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Maurizio Bruglieri *Editor*

Multidisciplinary Design of Sharing Services

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ISSN 2198-7300 ISSN 2198-7319 (electronic)
Research for Development
ISBN 978-3-319-78098-6 ISBN 978-3-319-78099-3 (eBook)
https://doi.org/10.1007/978-3-319-78099-3

Library of Congress Control Number: 2018935843

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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Regulating (and Self-regulating) the Sharing Economy in Europe: An Overview

Guido Smorto

Abstract The article describes the main legal challenges for regulating the sharing (or collaborative) economy in Europe and explains how the existing body of EU law applies to these new business models. In the last part, it makes a few brief comments on the need for future regulation.

1 Defining the Sharing Economy

In recent years, the progression of the sharing economy has been so rapid that it has prevented not only the development of clear rules but even the emergence of a shared terminology. In 2015, the Oxford Dictionary defined it as "an economic system in which goods or services are shared between private individuals, either for free or for a fee, typically by means of the Internet".[1] The European Commission decided to adopt the expression "collaborative economy" to designate those "business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals".[2] In addition, a plethora of other expressions is used in the current discourse as synonyms or with slight changes in meaning: not only sharing or collaborative, but also peer-to-peer (p2p), platform, on-demand or gig economy, and the list could continue.

[1] https://en.oxforddictionaries.com/definition/sharing_economy.

[2] "The term collaborative economy is often used interchangeably with the term 'sharing economy'. Collaborative economy is a rapid evolving phenomenon, and its definition may evolve accordingly". See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A European agenda for the collaborative economy" {SWD(2016) 184 final}, p. 3, ft. 7 (hereinafter referred to as "Communication").

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M. Bruglieri (ed.), *Multidisciplinary Design of Sharing Services*,
Research for Development, https://doi.org/10.1007/978-3-319-78099-3_8

Beyond such discrepancies, these expressions refer to business models that provide services via online platforms enabling transactions between decentralised economic agents, and the related possibility for non-professionals to offer goods and services which, up to a few years ago, used to be delivered entirely by professionals. This new economic environment is leading to a new "crowd-based" mode of production and exchange, in accordance with two key directives—decentralization and de-professionalization.

This paper provides an introductory overview of the main legal challenges for regulating the sharing economy under European Union law. Firstly, it considers the distinction between professional and non-professional provision of services and between service provider and "marketplace". Following, it explains how the existing EU law should be applied to the sharing economy, making reference to EU legislation and case law. Finally, it focuses on the respective roles of regulation and self-regulation.

2 The Need to Regulate the Sharing Economy in Europe

In October 2015, the Single Market Strategy was adopted, through which the EU Commission announced the development of "a European agenda for the sharing economy, including guidance on how existing EU law applies to collaborative economy business models", as part of the Commission's Digital Single Market Strategy.[3] From September 2015 to January 2016, a public consultation was carried out within the Internal Market Strategy for goods and services, with the aim to gather the views of public authorities, entrepreneurs and individuals.[4] In March 2016, a Eurobarometer survey on collaborative platforms was also published.[5] In June 2016, the European Commission published its communication on "A European agenda for the collaborative economy". Finally, in June 2017, the European Parliament adopted a Resolution on the collaborative economy.[6]

What clearly emerges from all these documents is a noteworthy economic potential for the sharing economy. New services are growing rapidly, gaining significant market shares in relevant economic sectors. However, a number of unsolved questions are still on the table. Compared to platforms operating in the USA, European platforms are facing several hindrances to their development. These difficulties can partly be justified by cultural and linguistic differences and unequal

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

[4]Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24/09/2015.

[5]Flash Eurobarometer 438—March 2016. "The use of collaborative platforms".

[6]European Parliament resolution of 15 June 2017 on an European Agenda for the collaborative economy (2017/2003(INI)).

development in different countries.[7] They are also exacerbated, though, by a fragmented regulatory environment and divergent regulatory approaches, both at national and local level. This causes a consequent degree of confusion still surrounding rights and obligations, which deters people from participating in the sharing economy and discourages investments due to the dangers of future legal challenges. Hence—as the Commission concludes—it is crucial to offer legal guidance and policy orientation to public authorities, market operators and interested citizens on how the existing EU law should be applied to the sharing economy.

