# 21st CENTURY LEGAL CHALLENGE : “UBERIZATION” OF THE ECONOMY

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**Siwar AlMashal**

Revue libre de Droit

**ISSN 2276-5328**

Article disponible en ligne à l’adresse suivante :

http://www.revue-libre-de-droit.fr

Comment citer cet article - How to cite this article:

S.ALMASHAL: « 21st century legal challenge: “Uberization” of the economy », *Revue libre de Droit*, 2017, p.1-25.

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**Article**

# 21st CENTURY LEGAL CHALLENGE : "UBERIZATION" OF THE ECONOMY

(How does the law intervene to regulate these platform-based companies? A comparison between the US and France).

**Siwar AlMashal**[1]

***Abstract***: *The size and scale of technology-driven businesses such as Uber, Airbnb, and several others continue to surpass some of the world's largest corporations. In September 2016, Airbnb was estimated to be worth 30 Billion dollars –more than the publicly traded Hilton Worldwide with a market value of 23.33 Billion*[2]*. While the use of these applications is increasingly becoming an unavoidable and necessary part of our daily lives, these new forms of companies are taking advantage of the lack of legal framework. The article describes and analyzes this "grey" legal area, which raises issues particularly in matters of labor law, tax law and civil and criminal liability. In this regard, they are subject to heavy scrutiny from (1) their traditional counterparts for illegal and unfair competition, (2) their employees for the lack of employment rights and benefits, (3) states in which they operate for fiscal evasion and (4) the public for their lack of liability. After studying, analyzing and comparing the French and American legal systems as well as the way both countries tackle the various legal issues around this new form of business transactions, it is hoped that the selection of these two jurisdictions could represent a wide enough spectrum to be able to determine whether legislators would need to create a new set of rules or whether they should implement the same legislation applicable to their traditional counterparts. Accordingly, throughout this article, we will see that adapting existing legislation to these new forms of companies would guarantee fair competition with their traditional counterparts. However, if this adaptation is considered, it should not be applicable to civil and criminal liability, where a shared liability must be established between the provider and the platform-based company.*

***Keywords:*** *Comparative law – Tax law – Labor law – Civil and criminal liability – Common Law – French law – US law – Uber – AirBnb – platforms – digital revolution.*

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[1] Mrs. Siwar AlMashal is a Jordanian jurist specialized in international corporate law. She was educated at Paris Descartes' Law School (LL.M.). The author can be contacted at siwar.almashal@gmail.com.

[2]<https://skift.com/2016/09/23/airbnbs-latest-investment-values-it-as-much-as-hilton-and-hyatt-combined/>

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# I. INTRODUCTION

At least 2 000 taxi drivers in Paris, France protested against Uber Inc, a company that provides transportation services, on Tuesday January 26th 2016[3]; disrupting traffic across France, including around Paris airport and national railway stations, burning tires[4], assaulting private drivers[5], taking Uber clients as hostages[6], these extremely violent protests denounce unfair competition of these new forms of platform-based companies. The taxi drivers regard Uber's services as illegal and as an unlicensed taxi service[7].

We have all heard of these new smartphone applications and the disruption they have caused all around the world, whether it is Uber, Airbnb, Lyft, or Heetch…, in regards to the traditional model of business transactions. First of all, let us start by explaining what the traditional model consists in, in order to understand the disruptive effect of this new economy. The traditional model of business

[3] <http://www.theguardian.com/world/2016/jan/26/french-taxi-drivers-block-paris-roads-in-uber-protest> (accessed the 1rst of March 2016).

[4]<http://www.ibtimes.co.uk/anti-uber-protests-french-taxi-drivers-start-paris-road-fire-demonstration-against-alternative-1540095> (accessed the 1rst of March 2016).

[5] <http://uk.businessinsider.com/uber-protests-in-paris-2016-1> (accessed 1rst of March 2016).

[6] Taken hostage by a taxi driver whom she booked through the Uber App;

<http://www.nbcchicago.com/investigations/chicago-uber--304350091.html> (accessed 1rst of March 2016).

[7]<http://www.theguardian.com/technology/2015/jun/26/uber-expansion-meets-global-revolt-and-crackdown> (accessed the 1rst of March 2016).

transactions is characterized, mainly, by two forms of commercial transactions: the Business-to-business model (often referred to as B2B) and the business-to-consumer model (often referred to as B2C). B2B is a process for selling products or services to other businesses where as B2C is a process for selling products or services directly to consumers. Housecleaning services, restaurants and taxi companies are examples of B2C services. The term became immensely popular during the dotcom boom of the late 1990's, when companies sold products and services directly to consumers through the Internet. Among the most successful companies in the world are Amazon.com and Priceline.com, based on a B2C model.

However, due to the exponential growth of internet, the nature and structure of business transactions has been changed dramatically. Today, we are witnessing a transition into a new platform-based economy, referred to as sharing or collaborative economy. This digital revolution is known as the *"Uberization of the economy"*. However, we have to note that the more appropriate terminology is *"platformisation"* of the entire economy. The confusion is understandable and arises from the all the mediatized and violent protests against Uber; this company has been subject to the most criticism, due to the aggressive attitude it has adopted, the lack of cooperation with governments and the violent opposition from Taxi companies. However, the "uberisation" of the economy is only an illustration of the change that platforms have generated in the transportation market. Apart from sectors that have already been "platformized", such as travel, finance and transportation, other markets will most likely go through this change.

