The Sharing Economy

The Sharing Economy:

Legal Problems of a Permutations and Combinations Society

Edited by

Maria Regina Redinha,
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and Francisco Liberal Fernandes

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PREFACE

The great display of resources, considered in their far-reaching meaning, makes up the vortex of society.

In a market economy—that is, when, by definition, there is minimal state interference[1]—the conduct of economic agents is ruled by a freedom as well as by an initiative sense that widely exceeds the essential needs of daily life. Multiple efforts generate wealth, either to ensure daily life needs or enrichment aims. Making use of that freedom and initiative ability, man has always, since immemorial times, made use of that originality to achieve his highest or minor aims.

The latest social and technological innovations characterize our time. Economical agents—or, in other words, the behaviour of different economical agents—tend to be strongly induced by the influence of the massive internet platforms, which on the one hand try to fulfil the consumers' various needs and on the other hand give rise to the appearance of new models of business organization.

This way the traditional model for business connections, the rendering and labouring of services, without neglecting some interferences concerning the duties and rights of property, ceased to be, at least, at first sight, a paradigma, emerging this way, a new first-rate kind of economic model. Some named it "collaborationist shared economy," others still use the expression "economy uberization" (due to the name of Uber, who have been presented as an icon), and therefore everything seems to suggest the emergency of a new paradigma, as a post-modern model of economical organization that has been stirred as something devoted from what was "traditional" to the obsolete.

Going beyond any useless endeavour of a philological analysis of each of the above and referred expressions which, at least, might lead to the conclusion that such a notion would only be an *inventio* (in the Latin and rhetorical meaning), the designation "shared economy" was chosen. This choice is based on the fact that some modalities of the new economy model settle a sharing of private property—affecting the rights and duties

[1] The function of a capitalist state is fundamentally based on the protection of rights of the different agents concerning the professional sector (for instance a taxi driver's legal rights and laws).

of private property, as well as economical relationships, settled in most cases in the so named technological communication and information through platforms or applications that allow a direct connection among the different economical agents, through which the different individuals interact in diverse qualities, sometimes opposed (for services rendered to users, traders and consumers).

Central question—will there be a non-shared or a non-collaborating economy? What situations allow the designation of a shared economy? Let us think of the case of Uber (whenever someone sends for a car with a driver through a mobile phone, with the possibility of choosing the qualities of the car, taking into account other users' valuation concerning the driver, his politeness and driving qualities) or seek some information provided by Airbnb (through which people advertise and book a short stay through the internet). In both cases—besides the obvious competition with the traditional services offered by a taxi driver or hotel groups, both bound by their activity in strict observance of legal standards—it happens that the transport service or the leasing contract for a short housing period is always against a pecuniary duty. Another example may be that of an occasional hiring of a private vehicle whenever it is not needed by its owner may render it lucrative. However, if the owner possesses several vehicles to hire, such activity will not differ from a common firm of the same branch and so he will have to fulfil all the legal formalities.

Considering the above exposition, does the difference between an economical relationships model, reckoned as conventional, and another that is said as shared depend on the number of people involved or on the complex degree of instalments? If so, the distinctive criterion would be set on an adjective difference or, if preferred, on a scale. It may be said that the difference is rather the existence of a legally established firm with a certain degree of a complex organization, that is, the production as well as the service transaction imply a clear division between working production factors and capital aiming at a wealthy generation as well as employment according to the socioeconomic point of view.

From the above statements, there are circumstances that would be better classified if generated under the informality sign. This is the case of a plumber, who laying aside fiscalization, takes on some small repairing tasks on weekends and the lady who knits pullovers to sell through a Facebook page.

The sharing notion, besides its strict legal meaning related with the possession of a certain property, leads to a moral dimension connected to a human behaviour in society. Among the probable meanings, the one that

stands out is that of sharing division. There, as a maximum exponent, we find a meaning connected with that of donation.

Will this mean that if the sharing notion leads to the so-called sharing economy based on some sort of a generous offer is it inspired by self-denial? Is that an ability? If so, the term would lead to a utopian behaviour of contemporary societies; it would mean that individuals would have achieved a decisive role as well as an alliance degree on satisfying the needs of another person, in spite of their different and unfavourable conditions. This would be a society in which a political as well as an economic organization would be perfect without despising social mobility, specialized in archetypes, there would not be either scantiness, any crisis or inevitable consequences of any social cleavage. The new consumption pattern rights of sharing would be followed without any detriment to anyone or any rights of property. Sharing does not mean a gift.

