barcelona,https://www.elperiodico.com/es/opinion/20180707/editorial-los-problemas-del-alquiler-turistico-6930956), in Madrid (https://elpais.com/ccaa/2018/02/22/madrid/1519304667_585227.html) and in Mallorca (https://elpais.com/economia/2018/04/23/actualidad/1524493873_547313.html). The hotelization of residential housing, as Katz calls it (*BTLJ* 2015, pp 1108 and 1109), with reference to the normative measures taken to combat these lettings by the authorities of San Francisco and New York. These cities seek to discourage these practices by subjecting those who negotiate their homes in a volume similar to a bed and breakfast to the same taxes and requirements, so that long-term rentals are more lucrative. In a similar sense, K. Zale, 53. *SDLR* 2016, p 986.

27 To go more deeply into the subject, see the aforementioned work by N. Fernandez Perez, *El alojamiento colaborativo*; also Campuzano Tome, 'El alquiler de uso turistico a partir de la Ley 4/2013: la necesaria interpretacion conjunta de la LAU y de la legislacion autonomica', *Revista Critica Derecho Inmobiliario* n. 749, May 2015, pp 1119 and ff.

that administrative legislation issued for the purpose of subjecting these lettings to similar demands as the hotel industry (authorization, security, hygiene, tax and others). What is decisive in terms of the applicability of consumer regulations is whether the provider (the host, in the case of lodging platforms) is a trader. In this sense, the thresholds that our autonomous legislation establishes.[28] to determine which hosts exceed what is an occasional rental or accommodation that only tries to monetize an underutilized asset and which is tourist accommodation may be indicative.[29]

9. Setting thresholds in some sectors – says the European Commission – [30] may be an appropriate way to move forward and be a useful indicator, but in other types of platforms the problem is more difficult and has to be decided on a case-by-case basis considering other factors. The European Commission points to three elements that can be taken into account, although none of them is in itself determinative.[31] First, the frequency of those services, because a person that offers a service on an occasional basis is less likely to qualify as a trader.[32] Second, the profit-seeking motive, which in some cases (transport, already referred to) may be an indication that the provider can be considered a trader, although in most cases the existence of some remuneration will be normal. Third, the level of turnover, the higher it is, the stronger the indications that the supplier can be considered a trader in relation to the same activity, even if it comes from more than one platform.

3. The Contracts of the Platform with the Provider and with the User

10. The services of the platform are aimed at facilitating the provider and the user to enter into a contract (the underlying or main one already examined). This section deals with examining the contracts that, for this purpose, link the platform with the provider and with the user. To do this, we will study separately the services

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28 In the case of Andalucia (Region of Spain), Art. 3.1 of Decree 28/2016 of the Junta de Andalucia considers as housing for tourist purposes that which offers the accommodation service for a price, on a regular basis and for tourism purposes. When it is considered as habitual is something that the rule does not determine which poses a serious lack of definition. More precise in this regard is the Art. 66 of Decree 159/2012, 20 November of Catalonia (Region of Spain), also regulating tourist establishments that defines tourist accommodation as those places that are let out in exchange for a consideration in the season for twice or more often within one year and is done for continuous periods, equal to or less than 30 days.

29 We agree with Campuzano Tome (*RCDI* 2015, pp 1233 and 1234) in the sense that places let for tourism are lettings not subject to LAU..

30 European Agenda for Collaborative Economy, pp 6 and 8.

31 European Agenda for ... . pp 10 and 11.

32 In some countries the tax laws can be useful for determining the frequency of the service, e.g. in Holland where the tax laws envisage that if a person devotes more than 1225 hours a year to a certain activity then that is his occupation like a trader.

that the platform performs in the field of services of the information society and electronic commerce (e-Commerce), since it is here that it obtains the instruments that the platform uses to facilitate the completion of the underlying contract. But, that role of facilitating the underlying contract will have to be also studied necessarily from the perspective of the general law of contracts.

3.1. The Contracts with the Platform from the Perspective of the Information Society Services

11. There is no doubt that collaborative economy platforms provide a service of the information society (ISS)[33] in accordance with Article 2 of the Directive on Electronic Commerce 2000/31/EC (hereafter DCE) and Article 1 of Spanish Law 34/2002 on Services of the Information Society and Electronic Commerce (hereafter LSSI).[34] This indicates that they benefit from the principle of not being subject to prior authorization (Art. 6 LSSI) and that they have to comply with the requirements established by this regulation, in particular, those relating to the obligation of providing general information under Article 10 LSSI. In this area of e-Commerce, there are two issues to raise. One relates to the data hosting service provided by these platforms and the other concerns the electronic contracts that the provider and the user agree with the platform for the provision of those services as well as for the provision of the service of the platform's intervention in the underlying contract. We shall examine them separately.

3.1.1. The Data Hosting Service Provided by the Collaborative Economy Platforms Through the User Profile and the Reputation System

12. The collaborative economy platforms are obviously providing an electronic intermediation service (as called in Art. 13.2 LSSI) or intermediary services (the name applied in Directive 2000/31) (known as ISP). Obviously, of the three types of ISPs, the only relevant one is data hosting (Art. 14 of Directive 2000/31 and Art. 16 LSSI). But the question is whether in its role with respect to customers, it goes beyond mere data hosting or exceeds it and therefore does not fit into the regime of ISPs. The issue is vital because, if admitted, collaborative economy platforms: a) would benefit from the exemption from liability that this regulation establishes for the illicit contents

33 European Commission, European Agenda for the Collaborative Agenda, p 6; Working Group on the Collaborative Economy, 'Impulse Paper', p 124; M.I. Grimaldos Garcia, in *Retos Juridicos*, p 370; J.J. Montero Pascual, 'La regulacion de la economia colaborativa', in Montero Pascual (ed.), *La regulacion de la Economia Colaborativa, Airbnb, Blablacar, Uber y otras plataformas* (Valencia: Tirant Lo Blanch 2017), p 39; I. Rodriguez Martinez, in *La regulación de la Economia*, p 135.

