

Public authority and digital platforms: supporting "uberisation"¹

Thinking disruption – Behind the term "uberisation", a powerful, emerging phenomenon is disrupting the benchmarks and balances of the traditional economy with, at the centre of the phenomenon, digital platforms and the technological ecosystem they entail. The power of the changes taking place calls for an analysis of the strengths and weaknesses of our legal system to anticipate legal and public policy developments and provide comprehensive answers, on a European and national scale.

I- Something is happening...

1.1. The platform: the figurehead of "uberisation"

While available statistics are insufficient to accurately identify and measure the scope of the **platform economy**, its **immense potential** is fully perceptible. This is evidenced, both in and outside France in all sectors of the economy, by the economic models of the world's largest corporations (GAFA, but also NATU and BATX) and the broad expansion of the market of "on-demand" employment and gig economy proposed by online platforms.

- **The emergence of platform capitalism** – Four characteristics contribute to making platforms particularly efficient ecosystems for the development of relations, and thus of economic exchanges, of which "uberisation" is a major vehicle today:

1. The establishment of a system between a crowd of individuals that multiplies exchanges between producers and consumers at no extra cost.
2. An economic model almost exclusively based on the greatest possible customization of user experience.
3. A relationship of trust between users that fosters the multiplication of exchanges.
4. A cost of platform transactions and a marginal cost that are irremediably approaching zero.

- **A shift of economic and social paradigm** – The disruption created by digital platforms materialises, in practical terms, by a **process of disintermediation**, in which they substitute for the middle-men of the traditional economy and end up capturing a portion of their profits.

Several salient characteristics of the new "Uber Economy" are emerging: to develop, it favours sectors regulated by public authority, bringing to light the legislative gaps and incoherencies or their incompatibility with technological developments; it heightens economic competition in regulated sectors and between "the crowd" and the operators in place.

- **A legal typology** of the different platforms can be outlined, combining three different criteria:

1. The economic or non-economic nature of the ecosystem that the platform creates.
2. The purpose of the economic exchanges, i.e. whether or not they create net value.

¹ The term "uberisation", derived from the name of the "Uber" company, was popularized in France by Maurice Lévy in an interview given to the *Financial Times* on 14 December 2014, entitled "*Tout le monde a peur de se faire ubériser*" ("Everyone is starting to worry about being ubered").

3. The organisation of economic exchanges on the platform.

Five types of platform can thus be identified: platforms that create common goods; cost-sharing platforms; sharing economy platforms; brokerage platforms; activity platforms.

1.2. At the heart of the platform: the mechanisms of a new foundation

The platform economy, which feeds on the spread of "digitisation", is a source of both individual and collective opportunities. But it above all looks set to continue developing in future because its organisation and values correspond to growing social aspirations.

- **The network economy** that platforms have generated has sparked a break with the corporate organisational structure, the foundation of the industrial economy and the wealth of nations since the turn of the 19th century: a pyramid organisation of exchanges, hierarchical and in silos. On the contrary, the platform economy fosters the growing aspiration for "collaborative" and "sharing", in its economic, social, political and legal dimensions. However, the reality of the horizontal and global network created by the world's biggest platforms must not be overlooked: it also comprises economic and capitalistic goals, resulting in new feudal systems requiring regulation by the public authority.

- **The conjunction of an economic model and social aspirations** – The aspiration for new economic, social or cultural models and frameworks finds an echo in the platform organisational structure irrigating the new economy: the "sharing economy" optimises the use of hitherto under-used assets, new forms of autonomy and work time management are reshaping the framework of professional activity, and the opening of the "on-demand" employment market has in some cases been an answer to economic recession.

This dimension of "uberisation" nonetheless highlights new dividing lines, because while these renewed forms of work or social relations are chosen, they are also suffered as inequalities in access to new technologies widen.

1.3. The platform ecosystem: robots in the naked sun

The disruptions under way are shaping a future in which physical or virtual "robots" will have a special place.

- **The "law of code"** – Today, algorithms or artificial intelligence govern all relationships that arise on a digital platform. Their development brings obvious legal challenges, relating to transparency, review – particularly judicial –, and questions of responsibility in their use. Free competition and economic issues are no less crucial: the complexity of data processing is such that companies which succeed now in gaining a sufficient technological lead in this area will suffer little competition from new entrants in future.