If it hypothetically were a gift, it would not be despicable to evoke Mauss' theory about it. In Marcel Mauss' *Essai sur le don* (1950), the vortex of social, political, economic and even juridical diplomacy is based on a notion of a sharing system where the act of giving results from a rewarding situation, where the gift in its extensive meaning does not exist without the expectation of a reward, as spontaneous as compulsive, that contradicts the idea of a liberal and individual interest that labels the system of an economical market.

According to the same outlines as well as to the idea of sharing under the sharing cover through gifts, abjuring the economy meaning what we apprehend, seems to be divested of meaning considering that we only find it in a pre-capitalist economy or at a different level of social structure where a gift and a reward are a gift, as a symbolic benefit and its basic function is its strict relationship with the structuring of social relationships with a market of prestige for symbolic amass of funds that according to Pierre Bordieu would carry out the function of supremacy tools.

If, in the outset of this text, the resources affectation was the nucleus of society's anxiety, it is also true that the reciprocity of exchanges does not only refer to material goods. However, as was largely underlined after the publication of Adam Smith's work *The Wealth of Nations* in 1764, individual interest that consolidates the economical function of production, moral and the legal principles—which the law does not ignore—allows the discovery of a proximity between economical functioning and legal productions. Marnoco e Souza (1917, 64–65) underlines that "each economic relationship assumes legal patterns, all the important legal theories, mainly those concerning private ownership, have an economic content," adding that "the peoples partly uncivilized, need a legal system

to regulate their economical activity […]. So we should not be surprised if economical theories often renew legal theories," and concluding that "the renovation of private law is but the result of new economical theories in the old legal organism. It acknowledges that law could not help paying attention to the new assumed conditions of propriety, work, credit and circulation so that they might suit the modern societies demands."[2]

We may conclude that the new market places introduced to daily life through the emergency of technological platforms have led to new consumption patterns, not yet entirely considered by the existing legislation, and have given rise to contentious situations, sometimes almost demolishing the traditional and firm-related model. Because those new consumption relationships lie outside a specific legal arrangement to exhaust the casual and negative connotation, already in moral as well as in legal terms. The question is, as we have already mentioned, a kind of *inventio* of which the essential aim is to legitimate by means of working up a model both theoretic and elucidative, an entire collection of new economic experiences that will surely be reproduced to the most different areas under a probable geometric progression as much as people's increasing adhesion to the most modern technologies offered by smartphones and tablets. If, at first, the trend may arouse some cultural as well as historical opposition, history has proved, as has happened in many other situations, that this problem will be surpassed from the moment that disposition and legal theories have been necessarily renewed.

Jorge Gonçalves Guimarães

[2] *"[...] cada relação económica reveste formas jurídicas, todas as grandes teorias do direito, principalmente do direito privado, têm um conteúdo económico"; "os povos, num certo grau de civilização, precisam dum sistema jurídico para regular a sua atividade económica […]. Não deve admirar, por isso, que frequentemente sejam as teorias económicas que renovam as teorias jurídicas"; "a renovação por que está passando o direito privado, não é mais do que uma consequência das novas teorias económicas no velho organismo jurídico. Reconheceu-se que o direito não poderia deixar de atender às novas condições assumidas pela propriedade, pelo trabalho, pelo crédito e pela circulação, a fim de corresponder às exigências das sociedades modernas"* (Souza, Marnoco e. 1917. *Tratado de Economia Política I*. Coimbra: F. França Amado: 64–65).

CHAPTER ONE:

META-LEGAL PERSPECTIVES OF THE SHARING ECONOMY

CIVIL LAW AND THE SHARING ECONOMY[1]

TIAGO AZEVEDO RAMALHO[2]

1. The importance of the idea of sharing

Over the past few years there has certainly been a significant increase in references to the idea of collaboration, or, more especially and more importantly to the purpose of this presentation, to the idea of sharing—and while such references are more often used in the economic, sociological or political discourse than in legal discourse, they inevitably raise legal issues.

