



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



Critical Assessment of European Agenda for the Collaborative Economy

Economic and Monetary Affairs

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Consumer Protection**

Critical Assessment of European Agenda for the Collaborative Economy

In-Depth Analysis for the IMCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Critical assessment of European Agenda for the collaborative economy

IN-DEPTH ANALYSIS

Abstract

The research paper describes the main legal challenges for regulating the collaborative economy and evaluates the definition of, and elucidates how the existing body of EU law applies to collaborative economy business models. In the last part, the paper elaborates on how a regulatory framework for non-professional provision of services and prosumers should look like and makes a few concrete proposals for future policies.

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EXECUTIVE SUMMARY

Introduction and legal challenges

The expression “collaborative economy” and its equivalents all refer to those business models for the provision of services that enable peer-to-peer transactions via online platforms, and describes the possibility for non-professionals to offer goods and services traditionally provided by professionals. The economic actors involved in peer-to-peer transactions are:

- (i) service providers;
- (ii) users of these; and
- (iii) intermediaries that connect — via an online platform — providers with users.

There is a large degree of confusion surrounding regulatory rights and obligations on the part of participants in the collaborative economy.

With regard to the distinction between peers and professionals, rules designed to regulate sales of goods and provisions of services by professionals are often inadequate when these activities are carried out by non-professionals. While there are no fixed criteria to distinguish between peers and professionals, some circumstances may point into one direction or the opposite.

With regard to collaborative platforms, some of these platforms may be deemed as service providers with new employment models, others as “digital marketplaces” connecting peers, while many may be understood as firm-market hybrids. Their business models constitute a wide spectrum, ranging from marketplaces to hierarchies, each in need of a different sets of rules.

As a first rule of thumb, when an online platform exerts a high level of control and influence over the peers, it may be identified as a provider of the underlying service. On the contrary, when the platform limits its activity to the matching of demand and supply, even if offering ancillary services, the peer should be deemed as the only service provider.

The Single Market

It is crucial to scrutinise the great diversity of regulatory regimes across the single market and to review the existing legal framework in the light of the emergence of the collaborative economy, in order to debate the most appropriate forms of regulation.

EU platforms face several barriers to their development, compared to platforms operating in the US: beside cultural and linguistic differences, they are constrained by a more fragmented regulatory environment.

In assessing how existing EU law should be applied to the collaborative economy, three pieces of legislation are especially relevant: Services directive; e-Commerce directive; consumer and marketing law.

In application of Services directive, restrictions on peer-to-peer services are permitted only if: equally applicable to the national and the foreign; justified by some legitimate public interest objective; proportionate to that objective. Accordingly, Member States are required to reassess the proportionality of restrictions for private individuals providing services on occasional basis, pointing towards a less restrictive legal discipline. While a lighter regime for peers is strongly desirable, at the same time there is an urgent need to simplify procedures and formalities for professionals.

In accordance with e-Commerce directive, a case-to-case assessment on collaborative platforms is required for determining their legal regime: if deemed as service providers, collaborative platforms would be subject to those market access requirements generally

applied to providers, and to the relevant sector-specific regulation, including business authorisation and licensing requirements; while none of these rules would be applied to “information society services”.

The content of this case-by-case assessment deserves to be further highlighted and additional reflections are desirable on the appropriateness of criteria laid down by the Commission to assess the degree of control exerted by collaborative platforms on peer-to-peer transactions. Besides, a potential tension may arise between liability exemption for technical, automatic, passive, conduct by the platform and the goal of encouraging responsible behaviour. For these reasons, further reflections are desirable on the opportunity to maintain the framework provided by the e-Commerce directive in order to assess the nature and the resulting legal regime of collaborative platforms.

EU consumer and marketing legislation is based on the distinction between “trader” and “consumer”, as EU consumer law applies only to those who qualify as “trader” and engage in “commercial practices” vis-à-vis consumers. If neither the collaborative platform nor the peer service provider qualifies as a “trader”, the transaction falls outside the scope of consumer legislation, bringing to the central question of protecting consumers in the collaborative economy.

While traditional rules laid down for the professional provision of services are too burdensome and thus clearly inadequate to regulate the supply of goods and services by peers, the dismissal of professional rules and the lack of a legal discipline for peer-to-peer activities raise a manifest problem of protection of users. A lighter legal regime for those people who, occasionally and non-professionally, provide services via online platforms, is strongly desirable; at the same time, it is vital to give customers of the collaborative economy a legal protection comparable to business-to-consumer transactions.

A new regulatory framework

Collaborative platforms usually enjoy a significant degree of control over economic agents and they can help reducing market failures in many significant ways. For these reasons, it is recommendable to leverage platforms’ self-governing capacity and explore non-regulatory alternatives offered by private entities.

Even so, external regulation is still needed and a significant part of the regulatory and enforcement process should be retained by the public for those market failures that platforms cannot solve and/or have no interest to address. The persisting need of external regulation is reinforced if, in addition to correcting market failures, other aspects are taken into account: namely distributive consequences of peer-to-peer services and the protection of specific values.

A combination of strict rules and principles is suggested: strict rules are usually preferable for delimiting the scope of application of professional rules and for defining the non-professional status of peers; principles are better suited to address safety concerns and consumer protection issues. Member States should adopt flexible standards in both regulation and enforcement.

A complex strategy is suggested to encourage the flourishing of peer-to-peer activities while tackling the highlighted risks.

It is recommendable to explore these non-regulatory alternatives offered by private entities, and formal and informal systems of regulation and enforcement should be put in place. In this perspective, collaborative platforms should be seen as both ruler and enforcer of such a self-regulatory regime, thus leveraging their self-governing capacity.

