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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}

1. Introduction

The collaborative economy creates new opportunities for consumers and entrepreneurs. The Commission considers that it can therefore make an important contribution to jobs and growth in the European Union, if encouraged and developed in a responsible manner. Driven by innovation, new business models have a significant potential to contribute to competitiveness and growth. The success of collaborative platforms are at times challenging for existing market operators and practices, but by enabling individual citizens to offer services, they also promote new employment opportunities, flexible working arrangements and new sources of income. For consumers, the collaborative economy can provide benefits through new services, an extended supply, and lower prices. It can also encourage more asset-sharing and more efficient use of resources, which can contribute to the EU's sustainability agenda and to the transition to the circular economy.

At the same time, the collaborative economy often raises issues with regard to the application of existing legal frameworks, blurring established lines between consumer and provider, employee and self-employed, or the professional and non-professional provision of services. This can result in uncertainty over applicable rules, especially when combined with regulatory fragmentation stemming from divergent regulatory approaches at national or local level. This hampers the development of the collaborative economy in Europe and prevents its benefits to materialise fully. At the same time, there is a risk that regulatory grey zones are exploited to circumvent rules designed to preserve the public interest.

The collaborative economy is small but growing rapidly, gaining important market shares in some sectors. Gross revenue in the EU from collaborative platforms and providers was estimated to be EUR 28 billion in 2015. Revenues in the EU in five key sectors almost doubled compared with the previous year and are set to continue expanding robustly.[1] Growth has been strong since 2013 and accelerated in 2015 as large platforms invested significantly in expanding their European operations. Going forward, some experts estimate that the collaborative economy could add EUR 160-572 billion to the EU economy. Therefore there is a high potential for new businesses to capture these fast growing markets.[2] Consumer interest is indeed strong, as confirmed by a public consultation and a Eurobarometer poll.[3]

This Communication aims at helping to reap these benefits and to address concerns over the uncertainty about rights and obligations of those taking part in the collaborative economy. It provides legal guidance and policy orientation[4] to public authorities, market operators and interested citizens for the balanced and sustainable development of the collaborative economy, as announced in the single market strategy.[5] This non-binding guidance on how existing EU law should be applied to the collaborative economy covers key issues faced by market operators and public authorities alike.[6] It is without prejudice to initiatives that the

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1 It is estimated that collaborative platforms operating in five key sectors of the collaborative economy generated revenues of EUR 3.6 bn in 2015 in the EU: accommodation (short-term letting); passenger transport; household services; professional and technical services, and collaborative finance. All figures are based on estimates of PwC Consulting as part of a study contracted by the European Commission.

2 EPRS: The cost of non-Europe in the Sharing Economy. January 2016.

3 A Eurobarometer opinion poll found that 52 % of EU citizens are aware of the services offered by the collaborative economy and 17 % have used such services at least once. A presentation of the results of the Eurobarometer poll and the public consultation carried out from September 2015 to January 2016 can be found in the accompanying Staff Working Document.

4 Issues related to crowdfunding activities (addressed by the Commission's Communication COM/2014/0172) and services provided by learning platforms are not covered by this Communication.

5 COM(2015) 550.

6 The guidance provided in this Communication focuses on economic activities. Collaborative economy services can be offered for free, on a cost-sharing basis or against remuneration. For many Member States, pure cost-sharing activities

Commission may take in this area in the future and to the prerogatives of the Court of Justice as regards the interpretation of EU law.

What is the collaborative economy?

For the purposes of this Communication, the term "collaborative economy"[7] refers to business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals. The collaborative economy involves three categories of actors: (i) service providers who share assets, resources, time and/or skills — these can be private individuals offering services on an occasional basis ('peers') or service providers acting in their professional capacity ("professional services providers"); (ii) users of these; and (iii) intermediaries that connect — via an online platform — providers with users and that facilitate transactions between them ('collaborative platforms'). Collaborative economy transactions generally do not involve a change of ownership and can be carried out for profit or not-for-profit. [8]

2. Key issues

2.1. Market access requirements

As well as creating new markets and expanding existing ones, collaborative economy businesses enter markets so far served by traditional service providers. A key question for authorities and market operators alike is whether and if so to what extent, under existing EU law, collaborative platforms and service providers can be subject to market access requirements. These can include business authorisations, licensing obligations, or minimum quality standard requirements (e.g. the size of rooms or the type of cars, insurance or deposit obligations etc.). Under EU law, such requirements need to be justified and proportionate, taking account of the specificities of the business model and innovative services concerned, while not favouring one business model over the other.

Professional provision of services

National regulatory approaches differ in various sectors, some being more restrictive than others. Depending on the type of service, regulatory intervention is usually motivated by reference to varying public interest objectives: protection of tourists; ensuring public safety; combating tax evasion; maintaining a level playing field; safeguarding public health and food safety; remedying scarcity of affordable housing for citizens, etc. In some Member States, in addition to existing sector-specific regulation, there have been targeted regulatory interventions, spurred by the entry into the market of collaborative economy operators.