But if the emphasis, the urgency and the frequency of the reference to the idea of sharing is certainly new, this appeal is persuasive partly because it bases its roots on classic cultural strata. As November approaches, we cannot forget a story that many will have known in childhood and through which we have been offered an example of sharing: it is the legend of Saint Martin, who met a poor man on the road and cut off his cloak to share it with him, giving up a part of what was his to help the neighbour.[3] It should also be noted that the most successful religion of the Occident sees in the breaking of bread its fundamental moment of assembly and worship. And in the light of this example we shall too remember the communities which have historically and cyclically been founded and which find in radical sharing their raison d'être: monastic communities, orders of friars, confraternities, brotherhoods, associations with the most diverse purposes, cooperatives, humanitarian missions. The word *sharing* summons up a concept of great symbolic significance.

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[1] "Estruturas negociais e dominiais civis da economia da partilha": this text was written in Portuguese and is therefore subject to the pre-comprehension of a Portuguese lawyer. Considering the term "partilha" rather than sharing and using—as derived from the original title—a European continental law terminology.

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[3] Programme 4 of the broadcast mentioned on footnote 4.

What does all this have to do with the Uber platform or the Airbnb platform? I would say that absolutely nothing—even though similar entities are presented as an example of sharing economy. But this dissimilarity serves precisely as a reason for raising some fundamental questions: what is sharing? What are its particularities? How does law, and particularly civil law, allow it? What are its limits? Terminological issues are not always important; they matter, however, when the term that is to be used performs, by its obvious semantic and symbolic misuse, a rhetorical role.

For this purpose, I shall begin by listing different practices that are connected to the general idea of *sharing*. Then I will try to define both the technical and general understanding of *sharing*, in order to consider in what way and to what extent civil law allows it. I will finally present my conclusions.

2. The ubiquity of the idea of sharing

Before defining the concept of sharing precisely, it is important to mention several initiatives that have been carried out in different places under the word *sharing*. If we consider these initiatives together, we will be able to conclude that, far from a merely casual reference, they reflect a trend of our time. Using a recent series of radio broadcasts about this subject—a particularly relevant contribution to experience what has been presented as an example of "sharing"—the following initiatives can be indicated:[4]

> *a)* The so-called "time-based currency" through which one shall purchase or provide services against units of time—the unit of time here is a medium of exchange for the acquisition of goods;
> *b)* Marketing of second-hand products, sometimes with the intention of reducing the waste of resources, and also with the intention of financing the entity that markets the products, often of philanthropic purpose (charity). Sometimes the products are restored by the intermediary, which reinforces the intention of reusing it;
> *c)* Introduction of the topic of *economic decrease* in the economic discourse, suggesting that sharing and renunciation, among other practices, are elements of an economic system that is presented as an alternative to

[4] Series of 12 programmes (*Die teilende Gesellschaft)* broadcasted by SWR 2 (*Südwestrundfunk*) and available at <www.swr.de>. These programmes were first broadcast between 7/5/2016 and 23/7/2016.

the simple accumulation of production upon which our economic system is founded;
d) Common property (*commons, Allmende, baldios*) created or produced to be available to a multitude of persons—bicycles, tools, housing, gardens, swimming pools, workshops. Or, moreover, a public library;
e) New typology of the different market actors: instead of the division between consumer and producer we would have a prosumer, consumer and producer at the same time;
f) Open access science pages;
g) Peer-review journals, where peer-reviewers provide their time for the purpose of reviewing, thus giving an opportunity of publishing a paper to those who have applied for it—the peer-reviewers share their time and their knowledge in order to increase the *agora* of scientific discussion;
h) Crowdfunding, crowd lending or crowd investing;
i) Sharing of goods—food, clothes, houses and, above all, time—with immigrants and refugees;
j) Sustainable cities designed or remodelled in such a way that ensure the highest possible level of use of resources;
k) Introduction of new behaviour standards and setting of new values, in which sharing or use replaces exclusive ownership (which, moreover, is already a classical question of private law theory raised by the Franciscan friars: they could not be owners of goods but they needed them, so they were entitled only for the use of those goods);
l) Intergenerational housing, in which the older ones house the younger ones—the first ones share their space, the second their presence and their time;
m) Creation of farming cooperatives that connect people interested in the production and producers, some contributing with their work and others with money. The second receive in return the farming products;
n) Community or local vegetable gardens;
o) School gardens, which on the one hand play a pedagogical role and on the other contribute to the domestic economy of the students' families—an idea of similar content was also proposed by some Portuguese political philosophy in the middle of the last century (Agostinho da Silva, António Sérgio), defending the creation of schools that operated as true existential communities;
p) New currencies, either with a complementary function to the legal currency or as a real substitute or alternative (e.g. bitcoins) to the legal currency—in this case, what is shared is the *fiducia* in the value of the currency;
q) Social networks which promote the public disclosure and networking of several aspects of the private life of a person. On Facebook's Portuguese page we will find the following quote: "Facebook helps you connect and

share with the people in your life";[5] and on Instagram: "a community of more than 600 million who capture and share the world's moments on the service";
r) "Sharing" of data, either voluntarily or as a condition for access to certain goods, which are subject to further computer processing, and seeking to generate large volumes of information;
s) Business spaces for new companies or professionals, with common use of certain divisions (e.g. meeting room);
t) Online file storage sites, the "clouds."