This business model is characterized by three essential elements: it is an online intermediary (1), that acts as a market for peer-to-peer services (2), and that facilitates exchanges by lowering transaction costs (3)[8]. In regards to the first element, these platform-based companies operate through either a web portal, or a mobile application. Unlike the B2C model, they are not direct service providers. For example, Fetch!Pet Care is a traditional pet services provider with an online storefront. Users directly contract with Fetch for pet services, meaning it acts as a direct provider and not as a platform.[9] The aim of these platforms is to connect "users" (purchasers of services) with "providers" (sellers of services). For every transaction realized and every service provided, they receive a transaction fee. Uber, for example, takes a commission fee for every ride ranging from 20% to 30%, depending on the city. Since it launched in 2012, Uber's low-cost service, UberX, has always had a 20% commission. However, in the last few months, it has raised commissions to

[8] <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2083&context=btlj>

[9] *FETCH! PET CARE,*<http://www.fetchpetcare.com/>

25% and even to a shocking 30% in some cities. For example, any drivers in San Francisco who signed up after the 2nd of September 2014 had to pay a fee of over 25% to license the technology[10].

Concerning the second element, "a market for peer-to-peer services", it is the counterpart of both the B2B and B2C models. What is extremely advantageous is that it allows providers to market their skills on a freelance basis. Therefore, we can clearly see that it consists in a three party relationship, as opposed to the previous economic model, between two private individuals and an intermediary platform-based company, allowing the meeting of offer and demand. Furthermore, it also allows them to profit from under-used personal assets.

Finally, the third characteristic consists in low transaction costs. This facilitates and enhances exchanges between the provider and the user, by, on the one hand, incorporating a social connectivity. Users create an e-reputation system –a review and rating tool for screening bad providers; they create individual profiles, they share their connections and review each provided service. On the other hand, they also lower transaction costs by providing quality or safety guarantees, such as the previously mentioned reputation systems, background checks or cancellation policies. In conclusion, they act like virtual matchmakers by allowing relationships that otherwise might be too costly or burdensome to arrange[11]. Airbnb cofounder Brian Chesky, a platform-based company providing accommodation services, perfectly identified the nature of this emerging movement of sharing economy: *"What the sharing economy did was create a third category: people as businesses"*[12].

Although these digital technologies are still in their nascent stages, they are expanding extremely rapidly: they operate all around the world and moreover know no borders. Airbnb can illustrate this expansion perfectly, as it's the leading accommodation service provider nowadays: in six years, it has become a company valued at $2.5 billion, with 500,000 properties available in more than 190 countries[13].

The question we need to ask ourselves is how does the law intervene to regulate these platform-based companies? Should we apply existing laws to these platforms, adapt them or create a new set of regulations?

[10] New York City drivers who joined as of April 2015 will also pay 25%, as well as drivers in Toronto, Indianapolis, Boston and Worcester. <http://www.forbes.com/sites/ellenhuet/2015/09/11/uber-raises-uberx-commission-to-25-percent-in-five-more-markets/#1ab43e7964b5> (accessed February 25th 2016)

[11] <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2083&context=btlj>

[12] <https://lawreview.uchicago.edu/page/airbnb-case-study-occupancy-regulation-and-taxation#3N>

[13] <http://www.wsj.com/articles/SB10001424052702304049704579321001856708992> (accessed February 20th 2016)

First of all, this raises the issue of the applicable law to these companies, and especially the applicable law in the case of a contentious dispute (I). Second of all, they exist and operate in and parallel to a wide variety of traditional service providers, such as hotels, that are disrupted by this new economy. The biggest concern is that they operate within a gray area of the law, a "legal vacuum" if we may, because of their different and specific nature. Sharing companies erode the distinction between commercial and personal, creating a difficult application of existing laws. This confusion furthermore creates legal issues concerning particularly matters of employment law and tax payments (II). Finally, this lack of appropriate regulation also raises the issue of the liability of sharing platforms (III).

Throughout this article, will be compared the regulations in France and in the United States, and the different suggestions each country proposes to do in order to regulate this new economy. Moreover, will be seen the way each country tackles the various legal issues around this new form of business transactions.

## II. THE APPLICABLE LAW TO MULTINATIONALS

Companies operating all around the world raise the issue of the applicable law to each branch. This problem is accentuated with the rise of platform-based companies, since they are accessible to everyone through the internet. One the one hand, the question that if often asked is whether the domestic law of each country applies to the branch in question, whether the law of the seat applies, or finally whether there is an international law regulating all the branches (A). On the other hand, we need to also ask ourselves what happens if a dispute arises between a branch and a private actor. Which court has jurisdiction to hear and solve the dispute? (B)

### A. *The applicable law to multinationals*

First of all, the term "multinational enterprise" needs to be defined. As a direct consequence of globalization, it comprises companies or other entities established in several jurisdictions, specifically in more than two countries, other than their home country, with business activities which may range all over the globe.[14] Multinational enterprises have become extremely important actors in contemporary international business transactions.

[14]<https://books.google.fr/books?id=3C_18HEu1TwC&pg=PA191&lpg=PA191&dq=applicable+law+to+multinationals&source=bl&ots=yTCB92Rd1&sig=UJAr7NtG4uz3ek_RLUvhhlvqpZw&hl=en&sa=X&ved=0ahUKEwj9tojqqM_LAhUC2hoKHcOSC0I4ChDoAQgoMAM#v=onepage&q=applicable%20law%20to%20multinationals&f=false> (accessed February 20th 2016)

The main difficulty with these enterprises is the absence of corporate regulation in international law. Consequently, they are subject only to the domestic laws of the different states in which they operate. Accordingly, from a legal point of view, a more appropriate definition of a multinational company is an enterprise, incorporated under the laws of a particular country, undertaking business activities beyond the borders of that particular country.[15] This definition directly tackles the issue of the applicable law, and expressly identifies the domestic law as the applicable one.

On another note, it is essential to talk about the OECD's[16] effort to regulate these companies. It publishes annual reports on its guidelines for multinational enterprises, which provide voluntary principles and standards for business conduct in accordance with applicable laws.