Under EU law, in particular the fundamental freedoms of the Treaty and the Services Directive,[9] service providers are not to be subject to market access or other requirements, such

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or transactions making services available as part of an exchange, do not involve remuneration. Only remunerated activities constitute an economic activity under EU law. See Case C-281/06 Jundt [2007] ECR I- I-12231 §32, 33. Importantly, even if the transaction between a service provider and a user does not constitute an economic activity, this may still be the case for their respective relationship with the collaborative economy platform. Each relationship (platform-user; platform-service provider; service provider-user) must be assessed separately.

7 The term collaborative economy is often interchangeably used with the term 'sharing economy'. Collaborative economy is a rapid evolving phenomenon and its definition may evolve accordingly.

8 Collaborative economy services may involve some transfer of ownership of intellectual property.

9 See Article 9 and 16 of Directive 2006/123/EC ('the Services Directive') and Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU).

as authorisation schemes and licensing requirements, unless they are non-discriminatory, necessary to attain a clearly identified public interest objective[10] and proportionate to achieving this interest (i.e. imposing no more requirements than strictly needed).[11] This also applies to the regulation of professions.[12]

The Services Directive requires national authorities to review existing national legislation to ensure that market access requirements continue to be justified by a legitimate objective. They must also be necessary and proportionate. As the Commission emphasised in its Annual Growth Survey 2016[13], a more flexible regulation of services markets would lead to higher productivity and could ease the market entry of new players, reduce the price for services, and ensure wider choices for consumers.

The emergence of the collaborative economy and the entry into the market of new business models provide an opportunity to policymakers and legislators in Member States. They can consider whether the objectives pursued in existing legislation remain valid, both in relation to the collaborative economy and to traditionally operating service providers.

When reassessing the justification and proportionality of legislation applicable to the collaborative economy, national authorities should generally take into consideration the specific features of collaborative economy business models and the tools they may put in place to address public policy concerns, for instance in relation to access, quality or safety. For example, rating and reputational systems or other mechanisms to discourage harmful behaviour by market participants may in some cases reduce risks for consumers stemming from information asymmetries. This can contribute to higher quality services and potentially reduce the need for certain elements of regulation, provided adequate trust can be placed in the quality of the reviews and ratings.

Absolute bans and quantitative restrictions of an activity normally constitute a measure of last resort. They should in general only be applied if and where no less restrictive requirements to attain a legitimate public interest objective can be used. For example, banning short-term letting of apartments appears generally difficult to justify when the short-term rental use of properties can for example be limited to a maximum number of days per year. This would allow citizens to share their properties on an occasional basis without withdrawing the property from the long-term rental market.

In addition, where service providers are legitimately required to obtain authorisations on the basis of national law, Member States are to ensure that the conditions to obtain them are, among other things, clear, proportionate and objective and that the authorisations are in principle granted for an unlimited period of time.[14] Moreover, the relevant administrative procedures and formalities must also be clear, transparent and not unduly complicated, whereas their costs for the providers must be reasonable and proportionate to the cost of the procedure in question and the procedures must be as speedy as possible and subject to tacit

[10] For a list of overriding reasons relating to the public interest under the Services Directive see its Article 4 (8).

[11] See Recital 39 and Article 4 (6) of the Services Directive on the concept of 'authorisation'.

[12] See Article 59 of the Professional Qualifications Directive 2005/36/EC. The proportionality and the necessity of national regulations on regulated professions will be further discussed in two forthcoming Commission initiatives (guidance on reforms needs on regulated professions and the proportionality test for regulated professions).

[13] COM(2015) 690 final, of 26.11.2015, Communication on the Annual Growth Survey 2016: Strengthening the recovery and fostering convergence

[14] See Articles 10 and 11 of the Services Directive.

approval.[15] Employing e-government best practices and principles can significantly lower the cost and burden of compliance for service providers.[16]

Peer-to-peer provision of services

In the collaborative economy context, an important element to assess whether a market access requirement is necessary, justified and proportionate, can be whether the services are offered by professional providers or rather by private individuals on an occasional basis. In fact, a specific feature of the collaborative economy is that service providers are often private individuals offering assets or services on an occasional peer-to-peer basis. At the same time, increasingly micro entrepreneurs and small businesses are using collaborative platforms.

EU legislation does not establish expressly at what point a peer becomes a professional services provider in the collaborative economy.[17] Member States use different criteria to differentiate between professional services and peer-to-peer services. Some Member States define professional services as services provided against remuneration compared to peer-to-peer services that aim at compensating costs incurred by the services provider. Other Member States have introduced a differentiation using thresholds. These thresholds are often developed on a sector-specific basis taking into account the level of income generated or the regularity with which the service is provided. Below these thresholds, service providers are usually subject to less restrictive requirements. Thresholds, established in a reasonable way, can be a useful proxy and can help create a clear regulatory framework to the benefit of non-professional providers.

