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. 44

The Sharing Economy and the Information Society Services in the European Union: Opportunities and Challenges for the European Legislator and the Potential Ways Forward

Tina Fokter & Dushko Kosturanov

2020

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

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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 Authors

Tina Fokter is currently pursuing an LL.M. degree at the University of Vienna School of Law. She graduated with a BA degree from the University of Ljubljana Law School. During her studies, Tina participated in the project The Big Scientific Commentary of the Penal Code, which received an award for outstanding achievement in science. Prior to her studies in law, she received her BA with the highest distinction in Interlingual communication, studying French, English and Slovene at the University of Ljubljana. Tina worked as a winter intern at Wolf Theiss Slovenia. Her main areas of interest include European and international business law, technology law and intellectual property law.

Dushko Kosturanov holds a BA degree in Law and an LL.M. degree in Finance and Financial Law from Ss. Cyril and Methodius University in Skopje, North Macedonia. He is currently pursuing an LL.M. degree in European and International Business Law at the University of Vienna School of Law. Dushko has gained significant experience in risk management by working in the banking industry within large banking groups. He currently serves as General Counsel in an industrial firm in North Macedonia, part of a large international trading group. Dushko has interest in research projects on IP, technology, and international business law.

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Suggested Citation

This European Union Law Working Paper should be cited as:
Tina Fokter & Dushko Kosturanov, The Sharing Economy and the Information Society Services in the European Union: Opportunities and Challenges for the European Legislator and the Potential Ways Forward, Stanford-Vienna European Union Law Working Paper No. 44, http://ttlf.stanford.edu.

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Abstract

The sharing economy, also known as collaborative consumption, is an economic model that is usually facilitated by an online platform that improves services, such as apartment renting, car-sharing, crowdfunding, etc. In the beginning, the European Union has dealt admirably with the advances in this area by enacting the Directive 2000/31/EC and Directive (EU) 2015/1535. However, the sharing economies have since gained increased significance. With the rise and influence of companies such as Uber, Airbnb, and SoFi, recent innovations in the field of sharing economy have proven to be too substantial and wide-ranging for the current legislation to be able to adequately follow them or even regulate them. These companies can define themselves in different ways and can fit into the category of the information society services, which are covered by the European Directives.

In an attempt to mitigate the legal uncertainty, the member states of the European Union responded in a divergent manner to comparable issues. For example, some have banned Uber in their cities due to non-compliance with the rules that had to be followed by taxi companies, others have capped the maximum duration of stays with Airbnb. While the member states are struggling to find methods to adapt to the rise of the new technologies, it seems that new regulations could be the possible way forward. In this paper, the authors present potential solutions to the legal uncertainty in the European Union.

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1. Introduction

There is no doubt that the so-called digital revolution marked the 21st century. This revolution transformed business, everyday life, and communication among people worldwide, making the world a global village where information spreads at the speed of light. In addition to causing numerous changes, technology has also influenced the rise of collaborative consumption, which is an emerging phenomenon, fueled by developments in information and communications technology, growing consumer awareness, the proliferation of collaborative web communities, and social commerce and sharing.[1]

The sharing economy, which is also known as collaborative consumption, is an economic model defining peer-to-peer based activity that includes providing, acquiring, or sharing access to goods and services.[2] These activities are generally short term and primarily exist to ease collaboration between people. The sharing economy is usually facilitated by an online platform, such as a community-based platform.[3] There are various examples of the sharing economy prospects, for example peer-to-peer lending, crowdfunding, house rentals or apartment rentals, car sharing, reselling, trading, various niche services, and so on. It has been stated that for the business economy, access is the new form of ownership.[4] Many of these services seek profit, but what they take is only a small amount while the rest is passed on to the owners.

There are notable benefits of sharing economy. First of all, it makes it easier for users to exchange resources, such as apartments or cars that are not in use. With car sharing, for

[1] Hamari Juho, Sjoklint Mimmi, Ukkonen Antti, *The sharing economy: Why people participate in collaborative consumption*, Journal of the Association for Information Science and Technology (2015), 20, https://asistdl.onlinelibrary.wiley.com/doi/abs/10.1002/asi.23552.
[2] Wirtz Jochen, Kam Fung So Kevin, Mody Makarand et al., *Platforms in the Peer-to-Peer Sharing Economy*, Journal of Service Management, (2019), 453, https://www.researchgate.net/publication/331907029_Platforms_in_the_Peer-to-Peer_Sharing_Economy.
[3] Jim Chappelow, *Sharing Economy*, https://www.investopedia.com/terms/s/sharing-economy.asp.
[4] Belk Russell, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, Journal of Business Research (2015), 1595, https://www.researchgate.net/publication/262490610_You_are_what_you_can_access_Sharing_and_collaborative_consumption_online.

example, the impact on the environment decreases significantly. There is also the flexibility that has to be considered; it is much easier to return a bike or a car anywhere in the city instead of paying for parking. In addition, there are social benefits and anti-consumerism that come with the sharing economy. However, there are also the adverse effects of sharing economy. The change it may bring could potentially disrupt many economic models known today. It has the possibility to change the banking sector completely; it has already changed the taxi industry, apartment renting, and many others. Public safety concerns, health, and limited liability have all been listed among possible concerns regarding sharing economy practices. The traditional providers of these services are also claiming that the sharing economy is the ground for unfair competition.

Nonetheless, sharing economy is the new trend and is likely to become more advanced in the coming years. With the rise and influence of Uber, Airbnb, and many others, the traditional employment arrangements, transactions, and apartment renting are becoming undermined and threatened. These companies all have one thing in common: they share underused facilities. Therefore, it is becoming increasingly important for governments to decide whether (and how) they should regulate this evolving area. With any kind of regulation in mind, there is always the other side of stifling innovation. Naturally, there are many companies that are already so big that they do not require special protection for innovation, such as Airbnb or Uber. However, there are smaller start-ups that would not make it in an overly regulated field. It must be noted that many of the sharing practices do not even require regulation because they are limited to the personal sphere. On the other hand, companies driven by profit have already opened some doors to unsafe and underinsured practices, which would already require regulation.[5] Due to all these concerns, the regulators find themselves torn between the decision of whether this

[5] Ranchordas Sofia, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, Minnesota Journal of Law, Science and Technology (2015), 414, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1356&context=mjlst.

area is something that should be regulated to protect the users of the services, or if they should instead not limit innovation by restrictions. Even European countries, which are known to be regulator-friendly, have not yet been able to decide what to do with this field harmoniously. Therefore, there is an imbalance between the various European countries and a lot of disorder due to some countries dealing with the issue of regulating in different ways, on the one hand, and other countries deciding not to regulate at all. The principal concern remains whether the innovators should be protected and not regulated, even if, in the end, it is the user that suffers the principal loss.

The technological and economic developments regarding the sharing economies can lead to interesting legal repercussions. Some online peer-to-peer coordination hubs ended up having legal problems based on what individuals have exchanged through the hub (e.g., The Pirate Bay, Uber, and Airbnb). Since all sharing economy services in practice and principle possess the trait of being autonomous and separate from their users, it is interesting to question to what extent their operators should be held responsible for the goods being exchanged through the sharing economy services.[6]

The expectations for increased regulatory awareness are not surprising. For example, in 2018, Denmark became the first country to enable Airbnb hosts to report income directly to the tax authorities[7], while many other places are developing transportation as service platforms to meet the needs of all residents, including those with low income.[8] It is also worth noting the change in how regulators reacted to the entry of e-scooters, compared with how they dealt with ride-hailing platforms years ago. Many cities put e-scooter platforms on notice, while others,

[6] *Id*. 20.
[7] Airbnb to report income directly to Danish authorities, The Local, https://www.thelocal.dk/20180518/in-world-first-airbnb-to-report-income-directly-to-danish-authorities.
[8] Dave Nyczepir, *D.C. Prepares to Launch Transportation as a Service*, Route Fifty, https://www.routefifty.com/smart-cities/2018/10/dc-launch-transportation-service/151839/.

such as Portland, Oregon, have run pilots to determine the appropriate regulatory targets.[9] There are still not enough data to predict the reactions of the regulator, but action will undoubtedly be taken worldwide in an attempt to regulate this relatively new area accurately and effectively.[10]

To summarize, legal constraints always focus on the nature of the goods subject to sharing, physical or digital, furthermore, its distribution, and sharing coordination.

