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The legal qualification of collaborative platforms offering composite services. What consequences for consumer protection?

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Abstract

This paper discusses the legal qualification of collaborative platforms offering composite services, and it aims at identifying a preliminary solution that could ensure a high level of consumer protection to users. The paper argues that collaborative platforms should be considered providers of information society services according to the E-Commerce Directive, without precluding their classification as offline services providers in light of sector regulations.

Moreover, the paper focuses on contractual liability of platforms for non-performance by offline suppliers. The solution suggested is using the criterion of the decisive influence elaborated by the CJEU in Uber and Airbnb cases to define cases where a platform is obliged to compensate consumers for non-performance.

Keywords: collaborative platforms - composite services - information society services - consumer protection - prosumer - E-Commerce Directive - sector regulation - liability for non-performance.

Summary: Introduction. – 1. The main features of the collaborative economy. A legal perspective. – 2. The applicable legal regime to collaborative platforms offering composite services: an overview of the CJEU's case-law and the academic literature. – 3. The legal qualification of collaborative platforms in the light of consumer protection needs. – 4. The allocation of liability for non-performance. The decisive role of platforms in light of the E-Commerce Directive's approach. – 5. The ELI Model Rules on Online Platforms. An overview. – Conclusions.

Introduction.

Collaborative platforms have become increasingly popular in recent years and are disrupting traditional centralized business models of supplying goods and services. Their spread is involving the most different market sectors and has its roots in several technical, social, and economic factors.[1] The technological evolution of mobile devices, systems of online transactions, and geolocation represents the essential context in which collaborative platforms have been developed. At the same time, the idea of sharing unused goods represents a social reaction to an 'overmarketized' society and shows a new environmental consciousness based on the sustainability of consumption.[2] Most importantly, *sharing economy* arises as an alternative economic model and constitutes an answer to the financial crisis and

[1] V Hatzopoulos, S Roma, 'Caring for sharing? Collaborative economy under EU law' (2017) 54 Common Mark. Law Rev. 81.

[2] T Teubner, 'Thoughts on the Sharing Economy' in P. Kommers and others (ed), *Proceedings of the International Conferences on e-Commerce 2014* (2014) <https://www.researchgate.net/publication/285356329_Thoughts_on_the_Sharing_Economy> accessed 03 September 2020.

the resultant unemployment, enabling non-professional actors to profit for monetization of idle capacity.[3]

The chance for strangers to interconnect with each other without traditional intermediaries challenges the vertical and centralized way of conceiving legal relationships between market actors. As a result, the *collaborative economy* raises relevant issues related to the application of existing legal frameworks.[4] More specifically, collaborative platforms that offer composite services – i.e. non-electronic performances through electronic means – are the most difficult to classify and regulate, as shown in cases arising before courts both in the EU and US.[5] Innovative platforms try to avoid the application of rules that impose on offline providers stricter market access requirements than the ones contained in regulations on online services. At the same time, incumbents complain about a disproportionate competitive disadvantage caused by new platforms that offer their same services without the same administrative burdens. For these reasons, regulators, judges, and researchers are seeking to rationalize these issues and strike a balance between the different interests at stake. In doing so, one of the main regulatory objectives should be to figure out solutions able to create a trustworthy environment for consumers.[6] However, this topic is still not thoroughly explored in the literature, except for some authors that have started to investigate the implications of the first CJEU's rulings on the legal treatment of consumers operating in collaborative platforms.[7]

This paper will focus on the dynamic aspect of transactions in collaborative platforms, using the categories of contract law and consumer protection law to preliminarily outline a legal regime for the emerging *collaborative economy*. More specifically, the paper endeavors to solve the issue of the legal qualification of collaborative platforms offering composite services – whether they are providers of information society services within the meaning of Article 2(a) of Directive 2000/31[8] (E-Commerce Directive) or not – in order to identify suitable solutions to ensure a high and uniform level of consumer protection to users. In this context, particular attention will be devoted to transparency requirements and contractual liability for non-performance, considered as the key factors to regulate in order to ensure a trustworthy environment for consumers and to encourage the participation of *prosumers*. To this end, the research will emphasize, from a legal point of view, the role of the technical means by which exchanges are enabled in collaborative platforms. The technological dimension of transactions should be considered the decisive element in the legal assessment because it introduces a high level of legal uncertainty, having a *disruptive* effect on the traditional way of conceiving market relationships for the supply of services or goods. Moreover, embracing this perspective could avoid the fragmentation of the European digital market and guarantee legal certainty to market operators and users that need to know what rules to follow in their transactions.

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[3] M Böckmann, 'The Shared Economy: It is time to start caring about sharing; value creating factors in the shared economy' (2013) <https://pdfs.semanticscholar.org/a914/b038d4bddca35994f5c2b202c862de22339c.pdf> accessed 10 March 2020.

[4] A Savin, 'Electronic services with a non-electronic component and their regulation in EU law' (2019) 23 J. Internent Law 13.

[5] For an overview of the case-law, S Ranchordas, 'Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy' (2015) 16 Minn. J. L. Sci. & Tech. 413.

[6] M Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (Springer 2019).

[7] MY Schaub, 'Why Uber is an information society service Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)' (2018) 3 EuCML 109; I Domurath, 'Platforms as contract partners: Uber and beyond' (2018) 25(5) MJECL 565.

[8] European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178.

The paper has the following structure. As a point of departure, Section 1 will explore the phenomenon of the spread of collaborative platforms and identify its main relevant features from a legal standpoint. Section 2 will briefly analyze the decisions of the Court of Justice concerning the legal qualification of the two most common collaborative platforms, such as Uber and Airbnb. Then, Section 3 will point out that the application of the 'decisive influence criterion' elaborated by the CJEU does not ensure protection to consumers and create a framework of legal uncertainty in these emerging marketplaces. On this basis, the paper will stress that all collaborative platforms should be considered as providers of information society services, regardless of the level of control exerted on the underlying service and without precluding at the same time their classification as offline services providers. This solution could guarantee the applicability of the E-Commerce Directive as the minimum instrument to assure a common level of protection to consumers operating in the *collaborative economy* context. In addition, Section 4 will investigate whether the approach of the E-Commerce Directive to define platform liability for the user conduct could serve as a regulatory model to establish cases in which collaborative platforms can be considered liable for non-performance by suppliers/*prosumers*. In this respect, it will be highlighted that platform immunity is not a feasible solution, and the decisive influence criterion could play a role in the identification of liability indicators. Finally, Section 5 will offer a preliminary overview of the ELI Report on Model Rules on Online Platforms,[9] devoting particular attention to the suggested model of contractual liability for non-performance.

