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This is the **accepted version** of the journal article:

Navas Navarro, Susana (Universitat Autònoma de Barcelona.). «Discrimination and Online Platforms in the Collaborative Economy». Journal of European Consumer and Market Law, Vol. 8 Núm. 1 (2019).

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## Discrimination and online platforms in the collaborative economy

### I. Overview

Digital platforms that are intermediary service providers for the information society perform a very important role in the “collaborative”, “sharing” or “peer-to-peer” economy, as it is known today.<sup>1</sup> Transactions of goods and services between millions of people around the world, especially in the transport (62 %) and accommodation (18 %) sectors,<sup>2</sup> have been carried out. In 2015, it was estimated that the profit obtained by the collaborative economy in the EU-28 came to four billion euros, generating exchanges to the value of 28 billion euros.<sup>3</sup> It is expected that, by 2025, turnover will be as high as around 35 billion euros.<sup>4</sup>

The strength and relevance of intermediary digital platforms at both national and European level is indicative of the need for their regulation.<sup>5</sup> Certain national regulations have come into force, governing these exchanges basically from a tax perspective.<sup>6</sup> Likewise, it is worth mentioning the ongoing efforts of the European Union towards a future legal framework for the collaborative economy, namely: the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on “*A European Agenda for the collaborative economy*”;<sup>7</sup> the Communication from the Commission on “*Online Platforms and the Digital Single Market (Opportunities and Challenges for Europe)*”;<sup>8</sup> as well as the “*Report on Online Platforms and the Digital Single Market*” submitted by the Committee on Industry, Research and Energy and the Committee on the Internal Market and

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- 1 Koen Frenken and Juliet Schorb, ‘Putting the sharing Economy into perspective’ [2017] Vol. 23, Environmental Innovation and Societal Transitions, June 3-10.
- 2 National Commission on Markets and Competition (Spain), *Preliminary conclusions on the new models of service provision and collaborative economy*, March 2016, <[http://ka-au.net/wp-content/uploads/2017/01/05.CNMC\\_GOVERNMENT\\_PRO\\_SP.pdf](http://ka-au.net/wp-content/uploads/2017/01/05.CNMC_GOVERNMENT_PRO_SP.pdf)>, accessed 10 September 2018.
- 3 Robert Vaughan and Raphael Daverio, ‘Assessing the size and presence of the collaborative economy in Europe’ [2016] PwC UK, <<http://grupo.us.es/iwpr/wp-content/uploads/2017/12/INFORME-PWC-COMISIÓN.pdf>>, accessed 9 September 2018.
- 4 <[www.libremercado.com/2018-04-08/las-plataformas-de-economia-colaborativa-facturaran-335000-millones-en-2025-1276616633/](http://www.libremercado.com/2018-04-08/las-plataformas-de-economia-colaborativa-facturaran-335000-millones-en-2025-1276616633/)>, accessed 10 September 2018.
- 5 Aura Esther Vilalta Nicuesa, ‘La regulación europea de las plataformas de intermediarios digitales en la era de la economía colaborativa’, [2017] No. 765, *RCDI*, 275-330.
- 6 For instance, the Loi-Programme of 1 July 2016 (Belgium), JO, published 4 July 2016, <<http://www.ejustice.just.fgov.be/eli/loi/2016/07/01/2016021055/justel>>, accessed 10 September 2018; Loi No. 2016-1321, pour une République numérique (France), 7 October 2016, JORF, No. 0235, published 8 October 2016. In Italy, see ‘Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell’economia della condivisione’ (3564), <[https://www.de.digital/DIGITAL/Redaktion/EN/Publikation/white-paper.pdf?\\_\\_blob=publicationFile&cv=4](http://www.camera.it/leg17/126?tab=2&leg=17&idDocumento=3564&sede=&tipo=&”, accessed 10 September 2018; and a White Paper on digital platforms has been published in Germany, <<a href=)>, accessed 9 September 2018.
- 7 Commission, ‘A European agenda for the collaborative economy’ COM (2016) 356 final. See: Caroline Cauffman, ‘The Commission’s European Agenda for the Collaborative Economy - (Too) Platform and Service Provider Friendly?’ [2016] EuCML No. 6, 235-243. See: Reports from 13 EU-Member States published in EuCML issues 1-2/2015, 3/2015, 4/2015.
- 8 Commission, ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’ COM(2016) 288 final.