This paper is divided into five parts. First, current legal challenges and questions are presented, followed by a brief explanation of the Information Society Services Directive, as well as the Digital Single Market Directive. In the next part, the relevant European case law and the contemporary practices in the member states are discussed. In the fourth part of the paper, the authors discuss the "mere conduit" solution, proposed by the directive, and its legal repercussions. Finally, the potential solutions and possible ways forward for the European Union are presented.

2. Current legal challenges and questions

Due to a lack of regulation, the rules of sharing remain unclear. The sharing economy is functioning through online platforms; therefore, it is difficult to put it under the legal framework that is suitable for the traditional economy. As discussed in-depth below, the current standard is to regard the sharing economy under the Information Society Services. Nevertheless, even though they are considered as such, the current regulatory framework does not seem suitable for the e-commerce directive and clearly needs to be modernized.[11]

[9] Portland Bureau of Transportation, *E-Scooter Findings Report* (2018), 10, https://www.portlandoregon.gov/transportation/article/709719.
[10] April Rinne, *4 Big Trends for the Sharing Economy in 2019*, https://www.weforum.org/agenda/2019/01/sharing-economy/.
[11] Burcin Bozdoganoglu, *Tax Issues Arise From a New Economic Model: Sharing Economy* (2017), 128, https://www.researchgate.net/publication/322211247_Tax_Issues_Arise_From_a_New_Economic_Model_Sharing_Economy.

Compared to ownership, sharing is nowadays preferred by many users.[12] However, sharing companies try to distinguish themselves from their traditional counterparts in order not to be subjected to the same rules. A prominent example is Uber, which claimed vast differences from taxi companies in order not to have to comply with the regulations applicable to that sector. The company also faced many strikes. Users were happy with the competition and the fact that they can select a car, the driver, and monitor their ride, which generally makes the user feel safer than the usual taxi ride. However, Uber has not always been well accepted in some cities, where licensed taxi drivers have gone on strikes and protested because their industry is regulated while Uber is not. The outcome was that Uber was first prohibited in some European cities, like Berlin, Ljubljana, and many others. Berlin's District Court also stated that Uber was violating German passenger transport laws because it lacked the needed legal permits.[13] There were different opinions on the subject; on the one hand, many agreed that Uber should be regulated, but many implored that the rules should be modernized and changed.[14] There have been some developments in regulation; in the USA, for example, the District of Columbia Council passed a bill that tries to regulate Uber and similar types of services in the area. It requires that the drivers should be at least twenty-one years old, not have a criminal record, and have vehicles inspected at least once each year.[15] Nonetheless, there have been numerous claims for unfair competition and a lack of licenses regarding Uber.

The regulation of taxis affects the price, availability, and quality of taxi services. The main reason behind the price regulation in the taxi sector is that the consumers will not have the chance to look for other providers of the same service, but with Uber, things may be different.

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[12] *Id*. 462.
[13] Mark Scott and Melissa Eddy, *Uber Service Banned Across Germany by Frankfurt Court*, N.Y. Times (Sept. 2, 2014), https://bits.blogs.nytimes.com/2014/09/02/uber-banned-across-germany-by-frankfurt-court/.
[14] Ranchordas Sofia, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, Minnesota Journal of Law, Science and Technology (2015), 462, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1356&context=mjlst.
[15] *Id*. 465.

Where the prices for taxis should remain the same because of the regulation, no matter how busy the evening is, prices with Uber may vary depending on demand. Additionally, in some cities, taxi drivers are required to take examinations that prove their knowledge of the city, but for Uber drivers, there is no such requirement. However, does this mean that Uber drivers are fundamentally the same as taxi drivers and should be treated as such? Not necessarily, because Uber does not bring a professional taxi driver service but rather a non-professional one, which is known to the user and he is aware of the difference between ordering a taxi or an Uber. Therefore, many agree that while Uber should be regulated, it requires new regulations and not the traditional ones.[16]

After these initial attacks, Uber finally found itself in front of the Court of Justice of the European Union (CJEU), which issued a decision in December 2017.[17] CJEU ruled that services cover the service which Uber provides in the field of transportation. From then on, member states can regulate the conditions for providing these services.[18]

There have also been setbacks for others, like Airbnb, which has been (badly) regulated in some countries and, due to lack of a higher regulation or even harmonization by the European Union, countries have come to different solutions and conclusions. This was also a query in the USA, where Airbnb faced numerous legal problems because hosts did not comply with local regulations.[19] In New York, for example, private short term rentals may have operated as illegal hostels because some rooms and apartments listed on Airbnb were not compliant with the New York regulations.[20] In 2014, a report concluded that 72% of Airbnb's rentals were violating regulations or other laws in New York.[21] The same report also alluded to the fact that

[16] *Id*. 465.
[17] Case C-434/15, *Associacion Profesional Elite Taxi v Uber Systems Spain SL*, Judgement, 2017, E.C.R.
[18] See more about this issue below, pages 13 and further.
[19] Ron Lieber, *A $2,400 Fine for an Airbnb Host*, N.Y. Times (May 21, 2013, 2:22 PM), https://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/.
[20] Eric Schneiderman, *Airbnb in the City* (Oct. 2014), https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf, page 2.
[21] *Id*.

Airbnb and other rental sites may be "a black market for unsafe hotels".[22] In Germany, short-term rentals were banned in the most popular areas in the city of Berlin.[23]

Nonetheless, Airbnb replied to numerous battles and regulatory issues with reports that portray the benefits of its services to the local economy.[24] Furthermore, there are also some countries or specifically cities that have passed the so-called Airbnb-friendly legislation. In the UK, for example, there was an initiative that tried to make UK the global center for the sharing economy[25], while Amsterdam was the first city to pass the Airbnb-friendly regulation in 2014.[26] However, in 2018, city councilors in Amsterdam decided to reduce the number of nights that Airbnb hosts are able to rent their apartments. The number now involves a cap at 30 nights per year.[27] Amsterdam now has a special short-term regulation provisions where Airbnb hosts must classify their rentals either as holiday rentals or bed and breakfast if they want to rent their homes on Airbnb.[28] Nonetheless, Airbnb issued a statement in which it said they will not comply with the 30-day rule and will continue with the housing limit of 60 days, which was introduced one year prior.[29]

However, in the times when the existing regulations and directives have been drafted, no one could have expected such a rise in sharing economy. While there are many rules and

