

PROTECTING THE WEAKER PARTIES IN THE PLATFORM ECONOMY

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ABSTRACT. Known by many names – platform, sharing, peer-to-peer (p2p), collaborative economy, and so on - entirely new business models have emerged in recent years, whereby online platforms use digital technologies to connect distinct groups of users in order to facilitate transactions for the exchange of assets and services. This dramatic shift in business organisation and market structure has opened an intense debate on the persisting need for those regulatory measures that typically protect the weaker party in bilateral business-to-consumer transactions. Widespread calls for a more “levelled playing field” makes a strong argument for reconsidering the scope of regulation and delegating regulatory responsibility to the platforms.

The chapter calls into question these assumptions. It demonstrates that platforms make frequent use of boilerplate, architecture and algorithms to leverage their power over users - whether customers or providers - and that it is still not clear to what extent effective market-based solutions are emerging to tackle these issues. Part I illustrates the reasons for the alleged reduction of disparities, and it explains why such conclusion fails to fully appreciate the many grounds to the contrary. Part II scrutinizes terms and conditions adopted by online platforms to assess whether they mirror an imbalance in the parties’ rights and obligations. The article concludes that it is crucial to protect the weaker parties in these emerging markets, and it presents some brief recommendations.

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INTRODUCTION

Known by many names – platform, sharing, peer-to-peer (p2p), collaborative economy, and so on - entirely new business models have emerged in recent years, whereby online platforms use digital technologies to connect distinct groups of users in order to facilitate transactions for the exchange of assets and services. Compared to both offline and online providers, these platforms do not act as direct suppliers, but leverage the widespread diffusion of internet and mobile technologies to operate as virtual meeting points for supply and demand, providing ancillary facilities for the smooth functioning of these markets.¹

This dramatic shift in business organisation and market structure has opened an intense debate on the persisting need for those regulatory measures that typically protect the weaker party in bilateral business-to-consumer (b2c) transactions. In the platform economy both customers and providers are said to be empowered, with the former enjoying wider choice and lower prices and the latter benefiting from countless new business opportunities, while platforms make transactions safe and efficient by adopting new mechanisms to enhance trust. Widespread calls for a more “levelled playing field” makes a strong argument for reconsidering the scope of regulation and delegating regulatory responsibility to the platforms. Accordingly, the appeal for lighter rules and reliance on self-regulatory mechanisms is pervasive.²

The chapter calls into question these assumptions. It demonstrates that platforms make frequent use of boilerplate, architecture and algorithms to leverage their power over users - whether customers or providers³ - and that

¹ Cf. Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. (forthcoming 2017), <https://ssrn.com/abstract=3074717>; Liran Einav et al., *Peer-to-Peer Markets*, ANNUAL REVIEW OF ECONOMICS, vol. 8, 615 (2016); BERTIN MARTENS, AN ECONOMIC POLICY PERSPECTIVE ON ONLINE PLATFORMS, Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05. JRC101501 (2016), <https://ec.europa.eu/jrc/sites/jrcsh/files/JRC101501.pdf>.

² See generally Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem”*, 70 U. MIAMI L. REV. 830 (2016); Christopher Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS. ENTREPRENEURSHIP & L. 529 (2015); Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, U. CHI. L. REV. DIALOGUE 116 (2015); Darcy Allen & Chris Berg, *The Sharing Economy: How Over-Regulation Could Destroy an Economic Revolution*, INSTITUTE OF PUBLIC AFFAIRS (2014).

³ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “A European

it is still not clear to what extent effective market-based solutions are emerging to tackle these issues. Part I illustrates the reasons for the alleged reduction of disparities, and it explains why such conclusion fails to fully appreciate the many grounds to the contrary. Part II scrutinizes terms and conditions adopted by online platforms to assess whether they mirror an imbalance in the parties' rights and obligations. The article concludes that it is crucial to protect the weaker parties in these emerging markets, and it presents some brief recommendations.

I. BARGAINING POWER IN THE PLATFORM ECONOMY

1.1 Assessing Empowering Processes: from the Rise of Internet to P2P Transactions

Protecting the weaker party has long been the main reason for external regulatory intervention in bilateral business-to-consumers transactions (b2c), mainly justified on the lack of ability to negotiate on an equal basis with her professional counterpart. However, with the rise of internet and the platform economy, this need is said to be dramatically reduced.

A. The Rise of Internet

A first significant change in market power to the benefit of consumers has been predicted since the beginning of the web. The main reason is commonly identified in the widening of choice, due to the removal of geographic and time constraints. The amount of available information, both from the "crowd" and from experts, and the reduction in search costs have expanded the capacity to access and to compare products and services, significantly increasing consumer surplus.⁴ As a result, consumers are now

agenda for the collaborative economy" {SWD(2016) 184 final}, at 3 ("The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ('professional services providers'); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms')").

⁴ See generally Jeremy Heimans & Henry Timms, *Understanding "New Power"*, HARVARD BUSINESS REVIEW, Dec. 2014, <https://hbr.org/2014/12/understanding-new-power>; Lauren I. Labrecque et al., *Consumer Power: Evolution in the Digital Age*, 27 JOURNAL OF INTERACTIVE MARKETING 257 (2013); Eric Brynjolfsson et al., *Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers*, MANAGEMENT SCIENCE, vol. 49, 1580 (2003). With specific reference to the sharing economy, see ARUN SUNDARARAJAN, *THE SHARING ECONOMY. THE END OF EMPLOYMENT*

considered more sophisticated and educated, and better able to make informed decisions, therefore creating more efficient incentives for firms as well. Further, consumers do not only have much more information than in the past, but they are also active players in producing it through reviews and opinions, thus intensifying the potential for individual opinions to signal dissatisfaction, influence markets and impose effective market sanctions through both “voice” and “exit”.⁵

B. Platforms and Digital Marketplaces

With the rise of online platforms, and the shift from contracts between a trader and a consumer to trilateral relationships with a platform acting as an intermediary, this change in power in favour of consumers is supposed even more pronounced. Compared with internet suppliers that themselves trade goods and services, online platforms operate as third parties mediating the transaction. And since platforms’ commercial success is obviously related to the quality of the marketplace, they have a compelling interest to create a safe environment and reduce moral hazard. Further, in performing these tasks platforms can leverage an enormous amount of information and make use of a wide range of tools - ex ante screening, reputation mechanisms and other monitoring systems - through which they can manage the marketplace, dictate rules and sanction conducts. Hence, not only recreating analogues to brick-and-mortar guarantees (e.g., images and videos of the product, detailed descriptions and tech specs, online chat, complaint services), but also providing an entirely new way of signalling reliability (e.g., rating systems and trust mechanisms).⁶ For these reasons, digital platforms should be deemed to have both a manifest interest, and the related tools, to address many of the market failures that commonly justify government regulation in firm-to-consumer transactions.