Consumer Protection.<sup>9</sup> Further, on 15 June 2017, the European Parliament passed a Resolution on a European Agenda for the collaborative economy.<sup>10</sup>

In Private Law there is no norm that addresses the triangular relationship that takes place when using online platforms. However, the Research Group on the Law of Digital Services has prepared “*Model rules on Online Intermediary Platforms*” to show what a potential piece of legislation at EU or national level could look like.<sup>11</sup> The prospective regulation should provide answers to problems that are being identified in the market. One of them is discussed in this paper. Indeed, it has been noted that, primarily in the two foremost sectors of the collaborative economy —i.e., transport and accommodation—<sup>12</sup> discrimination based on ethnic origin has been taking place.<sup>13</sup>

Research conducted in the United States has concluded that Uber (Lyft, too) discriminate passengers based on race. African-Americans or Asians end up waiting longer than Caucasians for their cars to arrive to pick them up and take them to their destination. With regard to the drivers, those whose origin was Anglo-American or who were not but did not have a noticeable accent when expressing themselves in English gave more lifts than those from other ethnic groups or those whose accents indicated that they were not Americans. Those drivers were frequently ‘deactivated’.<sup>14</sup> Similarly, African-American hosts on the Airbnb platform received 12 % fewer offers than white hosts and African-American guests, or those whose surnames might suggest that they were so, received 16 % fewer offers from white hosts than from black hosts.<sup>15</sup> France shows similar figures: 14 % of the users of platforms for transport and accommodation have been discriminated. Of them, 30 % are of Arab origin and 40 % are black users.<sup>16</sup>

In this study, I focus mainly on digital platforms that broker transactions between B2C and C2C, aiming to present measures that may be adopted to prevent discrimination in the

9 Report: Henna Virkkunen, Philippe Juvin, 2016/2276(INI), conference room paper A8-0204/2017.

10 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0271+0+DOC+PDF+V0//ES>>, accessed 8 September 2018.

11 <[http://www.elsi.uni-osnabrueck.de/projekte/model\\_rules\\_on\\_online\\_intermediary\\_platforms.html](http://www.elsi.uni-osnabrueck.de/projekte/model_rules_on_online_intermediary_platforms.html)>, accessed 3 September 2018.

12 Regarding accommodation and tourism, see the report prepared jointly by the European Commission and the International Tourism Organization, *European Union Tourism Trends*, April 2018, <<https://www.e-unwto.org/doi/book/10.18111/9789284419470>>, accessed 9 September 2018.

13 Some gender-based discrimination perpetuating stereotypes of the offline world has also been identified in the fields of transport, accommodation (e. g., a private room in a dwelling that is inhabited by its owners), and temporary jobs (e. g., home cleaning or small repairs). Nevertheless, it should be underlined that the private setting (car, dwelling) in which these situations occur could justify the preference of the customer for a person of the same gender [Naomi Schoenbaum, ‘Gender and the Sharing Economy’, [2016] 43 *Fordham Urb. L. J.* 1023, 1024-25; Yanbo Ge, Christopher R. Knittel, Don MacKenzie, Stephen Zoepf, ‘Racial and Gender Discrimination in Transportation Network Companies’, National Bureau of Economic Research, October 2016, <<http://www.nber.org/papers/w22776>>, accessed 6 September 2018.]

14 <<https://uberpeople.net/threads/is-the-rating-system-illegal.32254/>>, accessed 7 September 2018; Benjamin Sachs, ‘Uber: A Platform for Discrimination?’, [2015] *On Labor*. Retrieved from <<https://onlabor.org/uber-a-platform-for-discrimination/>>, accessed 4 September 2018.

15 Benjamin Edelman, Michael Luca, Dan Svirsky, ‘Racial Discrimination in the Sharing Economy: Evidence from a Field Experience’, [2017] *American Economic Journal: Applied Economics*, 9(2): 1–22.

16 Ombudsman of France, *Enquête sur l'accès aux droits: Les discriminations dans l'accès au logement*, vol. 5, <[http://www.defenseurdes-droits.fr/sites/default/files/atoms/files/171213\\_ddd\\_ead\\_discrimination\\_logement\\_num.pdf](http://www.defenseurdes-droits.fr/sites/default/files/atoms/files/171213_ddd_ead_discrimination_logement_num.pdf)>, accessed 5 September 2018.

collaborative economy. However, I do not address discrimination within the labour market.