While public regulation should be considered as a last resort, a significant part of the regulatory and enforcement process is still for the government, for those critical aspects that platforms cannot solve and/or have no interest to address. In all cases, a flexible approach with regard to both regulation and enforcement is strongly encouraged.

1. INTRODUCTION

1.1. Background

In June 2016 the European Commission took a first important step in addressing the nascent sector of collaborative economy and published a Communication on “A European agenda for the collaborative economy”¹.

The Communication acknowledges the economic and social relevance of the collaborative economy and recognises that it may create new opportunities for consumers and entrepreneurs, thus making an important contribution to jobs and growth in the European Union, and fostering competitiveness and growth. In addition, the Communication underlines that the collaborative economy may promote new employment opportunities and new sources of income by enabling individual citizens to offer services, and provide benefits for consumers through new services, an extended supply and lower prices.

At the same time, the Commission acknowledges that, blurring established lines between consumer and provider, employee and self-employed, professional and non-professional provision of services, the collaborative economy often raises issues with regard to the application of existing legal frameworks. This can result in uncertainty over applicable rules - especially when divergent regulatory approaches are adopted at national or local level - and in the risk that regulatory grey zones are exploited to circumvent rules designed to preserve the public interest.

For these reasons, the Commission considers crucial to provide legal guidance and policy orientation to public authorities, market operators and interested citizens, on how existing EU law should be applied to the collaborative economy, in order to reap benefits and to address concerns over the uncertainty about rights and obligations of those taking part in the collaborative economy. Thus encouraging a balanced and sustainable development of the collaborative economy.

1.2. Aim

This paper aims at focusing on the main points of the Communication, namely the contrast between professional versus occasional and non-professional provision of services by so-called prosumers and the nature of collaborative platforms.

It discusses the main legal challenges for regulating the collaborative economy, by appraising the distinction between professional and non-professional provision of services and between service provider and “marketplace”.

Furthermore, it conjectures on how a regulatory framework for non-professional provision of services and prosumers should look like, whether a lighter regime for prosumers is preferable, and how to define it.

In order to do so, this paper:

- makes a brief introduction to characterise the nascent “collaborative economy” (chapters 1-2);
- describes the main legal challenges for regulating peers and platforms in the collaborative economy (chapter 3)

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “A European agenda for the collaborative economy” {SWD(2016) 184 final} (hereinafter referred to as “Communication”).

- elucidates how the existing body of EU law applies to collaborative economy business models (chapter 4);
- contemplates how a regulatory framework for non-professional provision of services and prosumers should look like and makes a few concrete proposals for future policies (chapters 5-6).

2. GENERAL INFORMATION

KEY FINDINGS

- EU platforms face several barriers to their development, compared to platforms operating in the US: beside cultural and linguistic differences, they are constrained by a more fragmented regulatory environment;
- There is a large degree of confusion surrounding regulatory rights and obligations on the part of participants in the collaborative economy;
- For these reasons, it is crucial to scrutinise the great diversity of regulatory regimes across the single market and to review the existing legal framework in the light of the emergence of the collaborative economy, in order to debate the most appropriate forms of regulation.

In October 2015 the Single Market Strategy was adopted, announcing that the Commission would have developed “a European agenda for the collaborative economy, including guidance on how existing EU law applies to collaborative economy business models” as part of the Commission’s Digital Single Market Strategy².

A public consultation was carried out from September 2015 to January 2016, in the context of the Internal Market Strategy for Goods and Services, to gather the views of public authorities, entrepreneurs and individuals. Results of this consultation clearly show that there is significant economic potential in the collaborative economy but also a large degree of uncertainty regarding rights and obligations³. In March 2016, an Eurobarometer survey on collaborative platforms was also published, confirming the same picture⁴.

Compared to platforms operating in the US, EU platforms face several barriers to their development⁵. Beside cultural and linguistic differences and unequal development in different countries⁶, they are constrained by a more fragmented regulatory environment. As the consultation have shown, this is reflected in a large degree of confusion surrounding regulatory rights and obligations on the part of participants in the collaborative economy.

This lack of clarity may deter some people from participating in the collaborative economy and restrict its growth, with a negative impact on the development of collaborative platforms. In addition, it may determine a less favourable venture capital environment, since regulatory uncertainty on new collaborative business models creates a risk of future legal challenges, which can also deter investment in collaborative businesses.

For these reasons, the Commission concluded that it is crucial to scrutinise the great diversity of regulatory regimes across the single market, and to review the existing legal framework conceived for the provision of professional services in the light of the emergence of the

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe {SWD(2015) 100 final}. Brussels, 6.5.2015. COM(2015) 192 final

³ Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy. Published on: 24/09/2015, Last update: 23/12/2015.

⁴ Flash Eurobarometer 438 - March 2016. “The use of collaborative platforms”.

⁵ European agenda for the collaborative economy - Supporting analysis {COM(2016) 356 final}, Brussels, 2.6.2016 SWD(2016) 184 final, p. 10.

⁶ While societal drivers play an important role in the development of the collaborative economy (e.g. population density), internet technology is the most essential driver of the new economy. Thus, the collaborative economy appears to be developing more quickly in EU Member States with high levels of internet access and usage, but less in others. See European agenda for the collaborative economy - Supporting analysis {COM(2016) 356 final}, Brussels, 2.6.2016 SWD(2016) 184 final, p. 12

collaborative economy, in order to debate the most appropriate forms of regulation for peer-to-peer transactions and to design policies accordingly.