34 The LSSI Annex defines information society services as 'any service normally provided for consideration, remotely, electronically and on individual request', a definition that coincides with that contained in Art. 1.2 of the Directive 98/34/EC which is remitted to Art. 2 of Directive 2000/31/EC.

hosted by customers, unless, knowing of the wrongfulness, the platform does not act promptly to withdraw the data or make it impossible to access them (the so-called *notice and take down*); and b) the obligation to monitor the contents hosted by their customer would not fall on these platforms.

13. The data hosting service provided by these platforms starts with the integration or registration, which is usually an essential requirement to be able to carry out the contract or the underlying contracts for which the platform is created, without which it will not even be able to access the data of the providers. This registration will also imply the acceptance of the general terms of the contract with the platform.[35] In principle, on most platforms this integration does not mean that any underlying contract has necessarily to be carried out. It does not prevent platforms that establishes in their conditions the exclusion of those (especially suppliers) that do not make any contract or reject offers, – more or less repeatedly – an aspect that may be relevant later. The integration on the platform also means that customers provide information about series of personal data that will create what is commonly known as the user profile. That is, the platforms encourage or invite the client to provide data about himself, variables according to the type of platform, intended for suppliers and users (potential contractors) to know the relevant personal circumstances that will make them decide to hire each other. In the case of trader providers, we will later see the information required by the regulations on electronic and distance contracting with consumers. The profile of the user is an element designed to generate trust, taking into account that it is contracted with strangers. But above all, the reputation system is the most important instrument used by the platforms to generate trust, which must be referred to, albeit briefly.

14. The reputation system is a typical element of collaborative economy platforms and is fundamental for suppliers and users to decide whether to make the underlying contract between them. They do not know each other and being a plural market of hundreds or thousands of participants, and moreover cross-border, reputation systems constitute a social instrument of information, verification and control that encourages good behaviour.[36] The reputation system is an instrument for participants to host information about their experiences and, above all, to assess the contractual relationships they have made, so that it is said that they create a 'community of users'[37] or that the reputation system is the true heart of the platform.[38] A virtual platform of collaborative consumption without a community

35 The Register is not confined to collaborative platforms, but is usual for all types of webs such as trade, social networks, etc.

36 C. Busch, in *European Contract Law*, p 227.

37 Alfonso Sanchez & Burillo Sanchez, in *Retos juridicos*, p 63.

38 C. Busch, in *European Contact Law*, p 226.

is not relevant; it is useless, because the platform needs an active community that is based on the fundamental pillar of trust.[39] The massive nature of this new form of business, the plurality of participants as providers and users makes it impossible to resort to traditional forms of trust generation and they are replaced by the reputation system, in which certainty is provided by the personal valuations of the adherents to each other.[40] Given the importance of the reputation system, it is imperative that the platforms take measures that guarantee transparency, objectivity and veracity, which prevent ratings and valuations from being manipulated. From the *lege ferenda* a norm with European status should be imposed to establish a criterion or standard for the reputation systems.[41]

15. But on the issue of whether collaborative economy platforms can benefit from the data hosting of the ISP regime (exemption from liability and lack of monitoring obligation), the European Commission is cautious in denying them that status for the detriment that could be caused to the development of the digital economy. The European Commission considers that issue has to be assessed on a case-by-case basis according to the criterion that the platform does not play an active role, but rather that the hosting of data is something merely technical and automatic.[42] The European Court of Justice (ECJ) has similarly admitted that collaborative platforms can be considered as data hosting ISPs within the meaning of Article 14 of the DCE, as reported in the case of *SABAM* v. *Netlog* (Netlog was a friendship and relationship platform that ceased to exist because it merged with Two), while this platform stores information provided by users relative to its profile on its servers.[43]

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39 M.D. Ortiz Vidal, 'La economia colaborativa en la Union Europea: un fenomeno tan popular como controvertido', in Alfonso Sanchez & Valero Torrrijos (eds) *Retos Juridicos de la economia colaborativa en el contexto digital* (Cizur Menor: Thomson Reuters Aranzadi 2017), p 79, where the author refers to trust at three levels, user confidence in the platform, the user's trust in the other users and of the user in the legal environment. But what really distinguishes the collaborative economy is the information about the experiences of other users with respect to the provider and of the latter with respect to the user.

40 Working Group on the Collaborative Economy, *Impulse paper*, p 11, points out that unlike the traditional market in which confidence is sought in certificates, brands, institutions or in the knowledge of a close relative or family, in the collaborative economy the system that generates trust is bilateral interaction.

41 C. Busch, in *European Contract Law*, p 233, which proposes the drafting of a European Directive to establish the principles of the reputation systems. To this end, there are initiatives, both at the European level [Guidance on the implementation/application of the Unfair Practices Directive, SWD (2016), p 163] and various countries of the Union, which may be indicative of the requirements of the reputation system.

42 European Commission, Agenda ... , pp 8 and 9.

43 ECJ 16 February 2012, C-360/10, *SABAM* v. *Netlog*, http://curia.europa.eu/juris/document/document.jsf?docid=119512&doclang=EN. It is the opinion of the Working Group on the Collaborative Economy, *Impulse Paper*, p 25, which supports the idea that the collaborative platforms as providers of data holding services and held in that judgment, *In that regard, first, it is not in dispute that the owner of an online social networking platform – such as Netlog – stores information provided by the*

However, this criterion was clarified shortly afterwards by the ECJ itself in the case of *L'Oreal* v. *eBay*,[44] holding that these platforms can benefit from the exemption of liability when they act neutrally through a purely technical and automatic treatment of the data provided by their customers, but not when the operator plays an active role optimizing the presentation or promoting sales offers.[45] In this evaluation of the role of the platform, two types of platforms are distinguished, active and passive (agent platform and bulletin board).[46] The first are those in which the platform is involved in the contract as an active agent, to the extent that the contract cannot be made directly between the user and the provider, while the passive platform is limited to putting the parties in contact by providing their data, so that they make the contract. According to this opinion, these passive platforms could benefit from the liability exemption.[47]

16. But we should not confuse these passive platforms of collaborative economy with pure advertising platforms, which are clearly ISPs. The collaborative companies are located in the wide spectrum existing between those that are properly message boards and the direct suppliers of online services.[48] The bulletin boards are not even collaborative economy companies because it is the platform itself that provides the service; an advertising service aimed at all those – trader, entrepreneur or private individual – who wish to publish commercial information. In contrast, collaborative economy platforms – as already mentioned – do not directly provide the underlying service or sell directly, but are designed to allow others to connect with suppliers and obtain a product (triangular relationship), while advertisement platforms only involve a bilateral relationship between the platform and the

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users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31 (judgement, para. 27).

