



**Stanford – Vienna
Transatlantic Technology Law Forum**

A joint initiative of
Stanford Law School and the University of Vienna School of Law



European Union Law Working Papers

No. 27

**The Application of EU Competition Law to
the Sharing Economy**

Johannes Safron

2018

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share “work in progress”. The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at <http://tlf.stanford.edu>.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law’s LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at the

Stanford-Vienna Transatlantic Technology Law Forum
<http://tlf.stanford.edu>

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Johannes Safron studied law at the University of Vienna and University of Bologna. He is currently pursuing a PhD degree at the University of Vienna, where he is also working as a University Assistant at the Department of European, International and Comparative Law. His research focuses on European Competition Law and European Internal Market Law.

General Note about the Content

The opinions expressed in this paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum or any of its partner institutions, or the sponsors of this research project.

Suggested Citation

This European Union Law Working Paper should be cited as:
Johannes Safron, The Application of EU Competition Law to the Sharing Economy, Stanford-Vienna European Union Law Working Paper No. 27, <http://tlf.stanford.edu>.

Copyright

© 2018 Johannes Safron

Abstract

This paper addresses the impacts of European competition law on the sharing economy and algorithmic pricing. It focuses on the specific features of the relationship between platforms and service providers and provides guidance on the question of when a platform and its peers form a single economic entity under competition law. In the backdrop of recent European Court of Justice judgment addressing the use of pricing measures by platforms, the article also discusses the application of competition law to agreements and concerted practices in the sharing economy.

Content

A. Introduction.....	2
B. Definition	3
C. The Relationship between Platforms and Providers.....	7
I. The Single Economic Entity	10
1. Employment Relationship.....	11
2. Commercial Agent	15
3. Franchising and Sub-contracting	18
II. Interim Conclusion	20
D. Assessment of the Infringement	25
I. “Hub-and-spoke” Scenarios	27
II. Consequences of Eturas for the Sharing Economy.....	32
III. Interim Conclusion	37
E. Conclusions	40

A. Introduction

Whether it is renting an apartment via Airbnb, calling a ride with Uber or getting a small task in the household done the sharing economy transforms several areas of our everyday life into *ad hoc* marketplaces that are accessible via online platforms. Disguised as disruptive enterprises, sharing economy platforms are conquering the old fashioned commercial sectors and trying to revolutionize them—disregarding legal regulations. In a recent, pending case in the United States District Court for the Southern District of New York, Uber is accused of fixing prices for rides via an algorithm in its smartphone application.¹

In relation to the accusation of infringing Section 1 of the Federal Sherman Antitrust Act, 15 U.S.C. § 1, questions also arise for European competition law on whether and how it is applicable to these kinds of practices. The most pressing question concerns the relationship between sharing economy platforms and its providers (e.g., between Uber and its drivers). When accused of orchestrating an infringement of competition law, Uber argues that it is “only” a platform connecting independent drivers and customers. This explanation, however, might not necessarily hold true for every platform and most likely does not for Uber. Uber’s drivers could be considered employees or sub-contractors within a single economic entity. In other words, the platform itself might be considered the provider of the underlying service. Under this scenario, agreements between the platform and its providers might not fall within the scope of competition law.

Although there are many legal questions regarding the sharing economy in general² and in relation to competition law, this paper focuses on two specific issues. The first part of the

¹ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist; also note Marshall Steinbaum, *Uber’s Antitrust Problem*, The American Prospect (2016) available at <http://prospect.org/article/uber%E2%80%99s-antitrust-problem> (last accessed Feb. 19, 2018).

² See further Vassilis Hatzopoulos and Sofia Roma, *Caring for Sharing? The Collaborative Economy Under EU Law*, 54 CMLR 81 (2017).

paper deals with the relationship between the platform and its peers in the context of competition law. It will examine under which circumstances a platform should be regarded as the supplier of the underlying service towards a customer and thus forming a single economic entity with peers. The conclusion of part one presents a catalogue of criteria for the assessment of these two questions. This catalogue considers different approaches in the literature and provides guidance on the question “When does competition law apply to the sharing economy?” The second part of the paper examines the nature of the agreement or practice. It addresses whether users of the platform participate in an anticompetitive agreement or in a concerted practice, and whether it is of a horizontal or vertical nature. Part two of the paper ultimately discusses “How does competition law apply to the sharing economy?” This analysis is done in consideration of recent approaches in the literature and in the context of recent judgment by the European Court of Justice (ECJ) in the *Eturas* case³, which deals with infringements of competition law in the case of a travel booking platform. Lastly, this paper addresses whether European competition law is fit to tackle new challenges imposed by the sharing economy.

B. Definition

The sharing economy, also known as the share economy, collaborative economy or peer economy, is a general term for different forms of business models that comprise different kinds of features, including goods and services. This manifold phenomenon presents the difficult task of finding a proper definition. The European Commission (the Commission), for the purpose of its Communication on the collaborative economy (agenda for the sharing economy), defined it as “*business models where activities are facilitated by collaborative*

³ Case C-74/14, *Eturas*, ECLI:EU:C:2016:42.

platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.”⁴

There are two main features that draw a distinction between already known online marketplaces such as Amazon and new forms of sharing economy platforms: (i) instead of the occasional resale, sharing economy platforms facilitate recurring short-term rental or service provision; and (ii) sharing economy platforms largely facilitate trade between individuals or peer-to-peer rather than between individuals and professional firms.⁵ Sharing economy platforms constitute a subgroup of so called two-sided markets. Generally in two-sided markets platforms offer their services to two different groups. Between the two different groups, network effects exist. This means that the value of the services provided by the platform increases as more people use the platform.⁶ Rochet and Tirole proposed the following definition of two-sided markets: *“a market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount.”⁷*

According to the Commission’s approach, the sharing economy involves three kinds of actors:⁸

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European agenda for the collaborative economy, COM(2016) 356 final, at 3, *available at* <http://ec.europa.eu/DocsRoom/documents/16881> (last accessed Feb. 19, 2018); for a critical analysis see Caroline Cauffman, The Commission’s European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly?, 6 EuCML 235 (2016).

⁵ Samuel P. Fraiberger & Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy*, NYU Stern School of Business Research Paper 1, 2 (2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574337 (last accessed Feb. 19, 2018).

⁶ Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 9 Tilburg Law School Legal Studies Research Paper Series 1, 7 (2013) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240850 (last accessed Feb. 19, 2018).; Martin Blaschczok, *Kartellrecht in zweiseitigen Wirtschaftszweigen* 27 (2015), Richard Wish & David Bailey, *Competition Law* 11-12 (8th ed. 2015).

⁷ Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 The Rand J. of Econ. 645, 664-665 (2006).

⁸ See Agenda for the Sharing Economy, *supra* note 4, at 3.

- i. Collaborative platforms: intermediaries that connect providers with users that facilitate transactions between them (via an online platform);
- ii. Peers: service providers who share assets, resources, time and/or skills; and
- iii. Users: people who use the service/goods provided.

For the purpose of this paper, sharing economy platforms will be addressed as “platforms,” providers of services as “peers,” and recipients of the services as “users.”

The number of sharing economy platforms and the services provided by them is legion. That being said, the sharing economy can be divided into different subgroups. With respect to the users, there are three types of platforms: (i) business-to-business (B2B), which connects professionals with professionals; (ii) business-to-peer (B2P), which connects professionals with non-professionals; and (iii) peer-to-peer (P2P), which connects non-professionals with non-professionals. Further distinctions can be made concerning the services these platforms provide (e.g., accommodation,⁹ transportation,¹⁰ tasks,¹¹ etc.).

For this paper I will hypothetically focus on two sharing economy platforms to illustrate my findings: Uber and TaskRabbit. These platforms are interesting insofar as both seem to use pricing algorithms but differ in the amount of exerted influence on their peers. Uber is a P2P platform connecting people for the purpose of car rides. The platform provides a smartphone application where users can request rides from a certain location to another. The request may be accepted by a driver.¹² The price paid by the customer is calculated by Uber via an algorithm, which adjusts the price according to the demand in a certain area

⁹ See for instance Airbnb.

¹⁰ See for instance Uber or Lyft.

¹¹ See for instance TaskRabbit, Clickworker or Amazon Mechanical Turk.

¹² See Uber, *Wie funktioniert Uber?*, available at <https://help.uber.com/h/738d1ff7-5fe0-4383-b34c-4a2480efd71e> (last accessed Feb. 19, 2018).

