Intermediary Platforms – The Contractual Legal Framework

Marie Jull Sørensen*

* Co-editor of Nordic Journal of Commercial Law. PhD, Master of Laws. Associate Professor at the Department of Law, Aalborg University, e-mail: mjs@law.aau.dk.

ABSTRACT

From a consumer protection perspective, this contribution analyses four contractual legal frames potentially applicable to the triangular contractual structure of online intermediary platforms. For each framework, criteria are derived, and it is discussed how and if these criteria are met in regards to intermediary platforms. The legal frameworks are 1. The Platform as employer; 2. The platform as the main contracting party; 3. The Platform as intermediary and 4. The platform as a secondary obligated party. It is discussed how the intermediary platforms challenge some of the basic considerations behind some of the legal frameworks. The contribution helps qualify the ongoing deliberations of legislators and academics on (re-)framing the legal frame(s) of intermediary platforms.

1. INTRODUCTION

Intermediary platforms are the key drivers of the platform economy. Under the positive value-laden concept of 'sharing economy', the platforms experienced goodwill in the early rise of the platform economy. However, following the honeymoon period, first the affected 'old' businesses raised the issue of unfair competition and demanded a level playing field. Later, concerns about the challenge of protection paradigms of employees and consumers were voiced. The element of 'sharing' was not as prevailing for some of the platforms as first advertised and therefore, detached from the concept of sharing, the platforms are to be governed by the existing legal framework of contract law. Here, the identification of the parties plays a crucial role in order to establish their legal position. However, preliminary research has shown that the platforms' triangular contractual structure (the two-sided structure) does *not* fit well into existing legal frames based on a two-party structure ('chain'/'tube'). Evidently, challenges arise especially in the areas where legislators have intervened into the principle of freedom of contract. This legal intervention has taken place in the areas where a weaker party can be identified such as in the case of the relationship between a consumer and a trader and an employee and an employer. Thus, especially consumers have been a still increasing object for protective legislation in Denmark and in the EU. If the legal paradigm of consumer protection does not apply to the platform structure, the consumer is not protected, and the policy question then arises, whether this is a desirable consequence of the platforms. If not, action needs to be taken in order to either make the existing protective legislation apply or to make a new consumer protection scheme suited for the platform economy. Such a scheme does not necessarily need to entail legislation but could also be facilitation of self-regulation or utilising digital platforms as partners in the regulation – at least in the areas where the platforms have clear incentives to behave in a way compatible with

public policy. But before engaging into developing new legislation or finding other alternatives, it is important to establish the extent of application of the existing legislation in relation to platforms, and therefore, this article will provide an insight into how platforms fit into four legal frames relevant for consumer protection. The four legal frames are identified within Danish law, and they are selected because of their potential influence on consumer protection when applied on the triangular business structure of intermediary platforms. The frameworks are: 1. The platform as employer; 2. The platform as the main contracting party; 3. The Platform as intermediary and 4. The platform as a secondary obligated party.[1] In framework 1 and 3, it is relevant to delimit the scope of the article to peer2peer (P2P) intermediary platforms on which a peer-provider and a peer-customer register in order to enter into to the main contract with each other. In framework 2 and 4, the provider can also be a business since the focal point in these frameworks is to determine if the platform instead of or maybe along with the provider can be liable for performance of the main contract. However, in all frameworks, the article does not include social platforms and search engines etc. 'Peer-provider' is to be understood as a private person selling his labour or his goods – however, much of the uncertainty is exactly related to whether such a private person is actually something else when acting through the platform. The P2P platform, in particular, raises questions in regards to consumer protection of the peer-customer[2] and also protection of the non-business peer-provider. The legal frameworks to be discussed here are focused primarily on the contractual relation between the three parties. The methodology of the analyses presented in this article is legal dogmatic as the aim primarily is to establish the legal position of consumers in the situation where the current Danish legal paradigm of consumer protection is faced with P2P or B2C intermediary platforms. The focus in the article will be on Danish law with incorporation of views and cases of other jurisdictions in order to qualify the discussion of the legal frameworks.

'The jury in this case will be handed a square peg and asked to choose between two round holes' (District Judge Vince Chhabria, California).[3] The quote is frequently used by scholars because of its perfect illustrative metaphor of the core legal challenge with intermediary platforms – not just in relation to the specific dispute in the case. The

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[1] Parts of this contribution contains content from a book chapter in Danish, Sørensen, Marie Jull, Digitale formidlingsplatforme: Disruption af forbrugerretsparadigmet? in Dahl, Børge; Riis, Thomas; Trzaskowski, Jan, *Festskrift til Peter Møgelvang-Hansen*, 2016, 185 and an article in Danish, Sørensen, Marie Jull, Digitale formidlingsplatforme - formidlingsreglen i dansk forbrugerret, *Ugeskrift for Retsvæsen (UfR)*, U2017B.119.

[2] Busch, Christoph; Schulte-Nölke, Hans; Wiewiórowska-Domagalska, Aneta and Zoll, Frederic, The rise of the Platform Economy: A new Challenge for EU Consumer Law? *EuCML*, 1 2016, 3.

[3] *Cotter v. Lyft*, Inc., 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

quote is from a US case regarding the legal status of a platform-driver on the platform Lyft (a 'driver-on-demand'-platform). The platform-driver (the 'square peg') claimed to be an employee of the platform (a round hole) and not an independent contractor (the other hole). The quote illustrates that establishing the legal position of this platform worker comes with much difficulty, as set legal definitions might not be compatible with the 'new' reality of intermediary platforms. This is not only the case in the US and not only the case with platform workers. The existing carpet of neatly crafted and fairly close attached legally defined boxes might not fit when the real life of intermediary platforms is rolled out over the carpet. The real life platform participants and transactions will not fall into the boxes, as they do not fit the legal definition of the boxes. Thus, leaving the platforms floating over the boxes, giving room for the platforms to define themselves and creating their own 'legal' regimes with the risk of legal uncertainty and lack of protection for platform users and others.

Most platforms define themselves merely as providers of a facilitating tool and, therefore, only as intermediaries. For this contribution, the term 'intermediary' is not to be understood as a strict legal term, but only as someone who establishes contact between two parties with variant degrees of interference and control. According to contract law, as an intermediary, the platform has no contractual obligations in regards to the contract between the two users. The existing substantial consumer protection regulation based on the existence of a weak party vis-á-vis a business[4] does not normally apply to P2P transactions in regards to the main contract. It will, however, apply in the user-platform contract. The four legal frames all entail a framing where consumer protection *might* be triggered because of a possible alternative identification of either the platform or the peer-seller.

There are many variations of intermediary platforms[5] – also within P2P platforms - but it is not for this article to categorise them. The analyses of the four legal frames will be conducted at a *general* level deriving criteria and discussing their applicability on platforms.

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[4] ECJ case law has developed a 'system of protection' which also entails other presumptions. See for example Banco Español de Crédito, C-618/10, para 39 - 42 ECLI:EU:C:2012:349, 14 June 2012. See also Schulte-Nölke, Hans, The brave new world of EU consumer law – Without consumers, or even without law?, *EuCML* 4 (2015).

[5] Se blandt andre Tilenius, Stephanie, The New Curated Consumer Marketplace Model: 10 Criteria For Success, *Forbes* 10/03/1013 and Cand. jur. Styrishave, Michael, Digitale platforme i en kontraktretlig kontekst, (2016, Master Thesis, Aalborg University).

2. LEGAL FRAMEWORKS

2.1. THE PLATFORM AS AN EMPLOYER

Establishing whether the relation between the platform and the peer-provider is an employment relationship is of course relevant only when the platform is a labour-platform – a peer-provider selling his labour (such as transportation or cleaning) to the peer-customer. If the peer-provider is actually an employee of the platform, it will affect the contractual relationship with the peer-customer, and in addition, the peer-provider will be protected by labour law.[6] In the case of an employment relationship between the peer-provider and the platform, the peer-customer will have entered into a contract with the platform, providing that the peer-provider has not somehow gone out of his mandate as employee. The peer-customer can then claim consumer rights against the platform as his counter party in the main contract.

