Cost of non-Europe in the sharing economy: legal aspects

By
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February 2016
"This report was prepared at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament. It was also published by the European Parliament as a study under no. PE558.777 and is republished here by EIPA with the kind permission of the European Parliament"
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Gracia Vara Arribas – Project leader
Anthony De Bondt – Researcher
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List of abbreviations

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>B2B</td>
<td>Business to business</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CoR</td>
<td>Committee of the Regions</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>IP</td>
<td>Internet Protocol</td>
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<td>MS</td>
<td>Member States</td>
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<td>SE</td>
<td>Sharing Economy</td>
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<td>P2P</td>
<td>Peer to peer</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the EU</td>
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<td>TEU</td>
<td>Treaty of the EU</td>
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Executive Summary

The Sharing Economy (SE) is a business model based on sharing underutilised assets using digital platforms, either for monetary or non-monetary benefits. Many are the terms and definitions that appear to describe the phenomenon, and in this report we use the concept in the broad sense to cover most or all the activities that are generally thought of when speaking of the SE: collaborative economy, peer economy, etc.

By now, everyone agrees that the SE is shaking grounds and disrupting the market, providing a real challenge to traditional market players, authorities and consumers. In fact, the exchanges the SE facilitates are not new in themselves: people have been renting out rooms, sharing car rides, or providing cleaning services for ages, but the novelty now is the reduction in transaction costs, and the possibility platforms offers to reach consumers worldwide through one single click. Better and more sustainable use of underutilised resources (cars, houses, skills) is claimed to be a pivotal benefit SE can provide to society. Creation of employment, prevention of the shadow economy and access to new services for consumers are amounting advantages according to the SE advocates. But many are the complaints against these business models: people are renting their apartments without complying with the existing regulations for hotel accommodation; drivers are making rides for a price without complying with the taxi regulations. The industry has mobilised and several cases have been brought to court pleading the prohibition of some of the business models.

Uber for example, is the business model most challenged in Europe, and has had to stop some of its activities in different Member States (MS). Through its platform, Uber allows consumers with smartphones to submit a trip request which is then routed to Uber drivers, who – using their own cars – will provide the transport service for the price fixed by the platform. Taxi drivers claim unfair competition, consumers praise good quality at low price, and the authorities defend the need to protect the taxi sector but want to support innovation. In the meantime, the judiciary is wondering how to qualify the services provided by the platform: is it a transport company or an IP (Internet Protocol) enabled service? Several judges have submitted a preliminary ruling to the Court of Justice of the European Union (CJEU), and different new laws have been adopted so far by different MS. The European Institutions are closely following these events, and considering the need for action in view of the clear European dimension of the SE. Whether to enact new regulation, promote self-regulation and/or defend a non-regulation approach are the issues at stake. The Commission has already announced that it will provide guidance on how existing EU law applies to the SE rather that strictly regulating it.
In this report we analyse the legal obstacles/barriers that prevent the SE from reaching its full potential and the effectiveness of the existing EU regulatory framework to oversee these new business models.

To do so, we have analysed the practices in six Member States (BE, DE, ES, FR, NL and UK) and in some cities of USA around three economic sectors: transportation, accommodation and the provision of professional services.

We have detected that the transport platforms providing transport services similar to taxis (Uber and assimilated) have been the most problematic and finally banned in four of the six MS. These platforms make three transactions between the service provider and the consumer (information, for profit payment and control over the service provision). On the contrary, transport platforms facilitating car sharing but being not-for profit (Blablacar), have been allowed provided that users comply with the basic existing local/national legislation (taxes, insurance, consumer protection, data protection, etc.). This second type of platform provides only two transactions (information and payment –not for profit) without controlling the provision of the service itself: the driver shares their ride to their destination and fixes the price.

In the case of accommodation platforms (renting houses or rooms through a platform), legal acts have been approved or adapted in different cities/countries, to oblige the platforms and the service providers to comply with different sets of rules, and to try to establish a dividing line between what constitutes a sharing practice or a professional practice illegally competing with the professional sector. In the case of platforms for the provision of services (cleaning, consultancy, etc.) legal problems have been debated in American courts so far, and mostly related to the qualifications of service providers as employees or as self-employed – with the consequent different legal treatment -, a debate that is common to other transport and accommodation platforms performing in Europe.

Since the European Union has the competence to protect the Single market freedoms, it needs to find the balance between creative freedom required by SE business and the need for regulation of the sector. Two types of approaches can be applied: (1) government control or top-down government regulation or (2) bottom-up regulation or self-regulation through reputation. Best practices deployed at MS level indicate that a mixture of both approaches will be needed. We recommend as a potential line of action:

a) The need to distinguish between the different types of platforms and the professional and non-professional divide – categorising at EU level would clear up the confusing landscape.

b) Harmonisation of reputational rating systems: the establishment of guidelines at EU level would provide a unified framework.
c) The establishment of enforcement mechanisms of compliance with the existing European rules on consumer protection, insurance, labour conditions, tax collection etc. For this purpose the partnership between authorities and platforms could support the externalisation of the control mechanisms to the platform where all the information is centralised.

d) Promote the use of self-regulation per sector based on detected best practices such as: provision of insurance contracts, performing tax collection, having in place a cash less payment system and policies to safeguard consumer protection.

In the year 2016 the CJEU will decide on the pending preliminary rulings. The European Commission will present its line for action, and different commissioned studies by different bodies will see the light. Further research will be needed to decide at EU level the precise actions that need to be taken in the course of the coming months, but we hope to have shed some light on the blurred picture of the legal aspects of the SE in Europe.
1 Introduction

The Directorate-General for Parliamentary Research Services has commissioned the European Institute of Public Administration (EIPA-Barcelona) in the person of Gracia Vara Arribas (EIPA Expert) to draft a briefing paper on “Cost of non-Europe in the sharing economy: legal aspects”. The paper should complete the report made by Europe Economics on “Cost of Non-Europe in the Sharing Economy: Opportunities and challenges” by focusing more on the regulatory aspects of the sharing economy (SE) and deepening the analysis on them.

1.1 Defining the sharing economy

When looking at the literature, a plethora of definitions appear to exist to describe what is commonly seen as part of the Sharing Economy (hereafter, ‘SE’). Rooselaer (2014: 13) provides a non-exhaustive list of the many different concepts that have seen the light over the course of the past years when authors tried to name the phenomena. Botsman (2013), co-author of the book “What’s mine is yours. How collaborative consumption is changing the way we live”, tried to provide structure to the chaos. Doing so, she identified four concepts that cover most or all activities that are generally thought of when speaking of the sharing economy.

1. **Collaborative consumption**: an economic model based on sharing, swapping, trading, or renting products and services, enabling access over ownership
2. **Collaborative economy**: an economy built on distributed networks of connected individuals and communities (as opposed to centralised institutions). Collaborative economy spans collaborative finance, collaborative education, collaborative production, and collaborative consumption.
3. **Peer economy**: person-to-person marketplaces that facilitate the sharing and direct trade of assets built on peer trust’
4. **Sharing economy**: an economic model based on sharing underutilized assets from spaces to skills to stuff for monetary or non-monetary benefits.

Building on this logic, “collaborative economy” is the umbrella concept for both collaborative consumption and peer economy, while the Sharing Economy is seen as a subset of collaborative consumption.

In this Report we will follow the definition selected by Europe Economics (2015: 6)
The use of digital platforms to reduce the scale for viable hiring transactions or viable participation in consumer hiring markets (i.e. “sharing” in the sense of hiring an asset) and thereby reduce the extent to which assets are under-utilised.

This definition reflects the broader categories described above – including the Sharing Economy – such as the Collaborative Economy (Botsman, 2013), or includes sectors which others have defined as similar to but not a part of the Sharing Economy, those transactions not based on a peer-to-peer model have been called the Product-Service Economy (Frenken, Meelen, Arets, & van de Glind, 2015). As stated by Europe Economics, “while none of these terms are necessarily illegitimate, the Sharing Economy is by some margin the most commonly used and a reasonable descriptor which reflects common usage for the entire economic phenomenon we will study, rather than a part of it”.

1.1.1 Benefits and concerns of the Sharing Economy

**Table nº 1: Benefits and concerns of the Sharing Economy**

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Concerns</th>
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<tbody>
<tr>
<td>The enumeration and description of real and potential benefits of the sharing economy is not peaceful. Defendants will claim these and other benefits, while detractors will challenge them. We therefore propose to read this list using the perspective of the advocates of the SE.</td>
<td>There is a lot of opposition to these sharing economy companies, especially coming from traditional businesses and sometimes even authorities that are threatened by the new competition or by the new unregulated entrants to the market. The legal framework of the sharing economy is unclear, and many are fighting to interpret existing laws in the context of P2P sharing economy business models, and considering whether new regulation is required.</td>
</tr>
<tr>
<td><strong>Affordable and qualitative products/services</strong></td>
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<td>The entrance to the market of SE platforms has led to the introduction of products and services at a much lower price. People can now rent an entire flat at the price of a mid-range priced hotel room, return home by taxi for half the price of a normal taxi fare, etc.</td>
<td></td>
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<tr>
<td>Furthermore, a study by Wallsten (2015) on the reactions by taxi companies in New York City and Chicago reveals that the rise of Uber has caused them to improve quality. Therefore, consumers seem to be great benefiters.</td>
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<tr>
<td><strong>Knowledge coordination and decreased transaction costs</strong></td>
<td></td>
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<tr>
<td>The exchanges the SE facilitates are not necessarily new (people have been renting out rooms, they have been sharing car rides, etc.) but the reduction in transaction costs because of knowledge coordination allows for unlocking underutilized assets.</td>
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<tr>
<td>Nowadays, many people have access to products and services they wish to purchase. However, we are facing a challenge that is related to data and intelligence regarding what we want to buy. There is so much (often contradicting) information out there that is has become cumbersome to make a sound decision on what to purchase. Indeed, according to Allen &amp; Berg (2014) it is not the cost of the resource (asset) itself that constitutes a</td>
<td></td>
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<td></td>
<td>Economic concerns</td>
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<td>By now, everyone agrees that the SE is shaking grounds and disrupting the market. With their entirely new business models (basically there are facilitators rather than owners), SE platforms provide a real challenge to ‘traditional’ market players. These are losing market share and thus revenue. Zervas &amp; Proserpio (2015) have undertaken a study on the economic impact of Airbnb on the hotel market in Texas (USA) and found that in Austin, where Airbnb supply is highest, the negative impact on hotel revenue lies between 8 to 10%.</td>
<td></td>
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<tr>
<td>While we acknowledge the relevance and importance of these concerns we will, following out mandate, focus on the legal concerns in the paragraphs below.</td>
<td></td>
</tr>
<tr>
<td><strong>Legal concerns</strong></td>
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<tr>
<td>The key concern regarding the SE revolves around the legal framework (or the lack thereof). This section</td>
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problem to society, but rather the cost of coordinating the knowledge that people need to transact the resource. People need to know how to exchange in order to speed up and increase transactions. Such knowledge can lead to decreased transaction costs. According to Dahlman (1979), transaction costs consist of three different types:

- search and information costs;
- bargaining and decision costs; and
- policing and enforcement costs.