## **II. Adoption of measures by online platforms to prevent discrimination in the fulfilment of the duty to protect users in the collaborative economy**

### **1. Legal status of platforms and user discrimination**

The right not to be discriminated against is highlighted by the European Union in documents concerning the collaborative economy. Thus, the Resolution, quoted above, of the European Parliament of 15 June 2017 considers:

“that those services offered within the collaborative economy which are publicly advertised and offered for profit fall within the remit of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services and should, therefore, be consistent with the principle of equal treatment of women and men” (Recital Nr. 13).

Further, Recital Nr. 12 of the Report of the Committee on Industry, Research and Energy and the Committee on the Internal Market and Consumer Protection stipulates that this field should merit substantial consideration to prevent any discrimination.

Council Directive 2000/43/EC of 29 June 2000, in relation to access to goods and services and their supply, implementing the principle of equal treatment of persons irrespective of their racial or ethnic origin, as it is known,<sup>17</sup> should be referred to alongside Directive 2004/113/EC.<sup>18</sup> Discrimination due to racial origin in online transactions using intermediary platforms is currently a major concern when compared to gender discrimination.

Bilateral relationships directly concluded by the parties fall within the scope of those Directives, excluding the triangular one that arises when a digital platform intervenes. They contemplate ‘one-sided’ rather than ‘two-sided’ markets.<sup>19</sup> Nevertheless, the application of the principle of equal treatment of persons, one of the fundamental pillars on which the European Union itself is based,<sup>20</sup> should take into consideration this triangular relationship and the position that online platforms hold with respect to their users, both suppliers of goods and services and customers at the same time (*prosumers*).

In particular, platforms face two legal situations: first of all, they may act solely as intermediaries and, secondly, they may add to their brokerage role a range of service components inherently linked to exercising decisive influence over them.<sup>21</sup>

<sup>17</sup> Council Directive (EC) 2000/43, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>18</sup> Council Directive (EC) 2004/113, implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

<sup>19</sup> Jean-Charles Rochet, Jean Tirole, ‘Platform Competition in two-sided markets’ [2003] *Journal of the European Economic Association*, June 1 (4):990–1029; Mark Armstrong, ‘Competition in two-sided markets’, [2006] *Vol. 37, No. 3, RAND Journal of Economics*, 668–691.

<sup>20</sup> Relating to this issue, see my article “No discriminación por razón de sexo y Derecho europeo de contratos” [2015] *Revista Crítica de Derecho Privado*, No. 12, 315–402.

<sup>21</sup> Aura Esther Vilalta Nicuesa, ‘La regulación europea de las plataformas de intermediarios digitales en la era de la economía colaborativa’, [2017] *RCDI*, No. 765, 275–330; María Sobrino Ruiz, Pedro Hinojo González, ‘El desarrollo de la economía colaborativa y los modos digitales de prestación de servicios’, [2017] *ICE Economic Bulletin*, No. 3086, April, 31–42; Christoph Busch, Hans Schulte-Nölke, Aneta Wie-

If such services imply ‘control’ of providers, then the online platform in fact becomes “the provider” of the service at hand.<sup>22</sup> In this case, there is no longer a ‘two-sided market’ relationship. Consequently, European non-discrimination rules need to be applied as if there were just two contractual parties without the brokerage of the online platform. However, if the platform acts purely as the go-between, for instance cases where Airbnb or Uber are involved, the matter unfolds differently. Indeed, the platform does not discriminate users; rather, suppliers discriminate customers or, *vice versa*, users discriminate themselves.

That notwithstanding, the online platform as an intermediary is liable for the fulfilment of a host of duties: one of them is the duty to protect users from harm caused by other users’ behaviour, such as discrimination in access to goods and services in the collaborative economy.

## 2. Discrimination and transparency of the information provided by users and online platforms

### 2.1. Models of discrimination

Two models explaining why discrimination generally occurs have been proposed by scholars. Although they relate to mainly race-based cases, they may explain why discrimination based on other grounds aside from race occurs.<sup>23</sup> The first model considers that discrimination takes place because there is imperfect information (*statistical discrimination*)<sup>24</sup> concerning the contractual counterparty. Hence, if there is complete and transparent information, discrimination would be avoided. The second approach refers to people’s tastes and preferences (*taste-based discrimination*), that is, we would usually prefer those that we consider to be as similar as possible to ourselves.<sup>25</sup> Despite having all the information regarding the contractual party, we continue discriminating based on our tastes.<sup>26</sup>

Certain empirical studies that have specifically addressed ethnicity-based discrimination on the Airbnb platform have led researchers to state that, although discrimination is not entirely removed, a larger volume of comprehensive, trans-

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wiórowska-Domagalska, Fryderyk Zoll, ‘The Rise of the Platform Economy: A New Challenge for EU Consumer Law?’, [2016] EuCML 1, 3-9.