For example, in the transport sector, some Member States are preparing to exempt small-scale passenger transport services — falling below a specific threshold of annual turnover — from licensing requirements. In the short-term accommodation sector, some cities permit short-term rentals and home-sharing services without prior authorisation or registration requirements. This would be the case when the services are provided on an occasional basis, i.e. up to specific thresholds such as less than 90 days per year. Other cities apply different rules depending on whether the property is a primary or secondary residence, on the assumption that a citizen's primary residence can only be rented out on an occasional basis.

Collaborative platforms

Whether or not – and the extent to which – collaborative platforms can be subject to market access requirements depends on the nature of their activities. As long as collaborative platforms provide a *service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services,*[18] they provide an information society service. Therefore, they cannot be subjected to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services.[19] Also, Member States can only impose regulatory requirements on collaborative platforms providing such

15 See Article 13 of the Services Directive.

16 COM(2016) 179 final of 19.4.2016, Communication on EU eGovernment Action plan 2016-2020 – Accelerating the digital transformation of government

17 The Services Directive for example defines service providers as any natural or legal person who offers any self-employed economic activity, normally provided for remuneration (see Article 4 (2)). This means that any economic activity could be captured by the rules of this Directive regardless of the frequency it is offered and without requiring that the provider necessarily acts as 'professional'. In addition, EU consumer acquis defines 'trader' as any person acting for the purposes relating to his trade, business, craft or profession (see section 2.3).

18 See Article 2(a) of Directive 2000/31/EC ('e-Commerce Directive') and Article 1(1)(b) of Directive 2015/1535. See also Annex I to that latter Directive for an indicate list of services not covered by this definition.

19 See Article 4 of the e-Commerce Directive.

services across borders from another Member State under limited circumstances and subject to a specific procedure.[20]

However, there may be cases in which collaborative platforms can be considered as offering other services in addition to the information society services that they offer to intermediate between the providers of underlying services and their users. In particular, in certain circumstances, a platform may also be a provider of the underlying service (e.g. transport or short-term rental service). In such a case, collaborative platforms could be subject to the relevant sector-specific regulation, including business authorisation and licensing requirements generally applied to service providers, under the conditions as set out in the preceding sections[21].

Whether a collaborative platform also provides the underlying service will normally have to be established on a case-by-case basis. Several factual and legal criteria can play a role in this regard. The level of control or influence that the collaborative platform exerts over the provider of such services will generally be of significant importance. It can in particular be established in light of the following key criteria:

- Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service. Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met.
- Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (such as for example setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service).
- Ownership of key assets: does the collaborative platform own the key assets used to provide the underlying service.

When these three criteria are all met, there are strong indications that the collaborative platform exercises significant influence or control over the provider of the underlying service, which may in turn indicate that it should be considered as also providing the underlying service (in addition to an information society service).

Depending on the case at hand, other criteria may also play a role. For instance, if the collaborative platform incurs the costs and assumes all the risks related to the provision of the underlying service. Or if an employment relationship exists between the collaborative platform and the person providing the underlying service in question (see section 2.4). These elements could indicate that the collaborative platform exerts a high level of control and influence over the provision of the underlying service.

Conversely, collaborative platforms may merely assist the provider of the underlying services by offering the possibility to carry out certain activities that are ancillary to the core information society services offered by the platform to intermediate between the provider of

[20] See Articles 2 and 3 of the e-Commerce Directive. The country of origin principle for the freedom to provide information society services cross-border can only be derogated from when there is a threat or a serious and grave risk to undermine the following four objectives: public policy, protection of public health, public security, including the safeguarding of national security and defence and protection of consumers. In that case the national measures in question must still be proportionate and certain procedural conditions (including notification to the Commission) must also be respected.

[21] i.e. that they are non-discriminatory, necessary to attain a clearly identified public interest objective and proportionate to achieving this interest (i.e. imposing no more requirements than strictly needed)

the underlying services and their users (e.g. by providing payment facilities, insurance coverage, aftersales services etc.) This, in itself, does not constitute proof of influence and control as regards the underlying service. Similarly, offering user rating or review mechanisms is not in itself proof of significant influence or control.[22] Yet, generally speaking, the more collaborative platforms manage and organise the selection of the providers of the underlying services and the manner in which those underlying services are carried out — for example, by directly verifying and managing the quality of such services — the more apparent it becomes that the collaborative platform may have to be considered as also providing the underlying services itself.

Therefore, a collaborative platform providing services in the short-term rental sector may only provide information society services and not also the accommodation service itself if, for example, the provider of the accommodation service sets its own prices and the platform does not own any of the assets used for that service provision. The fact that the collaborative platform may also offer insurance and rating services to their users need not alter that conclusion.

When assessing whether market access requirements applied to the collaborative economy are necessary, justified and proportionate to meet identified and legitimate public interest objectives, Member States should take into account the specific features of collaborative economy business models.

For the purposes of regulating the activities in question, private individuals offering services via collaborative platforms on a peer-to-peer and occasional basis should not be automatically treated as professional service providers. Establishing (possibly sector-specific) thresholds under which an economic activity would be considered a non-professional peer-to-peer activity may be a suitable way forward.