- **The internet of things, the catalyst of "uberisation"** – The internet of things (connected watches, medical devices, mobile phones, etc.) crystallises three key dimensions of the platform economy:

- Growing individualisation of services to consumers, thanks to new, lower-cost technologies and the multiplication of connected objects.
- Reduced production costs, to a zero marginal cost, made possible by the mass collecting and processing of data obtained via user objects.
- Optimised use of existing assets.

The development of connected objects raises numerous issues: on a legal level – for example in terms of connection standard harmonisation or personal data protection with the crucial question of consent to use of data –, but also in the area of defence, security and ethics.

- **Blockchain technology – an outcome of the disintermediation process?** – Blockchain technology allows several parties to complete transactions, while guaranteeing the anonymity and absolute certification of all the exchanges, without the involvement of a trusted third party (be it a platform, the government or a government official). This

technology is based on proof and can be regarded as an outcome of the disintermediation process at the heart of "uberisation".

Blockchain technology has major legal implications calling for a reassessment of the role of public authorities, at least to make up for the technology's weakness: the certification of the relationship between the real world and the virtual world. They require in-depth review by all the stakeholders. This is the case in the banking and insurance sectors – which very rapidly adopted it –, in the regulated professions sector – notaries or bailiffs perform the same certification function –, but also for those who are confronted with its link with contract law – a blockchain bans for example all external intrusion in the performance of the contract and all possibility of backtracking.

II- From economic disruption to legal upheavals

2.1. Reappraisal of the concepts of economic law

The platform economy raises questions as to the relevancy of numerous founding paradigms of economic law.

- **The platform economy destabilises the frameworks of economic intervention** – Two of its characteristics are motives for changing certain ways of regulating competition.

1.- *The platform economy fundamentally blurs the central reference of the market economy, i.e. price.* Digital networking platforms are far from being perfectly competitive markets. User data, whether provided consciously or not, forms a vital sub-product of their economics: the price of the goods and services exchanged does not, alone, reflect the real value of the consideration actually paid.

2.- *The "network effect" is central to the development of platforms.* While, in its early stages, a platform may be weakened by a highly competitive environment, the network effect means it can swiftly develop once it has reached its critical size, until it can very largely dominate the given sector's intermediation market, or quite naturally attain monopolistic status.

This does not, however, make all regulation in the digital sector counterproductive, quite the contrary. It is vital to preserve free competition, as it enables new players to emerge in the hope of winning an existing market and thus maintains a sustained level of innovation, especially in the fast-evolving sectors of new technologies.

Another fundamental issue concerns the relevance of rules and the implementation of administrative regulations in the sector in which digital platforms are developing. This is particularly the case in housing rental, where the gap between the reality of the "uberisation" phenomenon and existing legal rules is vivid. In this area, little regard was had for the specificities of the new economy in the law development process and little thought was given to adapting the existing legal framework to the market of digital rental platforms. It is also possible that the sector's new regulations will act as barriers to entry that protect or even increase the revenue of the monopolistic player in place.

- **A crowd economy breaking up the legal blocks of the industrial economy** – The platform economy is based on the action of a "multitude" of individuals, a spontaneous, unqualified crowd of producers-suppliers-sellers of goods and services who renew the conception of traditional economic players.

This "crowd" is firstly blurring the lines of the conventional distinction between "professional" and "non-professional" – a fundamental criterion that particularly governs application of consumer law and a substantial part of tax and business law –; it also raises numerous questions about the guarantees or protections that a consumer must have, even when dealing with a non-professional private individual.

Furthermore, while the innovative and competitive ecosystem of digital platforms has positive effects on the economy and employment, protection is needed against asymmetry in the applicable rules. It is indeed difficult to imagine imposing less stringent legal obligations on platform activity to those applying to traditional business. This

could nonetheless result, rather than increasing the constraints weighing on new entrants, in reducing those applicable to all players. The use of the "crowd" on which platforms are based also makes the financial, administrative or psychological threshold effects of existing legal regimes all the more significant – for example the top way out of the *auto-entrepreneur* regime² leading to application of standard tax, social security and commercial regimes. A possible transposition of the specificities of the *auto-entrepreneur* regime to companies that have exceeded the threshold could offer a possibility in this area.

