

The Consumer Voice in Europe

## COLLABORATIVE ECONOMY

BEUC Position



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## Why it matters to consumers

Many of our daily activities such as getting around by car, renting holiday accommodation or buying food are radically changing. Emerging business models can give consumers access to cheaper, more convenient or targeted goods and services. And they can make consumers' lives easier if they want to offer their own goods and services themselves. But questions emerge such as how existing laws regarding information provision or the liability of each party apply in these new business models. This is why policy makers need to have a close look at this "collaborative economy" to ensure it is delivering for consumers.

### 1. KEY DEMANDS<sup>1</sup>

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Over the past few years a wide range of business models have emerged which have the potential to change our way of consumption. This so-called collaborative economy at the same time offers benefits and poses potential new risks to consumers. There is an urgent need to clarify which rules govern the collaborative economy in Europe, the rights and obligations of each party and in particular the responsibilities that different platforms in different sectors should bear. In a second instance it will be necessary to check whether there is a need for additional regulatory measures.

Policy-makers face the challenge to find the most optimal public policy approach for the collaborative economy. Their objective must be to ensure that consumers buying and prosumers<sup>2</sup> offering products and services are well protected and empowered when they transact via these platforms, whilst at the same time unlocking both the opportunities and the disruptive, pro-competitive effect that many of these platforms create. Sometimes this might require additional regulation, other times not.

#### Action points for policy-makers

1. Define clear criteria to determine when a prosumer becomes a trader in the different sectors of activity within the collaborative economy. These criteria can be based on the frequency of transactions, the number of assets traded, the amount of revenues generated, etc. It would be worth exploring whether such criteria can be set at EU level. Ensure that platform users have easy access to this information through the platform.

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<sup>1</sup> "Our UK member Which? is not signatory to this paper.

<sup>2</sup> Throughout this position paper, we refer to individuals who offer goods and services on collaborative economy platforms as 'prosumers'. Prosumers therefore do not meet the legal requirements to be considered as traders or businesses within the activity undertaken through the collaborative economy platform. By using this term, we do not suggest that a new legal category should be created.

2. Make sure there is a modern policy and legal framework that allows the development of the collaborative economy. Coordination at EU level is essential to allow the use of cross-border collaborative economy services and ensure all users can know their rights and obligations.
3. In the EU, many laws exist which potentially apply to collaborative economy activities. These laws need to be clear and enforceable. In this respect, issuing non-binding guidance will probably not be enough to guarantee a consumer-friendly regulatory framework.
4. Guarantee high standards of consumer protection, making sure that in consumer-to-consumer (C2C) relationships, where relevant, there are still certain safeguards for consumers such as insurance in case something goes wrong.
5. Prosumers who want to trade on the collaborative economy need easy-to-understand rules. This involves clear administrative and fiscal information so they know what they have to comply with.
6. Ensure that platforms comply with the obligations that stem from their concrete role in all the transactions they participate in, where relevant not limited to their intermediating service. Establish an efficient system of sanctions for cases in which rules are not respected.
7. Develop technologically-neutral regulation that can stand the test of time and technological innovation, avoiding over-regulation. .
8. Monitor and measure the social, economic and environmental impact of the collaborative economy and where feasible, take measures to prevent any potential rebound effect that might happen.
9. Ensure access to affordable, high quality internet broadband for all. For platforms that are cross-border and as such require consumers to be mobile, ensure the absence of roaming surcharges.

### **Action points for platforms**

On top of the above demands for direct action by policy-makers, they should also make sure platforms do the following:

1. Create a safe environment for all users of the platform, including identity verification, dispute resolution and redress mechanisms where applicable.
2. Guarantee adequate transparency by providing clear information regarding how the platform offers its intermediary services including ranking and reputation criteria. Clearly disclose information regarding the business model of the platform, particularly about any commissions taken for intermediation and inform about the platform's liability towards users.
3. Inform providers about their obligation to have insurance in place, or provide adequate insurance policies where necessary. For example, transport platforms should make sure drivers offering their services on the platform have appropriate insurance, as a standard car insurance might not cover such activities. Similarly, accommodation platforms should offer providers insurance cover for possible damages to property.

4. Clearly explain the applicable legal regime and criteria used to determine when a prosumer is considered a trader and vice versa, and the legal consequences of each scenario.
5. Ensure users can easily switch out of and into the platform, guaranteeing data portability. In particular, users need to be able to take away their reviews if they wish to, so they can use the reputation they've built up across different platforms. This process has to respect the privacy of both the supplier and the provider of the review.
6. Offer multiple payment methods, including methods of payment that do not come at a cost, such as debit cards. Payment by credit cards should not be the only way.
7. Provide all the relevant information on the points above in the language of the country of operation in a visible and user-friendly manner, not lost in the middle of the terms and conditions.
8. Guarantee that data protection legislation is respected for all users of the platform. In particular, users need to be able to correct and delete information.

## 2. A World of New Opportunities and Challenges

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Today's new collaborative economy initiatives are changing the landscape for the provision of many consumer goods and services, offering new benefits and posing new risks to consumers.