C. From Professionals to Peers

A final transformation of bargaining power in favour of customers is said to have taken place with specific regard to peer-to-peer transactions. With the transition from traditional, large-scale, corporations to a “crowd” of

AND THE RISE OF CROWD-BASED CAPITALISM (2016), at 111 (“As search engine use has become widespread, consumers have become increasingly empowered – they can make better choice with access to superior information, a larger number of markets, and up-to-date feedback and reviews on products”).

⁵ The alternative between voice and exit has been famously stated by ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁶ See generally *THE REPUTATION SOCIETY: HOW ONLINE OPINIONS ARE RESHAPING THE OFFLINE WORLD* (Hassan Masum & Mark Tovey eds., 2012).

non-professional “micro-entrepreneurs”, disparity of bargaining power between suppliers and customers is less probable, with regard to both asymmetric information and wealth inequalities. Asymmetric information, which conventionally justify external intervention in b2c transactions, can run in both directions when transactions occur between “peers”: hosts in short-term accommodation and drivers in ride-sharing services may be as concerned as guests and riders on the reliability of the counterpart.⁷ Similarly, with the massive service provision by “regular people” sharing their time and assets, those wealth disparities that typically affect firm-to-consumer transactions are much less likely, as the economic power of counterparts is also much more akin, making the relationships between non professionals more equal than b2c ones.

1.2 Is There a Weaker Party in the Platform Economy?

While these transformations undeniably affect both internet-enabled market structure and digital economic organizations, their effect on parties’ bargaining power are far from clear. The widespread belief in an informed and empowered platform user, who is now able to transact on equal terms with her counterparts, is too one-sided. In contrast, a quite different picture emerges if other relevant factors are also taken into account.⁸

A. New Information Asymmetries

A first reason for a more cautious conclusion about this apparent empowerment of platform users is the enhanced capabilities of platforms to collect and use an enormous amount of data.⁹ A novelty which makes the

⁷ Cf. Alex Tabarrok & Tyler Cowen, *The End of Asymmetric Information?*, CATO UNBOUND (Apr. 6, 2015), <http://www.cato-unbound.org/2015/04/06/alex-tabarrok-tyler-cowen/end-asymmetric-information>; Id., *Symmetric Information Won't Be Perfect*, CATO UNBOUND (Apr. 20, 2015), <https://www.cato-unbound.org/2015/04/20/alex-tabarrok-tyler-cowen/symmetric-information-wont-be-perfect>.

⁸ See generally Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, DEDALUS, THE JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 18 (2016), which discuss the shift from the original internet design of decentralized power to a concentration of power in the hands of a relatively small set of actors, at 20 (“Mobile and cloud computing, the Internet of Things, fiber transition, big data, surveillance, and behavioral marketing introduce new control points and dimensions of power into the Internet as a social-cultural-economic platform.”). Cf. also VASILIS KOSTAKIS & MICHEL BAUWENS, NETWORK SOCIETY AND FUTURE SCENARIOS FOR A COLLABORATIVE ECONOMY (2014) (defining “netarchical capitalism” the economic systems that matches centralized control of a distributed infrastructure with an orientation toward the accumulation of capital).

⁹ See Julia E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133 (2017), at 145 (“Economically speaking, platforms represent both horizontal and vertical strategies for

balance less clear than sometimes asserted. The collection of vast amounts of data by platforms may give rise to new information asymmetries between platform operators on the one hand and platform users on the other. Notably, this conclusion holds not only with regard to consumers vis-à-vis platforms, but more generally for all platforms' "users", whether customers or providers.

With regard to the latter, the same reputational mechanisms that are often at the centre of the supposed consumer empowerment are open to gaming and other forms of exploitation, with the aim of taking advantage of the growing reliance of users.¹⁰ User-generated-content is commonly used to profile consumers, leading to both traditional market failures and increased chances to exploit cognitive vulnerabilities by means of "market manipulation".¹¹ Moreover, due to big data analysis platforms also enjoy an enhanced opportunity to set different offerings and to charge each customer the exact "reservation price" – the maximum price she is willing and able to pay.¹² This novelty makes price (and terms) discrimination easier and reduce the capacity

extracting the surplus value of user data"). On the growing importance of knowledge-based markets see Mayo Fuster Morell, *Online Creation Communities Viewed through the Analytical Framework of the Institutional Analysis and Development*, GOVERNING KNOWLEDGE COMMONS (Brett M. Frischmann, Michael J. Madison, Katherine J. Strandburg eds., 2014).

¹⁰ See Juliet B. Schor, *Does the Sharing Economy Increase Inequality Within the Eighty Percent?: Findings from a Qualitative Study of Platform Providers*, 10 CAMBRIDGE JOURNAL OF REGIONS, ECONOMY AND SOCIETY 263 (2017) ("In general, we believe that users are likely overstating the accuracy of the ratings and reputational data on these sites."); Sonja Utz et al., *Consumers Rule: How Consumer Reviews Influence Perceived Trustworthiness of Online Stores*, 11 ELEC. COMM. RES. & APPS. 49, 54 (2012) (The separation of information and product may lead consumer to believe that the information is more objective, making the case more dangerous than old-fashioned conventional advertising).

¹¹ See, e.g., Damian Clifford, *Citizen-Consumers in a Personalised Galaxy: Emotion Influenced Decision-Making, a True Path to the Dark Side?* (Sept. 15, 2017), CiTiP WORKING PAPER SERIES, 31/2017, <https://ssrn.com/abstract=3037425>; Max N. Helveston, *Regulating Digital Markets*, 13 N.Y.U. J. L. & BUS. 33 (2016); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014). See also Sofia Ranchordás, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, CRITICAL ANALYSIS OF LAW (forthcoming 2018), <https://ssrn.com/abstract=3082403> ("In the context of the platform economy, reputational feedback does not create a scenario of perfect information. Rather, it creates the illusion thereof").

¹² On the effects of algorithms and pricing bots on competition and price discrimination see Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 (2016); Maurice E. Stucke & Ariel Ezrachi, *How Pricing Bots Could Form Cartels and Make Things More Expensive*, HARV. BUS. REV. (Oct. 27, 2016), <https://hbr.org/2016/10/how-pricing-bots-could-form-cartels-and-make-things-more-expensive>; Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV. 1775 (2017).

for consumers to capture welfare gains enjoyed in a traditional model of static prices.¹³

With regard to the former, much relevant information is often not accessible to suppliers who provide their services via online marketplaces. Online platforms do not give sufficient information about the functioning of the algorithm and the adopted ranking criteria: they do not specify what individual factors mean and what their weight is or how they are taken into account.¹⁴ Further, providers are often unable to assess *ex ante* the profitability of a transaction or to set the price, being forced to accept any proposal, regardless of their preference¹⁵ - a practice that may result especially problematic when platform has a reason to keep prices low for competitive reasons.¹⁶

B. Communication, Control and Influence

¹³ See, e.g., Saul Levmore & Frank Fagan, *The End of Bargaining in the Digital Age*, CORNELL L. REV. (forthcoming 2018), <https://ssrn.com/abstract=3062794> (advocating for a requirement of uniform or transparent pricing that limit a seller's ability to price discriminate in consumer contracts). On how price discrimination can affect consumer welfare and competition, see generally Dirk Bergemann et al., *The Limits of Price Discrimination*, 105 AM. ECON. REV. 921 (2015), <https://www.aeaweb.org/articles.php?doi=10.1257/aer.20130848>; Hal R. Varian, *Computer Mediated Transactions*, 100 AM. ECON. REV. 1 (2010) (arguing that when fixed costs are high and marginal costs are low, personalized pricing will tend to increase output, consumer surplus, and welfare); Kenneth S. Corts, *Third-Degree Price Discrimination in Oligopoly: All-Out Competition and Strategic Commitment*, RAND J. OF ECON., Vol. 29, no. 2, 306 (1998), http://www.jstor.org/stable/2555890?seq=1#page_scan_tab_contents. See also UK OFFICE OF FAIR TRADING, THE ECONOMICS OF ONLINE PERSONALISED PRICING (2013), http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/research/offt1488.pdf.