1. The main features of the *collaborative economy*. A legal perspective.

Collaborative platforms offer a wide range of services, from transportation to sharing rooms, thus creating new opportunities for consumers and enterprises.[10] There is not a universally accepted definition of the *collaborative economy*, and many terms are used to refer to the same concept, such as *peer-to-peer economy, sharing economy, collaborative consumption*. However, in light of the existing literature on the topic,[11] it is possible to identify some key features that represent the lowest common denominator in all these platforms: i) the digital element on which platforms are based; ii) the possibility of offering offline services for non-professional actors on an occasional basis (hence the term *peer-to-peer economy*); iii) the absence of a change of ownership as a result of transactions (the concept of ownership is replaced by the concept of accessibility); iv) the possibility of profiting from monetization of unused goods or idle capacity; v) the platforms' ability to self-regulate their transactions and self-establish the rules that users must follow to continue to participate in the digital life of the community.

The European Commission has rationalized the ideas coming from scholars and enterprises and has given its definition of the *collaborative economy* in a Communication,[12] establishing that 'the term collaborative economy refers to business models where activities

[9] ELI 'Report on Model Rules on Online Platforms' (2016) <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/online-platforms/> accessed 03 September 2020.

[10] In 2011 the Time Magazine nominated sharing economy as one of 'ten ideas that will change the world', <content.time.com/time/specials/packages/article/0,28804,2059521_2059717_2059710,00.html>.

[11] J Kassan, J Orsi, 'The LEGAL Landscape of the Sharing Economy' (2012) 27(1), J. Environ. Law Litig.; D Rauch, D Schleicher, 'Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the 'Sharing Economy' (2014) George Mason University Law and Economics Research Paper Series No 15-01, <http://ssrn.com/abstract=2549919>; C Koopman, M Mitchell, A Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' (2015) 8(2) JBEL 529; M Cohen, A Sundararajan, 'Regulation and Innovation in the Peer-to-Peer Sharing Economy' (2015) 82 U Chi L Rev 116 <https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Sundararajan_Cohen_Dialogue.pdf> accessed 29 June 2020; V Katz, 'Regulating the Sharing Economy' (2015) 30(385) BTLJ 1068.

[12] *A European agenda for the collaborative economy* COM(2016) 356 final Commission Communication [2016] OJ L 119 .

are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals'. The Commission Communication has clarified that platforms offering composite services generally involve three main actors: i) the providers of the underlying service, that can act as professional actors or on an occasional basis; ii) the users of these services; iii) the online platform acting as an intermediary that provides market operators with the digital interconnection needed to facilitate their exchanges. The presence of these three actors has some consequences on the way of understanding traditional two-party contractual relationships. Indeed, in the *collaborative economy* context, contractual interactions should be conceived as a triangle network: a provider enters into a contract with a user for the supply of the underlying service; at the same time both the provider and the user enter into a contract with the platform to use the intermediation service that allows them to digitally interact. Moreover, the Commission specifies that transactions in collaborative platforms can be carried out for-profit or not-for-profit and generally do not involve a change of ownership. This is because parties are interested in the temporary use of a good (an apartment) or need to use a service for a limited time (transportation), so they only need the possibility of accessing to a service or a good, and not acquiring property rights on them. For all these reasons, some authors classified the *sharing economy* as a regulatory *disruption*,[13] able to have drastic implications for the current legal categories because it is based on a kind of innovations that 'goes beyond improving existing products; it seeks to tap unforeseen markets, create products to solve problems consumers don't know they have, and ultimately to change the face of the industry'.[14]

For the purposes of the present article, there are two most crucial features to take into account to ensure the optimum level of protection to consumers in collaborative platforms, namely the overlapping of the two layers of market relationships, the digital one and the offline one, and the presence of a new category of market actors, the *prosumers*, those subjects that offer their service non-professionally. On the first point, at the digital level, consumers and suppliers can interact and conclude their transactions through the intermediation service offered by platforms. Likewise, the offline dimension concerns the offering of the underlying services that cannot be digitized, such as transportation or provision of accommodations. These two layers are inextricably interconnected in every collaborative platform, and this aspect causes many issues associated with the identification of the applicable regime, as the CJEU case-law has shown. However, as discussed below, the twofold dimension of collaborative platforms should not be simplified, but enhanced by judges and regulators, because it represents the context where consumers interact and, therefore, where it is necessary to conceive legal remedies for their protection. Considering collaborative platforms only as digital intermediaries or otherwise only as offline provides would mean ignoring their dual nature, which corresponds to two different sets of rules that, in turn, pursue two different regulatory objectives.

On the second point, the chance for non-professional actors to offer services and goods challenges the traditional *business-to-consumer* (B2C) model, on which the regulation of goods and services supply is based. According to the B2C model, suppliers operate in the market as professional actors and, for this reason, are obliged to apply transparency requirements and specific rules on contracts to fill the information asymmetry of consumers. In the *sharing economy* context, subjects that act as users should maintain their rights as consumers, but

[13] V Katz, 'Regulating the Sharing Economy' (n 11) 1092.

[14] N Katyal, 'Disruptive Technologies and the Law' (2014) 102 Geo. LJ 1685. On the meaning of the expression 'disruptive technology', see CM Christensen, 'The Innovator's Dilemma – When New Technology Causes Great Firms to fail' [1997] Harv. Bus. Rev.

subjects acting as suppliers could hardly ensure consumer protection to users with all the existing tools provided for in the law. This is why the allocation of liability in collaborative platforms represents a serious problem from a consumer protection law standpoint: prosumers are not able to ensure legal protection to users and to pay compensation, and the platform has formally no role in the supply of the underlying services. As discussed below, we can conclude that, in the process of allocation of liabilities, legal solutions should be designed in light of the triangular interactions of market actors by emphasizing the role of the digital platform, which could be decisive also in the provision of offline services.