The aim of this position paper is to identify the opportunities for consumers and prosumers, pinpoint the main challenges for consumer protection, and highlight the most immediate actions that policy makers should undertake.

### What does this paper address?

"Collaborative economy" is a loose concept used to describe many different types of initiatives, online platforms and business models. Other concepts such as "sharing economy", "shared economy" or "shared access" are sometimes used as overlapping substitutes. Similarly, "collaborative consumption", "on-demand" or "access economy" are terms used to refer to a subset of the activities that exist under the general umbrella of the collaborative economy.

This position paper addresses issues regarding online platforms that:

- Consumers can use to buy, rent or borrow goods or services from another party via an intermediary platform, whether that other party is a prosumer or a business;
- Prosumers can use to offer their goods or services via the intermediary platform to consumers and businesses.

Considering the lack of general agreement on the concepts and on whether certain business models are part of the collaborative economy or not, this paper does not take a position on the exact definitions of each concept<sup>3</sup>.

The collaborative economy offers numerous opportunities to consumers and prosumers alike, and these opportunities have to be protected and fostered. For example, research undertaken by some of BEUC's member organisations shows that many consumers in Belgium, Spain, Italy and Portugal are highly satisfied with the collaborative economy services<sup>4</sup>.

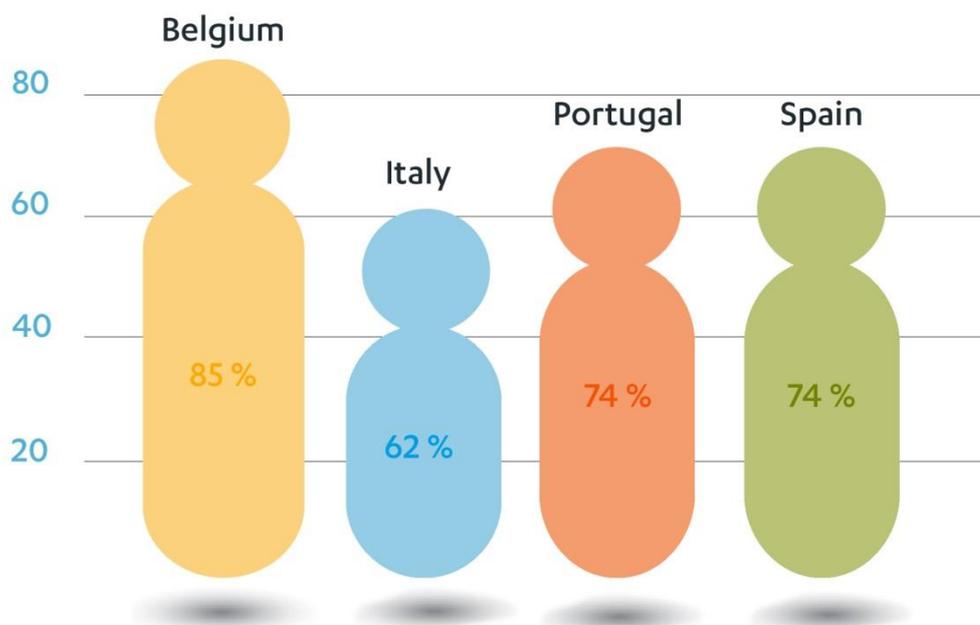
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<sup>3</sup> Crowdfunding and other financial initiatives, a special case: these crowdfunding platforms are part of the collaborative economy, they are handled as a separate line of work because crowdfunding is embedded in the EU financial ecosystem, and it requires a dedicated regulatory approach. Moreover, the European Commission has already started its separate work stream on crowdfunding, establishing an expert group on this topic: [http://ec.europa.eu/finance/general-policy/crowdfunding/index\\_en.htm](http://ec.europa.eu/finance/general-policy/crowdfunding/index_en.htm)

<sup>4</sup> Between 60% and 80% of consumers declared to be 'very satisfied' with their experience with different collaborative economy services - "Collaboration or Business? Collaborative Consumption: From value for users to a society with values", OCU (2016) - <http://bit.ly/1YGG3v7>

## Participation in P2P collaborative economy activities

Figures based on survey where respondents answered the question whether they had “ever” participated in “any” P2P collaborative economy activity, directly or through a website/platform. The total number of respondents was 2420.



At the same time, the collaborative economy poses many challenges that must be overcome for consumers and prosumers to reap its benefits. Some of these challenges exist in similar businesses and existing industries too, and others are exclusive to the newer business models in the collaborative economy.

It is therefore important for policy-makers to stand up to the challenge of regulating for a new era, without impeding the development of the collaborative economy. Innovative business models that can offer benefits to consumers and prosumers should not be blocked or banned. Rather, policy-makers must be agile, constructive and creative in order to ensure consumers and prosumers can benefit from these new initiatives in a safe environment.