(surge pricing). The driver then receives a certain percentage of the price.¹³ Although Uber claims drivers are not bound to the price and may depart downwards, it seems that Uber does not offer any mechanism by which drivers can do so.¹⁴ In order to qualify as an Uber driver, the driver and his car have to meet certain requirements that vary by country (e.g., the age of the car or the number of doors).¹⁵ Drivers also have to provide Uber with a criminal record.¹⁶ Moreover Uber imposes certain standards for job performance. Customers, for instance, can ask for a specific music to be played during the ride and can complain if the driver followed a detour.¹⁷ At the end of the trip the customer and the driver rate each other via the application. Based on this rating and other criteria such as cancellation and acceptance rate, Uber has the discretion to block drivers' access to the platform.¹⁸

TaskRabbit on the other hand is an online platform matching customers with "taskers" who offer different everyday services such as repairs, cleaning, and moving. The price paid by the customer is determined by the taskers who set their own hourly rates.¹⁹ TaskRabbit also offers a so called "Quick Assign option," which is the only option to get same day assistance with a task. In that case the job is proposed to taskers in the area and will then be assigned to a tasker who has the experience and availability to perform the work.²⁰ A job under the

¹³ See Uber, *Was ist die Preisdynamik?*, available at <https://help.uber.com/h/34212e8b-d69a-4d8a-a923-095d3075b487> (last accessed Feb. 19, 2018).

¹⁴ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist, at 4.

¹⁵ See Uber, *Voraussetzungen*, available at <https://www.uber.com/en-AT/drive/requirements/> (last accessed Feb. 19, 2018).

¹⁶ Sverre Rørvik Nilsen, *I drove for Uber for a week, and here's what it was like*, Business Insider Deutschland (2015), available at <http://www.businessinsider.de/i-drove-for-uber-for-a-week-heres-what-its-really-like-2015-2?r=US&IR=T> (last accessed Feb. 19, 2018).

¹⁷ See Spotify, *News*, available at <https://news.spotify.com/li/2014/11/17/uber/> (last accessed Feb. 19, 2018).

¹⁸ See Uber, *Uber Community Guidelines*, available at <https://www.uber.com/legal/community-guidelines/us-en/> (last accessed Feb. 19, 2018).

¹⁹ See TaskRabbit, *How Pricing Works*, available at <https://support.taskrabbit.com/hc/en-us/articles/205313140-How-Pricing-Works> (last accessed Feb. 19, 2018).

²⁰ See TaskRabbit, *What is Quick Assign?*, available at <https://support.taskrabbit.com/hc/en-us/articles/205313120-What-is-Quick-Assign-> (last accessed Feb. 19, 2018).

Quick Assign option is not priced by the tasker but by TaskRabbit and the price can vary from day to day.²¹ Unlike Uber, TaskRabbit does not block access to the website when taskers do not fulfill certain rating criteria, but it will provide rather unattractive requests.²²

C. The Relationship between Platforms and Providers

Generally speaking, pricing algorithms installed by platforms, which determine the price a peer can offer for his services *prima facie*, could under certain conditions be regarded as price fixing agreements or concerted practices in a horizontal relationship between competing peers or as resale price maintenance in a vertical relationship between the platform and its peers (see below for further elaboration). These kinds of practices can be considered an infringement of 101 (1) TFEU, which prohibits agreements, concerted practices, or decisions of associations of undertakings, which have as their object or effect the prevention, restriction, or distortion of competition. As the ECJ stated in *Höfner*²³ an undertaking is “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.”²⁴ Also individuals can be treated as undertakings “if they are independent economic actors on the market for goods or services.”²⁵

Nevertheless, not every agreement between undertakings falls within the scope of Article 101 (1) TFEU. The agreement rather has to be concluded between independent undertakings, which is not the case if undertakings form a single economic entity (i.e., they

²¹ See TaskRabbit, *How Pricing Works*, available at <https://support.taskrabbit.com/hc/en-us/articles/205313140-How-Pricing-Works> (last accessed Feb. 19, 2018).

²² See Jeremias Prassl and Martin Risak, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdfundwork*, 8 Oxford Legal Studies Research Paper 1, 23 (2016) available at <https://ssrn.com/abstract=2733003> (last accessed Feb. 19, 2018).

²³ Case C-41/90, *Höfner*, ECLI:EU:C:1991:161.

²⁴ *Ibid.*, para. 21.

²⁵ See Opinion Advocate General Jacobs in Case C-67/96, *Albany*, ECLI:EU:C:1999:28, para. 214.

are closely linked to each other and their independent behavior on the market cannot be determined).²⁶ As Odudu and Bailey described it, “*the concept of an economic entity is best understood as the minimum combination of natural and legal persons able to exert a single competitive force on the market.*”²⁷ This is the case where an undertaking can exert a decisive influence over other undertakings (see below).²⁸

In the case of the sharing economy, Article 101 (1) TFEU would not apply where the platform exerts such a decisive influence over its peers that it would *de facto* be regarded as the supplier of the service itself and its peers would be regarded as employees or sub-contractors for example. In this case peers perform the service for the platform or on its behalf, and the platform is the supplier of the service to the user. Consequently, the price determined by the algorithm has to be considered as the remuneration paid by the platform to the peers for their performance and not as a sale price determined by the platform paid by the user to the peer.

It is important to outline certain criteria when a platform exerts a decisive influence over its peers. In its agenda on the collaborative economy, the Commission, in the context of questioning whether a platform is merely a provider of an information society service, proposed the following guiding criteria in order to assess if a platform itself is the *de facto* provider of the underlying service:²⁹

- i. Price: the platform sets the final price to be paid by the user for the underlying services;

²⁶ See generally Alison Jones, *The Boundaries of an Undertaking in EU Competition Law*, 8 ECJ 301, 301 et seq. (2012); Okeoghene Odudu & David Bailey, *The Single Economic Entity Doctrine in EU Competition Law*, 51 CMLRev. 1721, 1721 et seq. (2014).

²⁷ See Odudu & Bailey, *supra* note 26, at 1723.

²⁸ See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, para. 11.

²⁹ See Agenda for the Sharing Economy, *supra* note 4, at 6.

- ii. Other key contractual terms: the platform sets the terms and conditions, other than the price, which determine the characteristics of the contractual relationship between the peer and the user (e.g., mandatory instructions for the provision and the obligation to provide the service); and
- iii. Ownership of key assets: the platform owns the assets essential to providing the service.

According to the Commission, if these three criteria are met the platform has to be considered as the provider of the underlying service as well as the provider of the information society service (intermediary). In addition, the Commission argued that an existing employment relationship and the fact that the platform incurs the costs and assumes all the risks related to the provision of the underlying service are further criteria that indicate the platform provides the underlying service itself.³⁰

As illustrated above, the Commission proposed certain criteria demonstrating a platform's ability to exert a decisive influence on the behavior of the peer in the market.³¹ This approach seems to reflect the guiding principle of the single economic entity doctrine in competition law, where an undertaking exerts a decisive influence over another undertaking and thus no longer might be considered as an independent economic actor on the market for goods or services. As the Commission's catalogue of criteria is rather vague and thin, providing additional guiding criteria to examine when the platform and their peers indeed form a single economic entity would be useful. Accordingly, the next section of the paper examines the concept of a single economic entity in general and tries to deduce further helpful criteria for this assessment.

³⁰ See *ibid.*, at 6.

³¹ See *ibid.*, at 6.

I. The Single Economic Entity

As explained above, the concept of an economic entity captures the minimum combination of natural and legal persons able to exert a single competitive force on the market. The case law on the concept of the single economic entity is quite broad and addresses different scenarios. For the purpose of this paper these scenarios can be subdivided into single economic entities encompassing legal and natural persons and those encompassing only legal persons. The latter can be discussed in the context of rich case law surrounding mergers, a parent's liability for infringements of competition law by its subsidiaries, and joint ventures. In general, agreements between undertakings in light of Article 101 (1) TFEU are considered neutral where one undertaking is controlling the other to the extent that the other undertaking does not enjoy real autonomy in determining its course of action in the market.³² When assessing whether control is exerted, relevant factors relating to the economic, organizational, and legal links between the undertakings must be taken into account.³³ The court found that it can be assumed a parent undertaking can and in fact does exercise decisive influence where it owned 100% of its subsidiary's shares.³⁴ In a case where a company only owned 30% of the shares, the General Court found that it had decisive influence over its subsidiary because of its representation on the board of shareholders and other links.³⁵ In addition, sister companies, which are owned by the same parent company,

³² See Case C-73/95 P, *Viho/Commission*, ECLI:EU:C:1996:405, para. 16; see also European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ 2011/ C 11/1, para 11.