These guidelines aim to establish a mutual confidence between the enterprises and the societies in which they operate, in order to promote and ensure a favorable foreign investment climate. This is made possible only if these enterprises are in conformity with government policies, as to not violate the host country's sovereignty.[17] However, these guidelines are not legally binding, but act only as a sort of framework establishing principles for better business transactions between countries. They are referred to as "soft law", as opposed to "hard law". The latter refers to actual binding legal instruments and gives states and international actor actual binding responsibilities and rights whereas the term soft law refers to norms of different nature which do not have any legally binding force. They are often found in instruments such as resolutions, recommendations, guidelines, codes of conduct… An interesting doctrinal debate has been triggered on the difference between these two forms of law. In fact, some authors rely on a binary distinction between legal and non-legal rule while other choose the idea of a graduated normativity[18].

[15] <http://escholarship.org/uc/item/3nz79708#page-4> (accessed February 20th 2016)

[16] Organization for Economic Co-operation and Development – International organization helping governments tackle the economic, social and governance challenges of a globalized economy.

[17]<https://books.google.fr/books?id=3C_18HEu1TwC&pg=PA191&lpg=PA191&dq=applicable+law+to+multinationals&source=bl&ots=yTCB92Rd1&sig=UJAr7NtG4uz3ek_RLUvhhlvqpZw&hl=en&sa=X&ved=0ahUKEwj9tojqqM_LAhUC2hoKHcOSC0I4ChDoAQg oMAM#v=onepage&q=applicable%20law%20to%20multinationals&f=false> (accessed February 20th 2016)

[18] <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0040.xml> (accessed February 20th 2016)

In conclusion, there is no international binding regulatory framework concerning multinationals, only international guidelines, and therefore, they must operate in accordance with the domestic laws of each country.

B. *Applicable law to dispute resolution*

Dispute resolution obeys to a different legal framework than the domestic law of a country a multinational operates in. The use of appropriate international dispute settlement mechanisms is encouraged, in order to facilitate the legal problems arising between enterprises and host country governments, especially arbitration. Indeed, if a dispute arises and is heard before state Courts, there is clearly the issue of impartiality and bias in favor of the government, and not the company. Therefore, arbitration comes into play to resolve this issue.

There are three elements to define arbitration. First of all, it is a private justice: the judge appointed by the parties and called the arbitrator, renders justice in the name of the parties, as opposed to a state judge who renders justice in the name of the state. Second of all, there is no arbitration without a contract. The parties must give their consent to settle the dispute through arbitration, with an arbitration agreement. This agreement is considered as a renunciation of an individual's right to seek legal redress before a state court; you can only renounce your right to public hearing by express consent or implied limitations, when the parties agree to have the dispute resolved by an arbitration agreement.[19] Finally, the arbitrator renders a binding decision, referred to as an award. It is qualified as a judicial decision with res judicata, meaning a case in which there has been a final judgment, and is no longer subject to appeal. For example, Uber states on its website that *"any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation, or validity thereof or the use of the Services will be settles by binding arbitration between you and Uber, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relied in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights."*[20] Accordingly, we can see that the only exception to arbitration concerns intellectual property rights, since their protection is limited to the state in which they were recognized. Indeed, part of the doctrinal authority denies any international character to these disputes, and confirms the

[19] *ECtHR, Deweer vs Belgium, 27th of February 1980*

[20] <https://www.uber.com/legal/usa/terms> (accessed February 26th 2016)

territoriality principle since any violation is limited within the borders of the State[21]. It also adds that, by using these platforms, *"you waive the right to a trial by jury or to participate as a plaintiff or class member in any class action or representative proceeding"*[22].

This provision has been challenged by Uber drivers on the 3rd of November 2015, when four drivers filed a putative class action suit against Uber Technologies, before the United States District Court of California, on behalf of themselves and approximately 160,000 other "UblerBlack, UberX and UberSUV drivers who have driven for Uber in the state of California at any time since August 16, 2009[23]. On December 9th 2015, the Court issued its final order certifying the case as a class action[24]. It rules that Uber's arbitration clause is unenforceable, and thus cannot be used to keep drivers out of this case[25]. However, the arbitration provision may still apply to other claims that are brought in other class action lawsuits[26].

In conclusion, arbitration seems like the most appropriate mean to solve international disputes arising out of or relating to platform-based companies. However, the provision prohibiting class action law suits or trial by jury seems extremely unfair to the workers; it is only introduced into the contract for the own personal interest of these multinational companies, in order to avoid the risk of being held accountable by a great number of plaintiffs, and being convicted to pay punitive damages, which can rise up to extremely high amounts in the United States.

[21] <http://www.unige.ch/droit/pi-ip/vol2/recensions/vol2_CRideau.pdf> (accessed February 26th 2016)

[22] <https://www.uber.com/legal/usa/terms> (accessed February 26th 2016)

[23] <http://uberlawsuit.com/Uber%20-%20class%20cert%20order%20-%209-1-15.pdf> (accessed February 26th 2016)

[24] <http://uberlawsuit.com> (accessed February 26th 2016)

[25] Idem n22

[26] <http://uberlitigation.com/notice.php> (accessed February 26th 2016)

## III. THE LEGAL CHALLENGES DUE TO THE SPECIFIC NATURE OF THE COMPANIES

Even though this new economic model is closely analogous to traditional one, their specific falls within a gray area of the law. It is hard to distinguish and identify the commercial from the personal asset, the professional from the occasional provider, the degree of control exercised by the platforms, etc.…raising many issues concerning employment law (A), tax law (B) and finally in regards to insurance rules and liability (C). This is why we have to ask ourselves if they should apply the same laws as their traditional counterparts.