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[22] *Id*. 1.
[23] Joanna Penn and John Wihbey, *Uber, Airbnb and Consequences of the Sharing Economy: Research Roundup*, https://journalistsresource.org/studies/economics/business/airbnb-lyft-uber-bike-share-sharing-economy-research-roundup/.
[24] Airbnb: https://www.airbnb.com/berlin-economic-impact; http://web.archive.org/web/20150322021438/http://publicpolicy.airbnb.com:80/wp-content/uploads/2013/09/Berlin-Airbnb-economic-impact-study.pdf.
[25] Press release from the UK Government: https://www.gov.uk/government/news/move-to-make-uk-global-centre-for-sharing-economy.
[26] Joanna Penn and John Wihbey, *Uber, Airbnb and Consequences of the Sharing Economy: Research Roundup*, https://journalistsresource.org/studies/economics/business/airbnb-lyft-uber-bike-share-sharing-economy-research-roundup/.
[27] Natasha Lomas, *Amsterdam to Halve Airbnb-style Tourist Rentals to 30 Nights a Year Per Host*, https://techcrunch.com/2018/01/10/amsterdam-to-halve-airbnb-style-tourist-rentals-to-30-nights-a-year-per-host/.
[28] *Understanding Short-Term Rental Regulations in Amsterdam*, https://blog.keycafe.com/understanding-short-term-rental-regulations-in-amsterdam/.
[29] *Amsterdam Fails to Reach Deal with Airbnb on Holiday Rental Rules*, https://www.dutchnews.nl/news/2019/02/amsterdam-fails-to-reach-deal-with-airbnb-on-holiday-rental-rules/.

regulations on hotel rooms and apartments, it is essential to recognize that these will not work in the same way for Airbnb. The existing laws must be modernized and tailored specifically for the sharing economy. This may be the root cause of tremendous differences when it comes to decisions about rentals.[30]

It seems that leaving the market unregulated has caused the decision-making bodies to use the existing regulations on the sharing economy sector, which in the end is even worse as the "traditional" rules do not fit the sharing economy standards. In turn, this is not friendly either to innovators nor to regulators.

3. Legal background

3.1 Information Society Services

Through its legislative bodies, the European Union made an attempt to create a legal framework ensuring the free movement of Information Society Services between the Member States by enacting the Directive 2000/31/EC of the European Parliament and the Council as of 08 June 2000.[31]

This Directive establishes the principles where the operators of Information Society Services (ISS) are subject to regulation (related to the taking up and the pursuit of services) only in the EU country where they have their registered headquarters – not in the country where the servers, email addresses or postboxes they use are located. Member States (MS) must ensure that operators publish the necessary information on their activities (name, address, trade register number, etc.) in a permanent and easily accessible form.[32]

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[30] In 2013, for example, a judge in New York ruled that a host on Airbnb was operating an unlicensed hotel, which sentenced him to a fine of 2400 USD when he was hosting strangers for compensation. More: Ranchordas S, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, Minnesota Journal of Law, Science and Technology (2015), 470, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1356&context=mjlst.

[31] Directive 2000/31/EC, of the European Parliament and the Council of 8 June 2000.

[32] *Id*.

As far as the liability of the ISS is concerned, the ones who act as a mere conduit[33], caching or hosting services providers, are not responsible for the information they transmit or host if they fulfill certain conditions. In the case of hosting service providers, they are exempted from liability as long as:

1) they do not have actual knowledge of illegal activity or information and,
2) if they obtain such knowledge or awareness, they act at once to remove or to disable access to the information.

MS cannot impose any general monitoring obligation on these "intermediaries" over the information they send or store, to look for and prevent illegal activity.[34]

The EU legislator's efforts to impose rules and to harmonize the ISS field twenty years ago is admirable. The activities of the operators, however, evolved in the years following the enforcement of the Directive. In addition, the EU invested further efforts by approving and adjusting its legislation with regard to the recent developments – the adoption of Directive (EU) 2015/1535 of the European Parliament and the Council as of 9 September 2015. The rules regulating the liability of the operators, though, did not change significantly. Instead, the 2015 Directive attempted to regulate the enactment of some technical standards by the MS that could potentially be liable for preventing or hindering the free movement of goods and/or providing of services with a cross-border element. On the other hand, the rules steered at the responsibility of ISS remained intact. At present, it seems that the risks associated with the activities of ISS can only be mitigated by an extensive interpretation of the existing rules by the CJEU and the MS.

[33] In the Directive, "mere conduit" refers to a situation when the "provided information society service consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network". See Article 12 of the Directive.
[34] *Id.*

3.2 The Digital Single Market

Recently, the European Parliament and the Council announced the Directive (EU) 2019/790 as of 17 April 2019.[35] The aims of the Directive are the following:

1) to adapt certain key exceptions to copyright to the digital and the cross-border environment;
2) to improve licensing practices and ensure wider access to content; and
3) to achieve a well-functioning marketplace for copyright.

The Directive imposes additional obligations towards online content-sharing providers, as follows:

1) Online content-sharing service providers should obtain permission from rights holders to make works uploaded by their users available to the public, for example through a licensing agreement. If a license is not concluded, the concerned platforms benefit from a liability-mitigation mechanism, but they have to make "best efforts" to make sure that illegal content is not available on their websites. They must make those efforts on the basis of relevant and necessary information provided by the rights holders.
2) Users are allowed to post content for the specific purposes of quotation, criticism, review, caricature, parody or pastiche and may use complaint and redress mechanisms in case of disputes over content erroneously blocked or removed from the platforms.[36]

With the Digital Single Market Directive, the EU attempted to create a better functioning copyright marketplace by protecting the rights of rights holders.[37] In addition, the

[35] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019.
[36] A summary of the Directive (EU) 2019/790 on copyright in the Digital Single Market, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:4393033*.
[37] Frequently Asked Questions on Copyright Reform, *supra* note 7.

legislator believes that the removal of online barriers would accelerate the rise of the EU's digital economy and contribute to reaching its full potential. Furthermore, the EU holds that the digital single market would add to the economic growth of EUR 415 billion per annum, boost jobs, as well as competition, investment, and innovation throughout the Union.[38]

The reactions of the stakeholders following the enactment of the Directive are rather diverse. The supporters argue that this Directive has finally imposed rules that would protect the authors of the contents uploaded by the platforms and would also coerce the digital platforms to share their profits with those who have contributed significantly to the gaining of their earnings, as well as their reputation. The critics, however, claim that the Directive will prevent further innovation, due to its complexity and unreasonably strict rules that create burdens for the business and irrationally high cost, in terms of technology to be developed, as well as long and complicated online checks.

At a first glance, there is not much in common between these two Directives.[39] The two Directives attempt to regulate certain aspects of operations to ISS and/or online content sharing platforms. Namely, the first Directive[40] holds that the ISS are "risk-free", provided they fulfill specific criteria. This Directive explicitly prevents imposing additional commitments by MS towards ISS; the justification for the latter be the "mere conduit". The second Directive[41], however, aims at expanding the liability of ISS, both in terms of adequately run online checks, as well as fair profit sharing.

Nonetheless, the second Directive is designed to protect the rights holders and to prevent the misuse of their copyright-protected content by the ISS; it does not affect the accountability of ISS from any other perspective. Consequently, the ISS, whose operations do

[38] Digital Single Market, Official website of the EU, https://ec.europa.eu/commission/priorities/digital-single-market_en, last visited on March 12, 2020.
[39] Directive 2000/31/EC and Directive (EU) 2019/790.
[40] See footnote 4 hereinabove.
[41] Directive (EU) 2019/790.

not include uploading of copyright-protected content, have actually remained sound. The digital single market consists of numerous ISS, operating in many dissimilar business fields, some of which do not include any uploading of copyright-protected content, but still have significant importance for further development of digital single market, and whose activities certainly require protection of their users. Therefore, the need for new legislation that would address the latest developments of ISS's operations or at least an adjustment of the current one to the new circumstances is essential.

3.3 The CJEU case law and the contemporary practice in the EU Member States

The EU established the legislative framework for ISS back in 2000, which was amended in 2015. With these directives, not much room was left for the MS to develop their own rules for accountability of ISS and their activities. As a consequence, the legislative landscape in the MS varies broadly throughout the EU. The legislation, however, rarely concerns ISS directly; it generally targets the "users" of the platforms, whether they are, in fact, providers or consumers of the services.