Member States are advised to take the opportunity to review, simplify and modernise market access requirements that are generally applicable to market operators. They should aim to relieve operators from unnecessary regulatory burden, regardless of the business model adopted, and to avoid fragmentation of the Single Market.

2.2 Liability regimes

Most relevant rules on contractual and extra-contractual liability are laid down in national laws of Member States. However, under EU law, online platforms, as providers of information society intermediary services, are under certain conditions exempted from liability for the information they store.[23]

The applicability of this exemption from liability will depend on the legal and factual elements relating to the activity performed by the collaborative platform and applies where the activities in question qualify as hosting services under the terms of the e-Commerce Directive.[24] To do so, their conduct must be merely technical, automatic and passive.[25] The

22 The actual rating/review is undertaken by the user, not the collaborative platform.

23 Article 14 of the e-Commerce Directive.

24 In the context of the collaborative economy hosting can broadly speaking be understood as the activity of dealing with the storage of customer data and providing the venue where users meet providers of the underlying services. The exemptions under Articles 12 and 13 of the e-Commerce Directive would usually not apply in this regard, as collaborative platforms normally do not provide 'mere conduit' or 'caching' services within the meaning of those provisions.

25 As per section 4 of the e-Commerce Directive. In joined cases C-236/08 to C-238/08 Google France/Louis Vuitton, the CJEU underlined the key criterion when an online platform is deemed an 'intermediary service provider,' referring to recital 42 to Directive 2000/31/EC. According to this recital, information society services are meant to provide the

exemption from liability applies on the condition that the collaborative platform does not play an active role which would give it knowledge of, control over, or awareness of the illegal information - and, where it nonetheless obtains such knowledge or awareness, acts expeditiously to remove it or to disable access thereto.[26]

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.

Importantly, under EU law, Member States cannot impose on collaborative platforms, to the extent that they provide hosting services, a general obligation to monitor or to actively seek facts or circumstances indicating illegal activity.[27]

The Communication on Online Platforms and the Digital Single Market[28] explains that maintaining the existing intermediary liability regime is crucial for the further development of the digital economy in the EU. This includes the collaborative economy, as online platforms act as key drivers for its growth. The Commission, at the same time, encourages responsible behavior by all types of online platforms in the form of voluntary action, for example to help tackle the important issue of fake or misleading reviews. Such voluntary action taken to increase trust and to offer a more competitive service should not automatically be taken to mean that the conduct of the collaborative platform is no longer merely technical, automatic and passive.

In addition to hosting services, a collaborative platform may also offer a number of other connected or ancillary activities. These can include review or ratings facilities, payment facilities, insurance, ID verification (often carried out by third-party providers) or the platform may even provide the underlying service that is being offered to the users.

The aforementioned liability exemption set out in EU law remains limited to the provision of hosting services and does not extend to other services or activities performed by a collaborative economy platform. The aforementioned liability exemption also does not exclude the collaborative economy platform's liability arising under the applicable personal data protection legislation, in as far as the platform's own activities are concerned. Conversely, the mere fact that a platform also carries out certain other activities - besides providing hosting services - does not necessarily mean that that platform can no longer rely on the liability exemption in respect of its hosting services.[29] In any case, the way in which collaborative platforms design their information society service and implement voluntary measures to tackle illegal content online remains in principle a business decision and the question of whether they benefit from the exemption from intermediary liability should always be assessed on a case-by-case basis.

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technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature.

26 Case C-324/09 L'Oréal/eBay. This is without prejudice for courts and national administrative authorities to require the collaborative platform to terminate or prevent an infringement. See Article 14(3) e-Commerce Directive. A comprehensive background on the intermediary liability regime is contained in the Commission's Staff Working Document "Online services, including e-commerce, in the Single Market", SEC(2011) 1641 final.

27 As set out in Article 15 (1) of the e-Commerce Directive.

28 COM(2016) 288/2 of 25 May 2015, Communication on online Platforms and the Digital Single Market Opportunities and Challenges for Europe

29 In that respect, some courts exclude liability protection if the hosting-related aspects of a service are not the most important aspects of the service. See to this extent the decision of the Court of Paris in Louis Vuitton Malletier / Christian Dior Couture and Parfums Christian Dior, Kenzo, Givenchy et Guerlain v. eBay all issued by the Commercial Court of Paris, First Chamber, on 30 June 2008. An opposite view was taken by a Greek court in the Greek case No 44/2008 of Rodopi Court of First Instance, published in (2009) Armenopoulos, 406.

Collaborative platforms are encouraged to continue taking voluntary action to fight illegal content online and to increase trust (for example by helping to ensure the quality of the services offered by providers of underlying services on their platform). Such voluntary measures should not automatically be taken to mean that collaborative platforms that benefit from the exemption from intermediary liability no longer do so.

2.3 Protection of users

Traditionally, EU consumer and marketing legislation has been designed to address transactions, in which there is a weaker party that needs to be protected (typically the consumer). However, the collaborative economy blurs the lines between consumers and business since there is a multisided relationship that may involve business-to-business, business-to-consumer, consumer-to-business, and consumer-to-consumer transactions. In these relationships, it is not always clear who the weaker party requiring protection may be.