3 Regulating Peers. The Service Directive

The main challenges for regulating the sharing economy are linked to the wide range of very diverse individuals proposing via online platforms goods and services traditionally offered by professionals. These new opportunities for non-professionals cause the blurring of established lines between consumers and providers, employees and self-employed, the professional and non-professional provision of services (Sundararajan 2016). Therefore, the legislator's ability to lay down distinctive rules for professionals and non-professionals results undermined. Since peers are no longer full-time large-scale professionals, they are unable to support the costs associated with full regulatory compliance, and the rules designed to regulate professionals' sale of goods and provisions of services are inadequate to regulate p2p activities in many highly regulated economic sectors (e.g. hotel regulations for who occasionally rents out a spare guest room).

As always when a massive technological transformation takes place, the bipartisan appeal is to establish fair rules that "level the playing field" and leave the market ruling on winners and losers, in application of the well-known adagio "the State should not be picking winners". But the problematic aspect concerns the actual identification of such rules: the debate revolves around "regulating up versus down deregulating", a drastic revision of the existing rules through a massive deregulation or the application of professional standards to peers (Koopman et al. 2015).

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

Under European Union law, such debate should be viewed in the context of the Treaty on the Functioning of European Union and the Service Directive.[8] The Service Directive establishes that any national measure on market access requirements which prohibits, impedes or renders less attractive EU nationals' exercise of freedom of establishment—guaranteed by the Treaty—must be regarded as a "restriction" within the meaning of Article 49 TFEU.[9] Such restriction is permitted only if it is equally applicable to nationals and non-nationals and justified by a legitimate public interest objective.[10] Furthermore, it must be proportionate to that objective,[11] meaning that any restriction appropriate for ensuring the attainment of

[8]Consolidated version of the Treaty on the Functioning of the European Union (2012) C-326/49, Art. 56 (ex Article 49 TEC) and Art. 49 TFEU (ex Article 43 TEC); Directive 2006/123/EC on services in the internal market ("Services Directive").

[9]Equality of treatment not only forbids overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result. See Case C-330/91 *The Queen v Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-04017. According to the Court's case-law, Art. 56 of TFEU requires not only the elimination of all discrimination on grounds of nationality, against providers of services established in another Member State, but also the abolition of any restriction. This even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State lawfully supplying similar services". See Case C-544/03 Mobistar v Commune de Fléron [2005] I-07723; Joined Cases C-369/96 and C-376/96 Arblade [1999] I-08453; Case C-165/98 Mazzoleni and ISA [2001] I-02189; Case C-49/98 Finalarte [2001] I-00787; Case C-350/07 Kattner Stahlbau [2009] I-01513.

[10]In order to define the legitimate criteria that can be adopted for regulating the provision of p2p services under EU law, it is essential to focus on what amounts to a "justified restriction" of services. As mentioned, such restriction is permitted if it is equally applicable to the national and the non-national, justified by a legitimate public interest objective and proportionate to that objective. Restrictions that are not equally applicable may be saved only by reliance on Treaty exceptions, viz public policy, public security or public health, and only when a genuine and sufficiently serious threat occurs, affecting one of the fundamental interests of society. As regards equally applicable measures, various justifications may be put forward, and the list is not closed. According to Art. 4, par. 8, Services Directive: "'Overriding reasons relating to the public interest means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives".

[11]"National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it": Case C-55/94 *Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano* [1995] I-04165. See also Case C-79/01 *Payroll and Others* [2002] I-08923; Case C-442/02 *Caixa Bank France* [2004] I-08961; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] I-08061.

the objective pursued, should not go beyond what is necessary for that purpose.[12] This call for proportionality of restrictions is of great significance in regulating private individuals that provide services on occasional basis, as it clearly points to distinctive rules for peers and professionals and less restrictive requirements for the latter. As stressed by the Commission, private individuals offering services via sharing platforms on a p2p and occasional basis should not be automatically treated as professionals, since such an extension would produce a disparate impact on the latter. At the same time, while there is a strong need for different rules and lower standards for peers, the Service Directive also urges national authorities to review existing national legislation for professionals, in order to avoid the risk of unfair competition among comparable categories of economic agents.