Finally, peer-to-peer activity draws attention to the need to adapt the control and collection processes implemented by the various administrations.

- **A globalised economy pushing back the territorial boundaries of law** – The global nature of the platform economy results in transnational legal relationships between parties, making it particularly difficult for consumers and the individual entrepreneurs on whom the platform economy is based to determine the law that governs their dealings. The platform's contracting party, acting as a "professional", may be almost completely subject to a foreign law and the applicable settlement procedure may even preclude recourse to the national courts. The a-territoriality of law and schemes to circumvent social and economic legislation of States thus call for a reinforcement of the enforcement instruments that national players can use in respect of private players based in other countries.

2.2. New horizons for social and employment law

Salaried employment has not disappeared and will no doubt not disappear. But, without actually creating new forms of work, "uberisation" would appear to be accelerating the changes taking place, which are gradually shifting the centre of gravity of professional activity from salaried employment to "atypical" work.

- **Salaried or freelance work: the need to transcend a now overly radical dichotomy** – In several court procedures in France and Europe, "platform workers" have applied for their relationship with the platform they worked with as an individual entrepreneur to be reclassified as salaried employment. For both the worker and the platform, this requalification has significant consequences in terms of labour law application: potentially, the entire economic model of platforms determining the characteristic of the service is out of step with current legislation.

The radical answer that would resolve this contradiction by considering the platform model to be illegal in principle is not possible. Neither can the model of salaried employment be challenged, nor the pertinence of the dichotomy between the systems of salaried and freelance work.

In reality, this problem is not new and has already prompted some cosmetic alterations to labour and social security legislation. But the process has reached its limits, as evidenced by one of the now strongly suggested changes in labour law: that of creating a specific status for platform workers.

Another movement already at work is the progressive emergence of social protection centred on individuals rather than the status of the work they do. This is already possible via the *compte personnel d'activité* introduced by the *Labour* law of 8 August 2016, an account that records all the rights the holder acquires throughout their career as regards occupational training, arduous work and citizen engagement, irrespective of the turns the career takes and whatever changes occur in the applicable social security scheme.

- **The emergence of collaborative, cooperative and universal "e-solidarity" (online solidarity): an alternative to the slowdown of traditional forms of social connection** – "Uberisation" has initiated a process of "fragmenting" the workers/producers within a "crowd" that is struggling to reconcile individual interests and could therefore worsen isolation by killing traditional forms of solidarity.

² Translator's note: in France, the *auto-entrepreneur* regime only applies to freelance workers up to a defined revenue threshold beyond which they are automatically subject to the standard regime of tax and social security contributions.

However, the platform economy has also created new forms of social connection that go hand in hand with a new attitude to the role of work in society. This can be seen from the ramp-up of social networks, multiplying the possibilities of exchange and undeniably encouraging a renewal of social and participatory democracy ("forums", "groups", "demonstrations", "online petitions", etc.). The fast-expanding collaborative model, with the ensuing large-scale development of free exchanges to enable widespread sharing and access to resources, is also a new form of social connection, as is the organisation of independent workers in cooperatives who also benefit, through this solidarity structure, from a set of services (billing, declaratory returns, etc.) to deal with administrative complexity. Alongside existing organisations, such platforms can no doubt be a credible opposition force in terms of creating social bonds and defending worker interests.

However, the strength the main social networks and content-sharing platforms have gained gives them great power of advocacy that raises vital questions as to the protection of fundamental freedoms.

2.3. New frontiers for the government and public services

It would be unrealistic to think that public authorities, public services and the government could escape the "uberisation" process. The need to accompany the upheavals taking place and to protect common goods such as security, the environment, dignity and fundamental rights, should not result in resigning ourselves to the disappearance of all forms of public authority.

- **Government authority faced with the challenge of "uberisation"** – The extent of the changes government authority faces can be illustrated by an analysis of how the "uberisation" process impacts three of its functions.