### Newer, more efficient markets with innovative forms of consumption

Collaborative economy platforms can create new marketplaces and forms of consumption, based on the exchange of goods and services, not just between companies and consumers, but also between private individuals. Consumers seem to respond positively: in a vast study carried out in Spain, Italy, Belgium and Portugal, 70% of consumers have participated in a collaborative economy activity at least once<sup>5</sup>.

Sometimes collaborative economy platforms can be more efficient than traditional businesses at matching supply with demand. They give consumers and providers of services the possibility of matching supply and demand in real-time. Importantly, they

<sup>5</sup> “Collaboration or Business? Collaborative Consumption: From value for users to a society with values”, OCU (2016) - <http://bit.ly/1YGG3v7>

can allow individuals to use assets such as an apartment or a car to generate new sources of income, which in turn helps them reduce the costs of ownership of that same asset.<sup>6</sup>

Platforms generally aim to cut transaction costs for all parties involved, i.e. they make it easier for both suppliers and consumers to buy and sell from each other. Collaborative economy platforms can also help market participants overcome problems associated with asymmetric information by, for instance, introducing reputation and review systems that allow parties to generate trust in each other. They can also allow consumers to find nearby services and products which otherwise would have not been possible to find using traditional means and traders.

On the other hand, the transparency of platforms is essential for consumers. Platforms must be transparent about their business model, how they are financed, the liability they carry depending on their role in each of the services provided, etc.

Many platforms deal with the payment between users (often adding commissions along the way), which means that the two peers do not need to exchange money, easing the transaction when they meet.

### **Lower prices, lower entry barriers**

When accessing services and goods via the collaborative economy, consumers can sometimes find lower prices than they would otherwise pay for via traditional providers. Research suggests that the most common motivator for consumers to go to collaborative economy platforms is to save money<sup>7</sup>.

Entry barriers into certain markets are lowered for prosumers, as it is very simple to join and leave collaborative economy platforms. Provided they meet the platform's requirements, any individual with an asset such as an apartment, a tool or a car, can potentially join a platform, sometimes for free, other times at low cost, and generate additional income.

On the other hand, other undesired effects can happen, such as the creation or worsening of access barriers to other markets. For example, some argue<sup>8</sup> that accommodation platforms such as Airbnb have caused an increase in traditional rental prices in some cities, making it more difficult for consumers to find long-term rentals at affordable prices.

Another access barrier that may exist relates to language, as some collaborative economy platforms are not available in the local language/s of a market they enter.

### **The promise of a more sustainable economy**

Against the challenge of building more economically and environmentally sustainable societies, some collaborative economy platforms offer promising incremental improvements to our existing production and consumption models. In this regard, many argue that collaborative economy business models, for example those offering ride-sharing services, allow a more efficient use and allocation of goods and services and

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<sup>6</sup> "The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets", Pricewaterhouse Cooper Luxembourg for the European Commission, 2013.

<sup>7</sup> "Collaboration or Business? Collaborative Consumption: From value for users to a society with values", OCU (2016) - <http://bit.ly/1YGG3v7>

<sup>8</sup> <http://therealdeal.com/2015/10/14/how-much-does-airbnb-impact-nyc-rents/>

lower consumption levels of energy and materials, thus offering solutions to our otherwise inefficient consumption model.<sup>9</sup>

For example, some collaborative economy platforms claim their business model promotes longer life cycles of products and waste reduction by encouraging repair and reuse of products. They can also promote consumer demand for more durable products as goods with a longer lifetime and resistance to intensive use can make products suitable for sharing between multiple users. In this context, the leasing of products becomes more common.

These potential benefits will largely depend on the existence or lack of rebound effects, for example on whether lower access barriers to accommodation or transport services will encourage even more consumers to travel. Understanding and preventing or correcting such rebound effects is a major challenge for policy-makers.

A particular case in point is car-sharing, with well-known platforms in Europe such as Cambio and Car2Go. An increasing use of car-sharing could reduce the total amount of owned cars, which would in turn have the positive effect of reducing the amount of cars on the roads. Conversely, it has also been found that "50% of new car-sharing members that join to get access to a car did not already have access to a car"<sup>10</sup>, which means that car-sharing could have the undesired effect of incentivising even more consumers towards using a private car instead of public transport, a development that could lead to an increase in air pollution and carbon emissions.

It is nonetheless important to consider that the assumed sustainability promise is not always accurate. For example, ride-sharing company Lyft has acknowledged that its service does not contribute to reducing the total number of private cars or the total distance travelled because the company competes mainly with taxis, and not with private cars. It is therefore important for policy-makers to avoid that companies engage in *share-washing*, that is, that they do not mislead consumers into believing that the use of certain platforms has specific benefits which they do not generally have

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<sup>9</sup> Harald Heinrichs, "Sharing Economy: A Potential New Pathway to Sustainability", GAIA 22(4):228-231

<sup>10</sup> Joe Peach, "Why the Sharing Economy is a Big Opportunity for Cities," *Sustainable Cities Collective*

## Disruptive competition and innovation

An important potential benefit of collaborative economy platforms is that they sometimes disrupt traditional industries and markets, putting pressure on incumbent actors. Due to increased competitive pressure, some companies will adapt and consumers both inside and outside the collaborative economy may consequently benefit from more affordable, better quality of products and services. For example, studies on the impact of Airbnb suggest that “hotels have responded by reducing prices, an impact that benefits all consumers, not just participants in the collaborative economy”<sup>11</sup>.