Making use of digital platforms, the SE is able to significantly reduce transactions costs. For instance, it has never been easier to gather information on prices, quality, specifications, of products and services. To be sure, we have fast and cheap access to knowledge in the three above-mentioned fields that compose transactions costs.

SE platforms provide room for peer-reviews, rating systems, personalised searches, etc. This is a pivotal factor for the success of the SE.

**Empowerment of economic actors**

We have already touched upon this element in the above paragraph but it still deserves some explanation. Users of the SE play a key role in a concept the SE has universally integrated: i.e. reputational mechanisms. Through reputational rating mechanisms, for example, it has become impossible for those that do not play by the rules to hide. Indeed, if users do not share in a satisfactory manner, they will be excluded from future exchanges.

In addition to empowerment related to policing and oversight, SE users are also empowered in the sense that they receive additional earnings alongside their regular income, and have the opportunity to choose when and where they want to make use of platforms (which contrasts with traditional corporations where one has to follow the rules regarding working time, work place, etc.).

**Better (more sustainable) use of underutilized resources**

This can be derived from the definition and it is arguably the pivotal benefit SE can provide to society. Many of our assets remain underused. Yet at the same time, we are facing huge environmental challenges. SE can help coming to a more sustainable market. The French Environment and Energy Management Agency (ADEME) has calculated that shareable goods account for about one third of household waste. Therefore, intuitively, one can expect a positive impact from the SE on the environment. Demailly & Novel (2014) elaborate on the subject and explain how three different elements could contribute to such an impact.

First, redistribution of goods is easy to understand to have a positive outcome to the environmental balance. If presents different subsets of this concern, which are taken from Susan Mclean’s (2015) article.

**Consumer Protection**

Operators need to consider the extent to which their platforms comply or not with applicable consumer protections laws. While traditional companies have to comply with the strict rules that have been applied to them to ensure consumer protection, SE platforms have much more freedom in this regard. A regular taxi company for instance, might be obliged to undertake a background check on the criminal record of its drivers, while users of the application Uber have long been exempted from this. Recently, the company has started to apply such checks, however they are still contested.

It is worth noting that some platforms add a “plus” of guarantees and security to their users, although not all of them do so. Another important element to consider here is the value of the rating systems/reputation scores, as an element of self-protection by the users of the services.

**Data protection**

No different from many internet-driven companies, data protection has become an issue for some SE platforms as well. The platforms have the technological capacity to collect and store user data, and operators need to address issues of compliance with applicable data protection laws, in terms of the processing of personal data of both users and users’ customers, and prepare appropriate privacy policies and cookie notices.

In case of transport and accommodation platforms, it basically comes down to the following: they know where you are, how you got there and where you will be. According to Rogers (2015), in the case of Uber, data privacy issues might self-correct since sale or exploitation of user data is not considered a main source of revenue, unlike for companies such as Facebook and Google. If this is the case, then we might expect it to hold true for most of the SE platforms.

**Labour laws**

There is an ongoing discussion on weather SE platforms should be considered information providers or employers. The distinction has a major effect. If employer, a number of social rights are to be taken into account: Overtime, a minimum salary, worker compensation (replacement wage and medical benefits during medical leave), etc. One of the main issues regarding the SE is then what employment status a user should have: employee or independent contractor?

**Discrimination**


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person X has a piece of furniture that he does no longer need and at the same time person Y is in need of such an item, redistributing the item (selling, exchanging or giving) has the following results:

- Person X disposes his item and does not necessarily need to replace it by another one
- Person Y receives the item that he wanted without having to purchase a new item
- The lifespan of the item is extended, it slows down the distribution of new products (that obviously need to be produced, for which resources are required)
- In case person X had anticipated the redistribution (that is to say, if he knew that he was going to sell/exchange/give away the item after a certain period of time), this leads to the purchase and thus the production of durable goods (since one would only redistribute goods that are still in acceptable condition)

The second element is what they call ‘mutualisation’ and refers to short-term renting and lending of items. Here, the positive outcome derives from the following assumptions:

- Renting or borrowing an item replaces the need to purchase one
- The item that is rented out or lent out is of high quality and resistant to intensive usage
- Repeated rental takes place at a local scale, minimizing environmental effects caused by motorized transport that would have taken place if the item had been purchased.

The third element they discuss is shared mobility. While it is pointed out that cars are only used 8% of their time and car sharing could therefore lead to significant financial savings, the environmental impact of car sharing can only be positive if:

- The shared car is more durable. This means that the lifespan of a car should not decrease as many times as the usage of the car increases due to sharing.
- Users do not travel more distance with a shared car than they would have done with their own.

Provides workplace flexibility

According to Kumar (2015), SE responds to the growing demand for workplace flexibility. He argues that freelance work could be the employment of the future and SE has a vital role to play in it. For example in the case of drivers they may simultaneously use different platforms (Uber, Blablacar) to provide their services, without being committed to one single one, and combining it with their regular jobs.

Operators need to consider potential discrimination issues. What would happen if users refuse to loan their car or hire their spare room based on the person’s race, religion or sexuality? Would then the operator be liable under antidiscrimination laws?

Laws relating to payments

If payments are made via the P2P platform rather than directly between users, operators need to address compliance with applicable payment rules and potentially deal with local payment services laws. Clarity on who is responsible becomes very relevant. Nevertheless, many countries impose restrictions on certain types of payment structures in order to protect the consumers.

Taxation

Both operators and users might be subject to taxation issues. For example, tourist taxes apply in many cities to hotel accommodations, and therefore might be applicable to P2P models that provide equivalent services. Collection of such taxes is an issue, where both operators and users of a given platform might be responsible. This is obviously a major concern as it determines for a large part whether the SE is de facto a shadow economy or not.

Safety and security

Security issues might be involved when operating via a platform. Some of them already request information on users to credit their positive records. In other cases, reciprocal reviews and a system of ratings help to build trust among the users.

Liability

One of the key concerns is who is legally liable if something goes wrong: could the platform be held responsible if a hired car crashes or a host’s apartment is damaged?

Insurance

Some insurance companies are refusing to provide insurance if policyholders engage in P2P sharing. At the same time, many users participate in the SE without checking beforehand with their insurer what is covered by the insurance and what is not.

Industry specific laws

Sharing economy platforms need to consider issues of compliance with any sector specific rules. The UK sharing economy sector for example is engaging in associations for their sector in order to early engage with the regulators to design common constructive solutions for the P2P businesses.

Creates new services

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Still according to Kumar (2015), SE is responsible for the creation of many new services that could not easily be provided by traditional companies. As an example he refers to the case of Uber. A ‘normal’ taxi company could have never provided this type of service (basically a very cheap taxi ride for a great number of people) without having an enormous car fleet, which is extremely expensive.

Prevents the shadow economy

Provided that mechanisms are in place to collect taxes from users of the SE that generate (part of) their income with their SE activities, the SE is a means to get people out of the shadow economy. It goes without saying that such an evolution has major benefits to the State Treasury and to society as a whole.

1.2 Research aims

While much attention is being given to the phenomenon of SE, its benefits and concerns, not much work has been produced to analyse the legal barriers which prevent the SE from reaching its full potential nor has there been a lot of analysis on what could be done about it at the European level. With this research paper we aim to close this gap in existing literature on the topic.

The paper aims to answer the following three research questions:

1. Are there legal obstacles/barriers that prevent the SE from reaching its full potential?

2. How effective is the existing EU regulatory framework in promoting and overseeing SE platforms?

3. What additional steps should be taken at EU level for the SE to realise its economic potential, with the objective of preserving a balance between creative freedom needed by business and the need for regulation of the sector? In this regard, are there any best practices from Member States that could be suggested? To what extent could self-regulation of the sector be a relevant option?
1.3 Methodology

To do so, the tasks to be performed are divided in two areas:

a. To take as a point of departure the draft report produced by Europe Economics, in order to avoid repeating what has already been done, and focusing on the identification of interesting issues that can further be studied and analysed in our report. We take as a point of departure the definition of the (SE) given by Europe Economics.

b. To analyse legal gaps for citizens, business and other relevant stakeholders regarding the Sharing Economy. To assess the effectiveness of the existing EU regulatory framework in this regard. To highlight best practices and provide recommendations as to possible EU action in this field.

Due to the novelty of the concept, we have chosen a phased funnel approach whereby we start with gathering as much information as possible and want to end up with a selected number of usable cases that allow for answering our research questions.