³³ See Case T-399/09, *HSE*, ECLI:EU:T:2013:647, para. 30.

³⁴ See *ibid.*, para. 16.

³⁵ See Case T-132/07, *Fuji Electric Co. Ltd/Commission*, ECLI:EU:T:2011:344, para. 184.

form a single economic entity, and are therefore not to be regarded as competitors under competition law.³⁶

In regards to single economic entities encompassing natural and legal persons, which generally includes platforms and peers in the sharing economy, there are four relevant constellations in the context of competition law: employment relationships, sub-contracting relationships, agency agreements, and franchising. Employment, commercial agent agreements, and sub-contracting in particular are constructs that share the same features since they are considered auxiliary organs that form an integral part of the undertaking bound to carry out the principal's instructions.³⁷ As illustrated below, in the context of the sharing economy, it is very likely that peers will either qualify as employees or sub-contractors. An exact distinction of both is irrelevant for the purposes of this paper and for the question of the application of competition law as it is primarily the decisive influence that determines whether a peer qualifies as an independent economic actor or not. In both cases the platform would be the supplier of the service or goods to the customer. The price calculated by the algorithm would not be the fee the user has to pay to the peer as remuneration but to the platform. I will now address these different concepts and provide additional, helpful criteria to show when a platform exerts decisive influence.

1. Employment Relationship

For workers and the undertaking they are working for, the ECJ in *Becu* stated that workers in the duration of their employment relationship are incorporated into the undertaking

³⁶ See Odudu & Bailey, *supra* note 26, at. 1731-1733.; see also European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ 2011/ C 11/1, para 11.

³⁷ See Case C-40/37, *Suiker -Unie/Commission*, ECLI:EU:C:1975:174, para. 539; see also Case C-22/98, *Jean Claude Becu*, ECLI:EU:C:1999:419, para. 26.

concerned and form an economic unit with it.³⁸ According to AG Jacobs' opinion in *Albany* “[d]ependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity.”³⁹ As employees do not bear the direct commercial risk of a transaction and are subject to the orders of their employer, there is a significant functional difference between an employee and an undertaking providing services.⁴⁰ In order for the peer to be considered as an employee and therefore an “auxiliary organ,” which is an integral part of the undertaking, it is essential that he or she cannot exert separate competitive significance from their employer and cannot retain some degree of essential economic autonomy.⁴¹

With respect to the definition of the term “worker” or “employee,” the ECJ refers to Article 45 TFEU. As the term is neither defined in the Treaties nor in secondary legislature, it was up to the ECJ to find a definition. According to established case law of the ECJ “[a]ny person who pursues activities, which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’.”⁴² Over time the ECJ further developed several features in order to distinguish workers from self-employed and clarified that the classification of a worker under national law is irrelevant: “It follows that the status of ‘worker’ within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content

³⁸ Case C-22/98, *Jean Claude Becu*, ECLI:EU:C:1999:419, para 26.

³⁹ Opinion Advocate General Jacobs in Case C-67/96, *Albany*, ECLI:EU:C:1999:28, para. 215.

⁴⁰ Opinion Advocate General Jacobs in Case C-67/96, *Albany*, ECLI:EU:C:1999:28, para. 215.

⁴¹ See *Odudu & Bailey*, *supra* note 26, at 1736; Case C-40/73, *Suiker -Unie/Commission*, ECLI:EU:C:1975:174, para. 480 and 539; Opinion of Advocate General Colomer in Case C-22/98, *Jean Claude Becu*, ECLI:EU:C:1998:133, para. 47.

⁴² Case C-94/07, *Raccanelli*, ECLI:EU:C:2008:425, para. 33

of his work [...], does not share in the employer's commercial risks [...], and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking."⁴³

Following the case law of the ECJ, the Commission defined three criteria for the sharing economy, which are crucial in determining whether a peer falls within the ECJ's definition of a worker:⁴⁴

- i. Existence of a subordination link: the service providers must act under the direction of the platforms. In other words, the service providers cannot decide on the activity, remuneration, or working conditions by themselves;
- ii. Nature of work: the provided service must be an activity of economic value, which is effective and genuine. Services, which can be regarded as purely marginal and accessory, are excluded. A short duration, limited working hours, discontinuous work, or low productivity cannot exclude an employment relationship; and
- iii. Remuneration: the provider receives remuneration and not merely a compensation of costs for his activities.

Although in the context of labor law the conformity of the Commission's approach with the requirements developed by the ECJ might be arguable, this catalogue provides further features that help determine the autonomy of the peers as service providers, which is crucial for the competition law assessment. A sole focus on the peer's role can in some cases lead to unsatisfying results because the relevant criteria might be fulfilled by the peer but it might be unclear who acts in the role of the employer (the platform or in some cases the user). Without going into detail on the potential shortcomings of the traditional approach in labor

⁴³ Case C-413/13, *FNV Kunsten Informatie en Media*, ECLI:EU:C:2014:2411, para 36.

⁴⁴ See Agenda for the Sharing Economy, *supra* note 4, at 12 et seq.

and competition⁴⁵ I will turn to scholarship where scholars tried to overcome the above approach and focused on the role of the platform and its features as an employer rather than focusing on the employee status of a peer.

By tackling the shortcomings of the traditional employee-based concept, Prassl and Risak developed a multi-functional approach containing five main functions of an employer, which make him a subject of the appropriate range of employee-protective norms:⁴⁶

- i. Inception and termination of the employment relationship: all powers over the existence of the employment relationship;
- ii. Receiving labor and its fruits: the employee has to provide labor and the results thereof;
- iii. Providing work and pay;
- iv. Managing the enterprise-internal market: control over all factors of the production, in particular how and what is done; and
- v. Managing the enterprise-external market: economic activity while making profits and losses.

This approach focuses on the platforms' ability to shape the way that peers are performing on the market for services. The concept seems to fit the idea of competition law when examining whether a peer is part of a single economic entity where the platform has a decisive influence over the peer. While the inception and termination of the relationship and the management of the internal and external market criteria especially reflect the idea of the decisive influence, the management of the external market reflects the commercial risks, which should also be taken into account when assessing the peers' autonomy.

⁴⁵ See for instance Victoria Daskalova, *Regulating the new self-employed in the Uber economy: what role for EU competition law?*, Faculty of Law, Stockholm University Research Paper No. 38, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075197, (last accessed Feb. 19, 2018).

⁴⁶ See Prassl & Risak, *supra* note 22, at 17.

2. Commercial Agent

A commercial agent is a legal or physical person who negotiates or concludes contracts on behalf of a principal.⁴⁷ The commercial agent's degree of integration in the principal's undertaking is not as intense as the employee's integration. Nevertheless competition law provides that certain agreements between commercial agents and their principals do not fall within the scope of Article 101 TFEU if certain conditions are met. According to the ECJ in *Bundeskartellamt/Volkswagen AG and VAG leasing GmbH*,⁴⁸ commercial agents shall not be treated as independent undertakings if (i) they do not bear any risks resulting from the contracts negotiated on their behalf and (ii) if they are acting as auxiliary organs constituting an integral part of the undertaking.⁴⁹ Regarding the first condition, the Commission in following ECJ's case law has elaborated a comprehensive catalogue of risks, which exclude a commercial agent from being exempted from Article 101 TFEU. Pursuant to the Commission there are three main groups of risks: (i) contract-specific risks, (ii) risks related to market specific investments, and (iii) risks related to other activities undertaken on the same product market.⁵⁰

In the literature, some scholars reach the conclusion that peers in the sharing economy do not qualify as commercial agents because they bear a significant amount of the commercial risk.⁵¹ While in some cases it might be true that peers use their own assets and independent resources when providing the service and platforms and thus only bear an inferior risk, this assessment overlooks an essential feature of the agency relationship: according to the Commission, agreements only fall out of the scope of Article 101 (1) TFEU if the agent does

⁴⁷ See European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 12.

⁴⁸ Case C-266/93, *Bundeskartellamt/Volkswagen und VAG Leasing*, ECLI:EU:C:1995:345.

⁴⁹ See *ibid.*, para. 19.

⁵⁰ European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 16.