¹⁴ See discussion *infra* Part II.

¹⁵ Cf. Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT. J. COMM. 3758 (2016).

¹⁶ There may be various reasons for keeping prices low. See, e.g., David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms*, ISSUES IN COMPETITION LAW AND POLICY (ABA Section of Antitrust Law), Vol. 1, Ch. 28, 690 (2008) ("Profit-maximizing two-sided platforms may find that it is profitable overall to price the product offered on one side below average variable cost, below marginal cost, or even below zero"), <https://ssrn.com/abstract=1094820>. Further, platforms may also adopt a "growth first, revenue later" strategy: first lower prices until they are below the average costs of its competitors and later raises them, earning monopoly profit and recouping losses. Cf. Amelia Fletcher, *Predatory Pricing in Two-Sided Markets: A Brief Comment*, 3 COMPETITION POLICY INT'L 221 (2007).

Another fundamental aspect in assessing bargaining power of both customers and providers vis-à-vis online platforms concerns the capacity of contracting parties to negotiate and influence the rules of the transaction and to communicate with their counterparts. Such abilities are at least questionable in the platform economy. Platforms usually impose terms of service to their user-base in a take-it-or-leave-it fashion, with no room to influence or amend them. These contracts are formally agreed upon even if hardly ever read, as the adhering parties typically affirms to have read terms and conditions by “clicking” an “I agree” icon.¹⁷

In addition, platforms make an increasing use of website architecture to constrain the kind of interaction allowed among participants and available information.¹⁸ Empirical findings show that this closeness has led to what has been labelled as “platform churn” - an increasing turnover, especially among providers, due to the fact that “exit” remains the only viable option when “voice” - the ability to raise concerns and negotiate contractual terms - has failed.¹⁹

C. Algorithmic Governance

Not only consent, but also enforcement is dramatically reshaped in online mass transactions. Contract terms are often implemented via algorithms, “machine rules” that create a sort of “private automatic injunction” highly resistant to legal scrutiny, and that do not take into account

¹⁷ Consumers’ failure to read contract terms may not be an issue when even a small proportion of consumers actually read boilerplate, thus inducing firms to adopt efficient terms. The thesis of a margin of informed and sophisticated consumers that through their action help discipline the market for the benefit of infra-marginal consumer has been famously stated by Alan Schwartz & Louis Wilde, *Intervening on Markets on the Basis of Imperfect Information: a Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). This thesis has been criticized for resting on questionable empirical assumptions about competition and information symmetries. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

¹⁸ See, e.g., Cohen, *Law for the Platform Economy*, *supra* note 9, at 155 (“The combination of asserted contractual control and technical control becomes the vehicle through which the platform imposes its own logics on the encounters that it mediates.”).

¹⁹ See G. NEWLANDS ET AL., *POWER IN THE SHARING ECONOMY* (2017), at 6 (“Sharing economy platforms are facing increasing turnover among their provider base”), <https://www.bi.edu/globalassets/forskning/h2020/power-working-paper.pdf>. Cf. Min K. Lee et al., *Working with machines: The impact of algorithmic and data-driven management on human workers*, Proceedings of the 33rd Annual ACM Conference on Human Factors in Computing Systems 1603 (2015) (finding that providers email to these companies usually go without response).

all those individual circumstances which may have affected a given outcome.²⁰ Even where redress possibilities are available, clear instructions about the operation of these mechanisms may be missing and access to justice may be restricted in practice. Foreign jurisdiction and/or foreign law are commonly applicable and internal redress mechanisms might be arranged only via email, without the possibility of a direct human contact and a responsible case handler.²¹ While appeals for transparency of these enforcement systems via algorithm are diffuse, such an outcome is difficult to attain for machine learning algorithms, thus leaving both providers and customers without viable legal remedies.²²

D. Market Structure

When a platform has a dominant position in the market, becoming its only point of access for providers and consumers, the dangers of imbalance of bargaining power in favour of platforms are clearly exacerbated. Admittedly, such market structure may benefit users on both sides of the platform, as a dominant platform would display a thick market, but at the same time it poses risks of higher prices and exploitative practices, due to the complete dependency of providers and customers on the platform.

Most online marketplaces are believed to bear an ingrained tendency to monopolies and display an anticompetitive structure, often reduced to a single operator (*winner-take-all*, or *most*). The main reason that leads to identify the risk of dominant positions is the occurrence of indirect network externalities, so that an increase in participants of a given group raises the value of their participation for the other group of users, potentially causing overwhelming difficulties for potential entrants to collect a sufficient amount of initial customers in order to be competitive.²³ In addition to network

²⁰ Cf. Margaret J. Radin, *The Deformation of Contract in the Information Society*, 37 OXFORD JOURNAL OF LEGAL STUDIES 505, at 511 (2017).

²¹ ECORYS, BUSINESS-TO-BUSINESS RELATIONS IN THE ONLINE PLATFORM ENVIRONMENT. FINAL REPORT. FWC ENTR/300/PP/2013/FC-WIFO (2017), at 29.

²² See generally FRANK PASQUALE, THE BLACK BOX SOCIETY. THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

²³ See generally FEDERAL TRADE COMMISSION, THE “SHARING” ECONOMY. ISSUE FACING PLATFORMS, PARTICIPANTS AND REGULATORS (2016), at 26 (“Two-sided network effects may enable a large platform to become dominant and insulated from competition from smaller platforms with fewer participants”); GEOFFREY G. PARKER, MARSHALL W. VAN ALSTYNE, & SARGEET P. CHOUDARY, PLATFORM REVOLUTION: HOW NETWORKED MARKETS ARE TRANSFORMING THE ECONOMY — AND HOW TO MAKE THEM WORK FOR YOU (2016). *But see* Andrei Hagiu & Simon Rothman, *Network Effects Aren’t Enough*, HARVARD BUSINESS REVIEW, April 2016; David S. Evans & Richard Schmalensee, *Why Winner-Takes-*

effects, the massive acquiring of proprietary data can give a very significant competitive advantage to a single operator, as the higher the number of interactions occurring via the platform, the better the algorithm governing transactions and the underlying service.²⁴ In sum, the combination of network effects and data gathering may generate significant competitive advantages, so that a single platform may insulate itself from competition by creating artificial barrier to entry, to the detriment of its user base.