A widespread criticism against some popular collaborative economy platforms is that they pose unfair competition to established businesses that provide similar goods or services, partly because they are not subject to the same rules. The most common examples are Airbnb and Uber, which compete against the traditional accommodation and taxi/private transport industries, without necessarily having to abide by the same rules and regulations as the traditional industries.

Collaborative economy platforms can also be disruptive in other adjacent markets. Many of the platforms offer related value-added services such as insurance, travel guides, booking systems, and so on. For example, in several EU countries Uber offers grocery and food delivery services.

## Impact on local communities

Many collaborative economy platforms are local in nature. They allow neighbours from a given area or city to cook for each other, provide home tasks, or lend home tools. Some platforms can help build new connections between neighbours in local communities.<sup>12</sup>

Platforms can also have a potential negative impact on local communities. For example, Airbnb has been criticised in some cities because its travellers can disturb local residents in the same building or in the neighbourhood. Families and individuals with a limited income could face problems to find available affordable living space in city centres as the supply of rental accommodation on offer diminishes because it becomes more profitable for many owners to rent out rooms short term via accommodation platforms rather than as long term rentals to local residents. For example, local associations of neighbours in popular neighbourhoods of Barcelona have strongly protested against the undesired impact of short-term holiday rental platforms.<sup>13</sup>

## Protecting consumer’s privacy is ever more important

Much of the Internet’s economy is based on a model where large advertising networks track consumers’ behaviour as they visit webs and use services. The data collected feeds user profiles that these networks keep on consumers, and can then be sold or traded with other networks or third parties.

By capturing more data about consumers’ behaviour both on and offline, collaborative economy platforms could risk worsening the problems associated with online tracking<sup>14</sup>.

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<sup>11</sup> Zervas, G, Proserop, D., Byers, J.W. (2014) The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry. Boston university School of Management Research paper Series 2013-16.

<sup>12</sup> “The Sharing Economy: Accessibility Based Business Models for Peer-to-Peer Markets”, PriceWaterhouse Cooper Luxembourg for the European Commission, 2013.

<sup>13</sup> [www.expansion.com/catalunya/2015/09/04/55e9e731e2704e1d038b4594.html](http://www.expansion.com/catalunya/2015/09/04/55e9e731e2704e1d038b4594.html)

<sup>14</sup> For example, the Electronic Privacy Information Center has filed a complaint before the Federal Trade Commission regarding Uber’s plans to track users and gather contact list data: <https://epic.org/2015/06/epic-files-ftc-complaint-again.html>

For example, many platforms base their services on the customer's location. Access to this kind of sensitive data without the user's knowledge and consent raises serious concerns, and there have been examples of apps that track a user's location even when the app is closed<sup>15</sup>.

Many collaborative economy platforms put in place reputation systems which encourage users to provide more data about themselves. As more personal data is added to the profile of the platform users, their reputation and visibility on the platform improve. This type of organisational model for platforms allows them to the amount of personal data collected.

### **Switching within the collaborative economy**

For consumers to reap the benefits of the collaborative economy it is important that their right to data portability is guaranteed where technically feasible. Portability is a key element to avoid consumer 'lock-ins', to foster competition, and therefore an essential part of consumer empowerment.

Where possible and technically feasible, users should be able to easily take their pictures, reviews and other data with them if they decide to switch platforms. The recently adopted EU General Data Protection Regulation foresees the right for all consumers to get a copy of their data in a format that is usable to port it to another provider, and where technically feasible this porting could happen automatically. These new rules are applicable as of 2018, but collaborative economy platforms should ensure that some degree of portability is available as of now, without waiting for the new rules to kick in.

It should be easy for users to own the reputation they have built for themselves by having the possibility to switch platforms easily and being able to port the necessary data to port that reputation. Platforms such as Traity.com have emerged to address this problem. The switching process should always happen while respecting the privacy rights of all users that have contributed to building the reputation of the user that is switching platforms.

### **The age of user reviews: new communities, new challenges**

Collaborative economy platforms often aim to build decentralised community models based on user reviews. They establish reputational models based on peer-to-peer reviews that seek to facilitate transactions between the users of the platform by potentially generating larger amounts of consumer trust. The success of the user review model, its governance, transparency and reliability, can become a determining factor in the success of the platform itself and its business model. With the rise of the collaborative economy, the issue of fake or misleading reviews can become an ever growing problem.