⁵¹ See Guy Lougher and Sammy Kalmanowicz, *EU Competition Law in the Sharing Economy*, 7 JECLAP 87, 91 (2016).

not own the sold good or does not himself provide (or perform) the contract services.⁵² Since it is an inherent feature of the sharing economy that peers actually perform the underlying service, they will almost never qualify as commercial agents. Furthermore the “commercial agent exception” is only applicable should the agreement result from a pure vertical relationship between the principal and the agent. If the agreement leads to a horizontal collusion between the agents (peers) Article 101 TFEU applies.⁵³

Despite the fact that peers will hardly ever qualify as commercial agents, it is worthwhile to examine the relevant criteria deriving from the ECJ’s case law and the Vertical Guidelines since they could provide guiding principles when a peer in the sharing economy participates in any commercial risks. In order to be exempted from Article 101 TFEU, according to the Vertical Guidelines, the agent must not participate in the following risks:⁵⁴

- i. Contribution to the costs relating to the supply/purchase of the contracted goods or services, including the costs of transporting the goods;
- ii. Maintenance of stocks of the contracted goods at its own cost or risk, including the costs of financing the stocks and the costs of loss of stocks;
- iii. Responsibility towards third parties for damage caused by the product sold (product liability);
- iv. Responsibility for customers' non- performance of the contract;
- v. Obligation to invest in sales promotion, such as contributions to the advertising budgets of the principal;
- vi. Market-specific investments in equipment, premises, or training of personnel; and

⁵² European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 16.

⁵³ European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 20.

⁵⁴ European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 16.

- vii. Other activities within the same product market required by the principal, unless these activities are fully reimbursed by the principal.

It should be noted that risks related to the general provision of the services, such as the risk of the agent's income being dependent upon its success as an agent or general investments for instance in premises or personnel, are irrelevant for the classification as an agent.⁵⁵

Regarding the deduction of certain criteria for the term “commercial risk,” not every risk listed above seems applicable to the sharing economy since the sharing economy peers usually perform the service with their own assets and therefore will usually contribute to the costs relating to the supply of the service. Accordingly, risks, especially those in relation to the sale promotion, market-specific investments, and other activities in the market, seem to be interesting and should be referred to when establishing a catalogue of criteria for the sharing economy (see below). These risks also reflect the criterion of the “management of the external market” described by Prassl and Risak.

Should one reach the conclusion that the peer is indeed an independent undertaking for the sake of competition law and may not be classified as a commercial agent, one might be tempted to examine whether the platform itself might be the agent and its peers the principals. This logical step does not seem odd at all as the platform’s role in the provision of a service, in the case it merely negotiates or concludes contracts for the peers, very much resembles the concept of a commercial agent. Nevertheless platforms of the sharing economy will hardly qualify as commercial agents for two reasons. First, it will be difficult to show that the platform does not bear any or only an insignificant amount of the commercial risks. Although the platform contributes neither to the costs related to the supply of the contract services nor to the costs of stocking, there will usually be a significant amount of

⁵⁵ European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 15.

costs regarding market specific investments to create and maintain their website. Considering the large number of different peers, it is doubtful that its peers will reimburse the platform for the incurred costs.⁵⁶ Second, it is unlikely that the platform will satisfy the second condition acting as an auxiliary organ constituting an integral part of the undertaking. While the Commission does not require the fulfillment of this condition, the ECJ seems to hold on to it.⁵⁷ According to Goffinet and Puel, especially in the wake of the revolution of e-commerce by the internet platforms, this second condition should be “revitalized” because it is not the principal (peer) who determines the commercial strategy but rather the agent (platform).⁵⁸ This approach holds true for some constellations in the sharing economy as well because some platforms determine the commercial strategy for their peers and thus no longer act as auxiliary organs. However, according to the Commission’s guidelines as well as ECJ’s case law, in this context where the agent (platform) is imposing contractual restrictions on the principal (peer), agreements generally fall under Article 101 (1) TFEU.⁵⁹

3. Franchising and Sub-contracting

Agreements that usually fall within the scope of Article 101 (1) TFEU might be exempted from its application in case one party is an employee or a commercial agent in the sense of competition law. The main difference between these two is that only the employee provides the service himself. If an agent provides the service himself, Article 101 TFEU applies. This

⁵⁶ See Josefine Hederström & Luc Peeperkorn, *Vertical Restraints in On-line Sales: Comments on Some Recent Developments*, 7 JECLAP 10, 17 (2016).

⁵⁷ See Case C-311/85, *VVR/Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, ECLI:EU:C:1987:418, para 20.

⁵⁸ See Pierre Goffinet & Frédéric Puel, *Vertical relationships: The Impact of the Internet on the Qualification of Agency Agreements*, 6 JECLAP 242, 248 (2015); also the German Bundeskartellamt seems to follow this approach: See *HRS*, B9-121/13, decision of 20 December 2013, Bundeskartellamt, para 147.

⁵⁹ See Hederström & Peeperkorn, *supra* note 56, at note 61 and the decisions cited therein; European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 19-20.

raises the question of whether there are other constellations where the peer provides the service himself but Article 101 TFEU does not apply to the agreement.

This is generally the case for franchising and sub-contracting agreements. In a franchise agreement, the franchisor enables the franchisee to use intellectual property rights such as know-how, trademarks, designs, and logos. In return the franchisee pays a franchise fee and is obliged to preserve the integrity of the business format.⁶⁰ By recurring to the ancillary restraints doctrine, the ECJ in its judgement in *Pronuptia*⁶¹ stated that Article 101 (1) TFEU does not apply to certain obligations imposed by the franchisor if (i) these obligations are necessary to ensure that the knowhow and assistance provided by the franchisor do not benefit competitors; or (ii) these obligations are necessary to maintain the identity and the reputation of the franchise system identified by the common name or symbol.⁶² Therefore restrictions imposing retail price maintenance and restrictions, which share markets between the franchisor and the franchisees or between franchisees, fall within the ambit of Article 101 (1) TFEU.⁶³

In regards to sub-contracting agreements, where a third party manufactures goods, supplies services, or performs work under the contractor's instructions for the contractor or on his or her behalf, the Commission published a notice giving guiding instructions on the application of Article 101 (1) TFEU.⁶⁴ Similar to the provisions regarding franchising, Article 101 (1) TFEU does not apply to agreements between the contractor and the sub-contractor concerning the transfer and protection of know-how and equipment. Nevertheless, this constellation is

⁶⁰ See European Commission, Guidelines on Vertical Restraints, OJ C130/1, para 189; Wish & Bailey, *supra* note 6, at 683 et seq.

⁶¹ Case C-161/84, *Pronuptia*, ECLI:EU:C:1986:41.

⁶² *Ibid.*, para. 27.

⁶³ See *ibid.*, para. 27; European Commission, Guidelines on Vertical Restraints, OJ C130/1, para. 47.

⁶⁴ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty, OJ C 1/2.

irrelevant for the purpose of the assessment of resale-price maintenance or price fixing, as the sub-contractor performs the service for the contractor or on his behalf. In cases where the peer is to be regarded as a sub-contractor and not an employee, the peer would still not be regarded as the provider of the service since he would supply the service for the platform or on its behalf. The price required by the peer for his service therefore is not a resale price but a mere remuneration for his work to be paid by the platform and therefore does not fall within the scope of Article 101 TFEU. The question of when a peer is to be regarded as a sub-contractor supplying services for the platform or on its behalf leads to the general question of when a platform exerts decisive influence over a peer and should be regarded as the provider of a service.

II. Interim Conclusion

As illustrated thus far, competition law offers several constructs to assess relationships in the sharing economy. However, when it comes to hardcore restrictions such as price-fixing, only in the case when the platform itself is the provider of the service towards the user, Article 101 TFEU does not apply. In order to assess when the platform is the provider, the Commission's catalogue of criteria can serve as a basis for the examination. As noted above, this catalogue is quite vague and needs further elaboration. First, as the existence of an employment relationship might be a further circumstance indicating that the platform provides the service, the assessment should also be undertaken against the background of certain criteria derived from the ECJ's case law in regards to Article 45 TFEU. As the sharing economy constitutes certain demarcation problems, the boundaries in the catalogue of criteria derived from the ECJ's case law should also be seen in the light of the platform acting as an employer, because it is not always clear in the sharing economy whether a user or a

platform acts as an employer in this regard. Second, in the context of a classification of the platform as a provider or of the peer as an employee, the rather hollow term “commercial risk” should be enriched with the Commission’s elaborations regarding risks in the context of commercial agents. This is logical because the assessment of the status of the peer in relation to the platform should also reflect the idea of the decisive influence, which is inherent in the principle of the single economic entity.

