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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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CARING FOR SHARING? THE COLLABORATIVE ECONOMY UNDER EU LAW

VASSILIS HATZOPOULOS AND SOFIA ROMA*

Abstract

The advent of the collaborative economy is what economists call "disruptive innovation" while some even talk of "the fourth industrial revolution". This revolution started in the US and is now making its way into the EU. The aim of the present article is to outline, explore and analyse the way EU regulation applies/may apply to the collaborative economy. In the first part we rehearse the reasons for, and the ways of, the development of the collaborative economy. We also discuss the various regulatory reactions it has (or has not) triggered, so far, in the US and the EU. In the second part we examine the way the various EU rules may apply to those participating in the collaborative economy, i.e. the platforms, "prosumers" and consumers. We conclude by addressing the way regulation could or should evolve in this area.

1. Introduction

The concept of sharing goods and services is far from novel. Neighbours have been borrowing tools, family has been lending money to each other, and friends have been hosted in friends' houses long before the emergence of the sharing/collaborative[1] economy model. What is truly innovative about the collaborative economy is the expansion of "sharing" beyond an individual's social network or even region. The collaborative economy facilitates the connection between peers, while bypassing the traditional economic intermediaries. Hence, the sharing/collaborative model "has progressed from a community practice into a profitable business model".[2]

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1. Hereinafter "collaborative economy", which is the term used by the European Commission. For a discussion of the various terms and the nuances thereby introduced see *infra* section 1.2.

2. Böckmann, "The shared economy: It is time to start caring about sharing; value creating factors in the shared economy" (2013), available at <www.thelovettcenter.com/wp-content /uploads/2014/11/bockmann-shared-economy.pdf> (all websites last accessed 7 Dec. 2016), at

That seemingly simple concept of sharing among everyone who is willing to share has an inherent dynamism that is currently changing the global economic landscape as we know it. Within that context, "[t]he advent of the collaborative economy, in combination with artificial intelligence, big data and 3D printing, makes something like a fourth industrial revolution".[3] The objective of the present article is, modestly, to discuss the tentative content and outer limits of this new phenomenon (sections 1 and 2) in order to subjugate it to EU law and trace, in a somehow speculative way, the tensions and lacunae thus arising (sections 3–7). We conclude that the non-regulatory approach currently followed by the EU relies on many pre-existing legal concepts, often ill-adapted to this new mode of doing business, thus bearing the risk of extreme fragmentation along national lines (section 8).

1.1. *The rise of the collaborative economy*

The appearance and growth of the collaborative economy models has roots in numerous social, cultural and economic factors. *Firstly*, technological evolution has been a key ingredient of this innovative model.[4] The extensive use of mobile devices, equipped with elaborate apps and GPS-mapping in real

2.1; for general background reading about the collaborative economy see e.g. Botsman and Rogers, *What's Mine Is Yours: The Rise of Collaborative Consumption* (Harper Collins, 2010); Cohen and Kietzmann, "Ride on! Mobility business models for the sharing economy", 27 *Organization & Environment* (2014), 279 –296; Belk, "You are what you can access: Sharing and collaborative consumption online", 67 *Journal of Business Research* (2014), 1595–1600; Fraiberger and Sundararajan, "Peer-to-peer rental markets in the sharing economy" (2015), available at <www.ssrn.com/abstract=2574337>; Kassan and Orsi, "The legal landscape of the sharing economy", 27 *Journal of Environmental Law and Litigation* (2012); Rauch and Schleicher, "Like Uber, But for local governmental policy: The future of local regulation of the 'sharing economy'", George Mason University Law & Economics, Research Paper No. 15-01 (2015); Schor, "Debating the sharing economy", (2014) *Great Transition Initiative*, available at <www.greattransition.org/publication/debating-the-sharing-economy>; Koopman, Mitchell and Thierer, "The sharing economy and consumer protection regulation: The case for policy change", 8 *Journal of Business, Entrepreneurship & the Law* (2015); Cohen and Sundararajan, "Regulation and innovation in the peer-to-peer sharing economy", 82 *University of Chicago Law Review Dialogue* (2015)>; Katz, "Regulating the sharing economy", 30 *Berkeley Technology Law Journal* (2015), 1068–1125.

3. Schwab, "The Fourth Industrial Revolution: What it means and how to respond", *Foreign Affairs* (12 Dec. 2015).

4. See e.g. Sundararajan, "Peer-to-peer businesses and the sharing (collaborative) economy: Overview, economic effects and regulatory issues" (2014), available at <www.smallbusine ss.house.gov/uploadedfiles/1-15-2014_revised_sundararajan_testimony.pdf>; Hamari, Sjök lint and Ukkonen, "The sharing economy: Why people participate in collaborative consu mption", 67 *Journal of the Association for Information Science and Technology* (2015).

time facilitates the direct, efficient and quick match of goods/services supplied in any place and any time with someone's needs. The availability of intelligent, secure and user-friendly payment systems increases trust of users and efficiency of the transaction online. Moreover, the massive spread of social media has established the culture of sharing (information, photos, position etc.) to the general public and has played a connecting role between peers.

Secondly, the growth of the collaborative economy model draws on societal parameters. Urbanization and high population concentration create a "critical mass" of supply and demand and facilitate better matches. The collaborative economy also enables bypassing traditional middlemen and taking control of meeting one's own needs. In fact, platforms usually exercise no or little control and act rather as "economical – technological coordination providers".[5] Furthermore, as a social reaction to materialism, overconsumption and an increasingly "marketized" society,[6] the collaborative economy – based on sharing access and recycling – is characterized by environmental consciousness and awareness of the need for sustainability. Last but not least, the growth of the collaborative economy reflects society's desire for communication and connection,[7] since the idea behind this economic scheme is the facilitation of connection between strangers. An example of strengthening communities by sharing is the collaborative platform *Share Some Sugar*, a website where "you can find someone in your neighbourhood or social network who is willing to lend you something that you need".[8]

Thirdly, the "fall" of the conventional economic model, the global financial crisis and the rise of unemployment have fuelled the rise of the collaborative economy.

The collaborative economy model started in 1999 with the creation of *Couchsurfing*; an originally non-profit organization aiming to match people who were looking for cheap travel with people who had an empty couch. Since then, it has evolved into a highly profitable multi-national corporation, has inspired the creation of *Air*B*n*B and has spread the "sharing" phenomenon worldwide. The trend started in the United States, where there are already well-established companies in many domains, but it is now quickly spreading

5. Hamari et al., op. cit. *supra* note 4.

6. Teubner, "Thoughts on the sharing economy", 11 *Proceedings of the International Conference on e-Commerce* (2014), 322–326.

7. Böckmann, op. cit. *supra* note 2.

8. See <www.collaborativeconsumption.com/2010/09/01/keara_schwartz_founder_of_share_some_sugar/>.

around Europe as well, where more and more European collaborative platforms are appearing. Lastly, the phenomenon of the collaborative economy may be seen as a strong component of the more general trend of servitization of modern economies, whereby added value is being created by combining services and products, and branding them altogether as "new" or "advanced" services.[9]

1.2. *Definitions and main characteristics*

Even though in 2011 the TIME magazine nominated Sharing Economy as one of "10 ideas that will change the world"[10] there is great ambiguity as to what exactly this idea entails.[11] There is no universally accepted terminology, let alone definition. While the terms collaborative economy, sharing economy, peer (P2P) economy, access economy, collaborative consumption and demand economy – among others – are mostly used interchangeably, it is arguable whether these notions reflect the same economic model,[12] especially given the plurality and diversity of the activities and the various forms that the "sharing" scheme may take.[13] The lack of definition is especially problematic within the European context since a coordinated approach between the European Commission and the Member States is essential in order to avoid fragmentation of regulation across EU borders.

The definitions suggested by academia and institutions range from extremely broad,[14] which fail to offer sufficient delineation, to extremely narrow,[15] which exclude any business-to-peer transaction,[16] such as *ZipCar* and *Toys4rent*, or any transaction regarding non-physical assets.[17] While a universally accepted definition for a novel, dynamic and evolving

9. For an overview of servitization and its correlation with online platforms, see Hojnik, "The servitization of manufacturing: EU law implications and challenges", 53 CML Rev. (2016), 1–50.

10. Walsh, "Today's smart choice: Don't own. Share", *Time* (17 March 2011).

11. For the linguistic history of the term "sharing", see Teubner, op. cit. *supra* note 6, at 323.

12. Botsman, "Defining the sharing economy: What is collaborative consumption – And what isn't?" (2015), available at <www.fastcoexist.com/3046119/defining-the-sharing-economy-what-is-collaborative-consumption-and-what-isnt>.

13. For which see *infra* section 1.3.

14. See e.g. the activities included under the "sharing" umbrella according to the pro-sharing organization "People who Share", at <www.thepeoplewhoshare.com/blog/what-is-the-sharing-economy/>.

15. Frenken et al., "Smarter regulation for the sharing economy", *The Guardian* (20 May 2015).

16. For which see *infra* section 1.3.

17. Frenken et al., op. cit. *supra* note 15.

phenomenon is nearly impossible, there seems to be common understanding as to certain key elements of this economic model: a) digital platforms,[18] b) shift from ownership to accessibility,[19] c) peer-to-peer transactions, d) profits from monetization of idle capacity, and e) self-regulation.[20]

On the above basis, the European Commission opted for a rather pragmatic, if broad, approach to the definition of the term "collaborative economy":[21] the term

> "refers to 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. 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'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit".[22]

For the purposes of the present article, we shall follow the above definition. In view of this, collaborative platforms such as *Ebay* or *Etsy* do not fall within the scope of the present article, since they promote transfer of material ownership. Further, content provider platforms, such as *ResearchGate*, *Spotify*, *Netflix*, *YouTube*, *Wikipedia, LimeWire, BitTorrent, newsroom platforms* etc. may or may not qualify as collaborative platforms, but will not be dealt with in this article, as they raise complex intellectual property rights issues surpassing its scope.

18. For which see *supra* section 1.1.

19. It is worth noting that a small part of academia argues that transactions transferring ownership, such as on *Ebay* and *Etsy*, may still be included in the definition of collaborative economy.

20. See *infra* section 7.1.

21. In 2015 the Commission had defined the collaborative economy as "a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms". See Commission Communication, "Upgrading the Single Market: More opportunities for people and business", COM(2015)550 final, at 2.1.

22. Commission Communication, "A European agenda for the collaborative economy", COM(2016)356 final, at 1.

1.3. *Main business models*

While there are three business types that platforms use, i.e. peer-to-peer (P2P), business-to-peer (B2P)[23] and business-to-business (B2B),[24] the market structure mostly linked with collaborative economy is the first. Hence, the present article will concentrate on P2P collaborative platforms. P2P platforms do not own any shared assets themselves, but rather act merely as connectors for peers that exchange products or services with each other. In the P2P model, normally the person offering a good or a service is a non-professional person, i.e. a peer among peers (a so-called "prosumer"). Most of the popular collaborative platforms, such as *Airbnb*, *Uber*, *Taskrabbit*, *Indiegogo*, *Blablacar*, *Turo* etc. fall into this category. It is worth noting that in conventional P2P models, the boundaries between the roles of the participants are often vague, since both the provider and the user are "peers". Hence, the lines are blurred between the terms *consumer* and *provider*, *employee* and *self-employed*, or the *professional* and *non-professional* provision of services.

1.4. *Main market sectors*

From renting out tools that have been living in the toolbox, or books that have been already read, the possibilities of sharing are endless, since one man's trash is another man's treasure. Through sharing, individuals may gain access to expensive and luxury goods, such as a yacht or a couture dress, that suddenly become affordable.[25] Collaborative platforms may even provide financial services, such as crowdfunding and fundraising, money lending, investing, virtual currencies, etc., the most popular of which is crowdfunding.[26] Even though "sharing" is confidently expanding in nearly all aspects of our lives, the present article will focus on the most important market sectors where collaborative economy flourishes.[27]

23. A popular B2P platform is *Zipcar*, a business which rents to peers (=consumers) cars it owns.

24. Even though the B2B model is not yet as popular, it is definitely up-and-coming. E.g., renting office space by a company or by public/municipal bodies through a collaborative platform would be considered as B2B transaction. See e.g. *Kwipped*, an online B2B platform, where businesses can find and rent equipment from a network of rental suppliers.

25. The above may be achieved through platforms such as *1000tools*, *Bookshare* (a P2P book lending platform based in Brazil), *Get My Boat* and *Girl Meets Dress* respectively.

26. See e.g. *Kickstarter* and *Indiegogo*.

27. For a collaborative economy sector-based graphic see <www.web-strategist.com/blog/2014/12/07/collaborative-economy-honeycomb-2-watch-it-grow/>.