44 ECJ 12 July 2011 C-324/09, *L'Oreal* v. *eBay* (http://curia.europa.eu/juris/document/document.jsf?text=&docid=107261&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=573374), resolving the preliminary issue put forward by the *High Court of Justice (England & Wales), Chancery Division* (United Kingdom), in relation to various breaches of trade marks belonging to the first committed in the sales that third parties made on the eBay platform.

45 The text in bold is in para. 123 of the judgment in the case cited.

46 Working Group on the Collaborative Economy, *Impulse Paper*, p 27. This distinction between active and passive platforms is based on a judgment of the Supreme Court of Holland of 16 October 2015 (ECLI:NL:HR:2015:3099, Prejudiciële beslissing op vraag van ECLI:NL:RBDHA:2015:1437) cited by the Working Group on the Collaborative Economy, *Impulse Paper*, p 12.

47 Working Group on the Collaborative Economy, *Impulse Paper*, p 125.

48 V. Katz, 30. *BTLJ* 2015, p 1072, who adds that although the message boards reserve the right to remove advertisements, they provide minimal guidelines on the content and form thereof, and do not have any working relationship with suppliers, or financial interest in the particular transaction. The Research Group on te Law of Digital Services ('Discussion Draft of a Directive on Online Intermediary Platforms', 4. *EuCML-Journal of European Consumer and Market Law* 2016, p 166) excludes in Art. 2 a) advertising platforms understanding by such those that only identify the suppliers, directing the clients directly to their websites or to their contact data.

advertiser-provider.[49] Therefore, there is no doubt that these platforms are entitled to benefit from the exemption of liability for data hosting services. On the other hand, there is no clear dividing line between active and passive collaborative economy platforms,[50] although from the point of view of general contract law it is possible to establish differences, as we will now see.

17. Lastly, it may be asked whether the partial exemption of liability can be applied to collaborative economy platforms, that is, only as regards the data hosting service, even if it does not extend to other services that it provides.[51] This would mean that collaborative economy platforms can be considered ISPs with respect to the data storage service, but not with respect to other services. However, taking into account that these platforms are primarily dedicated to providing other services and that the hosting service is merely accessory (the data hosted by customers are the interesting ones depending on the service they provide and the underlying contract that providers and users can agree on), it does not seem easy for the exemption to be applicable in practice. This is the view held by a well-known judgment of the Commercial Court of Paris in a case in which again the defendant was eBay. The Court held that eBay as a business brokerage webpage could not get the benefit from the status of its own technical hosting services because eBay's data hosting and brokerage services are indivisible.[52]

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49 In this advertising platform, the recipient of the advertising information is the general public that accesses that information freely, without there being any legal link – or any other type – with the platform; they do not even have to join the platform to access the information. The situation is closest to advertisements that are published in a newspaper, in the mass media or on a billboard, with the only difference that these advertisements are published on the internet.

50 The Working Group on the Collaborative Economy itself recognized that difficulty (*Impulse Paper*, p 14).

51 N. Fernandez Perez, *El alojamiento colaborativo*, p 227, expressed it in this way because he considered that these platforms (those of tourist lettings to which he dedicated his study) are a hybrid category between ISPs and tourist agent. The European Commission (Agenda, p 9) seems to admit it generally.

52 Tribunal de Commerce de Paris 1èr chambre B Jugement du 30 juin 2008. https://www.legalis.net/jurisprudences/tribunal-de-commerce-de-paris-1ere-chambre-b-jugement-du-30-juin-2008-2/.
Judgment commented on by J.J. Marin Lopez, 'Responsabilidad civil de eBay por infraccion de marcas (Nota sobre la Sentencia del Tribunal de Commerce de Paris de 30 de junio de 2008 *Louis Vuitton Malletier* v. *eBay Inc.* and eBay International AG', *Rev. La Ley* n 7011, 12 September 2008, p 3). Vuitton's claim was based on eBay being liable for the transactions of counterfeit LV products that were carried out en masse through the virtual auction system developed by eBay. eBay sought to take refuge as a provider of a hosting service to benefit from the exemption of liability established by DCE in Art. 14. It was not accepted by the Court, because they considered that eBay is a brokerage firm (courtage, in the French original), so the defendants cannot benefit from the status of technical intermediaries of the hosting services; eBay operates a paid commercial activity on the sale of the products auctioned and does not limit its activity to that of a host of Internet pages. The essence of the provision of eBay is acting as a broker between sellers and buyers, making tools available to both specifically designed to ensure the promotion and development of sales, which shows that eBay plays a very active role, in particular by the repeated commercial appeals that it makes to increase the number of transactions that generate commissions for it. EBay's hosting and brokerage services are indivisible, as it offers an advertisement

18. In short, unlike ISPs, collaborative platforms cannot easily be considered passive; most exert some control over the transaction of the provider and user and almost all have a financial interest in transactions, which suggests that immunity for these platforms is not appropriate.[53]

3.1.2. Electronic Contracts with the Platform

19. The customers integrated into the platform are making contracts with it (the hosting of data and others that we will see in the next section) and taking into account that these contracts are electronic, they will be subject to specific information obligations regarding electronic contracting (Art. 27 to 29 LSSI) and also the regulations of distance contracting with consumers contained in the Spanish Revised Consumer Law (TRLGDCU), without prejudice to other precepts. Without entering into the information obligations of Article 10 LSSI required for platforms simply for being an information society service, the obligations in relation to the contracting of the service or services provided to the supplier and the user are more important. These obligations will differ – once again – depending on whether or not the supplier of the underlying goods or service has the status of consumer. The user who contracts with the platform will usually act as a consumer, albeit not necessarily so. Thus, if the contracting party does not have the status of consumer with the platform, the only rules to be taken into account are those of the LSSI, while as a consumer, it will also be necessary to comply with the remote contracting rules of the information society of the Revised Consumer Law.