This paper aims at focusing on the main points of the Communication, namely the contrast between professional provision of services versus occasional and non-professional provision of services by so-called prosumers. In order to do so, after designating the “collaborative economy” (chapters 1-2), it means to define the main challenges for regulating it (chapter 3) and to assess how the existing body of EU law applies to services provided through collaborative economy and its various business models, offering some thoughts on how to define and make a distinction between professional and non-professional provision of services (chapter 4). Finally, it considers how a regulatory framework for non-professional provision of services and prosumers should look like and makes some final recommendations for future policies (chapters 5-6).

3. THE LEGAL CHALLENGES OF THE COLLABORATIVE ECONOMY

KEY FINDINGS

- The expression “collaborative economy” and its equivalents all refer to those business models for the provision of services that enable peer-to-peer transactions via online platforms, and describes the possibility for non-professionals to offer goods and services traditionally provided by professionals. The economic actors involved in peer-to-peer transactions are: (i) service providers; (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users;
- With regard to the distinction between peers and professionals, rules designed to regulate sales of goods and provisions of services by professionals are, in most cases, inadequate to regulate these activities when carried out by non-professionals. While there are no fixed criteria to distinguish between peers and professionals, some circumstances may point into one direction or the opposite;
- Collaborative platforms business models constitute a wide spectrum, ranging from marketplaces to hierarchies, each in need of a different sets of rules. Some of this platforms may be deemed as service providers with new employment models, some others as “digital marketplaces” connecting peers, while many others may be seen as firm-market hybrids;
- As a first rule of thumb, when an online platform exerts a high level of control and influence over the peers, it may be identified as a provider of the underlying service. On the contrary, when the platform limits its activity to the matching of demand and supply, even if offering ancillary services, the peer should be deemed as the only service provider.

3.1. Levelling the playing field

In these last years, the progression of the collaborative economy has been so rapid that it prevented not only the development of clear rules, but even the emergence of a shared terminology⁷.

In 2015 for the first time the Oxford Dictionary tried to encapsulate the collaborative economy (labelled as “sharing economy”) by defining it as: “an economic system in which goods or services are shared between private individuals, either for free or for a fee, typically by means of the Internet”⁸. This attempt, as many others before and after it, was aimed at circumscribing the boundaries of a complex phenomenon and to get oriented in a plethora of expressions, used in the current discourse as synonyms or with slight changes in their meaning: sharing, collaborative, peer-to-peer, on-demand or gig economy, and the list could be even longer.

⁷ The Communication stresses that: “The term collaborative economy is often interchangeably used with the term ‘sharing economy’. Collaborative economy is a rapid evolving phenomenon and its definition may evolve accordingly.”. See Communication, p. 3, ft. 7.

⁸ “An economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet”, e.g. *thanks to the sharing economy you can easily rent out your car, your apartment, your bike, even your wifi network when you don’t need it*, <http://www.oxforddictionaries.com/definition/english/sharing-economy>

The Commission, in its turn, decided to adopt the expression "collaborative economy" to designate those 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 individuals⁹.

Leaving aside the debate over the most appropriate definition, the term collaborative economy and its equivalents all refer to those business models for the provision of services via online platforms that enable peer-to-peer transactions, and describes the possibility for non-professionals to offer goods and services which, until a few years ago, were entirely provided by professionals.

This new economic environment is leading to the emergence of a novel economic agent, currently described with different neologisms – peers, prosumers, producers, pro-am consumers, and so on - that combines both production and consumption for a new, peer-based, mode of production and exchange, in accordance with two key directives: decentralization and de-professionalization, in a gradual overcoming of the distinction between producer and consumer.

Since the line, once very clear, between producers and consumers is now more and more tangled, these changes affect the ability of the legislator to articulate distinctive rules for professionals and non-professionals. Traditional rules governing many economic sectors - often highly regulated ones - are now deeply challenged by the emergence of a peer-to-peer economy. And rules designed to regulate sales of goods and provisions of services by professionals are, in most cases, inadequate to regulate these activities when carried out by non-professionals.

Facing the rise of peer-to-peer economy, the bipartisan appeal is to "level the playing field" - review the regulatory framework by establishing fair rules for each category and leave the market forces ruling on winners and losers, in accordance with the well-known adagio "the State should not be picking winners". But, if this premise can be easily endorsed, the problematic part concerns the actual identification of such rules.

3.2. Peers and professionals

The main challenges for regulating the collaborative economy are related with the massive provision of services, traditionally offered by professionals, by a wide range of very diverse individuals who offer their good and services, thanks to online collaborative platforms.

As pointed out by the Commission, these new opportunities for non-professionals determines the blurring of established lines between consumer and provider, employee and self-employed, professional and non-professional provision of services, making legal rules more difficult to define and implement. These changes raise issues with regard to existing legal frameworks, resulting in uncertainty over applicable law, especially when combined with divergent regulatory approaches at national or local level.

The regulation of collaborative services offered via online platforms is more complex than that surrounding typical e-commerce platforms selling goods. First of all, because regulation for the collaborative economy is applied at national, sector, regional and local level, and much of this regulation is specific to Member States, leading to market fragmentation at EU level.

⁹ The Commission identified the economic actors typically involved in peer-to-peer transactions: "the collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Adding that collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit." See Communication, p. 3.

But, to a larger extent, difficulties derive from the circumstance that peer providers only use the collaborative economy on an occasional basis, thus making them unable to support the costs associated with full regulatory compliance.¹⁰

When confronted with these challenges, the widespread conclusion is that lighter rules should be adopted for those people who, occasionally and non-professionally, provide peer-to-peer services. Peers are not full-time, large scale professionals - hosts are not hoteliers, drivers are not professional taxi drivers – and this profound difference put in question the opportunity to simply apply existing rules originally conceived for professionals (e.g. taxi drivers, hoteliers) to these non-professionals.¹¹

Such an application – it is usually observed - would produce a disparate impact on the latter, as rules conceived for large scale professional provision of services are not suited for these new category of service providers, and there is a strong need for different rules and lower standards for small scale, non-professional providers.