1.4.1. *Accommodation*

Airbnb is undoubtedly one of the most popular collaborative businesses. It currently operates in 191 countries, counting more than 60 million users.[28] *Airbnb* allows individuals to become entrepreneurs by offering part or all of their living space to their peers as short-term accommodation. Hence, visitors (consumers), instead of participating in the traditional hotel industry – or in regions with no hotel presence -,[29] may choose to pay to be hosted at an individual's home. Rates are determined by hosts (providers of the underlying service) and *Airbnb* withholds a charging fee per transaction.[30] *Airbnb* allows peers to list on the platform a spare room in their home, an empty apartment, a house they don't use, or even a tree-house. So far it exercises minimal regulatory control,[31] depending mostly on some identification procedures and online reputation system (rating stars).[32]

Similarly, collaborative businesses such as *Couchsurfing*[33] or home swap platforms (e.g. *HomeExchange*)[34] promote short-term accommodation at private individuals' homes (or just couches), but without payment for the accommodation *per se*. These platforms usually charge a membership fee[35] to the platform and connect those interested.

1.4.2. *Transportation*

Urban transportation through collaborative businesses could take various forms, namely car rental, ride sharing, driving services, bicycle sharing etc. Platforms such as *Zipcar*, *Turo* (formerly *RelayRides*) and *Getaround* support *car rental services*, not very different from a traditional car rental company; *Turo* and *Getaround* allow individuals-car owners to become entrepreneurs who offer their own vehicles to their peers as short-term car rentals. *Zimride*, connects people from the same school, university, company, etc. who can *share a ride* to/from the same location. *Zimride* sells rideshare networks to

28. See <www.Airbnb.com/about/about-us?locale=en>.

29. Interestingly enough "76% of Airbnb properties are outside the main hotel districts", suggesting complementarity of collaborative and incumbent businesses; see Zervas, Proserpio and Byers, "The rise of the sharing economy: Estimating the impact of Airbnb on the hotel industry", (2016) *Boston University School of Management*, Research Paper No. 2013-16, at 2.

30. Ibid., at 8.

31. For the legal battles that *Airbnb* is dealing with see *infra* section 2.

32. Note, though, that following complaints about racism and discrimination against potential visitors, *Airbnb* will soon be enforcing a new anti-discrimination policy; see <www.bbc.com/news/business-37314230>.

33. See <www.couchsurfing.com/about/how-it-works/>.

34. See <www.homeexchange.com/en/how-it-works/>.

35. While registration at *Couchsurfing* is free, verification of users comes upon payment of an annual fee; see <support.couchsurfing.org/hc/en-us/articles/214633027-Verification-Payment-Questions>.

organizations, such as universities and companies and offers free membership for passengers/users. Platforms such as *Uber*, *Lyft*, *Blablacar* or *Sidecar* allow individuals who own a car (outside the taxi industry) to provide *driving services* in point-to-point chauffeured urban transportation, for a fee.

1.4.3. *Tasks*

Collaborative platforms operating as "time banks"[36] facilitate the provision of services between peers in a non-monetary relation, through exchange of services. Individuals can pool and trade time and skills, bypassing money as a measure of value. Everyone's time and work is valued equally, and one hour of work equals one time dollar. Hence, an individual could clean a garden in exchange for a massage, or teach a yoga class in exchange for learning Portuguese. Almost any skill is an asset and could be traded for another skill in this time-based model. Moreover, numerous freelance platforms offer the opportunity to millions of unemployed or underemployed individuals to trade labour for pay. Individuals may engage in a myriad of tasks and errands in exchange for pay, from translating a document or designing a website on *Fiverr*, to watering the neighbour's lawn on *Taskrabbit*, to dog sitting on *DogVacay*, to running an errand on *Job-runners*, etc.

2. Regulatory challenges

"The sharing economy evokes three kinds of response: regulate it out of existence, don't regulate it at all, and "wait-and-see"'.[37] Different sectors, in different jurisdictions have provoked different regulatory reactions.

2.1. *Accommodation sector*

In the accommodation sector, *Airbnb* has faced legal actions in numerous States and for various reasons. The main legal issue arises from potential violations of short-term rental laws. In that regard, EU Member States and US states have a) imposed regulatory restrictions and requirements and/or b) fined both *Airbnb* and hosts for non-compliance with existing regulation. For example, New York imposed fines on *Airbnb* hosts for not complying with

36. See e.g. *Skillharbour.*

37. Quote from Das Acevedo, "Regulating employment relationships in the sharing economy", 20 *Employee Rights and Employment Policy Journal* (2016), 1–35, at 9, note omitted.

local regulations. According to New York short-rental laws, which were last updated in 2010, most apartments cannot be legally rented out for short periods (less than 30 days), unless the renter is present throughout the visitor's stay.[38] This means that most New York rooms and apartments listed on *Airbnb* can be qualified as illegal hotels. To make matters worse for *Airbnb*, New York state introduced a new law in June 2016 imposing even heavier fines on *Airbnb* hosts,[39] despite *Airbnb*'s aggressive pro-sharing campaign.[40]

As opposed to New York, which put pressure on *Airbnb* hosts, San Francisco turned directly to *Airbnb*. In June 2016, San Francisco passed a law imposing fines on *Airbnb* itself and similar short-rental websites for every host on their platforms not registered with the city's Office of Short-Term Rentals.[41] However, this approach seems to be backfiring for San Francisco, since *Airbnb* is currently suing the city, claiming that "websites can't be held responsible for the actions of the people who use those sites".[42]

Even though the collaborative economy is still in its infancy in Europe, it already appears that *Airbnb* has been treated in a somewhat friendlier way than in the US. In 2014, Amsterdam became the first city to pass an "*Airbnb* friendly" law: a law allowing short-term rentals by permanent residents, with certain restrictions[43] and subject to the obligation to pay the relevant taxes, including a tourist tax. Similarly, *Airbnb* was endorsed by France, with the adoption of *"loi ALUR"*,[44] a law legalizing short term rentals of primary residences,[45] and has begun collecting tourist tax in Paris.[46] Accordingly, London housing legislation was amended in order to clarify that short-term rentals are legal.[47] The UK has even launched an initiative to become the "global centre for sharing economy".[48] On the other hand, Barcelona has fined

38. Coldwell, "Airbnb's legal troubles: What are the issues?", *The Guardian* (8 July 2014).
39. Clampet, "Airbnb loses a fight in New York as legislature passes strict advertising law", *Skift* (17 June 2016).
40. See <www.airbnbaction.com/neighbors-move-forward-new-york-leaves-money-on-the-table/>.
41. Ting, "Measuring the Impact of New York's New Short-Term Rental Law on Airbnb", *Skift* (19 July 2016).
42. "Airbnb challenges San Francisco over rental law", *BBC News* (28 June 2016).
43. Namely to rent out their homes for up to two months of the year to up to four people at a time.
44. Acronym standing for *accès au logement et un urbanisme rénové*.
45. See <www.airbnbaction.com/major-step-forward-paris-france/>.
46. Lomas, "Airbnb gets tourist tax d'accord in Paris, its largest market", *TechChurch* (25 Aug. 2015).
47. Coldwell, "Airbnb to be legalised in London", *The Guardian* (10 Feb. 2015).
48. See <www.gov.uk/government/news/move-to-make-uk-global-centre-for-sharing-economy>.

Airbnb for breaching local tourism laws[49] and Berlin has restricted rentals of entire apartments on *Airbnb*, allowing owners to rent only individual rooms.[50]

2.2. *Transportation sector*

In the transportation sector, *Uber* has been fighting legal battles concerning mostly a) labour law, b) public safety concerns and c) unfair competition allegations in relation to the traditional taxi industry.

As regards the first, *Uber* has been facing class-action lawsuits across the US by thousands of *Uber* drivers. The main objective of those is to "force Uber to grant 'Employee' status to its drivers rather than hiring them as 'Contractors'".[51] *Uber* has already settled with thousands of its drivers by acknowledging that *Uber* drivers are entitled to sick leave, overtime, social security, health insurance and minimum wage, and by agreeing that it is unable to fire *Uber* drivers at will. So far, *Uber* has avoided classifying its drivers as "employees".[52] However, in a landmark judgment ruled by a UK employment court, *Uber* drivers were recognized to be providing their skilled labour for *Uber* which "runs a transportations business" and "earns its profits" through that labour.[53] Hence, the UK court ruled that *Uber* drivers were entitled to be paid the national living wage.

As regards public safety reasons, *Uber* (as well as *Lyft* and other similar companies) has either been obliged to conform with various regulatory restrictions and requirements (such as drivers' age requirements, no criminal record, adequate insurance, yearly inspected vehicles etc.[54]) or has been faced with *full ban or suspended operations* in numerous cities across the world.[55] It was even ruled that *Uber* should be subject to "the same regulations imposed on other for-hire vehicle services in the state since it was "a common

49. Coldwell, op. cit. *supra* note 38.

50. Oltermann, "Berlin ban on Airbnb short-term rentals upheld by city court", *The Guardian* (8 June 2016).

51. Elliott, "Class-action lawsuit against Uber threatens to force sharing economy platforms to regress", *Inquisitr* (3 May 2016).

52. Ibid.

53. Case 2202551/2015 & Others, *Aslam, Farrar and Others* v. *Uber*, judgment of 28 Oct. 2016, para 92, available at <www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/>.

54. See e.g. the "Vehicle for the Innovation Amendment Act of 2014", enacted in Oct. 2014 by the District of Columbia Council. Some regulation has also been put in place in several US cities. See a map of pro-Uber regulation and anti-Uber regulation US states at <www.qz.com/589041/uber-pulled-off-a-spectacular-political-coup-and-hardly-anyone-noticed/>.

55. For a global map of all the cities that Uber is banned from, see <www.businessinsider.com/heres-everywhere-uber-is-banned-around-the-world-2015-4>.

carrier"".[56] Further, *Uber* has been heavily fined by regulators for operating illegally in the state of Pennsylvania in 2014[57] and posing "a risk to public safety by offering rides without proof its drivers, vehicles and insurance provisions met state standards".[58]

Lastly, *Uber* has been facing legal challenges as regards its relation to the taxi industry. It has been banned from numerous cities in various jurisdictions, namely France, Germany, Belgium, Italy, Portugal and Spain. Accordingly, it has suspended all or some of its services in these countries. The lack of taxi licenses and registration of drivers and the non-satisfaction of "the requirements for the establishment of public transportation enterprises"[59] have been found to constitute breaches of existing regulations.

In a case brought by a taxi operator, the Brussels Commercial Tribunal declared *Uber* illegal and banned its *UberPop* services, on the basis that *Uber* and its drivers do not comply with existing rules regulating taxi services (licence, registration etc.).[60] Similarly, the Dutch courts imposed a ban on *Uber,* first in Amsterdam and subsequently in The Hague and Rotterdam, on the factual grounds of lack of licence.[61] The Dutch court ruled, however, that licensed taxi drivers, and drivers who don't seek payment, can still drive for the service. In Spain, *Uber* was ordered to cease all activities by a court decision ruling that the collaborative platform was exercising unfair competition.[62] Further, in Germany, the Berlin District Court qualified *Uber* as a "rental car service" that was violating German passenger transport laws, according to which, rental cars are required to return to home basis after completing a ride. Subsequently, the Frankfurt District Court found that *Uber* failed to have the necessary licences and insurance and posed unfair competition to the local taxi industry. It also found that the company did not carry sufficient insurance; it therefore imposed a nationwide ban.[63] France has

56. Ranchordás, "Does sharing mean caring? Regulating innovation in the sharing economy", 16 *Minnesota Journal of Law, Science & Technology* (2015), at 462.

57. Stempel, "Uber hit with record $11.4 million fine in Pennsylvania", *Reuters* (21 April 2016).

58. Stempel, "Pennsylvania reinstates Uber's record $11.4 million fine", *Reuters* (1 Sep. 2016).

59. See <www.m.tempo.co/read/news/2016/04/12/056761969/many-countries-ban-uber>.

60. A decision characterized as "crazy" by then Vice-President of the European Commission, Mrs Neelie Kroes. See the reaction published at <www.ec.europa.eu/archives/commission_2010-2014/kroes/en/content/crazy-court-decision-ban-uber-brussels-show-your-anger.html>. See also the Tribunal's decision at <www.lcii.eu/2015/10/16/uber-the-decision-of-the-brussels-commercial-tribunal/>.

61. See "Dutch judges ban taxi service UberPOP (Update)", *Phys* (8 Dec. 2014).

62. See "Uber taxi app suspended in Spain", *BBC News* (9 Dec. 2014).

63. See <www.blogs.loc.gov/law/2016/03/legal-challenges-for-uber-in-the-european-union-and-in-germany/>.

also followed a rather hostile approach towards *Uber*. Some of the legal issues that incurred are ban of *UberPop's* services in Paris, prohibition of advertisement of several of *Uber's* services and arrest of *Uber* managers on charges, including "deceptive commercial practices", complicity in instigating an illegal taxi-driving activity, and the illegal stocking of personal information.[64]

In an attempt to regulate collaborative companies such as *Uber*, France introduced Law No. 2014-1104 on Taxis and Chauffeured Transport Vehicles, commonly known as *Loi Thévenoud*.[65] This Law, *inter alia*, prohibits chauffeured vehicles other than taxis from charging a per-kilometer fee, requires chauffeured cars to return to their base or stop in an authorized parking place between fares, and prohibits the use of software that shows the location of nearby available vehicles to potential customers in real-time. The *Conseil Constitutionnel* ruled on the constitutionality of the above provisions, upon actions brought by *Uber*.[66] It found that the first of these – the prohibition to charge on a distance basis – unjustifiably violated the freedom of enterprise and therefore was unconstitutional, while the latter two provisions were constitutional, considered to be justified for reasons of public order.