4 Regulating Platforms. The E-Commerce Directive

A second critical aspect concerns the nature of online platforms that connect peers. The EU Commission affirms that these platforms create an "open marketplace" for the temporary usage of goods or services, and most sharing platforms depict themselves as networks or marketplaces. Defining platforms as marketplaces bears important legal consequences: rules for service providers are dismissed as immaterial, and public authorities are called to enforce regulation only against individual providers. Therefore, only peers are responsible for ensuring safe and reliable services, since platforms are neither part of p2p transactions nor responsible for breach of contract or illegal conducts by the parties.

While at times accurate, describing the sharing platforms as "marketplaces" not always reflects their genuine role, and a closer observation may result in a more changeable scenario. In some cases, platforms offer a truly open infrastructure that facilitates the matching of supply and demand among its users providing ancillary services for the smooth functioning of the market. In others, they maintain a tight control on the transaction, lay down the rules for the exchange, manage and organise the selection of peers and the quality of services, exercise a strict supervision on information and communication flows, and influence or even fix prices. In sum, online platforms differ from each other for the level of control or influence that they exert over peers, and their business models cover a wide spectrum, ranging from marketplaces to hierarchies. Some of them may be regarded as service providers with new employment models (Cherry and Aloisi 2017; De Stefano 2016), others as "digital marketplaces" connecting peers or firm-market hybrids (Sundararajan 2016; Sénéchal 2016). Given the variable features of online sharing platforms, it is essential to develop well-defined principles for a case-by-case

[12]Case C-140/03 Commission v Greece [2005] ECR I-04505. Indeed, the Member States must prove the existence of a link between the national measure and the invoked justification. See Case C-243/01 Gambelli [2003] ECR I-13031.

appraisal on their nature. As a first rule of thumb, when sharing platforms exert a high level of control and influence over peers, they should be regarded as service providers; conversely, when platforms limit their activity to the matching of demand and supply, enabling peers to deliver the underlying services, they should be deemed as intermediaries.[13]

Under European Union law, this dispute should be viewed against the background of the E-Commerce Directive. Platforms may be defined as "marketplaces" when platforms' activity is limited to delivering an "information society service" for remuneration, at a distance, by electronic means and at the individual request of a recipient.[14] In this case, they cannot be subject to prior authorisations or any equivalent requirements for the underlying services, and they benefit from a limited liability regime.[15] On the contrary, when considered as providers, sharing platforms are subject to market access requirements applicable to a relevant sector-specific regulation, including business authorisation and licensing requirements.[16]

Along these lines, the Commission has laid down several factual and legal criteria that can play a role in this ad hoc assessment, based on whether the sharing platforms: (a) set or recommend the final price to be paid; (b) set key contractual terms, other than price; (c) own the key assets used to provide the underlying service.[17] While for the most part, these criteria are effective proxies for the degree of control exerted by the platform on online p2p transactions, in some cases they

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

[14]See Article 2(a) of Directive 2000/31/EC (E-Commerce Directive) and Article 1(1)(b) of Directive 2015/1535. Cf. Communication, p. 5.

[15]See Art. 4(1) of the E-Commerce Directive. Internet intermediary service providers should not be held liable for the content that they transmit, store or host, as long as they act in a strictly passive manner. The Directive distinguishes between: "Mere conduit" service providers (Art. 12), "Caching" providers (Art. 13) and "Hosting providers" (Art. 14).

[16]According to C-324/09 *L'Oréal/eBay* [2011] I-06011, the service provider plays an active role if "it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them".

[17]In addition, other relevant factors are also mentioned by the Communication, based on whether: the collaborative platform bears the costs and assumes all the risks related to the provision of the underlying service; there is an employment relationship between the collaborative platform and the person providing the underlying service. When most criteria are met, there are strong indications that the collaborative platform exercises a significant influence or control over the provider of the underlying service, thus acting as a service provider employing peers to perform the offered services, whereas the contrary is true when a small degree of influence and control are exerted. C-434/15 Press and Information Asociación Profesional Elite Taxi v Uber Systems Spain SL. The European Court of Justice the Court declared that the intermediation service provided by Uber, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as "a service in the field of transport" within the meaning of EU law. Consequently, such a service must be excluded from the scope of the freedom to provide services in general as well as the directive on services in the internal market and the directive on electronic commerce.

may bring about contentious outcomes. A more general question regards the potential tension between liability exemption for a platform's technical, automatic, passive conduct and the goal of encouraging a responsible behaviour aimed at communication.[18] Finally, doubts persist on whether the E-Commerce Directive is the most suitable instrument to assess the nature of the platform and its legal regime, as its application has proved to leave many questions unsolved at national level, providing widely diverging interpretations in different cases and countries. The risk of contradictory interpretations is especially acute for p2p markets, which are not the original target of the Directive, and further considerations are necessary on the opportunity to review this piece of legislation with regard to the new online p2p marketplaces.