Considering these activities together, it can be concluded that the idea of sharing is now ubiquitous, resulting in a true society of "arrangements," of "ways," of "tradings."[6] The set of initiatives listed above allow us to confirm what was initially said: the idea of sharing is present in several contexts. In almost all of them, however, a predominantly economic intention of discourse was identified:

a) when alternative forms to the current economic system are proposed. In this case, it seems to correspond at some extent to what in some political philosophy is called communitarianism;
b) by proposing complementary forms to the current economic system;
c) by proposing ways of developing the current economic system.

It is not always easy to conclude by the real intention of the discourse—if it is aimed as an alternative, a complement, or a development.

In any case, we are dealing with ethical proposals concerning human action. As ethical proposals, they aim to or in fact determine human action and also influence either the structure of society or the forms of social interaction. Since it is the role of the Law to set the fundamental legal framework, any of the projects listed above has direct legal consequences and either is allowed by law or challenges the law.

Although the realities linked to the idea of sharing are so diverse, it is necessary to ask: in what terms does the Law, and especially civil law, look at this concept?

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[5] "O Facebook ajuda-te a comunicar e a *partilhar* com as pessoas que fazem parte da tua vida." Same in German ("Auf Facebook bleibst du mit Menschen in Verbindung und *teilst* Fotos, Videos und vieles mehr mit ihne.") and Spanish ("Facebook te ayuda a comunicarte y compartir con las personas que forman parte de tu vida").

[6] "Permutas e combinações"—the Portuguese title of the conference.

3. Legal and general understanding of sharing in Portuguese law

3.1. Technical legal sense

In Portuguese civil law, sharing is a technical term. I will consider civil law in a broad sense, taking it as the common branch of the legal system that regards the relationship between equals. There, the term "sharing" refers to the operation by which a joint ownership becomes a set of several individual entitlements, as occurs in the communion (partition).

Thus there tends to be sharing where there is a common heritage: consider, for example, the Law of Succession, in which the inheritance is owned by a plurality of heirs and is then shared among all of them; this is also the case of matrimonial relations, which imply the sharing of the common property of the spouses if the relationship ends; we shall mention the division of common thing in the co-ownership, in which the co-owners of the co-ownership sometimes divide the *res* itself and sometimes divide the product of its disposal; it is or may be the case of the winding-up of companies, of civil or commercial law.

Sharing (partition) is a way of disposing of the ownership of a right, now practiced by all the respective holders (under penalty of non-legitimacy and, therefore, ineffective of the intended effect) or by a third party who has the powers to practice the act (a judge). It is as a "novation" of a real legal right: the old legal right, which was entitled, is extinguished, and in its place arise several new legal rights, each singularly titled by each of the former owners and now singular holders. Before, we had a single right over one good that belonged to several individuals; now, we have several rights over various goods. As in novation, the old right is extinguished for the constitution of the new one; and the new one constitutes in the extent of the extinction of the old one and because of it.

It should be noted that sharing in this context is not associated with "liberality." Behind the sharing arrangement, there may be different purposes; but as a rule, it is a zero-sum arrangement, in which each party acquires a good that is equivalent to the one that has just been lost, aiming only to put an end to a situation of joint ownership of rights, as a result of the exercise of a personal right (*Gestaltungsrecht*). With regard to the value of each good, it is sought that it is as approximate as possible to the position owned previously by the individual.

When seeking to designate the *causa* of this contract, Ferreira de Almeida speaks rightly and simply of a *function of restructuring* (Almeida 2014, 9 ff., §9).

3.2. General understanding

But if sharing has this precise legal sense, it also knows a broader social understanding, which, after all, allows us to conclude why the term is repeatedly invoked. In the general understanding, there are different meanings for sharing.