In Denmark, no court cases have been filed regarding the issue of employment on intermediary platforms. Through an analysis of Danish case law regarding the definition of employee/employer in general, Danish Scholar Ole Hasselbalch has derived five elements to be considered when determining whether a person is to be regarded as an independent contractor or an employee:[7] 1) The degree of the potential employer's right to direct and control the work performed by the person in question (subordination); 2) The arrangement of the financial relationship between the parties (for example, how the pay is disbursed and calculated and who is the bearer of the entrepreneurial risk and provider of the material); 3) The obligation to carry out the work personally or the right to have someone else perform the work; 4) The personal relationship between the potential employee and employer, including the place of work and 5) The potential employee's social and

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[6] See for elaboration on labour protection, for example: De Stefano, Valerio, The rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy, International Labour Office inclusive Labour Markets, Labour Relations and Working Conditions Branch. Geneva: ILO, 2016, Conditions of Work and Employment Series No. 71. There might be slight differences between Member States' and EU's definition of the scope of labour law in regards to 'worker' and 'employee'. The EU is known to have a broad scope both in the high end in regard to business managers and in the low end in regards to accepting a low threshold of working hours see Christensen, Emma Engelsted and Jensen, Julie Pia, *Den kommende ferielov – lønmodtagerens retsstilling*, 2017, https://projekter.aau.dk/projekter/files/280805747/Den_kommende_ferielov___Lonmodtagerens_retsstilling.pdf.

[7] Hasselbalch, Ole, *Ansættelsesret & Personalejura*, 4. udgave, 2012, p. 31 et seqq. The 5 elements are translated by Jens Kristiansen in The Concept of 'Employee': The Position in Denmark, in Waas, Bernd (ed) and van Voss, Guus Heerma, *Restatement of Labour Law in Europe, The Concept of Employee*, I, 141.

occupational position, especially whether the worker is primarily considered to be comparable with an employee or a self-employed worker (an overall assessment). The labour platforms come in different shapes with different ways of contracting and interacting with the peer-provider. Presumably, for those platforms who provide a single service (e.g. transportation, cleaning, delivery of food or other etc.) and where this single service is connected to a platform brand with a distinct service profile (e.g. Uber), it will be easier to fit the platforms into the category of employer. If the platform instructs/suggests to the peer-provider to perform the service in a certain way and sets out the legal frame as well as the operational frame (payment system, routing software) to fulfil the main contract, this will address the first of the five elements presented. If the platform sets the price for the service and controls the payments and also limits the supplier to perform the service personally, this will address the second and third element. Labour platforms can be based both on white-collar labour and blue-collar labour. If the peer-provider has to work away from home, which is typical for blue-collar labour, this might speak in favour of an employee/employer relationship, especially if the work does not require a specific skill. Lastly, and related to element number 5, if companies providing similar services in a similar way usually are considered employers, this will speak in favour of an employee/employer relationship. In general, what can be regarded as the pivotal point in categorising a peer-provider as an employee is the fact that most peer-providers have the freedom to decide when and for how long they want to work and to a certain extend also what tasks they accept. Thus, one of the traditionally most important elements in the employment relationship – the fixed working hours – is not present. This element will vary in importance depending on the type of platform work. In addition, especially in regards to the transportation platforms, another element speaking against an employment relationship is the fact that the drivers use their own material (cars or bikes). This is typically a fact that will indicate that the driver is an independent contractor or self-employed person. The Danish court cases against Uber drivers have not been concerned with employment relationships but have focused on illegal transportation of passengers.[8]

Within EU labour law, the definition of employee has been subject to several ECJ cases, in particular within the area of free movement of workers[9] and competition.[10] There have not yet been cases targeted

[8] U2017.796 Ø. The Uber drivers were convicted of illegal transport of passengers among other because of lack of the necessary permits.

[9] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reaffirming the free movement of workers: rights and major developments, COM(2010)373 final.

specifically at platform workers. The EU Commission welcomes the platform economy but also acknowledges the challenges it brings in regards to the different considerations of the three parties.[11] In the agenda for the collaborative economy, the Commission states that:

> In order to help people make full use of their potential, increase participation in the labour market and boost competitiveness, while ensuring fair working conditions and adequate and sustainable social protection, Member States should:
>
> - assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models;[12]

Also in this specific agenda in regards to the three party relations, the Commission refers to the definition of 'worker' developed in ECJ case law.[13]

Here, a cumulative list consists of three criteria to be assessed on a case-by-case basis (text in parentheses added by the author).

- the existence of a subordination link; (distinction between self-employed and worker)
- the nature of work; (genuine activity) and
- the presence of a remuneration (distinction between a volunteer and a worker)

The subordination link refers to the platform directing the choice of activity, the remuneration and the working conditions. In further elaboration on the three criteria in regards to collaborative economy, the Commission makes clear that in order to meet the first criteria, it is not sufficient merely to pass on payments from one user to another. However, if the peer-provider is not free to choose what services she provides and how and for how much, this will speak in favour of the platform being subordinate. To meet the first criteria, it is not necessary for the platform to actually manage and supervise continuously. The

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[10] Schiek, Dagmar; Gideon, Andrea (2018): Outsmarting the gig-economy through collective bargaining – EU competition law as a barrier to smart cities?, *International Review of Law, Computers & Technology*.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda for the Collaborative Economy, COM(2016)356 final, 2 et seq.

[12] A European Agenda for the Collaborative Economy, COM(2016)356 final, 13 et seq.

[13] A European Agenda for the Collaborative Economy, COM(2016)356 final, 12 and Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Reaffirming the free movement of workers: rights and major developments, COM(2010)373 final, 4-6 (with references to ECJ case law).

second criteria aims at leaving out "services on such a small scale as to be regarded as purely marginal and accessory."[14] The performed service by the peer-provider must be an activity with economic value that is effective and genuine. Finally, to meet the last criteria, the work must not be volunteer work where the peer-provider does not receive any remuneration.

As mentioned, the ECJ has not yet had the opportunity to apply these criteria on a platform worker. The closest it gets is in C-434/15 Elite Taxi where the Court had to decide whether Uber is an information society service or a transport service. The AG, M. Szpunar, states very clearly that Uber drivers are not necessarily employees but could also be subcontractors, and adds that "The controversy surrounding the status of drivers with respect to Uber… is wholly unrelated to the legal questions before the Court in this case."[15] However, the AG also makes very clear that:

> While this control [the control performed by Uber towards the drivers] is not exercised in the context of a traditional employer-employee relationship, one should not be fooled by appearances. Indirect control such as that exercised by Uber, based on financial incentives and decentralised passenger-led ratings, with a scale effect, makes it possible to manage in a way that is just as — if not more — effective than management based on formal orders given by an employer to his employees and direct control over the carrying out of such orders.[16]

The ECJ did not go into similar statements about the employee status of the Uber drivers but it did adopt the argumentation regarding control in their argumentation for Uber not being merely an information society service:

> … In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

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[14] A European Agenda for the Collaborative Economy, COM(2016)356 final, 12-13 et seq.

[15] Advocate General in ECJ C-434/15, Elite Taxi, [2017] ECLI:EU:C:2017:981, para 54.

[16] AG in C-434/15 Elite Taxi, para 52.