- 22 In this regard, see the judgement of the Court of Justice of the European Union (Grand Chamber), C-434/15, *Asociación Profesional Elite Taxi* (20 December 2017). See the interesting remark of Philipp Hacker, ‘UberPop, UberBlack, and the Regulation of Digital Platforms after the *Asociación Profesional Elite Taxi* Judgment of the CJEU’, [2018] ERCL 14(1): 80-96. Alberto De Franceschi, ‘Uber Spain and the ‘Identity Crisis’ of Online Platforms’ [2018], EuCML No. 1, 1-4; Marie Jull Sørensen, ‘Private Law Perspectives on Platform Services. Uber- A business model in search of a new contractual legal frame?’ [2016] EuCML No. 1, 15-19.
- 23 On this topic, see: Ann-Sophie Vandenberghe, ‘The Economics of Non-Discrimination’ in Reiner Schulze (ed.), *Non-Discrimination in European Private Law* (Mohr Siebeck 2011) 10-22.
- 24 Edmund S. Phelps, ‘The Statistical Theory of Racism and Sexism’, [1972] Vol. 62, No. 4, *The American Economic Review*, 659-661; Kaas, Leo, Christian Manger, ‘Ethnic discrimination in Germany’s labour market: A Field experiment’, [2012] *German Economic Review*, 13(1) 1-20.
- 25 Teng Ye, Rasha Alahmad, Casey Pierce, Lionel P. Robert Jr, ‘Race and Rating on Sharing Economy Platforms: The Effect of Race Similarity and Reputation on Trust and Booking Intention in Airbnb’, short paper, [2017] Thirty Eighth International Conference on Information Systems, South Korea, 1-11, <[www.researchgate.net/publication/319957147\\_Race\\_and\\_Rating\\_on\\_Sharing\\_Economy\\_Platforms\\_The\\_Effect\\_of\\_Race\\_Similarity\\_and\\_Reputation\\_on\\_Trust\\_and\\_Booking\\_Intention\\_in\\_Airbnb](http://www.researchgate.net/publication/319957147_Race_and_Rating_on_Sharing_Economy_Platforms_The_Effect_of_Race_Similarity_and_Reputation_on_Trust_and_Booking_Intention_in_Airbnb)>, accessed 10 September 2018.
- 26 Marianne Bertrand, Sendhil Mullainathan, ‘Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination’, [2004] Vol. 94, No. 4, *The American Economic Review*, 991-1013.

parent information could prevent discriminatory attitudes based on individuals' preferences.<sup>27</sup>

Nevertheless, researchers who have observed that, when ordering services through the collaborative economy, discriminatory biases do indeed occur based on certain personal information, have suggested removing that information for the purpose of rendering unknown the racial origin, gender and immigration situation of users.<sup>28</sup> A further argument in favour of this approach is that having confidence in the successful performance of these exchanges is based more on the online platform's reputation rather than on the information provided by users, who are themselves in a position to supply inaccurate or fake data.

## 2.2. Reputational mechanisms and discrimination bias

Broadly speaking, two types of information are available to users in intermediary platforms. The first concerns information relating to the contractual parties —suppliers and customers— when, for instance, they rate one another according to each party's level of satisfaction with the performance of the service or when they post public comments that may be read by all users. Trust in platforms and in the collaborative economy, so that transactions can be concluded successfully, may be based on those ratings and comments. The second type of information is that provided by users of the platform when they create their profiles. They usually post a picture, name, telephone number, address and any other data requested by the platform. I will address these two types of information below.