- 1.- The *certification function*, which guarantees the quality or conformity of a state compared to a given standard, is profoundly challenged as it is extensively performed by digital platforms, without any government intervention. "Uberisation" thus occurs at the risk of giving the "crowd" of individuals who assess, certify and evaluate, a clear field to contest decisions made by professionals, thus undermining their established authority. The benefit of new forms of government intervention is therefore proven and is evidenced, for example, in the area of identity, by the digital certification provided by the *France connect* application.

- 2.- The *procedures for adopting government decisions*, which establish their legitimacy, are also rivalled by various forms of procedures spontaneously initiated on digital platforms, such as "on-line" petitions. In response to this change, the pertinence of existing frameworks should be reassessed, and methods to enhance the content of these unsolicited consultations should be devised.

- 3.- Public authorities are not shielded from *competition from digital platforms* either, for example in the exercise of security functions and justice. The development of "predictive" algorithms applied for example to analysing court decisions posted online is just one illustration.

- **Death of the bison – the shrinking service state** – The parable of the disappearance of the national road traffic information centre – irreversibly associated with "Bison futé", France's traffic monitoring service – illustrates the disruptive consequences that digital platforms and their competition have for public services. The economic model of digital platforms makes previously non-profitable activities profitable and activities once regarded as belonging to the public sphere end up being managed by private initiatives. "Uberisation" of the electricity distribution utility is, in this respect, a relevant example of the reorganisation of energy production, not by major centralised players but according to a horizontal and collaborative model on a local scale.

We must therefore think about new forms of public intervention in order to preserve the vital functions of security and continuity, develop security and viability strategies for the new networks and services, and define the means of exercising public authority control over platforms.

- **"Platform State" vs. "silo State"** – "Uberisation" affects not only the roles but also the very organisation of government and the formal rules of public decision-making. Many initiatives have already been taken to turn the

silo organisation of government into a "Platform State", which makes resources available to the public for the development of services. This is the case in health care for the treatment of chronic diseases, so that professionals can effectively and efficiently communicate and break away from their organisation's complex, vertical and expensive way of functioning. Looking further ahead, some even imagine the government acting as a "meta-platform" responsible for identifying projects that could be supported and financed and the people to implement them, the latter being either from the public or private sector. Public authority, through the government and Europe, which is no doubt a more appropriate scale to respond to the changes taking place, therefore has a key role to play to guarantee protection for individuals and their fundamental rights in the face of "uberisation".

III – Public authorities, innovation and law

The Conseil d'État makes 21 proposals.

1- General regulation at European level

The European Union is the most appropriate territorial framework to address and provide responses to the issues inherent in the expansion of digital technology.

- **Adopt a European *Technological innovation and fundamental rights* "package"** to offer a clear vision of the European drive and give the EU a potential advantage over its direct competitors in economic innovation (proposal no. 1). Consisting of a European Commission communication, a proposed regulation and a Council recommendation, the "package" would draw conclusions from a *European citizens' debate* on the ethical, social and legal questions relating to the main technological vehicles of digital society (proposal no. 2).

The European Commission communication would assert the uniformity of applicable law, determine a core set of social rights and initiate general thinking about the concept of "trader" in consumer law (proposal no. 3).

The European Union regulation could initially propose a set of instruments for regulating the platforms sector based on compliance obligations; secondly, assert the principles of loyalty and responsibility in the use of algorithms and artificial intelligence by studying the possibility of implementing emergency shutdown or backdoor mechanisms; and thirdly, reinforce the structure and powers of the European network of competition authorities (proposal no. 4).

The Council recommendation could encourage greater European solidarity in the digital era and gradual implementation of Union-wide social welfare. It could particularly advocate promoting the right to digital education for all and initiate the creation of digital identity and resident status in the European Union (proposal no. 5).

2. Adaptation of the internal legal framework to support the platform economy

The Conseil d'État suggests that the government make changes to domestic law to bring it into compliance with the principles France recommends for adoption in the European Union.

- **Support development of the platform economy**

Support individual entrepreneurship, whether it is carried out as a main occupation or for supplementary income. The government could thus undertake to iron out the threshold effects caused by the complexity of legal, tax and social security regimes and require administration-entrepreneur dialogue prior to any rectification or increase procedure (proposal no. 6). The government could also improve access to tax and social security information to foster the emergence of platforms offering paid services for entrepreneurs to relieve them of the administrative complexity (proposal no. 7).