> That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as 'a service in the field of transport' within the meaning of Article 2(2)(d) of Directive 2006/123. [17]

The Uber case can be interpreted as bringing the Uber driver a step closer to being regarded as an employee, but it is important to note that the ECJ did not address this issue directly. However, the question regarding the employment status of platform workers has been addressed in different countries.[18] In the UK Employment Tribunal's case, Mr. Y. Aslam vs. Uber[19], the Tribunal found that Uber de facto controlled the drivers (as if they were workers[20]) regardless of what the formal contract stated; "… it follows from all of the above that the terms on which Uber rely do not correspond with the reality of the relationship between the organisation and the drivers…"[21] 'The reality' was documented by drivers and it revealed for example how Uber warned the drivers when the drivers didn't accept rides or cancelled rides while having the Uber App switched on. If the rating benchmark was not met or a minimum number of cancellation was exceeded, the sanctions could be a temporary deactivation or even a total deactivation of the driver's account. Similar 'realities' can be seen in other cases regarding Uber[22] and similar issues have been raised in cases regarding platforms offering other services than passenger transportation such as plumbing and courier services.[23] The UK Court accepted that the driver's

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[17] C-434/15 Elite Taxi, para 39 and 40.

[18] See presentation of some of the law suits at http://uberlawsuit.com/.

[19] UK Employment Tribunal, Case 2202550/2015 *Mr. Y. Aslam, Mr. J. Farrar and others vs. Uber B.V., Uber London Ltd and Uber Britannia Ltd.* The ruling was appealed to the Employment Appeal Tribunal but was dismissed.

[20] In the UK 'worker' has a broader definition than 'employee'. The difference is not to be which considerations to take into account but relates to the boundaries. Thus, these boundaries are broader in relations to 'worker'. Jones, Benjamin and Prassl, Jeremias in The Concept of 'Employee': The Position in the UK, in Waas, Bernd (ed) and van Voss, Guus Heerma, *Restatement of Labour Law in Europe, The Concept of Employee*, I, 753 et seqq. In the Tribunal case, the difference between 'employee' and 'worker' was not up for discussion.

[21] UK Employment Tribunal, Case 2202550/2015 *Mr. Y. Aslam, Mr. J. Farrar and others vs. Uber B.V., Uber London Ltd and Uber Britannia Ltd.,* para 96.

[22] See for example California Unemployment Insurance Appeals Board, 2015, Case No. 5371509 – reopened, and Labour Commissioner, California, Case NO. 11-46739, *Berwick vs. Uber Technologies*.

[23] The cases are mentioned in Jamie Grierson and Rob Davies, Pimlico Plumbers loses appeal against self-employed status, *The Guardian*, Fri 10 Feb 2017 15.40 GMT,

status as worker was only relevant when the driver is actually logged on to the App. However, also during the time the driver is *not* logged on, the driver can experience so-called 'nudging'[24] from Uber.[25] Through nudging, Uber will 'gently' push the drivers to work more or work specific places by sending messages. Even though the UK case dealt with the UK 'worker' definition which is different from the Danish definition of employee, the case still illustrates an important point when dealing with intermediary platforms with a high level of self-made contractual framing. Misclassification of platform workers through linguistics in the contract is not decisive for how to perceive a peer-provider. The challenge here as in most cases regarding these platforms is, however, that if the legal position of the platform and its users mainly are to be determined on a case-by-case basis because of unclear legislation, this will not necessarily be sufficient for the majority of platform users, because the starting point (before cases are filed) will always be the legal frame set by the platform in its user-platform contracts.

In the US (more specifically in California), several cases have also been tried and some have been settled. In the California cases, the so-called Borello test is applied listing a number of elements to consider when determining whether a putative employee is to be regarded as such.[26] The elements of the test are very similar to the elements considered in Danish and UK case law. Pursuant to the Borello test, the question is "whether the person [or company] to whom service is rendered has the right to control the manner and means of accomplishing the result desired"[27]. It is also referred to as the 'right of control'-test. As is also the case in the UK cases, the California cases focus on *labour* law rights and are therefore interpretations of the definition of an employee in labour law. However, if an

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https://www.theguardian.com/business/2017/feb/10/pimlico-loses-appeal-against-plumbers-worker-status-in-gig-economy-case and Sarah Butler and Hilary Osborne, Courier wins holiday pay in key tribunal ruling on gig economy, The Guardian, Fri 6 Jan 2017 19.39 GMT, https://www.theguardian.com/business/2017/jan/06/courier-wins-holiday-pay-in-latest-key-tribunal-ruling-for-gig-economy.

[24] 'Nudging' is "any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid", see Loewenstein, George and Chater, Nick, Putting nudges in perspective, *Behavioural Public Policy* (2017) 1, 27 with references.

[25] Rosenblat, Alex and Stark, Luke, Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers, *International Journal of Communication,* 2016, 10, 3758–3784 and Rosenblat, Alex, "The Truth About How Uber's App Manages Drivers", *Harvard Business Review*, April 6, 2016.

[26] Supreme Court of California, March 23, 1989, No. S003956, *S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations.*

[27] Supreme Court of California, March 23, 1989, No. S003956, S.G. Borello & Sons, Inc. v. *Dep't of Industrial Relations.*

employee/employer relationship is established within labour law, this will presumably strongly indicate that the contractual relation with the peer-customer will be affected. Several cases in California have ruled that specific drivers on the platforms Uber and Lyft are to be regarded as employees and not independent contractors.[28] In line with the UK case, the California cases emphasise that the reality differs from the formal contract, e.g. "The reality, however, is that Defendants (Uber) are involved in every aspect of the operation."[29] We have yet to see a class action ruling in this area.[30] Attempts so far in the US have either been rejected by the court on the grounds that the cases are not suited for a class action[31] or a settlement has been reached before the trial[32].

Without going into detail, in summary, the foreign courts have emphasised that the platforms (despite not being expressed in the contract/terms of use) control the peer-provider through sanctions (or warnings of sanctions), if the quality goals set by the platform are not met. The platforms have the power to deactivate the account at any time ('terminate at will'). Also, some platforms set standards for the material (cars) and run background checks on the providers. In addition, the peer-providers are prevented from expanding their 'business' and might not be able to set their own prices or charge tips. Finally, some platforms offer some kind of instruction, guidance or education for their peer-

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[28] See for example Labour Commissioner, California, Case NO. 11-46739*, Berwick vs. Uber Technologies*. The case is mentioned in http://qz.com/430583/a-legal-victory-for-an-uber-driver-in-california-could-challenge-its-business-model/ og http://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor. The ruling has been appealed. Same result: California Unemployment Insurance Appeals Board, 2015, Case No. 5371509 – reopened.

[29] Labour Commissioner, California, Case NO. 11-46739*, Berwick vs. Uber Technologies*. The case is also mentioned in http://qz.com/430583/a-legal-victory-for-an-uber-driver-in-california-could-challenge-its-business-model/ and http://www.npr.org/sections/thetwo-way/2015/06/17/415262801/california-labor-commission-rules-uber-driver-is-an-employee-not-a-contractor. The ruling has been appealed.

[30] In United States District Court, Northern District of California, C-13-3826-EMC and C-13-cv-03826-EMC, 2016, *O 'Connor vs. Uber Technologies*, the Court denies O'Conner et. al. motion for preliminary approval of a settlement agreement with Uber on the grounds that it is unfair for the drivers.

[31] See for example United States District Court for the Southern District of Florida, Civil Action No. 16-23670-Civ-Scola, *Sebastian A. Rojas vs. Uber Technologies, Inc. and others.*

[32] Class action was granted to O'Connor against Uber by the United States District Court, Northern District of California in Case No. C-13-3826 EMC, 2015. The parties later agreed on a settlement, but a preliminary approval was denied by the same court in C-13-3826-EMC and C-13-cv-03826-EMC, 2016.

providers.[33] Having in mind that platforms are diverse, these elements all speak in favour of an employee/employer relationship. On the other hand, the platforms have argued that they *do not* control the peer-providers, because (and also according to their own standardised contract/terms of use) it is solely up to the peer-providers *when* they want to work (check in on the App) and *what tasks* they accept on the App. In addition, some of the peer-providers bring their own material and pay for their own expenses in regard to this material.