20. Dealing first with the rules of the LSSI, it starts with the pre-contractual information requirements of Article 27.1, which can be excluded if both parties agree and neither is a consumer. Secondly is the obligation to make the general terms of the contract with the platform (Art. 27.4) available in advance to the contractor. Here there is no difference whether or not the party is a consumer and the consequence will be open up the possibility of starting the transparency control resulting from being a adhesion contract ruled by the Spanish Ley Condiciones Generales del Contrato. Finally, there is the post-contractual information – the confirmation of Article 28.1 LSSI – , which can also be excluded if the adherent is not a consumer. Regarding the latter, in case of non-compliance, as the LSSI is silent as to the consequence, the nullity of the contract provided for in Article 100.1 of the Revised Consumer Law (TRLGDCU) could be applied

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storage service for the purpose of securing brokerage between sellers and buyers – and receiving the corresponding commission.

53 V. Katz, 30. *BTLJ* 2015, p 1107. In the same sense J.M. Busto Lago, 'La responsabilidad civil de los prestadores de servicios de la sociedad de la informacion ISPs', in Reglero Campos & Busto Lago (eds), *Tratado de Responsabilidad Civil*Vol. II (Cizur Menor: Thomson Reuters Aranzadi 5th edn 2014), pp 645 and 646; P.A. De Miguel Asensio, *Derecho Privado de Internet* (Cizur Menor: Civitas y Thomson Reuters 5th edn 2015), p 255; M.I. Grimaldos Garcia, in *Retos Juridicos*, pp 378 and 379.

by analogy. Additionally, as noted, if the service provider or user is a consumer, the regime applicable to the contract with the platform is that of distance contracts contained in Article 92 et seq. of Revised Consumer Law TRLGDCU. To emphasize the lengthy pre-contractual information imposed by Article. 97 (within which the most relevant point is that related to the right of withdrawal), the duty to confirm the contract under Article 98.7 [and the consequent annulment if it is not carried out (Art. 100.1)] and the regulation of the right of withdrawal (Art. 102 et seq.). In addition, insofar as the contracts linking suppliers and users with the platform will be adhesion contracts, the transparency controls of the Ley Condiciones Generales del Contrato (whether it is the trader provider or not) and the unfair terms control of Revised Consumer Law TRLGDCU will be applicable.

3.2. The Services Supplied by the Platforms to the Provider and the User Designed to Perform the Underlying Contract: Types of Platforms According to the Service They Provide

21. We have just seen that the provider and the user, when they join the platform they make an electronic contract with the platform and it provides a data hosting service. The hosting is merely instrumental to another service that, in parallel, is also agreed with it at the time of joining in relation to the underlying (main) contract. The essence of the platform, that is, the purpose for which it is created, is to facilitate (or enable) as a third party the making of this contract between provider and user, specifying the role or function that the platform plays in this sense. This will allow the type of contractual relationship that arises between the platform and its customers to be defined and to specify what will be the rights, obligations and responsibilities required of the parties. The difficulties are that the function carried out by each platform in this sense varies greatly from one to another, and furthermore the same platform can provide different services. In addition, the analysis is complicated due to the large number of existing platforms. But taking into account that there are typical characteristics and features that are repeated, it is possible to test the systematization by types of platforms, according to the function they perform with respect to the underlying contract. There are three types or groups of platforms that are analysed below.

3.2.1. Platforms that Provide the Data of Their Clients Who Make the Underlying Contract for Themselves

22. In this group are those platforms whose function is to enable the supplier and user to contact each other in order to contract the product or service without the platform participating in it.[54] That is, the provider and the user do it by themselves

54 It is characteristic of these platforms that they are generalist, that is to say that, they sell, provide or exchange all types of goods and services. Although that extreme is not relevant from the legal point of view, it serves to contrast this type of platforms with others to be studied later.

outside the platform, which may not even know that the contract has been made, unless the contractors or any of them, voluntarily, using the mechanisms of the platform or the reputation system, communicate it and/or evaluate the experience and, consequently, report that they have made the transaction. Another important element is that the platforms of this first group do not receive any commission or direct compensation for the transactions carried out, which does not mean that the platform does not obtain any indirect profit, for example, taking advantage of the data provided by the users. Based on the foregoing, the contracts that these types of platforms make with their clients could be qualified as follows.

23. For suppliers there is, on the one hand, the contract for dissemination of the advertising message that is clearly a publicity service, more specifically, an advertisement contract (Art. 17 to 19 of Spanish Act Ley 34/1988 General de Publicidad) for or without payment (the typical broadcast contract is for payment). Secondly, the platform also gives the provider a service (free or not) of hosting the data: those of the provider's profile and those that are inserted in the reputation system. From the foregoing, it is clear that the platform's obligations and responsibilities are principally to make available to the advertiser (provider) the space and time agreed for the advertising publicity.[55] The advertiser is liable for damages to third parties arising from any illegality of the message disseminated,[56] but the platform may be liable for non-contractual damage ex. Article 1903 Spanish Civil Code (hereafter SCc) when he knows of its illegality and does not act to eliminate the message or make it impossible to access it.[57] That is, by analogy, the criterion will be the same as that applied in the matter of data hosting (*notice and take down*) of the ISPs as we shall see. Regarding the hosting service of the other data provided by the platform (the inserts in the profile of the user and in the reputation system), as already stated, the provider of the data hosting service can benefit from the system of exemption from liability of the ISPs of Article 16 LSSI and the exemption from supervision duty (Art. 15 Directive 2000/31) if the platform plays a passive role in the underlying transaction. The platforms of this first group do not intervene in the underlying contract, but, as long as they know that the transaction has been made and/or its evaluation, they are exercising some control[58] and cannot benefit from the ISP regime. Therefore, the issue will have to be resolved case by case, inquiring whether or not the transaction was controlled by the platform, based on the data provided by the provider and user.