The need for information transparency is one of the priorities established in all European documents that I have mentioned thus far which address the legal future of intermediary digital platforms. Accordingly, the Resolution of the European Parliament of 15 June 2017 highlights the fact that business models for the collaborative economy are fundamentally based on reputation, emphasising that transparency is essential in this regard and deeming that, in many cases, business models for the collaborative economy empower consumers enabling them to take on an active role supported by technology. It gives prominence to the fact that rules are necessary to protect consumers in the collaborative economy, especially when markets are dominated by certain agents, information is asymmetrical or there is lack of competition or choice. The importance of ensuring that consumers receive suitable information on the legal system applicable to each transaction and the resulting legal rights and obligations is also highlighted. The EU Parliament stresses the significance of providing users with clear, impartial and transparent information on the criteria used to filter, rank, sponsor, customise or review the information presented to them; it underlines the need for a clear distinction between sponsored content and all other kinds of content (Recital Nr. 56).

The duty of transparency of intermediary platforms regarding information provided to users is a primary concern. Article 5 of the *Discussion Draft of a Directive on Online Intermediary Platforms* specifies that all information to be provided should be "clear and transparent". Information should

27 Ruomeng Cui, Jun Li, Dennis J. Zhang, 'Discrimination with Incomplete Information in the Sharing Economy: Evidence from Field Experiments on Airbnb', [2017], <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2882982](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882982)>, accessed 10 September 2018.

28 Benjamin Edelman, Michael Luca, Dan Svirsky, 'Racial Discrimination in the Sharing Economy: Evidence from a Field Experience', [2017] *American Economic Journal: Applied Economics*, 9(2): 1–22.

be provided to customers and indeed to the service, goods or digital content providers. For the former, the information supplied relates to the payment made by the provider for a better ranking on the platform or the existence of any special corporate links between the provider and platform. Additionally, the platform should inform users that a reputational system and a specific system of reviews or comments are available to them (Article 8 of the *Discussion Draft*)<sup>29</sup>. Ratings or listings offered by the platform should be explained transparently. Reviews, comments, ratings, and quality certificates assigned by independent bodies may contribute to gaining better familiarity about users and platforms.

However, it should be remarked that reviews and comments written by users on the platforms could be biased due to particular personal experiences. Users will score other users based on those experiences. A diversity of life experiences with the same goods and services exists. Hence, the relevance of the information supplied by reputational systems should be relativized when one considers these mechanisms as a remedy against discrimination in the transactions that are concluded using intermediary platforms.<sup>30</sup> Although reputational mechanisms throw light on how platforms and users act, in my view relying exclusively on them to prevent discrimination<sup>31</sup> should be not seen as a wise decision.

On the other hand, reputational systems could be viewed as a mechanism to impose on users a social sanction due to their behaviour on the network; for instance, excluding users from an online community.<sup>32</sup>

### 2.3. Discrimination based on user profiles

The *Discussion Draft of a Directive on Online Intermediary Platforms* does not mention what sort of common knowledge information should be provided by both suppliers and customers in order to be confident that a transaction can be successfully concluded. For the most part, users are required to register on the platform by submitting data so they can build their user profiles. As I pointed out, the name, address, professional status or picture of the person are examples of the items of information.

For the platform, at first glance it is difficult to be familiar with such information given the number of users registered on both sides of the transaction.<sup>33</sup> Accordingly, although less information, as highlighted by some scholars, might contribute to prevent discrimination, it can be affirmed that, once transactions have been concluded, comments, reviews or ratings may sometimes show a discriminatory bias on the part

29 Concerning the main problems relating transparency and contractual liability, see: Felix Maultzsch, 'Contractual Liability of Online Platform Operators: European Proposals and Established Principles' [2018] ERCL No. 3, 209-240

30 Bart de Langhe, Philip M. Fernbach, Donald R. Lichtenstein, 'Navigating by the Stars: Investigating the Actual and Perceived Validity of Online Users Ratings', [2016] Vol. 42, *Journal of Consumer Research*, 817-833; Russell S. Winer, Peter S. Fader, 'Objective vs. Online Ratings: Are Low Correlations Unexpected and Does It Matter? A Commentary on the Langhe, Fernbach, and Lichtenstein', [2016] Vol. 42, *Journal of Consumer Research*, 846-849.

31 The study carried out by Uber non-professional drivers has suggested that the platform scoring system shows a tendency to discriminate without having been specifically developed for that purpose, <<https://uber-people.net/threads/is-the-rating-system-illegal.32254/>>, accessed 10 September 2018. Also see Alex Rosenblat, Karen E. C. Levy, Solon Barocas, Tim Hwang, 'Discriminating Tastes: Uber's Customer Ratings as Vehicles for Workplace Discrimination', [2017] *Policy and Internet*, 1-24.