Even though many cases so far have ruled in favour of the peer-providers (the employees), the California courts have been reluctant to state with much certainty that their rulings should apply in similar cases without a case-by-case evaluation.[34] Some of the thoughts are presented in the following quote from District Judge Vince Chhabria from the Northern District of California. And even though Mr. Chhabria works in another judicial system, the cases have shown similar challenges cross-border in relations to finding the right legal box for peer-providers on labour platforms.

> As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. Perhaps Lyft drivers who work more than a certain number of hours should be employees while the others should be independent contractors. Or perhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here.[35]

The quote is also valid in Denmark and emphasises that the criteria set up for defining an employee is not appropriate when dealing with platform workers. The judge reveals his concern with the case-by-case evaluation based on outdated criteria, and the jury is forced to put the platform worker (the square peg) into one of two unfit boxes (two round

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[33] See the facts of United States District Court, Northern District of California, C-13-cv-04065-VC, 2015, *Cotter vs. Lyft*.

[34] The Court has denied to make a so called Summary Judgment in Case No. 13-cv-04065-VC, Order Denying Cross-Motions for Summary Judgment, United States District Court, Northern District Of California, *Cotter vs. Lyft*.

[35] Vince Chhabria, United States District Judge in Case No. 13-cv-04065-VC, Order Denying Cross-Motions For Summary Judgment, United States District Court, Northern District Of California, *Cotter vs. Lyft*.

holes). Along the lines of Mr. Chhabria, some scholars have suggested a category of employee suited for peer-providers on intermediary platforms, e.g. an 'independent worker'.[36] It varies to which degree the scholars believe the same labour law rights should apply, but they do agree that this platform worker is in need of protection. An obvious downside if a new category of 'worker' is introduced is that if this worker is not granted the same rights and benefits as an employee, businesses in general might feel tempted to transform parts of their labour force into this 'employee-light' category. In regard to consumer protection, such a new category will more easily place the peer-provider in an employment-like relation with the platform and this will result in the platform being the main contracting party of the peer-customer triggering consumer protection for the peer-customer.

2.2. THE PLATFORM AS THE MAIN CONTRACTING PARTY

In contract law, it is presumed that you are a party to the contract you engage in, unless it is very clear that you are not.[37] As long as no specific legislation regulates the contractual role of platforms in the triangular structure, it must thus be a precondition for the platform in order to avoid being considered the main contracting party to clearly present itself as merely an intermediary when the provider and the peer-customer engage into a contract through the platform.

In line with this presumption, the Danish courts and the Danish Consumer Complaints Board[38] have resolved a number of cases. After performing an overall assessment, the High Court of Eastern Denmark ruled in U2016.1062 Ø that an online travel agency platform had *not* provided sufficient information of its role as merely an intermediary. The terms and conditions in the user contract contained an opt-out clause,

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[36] See for example Harris, Seth, D. and Krueger, Alan B., A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker', *Brookings*, December 2015.

[37] Lynge Andersen, Lennart and Madsen, Palle Bo, *Aftaler og Mellemmænd*, 2017. See also Rognstad, Ole-Andreas, Mellommenns sivilrettslige ansvar ved handel på internett, TemaNord 2004:512, s. 27. Same position is taken in SWD(2016) 163, Commission staff working document guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices accompanying the document communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions a comprehensive approach to stimulating cross-border e-commerce for Europe's citizens and businesses, section 5.2.2. Also, if a platform performs commercial communication on behalf of a peer-provider, the ID of the peer-provider must be clearly stated, cf. Lov om tjenester i informationssamfundet, herunder visse aspekter af elektronisk handel, no. 227 of 22/04/2002 (Law on E-Commerce) para 9(1).

[38] The Consumer Complaints Board is an independent board that decides consumer complaints. The Consumer Complaints Board consists of a chairman (a judge) and representatives of consumer and business organisations.

and in the footer and header as well as right before and after payment, this opt-out clause was also mentioned. The overall assessment included the *interpretation* of the information given. The Court stated that it cannot "be presumed that the ordinary consumer, solely based on this information, can deduct the consequences for his legal position in his relations to" the platform. This line of argumentation entails that a correct information given in a correct way about the platform being only an intermediary is not necessarily sufficient if the peer-customer (the consumer) is not able to understand the *consequences* of this information. This extended *qualification* of the duty to inform is in line with the tendency of consumer protection in regards to the duty to collect *informed* legal consent ("express consent and acknowledgement")[39] and also in line with the requirements of terms in consumer contracts in regard to establishing whether a term is clear.[40] Other information on the platform's website referred to the travel agency as 'technical organiser' and even though this information might point in favour of the platform, it was not considered decisive for the case. Also, it was not considered pivotal that travel agencies normally do not enter into contracts in their own name.[41]

Following this case, the other regional court in Denmark ruled opposite when it tried a case concerning an online travel agency platform. In U2018.574V, the Court emphasised that from the homepage of the travel agency, it appears that the customer can choose between more than one million overnight accommodations and that the payment is to be paid directly to the accommodation. The name and address of the accommodation as well as price and duration was provided on the confirmation of the reservation. Also on the confirmation, it was stated that payment was to be made directly to the place of accommodation and it was also the place of accommodation that determined the fees for cancellation and alterations. The confirmation also made a referral to contact the place of accommodation if any problems with the booking occur. As a last point, the Court emphasised that the terms and conditions found on the agency's homepage states that the customer enters into a contract directly with the accommodation and that the agency only is a liaison between the customer and the accommodation. Based on these facts and without

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[39] Directive 2011/83/EU Of The European Parliament And Of The Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 7(2).

[40] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Article 5.

[41] Further analyses of the case, see Østergaard, Kim, Pakkerejsedirektivets krav om et almindeligt, forståeligt, tydeligt, klart og letlæseligt sprog, in Dahl, Børge; Riis, Thomas; Trzaskowski, Jan, *Festskrift til Peter Møgelvang-Hansen*, 2016, 564 et seqq.

further reasoning, the Court stated that the customer should have understood that the agency was *no*t the main contracting party. The Court did not attach importance to the fact that the agency tried to help solve the problems the customer encountered because of non-performance from the reserved place of accommodation (help to find other accommodation as well as payout of compensation). Neither did the Court mention that the customer actually typed in name and credit card information in the booking flow. Albeit lacking in detailed reasoning, this court case shows that there is a limit to how 'inattentive' a customer can be. The customer testified that he did not know that the platform was not the main contracting party. Different from the earlier court case, the Court in this case does not seem to go into interpreting the information given on the platform and in the confirmation. The Court simply acknowledges that the information is given and even though the platform does not explain the consequences of its contractual disclaimer (as was one of the focal points in the earlier case), it seems that the Court finds that the information is given in such a clear-cut manner that an explanation is unnecessary.

Normally, the contract will form the base of the legal position of two parties. In line with consumer protection legislation, the mentioned case law as well as Board cases indicate that in regards to consumer contracts, there is a special consideration to be taking into account. As the weaker party, the (average)[42] consumer must be protected against agreed standard terms such as opt-out clauses which (potentially) is to the detriment of her. Information on such terms must be provided in a clear and intelligible manner. Despite an opt-out clause in the terms and conditions, the additional information as well as the expectations of the consumer based on the behaviour of the platform will be decisive in categorising the platform as the main contracting party.[43] Thus, case law emphasises that the opt-out clause in the terms and conditions should be supplemented by a clear indication of who the peer-provider is and this should happen preferably at the beginning of the booking flow. Also, it will help make the identification of the peer-provider clear, if the supplier explicitly is mentioned as the one performing the obligations in the contract. Even though the platform in giving information uses the correct legal terms, case law indicates that additional information and

[42] The notion of 'average consumer' is developed in ECJ case law and incorporated into recent EU consumer protection regulation and Danish case law and statutory law. See Østergaard, Kim, Pakkerejsedirektivets krav om et almindeligt, forståeligt, tydeligt, klart og letlæseligt sprog, i Dahl, Børge; Riis, Thomas; Trzaskowski, Jan, *Festskrift til Peter Møgelvang-Hansen*, 2016, 560 et seqq. with references. See also among others Incardona, Rossella; Poncibó, Cristina, The average consumer, the unfair commercial practices directive, and the cognitive revolution, *Journal of Consum Policy*, 2007, 21-38.