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55 In regard to these, the general terms of the contract established by the platform will be decisive.

56 R. Sanchez Aristi, 'Contratos publicitarios', in Bercovitz Rodriguez Cano (ed.), *Tratado de Contratos*, T. IV (Valencia: Tirant Lo Blanch, 2nd edn 2013), p 5422.

57 Similarly J.M. Busto Lago (in *Tratado de Responsabilidad*, p 698), who adds that it will also be liable if it cannot demonstrate that measures to control the messages hosted are available.

58 In the same sense V. Katz, 30. *BTLJ* 2015, p 1110, when the platform does not exercise sufficient control over the user or supplier.

24. If the platform does not play an active role, liability will only be imposed if an *ad hoc* notification is made denouncing the misleading information addressed to it or if it is published by other means (for example in the reputation system). Nor will a supervisory duty be imposed on this type of platform, except the minimum due diligence that could have allowed it to know, consisting of establishing notice procedures available to the platform's clients and third parties.[59] But, even if they can benefit from the ISP regime, these platforms have a certain duty to warn.[60] Consequently, in the event of a negative evaluation of a supplier by a user in the reputation system or by direct communication, the platform must take verification measures and, if appropriate, give suitable warning to protect future users. Moreover, in the event that a user reports that a provider has been attributed trader status without being a trader, it must proceed to request rectification or correct or eliminate the misleading information itself.[61] Conversely, it will also have to act against non-trader suppliers, however, who due to the volume of contracts they carry out on the platform (always on the basis that these data have reached the platform), predictably, apart from being in a illegal situation – as already said 'de facto traders' – , they are avoiding the application to the contract of the stricter rules of contracts with consumers.

25. Accepting the previous assumptions that determine typical liability for fault, the damaged users, both due to the illegality of the advertisement (including misleading information), as well as inaccuracy of the profile data of the provider or those included in the reputation system, may seek damages against the platform, without prejudice to the provider's liability. The platform's liability will be contractual, because the platform is linked to the user by a data hosting contract, too,[62] that is, the user is their client, not a third party of the platform, unlike cases

59 According to P.A. De Miguel Asensio, *Derecho Privado de Internet*, pp 266 and 267, due diligence requires the platform to establish mechanisms for detecting illegal or inaccurate content (typically through interactive communication with its web page or through email), which requires it to have an address and current head office in order that the damaged parties may be aware of the presence of illegal or inaccurate content.

60 V. Katz, 30. *BTLJ* 2015, p 1110, estimates that in this type of platforms one can think of establishing a limited duty of warning. Recital 48 of Directive 2000/31 states for data entry services only that the prohibition on Member States from imposing a duty of supervision does not affect the possibility that they require these service providers to apply a duty of diligence that can reasonably be expected of them and that is specified in national law in order to detect and prevent certain types of illegal activities.

61 The Research Group on the Law of Digital Services (*EuCML-JECML* 2016, p 167) stipulates in Art.11.2 of the draft Directive that the platform must guarantee that the supplier informs the client if he offers his goods or services as a trader. On the scope of this duty of the platform, C. Busch doubts (*European Model Rules*, p 7) whether a system should be required, but believes that in clear or obvious cases it could be established that an incorrect self-rating of the supplier should be changed or he be asked to review it.

62 J.M. Busto Lago (in *Tratado de Responsabilidad Civil*, p 610) speaks of a contractual liability when the damage is caused in the framework of a legal liability that arises against the service provider through Internet and its receiver.

in which the illegality or inaccuracy of the data damages people other than its clients. In this concurrence of liability of both provider and platform, since both are bound contractually with the damaged user, it does not appear that the platform should be a solidary liable in accordance with Article 1137 SCc. On the other hand, if the aggrieved parties are third parties in the strict sense outside the platform,[63] the liability of the latter – as said before when referring to liability for the advertising message – is non-contractual ex Article. 1903 SCc, according to the majority of the doctrine.[64] Third parties are the typically damaged when the ISP is a mere provider of a data hosting service,[65] but not when, in addition, it is a collaborative economy platform and the damage is caused to each other by the clients of the platform themselves.

26. Regarding the contract of the platform with the user, everything said in relation to the contract of data hosting with the provider would apply, therefore, the providers damaged by illegal or inaccurate data inserted by a user, may claim damages against the platform and with the same limits that we have just seen.

27. Finally, in no case does it seems that this type of platform should be held liable for the supplier's breach (non-performance) or defective performance of the underlying contract. The platform is only liable based on the contracts related to the advertising service of the provider's message and the hosting of the data of provider and user and always within limits, but it cannot be liable for non-performance of the underlying contract, in as much as it does not intervene in the contract, and may not even know that it has been carried out.

3.2.2. Platforms in Which the Clients Cannot Perform the Contract Without the Platform's Participation

28. In this second group are those platforms in which the provider and the user cannot carry out the transaction without the intervention of platforms, because they do not provide users with the respective data until the transaction is well advanced or the contract is already made.[66] Usually, in these platforms, the

63 Third parties would be, e.g. in the case of a lettings platform: a) the landlord for the damage caused by the guests to the property in a sublease makes by the tenant; or b) the neighbours for the damage caused to them by the guests.

64 For all about this, J.M. Busto Lago points out (in *Tratado de Responsabilidad Civil*, pp 699 and 700) that there will be a liability for an act derived from damage causally attributable to content or information outside the ISP, but subjectively subject to it in response to the concurrence of negligence in the provision of intermediation service.