### A. *Employment law challenges*

First of all, the contracts between platform-based companies and their workers are not employment contracts, nor can employment law be applied to these transactions. In fact, the providers are registered as independent contractors, and are therefore considered as "partners". The scale on which self-employed individuals are providing services to other people consists in one of the biggest differences with the precedent economy. The problem is that this classification deprives workers of many types of protection, specifically economic protection, social security protection and legal protection that dawn from employment law. We will start by explaining the legal framework of the matter in France, and how they aim to resolve it, and then compare it to the United States' situation, which is already going through a misclassification lawsuit.

In France, to be qualified as an employment contract, three conditions must be satisfied: the person must receive remuneration (1) in exchange of a work performance (2) which is executed under a link of legal subordination (3)[27]. This link was referred to for the first time in the case of Bardou in 1931 rendered by the Court of Cassation. During the precedent jurisprudence, economic dependence sufficed to qualify an employment contract. In the case of Uber workers and other similar companies, the last condition is not met. These companies consider there is not a link of legal subordination, which is determined by the degree of control exercised by the platforms. The Court considers that a link of legal subordination is present only when the work performance is executed under the authority of an employer who has the power to give orders, the power to control the execution of his orders, and the power to punish breaches of his subordinate."[28] It is also important to mention that work executed within an organized service is considered as an indication of legal subordination, provided that the employer unilaterally sets the conditions for the work performance. Consequently, there is still a possibility to automatically requalify the contract from an independent

[27] *Bardou Case, 1931, Court of Cassation*

[28] *Société générale Case, 1996, Court of Cassation*

contractor into an employment contract if the subordinate works on a daily basis in conditions of subordination in relation to his superior.[29] One solution to this issue is to change and adapt the definition of legal subordination to include economic dependence.[30] It was proposed by the « Conseil National du Numérique», which presented a report to the current Minister of Labor, Myriam El Khomri, on the digital revolution and the necessary evolution of the law to ensure effective protection for independent contractors but economically dependent workers. In addition this, concerning social security matters, another report[31] proposes the convergence of social protection between employees and independent contractors. Employers must have legal duties in regards to social security. A prompt reaction to these legal issues is needed in order to avoid requalification law suits such as the ones happening in the State of California in the United States against Uber Technologies that we previously mentioned[32].

On the other hand, to understand how the United States tackles this issue, we will focus on this class action suit which solves the matter of misclassification of workers as independent contractors instead of employees. The plaintiffs allege that they are eligible for various protections codified for employees in the California Labor Code. To be specific, they are demanding the reimbursement of all *"necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties"*, which violates the California Labor Code section 2802, and also *"failed to pass on the entire amount of any tip or gratuity that is paid, given to, or left for an employee by a patron"*, violating section 351 of the same Code[33]. To determine whether the plaintiffs should be qualified as employees or independent contractors, the Court proceeds in a two-stage analysis, referred to as California's Borello Employment Test.

First of all, under Californian law, there is a presumption that a service provider is an employee, unless the employer is able to bring evidence proving otherwise. The burden of proof lies with the employer.[34] Second of all, to rebut this presumption of employment, the Supreme Court's opinion in the Borello case established a set of criteria qualifying an employment relationship.[35] The most

[29] Mettling Report, September 2015 *(the Director of the Human Resources Department of Orange presented this report to the current Minister of Labor, Myriam El Khomri, on the impact of new technologies on labor)* <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>

[30] CNNum Report, January 2016 <https://contribuez.cnnumerique.fr/sites/default/files/media/CNNum--rapport-ambition-numerique.pdf>

[31] Terrasse Report by French deputee Pascal Terrasse, february 2016

[32] *O'Connor vs Uber technologies, Inc., 2015* <http://uberlawsuit.com/OrderDenying.pdf>

[33] *Idem n30*

[34] *Narayan v EGL, Inc, 9th Cir. 2010 ; Yellow Cab Coop. Inc. vs Worker's Comp. Appeals Bd., 1991;*

[35] *S.G Borello & Sons, Inc vs Dep't of Indus. Relations (Borello), 1989* <http://uberlawsuit.com/OrderDenying.pdf>

important criterion is the employer's "right to control work details"[36], meaning the employer must retain all necessary control over the worker's performance. The fact that some freedom or flexibility is *"inherent in the nature of the work"*[37] does not automatically exclude the employment status. The Supreme Court has also specified a second essential criterion, which is the employer's right to terminate the services of his employee at will and without cause[38]. In addition to this, the Supreme Court judges enumerated a set of secondary criteria for deciding whether an employment relationship exists: *"(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or material required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business."*[39]

It is important to note that these criteria are not supposed to be analyzed separately, but collectively, as they are intertwined. It specifies that *"the weight given to these various factors depend on their particular combination"*[40]. In the case of Uber, the presumption of an employment relationship stems from the fact that they provide a service to Uber and that the company would not survive without its drivers[41]. Other indications of an employment relationship are: the fares are set unilaterally by the company, a service fee is taken for each ride, substantial control is exercised over the qualification and selection of drivers, termination of the accounts of drivers who do not perform up to Uber's standards[42], etc.…

The application of the traditional test of employment may be inappropriate for a new economic model, which is the sharing economy, and raises significant challenges. However, the Court is obliged to apply this traditional Borello test. Since the matter cannot be decided as matter of law, but as a mixed matter of facts and law, the decision will only be rendered on the 20th of June 2016 –the date of the jury trial[43].