Nonetheless, the CJEU has developed clear case law, linked mainly with the nature of the services that ISS is providing, as well as the degree on the involvement of the ISS in the mediation between the parties that it aims to correlate.

For instance, CJEU ruled in December 2017 that "the service provided by Uber, connecting individuals with non-professional drivers, is covered by services in the field of transportation. MS can, therefore, regulate the conditions for providing that service".[42]

This particular verdict came as a consequence of a multi-year legal challenge brought by EU taxi associations to Uber's claim that it is just a technology platform. The judgment

[42] Case C-434/15, *Associacion Profesional Elite Taxi v Uber Systems Spain SL*, Judgement, 2017, E.C.R. See also press release: https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2017/12/uber-ecj-press-release.pdf.

paved the way for MS to adopt legislation that will be compulsory for Uber to comply with; therefore, Uber will no longer be able to claim that it is a peer-to-peer ride-hailing service that shall be governed by EU extensive e-commerce rules. In addition, the CJEU holds that "such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31". Consequently, the CJEU rules that "as EU law currently stands, it is for the MS to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty".[43] The Court has based the judgment mainly on the circumstance that Uber exercised decisive influence over the conditions under which transport services were provided by the non-professional drivers using the application made available to them by Uber.[44]

Although it is apparent that the ruling has explicitly authorized the MS to lay down rules associated with services in the field of transportation for Uber and similar platforms, the practice in this regard has remained somewhat diverse. Germany, for instance, has banned Uber's operations on its territory due to lack of car-hire licenses and additional pre-conditions, which the company failed to fulfill.[45] On the other hand, Austria did not ban Uber but classified it as a car-rental service, thus allowing the company to set its own fare prices. Austrian legislator made an additional attempt to regulate Uber's activities by equating them with taxi services, thus setting the same pricing mechanism.[46] The different legislative approaches of the two neighboring MS mirror the inconsistency arising out of the implementation of the authorizations conferred by the CJEU ruling.[47]

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[43] *Id.*
[44] *Id.*
[45] Sara Germano, *Uber Hit With Fresh German Ban*, The Wall Street Journal, https://www.wsj.com/articles/uber-hit-with-fresh-german-ban-11576782166.
[46] Reuters, *Uber threatens to withdraw from Austria*, Reuters, https://www.reuters.com/article/us-uber-austria/uber-threatens-to-withdraw-from-austria-idUSKCN1TJ1NL.
[47] See footnote 11 hereinabove.

With this decision, the CJEU seems to revert from the previously established legal position and the interpretation of primary and secondary EU law, in comparison with the judgment concerning Airbnb's obligation to obtain a "license" for real estate agents in France.[48] In this case[49], the CJEU based its verdict on a broad and comprehensive elaboration of its legal position and especially explanation of the term "Information Society Service". The CJEU has finally concluded that the services provided by Airbnb "meet the four cumulative conditions laid down in Article 1(1)(b) of Directive 2015/1535 and, therefore, in principle, constitute an "information society service" within the meaning of Directive 2000/31".[50]

Furthermore, in the explanation of their ruling, the CJEU held that "although it is true that the purpose of the intermediation service provided by Airbnb Ireland is to enable the renting of accommodation — and it is common ground that that comes under Directive 2006/123 — the nature of the links between those services do not justify departing from the classification of that intermediation service as an "information society service" and therefore the application of Directive 2000/31 to it."[51]

The CJEU further elaborated that Airbnb does not set the amount of the rent charged by the hosts using that platform, but rather provides the hosts with an optional tool for estimating their rental price, having regard to the market averages taken from that platform and leaving responsibility for setting the rent to the host alone.[52] Likewise, the CJEU ruled that Airbnb shall be treated as ISS under Directive 2000/31; thus pronouncing its "independence" from its users, that is to say, "hosts" and "guests".

The CJEU emphasized that "Airbnb has not exercised any decisive influence over the conditions for the provision of the accommodation services to which its intermediation service

[48] Case C-390/18, *X v YA, Airbnb Ireland UC, Hoteliere Turenne SAS, AHTOP, Valhotel*, 2019, E.C.R.
[49] Case C-390/18.
[50] *Id.*
[51] *Id.*
[52] Case C-390/18, paragraph 56. See also footnote 16 hereinabove.

relates, particularly since Airbnb does not determine the rental price charged. Even less does it select the hosts, or the accommodation put up for rent on its platform".[53] With the judgment, the CJEU proclaimed that the ISS should not hold any risks associated with the services they facilitate.

The announcement of the CJEU verdict caused a heating debate between supporters and critics. The supporters claim that the judgment would eventually encourage innovators and entrepreneurs, thus contributing to further expansion of the online services between the MS. The critics, however, held that the ruling would only escalate unfair competition, especially in terms of tourism and hoteliers, thus adding to uncertainty, both in business and legal terms.

Despite the controversy of the judgment, it is apparent that the CJEU once again confirmed that by applying the contemporary secondary legislation, the ISS simply could not be held liable for any action they took, because the ISS is detached from the service itself, their providers and users. In other words, the ISS is just facilitating the pursuing of the services, while the providers and users are free to choose if they wish to enter the transaction. Consequently, the latter is also responsible for assessing and mitigating the risks associated with the transaction itself, that is to say, when it comes to risks linked with the transaction itself, the users are on their own.

Even though it can be argued that the Directive 2000/31 encourages innovation, it nonetheless leaves the society exposed to numerous undesirable risks. Regulation has been traditionally thought of as an obstacle to innovation and creativity. The law is about routine and regulation, defining boundaries and standardizing procedures, whereas innovation emerges from freedom, room for new ideas, and openness to diversity.[54] Still, a balance between these two approaches must be found.

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[53] See footnote 20 hereinabove.
[54] Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN. J.L. SCI. & TECH. (2015), 414, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1356&context=mjlst.

Despite the rules that held ISS "harmless", as long as they fulfill certain criteria, it seems that MS have taken specific actions in an attempt to monitor relevant market segments that are linked with the services ISS facilitates. The reality check concerning the regulation of short-term accommodation, facilitated by Airbnb, shows that the decreeing practice varies considerably from one MS to another.

For example, in February 2014, the city of Amsterdam decided to authorize the private rental of houses to tourists in an attempt to reduce regulatory uncertainty, and to address the growing problem of professionals who rent multiple homes through Airbnb.[55]

Moreover, the city of Berlin had barred almost all landlords from letting their apartments to short term visitors, thus imposing significant fines, amounting up to EUR 100.000. The rule was overturned in March 2018, following the city's assembly decision to allow landlords to rent their homes to an extent they deem appropriate and to rent second homes for up to 90 days a year. The new law, however, has imposed additional burden for the owners, because they have to obtain a general permit from their borough, even if they only intend to rent their property occasionally. Most strikingly, the penalty for breaking the rules escalated to EUR 500.000.[56]

On the other hand, in early 2018, the city of Barcelona issued an order to Airbnb to remove from their site 2.577 listings that were found to be operating without a city-approved license. Subsequently, on 01 June 2018, Airbnb and the city of Barcelona launched a new agreement that allows city officials to access data for the listings. These measures aim to provide the local council with useful tools to manage out-of-control vacation rentals.[57]

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[55] *Id*.
[56] Ulrich Paul, *Airbnb: Berliner dürfen künftig ihre Wohnung zeitweise vermieten*, Berliner Zeitung, https://archiv.berliner-zeitung.de/berlin/airbnb-berliner-duerfen-ihre-wohnung-zeitweise-vermieten-29912080.
[57] Feargus O'Sullivan, *Barcelona Finds a Way to Control Its Airbnb Market*, Citylab, https://www.citylab.com/life/2018/06/barcelona-finds-a-way-to-control-its-airbnb-market/562187/.