Besides judicial battles, some Member States have attempted to regulate *Uber* and similar companies. In Italy, the *Consiglio dello Stato* in a consultative opinion to the government has held that the existing framework for transportation services is inadequate to cover collaborative platforms. France and Hungary have already introduced purpose-made regulations, while in the UK and Ireland collaborative platforms are required to obtain a prior authorization as transport operators. The Netherlands is contemplating a complete liberalization of the taxi and car-and-driver sector.[67]

In view of all the above, *Uber* has filed complaints with the European Commission against France, Germany, Spain and, recently, Hungary, alleging that they are in violation of Article 49 (freedom of establishment) and Article 56 (freedom to provide services) TFEU.

64. See "2 Uber executives ordered to stand trial in France", *Los Angeles Times* (30 June 2015).

65. Available in French at <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029527162&dateTexte=&categorieLien=id>.

66. In Decision No. 2015-468/469/472 QPC of 22 May 2015, *Société UBER France SAS et autre*, available in French at <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-468/469/472-qpc/decision-n-2015-468-469-472-qpc-du-22-mai-2015.143800.html>.

67. For a more detailed discussion of these trends and the references to the relevant documents, see the Commission Staff Working Document accompanying the Commission Communication, "A European agenda for the collaborative economy", SWD(2016)184, at 27 et seq.

2.3. *The role of the ECJ*

The ECJ has received references for preliminary rulings concerning the activities of *Uber* in Belgium, Spain and France. The questions posed by Member State courts to the ECJ concern, *inter alia*, whether *Uber* can be considered as merely a transport service, or as an electronic intermediary service or as an "information society service", and accordingly what EU rules apply.[68] Further, the question has been put whether the concept of "taxi services" applies equally to unremunerated occasional private carriers who engage in ride-sharing (shared transport) as a result of accepting journey requests that are offered to them via *Uber*.[69] At the time of writing, the ECJ has only issued a ruling in *Uber Belgium*, and in that case it found the preliminary request inadmissible and hence did not respond to the questions raised.

3. Collaborative economy under the EU rules: A first assessment

It has been observed that "[t]hus far, two of the most significant obstacles to the development of the digital economy both in Europe and overseas have been the *existence of outdated national legislation and regulation* which was enacted decades ago to regulate the paradigm of traditional businesses, and in some cases, protect them directly or indirectly against foreign competitors; and the regulatory uncertainty regarding the rules, rights and obligations applicable to digital platforms".[70] The Commission itself recognizes that "[r]egulatory uncertainty and fragmentation across and within Member States complicates (or even impedes) market access and limits investment opportunities for platforms".[71]

The question thus arises how and to what extent EU rules apply to the collaborative economy and whether the impact of EU law is to increase or, on the contrary, to decrease legal certainty in this field. It is certain that the EU

68. Case C-434/15, *Élite Taxi* v. *Uber Systems Spain,* pending, O.J. 2015, C 363/21; Case C-320/16, *Uber France*, pending, O.J. 2016, C 296/22; on this very issue, see Geradin, "Online intermediation platforms and free trade principles: Some reflections on the *Uber* preliminary ruling case" in Ortiz (Ed.), *Internet: Competition & Regulation of Online Platforms* (Competition Policy International, 2016), at 119–133.

69. Case C-526/15, *Uber Belgium* v. *Taxi Radio Bruxellois*, EU:C:2016:830.

70. Ranchordás, Gedeon and Zurek, "Home-sharing in the digital economy: The cases of Brussels, Stockholm and Budapest", Impulse Paper prepared for the European Commission (2016), available at <www.ec.europa.eu/DocsRoom/documents/16950/attachments/1/translations/en/renditions/pdf>, p. 80, original emphasis.

71. Commission Staff Working Document, "A Single Market Strategy for Europe: Analysis and evidence", SWD(2015)202 final, at 6.

could, through harmonization or otherwise, override national disparities and help create an internal market for collaborative economy. This, however, would add to the already complex EU legislation in the field of e-commerce and consumer protection, could stifle innovation in a field under rapid expansion and diversification, and could face legitimate resistance from Member States *inter alia* on the basis of overriding reasons of general interest and, more generally, subsidiarity.

In view of the above the Commission, so far, has followed the "wait-and-see" approach: it avoided proposing new legislation and, instead, explored the potential hidden in the application of existing rules. In this direction, in May 2016 the Commission, based on several "impulse papers" prepared by academia and professional consultancies in relation to specific issues,[72] published the EU Agenda for the Collaborative Economy.[73] In this well-drafted document the Commission gives some guidance on the way the various rules already in place may apply in the collaborative sector.

The rules the Commission contemplates are those affecting the market access of the platforms and of the underlying services, their liability, consumer protection, labour law and taxation. Although the guidance offered by the Commission is indeed sensible and useful in order to apprehend an area under constant mutation, the Commission itself concludes every single set of criteria proposed with the *leitmotiv* that the results may only be determined on a case-by-case basis. What is more, the Commission stays mute on the impact that other EU rules, such as e.g. the rules on competition, State aids and public procurement may have on the collaborative economy.

In the following sections, an attempt is made to draw an outline of the legal situation as it stands today. Rather than adopting a legalistic approach and examining the application of the different sets of rules to the parties concerned, we follow a more user-oriented approach and examine successively the position of the different parties, i.e. the collaborative platforms, the provider of the underlying service, and the user of the services.

4. The collaborative platforms

The legal position of platforms under EU law is subject to many variants and may differ considerably under the different sets of EU rules. This legal

72. Some highly analytical and rich Impulse Papers have been published on the following topics: market access requirements, liability issues raised by collaborative economy business models and the economic development of the collaborative economy, available at <www.ec.europa.eu/growth/single-market/strategy/collaborative-economy_el>.

73. COM(2016)356 final, cited *supra* note 22.

position may only be assessed on a case-by-case basis in respect to each set of rules. Rights and obligations may differ as between the "recipient" of shared service and the "provider" of such services, as the former will almost always qualify as a consumer *vis-à-vis* the platform and their relationship will be a B2P one, while the latter's position is more ambivalent and may give rise to both B2P and B2B relations. In what follows the various possibilities, under the various sets of rules, will be examined.

Collaborative platforms serve as intermediaries between those who are looking for specific services and those who may be offering them. They act as brokers. Their very function, of allowing demand to meet the (by them newly created) supply,[74] clearly brings them within the traditional definition of a trader. Given that most platforms either charge a subscription fee or claim a commission for each contract concluded with their intermediation, their activity is overarchingly economic. Even in the cases where the use of a platform is apparently free, it will typically be making money either from publicity or from the secondary use of the users' data.[75] In view of the extremely large definition of remuneration accepted by the Court[76] and the fact that remuneration may be provided by a party other than the recipient (the so called triangular situations, typically in the field of advertising and publicity),[77] almost all collaborative platforms will qualify as service providers in the sense of Article 57 TFEU.[78] This general, broad vision is also confirmed in the draft "digital economy" directives, where it is specifically stipulated that remuneration exists where "a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data".[79] Only those rare small-size platforms operating at the local/community level, which only serve social/solidarity purposes, such as e.g. sharing libraries, will evade this qualification. These will in principle fall outside the scope of the EU rules, primary and secondary; by the same token they are likely to evade the bulk of locally applicable restrictions and rules, as they will tend to have a very specific, not-for-profit object and a very limited geographic coverage. These will not be further considered here.

74. Given that they actually "create" this new kind of supply.

75. I.e. by compiling such data and making it available to other traders for the promotion of their own goods and services.

76. Joined Cases C-51/96 & 191/97, *Deliège*, EU:C:2000:199.

77. Ibid., but more importantly Case C-353/89, *Commission* v. *The Netherlands,* EU:C:1991:325.

78. See Case C-291/13, *Papassavas*, EU:C:2014:2209, where a free online newspaper paid only by advertisements was held to be an information society service.

79. See COM(2015)634 final, Art. 3(1) for the supply of digital content and COM(2015) 635 final, Art. 3(2) for the distant sale of goods.

In their capacity as service providers, collaborative platforms will be subject to the Treaty rules. Further, different rules of secondary legislation may be applied, depending on their respective criteria. In the following, we shall examine (a) the rights platforms may claim under EU law and (b) their obligations and the prohibitions which they may be subject to.

4.1. *Rights that collaborative platforms may claim*

Market access is the building block of any economic integration project. While it has always been at the core of the internal market, it is in this last decade that the Court has expressly acknowledged its importance, transforming it thus into the "slogan" of the internal market.[80] Given that most collaborative platforms are situated in the USA, it may also be worth discussing market access from outside the EU; this, however, would require us to analyse the GATS and its complexities and would not fit in the present analysis.

Collaborative platforms which have their seat or are else connected to one Member State, may claim market access under the general Treaty rules, the Services Directive and the E-commerce Directive. In actual fact, platforms are likely to invoke these texts in the inverse order.

4.1.1. *The E-commerce Directive*

The E-commerce Directive[81] is *lex specialis* in relation to the Services Directive, to the extent that it applies exclusively to information society services, i.e. "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".[82] The provision of such services in the EU is, in principle, subject to no prior authorization in the providers' home State (Art. 4(1)) and benefits from the "internal market clause" (Art. 3(2)), according to which all other (host) Member States are precluded from raising any obstacles. Hence, the

80. See Snell, "The notion of market access: A concept or a slogan?", 47 CML Rev. (2010), 437–472.

81. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, O.J. 2000, L 178/1.

82. Art. 2(a) of the Directive refers to the definition given in the "notification" Directive 98/34/EC, nowadays replaced by Directive 2015/1535/EU, O.J. 2015, L 241/1. This latter text explains the elements of the above definition as follows: i) "at a distance" means that the service is provided without the parties being simultaneously present; ii) "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, iii) "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

E-commerce Directive is the ideal "market access opener" both in the home and in the host Member States, and collaborative platforms may greatly benefit from it. This is only possible, however, for those platforms whose activity is limited to the provision of electronic services, i.e. mere intermediation, and does not extend to affecting/participating in the provision of the underlying service. From the very definition of the concept of "sharing economy" it follows that most platforms do not own the assets they put at the disposition of their clients; in this sense they only offer an information society service, i.e. intermediation through electronic means.

This simple assertion, however, should be revisited in view of the fact that several platforms are involved, to a greater or lesser extent, in the type/quality/conditions of the underlying service provision. Hence, for example, *Uber* and many of the transportation platforms[83] impose conditions on the types of cars (only passenger cars, of a certain age etc.), the facilities that should be offered (bottle of water, Wi-Fi connection, Bluetooth connection with the passenger's music etc.) and, most importantly, fix the price paid by the passenger; some of them, including *Uber*, pay the drivers for their services. Hence, they are directly involved in the provision of transportation services and are unlikely to qualify as mere providers of online services. The position in relation to *Uber* has given rise to great controversy and to conflicting judicial decisions in the various Member States, and even more contradictory decisions in the USA.[84] The question is pending before the ECJ.[85]

In our view, it should be assumed that the EU E-commerce Directive, in view of the requirement that services should be offered "at a distance, by electronic means", does not cover platforms which fall in the above category.[86] It is a different question still, whether such platforms could come under the said Directive only in respect of their information society services, while being subject to other pieces of legislation for the rest. In other words, could a severability test apply where the electronic services are sufficiently distinguishable from the physical ones, or rather should the test be that only the principal service (typically the physical one) should be taken into account?

While for commercial transportation platforms this question seems rhetorical in view of the overall control they exert over the actual transportation service, the same is not true for home-sharing platforms. For one thing, these platforms clearly do not have any employment relationship

83. The examples which follow are not necessarily taken from *Uber*, but rather illustrate the practices of various transportation platforms.

84. For the different solutions reached in different jurisdictions, see *supra* section 2.

85. Case C-434/15, *Elite Taxi* v. *Uber Systems Spain,* pending.

86. See, however, Geradin, op. cit. *supra* note 68, for the opposite view.

with home-owners, nor do they (typically) exert any control over the facilities put on offer. On the contrary, they are open to any type of accommodation (from single beds in shared rooms to entire houses and to luxurious estates; and from barges and sailing-boats to tree-houses) and they make it clear that it is the responsibility of the home-owners to define and deliver the level of service they deem appropriate. Price is also determined by the homeowners. In this sense, such platforms are more akin to traditional intermediaries. Several of these platforms, however, are less passive than the previous passage assumes: they offer advice to home-owners as to how to be good hosts, put at their disposition professional photographers, propose set-term contracts, withhold a security deposit, take insurance on behalf of both the parties and even, on the basis of the big data they dispose, propose the "ideal" price for different locations at different periods of the year![87] While it is difficult to hold that platforms which do all the above are mere intermediaries, it may, nonetheless, be said that all the above services are indeed ancillary to the main service which is that of the intermediation.