[36] *Idem n32*

[37] *Idem n32*

[38] *Idem n33*; *Ayala vs Antelope Valley Newspapers Inc., 2014*

[39] *Borello case, 1989; O'Connor vs Uber technologies, Inc., 2015* <http://uberlawsuit.com/OrderDenying.pdf>

[40] *Idem n37*

[41] *Idem n37*

[42] *Idem n37*

[43] <http://uberlitigation.com/notice.php>

We would also like to mention a novel approach to avoid these requalification law suits, which is to bring employment rights to independent contractors with a legislative reform. We believe it is the only way to bring a definitive response to this issue and the best long-term solution: the Seattle city Council in Washington State voted unanimously, in December 2015, in favor of legislation that would allow companies like Uber and Lyft to unionize and collectively bargain with organizations representing the independent-contractor drivers. If enacted, this legislation would be the first of its kind in any jurisdiction of the United States. One concern from legal specialists is that this ordinance may violate federal law, especially the National Labor Relations Act. However, this federal act only governs collective bargaining in the private sector and only applies to "employees", excluding independent contractors. Therefore, preemption arguments may not succeed in case of a legal challenge.[44]

Finally, this emerging new economy is also leading to the progressive disappearance of the traditional concepts of time and place of work. The previously mentioned Mettling Report[45] talks about this issue and focused on measuring the impact of the digital revolution on the fundamental characteristics of an employment. On one hand, the work place is no longer fixed and limited to an office or an immobile place. Today, there are different forms of work places ranging from offices to the seat of the car.

On the other hand, the most important transformation concerns the time of work. The usage of smartphones raises many difficulties in regards to the separation between private and professional life. Firstly, the report mentions that the situation of these workers, who can connect at any time, on any day, with only one simple click, is extremely risky since they can go over the daily hours of work time (11h), as well as the weekly hours of work (35h), imposed by French and European law[46]. The purpose of these legal hours is to protect the health and quality of life of the workers. Secondly, it also mentions the risk of abuse: the drivers can easily keep the application open for more than 11 hours, while doing private chores, in order to stay visible to possible clients, who can order him only when the application has been started. Therefore, the establishment of a right and duty to disconnect is proposed[47]; for example, the Volkswagen Company implemented a server,

[44]<http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html?_r=0>

[45] Mettling Report –by the Director of the Human Resources Department of Orange, in France, on the impact of new technologies on labor, September 2015; <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>

[46] *Idem n42*

[47] *Idem n42*

which automatically puts all applications and servers on standby between 6.15 pm and 7 am.[48] This measure would be appropriate to individuals working within a platform-based enterprise.

In conclusion, the digital revolution we are witnessing has extremely important effects on labor law. The relevant authorities in France must react quickly as to not be subject to requalification law suits concerning the misclassification of independent contractor, but also to preserve the quality of life of these workers by imposing a more efficient supervision.

### B. *Tax law challenges*

These new platforms raise many issues relating to tax law. First of all, it is difficult to distinguish the commercial asset from the personal one. For example, drivers working for Uber operate personal vehicles for a commercial purpose; the same goes for Airbnb hosts who offer private residential housing to the public…

Furthermore, it is also difficult to distinguish the professional provider from the occasional one, which directly affects tax law. Private individuals who do not declare their income while generating an important amount of revenue from this activity create financial losses for the state. Consequently, it is extremely necessary to clarify the distinction between sharing fees businesses, such as the French company Bla Bla Car, from a professional activity (cf. Annex 1), since professional activities are subject to taxes whereas occasional activities to "round up the month" or sharing fees businesses are not. To be more precise, Bla Bla car is a ridesharing service, connecting drivers with empty seats to people travelling the same way; the driver sets the fare of the ride, as opposed to transportation service providers such as Heetch and Uber, and the different passengers share the cost of this ride[49].

One solution is to set a revenue threshold to set a revenue threshold to distinguish these two types of providers. For example, article 35 bis of the French Tax Code states that the income generated from renting out a room in an individual's main home is exempted from taxes when the revenues do not exceed 760 euros per year[50]. However, this law seems unsuited to the reality of the digital world, with a very low threshold to impose taxes, which is why the Terrasse Report of February 2016, on the development of sharing economy presented by the French deputy Pascal Terrasse to

[48] *Idem n42*

[49] <https://www.blablacar.fr>

[50]<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006307529&cidTexte=LEGITEXT0000060695>

the French Minister Manuel Vals, does not encourage this system[51]. Instead, he incentivizes the platforms that have knowledge of the income generated by their workers to communicate these amounts to the fiscal administration in order to ensure a reliable tax payers' return. He specifies that all revenues should be declared, and establishes a distinction: occasional drivers should be subject to income tax whereas professional drivers should be subject to the industrial and commercial tax –a category of taxes in French law. The clarification of these notions and their legal framework will also ensure fair competition and equal treatment with their traditional service providers counterparts, and put an end to the idea that digital platforms organize tax fraud.

Second of all, the collective revenue of these platform-based companies was estimated to be in excess of 3.5 billion last year alone[52], which is a significant amount, leading to the interest of the States in getting their fair share of the profits. Companies who do not pay the same taxes as their traditional counter parts are accused of unfair competition and illegal practice of a commercial activity. The Metling report demands that these companies be subject to similar requirements as the regulated and traditional sector, by establishing an obligation to transfer all information on income and profits made per year[53]. For example, New York City in the United States charges a 5.875 % percent hotel room occupancy tax that applies to private short-term rentals; by providing a platform for hosts (the providers) and guests (the users) to connect and contract, Airbnb is neither a hotel operator, nor a room remarketer. It is therefore unclear what tax should apply to this platform. What is positive about Airbnb's behavior is that it does not take an aggressive approach to avoid taxation. Instead, it voluntarily collaborates with the government to collect and remit occupancy taxes from its hosts, which it already does in several American cities.[54] However, there are limited tax exemptions for hosts who earn under a certain threshold.[55]To understand the scale of revenue loss for the state, the total estimated liability for hotel room occupancy taxes associated with the reviewed transactions, excluding fines and penalties, is over 33 million dollars[56]. To calculate this liability, the New York City Attorney General excluded all private room transactions where the host only offered one listing, since they are not subject to taxes when the host is also present during the