2. The applicable legal regime to collaborative platforms offering composite services: an overview of the CJEU's case-law and the academic literature.

2.1. The Uber case and the Airbnb case.

The first step to address the problem of the legal framework applicable to collaborative platforms is exploring the case-law of the Court of Justice concerning the legal qualification of Uber and Airbnb.

In *Asociación Profesional Elite Taxi v Uber Systems Spain SL*,[15] a Spanish taxi company started legal proceedings against Uber, seeking a prohibition of its transport activities. This company claims that Uber offers a transport service without being subject to all required applicable authorizations and rules on traditional taxi services, and these activities amount to misleading practices and acts of unfair competition. So, the question referred to the Court was whether Uber services could be classified as transport services within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 (Service Directive)[16] and Directive 2000/31, or whether they could be considered online intermediation services, and, so, covered by the aforementioned rules. The Court first notes that the intermediation service of matching a non-professional driver with a passenger is, in principle, a separate service from a transport service consisting of the physical act of moving persons from one place to another and that each of these services is subject to different directives. Second, the Court recognizes that an intermediation service that, through a smartphone application, enables the transfer of information concerning the booking of a transport service between a passenger and a non-professional driver meets, in principle, the criteria for classification as an 'information society service' within the meaning of Article 2(a) of Directive 2000/31. Nevertheless, the booking service offered by Uber must not be classified as an information society service, but as 'a service in the field of transport', because of the active role exercised by the digital platform on the substantive service conditions. In this regard, the intermediation service forms an integral part of an overall service whose main component is the transport service. According to the Advocate General Szpunar's Opinion,[17] this digital interconnection activity is not economically independent but exerts a pervasive influence on the conditions under which the transportation service is provided by non-professional drivers, such as determining the maximum fare, exercising a certain control over the quality of the vehicles, the drivers and their conduct. For this reason, Uber services cannot be considered as information society services, and the effects of the E-Commerce Directive must be restricted to composite services in which the electronic element is

[15] Judgement of 20 December 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain SL,* C-434/15, EU:C:2017:981.

[16] European Parliament and Council Directive 2006/123/EC of 12 December 2006 on services in the internal market [2006] OJ L 376.

[17] Opinion of Advocate General Szpunar delivered on 11 May 2017, *Asociación Profesional Elite Taxi v Uber Systems Spain SL*, C-434/15, EU:C:2017:364.

independent from the non-electronic one. In summary, although online and offline services are, in principle, subject to own regulations, the criterion to identify the correct applicable regime is to verify whether the two services are economically independent. If so, the E-Commerce Directive applies to the electronic services, while the offline service remains subject to its regulation. Otherwise, it is necessary to establish which is the dominant element, and, therefore, apply the E-Commerce Directive when the electronic element is dominant, and the offline regulation when the non-electronic one prevails.

The Court again applies the decisive influence criterion to identify the legal regime suitable for regulating Airbnb services,[18] but it arrives at the opposite solution. Advocate General Szpunar[19] clarifies the criteria to establish whether collaborative platforms services should be classified as information society services. As the Uber case has shown that the applicable regime to composite services depends on the level of control exercised by the electronic platform on the non-electronic component, then the intermediation service offered by Airbnb – consisting of compiling of offers using a harmonized format, coupled with tools for searching for, locating and comparing those offers – constitutes an autonomous and economically independent service. These activities cannot be regarded as merely ancillary to an overall service coming under a different legal classification, namely provision of accommodation services. Moreover, hosts and guests can use many other channels to obtain accommodation services, so Airbnb is not indispensable to provide this offline service. According to the Court, it is not possible to infer that Airbnb offers accommodation services from the mere fact that it competes with traditional channels offering the same services. In conclusion, unlike Uber, the electronic element of Airbnb services is autonomous from the non-electronic one and does not exert a decisive influence on the conditions of the offline performance. Therefore, Airbnb can be considered a provider of information society services and benefit from the most favorable rules of the E-Commerce Directive.

Thus, the question in both cases was whether it is possible to consider collaborative platforms offering composite services as providers of information society services in the light of the E-Commerce Directive, or whether they are comparable to traditional offline companies of the underlying service. In the former case, they would benefit from the principle of freedom to provide information society services in the EU; in the latter, they would be subject to market access requirements imposed by national regulations within the minimum harmonization limits contained in the Service Directive, where applicable (for instance, not in the case of transportation).[20] By laying down the decisive influence criterion, the Court adopts a case-by-case approach aiming at excluding the applicability of the E-Commerce Directive in cases in which collaborative platforms determine the contractual conditions of the substantive service offered and control the relevant underlying market. According to the Court interpretation, the existing European legislation would be *de facto* inadequate to regulate the *collaborative economy* phenomenon. Indeed, applying the criterion of the decisive influence in the particular case of platforms offering transportation services means delegating the regulatory power to the Member States, which can decide for themselves to allow or prohibit Uber. The result of this approach is fragmentation that involves not only the European internal market for the same offline service but also the harmonization of the Digital Single Market as a whole, because of the variety of underlying services, governed by own regulations, that online platforms offer.

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[18] Judgement of 19 December 2019, *Airbnb Ireland*, C-390/18, EU:C:2019:1112.

[19] Opinion of Adovcate General Szpunar delivered on 30 April 2019*, Airbnb Ireland*, C-390/18, EU:C:2019:336.

[20] On the limited capacity of the Service Directive to protect providers of a composite service where the E-Commerce Directive is not applicable, A Savin, 'Electronic services with a non-electronic component and their regulation in EU law' (n 4).

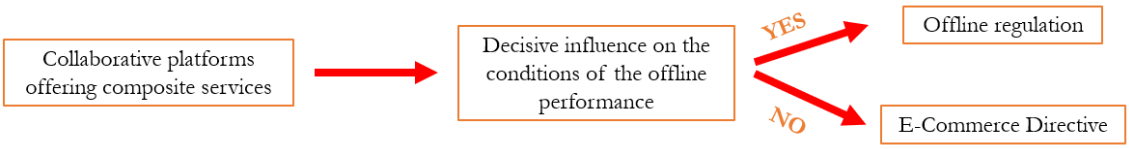

Fig. 1. The impact of the criterion of the decisive influence elaborated by the Court of Justice on the applicable legal regimes.