The Commission's recent Communication on a European Agenda for the Collaborative Economy[88] gives some welcome clarifications in this respect. While acknowledging that the question whether a collaborative platform also provides the underlying service may only be resolved on a case-by-case basis, it sets out three criteria: a) whether the platform imposes (as opposed to proposes) the price, b) whether it decides on other key contractual terms and c) whether it owns the key assets used to provide the underlying service. When these criteria are cumulatively met, then there would be a strong indication that the platform also offers the underlying service. Other, secondary criteria that may be taken into account are, according to the Commission, whether the platform incurs the costs and assumes all the risks related to the service and if an employment relationship exists with the person providing the service; mere assistance, on the other hand, for the performance of ancillary tasks (as the ones described above for home-renting platforms) does not mean that the platform exerts significant control over either the choice of the providers or the manner in which the underlying service is being offered.[89]

From this it follows that the test set by the Commission makes it quite difficult to reach the conclusion that a platform actively participates in the underlying service. This is consistent with the Commission's pro-sharing attitude, given that platforms which are found to participate in the underlying

87. On the issue of price fixing, see *infra* sections4.2.4. and 5.2.3.
88. COM(2016)356 final, cited *supra* note 22.
89. Ibid., at 6–7.

service will (also) need to comply with the sector-specific regulations applicable, both at the national and at the EU level, to the corresponding economic activity. If they need to comply with national law themselves, it is not clear whether and under what circumstances such platforms could also be held responsible for those underlying service-providers who violate the relevant legislation.[90]

The other platforms, which only qualify as information society providers will, in principle, be free both to carry out business in one (the home) Member State and to offer services in all other (host) Member States without being subject to any prior authorization, declaration or other restriction.

There are situations, however, under which the host State authorities may legitimately deviate from the internal market clause enshrined in Article 3 of the E-commerce Directive: when public policy, public health, public security and consumer protection are at stake.[91] According to the E-commerce Directive, such reasons only justify measures imposed for services "imported" from some other Member State, but they do not allow that "home" Member State (or the State in which e.g. a US-based platform locates its establishment within the EU) to impose any prior authorization requirement or equivalent restriction. This does not mean that the home Member State may not supervise information society providers established in its territory; on the contrary, it is responsible for supervising them "on behalf" of all other Member States.[92]

4.1.2. *The Services Directive*

The Services Directive[93] is supposed to have "horizontal" application and to cover most services. Several activities, however, are excluded. Transportation services, financial services, healthcare services, temporary work agencies, social services such as social housing and childcare are some of the activities which, while being excluded from the Directive, are relevant for the collaborative economy. For each collaborative economy activity, an individual assessment is needed of whether and to what extent it falls within the exception. Given that exceptions to the Treaty freedoms and to secondary legislation implementing them should be interpreted narrowly, it does not go without question that any activity in the above sectors will be excluded from the scope of the Services Directive. For instance, given that in *Femarbel* the

90. See e.g. *supra* section 2.1, the example of *Airbnb* in the state of San Francisco, where it is suing to recover the fines imposed to it by that state, arguing that the platform may not be held responsible for the actions of the people who use the site.

91. See Art. 3(4) E-Commerce Directive.

92. Ibid., Recital 22; the issue of the grounds which may be invoked by the Member States in order to regulate collaborative economy activities is addressed *infra* section 7.1.

93. Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/36.

Court held that only those core health-related activities which are performed by health professionals are excluded from the Directive,[94] most health-related services offered over platforms[95] would still come under the Services Directive. On the other hand, the Court has given an extremely wide interpretation to the concept of transport services, including hot air balloon rides[96] and short cruises in the canals of Amsterdam.[97] Hence, it would need to be ascertained, for every particular activity, whether it falls within or outside the scope of the Services Directive.

Market access for those collaborative platforms which do fall within the Services Directive will be facilitated, both at the level of taking up activity (in the home Member State) and at that of offering services in other (host) Member States. Under the Services Directive, the requirement of a prior authorization is not altogether excluded (as is the case under the E-commerce Directive), but it needs to be justified, necessary and proportionate.[98] Justifications may stem from overriding reasons of public interest (including, public order, security and health).[99] Further, authorizations should be delivered according to non-discriminatory, objective and transparent criteria, known in advance, within reasonable time, and must be of indeterminate temporal and geographical coverage.[100] They may not contain any of the requirements blacklisted in Article 14 of the Directive and may only exceptionally contain requirements from the grey list in Article 15. It need not be stressed that, at present, the above requirements of non-discrimination (between what kinds of platforms?), objectivity (again, how to compare different collaborative services?) and transparency, are far from being served. Consequently, it is evident that although the Services Directive does contain both substantive and procedural guarantees, it is far from granting the automatic take-up of an activity in the way the E-commerce Directive does.

Cross-border service provision under the Services Directive is supposed to be without obstacles, unless such obstacles are justified by public policy,

94. Case C-57/12, *Femarbel*, EU:C:2013:517.

95. Such as e.g. <www.cohealo.com>, which helps health systems share medical equipment across facilities, or Macmillan cancer support which brings into contact and supports cancer patients at <www.macmillan.org.uk/about-us>.

96. Case C-382/08, *Neukirchinger*, EU:C:2011:27.

97. Joined Cases C-340 & 341/14, *Trijber and Harmsen*, EU:C:2015:641.

98. Art. 9 Services Directive.

99. For the confusions around overriding reasons of general interest and express Treaty provisions, see Hatzopoulos, "Justifications to restrictions to free movement: Towards a single normative framework?" in Andenas, Bekkedal and Pantaleo (Eds.), *The Reach of Free Movement* (Springer, 2016) (forthcoming).

100. Arts. 10–13 Services Directive.

public security, public health or the protection of the environment.[101] In this respect, collaborative platforms offering services in other Member States under the Services Directive are in a strongly comparable condition with those platforms which only provide information society services and come under the E-commerce Directive.

Finally, insofar as collaborative platforms are outside the scope of the Services Directive, they come under the general Treaty rules on services.

4.1.3. *Public procurement*

Collaborative platforms offer services that are of interest to the State. Indeed, in the UK several public bodies have decommissioned part or all of their fleets of service cars and have, instead, taken car club memberships for their employees.[102] Similarly, civil servants who travel on mission or official guests visiting from other regions or States may be accommodated in rooms and/or houses found through platforms, which may be both cheaper for the public authorities (and maybe more enjoyable for the officials concerned). Further, the provision of accommodation for social tourism is a prime candidate for house-sharing platforms. The use of extra working space needed for short periods of time could also be offered through platforms such as *Sharedesk* or *Liquidspace*. Examples may be multiplied.

However, under the current public procurement framework, even after the 2014 reshuffle intended to render it more flexible, it would be difficult for platforms to participate in public tenders; obstacles would lie both at the level of the *selection* and of the *award* criteria.

Given that the second of the three *selection* criteria foreseen by the general Public Procurement Directive[103] relates to the "economic and financial standing" of the tenderer, it is difficult to imagine how e.g. a house-sharing platform which owns little more than its software and employs few employers in rented premises, can compete with a hotel chain which owns facilities worth millions and employs hundreds of people. Similarly, the third selection

101. It is a controversial issue whether Art. 16 of the Services Directive can legitimately restrict recourse of the Member States to the vast body of overriding reasons of general interest recognized by the Court without introducing any harmonization in respect of those; see Hatzopoulos, "Assessing the Services Directive", 10 CYELS (2008), 215–261.

102. E.g. Croydon Council took this approach in 2010 when it piloted a partnership with *Zipcar* that gave it exclusive access to vehicles during working hours and allowed local residents to rent them for the rest of the time; in this way they reported 42% reduction in travel costs and 36% reduction in CO2 emissions: see Wosskow, "Unlocking the sharing economy: An independent view", Report commissioned by the UK Government (2014), at 19, available at <www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf>.

103. Directive 2014/24/EU on public procurement and repealing Directive 2004/18, O.J. 2014, L 94/65, Art. 58.

criterion, namely the "technical and professional ability" of a platform, which has no employment relationship with the people who would be performing the tasks and where the choice of such people is not determined in advance, would be very difficult to substantiate. Indeed, although it is foreseen in the Directive that the tenderer may rely on the capacities of other "entities", the wording of the relevant provision seems to imply that such entities should be individualized at the time of the tender and could be made to provide written commitments.[104]

To take this point further, when the *award* criterion used is not merely the lowest price, but the most economically advantageous tender, one of the elements which may be taken into account is the "organization, qualification and experience of staff assigned to perform the contract".[105] Hence, the said staff need be determined in advance. The same conclusion is also drawn from the provisions of the Directive on subcontracting, where it is foreseen that the tenderer may be asked to "indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors".[106]

These are a few of the points which indicate that the current framework for public procurement is far from accommodating for tenders from collaborative platforms. This, however, is disconcerting in at least two ways. From an economic point of view, as stated in the previous paragraphs, the award authorities could greatly benefit from receiving collaborative services. From a legal point of view, collaborative platforms, especially where they qualify as more than mere e-providers and are subject to the rules and obligations foreseen for the underlying service providers (e.g. if *Uber* is qualified as a transportation undertaking), should have the same rights with regard to tendering. Failing which they would be suffering unjustified discrimination.

4.2. *Obligations arising for collaborative platforms*

Collaborative platforms may be liable both towards the provider and the recipient of the underlying service. They may be liable both for the electronic services provided online by them, and for the underlying services provided by/with the help of the service providers. For instance, *Airbnb* might be liable to a homeowner for damages or other loss caused by the guests; it might also be liable to the accommodation seeker who was either misled by the information published on the site (i.e. the electronic service) or who was left without accommodation because the owner had disposed of their home otherwise (i.e. the underlying service). Further, given that platforms collect

104. Ibid., Art. 63.
105. Ibid., Art. 67.
106. Ibid., Art. 71(2).

and process data from both parties, they are also bound by the data protection rules. These all need further clarifications.

4.2.1. *Liability under the E-commerce Directive*

Next to automatic market access, the other way in which the E-commerce Directive facilitates the providers of e-services is by limiting their liability for content over which they have no control. Hence, in cases where the e-service provider serves as a "mere conduit" for illegal content (Art. 12), offers "caching" services (Art. 13) or provides hosting (Art. 14), without in any way participating in the creation, transformation or else the modification and active dissemination of the illegal information, such provider is exempt from liability.[107] Since "mere conduit" and "caching" suppose that the information is stored only in a temporary and transient manner necessary for the electronic process to take place, and given that most platforms store information for longer and process it in order to perform their matching function, it is essentially Article 14 on "hosting" which is relevant here. According to the ECJ,

> "in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores".[108]

On the other hand, "the operator plays such [an active] role when it provides assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting them".[109]

107. For the finding that a social networking platform (which is not very dissimilar from collaborative platforms) offers hosting services, see Case C-360/10, *SABAM* v. *Netlog*, EU:C:2012:85.

108. Joined Cases C-236-238/08, *Google France* v. *Louis Vuitton*, EU:C:2010:159, para 114.

109. Case C-324/09, *L'Oreal* v. *eBay*, EU:C:2011:474, para 123. Illustrations of the application of the above rules are provided by the decision of the French *Cour de cassation* of 4 Dec. 2012, Appl. No. 11-27729, *Publicité Sté Pewterpassion.com* v. *Sté Leguide.com,* where the court held that a platform which top ranked products against remuneration was indirectly promoting such products and could not claim Art. 14 liability exclusion; the German Federal Court of Justice, in case I ZR 94/13, of 19 March 2015, however, held a platform not liable for the demeaning review put up by one of its users concerning the services received through the intermediation of the said platform. For a thorough discussion of the liability issues raised by the combination of the E-commerce Directive with the Unfair Commercial Practices Directive, see the Commission Staff Working Document, "Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices", SWD(2016)163 final, at 119 et seq.

Hence, it becomes crucial to know whether a platform actively intermediates between the parties (by drafting terms or clauses of their contract, by deciding on the price etc.) or whether, on the contrary, it only serves as a passive "bulletin board" for information over which it has no control whatsoever.[110] As the Commission has put it, "the exemption from liability applies on the condition that the collaborative platform does not play an active role which would give it the knowledge of, control over or awareness of the illegal information".[111]

The Dutch Supreme Court has held that an active platform (in the area of accommodation) is characterized by the fact that the provider and the seeker may not get into direct contact but have to go through the platform for their transaction to be concluded. In the opposite case, where the platform only provides the necessary contact details of the accommodation provider, then it will be considered a mere bulletin board.[112] Further to this criterion, one may say that a platform which is being paid for the actual conclusion of a contract (by way of a commission) rather than for making public the service and contact details of its provider (by way of a registration fee, subscription or advertisement) is more likely to qualify as "active".[113]

The appreciation of the neutrality of the platform in view of assessing its liability resembles in many respects the evaluation, discussed above, of whether it provides merely e-services or, on the contrary is also involved in the provision of the underlying service. Indeed, if the platform is considered to be itself offering the underlying service, then the E-commerce Directive and its Article 14 are altogether inapplicable (at least to the services exceeding the e-service). If, on the other hand, it is established that the platform is only an e-provider, then the applicability of Article 14 may be assessed on the basis of the criteria discussed above. Hence, a gradation may be established along the following lines: when the platform participates in the provision of the underlying service, the E-commerce Directive is inapplicable; when the platform plays an active role in determining the content of the underlying service (which may be offered by a third party) then the E-commerce Directive may apply, but the exclusion of liability foreseen in Article 14 may not. The

110. The term "bulletin board" is taken from Koolhoven, Neppelenbroek, Santamaria Echeverria and Verdi, "Impulse paper on specific liability issues raised by the collaborative economy in the accommodation sector" (2016), at 12, available at <ec.europa.eu/DocsRoom/documents/16946/attachments/1/translations/en/renditions/native>.