32 Jeremy Rifkin (ed), *La sociedad de coste marginal cero* (Paidós, Espasa Libros, 1st ed. 2014) 308-309, 320-322.

33 Fake user profiles were created in the experiments driven by researchers to check whether discrimination exists within platforms unaware of the fact.

of users, for example, when the racial origin of the provider or the customer arises.

## 2.4. Conclusion

Even though the approaches discussed —providing as much information as possible or reducing it to a minimum<sup>34</sup>— revealed pros and cons and did not achieve the final outcomes, it can be asserted that the former rather than the latter is supported by more empirical data.<sup>35</sup> It seems that providing all the information to the counterparty decreases or could decrease cases of discrimination based on users' tastes or preferences to a greater extent in comparison to the thesis that proposes reducing information to the essential. Consequently, platforms should request from their users with mandatory fields for registration as much clear and transparent information as possible so that transactions can be positively concluded.

Once users have registered, and the information requested has been provided, transparent reputational mechanisms and scoring systems could be a source of information to be taken into account —with all due caution because of the presence of possible biases— when seeking to decide whether to enter into a transaction or not.

## 3. Removal of discriminatory situations in the collaborative economy

Platforms can monitor suitable measures to reduce discriminatory attitudes, such as imposing on suppliers the duty to accept a code of conduct, where the commitment to respect the principle of equal treatment of persons in the access and supply of goods, services, and digital content should merit substantial consideration.<sup>36</sup> The settlement of a speedy ordering mechanism ('instant click')<sup>37</sup> or an automated matching system based on the information provided by the platform linking providers and customers are measures that platforms could take into consideration.<sup>38</sup> Mechanisms for online dispute resolution may also be stated when situations of this type are identified.<sup>39</sup> Furthermore, platforms usually cross data using algorithms to extract correlations or patterns (Big Data), develop profiles or make decisions. When platforms realise that a discriminatory pattern exists, they shall then take appropriate steps to prevent it in the future.<sup>40</sup> In short, because intermediary platforms are in a prominent position both economically and legally, they can put into practice measures to prevent discrimination at a lower cost in comparison to users ("*cheapest cost avoider*"<sup>41</sup>).

<sup>34</sup> See section 2.1.

<sup>35</sup> Ruomeng Cui, Jun Li, Dennis J. Zhang, 'Discrimination with Incomplete Information in the Sharing Economy: Evidence from Field Experiments on Airbnb', [2017], <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2882982](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2882982)>, accessed 4 September 2018.

<sup>36</sup> On the website, see the Non-Discrimination Policy of Airbnb and the commitment of the Airbnb community to not discriminate.

<sup>37</sup> Likewise, in the offline world, we take out services from a company that sends workers to our homes without us knowing who they are in advance or whether they have a contractual relationship with the employer or their services are just being hired by the company.

<sup>38</sup> Benjamin Edelman, Michael Luca, Dan Svirsky, 'Racial Discrimination in the Sharing Economy: Evidence from a Field Experience', [2017] *American Economic Journal: Applied Economics*, 9(2): 1–22.

<sup>39</sup> Aura Esther Vilalta Nicuesa, 'La regulación europea de las plataformas de intermediarios digitales en la era de la economía colaborativa', [2017] *RCDI*, No. 765, 275-330.

<sup>40</sup> Betsy Anne Williams, Catherine F. Brooks, Yotam Shmargad, 'How Algorithms Discriminate Based on Data they Lack: Challenges, Solutions, and Policy Implications', [2018] Vol. 8, *Journal of Information Policy*, 78-115.

<sup>41</sup> As is known, this concept was proposed by Guido Calabresi, who stresses that individuals that can avoid damages at lower costs must be considered liable if they fail to adopt the necessary care measures in



The academic *Discussion Draft* for a future regulation of intermediary platforms states that, as long as there is “credible evidence”, platforms shall have the duty to “protect users” in cases of criminal behaviour perpetrated by providers or customers against or to the detriment of other users, as well as in cases of conduct that could cause physical injury, violation of privacy, damage to property, deprivation of liberty, or violation of other similar rights of the other party (Article 9).<sup>42</sup> The protection afforded is based on monitoring “adequate measures”, such as those that I have previously suggested. If measures are not adopted or those adopted are not suitable, the operators of the platforms will be deemed liable for damages caused to users. The *Discussion Draft* does not specify whether preventive actions are suitable to minimise violation of users’ rights, or whether they should be adopted once the violation has taken place.<sup>43</sup> Although, at first, the wording of the Draft supports the monitoring of all kinds of measures, it seems that it advocates more for the latter rather than the former type. Thus, if violations of rights have indeed occurred, actions protecting the holder of the rights may, for instance, consist of removing comments or reviews made by offending users, preventing access to their accounts registered on the platform, or even preventing them from accessing the platform itself.