2.2. The Communication of the European Commission and the reactions from academia.

It should be highlighted that the aforementioned CJEU's decisions have completely ignored the guidelines established by the Commission Communication on the *collaborative economy*.[21] The Commission adopts a comprehensive approach that takes into consideration the specific features of *collaborative economy* business models and, in particular, the way in which these platforms carry out their activities. On this basis, it points out that collaborative platforms are first of all providers of information society services. However, in some particular cases, they may also be considered as providers of the underlying services and be subject to the relevant sector-specific regulation, including authorizations and licensing requirements. The Commission lists three criteria, based on the level of control exerted on relationships between users and underlying suppliers, to determine whether a platform can also be considered as a provider of the offline service: i) the control over the price of transactions. This criterion is met only when collaborative platforms set the final price that users have to pay and not when the platform merely recommends a price or the offline provider is free to adapt the price set by the platform; ii) the control over setting terms and conditions of the underlying service. This criterion is met when the platform determines the terms and conditions that govern the contractual relationships between offline providers and users; iii) the ownership of the key assets used to provide the underlying service. This criterion means that the platform uses its own assets to provide not only the online interconnection but also the underlying service. When these three criteria are all met, a platform should reasonably be considered as a provider of the underlying service, as well as an information society service provider, and be subject to the relevant regulation.[22] However, the CJEU did not refer to these criteria to integrate the decisive influence standard and, most importantly, did not recognize the general twofold nature of the composite services offered by collaborative platforms, which should be considered information society services in every case and also offline services in some cases, according to the Commission Communication.

Many authors have commented on the legal and regulatory implications of these judgments on the *collaborative economy*. In particular, they have investigated whether the criterion elaborated by the Court could strike a fair balance between the growth of innovative business models and the needs of protection of incumbents that are subject to strict market access requirements.[23] In this regard, it must be said that the Uber and Airbnb cases have

[21] C Cauffman, 'The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?' (2016) 5 Common Mark. Law Rev. 235.

[22] *A European agenda for the collaborative economy* 7: 'Generally speaking, the more collaborative platforms manage and organize the selection of the providers of the underlying services and the manner in which those underlying services are carried out — for example, by directly verifying and managing the quality of such services — the more apparent it becomes that the collaborative platform may have to be considered as also providing the underlying services itself'.

[23] D Geradin, 'Online Intermediation Platforms and Free Trade Principles – Some Reflections on the Uber Preliminary Ruling Case' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759379> accessed

not been welcomed by commentators. Most of all, they have criticized the restrictive approach adopted by the Court, according to which the way platforms conduct their business is irrelevant if the non-electronic service appears predominant. This approach jeopardizes the principle of legal certainty in the regulation of the *collaborative economy*. Indeed, collaborative platforms offer the most different underlying services; as a result, following the factual approach of the Court risks creating a fragmented scenario of different applicable legal frameworks and undermining the completion of the European Digital Market.[24] On the other hand, the solution of the Court does not reach the dual objective of protecting the freedom of innovative platforms to offer services and, at the same time, ensuring that these platforms comply with offline regulatory requirements provided to correct market failures, and not to prevent market access for competitors.[25] In this context, a comprehensive attempt to rationalize the legal implications of these judgments in the field of consumer protection is still missing. So, after analyzing the impact of the decisive influence criterion on the legal treatment of consumers, this paper will focus on what could be the most effective legal framework to apply in order to ensure a minimum level of consumer protection in collaborative platforms.

3. The legal qualification of collaborative platforms in the light of consumer protection needs.

3.1. The harmonizing role of consumer provisions in the E-Commerce Directive.

At the end of the day, the substantial result of the Court of Justice interpretation in the Uber case is ruling out the application of the E-Commerce Directive in the *sharing economy* context[26] and jeopardizing its harmonizing role by the introduction of a further element of legal uncertainty. According to the Court approach, the electronic component enabling collaborative platforms services is completely irrelevant in defining the applicable regime in so far as the offline component is dominant over all other aspects. Therefore, many collaborative platforms will be generally classified as underlying services providers, without the opportunity to benefit from the more favorable regime of the E-Commerce Directive.

As a result, this solution could seriously affect consumers.[27] The E-Commerce Directive contains a detailed list of the information to be provided to users, including the name and the address of the service provider (art. 5), and the requirements to provide commercial communications (art. 6). In addition to these transparency requirements, the Directive regulates the treatment of online contracts, including the information to give to the users before the order is placed, such as the different technical steps to follow to conclude the contract and the technical means for identifying and correcting input errors (art. 9–11). It appears clear that qualifying collaborative platforms only as providers of the underlying services would mean not enforcing these rules and, therefore, diminishing protection instruments tailored to consumers that operate in a digital environment. Even considering

9 March 2020; P Hacker, 'UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociación Profesional Elite Taxi Judgment of the CJEU' (2018) 14 Eur Rev 80; M Finck, 'Distinguishing internet platforms from transport services: Elite Taxi v. Uber Spain' (2018) 55 Common Mark. Law Rev. 1619; C Busch, 'The Sharing Economy at the CJEU: Does Airbnb pass the 'Uber test'? Some observations on the pending case C-390/18 – Airbnb Ireland' (2018) 4 EuCML 172; A De Franceschi, 'Uber Spain and the Identity Crisis of Online Platforms' (2018) 1 EuCML 1.

[24] M Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (n 6) 34.

[25] D Geradin, 'Online Intermediation Platforms and Free Trade Principles' (n. 23).

[26] M Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market*' (n 6) 34.

[27] MY Schaub, 'Why Uber is an information society service' (n 7); C Busch, 'The Sharing Economy at the CJEU' (n 23).

other consumer protection provisions still applicable, such as the Directive on Unfair Contract Terms, the Directive on Unfair Commercial Practices, and the Consumer Right Directive, the impossibility of classifying active platforms like Uber as information society services providers would result in detrimental effects on the peculiar protection needs of consumers engaging in online transactions.