111. Commission Report on the adequacy of national expert resources for complying with the regulatory functions pursuant to Art. 27(4) of Directive 2013/30/EU, COM(2016)318 final, at 7–8.

112. *Hoge Raad*, judgment of 16 Oct. 2015, NL:HR:2015:3099, Prejudiciele beslissing op vraag van NL:RBDHA:2015:1437.

113. In this sense see also Koolhoven et al., op. cit. *supra* note 110, at 15.

exclusion of liability will apply where the platform does neither of the above and has a passive or else neutral role both in the definition and in the provision of the underlying service.

"Neutral" platforms only benefit from the liability exemption as long as they can reasonably be unaware of the illegal information. As soon as they get to know of it, they need to remove or disable access to it. According to the ECJ the platform may no longer benefit from the exclusion when it has "been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance".[114] Hence, a diligent platform provider must not only respond to notifications from users but should also implement an effective notice-and-take-down policy.[115]

Liability under the E-commerce Directive may exist *vis-à-vis* the consumers of e-services as well as *vis-à-vis* third parties.[116] In other words, the question whether the subject of the illegal information (the plaintiff) is or is not a consumer is irrelevant. Hence, the above analysis holds true both in relation to the service recipients (who would typically qualify as consumers) and to service providers (who occasionally would qualify as traders themselves).[117]

4.2.2. *Consumer protection*

Consumer Protection in the EU is essentially secured through (in chronological order of adoption) the Unfair Contracts Terms Directive,[118] the Unfair Commercial Practices Directive,[119] the Consumer Rights Directive[120] and the Directive on alternative dispute resolution and the Regulation on online dispute resolution.[121] These will be further complemented by the

114. Case C-324/09, *L'Oreal* v. *eBay*, para 120. It should be noted, however, that no general obligation to monitor the content of the hosted material may be imposed on the e-service provider; see Art. 15(1) of the E-commerce Directive.

115. It is a different issue again whether and to what extent national private law on agency – an issue typically regulated by the national civil codes – will apply to "passive" platforms.

116. See e.g. Case C-131/12, *Google Spain* v. *AEDP and Mario Costeja Gonzales*, EU:C:2014:317.

117. For the peers providing the service, see *infra* section 5.

118. Directive 93/13/EC on unfair terms in consumer contracts, O.J. 1993, L 95/29.

119. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices, O.J. 2005, L 149/22.

120. Directive 2011/83/EU on consumer rights, O.J. 2011, L 304/64.

121. Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, O.J. 2013, L 165/63 (Directive on consumer ADR); Regulation (EU) 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, O.J. 2013, L 165/1 (Regulation on consumer ODR).

forthcoming "Digital Single Market Directives", especially that on digital content.[122] The web of rules set by these texts is designed to protect *consumers* against *traders*.[123] In other words, none of this legislation applies to either P2P or B2B relations. As already explained, the existence of a P2P relationship is one of the main characteristics of collaborative activities (while B2B is also conceivable, but not discussed in this paper). Hence, in order to understand the way consumer protection law applies to collaborative platforms, it is crucial to assess which of the three parties typically involved in collaborative economy activities qualifies as a *trader,* i.e. "acting for purposes relating to his trade, business, craft or profession" and which is a *consumer* i.e. acting outside his trade, business, craft or profession.[124]

The fact that collaborative platforms typically exercise *economic activities*[125] does not necessarily mean that they qualify as *traders*. In the *economic activities* test, the focus is on the nature of the activity, while in order to identify *traders*, the kind of trade, profession etc. exercised by the operator and whether they gain – direct or indirect – revenue from it is relevant. What is more, the fact that the definition followed by the directives mentioned above uses the term "purpose" introduces an element of intent and allows for some subjectivity in the definition of a trader – and of a consumer. The Commission found: "According to a case-by-case assessment, a platform may be acting for purposes relating to its business, whenever, for example, it charges a commission on the transactions between suppliers and users, provides additional paid services or draws revenues from targeted advertising".[126] In this perspective, for instance, the Italian Consumer and Competition Authority, upheld by the Administrative Court of Lazio, held that *Tripadvisor* qualifies as a "trader" although not directly charging for its services.[127]

It is, however, perfectly conceivable that a platform carries out some economic activity which is *outside* the scope of its trade etc. or that it offers some activity which does qualify as economic but which is offered for a

122. Commission Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015)634 final.

123. Or "suppliers", defined in the same manner in Art. 2(3) of the draft Digital Content Directive, cited note 122.

124. Art. 2(a) and (b) Unfair terms Directive, cited *supra* note 118.

125. See *supra* section 4.

126. See SWD(2016)163 final, cited *supra* note 109, at 124.

127. *Autorità Garante della Concorrenza e del Mercato*, Decision No. PS9345 of 19 Dec. 2014, *Tripadvisor*, paras. 87–89. This specific part of the decision by the AGCM was confirmed by the *Tribunale Amministrativo Regionale per il Lazio* on 13 July 2015; *Sezione I*, *Sentenza* No. 09355. This case is taken from the abovementioned Communication, which is a sign that the Commission endorses this reasoning.

communitarian, social or other non-commercial purpose. All in all, however, more often than not, collaborative platforms will qualify as "traders".

In a similar, but inverse, manner, most users of the platforms' underlying services will qualify as "consumers" and will, thus, be able to claim protection.[128] More delicate is the qualification of the provider of the underlying service.[129]

In addition to the consumer protection obligations stemming from the abovementioned directives, collaborative platforms which are held to directly partake in the provision of the underlying service are also subject to any sector-specific regulations, liability regime, codes of conduct etc. foreseen for the regulated profession which each of them exercises.

4.2.3. *Data protection*

Personal data has the potential to lower entry barriers, stimulate competition, enable consumers to receive better quality services and help companies gain insight in market opportunities. Hence, it has been argued that in the modern, data-driven economy, data is a new form of currency.[130] The "datafication"[131] of all aspects of life, and the aggregation of large amounts of data has led to talk of a "big data revolution".[132] Collaborative platforms collect personal data, concerning the age, gender, residence, employment, professional capacities and qualifications, dietary or other preferences, health condition, medications, economic details and much more of both the users and the providers of collaborative services. Indeed, their function is to match the needs of the former with the goods/services on offer from the latter. In this sense they are *data controllers* and, typically also *data processors*: not only do they do the actual processing (unless they outsource it), but also, and most importantly, they determine the purpose and the means of the processing of personal

128. For the qualification of users as "consumers", see *infra* section 6.

129. For the qualification of the underlying service provider, see *infra* section 5.

130. See the House of Lords Select Committee on EU, "Online platforms and the Digital Single Market", 10th Report of Session 2015–16, para 203, including the quotation of Ezrachi: "Data is the currency – the commodity – which provides us with 'free' access to many online services and products and an advanced Internet environment".

131. See Cukier and Mayer-Schoenberger, "The rise of big data: How it's changing the way we think about the world", 92 *Foreign Affairs* (2013).

132. "Big data" is characterized by volume, variety and velocity: see Lambrecht and Tucker, "Can big data protect a firm from competition?" (2015), available at <www.ec.europa.eu/information_society/newsroom/image/document/2016-6/computer_and_communications_industry_association_-_can_big_data_protect_a_firm_from_competition_13846.pdf>.

data.[133] Hence, they are subject to all the rules and disciplines of the Data Protection Directive[134] and of the e-Privacy Directive.[135]

These rules have been revised with the adoption of the new Data Protection Regulation, which must be implemented by Member States by 25 May 2018.[136] As well as the right to be forgotten (recognized by the ECJ in *Google Spain*),[137] the new Regulation introduces the idea of data protection "by default" or "by design", meaning that the default settings/characteristics of any site, service or electronic product should be the ones most protective of privacy. Correlatively, the conditions leading to a valid consent are clarified. Further, the new Regulation expands the definition of "personal data" to include data collected through the use of cookie IDs, IP addresses, location tracking and other online and device identifiers. Lastly, and this will be a cause of extra burdens for electronic platforms, a new obligation of data portability from one platform to the other is enacted, as a means to foster competition.[138] This, in turn, means that similar platforms would have to build their applications in similar manners, in order to make such portability possible. The General Data Protection Regulation also applies to data controllers and processors outside the EU if their data processing activities relate to EU data subjects.[139] In order to ensure some extra-territorial application of the EU rules in a more effective manner than it did with the "Safe Harbour"

133. See the definitions in Art. 2(d) and (e) of Directive 95/46/EC on protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31 (Data Protection Directive). For the fine distinction between the two, see Information Commissioner's Office, "Data controllers and data processors: What the difference is and what the governance implications are" (2014), available at <www.ico.org.uk/media/for-organisations/documents/1546/data-controllers-and-data-processors-dp-guidance.pdf>.

134. For a comprehensive and up to date presentation of the obligations stemming from this Directive, see Linskey, *The Foundations of EU Data Protection Law* (OUP, 2015); for a briefer account see Hustinx, "EU data protection law: The review of Directive 95/46/EC and the proposed General Data Protection Regulation" (2014), available at <www.statewatch.org/news/2014/sep/eu-2014-09-edps-data-protection-article.pdf>.

135. Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, O.J. 2002, L 201/37 (e-Privacy Directive).

136. Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, O.J. 2016, L 119/1 (General Data Protection Regulation).

137. Case C-131/12, *Google Spain*.

138. For an assessment of the new Regulation, see Hustinx, op. cit. *supra* note 134; see also Reding, "The upcoming data protection reform for the European Union", 1 *International Data Privacy Law* (2011), 3–5.

139. Art. 3 General Data Protection Regulation.

agreement,[140] the EU has adopted the EU-US Privacy Shield framework. While the updated legal framework offers a stronger data protection scheme to users of collaborative platforms, irrespective of the place where these are located, certain issues are still not addressed by regulation but rather are determined solely by the terms and conditions of the platforms. For instance, cancellation of one's account on a collaborative platform does not necessarily lead to the deletion of personal data previously gathered.[141] Similarly, personal data concerning one person may be provided to the platform – and made known to the public – by another user without their consent, especially through the posting of peer-reviews; regulation of such personal data "spills" is solely up to the platform's policies.[142]

4.2.4. *Anti-trust*

There is no doubt that collaborative platforms offer new services – or a wider variety of pre-existing ones – in a way that overall is beneficial to consumers. Hence, for instance, tourists nowadays have a much wider variety of accommodation choices, at a much wider array of prices. Moreover, the supplementary supply of accommodation makes sure that hotel prices do not skyrocket even during high-season or peak events and can prevent abusive practices; it allows for extra demand to be covered when permanent facilities are not enough.[143] Therefore, the overall balance of the collaborative economy towards consumer welfare is clearly positive. However, the literature has identified several important challenges to the application of anti-trust law as we know it, raised by the collaborative economy.

As far as concerted practices are concerned, collusion between platforms would be very difficult to establish, since, collusive "intent" would be altogether absent, as would be any "agreement": platforms may reach comparable prices as a result of processing comparable data with similar

140. The EU-U.S. Privacy Shield imposes stronger obligations on U.S. companies to protect Europeans' personal data and complies with the requirements of the ECJ, which ruled the previous "Safe Harbour" framework invalid with its judgment in Case C-362/14, *Maximillian Schrems* v. *Data Protection Commissioner*, EU:C:2015:650.

141. See e.g. *Airbnb's* Terms of Privacy policy, point 8: " … any reviews, forum postings and similar materials posted by you may continue to be publicly available on the Platform in association with your first name, even after your Airbnb Account is cancelled", available at <www.airbnb.com/terms/privacy_policy>.

142. *Airbnb* prohibits reviews that include "content that violates another person or entity's rights, including intellectual property rights and privacy rights (e.g. publishing another person's full name, address or other identifying information without permission)"; see <www.airbnb.com/help/article/546/what-is-Airbnb-s-content-policy?topic=250>.