65 J.M. Busto Lago, in *Tratado de Responsabilidad Civil*, pp 614 and ff.

66 A characteristic of these platforms, unlike those of the first group, is that these can be either general or specialists in the sale or exchange of certain types of goods or supplying specific services.

payment, although is not always made directly to them, they control it in some way (for example, establishing payment systems through third parties). This is because these platforms receive a commission – commonly from the provider – if the transaction is made. Therefore, the platforms of this second group have a **direct** economic interest in the transaction being made due to the benefit they obtain.[67] Another characteristic of this type of platform is that, although some terms and conditions of the underlying contract between the provider and the user are predetermined, platforms allow the supplier to insert in his offer particular conditions by which the transaction will be governed. However, the establishment of guide prices means that the supplier is allowed to fix it, so it cannot be said that in this important aspect the platform intervenes. There are also platforms that allow or enable mechanisms so that once the provider and user have contacted each other, the user may insert some contractual conditions.

29. It seems clear that the contractual position occupied by this type of platform with regard to the underlying contract is that it is intended to manage the affairs of others. In this context, an opinion that has a good number of followers, particularly in Spain, considers the performance of the platform as an intermediary agent or brokerage.[68] It seems, however, that contractual relationships with users and with providers go beyond simple mediation and this is so for several reasons.

30. Firstly, for the length of the contract, the contractual relationship arising from the typical brokerage mediation is extinguished (unless prior revocation) when as a consequence of the broker's action, the mediated parties complete the contract between them. However, the contracts that link the platforms with the provider or the user are not extinguished with the conclusion of the underlying contract between them.[69] In contracts with collaborative economy platforms, it is not a matter of connecting two parties in an occasional and unique way, as is typical in mediation, but rather they are created with the aim of extending over time, even indefinitely, because integration in the platform through previous registration is shaped to channel a plurality of transactions. This does not mean that the party that adheres to the platform is obliged to contract once or more often, but in these platforms, especially with suppliers, the relationship is made to last, since it starts with the registration on the platform. In the event that an underlying contract is

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67 As Katz shows (*BTLJ* 2015, p 1105) for North American law, freedom from liability from which ISPs benefit in *Digital Millennium Copyright Act* (which European Directive 2000/31/EC has taken as the model for Europe) sets out two exceptions that can determine the liability of the ISP: 1) when it receives a direct economic benefit attributable to the activity, and 2) when the ISP is aware or should have been aware of the activity.

68 M.I. Grimaldos Garcia, in *Retos Juridicos*, pp 367 and 368; I. Rodriguez Martinez, in *La regulacion de la Economia*, pp 130 and 131; and Working Group on the Collaborative Economy, *Impulse Paper*, pp 94 and 96 for Spanish law.

69 In disagreement with this, see I. Rodriguez Martinez, in *La regulacion de la Economia*, p 134.

made, the contractual relationship of the platform with its customers continues after its conclusion and tends to persist over time in expectation of future transactions. That is to say, the contractual relationship with the platform starts with joining it and ends with withdrawal or expulsion. This different way of extinguishing the contractual relationship of providers and users with the platforms brings them closer to the typical forms of termination of mandate, agency and commission contracts, such as revocation and relinquishment.

31. Secondly, the reputatin system is another element that distinguishes the platform's intervention of the brokerage contract. This is the instrument that generates trust among those who are integrated into collaborative economy platforms and for that reason, as we have already seen, respond to its good functioning since it is what guarantees the reliability of the participants in these new business forms. In this sense, the platforms have a duty similar to that of third-party managers of mandate, commission and agency contracts, which is to control the reliability and solvency of the third parties with whom the manager comes into contact.[70] This is just the opposite of what happens in the brokerage contract, in which the mediator has no obligation to control the reliability of the other contracting party because, as a general rule, it is not liable for the good purpose of the contract.[71]

32. A third and decisive element to be taken into account is that the platform intervenes in the transaction, as the parties could not otherwise contract, the activity of the platform going beyond what the broker or mediator usually does, because the parties to a mediation could conclude the contract without the intervention of the mediator, it is enough that each party knows the identity of the other contracting party. But this is impossible in this type of collaborative economy platforms because the contract can only be carried out through the platform.

33. What kind of management activity does the platform carry out? On the one hand, for the supplier, the fact that he inserts an offer for a sale or service, taking into account that such offer remains pending acceptance by a user, the platform has become an agent of the supplier with the order to sell or offer a service to third parties. The commission is remunerated, since the platform charges a fee. Therefore, for as long as the provider does not withdraw the contract offer from the platform, the platform on his behalf (therefore, with power of representation) can enter into the contract with a user who states that he accepts the offer.[72] Consequently, when a user accepts the offer he is not contracting directly with the provider, he is doing it with the platform. On the other hand, with respect to the user, the fact of joining the

70 Cf. Art. 1726 SCc; Art. 253 Spanish Codigo de Comercio, 9.2b Ley Contrato de Agencia.

71 Busto Lago, 'Contrato de mediacion o corretaje', in R. Bercovitz Rodriguez Cano (ed.) *Tratado de Contratos*, Vol III (Cizur Menor: Thomson Reuters Aranzadi 2nd edn 2013), p 3578.

72 On that assimilation with the mandate contract see Working Group on the Collaborative Economy, *Impulse paper*, for French law (pp 40 to 42) and Dutch law (pp 69 to 71).

platform, apart from making a data hosting contract, he expects the platform to provide a service consisting of supplying solvent providers; it is understood that the user confers on the platform a mandate consisting of managing the search for suppliers on whom he can – safely – rely for the acquisition of goods or the provision of services. In short, platforms of this type control the suppliers because the transaction is held on the platform and the platform knows whether it has been made or not, unlike the first group of platforms in which it does not intervene in the underlying contract and may not get to know whether the transaction was made or not.