All things considered, collaborative platforms services should always be considered information society services, without precluding their simultaneous classification as offline services, such as transportation or provision of accommodation service. As a result, active platforms offering composite services should be subject to the E-Commerce Directive and, at the same time, to the relevant rules applicable to underlying services, which are the Service Directive, where applicable, and the Member States regime, including authorizations and license requirements.[28] Although market access requirements for offline services could affect the freedom of collaborative platforms to provide online services, it must be said that, according to the Service Directive, access requirements have to comply with the principles of non-discrimination, necessity, and proportionality. On the contrary, making the enforcement of the E-Commerce Directive subject to the decisive influence check would lead to an unjustifiable unequal treatment between consumers operating in active collaborative platforms – they would not benefit from the legal protections of the Directive – and consumers that interact in more neutral collaborative platforms. On the surface, it might seem that not applying the E-Commerce Directive could have adverse effects only on collaborative platforms business because they cannot benefit from the principle of freedom to provide information society services, and, therefore, are subject to strict requirements laid down for preventing market failures. However, closer examination reveals that, in the end, platforms could profit from the exemption to the E-Commerce Directive since they do not have to comply with information requirements and rules governing online contracts.[29]

3.2. The triangular structure of contractual relationships in collaborative platforms. The role of the technological layer.

In the end, considering platforms services at the same time as information society services and offline services could ensure a fair balance between incumbents and newcomers and, most importantly, a high level of protection for digital consumers of offline services. Thus, collaborative platforms can benefit from the principle of freedom to provide information society services but, at the same time, are required to comply with the transparency requirements and the rules applicable to online contracting. On the contrary, following the approach of the CJEU would mean, first of all, fragmenting the area of effectiveness of the E-Commerce Directive and, second, making the application of consumer provisions conditional to an uncertain and difficult case-by-case assessment based on the level of

[28] In this regard, the control exerted by the online platform on the substantive service should be a benchmark for determining not whether the E-Commerce Directive is applicable, but rather under what circumstances the platform is liable for nonperformance by suppliers/users (§ 5).

[29] MY Schaub, 'Why Uber is an information society service' (n 7) 114: 'The judgement essentially limits the scope of the ecommerce Directive to independent or neutral platforms, that is to say platforms that have no relation or interference with the users that offer their goods or services via the platform, nor with the contracts concluded via the platform or the provision of the offline services. It could mean, for example, that if […] an online platform where cleaners can offer their cleaning services screens and selects the cleaners and sets certain conditions for the performance of the cleaning service, this active role can lead to an exclusion of the platform from the applicability of the directive. At first sight this may seem to be to the detriment of the active platform, because this entails that it cannot rely on the principles relating to the freedom to provide information society services, but the platform in the end also profits as it does not need to comply with the transparency requirements and the rules related to online contracting'.

influence exerted by the platform on offline performances. In such a way, there would not be a minimum level of protection for users operating in these platforms, and consumers would risk losing some basic contractual rights specifically designed to protect them in a digital environment. To avoid this, it should be noted that the legal situation of consumers operating in collaborative platforms is the same and, therefore, rights ensured to a passenger using Uber should be no different from the ones guaranteed to a consumer who rents an apartment on Airbnb. In both cases, consumers are parties of a broader contractual relationship, which, in turn, consists of three different contracts according to a triangular scheme: i) the contract between consumers and the platform, that concerns the provision of the digital interconnection service; ii) the contract between the platform and providers, which allows the latter to offer their offline services through the digital interconnection provided by the platform; iii) the contract between a provider and a consumer, concerning the offline service.

The platform is at the core of this triangular scheme because it constitutes the essential intermediary to connect consumers and providers and allow the communication between them. Indeed, it is the digital layer that enables non-professional actors to offer their services on an occasional basis and challenges traditional centralized business models. So, the distinctive feature of the *collaborative economy* is how the service is provided. It is the technological means that determines the new market structure, and, therefore, has some consequences on the way of conceiving legal relationships. The mere fact that the underlying service is provided by a digital platform makes it not comparable with the same service provided by traditional offline channels. Regardless of the level of control exerted by the platform on the underlying activity and its conditions, what matters and distinguishes traditional services from collaborative services is that consumers rely on the intermediation activity carried out by the digital platform.

The legal interactions of consumers and providers with the platform give rise to two autonomous contracts, that are different from the contract on the offline service and must comply with the requirements enshrined in the E-Commerce Directive. The online contracts (consumers-platform and platform-providers) and the offline contract (consumers-providers) should not be seen in a conflictual relationship. It is not necessary to identify the dominant element – electronic or not electronic – to rule out the application of the E-Commerce Directive in one case, or the underlying service regulation in the other case, as argued by the Advocate General Szpunar. On the contrary, these contracts are integral parts of a broader triangular agreement that requires parties to provide two different services, the offline one and the online one, subject to two different legal frameworks. As a result, consumers should benefit from all the legal guarantees provided for in the E-Commerce Directive.

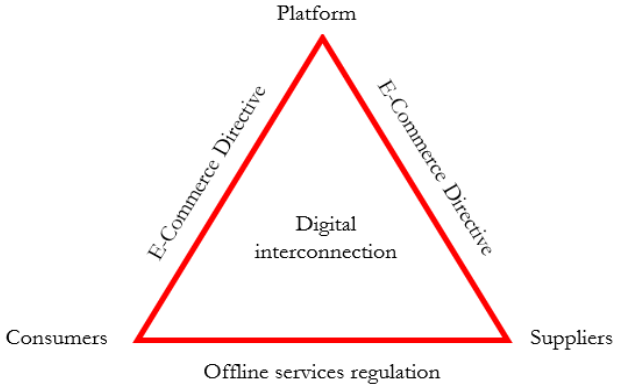

Fig. 2. Legal relationships in active collaborative platforms and the applicable regimes.

In a nutshell, the decisive criterion to identify the applicable legal regime to innovative platforms offering composite services should be conceived in the light of the technical means by which the service is provided. Considering *peer-to-peer* platforms in their twofold role as online intermediaries and offline providers leads to rethinking the traditional way to regulate contractual relationships in the market. From the perspective of ensuring a smooth level of consumer protection and a harmonized Digital Single Market, all that matters is how the performance is provided, not its substance itself. This does not mean that the regulation on underlying services is irrelevant. On the contrary, the offline aspect could have a decisive role in guaranteeing those market access requirements that prevent market failures (for instance, information asymmetry and distortions of competition). However, it is necessary to conceive instruments of legal protection at a higher level, in such a way that the variety of offline services provided in the context of the *collaborative economy* does not result in an attempt to jeopardize legal guarantees for consumers. To this end, the digital element underlying the *collaborative economy* plays a crucial role, leading to enforcing the application of the E-Commerce Directive as the minimum instrument to ensure consumer protection in online platforms.