143. It has been calculated that approximately 30% of the visitors of the 2014 World Cup in Rio were able to find accommodation through some collaborative platform.

algorithms.[144] Hence, some authors propose that the fundamental role played by big data and its use by "robo-sellers" in determining market prices, should lead the enforcement authorities to revisit the above two concepts in order to apprehend indirect intent enshrined in the coding of algorithms and "agreements" which are reached without the parties ever colluding.[145] In the US such developments have, discretely, emerged.[146] Other commentators suggest even broader adaptations to legal reasoning by for instance "reconsidering the relationship [and respective responsibility] between humans and machines" and looking into "the relevant algorithm to establish whether any illegal action could have been anticipated or was predetermined".[147]

Another issue is whether platforms may be held liable for collusion of undertakings operating in a completely different market segment. In this respect, a recent judgment of the ECJ has paved the way by holding that a consultant company, operating in a completely distinct market from the one where the collusion took place, but who actively and positively coordinated and facilitated the collusion, may be held liable together with the participating undertakings.[148]

In a similar way, it may be difficult to control the abuse of dominance (Art. 102 TFEU) and mergers in the collaborative economy. On top of the difficulties mentioned above, the question of determining the relevant market

144. It is recalled that both under the Sherman Act and under EU law, oligopolists that achieve price coordination interdependently, without communication or facilitating practices, may escape enforcement, even when their actions yield supra-competitive pricing that harms consumers.

145. See Mehra, "Anti-trust and the Robo-Seller: Competition in the time of algorithms", (2015) *Temple University Legal Studies*, Research Paper No. 15, available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2576341>; see also Stucke and Ezrachi, "Artificial intelligence and collusion: When computers inhibit competition", (2015) *University of Tennessee Legal Studies*, Research Paper No. 267, available at <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2591874>.

146. The US Department of Justice, in a case involving *Amazon* and price-fixing in the area of posters, found that the conspirators "adopted specific pricing algorithms for the sale of certain posters with the goal of coordinating changes to their respective prices and wrote computer code that instructed algorithm-based software to set prices in conformity with this agreement", see <www.justice.gov/atr/public/press_releases/2015/313011.docx>; for a discussion of this and other cases, see Stucke and Ezrachi, op. cit. *supra* note 145.

147. Stucke and Ezrachi, op. cit. *supra* note 145, at 31.

148. Case C-194/14 P, *AC-Treuhand* v. *Commission*, EU:C:2015:717; it should be noted however that the test used by the Court in order to hold the "facilitator's" liability is quite strict, since it requires that its conduct should be a) directly connected to the negotiation and implementation of the agreement between the parties and b) have as its very purpose "the attainment, in full knowledge of the facts, of the anticompetitive objectives", see para 38.

risks being a tricky one, for at least five reasons.[149] *First*, while traditional markets are one-sided, collaborative markets are two sided: the platform gets money and gathers market share both in the market of prosumers/providers and in the market of final consumers. While the two markets are strongly interconnected by means of the externalities produced (i.e. the larger number of prosumers connected to a platform is likely to attract a larger number of final consumers), participants in each market segment may have opposing interests (the prosumer strives for higher income, while the consumer for lower prices). Hence, the question: which market segment is relevant and how is it to be taken into account?[150] *Second*, the above externalities often lead to a winner-takes-all dynamic which allows the first, most active, most efficient player to attract the biggest number of participants, in both markets, thus marginalizing all other players: the lower the cost of the service offered, the more unlikely it will be for consumers to switch from the search habits, history, cookies etc. which link them to their preferred site to one which offers (insignificantly) lower prices. Big data at the disposal of the "established" platform exerts an important lock-in effect in this respect. *Third*, however, in view of the innovative and "disruptive" character of the collaborative economy, such a lead may be extremely short-lived; therefore the "temporal market" also need be reconsidered. The same "disruptive" nature of the collaborative economy also commands a further *two points*: the need to reconsider the geographical market and, also, the product market, since the technology often leads to convergence among traditionally separated markets. In view of the above, it has been convincingly argued that in these businesses market power does not coincide with market share and that other factors such as the community of reference, reputation and trust play a fundamental role.[151]

Even after market power has (somehow) been established, it will also be difficult to establish abuse. Technology and the data gathered by platforms provides them with the capacity to monitor customers' activities, accumulate data and react to market changes in real time. Computer algorithms may be used to optimize behavioural advertisements, individualized promotions and targeted, discriminatory pricing.[152] Would such "market-driven" adjustment qualify as "abuse"? In other words, if *Uber's* surge pricing perfectly reflects

149. For a more extensive discussion of this issue see Russo and Stasi, "Defining the relevant market in the sharing economy", 5 *Internet Policy Review* (2016), 1–14.

150. On two-sided markets under competition law, see Fillistruchi et al., "Market definition in two-sided markets: Theory and practice", 10 *Journal of Competition Law and Economics* (2014), 292–393.

151. Russo and Stasi, op. cit. *supra* note 149, at 5.

152. Stucke and Ezrachi, op. cit. *supra* note 145, at 4.

the supply and demand conditions of the market at a given moment,[153] is this not what competition law is all about? Similar questions would rise in the event of dominant platforms performing tying and bundling practices, i.e. supplying a product/service only in a bundle with some other product/service.[154] While competition law does not prohibit every bundling practice, in view of the *Microsoft* saga, it may not be excluded that a violation of Article 102 TFEU could be raised e.g. by *Uber's* initiative to become active in food delivery.[155] Further, the big data and/or meta-data owned by a dominant firm, may, under circumstances, qualify as "essential facilities" and refusal to grant access to newcomers or other competitors, may qualify as abusive.[156]

4.2.5. *State aid*

Collaborative platforms are a new thing in the economy. They lack the links that traditional entrepreneurs have with the government and State agencies. Their relationship with power is one of suspicion, if not animosity. The most powerful collaborative platforms, such as *Airbnb*, invest human and financial resources to make governments listen (also) to them and not combat them. The others are either trying to comply with restrictive regulation pushed through by the incumbent traditional providers, or to pursue their activities virtually unnoticed by the authorities. Hence, for the time being the risk of public money being directly transferred to a collaborative platform is quite low.

There are, however, two current realities which may raise concerns under Articles 107 et seq. TFEU. *First*, collaborative economy participants enjoy an *economic advantage* in the form of a) tax payment facilities and b) forgiveness of liabilities. With regard to the former, some Member States have already enacted tax relief measures especially for collaborative economy actors,[157] while others silently allow the non-payment of several taxes. Hence, most Member States are currently not collecting from collaborative economy participants, i*nter alia*, i) VAT by any of the parties involved, ii) local or

153. According to *Uber's* Q&A webpage, prices may temporarily increase on the occasion of sports events, bad weather, public holidays etc., the purpose being to secure adequate supply at all times; see <www.help.uber.com/h/34212e8b-d69a-4d8a-a923-095d3075b487>.

154. For an overview of the anti-competitive practices of tying and bundling in relation to servitization, see Hojnik, op. cit. *supra* note 9.

155. See <www.ubereats.com/>.

156. Under the logic of Case C-418/01, *IMS Health* v. *NDC Health*, EU:C:2004:257. For a general overview of this doctrine, see Hatzopoulos, "The evolution of the essential facilities doctrine" in Amato and Elhermann (Eds.), *EC Competition Law: A Critical Assessment* (Hart, 2007), pp. 317–358; more specifically on the issue of data as an essential facility, see Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility*, (Wolters Kluwer, 2016).

157. See SWD(2016)184 final, cited *supra* note 67, at 5.2.2, Table 6.

sector-specific taxes (e.g. tourist tax), iii) personal income tax from prosumers, since most of them avoid declaring income they gain from collaborative practices, iv) corporate income tax,[158] etc.[159] With regard to the latter, most Member States are currently allowing the operation of collaborative companies, such as *Uber*, without claiming any social security payments for prosumers/workers[160] or any licence fees.[161] Considering that the concept of aid embraces not only positive benefits, such as subsidies themselves, but also interventions mitigating the burdens normally included in the budget of the beneficiary,[162] the above economic privileges, specifically awarded to/allowed for collaborative platforms, grant them a competitive advantage that could constitute "State aid".

Second, collaborative platforms enjoy a *regulatory advantage*, since they operate on preferential terms, thus disrupting equality of treatment between operators. Indeed, collaborative economy participants face fewer (if any) complex and time-consuming regulatory requirements, such as undergoing authorization/licensing procedures, being registered with the competent professional body, passing capacity tests, being subject to professional disciplinary rules, having to underwrite professional insurance policies etc. Such requirements have a cost for the professionals and are a source of revenue for the State. The Court has already held that procedural advantages selectively awarded, which favour the cost structure of an undertaking in relation to its competitors may constitute State aid.[163] Could that case law

158. The Commission recently found that Ireland granted undue tax benefits to *Apple*, which is illegal under EU State aid rules, because it allowed *Apple* to pay substantially less tax than other businesses (Case No. SA.38373); see <www.europa.eu/rapid/press-release_IP-16-2923_en.htm>. Similarly, it has opened an investigation on whether the corporate income tax payable by *Amazon* in Luxembourg complies with the EU rules on State aid (Case No. SA.38944); see <www.europa.eu/rapid/press-release_IP-14-1105_en.htm>. It is worth noting that those two companies operate under a similar tax model to that of several collaborative platforms, such as *Airbnb*.

159. For an analysis of the taxation issue see *infra* section 7.2.

160. The ECJ has ruled that tolerance by the responsible public body of late payment of social security contributions gives the beneficiary a significant commercial advantage by mitigating the burden associated with normal application of the social security system: see Case C-256/97, *DM Transport*, EU:C:1999:332, para 19.

161. In fact, Member States have withdrawn or amended existing laws in order to legitimize the lack of licences. See e.g. in Greece the abolition of provisions requiring a tourist accommodation licence for short-term rentals (Art. 2, para 4 of Law 4336/2015, Official Gazette A 94).

162. See *inter alia* Case C-387/92, *Banco Exterior de Espana* v. *Ayuntamiento de Valencia*, EU:C:1994:100, paras. 13–14; Case C-256/97, *DM Transport*, para 19; Case C-276/02, *Spain* v. *Commission*, EU:C:2004:521, para 24; Joined Cases C-128 & 129/03, AEM, EU:C:2005:224, para 38; Case C-522/13, *Navantia*, EU:C:2014:2262, paras. 22–23.

163. See Case C-690/13, *Eurobank*, EU:C:2015:235.

expand and also cover more broadly "regulatory advantages"? Articles 107 et seq. TFEU could, then, assume a function similar to that played by national rules on "fair competition".

5. The providers of the underlying service

The providers of the underlying service offer collaborative services occasionally, in their spare time, on top of their main employment (or unemployment benefit).[164] Hence, in most cases the collaborative activity does not become the main "trade, business, craft of profession" of the individuals concerned. This could be otherwise if the collaborative activity comes within the broader professional activity of the person concerned, in which case it could be said that it constitutes a diversified expression of the trade etc. already exercised (this would be the case of hoteliers promoting their rooms through *Airbnb*). It should be noted, however, that even though not "traders", most providers of the underlying services would qualify as "service providers" under Article 57 TFEU and the Services Directive. This qualification is given to any natural or legal person who offers any self-employed economic activity, normally provided for remuneration;[165] no requirement of frequency, duration or requirement that the providers act within their trade etc. is to be found in the Directive. Indeed, the ECJ has qualified as service providers anyone from amateur athletes[166] to retired university professors.[167] In view of the very wide concept of remuneration followed by the Court, any activity which has a broadly economic character, even if pursued on a one-off basis by a non-professional, will qualify as a service – and the person providing it a "service provider". Hence, the concept of "service provider" is much wider than that of "trader" under the Consumer Rights and the Unfair Commercial Practices Directives. As the Commission

164. See e.g. the data published in SWD(2016)184 final, cited *supra* note 67, at 37–38, where it is stated that a) income from collaborative activities account for less than quarter of the household income for 39% of participants and for less than half of the household income for another 58% and b) many "participants" never performed a task for the platform they are registered with. Even in the USA, where the collaborative economy is well ahead of that in Europe, only 33% of the participants gain their principal income from the collaborative economy; see De Groen and Maseli, "The impact of the collaborative economy on the labour market", (2016) *CEPS Special Report*, available at <www.ec.europa.eu/DocsRoom/documents/16953/attachments/1/translations>, at 10.

165. Art. 4(2) Services Directive.

166. Joined Cases C-51/96 & 191/97, *Deliège*.

167. Case C-281/06, *Jundt*, EU:C:2007:816.

acknowledges "EU legislation does not establish at what point a peer becomes a professional services provider in the collaborative economy".[168]

This, however, is a core issue, given that the provider's qualification as a trader or as a consumer is crucial for the application of the rules mentioned above. Indeed, if the provider of the underlying service is a trader then the collaborative platform will be in a B2B relation with them and it won't have to comply with the above obligations that only apply to B2P situations.