5 Protecting Customers. Consumer and Marketing Law

EU consumer and marketing legislation is based on the distinction between "trader" and "consumer", as EU consumer law applies only to those who qualify as "traders" and engage consumers in vis-à-vis "commercial practices."[19] The EU consumer and marketing legislation clearly applies to traditional business-to-consumer transactions, in addition to sector-specific legislation, but its relevance is questionable in the sharing economy. If peers are not professionals and platforms limit their activity to transactional services, thus acting as "information society services", consumer law does not apply to the provision of the underlying service. Hence, a legislation developed in an era of full-time professional service providers in order to keep customers safe is not suited to face the many challenges of the sharing economy. The emergence of a p2p economy may lead to both old and new safety and health concerns, and since these market failures are only partially addressed by private ordering (see *infra*), the need to protect customers in p2p transactions is no less compelling than in b2c ones.

In short, while a lighter regulation may be recommendable for peers and platforms, if neither the platform nor the peer qualifies as "trader" p2p transactions fall outside the scope of consumer legislation, leaving consumers without adequate legal protection. Weighting the two conflicting aspects—having distinctive rules for peers and for marketplaces while at the same time protecting consumers—is one of

[18]Communication, p. 8: "The Commission, at the same time, encourages responsible behaviour by all types of online platforms in the form of voluntary action, for example to help tackle the important issue of fake or misleading reviews. Such voluntary action aimed at increasing trust and offering a more competitive service should not automatically mean that the conduct of the collaborative platform is no longer merely technical, automatic and passive".

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

the most crucial challenges posed by the rise of the sharing economy (Busch et al. 2016; Možina 2016).

6 Fostering Competition. EU Antitrust Policies

At this early stage, the competitive dynamics of the sharing economy are arduous to assess, due to the difficulty to identify stable indicators for market power in fast-growing sectors characterised by frequent market entry and short innovation cycles.[20] Notwithstanding, it may be useful to briefly mention how the sharing economy may impact the structure of the market (Podszun and Kreifels 2016; Lougher and Kalmanowicz 2015).[21]

According to many observers, most online p2p markets bear an ingrained tendency towards monopolies and display an anti-competitive structure, often reduced to a single operator (*winners take all*). The main reason that leads to identify the risk of dominant positions is the occurrence of (indirect) network externalities, so that the increase of participants of a given group rises the value of their participation for the other group of users. This potentially leads to overwhelming difficulties for potential entrants to collect a sufficient amount of initial customers in order to be competitive (Rochet and Tirole 2003; Caillaud and Jullien 2003; Evans 2003). In addition to network effects, the huge amount of data held by platforms can give a very significant competitive advantage to a single operator. Indeed, the higher the number of interactions occurring via the platform, the better the algorithm governing transactions and the mentioned service.[22] In conclusion, the combination of network effects and data gathering may generate significant competitive advantages and lead to the dominant position of a single platform.

[20]On the difficulty to identify stable indicators for market power in these sectors see Commission, 3.10.2014, COMP/M.7217—*Facebook/WhatsApp*, para 99.

[21]See also Autoritat Catalan de la Competència, "P2P Transactions and Competition" [2014]; Federal Trade Commission, "An FTC Staff Report. The Sharing Economy. Issues Facing Platforms, Participants and Regulators" [2016] https://www.ftc.gov/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission.

[22]On the effect of data on competition under EU law, see Google case, http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740. See also Monopolies Commission, "Competition policy: The challenge of digital markets" (2015), Special Report by the Monopolies Commission pursuant to Sect. 44(1)(4) ARC; Autoritat Catalan de la Competència, "The Data-Driven Economy. Challenges for Competition" [2016]; Autorité de la concurrence—Bundeskartellamt, Competition Law and Data (2016). See also Federal Trade Commission, "Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues" [2016].