After taking into consideration the Commission’s approach in its agenda for the collaborative economy, the ECJ’s case law in regards to Article 45 TFEU, Prassl’s and Risak’s functional employer concept, and the Commission’s elaboration of a demonstrative list of commercial risks in the context of the commercial agent, the question of when the platform shall be regarded as the provider of the service who has formed a single economic entity with peers can be addressed in the light of the following criteria, which can be categorized in two groups:

- i. Subordination link: the platform independently decides upon
 - a. The selection of the peer;
 - b. The activity of the peer;
 - c. The price paid by the users and the remuneration of the peer (exceeding a mere remuneration of costs for his activities) as well as the share for the platform itself;
 - d. Essential contractual features that determine the relationship between the platform and the peer as well as the peer and the user; and
 - e. The inception and termination of the contractual relationship between the peer and the platform.

- ii. Commercial and financial risks: the platform bears all or a significant amount of the relevant commercial and financial risks and costs that incur from the provision of the service.
 - a. The platform owns the key assets used to provide the underlying service;
 - b. The peer does not participate or only insignificantly participates in any contract-specific or market-specific investment risks as well as risks related to certain activities on the product market (the peer's income being dependent upon its success should not to be considered); in particular the peer does not:
 - invest, directly or indirectly, in sales promotion such as advertising of the platform;
 - invest in market specific equipment, premises or training, if the investment is regarded as sunk costs, which cannot be used for other activities or resold without significant loss; or
 - perform other activities on the same product market, which the platforms require the peer to do on his own behalf and risk.

This approach is said to be of a flexible nature and has to follow the principle of predominance. Although factors in respect of the risks and costs borne by the platform should not be neglected, as they are also strong indicators of a lack of autonomy in the market as can be seen in regards to commercial agents, their importance in relation to the subordination link should be regarded as being of an inferior nature.⁶⁵

When applied to the platforms analyzed hypothetically in this paper, one could reach different conclusions. For Uber, quite a few of the above criteria seem to be fulfilled.⁶⁶ First, there seems to be a strong subordination link between Uber and its drivers: Uber requires

⁶⁵ See also Agenda for the Sharing Economy, *supra* note 4, at 6.

⁶⁶ See Chapter B for the essential features of *Uber*.

certain standards regarding the drivers and the cars to be fulfilled and thus participates in the selection of the drivers. Uber also chooses the activity of the peer and determines the price paid by the users. Even the way the driver has to perform his task is determined by the platform. For example, drivers in some countries must allow users to listen to their own music and are indirectly penalized for detours. Uber also decides the inception and termination of the contractual relationship, because it can ban drivers from its platform as a consequence of low performance. Second, drivers only insignificantly participate in contract or market specific risks: they do not seem to invest in sales promotion or specific investments, which cannot be resold without significant loss. Furthermore, Uber generally does not require drivers to perform other activities on the product market. Uber and its drivers therefore very likely constitute a single economic entity. Consequently, Uber should be regarded as the provider of the service to users. Article 101 (1) TFEU does not apply to any agreements between the platform and their peers. This reasoning is also in line with AG Szpunar's recent opinion on the *Asociación Profesional Elite Taxi* case where the ECJ, in the course of a request for a preliminary ruling, decided on the question of whether Uber provides services in the field of transportation.⁶⁷ Szpunar found that the drivers do not pursue an independent activity that exists autonomously of the platform as Uber exerts control over all the relevant aspects of the transport service.⁶⁸ This has subsequently been affirmed by the ECJ, which found that Uber's intermediation services forms an integral part of the overall service and thus must be classified as a service in the field of transport according to Art 2 (2) d of the Service Directive⁶⁹ and is therefore exempted from its scope.⁷⁰

⁶⁷ Case C-434/15, *Asociación Profesional Elite Taxi*.

⁶⁸ Opinion of Advocate General Szpunar in Case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:364, para 51 and 56.

⁶⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L 376/36.

The crucial aspect in the ECJ's assessment was that the application provided by Uber was quintessential since the drivers would otherwise not be able to provide the service and users would not use the service provided by the drivers. Another important question is whether Uber exerts decisive influence over the conditions under which the services are provided by the drivers.⁷¹ For the purpose of competition law, it is not necessary to distinguish whether the drivers are to be considered as employees or sub-contractors since in both cases Uber would be the provider of the service to the user and the drivers would not be regarded as independent economic actors for the purpose of the provision of the service.⁷²

For TaskRabbit, hypothetically speaking, it seems that significantly fewer criteria are fulfilled.⁷³ Concerning the subordination link, it looks like the platform does not exert a decisive influence over its peers. While it could be the case that TaskRabbit imposes some standards in order to qualify as a tasker on the platform, it does not determine the tasks to be performed by the taskers. Furthermore the platform does not determine the price paid for the task; instead, the tasker sets his own price (with the exception of the Quick Assign option). The platform also does not seem to interfere with essential contractual features nor does it ban workers from the platform if they do not perform in a proper manner. With regards to the participation in contract or market specific risks, TaskRabbit seems to face the same situation as Uber. Taskers do not participate or only insignificantly participate in any of the other market-specific risks. TaskRabbit does not really exert significant influence over its taskers in regards to the subordination link. Therefore it might seem likely that the platform and the peers do not form a single economic entity. As mentioned above, the element of the

⁷⁰ Case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:981, para. 40.

⁷¹ Case C-434/15, *Asociación Profesional Elite Taxi*, ECLI:EU:C:2017:981, para. 39.

⁷² For the purpose of the classification of *Uber* drivers as employees see Prassl & Risak, *supra* note 22, at 18-22; see also the decision of the, which qualified *Uber* drivers as employees: Case *Aslam Farrar and Others v. Uber*, 2202551/2015, judgment of 28 October 2016, UK Employment Tribunal.

⁷³ See Chapter 1 for the essential features of *TaskRabbit*.

participation in risks is of minor importance to the subordination link. TaskRabbit might thus not be regarded as the provider of the service. Consequently, Article 101 (1) TFEU could generally apply in this hypothetical scenario.

D. Assessment of the Infringement

If one draws the conclusion that platforms are not to be classified as providers of the service, Article 101 TFEU is generally applicable. With this conclusion comes the difficult task of assessing the infringement of competition law. This raises several questions that are crucial to a proper evaluation of the infringement. The following section will focus on the question of whether it is of a horizontal or vertical nature. This distinction is mainly important for the purposes of leniency programs and the application of the Private Enforcement Directive⁷⁴ because parties on the EU-level and in certain Member States can only apply for leniency when involved in an horizontal agreement or concerted practice. Furthermore only leniency statements regarding horizontal agreements and concerted practices are protected from being disclosed in damage claims procedures under the Private Enforcement Directive.⁷⁵ According to the Commission's Guidelines for horizontal agreements⁷⁶ (Horizontal Guidelines), a cooperation is of a horizontal nature *"if an agreement is entered into between actual or potential competitors."*⁷⁷ In accordance with the definition in the Vertical Block

⁷⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1.

⁷⁵ See Corinna Potocnik-Manzouri, *Das Offenlegungsverbot für Kronzeugenerklärungen – (K)ein Problem?*, 3 wbl 131, 134 et seq. (2017).

⁷⁶ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1.

⁷⁷ See *ibid.*, para. 1.

Exemption Regulation (VBER),⁷⁸ an agreement or concerted practice is of a vertical nature where the agreement or the concerted practice is entered into between parties, which, for the purposes of the agreement or practice, operate on different levels of the production and distribution chain and the agreement or the practice relates to the conditions under which the parties may purchase, sell, or resell certain goods or services.⁷⁹ Thus the essential features for an agreement to classify as a vertical agreement are the different levels of market structure (i.e., where the undertakings are operating). This generally – or at least for the scope of the VBER – excludes agreements where two or more undertakings are providing services or selling goods at the same level of the distribution or production chain.⁸⁰ Should an agreement comprise horizontal as well as vertical elements, priority should be given to the horizontal elements of the agreement.⁸¹ However, if suppliers have several single agreements with their retailers, which operate on the same level of the distribution chain, the agreements would still be considered as being of a vertical nature and the VBER generally applies. If the supplier has one agreement with several of his retailers, the agreement should be classified as being of a horizontal nature and should thus be assessed under the Guidelines for Horizontal Agreements.⁸²

⁷⁸ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102/1.

⁷⁹ See *Ibd.*, Article 1(1) a.

⁸⁰ See Reinhard Ellger, *Art. 2 Vertikal-GVO*, in *Wettbewerbsrecht Band 1 EU Teil 1*, para. 14 (Ullrich Immenga & Ernst-Joachim Mestmäcker eds., 5th ed. 2012).