We therefore performed mainly desk research, using both primary and secondary sources. In this regard, in addition to the academic literature on the subject, special attention has been paid to cases brought before both national jurisdictions and the Court of Justice of the EU (hereafter, ‘CJEU’). Furthermore, due to the novelty of the topic, a lot of research has been conducted on the Internet, using institutional and governmental websites, online newspapers and blogs. Finally, some interviews have been conducted with experts on the topic4.

Considering the time constraints we had we deliberately limited our analysis to six Member States (BE, DE, FR, ES, NL and UK). Even though these six proved to cover a wide array of national responses to the SE, it is quite possible that – especially because of the rapid rise of the SE, and together with it the concerns – other interesting cases have come up just before the publication. Furthermore, in order to respect the requirements, we choose to perform mainly desk research, using both primary and secondary sources. While a great deal can be found in books and on the Internet, it can be expected that nuances to national cases are more easily identifiable through other research methodologies, such as interviews for instance. Yet, these would have demanded a lot of time and such an approach would go beyond the objectives of this paper. It is nevertheless a suggestion for future research. On the same line, we have presented the court cases up a level we considered appropriate for the purpose of the study and to allow us draw to detect remaining legal gaps and draw conclusions. Again, it could also be interesting to analyse every case from every possible angle. However, this would leave us with hundreds of pages that only address specialists.

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4 Oui Share Festival, 19 November 2015, Barcelona: Interviews conducted with Albert Canyigueral and Miquel Ferrer, members of Oui Share Spain.
In light of the above, the report is divided in five chapters. In the first chapter, the introduction, the literature review on the SE, and the methodology are provided.

In the second chapter, the national legal responses given to the SE in BE, DE, FR, ES, NL and UK is addressed. This chapter covers the three sectors selected (transport, accommodation and professional services) analysing cases from different geographical areas. The chapter is divided per sector, and for each one of them, the following aspects are covered:

a. Study and compare the legal responses given by the Member States to the phenomena and the effectiveness so far of those responses. The legal responses analysed cover both the legislative and jurisdictional branches: in some MS the drivers of the responses have been triggered through Court cases, while in others it has been the legislator reacting to sector’ protests without waiting for the problem to reach the Courts.

b. Comparative analysis of the different legal responses and identification of best practices.

In the third chapter, the EU regulatory framework is analysed. Questions relating to the Single market strategy, EU competence, and different areas of legislation of relevance for the purposes of this report – in particular, the Services Directive, the eCommerce directive, consumer legislation, and data protection laws – are examined.

In the following chapter, the remaining legal gaps and issues, as well as the obstacles and barriers preventing the SE from reaching its full potential are analysed. We categorise through indicators the different obstacles and present a comparative analysis among the six member states analysed in the study. Finally we cover the potential of self-regulation in the SE.

In the concluding chapter, the need for EU action will be assessed. Based on the findings of the previous chapters, we will try to identify if and how possible EU action is needed. Recommendations are presented in this regard.
2 National legal framework: case studies

SE businesses are appearing at unprecedented rate; one can now find a sharing platform for almost anything. In order to define the focus of our research we have narrowed down the geographical area of investigation, the legal areas to be covered as well as the P2P sectors included in our analysis.

a. Geographical scope: we will concentrate the analysis of the cases geographically, based on a combination of factors like the geographical location (North/South); the amount of concentration of big cities where major platforms are strong; existing literature on the sharing economy in a given country, related to the amount of Court cases, relative size of the sharing economy users, social and citizens’ mobilization around the phenomena etc. We are presenting in this briefing paper the analysis of cases relevant in BE, DE, ES, FR, NL, and UK. Where relevant, or in the absence of cases on the European continent, some examples were taken from the United States of America.

b. The law areas covered: we will highlight the legal issues that are raised in the cases presented in this report. With special attention to the questions related to Labour law, Consumer protection (including insurance) and Fiscal law.

c. The platforms to be analysed. Because of the discussions and debates they are causing in the media and academic and political spheres we have focused our analysis on platforms that operate in the following sectors: (1) Transportation; (2) Accommodation; (3) Professional Services. Due to the time constraints and limited budget, the final number of platforms analysed in the research is limited.

2.1 Transportation

Uber has given rise to the most notable example of legal conflict arising out of SE platforms in the transportation field. Blablacar is also a SE platform for transport with a different business model that has been also subject in some MS to different legal disputes; we will therefore focus our analysis upon the legal issues surrounding Uber (and when relevant also Blablacar) in six Member States.

Uber

This business model allows consumers with smartphones to submit a trip request which is then routed to Uber drivers who use their own cars. Uber fixes the price, and occasionally they use a dynamic pricing model at peak seasons/moments, to encourage drivers to be available: With some events (New Year’s Eve, a storm), the car demand increases while the car supply tends to shrink. In these cases the supply curve is moving left at the exact
same time that the demand curve is moving right. As a result Uber considers vital to use price as a catalyst to increase supply.

By May 2015 the transportation network company, founded in 2009 and headquartered in San Francisco, was giving service in 58 countries and 300 cities worldwide.

According to Uber owners, Uber’s drivers are independent agents that are either self-employed, or work for someone who owns multiple cars. Uber does not own cars and they claim not to employ drivers: the drivers decide whether or not to open the Uber application and accept requests for rides from Uber customers. The drivers are not bound by exclusivity, and many of them work on multiple services, and many have “regular customers” that they engage off the Uber platform.

The majority of Uber fares go to these independent drivers: on average, over 80% of gross fares. Uber Company argues that of the percentage that is retained by Uber, a large portion goes to cover variable expenses within the service. These expenses include payment processing, payment fraud, refunds, customer support, dispute resolution, cellular handsets and service fees for the drivers, and local regulatory efforts. They claim to have a low margin business5.

As Uber grew internationally, it began to experience disputes with governments and taxi companies. In Europe it has been banned in different cities, with different legal arguments. The company has requested an investigation to the European Commission to see whether some of these restrictions are legal and do not violate EU law. At least Spain, France and Germany are on the list according to different information.6

**Blablacar**

The platform connects drivers and passengers willing to travel together between cities and share the cost of the journey. Prices are fixed when a car owner offers a ride7. They are non-negotiable and the same for all co-travellers. The price is always based on a suggestion calculated by BlaBlaCar according to the itinerary and real costs incurred by car owners. Car owners are free to adjust the price within reason, to account for the comfort of their car or their willingness to make a detour. The price cannot exceed a ceiling set by BlaBlaCar, in order to ensure costs are fairly shared and that car owners do not make a profit.

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And [www.reuters.com/article/2015/04/01/us-uber-eu-complaint-idUSKBN0MS4BH20150401](www.reuters.com/article/2015/04/01/us-uber-eu-complaint-idUSKBN0MS4BH20150401) (last consulted on 25/10/2015).

Generally, price per seat represents a third of the fuel cost for the journey; when a car owner takes three co-travellers, he offsets all fuel costs, but not necessarily tolls. Payment is made through the application: the passenger pays online at the moment of the reservation, and the driver receives the payment once the journey is completed. The platform charges since recently a percentage of the price.

BlaBlaCar has more than 20 million members across 20 countries. Before the on-line payment, BlaBlacar (ex-covoiturage.fr) has made his living with web ads and selling custom ride sharing platforms for companies (e.g. Ikea, Carrefour) and cities. But the B2B model was not profitable, requiring too many customisations for lower and lower costs, so the founders focused entirely on the C2C model and looked on how to improve it and monetise it. Since mid-2012, they deployed a booking system and then charge a few fees when people book a ride through their site. Since the introduction of such system, BlaBlaCar's revenue has been increasing each year and the company has developed to become a European market leader in ride sharing (current leader is Carpooling in Europe).

2.1.1 Benefits

Unlike employees of taxi companies, drivers of Uber chose when to drive and hence to work. This provides drivers with the opportunity to earn an income without the strict full-time employment scheme. Furthermore, there is more efficient use of resources, in this case the car and time. While traditional taxi drivers often have to wait around at taxi stands for the next passenger, Uber drivers can use their time as they like, possibly filling their spare time offering themselves out for different sharing services.

Consumers also benefit from Uber in several ways. First, Uber rides complement public transport, which is often limited in time (no 24/7 service) and space (no door-to-door transport). Second, they can offer a cheap alternative to traditional taxi rides. Finally, the convenience of getting an Uber ride adds value. A recent study comparing Uber with traditional taxi services in the Los Angeles area reveals that UberX rides arrive in less than half the time of telephone-dispatched taxi.

2.1.2 Complaints

The rise of Uber has been the instigator for protest in many big cities all over the world. These protests are led by traditional taxi companies and drivers. They argue Uber is challenging them with unfair practices. More concretely, Uber is offering the same type of

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services without being subject to the same rules, the argument goes. These rules deal with among others, social benefits, working time, taxes and insurances.

2.1.3 Case analysis

Belgium

In Belgium, it was not a taxi company that took Uber to court but one that in a way offers the same type of service as Uber. The Brussels-based company ‘Taxis Verts’ (Green Taxis) assumes the role of contact centre between customers and affiliated taxis. Taxis Verts itself is therefore not subject to the rules regarding taxi services as laid down in a Decree of 1995. However, professional taxi drivers to whom it assigns taxi rides do have to comply with the rules. Taxis Verts claims Uber is offering exactly the same services as themselves since it offers taxi services against payment, at a moment where Taxis Verts itself is offering a web application to its customers to request a service. Summarised, Taxis Verts blames Uber to commercialise a service in the framework of rides that fulfil the criteria of a taxi ride, delivered by drivers that do not possess the required license nor comply with the rules. It therefore accused Uber of unfair competition with regard to drivers with the necessary documents as well as to other companies such as Taxis Verts, to which they are affiliated.