[43] See also the application of the same principle in case law in Rechnagel, Hardy, Endnu en Sø- og Handelsretsdom om speditørens retlige status som fragtfører, *UfR,* U1980B.47.

matching behaviour also is necessary in order to ensure that the consumer *understands* that the platform is not the main contracting party.

In late 2016, the ECJ too had the opportunity to rule in a case regarding a platform that potentially gives the impression of being the main contracting party to a consumer. In C-149/15 Wathelet, the Court interprets the concept of 'seller' stemming from the Sales Directive.[44] The Court emphasises that in order to be perceived as a 'seller', you do not have to be the owner of the good. The GA, H. Saugmandsgaard Øe, expresses the opinion that when the platform gives the impression of 'seller', the intermediary platform makes an 'irrevocable decision'[45] that despite the intended contractual constellation is crucial for the liability of the platform. The ECJ agrees with the GA and leaves it up to Member States to decide, *when* an intermediary gives the impression of a seller. As help for performing such an assessment, the ECJ provides some guidelines: The intermediary can be regarded as the seller if:

> "he fails to duly inform the consumer that he was not the owner of the goods in question, which involves, on the part of that court, taking into consideration all of the circumstances of the case… The degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer and the latter's behaviour may, in particular, be relevant in that regard in order to determine whether the consumer could have understood that the intermediary was acting on behalf of a private individual."[46]

Danish case law seems to include these elements as emphasis is placed both on how and what information is provided and on the perception of the consumer.

2.3. THE PLATFORM AS A MERE INTERMEDIARY

Sénéchal defines the intermediary platforms as

> … a hybrid figure oscillating between distribution on their own behalf and intermediation with certain characteristics of the commercial agency while radically deviating in that the online

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[44] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

[45] GA in ECJ C-149/15, *Wathelet*, [2016] ECLI:EU:C:2016:840, Para 75.

[46] C-149/15 *Wathelet*, Para 44. See case comments in Dodsworth, Timothy J., Intermediaries as Sellers – a commentary on Whathelet, *European Journal of Consumer and Market law*, issue 5, 2017, 213.

> platform has not the economic dependence of a commercial agent.[47]

The quote underlines that the platforms do not seem to fit into the commercial agent box. Consequently, if the platforms are what they claim they are – merely intermediaries - the question then is how they are regulated – if regulated at all. Besides potentially being governed by sectorial laws, the intermediary platforms are not governed by specific legislation in relations to the triangular structure other than the E-commerce Directive.[48] However, this is only partly true for the intermediary platforms covered by Danish law.

2.3.1. THE DANISH INTERMEDIARY RULE

The Danish intermediary rule was first introduced in the new Danish Consumer Contract Act of 1977 governing off premises selling and the right of withdrawal.[49] The rule constitutes a part of the consumer definition. In Denmark, a consumer is a person who primarily acts outside his trade or business.[50] A consumer contract is a contract between a consumer and a natural or legal person acting *within* his trade or business.[51] The intermediary rule adds: "…. the law also applies for contracts on goods and services from non-traders, if the contract is concluded or mediated through or with the help from a business."[52] Basically, it means that when two peers enter into a contract through a (business) platform, this contract becomes a consumer contract. The peer-customer is then protected as a consumer vis-à-vis the other private person (the seller). The latter then has to comply with consumer law. The Danish intermediary rule has lived a somewhat quiet life but has become pertinent with the rise of the platform economy.

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[47] Sénéchal, Juliette, The Diversity of the Services provided by Online Platforms and the Specificity of the Counter-performance of these Services - A double Challenge for European and National Contract Law, *EuCML* 5, 2016, 41.

[48] It must be presumed that an intermediary platform which is governed by sector specific law also is a service provider within the scope of the E-commerce Directive. See a discussion on the application of the E-commerce Directive and platforms in Cauffman, Caroline, The Commission's European Agenda for the Collaborative Economy – (Too) Platform and Service Provider Friendly? EuCML 6, 2016, 235 – 243.

[49] See for more information on the Danish intermediary rule: M. J. Sørensen, Digitale formidlingsplatforme - formidlingsreglen i dansk forbrugerret, *UfR,* U2017B.119 and M. J. Sørensen, Uber – a business model in search of a new contractual legal frame, *EuCML* 1, 2016, 15 -19.

[50] The Consumer Contract Law, no. 1457 of 12/17/2013, para 2(3) as well as all other consumer protection laws within the area of civil law.

[51] The Consumer Contract Law, no. 1457 of 12/17/2013, para 2(1) and other civil law legislation on consumer protection.

[52] Now to be found in The Consumer Contract Law, no. 1457 of 12/17/2013, para 2(3) as well as all other consumer protection laws within the area of civil law.

In 1977, the Danish legislators were of the opinion that the need for protection of the peer-customer "presumably significantly" is the same when contracting *through* an intermediary as it is when the intermediary *itself* is the contracting party.[53] In the preparatory work, it is clarified that the peer-customer in both situations negotiates with a professional, but the peer-customer is not aware that the main contracting party (the provider) is not a professional, when the intermediary is only an intermediary. This is underlined by referring to the fact that the intermediary often puts a standard contract at the disposal of the parties.[54] In 1978, the intermediary rule was added to the Danish Sales Act for the same reason[55]: "The crucial point is that the peer-customer negotiate with a professional who often possess a superior level of expertise."[56] The preparatory work goes on to state as an example that goods bought at auctions performed by a business platform should be seen as a consumer purchase if the good is to be used for private purposes by the consumer.

The intermediary rule does not refer to known agency figures.[57] It consists of three cumulative criteria: 1) The intermediary must act within his trade or business;[58] 2) The intermediary must play an active part in the transaction between the peer-customer and the peer-provider;[59] Lastly, 3) the intermediary must not be the main contracting party or act in its own name. Of specific interest is the *second* criteria, which will be unfolded in the following paragraph.

Active part

To be regarded as an active part under the Danish intermediary rule, the intermediary has to do more than just connect the two contracting parties. If the intermediary only provides space on its website, a billboard or other passive possibilities of exchange of contact information, according to the preparatory work, this will not constitute

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53 L 39, 1977 om Forslag til Lov om visse forbrugeraftaler, comments on Para 1(4). (preparatory work of the Danish Consumer Contract Act)

54 L 39, 1977 om Forslag til Lov om visse forbrugeraftaler, comments on Para 1(4). (preparatory work of the Danish Consumer Contract Act)

55 Bekendtgørelse af lov om køb, no 140 of 17/02/2014.

56 L 119, 1978-1979 Forslag til Lov om ændring af købeloven, comments on Para 4a(2). Later repeated in L 220, 2004 om visse forbrugeraftaler og om ændring af lov om forsikringsaftaler og lov om beskatningen af pensionsordninger m.v., Section 4.2.1.1.

57 See Karstoft, Susanne, Retlig regulering af 'elektroniske loppemarkeder', *UfR*, U2006B.55.

58 L 39, 1977 om Forslag til Lov om visse forbrugeraftaler, comments on Para 1(4). and Betænkning no. 845/1978 om forbrugerkøb, 59. (both preparatory work of the Danish Consumer Contract Act).