[51] Terrasse report by French deputee Pascal Terrasse, february 2016; <http://www.gouvernement.fr/partage/6421-rapport-de- pascal-terrasse-sur-le-developpement-de-l-economie-collaborative>

[52] <https://lawreview.uchicago.edu/page/airbnb-case-study-occupancy-regulation-and-taxation>

[53] Metling Report, September 2015 –*by the Director of the Human Resources Department of Orange, in France, on the impact of new technologies on labor*; <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000646.pdf>

[54] Such as Washington DC, Chicago, Florida State, Malibu, North Carolina, etc… <https://www.airbnb.com/help/article/653/in-what-areas-is-occupancy-tax-collection-and-remittance-by-airbnb-available >

[55] <https://lawreview.uchicago.edu/page/airbnb-case-study-occupancy-regulation-and-taxation>

[56] <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>

stay of the tourist. Then, he applied the "de minimus" exception as well, which excludes: *"any unit booked in a given year, for fewer than 14 days, or on fewer than three separate occasions"*.[57] We can witness a similar legislative evolution in France. The Finance Act 2015 has opened the possibility of entrusting the collection of a tourist tax to the platforms, when reserving a room by Internet.

In Paris, Airbnb began to collect the tourist tax on behalf of individuals renting out units of their houses, starting from the 1rst of October 2015[58]. The Senate states that this automatic collection and remittance of the tourist tax is an important step and shows that that modernization of tax collection is possible in the context of digital economy.

Finally, the last tax law challenge concerns tax planning. This concept covers a broad interpretation of legal behavior and its usage in order to minimize tax contribution which a company is, in principle, subject to. It is therefore a tax management strategy of companies, to exploit legal flaws resulting possibly from interactions between the different tax systems existing in parts of the world on a regional level, or even on an international level. This exploitation allows for an artificial reduction of taxable income of a company, or for the transfer of the generated profits to law-tax countries, which constitutes a significant revenue loss for states they operate in. We can see that tax planning operates within the limits set by law, since it's the use of legal means in order to evade taxes. As such, it is distinguished from tax evasion, which, in turn, is based on illegal methods and is closer to fraud, which itself is illegal. Many existing tax rules, protecting companies from double taxation, allow multinationals to avoid taxes. These rules no longer reflect the contemporary economic integration. Multinationals exploit these gaps in order to reduce their income tax, which confers an unfair competitive advantage to these companies. This issue is of singular importance today. Indeed, the economy, especially the platform-based model, knows no borders and investors think today in terms of global markets.

However, national tax systems are based on a territoriality logic, which is substantially challenged by the large-scale economy of globalization. Primarily, they are inadequate to the reality of our new economy; in particular, the mechanisms put in place to avoid double taxation are now frameworks of a double non-taxation. It is important to show the efforts realized on a national level, for example within the European Union, and on an international level, to challenge

[57] *Idem n54*

[58] This tax is fixed at 0.83 euros per night and per tourist; <http://www.lesechos.fr/01/10/2015/lesechos.fr/021370081878_airbnb-collecte-desormais-la-taxe-de-sejour-a-paris.htm> ; <https://www.airbnb.fr/help/article/654/what-is-occupancy-tax--do-i-need-to-collect-or-pay-it>

the mechanism of tax planning. In 2014, the OECD published its first recommendations to the G20 for an international approach to the fight against tax planning[59]. It aims to establish a body of international tax rules to end the artificial transfer of benefits to certain territories in order to be exempted from taxes. During the G20 meeting, in Lima, held in Lima on the 8th of October 2015, the Ministers of Finance approved the proposed measures to reform all international tax rules in a coordinated way to direct the action of multinationals[60]. The departments then reaffirmed their support for the fight against OECD project on avoiding taxation and the transfer of profits. They also committed to an early implementation of the measures of the project, and expressed their wish to monitor the legal framework, to be set up by the OECD, so that all countries participate equally in the project.[61] Finally, as agreed at the Lima meeting, these measures were submitted to the decision of the different Heads of State of the G20 Summit held in Antalya, Turkey, on the 15th and 16th of November 2015. They endorsed the measures enumerated in the OECD project. They also reaffirmed the need for a broad and consistent implementation to ensure the effectiveness of this project, especially regarding the exchange of information concerning transnational tax rulings.[62]

Furthermore, on a regional level, in particular within the European Union, one interesting approach is to base their fight against tax planning on unfair competition and unequal treatment of companies in similar situations. Following an investigation by the Commission, it was discovered in 2014 that the firms Fiat and Starbucks have benefited from tax rulings, opening an unrequited privileged tax regime, from Luxembourg and the Netherlands respectively. This investigation is referred to as LuxLeaks. The Commission ordered these countries to recover unpaid taxes by those two businesses, in order to remove the unfair competitive edge they benefited from, and restore equal treatment in regards to companies in similar situations.

It was stated that the amount to be recovered ranges from 20 to 30 million euros for each company. Today, the same goes for McDonald's, which is suspected to benefit from state aid via favorable tax ruling. Indeed, on the 3rd of December 2015, the launch of an investigation was announced, in

[59]<http://www.oecd.org/fr/fiscalite/locdepubliesespremieresrecommandationsalintentiondug20pouruneapprocheinternationaledel aluttecontrelevasionfiscaledelapartdesentreprisesmultinationales.htm>

[60]<http://www.oecd.org/fr/ctp/les-ministres-des-finances-des-pays-du-g20-approuvent-des-reformes-du-systeme-fiscal-international-visant-a-endiguer-l-evasion-fiscale-des-entreprises-multinationales.htm>

[61] *Idem n58*

[62]<http://www.diplomatie.gouv.fr/fr/politiqueetrangeredelafrance/diplomatieeconomiqueetcommerceexterieur/actualites-lieesaladiplomatieeconomiqueetaucommerceexterieur/2015/article/communiquedeschefsdetatetdegouvernementdug20-sommetdantalya151611>

regards to tax agreements contracted between the multinational and the State of Luxembourg.[63] In conclusion, we can see that states and international organizations are setting an international regulatory framework to fight against tax planning.