Uber, in a response to this action, claimed their users indeed receive a payment, but this should be seen as a compensation for the costs made rather than a form of salary. The Brussels Tribunal of Commerce (Rechtbank van Koophandel) did not follow Uber’s explanation and ruled that Uber is indeed offering unlicensed taxi services against what can be seen as a salary, since the payment offered to drivers can exceed the costs made by the ride. It therefore imposed a ban on the service UberPOP in Brussels. Nevertheless, the Tribunal decided to refer a question for a Preliminary Ruling on whether this strict interpretation of the Decree would not interfere with articles in the Charter of Fundamental Rights of the European Union, the Treaty on the Functioning of the EU and the European Charter of European Rights. In essence, it boils down to the following question: Does the principle of proportionality as laid down in the above mentioned documents interfere with the rules as written in the Brussels Decree on taxi services for those cases where ‘taxi services’ would be applicable even to occasional, not compensated for in the form of a salary, rides as a reaction to requests for taxi services.

10 Ordonnantie betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur.
In the meantime, the Government of the Brussels Region is developing a legal framework for alternative taxi services, such as Uber. In consultation with the taxi sector it is creating a framework for all types of paid transport, in order to abolish unfair competition and social dumping. The former Brussels Minister of Transport, Pascal Smet, has said that this does not constitute a legalisation of Uber. However, if companies like Uber abide by the rules concerning transparency, safety, liability as well as the social and fiscal rules, they can get a legal base for their operations. Notwithstanding this legal base, Uber would not enjoy the same privileges as regular taxi companies. Drivers could not work full time, they could not make use of priority lanes nor could they pick up clients on the streets. It is the Minister’s expectation that Uber will have to increase its prices if it wants to follow the rules (De Redactie, 2015).

Germany

In Germany, Uber is facing problems with several local authorities. It started on 25 August 2014, when UberPOP was prohibited by a preliminary injunction of a district court in Frankfurt am Main (Hessen). Drivers without an official permission, according to the Personenbeförderungsgesetz (1964), were not allowed to offer their services. The company could be fined with a maximum of €250,000. The reason for the lawsuit was a complaint from the German organization for taxi companies, Taxi Deutschland Servicegesellschaft für Taxizentrallen.

Three weeks later, the same court lifted the preliminary injunction. The German taxi organisation that asked for the court decision had based its demand on reasons of urgency – which in itself was unjustified because Uber already existed since 2013. The content of the injunction itself was not contradicted, but the procedure should have been different.

Uber’s fortune did not last long. On 26 September 2014 the local courts of Hamburg and Berlin ratified the first ruling of ‘Frankfurt’. In their jurisdiction UberPOP was prohibited. The motivation was based on the fact that the consumer rights and safety were not sufficiently guaranteed. In the case, Uber was not merely an intermediary party; it represented the drivers. Uber appealed, without success. On April 16, 2015 the initial court decision was upheld by the Berlin-Brandenburg Court of Appeal.

In March 2015, the Frankfurt Regional Court issued a nationwide ban against Uber ride-hailing service UberPOP (UberBlack and UberTaxi were not affected), declaring its business model illegal. Mediating rides with private drivers who don’t have the required

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12 Landgericht Frankfurt am Main Beschl. v. 25.08.2014, Az.: 2-03 O 329/14.
licenses is illegal.\textsuperscript{14} Uber tried to convince the court that the price the customer had to pay was no more than the transportation costs. The court, however, argued that the price per kilometre charged by Uber, was far higher than the actual costs. The surplus goes to Uber (20\%), Dutch taxes (Uber operates from The Netherlands), and an income for the drivers. Thus, the court argued, Uber has to be seen as a regular business, without the necessary licences. Also in this case, Uber appealed.

Uber decided to continue operations in several cities, but only with its limousine service (UberBlack) and licensed taxi drivers (UberTaxi) with lower fares than regular taxis. However, due to a lack of drivers, in November 2015 Uber suspended services in three major German cities: Hamburg, Frankfurt and Dusseldorf, and retreated to Münich and Berlin. "For many prospective Uber partners the process of registering an independent rental car enterprise has proved as too costly and time consuming," Uber said in a statement. It added it would improve its services in the two remaining German cities and "intensify the dialogue" with lawmakers and authorities, saying Germany remained one of its most important global markets.\textsuperscript{15}

At the moment of writing this report, UberPOP is still banned in Germany. Uber needs to hold a taxi operator’s license and comply with all the existing taxi legislation. An appeal case regarding the court ruling of the Frankfurt Regional Court is still pending.

\subsection*{France}

In the first half of 2014, the UberPOP version of the app was launched in Paris, France, whereby users are linked to drivers without professional taxi or chauffeur licenses, while Uber covers supplemental insurance.

While the public response to the SE has been quite positive in France, the creation of web applications such as UberPOP has given rise to important social problems and mobilizations from the traditional actors in the transport sector, as they consider that SE platforms exploit the existing legal gaps to infringe upon the principle of fair competition. The stance adopted by the French authorities in this field has been quite conservative.

As a preliminary comment, it should be noted that the transportation market is divided into two domains: the cruising market, which is reserved to taxis, and the advanced booking market, which is open to competition and therefore includes chauffeur-driven vehicles. The legal monopoly of taxis in the cruising market is justified on public interest grounds, relating to the policing of traffic and parking. In return, taxis are subject to regulated prices

\textsuperscript{14} Landgericht Frankfurt am Main Urt. v. 18.03.2015, Az.: 3-08 O 136/14.
\textsuperscript{15} \url{http://www.reuters.com/article/us-uber-germany-cities-idUSKCN0SO2R620151030} (last consulted on 10/01/2016).
and to a system of administrative licence authorizing them to stand at rank within their municipality or the common service to which they are attached. By way of example, this licence amounts to 230,000 Euros in Paris\textsuperscript{16}. Nonetheless, technological innovations and the appearance of SE platforms in the transports industry such as Uber blurred this distinction, and allowed the fast development of chauffeur-driven vehicles\textsuperscript{17}.

**Prohibition on electronic cruising; obligation to return to base; pricing system**

Against this background, the French legislator has intervened to regulate this activity, mainly through the adoption of the so-called “Loi Thévenoud”\textsuperscript{18}. This Act recalls the prohibition of cruising in a street open to public circulation to chauffeur-driven vehicles, thus seeking to guarantee the legal monopoly enjoyed by taxi drivers. In particular, it limits the use of GPS by chauffeur-driven vehicles, and it prohibits electronic cruising through smartphones, as well as the solicitation of clients without advanced booking, except for taxi drivers\textsuperscript{19}. The prohibition on cruising is punished by criminal sanctions.

In addition, it regulated chauffeur-driven vehicles pricing system\textsuperscript{20}: The total price of the service needs to be determined at the time of the advanced booking. Therefore it was prohibited to charge on the basis of both time and distance. This was considered by the plaintiffs to violate the freedom of enterprise.

Finally, it established an obligation to return to the base applicable to chauffeur-driven vehicles: drivers must return to the establishment of the operator or to an off-road location where parking is authorized, unless (s) he is able to provide evidence of a prior reservation or a contract with the client\textsuperscript{21}.

Uber France SAS and Uber BV challenged these legal barriers before French courts\textsuperscript{22}. They argued that these articles infringed upon the freedom of enterprise, the principle of equality.

\begin{footnotesize}


\textsuperscript{17} Conseil constitutionnel, *Commentaire Décision n° 2015-468/469/472 QPC, Société Uber France SAS et autre*, p. 3.


\textsuperscript{19} Transports Code, article L. 3120.2 (III).

\textsuperscript{20} Transports Code, Article L. 3122-2.

\textsuperscript{21} Transports Code, Article L. 3122-9.

\textsuperscript{22} French Court of cassation, commercial chamber, judgment no. 376 of 13 March 2015. Available in French at: \url{www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030356182&fastReqId=1459466973&fastPos=2} (last consulted on 25.10.2015); French Court of cassation, commercial chamber, judgment no. 375 of 13 March 2015. Available in French at: \url{www.courdecassation.fr/jurisprudence_2/qpc_3396/375_13_31319.html} (last consulted on 25.10.2015);
before the law and the right to ownership. The French Constitutional Court (Conseil constitutionnel) held that both the prohibition on electronic cruising and the obligation to return to the base are constitutional while the regulation of the pricing system of chauffeur-driven vehicles is unconstitutional23.

**Prohibition of UberPOP**

The Loi Thévenoud introduces a distinction in the Transports Code between Uber-like platforms and Blablacar-like platforms; the former are considered as a disguised form of car sharing and are illegal whereas the latter is legal, as they are understood as real forms of SE. An amendment to the Transports Code was made in 2015 in order to clarify this difference. Car sharing is defined as the common use of a motorized ground vehicle by a driver and one or more passengers, provided that the costs are merely shared among them and the trip is carried out by the driver for their own purpose24. In contrast, platforms like UberPOP, that connect clients with people who engage in individual transportation activities without being transport companies, taxis or chauffeur-driven vehicles, are illegal and subject to criminal sanctions25.

The Constitutional Court held a judgment on 22 September 2015 whereby it concluded to the constitutionality of UberPOP’s ban26. It is worth noticing that the Constitutional Court confirmed the difference of treatment between Uber and Blablacar, as it considered that the challenged provision did not aim to prohibit car-sharing platforms27.

Two CEOs of Uber were arrested on charges of being illegally handling data and illegally operating a taxi service; they will be judged together with Uber France in 201628.

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24 Transports Code, article L. 3132-1.