The first understanding is the one in the story of Saint Martin narrated in the beginning of this text: putting our own goods at the disposal of the others. More precisely: the renunciation to our own goods to offer them to others. Sharing has in this case three characteristic features:

a) It involves, in the first place, the renunciation to part of our own goods
b) The part of the property to which we renounce is then assigned free of charge to another person
c) The reason for the transmission to others (b) is the original renunciation (a). Thus, in this current general understanding, sharing has a *causa* of liberality (*bienfaisance*)

Another meaning of the term sharing is the common use of public open spaces. This second understanding leads to the third one, which is the sharing of spiritual contents: of a memory, of an experience, of a problem.

We thus differentiate two fundamental notions of sharing:

a) In a legal sense, there is the sharing of a *certain good* among its owners
b) In the general understanding, we consider the sharing of *certain goods* with *certain people*

Sharing is thus—alongside, for example, buying and selling and bartering—one of many possible ways to distribute goods.

It is well understood why the idea of sharing in its general understanding seems so attractive. Among other reasons that could be advanced to the love devoted to this practice, I would mention the following: sharing implies a certain form of recognition of the other, of the one with whom we share something with, who is considered worthy and valuable enough to be a beneficiary of a resignation by the owner.

3.3. Other meanings?

But if so, one must at the same time conclude that many of the practices that are being considered as part of the sharing economy are hardly likely to deserve this name. It is simply an allusion with a rhetorical effect which, whether it is sought or not, has the consequence of placing in the shadows the real implications of a certain practice. Let us take the example

of Airbnb, often presented as an example of activity within the sharing economics: this is not a way of sharing goods, since there is no free renunciation or use of common goods, but only of marketing of goods, that is to say, the placing on the market of a wide range of goods which, in the absence of such a platform, would not be placed there at all or would be placed in a different way. Or the Uber platform: but in this case it is a question of marketing the car itself and, whether by *locatio conductio* or by employment contract, to provide some activity against remuneration. We do not intend to judge this or that platform—but only to state that they are based on the commercialization and marketing of certain goods, that is, on their placing on the market for financial profit—and not for *bienfaisance*.

That is to say: the set of cases that must be strictly brought back to sharing is significantly smaller than it might seem at first. And it is important to emphasize it, since sharing has certain emotional or affective senses, meanings, understandings, and thus it may hide the real face of certain economic operations.

4. Civil law and sharing

The general understanding of sharing is established. Now it is important to determine the extent to which civil law allows it. There are several frameworks that allow the sharing of goods:

a) This possibility is first of all admitted through the recognition of private property, a fundamental cornerstone of the private law. If private property is recognized and the holder is given the possibility of disposing of his right—alienating it, creating limited real rights, renouncing to it—then it can serve the most convenient purpose to the owner—including sharing it with others;

b) The concern to allow different degrees of use of the same goods is still historical and currently on the foundations of the limited real rights. As an alternative to a solipsistic use of the property by its owner, sometimes at the expense of a non-economic use of the property, it is admitted that on the same right there may be different levels of dominance, with limited legal rights directed not at the use of ownership (as the medieval legal discourse would say: *dominium directum*), but rather to the effective use of the object of the right (the *dominium utile*), as in the limited real positions occurs—usufruct, use, housing, servitude and, historically, *emphyteusis*;

c) Civil law also includes legal rights that allow the joint use of property: take into account condominium, where each legal position grants the exclusive right of ownership over the fraction and ownership of the common parts. And we should also mention the *baldios*—of minor

importance, but still existing—that constitute common land of common use;
d) Together with the cornerstone of property, we find the cornerstone of the contract, which is also an appropriate instrument for the sharing of goods—in fact, it is through the contract that legal goods between persons are mobilized according to their will: contracts that seek to grant the use of something fungible (loan, which has historically emerged as a gratuitous contract, common in friendship relations) or non-fungible (loan for use), or the donation through which we give to the other the goods we renounce;
e) A growing number of volunteer "contracts" or "quasi-contracts" in which one is predisposed to provide a free service to another person, with a series of other non-primary obligational duties to the other part (protection, reimbursement of expenses in the course of the activity, etc.)—not unusual, as it happens in the sharing economics, with great language abuse. Not being compulsory contracts, they constitute valid titles of use of the activity of others (thus excluding the application of rules of unjustified enrichment);
f) We should also mention the organizations where goods become common for the exercise of a certain activity: special commissions, associations, cooperatives and the contract of society itself (in countries that do not set profit as a requirement of the partnership agreement). Non-profit foundations with philanthropical goals shall be considered as well.