II. A LEGAL FRAMEWORK FOR THE PEER-TO-PEER ECONOMY

On the above basis, it is hard to conclude that the risk of disparity of bargaining power is lowered or even eradicated in the platform economy, and the often asserted reduction of inequalities fails to appreciate the persistent problem of protecting the weaker party of the transaction. In this second Part, after a survey on standard form contracts adopted by the most successful platforms, an examination of the legal relationships between the different actors is conducted, in order to verify whether existing legal categories can provide effective protection, and to suggest when a regulatory intervention may be desirable.

2.1 A Survey of Standard Form Contracts

All Thinking Doesn't Apply to the Platform Economy, HARVARD BUSINESS REVIEW, May 2016; Jonathan A. Knee, *All Platforms Are Not Equal*, MIT SLOAN MANAGEMENT REVIEW, Sept. 15, 2017 (arguing that key structural attributes that drive the value of network effects in the digital domain are: the minimum market share at which the network can achieve financial breakeven; the nature and durability of the customer relationships; the extent to which the data generated by the network facilitates product and pricing optimization). With specific reference to the sharing economy, see SUNDARARAJAN, THE SHARING ECONOMY. THE END OF EMPLOYMENT AND THE RISE OF CROWD-BASED CAPITALISM, *supra* note 4, 119 (arguing that the nature of two-sided network effects varies in very significant ways across different sharing economy platforms, due to the local nature of the sharing economy).

²⁴ See generally FEDERAL TRADE COMMISSION, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES (2016); AUTORITE DE LA CONCURRENCE – BUNDESKARTELLAMT, COMPETITION LAW AND DATA (2016) (“The collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies”); OECD, DATA DRIVEN INNOVATION FOR GROWTH AND WELL-BEING: INTERIM SYNTHESIS REPORT, (2014); AUTORITAT CATALAN DE LA COMPETÈNCIA, THE DATA-DRIVEN ECONOMY. CHALLENGES FOR COMPETITION (2016). See also Bruno Carballa Smichowski, *Data as a Common in the Sharing Economy: a General Policy Proposal*, CEPN DOCUMENT DE TRAVAIL n. 2016-10 (2016), at 25 (“Most of the competition problems we detected in the sharing economy arise from the fact that platforms have private and exclusive property over the databases they create with users’ information.”).

Compared to traditional standard form contracts, typically drafted by professional suppliers and adhered by consumers, contracts in the platform economy involve three different players: the online platforms and the “users” – both providers and users - concluding transactions through it. Each of these actors enters into legal relationship with the others, thus creating an extremely complex legal scenario. In the vast majority of cases, there is only one contract governing all transactions: terms are usually drafted by the platform and adhered by its users and, unless otherwise specified, the same clauses usually apply to service providers and customers, as both users of those services provided by the platform.

A survey of contractual agreements points to a twofold result. In the first place, contractual clauses usually provide roughly comparable rights and duties for peers, making them fully responsible for performing their obligations. Being laid down by the platform, contracts between provider and customer usually display less one-sided terms compared to bilateral ones, equally imposing to both parties to comply with their basic obligations. At the same time, by controlling the entire matching system, platforms exert considerable power over consumers and providers, and such power is clearly revealed in their terms and conditions, which contain many of those clauses that are typically deemed to reflect an imbalance of bargaining power between contracting parties.²⁵

Unequal bargaining positions can be reflected in high prices for using platforms as well as in the terms and conditions. Contract terms usually allow platforms to make unilateral changes in contract terms, often without prior notification and with no need to rely on a valid reason to make these modifications.²⁶ Lack of or very short-term prior notice about changes is

²⁵ The one-sidedness of standard form contracts is generally explained as a result of informational and cognitive problems, and adverse selection. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373 (2004); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 594–603 (1990); Phillipe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J. L. ECON. & ORG. 381 (1990).

²⁶ Airbnb Terms and Condition, § 3 (“Airbnb reserves the right, at its sole discretion, to modify the Site, Application or Services or to modify these Terms, including the Service Fees, at any time and without prior notice (...) If the modified Terms are not acceptable to you, your only recourse is to cease using the Site, Application and Services. If you do not close your Airbnb Account you will be deemed to have accepted the changes.”); Uber Terms and condition, §1 (“Uber may amend the Terms from time to time. Amendments will be effective upon Uber's posting of such updated Terms at this location or in the amended

usually applicable, with a presumption of acceptance of changes by continuation of use. Platforms appears to make extensive use of this ability, in some cases with an almost daily frequency, and this practice does not always allow users to adjust themselves to the changes completely and in time for their application.²⁷

Similar provisions regard the right to terminate the contract at the discretion of the platform²⁸, to suspend an account or to delists individual

policies or supplemental terms on the applicable Service(s). Your continued access or use of the Services after such posting confirms your consent to be bound by the Terms, as amended.”); Etsy, Terms of Use, § 12 (“Changes to the Terms. We may update these Terms from time to time. (...) You are responsible for reviewing and becoming familiar with any changes. Your use of the Services following the changes constitutes your acceptance of the updated Terms.”); BlaBlaCar, Terms & Conditions, § 13 (“BlaBlaCar reserves the right to modify or suspend all or part of access to the Platform or its functionalities, at its sole discretion, temporarily or permanently.”); Getaround Terms of Service (“Eligibility. We may, in our sole discretion, modify or update this Agreement from time to time, and so you should review this page periodically (...) Your continued use of the Service after any such change constitutes your acceptance of the new Terms of Service”); TaskRabbit Terms of Service, § 26 (“Company reserves the right, at its sole and absolute discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this Agreement (including the Privacy Policy) and review, improve, modify or discontinue, temporarily or permanently, the TaskRabbit Platform or any content or information through the TaskRabbit Platform at any time, effective with or without prior notice and without any liability to Company.”). Last visited, Sept. 13, 2017.

²⁷ Cf. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017). Cf. also David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010) (arguing that changes to boilerplate or other contracts result in “shadow terms” consumer are not aware of).