Inspired from the practice followed in several Member States, the Commission suggests that "thresholds, established in a reasonable way, can be a useful proxy and can help create a clear regulatory framework to the benefit of non-professional providers".[169] The Commission proposes that a combination of the following would be determinant: a) the frequency of the services, i.e. whether the services are offered regularly or on a purely marginal and accessory basis, b) the profit seeking motive, as opposed to the aim of exchanging assets or skills, and even (in a more questionable manner) the fact that they simply obtain cost compensation, c) the level of turnover from the activity concerned, and whether such turnover is higher/lower than that obtained from other activities pursued by the same person (in the sense that if some other activity is more lucrative, this other activity is likely to qualify as the trade etc. of the provider).[170]

5.1. *Rights that service providers may claim*

Service providers will be able to claim market access under the Services Directive along the same terms as platforms. Three points may differ, however, depending on whether the service provider qualifies as a "non-professional" (to use the Commission's terms) or prosumer, or on the contrary as a "professional" (presumably a "trader").

First, service providers who only act occasionally – and not on a professional basis according to the thresholds discussed above – should not be subject to any authorization requirement; or if an authorization were required it should be subject to lighter requirements than the equivalent for "professionals" in order to satisfy the requirement of proportionality.[171] Hence, for instance, people active in the short-term accommodation sector may be subject to the same rules as hoteliers if they rent out their premises in a repeated and systematic manner, but subject to lighter regulation

168. COM(2016)356 final, cited *supra* note 22, at 5.

169. Ibid; it should be assumed that the term "non professional" provider is to be opposed to a "professional" service provider, i.e. a "trader" or, in the most recent texts, a "supplier".

170. COM(2016)356 final, cited *supra* note 22, at 9.

171. See in that sense also SWD(2015)202 final, cited *supra* note 71, at 5.

(concerning e.g. health, safety and security) or no regulation at all if they are occasional flat/couch swappers. The extensive information obligation (*second*)[172] as well as the professional liability insurance (*third*)[173] foreseen by the Services Directive may also prove to be disproportionate where the provider is only a prosumer occasionally offering sharing services.

5.1.1. *Regulated professions: Professional qualifications*

Collaborative economy activities may sometimes fall within a regulated profession. Hence, for instance, the activity of tourist guides is regulated in several countries. Similarly, the provision of financial services and, in some circumstances, financial advice, is also regulated, both at the Member State and the EU level. Other collaborative activities may not directly correspond to a regulated profession as such, but may be in its periphery, such as in the field of healthcare and social assistance. An issue which is as yet unexplored is whether, to what extent and how, service providers should comply with the national requirements on regulated professions.

The starting point should be that regulated professions remain regulated no matter how/how often activities are carried out. Hence, collaborative service providers offering some regulated activity should do so in accordance with the rules applicable within the (host) Member State where the service is provided. Typically even the occasional (or even the one-off) exercise of such a regulated profession is prohibited and may give rise to criminal and/or administrative action against the "counterfeiter". Therefore, in principle, the obligation to comply with the relevant regulations should apply to all those who qualify as service providers, even if they do not qualify as traders or professionals. This, however, may be counter-intuitive for people who are willing to give up some of their time, skills and expertise in order to help their fellow men and women, especially when they do so for no immediate return.[174] Therefore, a question may be raised whether a different, more relaxed, approach should be taken in relation to collaborative services which are offered for free (even if the platform makes money from advertising or else).

For those who act "professionally", a different issue is raised as to how they may make use of their qualifications in order to lawfully offer services in other Member States. Directive 2005/36 contains a Title II on (non-established) occasional service providers who may, in principle, rely on their home qualifications and title, without having to go through the recognition

172. Art. 22 Services Directive.

173. Ibid., Art. 23.

174. In that regard see *JustAnswer*, a collaborative platform connecting experts such as doctors, lawyers, vets, mechanics etc. with people with questions/problems, available at <www.justanswer.com/>.

procedure. Such service providers may not be required to get any authorization or to register with any professional body of the host State; they may be required, however, to inform the competent authority of their presence on the territory. On this occasion they may be required to prove their nationality, the fact that they are legally established in another Member State, their qualifications and other more case-specific issues; exceptionally their qualifications may be checked by the host Member State when they intend to exercise an activity with public health or safety implications.[175] It is clear that these obligations may not apply, as such, to a service provider who does not move to the host Member State but only offers services over the Internet. A good practice, however, could be identified whereby such information is made public by means of the collaborative platform.

5.1.2. *Labour law rights for the participants of the collaborative economy*

The collaborative economy has developed out of private initiative and entrepreneurship. It is appealing because it allows for the use of "spare" capacity in a flexible manner. Hence, "most of the workers in the digital labour market should be considered freelancers, since they make money from labour outside an employee-employer relation".[176] What is more, most of them do not earn the major part of their income from the collaborative economy, and some indeed, do not consider it to be work at all.[177] An attribute of the extreme flexibility, however, is that some collaborative activities do take the shape of an employment relationship. When this is the case, three questions, one directly and two indirectly relevant for EU law, may be raised.

First, it is important to set the criteria which characterize an employment relationship within the collaborative economy in order to know when EU "labour law" rules come into play;[178] this will only happen when someone

175. Directive 2005/36/EC on the recognition of professional qualifications, O.J. 2005, L 255/22, as amended by Directive 2013/55/EC, O.J. 2013, L 354/132, Art. 7.

176. De Groen and Maseli, op. cit. *supra* note 164, at 12.

177. Ibid., at 4.

178. The fact that labour law remains essentially a matter of national regulation should not overshadow the fact that there are EU rules, e.g. on working time (Directive 2003/88/EC), information on individual working conditions (Directive 91/533/EC), posted workers (Directives 96/71/EC, 2014/67/EU and Regulation 883/2004/EC), anti-discrimination for non-standard forms of employment (e.g. part time, fixed term or workers employed under temporary agencies, Directives 97/81/EC, 1990/70/EC and 2008/104/EC resp.), anti-discrimination on grounds of gender, ethnicity, sexual orientation (Directive 2000/78/EC), protection in case of insolvency of employers (Directive2008/94/EC), protection in case of collective redundancies (Directive 98/59/EC), in case of transfer of undertakings (Directive 2001/23/EC) or in case of cross-border mergers (Directive 2005/56/EC).

may be said to be a "worker".[179] The Commission has tried to illustrate the way in which the three criteria set out by the case law and the doctrine – i.e. the existence of subordination, the pursuance of genuine work and the existence of remuneration – apply in the collaborative economy.[180] In respect of the first criterion the Commission distinguishes situations where the platform determines the choice of the activity, remuneration and working conditions from those where it merely processes the payment deposited by the receiver and passes it on to the provider. In relation to the second criterion the Commission distinguishes between effective and genuine work and work which is purely marginal and accessory. Lastly, remuneration is used in order to distinguish work from volunteering.

While the added value of the above criteria is open to discussion, it would seem that of the areas currently developed, urban transport (e.g. *Uber*) is the one most likely to qualify as being based on an employment relationship. Indeed, such platforms not only determine the remuneration of their drivers, but they also tend to propose/impose a territorial focus on the services provided (towards the more densely populated areas), use dynamic pricing and impose other kinds of obligations on the drivers. It is worth noting that in the landmark case of the UK employment court mentioned above,[181] some of the contributing factors which led the national court to qualify *Uber* drivers as employees were a) the fact that *Uber* is not merely a software company, but rather it "sells rides", b) the fact that *Uber* drivers generally do not and cannot negotiate with passengers but instead must strictly follow *Uber's* terms and c) the fact that *Uber* earns its profits through the skilled labour of the drivers.[182] A survey conducted at the end of 2015 showed that out of a total of 600,000 collaborative workers in the USA (0.4% of all US employees) more than 400,000 worked for *Uber*. The numbers for the EU would be much lower, as the number of collaborative workers is estimated to be 100,000 (0.05% of all EU employees) out of which 65,000 work for *Uber*.[183]

A second issue is whether and to what extent nationally negotiated collective agreements and/or statutory minimal wages should/could be applied in collaborative activities. In this respect surveys show that, overall, providers in the collaborative economy receive more per hour for their activities than the average "offline" worker, but work less and, overall, make

179. On working time, see Case C-428/09, *Isère*, EU:C:2010:612; on collective redundancies, see Case C-229/14, *Balkaya*, EU:C:2015:455; and on employment equality, see Case C-432/14, *O*, EU:C:2015:643.

180. COM(2016)356 final, cited *supra* note 22, at 13.

181. See *supra* section 2.2.

182. UK Tribunal, *Aslam, Farrar and Others* v. *Uber*, cited *supra* note 53, paras. 87–97.

183. De Groen and Maseli, op. cit. s*upra* note 164, at 20.

less money.[184] These surveys, however, draw a neat distinction between activities which consist in the virtual (i.e. at a distance) delivery of a service (such as consultation, design etc.) and activities which require physical contact: the former are part of the truly global market and are, thus, subject to fierce price competition from developing countries. Hence, in these areas, EU-level minimum wages would be extremely difficult, if counter-productive, to enforce. Moreover, national authorities trying to enforce minimum wages, where such wages are fixed by the platform and not by the service providers, will face the extra difficulty of locating such platforms, typically established in some other Member State or, also very often, outside the EU.

The above factors raise the further question, third, whether action is needed to protect the traditional economy from similar activities of the collaborative economy.[185] In view of the tiny proportion represented by workers in the collaborative economy as part of the total of European employees (0.05%, see above) and the fact that collaborative economy in Europe is still in its first infancy and needs be encouraged rather than controlled, the answer should, in our view, be negative.

5.2. *Obligations arising for service providers*

5.2.1. *Liability*

Providers of underlying services who qualify as "traders" are subject to the same consumer protection obligations as collaborative platforms who are themselves "traders"; with the difference that they may not claim the applicability of the E-commerce Directive and the exclusion of liability contained therein. Hence, reference is made to the developments above, under section 4.2. Those providers who do not qualify as "traders" but as mere prosumers are not subject to any specific liability regime; they may be held liable on the basis of the general provisions of contractual (or indeed, extra-contractual) liability under the rules of civil law applicable in each Member State.

5.2.2. *Consumer protection*

Again here the question to be answered is whether the provider of the underlying service qualifies as a "trader". In the affirmative, their relationship with the platform is (typically) a B2B and, thus, not subject to any consumer protection legislation. Their relationship with the end users of the service is a

184. Ibid., at 12–14.

185. For a detailed discussion of the questions raised by regulating labour in the sharing economy, see Das Acevedo, "Regulating employment relationships in the sharing economy", 20 *Employee Rights and Employment Policy Journal* (2016), 1–35.

B2P and all the considerations discussed above under 4.2.2. (concerning the collaborative platforms) are also applicable to them. If, on the other hand, they do not qualify as traders, then their relationship with the collaborative platform is a B2P one and they can claim full protection under the rules. Their relation to the users is then a P2P one and subject to the general obligations of diligence stemming from civil law in the Member State concerned.

5.2.3. *Anti-trust*

The general issues raised by the collaborative economy for the application of anti-trust rules, especially in relation to platforms, have been briefly sketched above.[186] Here, we briefly focus on the specific questions relating to the providers of the underlying services who act professionally (i.e. are not prosumers) and qualify, thus, as undertakings.

The collaborative platform through which they get to promote their services in a harmonized manner, under uniform terms and conditions, and through which they compare and fix their prices, may raise suspicions under competition law. For instance, if *Uber* drivers were to qualify as independent contractors (and not workers),[187] would the "Uber pricing algorithm" responsible for the "price surges" for which *Uber* has been criticized, be the instrument of collusion between them?[188] The platform, however, may not qualify as an association of undertakings, since it is connected only contractually with the service providers, it does not promote their interests but its own, and the providers have no say whatsoever in determining the platform's policies and decisions. The recent ECJ judgment in *Treuhand*, however, may be opening up new means by virtue of which platforms may be held accountable for facilitating collusion between individual undertakings.[189]

It would also be difficult to apply competition law to individual service providers, since it can hardly be said that they partake in a concerted practice: a) they do not enter into horizontal contacts with any competitor, but into a vertical one with a (and occasionally several) platform(s) and b) their agreement with the platform is individual and not directly or explicitly connected with those of the other providers. Here, again, the ECJ may be breaking new ground with its recent judgment in *Eturas*: it held that the clients of a platform who learned of and did not act against the application of a

186. See *supra* section 4.2.4.

187. For this dilemma see *supra* section 5.1.2.

188. See on this issue Gata, "The sharing economy, competition and regulation", (2015) *Competition Policy International*, at 4, available at <www.competitionpolicyinternational.com /assets/Europe-Column-November-Full.pdf>.

189. See *supra* note 148 and the corresponding text.

uniform discount decided unilaterally by the platform, could be held liable for collusion.[190]

On a different note, the complete absence of any commonality of interests and any real means of directly coordinating among themselves would mean that the providers could not possibly be found collectively dominant under Article 102 TFEU.

6. The service recipient

Being at the receiving end, both of the electronic service offered by the platform and of the underlying service offered by the service provider (alone or jointly with the platform),[191] these users will typically qualify as "consumers", although it may not be excluded that some of them make use of the platform's services within (i.e. not outside) their own trade etc. For instance, most users of business, financial and work-space collaborative services would probably not qualify as consumers since they are likely to be using those in the course of their own trade. The development of the collaborative economy is likely to set it adrift from its initial "sharing" culture and give rise to more B2B (rather than P2P) transactions. Inversely, the fact that the users of a collaborative platform make their living through some trade activity, does not automatically mean that they enter the specific transaction in this quality. Hence, for instance, a shopkeeper who enters a loan/fundraising agreement with a platform in order to fund a personal project, such as an expensive trip or the acquisition of a holiday house, qualifies as a consumer for the specific transaction.