It should be noted, however, that if there are several possibilities for sharing, civil law places certain boundaries to individual freedom: in the case of property, when acts granting minor rights of use are not renewed, the owner of the property right will get the full *in re potestas* back. On the other hand, it is the general rule that no one is obliged to remain in communion—and therefore may demand the partition of common goods. The rule has exceptions, as in the case of condominium. With regard to the contract, the rule is that the contract should be temporarily limited. That is to say, the fundamental principle that each one is protected as *sui iuris* has two legal meanings: the limited real rights and the obligatory force of contract are limited, so that each one can be the owner of himself. In any of the cases, these are rules that seek to protect personal freedom, granting the possibility to judge from time to time the reasonableness of the legal ties.

In respect of any of the cases listed above, it is nevertheless of fundamental importance to distinguish between the civil legal framework and the way individuals interact. It is not the provision of mechanisms that makes the sharing legally possible that will lead to sharing—to move from the first to the second level, it is necessary that different members of the community choose to act this way and not in a different one. Recognizing the personal freedom also implies that the ultimate judgment about the

reasonableness of a certain act is a personal right—like sharing or not sharing. The alternative is a central coordinated system.

With such precisions, it seems that we are approaching the precise direction in which the sharing economy confronts civil law. In the majority of the proposals made above, it is not intended to introduce new, unprecedented possibilities for action, but to convince the members of the community who already enjoy such possibilities to act in a certain way. As we now better understand, we are thus in the presence of a proposal of essentially ethical nature.

But if civil law allows many possibilities, its limitations are also significant. In order to offer an adequate legal framework, civil law depends on an approximated balance of positions between the legal peers. As soon as this balance breaks down, it is necessary to introduce a complementary framework that will try to restore it: hence, wherever there is a relationship between a professional and a consumer, consumer law shall be applied. Before civil law itself, but setting boundaries to it, there are different rules of economic regulation.

On the other hand, even when private legal relationships can be detected—as in the activities referred to in *3.c)*—they have a double meaning. On the one hand, they are, or may be, the result of a small economic operation carried out by two small individuals, without any general economic impact; however, as several similar activities are promoted by the same operator, that leads to a major economic activity. Even if civil law can frame that first activity, it is prepared to respond to this second problem that simultaneously arises.

That is to say: civil law needs to be bounded by wide set of rules of public law so that it can contribute to common good. Now, it seems to me that the great problem raised by the sharing economics in its most inappropriate sense (*3.c*) is of public economic law.

5. Five conclusions

Today we are meeting to discuss a "society of exchanges and arrangements." What are the conclusions of this presentation? I believe that five conclusions can be drawn.

1. *Sharing* in a legal sense means the transformation of a joint ownership into several individual entitlements by the previous owners. This is not the meaning of the idea in the sharing economics approach.

2. *Sharing* in the social sense means the renunciation of one's own goods for other's benefit or the common use of certain goods.

3. Today there are many activities that appeal to the idea of *sharing*. Many of them seek to either persuade the members of the legal community to exercise their legal rights in a way that places their personal or property goods at the disposal of others or to choose the common use of goods. And there are several civil structures that allow it. In conclusion: those proposals seek to challenge the members of the community to make use of their concrete possibilities of sharing, thus with a predominantly ethical intent. This does not raise particular legal challenges.

4. Platforms like Uber cannot be designated as a mode of sharing unless there is a misuse of language. They are simply platforms that allow the placement of certain goods on the market that otherwise could not be placed there or would not have the same economic impact. It is of utmost importance to dismiss the designation *sharing*, given that this designation has considerable symbolic meaning.

5. The great challenge of such platforms is not to adhere to civil law, but rather to economic regulation: a matter that requires a public economic law approach.

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CHAPTER TWO:

MACRO-LEGAL PERSPECTIVES OF THE SHARING ECONOMY

SHARING ECONOMY: FROM B2C TO P2P AND BACK

MARIANA FONTES DA COSTA[1]

1. Introduction: the rise of new peer-to-peer contractual relationships

Since the second half of the twentieth century, consumer protection has become one of the most important goals of the legal regulation of market transactions.[2]

Two central milestones can be identified in this process.