²⁸ Airbnb Terms and Conditions, §24 (“Airbnb may deactivate or delay Listings, reviews, or other Member Content, cancel any pending or confirmed Bookings, limit your use of or access to your Airbnb Account and the Site, Application or Services, temporarily or permanently revoke any special status associated with your Airbnb Account, or temporarily or permanently suspend your Airbnb Account if (i) you have breached these Terms or our Policies, including material and non-material breaches and receiving poor ratings from Hosts or Guests, or (ii) Airbnb believes in good faith that such action is reasonably necessary to protect the safety or property of Members, Airbnb or third parties, for fraud prevention, risk assessment, security or investigation purposes.”); Uber Terms and condition, §1 (“Uber may immediately terminate these Terms or any Services with respect to you, or generally cease offering or deny access to the Services or any portion thereof, at any time for any reason.”); Etsy, Terms of Use, § 7 (“Termination By Etsy. We may terminate or suspend your account (and any related accounts) and your access to the Services at any time, for any reason, and without advance notice.”); Blablacar, Terms & Conditions, § 9 (“BlaBlaCar reserves the right to terminate the T&Cs binding you with BlaBlaCar immediately and without notice.”); Getaround Terms of Service (“Termination. We may terminate your participation in the Service at any time, for any reason or no reason, without explanation”); TaskRabbit Terms of Service, § 8 (“Company may terminate, limit or suspend your right to use the TaskRabbit

products or services.²⁹ Despite unilateral delisting of products and suspension or termination of accounts may threaten the very existence of certain economic activities, the conditions and the procedures related to suspension and blocking of accounts and products are not transparent and often completely missing, and the lack of contractual obligations to provide an explanation make it very difficult to substantiate a claim against these actions.³⁰

Other ubiquitous clauses concern the choice of law and/or jurisdiction³¹, arbitration agreement and dispute resolution clauses, frequently in conjunction with class actions and jury trials waiver³², and price

Platform in the event that we believe that you have breached this Agreement (...) you will not be entitled to any refund of unused balance in your account (...) this Agreement will remain enforceable against you"); Lyft Terms of Service, § 16 ("Lyft may terminate this Agreement or deactivate your User account immediately in the event"). Last visited, Sept. 13, 2017.

²⁹ Airbnb Terms and Conditions, § 7 ("Airbnb reserves the right, at any time and without prior notice, to remove or disable access to any Listing for any reason"); Uber Terms and conditions, § 4 ("Uber may, but shall not be obligated to, review, monitor, or remove User Content, at Uber's sole discretion and at any time and for any reason, without notice to you"). Last visited, Sept. 13, 2017.

³⁰ ECORYS, BUSINESS-TO-BUSINESS RELATIONS IN THE ONLINE PLATFORM ENVIRONMENT. FINAL REPORT, *supra* note 21, at 70 (Several users have identified the danger of delisting or suspension of their activity as a major risk, suggesting that claims based upon breach of conditions are sometimes abused, be it by brand owners, by competing businesses, by customers or by unspecified third parties. Further, "A few of the interviewed business users active in e-commerce indicated to have sought compensation for the lost turnover and fees paid, but no compensation was offered by the specific platform, even in the case where suspension was a platform's mistake, which was admitted by the platform").

³¹ Airbnb Terms and Conditions, § 33 ("These Terms and your use of the Services will be interpreted in accordance with the laws of the State of California and the United States of America, without regard to its conflict-of-law provisions."); Uber Terms and Conditions, § 7 ("These Terms are governed by and construed in accordance with the laws of the State of California, U.S.A., without giving effect to any conflict of law principles."); Etsy Terms of Use, § 11 ("A. Governing Law. The Terms are governed by the laws of the State of New York, without regard to its conflict of laws rules, and the laws of the United States of America."). Last visited, Sept. 13, 2017.

³² Airbnb Terms and Conditions, § 34 ("Any dispute, claim or controversy (...) will be settled by binding arbitration"); Uber Terms and conditions, § 2 ("You are required to resolve any claim that you may have against Uber on an individual basis in arbitration (...) This will preclude you from bringing any class, collective, or representative action against Uber, and also preclude you from participating in or recovering relief under any current or future class, collective, consolidated, or representative action brought against Uber by someone else (...) You acknowledge and agree that you and Uber are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding."); Etsy Terms of Use, § 11 ("B. Arbitration. You and Etsy agree that any dispute or claim arising from or relating to the Terms shall be finally settled by final and binding

(and non-price) parity clauses.³³ Further, contracts usually contain “bundling” clauses that prescribe the use of certain auxiliary services provided by the platform (payment systems, data cloud, communications channels, delivery services).³⁴

arbitration (...) you and Etsy are each waiving the right to trial by jury or to participate in a class action or class arbitration.”); Getaround Terms of Service (“Arbitration. We each agree to resolve any claim, dispute, or controversy (...) by binding arbitration (...) All claims must be brought in the parties' individual capacity and not as a plaintiff or class member in any purported class or representative proceeding (...) you and Getaround are each waiving the right to a trial by jury or to participate in a class action, collective action, private attorney general action, or other representative proceeding of any kind.”); TaskRabbit Terms of Service, § 20 (“You and company mutually agree to waive your respective rights to resolution of all claims between you (...) in a court of law by a judge or jury and agree to resolve any disputes by binding arbitration on an individual basis (...) you acknowledge and agree that you and company are each waiving the right to participate as a plaintiff or class member in any purported class action or representative proceeding”); Lyft Terms of Service, § 17 (“You and Lyft mutually agree to waive our respective rights to resolution of disputes in a court of law by a judge or jury and agree to resolve any dispute by arbitration (...) Class arbitrations and class actions are not permitted (...) All disputes and claims between us (...) shall be exclusively resolved by binding arbitration solely between you and Lyft”). It is worth noting that BlaBlaCar makes reference to the online dispute resolution platform developed by the European Commission (BlaBlaCar Terms & Conditions, § 15). In some cases, these clauses are coupled with the assignment to the platforms of the possibility to select different jurisdiction/applicable law, without at the same time recognizing this privilege to the other party. *See, e.g.*, Booking.com General Delivery Terms, § 10.6 (“Notwithstanding this Clause 10.5, nothing in this Agreement shall prevent or limit Booking.com in its right to bring or initiate any action or proceeding or seek interim injunctive relief or (specific) performance before or in any competent courts (...) the Accommodation waives its right to claim any other jurisdiction or applicable law to which it might have a right.”). Last visited, Sept. 13, 2017.

³³ In such a clause the seller agrees to offer a price for product and/or service no less favorable than what granted to other platforms. Besides displaying an imbalance of market power, these clauses can present further problems, such as creating a barrier to entry for new platforms or raise prices to the detriment of consumers. The most notable case is the Booking.com one, which has been addressed by Italian, French and Swedish competition authority. *See* European Commission Press release, *Antitrust: Commission announces the launch of market tests in investigations in the online hotel booking sector by the French, Swedish and Italian competition authorities* (Dec. 15, 2014), http://europa.eu/rapid/press-release_IP-14-2661_en.htm. At the end, these authorities accepted Booking commitment to address this concern. The German Bundeskartellamt prohibited Booking.com to use these clauses, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/23_12_2015_Booking.com.html.

³⁴ *Cf.* Report of an engagement workshop hosted by the European Commission “Business-to-business relationships in the online platforms environment - Legal aspects and clarity of terms and conditions of online platforms” (Brussels, Nov. 14, 2016), http://ec.europa.eu/newsroom/document.cfm?doc_id=43829.