Currently, EU consumer and marketing legislation is based on the distinction between a 'trader' and a 'consumer'. A trader is a person *'acting for purposes relating to his trade, business, craft or profession*';[30] a 'consumer' is a person acting *'outside his trade, business, craft or profession*'[31]. These criteria applied to the participant categories in the collaborative economy, determine the respective rights and obligations of the parties under existing EU consumer and marketing legislation.[32]

In particular, EU consumer law applies to any collaborative platform that qualifies as a 'trader' and engages in 'commercial practices' vis-à-vis consumers. Providers of the underlying services also qualify as traders if they act '*for purposes relating to their trade, business, craft or profession*'. Conversely, EU consumer and marketing legislation does not apply to consumer-to-consumer transactions. Therefore, if neither the collaborative service provider nor the user qualifies as a trader, the transactions between them will fall outside the scope of this legislation.

This raises the central question under which conditions in a peer-to-peer provision of services, the provider of the underlying service qualifies as trader. Member States currently approach this issue differently.[33] Under current EU law, this question must be answered on a case-by-case basis. To this end, the Commission offers some general orientations in the revised Guidance on the Unfair Commercial Practices Directive[34]. Within the specific context of the collaborative economy the following factors are important. While none of them in itself would be sufficient to qualify a provider as trader, depending on the circumstances of the case, their combination may point into that direction:

- *Frequency of the services*: providers who offer their services merely on an occasional basis (i.e. on a purely marginal and accessory basis as opposed to regularly) will be less likely to qualify as a trader. The greater the frequency of the service provision, the more apparent it is that the provider may qualify as a trader, because this could indicate that he is acting for purposes related to his business, craft or trade.

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30 Article 2(b) Directive 2005/29/EC ('Unfair Commercial Practices Directive').

31 Article 2(a) Unfair Commercial Practices Directive.

32 For business to consumer transactions in the collaborative economy, the Unfair Commercial Practices Directive, Directive 2011/83/EU ('Consumer Rights Directive') and Directive 93/13/EEC on Unfair Terms in Consumer Contracts would apply. For business to business transactions, Directive 2006/114/EC on Misleading and Comparative Advertising would apply.

33 An ongoing Commission study on consumer issues in the collaborative economy will map relevant national legislation in the 28 Member States.

34 SWD(2016) 163 final, of 25 May 2016, Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices

- *Profit-seeking motive:* a profit-seeking motive may be an indication that the provider may qualify as a trader for a given transaction. Providers aiming at exchanging assets or skills (for example, in the case of home swapping or time banks) will in principle not qualify as traders. Providers who simply obtain cost compensation for a given transaction may not be seeking a profit. Conversely, those providers that obtain remuneration beyond cost compensation likely have a profit-seeking motive.
- *Level of turnover:* the higher the turnover generated by the service provider (be it from one or several collaborative platforms), the greater the indication that the provider may qualify as a trader. In this regard, it is important to assess whether the level of turnover generated by the provider stems from the same activity (e.g. ride sharing) or from various type of activities (ride sharing, gardening, etc.). In the second scenario, a higher turnover may not necessarily imply that the provider qualifies as a trader, since it may not have necessarily been obtained in relation to the provider's other (main) business.

A person regularly offering gardening services — facilitated by collaborative platforms — and seeking to obtain substantial remuneration could fall within the definition of trader. However, a professional babysitter who occasionally provides gardening services — facilitated by collaborative platforms — would in principle not qualify as a trader insofar as the occasional gardening services are concerned. In line with the Unfair Commercial Practices Directive, all traders must comply with professional diligence duties and not mislead consumers. This also applies to collaborative platforms qualifying as traders as far as their own commercial practices are concerned (e.g. intermediation services, payment services, rating services etc.). Collaborative platforms should also enable underlying service providers that qualify as traders to comply with EU consumer and marketing law, for example by designing their web structures to make it possible for third party traders to identify themselves as such to platforms users. In addition, they could also clearly indicate to all users that they will only benefit from protection under EU consumer and marketing laws in their relation with traders. If the collaborative platform applies criteria to select underlying service providers operating through it and if it performs checks in relation to their reliability, it should inform users accordingly.

In addition, collaborative platforms and providers of underlying services may be required to comply with other applicable information obligations under EU law,[35] including with regard to transparency requirements of the relevant sector-specific legislation.[36]

In any event, like any other controllers collecting and further processing personal data in the EU, collaborative platforms must comply with the applicable legal framework on the protection of personal data.[37] Ensuring adherence to the rules for processing personal data will help increase the trust of individuals, whether providers or consumers (including peer to peer) using the collaborative economy, so they know that when it comes to their personal data they will have the protection they are due.