7 Ex Ante Monitoring Versus Ex Post Enforcement

Online transactions entail a high risk of opportunistic behaviours, since geographical distance, little chance of repeated interactions and trivial exit costs, together with the absence of a framework of agreed rules, potentially amplify information asymmetries, especially for low-value economic transactions. These concerns are further amplified in p2p transactions, where parties do not possess a business reputation.

In the absence of ex post tools to enforce individual rights, ex ante monitoring mechanisms have been created in order to alleviate the lack of trust, to establish credibility and to limit non-performance risks. While not so long ago these systems were extremely expensive—this being so far the limit of these systems especially for low-value transactions (Bernstein 2001; North and Weingast 1990; Kornhauser 1983; Macaulay 1963)—the recent, drastic reduction of transaction costs is spurring an unprecedented diffusion of ex ante control systems (Gillette 2001). Owing to the enormous mass of data available and the reduction of communication costs, we are witnessing the widespread adoption of crowd-based "reputational systems", technologies that enable information about individuals' actions and reputations to circulate efficiently among members of society" for determining individual trustworthiness, facilitating transactions and disseminating relevant information (Rosenberg 2011; Farmer and Glass 2010; Strahilevitz 2008; Moorhouse 2003).

Since a good or bad reputation may result in substantial economic advantages or disadvantages, in some cases a reputational system creates an especially efficient structure of incentives which may play as a central self-regulation tool for markets and social systems, favouring consumers' learned choices (Strahilevitz 2008; Resnick et al. 2002). Moreover, these systems give incentives also for providers to improve the quality and range of services offered and to foster the lowering of prices (Thierer 2014). The threat of "reputational penalties" alters individual behaviours with no need of legal sanctions, without waiting for complex and costly legal systems to intervene. In a word, reputational systems are believed to create what has been defined the "second invisible hand" (Goldman 2011) helping the invisible hand of the market reduce market failures, which traditionally justify external regulation (Thierer et al. 2015a, b; Tabarrok and Cowen 2015; Steckbeck and Boettke 2003).

While it is crucial to recognise the importance of reputational systems in p2p transactions, it is also essential to understand their many limitations. A first constraint of these systems concerns the manipulation of results ("gaming"). The growth of the economic value of reputation also increases incentives to game the systems, thus leading to an overinvestment in reputation with a twofold negative effect: a waste of resources and a decreased informative value of reputation systems. Besides intentional alterations, other potential modifications of the information framework may derive from the diffuse tendency to express an opinion only under given circumstances. Several empirical studies have shown that people are more inclined to give their feedback if they want to report very positive or very negative

facts; contrariwise, they are less motivated to do so when their evaluation falls within the average. This bias may explain the anomalous percentage of high evaluations occurring in many platforms (Dellarocas and Wood 2006). The reliability of information may also be tainted by (explicit or tacit) collusion, by the fear of a negative judgment or by social norms that regulate interpersonal relations, which makes it harder to express negative judgments when a direct contact between the parties occurs, regardless of the actual level of satisfaction (Dellarocas and Wood 2008). In addition, other issues still to be solved range from "reputation milking" for established sellers and "cold start" for new entrants[23] to the disproportionate weight given by users to the most dated opinions compared to the most recent ones (Salganick et al. 2006). And despite many solutions have been suggested and implemented to correct these alterations,[24] there are still many failures of reputational systems to be solved (Slee 2015; Bolton et al. 2013; Farmer 2011; Pasquale 2007, 2008).

8 Self-regulating the Sharing Economy?

The current debate on regulating the sharing economy is deeply intertwined with a growing reflection on the marginalization of public regulators, and the emergence of new sophisticated forms of self-regulation by private entities.[25] Legal rules and centralised instruments of control are being gradually replaced by a diffused monitoring, which is becoming a substitute for the implementation of rights before courts. Accordingly, it is often being argued that the State should foster the spreading of reputational systems and remove the regulatory barriers in order to create an optimal information flow.