25 Transports Code, Article L. 3124-13. (« Est puni de deux ans d'emprisonnement et de 300 000 € d'amende le fait d'organiser un système de mise en relation de clients avec des personnes qui se livrent aux activités mentionnées à l'article L. 3120-1 sans être ni des entreprises de transport routier pouvant effectuer les services occasionnels mentionnés au chapitre II du titre ler du présent livre, ni des taxis, des véhicules motorisés à deux ou trois roues ou des voitures de transport avec chauffeur au sens du présent titre »)


The Netherlands

The Netherlands has three sorts of the Uber app. The drivers Uber Black and UberLUX are certified drivers that use Uber in addition to their other duties and services. Legal but not undisputed. With the third one, UberPOP, the drivers are individuals. The controversial question has been – like in other countries-cities, to what laws and regulations the individuals offering their services must comply.

Uber contributed to the discussion by the start of a pilot with UberPOP in Amsterdam, and gave order to the consultancy firm Accenture to map how many people use the service, what their motives are for this and how they experience the service in terms of flexibility, safety and cost. In October 2014 the evaluation of Accenture was presented. Although the test officially had ended, Uber continued to function. Meanwhile the Dutch Inspection Environment and Transport controlled regular taxis on the compliance with the Law on Personal Transport 2000 (WP2000), and fined them if anything was not in order.

The report showed that most of the drivers had other jobs, and saw Uber activities as an extra income. One of the basic conclusions was that Uber deals with ordered personal transport and no ‘hitchhiking’ service like Toogethr and Blablacar. Respondents did not mind that Uber-drivers were not official taxi drivers. Official taxi drivers in Amsterdam have a poor reputation. Basically, Uber-users were quite satisfied with the service.

The report was sent to several MPs, in the hope to influence discussions on new taxi laws. According to the Dutch Inspection Environment and Transport anyone who offers taxi transport needs to comply with the WP2000 and have a licence. Uber says it does not offer transport, it only offers an application that enables others (the drivers) to offer their services. And therefore it does not need a licence.

The legislator did not agree: offering taxi transport without a licence in NL will be punished with a fine of € 4300. Also the car can be taken into custody. If the same driver is caught again, he will be fined with a € 10.000 (a maximum of € 40.000). As well a fine will be given to Uber (up to a maximum of € 100.000). Several Uber drivers were caught and fined.

In order to stop this procedure, Uber went to the Dutch Commercial Court of Appeal, asking for a preliminary injunction.

In December 2014 (Judgement: ECLI:NL:CBB:2014:450  (8 December 2014)) the court denied the request and argued: “The Minister is right when it argues that the drivers have violated the prohibition of the provision and supply of unlicensed taxi. And that Uber is the co-perpetrator of this violation by the drivers”. The judgment can be interpreted this way that Uber is in fact a provider of taxi services. And not just simply as a broker or other

intermediary that should perhaps be excluded from the authorization. The judge ruled that between the drivers and Uber there is “conscious and close cooperation” to provide taxi services. Uber selects the drivers, the drivers can only access the app through Uber, Uber determines the fares and Uber receives a percentage of the fare. In short, Uber will not get away with the claim that it only offers an app that brings together supply and demand of individuals.

The question that has been arising in the social media is: why would an individual who by his own car brings another private person from A to B, where supply and demand is established via an app, must have a taxi license? What interest does this serve? According to the Minister the regulations on taxi licenses is aimed at “a minimum required transport quality” and the interests of consumers. But does this actually lead to a form of service that should be controlled by government regulations? Or is it more a question of the convergence of supply and demand of clients, offering private individuals arrange their affairs, albeit with help from a commercial third party? A sort Marketplace? Does the government have a role in this at all?30 On the other hand, - social media debates argue - we need to consider the problems of traffic congestion in big cities, as well as environmental considerations to favour public instead of private transport.

In this context, Minister Henk Kamp promised "technology-neutral regulations" that would ensure no company is disadvantaged because it is using different technologies. This would, for example, allow taxi drivers to replace their meters with smartphone apps like Uber's.

A government spokesperson said UberPOP would remain illegal. “We want to make the taxi market more open, but we need to have fair competition," spokeswoman Karin van Rooijen said.

Despite the judgement of December 2014, and even though Uber started a so-called ‘bottom-procedure’, in Amsterdam and Utrecht Uber drivers have been caught without having any licence. Uber was getting ‘underground’ by offering its services only to known customers, not accepting any new customers. In March and September 2015, police officers entered Uber offices in Amsterdam to get hold of Uber administration.

Finally on 20 November 2015, Uber decided to stop with UberPOP in the Netherlands31.

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31 “Today we have informed all Dutch drivers that on Friday November 20 at 12:00 am we stop UberPOP in the Netherlands. Despite the fact that UberPOP has led to interesting insights about how the mobility of the future might look like, we decided to stop UberPOP. We believe that continuing is an obstacle to a constructive dialogue on modernization of existing laws and regulations. The services UberX, Uber Black and UberLUX are not in question and remain available.” See: https://newsroom.uber.com/amsterdam/nl/uberpop-stopt-in-nederland/ (last consulted on 13/01/2015).
Spain

At the end of 2013, Uber started operating in Spain its UberPOP taxi service, which caused taxi strikes in Madrid and Barcelona 16 months later. After a ban from Berlin, Spain joins the ban and in December 2014 Uber suspends its taxi service in Spain, to set up three months later UBER EATS in Barcelona. In Madrid and Barcelona parallel cases were brought to the tribunals on unfair competition grounds. Both cases have followed different paths:

In Madrid, the association of taxi drivers decided to start proceedings against the company. The resulting ruling establishing precautionary measures argued that the drivers contracted by Uber do not have the required administrative license to provide the service. Furthermore, the activity constitutes – according to the precautionary measures – unfair competition, (the company had not been certified as transport mediator in Spain) ordering to the telecom companies and electronic payments, to ban any transaction and hosting of the company UberPOP. At the moment of writing this article, the precautionary measures have been prolonged through with some modifications: the unfair competition affects only UberPOP, making possible the access to other non-related companies.

In parallel, a claim was brought before the same Judge, by the Confederation of Buses (Confebus) against Blablacar Spain. The plaintiff is using similar arguments to the ones of the Taxi confederation against Uber, and has requested provisional measures to have the web page closed. At the moment of writing this article the case is waiting for a verdict.

In Barcelona, the Judge referred the case to the CJEU asking whether Uber should be considered a transport company or an information society service. Although the ruling will not be solved before the summer of 2016, a lot of expectation has been raised already: if the Court decides that Uber is a digital service provider, it will be much harder for national regulators to curb its activities. But if it were considered to be a transport service, it would increase significantly its operational costs. This could include how drivers are insured and its approach to adhering to local correspondent.

The specific questions referred to the CJEU are the following:

1) Whether Uber is a “mere transport activity”, and is therefore excluded from the scope of Article 2.2.b of Directive 2006/123/EC of 12 December 2006 on services in the internal market;


www.blablacar.es/.


2) If not, whether Spanish unfair competition law as applied to “information society” services is contrary to European law, specifically Article 9 of the Services Directive, which states that an authorization, licensing or permits regime cannot be restrictive or disproportionate, and cannot unreasonably hinder the principle of freedom of establishment.

All legal proceedings against Uber in Spain have now been suspended, pending the ruling of the CJEU. For a deeper analysis of the questions posed in the preliminary ruling see Annex II.

**The United Kingdom**

In September 2015, Transport for London, the government body responsible for the transport system in Greater London has put forward proposals for private hire companies, such as Uber. Consultations on these proposals were held until 23 December 2015. According to our knowledge, no final decision has yet been taken. A number of these proposals could hit Uber’s operations in London. In particular, the proposal to install a five-minute wait time between the ordering of a taxi and its arrival would have a huge impact since many of Uber trips took place within five minutes of the car being booked.36 Other proposed rules include a ban on showing cars for hire within a smartphone app, one of Uber’s main features, and the ability to book rides up to seven days in advance, something Uber does not offer. Furthermore, drivers would only be allowed to work for one operator at a time, while Uber states a great deal of its users work for traditional minicab firms too. Finally, the draft proposal suggests there should be controls on ridesharing in public vehicles. This would potentially harm the service UberPool, launched only in December 2015 in London that allows several customers to share a car.37

At the same time, Transport for London asked for judicial review on Uber’s operations. The key question was whether the smartphone app should be considered a taximeter, which is prohibited in private hire vehicles.38 The argument held by the Licensed Taxi Drivers' Association was that the way Uber calculates fares on smartphones is technically metering. However, the judge ruled in favour of the taxi-hailing company. In the judgement, it is written that:

“A taximeter, for the purposes of Section 11 of the Private Hire Vehicles (London) Act 1998, is not a device which receives GPS signals in the course of a journey, and forwards

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GPS data to a server located outside of the vehicle, which calculates a fare that is partially or wholly determined by reference to distance travelled and time taken, and sends the fare information back to the device.\[^{39}\]

Therefore, the smartphone with the Uber app does not constitute a breach of the taximeter prohibition. In addition, the judge declared that it was drivers, not cars, who are equipped with smartphones.\[^{40}\]

While Uber is seen to have won this battle, it remains to be seen what the new regulations on private hire companies will look like and whether the Licensed Taxi Drivers' Association will appeal the Court’s ruling on Uber’s taxi meter.\[^{41}\]

**USA**

A case in California is worth mentioning, as it highlights very well the labour implications of applications like Uber. In this regard, the California Labor Commission ruled in favour of an Uber driver who alleged that she is an employee, not an independent contractor\[^{42}\]. Uber decided to appeal the decision, which is still pending. Even though this case takes place outside of Europe, it arguably highlights a trend, that should seriously be taken into account by European authorities.

### 2.2 Accommodation

Already since some years people have rented out their apartments through their own websites, but also through platforms, new companies offering space in return for a percentage of the letting price. The biggest ones like HomeAway, Housetrip (both US-based) have some million apartments and houses for rent. Of course their growing rate is limited, because only a small percentage of the internet-users have a spare apartment to rent out.