A way to increase consumer confidence is to increase trust in peer-to-peer services. Trust-building mechanisms such as online rating and review systems and quality labels can be an essential tool to overcome the lack of information about individual service providers. Such mechanisms for establishing trust in the collaborative economy have been created either by

[35] For example, pursuant to Article 6 of the Consumer Rights Directive, Article 22 of the Services Directive and Article 5 of the e-Commerce Directive.

[36] For example, pursuant to Article 5 of the e-Commerce Directive.

[37] Data protection rules, currently contained in Directive 95/46/EC, have been reviewed recently. The new General Data Protection Regulation (EU) 2016/679, OJ L 119, 4.5.2016, p. 1, shall apply from 25 May 2018.

the collaborative platforms themselves or by specialised third parties and can be particularly important where existing consumer legislation does not apply, as explained below.

In line with EU consumer and marketing rules, Member States are encouraged to seek a balanced approach to ensure that consumers enjoy a high level of protection in particular from unfair commercial practices, while not imposing disproportionate information obligations and other administrative burdens on private individuals who are not traders but who provide services on an occasional basis.

The effectiveness and use of online trust mechanisms (e.g. quality labels) to increase trust and credibility should be improved to encourage a more confident participation in the collaborative economy.

2.4 Self-employed and workers in the collaborative economy

The collaborative economy generates new employment opportunities, generating revenues beyond traditional linear employment relationships, and it enables people to work according to flexible arrangements. This makes it possible for them to become economically active where more traditional forms of employment are not suitable or available to them. At the same time, the more flexible work arrangements may not be as regular or stable as traditional employment relations. This may create uncertainty as to applicable rights and the level of social protection. Working arrangements in the context of the collaborative economy are often based on individual tasks performed on an ad hoc basis rather than tasks regularly performed in a pre-defined environment and timeframe.

In fact, this is part of a more structural shift. There are increasingly blurred boundaries between the self-employed and workers, there is an increase in temporary and part-time work and multiple job-holding.[38] Under the European pillar of social rights[39], the Commission has launched a public consultation as to how best to address the need for increased participation in the labour market, ensuring fair working conditions and adequate and sustainable social protection. This initiative is currently subject to a consultation process, by which the Commission seeks to gather stakeholders' views on the current EU social *acquis*, the future of work and the coverage of social protection schemes.

While most labour law falls under national competence, the European Union has nonetheless developed certain minimum standards in the field of social policy.[40] To provide some orientation on how the traditional distinction between the self-employed and workers applies in the context of the collaborative economy, this section examines the conditions under which an employment relationship exists in line with EU labour law[41] and jurisprudence.

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38 Based on statistics from Eurostat.

39 COM(2016) 127 final. The public consultation on the European pillar of social rights was launched on 8 March 2016 and will run until 31 December 2016.

40 In accordance with its competences as set in Article 153 of the Treaty on the Functioning of the Union

41 EU labour law includes Directives regulating workers' rights and obligations. They refer to limits to working time including the right to paid annual leave, to daily and weekly rest and protection in case of night work, as well as information on individual employment conditions, rights for posted workers, prohibition of discrimination against workers in non-standard forms of employment (e.g. part time, fixed term or workers employed under temporary agencies), protection in case of insolvency of employers, protection against discrimination on protected grounds as gender, ethnicity, sexual orientation. They also include protection in case of collective redundancies or in case of transfer of undertakings or in case of cross-border mergers. It provides for the involvement of workers — information and consultation, and board-level worker participation in some circumstances. In the area of health and safety at work, general principles concern the prevention of occupational risks and the protection of the safety and health of workers at the workplace.

Since, in general, EU labour law only sets minimum standards and does not cover all aspects of social legislation applicable to work relationships, which implies that Member States may in principle set higher ones in their national legislation, collaborative economy actors are advised to refer to national labour legislation applicable in the country where the service is provided.

The EU definition of 'worker'

EU law guaranteeing rights to workers is only applicable to people who are in an employment relationship, i.e. who are considered 'workers'. While EU Member States are responsible for deciding who is to be considered a worker in their national legal order, at EU level the Court of Justice (CJEU) has defined the concept of worker for the purpose of applying EU law.[42] This definition has primarily been developed within the framework of the free movement of workers. The CJEU stated that '*the essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*'.[43] The CJEU notably confirmed that this definition shall also be used to determine who is to be considered as a worker when applying certain EU Directives in the social field.[44]

Whether an employment relationship exists or not has to be established on the basis of a case-by-case assessment, considering the facts characterising the relationship between the platform and the underlying service provider, and the performance of the related tasks, looking cumulatively in particular at the following three essential criteria:[45]

- the existence of a subordination link;
- the nature of work; and
- the presence of a remuneration.