3.3. Providers and “marketplaces”

Beyond defining a different set of rules for professionals and peers, a second critical aspect that need to be addressed for regulating the collaborative economy is assessing the nature and the function of online platforms that connect non-professional service providers with customers for a peer-to-peer provision of services, so to better define their legal regime.

In the definition offered in the Communication, the Commission affirms that collaborative platforms activities create an open marketplace for the temporary usage of goods or services provided by private individuals¹². Similarly, terms and conditions of most collaborative platforms often depict themselves as networks or “marketplaces” – virtual places for peers to meet each other¹³.

On a legal ground, such a description is of utmost importance, as it may easily lead to the conclusion that only peers are subject to legal obligations applicable to service providers and thus directly responsible for ensuring safe and reliable services, and to exclude that the platform is part of peer-to-peer transactions or otherwise responsible for breach of contract or illegal conducts by the parties. By framing themselves as “marketplace”, peer-to-peer companies dismiss rules for service providers as immaterial, and public authorities would be supposed to enforce regulation only against individual providers.

Whilst often accurate, this description of collaborative platforms as “marketplaces” not always reflects the genuine role of the intermediary. And a case-to-case assessment of existing collaborative platforms may result in a more changeable scenario.

In some cases, the platform is a truly open infrastructure that facilitate the matching of supply and demand among its users, who conclude independent transactions. Many collaborative platforms merely assist the provider of the underlying services by offering the

¹⁰ European agenda for the collaborative economy - Supporting analysis {COM(2016) 356 final}, Brussels, 2.6.2016 SWD(2016) 184 final, p. 19.

¹¹ As stressed by the Commission, in any case, private individuals offering services via collaborative platforms on a peer-to-peer and occasional basis should not be automatically treated as professional service providers. See Communication, p. 7.

¹² Thus, in fact defining these platforms as two-sided (or multi-sided) markets. In two-sided markets a company runs a platform that enables direct interactions between two (or more) interdependent groups of economic agents - each belonging to one of the two sides of the platform - in order to mitigate coordination problems between supply and demand and encourage the conclusion of transactions.

¹³ Even when, as it often happens, collaborative platforms facilitate the transaction between peers by providing tools to reduce the risk of harmful behaviours or offering guarantees (insurance, security deposits, alternative dispute resolution mechanisms) - such remedies and guarantees are often presented as voluntary, with no assumption of legal obligations by the platform.

possibility to carry out certain activities that are ancillary to the smooth functioning of the market. In this case, the offering of connected and supporting activities for the functioning of the platform does not alter this conclusion: only peers are responsible for ensuring a safe and reliable services. Accordingly, authorities should enforce regulation only against individual service providers.

In other cases, platforms maintain a tight control on the transaction, lay down the rules for transactions, exercise a strict supervision on information and communication flows, and often influence or even decide prices. In addition, they may also manage and organise the selection of the providers and the quality of such services, acting as service providers themselves, through the adoption of innovative models of business organisation.

In sum, online platforms differ from each other for the level of control or influence that they exert over the service providers. Collaborative platforms business models constitute a wide spectrum, ranging from marketplaces to hierarchies, each of them in need of a different sets of rules. Some of this platforms may be deemed as service providers with new employment models, some others as “digital marketplaces” connecting peers, while many others may be seen as firm-market hybrids.

As a first rule of thumb, we may affirm that when a collaborative platform exerts a high level of control and influence over the peers, it may be identified as a provider of the underlying service. Conversely, when platforms limit their activity to the matching of demand and supply, enabling peers to provide the underlying services, peers should be deemed as the only service providers.

4. THE COLLABORATIVE ECONOMY IN THE SINGLE MARKET

KEY FINDINGS

- In assessing how existing EU law should be applied to the collaborative economy three pieces of legislation are especially relevant: Services directive; e-Commerce directive; consumer and marketing law;
- A restriction on peer-to-peer services is permitted under EU law only if it is: equally applicable to the national and the foreign; justified by some legitimate public interest objective; proportionate to that objective;
- Member States are required to reassess the proportionality of restrictions for private individuals providing services on occasional basis, pointing towards a less restrictive requirement;
- While a lighter regime for peers is strongly desirable, at the same time there is an urgent need to simplify procedures and formalities also for professionals;
- Further reflections are desirable on the appropriateness of criteria laid down by the Commission to assess the degree of control exerted by collaborative platforms on peer-to-peer transactions;
- A potential tension may arise between liability exemption for technical, automatic, passive, conduct by the platform and the goal of encouraging responsible behaviour;
- Further reflections are desirable on the opportunity to maintain the framework provided by the e-Commerce directive in order to assess the nature and the resulting legal regime of collaborative platforms;
- If neither the collaborative platform nor the peer service provider qualifies as a "trader", the transactions fall outside the scope of consumer legislation, bringing to the central question of protecting consumers in the collaborative economy.

4.1. The impact of the collaborative economy in Europe

As the Commission pointed out in its Communication, the collaborative economy is small but growing rapidly, gaining significant market shares in relevant economic sectors. Many large platforms invested significantly in expanding their operations in Europe and also consumer interest in new collaborative services is strong¹⁴.