Even more importantly, most platforms depict themselves as “networks” or “marketplaces”.³⁵ Often coupled with exemption clauses, these definitions suggest that users are the only service providers, while platforms limits their activity (and consequent liability) to the provision of “transactional services”. A conclusion that may be justified when the platform merely provide a matching system for independent agents by offering an infrastructure that facilitate the matching of supply and demand among its users, but which is clearly inappropriate when an higher degree of control and influence is exercised, thus shifting the burden of responsibility to users for issues that are outside their control, but within the control of the platform.³⁶

In conclusion, while in principle platforms have contributed to making contracts governing the provision of services more even-handed³⁷, the same cannot be said with regard to legal relationships between platforms and their

³⁵ Airbnb Terms and Conditions, § 1.1 (“The Airbnb Platform is an online marketplace that enables registered users and certain third parties who offer services (...) to publish such Host Services on the Airbnb Platform and to communicate and transact directly with Members that are seeking to book such Host Services”); TaskRabbit Terms of Service, §§ 1, 12, 17 (“The TaskRabbit Platform only enables connections between Users for the fulfillment of Tasks. Company is not responsible for the performance of Users (...) The TaskRabbit Platform is not an employment service and Company is not an employer of any User”); Lyft Terms of Service, §§ 1, 12 (“The Lyft Platform provides a marketplace where persons who seek transportation to certain destinations (“Riders”) can be matched with persons driving to or through those destinations (“Drivers”) (...) Lyft does not provide transportation services, and Lyft is not a transportation carrier”; “We disclaim liability for, and no warranty is made with respect to, connectivity and availability of the Lyft Platform or Services (...) We cannot guarantee that each Rider is who he or she claims to be. Please use common sense when using the Lyft Platform and Services”).

³⁶ Cf. C-434/15 Press and Information Asociación Profesional Elite Taxi v Uber Systems Spain SL (The service provided by Uber is more than an intermediation service: it must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of EU law). See also PIERRE HAUSEMER ET AL., FINAL REPORT EXPLORATORY STUDY OF CONSUMER ISSUES IN ONLINE PEER-TO-PEER PLATFORMS MARKETS (2017) (“The discrepancy between the platforms’ level of intervention in the P2P transaction and the liability clauses in its T&Cs risks to confuse or mislead users with regard to the responsibility of the platform in case of problems with the P2P transaction.”), http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704#_ftn4.

³⁷ However, in some cases platforms may have reasons to favour one group of agents of the platform. See, e.g., Rosenblat & Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, *supra* note 15, at 3765 (finding that drivers perceive Uber as favoring consumers). On the price structure in two-sided markets see Jean C. Rochet & J. Tirole, *Platform Competition in Two-Sided Markets*, 1 JOURNAL OF EUROPEAN ECON. ASSN. 990 (2003) (Platforms choose a price structure and not only a price level, thus allocating prices between the two sides of the market).

users. Many clauses adopted by online platforms vis-à-vis their users call into question essential contractual rights, such as the availability of legal remedies or the capacity of one party to hold the other accountable for failing to comply with its obligations.³⁸

2.2 *The Platform and its Users*

In the platform economy consumer is notoriously no longer apart from producer and seller, as the line between providers and customers is increasingly blurring. However, providers and customers still have different set of challenges before platforms, and separate assessments of each case are still preferable for the purpose of this analysis.

The relationship between platforms and providers has usually been scrutinized under the lens of labour law. The vast majority of online platforms for on-demand services claim to make use of contractors hired by the job rather than workers, with a significant shift from long-term employment contracts to spot labour markets and “gig” economy. Quite predictably, this position on worker qualification has been challenged before courts all over the world for the risk of misclassification and dodging of those legal safeguards that are usually justified when market forces do not adequately protect workers. The main question is whether those who supply services over platforms should be viewed as employees or independent contractors. The current debate revolves around the criteria that should point to one or the other direction, and on whether this sharp dichotomy should be revised in the light of the ongoing changes.³⁹

³⁸ See, e.g., Radin, *The Deformation of Contract in the Information Society*, *supra* note 20, at 505 (“The technological and concomitant social features of today’s information society have enabled private firms to engage in massive re-organization of legal rights in their favor”); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, U.C. DAVIS L. REV. (forthcoming 2018) (“Big Data allows new forms of manipulation and control, which private companies will attempt to legitimate and insulate from regulation”), <https://ssrn.com/abstract=3038939>. On boilerplate, see generally MARGARET J. RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); NANCY S. KIM, *WRAP CONTRACTS* (2013); BOILERPLATE. *THE FOUNDATION OF MARKET CONTRACTS* (Omri Ben-Shahar ed., 2007).

³⁹ See Chapter six of this Book. The claim made by Uber that drivers are its customers (or “partners”) has been rejected by American and British courts. Cf. *O’Connor v. Uber Technologies Inc.*, 82 F.Supp.3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft Inc.*, 60 F.Supp. 3d 1067 (N.D. Cal. 2015); *Aslam v. Uber*, judgment of Oct. 28, 2016 (London Employment Tribunal) (“The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous”).

While the distinction between employers and independent contractors goes beyond the scope of this article, a related aspect is more relevant to our analysis. When a provider is deemed as “employee”, labour and employment laws apply, thus offering a protective legal framework for a category typically considered as weaker vis-à-vis her employer. By contrast, a less protective b2b legal framework is pertinent when providers are regarded as truly autonomous entrepreneurs who offer their services via online platforms.⁴⁰

The risk of imbalance of contractual rights, and the consequent need to protect the weaker party of the transaction, is not ruled out in case of independent professional providers.⁴¹ In some instances, a well reputed business may be able to negotiate its own contractual terms with the digital platform⁴², but this is not a realistic option in the vast majority of cases.

In addition to the clauses discussed above (*cf.* § 1.3), certain contractual terms are especially significant for service providers vis-à-vis the platform. On this regard, lack of transparency is a central concern, particularly for crucial aspects of the transaction, such as search rankings criteria, reputation systems and dynamic pricing.⁴³ In fact, in many cases platforms do not provide sufficient information to service providers on how their offerings are displayed or ranked, make no clear reference to the adopted standards, and employ an extremely vague language (e.g. the meaning of criteria such as “popularity” are not clear to providers).⁴⁴ By presenting a long

⁴⁰ The need for special rules for the protection of weaker commercial party is a highly controversial topic. Yet, under EU law SMEs enjoy a special protection in limited cases. *See, e.g.*, Council Directive 90/314, 1990 O.J. (L 158), 59-64 (EEC); European Parliament and Council Directive 2011/7, 2011 O.J. (L 2011), 48-1 (EU). *See also* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market – Opportunities and Challenges for Europe (May 25, 2016), COM (2016) 288/2.

⁴¹ ECORYS, BUSINESS-TO-BUSINESS RELATIONS IN THE ONLINE PLATFORM ENVIRONMENT. FINAL REPORT, *supra* note 21, at IX (A total of 46% of business users have experienced problems and disagreements with the platforms. Among heavy users the share of those that experienced problems is significantly higher (75%)).

⁴² On eBay “power sellers” obtained to do “bulk listings” (to automate the listing of many products) and this enabled these sellers to negotiate lower per-listing fees from the platform. *See* Hagiú & Rothman, *Network Effects Aren’t Enough*, *supra* note 23 (“Over the years, power sellers came to dominate eBay’s supply side and made it difficult for nonprofessional sellers to compete”).