⁸¹ See Sebastian Jungermann, *Fallgruppen I. Art. 101 Abs. 1, 3 AEUV*, in *Frankfurter Kommentar Kartellrecht*, para. 49 (Wolfgang Jaeger et al. eds., loose-leaf collection 2017).

⁸² See Daniela Seeliger, *§ 11 Die Beurteilung der verschiedenen Arten von Vertriebsverträgen unter besonderer Berücksichtigung der Vertikal-GVO Nr. 330/2010 und der dazu erlassenen Leitlinien*, in *Handbuch des Kartellrechts*, para. 80 and note 152 (Gerhard Wiedemann ed., 3rd ed. 2016).

I. “Hub-and-spoke” Scenarios

Following the Commission’s definition in the VBER and Horizontal Guidelines, an agreement between a platform and its peers should *prima facie* be regarded as being of a vertical nature, for, based on the assumption that platforms merely provide intermediary platform services, platforms and peers operate on different levels of the supply chain and are not to be considered as competitors. Moreover, it can be argued that the peers did not enter into horizontal contacts with each other but merely with the platform. At this point attention should be paid to so-called “hub and spoke” scenarios, which constitute a special case. In a hub-and-spoke scenario competitors (spokes) usually exchange information vertically via undertakings (hubs) upstream or downstream in the distribution chain. Thus the competitors, while exchanging information with competitors via vertical agreements with a third undertaking, reach a horizontal collusion with each other.⁸³ This concept is used in competition law to hold competitors liable for an indirect exchange of information in the absence of a direct communicative element. *Prima facie*, price restrictions in the context of the sharing economy seem to follow the same idea: the fact that peers have an agreement with a platform to provide a certain service on a fixed price calculated via an algorithm may lead to a horizontal collusion.⁸⁴

Judge Jed S. Rakoff in the Uber case before the New York Southern District Court also seems to follow this approach when he refers to the *Interstate Circuit* case⁸⁵ where competing movie distributors had unlawfully restricted competition by agreeing to a theater operator's

⁸³ See generally Okeoghene Odudu, *Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion*, 7 ECJ 205, 205 et seq. (2011); Josef Hainz & Robert Benditz, *Indirekter Informationsaustausch in Hub and Spoke-Konstellationen – Der Teufel steckt im Detail*, 18 EuZW 686, 686 et seq. (2012).

⁸⁴ See also Uwe Salaschek & Mariya Serafimova, *Preissetzungsalgorithmen im Lichte von Art. 101 AEUV*, 1 WUW 8, Point IV, subsection 2 (2018); Thorsten Käseberg & Jonas von Kalben, *Herausforderungen der Künstlichen Intelligenz für die Wettbewerbspolitik*, 1 WUW 2, Point III, subsection 1 (2018); Johannes Yilnen, *Digital Pricing und Kartellrecht*, 1 NZKart 19, 20 et seq. (2018).

⁸⁵ *Interstate Circuit v United States*, 360 U.S. 208 (1939).

terms, which included price restrictions: “[C]ourts have long recognized the existence of “hub-and-spoke” conspiracies in which an entity at one level of the market structure, the “hub,” coordinates an agreement among competitors at a different level, the “spokes.” These arrangements consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hub’s] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing.”⁸⁶

Rakoff further referred to the US. Supreme Court in the Apple case:⁸⁷ “where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade.”⁸⁸

As a matter of fact, EU law provides no definition of a hub-and-spoke cartel but seems to acknowledge this form of horizontal collusion. Regarding the exchange of information, the Commission in its Horizontal Guidelines held that information exchange can also take place where competitors indirectly share information via a third party such as a research organization, suppliers, or retailers.⁸⁹ Generally speaking, a hub-and-spoke scenario could *prima facie* constitute some form of a “concerted practice.” According to the ECJ a concerted practice is “a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.”⁹⁰

⁸⁶ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist, at 11.

⁸⁷ *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015).

⁸⁸ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist, at 11-12.

⁸⁹ See Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, para. 55.

⁹⁰ Case C-8/08, *T-Mobile*, ECLI:EU:C:2009:343, para. 26.

While it is absolutely legal to adapt one's own strategy to the behavior of the competitors on the market, following the ECJ, competitors must independently determine their policy on the market.⁹¹ Therefore *“any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question”*⁹² is strictly forbidden.

In its judgment in the *Argos* case,⁹³ which generated great interest, the English Court of Appeal provided guiding criteria to assess whether parties in a hub-and-spoke scenario are to be regarded as parties to a concerted practice. According to the court, every party involved in a hub-and-spoke scenario shall be held liable for participating in a concerted practice with the restriction or distortion of competition as its objective if:

- i. a spoke discloses future pricing strategies to a hub, where the spoke may be taken to intend that the hub will make use of the information to influence market conditions by providing other spokes with this information;
- ii. the hub indeed passes the information to other spokes and it might be assumed that these spokes know the circumstances in which the information was disclosed by the first spoke to the hub; and
- iii. these spokes do indeed use the information to determine their future pricing strategies.⁹⁴

⁹¹ Case C-8/08, *T-Mobile*, ECLI:EU:C:2009:343, para. 32.

⁹² *Ibid.*, para. 33.

⁹³ *Argos Ltd. And Littlewoods Ltd v The Office of Fair Trading and JJB Sports plc v The Office of Trading*, 2006 EWCA Civ 1318, Supreme Court of Judicature, Court of Appeal.

⁹⁴ *Ibid.*, para 141.

This approach strongly reflects the element of “intent.” It is not enough that the spoke provides the hub with information and another spoke receives the information. The provider of the information needs to be “taken to intent” that the hub will pass the information to a competitor.

A similar concept is also featured in the *Eturas* case, which offers further guidance to price-fixing scenarios in the sharing economy.⁹⁵ In this judgement the ECJ had to deal with a platform where travel agencies offer travel bookings. In this case the platform, via its internal message-system, sent a message to several travel agencies asking the agencies to vote on a reduction of the online discount rates from 4% to 1%-3%. The platform subsequently enabled online discounts in the range of 0% to 3% and automatically reduced discounts exceeding 3%.⁹⁶ The ECJ ruled that it could be presumed that the users of the system participated in a concerted practice according to Article 101 (1) TFEU, unless they did not publicly distance themselves from that practice, reported it to the authorities, or adduced other evidence to rebut that presumption.⁹⁷ The crucial element in establishing the parties’ liability was the parties’ “awareness” of the message sent by the platform. The ECJ in this context held that *“if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue in the main proceedings, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action.”*⁹⁸

⁹⁵ For a thorough assessment of the case see Andreas Heinemann & Aleksandra Gebicka, *Can Computers Form Cartels? About the Need for the European Institutions to Revise the Concentration Doctrine in the Information Age*, 7 JECLAP 431, 431 et seq. (2016).

⁹⁶ Case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para. 5-12.

⁹⁷ *Ibid.*, para. 50.

⁹⁸ *Ibid.*, para. 45.

AG Szpunar in his opinion also held that a horizontal collusion can be assumed between competitors where a third party is the sender of information and if the addressee *“may be deemed to appreciate that the information transmitted by a third party comes from a competitor or at least is also communicated to a competitor.”*⁹⁹ While the ECJ did not explicitly deal with the question of whether the discount capping was to be regarded as a vertical or horizontal agreement, AG Szpunar classified the restriction as being of a horizontal nature, but not a hub-and-spoke collusion, by arguing that *“[t]he application of a uniform maximum discount rate by competitors requires their mutual reliance, and an undertaking would comply with such an initiative only on the condition that the same restriction applies horizontally to its competitors.”*¹⁰⁰ In response to the applicants’ argument that the alleged anticompetitive restriction is the result of a unilateral action by *Eturas*, he stated that a restriction should only be regarded as a unilateral act where *“both the illicit initiative itself and the related actions in its implementation could exclusively be attributed to that third party, which acted in its autonomous interest.”*¹⁰¹ Szpunar further elaborated his idea on the demarcation criterion of “autonomous interest”: where a platform restricts the pricing conditions for the undertakings using the system, acting solely in its own interest (e.g., in order to maximize its revenues from the commissions or to restrict the competition in its market), a mere absence of an opposition of that limitation by the users of the platform should not be regarded as a horizontal collusion, but rather as a series of several vertical agreements or as unilateral behavior under Article 102 TFEU.¹⁰² This was not the

⁹⁹ Opinion of Attorney General Szpunar in Case C-74/14, *Eturas*, ECLI:EU:C:2015:493, para. 50.

¹⁰⁰ *Ibid.* para. 64.