European consumers recognise the many advantages of the collaborative economy: they are aware that in many cases access to services is organized in a more convenient way than traditional services; mention the fact that such services are cheaper or free, appreciate the

¹⁴ According to Flash Eurobarometer 438 – TNS Political & Social, "The use of collaborative platforms", June 2016, p. 6, "the majority of respondents (52%) are aware of the services offered by the collaborative economy and almost one in five respondents say that they have used these services (17%). Less than half of respondents have never heard of collaborative platforms (46%) and over a third of respondents have heard of these platforms but have never visited them (35%). At country level, more than one third of respondents in France (36%) and Ireland (35%) have used these platforms, as have almost a quarter in Latvia and Croatia (both 24%). On the other hand, respondents in Cyprus (2%), Malta (4%) and the Czech Republic (7%) are the least likely to have done so. The survey was carried out in the 28 Member States of the European Union in March 2016, and some 14,050 respondents from different social and demographic groups were interviewed."

ability to exchange products or services instead of paying with money and the fact that these platforms offer new or different services¹⁵.

However, consumers are also aware of the risks connected with these activities. Among those who have heard of or have visited collaborative platforms, over four in ten respondents say that not knowing who is responsible in the event of a problem is one of the main drawbacks of this type of platforms (41%). Just over a quarter mention not trusting internet transactions in general (28%), not trusting the provider or seller and being disappointed because the services and goods do not meet expectations (both 27%) among the main problems. Not having enough information on the service provided is mentioned by less than one in five respondents who are aware of these platforms (17%)¹⁶.

This survey confirms the need for a balanced approach to the collaborative economy that protect users while encouraging the flourishing and the scaling up of collaborative services in European single market. For these reasons, it is crucial to provide legal guidance and policy orientation to public authorities, market operators and interested citizens, on how existing EU law should be applied to the collaborative economy, and to encourage a balanced and sustainable development of the collaborative economy.

In assessing how existing EU law should be applied to the collaborative economy three pieces of legislation are of particular significance: Services directive; e-Commerce directive; and the consumer and marketing law.

Namely, freedom of establishment and freedom to provide services are relevant to define those rules that are applicable to peers and/or professionals in the provision of services; e-Commerce directive invests the liability regime and market access requirement appropriate for online collaborative platforms; finally, the scope of application of EU consumer and marketing law must be assessed, as resulting from the combination of the directives on services and e-commerce.

4.2. Regulating peers. The Services Directive

Under the Services Directive, any national measure on market access requirements should not be discriminatory. Equality of treatment not only forbids overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result¹⁷.

In addition, albeit applicable without discrimination on grounds of nationality, any measures which prohibit, impede or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the Treaty must be regarded as a restriction within the meaning of Article 49 TFEU¹⁸.

A restriction on services is permitted only if it is equally applicable to the national and the foreign, justified by some legitimate public interest objective, and proportionate to that objective. Appropriateness, necessity, indispensability, and proportionality of the measure,

¹⁵ Flash Eurobarometer 438 – TNS Political & Social, “The use of collaborative platforms”, p. 15.

¹⁶ Flash Eurobarometer 438 – TNS Political & Social, “The use of collaborative platforms”, p. 21.

¹⁷ See Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993]. Although the difference in treatment has only an indirect effect on the position of companies constituted under the law of other Member States, it constitutes discrimination on grounds of nationality which is prohibited by Article 52 of the Treaty. Case C-1/93 *Halliburton Services v Staatssecretaris van Financien* [1994].

¹⁸ Case C-55/94 *Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano* [1995]; Case C-79/01 *Payroll and Others* [2002]; Case C-442/02 *Caixa Bank France* [2004]; Case C-157/07 *Krankenhaus Ruhesitz am Wannsee-Seniorenheimstatt* [2008].

together with the priority for less restrictive measures, are the elements to be pondered in order to evaluate whether a national decision amounts to a justified restriction¹⁹.

In other words, in keeping with their domestic needs Member States remain free to fix the requirements of public policy and public security, as grounds for derogating from a fundamental freedom, but they must ensure that market access requirements are justified by a legitimate objective, necessary and proportionate to the scale of operation, with clear, transparent and not unduly complicated or costly administrative procedures and formalities²⁰. And such requirements must be interpreted strictly, so that their scope cannot be determined unilaterally without any control by the institutions of the European Community.

This conclusion implies that, under existing EU law, service providers can be subject to market access requirements insofar as such requirements are justified and proportionate, and such an assessment should take account of the specificities of the business model and innovative services concerned, while not favouring one business model over the other.

As a consequence, the Services Directive imposes Member States to consider the proportionality of restrictions for private individuals providing services on occasional basis, clearly pointing to less restrictive requirements for peers.

At the same time, if a lighter regime for peers is required in the light of EU legislation, the Services Directive also imposes national authorities to review existing national legislation and to simplify procedures and formalities for professionals, and this need is especially urgent in consideration of rise of collaborative economy, in order to avoid unfair competition among comparable categories of service providers.

4.3. Regulating platforms. The e-Commerce Directive

According to the e-Commerce Directive, online platforms provide an "information society service" as long as they deliver a service for remuneration, at a distance, by electronic means and at the individual request of a recipient.

When this is the case, platforms cannot be subject to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services²¹. For these

¹⁹ Article 56 TFEU (ex Article 49 TEC) prohibits restrictions on the provision of services between Member States: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended." Article 49 TFEU (ex Article 43 TEC) provides that: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State." Art. 16, Directive 2006/123/EC on services in the internal market ("Services Directive"), provides that: "Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles: (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established; (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment; (c) proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective."

²⁰ Article 5(1) of the Services Directive provides that: "Member States shall examine the procedure and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities are not sufficiently simple, Member States shall simplify them."