Although platforms are not necessarily liable for the content of the review, they are still responsible for their review system, and should therefore be transparent about how it functions.<sup>16</sup> Importantly, platforms should take steps to avoid fake reviews. Platforms should exercise reasonable and proportionate technical verifications of the genuine

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<sup>15</sup> <http://uk.businessinsider.com/uber-soon-able-to-track-your-location-even-when-app-is-closed-and-gps-turned-off-2015-6?r=US&IR=T>

<sup>16</sup> Regarding the transparency of review systems, linked to the European Commission's work on Comparison Tools, a study carried out by RPA (Risk and Policy Analysis) with regards reviews in hotels identified some of the measures which could be generally applied by reviews-based platforms that would address some of the highlighted concerns.

nature of reviews, and be transparent about the verification mechanisms and criteria put in place to assess the reliability and veracity of the reviews. However, it is also important that the verification process is not too cumbersome on users that provide reviews as this could discourage them from doing so.

If reputation really becomes the currency of the collaborative economy, some problematic issues for consumers might arise. Within platforms that rely strongly on their review system, consumers could find themselves in a position where they have to unreasonably work on their online reputation or image in order to be able to access the platform's marketplace. Another downside could be that those consumers who not participate in the platforms so much will be increasingly left out, creating or worsening a digital and social divide.

When reviews are mixed with advertising or with sponsored reviews, these adverts or paid-for reviews should be clearly identifiable. It may be worthwhile considering whether the platform could enable users to be able to tag a review as being an "on-behalf-of-trader" review. Regarding reviews posted by companies that are presented as consumer experiences (i.e. reflect the opinion of the real consumers), we are concerned that this genuineness cannot be fully guaranteed. Whether it is via a user (trader) on the platform, or the platform itself, representing a consumer, there is no ultimate way to ensure that the review genuinely represents the opinion of the consumer it claims to represent.

### **Network effects can lead platforms towards monopolies**

As platforms succeed in becoming popular with one of the sides of the market, for example with providers, the other side (consumers) increasingly gets incentives to join the platform, in turn increasing the incentive for more providers to join. Reaching a critical mass of both types of users on the platform is one of the main criteria for its initial success. But the network effect can lead successful platforms to grow rapidly, gain significant market shares, and potentially make it difficult for competitors and newcomers to succeed.

The network effect allows platforms to gather vast amounts of consumer data, which is often personal data, an asset that then becomes very valuable from a competition perspective. Combined with the importance of user review systems, the data that platforms collect can easily turn into a tool that can be used to lock consumers into the platform, reducing consumer's willingness or ability to switch platforms.

### **A different impact with different types of consumers**

As the new collaborative economy platforms make use of web 2.0 and mobile technology to disrupt traditional markets or offer new opportunities to consumers, a logical consequence is that those consumers without internet access or access to a smartphone or tablet will be left out.

Many collaborative economy platforms require that payments be done with credit cards, therefore excluding all those consumers who do not have access to such payment methods. It is therefore important to allow consumers to use free means of payment such as debit cards to participate in the collaborative economy.<sup>17</sup>

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<sup>17</sup> Airi Lampinen et al, Stockholm University, "The Role of Money and Reputation in the Sharing Economy"

### 3. A complex legal environment

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The main challenge regarding these new business models and forms of consumption is to first assess the legal and regulatory framework applicable to these transactions, and second to check whether there is a need for additional regulatory measures. There is an urgent need to clarify which rules govern the collaborative economy in Europe, the rights and obligations of each party and in particular the responsibilities that different platforms in different sectors should bear.

#### Initial Legal Considerations

In a typical collaborative economy business model, there are normally at least two distinct services taking place. It is important to distinguish between the services, the nature of the economic actors and the transactions between them, and importantly, the legal framework(s) that regulate each of those services.

**The first service is provided by the collaborative economy platform itself.** It provides the infrastructure and technical means for the conclusion of a contract between different users. This service will usually be an “information society service” as defined in the E-Commerce Directive.<sup>18</sup> In addition, a commercial platform will also be subject to requirements set out by other EU legislation, in particular information requirements under the Unfair Commercial Practice Directive<sup>19</sup>. Within the range of its economic activities, the platform provider has to provide the material information that consumers need to take an informed decision. Where a contract is concluded between the platform provider and a consumer, the Directives on Consumer Rights<sup>20</sup> and Unfair Contract Terms<sup>21</sup> will apply.

One of the main novelties in the collaborative economy is the existence of a **second service which is normally provided by a prosumer**, although it could also be offered by a trader, a distinction which is of crucial legal importance as explained further below. In many cases, the second service is a service carried out offline, such as the sale of a good, or transport, accommodation, or home assistance service. In other cases, the second service is delivered entirely online, such as a counselling or technical programming service.

Depending on the legal status of the service provider (i.e.: whether it is a trader or not) and on the nature of the second service, different legal regimes will apply. EU consumer protection rules only apply to the legal relationship between traders and consumers. If the service is provided by a prosumer to a consumer, or in other words, there is a consumer-to-consumer (C2C) relationship, these rules do not apply, and the sale of goods or provision of service is regulated by a different framework, often by national civil law.

The chart below lays out the legal framework that would apply to different services according to different possible scenarios. It is not an exhaustive list of potential scenarios, but shows that the applicable legal framework will vary considerably depending on the type of actors involved in the transaction and the nature of the second service.