Encourage use of platforms to stimulate the transition of economic transactions to digital, in order to improve their traceability and allow the introduction of simplified declaratory and payment procedures. The government could thus extend mandatory electronic data transmission to tax and social security administrations via platforms, and

make the authorities responsible for completing the declarations based on the data obtained, subject to validation by the taxpayer (proposal no. 8).

Very substantially increase funding for innovative start-ups. Two measures are possible on a national scale: massively increase public investments to encourage the emergence of "unicorns", notwithstanding the risks inherent in the new economy (proposal no. 9), and encourage the creation of technology, economic and social innovation "sandboxes" (proposal no. 10).

- **Promote equality in access to the new economy and equity in applicable legislation**

Guarantee equitable tax rules by reasserting the principle that all income is taxable. In this respect, the Conseil d'État recommends adapting legislation so that digital platforms are taxed in exactly the same way as transactions carried out by other methods. The new fiscal framework should be adapted to the reality of the business carried out and provide for the possibility of advance ruling procedures with the tax administration, to guarantee methods of calculating reimbursements of costs applying on platforms that have based their economic model solely on customer payment of user/supplier expenses (proposal no. 11).

Promote the opportunities the new economy offers and encourage entrepreneurs, including in regulated sectors, to seize them to innovate (proposal no. 12).

- **Protect the rights of platform workers**

The Conseil d'État considers that innovative platforms in the social sphere – such as cooperative platforms – deserve to be supported. It recommends encouraging the emergence of new forms of representation for platform workers (proposal no. 13). It recommends further decompartmentalisation of social security regimes to make it easier for platform workers to exercise their rights to social welfare or, at least, moving ahead with social welfare centred on the person. One concrete and swiftly feasible measure would involve gradually extending the functions of the *compte personnel d'activité* to include all social rights and thus address the current state of complexity with a platform logic focused on user satisfaction (proposal no. 14).

3. Adjustment of the organisation and operation of public authorities to the social dynamics of "uberisation"

Public authorities are responsible for ultimately guaranteeing the reliability and security of transactions carried out on digital platforms.

- **Adapt the scope of public services**

Government action must be moved into the platform era to safeguard the quality, efficiency and funding of public interest activities.

Reorganise public services to adapt them to the platform boom. The Conseil d'État recommends mapping public services that are in competition with platforms and taking a new step in their reorganisation by questioning whether they should be maintained (proposal no. 15). It is vital to train public sector employees in the techniques and languages of digital technologies; in this respect, continuing vocational training provides the appropriate framework for updating skills (proposal no. 16).

Develop new public service activities or strengthen some of the existing functions for missions potentially within the province of public authority. The Conseil d'État believes that this could be the case in providing access to and disseminating public data, and in the area of personal data exchanges between government bodies. The development of a secured digital meta-platform would allow administrations to network and innovative services to be provided, within the limits of their powers and the needs to protect personal data (proposal no. 17).

- **Encourage the development of digital public services**

Digital platforms can effectively contribute to combatting territorial and social divide: a new ecosystem can therefore effectively help to lift populations out of isolation and provide them with goods or services more efficiently, faster and in a more personalised way. The Conseil d'État suggests that the *Commissariat général à l'égalité des territoires* define a methodology with a view to integrating the opportunities generated by digital platforms into the design and implementation of policies for combatting territorial inequalities and developing local capacities (proposal no. 18). The government is also responsible for guaranteeing the reliability and security of digital exchanges and transactions by explicitly confirming that a public network protection service exists, led by the *Agence nationale de la sécurité des systèmes d'information* (ANSSI – the national cybersecurity agency) (proposal no. 19).

- **Adapt the process of developing standards**

Legislation must be revised with the involvement of stakeholders from both the new and the traditional economy. In this respect, the Conseil d'État recommends that, prior to each legislative or regulatory reform, a complete review of the applicable law be carried out by bodies consisting of all players in the sector; the impact study carried out in support of the planned reform should report on the results of this evaluation (proposal no. 20). Lastly, the Conseil d'État suggests trying out a new methodology for public decision-making, inspired by "Agile" methods, with networking between the government, public bodies and all relevant stakeholders (proposal no. 21).