The pervasive depiction of platforms as a self-sufficient economic system, with little need for external rules, is usually built on some basic assumptions. The unprecedented amount of data and ratings now available on the Internet provides a complex information framework for ruling the market. Further, platforms not only possess information through which they can regulate the marketplace but they also

[23]See Federal Trade Commission, "An FTC Staff Report. The Sharing Economy. Issues Facing Platforms, Participants and Regulators" [2016] https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf.

[24]Among them, allowing users to express judgements invisible to the other party (the so-called double blind system), giving a different timing to each party or eliminating this possibility for one of the parties (the choice of who is allowed to express an opinion depending on many factors, i.e. if the risk of moral hazard is greater for one of the two categories). In order to curb the risks of gaming, many tools can be employed, such as verification of the personal identity of the "rater" or giving the right to reply. In addition, meta-moderation mechanisms have been developed to verify the reliability of users' ratings and feedbacks and to avoid distortions.

[25]See Federal Trade Commission, "An FTC Staff Report. The Sharing Economy. Issues Facing Platforms, Participants & Regulators".

have a compelling interest to do so. In fact, the quality and the economic success of an online platform deeply intertwined with economic transactions take place through the platform. Since facilitating safe transactions among peers is the aim of p2p platforms, their interest is typically aligned with the societal one.

In sum, platforms have an interest in regulating p2p transactions and they have all the instruments to do so. This produces a strong argument for reconsidering the scope of regulation, making the role of public intervention more and more marginal. In addition, other familiar justifications in favour of self-regulation are usually raised. Legislators—it is often observed—cannot follow the pace of technology, running the risk to provide solutions fatally doomed to a rapid obsolescence (Bennett Moses 2013; Brownsword and Somsen 2009; Hadfield 2008). Moreover, legislators are exposed to the risk of being "captured" by the very same targets of their regulations, established interest groups whose aim is to obtain more favourable rules for themselves, such as barriers to entry and other protectionist measures (Botsman 2014; Peltzman 1976; Krueger 1974; Stigler 1971; Olson 1965). Following this line of reasoning, the widespread conclusion is that these marketplaces may be self-regulated, leaving to platforms the task to make the market safe or delegating regulation to self-regulatory organizations (Cohen and Sundararajan 2015).

However, there is still much information that users are not able to verify and that reputation systems are not able to convey. Neither individual consumers nor crowd-based reputational systems may be able to check compliance with certain standards, especially for qualities that are difficult for users to detect. Besides, the quality of reputational systems is not only a matter of conveying accurate information: in some cases, platforms may have no interest to disclose specific information, for instance because potentially harmful to their own reputation. Further, they may have no reason to correct externalities and to take into full account the negative effects of the transactions with respect to parties not involved in the platform, leading to an oversupply. In many cases platforms make frequent use of boilerplate, architecture and algorithms to leverage their power over users—whether customers or providers—and it is still not clear to what extent effective market-based solutions are emerging to tackle these issues (Smorto 2018). For these reasons, a well-functioning reputation system can surely complement more traditional forms of regulation, but it is also important to identify which issues platforms are unable or have no interest to address and when external rules are still necessary.

The need of regulation is further reinforced when taking into account other goals, in addition to the correction of market failures and efficiency concerns. So far, the economic and social impact of the sharing economy has not been explored enough and evidence is mixed. Some studies conclude that p2p activities potentially benefit the below-median-income part of the population, more than the above-median-income one, and that sharing firms can be used as means to redistribute income. The explanation for such conclusion lies in the fact that these firms offer non-owners the opportunity to affordably access goods and services, thus avoiding the need to buy capital goods and making the ownership of these goods less compelling. Further, they provide the opportunity for economically distressed

owners to offset purchase costs by allowing goods to be shared and borrowed in new ways (Fraiberger and Sundararajan 2015; Dillahunt and Malone 2015). Other analyses point to the opposite direction, as they emphasise that the sharing economy has a disparate impact on race and gender and leads to the risk of a potential technological hurdle that may impede or deter access to a significant part of the population. Said analyses highlight that many sharing services are often unavailable to poor areas, people with disabilities and underserved communities (Schor 2017; Schoenbaum 2016; Smorto, 2016; Reich 2015; Edelman and Luca 2014).