Airbnb (USA) has raised this business to a new level. Main offerings are not only the whole house/apartment, but also bedrooms. This makes ‘sharing’ the house, an option for almost anyone. Latest statistics show a rapid increase in offerings. Touristic cities like Berlin, London, Amsterdam and Barcelona have all more than 10,000 rooms and apartments to offer through Airbnb while Paris reaches a staggering number of 40,000.


\[^{40}\] Ibid.


Airbnb is not the only company in the market. Wimdu (Germany) is showing similar growing rates. Many smaller websites with similar offerings are popping up.

### Table 2: Number of apartments available per city 2015

<table>
<thead>
<tr>
<th>Company</th>
<th>State of origin</th>
<th>Paris</th>
<th>London</th>
<th>Berlin</th>
<th>Barcelona</th>
<th>Amsterdam</th>
<th>Brussels</th>
<th>World</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airbnb</td>
<td>USA</td>
<td>40,000</td>
<td>20-30,000</td>
<td>12,000</td>
<td>12,000</td>
<td>11,000</td>
<td>-</td>
<td>2,000,000</td>
</tr>
<tr>
<td>HomeAway</td>
<td>USA</td>
<td>8,000</td>
<td>4,500</td>
<td>1,900</td>
<td>5,000</td>
<td>1,700</td>
<td>-</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Housetrip</td>
<td>UK</td>
<td>4,500</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Wimdu</td>
<td>Germany</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>300,000</td>
</tr>
<tr>
<td>Flipkey</td>
<td>USA</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>300,000</td>
</tr>
</tbody>
</table>

Source: Own elaboration

#### 2.2.1 Benefits

The benefits pointed out by Airbnb seem to be obvious too.

For the platform it benefits from unique marginal economics: while a hotel chain expands by creating more hotels it has high marginal costs of maintenance. For Airbnb expansion means almost zero costs: new rooms are added and maintained by hosts. Airbnb does invest in community management to ensure that hosts follow best practices, and it offers insurance cover to hosts to encourage them to participate in the platform. But compared to a hotel chain, the marginal costs of creating added value are much lower.

For small house owners (the providers), the platform offers the possibility of renting out space to a huge market, which allows them to pay domestic household bills, an argument worth a million in times of economic crisis.

For tourists (the users) the platform offers competitive process compared to hotel rooms, and opens up a new way of interacting with the locals by opening up the possibility to use the local houses.

For cities, the benefit comes from the spending of tourists who otherwise would not have visited the cities involved.

Following the trend in many US cities, in Europe legal disputes are growing. As a response public authorities are approving new rules – like in the case of Berlin – to create new housing laws banning regular short-term renting of rooms without permission from the authorities, or otherwise supporting the trend but under clear regulatory conditions.
2.2.2 Complaints

Like in the case of Uber, the holiday rental site Airbnb finds itself under growing attack from city authorities. Airbnb provides an online platform to allow individuals to rent out their homes, rooms or apartments to visitors. While this is not in itself illegal, in most cases it breaches local housing laws, as well as fiscal obligations stemming from the activity.

As a consequence, complaints are being heard from traditional economy sectors. ‘Unfair competition’ is the most common. Hotels, Bed Breakfasts, and other lodgings have to register, pay taxes and comply with a lot of regulations. The owners who rent private rooms via companies like Airbnb usually are not registered, do not pay taxes, and do not comply with any regulations.

Another complaint – coming from citizen’s platforms – deals with the supposed withdrawal of rental space in a city, and the forthcoming rise in rents. Since the business of renting out tourist apartments and rooms is getting more and more profitable, part of the offerings of Airbnb come from companies that manage several (sometimes even tens) of apartments at the same time, apartments used for tourists, and not for house-seeking locals.

These complaints – even though it sounds logical – are not supported by statistical evidence. Research in the case of Berlin (www.Airbnbvsberlin.com) did not come with solid conclusions.

A final complaint is related to the fact that cheap rentals attract too much rowdy tourism.

2.2.3 Case analysis

Belgium

Brussels

The Brussels Regional Government will impose a new rule as from 2016 for touristic accommodations. The scope of the regulatory framework will be extended from hotels and guest rooms to rooms offered by residents (which constitutes the largest part of Airbnb users). From 2016 onwards, Airbnb users offering a room will need a registration number. In order to receive one, they need to provide the following documents: a copy of proof of ownership, an excerpt from the criminal record, an insurance contract, a certificate of fire safety, and a plan of the property (De Morgen, 03 November 2015; Haeck, 2015). While a normal procedure for getting a certificate of fire safety requires an inspection from the fire department, individuals will only need to present an inspection certificate of gas and electricity (Haeck, 2015). All of these documents will have only to be presented once (Haeck, 2015).
**Flanders**

The Flemish government is reviewing\(^{43}\) the Lodging Decree\(^{44}\) by which it wants to offer a framework to govern Sharing Economy platforms such as Airbnb. Rules will be simplified and clarified. A license or registration would no longer be necessary to offer a room for rent as long as all safety provisions are complied with. Whoever wants to be recognized as an official touristic accommodation operator can voluntarily request a recognition, in which case an inspector will pass by (Cludts, 2015). Online platforms such as Airbnb are also considered in the Decree and will have to provide the Government with addresses so targeted inspections can be performed (Goddefroy, 2015).

**Wallonia**

The Walloon Government has not yet taken any measures in response to Airbnb’s growth. It has to be noted that the platform has only got a small number of users in the French speaking part of Belgium (Godart, 2015). The current legislation requires from people offering touristic accommodation that they identify themselves in front of the municipal administration where the accommodation is situated and that they possess a certificate of simplified control (for dwellings offering space to less than 9 persons) or a fire safety certificate. This is the only requirement to enter the touristic housing market (Le Vif, 13 July 2015).\(^{45}\) One could argue here, of course, about the definition of touristic accommodation and question whether Airbnb users voluntarily identify themselves or whether the government would take action to detect unidentified users.

The Brussels and Flanders cases constitute two different approaches taken by the different regions in Belgium. While Brussels choses to impose more rules, obligations and controls on residents willing to offer a room for rent, Flanders opts for an opposite, more liberal, approach with controls to be performed a posteriori. The Walloon government’s non-approach, then, could be seen as leaning towards the Flemish approach, since it requires only one certificate.

**Germany**


Airbnb: The number of Airbnb listings in Germany is changing every month. What is clear, is that Berlin has by far the biggest offering: somewhere between 10,000 and 15,000 apartments. Complaints of local citizens and politicians about the impact on local rental prices, led to an investigation report from students from the University of Applied Sciences in Potsdam, Germany, Spring 2015. This report states that in February 2015 Airbnb offered 11,700 apartments in Berlin. Munich (around 4000), Hamburg and Cologne (around 3000), came in second, third and fourth place. The report did not come to a clear conclusion on the consequences of subletting for rental prices in general.46

In order to meet general discomfort from the side of citizens and hotel organizations, the city of Berlin adopted a local law in May 2014: the so-called Zweckentfremdungsverbot-Gesetz (ZwVbG).47 The law bans the regular short-term letting of rooms without permission from the authorities. However, a two-year’s term was included for apartments that were already being used for holiday lets at the time the law came into force.

Based on this law, at the end of 2015 approximately 6,300 apartments were registered and 1,200 possible violations. There are also around 2,800 notes from the public on possible infringements of the ban, which are also being checked.48 Inspections are conducted in order to ensure that the law is correctly applied, authorising compliance forces to enter into the houses without warrant49.

At the moment of writing this report (December 2015) a new draft law is being discussed – an amendment to the existing Zweckentfremdungsverbot-Gesetz (ZwVbG). It stipulates that secondary residences cannot be rented without a permit as a holiday home. In addition, according to the new draft law the authorities will be able to oblige platforms like Airbnb and similar ones like Wimdu and 9Flats to collaborate in the investigation of possible cases of infringement. That is, they will have to give the District Offices information about the registered users of their portals.50

France

In response to the creation of platforms such as Airbnb, the French legislator intervened mainly through the adoption of the so-called “Loi ALUR”51. Occasional users wishing to rent a room see their rules simplified as they do not need to request an authorization. In this regard, a distinction is made between principal and secondary residences. Short-term

46 http://www.Airbnbvsberlin.com/
47 http://gesetze.berlin.de/jportal/?quelle=jlink&query=WoZwEntfrG+BE&psml=bsbeprod.psml&max=true (last consulted on 10/01/2016).
rentals are allowed without requiring a prior authorization from the City Council for principal residences. If the dwelling is the owner’s secondary residence, short-term rentals are also authorised, but in cities of more than 200,000 inhabitants the owner must obtain a prior authorization from the City Council. Otherwise, short-term rentals regularly used are commercial units, subject to the common legal and tax framework. Violating these rules entails fines of up to 25,000 Euros, and French tribunals effectively enforce these rules.

Therefore, using Airbnb and other similar platforms is legal provided that the owner complies with the existing regulation, including tax legislation, which tends to align to the hotels' regime. For example, the French Government recently adopted a decree that extended the tourist tax to this situation and it is quite significant that Airbnb created a mechanism to collect this tax on behalf of the city council. This mechanism is now in force in Paris, but it will be progressively expanded to the other French cities.

Nonetheless, the legislation is not completely clear, especially regarding the threshold upon which the dwelling becomes a commercial unit and using Airbnb becomes a professional activity. So far, no judgment has been published in this regard. However, a tax exemption for revenues stemming from the SE amounting up to 5,000 Euros is under discussion by the national authorities. Above that threshold, the common legal and fiscal provisions would apply. In any event, it should be noted that the Act did not change anything regarding subletting. Therefore, a tenant cannot use Airbnb and other similar platforms to rent out the dwelling, except if the owner expressly consented to it and the rent does not exceed the one paid by the tenant. Violating these rules may entail the lease cancellation. The first judgment that involved Airbnb took place in 2014: a tenant who hosted tourists through

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52 The other cities enjoy discretion to decide whether the prior obligation is compulsory or not.