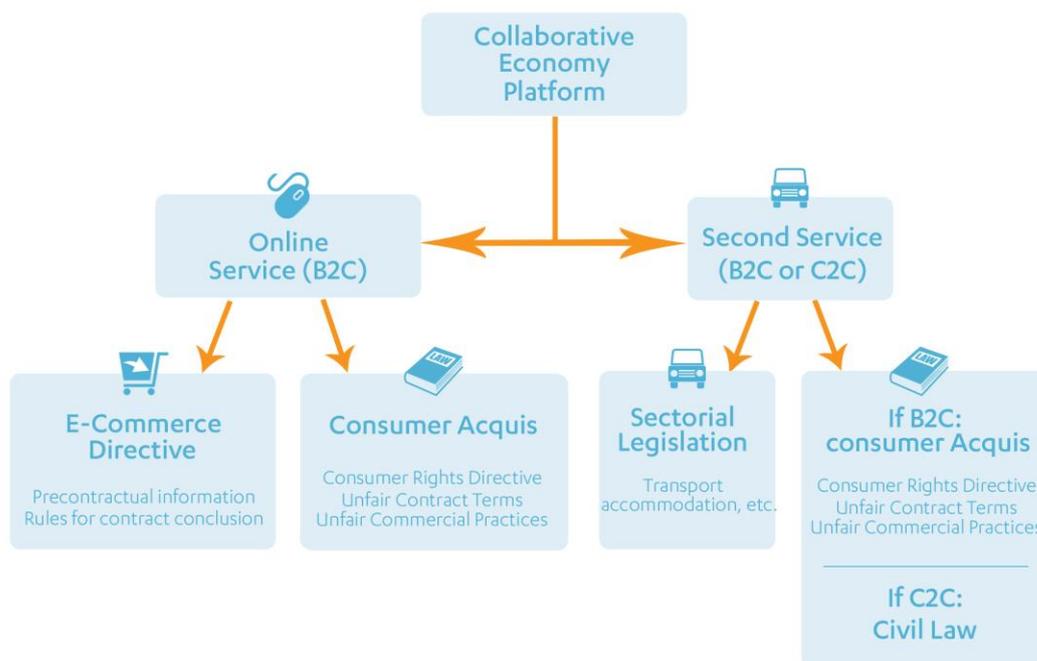
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<sup>18</sup> Directive 2000/31/EC on electronic commerce: “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

<sup>19</sup> Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

<sup>20</sup> Directive 2011/83/EU on consumer rights.

<sup>21</sup> Directive 93/13/EEC on unfair terms in consumer contracts.



Collaborative economy business models can include financial transactions between the parties involved or not. Whether or not these monetary transactions exist between the parties is a very important element to bear in mind when analysing the potential benefits and risks for consumers, and it has important legal consequences.

### All users need clarity about the rules of the game

The complexity of the legal environments in which different collaborative economy activities take place require a thorough analysis, and where insufficient protective measures or regulatory gaps are identified, action must be undertaken.

The first step to ensure that European consumers can fully benefit from the collaborative economy is to undertake a thorough legal analysis and assess how different legal instruments apply or not to different collaborative economy activities. The European Commission's announced analysis of legal instruments such as the Services Directive, the E-Commerce Directive, and consumer protection legislation such as the Consumer Sales Directive, Unfair Commercial Practices Directive, Unfair Contract Terms Directive, and Consumer Rights Directive, is most welcome and necessary.

In its Single Market Strategy<sup>22</sup> launched in October 2015, the European Commission announces the preparation of a "European agenda for the collaborative economy" in 2016, which is to include guidance on how the relevant European legal instruments apply to different collaborative economy activities. The announced agenda will also include an analysis of any regulatory gaps that might exist.

<sup>22</sup> "Upgrading the Single Market: more opportunities for people and business", COM(2015) 550, European Commission, October 2015

Prosumers who want to trade on the collaborative economy need easy-to-understand rules. This involves clear administrative and fiscal information so they know what they have to comply with.

### **Choosing the right policy or legal instrument**

While analysing the legal environment that is applicable to the collaborative economy and providing guidance on the most important Directives is an important first step, we are concerned that non-binding guidance documents will not be the adequate tool to address consumer issues.

It is important to be aware that guidance documents cannot provide a formal interpretation of European law in relation to specific situations, and do not provide legal advice on issues of national law. There is no legal obligation – neither for enforcement bodies or courts nor businesses – to take these guidance documents into account or abide by them when interpreting or enforcing EU law. More efficient regulatory and policy-making tools might be necessary.

### **Trader or prosumer: a crucial distinction**

Different legal regimes are applicable depending on whether the party offering the service or selling the good is a trader or a prosumer. Under EU law, a prosumer is considered as such when he or she acts outside of his/her business or profession. The moment the economic activity becomes a business-model the person stops being considered a non-professional actor.