34. Therefore, because the contractual relationship of these platforms with their customers (suppliers and users) and their position with respect to the underlying contract is included in the mandate contract, their liability will be determined by the rules themselves, without needing greater justification for the non-application of the exemption of liability regime of the ISPs of Article 16 LSSI and the exemption from supervision duty (Art. 14 and 15 Directive 2000/31). Here it is clear that in these cases the platform plays an active role in the underlying transaction.[73] They will have to be liable as agents or commission agents on behalf of suppliers and users for lack of due diligence by any professional who manages the affairs of another as an agent in exchange for a price.[74] As a result, they will be directly liable for damage caused by fault actions in the management of their duties, for lack of control of their clients caused to a user by a supplier or to a supplier by a user, due to the illegality or inaccuracy of the data of the supplier's offer, of the profiles and of the inserts in the reputation system. Unlike the platforms of the first group, here they will be liable not only when they have known of the illegality or inaccuracy of the data because there is a communication in that sense (notification of an individual, of an authority or an insert in the reputation system), but when they should have known, in accordance with the duty of due diligence based on the law of contracts and because platforms here have an obligation of supervision. This duty of supervision requires the surveillance of the reputation system, of the valuations, of the information about the reprehensible behaviour of suppliers and users, etc. That does not exclude the fact that they can escape liability if they prove that they used all the diligence and care required of professionals.[75] For the rest, it should be reiterated here what has been said in relation to the first group of platforms about

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73 In the same sense Working Group on the Collaborative Economy (*Impulse Paper*, p 125) because the active platforms cannot be shielded by the exemption from liability of Art. 14 Directive 2000/31. Also V. Katz, 30. *BTLJ* 2015, p 1107 states that when the platform exercises sufficient control to decide on relevant aspects of the transaction, it cannot enjoy immunity and *notice and take down* is not sufficient safeguard for the users.

74 The Spanish Civil Code stipulates that in order to assess due diligence as to whether the mandate is paid or not, it is better when it is (Art. 1726). The commission contract is assumed to be paid (Art. 277 Spanish Commercial Code).

75 Working Group on the Collaborative Economy, *Impulse Paper*, p 76.

controls of suppliers that have been attributed the status of trader without being so *de facto,*[76] with the difference that in these platforms due to the duty of supervision that weighs on them, the control of their clients is demanded more rigorously and more far-reaching. The liability will be contractual for the damage that suppliers and users may allege against each other, given that the platform is contractually linked to both. The platform's liability will be direct here for the damage that incorrect management of the mandate has caused its clients.

35. The platform will also be liable for damage caused to third parties outside the platform caused by the providers and users, taking into account that the platform has an obligation to supervise its clients. This will be liable for non-contractual damage under Article 1903 SCc. In addition, platforms are required to have procedures for warning third parties of illegal or harmful behaviour or content. That is, to have mechanisms that enable third parties to inform the platform of reprehensible behaviour of suppliers and users. This is of paramount importance for platforms whose services can potentially be detrimental to third parties, as is notably the case of hosting services, in which suppliers could also be required to inform third parties of their activities.[77]

36. Finally, it is doubtful if this type of platform has to to be liable for the damage that the user has suffered as a consequence of the non-performance or defective performance by the provider. In order to take advantage of exemption from this liability, it will be necessary for the platform to present itself clearly as an intermediary or agent,[78] and in any case it will depend on the user being able reasonably to trust that the platform has influence on the supplier,[79] which is a issue to be

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76 Research Group on the Law of Digital Services (*EuCML-JECML* 2016, p 168) establishes in the draft Directive the duty of the platform to guarantee that the supplier informs the client if he offers his goods or services as a trader. However, this guarantee is not understood if the platform does not have in parallel a duty of control. Yet this draft does not include this in a clear manner, because then in relation to the reputation system in Art. 17.2 of the draft it refers to the duty to counteract misleading information provided by suppliers.

77 V. Katz, 30. *BTLJ* 2015, p 1112 suggests that there should be imposed on the platforms a requirement that they arbitrate dispute resolutions and claims in favour of third parties to exclude annoying users; also in favour of the landlords, in order to prevent tenants from being included in the lists of hosting platforms as hosts (the tenant who sublets the property from the landlord breaches the contract). This author also suggests that in some cases the obligation to inform third parties of their activities is imposed on suppliers (this is the case of the accommodation provider who habitually gives up his house or apartment, with the inconvenience that this entails for the neighbours).

78 Research Group on the Law of Digital Services, *EuCML-JECML* 2016, p 167 (Art. 16.1 of the draft Directive.

79 Research Group on the Law of Digital Services, *EuCML-JECML* 2016, Art. 18 of the draft Directive points to a series of criteria to evaluate whether the platform exercises a predominant influence. They are as follows: (a) The supplier-customer contract is concluded exclusively through facilities provided on the platform; (b) The platform operator can withhold payments made by customers under supplier-customer contracts; (c) The terms of the supplier-customer contract are essentially determined by the platform operator; d) The price to be paid by the customer is

assessed in the case in hand. It may be also doubtful, bearing in mind that the liability of the platform is convergent with that of the supplier, if it is a solidary or a divided liability, although due to the contractual nature of the damage, the second option seems more appropriate.[80]

3.2.3. Platforms in Which Clients Cannot Perform the Contract Without the Platform and the Contract Elements Are Predetermined

37. The third group of platforms are those in which, in addition to taking part in the underlying contract as with the previous type (the contract between the provider and the user can only be carried out through the platform, the payment is made to the platform and it receives a direct benefit from each transaction), the underlying contract is predetermined by the platform in its essential elements (price, quality of provision, subjective conditions of suppliers) and in its terms and conditions. Taking into account that these platforms are services, from the perspective of general contract law, there are two alternatives to qualify the position of the platform with respect to the underlying contract.