59 L 39, 1977 om Forslag til Lov om visse forbrugeraftaler, comments on Para 1(4) and L 27, 1994 om Forslag til Lov om ændring af lov om aftaler og andre retshandler på formuerettens område og visse andre love, comments on Para 38a.

as an active intermediary.[60] If the platform praises the goods or services or in other ways takes part in the negotiations or transaction, it will be regarded as an active part and the intermediary rule will apply if the two other criteria are met. Defining the criterion of active participation has been the focal point in a couple of Danish cases.

In SH2009.N.0001.07 from June 18 2009 (QXL), the Maritime and Commercial Court found the online auction platform QXL to be an active intermediary. The argumentation can be divided into two: Firstly, the Court found that QXL was acting as agent for the peer-provider (authorised to act on behalf of the peer-provider) based on the fact that a contract was automatically concluded as soon as the peer-customer won the bidding round. Secondly, QXL participated significantly in the entering into contract between the peer-provider and peer-customer by making available a promoting and professional distance selling system. In addition, the contract was concluded by filling out a form drawn up by QXL and later confirmed by QXL. QXL received a fee for each contract concluded. In a second Court ruling, U2000.2559 Ø (Regional East Court), the Court was also of the opinion (though without stating on what ground) that a lawyer met the criteria of the intermediary rule when intermediating a sale of property between two peers. The lawyer handled the negotiation on behalf of the provider and produced all documentation. It was without bearing that the peer-customer himself was represented by a legal advisor. Also, in a statement from the Danish Consumer Ombudsman, no. 08/04028, the Ombudsman found that a business intermediating contracts between two peers was an active intermediary because it collected a fee for each contract and provided a payment system for the two parties.

The legal consequences

In the mentioned QXL case, the Court ruled that QXL is governed by the intermediary rule which means that the contract between the peer-provider and the peer-customer is to be regarded as a consumer contract. According to the Court, this also means that certain information duties contained in consumer protection legislation is triggered and this information (e.g. information about the right of withdrawal)[61,62] is to be provided by QXL.[63] QXL had given some

[60] Betænkning nr. 845/1978 om forbrugerkøb, sp. 18 and L 27, 1994 Forslag til Lov om ændring af lov om aftaler og andre retshandler på formuerettens område og visse andre love, comments on Para 38a(3).

[61] See also case from the Consumer Ombudsman FOM 08/04028.

[62] Rognstad finds that the expectations to the role of the intermediary also can create a ground for liability for information for the intermediary. This means that the commercial practice regulation will influence the area, cf. Rognstad, Ole-Andreas, Mellommenns sivilrettslige ansvar ved handel på internett, TemaNord 2004:512, Section 3.4.

general information about consumer rights, but the Court did not find the information sufficient. Placing the information duty on the intermediary also finds support in the preparatory work of the intermediary rule:

> The starting point is that it is the business intermediary who is required to fulfill the duty of information and that notice about the exercise of the right of withdrawal etc. can be given to the intermediary. The counterparty of the peer-customer is, however, still the peer-provider and obligations and rights that follow from the (consumer) contract lies therefor with the two peers and not the intermediary.[64,65]

However, whether a *specific* information duty lies with the intermediary or the peer-provider has to be determined by an "interpretation of the specific rule in the Act."[66] Thus, when the legislation refer to a 'business' or a 'trader' to give certain information, it must be assessed whether it is the intermediary or the private peer-provider who is the obligated party. The preparatory Report No. 1440/2004 states that "the starting point is that the rules must be interpreted in line with the wording of the text…", which means that when the rules refer to the 'business', it refers to the intermediary.[67] This, however, only applies to *information duties* and to the duty to receive notice on right of withdrawal from the peer-customer.

QXL tried to argue against an obligation to give information by referring to the principle of exemption of liability for intermediaries in

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[63] Relevant in the case is the Danish Consumer Contract Act and the Danish law on e-commerce. See for a general discussion on information duties of platforms in Wendehorst, Christiane, Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive, *EuCML* 5, 2016 and in Sandfeld Jacobsen, Søren, Formidleransvaret i forbindelse med sociale tjenester på internettet, *UfR*, U2009B.291.

[64] L 220, 2004 om visse forbrugeraftaler og om ændring af lov om forsikringsaftaler og lov om beskatningen af pensionsordninger m.v., bemærkningerne til § 3. (preparatory work for the Danish Consumer Contract Act)

[65] See a discussion of the scope of the Consumer Rights Directive in regards to digital platforms and a general discussion of the information duty of the intermediary, Wendehorst, Christiane, Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive, *EuCML* 5, 2016, 30 et seqq. and Možina, Damjan, Retail business, platform services and information duties, *EuCML* 5, 2016, 25 et seqq.

[66] L 220, 2004 om visse forbrugeraftaler og om ændring af lov om forsikringsaftaler og lov om beskatningen af pensionsordninger m.v., bemærkningerne til § 3. (preparatory work for the Danish Consumer Contract Act)

[67] Betænkning 1440/2004 om revision af forbrugeraftaleloven, p. 106 (Karnov edition)(preparatory work for the Danish Consumer Contract Act)

Article 16 of the Danish E-commerce Act[68] implementing the E-commerce Directive. The Court rejected this argument with reference to the active participation of QXL that exempted them from the scope of application of the liability exemption rules in Articles 14-16.

In Danish law, the information duties in the consumer protection legislation are sanctioned with fines. Thus, the platforms can face a fine if they do not comply with the information duties triggered by the intermediary rule. The consumer can still only claim his material consumer protection rights (e.g. the right of withdrawal and right to remedies) towards the provider. As a consequence, in the case where the information duty lies with the platform, the *civil law* sanctions are still put upon the peer-provider, as she in the case of information about the right of withdrawal then has to provide the legally stated extended period of the right of withdrawal to the consumer.

The EU Commission has expressed concern with rules such as the Danish intermediary rule as it, in their opinion, is too burdensome on the peer-provider.[69] The Commission states:

> In line with EU consumer and marketing rules, Member States are encouraged to seek a balanced approach to ensure that consumers enjoy a high level of protection in particular from unfair commercial practices, while not imposing disproportionate information obligations and other administrative burdens on private individuals who are not traders but who provide services on an occasional basis."[70]

Determining a 'balanced approach' is ultimately a policy question. The downside of the 'balance' prompted by the Danish intermediary rule is that the protection of the peer-customer might be illusory as the peer-provider is unable to support the costs associated with compliance with consumer protection legislation and therefore might not provide consumer protection in practice. In addition, when the peer-provider is to be regarded as a business/trader within the contractual triangular structure, it is unclear whether this classification will influence the application of sector specific regulation such as hotel regulation which presumably is inadequate in P2P relations.

In relation to legal certainty and transparency, the intermediary rule has an advantage as it eliminates the legal uncertainty as to whether the

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[68] Lov nr. 227 af 22. april, 2002 om tjenester i informationssamfundet herunder visse aspekter af elektronisk handel (Law on E-commerce).

[69] A European Agenda for the Collaborative Economy, COM(2016)356 final, section 2.1. See a critical analyses of this agenda, Cauffman, Caroline, The Commission's European Agenda for the Collaborative Economy – (too) Platform and Service Provider Friendly?, *Maastricht European Private Law Institute*, Working Paper No. 2016/07.

[70] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda for the Collaborative Economy, COM(2016)356 final, 11.

peer-provider is a private person or a business. This is a challenge for other Member States and the EU without the intermediary rule.[71]

2.4. THE PLATFORM AS A SECONDARY OBLIGATED PARTY

Seemingly, Danish and EU contractual consumer protection law is based on a two party relationship between a provider and a peer-customer (chain economy). In regards to the *two-sided* market, the platform economy is constructed as a triangular contractual relationship with the platform in one corner and a provider and customer in the two other corners, respectively. Even though the contract between the provider and the customer (the main contract) is concluded with the help of the platform and sometimes with great *influence* from the platform, according to contract law, the contractual obligations lies only with the provider and the customer. Even if the two parties of the main contract wanted to obligate the platform in any way, this would not be possible as it would be contrary to the principle of relativity of contracts as well as freedom of contract. Aside from the exception in the second legal frame, this section will briefly elaborate on how, within the current contractual legal paradigm, the platform could perhaps in some other situations be obligated in regards to the main contract.