Undoubtedly, the preceding presentations show that the measures taken by the local governments spot mainly the landlords and the users of the online platform. Nevertheless, the promotion of these rules is kindled by the online platform, Airbnb, that was recognized by the CJEU as "Information Society Service" within the meaning of Directive 2000/31.[58]

In conclusion, the present EU legislation, regulating the ISS, and the case law developed by the CJEU, have caused some MS to develop their legislation, which tries to manage the consequences of the activities, caused directly or indirectly by the operations of ISS. The rules developed by the MS target specific issues that seem to be considered essential to the nation. However, the lack of a general framework that would put accountability of ISS into force drove the stakeholders to take appropriate action, in an attempt to mitigate the risks associated with the emerging new areas of digital service providers.

4. Justification of (no) liability to intermediary service providers – "Mere Conduit"

Article 4 of the Directive 2000/31 holds that MS "shall ensure that the service provider is not liable for the information transmitted, on the condition that the provider:

a) does not initiate the transmission;

b) does not select the receiver of the transmission; and

c) does not select or modify the information contained in the transmission."[59]

The acts of transmission and of the provision of access include storage of the information transmitted where it takes place for the purpose of carrying out the transmission in

[58] See footnote 19 hereinabove.
[59] See footnote 4 hereinabove.

the communication network and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

The EU lawmaker intended to keep the ISS inoffensive, as long as they do not interfere with the decision of the entities. Presumably, the legislator assumed that the ISS is incapable of influencing the decision making of their clients, provided that the criteria laid down in the Directive 2000/31 are fulfilled. Even though twenty years ago that may have been the case, it is quite apparent that the reality has swapped nowadays.

Undoubtedly, the ISS and online content sharing platforms are meaningful agents. Although, from a formal point of view, the ISS may not influence the decision of the customer, it certainly adds to it due to the crucial information they supply. Namely, most, if not all, of the ISS provide "ancillary" services, consisting of price comparison, ratings, etc. These services may play a decisive role in the decision-making process of the user. As much as one can argue that the ISS's clients are free to make their own choice, in reality, the "guidelines" are most frequently the ones established by the platforms.[60]

In reality, the conditions of Article 4 cited above may *stricto sensu* be fully satisfied by most of the ISS, due to technology they employ in performing their activities. As a result, the ISS is actually given the role of a mere facilitator that has nothing to do with the information but to process it "as is", with almost no additional analysis in terms of its accuracy, fitness for purpose, reliability, etc. Hence, the burden for an additional examination of the information provided, as well as the risks associated with its accuracy, are firmly transferred to the parties using the services of ISS – the users.

[60] Jingen Liang Lena, Chris Choi HS, Joppe Marion, *Understanding Repurchase Intention of Airbnb Consumers: Perceived Authenticity, Electronic Word-of-Mouth, and Price Sensitivity*, Journal of Travel and Tourism Marketing (2017), https://www.researchgate.net/publication/313824418_Understanding_repurchase_intention_of_Airbnb_consumers_perceived_authenticity_electronic_word-of-mouth_and_price_sensitivity.

Nonetheless, the ISS charge significant fees for these services of "mere facilitators", although they bear almost no risk. For example, following a complaint that its terms and conditions and the way they present prices were in breach of EU's unfair commercial practices Directive, the unfair contract terms Directive and the regulation on jurisdiction in civil and commercial matters, the European Commission imposed an ultimatum to Airbnb in 2018. Airbnb then took action, and subsequently "improved and fully clarified the way it presents accommodation offer to consumers", thus avoiding heavy fines for not complying with EU rules.[61] Even if this action made the advertisements more transparent, it did not influence the pricing mechanism of Airbnb at the slightest. Therefore, the platform has resumed its operations unaffected and in the usual course of business.

This illustration verifies the fact that ISS are capable of adapting their service to satisfy separately inflicted duties while their business remains unaltered. The reason for this goes back twenty years ago when the ISS were granted the status of "poor channel". Exploring the rationale for such a resolution, it is necessary to go back and examine the activities of the ISS and their popularity in that specific period, when the ISS were only starting to develop.

There are numerous cases of exceptionally well-off performing companies, which are primarily a result of the regulations which stated that ISS are "risk-free". For instance, Airbnb posted profits of nearly $ 100 million in 2018, out of $ 2,6 billion in revenue.[62] Furthermore, Airbnb is set to launch its first Initial Public Offering (IPO) later in 2020, aiming for the collection of venture capital, amounting to $ 3,1 billion.[63]

[61] Benjamin Fox, *Airbnb Bows to EU Demands on Room Fees*, Euractiv, https://www.euractiv.com/section/competition/news/airbnb-bows-to-eu-demands-on-room-fees/.
[62] Krista Gmelich *Airbnb Says It Made a Profit Again in 2018*, Bloomberg, https://www.bloomberg.com/news/articles/2019-01-15/airbnb-says-it-made-a-profit-again-in-2018-as-ipo-looms-large.
[63] Chris O'Brien, *Airbnb Tops List of 13 Potential Tech IPOs in 2020*, Venture Beat, https://venturebeat.com/2020/01/03/airbnb-tops-list-of-13-potential-tech-ipos-in-2020/.

In contrast, Uber reported losses of $ 1,8 billion in 2018; however, as the losses shrunk, so did the sales grow. Namely, the revenue of Uber hit $ 3 billion in the fourth quarter of 2018, soaring 25% compared with the previous year. The annual income of Uber for 2018 amounted to approximately $ 11 billion.[64] Uber is also preparing for an IPO in 2020 in an attempt to gain new capital for its business.[65]

These illustrations only further demonstrate that these companies, as well as many others, which could potentially qualify as ISS within the meaning of Directive 2000/31, are not a "novice" that should be treated with special rules preventing their liability. In addition, like all other companies, their main purpose is lucrative.

The differences between the companies qualified under ISS and other companies operating on the market are vital. The "risk-free" operations of the ISS are fueled by the rules that have enabled the ISS to hover above the parties they aim to connect. The current legislation actually empowers ISS to "float" over their users, to charge fees for their services, and to refrain from any liability when it comes to risks. This is also a motive for ISS to charge high fees for their services.

For instance, Airbnb charges considerable fees for its service, amounting to approximately 20%, thus adding significantly to the overall price for the accommodation, booked by its clients.[66] Uber charges between 20-25% of the earnings the drivers make by using the services of the platform.[67]

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[64] Sara Ashley O'Brien, *Uber Says it Lost* $ 1.8 billion in 2018, CNN Business, https://edition.cnn.com/2019/02/15/tech/uber-2018-financial-report/index.html.

[65] Brian Deagon, *IPO Stocks In 2020 Hope To Sidestep Pitfalls Of Uber, Lyft, WeWork*, Investor's Business Daily, https://www.investors.com/news/technology/ipo-stocks-in-2020-hope-sidestep-pitfalls-uber-lyft-wework/.

[66] Caroline Donovan, *Here's Why Airbnb Costs More Than You Think – And What Airbnb Is Doing About It*, Buzzfeed News, https://www.buzzfeednews.com/article/carolineodonovan/why-airbnbs-cost-more-extra-cleaning-fees.

[67] Kathleen Pender, *How Much of Your Fare goes to Uber and Lyft Drivers? You'd be Surprised*, San Francisco Chronicle, https://www.sfchronicle.com/business/networth/article/For-a-driver-s-pay-what-s-fair-in-an-Uber-13830931.php.

