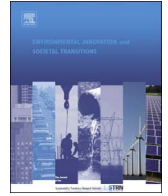


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Original Research Paper

Neoliberalism and the legality of peer platform markets

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ABSTRACT

Online platforms for rentals and services raise difficult legal issues. Nevertheless, some commentators have been quick to dismiss these issues or to argue that the laws themselves are the problem. This article traces the intellectual sources of these responses. It argues that these sources can generally be identified with neoliberalism, including its description of markets as both spontaneous and institutionally constructed as well as a distinction between laws that provide infrastructure for markets and laws that interfere with markets. Cyberlibertarianism and “sharing economy” discourse also play a role. However, there are flaws in these theoretical premises and in their application in this context. While there exist sound bases for critiques of certain regulatory regimes, the assumption that the platforms are, on the whole, more freedom-enhancing and more efficient than state regulation cannot be sustained. Nor can it be assumed that the benefits of these markets will be widely distributed.

1. Introduction

In recent years, entrepreneurs have created numerous websites and mobile applications in the form of markets. These platforms employ a peer-to-peer structure, allowing users to both buy and sell. The platform acts as an intermediary, often charging a commission on each transaction. The earliest such platforms, such as Ebay and Amazon.com’s “marketplace”, focused on the exchange of goods. More recent platforms have applied this model to the exchange of services or rentals. The best known examples are Airbnb (short-term accommodation) and Uber (local transportation), but there are many others vying for market share (Owyang, 2016). While these platforms are sometimes associated with the idea of a “sharing economy” or a “collaborative economy”, the term “peer platform markets” is more appropriate (OECD, 2016).

Around the world, the expansion of peer platform markets from goods to rentals and services has given rise to a host of policy concerns. It has also given rise to major legal issues. In many jurisdictions, the platforms’ activities, or those of “providers” who offer services through the platforms, are illegal. For example, the laws in some places make it clear that only licenced taxi drivers may transport passengers in exchange for money. Nevertheless, certain Uber services, known as UberX in North America and UberPop in Europe, invite ordinary drivers (without taxi licences) to offer rides to paying passengers. In other cases, vague or technologically-specific laws have left the platforms and their users in a legal gray zone. Aside from sectoral licensing regimes, questions have been raised about the platforms’ compliance with tax, labour, competition, and anti-discrimination laws (Rogers, 2015; Finck and Ranchordás, 2016).

In public debates surrounding peer platform markets, however, some commentators have been quick to dismiss or minimize these legal issues. Some have engaged in outright denial. Others have exaggerated the legal ambiguities surrounding peer platform markets, or sought to excuse those who break the law. The same commentators have often engaged in frontal attacks on the law itself, arguing that it is outdated, that it is inefficient, or that it is politicized. As an alternative to current regulatory frameworks, they have

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frequently recommended some combination of self-regulation and deregulation. When making such arguments, these commentators have often assumed that peer platform markets are efficient and that their benefits will be widely distributed.

This article is meant as a critique of these commentaries. While the legal issues surrounding peer platform markets vary widely from one jurisdiction to another, they cannot (or should not) simply be wished away. Moreover, the arguments for minimizing the legal issues are largely unfounded. Assumptions about the efficiency of peer platform markets or the equitable distribution of their benefits are not necessarily accurate.

We can better understand these commentators' positions—and better respond to them—by tracing their intellectual sources. The assumptions informing these commentaries can generally be traced to neoliberalism. Neoliberalism provides a package of ideas about markets and the state that appears to minimize the significance of the legal issues raised by the platforms. In particular, neoliberalism provides a description of markets both as spontaneous and as depending on state-enacted laws. Nevertheless, neoliberals are profoundly ambivalent with regard to law, distinguishing laws that provide market infrastructure from laws that interfere with markets. In the case of peer platform markets, neoliberal ideas have been overlain with additional discourses. The first of these is a variant of libertarianism associated with contemporary information and communication technology, and with the Internet in particular. The second is a rhetoric of “sharing” in which peer-to-peer markets are linked to altruism, community, and ecological responsibility.

However, there are good reasons to be critical of all of these ideas, both in general and with respect to their application to peer platform markets. There is nothing spontaneous about peer platform markets; they are a product of the rules developed by the platforms and of the background rules of state-enacted private law. A critical examination of such rules suggests that the platforms are not necessarily efficient and freedom-enhancing, nor are their benefits necessarily widely distributed. There is no reason why regulatory regimes should be singled out for criticism while other legal rules are spared such scrutiny. A dismissive attitude toward the of the legal issues surrounding peer platform markets is therefore not justified.

2. What are the legal issues?

Peer-to-peer platform markets have raised complex legal issues in jurisdictions around the world. These issues vary from one jurisdiction to another, often depending on subtle differences in regulatory design. An exhaustive treatment of the legal issues is therefore impossible. It is nevertheless possible to provide a broad overview of the types of issues that peer platform markets have raised.

Perhaps the most prominent legal controversies surrounding peer platforms markets are those involving licensing regimes. In many jurisdictions, a driver may not legally transport passengers in exchange for money unless he or she holds a valid taxi licence. Such licences are often linked to quality and safety standards. Nevertheless, some of Uber's services (known as UberX in North America and UberPop in Europe) serve to facilitate transactions between drivers and paying passengers, regardless of such licences. Uber's defiance of licensing regimes has led to widespread protests by taxi licence holders. In several European countries, governmental or judicial authorities have effectively shut down the UberPop services due to its non-compliance. In others jurisdictions, they have been more permissive. Some jurisdictions also require those who offer short-term accommodation to tourists, such as Airbnb hosts, to hold special licences.

Almost as controversial as the question of licences has been the question of taxation (Oei and Ring, 2016). The economic activities undertaken by peer providers are subject in many jurisdictions to value-added taxes as well as income taxes. But providers may, through ignorance or inadvertence, neglect to report such income to tax authorities. Tax authorities in many jurisdictions have taken enforcement actions against peer providers who fail to pay their taxes. Platforms like Airbnb and Uber initially took the position that, as mere intermediaries, they were not responsible for peer providers' tax problems. However, under pressure from authorities, such platforms have begun to collect and remit taxes on behalf of their users in some jurisdictions.

Another set of legal issues arises from labour laws and their application to the platforms. The platforms have generally taken the position that peer providers are self-employed individuals acting as “independent contractors.” This characterization spares the platforms from having to comply with laws concerning, for example, minimum wages, job security, or workplace accident insurance. In some legal systems, it also hinders peer providers from forming legally recognized unions (Rogers, 2016). Moreover, in some legal systems, this characterization serves to exempt the platform from liability for harms caused by peer providers. However, peer providers in some jurisdictions have begun to challenge this characterization, arguing that they should benefit from the rights and benefits associated with employment.

Alternatively, if one takes at face value the platforms' contention that peer providers are independent entrepreneurs, another set of legal issues arises—that of competition law. Uber, for example, sets the prices for rides booked through its mobile application. A number of lawsuits have argued that Uber is, in effect, a cartel, allowing drivers to engage in price-fixing (United States Court for the Southern District of New York, 2016).

Finally, another thorny legal issue for peer platform markets is that of discrimination. Peer providers often rent out their own homes or offer rides in their personal vehicles. Many therefore insist on having absolute discretion to select their customers. But research in the United States has detected patterns of racial discrimination in Airbnb hosts' acceptance of accommodation requests (Edelman et al., 2016). Likewise, issues have been raised about Uber drivers' treatment of disabled passengers. Such discrimination, if it occurred in a purely commercial setting, would be illegal in many jurisdictions.

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