Since the principle of equal treatment of persons holds a particularly prominent position in the *Acquis communautaire*, in my view, aside from the offending conduct that is referred to in its wording, article 9 (b) of the *Draft Discussion* should expressly mention the infringement of that important fundamental right.

In any event, steps to be taken which digital platforms could consider should be those relating to their role as intermediary. If those measures involve controlling the suppliers, in accordance with the CJEU in the prominent case *The Elite Taxi Professional Association v. Uber*, platforms cease to be viewed legally as intermediaries, whereby they become service providers,<sup>44</sup> which may not be a desirable legal position for them to be in.

### III. Final remarks

A more general conclusion concerning information society service providers in the European digital single market may be drawn from this paper. It seems debatable whether they will hold civil liability solely when having “effective knowledge” of the violation of rights and freedoms of users taking

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order to avoid them (*The Cost of Accidents. A Legal and Economic Analysis*, Yale University Press, London, 1970).

42 Article 9 of the *Discussion Draft* refers back to *Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* [2000] OJ L 178, 1–16 (E-commerce Directive). Although article 9 does not refer to ‘effective knowledge’ but to ‘credible evidence’ which can be noticeable by any means, in my opinion it takes a similar approach to that of the E-commerce Directive. As is known, this Directive states that information society service providers shall not be considered liable—and operators of online platforms are service providers— unless they have “effective knowledge” of the infringements of users’ rights and do not take any action in this regard.

43 Concerning the interaction between Art. 9 and Art. 17 of the *Discussion Draft*, see: Felix Maultzsch, ‘Contractual Liability of Online Platform Operators: European Proposals and Established Principles’ [2018] ERCL No. 3, 209-240.

44 The reasoning of the CJEU regarding Uber may be perfectly applicable to similar platforms. See Philipp Hacker, ‘UberPop, UberBlack, and the Regulation of Digital Platforms after the *Asociación Profesional Elite Taxi* Judgment of the CJEU’, [2018] ERCL, 14(1): 80-96; Vanessa Mak, ‘Private Law Perspectives on Platform Services: Airbnb - Home Rentals between AYOR and NIMBY’ [2016] EuCML No. 1, 19-25.

into account the relevant economic, social and legal position that service providers have in the market.<sup>45</sup> Arts. 12 to 15 of the E-Commerce Directive include liability privileges for the information service providers. In particular, Art. 14(1) applies the liability privilege even though the service provider has obtained actual knowledge of the illegal behaviour of those who use the online platform. In my opinion, it is necessary to include a rule concerning the burden of proof in the forthcoming update of the E-Commerce Directive, under which service providers are compelled to prove both that they could not have been aware of an infringement of rights and that they do have reasonable means to be aware according to a standard of professional diligence<sup>46</sup> (*reverse onus rule*).

If the reverse onus clause applies to the burden of proof in the case under discussion in this comment, platform operators would be liable for damages caused to users owing to discrimination suffered if they fail to prove that they were not or could not be aware of those violations by any means and, therefore, that they were unable to adopt suitable measures to prevent, remove or avoid them. Further, this procedural rule would be consistent with Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of sex-based discrimination.<sup>47</sup> ■

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45 Alberto De Franceschi, 'Uber Spain and the 'Identity Crisis' of Online Platforms' [2018], EuCML No. 1, 1-4; Rupprecht Podszun, 'Uber - A Pan-European Regulatory Challenge' [2015] EuCML No. 1/2, 59. The so-called "right to be forgotten", the publication of "fake news" or the distribution and public communication of copyright-protected digital content are some other examples that advocate for a legal change.

46 This standard is proposed by the *Discussion Draft for a Regulation of Intermediary Platforms* (Article 8).

47 Council Directive (EC) 97/80 on the burden of proof in cases of discrimination based on sex [1998] OJ L 14, 6-8. On the burden of proof in sex-based discrimination cases, see Guillermo Ormazábal Sánchez, 'Beweislastregeln im Anti-Diskriminierungsrecht' in Reiner Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebeck 2011) 131-156.