²¹ See Article 4(1) of the e-Commerce Directive: "Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect". Internet intermediary service providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner (articles 12 to 14). The Directive distinguishes: "Mere conduit" service providers (art. 12), where this liability exemption only applies when the service provider is passively involved in the transmission of data; "Caching" providers (art. 13), who temporarily and automatically store data in order to make the onward transmission of this information more efficient; and "Hosting providers" (art. 14) who store data provided by their users. These last type of providers can benefit from the liability exemption only if they are "not aware of facts or circumstances from which the illegal activity or

reasons, it is crucial to ascertain whether collaborative platforms are offering other services in addition to the “information society service”.

The adaptable nature of online collaborative platforms raises a preliminary issue regarding the ascertaining of the service provider in peer-to-peer services. Such an assessment imposes the identification of well-defined principles for a case-by-case appraisal on the nature of the collaborative platforms.

The Commission acknowledges this need²² and lay down several factual and legal criteria that can play a role in this ad hoc assessment, based on whether the collaborative platform: a) set or recommend the final price to be paid by the user, as the recipient of the underlying service²³ ; b) set key contractual terms, other than price; c) own the key assets used to provide the underlying service. In addition, other relevant factors are also mentioned, based on whether: the collaborative platform incurs the costs and assumes all the risks related to the provision of the underlying service; an employment relationship exists between the collaborative platform and the person providing the underlying service.

When most criteria are met, there are strong indications that the collaborative platform exercises a significant influence or control over the provider of the underlying service, thus acting as a service provider employing peers to performs the offered services. While the contrary is true when a small degree of influence and control are exerted.

This case-to-case assessment on collaborative platforms and the nature of their activities, is of paramount importance for determining their legal regime: if service providers, collaborative platforms would be subject to those market access requirements generally applied to providers, and to the relevant sector-specific regulation, including business authorisation and licensing requirements. While none of these rules would be applied to “information society services”.

The content of this case-by-case assessment deserves to be further highlighted. While all these criteria are effective proxies of the degree of control exerted by the collaborative platform on peer-to-peer transactions occurring online, some of them may bring about contentious outcomes. For example, it is questionable whether ownership of assets makes sense for collaborative platforms, where the sharing of under-used resources belonging to peers is a common feature; or setting price, while often a clear symptom of platform’s control over the transaction, sometimes can be a way to curb profit-seeking actors when the goal is to create a non-market exchange among peers.

More broadly, a potential tension may arise between liability exemption for technical, automatic, passive, conduct by the platform and the goal of encouraging responsible behaviour that aims the Communication²⁴.

information is apparent” or “do not have actual knowledge of illegal activity or information”. In all these cases, service providers are exempted from contractual, administrative, tortious, criminal liability, civil or any other type of liability, for all types of activities initiated by third parties.

²² See Communication, p. 8: “Whether or not collaborative platforms can benefit from such liability exemption will need to be established on a case-by-case basis, depending on the level of knowledge and control of the online platform in respect of the information it hosts.”

²³ See Communication, p. 6: “Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met.”

²⁴ Communication, p. 8: “The Commission, at the same time, encourages responsible behavior by all types of online platforms in the form of voluntary action, for example to help tackle the important issue of fake or misleading reviews. Such voluntary action taken to increase trust and to offer a more competitive service should not automatically be taken to mean that the conduct of the collaborative platform is no longer merely technical, automatic and passive.”

Moreover, as experienced in these years, rules laid down in the e-Commerce directive left many questions unsolved at national level. National court rulings continue to provide widely diverging interpretations in different cases and in different countries, and the way courts interpret the special liability regime across the EU, varies considerably across EU Member States and within legal systems²⁵. In this light, there is a significant risk that assessing the nature of collaborative platforms using this framework may exacerbate such an uncertainty.

4.4. Protecting customers. Consumer and marketing law

EU consumer and marketing legislation is based on the distinction between a “trader” and a “consumer”, as EU consumer law applies only to those who qualify as “trader” and engage in “commercial practices” vis-à-vis consumers²⁶.

In traditional business-to-consumer transactions EU consumer and marketing legislation is applicable and, in addition, providers are requested to comply with sectorial legislation²⁷. But things may be radically different in collaborative economy, as peers and not always professionals and collaborative platforms are not always service providers.

If neither the collaborative platform nor the peer service provider qualifies as a “trader”, transactions fall outside the scope of consumer legislation: neither consumer law, nor sector-specific legislation would be applicable to either services provider and collaborative platform, and this brings us to the central question of consumer protection in the collaborative economy. For these reasons, in order to protect customers in peer-to-peer transactions it is important to assess: a) under which conditions the provider of the service qualifies as professional; b) under which conditions the collaborative platform qualifies as service provider.

If legislation developed to keep customers safe in an era of full-time professional service providers is not suited to face the many challenges of this new economy, on the other hand, the emergence of a peer-to-peer economy, where private, non-professional individuals provide services to customers, may lead to safety, health, environmental concerns. While consumers of peer-to-peer services deserve a protection that is comparable to the protection provided in business-to-consumer transaction.

Peers are not professionals and applying to peers those rules originally conceived for a professional provision of goods and services would determine a disparate impact to the detriment of peers (e.g. imposing a duty to comply with hotel regulations for allowing people to occasionally rent out a spare guest room). For this reason, a lighter regime for peers is strongly desirable. Similarly, a lighter regime is also of great importance for the flourishing of online peer-to-peer “marketplaces”. At the same time, it is crucial to ensure effective protection for customers in the collaborative economy.

Weighting the two somehow conflicting aspects – having distinctive rules for peers and for collaborative marketplaces while at the same time protecting consumers - is one of the most

²⁵ EU Study on “Legal analysis of a Single Market for an Information Society. New rules for a new age? Liability of online intermediaries”, DLA Piper, 2009, p. 25, concludes that: “It seems that courts and legal practitioners find it difficult to apply the special liability regime, and seem inclined to find arguments to put aside the special liability regime and instead revert to more general rules of legal doctrine”.