Those users who do qualify as consumers may claim all the protection offered by the Consumer Rights Directive and the Unfair Consumer Practices Directive as against any party which qualifies as a "trader".

7. Horizontal issues

7.1. *Reasons justifying restrictions on collaborative economy activities*

The collaborative economy is "disruptive" of the way the traditional economy works, impinges upon vested interests, and raises new legal questions. Governments often make the ensuing insecurity even more acute either through new legislation hastily enacted, or through the questionable

190. Case C-74/14, *Eturas and Others,* EU:C:2016:42.
191. See *supra* section 4.

enforcement of existing legislation, wholly inappropriate for the collaborative economy. In so doing, governments claim to pursue the general interest but may, in reality, be pursuing the interests of "incumbent" real economy operators or other ill-intended interests. Hence, it is necessary to look more into detail in the reasons put forward by Member States. In this respect the survey conducted on behalf of the Commission in the area of short-term accommodation is extremely helpful.[192]

The reasons invoked by Member States in order to regulate this area include a) the control of human trafficking and prostitution (Stockholm), b) the protection of privacy and dignity (Brussels), c) the protection of property value and neighbourhood (zoning regulations, Stockholm), d) the fight against housing shortage and rising rents to the detriment of locals (Berlin, Paris, Barcelona), e) the maintenance of a high level of tourist industry and control of excessive tourism (Brussels), f) taxation and revenue, g) securing a level playing field and competition with licensed operators. Similar grounds may be invoked in other activity areas, with personal security of the user, consumer protection, insurance and maintaining a level playing field being the common denominators.

Translated into "eurospeak" most of these grounds either relate directly to the protection of public order, security and health (a, b, c and, even, d, above), or to some overriding reason of general interest (d, e and f, above). Two remarks need be made in this respect. *First*, it is not clear whether the maintenance of a level playing field between different categories of professionals is a valid justification under EU law for imposing restrictions on the economic freedoms. The express Treaty provisions, i.e. public security, order and health, are to be interpreted in a restrictive manner and it would be difficult to see how the interest of "incumbents" in an industry, especially when it is not one of strategic importance (e.g. oil supplies, electronic communications, energy or financial services) could come under this heading. Moreover, according to mainstream jurisprudence, economic grounds do not qualify as overriding reasons of general interest.[193]

Second, Member States may not invoke simply any reason in order to impose restrictions to the activity of collaborative platforms. There is no justification for obstructing the creation of an otherwise lawful e-service provider under the E-commerce Directive; only the express Treaty provisions may be invoked under that Directive against e-operators from other Member

192. See the Impulse papers on housing in a) Stockholm, Budapest and Brussels, b) Barcelona, Berlin and Amsterdam, and c) Paris, Rome, Milan and London, available at <www.ec.europa.eu/growth/single-market/strategy/collaborative-economy_el>.

193. See on this issue the excellent article by Oliver, "When, if ever, can restrictions on free movement be justified on economic grounds?", 2 EL Rev. (2016), 147–175; see also Hatzopoulos, op. cit. *supra* note 99.

States; the three express exceptions, plus the protection of the environment, may be invoked under Article 16 of the Services Directive to block service providers from other Member States.[194] All overriding reasons of general interest may be invoked by governments in order to impose an authorization requirement under the Services Directive or, indeed, under the Treaty rules.

Any restriction, irrespective of the objective it is supposed to pursue, is lawful only to the extent that it is proportionate. While it is not the place here to delve into the "mysteries" of the principle of proportionality and its applications, a particularity specifically applicable in the area of collaborative platforms should be singled out: most platforms have in place a system of peer-evaluation and evaluation of the underlying service and, typically, of their own e-services too. Such evaluations alleviate the information asymmetries existing between the parties and may also serve other general interest objectives. It is true that these evaluations typically concern the "visible" parts of the service (e.g. the aesthetic evaluation of an apartment, the utensils put at the disposition of the users; or the make of the car and the politeness of the driver etc.) and much less the invisible ones (e.g. fire safety, respect of zoning regulations; or the level of security of the car and its insurance coverage etc.). It is also true that the accuracy and validity of such evaluations is strongly disputed.[195] When applying the principle of proportionality, however, the interests already protected through the reviewing system put in place by the platforms should be taken into account.

7.2. *Taxation*

The tax treatment of the activities in the collaborative economy is a highly salient issue. Indeed, as participants do not consider their collaborative economy activities as being "professional" they do not feel compelled to declare any "additional" income thus made. Others, perfectly conceive their activity as economic but decide to take advantage of the existing loopholes in order to avoid tax. Taxation in the collaborative economy is far too technical an issue to be discussed here and merits separate, specialized, studies. Two remarks may, nonetheless, be made.

First,[196] "taxation" covers at least two, and occasionally more, different kinds of taxes, subject to completely different calculation and collection modalities. Income tax is always due, whenever the level of income justifies it, irrespective of the kind and nature of the activity which gave rise to such

194. Although this point is contested, see *supra* note 101.

195. Belk, op. cit. *supra* note 2, at 1598.

196. This point is also clearly made by the Commission in its Agenda for the collaborative economy, cited *supra* note 22.

income; it is a "personal" tax calculated, collected and/or exonerated in respect of the situation of the tax payer. VAT, on the other hand, is due in respect of the activity carried out: if an activity is not commercial – a question which in the collaborative economy needs be considered[197] – VAT is not due. Further, VAT rules may entail wonderful problems where different activities (e.g. e-services and housing) are subject to different VAT levels. Third, some activities, notably short-term accommodation, may give rise to some kind of local/residence tax, typically imposed by the community or local government. This tax may be due irrespective of the (economic or not) nature of the collaborative activity, and irrespective of whether such activity generated any income (e.g. in case of simple house-swapping), and will typically be calculated on the basis of the nights that the guest spent on the spot.

The *second* point which needs be made is that, while for some collaborative activities, especially virtual ones, taxation is a technically difficult issue, for others, especially the ones with physical delivery, and even more so those for which payment is made through the platform, taxation is just a matter of connecting the platform with the tax authority.[198] Currently the most profitable collaborative economy activities are of the second category (accommodation, transportation) and some cities, (such as Amsterdam and Paris), have, indeed, made the move to ask for help from platforms.

7.3. *Collaborative services of general economic interest (SGEI)?*

The present section, and its title, is just a speculation on "the shape of things to come". Indeed, it may sound futuristic at this point in time, but several commentators foresee recourse to collaborative economy services by (local) governments in order to accomplish their social mission towards their populations.[199] Several collaborative activities, from their very "sharing" nature, by being better adapted to the personal needs of both the provider and the recipient and through the interpersonal exchange on which they are based (as opposed to the impersonal contacts with the average public service), are ideally suited to serve solidarity-based needs. They may also entail considerable cost-saving results.

SGEIs could benefit from sharing in at least four ways. *First*, municipalities could share expensive goods with important idle capacity among themselves:

197. See *supra* section 4.

198. This is an oversimplification, but it must be stressed that collaborative platforms may indeed help, rather than deter, tax collection.

199. See e.g. Wosskow, op. cit. *supra* note 102; see also more in detail Rauch and Schleicher, op. cit. *supra* note 2.

examples are excavators, paving machines, road stripping trucks etc.;[200] and they could share with private entities office and school buildings and (sports) facilities outside operating hours. *Second*, public authorities could have recourse to sharing companies in order to face their own needs; car-share membership for public officials is an example already mentioned. *Third*, public authorities could contract out some of the tasks they should be performing for their populations: in Greece hoteliers and individuals have been paid to use some of their spare space to host Syrian asylum seekers.[201] In a more organized manner, San Francisco's Department of Emergency Preparedness works with BayShare, an advocacy group funded by sharing economy firms to deploy privately-owned sharing services in response to citywide crises. "For instance, during a natural disaster, the partnership provides AirBnB listings to house those made homeless, food sharing sites to coordinate charitable food offers, and Lyft cars to transport people away from affected areas, all at lower cost and higher efficiency than operating the same services through government coffers".[202] *Fourth,* sharing firms could provide government with precious data; hence, e.g. *Uber* could provide "huge amount of information about where people want to go and leave and when, which could aid everything from public transportation routing to land use planning".[203]

Contrary to the US, where the culture and public debate on services of general economic interest are limited, the EU has developed over the years a solid intellectual background, an extensive experience and, even, a legal basis (if need be), in order to help Member States accomplish their SGEI missions towards their citizens. It could be then, that the EU is the natural space where the wedding between collaborative economy (still in its infancy) and SGEI provision should materialize. In this respect, the thoughts expressed above in relation to public procurement may constitute a starting point.[204]

8. Conclusion

The development of the collaborative economy offers incredible chances, at macro and micro level. It helps alleviate the effects of high levels of unemployment currently met in Europe. At the same time it raises concerns

200. See e.g. <www.munirent.co/> for equipment and service sharing for public agencies.
201. See e.g. <www.cnn.gr/news/ellada/story/33267/refugees-welcome-h-protovoylia-fil oxenias-ton-prosfygon-sto-spiti-mas>.
202. Rauch and Schleicher, op. cit. *supra* note 2, at 58, note omitted.
203. Ibid.
204. See *supra* section 4.1.3.

about the public order, security and health, the protection of users, unfair commercial practices, tax evasion and more. The EU is seriously lagging behind the US in this world-wide "revolution". Given that the collaborative economy attracts more high-skilled workers, develops more in densely populated areas, and corresponds to a modern post-ownership state of mind, the EU could be an ideal place for the development of the collaborative economy. Compared to the US, however, the EU has one clear disadvantage: regulatory fragmentation. The EU has, inevitably, been caught in the dilemma "regulation vs innovation": while some regulation of the collaborative economy is needed to overcome the "disruption" caused by this new phenomenon, innovation should not be stifled by either outdated regulation or novel excessive regulation. Consistent with its Europe 2020 strategy, the EU has, so far, privileged innovation over regulation, as a step towards a "more competitive, sustainable and inclusive economy".[205]

However, regulation need not necessarily stifle innovation. In particular in relation to the collaborative economy, it has been convincingly argued that regulation may impact on innovation in three distinct ways: a) it may *hinder innovation* by placing excessive burdens on entrepreneurs (e.g. the requirement of licences for prosumers who perform very little or scarce activity in the collaborative economy industries, such as accommodation or urban transportation); b) it may *facilitate* the introduction of innovations in the market, notably by waiving requirements or the observance of standards, granting exemptions, or authorizing companies to develop novel activities and projects on a temporary or permanent basis; and c) it may have *no direct effect* on innovation and only accidentally foster it, since innovation might simply emerge serendipitously.[206]

From the arguments in the present article it becomes plain that the choice of not adopting new regulation in order to tackle a phenomenon as new as this, has a regulatory cost of its own. The EU, so far, has taken a cautious approach and has tried to exploit to the maximum the existing regulatory arsenal. It has tried to boost the effect of such regulation and to make it work for the collaborative economy, in two ways. *First*, it has published a series of documents, prominently its Agenda on the collaborative economy, where it tries to set the criteria for the application of the existing "traditional" economy rules to the collaborative economy. *Second*, it has announced that it will closely monitor Member States in order "to ensure that national law does not

205. See <www.ec.europa.eu/europe2020/europe-2020-in-a-nutshell/priorities/smart-growth/index_en.htm>.

206. Ranchordàs, op. cit. *supra* note 56, at 442.

hinder the development of the collaborative economy in an unjustified manner".[207]

This may be a sensible starting point, although the "reactive" nature of infringement proceedings only allows for case-by-case, belated, solutions to problems which arise by the day. More importantly, the above approach is based on the transposition in the collaborative economy of legal concepts developed in a different framework. Hence, next to the concept of "trader" and the, much wider, one of "service provider", we now come across the concept of "non-professional provider", and concepts which cut across the newly introduced distinction between "platforms offering only e-services" and "platforms involved in/offering (also) the underlying services". The inefficiency of this approach may be aggravated by the fact that national regulators are easier to capture by local "incumbents" and may be more prone to impose disproportionately restrictive measures; the experience of recent regulations in the field of short-term accommodation and transportation confirms this point.[208]

It may be then, that the current approach is just to be taken as the "acknowledgment" from the Commission that the EU is facing this new economic reality. It is supposed to guide Member States, first softly through the guidance it has already issued, then more aggressively through the infringement procedures. By the same token, this approach offers some reflection time to the Commission and to national governments. If, however, the EU is to take a lead in the collaborative economy with a view to reaping all the advantages it may offer, it may be that time is running out and that a more "hands-on" regulatory approach is needed to alleviate legal uncertainty and facilitate the "revolution" happening.

207. COM(2015)550 final, cited *supra* note 21, at 4.
208. See *supra* section 2.

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