

Will Deliveroo and Uber be captured by the proposed EU platform Regulation? You'd better watch out...

By Pieter van Cleynenbreugel

Online platforms have become major economic players over the past decade. It is not surprising, therefore, that their business practices have captured the European Union's attention. This attention resulted in a 2018 proposal for a Regulation on transparency and equity in relationships with online platforms, a political agreement on which has been reached between the Commission, Council and European Parliament on 13 February 2019 (see for the press release, http://europa.eu/rapid/press-release_IP-19-1168_en.htm). It is very likely that this Regulation will be adopted before the European Parliament elections of this year. Even though it may seem premature to comment on the Regulation's content in an in-depth way (the final negotiations and fine-tuning are still in progress at this time), this contribution would like to flag an important gap that has seemingly withstood scrutiny so far. That gap concerns the fact that the proposed Regulation apparently – seemingly unintentionally – would not apply to 'underlying service-attached intermediation activities' offered by platforms such as *Uber* and *Deliveroo*. This is most surprising, as the Commission clearly wants them to fall within the scope of that Regulation (according to its press release mentioned above, the new instrument is to apply to 'the entire online platform economy' if and when adopted). This contribution uncovers that gap and proposes a way to close it.

Enhanced transparency and redress for professional platform users

In response to the finding that business users of platforms (e.g. a restaurant offering food via a platform like *UberEats* or *Deliveroo* to name but a few, or a hotel renting rooms via *Booking.com*) were often faced with unfair business practices and tactics by the platform itself (see the Commission's mid-term review on the Digital Single Market strategy, available [here](#)), the Commission proposed to take regulatory action. On 26 April 2018 the Commission published a proposal on promoting fairness and transparency for business users of online intermediation services. Per that proposal, platforms providing online intermediation services have to be more transparent vis-à-vis their business users (hotels, restaurants and any other professional making use of their intermediation services to sell goods or services to consumers) by explaining their terms and conditions (Art. 3, 6 and 7) and making transparent the conditions under which accounts can be suspended or terminated (Art. 4) as well as their ranking parameters (Art. 5). In addition, an internal complaint-handling (Art. 9) and mediation framework (Art. 10) are to be provided for. At the same time, the Commission decided also to impose the same ranking transparency on search engines as well (Art. 5), an issue that will not be discussed further here. As the procedure currently stands, the European Parliament would also propose an explicit extension to device operating systems, such as IOS or Android (see [here](#)).

It is this proposal that is currently moving forward, on which a political agreement has been reached (see also the legislative schedule at the European Parliament's website, <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file->

[jd-online-platforms-fairness-in-platform-to-business-relations](#)) and that will most likely be adopted in the course of the following months.

The scope of the proposed platform Regulation

If adopted, the Regulation will be applicable to any platform established anywhere in the world offering ‘online intermediation services’ to business users of that platform established or residing in the European Union (Art. 1(2)). A business user, according to the proposal, is ‘any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession’ (Art. 2(1)).

In practice, the obligations of transparency outlined here will apply only in B2B relationships, i.e. when the person offering goods or services via the intermediary of a platform is to be qualified as a professional. A private individual offering to share on a non-regular basis a spare room in his house (via *Wimdu*) or a spare seat in his car (via *Blablacar*) within the framework of the so-called sharing economy and not on a professional basis, does not fall within the scope of the Regulation. Only when the business is carried out on a professional basis will the Regulation apply.

In contrast, a non-professional user of a platform will be considered a consumer, to which the platform would have to apply EU consumer law provisions, most notably those of Directives [93/13](#) (unfair contractual terms), [2005/29](#) (unfair commercial practices) and [2011/83](#) (distance sales and right of revocation) as well as of the proposed ‘New Deal for consumers’ Directive (see [here](#)) which all impose or would impose particular transparency and redress possibilities. The purpose of the envisaged platform Regulation is to foresee similar – though not equal – transparency and redress guarantees for *professional* users of platforms. A professional restaurant owner, a professional licensed limousine driver, a professional seller of goods would all be considered beneficiaries of this Regulation.

The envisaged Regulation does not offer a definition of online platforms, but simply extends its scope of application to all natural or legal persons which provide, or which offer to provide, online intermediation services to business users (Art. 2(3)). The crucial question to determine whether a platform falls within the substantive ambit of the Regulation therefore is whether the platform offers online intermediation services.