⁴³ *See* HAUSEMER ET AL., FINAL REPORT. EXPLORATORY STUDY OF CONSUMER ISSUES IN ONLINE PEER-TO-PEER PLATFORMS MARKETS, *supra* note 36, at 8 (“One of the main issues concerning the relationship between platforms and their users relates to the lack of transparency in online p2p platform rules and practices.”).

⁴⁴ *Cf.* Report of an engagement workshop hosted by the European Commission “Business-to-business relationships in the online platforms environment - algorithms, ranking and

list of general and non-exhaustive factors, sometimes coupled with clauses which confer to platforms the ability to change placement at their sole will, platforms enjoy a significant degree of discretion.⁴⁵ And since the way offerings are listed and presented is the most relevant variable to explain who gets attention from customers and to determine which goods or services will be chosen⁴⁶, this substantial flexibility enjoyed by the platform may cause considerable harm to their counterparts.⁴⁷

This danger is increased in case of vertical integration, when the same platform that operates as a marketplace also offers its own products. In the case of platforms adopting these hybrid business models, the incentives of the firm as a marketplace may conflict with the incentives of the firm as a service provider: the interests of the marketplace likely prevail when a market has not tipped, but the interest of the service is likely to become more dominant once the platform is uncontested. The same applies when the platform obtains higher revenues from some providers (i.e., when the best ranked results are due to high commissions paid by the offeror).⁴⁸

transparency” (Brussels, March 16, 2017), http://ec.europa.eu/information_society/newsroom/image/document/2017-12/report_on_the_workshop_16_03_2017_clean_F7EF00C2-E39F-1747-949E9C1820629D05_43830.pdf.

⁴⁵ Airbnb Terms and Conditions, § 7 (“You understand and agree that the placement or ranking of Listings in search results may depend on a variety of factors, including, but not limited to, Guest and Host preferences, ratings and/or ease of booking.”); BlaBlaCar Terms & Conditions, § 4.1 (“You recognise and accept that the criteria taken into account in the classification and the order of display of your Advert among the other Adverts are at the sole discretion of BlaBlaCar.”); Booking.com General Delivery Terms, § 4.1.1 (“The order in which the Accommodation is listed on the Platforms (the “Ranking”), is determined automatically and unilaterally by Booking.com. Ranking is based on and influenced by various factors, including but not limited to the commission percentage (to be) paid by the Accommodation, the minimum availability stated by the Accommodation, the number of bookings related to the number of visits to the relevant accommodation page on the Platform (the “Conversion”), the volume realized by the Accommodation, the ratio of cancellations, the guest review scores, the customer service history, the number and type of complaints from Guests and the on-time payment record of the Accommodation.”). Last visited, Sept. 13, 2017.

⁴⁶ See, e.g., Matthew Goldman & Justin M. Rao, *Experiments as Instruments: Heterogeneous Position Effects in Sponsored Search Auctions* (Nov. 20, 2014) (Buyers are about twice as likely to click a listing in the top position as they would be if it were moved one position down), <https://ssrn.com/abstract=2524688>.

⁴⁷ ECORYS, BUSINESS-TO-BUSINESS RELATIONS IN THE ONLINE PLATFORM ENVIRONMENT. FINAL REPORT *supra* note 21, at 38 (“To business users it is not clear when their ranking drops due to their own mistakes and transgressions and when it drops due to the proper functioning of the ranking algorithm.”).

⁴⁸ See, e.g., Booking.com General Delivery Terms, § 4.1.2 (“The Accommodation has the possibility to influence its own ranking by changing the commission percentage and

In both these cases, the platform may place its listings at the top of the ranking or deeper pockets providers may be able to get a better ranking simply by increasing their commission, despite their service may not be as good as others. These practices are clearly detrimental to other providers, who may be forced to pay an extra fee to be competitive, but may also be harmful for consumers, who will not necessarily get to see the best or most relevant offer but instead the one with the highest commission, and likely to pay higher prices (the weight of ranking fee in relation to other criteria used by the algorithm is not clear to business users and consumers).⁴⁹ Thus exacerbating the conflict-of-interest problem, especially if the platform is the only gateway to the market.

A second major issue regarding providers with respect to service providers concerns contractual restrictions on data access and use. Despite often being user-generated contents, the use of this data outside platforms is frequently restricted by contractual clauses, as platforms usually affirm their exclusive ownership on user reviews and other relevant information, well beyond what is required by data protection laws.⁵⁰ This practice may artificially increase switching costs to other platforms for service providers, making them more dependent on the platform as they are unable to transfer their reputation (*lock-in*).⁵¹ Thus not only restricting voice, but also curbing

availability for certain periods, and continuously improving the other factors.”). Last visited, Sept. 13, 2017.

⁴⁹ Cf. Report of an engagement workshop hosted by the European Commission “Business-to-business relationships in the online platforms environment - algorithms, ranking and transparency” (Brussels, March 16, 2017), http://ec.europa.eu/information_society/newsroom/image/document/2017-12/report_on_the_workshop_16_03_2017_clean_F7EF00C2-E39F-1747-949E9C1820629D05_43830.pdf.

⁵⁰ Airbnb Terms and Conditions, § 24 (“If you or we terminate this Agreement, we do not have an obligation to delete or return to you any of your Member Content, including but not limited to any reviews or Feedback.”); Uber Terms and Conditions, § 4 (“By providing User Content to Uber, you grant Uber a worldwide, perpetual, irrevocable, transferable, royalty-free license, with the right to sublicense, to use, copy, modify, create derivative works of, distribute, publicly display, publicly perform, and otherwise exploit in any manner such User Content (...).”); Etsy Terms of Use, § 7 (“If you or Etsy terminate your account, you may lose any information associated with your account, including Your Content.”); TaskRabbit Terms of Service, § 10 (“You hereby grant Company a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, sublicensable (through multiple tiers) right to exercise all copyright, publicity rights, and any other rights you have in Your Information, in any media now known or not currently known in order to perform and improve upon the TaskRabbit Platform”). Last visited, Sept. 13, 2017.

⁵¹ The same result can be obtained with comparable practices, such as platform sponsored auto-loans. Cf. <https://www.uber.com/en-GB/drive/vehicle-solutions/>. See NEWLANDS ET

exit as an alternative strategy.

2.3 Peer-to-Peer Transactions

When the user providing the service is deemed to be an employee and the platform is the truly service provider, the platform is held liable to consumers for non-performance and/or damages, in accordance with “vicarious liability” and similar doctrines. In this case, the platform is the professional counterpart of the customer, and consumer law clearly applies to the provision of the underlying service, in addition to sector specific legislation.