National legal systems build on this approach and can set certain thresholds based on criteria such as frequency or profit size. For example, in accommodation platforms like AirBnb or HomeAway, users offering their private properties for short rental periods could be considered as businesses if certain conditions are met. These conditions differ from country to country, and might even vary within different regions or cities.<sup>23</sup>

It is of utmost importance that rules determining when a market participant is considered a prosumer or a trader are clear, and clearly disclosed and explained to users by platforms. If the criteria to determine the legal status of each party continue to be defined at national level and remain considerably different, there is a risk that there might be a race to the bottom in terms of protection standards.

Consumer protection law is only applicable to transactions between professionals/traders and consumers. The rationale behind it is to protect the weaker party in a transaction that is considered to be unlevelled because there is an asymmetry of information, experience and/or bargaining power.

On the other hand, C2C transactions are covered by national contract law regimes, where it is assumed that there are no asymmetries in the parties' positions. Yet even in C2C relationships, consumers should not be left unprotected, and there is a need to find a balanced framework. The role of the platform is important in informing the parties that even if the transaction is C2C, rules apply. Certain protective measures, such as insurance, should also be provided where relevant.

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<sup>23</sup> For example, under Austrian law, an individual who rents out 5 or more properties is, as a general rule, considered a professional by the courts. In the UK, the distinction is made with regards to the amount of days per year that a property is rented out.

The problem of uncertainty regarding the legal status of the seller is not only an issue for consumers. Prosumers too may find themselves in problematic situations if they are not aware of their rights and obligations towards the consumer and likewise of their rights and obligations towards the platform. This multi-sided lack of information acts as a disincentive for prosumers and as a source of mistrust for consumers and therefore needs an efficient solution.

### **Transparency as a precondition for consumer trust**

Without sufficient consumer protection and trust, the collaborative economy will not thrive. Collaborative economy business models rely on the parties trusting each other to carry out economic exchanges.

In this regard, platforms should be responsible for providing adequate transparency to all actors. Platforms should comply with information requirements about their own services as well as with their general professional diligence obligations towards consumers regarding information supplied by the third parties that offer services on their platforms. Importantly, this obligation should also apply when the information is supplied by a prosumer.

With regards to the information that collaborative economy platforms should disclose to all participants in its business, this should include:

- Information about the legal status of each party, including a self-declaration by the supplier on whether it is a trader or not, and a simple explanation of the implication of either scenario.
- Information about the internal rules of the platform, such as those related to the review system, the criteria to become a supplier, and information regarding internal conflict resolution and redress mechanisms if they exist.
- Information to users about the criteria used for the inclusion of offers by suppliers, as well as about any controls and checks applied on suppliers.
- Without being forced to disclose any business secrets or algorithms, platforms whose core function is to put in contact sellers/providers with consumers should clearly disclose the nature of the information they are providing and the rationale they apply to rank, display and filter the information and offers they show to the end. Platforms must clearly disclose if certain traders have paid for higher placement or inclusion in the display of search results. In cases where platforms take a commission from the parties involved in the different services, this practice should not influence how the platform provides information to consumers.
- Where relevant, platforms should disclose information on how prices for different services are set and if and how dynamic pricing mechanisms (e.g. Uber's *surge pricing*) are applied.
- Information about the business model of the platform itself, including details about any commission(s) it might take for handling the intermediary service. This is particularly important in situations where platforms are providing services to consumers "free of charge" on the basis of a business model which relies on the monetisation of users' personal data. In such cases, it should be clear for users that this exchange is taking place and that they are indeed paying for the service with their personal data.
- If a user reviews system is included, information about the reliability and verifiability of such reviews, and the measures in place to detect and avoid fake reviews.

- Where an internal conflict resolution and redress mechanism exists, information about how users can use it if problems arise.

A system of efficient sanctions is necessary for cases where platforms do not comply with these transparency obligations.

Some EU Member States have already adopted legislation that regulate certain aspects of collaborative economy platforms. For example, two French laws (one already in place, the other in legislative procedure at the time of publication) address multiple aspects of the collaborative economy, and should be analysed and used as examples. Some provisions in the latest legislative initiative deal with the transparency obligations for platforms in terms of the information they shall provide to their users regarding for example applicable law, referencing system, quality of the user offering the good or service, etc. There are also provisions aimed at regulating peer-to-peer rating systems in order to push for more certification or reliability of the comments published online.

### The potential legal responsibilities of platforms

It is important to analyse responsibilities of platforms with respect to the different services that are present in each type of collaborative economy business model.

- 1. With regards to the online service provided by the platform,** the liability regime for third party content provided by the E-Commerce Directive should be maintained. This regime has encouraged access to information and created the right environment for the proliferation of innovative business models that allow users to generate their content or advertise their products or services freely, a mechanism which has in turn allowed the surge of the collaborative economy. It is nonetheless important to provide clarity as how the ECD and in particular article 14 applies to collaborative economy business models.