For the criterion of **subordination** to be met, the service provider must act under the direction of the collaborative platform, the latter determining the choice of the activity, remuneration and working conditions.[46] In other words, the provider of the underlying service is not free to choose which services it will provide and how, e.g. as per the contractual relationship it entered with the collaborative platform.[47] Where the collaborative platform is merely processing the payment deposited by a user and passes it on to the provider of the underlying service, this does not imply that the collaborative platform is determining the remuneration. The existence of subordination is not necessarily dependent on the actual exercise of management or supervision on a continuous basis.[48]

For the **nature of the work** criterion to be met, the provider of the underlying service must pursue an activity of economic value that is effective and genuine, excluding services on such

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42 For the purpose of applying national labour law, Member States remain free to extend the EU concept of worker to situations that do not fall under the EU definition. If the assessment of the existence of an employment relationship is linked to the applicability of some specific instruments of EU law (Working Time Directive 2003/88/EC) and Collective Redundancies Directive 98/59/EC), then national definitions of workers are not relevant. In addition, the definitions given by national laws are always subject to the assessment by national or European courts.

43 COM(2010) 373 Reaffirming the free movement of workers: rights and major developments. Point I.1.1 http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453133735571&uri=CELEX%3A52010DC0373.

44 Directives on working time (Isère (C-428/09)), on collective redundancies (Balkaya (C-229/14)) and employment equality ('O' (C-432/14)). Other labour law Directives expressly refer to the Member States understanding of who is a worker, as long as these respect the effectiveness of EU law, with reference to O'Brien case (C-393/10).

45 See also COM(2010) 373 final, pages 4-6.

46 Jany and Others v Staatssecretaris van Justitie (C-268/99).

47 *'The rise of the 'just-in-time workforce': on-demand work, crowdwork and labour protection in the 'gig economy'*, Valerio De Stefano, ILO Conditions of Work and Employment Series No. 71 , 2016, p. 17

48 Danosa (C-232/09); see also De Stefano, ibid, page 16

a small scale as to be regarded as purely marginal and accessory.[49] National courts have adopted divergent approaches in identifying what is marginal and accessory even within the context of more traditional employment relationships. There is a mix of use of thresholds (hour or wage-based) and ad hoc assessments of the features of a given relationship. In the context of the collaborative economy, where persons actually provide purely marginal and accessory services through collaborative platforms, this is an indication that such persons would not qualify as workers, although short duration[50], limited working hours[51], discontinuous work[52] or low productivity[53] cannot in themselves exclude an employment relation. At the same time, persons providing services on more than an occasional basis may be either workers or self-employed, as the actual qualification of their status results from a comprehensive test of all three criteria.

The **remuneration** criterion is primarily used for distinguishing a volunteer from a worker. Thus, where the provider does not receive any remuneration or receives merely a compensation of costs incurred for his activities, the remuneration criterion would not be met.

While the above criteria are referred to when applying the EU definition of workers, courts in the Member States tend to use a similar set of criteria when they undertake their global assessment of a given employment relationship in the national remit.

In order to help people make full use of their potential, increase participation in the labour market and boost competitiveness, while ensuring fair working conditions and adequate and sustainable social protection, Member States should:

- assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models;

- provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy.

2.5 Taxation

Adapting to new business models

Like all economic operators, those in the collaborative economy are also subject to taxation rules. These include personal income, corporate income and value added tax rules. However, issues have emerged in relation to tax compliance and enforcement: difficulties in identifying the taxpayers and the taxable income, lack of information on service providers, aggressive corporate tax planning exacerbated in the digital sector, differences in tax practices across the EU and insufficient exchange of information.

In this regard, Member States should aim at proportionate obligations and a level playing field. They should apply functionally similar tax obligations to businesses providing comparable services. Raising awareness on tax obligations, making tax administrators aware of collaborative business models, issuing guidance, and increasing transparency through online information can all be tools for unlocking the potential of the collaborative economy.

[49] For more details on the actual assessment of 'genuineness of work' by CJEU, as well as in the Member States (e.g. using earning or hour-based thresholds) in the context of free movement of workers, see '*Comparative Report 2015 - The concept of worker under Article 45 TFEU and certain non-standard forms of employment',,* FreSsco network for the European Commission

[50] Ninni-Orasche (C-413/01)

[51] Kempf (C- 139/85)

[52] Raulin (C-357/89)

[53] Bettray (C-344/87)

Information about national tax obligations, including those linked to employment status, should be clearly communicated to stakeholders.

To increase clarity and transparency, some Member States have issued guidance on the application of the national tax regime to collaborative business models, and a few have considered changes to their legislation.[54] Concerning corporate tax, the Commission is working on a general approach to tax avoidance.

At the same time, the collaborative economy has created new opportunities to help tax authorities and taxpayers with their tax obligations. This is, in particular, thanks to the increased traceability allowed by the intermediation of online platforms. It is already an ongoing practice in some Member States to have agreements with platforms for the collection of taxes. For example, in the accommodation sector, platforms facilitate the payment of tourist taxes on behalf of service providers. There are also cases where tax authorities use the traceability allowed by online platforms to collect taxes from the individual providers.

An example of good cooperation between tax authorities and collaborative businesses comes from Estonia. In cooperation with ride-sharing platforms, the aim is to simplify the tax declaration process for drivers. Transactions between the driver and the customer are registered by the collaborative platform, which then only sends the data that is relevant for taxation purposes to the authorities, who will then pre-fill taxpayer tax forms. The main idea is to help taxpayers fulfil their tax obligations effectively and with minimum effort.