4. The allocation of liability for non-performance. The decisive role of platforms in light of the E-Commerce Directive's approach.

In light of the dual nature of collaborative platforms, the resulting topic to explore concerns the allocation of liability for non-performance by suppliers of offline services. As previously said, the contractual role of platforms should be distinguished from the legal relationships between suppliers and consumers concerning offline activities. Therefore, platforms could not be held contractually liable in principle for all accidents resulting from the non-adequate performance of underlying transactions. At the same time, regulatory burdens that are traditionally on offline service providers should be revised, because their relationship with consumers in digital platforms cannot be compared with the one they have in traditional offline transactions. All things considered, liability rules should be rethought in light of the different actors involved, thus determining criteria to define cases where a platform could be held liable for non-performance of the underlying service, or where this liability rests on offline suppliers. In this respect, the active role of the platform in defining contract terms could be decisive.

Although the underlying service is almost always provided by suppliers, platforms often act not as mere intermediaries but as the actual suppliers when they conclude the contract with consumers. Here, the platform assumes the economic risk of *collaborative* operations and defines the content of the offline contract by establishing the terms and the standards that providers must meet to offer the performance. For these reasons, some authors define the action of these platforms as a form of 'remote control' over the contractual relationship between consumers and suppliers, consisting, for instance, of providing payment services or reputation systems.[30] In these cases – that are the vast majority in the *sharing economy* context – the main question is, therefore, whether and to what extent it is possible to hold the platform as the liable subject for the non-performance of the providers' obligations, and eventually, what are the applicable rules.

To this end, the approach adopted by section 4 of the E-Commerce Directive on 'Liability on intermediary service providers' could suggest the appropriate solution. Articles 12-15 contain the safe harbors' provisions and specify that there is not a general obligation on online providers to monitor the information which they transmit and store or a general

[30] C Busch, A Wiewiórowska, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016) 1 EuCML 3.

obligation to seek actively facts or circumstances indicating illegal activity.[31] Although these provisions have been applied mainly with regard to infringements of intellectual property and personality rights and are not meant for the *collaborative economy* context, it should be further investigated whether the same approach of the E-Commerce Directive could be adopted to regulate platform liability for non-performance by suppliers.

Without going into the specific content of these provisions, it should be stressed that the Directive recognizes that a form of unmitigated platform immunity could not be an appropriate solution. Therefore, it introduces liability for user conduct only when platforms have an active role in the transmission or storage of information (*mere conduit, caching* and *hosting*) or, more generally, when they have control over the activities carried out within platforms themselves, by specifically identifying the relevant cases. In principle, platforms should not be held liable for suppliers' conduct as long as their actions do not correspond to the situations referred to in articles 12-15.

The same regulatory approach could be useful also to define whether platforms should be held liable for non-performance by suppliers and, therefore, to determine the objective exceptions under which platforms' immunity fails. Upon further research, it seems that the CJEU's criterion of the decisive influence could be applied to establish these cases, rather than to exclude the applicability of the E-Commerce Directive. It would be possible to introduce a sort of joint liability of the platform in cases where it exerts a decisive influence over the conditions under which the offline service is provided by suppliers, for instance when it determines at least the maximum fare; when it receives that amount from the user before paying part of it to the supplier; when it exercises a certain control over the quality of the means by which the services are provided. In this respect, the criteria drafted by the European Commission could play a role in preliminarily defining the relevant level of control exerted such that the platform should be held liable for non-performance by suppliers. If the platform i) sets the final price, ii) sets the terms and the conditions of the offline performance, and iii) owns the key assets used to provide the underlying service, there are strong indications of its control over the underlying service. In other words, in these cases, the platform objectively bears all significant economic chances and risks of the transaction as a traditional contractual partner and, therefore, it should be at least jointly liable with suppliers in case of non-performance. Obviously, these criteria are not exhaustive, and they do not need to be cumulatively present but, if several or all are present in such a way that they show the economic and contractual preeminent role of the platform in the internal relationship between offline suppliers and consumers, this could justify the joint liability of the platform.

To sum up, the criterion of the decisive influence, as elaborated by the Court of Justice and if redesigned in light of the Commission Communication, should play its role not in

[31] More specifically, article 12 states that service providers are not liable for the information transmitted on the condition that i) they do not initiate the transmission; ii) do not select the receiver of the transmission; iii) do not select or modify the information contained in the transmission. As regards the temporary storage of information (art. 13), platforms that just transmit in a communication network information provided by a recipient of the services (caching) are not liable in so far as i) they do not modify the information; ii) comply with conditions on access and iii) rules regarding the updating of the information; iv) do not interfere with the lawful use of technology to obtain data on the use of the information; v) act expeditiously to remove or to disable access to the information as soon as they obtain actual knowledge of its removal or disablement of access at the initial source or by a court. Finally, according to article 14, platforms offering a storage service of information provided by a recipient of the services (hosting) are not liable for the information stored, on the condition that i) they do not have actual knowledge of illegal activity or information nor are aware of facts and circumstances from which the illegal activity or information is apparent; ii) upon obtaining such knowledge or awareness, they act expeditiously to remove or disable access to the information. In any case, platforms, when providing information transmission or storage services, do not have a general obligation to monitor (art. 15).

identifying cases in which the E-Commerce Directive is applicable (all collaborative platforms should be subject to this Directive), but rather in selecting cases in which the platform is liable for non-performance of the contract between consumers and suppliers.

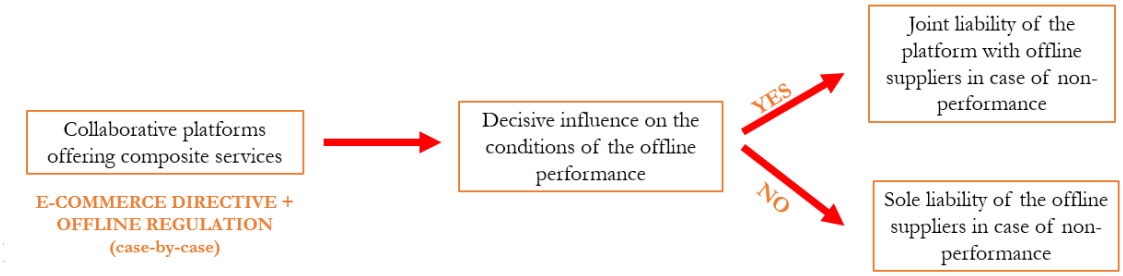

Fig. 3 The use of the decisive influence criterion as a means to select cases in which the platform is jointly liable for non-performance of the contract between consumers and suppliers.