Article 2(2) of the proposed Regulation defines online intermediation services as all services that meet three cumulative requirements:

- they constitute *information society services* within the meaning of Article 1(1)(b) of Directive (EU) No [2015/1535](#) of the European Parliament and of the Council;
- they allow *business users to offer goods or services to consumers*, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; and
- they are provided to business users on the basis of *contractual relationships* between, on the one hand, the provider of those services and, on the other hand, both those business users and the consumers to which those business users offer goods or services.

With this definition, the Commission hopes to capture, in its own words, the entire online platform economy – approximately 7,000 online platforms or market places operating in the

EU – which include world giants as well as very small start-ups (see press release of 14 February 2019, available at http://europa.eu/rapid/press-release_IP-19-1168_en.htm).

Unintended consequences

Upon first glance, the definition of online intermediation services offered by the Commission in its proposed Regulation is sufficiently broad to capture the essence of what online platforms do: intermediating between professionals and consumers. On closer examination, however, the definition of online intermediation services suffers from one major shortcoming: it limits online intermediation services to ‘information society services’, i.e. any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (Art. 1(1)(b) Directive 2015/1535). This definition basically covers the activities of platforms doing nothing more than bringing in touch (professional) services providers with clients. One could say a platform like *Booking.com* is a good example of such a service provider. *Booking.com* does not own properties and puts in touch non-professional travellers/guests and mostly professional lodging providers such as hotel owners. The terms and conditions of lodging are determined by the hotel and not by the platform itself, which does not have an influence on the underlying service offered by the hotel owner making use of that platform.

The fundamental problem is that some platform intermediation activities have been excluded by the Court of Justice from the information society service definition. I would like to refer to those activities as ‘underlying service-attached intermediation activities’. ‘Underlying service-attached intermediation activities’ refer to preliminary intermediation activities provided by a platform that are necessary preconditions to make the underlying service (transport, lodging, catering,...) happen and without which that service could not be offered. The Court of Justice’s case law on *Uber* confirms that such services, at least in the domain of transport, fall outside the scope of the information society services definition offered by Directive 2015/535.

Although a platform such as *Uber* stresses the fact that it only intermediates between professionals and does not provide transportation itself (see terms and conditions, available at <https://www.uber.com/en-BE/legal/terms/za/>), the Court of Justice classified parts of its activities as falling within the realm of transport. In its *Elite Taxi* (C-434/15) and *Uber France* (C-320/16) judgments (discussed previously on this [blog](#)), the Court ruled that the services offered by *Uber* in the realm of connecting non-professional drivers and clients are not to be considered an information society service. As the Court held, this action creates a new offering of services, of which *Uber* determines the essential conditions and over the performance of which it has a decisive influence. In earlier cases, the Court had already ruled that any service inherently linked to the transportation of goods and services qualifies as a transport service, even when that service is performed by someone who is not actually going to provide the transport service (see by way of example technical control services of vehicles, C-168/14, *Itevelesa*). Given the broad interpretation given to the notion of transport service in the *Itevelesa* judgment, it would not be surprising should the Court arrive at the conclusion that *Uber* intermediation is inherently linked to the underlying transport service, even when that service is offered by a professional driver (which was not at issue in the abovementioned *Uber* judgments). According to the Court, services in the field of transport, even when including intermediation as a part of them, are not to be considered information society services and therefore also escape the specific regulations that focus on that type of services.

It follows from the foregoing that transport services offered by *Uber*, even when consisting in online intermediation activities, would not qualify as information society services under EU law. As the proposed Regulation would only apply to those EU-defined information society services, *Uber's* intermediation activities would not fall within the scope of that instrument.

The same argument could be made, *a fortiori*, for *Deliveroo*, *UberEats* or any other food delivery platform organising itself the transport of restaurants' meals to clients. As a platform allowing restaurant owners to have their meals delivered to non-professional clients, *Deliveroo* not only brings restaurant owners and clients in contact with each other, but also organises and provides for the transportation of the meal to the client's home. Although, at first sight, *Deliveroo* would seem to perform a catering service, it does neither prepare the meals in advance itself, nor does it serve in the way a traditional caterer would (with the help of staff on site serving the food delivered). Quite on the contrary, *Deliveroo* only limits itself to transporting pre-arranged and pre-ordered meals, which it only delivers at the client's doorstep. As such, bringing in touch restaurant owners and clients, *Deliveroo* offers an intermediation service that is inherently attached to and part of the actual transportation of the meal. It could be submitted, therefore, that the transportation of the meals is the essential element characteristic of this service. Although the Court of Justice has not rendered a judgment on the nature of *Deliveroo* services, its *Uber* case law at least allows to speculate that *Deliveroo* services would equally be transport services. It would follow from this that the envisaged platform Regulation would also not cover those activities....