Reducing administrative burden

Economic growth is best supported by measures that aim to reduce the administrative burden on individuals and businesses without discriminating between business models. To this end, an efficient exchange of tax-related information amongst platforms, authorities and service providerscan help reducing costs. The creation of one-stop shops and the development of online feedback mechanisms can also create new possibilities for partnerships and compliance monitoring.

However, different approaches by national tax authorities toward the treatment of platforms can increase the administrative burden on collaborative activities. These may include different views on the business scope of platforms with respect to the services they provide; the criteria used to link their activities to a tax jurisdiction, the employment relationship between services providers and platforms, as well as general compliance requirements and auditing procedures.

The development of commonly agreed standards to tackle these issues in a coherent manner, taking into account the elements clarified in the previous sections of this Communication, as well as moving more administration online, could help in this respect.

Value added tax

Supplies of goods and services provided by collaborative platforms and through the platforms by their users are in principle VAT taxable transactions. Problems may arise in respect of the qualification of participants as taxable persons, particularly regarding the assessment of economic activities carried on, or the existence of a direct link between the supplies and the remuneration in kind (for instance in case of 'bank' type arrangements where participants contribute goods or services to a common pool in exchange for the right to benefit from that pool).

[54] An overview of initiatives can be found in the Staff Working Document accompanying this Communication.

The Commission is preparing several initiatives to enhance the capacity of tax administrations within the framework of the Action Plan on VAT.[55] This includes extending to the supply of goods the VAT one-stop shop for electronic services, starting a pilot project to improve cooperation between tax administrations, and publishing a guide for cooperation between tax authorities and businesses in e-commerce.

Member States are encouraged to facilitate and improve tax collection by using the possibilities provided by collaborative platforms, as these already record economic activity.

Collaborative platforms should take a proactive stance in cooperating with national tax authorities to establish the parameters for an exchange of information about tax obligations, while ensuring compliance with legislation on the protection of personal data and without prejudice to the intermediary liability regime of the e-Commerce Directive.

Member States are invited to assess their tax rules to create a level playing field for businesses providing the same services. Member States should also continue their simplification efforts, increasing transparency and issuing online guidance on the application of tax rules to collaborative business models.

3. Monitoring

The collaborative economy spans across several sectors in a rapidly changing landscape. Given this dynamic and evolving nature, the Commission intends to establish a monitoring framework covering both the evolving regulatory environment and economic and business developments. The monitoring will aim to follow trends on prices and quality of services, and identify possible obstacles and problems encountered, in particular when they arise from divergent national regulations or regulatory gaps.

The monitoring tools will include:

1. Periodic surveys of consumers and businesses on the use of the collaborative economy.[56]
2. Ongoing mapping of regulatory developments in Member States.
3. Stakeholder dialogue in the framework of the Single Market Forum, with twice yearly forums to assess sector development on the ground and to identify good practices.
4. The results of the monitoring of the collaborative economy will be summarised in the Single Market Scoreboard.

The monitoring activity[57] will also contribute to the Commission's ongoing work[58] on the single market in view of facilitating innovation and entrepreneurship. Given the dynamic character of collaborative economy business models and the rapid development of data-driven digital technologies, further policy issues may emerge from ongoing or new data collection and research, and may need to be addressed. Collaborative platforms should cooperate closely with the authorities, including the Commission, to facilitate access to data and statistical information in compliance with data protection law.

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[55] COM(2016) 148 final, of 7.04.2016, Communication on an action plan on VAT; Towards a single EU VAT area - Time to decide

[56] In addition, information will be drawn from official statistics and third party reports.

[57] The core elements will be complemented with data and insights from third party reports, possible data analytics and web scraping, and official statistics to the extent information is available..

[58] Existing or future REFIT exercises may also identify areas where further intervention is needed.

The monitoring activity and its tools are, in any case, without prejudice to Commission's enforcement of existing EU legislation which will continue in line with the principles expressed in this Communication.

4. Conclusion

In view of the significant benefits that new collaborative economy business models can bring, Europe should be open to embracing these new opportunities. The EU should proactively support the innovation, competitiveness and growth opportunities offered by modernisation of the economy. At the same time, it is important to ensure fair working conditions and adequate and sustainable consumer and social protection. For this to happen, citizens and businesses should be aware of the rules and obligations applying to them, as clarified in this Communication. Member States are encouraged to clarify their national situation in a similar way. The Commission stands ready to work with Member States and relevant authorities to support them in this process.

The guidance provided in this Communication aims at supporting consumers, businesses and public authorities to engage confidently in the collaborative economy. It will also support Member States to consistently apply EU law across the single market. The Commission will continuously review developments in the European collaborative economy, collect statistical data and evidence and work with Member States and stakeholders also to exchange best practices. The Commission looks forward to engaging in a dialogue with the European Parliament, the Council and Member States to ensure the best possible environment for citizens and businesses in the collaborative economy.