Furthermore, Uber claimed for a long time that the drivers using the platform are self-employed, and not employees within the meaning of the labor laws, thus avoiding certain duties they would otherwise be coerced to fulfill. However, recently, the Paris Court of Appeals forced Uber to cease this practice with its decision on January 10, 2019. The court ruled that Uber drivers need to be recognized as employees rather than self-employed partners.[68] France's first instance courts first refused to decide on the case, claiming that they could not rule on it since it did not involve an employment relationship. But with this decision, a "*sufficient set of clues*" existed to establish the existence of a relationship of subordination between the Uber platform and the self-employed driver."[69] This is just another example of the recent developments and legal issues Uber (and similar companies) will have to comply with in the future.

These are numerous illustrations in support of the argument that the ISS are taking advantage of the legislation and relatively soft rules regulating their activities by dislodging or attempting to remove their liability in as many perspectives as possible. The variety of rules throughout MS, which regulate separate aspects of their operations, contribute to the more favorable treatment of the ISS compared with other entities operating in the EU single market.

The latest developments in technology and consumer practices indicate that this field needs to be updated and approached in a new, modern way. Therefore, extra efforts are more than necessary for an in-depth understanding of these new trends and strengthening the laws aiming at the regulation of the tech industry. It is also important to note that the new legislation should not stifle innovation and must not prevent further advancement of technology. Still, it

[68] Sam Schechner and Preetika Rana, *Uber Ruling in France Boosts Gig Worker's Rights*, The Wall Street Journal, https://www.wsj.com/articles/france-uber-ruling-puts-gig-workers-rights-in-focus-11583353513.
[69] Sara Bellahouel, *France: Uber Drivers are Employees According to the Paris Court of Appeals!*, http://www.mondaq.com/france/x/796654/employee+rights+labour+relations/Uber+drivers+are+employees+according+to+the+Paris+Court+of+Appeals.

must sanction transparent and comprehensive rules that will contribute to fair market competition and consumer protection.

5. Supplementary contingencies

While the new technology advances, the risks associated with it are also emerging. Nowadays, we can witness the attempts of technological giants to expand their business in finance, logistics, trade, marketing, etc. Additionally, these companies are developing technologies like artificial intelligence and blockchain, the application of which will probably soon become indispensable in running numerous businesses.

There have been countless cases in the past, which can confirm that the lack of adequate rules may quickly become a root cause of market turmoil. For instance, the financial meltdown in 2008 revealed the shortcomings of a conventional financial theory based on models of strong reliance on economic policy instruments and principles-based regulation deprived of effective regulatory enforcement.[70] This approach failed to keep up with financial innovation, follow the complexity of financial markets, and generate the trust of the investors.[71] In addition, innovation appears to be posing novel and more complex challenges to regulation, crossing borders that were once thought to be insurmountable.[72]

The Financial Technology (Fintech) companies were taking their first steps in 2008 when the financial crunch shadowed the economic growth and caused unforeseeable consequences to the financial systems worldwide. Nowadays, the Fintech industry is one of the

[70] Engobo Emeseh et al., *Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?* (2010) 230, 230–232, https://www.researchgate.net/publication/41583907_Corporations_CSR_and_Self_Regulation_What_Lessons_from_the_Global_Financial_Crisis.
[71] Dan Awrey, *Complexity, Innovation, and the Regulation of Modern Financial Markets*, HARV. BUS. L. REV (2012), 232.
[72] *See id.* at 335 ("[C]onventional financial theory failed to adequately account for . . . the nature and pace of financial innovation").

fastest-growing digital industries in the EU, with a market share of what some sources estimated to 33% in 2017.[73] These figures show the significance of the new technologies, and the aptitude of the market to absorb them swiftly. This innovative tendency adds to the efficiency and transparency of the market participants, but it comprises various risks.

Generally, Fintech companies may be treated as ISS in the broad sense of the term. The Fintech companies execute "intermediary service", linking its users.[74] However, they may be subject to some stricter finance regulations when performing services that are mostly financial (e.g., payments).

The EU seems to have identified the benefits and the contingencies that the Fintech companies can produce for the single market. For this reason, the European Commission adopted an action plan on Fintech in March 2018[75], because it believes that this plan would "foster a more competitive and innovative European financial sector". This action plan on Fintech aims to enable innovative business models to scale up at the EU level; support the uptake of new technologies, such as blockchain, artificial intelligence, and cloud services in the financial sector; and increase cybersecurity and the integrity of the financial system.[76]

In recent years, there were many polemics addressing the concerns for the next significant economic downturn, the causes for it, and the actions needed for avoiding or at least reducing its repercussions. Financial institutions, especially the ones that were too-big-to-fail, were blamed for the last financial crisis. At present, some columnists argue that the next financial crash will begin from the big technological companies as these companies are not

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[73] Ramos Munoz David, Villar Garcia Juan Pablo et al., *Competition Issues in the Area of Financial Technology (FinTech)*, In-depth analysis for the Policy Department for Economic, Scientific and Quality of Life Policies by the European Parliament, https://www.europarl.europa.eu/RegData/etudes/IDAN/2019/631061/IPOL_IDA(2019)631061_EN.pdf.

[74] Study on Competition Issues in the Area of Financial Technology (FinTech) by the European parliament, 91, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/619027/IPOL_STU(2018)619027_EN.pdf.

[75] European Commission, FinTech action plan: For a more competitive and innovative European financial sector (2018), https://ec.europa.eu/info/publications/180308-action-plan-fintech_en.

[76] European Commission, Digital Finance, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/fintech_en?fbclid=IwAR279jfsDPhpsyH_3iHN_Q3C8VqL051fesOaEPiL8xry24utTjq86a6zyE8.

regulated as financial institutions, and it is, therefore, difficult to track exactly what they are buying and what the market implications may be.[77]

Apparently, there are arguments that support the claim that the big technological companies and big banks are also similar in the opacity and complexity of their operations. The algorithmic use of data is like the complex securitization done by the world's too-big-to-fail banks in the sub-prime era. Both are primarily understood by industry experts who can use information asymmetry to hide risks and things that companies profit from, such as dubious political ads.[78]

Undoubtedly, technological companies promoting new technology are always considered progressive and are worth supporting, if nothing else, for the fact that they bring innovations. Those were also the reasons for the massive financial support from governments worldwide.

When it comes to big technological companies, it seems that self-regulation has, in some way, become a standard. Still, the lack of regulation may backfire. Just as many big-bank risk managers had no idea what was going to happen in 2008, the executives of big technological companies can also be thrown off balance by how their technology can be misused. We can name, for example, the New York Times investigation in 2018, which revealed that Facebook had allowed several other big technological companies, including Apple, Amazon, and Microsoft, to tap sensitive user data even as it was promising to protect privacy.[79]

At the outset, the progress of new technology was backed up by extensive state subsidies, advantageous positions, and ordinances that primarily safeguarded the innovators

[77] Rana Foroohar, *How Big Tech is Dragging us Towards the Next Financial Crash*, The Guardian, https://www.theguardian.com/business/2019/nov/08/how-big-tech-is-dragging-us-towards-the-next-financial-crash.
[78] *Id.*
[79] *Id.*

and their innovation, rather than mitigated risks associated with activities of the emerging business that was expected to bring the much-needed change.

Even though big technological companies have become vital in terms of earnings, staff, systemic importance, and economic growth, the approach of the lawmakers remained unaltered when it comes to limiting their liability. This is, of course, beneficial for the big technological companies, but risky for users.

The EU has undoubtedly made notable efforts to identify and mitigate risks associated with operations of the technological companies, but the outcome is still not sufficient. The legislation is too general and, in some way, too soft. Therefore, the search for an appropriate solution may be strenuous but indispensable.

6. The potential ways forward

As digitalization is penetrating numerous fields, the data is becoming increasingly critical for businesses and everyday life. The digitalization processes rely on data feeding the digital platforms and the software. These data are subsequently structured, analyzed, and shown in a user-friendly form. Consequently, the processing of data is the main product of the ISS, online digital platforms, and most of the software.