²⁶ A trader is a person “acting for purposes relating to his trade, business, craft or profession”; a “consumer” is a person acting “outside his trade, business, craft or profession”. See Article 2 Directive 2005/29/EC (“Unfair Commercial Practices Directive”).

²⁷ Directive 2005/29/EC on Unfair Commercial Practices; Directive 2011/83/EU on Consumer Rights; Directive 93/13/EEC on Unfair Terms in Consumer Contracts; Directive 2013/11/EU on alternative dispute resolution for consumer disputes; Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.

crucial challenge posed by the rise of the collaborative economy. We will address this aspect in the last part of this paper.

5. A NEW REGULATORY FRAMEWORK

KEY FINDINGS

- Traditional rules laid down for the professional provision of services are too burdensome and thus clearly inadequate to regulate the supply of goods and services by peers, but the dismissal of professional rules and the lack of a legal discipline for peer-to-peer activities raise a manifest problem of protection of users;
- Collaborative platforms usually enjoy a significant degree of control over economic agents and they can help reducing market failures in many significant ways. For these reasons it is recommendable to leverage platforms' self-governing capacity and explore non-regulatory alternatives offered by private entities;
- However, external regulation is still needed and a significant part of the regulatory and enforcement process should be retained by the public, for those critical aspects that platforms cannot solve and/or have no interest to address;
- The persisting need of external regulation is reinforced if other aspects are taken into account, namely distributive consequences and conflicting values of peer-to-peer services;
- A combination of strict rules and principles is suggested: strict rules are preferable for delimiting the scope of application of professional rules and for defining the non-professional status of peers; principles are better suited to address safety concerns and consumer protection issues;
- It is crucial that Member States adopt flexible standards in both regulation and enforcement.

5.1. The need for regulating the collaborative economy

As highlighted in the closing remarks of last chapter, professional rules are too burdensome and thus clearly inadequate to regulate the supply of goods and services by peers. But dismissing professional rules to peer-to-peer services raises a manifest problem of protection of users, exposing them to a number of risks.

If neither the collaborative platform nor the peers qualifies as professional service provider, consumer law and sector-specific legislation cannot be applied to peer-to-peer transactions. And this outcome raises the question of protecting consumers in peer-to-peer service provision.

Before illustrating how this issue can be tackled, it is important to review the traditional rationales usually invoked to justify consumer protection, in order to reassess whether they are still at play in the collaborative economy. Given the widespread assumption about the reduced need for external regulation in peer-to-peer transactions, questioning how important it is to define rules for protecting consumers in peer-to-peer services is an unavoidable question.

The widespread conclusion about minimal regulatory intervention for the collaborative economy is usually based on a few assumptions.

A first and often mentioned objection to external regulation emphasises the difference between actors involved in b2c and p2p transactions. Different from business-to-consumer transaction, where consumers are clearly the weaker parties, in peer-to-peer transactions the line between consumers and business is blurred, and it is no longer clear who the weaker party is.

A second, more pervasive, motivation asserts that online platforms can mitigate most information asymmetries and create strong incentives for economic agents interacting through the platform. Thanks to information gathering and reputation-based systems, new self-governing mechanism can be conceived, and data based solutions adopted to solve market failures.

A third related argument points to platform's interest: not only platforms possess an enormous amount of information through which they can regulate the marketplace, but they have a compelling interest to do so. The quality and the consequent economic success of an online platform is deeply intertwined with economic transactions occurring via the platform itself. Thus, facilitating economic exchanges among peers is a primary interest of the platform, since it fosters a safe and efficient development of the "marketplace": platforms' interests – it is usually observed – are aligned with the general one.

In sum, platforms have an interest in regulating peer-to-peer online transactions and they have all the instruments to do this. And this makes a strong argument for reconsidering the scope of regulation, making the role of public intervention more and more marginal.

5.2. Market failures, distribution and values

These observations are undoubtedly essential in better defining a new regulatory framework for the collaborative economy, and we will come back to that when making our final recommendations. However, they do not rule out the rationales usually invoked to justify regulation.

While the rise of the collaborative economy may well reduce information asymmetries in many significant ways, this prospect does not by any mean indicate the end of market failures: not all information asymmetries are solved by platforms and, further, the rise of peer-to-peer activities creates new services and activities, thus potentially generating additional issues.

Beside asymmetric information, there are other market failures that platforms may have no interest to correct, the most obvious examples being externalities (e.g. noise due to temporary guests of a peer-to-peer accommodation platform). Moreover, the risk of anticompetitive behaviours and the creation of monopolies are aspect that cannot be addressed by platforms themselves²⁸.

The persisting need of external regulation is reinforced if we take into account other potential aspects of regulation, in addition to efficiency concerns and correction of market failures. Namely, the distributive consequences of peer-to-peer services (e.g. the impact on poor and underserved communities; the risk of discrimination) and the need to balance conflicting values (e.g. the implementation of surge pricing mechanism in highly regulated markets or the commodification of goods and services not previously exchanged in markets)²⁹.

²⁸ The main reason commonly mentioned to identify the risk of dominant positions in two-sided markets is the occurrence of network externalities and the resulting difficulties for the potential entrant to collect a sufficient amount of initial customers to be competitive. Additionally, the huge amount of data held by platforms can give a very significant competitive advantage to a single platform.

²⁹ So far, the economic and social impact of the sharing economy has not been investigated enough and evidence is mixed, making further research on the impact and social consequences of the sharing economy required. Some studies conclude that peer-to-peer activities potentially benefit the below-median-income part of the population more than the above-median-income one and that sharing firms can be used as means to redistribute income. While others point to the disparate impact of these new services on poor people and underserved communities, and on the risk of discrimination. In both cases, there is a common understanding that the collaborative economy must also be evaluated in the light of its distributive effects.