In the triangular business structure, the peer-customer does not only engage into a contract with the provider (the main contract). The peer-customer also engages into a consumer contract with the platform when accepting the terms and conditions for the use of the platform (the user contract).[72] Normally, this contract is disconnected from the main contract between the provider and the peer-customer. Some Danish legal theorists claim that in modern contract law, a tendency towards a more objectified contract law can be traced.[73] Thus, there has been a movement away from the subjective theory of interpretation based on the will of the parties. This appears valid especially in the case of consumer contracts, where presumably there is a weak party who should be protected against the will of the trader.[74] The following examples can be given in this regard: In the unfairness test in regards to unfair consumer contracts, one part of the test is whether the consumer would have engaged into a contract if he knew/understood a specific term.[75]

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[71] The EU Commission suggests a maximum for the peer-provider, so that when the peer-provider exceeds a threshold of turnover, income, number of sales or other, the peer-provider becomes a business, A European Agenda for the Collaborative Economy, COM(2016)356 final.

[72] See for a discussion of the acceptance of 'terms of use' as 'a contract', Larsen, Torsten Bjørn and Feldthusen, Rasmus Kristian: De sociale mediers brugervilkår del I – aftalen, *Erhvervsjuridisk Tidsskrift*, T.2016.266.

[73] Bryde Andersen, Mads, Opgør med relativitetsprincippet, *UfR*, U2001.121. Ulfbeck, Vibe, *Kontrakters relativitet*, 1. ed, 2000, 47 et seqq.

[74] See also Bryde Andersen, Mads, Opgør med relativitetsprincippet, *UfR,* U2001.121.

[75] ECJ C-415/11, *Aziz*, [2013] ECLI:EU:C:2013:164, Para 69.

Another part of the unfairness test is to compare the contested term with mandatory law in the area. If the term gives the consumer less protection/benefits, this will indicate that the term is unfair.[76] Also, if a term differs from mandatory law, the term has to be presented in a very clear and intelligible manner to be valid. If it is not clear and intelligible, it must be interpreted most favourable to the consumer.[77] Moving away from weighing the *will* especially of the trader makes room for the theory of interpretation involving the *expectation* of the consumer. In the outline edition of the DCFR, it is stated that

> The protection of reasonable reliance and expectations is a core aim of the DCFR, just as it was in PECL. Usually this protection is achieved by holding the mistaken party to the obligation which the other party reasonably assumed was being undertaken.[78]

One of the arguments for the Danish intermediary rule was exactly that the peer-customer is given the impression that the intermediary somehow plays a part in the main contract. The platform might give this impression either by failing to give sufficient information about their intermediary role or by giving the impression that the platform somehow puts up guarantees for the performance in the main contract. The latter might be the case if the platform informs the peer-customer, or as part of its brand gives the impression to the peer-customer that the platform checks the providers, educates them, monitors them, controls them etc. Also, the platform might enhance this impression by making commercial statements like 'we deliver good service' related to their business as a whole in order to boost their brand. Applying a high level of consumer protection as aimed for and expressed in the Treaty of the Functioning of the Internal Market,[79] one cannot rule out that there might be cases where the peer-customer could have developed such reasonable expectation about the platform's part as a guarantor for elements of the main contract. What exactly the platform guarantees will depend on the specific information/branding. As such a 'guarantor', the platform will be liable together with the provider for non-performance of the main contract if 'the guarantee' is related to the performance. If 'the guarantee' is more related to the provider (background check and control) or the

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[76] C-415/11, *Aziz*, Para 68.

[77] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Article 5.

[78] Principles, Definitions and Model Rules of European Private Law, *Draft Common Frame of Reference (DCFR),* Outline Edition, Edited by Christian von Bar, Eric Clive; Schulte-Nölke, Hans; Beale, Hugh; Herre, Johnny; Huet, Jérôme; Storme, Matthias; Swann, Stephen; Varul, Paul; Veneziano, Anna and Fryderyk Zoll, Sellier, 2009, 73.

[79] Treaty on the Functioning of the European Union, Article 114 and 169.

services performed by the platform itself, the platform could be liable for damage in that regard.

Another specific challenge stemming from the triangular structure is if the platform controls all information given to the peer-customer. The peer-customer and the provider cannot always contact each other directly as their identity is not known to the other party before entering into a contract. This limits the provider's ability to apply with his information duties. If the provider is a business or the triangular setup is governed by the Danish intermediary rule, the duty to inform is the extended duties in consumer protection legislation. One could argue that the platform is obligated to give this information either in general, as they seem to be the closest to provide the (pre-contractual) information, or in the situations where they do not make it possible for the supplier to give the information to the consumer. This is in line with the notion that whoever controls the flow of information should also be obligated to provide it.

(Economic) risk is also an issue one could discuss when looking at the triangular business structure. Assessment of risk is related to social considerations and policy. However, normally, contractual considerations about risk will be related to the distribution of risk between two contracting parties. In the triangular structure, the provider and peer-customer bear the risk of the main contract. The platform bears the risk of running a business that is depended on a large number of users. In most cases, if the platform collects provision for each contract, this provision is not repaid if the contract is breached. Also, on some platforms, the users do not have to engage into contract to give the platform a profit. The platform can earn a profit from selling the data collected from the users and from selling advertisements - regardless of transactions on the platform. Thus, one might say that the possibility of earnings does not seem to follow the (economic) risk and traditionally, alignment of risk and profit is a law and economics issue that influences contract law.[80] From the point of view of who is nearest to bear the risk,[81] it might be tempting to point the finger at the platform in the case where both the provider and customer are peers. It would not be impossible to imagine arguments about risk and control in combination with the argument on reasonable expectations or guarantees. In C-434/15, the GA stated:

> "… I take the view that the finding made immediately above prevents Uber being treated as a mere intermediary between drivers and passengers. Drivers who work on the Uber platform do not pursue an independent activity that exists independently of

[80] Bryde Andersen, Mads, *Grundlæggende aftaleret*, 2013, 456.

[81] More on who is the nearest to bear the risk in Madsen, Christian Frank and Østergaard, Kim, Nærmest til at bære risikoen i kontraktretten, *Juristen*, 2, 2017.

> the platform. On the contrary, the activity exists solely because of the platform, without which it would have no sense."[82]

Despite the fact that the quote aims to argue for Uber being a supplier of transportation and not just a service provider, the quote also indicates that the platform in this case cannot be seen as a party disconnected from the main contract ('as a mere intermediary').

Lastly, there are some non-party considerations that can be addressed in viewing the triangular contractual structure of platforms. It is not new that contract law holds non-party considerations such as social responsibility and the promotion of welfare.[83] It depends on one's political stand how (if at all) these issues should be taken into consideration when looking at the contractual structure of platforms. The platforms help cut transaction costs through easy and standardised access to relevant parties. The platforms also expand the market and in some ways boost competition. Because of the reliance on a crucial number of users, in some sectors of business platforms could, however, be counter productive for the market. The labour platforms might supply a new way of income for people outside the labour market.[84] On the other hand, labour platforms do not necessarily feel obligated to follow rules on minimum wage and other rights constituted in labour law and therefore can be accused of undermining the labour marked as well as performing unfair competition.[85] The list of pros and cons of these platforms are much longer, but this short list illustrates, that arguments fitting many different political views can be found. However, as with the risk assessment, these considerations are traditionally linked to contract law governing the contract between *two* parties. It will probably be relevant to take these considerations into account, if a specific regulation of *platforms* was to be formulated.