Undoubtedly, the majority of the digital platforms are taking advantage of the Directive 2000/31/EC, when it comes to their accountability towards its users, the applicability of competition rules, and licensing burdens. On the other hand, the same digital platforms employ particularly advanced technology, which aims to protect their interests. Furthermore, these digital platforms developed their own strict rules, which apply in case of customer complaints, due to the platform's errors, or delusion that is attributable to the platform. In this final part of

the paper, the possible solutions (on the EU level) and rules by which these issues could be approached will be provided.

One possible answer to these challenges could be sanctioning the duty of the ISS to analyze the information/data they provide, and to guarantee the completeness and accuracy of their information, as well as fitness for purpose.

However, a balance between the support for innovation and protection of fair market competition, as well as consumer protection, must be maintained.

The new rule shall target the information/data as the primary object of regulation. Namely, the information/data is the "commodity" whose trade shall be directed. Failure to do so may leave the digital platforms *carte blanche* to operate in a manner they deem appropriate; additionally, it would coerce the MS to develop their own legislation, which would further harm the EU single market, only adding to legal uncertainty.

Therefore, the way forward for structuring a clear and comprehensive EU legislation that shall embrace the operations of the digital platforms in a broad sense may be unearthed by extensive analysis of the following viewpoints:

1) Firstly, it is essential to determine the scope of analysis of the information/data by the ISS. Notably, the ISS shall be obligated to assess the information/data they provide to the users, to ascertain if the information/data is accurate, complete, fit for purpose, etc.
2) Secondly, upon performing necessary verifications, the ISS shall warrant that the information/data they provide is thorough, reliable, and fit for end, in the scope of the analysis performed.
3) Thirdly, the ISS shall be held liable towards its consumers for the information/data they provide; in addition, they shall compensate damages incurred by their

consumers due to information/data that has afterward proved to be incomplete, inaccurate, and/or misleading.

4) Finally, the ISS shall be allowed to mitigate risks they undertake, by way of taking warranties by the owners of the information/data before its processing. Nonetheless, the ISS shall remain liable towards its customers, due to the fact that they are business entities that are competing on the market and have a lucrative purpose.

In general, this approach may be helpful to even the ISS with other market operators to a conceivable extent, or at least pave the way for fair market treatment of these relatively new and innovative entities which have shaped the market by their business models and proved that information/data may be a powerful tool when used properly.

The extent of scrutiny of the information/data by the ISS may be an intricate issue. This concern is mainly associated with the nature of the activity of the ISS, rather than its legal form. For instance, the nature of the activity of the ISS connecting hosts and guests with the purpose of short-term rental of real estate (e.g., Airbnb) is different from the nature of the pursuit of the ISS aiming at relating a transport service between provider and user (e.g., Uber). Likewise, the venture of the ISS operating in food sharing activities is different from the operations of ISS engaged in clothes sharing.

Therefore, the starting point in determining the range of inquiry shall be the business operations, i.e., the market segment in which the ISS functions.

For example, ISS whose activities include renting apartments shall be held liable for ensuring that the "host" is the true and lawful owner of the apartment or that the host is allowed to rent the apartment by the owner. In addition, the ISS shall make the necessary examinations in order to confirm that a host is a person with a good reputation, in terms of criminal records, rather than relying exclusively on ratings that are done by guests.

For instance: under the current legislation, Airbnb's Terms of use make it clear that while they "may help facilitate the resolution of disputes", they have nothing whatsoever to do with the safety of the listing, their accuracy, or even conduct of third parties.[80] Under the title Scope of services, Airbnb informs explicitly the users that they do not "own, create, sell, resell, provide, control, manage, offer, deliver or supply" any services or listings on their website, by which they essentially bear no burden whatsoever when it comes to liability.[81] Airbnb expressly states that it does not even guarantee or has any control even over the mere existence of the listings, which essentially signifies that if a listing on Airbnb does not exist, the user would theoretically be able to come to the designated place and find that the apartment does not exist, only to be told by Airbnb that they do not take any responsibility for such an occurrence. Of course, there are many safety nets in place, such as user feedback and listings rating.

Airbnb further states that when users (Members) make a booking on Airbnb, they enter in a contract with the host directly and "Airbnb is not and does not become a party to or other participant in any contractual relationship with between members"[82]. They also state that Airbnb is never to be considered a real estate broker. Airbnb even goes so far as to claim that their "verified" content, which makes an impression that it is somehow authenticated, is neither their endorsement, certification, or even a guarantee of the listing, and should be therefore carefully screened by the user. In addition, Airbnb does not assume any responsibility for the identification of any member's identity, and they may (but they have no obligation whatsoever) to ask members to provide a government identification to verify members or any kind of background checks.[83] With the above-mentioned solutions, there would, to a possible extent, at least be legal certainty regarding the listings provided and the person providing them.

[80] Scope of Airbnb services, 1.3, https://www.airbnb.com/terms#sec201910_1.
[81] *Id.*
[82] *Id.*
[83] Airbnb Terms of Use, part 2.4, https://www.airbnb.com/terms#sec201910_1.

Airbnb disrupted the hotel economy. According to the Boston University research, Airbnb poses significant competition to the hotel industry, especially for the non-high-end hotels.[84] When it comes to branded hotels, Airbnb is essentially considered a different product.[85] But if we take the high-end hotels aside, from the customer perspective, Airbnb is, in most cases, regarded as an alternative to hotels or apartments. However, compared with different safety and regulation standards, Airbnb does not have to comply with the standards required for the hotel industry.

On the other hand, despite Airbnb specifically stating that it does not "own, create, sell, resell, provide, control, manage, offer, deliver, or supply"[86] any listings and especially underlines that it is not an organizer or retailer of travel packages under the Directive (EU) 2015/2302[87], there are some to examples be considered from the way the CJEU dealt with the case of Leitner[88] and the travel package Directive. Even though the Leitner case differs significantly from the sharing economy, it must be noted that both services are contractual obligations. When booking a room through Airbnb or a ride with Uber, these platforms do not only serve as a means of providing a service; they make a profit. The previous CJEU decisions also lean in this area.[89] The concept of making a reservation on Airbnb or with an agency does not differ that much. A consumer comes to the travel agency to reserve a vacation, and if the vacation does not go as planned, the agency is responsible, even though they do not own the hotel or the apartment. With Airbnb, a consumer possibly has the same expectations regarding the availability of the room, size of the room, etc. By excluding any liability, Airbnb is given

[84] Georgios Zervas, Davide Proserpio, John Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry* (2013), 4, *Boston U. School of Management Research Paper No. 2013-16*.
[85] Quynh Nguyen, *A Study of Airbnb as a Potential Competitor of the Hotel Industry*, 17, UNLV Theses, Dissertations, Professional Papers, and Capstones, (2014), 2618, https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=3619&context=thesesdissertations.
[86] Airbnb Terms of Use, part 1.2, https://www.airbnb.com/terms#sec201910_1.
[87] Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015.
[88] Case C-168/00, *Simone Leitner v TUI Deutschland GmbH & Co. KG*, 2000.
[89] For example, the Court of Appeals in France stating that the Uber drivers are to be considered as employees.

a free pass whenever something goes wrong, and the consumer should fend for themselves. A possible solution, as stated above, would be to make the company liable to a certain amount. This would require that Airbnb makes sure that their properties are being advertised correctly and have the same safety standards and regulations. The same goes for Uber and other companies. It would be sensible for the EU to make a similar case for sharing economy practices as it did with the package travel Directive.

In comparison with Airbnb, the ISS connecting transport service providers and their users (like Uber) should be accountable and held liable for checking everything related to the driver: driver's license, technical conditions of the car, the chauffeur's previous traffic violations, etc.