5.3. Strict rules and principles

Once clarified the persistent importance of external regulation for peer-to-peer transactions, it is necessary to reflect on how such regulation may look like.

In this regard, a first choice must be made between strict rules and principles or, more likely, a combination of the two. In some cases, setting out minimum standards may be the most appropriate solution, providing certainty to economic agents. In other circumstances, a principled and flexible approach can be better suited.

A strict rule is preferable for demarcating the scope of application of professional rules versus new collaborative rules and to define the non-professional status of peers operating through platforms. As the Commission correctly pointed out in its Communication, establishing thresholds under which an economic activity would be considered a non-professional peer-to-peer activity may be a suitable way forward. These thresholds can be either general (e.g. income) or sector-specific (e.g. maximum number of days per year in short-term letting of residential premises).

It is true that the many peculiarities of service providers may be better described as a spectrum from professional to amateur rather than as a sharp polarisation between two distinct categories. Notwithstanding, fixing a threshold to distinguish the two spheres is strongly encouraged, in order to define clear cut criteria that are easy to be interpreted and implemented, so to demarcate the scope of application of rules for professionals and to define the non-professional status of peers operating through platforms.

EU legislation does not establish expressly at what point a service provider becomes a professional, and Member States use different standards to differentiate between professional and peer-to-peer services. But while there are no fixed criteria, some circumstances may point into one direction or the opposite. For example, frequency of the services, level of turnover and motives (whether profit-seeking or not) may all be considered as significant proxies for regarding the service provision as professional or not³⁰.

On the other hand, principles are better suited to address safety concerns and consumer protection issues. Assuming that there is no “one size fits all”, a general principle prescribing that regulation should be “proportionate to the scale of operation” can offer the essential flexibility to address a novel and elusive phenomenon. Adopting such a principle, legislation should impose peers to use their judgment to assess the risk of their own activity and to use their appraisal to determine what precautions are reasonably practicable and appropriate in the light of particular circumstances³¹.

In this regard, Member States may adopt flexible standards in both regulation and enforcement: rules should be proportionate to the scale of operation, and authorities should act proportionately in responding to suspected breaches, in the light of their particular circumstances, thus take the most appropriate action, ranging from deal with the problems informally to sanction misconducts, depending on the severity of the infraction.

³⁰ The greater the frequency of the service provision, and the higher the turnover generated by the service provider, the more apparent it is that the provider may qualify as a professional. And this is especially the case when the service is provided for remuneration. See Communication, p. 9.

³¹ See UK Department for Business, innovation and Skills, Independent review in the sharing economy. Government response, March 2015, 2.2.

6. CONCLUSIONS

KEY FINDINGS

- A lighter legal regime for those people who, occasionally and non-professionally, provide services via online platforms, is strongly desirable; at the same time, it is vital to give customers of the collaborative economy a legal protection comparable to business-to-consumer transactions;
- To tackle these risks while encouraging the flourishing of peer-to-peer activities, a complex strategy is suggested;
- First, it is recommendable to explore these non-regulatory alternatives offered by private entities, and formal and informal systems of regulation and enforcement should be put in place. In this perspective, collaborative platforms should be seen as both ruler and enforcer of such a self-regulatory regime, thus leveraging their self-governing capacity;
- While public regulation should be considered as a last resort, a significant part of the regulatory and enforcement process is still for the government, for those critical aspects that platforms cannot solve and/or have no interest to address: both market failures and other aspects (distribution, values);
- In all cases, a flexible approach with regard to both regulation and enforcement is strongly encouraged.

Traditional rules laid down for the professional provision of services are too burdensome and thus clearly inadequate to regulate the supply of goods and services by peers. On the other hand, the absence of professional rules for peer-to-peer services raises a manifest problem of protection of users, exposing consumers to a number of risks. To tackle these risks while encouraging the flourishing of peer-to-peer activities, a complex strategy is suggested.

The first and most important aspect of the suggested approach is leveraging platforms' self-governing capacity. Platforms have a pervasive control over peers operating through it. And this leads to a greater capacity to mitigate information asymmetries and to create strong incentives for economic agents. So, it is recommendable to explore these non-regulatory alternatives offered by private entities and consider public regulation as a last resort.

After all, in most cases platforms' interests are aligned with the general one - facilitating the exchange among peers and fostering a safe and efficient development of online market – and this makes a strong argument for reconsidering the role of regulation in the collaborative economy. For these reasons, formal and informal systems of regulation and enforcement should be put in place (peer regulation, self-regulatory organisations, etc.).

A second related strategy is considering collaborative platforms not only as ruler but also as enforcer of such a self-regulatory regime, making use of their self-correcting capacity, as they often enjoy a strong capacity of enforcement at trivial costs (e.g. by deactivating accounts).

However, these conclusions in any way imply that public regulators should refrain from defining rules for the collaborative economy. Quite the opposite, a significant part of the process is still for public regulators, but only for those critical aspects that platforms cannot solve and/or have no interest to address.

The need for public regulation may persist for efficiency reasons – i.e. those market failures that platforms cannot resolve and have no interest to face - and for other reasons, namely

distributive issue (e.g. the impact of collaborative practices on disadvantaged people and communities) and value concerns (e.g. to regulate surge pricing mechanisms or the commodification of certain goods).

When external regulation is suggested, it is vital for the public regulator to assess that such rules are proportionate to the scale of operation, following the distinction between occasional and commercial providers, and adopt a flexible approach with regard to both regulation and enforcement.

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NOTES

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