## IV. THE FIGHT AGAINST LIMITATIONS OF LIABILITY

Platform-based companies include on their website a limitation of liability, where they state that they are not liable or accountable to any damages arising out of or in connection with the transactions contracted between the provider and the user[64].

### A. *The need for an indirect liability of platforms*

Concerning the liability of providers, they operate on a smaller scale than traditional service providers (for example they offer a bedroom, not a hotel), use personal resources (a personal vehicle for example) rather than commercial assets. Therefore, regulators must decide how to divide liability between providers and platforms. These sharing services pose the same health and safety risks for users as traditional service providers, and put providers at risk as well; they are just as vulnerable as users. For example, platform-based companies providing transportation services eliminate many risks that make it a dangerous activity, such as the payment by credit card, meaning they are no longer a target for robberies, account registry with a valid credit card, a review system for the users of the platform…

However, in the United States, independent contractors are not subject to OSH Act Coverage, which suggests safety measures to help reduce the risks, such as barriers, background checks, silent alarms, safety training, tracking devices… In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a *workplace "free from recognized hazards likely to cause death or serious physical harm"*[65]. Therefore, we believe there is an indirect liability of platforms for accidents related to the transactions they facilitate[66].

The "Communications Decency Act" of provides absolute immunity to an "interactive computer service provider", which refers to *"any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server"*. Courts have

[63] <http://www.lemonde.fr/europe/article/2015/12/02/mcdonaldsdanslecollimateurdebruxelles_4822603_3214.html>

[64] <https://www.airbnb.com/terms>

[65] https://www.osha.gov/Publications/taxi-driver-violence-factsheet.pdf> *(accessed 15/3/2016)*

[66] <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2083&context=btlj>

applied this Act to absolve internet intermediaries from liability. Ex: For example, EBay is not responsible for defects in products sold by its users. However, the "Digital Millennium Copyright Act" mentions two exceptions to this immunity. Firstly, it can be liable for vicarious infringement when an "interactive computer service provider" receives a *"direct financial benefit attributable to the infringing activity"*. Secondly, it is also not liable when it is aware—or should be aware—of the infringing activity. Regulators could adapt one of these models to establish liability for sharing platforms. For example, platforms should be held accountable for harms that arise from transactions between users and providers. They could establish a notice-based system where platforms only become liable for the actions of providers when it has previously received notice of the provider's poor conduct. For instance, a platform might not be liable where a driver assaults a passenger. However, if users have previously complained about a particular driver's behavior, then it should be liable for future injuries. In the case of platform-based companies, they all obtain a financial stake from the transaction between the provider and the user. They also exercise some control over these transactions such as setting unilaterally the fare.

B. *A regulatory solution to liability*

To grasp the importance of regulating this liability gap, we will present the case of the wrongful death lawsuit against Uber for the New Year's Eve death of 6 years old Sofia Liu. This case concerns a tragic automobile-pedestrians accident involving a former driver of Uber and a mother and her two children[67]. The mother and the son survived but the daughter was killed by this accident. Uber directly published a statement saying "*they sympathize with the Liu family and understand their desire for redress for their loss and injuries. However, the Company and its affiliates did not cause this tragic accident"*[68]. Therefore the main issue was the lack of accountability of the platform.

Uber bases their defense on two main arguments: first of all, even though the driver had a license to receive ride requests through the Uber application, he is not an employee but an independent contractor. Under the Driver Addendum to the agreement he contracted, he acknowledged he was an *"independent, for-hire transportation provider"*. Hopefully, the pending misclassification class action law suit[69]will shed some light on the issue of liability, and platforms won't be able to use this argument as grounds for defense. Second of all, they argue that the driver *"was not providing transportation services requested through the Uber App. He was not transporting a rider who requested transportation services through the Uber App. He was not en route to pick up a rider*

[67] *Ang Jiang Liu vs Uber Technologies, Inc., 2015;* <http://www.sfbg.com/politics/2014/05/05/uber-files-defense-new-years-eve-death-driver-was-not-our-employee#.U2hMIj-E6_4.twitter>

[68] <http://fr.scribd.com/doc/222241859/Uber-s-response-to-wrongful-death-suit-from-new-year-s-even-death-of-sofia-liu>

[69] *O'Connor vs Uber technologies, Inc., 2015* <http://uberlawsuit.com/OrderDenying.pdf>

*who requested transportation services through the Uber App and he was not receiving a request for transportation services through the Uber App."*[70] Therefore, they believe the claims should be barred or limited by the doctrine of contributory negligence, and that his personal insurance should cover the damages. However, the family alleged that the driver did have the application open, was looking at a *"GPS-generated map with his location"* and was waiting for a request when he hit the victim as she crossed the street[71].

Questions about its insurance policies arose; the insurance coverage provided by the platform is usually limited to property damage, and not personal liability[72]. The problem is that most providers do not transact at sufficient volumes to cover the cost of accidents. This perfectly illustrates the gray area between personal and commercial activity. Many state officials have criticized this loophole in Uber's insurance coverage, particularly the "app on", "app off" loophole. The question was should platform-based companies provide insurance to cover drivers while they're between rides but actively looking to pick up passengers? Who is accountable?