The first was the famous speech by John F. Kennedy to the United States Congress on 15 March 1962 (Almeida 2016, 27; Leitão 2002, 17; J. M. Carvalho 2017, 17), when the then President of the United States of America underlined that "consumers are the largest economic group in the economy, affecting and affected by almost every public and private economic decision" and that it was the responsibility of Congress and the Executive Branch to ensure that the "Nation's economy fairly and adequately serves consumers' interests."[3]

The second was the adoption of the Consumer Protection Charter by the Consultative Assembly of the Council of Europe in Resolution 543 on 17 May 1973. Although this document was not binding in nature, it was an important acknowledgement of the need for specific measures regarding consumer protection and it worked as an incentive for the subsequent adoption of legal regulations, both at the Member State level and at the

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[2] Except when differently perceived from the context, the social and economic reasoning followed in this article is based on the European Union, with special emphasis on the Portuguese legal system.

[3] The speech is available online at http://www.presidency.ucsb.edu/ws/?pid=9108.

European Union level (Almeida 2016, 27; J. M. Carvalho 2017, 18; Benöhr 2013, 14).

Contract law as a discipline is generally built on the assumption that the contractual parties are the most capable players to promote and protect their own interests through a legally binding agreement they have freely entered into.

Nonetheless, this assumption of equality and balance between peers frequently fails when confronted with the relationships established between business professionals and consumers, that is, in the business-to-consumer economic sector. Consumers are often in a position of fragility and subordination when faced with the knowledge, financial capacity and economic power of the business they are negotiating with (Silva 1990; Almeida 2005, 38; Leitão 2002, 13; J. M. Carvalho 2017, 34; Oliveira 2002; Alves 2014, 44–45).

Aware of the inequality and imbalance that so often characterizes contractual relationships between business professionals and consumers, twentieth century legislators cautiously but steadily reduced the contractual freedom of the parties, in order to protect the consumer against the hegemonic power of corporate companies and business professionals in general. Topics like consumer protection with regard to health and safety, information, freedom of choice, product liability and privacy rights have long been the object of attention from regulators worldwide, and have given rise to a new and (to a certain point) coherent set of mandatory provisions, collectively identified as consumer law.[4]

Generally speaking, the typical scope of consumer contract law is the business-to-consumer relationship.[5]

As legal regulation on commercial and consumer contracts expanded, the general rules on private contracts became increasingly devoid of their

[4] According to Monteiro (2016, 12), consumer law may be defined as a "set of principles and rules designed for the protection of the consumer." In this context, protecting consumers means not only adopting defensive measures against the dangers consumers face, but it requires going further and adopting measures that positively reinforce and promote consumers' interest (Von Hippel 1986, 23–24). Another goal pursued by consumer law is the protection of the market *per se*, by reinforcing the trust of consumers and, therefore, stimulating the acquisition of more products and services (Monteiro 2016, 25; Almeida 2005, 52, 2016, 30–31; Leitão 2002; J. M. Carvalho 2017, 34–35).

[5] "Consumer law regulates consumption, legal relationships established between a consumer and a professional" (Leitão 2002, 24).

own sphere of application, gradually becoming a subsidiary (instead of a reference) regime.

If the twentieth century may be rightfully identified with the expansion of consumer law, the twenty-first century is giving signs of a reversal in that cycle.

The 2008 economic and financial crisis has led to a sharp drop in consumption, and political authorities in the most affected countries have generally recommended austerity, also promoting an increase in financial savings, as financial institutions abruptly cut access to credit (Cordeiro 2016a, 10–11; Frada and Costa 2016). According to Almeida (2016, 30–31), the 2008 financial crisis seems to have shattered (temporarily or definitively, only time will tell) the belief that consumption is the driving force behind the development of societies.[6]

Another phenomenon is, however, becoming apparent in society today, bringing about a truly disruptive trend with regards to the traditional frameworks that regulate market transactions: the rise of a new sharing economy, technologically-based and rooted in peer-to-peer transactions (Cohen and Sundararajan 2015, 116; Katz 2015, 1067–1068; PricewaterhouseCoopers 2015; J. C. Carvalho 2016, 120; Hamari, Sjöklint, and Ukkonen 2016, 2047).

A peer-based economy significantly diminishes the imbalance and inequality that justified the need for specific rules regarding consumer protection against business hegemony. Therefore, the need for heteronomous regulation in the sector may consequently diminish, leaving room for a broader application of the fundamental freedom of contract principle.

However, a more attentive analysis leads to the conclusion that an intricate mixture of heterogeneous relationships lies under the "veil" of what is usually identified as sharing economy, that range from real peer-to-peer relations to the very traditional business-to-business and business-to-consumer transactions (Katz 2015, 1073; J. C. Carvalho 2016, 120; Hamari, Sjöklint, and Ukkonen 2016, 2051; Gata 2016, 194).