Still, holding the platform jointly liable for non-performance by suppliers is also a more coherent solution with the philosophical assumption behind the concept of the *sharing economy*, based on the idea of empowering and enabling consumers to become prosumers. The non-professional nature of prosumers could be an obstacle to the rise of the *sharing economy* if platform participants alone were held liable for non-performance. Prosumers rely on the platform precisely because they do not have the complex legal and financial structure required to independently offer their services, so allocating the entire liability on them would mean preventing their participation in these innovative marketplaces. At the same time, liability only on prosumers would create an untrustworthy environment for consumers, discouraging them from using services offered by these platforms. On the contrary, the introduction of a form of joint liability of the platform could be the most suitable solution not only for stimulating the rise of *prosumerism* in the *collaborative economy* but especially for ensuring the enforcement of consumers' rights. From this point of view, consumers could claim damages directly from the platform and be sure to obtain compensation; then, at a later stage, the platform and the defaulting supplier could regulate their internal relationships and decide how to allocate these compensation costs.

In conclusion, it should be said that the current regulatory instruments provided for in the law could stimulate and enrich the legal debate on the optimal way to ensure a high level of consumer protection in the process of the allocation of liabilities for non-performance. The technological structure underpinning the *collaborative economy* consists of platforms that enable peers to interconnect with each other and define the content of offline contracts. Precisely for these reasons, platforms should be considered the regulatory units on which legislators, judges, and scholars should focus their attention. Allocating liabilities for non-performance only on suppliers would mean ignoring the complex triangular structure of the *collaborative economy*, and the key role carried out by platforms in transactions. As a result, this would lead to diminishing instruments of protection for consumers because the right to obtain compensation would become more uncertain. On the contrary, using the criterion of the decisive influence to define cases where a platform is obliged to compensate consumers for non-performance could be the most balanced solution to ensure the legal protection of all the interests at stake.

5. The ELI Model Rules on Online Platforms. An overview.

Finally, a brief overview of the *Model Rules on Online Platforms* outlined by the European Law Institute could be useful to rationalize what has been said in this paper and indicate the next steps. These Model Rules contribute to the debate about the convenience of an action

to regulate the changes in the Digital Single Market caused by the rise of the *collaborative economy* and represent the latest version of the Discussion Draft of a Directive on Online Intermediary Platforms, which was drawn up by the Research Group on the Law of Digital Services in 2015 and 2016.[32] This document adopts a *de iure condendo* approach, introducing new harmonization measures, with the aim of, on the one hand, avoiding the risk of stifling innovation and, on the other hand, ensuring basic values, such as consumer protection and fair competition.

First of all, Model Rules define services offered by platforms as information society services (art. 2) and include in this definition not only platforms that exercise control over their digital environment but also mere intermediary platforms, that identify relevant suppliers or direct customers to those suppliers' websites or contact details (art. 1). Most importantly, these Rules regulate the allocation of liabilities, providing that in the case of a violation of Article 13, 'the customer can exercise the rights and remedies available against the supplier under the supplier-customer contract also against the platform operator' (art. 19). In particular, art. 13 imposes on platforms the duty to inform consumers, before the conclusion of the offline contract, that they will be entering into a contract with a supplier and not with the platform. Therefore, responsibility *ex* art. 19 is justified 'by the fact that the platform operator did not fulfil its own duty to inform'.[33]

In addition to these transparency requirements, platforms are liable for non-performance of supplier if the customer can reasonably rely on the platform operator having a predominant influence over the supplier (art. 20). To this end, there are some criteria to be considered in assessing whether a consumer can reasonably rely on the platform operator's predominant influence over the supplier, that are a) the supplier-customer contract is concluded exclusively through facilities provided on the platform; b) the platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract; c) the platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the customer to the supplier; d) the terms of the supplier-customer contract are essentially determined by the platform operator; e) the price to be paid by the customer is set by the platform operator; f) the marketing is focused on the platform operator and not on suppliers; g) the platform operator promises to monitor the conduct of suppliers and to enforce compliance with its standards beyond what is required by law. It seems that these criteria represent a specification of the decisive influence benchmark, as outlined by the CJEU in Uber and Airbnb cases. However, the ELI Rules implement these criteria not to qualify the platform as a provider of information society services or as an offline services provider, but only to determine when a platform is jointly liable with the supplier for non-performance. Taking into account that collaborative platforms almost always have a key role in the underlying supply contract, the application of the predominant influence criterion could allow consumers to benefit not only from the monitoring function performed by platforms but also from their capability of compensating for damages.

The earlier Draft Directive and these Rules represent a great result in the harmonization of the complex topic of liability and try to rationalize the most relevant legal issues. However,

[32] Research group on the Law of Digital Services, 'Discussion Draft of a Directive on Online Intermediary Platforms' (2016) 4 EuCML 164.

[33] ELI 'Report on Model Rules on Online Platforms' (n 9), Comments on art. 19: 'The CJEU case C-149/15 (Wathelet) shows that in certain circumstances in which the consumer can easily be misled in light of the conditions in which the sale is carried out, eg leading the consumer to believe that the platform operator is the owner of the good, liability can be imposed on an intermediary'.

some aspects are still unclear. More specifically, the Rules do not explain the relationship between the transparency requirement contained in art. 13 (in conjunction with art. 19) and the predominant influence criterion of art. 20. If the platform clearly informs the customer that his actual counterpart is only the offline supplier, but, at the same time, it has a predominant influence over the supplier based on the terms of the supplier-platform contract, the platform should be considered in any case liable for non-performance. The lack of coordination between these two rules raises a fundamental question: if the platform determines, in a prominent manner, the content of the offline contract, could the mere fact that the platform itself has clarified to consumers its apparent passive role exempt it from liability? This uncertainty could jeopardize the effectiveness of the predominant influence criterion and weaken consumer protection mechanisms in case of failures and non-performance. The paradoxical result of art. 13 would be that platforms could always inform consumers on their passive role and, in this way, avoid liability even if they act as the actual supplier of the service by exerting decisive influence over the terms of the offline contract.