53 Code of construction and housing, article L. 631-7.


55 Décret n° 2015-970 du 31 juillet 2015 relatif à la taxe de séjour et à la taxe de séjour forfaitaire, JORF n°0179 of 5 August 2015, p. 13416.


Airbnb was condemned, but the tribunal refused to authorise his eviction from the apartment\(^{60}\).

**The Netherlands**

The City of Amsterdam is one of the European cities with the highest Airbnb apartment’s density. On a population of less than a million inhabitants, some 13,000 rooms/apartments are rented out, of which 7,000 by Airbnb.\(^{61}\)

On February 14, 2014, the Amsterdam City Council created a new category of accommodation that makes it legal for city residents to occasionally rent their homes to tourists.

The new category “private rental” gives residents the opportunity to list their homes on sites like Airbnb without fear of penalty. But some rules do apply:

- Residents can only rent the home they live in and they must own the space or have permission from their landlord to rent it.
- Residents must pay tax on the income made from short-term rentals as well as a tourist tax.
- No more than four people are allowed to rent one home at a time and residents cannot rent their home for more than four consecutive nights.
- A maximum of 60 days/year. Renting homes more than 60 days/year will be considered as commercial exploitation.
- Tourists may not cause any inconvenience and the house must meet fire safety requirements.\(^{62}\)

With this new legislation, Amsterdam became the first European city to pass an “Airbnb friendly law” to support the sharing economy under certain conditions. It was welcomed by Henk Kamp, the Minister of Economy: “If we in the Netherlands want to be first to profit from the benefits of innovation, then we have to make room for that in our rules”.

In December 2014 Airbnb and the city of Amsterdam came to a Memorandum of Understanding (MOU): Airbnb offered its help to collect the tourist taxes (5% of accommodation price). Airbnb will report information about infringement of the rules set


\(^{61}\) [http://zoeken.amsterdam.raadsinformatie.nl/cgi-bin/showdoc.cgi/action=view/id=234437/type=pdf/4_Bijlage_3_Overzicht_websites.pdf](http://zoeken.amsterdam.raadsinformatie.nl/cgi-bin/showdoc.cgi/action=view/id=234437/type=pdf/4_Bijlage_3_Overzicht_websites.pdf) (last consulted on 10/01/2016).

by the City, on demand. The City Council published neither the text of the memorandum nor the details of the collaboration on a day-to-day basis.

Both parties agreed not to start legal procedures against the other during the trial period, which was set at one year. In December 2015 the cooperation was renewed for another year, waiting for a more definite evaluation in spring 2016.\(^{63}\)

Since the introduction of the new regulation, the City Council seems to be satisfied with the implementation, although practical problems had to be overcome. Especially the controlling of more than 10,000 offerings was a more costly and complicated job than expected. In December 2015, the platform removed some 170 Amsterdam ads because the landlords would not abide by the rules\(^ {64}\). More details about the effectiveness of the new legislation and the collaboration with Airbnb are expected to be published in the fall of 2016.

Meanwhile other Dutch cities, like Rotterdam, The Hague and Utrecht are thinking of similar agreements with Airbnb, but prefer to wait for the outcome of the ‘Amsterdam experiment’.\(^ {65}\) The efforts of Amsterdam to come to an agreement with other platforms than Airbnb, have not been fruitful so far.\(^ {66}\)

**Spain**

It should be noted that since 2013, the regulation of tourist accommodation is regulated at the regional level\(^ {67}\). Several measures have been adopted in Spain in reaction to the emergence of Airbnb-like platforms, in particular in Catalonia.

**Catalonia**

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\(^{63}\) [https://www.amsterdam.nl/gemeente/college/nieuws-uit-b-w/2015/nieuws-16-december/#h41a09c67-2c3f-46c4-a157-593e3f164285](https://www.amsterdam.nl/gemeente/college/nieuws-uit-b-w/2015/nieuws-16-december/#h41a09c67-2c3f-46c4-a157-593e3f164285) (last consulted on 10/01/2016).


\(^{66}\) [http://zoeken.amsterdam.raadsinformatie.nl/cgi-bin/showdoc.cgi/action=view/id=234434/type=pdf/1_Rapportage_vakantieverhuur.pdf](http://zoeken.amsterdam.raadsinformatie.nl/cgi-bin/showdoc.cgi/action=view/id=234434/type=pdf/1_Rapportage_vakantieverhuur.pdf) (last consulted on 10/01/2016).

\(^{67}\) Ley 4/2013, de 4 de junio, de medidas de flexibilización y fomento del mercado del alquiler de viviendas.
According to the Catalan tourist legislation\(^{68}\), hotels and tourist apartments are subject to a licence fee. Furthermore, it is prohibited to rent-out a single room in a private apartment\(^{69}\). In July 2014 Airbnb was one of the eight letting sites fined by the Catalan government (30.000 Euro fine) for a “serious infringement” of the legislation\(^{70}\). The long battle against private lets is not specifically against Airbnb, but it has been caught in the pack.

While hotel owners claim unfair competition of the site, neighbourhood associations blame private lets for driving up house prices in central districts, plus putting locals in the position of being neighbours of an ever-changing roster of tourists, causing the effect of all times neighbours moving out to less touristic areas.

As a consequence the Catalan Government (Generalitat) is preparing a set of rules that apartment owners will have to comply with in order to put their rooms and apartments in the market\(^{71}\). The proposal is not public yet but its main lines have been already presented to the press. Owners will be allowed to rent apartment rooms under the following conditions:

- They live in the apartment, before and during the rental period.
- Rentals cannot last more than 31 days and rooms can only be available for a maximum period of 4 months per year (not consecutive).
- Maximum of 2 rooms per apartment.
- Municipalities will be able to determine in which city areas this activity can take place.
- Owners will be responsible of collecting a tourist tax (€0.65 in Barcelona and €0.45 in the rest of Catalonia, per night).

In the case of owners who wish to rent whole apartments, the Catalan Government will require them to include their properties on Catalonia’s tourism registry and to have a tourist license.

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\(^{68}\) The most important acts are the following: Ley 13/2002, de 21 de junio, de turismo de Cataluña, DOGC n°3739, 14/10/2002; ley 18/2007, de 28 de diciembre, del derecho a la vivienda, DOGC n°5044, 09/01/2008; Decreto 159/2012, de 20 de noviembre, de establecimientos de alojamiento turístico y de viviendas de uso turístico, DOGC n° 6268, 05/12/2012. See: http://empresaiocupacio.gencat.cat/es/treb_departament/emo_normativa/emo_normativa_turisme/ (last consulted on 08/01/2016).

\(^{69}\) Decreto 159/2012, de 20 de noviembre, de establecimientos de alojamiento turístico y de viviendas de uso turístico, DOGC n° 6268, 05/12/2012, article 66(2).


\(^{71}\) http://novobrief.com/Airbnb-legal-in-cataluna-barcelona/ (last consulted on 10/01/2016).
Besides, Barcelona local authorities have implemented strict measures in order to detect illegal apartments and they imposed fines of 60,000 Euros to Airbnb in December 2015\textsuperscript{72}. The authorities denounce the fact that Airbnb advertised rooms without their registration number, in violation of the Catalan legislation. Airbnb already announced that it would challenge the decision. It is worth noting that Barcelona has stopped in the summer 2015 issuing new tourist licenses for hotels and holiday rentals for at least one year\textsuperscript{73}.

\textit{Madrid}

Madrid has yet to pass a law regulating Airbnb’s activities in the Spanish capital. In 2014 it said it would impose a 5-day minimum stay for apartment rentals, but still today one can easily find shorter rentals on the site.

\textit{United Kingdom}\textsuperscript{74}

In February 2015 the Department for Communities and Local Government, UK Government, decided to review and modernise Property conditions in the private rented sector for London. While in all other parts of the country residents are able to let out their homes for short periods as a matter of course, in London short-term use is strictly regulated under legislation dating back to the 1970s\textsuperscript{75}.

London had enacted legal provisions in order to protect London’s existing housing supply, for the benefit of permanent residents, by giving London boroughs greater and easier means of planning control to prevent the conversion of family homes into short term rentals\textsuperscript{76}.

Short-term use as temporary sleeping accommodation was only permitted once planning permission is obtained from the local authority. London residents faced a possible fine of up to £20,000 for each ‘offence’ of failing to secure planning permission. This measure was preventing Londoners from participating in the SE by letting out either a spare room or their whole house in the same way as other residents across the country.

\textit{Adoption of legislation favouring the SE}

In 2015, with the Deregulation Act, the Government introduced an exception to this restriction.

\textsuperscript{72} \url{http://ccaa.elpais.com/ccaa/2015/12/21/catalunya/1450694300_272687.html} (last consulted on 08/01/2016).
\textsuperscript{73} \url{http://ccaa.elpais.com/ccaa/2015/07/02/catalunya/1435818964_383457.html} (last consulted on 12/01/2015).
\textsuperscript{74} \url{www.Airbnb.co.uk/help/responsible-hosting} (last consulted on 25/10/2015).
\textsuperscript{75} Section 25 of the Greater London Council (General Powers) Act 1973.
\textsuperscript{76} UK Government - Deregulation Act 2015, Sections 44 and 45: Short-term use of London accommodation: relaxation of restrictions and power to relax restrictions. Available at: \url{www.legislation.gov.uk/ukpga/2015/20/notes/division/5/46} (last consulted on 25/10/2015).
“London is a great city, and the Government wants to give Londoners the opportunity to be part of this modern approach and able to participate fully in the sharing economy. We want to open up this great global city to more visitors by embracing these new opportunities to allow people to make better use of their property.”