[6] The author also mentions the role played by the European Union legislator in the "decline of consumer protection" in the twenty-first century, identifying, as examples of this stance, the 2000 Directive on Electronic Commerce, the 2005 Directive on Unfair Commercial Practices, and the 2011 Directive on Consumer Rights (Almeida 2016, 30). On the same topic, see also Monteiro (2016, 25).

2. Is the sharing economy being overrun by an access economy?

One of the most difficult challenges when conducting research on the topic of sharing economy[7] is defining and establishing the exact scope of the social and economic phenomenon it represents.

Definitions from different authors who have focused on this topic vary significantly, from broad notions—encompassing a large variety of organizational structures and activities—to very restrictive notions, that conversely narrow the phenomenon according to elected criteria, such as the nature of the activities carried out within the sharing platforms and their providers.[8]

This article focuses on unveiling possible market configurations underlying the use of sharing economy platforms from the providers' perspective. Therefore, a precise definition of what the "sharing economy" should encompass, in order to identify a new economic trend based on a "more efficient use of resources," thus contributing to sustainability, extended supply and lower access prices to existing goods, will not be pursued (European Commission 2016, 2). Instead, a broad notion will be

[7] We use the term "sharing economy" in this context for its widespread acceptance, notwithstanding the criticism it is open to, as mentioned below, at the end of this section.

[8] An example of a broad notion of sharing economy may be found in the European Parliamentary Research Service's Report on Consumer Protection in the EU: "[t]he collaborative or sharing economy (…) is based on the sharing of human and physical resources like creation, production, distribution, trade and consumption of goods and services. It can take a variety of forms, taking advantage of new technologies and leveraging communities or crowds to rent, share, swap, barter, trade, or sell access to products or services." (Valant 2015, 15). An example of a restrictive notion of sharing economy may be found in Frenken et al. (2015). According to the authors, sharing economy consists of "consumers granting each other temporary access to under-utilized physical assets ("idle capacity"), possibly for money." Three elements result from this notion: first, that the sharing economy only applies to the peer-to-peer sector; second, that it only includes temporary access to a good and not the transfer of ownership of that good; and finally, that it only includes the use of physical assets and not delivery of services.
In the European Agenda for the Collaborative Economy, sharing economy is defined as "business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals" (European Commission 2016, 3).

adopted, in order to identify a new trend in the configuration of market transactions, through the intermediation of an electronic platform.

For this purpose, "sharing economy" may be defined as the "activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services."[9] The differentiating element in this context is, hence, the use of an online platform to promote the market transaction between the user and the provider.[10]

The typical contractual relationship established within the sharing economy requires the conclusion of three different contracts, in a triangular setting (J. C. Carvalho 2016, 120–121).

The first contract (with no specific chronological order to the second) connects the provider of the goods or services to the company that owns the sharing platform. There are, however, cases where the goods or services are provided directly by the company that owns the sharing platform (such as in the case of Citydrive), transforming the typical triangular setting of a sharing economy transaction into a simple bilateral contract between user and platform (J. C. Carvalho 2016, 120–121). These situations are excluded from the analysis in this paper, since they do not raise the framework difficulties explored below.

The second contract is concluded between the user and the company that owns the sharing platform, regulating the terms of the mediation. It is, nevertheless, also possible that this contract may not exist, in the rare cases where the platform consists of a mere exhibition showcase for providers' goods. In the words of Katz (2015, 1072), "[s]haring companies fall somewhere along a spectrum between purely passive message boards and direct service providers."

The third and final contract connects the user to the provider (J. C. Carvalho 2016, 120–121).

As mentioned previously, the relationship between the user and the provider in the sharing economy is usually portrayed as a peer-to-peer contractual relationship. However, reality seems to be evolving differently.

Although a significant number of providers using sharing economy platforms are non-professional individuals, commercial enterprises are

[9] This is the definition adopted by Hamari, Sjöklint, and Ukkonen (2016, 2047), with the relevant difference that these authors refer to it as a "*peer-to-peer based* activity of obtaining, giving, or sharing the access to goods and services, coordinated through community-based online services."

[10] To quote the PWC report (PricewaterhouseCoopers 2015, 15), "digital platforms that enable a more precise, real-time measurement of spare capacity and the ability to dynamically connect that capacity with those who need it."