Moreover, when entering an online transaction via platform customers usually rely on both counterpart’s and platform’s reputation. The presence of an intermediary and the same fact that peers are allowed to provide their services via platform - using logo, having an account, and so on - may suggest that a certain level of safety is assured and, in some cases, that the platform itself is the service provider. On this note, the gap between ex ante reasonable expectations and ex post costs and benefits should be taken into account⁵², and platforms should be made liable for the confusion they contribute to creating, thus going beyond adopted contract terms, also taking into account market design, especially when there is a chance of diffuse misperception of risks.⁵³

AL., POWER IN THE SHARING ECONOMY, *supra* note 19, at 8 (“If providers are ‘locked-in’ to auto-loans for use on the platform, platforms maintain a significant power advantage”).

⁵² See, e.g., ECORYS, BUSINESS-TO-BUSINESS RELATIONS IN THE ONLINE PLATFORM ENVIRONMENT. FINAL REPORT, *supra* note 21, at 29 (Consumers are unable to differentiate who is responsible for what with regard to the online transaction and usually contact the business with which they are dealing); Mareike Möhlmann, *Digital Trust and Peer-to-Peer Collaborative Consumption Platforms: A Mediation Analysis* (July 22, 2016) (Trust in the platform has a positive effect on the trust in peers’ sharing on this platform), <https://ssrn.com/abstract=2813367>; HAUSEMER ET AL., FINAL REPORT. EXPLORATORY STUDY OF CONSUMER ISSUES IN ONLINE PEER-TO-PEER PLATFORMS MARKETS, *supra* note 35 (On the larger platforms peers are likely to be confused or misled about who is responsible when something goes wrong: platform's practices may give the impression they assume at least partial responsibility in case of problems, but their Terms and Conditions exclude any liability. (...) About 60% of peer consumers say they do not know or are not sure who is responsible when something goes wrong, what the responsibility of the platform is or if they have a right to compensation or reimbursement. About 40% of peer providers say they do not know or are not sure about their rights and responsibilities, and about 30% think they know more or less. (...) At the same time about 85% of peer consumers find it important or very important that P2P platforms are clear and transparent about who is responsible when something goes wrong).

⁵³ See, e.g., Robert H. Sloan and Richard Warner, *When Is an Algorithm Transparent?: Predictive Analytics, Privacy, and Public Policy*, <https://ssrn.com/abstract=3051588>

In contrast, when the agent operating via platform is the actual service provider, two alternative scenarios may occur. It is possible that the provider is a professional according to relevant law. As the lines between professionals and amateur are blurring, more and more professionals are entering these markets over time, and many platforms are open to both professionals and occasional providers. In this case, consumer law clearly applies to the contract concluded between the professional service provider and the consumer. Such a conclusion would not only be consistent with the need to protect consumers vis-à-vis a professional, but it would further avoid creating an uneven playing field between incumbents and new entrants, which would not be justified in the light of the professional nature of both actors.

When instead the provider is not a professional, consumer protection and sector specific legislation do not apply to the provision of the underlying service. In this case, only ordinary civil remedies may be invoked in the first place. But, while it has been affirmed that ex post remedies may be the most suited solution to encourage innovation⁵⁴, this significant shift from ex ante requirements to an almost exclusive reliance on ex post remedies is not always desirable. The rise of massive provision of services by non-professionals have significantly lowered barriers to entry, as up-front legal requirements for traditional business - ex ante screenings, authorization procedure, inspections, certifications and so on – cannot be adduced. Further, peer providers do not have an established business reputation and have made no investments in a physical commercial space. Therefore, new forms of market failures are likely to occur and the need for protecting customers is a present one.⁵⁵

(arguing that predictive systems are transparent for consumers if they able to readily ascertain the risks and benefits associated with the predictive systems to which they are subject”); Lauren E. Willis, *Performance-based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015) (discussing a new approach to consumer law in order to bring consumer transactions in line with consumer expectations in online transactions).

⁵⁴ Koopman et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, *supra* note 2, at 18; ADAM THIERER, PERMISSIONLESS INNOVATION. THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL INNOVATION (2014); Richard A. Epstein, *The War Against Airbnb*, Hoover Institution (Oct. 20, 2014), <http://www.hoover.org/research/war-against-airbnb>.

⁵⁵ See HAUSEMER ET AL., FINAL REPORT. EXPLORATORY STUDY OF CONSUMER ISSUES IN ONLINE PEER-TO-PEER PLATFORMS MARKETS, *supra* note 36 (Peer consumers report frequent problems with transactions on p2p platforms. More than half (55%) have experienced at least one problem over the past year. The most frequent problems relate to the poor quality of goods or services, or to the goods and services not being as described. Problems with the quality of products/services appear to be almost twice as frequent in P2P markets (29%) as in online purchases in general (15%).

In this scenario, harm-based sanctions may be a viable solution in some cases. However, they may often be lacking in effectiveness, for example when the magnitude of possible harms is likely large in relation to the assets of the actor, in case of judgment proof parties or when dangerous behaviours are difficult to observe and identify. When such risks are real ones, prevention via public enforcement may prove to work better, and to be more appealing at least for fundamental assumptions and expectations about basic safe and risk free expectation.⁵⁶

CONCLUSION: HOW TO PROTECT THE WEAKER PARTIES IN THE PLATFORM ECONOMY?

Disparity of bargaining power exist in the platform economy, even if in different forms than in bilateral business-to-consumers transactions. At the same time, it is far from clear to what extent effective market-based solutions are emerging to tackle the issue. Quite the opposite, the combining effect of boilerplate terms, platform architecture and hidden algorithms is not only enabling a massive re-organization of legal rights in platform's favour, but also a significant realignment of power from the legal power of the State to the private power exercised by online platforms, in many cases shielding their decisions from any meaningful external scrutiny.

As clearly mirrored in surveyed terms and conditions, platforms make frequent use of different mechanisms to leverage their power over users, by considering themselves not liable for safety standards, and allocating the burden for compliance with service regulations on the providers, and liability disproportionately falling on their users. Further, despite platforms often depicting themselves as neutral intermediaries, thus better positioned to arbitrate disputes between provider and customers, in some cases they may well have reasons to favour one type of economic agent operating via platform, rather than acting as an objective judge, with the risk of becoming unsuitable to impartially adjudicate.

For these reasons, the often invoked, almost exclusive, reliance on market-based solutions for the platform economy is hardly justified. To be sure, platform's self governing capacity can definitely complement more traditional forms of regulation, and it is important to recognise platforms' remarkable ability to set up self-governing mechanism and data-based

⁵⁶ On the general structure of legal intervention from an efficiency perspective, *see generally* STEVEN M. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

solutions. But at the same time it is also crucial to identify the many issues platforms are unable or have no interest to dealing with.

If sometimes the case for protecting the weaker party may be addressed by existing legal frameworks – inter alia, labour and consumer law, torts and other harm-based remedies - in other cases a regulatory intervention is surely needed. And a certain degree of pre-emptive regulation may be necessary in addition to ex post remedies, as a kind of backstop to the liability regime in order to assure basic health and safety conditions, which hold regardless whether or not the service is professionally provided. In this line of reasoning, the widespread appeal for a “safe harbour” for the platform economy can only be accepted if it does not imply relinquishing a meaningful external regulation. Bearing in mind that “peer-to-peer” does not always mean equality of bargaining power.