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[82] AG C-434/15 Elite Taxi, Para 56.

[83] Principles, Definitions and Model Rules of European Private Law, *Draft Common Frame of Reference (DCFR),* Outline Edition, Edited by Christian von Bar, Eric Clive; Schulte-Nölke, Hans; Beale, Hugh; Herre, Johnny; Huet, Jérôme; Storme, Matthias; Swann, Stephen; Varul, Paul; Veneziano, Anna and Fryderyk Zoll, Sellier, 2009, 14. See also Lynge Andersen, Lennart and Madsen, Palle Bo, *Aftaler og mellemmænd*, 7. ed, Karnov Group, 2017, 117 and Bryde Andersen, Mads, Opgør med relativitetsprincippet, *UfR,* U2001.121.

[84] See for example De Stefano, Valerio, The Rise of the 'just-in-time workforce': On-demand work, crowdwork and labour protection in the 'gig-economy', International Labour Office Geneva, No 71, *Inwork*.

[85] See for example Adams, Abi; Freedland, Mark; Prassl, Jeremias, The 'Zero-Hours Contract': Regulating Casual Work, or Legitimating Precarity, *University of Oxford Legal Research Paper Series*, No 00/2015.

3. FINISHING REMARKS

This contribution has analysed and discussed four existing potential legal frames to apply to the triangular contractual structure of platforms. As with all legal frameworks, weighed principles and considerations result in criteria that have to be met in order for the platform to be governed by the framework. Even though the Danish intermediary rule (the second legal frame) is burdensome on the provider and the benchmark for sufficient information (the third legal frame) for disclaiming can be discussed and challenged, these two legal frames are both fitted to the triangular structure and do not seem to result in situations in conflict with their purpose – mainly the protection of the peer-customer (the consumer). However, in order to have an effect, firstly, the peer-customer has to be aware of his legal position and secondly, he has to be able and willing to pursue his rights. The triangular structure makes the conditions hard for these legal frames to be effective because the platform to a large extent controls information and because the counter party of the platform presumably is a weak peer-customer. The employee framework as well as the framework of a secondary obligated party are not designed to the triangular structure and seem to conflict with underlying considerations when platforms enter the scene. Here, 'reality' floats on top of the carpet of legal boxes. As a consequence, the considerations about social security, consumer protection, and ultimately welfare that traditionally justify both labour law and consumer law are challenged. Whether these considerations are also relevant in the case of platforms is of course a policy question, but if there is a need to take regulatory steps to respond to this potentially unintended challenge of the underlying considerations, there are several ways to go. In broad terms, there are three headlines for such next steps: 1. Regulation, 2. Self-regulation and 3. Regulating/facilitating self-regulation. A step within the *first* headline is taken by a group of European researchers (The ELI working group).[86] The group is a continuation of the Research Group on the Law of Digital Services. It is still a work in progress, but through a Draft of European Model Rules for Online Intermediary Platforms (MRD),[87] the working group aims to

[86] The Model Rules Draft is drafted by a group of 35 researchers from 10 different EU countries (the ELI working group) who started the work in 2015. The group is a continuation of the Research Group on the Law of Digital Services and is lead by C. Busch; H. Schulte-Nölke; A. Wiewiórowska-Domagalska; F. Zoll and G. Dannemann. Since 2017, the project has been incorporated as a project of the European Law Institute (ELI).

[87] An early draft is published in Bush, Christoph; Schulte-Nölke, Hans; Wiewiórowska-Domagalska, Aneta; Dannemann, Gerhard and Zoll, Frederic, ´Discussion Draft of a Directive on Online Intermediary Platforms´(2016), 4 *European Journal of Consumer and Market law*, 164. See some critical thoughts on this Discussion Draft in Maultzsch, Felix, 'Contractual Liability of Online Platform Operators: European Proposals and Established Principles' (2017), Goethe-Universität Frankfurt am Main

provide a general piece of legislation securing transparency as well as allocating risk in the triangular structure. The preliminary scope is primarily platforms where users register in order to engage into contract with each other. The MRD is sector neutral and follows in line of existing EU consumer (contract) law, especially the consumer acquis which to a large extent employs information duties as the preferred regulatory technique. The MRD is still undergoing adjustments, but two of the more innovative proposed provisions are specifically relevant to present here in the light of the four legal frames discussed in this article.[88] The two provisions constitute parts of the proposed liability regime in the MRD. The first provision entails that if a platform obtains credible evidence of illegal conduct by a user and this conduct potentially is harmful to another user engaging into contract with the first user, the platform is obliged to take adequate measures in order to protect the users. If the platform fails to take these measures, it becomes liable for damage caused by this failure. The provision contains elements from the e-commerce legislation, complicity rules in criminal law as well as tort law. In regard to the challenges in the four legal frames, this provision allocates some of the contractual as well as non-contractual risk present when two parties engage into contract/contact. The damaged user can make his claim either to the platform or to the other user. Albeit not obligating the platform to monitor the users, the provision allocates risk to the platform, because of the platform's ability to control the users' access to the platform. In addition to this alignment of control and risk, the provision also is an obvious accommodation of the expectation a user might have to the platform in situations like these. Apart from the sanctions for the platform, this provision is in alignment with the platform's own incentive to create and preserve trust as the most important requisite for the triangular business structure. The second of the two selected MDR liability provisions states that if a customer can reasonably rely on the platform having predominant influence over the provider, the platform and the provider are joint liable for breach of the main contract. The provision is supplemented with a non-exhaustive list of elements to consider when determining whether the customer has this reasonable reliance. The list refers to how the contract is concluded; whether the platform can withhold payments from the customer; who determines the content of the main contract; who sets the price etc. Similar to the first provision, this provision aligns risk and control (predominant influence) – this time, the rights conferred upon the peer-customer relate specifically to the non-performance of the main contract. Also, in this provision, a strong emphasis is placed on reliance

< https://ssrn.com/abstract=3074301> < http://dx.doi.org/10.2139/ssrn.3074301> accessed July 6, 2018.

[88] A commentary of an early draft of the Model Rules Draft (when it was a proposal for a Directive) is in press and is expected to be published in the fall of 2018.

(expectation). The provision seems to accommodate most of the considerations discussed in the fourth legal frame regarding quasi guarantees, expectations and control. In contrast to the first liability provision, without this second provision, the platform might not have incentive by itself to undertake the risk allocated to it in the provision. Thus, this provision will in fact provide an allocation of risk which most likely would not be actualised otherwise. As the criterion of 'predominant influence' (also in combination with 'reliance') is open-ended, the application of the provision will often be preconditioned by a case-by-case evaluation. This weakens the effectiveness of the provision as the platform controls the initial legal contractual framing of the triangular structure and the starting point will there for presumably be the self-definition as 'intermediary' disclaiming all liability.

If step number 2 regarding self-regulation is preferred, the platforms will find themselves floating on top of the carpet of legally defined boxes because it does not fit into the boxes, and they will thus create their own 'legal' environment applicable on the triangular contractual structure. Because the two-sided business structure is based on trust through reputation, the platform's interests will to a certain extent be aligned with the interests of the legislators (and users). However, in regard to transparency and extended liability, there will most likely be discrepancies. To a certain extent, these discrepancies could perhaps be squared up by supplementing the self-regulation with facilitating regulation (step 3) such as putting up (technical) standards for review systems, payment systems etc. as well as open-ended provisions/standards on behaviour.

Without additional regulation or regulation of self-regulation, the four legal frames presented in this contribution will apply. Whether these frames provide the right balance between all the different relevant considerations, such as consumer protection and protection of peer-providers on one side and market development on the other side, is ultimately a question of policy. This contribution has aimed to qualify future legal and political work in regard to this balance.