That finding is rather surprising, as the Commission clearly and explicitly indicated its willingness to target all activities of online platforms vis-à-vis business users. In both *Deliveroo* and *Uber* applications, business users (restaurant owners and professional drivers in *UberBlack*) are being listed, delisted and rated, just like other professional users of platforms. Would it make sense to exclude business users making use of *Deliveroo*, *UberEats*, *UberBlack*, *UberX* from the benefits of transparency and effective redress, only because of a string of case law that defines transport services in a very large way? Why would a hotel owner listed on *Booking.com* benefit from enhanced transparency rights and a restaurant owner using *Deliveroo* not? It would seem to me that the Commission did not intend for this to happen when it was drafting its proposal.

More fundamentally, limiting the scope of the envisaged Regulation to mere information society service providing platforms is likely to raise additional questions regarding the nature of services offered by other platforms. It has to be reminded that the legal status of platforms as service providers remains far from settled under EU law at this time. Take the example of *AirBnB*. Is this platform really only intermediating between professional lodging providers and potential clients, or does it also determine the essential conditions of the services offered by those owners? Should the Court arrive at that conclusion, *AirBnB* would likely no longer be considered a mere provider of information society services and would thus potentially fall outside the ambit of the envisaged platform Regulation. As this point is not settled in EU law, limiting the proposed Regulation's scope to information society services is likely to trigger a significant amount of litigation on the exact nature and scope of services offered by online platforms.

A way forward

How to move forward in light of this lack of clarity regarding the scope of the proposed Regulation? As one of the objectives of the Regulation was to make online intermediation

activities more transparent and, thus, certain, adding a layer of legal uncertainty for businesses using platforms such as *Deliveroo* and *Uber* (and potentially *AirBnB*) would not seem to make much sense.

In my opinion, the best solution would be to modify the definition of online intermediation services, before the instrument is adopted finally, so as to include all platforms, also the ones offering services beyond the scope of the information society service definition

In discussions at the European Parliament, some concerns seem to have risen in this regard as well. The European Parliament's Transport and Tourism committee has proposed an amendment that would extend the notion of business users to businesses in the field of transport and individuals working or providing services by personally providing work via online intermediation services (see [here](#)). In that understanding, the Parliament's Committee seems to presuppose that a platform like *Uber* offers information society services to professional and non-professional drivers, to which the Regulation would also apply. However, in doing so, one fails to observe that the problem lies with the Court considering those platforms themselves as providers of transport services and not as information society services providers. If the platform itself offers transport services excluded from the scope of the proposed Regulation, for which intermediation is a necessary precondition, extending the notion of 'business users' to professional and non-professional drivers would not change a great deal. If one really wants to ensure that those services are covered, a modification of the 'online intermediation services' definition would be required, rather than an extension/clarification of the notion of business user as proposed by the Committee.

Calling for an extension of the online intermediation services definition beyond mere information society services, I would dare to propose my own amendment to the proposed Regulation in this regard. In my opinion, what could be done, is simply adding that online intermediation services consist in information society services '*or services to which intermediation between a business user and a consumer via digital means is an necessary precondition*'. Doing so would already remove all doubts as to whether *Uber's* and *Deliveroo's* (and even *AirBnB's*) activities would fall within the scope of the Regulation. The fact that two other conditions have to be fulfilled (allowing business users other than the platform and consumers to engage in transactions and the presence of contractual relationships between those users) would in addition avoid to extend the Regulation all too far beyond its original ambitions.

The only impact this proposed amendment to the existing text would have is to take away all uncertainty as to whether services consisting in intermediation but classified otherwise by the Court would be excluded or not. If the Commission, Council and European Parliament are serious as to their willingness to extend the Regulation to the entire platform economy, including those platforms offering underlying service-attached intermediation activities (which seems to be the case), I can only urge them to seriously consider to modify the online intermediation service definition. Taking action now may indeed avoid future long-winding and costly litigation on this issue and will contribute to guaranteeing legal certainty for businesses using or wanting to use *Deliveroo*, *Uber* and other similar platforms...