By the application of the above-mentioned solutions, the ISS would be obliged to act in a prudent way, thus reducing the reliance solely on its customers and algorithms. Nonetheless, the ratings may be a useful tool in formulating the merit of the marketed product. However, the ratings should only be an addition to analysis, which should be based on official data provided by the ISS. Importantly, all the official data could be obtained automatically by sourcing it from the public registers.

By doing so, the legal certainty would improve to a notable extent, and consumer protection would also be enhanced, as consumers would be confident that at least essential examinations were made before marketing the output. The described solution would undoubtedly add to the certainty of the consumers, which would consequently increase their confidence in the digital platforms. In addition, it would lessen the possibility of disputes arising between the consumer and the provider because ISS could also be held liable.

As far as the guarantee for the information provided by the ISS is concerned, it must be stressed that the liability of the ISS shall be capped, both in terms of scope and volume.

Namely, the ISS shall warrant to its customers that they have checked the information before supplying it in a prescribed manner. To put this another way, the ISS shall not be allowed to process the data "raw", i.e. "as is", thus letting the consumers assess the risks. They shall instead "toll" the information, thus assuring its eligibility to be marketed.

The accountability of the ISS, however, shall be confined to the verge of the examination of the information, made under the applicable rules, before its processing on the market. The ISS shall be subject to fines in case of breach of duty to perform the prescribed checking of the information; also, the ISS shall indemnify their customers in case of failure to analyze the information before its marketing.

The cap of the fines and the indemnities, however, shall be settled in a way that would not harm the business of the ISS. Still, it should compel the ISS to follow the enacted rules and also compensate for the damages incurred by the consumers.

The susceptibility for indemnification by the ISS with regard to its consumers is mainly linked with the fact that the ISS is the "trader", i.e., the intermediary that is transferring the information among the parties. Moreover, most of the ISS are charging significant fees for their engagement in the transactions. Applying the language of the commercial law, it seems perceptive to sum-up that the ISS is a "merchant" rather than solely an "agent". There are numerous arguments in support of this claim; the most relevant one is the fee that is charged by most of the ISS, as well as their business models, that rely on algorithms, helping the ISS become indispensable for certain transactions, following its initial engagement.

Moreover, the ISS are legal persons, engaged in gainful business activities; thus it is probable that the ISS possess enough assets to indemnify their customers, in case they prove damages, both in material and immaterial terms due to involvement in the transaction, relying on the information provided by the ISS. Besides, ISS may employ comprehensive insurance, to hedge the risks associated with potential indemnifications, due to claims of their shoppers.

As much as it may sound unusual, the digital platforms have become increasingly important nowadays, and are replacing the traditional intermediaries, whose accountability has been undoubtedly settled clearly and comprehensively. In contrast, the liability of the ISS towards its consumers is regulated by rules that are soft and not imperative.

Furthermore, taking advantage of the legislation, the ISS are even reducing their accountability, developing terms and conditions that exclude most of the risks that would otherwise be customary to undertake. However, the transactions performed via the digital platforms are soaring. The reason for this is probably the user-friendly approach of digital platforms. Yet, the risks associated with the transactions remain, and the consumers have to bear them.

The scope of the indemnification by the ISS shall be capped to a reasonable volume, which would neutralize the damages suffered by its consumers. The cap, however, shall be a lump sum, determined in a prudent manner.

For example, the EU legislator has sanctioned rules that obligate the air traffic operators to indemnify its customers in case of delayed or canceled flights. The compensation is determined in frames that represent the minimum and the maximum thresholds that the passenger may be subject to.[90] This example may serve as a reliable stand-in exploration of the opportunities for setting fair rules, supportive for both competitiveness and consumer protection.

The caps, however, shall be set by the nature of the operations of the ISS, and the market segment in which the particular ISS is operating. Also, developing appropriate technical standards for the classification of the ISS's activities in a specific market section may also be a valuable instrument.

[90] Statement of the European Commission on the Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:en:HTML.

Once the liability of the ISS towards the consumers is determined appropriately and comprehensively, it seems fair to empower the ISS to mitigate the risks they are exposed to by undertaking guarantees by the entities providing the information towards the ISS. To put this another way, the persons, irrelevant whether they are legal or natural, providing the information to ISS, shall warranty to ISS that the information is accurate, complete, and fit for purpose; this shall be done before the further processing of the information by the ISS.

The warranties supplied by the owners of the information with regard to ISS shall refer exclusively to circumstances that cannot be checked automatically by the ISS. The nature of the guarantee is undoubtedly related to the market division, where the ISS runs its business.

For instance, the warranties required by a food sharing platform digress compared with the guarantees demanded by digital platforms facilitating the short-term rental of immovable. The food sharing platform may check online if the meal supplier owns the necessary license, in case there is an online register; on the other hand, the platform cannot examine the food provided by the supplier, to assure it will not cause any poisoning to the consumer. Consequently, the supplier shall warrant to the ISS that the meal has been properly checked before being marketed, and there would not be any undesired consequences for the final consumer. In the case of an unwanted effect, the ISS shall compensate for the damages incurred by the ultimate buyer and ask for reimbursement from the food supplier.

Likewise, the real-estate sharing platform may perform online-checking to ensure that the host is the lawful owner of the immovable that shall be let out; however, it is unable to check online if the place is, for instance, clean and safe. In the event of damages, the guest shall be compensated by the ISS, which shall subsequently be refunded by the host against the ISS, due to breach of “reps and warranties” previously given to the ISS.

The comprehensive insurance may be crucial to mitigating risks by both ISS and physical and legal entities, providing the information to the ISS, and thus avoiding losses in case of occurring the warranted event.

The application of this approach would undoubtedly add to legal sureness, thus paving the way for strengthening the trustiness in the digital platforms, and fair compensation for the consumers that have suffered damages.

The input of the new rules would undoubtedly shape the way the digital platforms operate, causing additional costs and efforts to accommodate the new legal surroundings. Nonetheless, the figures, both in terms of transactions taken via the digital platforms and annual turnover, as well as profits of the digital platforms listed before in this paper[91], support the argument that the legislation should evolve, just the way digitalization did. It should also be emphasized that the effectiveness of this approach can be achieved by the implementation of new regulations harmoniously throughout the EU. If this is not the case, the MS will end up having even more significant disparities in dealing with these issues. Most of the ISS rely on international transactions. For example, people often use Airbnb to make a reservation when going on vacation or abroad. Since the ISS know no barriers, the rules regulating them only make sense when they are harmonized on the EU level.

7. Conclusion

The process of digitalization has commenced, and it is emerging on a massive scale. This trend has added notable worth to society, helping the efficient allocation of confined resources, rising of efficacy, and assisting people in dedicating more time for themselves by easing everyday life.

[91] See footnote 33 and 44 hereinabove.

The innovators proved that they can change the way the world functions by facilitating communication among divergent cultures and promoting sustainable development. This is why they must be allowed to thrive. However, the recent (lack of) rules also need to be modernized in order to keep up with the innovations to come. Right now, the market is heavily relying on outdated directives, which were drafted and enacted in a time when sharing economy was just in infancy. Therefore, the concept does not fit the rules in the directives, and the MS were forced to deal with the legal uncertainty by themselves. This has led to various diverse arrangements across the countries that are only held together by the directives and judgments of the CJEU. However, since the activities of the ISS are not limited by frontiers, the same shall apply to legal regulations – they should be administered to the internal market, thus contributing to the expansion of the trade-in services between various MS. If the market is left under-regulated for a prolonged period of time, that may become a root cause for unfair competition, growing systemic risks, and legal uncertainty for the market participants. Therefore, proper legislation should be developed that would be conducive to both risk mitigation and innovation support.