¹⁰¹ *Ibid.* para. 73.

¹⁰² *Ibid.*, at footnote 23.

case as the interests of the platform's clients who tacitly approved the initiative have potentially motivated the discount cap.¹⁰³

As stressed by AG Szpunar, the *Eturas* case differs from the "classic" hub-and-spoke scenario, where information about future pricing intentions is passed between competitors via a hub. While in the *Argos* case a competitor passed the information to a hub, which passed the information to another competitor, in the *Eturas* case a platform unilaterally (although potentially motivated by some of the competitors) implemented a measure in the system, which capped discounts. According to the ECJ, every competitor should be held liable for infringing competition law if he or she was aware of the intention of the platform and did not distance himself or herself publicly from the measure. Even though this is not the classic hub-and-spoke scenario, it might constitute a special type of a hub-and-spoke cartel, for, on an abstract level, a third party (hub) is used to coordinate competitors' pricing while competitors do not communicate with each other.¹⁰⁴ The *Eturas* judgement is in line with former judgements of the ECJ concerning the presence of an undertaking in meetings at which anticompetitive agreements were formed. The ECJ held that a participation without clearly opposing the anticompetitive measure is indicative of collusion capable of rendering the undertaking liable under Article 101 (1) TFEU.¹⁰⁵ The judgment in *Eturas*, thus, only seems apt.

II. Consequences of Eturas for the Sharing Economy

As has been shown, the ECJ and AG Szpunar delivered several interesting findings for the assessment of measures implemented by platforms, which are relevant for the sharing

¹⁰³ *Ibid.*, para. 81.

¹⁰⁴ See Ariel Ezrachi & Maurice Stucke, *Virtual Competition*, 46 et seq (2016).

¹⁰⁵ See Case C-194/14 P, *AC-Treuhand*, ECLI:EU:C:2015:717, para. 31.

economy. Like in the *Argos* case the ECJ in *Eturas* found that the parties participated in a concerted practice. Specifically, three conditions have to be fulfilled in order to constitute a concerted practice according to Article 101 (1) TFEU: a concertation between the parties, subsequent conduct, and the causal link between them.¹⁰⁶ In regards to the concertation, the ECJ introduced a new standard insofar as it stated that mere “awareness” of the measure is sufficient for the element of concertation to be fulfilled. As the proof of awareness entails questions of evidence, national law has to provide answers. However, according to the ECJ, the principle of effectiveness requires that not only direct evidence but also coincidences and indicia may be sufficient to proof a concertation.¹⁰⁷ With respect to the distinction between the horizontal and vertical nature of the agreement, AG Szpunar suggested the criterion of autonomous interest: if the measure is in the sole interest of the platform, it should generally be treated as several vertical agreements between the platform and its peers or as an abuse of a dominant position under Article 102 TFEU. I will elaborate and apply this analysis to the sharing economy on an abstract level and in reference to worthwhile approaches in literature.

As a starting point one has to assess the restrictive element, namely the algorithm used by a platform and examine whether it is designed in a way that leads to price fixing. As similarly argued by Ezrachi and Stucke, if the algorithm is designed in a way that would or may lead to price fixing between competitors, this would probably constitute the basis for a restriction of competition by object according to Article 101 (1) TFEU.¹⁰⁸ As Heinemann and Gebicka in

¹⁰⁶ See Heinemann & Gebicka, *supra* note 95, at 433 et seq.

¹⁰⁷ Case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para. 37.

¹⁰⁸ See Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, CCLO (L) 40 Oxford Centre for Competition Law and Policy Working Paper 1, 15 (2015). available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591874 (last accessed Feb. 19, 2018).

reference to the ECJ's judgment in *Cartes Bancaires*¹⁰⁹ convincingly argued, the concept of concerted practices requires more openness to the effects of a certain behavior, for even in agreements the restrictive object cannot be deduced from the agreement itself but must be assessed in the context of the whole economic and legal background of the agreement.¹¹⁰ As the ECJ states: *"According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of [Article 101 (1)], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question."*¹¹¹ Further *"[t]he concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition."*¹¹² In this case the ECJ limits previous case law where a very broad concept of "restrictions by object" had been applied.¹¹³ He further clarifies that *"certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and*

¹⁰⁹ Case C-67/13 P, *Cartes Bancaires*, ECLI:EU:C:2014:2204.

¹¹⁰ See Heinemann & Gebicka, *supra* note 95, at 438.

¹¹¹ Case C-67/13 P, *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 53.

¹¹² *Ibid*, para. 58.

¹¹³ See Christoph Wolf, *Bezweckte Wettbewerbsbeschränkungen nach dem Urteil "Groupement des cartes bancaires"*, 2 NZKart 78, 80 et seq (2015).

*services, that it may be considered redundant, for the purposes of applying [Article 101 (1)], to prove that they have actual effects on the market Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.”*¹¹⁴ In this context it would be hard to argue that the application of prices, which were calculated by an algorithm and subsequently applied by competitors, should not to be classified as a restriction by object. Should one reach the conclusion that the pricing algorithm would not amount to a restriction by object, the effects of the algorithm have to be assessed: as has been rightly argued in literature, two sided-platforms such as can be found in the sharing economy need a more cautious approach since the effects of the horizontal coordination, although leading to positive effects for one side of the market, might lead to negative effects for the other side. However the coordination at hand might be essential for the business model to exist.¹¹⁵ By applying the counterfactual method one has to ask whether a business model such as Uber or TaskRabbit would be viable in the absence of the algorithms at hand. Should one come to the conclusion that without the algorithm platforms like Uber and TaskRabbit, the parties would not be able operate and without these platforms there would not be any competition at all in the respective fields, it seems tempting not to apply Art 101 TFEU to the agreement or concerted practice. In regards to business models where for some tasks prices are determined by an algorithm and for other tasks peers can determine the price themselves (similar to TaskRabbit) it seems unlikely that this model would not exist in the absence of the price-fixing algorithm since in the context of not determined tasks competition exists. In regards to models like Uber one can only speculate but in my opinion it does not seem

¹¹⁴ Case C-67/13 P, *Cartes Bancaires*, ECLI:EU:C:2014:2204, para. 51.

¹¹⁵ Niamh Dunne, *Competition Law (and its Limits) in the Sharing Economy*, 15 et seq, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058697 (last accessed Feb. 19, 2018).

unlikely that there wouldn't be any competition without fixed prices. Following this reasoning, the ancillary restraints doctrine, which exempts parts of an agreement, will also fail, since the doctrine requires that such a restriction cannot be dissociated from the main operation or activity without jeopardizing its existence and aims.¹¹⁶

With regards to the peers' liability, three aforementioned conditions of a concerted practice have to be fulfilled. Concerning the "concertation," peers must be aware of the intention of the system to implement a measure or the fact that the system implemented a measure, which (i) applies one single pricing scheme (ii) among all of the peers.¹¹⁷ As noted, the actual awareness of the peers is a question of evidence and of the standard of proof for which national law has to provide answers. Coincidences and indicia may be sufficient to establish proof of a a concertation. Concerning the subsequent conduct of the peers, it should be sufficient that they indeed required the price determined by the platform from their customers. In regards to the last condition, the causal link, the ECJ held in *Eturas* that the causal link between the concertation and the subsequent conduct can be presumed if the peers conducted the measure subsequently on the market.¹¹⁸ This presumption can be rebutted if the peers publicly distance themselves from it, report it to the authorities, or adduce other evidence to rebut that presumption such as actually departing from the restricted price. As the ECJ stated, it is not necessary to send a message of objection of the measure to everybody in the system. A message to the system administrator should be sufficient.¹¹⁹

¹¹⁶ Case C-382/12 P, *Mastercard*, ECLI:EU:C:2014:2201, para. 90 et seq.

¹¹⁷ For a similar approach see *Ezrachi & Stucke*, *supra* note 104, at 53.

¹¹⁸ See Case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para. 33; see also Case C-49/92 P, *Anic Partecipazioni*, ECLI:EU:C:1999:356, para. 118.

¹¹⁹ See Case C-74/14, *Eturas*, ECLI:EU:C:2016:42, para. 89.