Other-related matters potentially relevant for legislators concern "commodification" and "surge pricing" mechanisms. Thanks to lower transaction costs and the possibility to coordinate peers, the sharing economy is giving rise to the commodification of goods and services that were not exchanged on the market until the recent past (housing affordability and gentrification are crucial issues in this regard, as the rising short-term rentals are diminishing the availability of long-term rental houses in many urban areas, especially affordable ones). In sharp contrast with many regulated industries, sharing firms adjust prices for their services according to market fluctuations, so they allegedly help to match supply and demand. Despite these measures have been radically limited by companies as they have proved to be highly unpopular,[26] they are still at the very centre of the price mechanism of the sharing economy.

9 Strict Rules and Principles

In order to regulate the sharing economy, it is necessary to make a first choice between strict rules and principles or, more likely, a combination of the two. In some instances, minimum standards may be the most appropriate solution, ensuring legal certainty to economic agents. In contrast, a principled and flexible approach can be better suited in other circumstances.

A strict rule is preferable for establishing the scope of application of professional rules versus new rules in the sharing economy and for defining the non-professional status of peers operating through platforms. As pointed out by the Commission, establishing thresholds under which an economic activity would be considered non-professional may be a suitable way forward. These thresholds can be either general (e.g. income) or sector-specific (e.g. number of days in short-term accommodation). Even if the many peculiarities of service providers may be better described as a spectrum from professional to amateur, rather than as a sharp polarisation between two distinct categories, fixing a threshold to distinguish the

[26]Uber triggers protest for collecting fares during taxi strike against refugee ban", Washington Post, 17.1.2017 https://www.washingtonpost.com/news/dr-gridlock/wp/2017/01/29/uber-triggers-protest-for-not-supporting-taxi-strike-against-refugee-ban/?utm_term=.4951bf15112b.

two spheres is strongly preferable in order to define clear-cut criteria easy to be interpreted and implemented both by public authorities and platforms.[27]

On the other hand, principles may be better suited to address safety concerns and consumer protection issues. Assuming that there is no "one size fits all" measure to regulate such a heterogeneous spectrum, a general principle establishing that regulation should be "proportionate to the scale of operation" can offer the flexibility to address a novel and elusive phenomenon. In adopting such principle, legislation may oblige peers to use their judgment to assess the risk of their own activity and determine what precautions are reasonably practicable and appropriate in the light of particular circumstances. Public authorities should act consistently when responding to suspected breaches, thus choosing the most appropriate action to undertake in the light of the particular circumstances (Smorto 2017).

10 Concluding Remarks

The traditional rules laid down for the provision of professional services in some cases may result too burdensome and thus inadequate to regulate the peers' supply of goods and services. At the same time, though, the absence of legal rules for p2p services raises a manifest problem concerning users' protection, exposing customers to a number of risks, and may generate negative externalities. Moreover, the need of external regulation is further reinforced if other goals are taken into account besides protecting consumers and correcting market failures, namely distributive effects and value orientation.

To tackle these issues—while encouraging the flourishing of p2p activities—a multifaceted strategy is desirable. A first step is leveraging intermediaries' self-governing and enforcing capacity.[28] But this assumption does not imply that public regulators should refrain from defining rules for the sharing economy. Quite the opposite, many market failures cannot realistically be solved through self-governing tools. Platforms may have no interest to disclose information in their possession and may be induced not to take into full account the negative effects of their activities. For these reasons, a significant part of the regulatory process is still up to public regulators, especially for those critical aspects that platforms cannot

[27]Member States can use different standards to differentiate between professionals and p2p services, referring to circumstances that point toward one direction or the opposite, such as the frequency of services, the level of turnover and motivations. The greater the frequency of the service provision, and the higher the turnover generated by the service provider, the more evident it is that the provider may qualify as a professional. This is especially the case when the service is provided for remuneration. See Communication, p. 9.

[28]In tackling this aspect, public authorities should consider platforms not only as rulers but also as enforcers, making use of their self-enforcing capacity and urging them to enforce legal rules, without necessarily having to rely on peers' compliance. Cf. "Airbnb to Enforce Limits on Rentals in London, Amsterdam", 1.12.2016, https://www.wsj.com/articles/airbnb-agrees-to-enforce-amsterdam-limit-on-rentals-1480580233.

work out and/or has no interest to address. This conclusion holds both for efficiency reasons—i.e. market failures that platforms cannot solve and have no interest to solve—and, even more important, for other critical social goals.

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