38. The first alternative is to consider that in this type of platforms there is an agent activity, as in the previous group. We are going to analyse the contracting process. When the platform detects a demand for service, such as a offer to contract from a user, the platform assumes the task of channelling that offer, namely, searching for a supplier from its lists which suits the offer. Consequently, by channelling this offer, the platform acts on behalf of the user-offerer (all automatically). Having found the right provider, the platform requests its acceptance, and on having it, the contract is concluded. That is, with respect to the user, the platform has a representative mandate consisting of concluding a contract on its behalf with a third party (provider), a power that arises from the statemnt to request a service. Regarding the provider of the service, we believe that the platform has only one mandate: to inform him of the request for the service, which the provider may accept or reject. Then, the underlying contract is carried out between the platform and the provider, although the platform acts on behalf of the party requesting the service. The consequences in terms of liability to qualify the relationships would be basically identical to those that occur in the second type of platforms above.

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determined by the platform operator; (e) The platform operator provides a uniform image of suppliers or a trademark; (f) The marketing is focused on the platform operator and not on the suppliers; (g) [OPT:] The platform operator promises to monitor the conduct of suppliers. Commenting on this set of criteria C. Busch (*European Model Rules*, p 9) says that it is not necessary for all to be met nor is it sufficient that only one is complied with, the list of criteria is an invitation for the Courts to apply a flexible approach and assess each case on its own characteristics.

80 The Research Group on the Law of Digital Services (*EuCML-JECML* 2016) considers it to be a joint liability (cf. Art. 18 of the draft).

39. However, there is a second alternative. This is to consider that when the platform receives the service request it is accepting an offer, so it is understandable that it takes over the order itself, even though it then looks in its lists for a provider willing to perform the service. Thus we can affirm that the user contracts exclusively with the platform and that it takes over the performance and simply entrusts the compliance to a third party (the provider) with whom a working relationship is established or through a subcontractor. If we analyse the existing relationships, this is the traditional acceptance of third party performance or performance entrusted to a third party, admissible in cases of non-personal obligations and so frequent in the current legal traffic in which many obligations are not personally performed by the contractor. Therefore, to describe the relationships in this type of platform in this way is that in reality, there is a single contract: that between the platform that is committed to provide (usually a service) and the user requesting it, that is, there is no underlying contract.

40. Between the two alternatives described, if we bear in mind that the platform is the one that establishes the essential elements of the mandatory relationship between the provider and the user, such a position of power does not correspond to the genuine activity of an external affairs manager, whose essential characteristic is to manage the interests of another and carry out the authorization as ordered by the principal following his instructions. On the contrary, these platforms act in their own interest given their situation of superiority and the provider is subordinate to their requests, which makes it clear that the second alternative is the correct one. This point of view can also be based on the economic argument of the theory of transaction costs, in the sense that platforms, using modern information technology structures, can create management structures and control the production and distribution of goods and services, without the need to adopt a formal business structure.[81] In addition, this point of view is supported by the generic criterion of studies of the collaborative economy, which considers decisive the degree of control that the platform exercises in the underlying contract, which in this case is total.[82] Furthermore, the ECJ has followed the same criterion in two judgments handed down by in resolving preliminary issues concerning the services provided by the Uber platform.[83] The central question was whether Uber constitutes a mere online

81 C. Busch (*European Model Rules*, p 9) cites the work of COASE ('The Nature of the Firm', 4. *Economica* 1937(16), pp 386–405) which would permit platforms to be considered as hybrids between the two alternative forms of coordinating productive resources, that of the business or that of the market.

82 V. Katz, 30. *BTLJ* 2015, p 1071. C. Busch (*European Model Rules*, p 9) states that when the degree of influence and control – visible to the client – reaches a certain level, the business model of the platform shows a degree of similarity with the model of a company and this would justify applying the principle that responsibility follows control.

83 These are the judgment C-434/15 ECJ (Grand Chamber) of 20 December 2017, http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=695237, resolving a issue raised by the *Juzgado de lo Mercantil Barcelona n. 3* (Commercial Court of Barcelona no. 3) in the case raised by *Asociacion*

intermediatory service capable of being classified as an information society service subject to Directive 2000/31/EC, which would obviate the need for an administrative permission license or, whether on the contrary, it is a transport service in need of an ad hoc permission. The ECJ held that the service provided by Uber is not limited to being an intermediatory service, but rather creates an authentic offer of transport services that it organizes and controls.[84] Indeed, if Uber were limited to publishing messages about drivers or putting them in contact with passengers, without more organization of how the transport and the conditions of service have to be provided, it could be included in the platforms of the first or second type of those studied in this work. Not being so, Uber is closer to being considered a transport company.

41. The consequence of all of the above is that, while the platform is the obligor, it must be liable – as the contracting party that it is – for the breach or defective performance of the provider. In everything else, what is said in relation to the data hosting contracts in the previous section can be extended to these platforms. But in addition, the degree of diligence in the supervision or control of customers by these platforms must be greater,[85] absolute for the suppliers because they are assistants or collaborators in the performance, although also of the users because they are also their clients.

Profesional Elite Taxi v. *Uber Systems Spain, S.L.*; and the judgment C-320/1 ECJ (Grand Chamber) of 10 April 2018 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=200882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=695749), resolving issue raised by the Court of First Instance of Lille in the criminal proceedings against Uber France SAS.

84 In para. 39 of the judgment in the Uber Spain case – then reiterated in the case of Uber France – , the ECJ specifies that the elements that determine whether this platform organizes the service, are the following: 1) Uber selects its drivers and the quality of their vehicles; 2) Uber provides an application without which, on the one hand, these drivers would not be able to provide transport services and, on the other hand, people wishing to make an urban journey could not resort to the services offered by these drivers; 3) Uber exerts a decisive influence on the object of the contract in relation to the price (at least it controls the maximum price of the journey), the quality of the vehicles and the behaviour of the drivers, which in some cases may involve their exclusion.

85 The control exercised by Uber can be seen in the Star Rating policy, which states (in English): '*What leads to you losing access to your account?* There is a minimum average rating in each city. This is because there are cultural differences in the way people in different cities rate each other. We will alert you over time if your rating is approaching this limit, and you'll also get information about quality improvement courses that may help you improve. However, if your average rating still falls below the minimum after multiple notifications, you will lose access to your account. We may allow you to regain access to your account if you can provide proof that you completed one of these quality improvement courses.'