Concerning the classification of the horizontal or vertical nature of the infringement, one could follow AG Szpunar's approach, which focused on the interest behind the measure and applied the "autonomous interest test": should the price-fixing be in the sole interest of the platform implementing the measure, it is likely to be regarded as being of a vertical nature. In this case one could qualify the measure as several vertical agreements implementing resale price maintenance according to Article 4 a VBER. Should the measure be in the interest of the peers as well, it constitutes a horizontal concerted practice. This of course leads to the difficult task of assessing when price fixing measures are in the sole interest of the platform for price fixing *prima facie* seems also to serve competitors in order to avoid fierce price competition on the market. If it would not indeed be in the interest of the peers as well, if they were dependent on the platform because the platform has a (relative) dominant position on the market, and if the use of the pricing algorithm is *de facto* obligatory, the situation should be examined under Article 102 TFEU.¹²⁰

III. Interim Conclusion

As demonstrated, European Competition law generally provides appropriate tools to tackle anticompetitive behavior in the sharing economy. In particular, the newly implemented "awareness" requirement holds competitors liable for concerted practices where there has not been any communication between the parties. This reasoning has obvious consequences beyond the sharing economy for every system or algorithm, which determines prices among competitors. Following this line of thought, one would reach the conclusion that whenever competitors use the same algorithm and are aware that the algorithm also determines the price for all the other competitors, they would be liable for a concerted practice. Indeed, the

¹²⁰ See Wulf-Henning Roth & Thomas Ackermann, *Grundfragen Art. 81 Abs. 1 EG*, in *Frankfurter Kommentar Kartellrecht*, para. 174 (Wolfgang Jaeger et al. eds., loose-leaf collection 2017).

use of the same algorithm, which determines prices, could constitute a new form of concerted practice: a new form of hub-and-spoke collusion.

Building on a hypothetical scenario similar to Uber, *prima facie* it seems likely that drivers could engage in some sort of concerted practice in the form of a hub-and-spoke cartel, as the platform provides a price-fixing scheme to which drivers submit themselves when providing their services via the platform. The peers only need to be aware of the fact that the algorithm used by the platform applies a single pricing scheme reflecting the market demand. It can be assumed that peers are well aware of this fact as it is obvious that the scheme is an integral part of the business model. By effectively acting in accordance with the platform's pricing scheme, the subsequent conduct of the concertation is given. This is indeed the case because the customer directly pays the fee calculated by the algorithm to the platform. The causal link between the concertation and the subsequent conduct is evident. The rebuttal of the presumption in cases similar to Uber seems difficult, as there is obviously no actual possibility to depart from the algorithm.¹²¹ In regards to the question of whether the concerted practice restricts competition by object or effect, one has to look at the algorithm. At first glance the algorithm seems to be designed to apply the same rates to certain distances according to the demand in the market. It therefore might constitute a restriction by object. Even if the algorithm is not designed in that way, it has the obvious effect of coordinating prices on the market. The agreement seems to be of a horizontal nature. The "autonomous interest test" would also probably confirm this conclusion, as it can be supposed that it is in the interest of drivers that their rates are fixed in order to prevent fierce price competition, although it should be noted that some drivers would

¹²¹ *Spencer Meyer v Travis Kalanick*, 15 Civ 9796; 2016 US. Dist, at 4.

probably prefer to set the prices themselves.¹²² As a matter of fact, this is an empirical question, which does not have any definite answer at this point. Nevertheless, as it cannot be said that the measure is in the sole interest of the platform since it is probably also in the interest of (some) drivers, it seems likely that the measure is of a horizontal nature. Even if it is to be classified as a vertical agreement it would fall within the scope of Article 4 a VBER, which classifies resale price maintenance as a core restriction. However, it has to be added that Article 4 a VBER allows the implementation of maximum discount prices or recommended prices provided that they do not amount to a fixed or minimum sale price. As Uber claims to allow drivers to charge other (lower) fares, one could argue that the price calculated by the algorithm is only a recommended price. However, since the drivers do not seem to have the actual ability to require any other price, the price by the algorithm has to be classified as a fixed price. If the measure was not in the interest of the peers or if the peers were dependent on the platform because it has a (relative) dominant position in the market (probably for the intermediation of transport services¹²³), it seems appropriate to assess the scenario under Article 102 TFEU. Concerning the platform's liability for the facilitation of the cartel, one can refer to the above cited *AC-Treuhand* case, where the ECJ held a consultancy firm liable for supporting and organizing anticompetitive behavior.¹²⁴

With regards to hypothetical scenarios like TaskRabbit, the "Quick Assign option" seems to follow the same logic as Uber. Like Uber the platform determines the price (very likely via an algorithm) for a specific kind of task ("same-day-assistance-jobs"). When taskers are aware that the platform determines the price for same-day-assistance-jobs for every tasker and the

¹²² See Dara Kerr, *Detest Uber's Surge Pricing? Some Drivers Don't Like It Either*, Cnet (2015), available at <https://www.cnet.com/news/detest-ubers-surge-pricing-some-drivers-dont-like-it-either/> (last accessed Feb. 19, 2018).

¹²³ See Guy Lougher and Sammy Kalmanowicz, *EU Competition Law in the Sharing Economy*, 7 JECLAP 87, 91-95 (2016).

¹²⁴ Case C-194/14 P, *AC-Treuhand*, ECLI:EU:C:2015:717, para. 31, 35-39.

taskers subsequently accept and fulfill the job under the conditions set by the platform, they might participate in a concerted practice. As discussed, whether the price fixing solely serves the platform or (also) the taskers has to be examined. Whether the measure is also in the interest of the taskers is an empirical question. Nevertheless, if the platform does not allow the taskers to set their own prices, the measure could hypothetically be captured under Article 4 a VBER. If the measure only serves TaskRabbit, which has a (relative) dominant position in the market (probably for the intermediation of same-day-assistance jobs, which could be segmented further) it should be assessed under Article 102 TFEU.

E. Conclusions

The sharing economy implements new obstacles for competition law to overcome. First, it is not always clear whether competition law applies to certain agreements and practices in the sharing economy. The crucial question is whether the platform exerts decisive influence over its peers and therefore must be considered as the provider of the service to the users. The Commission proposed a helpful catalogue in its agenda for the sharing economy, which needs further elaboration. As the Commission seems to follow the idea of the single economic entity in its approach, it is possible to deduce and to add certain criteria from established case law of the ECJ and the Commission as well as secondary law, extending the Commission's catalogue. As for the contractual relationships between the platforms and the peers, it seems very likely that they would either qualify as employees, sub-contractors (within a single economic entity), or self-employed. Article 101 (1) TFEU only applies in the latter case. Peers will hardly ever qualify as commercial agents, because they generally perform the service on their own. Platforms also do not qualify as commercial agents because they usually participate in the peers' commercial risks and they are likely not

auxiliary organs since some platforms determine the commercial strategy for their peers. While Uber and its drivers will very likely form a single economic entity and thus be exempted from Article 101 (1) TFEU, TaskRabbit's tasker seem to be self-employed and therefore the agreements between them and the platform could fall within the ambit of Article 101 (1) TFEU.

With respect to the questions of how competition law has to be applied to the sharing economy and whether it is still fit to tackle algorithm related price restrictions, it has been shown that the ECJ in its *Eturas* judgment provided a valuable tool for the assessment of competition law in the sharing economy. Following the ECJ's reasoning, peers submitting themselves to price-fixing algorithms might participate in a horizontal collusion if they were aware that the algorithm fixes prices on the market for everybody submitting to the algorithm and acted accordingly by requiring the price calculated by the algorithm. Moreover, AG Szpunar's elaborations regarding the distinction between horizontal and vertical agreements provide an interesting approach: when a measure is in the sole interest of a platform, it should probably not be regarded as one horizontal agreement or practice but rather as several single vertical agreements with peers. When peers depend on the sharing economy platform because it has a (relative) dominant position in the market and the use of the pricing system is *de facto* obligatory (i.e., there are no actual possibilities to depart from the system's pricing scheme) the measure should be assessed under Article 102 TFEU.

There are still several further questions yet to be discussed in regards to competition law and the sharing economy. The exemption of agreements and concerted practices under Article 101 (3) TFEU is of great interest as there might be significant benefits for consumers coming along with these new business models since they provide peers and users with

completely unknown concepts contributing to an enlarged range of price and quality and a reduction of transaction costs.¹²⁵ Furthermore, this paper only examined multilateral conduct between the platforms and the peers and only mentioned the possibility of the platforms also infringing Article 102 TFEU as a side note.¹²⁶ This issue has to be discussed in more detail. To face this question is to also face the difficult task defining the relevant market, which is important for the assessment under Article 101 TFEU as well.

¹²⁵ See Uwe Salaschek & Mariya, *supra* note 84, at Point IV, subsection 2.

¹²⁶ See Dunne, *supra* note 115, at 2 et seq.