A notable evolution must be mentioned; two bills were introduced in reaction to this tragic accident. The first one is AB 2293, which establishes that commercial coverage should start at the moment a driver turns on a fare-finding application and end only when the application is turned off[73]. The 2nd bill, AB 2068, supported by taxicab companies, would mandate that commercial insurance be the primary coverage for ride-sharing cars[74]. At the end, the driver was charged with misdemeanor vehicular manslaughter and the company announced it would cover drivers who had the application activated but had not yet accepted a ride. These companies prefer not to pay for commercial coverage because on one hand, it is more expensive due to the increased liability risks involved. On the other hand, drivers can leave the application open while doing routine chores or other personal trips to benefit from this higher coverage. Today, many jurisdictions have adopted an "app on" rule, meaning platforms must provide insurance to drivers from the moment the application is turned on.

[70] <http://fr.scribd.com/doc/222241859/Uber-s-response-to-wrongful-death-suit-from-new-year-s-even-death-of-sofia-liu>

[71] *Idem n68*

[72]<http://www.sfbg.com/politics/2014/05/05/uber-files-defense-new-years-eve-death-driver-was-not-our-employee#.U2hMIj-E6_4.twitter>

[73] *Idem n70*

[74] *Idem n70*

## V. CONCLUSION

Throughout the article we asked ourselves how the law will regulate this new form of economy. In conclusion, we believe that the most appropriate mean to regulate this new world economy is to adapt existing laws to these new forms of transactions, in order to ensure fair competition and equal treatment with traditional service providers such as taxis, hotels… Creating a new set of rules would be inappropriate because of all the similitudes with these traditional counterparts, and would be qualified as unfair competition.

However, concerning liability, a different approach should be applied: the limitations of liability should be held unenforceable, and states must establish a shared liability between the provider and the platform.

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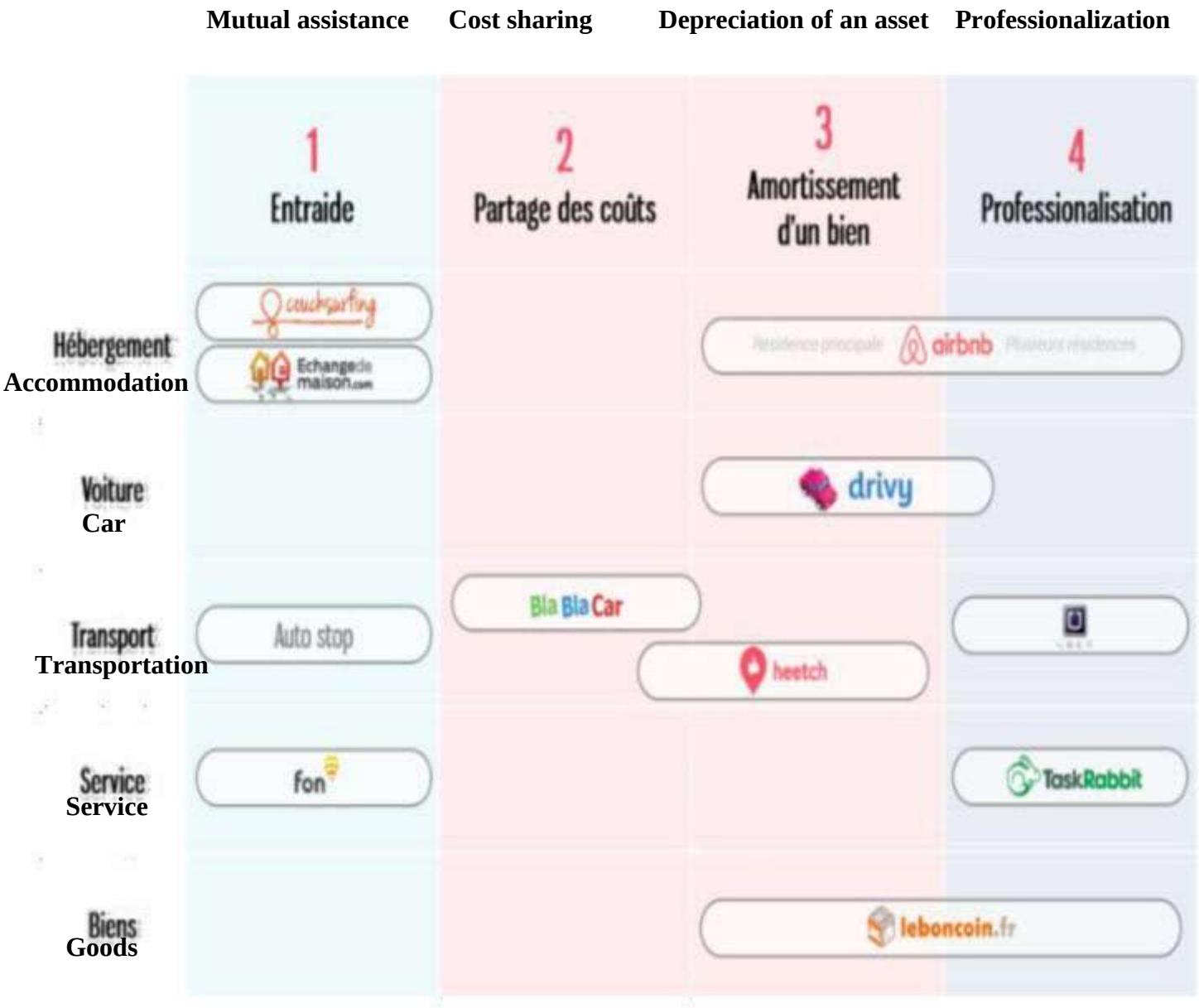
Mutual assistance
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Depreciation of an asset
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Partage des coûts
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Amortissement d'un bien
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