Without prejudice do the liability regime under the E-Commerce Directive, legal obligations are set out by the Directives on Unfair Contract Terms, Unfair Commercial Practices, Consumer Rights Directive, or the Sales Directive whose application will depend on the role of the platform (active/passive), on whether the platform provider acts for purposes relating to its business, and whether contracts are concluded between the platform provider and the consumer/prosumer.

Many collaborative economy platforms offer additional services to complement their intermediary role. Such services relate to insurances, travel guides, booking systems, secured payment facilities, identity verification systems, and so on. As direct providers of these services, collaborative economy platforms are directly responsible if something goes wrong. In these cases, national and to a certain extent EU consumer protection legislation applies.

- 2. With regards the second service (transport, accommodation, etc):** the legal regime and the rights and responsibilities of each actor largely depend on the concrete design of the business model behind the service/s offered and the design of the platforms themselves. A crucial distinction is to be made between models where the platform exclusively links sellers of products/services with buyers and models where the platform itself offers or has an important role in the sale or provision of products/services. The distinction between these two general

business models has very important legal consequences for consumers, as it will determine what will be the responsibility of the platform if something goes wrong. Some collaborative economy platforms are not mere intermediaries but have an intricate role to play in the marketing, negotiating, contracting and/or delivery of the second service, and should therefore bear the legal obligations and liabilities associated with that type of activity. Importantly, if the platform is considered the provider of the second service too, it must respect EU consumer law, in particular rules on unfair commercial practices, unfair contract terms, or conformity with the contract. It must also fulfil certain pre-contractual and contractual information duties as provided under EU law for consumer contracts and respect the right of the consumer to withdraw from the contract, where applicable.

Yet some platforms that operate a business model where they are a key player in the marketing, negotiation and delivery of the second service waive all responsibility for the safety, quality and fairness of such service. A good case in point is Uber. Considering that Uber obliges consumers to register on the platform, markets the transport service (calling them "Ubers"), negotiates the terms of service, sets the transport fare based on its own algorithm and handles the payment for both parties, it is clear that Uber is more than a mere intermediary between a driver and a traveller. It therefore becomes evident that Uber carries out commercial transactions and concludes contracts related to the offline transport service.

However, it is unclear whether the consumer concludes the transport contract with Uber, the individual providing the transport service, or both. The wide range of services and the particular position of Uber indicate that Uber is not only the intermediating platform but also the offeror of the service, using drivers to perform its service. In this case, Uber is the other party to the transport contract and would have to compensate the consumer in case the performance of the transport service is not in conformity with the contract<sup>24</sup>.

Examples like the one above show that it has become crucial to analyse the different categories of business models present in the collaborative economy, and what is the real role of the intermediary platform in order to determine its legal obligations and responsibilities with respect to consumers and to prosumers.

### **The importance of enforcement**

Numerous enforcement problems exist with regard to online platforms, including collaborative economy platforms. These problems range from lack of transparency about how some of these platforms operate to legal uncertainty when it comes to the applicability of consumer law, the widespread use of unfair contract terms and privacy-related concerns. Actions carried out by BEUC's members at national level, such as the action undertaken by UFC-Que Choisir in France against Uber<sup>25</sup>, highlight the importance of better enforcing existing legislation, in particular with regards to the most popular platforms.

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<sup>24</sup> This view was confirmed by a court decision issued in California, stating that Uber's drivers are to be considered as employees. Yet, Uber argues that drivers are independent contractors and, in its Terms and Conditions, waives all responsibility for what might happen with the transport service.  
<http://www.wired.com/2015/09/california-uber-loses-another-round-driver-debate/>

<sup>25</sup> <http://www.quechoisir.org/services-vie-sociale/service-au-particulier/services-marchands/communiqu-uber-l-ufc-que-choisir-s-attaque-aux-conditions-contractuelles>

## 4. Conclusions

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Policy-makers must find the optimal policy approach for the collaborative economy to ensure that all users can reap its benefits while being well protected and empowered. Throughout this paper we have identified numerous opportunities and risks that consumers and prosumers face in the collaborative economy. The opportunities need to be fostered and incentivised and the risks need to be mitigated.

The first essential steps must include the action points listed at the beginning of this paper, and which aim to resolve the most pressing challenges that have been identified. Amongst these challenges, it is crucial to ensure more transparency and provide information about the respective rights and obligations of the contracting parties and importantly, of the intermediating platform.

Whether accomplishing the listed actions requires additional legislative initiatives at EU level, soft law mechanisms such as guidance on the enforcement of existing rules, or potentially co-regulatory initiatives is an important element that should be thoroughly analysed.

In some instances, co-regulatory initiatives could be sufficient, depending on the industry sector and the potential role of the involved stakeholders. Co- and self-regulation should only be used on specific issues and under strict conditions, such as: strong independent governance of the self-regulatory scheme, oversight and enforcement across the sector, and the presence of effective sanctions in cases of non-compliance. In addition, these schemes should only be used as a complement to develop existing legislation.

Several Member States have already adopted or have initiated the process to adopt policies, often including legislative measures, to address many of the identified issues in this paper. These should function as a backdrop against which to analyse and put forward forthcoming EU actions.

END



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