Still, as abovementioned, art. 20 introduces the criterion of predominant influence to determine the cases in which platforms can be considered liable for suppliers' non-performance. As noticed by some authors, this rule introduces a form of reliance liability because the predominant influence is not assessed 'in a strict objective manner but according to the reasonable understanding of the customer'.[34] This subjective approach could affect consumers, especially in C2C platforms, where they can also operate as suppliers (*prosumers*) offering offline performance in a non-professional manner. In these platforms, consumers directly enter into a contract with other consumers acting as suppliers: these prosumers are not able to ensure legal protection and compensation rights to other consumers precisely because of their non-professional nature. Nevertheless, according to art. 20, the platform could be held liable only when the relevant circumstances of its predominant influence are apparent to consumers *ex-ante* in such a way that they can rely on the role of the platform as their actual counterparty. However, consumers cannot have a comprehensive understanding of the internal agreement between the platform and the supplier. Thus, designing a system of allocation of liabilities based on the *ex-ante* knowledge of consumers could not be the best solution to ensure a framework of legal certainty for collaborative platforms.[35] If consumers do not rely on the platform's predominant role because, for instance, the platform has clarified its merely intermediary function, but the platform has – on the basis of its internal agreement with suppliers/prosumers – a decisive influence on the offline performance according to the criteria of art. 20, it is difficult to see why the platform should not be held liable for non-performance. The criteria listed in art. 20 should be interpreted not according to the subjective standard of reliance, but in light of the objective circumstance – justified on the basis of the agreement between the platform and the supplier – that the platform

[34] F Maultzsch, 'Contractual Liability of Online Platform Operators: European Proposals and Established Principles' (2018) 3 European Review of Contract Law 209.

[35] ibid 238: 'The mere idea of reliance liability cannot explain why the reasonable confidence of the customer in a predominant influence of the platform operator on the supplier should nonetheless justify a performance responsibility of the former in such a case. If one follows the line of argument developed by the majority view in the case of agency models, a responsibility of the platform operator can only be justified by the fact that it bears objectively all significant chances and risks of the transaction (ie, contractual partner from an economic point of view). In that case, the responsibility of the platform operator, again contrary to Article 18(1) of the Academic Draft, should not depend on whether the relevant circumstances are apparent to the customer ex ante. As far as agency models are concerned, it is accepted that the retailer's responsibility does not depend on whether its internal arrangements with the seller-consumer were visible to the buyer-consumer. In platform constellations, too, the individual customer often does not have a comprehensive insight into the relationship between the platform operator and the supplier. Thus, the platform operator's responsibility should not depend on the ex ante knowledge of the customer'.

bears all significant economic changes and risks of the transaction with consumers, by acting as their actual contractual counterparty.

As a result, in the actual early stage of the *collaborative economy* expansionism, it seems that the objective regulatory approach of the E-Commerce Directive in the field of liability could show the right way forward in order to design a comprehensive legislative framework. The application of the predominant influence criterion to liability issues, if not interpreted according to a subjective approach, could guarantee a reasonable and satisfying level of consumer protection without stifling innovation, far from the piecemeal case-by-case approach of the Court of Justice on the relationship between the E-Commerce Directive and offline sector regulations.

Conclusions.

The regulatory approach to govern market relationships in the context of the *collaborative economy* should be investigated further. However, emphasizing the technological element from a legal perspective represents the first step of a broader research aiming at studying how traditional contract law and consumer law instruments could change in a digitized and decentralized *sharing economy* context. The legal interactions between consumers and the platform and between suppliers and the platform should be seen as two autonomous contracts, that are different from the offline services contract (between consumers and providers) and should comply with requirements tailored to the specific needs of *collaborative economy* consumers. From this standpoint, the technological element determines the triangular market structure of the *collaborative economy* (consumers-platform; platform-providers; providers-consumers) and should be emphasized when exploring the consequences on the way of conceiving and regulating legal relationships. This is because the digital layer enables consumers to empower themselves and become prosumers, so regulating in-depth this aspect represents the only way to govern transactions carried out in a platform. In doing so, except for mere intermediary and advertising platforms, collaborative platforms should be compared with providers of information society services, in such a way that consumers could be protected homogeneously. This does not mean that sector regulations for services offered through online platforms are irrelevant, but simply that they have a subordinate role, aiming at regulating specific (and fundamental) aspects concerning offline performance. On the contrary, the E-Commerce Directive is the minimum instrument that could ensure legal certainty without discriminations and difficult case-by-case assessments. Indeed, collaborative platforms are in the best position to ensure transparency requirements and principles governing online contracts, at least in their relationships with consumers and providers and, depending on the level of influence exerted, also in the internal agreements between consumers and suppliers.

The question of the allocation of liabilities is closely linked to the issue of the legal qualification of collaborative platforms. Indeed, the need to ensure legal certainty to consumers depends also in this field on the layer at which legal instruments should be conceived. To this end, a possible solution could be introducing a form of joint liability of platforms for non-performance of suppliers. Consumers should know for sure who is their actual counterparty liable in cases of non-performance, and, also from a practical perspective, active platforms have the legal structure and the required competence to manage complaints and compensation claims, and to correct mistakes or enforce suppliers to comply with supply requirements. The objective approach adopted by the E-Commerce Directive concerning safe harbor' provisions (art. 12-14) and the absence of a general obligation on platforms to monitor information and illegal activities (art. 15) could be applied to the *collaborative economy* with regard to the non-performance of underlying services in so far as platforms should not

be generally held liable for non-performance, but only if certain predetermined circumstances, related to the significant control (decisive influence) over offline services, occur.

Finally, the ELI Model Rules on Online Platforms represent the first comprehensive attempt to rationalize the legal issues raised by *peer-to-peer* marketplaces. However, the unclear coordination between transparency requirements and the criterion of predominant influence and the introduction of a form of reliance liability could undermine consumer law protections and merit further examination.