The exception allows residential premises to be used for temporary sleeping accommodation without this being considered a “change of use”, so long as the cumulative number of nights of use as temporary sleeping accommodation does not exceed 90 nights in a calendar year, and so long as the person who provides the accommodation is liable to pay council tax.

“Local planning authorities may direct that this exception does not apply to certain residential premises or to residential premises in certain areas. If a property is used for short-term rentals for more than 90 days in a calendar year, the exception does not apply.”

The Government clarifies that this policy is aimed at helping residents, and not providing opportunities for the commercial sector.

**Taxes**

The UK Government has established “The Rent a Room Scheme” allowing residents earn up to a threshold of £4,250 per year tax-free from letting out furnished accommodation in their home. This is halved if they share the income with their partner or someone else.

**The problem of property permanently in short-term use**

“It was clear that the existing focus for concern was where a property was permanently in short-term use, and this was where enforcement actions were largely targeted. The need for other related regulations, such as health and safety legislation, to remain in place was also recognised as important.”

Local authorities also confirmed that in considering any enforcement they would usually be mindful that some forms of short-term use will already be classed as a material change of use under Building Regulations, which results in the need for work to be carried out to upgrade the building to appropriate standards. There are also Fire Safety provisions that would need to be checked for compliance.

### 2.3 Professional services

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78 www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme (last consulted on 25/10/2015).
This section covers a wide array of SE platforms offering services ranging from postal services to freelance work for which otherwise it would be necessary to hire a professional (cleaning, accounting, designing, etc.). Because of the all-encompassing nature of this type of service provision we will first provide an introduction before discussing the benefits and complaints and presenting the national responses.

Service provision through platforms is not new, but “a whole slew of labour platforms have come up over the last couple of years, powering what is widely referred to as the Sharing Economy, Platform economy or (called by many) the Gig Economy”80.

According to the book “Platform Scale: How an emerging business model helps start-ups build large empires with minimum investment”81 remote freelancing (Freelancer, Elance-Odesk) and micro-tasking (Amazon Mechanical Turk) platforms have been around for quite some time, all of which enable service providers to find new ‘job’ (gig) opportunities. But a whole new range of specific task-related platforms (see figure XXX for vertical platforms) have come up in recent times creating two broad classes of new opportunities:

1. Higher end jobs: Consulting platforms like Clarity and Experfy now enable highly skilled individuals to find (temporary) jobs on platforms.
2. Real world job coordination: Platforms like Homejoy and Postmates allow people with spare time to find a new source of income in the ‘real’ world.

2.3.1 Benefits

The benefits for consumers are the same as with SE platforms in the transport and accommodation sector. (Sometimes luxury) services (personal assistants, cleaning services) become reasonably priced and affordable to much more people than before. Consumers can enjoy a lifestyle that was previously unthinkable. The professional services are on-demand, whereas traditional service providers often come with waiting periods.

2.3.2 Complaints

Professional service (or labour) platforms have been welcomed with great enthusiasm, but time is proving that they cannot be conceived as an alternative to traditional jobs. Many important aspects of traditional work are not offered in the existing online labour platforms (stability, healthcare, pension, paid holidays, social contacts etc.). Most complaints against professional service companies come from their own users. A number of people that use the platforms to earn a living complain about their employment status. Even though the

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80 http://platformed.info/sharing-economy-future-of-work/ (last consulted on 10/01/2016).
platforms impose certain rules on them (e.g. what to wear, what products to use, etc.), workers are still considered as independent contractors instead of employees. Workers providing services through labour platforms are not enjoying the benefits of traditional contract employment.

2.3.3 Trends

The platform owners are moving beyond the pure role of matching the supply and demand side, and start to understand and deal with the costs and benefits involved for the labour force participating on these platforms.

Unlike traditional organizations, workers may not be contractually tied to only one platform; most workers will participate in several platforms. This is why if platforms offer a type of insurance, it is often only partial, because they are reluctant to cover activities that take place beyond the platforms’ sphere. Therefore, in order to guarantee the well being of their users, platforms will need to develop horizontal infrastructural services.

According to the book cited previously - “Platform Scale: How an emerging business model helps start-ups build large empires with minimum investment” by S.P. Choudary -, these horizontal services are not yet put in place. This is the case for – for example - traditional insurance, where they have not yet developed horizontal insurance products addressed to service providers participating in multiple platforms (also called “multi-homing”). The freelancer economy may need an insurance provider specifically suited for this purpose. In some other cases, timid gestures are already performed, showing an initial emergence of such horizontal initiatives. Peers.org, for example, is powering the counterpart of labour unions for the platform economy. Sherpasphere and other similar players are powering better job discovery and management. Nevertheless, affordable healthcare guarantees for a platform economy continue to be elusive. And finally, as jobs get unbundled even further, these multi-homing service providers will need greater back office support. Most freelancers on labour platforms today are contract employees. They have unique work management and taxation issues. Services like 1099.is, TryZen99 and UseBenny have emerged to address this but there are many more opportunities to provide greater infrastructural support to this emerging economy. In the words of S. P. Choudary, “The future of job creation isn’t just about matching supply to demand but about providing the entire infrastructure that enables producers to reliably find a better substitute than traditional job alternatives. To enable this, platforms should ensure favourable producer

\[\text{\footnotesize{\textsuperscript{82}} For more information on the networked platforms (multi-homing) see Section 3.4 “The creation of cumulative value” in the book by CHoudary, S.P. (2015) op. cit.} \]
participation economics. In particular, non-platform players need to emerge to provide infrastructural services across multiple platforms\(^{83}\).

2.3.4 Case analysis

**United States of America**

Just like Uber and Lyft\(^ {84}\), on-demand platforms for services in other sectors have also been hit by lawsuits regarding the question whether their users are independent contractors or employees.\(^ {85}\) Employees generally have certain rights, such as overtime, a minimum salary, workers compensation (replacement wage and medical benefits during medical leave), etc. These are traditionally not granted to independent contractors.

The service providers in these platforms (drivers, cleaners) basically want to have the choice between having more rights as a full employee or otherwise having the possibility to exert more control over their conditions so they can, for instance, share a higher hourly rate.\(^ {86}\)

All the cases that have been filed so far took place in the US. The claims are pretty similar: users should receive the same benefits as employees given their treatment. This treatment differs from platform to platform, but each of them submits their users (service providers) to certain rules/controls which may indicate that they are employees under law. Below, we provide an overview that is taken from Carson’s (2015) article\(^ {87}\).

The on-demand laundry and dry cleaning service company, Washio, hires drivers, or “ninja’s”, to deliver laundry to their customers. The company is said to make drivers sign an exclusivity agreement, where they agree not to work for similar businesses. According to the court filing, drivers are paid a fee for each pick-up and delivery.

As a provider of similar services, Shyp chooses to pay its drivers an hourly fee to pick up packages (vs. a fee per pick up). Drivers are given clear instructions on how to perform their tasks, for instance: fragile items have to be bubble wrapped. In addition, drivers claim to receive warnings if they reject more pick-ups than allowed.

\(^{83}\) Ibid., p. 80.
\(^{84}\) [https://www.lyft.com/](https://www.lyft.com/) Operating only in USA.
Postmates was also hit by a court case. According to the arbitration demand, Postmates’ service providers only make $0.35 per delivery. In addition, the company is said to impose the following rule on its service providers: if a store does not answer the phone, one has to call back four times in two minutes before launching a search to find out if the store is closed. One plaintiff estimated that in April 2015, she worked thirty hours but only made $45.85 (approximately €42) for 131 calls.

A case had also been filed against Homejoy, a platform for cleaning services, which is said to have led to the shutdown of the company.88

### Table nº 3 Platforms’ rules and controls on service providers

<table>
<thead>
<tr>
<th>Company</th>
<th>“Job” conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washio</td>
<td>Non-competition clause imposed on service providers + commission paid to the platform</td>
</tr>
<tr>
<td>Shyp</td>
<td>Control over providers’ performance + strict instructions about how to perform the job</td>
</tr>
<tr>
<td>Postmates</td>
<td>Strict instructions about how to perform the job</td>
</tr>
</tbody>
</table>

A case had also been filed against Homejoy, a platform for cleaning services, which is said to have led to the shutdown of the company.88

#### 2.4 Comparative analysis of national legal responses

SE platforms are not easily reconcilable with pre-existing national legislation, in particular with regard to services like Uber, which severely affect established legal monopolies. The legal responses vary across Member States, and also depending on the type of SE platform at stake. Generally speaking, there is a shared concern by all, which is the necessity to adapt to technological innovations while ensuring the respect for fair competition. Nevertheless, this balance has not yet been found, as the varying responses demonstrate.

In the absence of cases on professional services found in Europe, the following section will focus on transportation and accommodation.

#### 2.4.1 Complete banning and equalising to traditional services

**Banning**

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Firstly, one of the responses has been banning. In some MS, the approach is quite conservative due to important mobilisation either from the traditional actors, or from the civil society.

This is particularly the case when talking about UberPOP, which has been banned in several countries or cities (DE, ES, FR, NL, Brussels) because it would not comply with the existing taxi legislation. The justifications for these bans make think that generally speaking, the national authorities and jurisdictions consider that UberPOP is a regular transport company which has been operating without the necessary licences.

In the accommodation sector, the situation is a little bit more nuanced, insofar as unregistered short-term rentals are prohibited in some places if they are not duly registered (Berlin and Catalonia\(^{89}\)).

**Applying strictly the existing legislation to the SE**

In some other cases, the legislation does not differentiate users of SE platforms from traditional actors. Even though we are not strictly talking about an intervention from the legislature, the decision is to apply the common legal framework to SE users, with all its consequences. For example, the other forms of Uber different from UberPOP (e.g., UberTaxi) are allowed in different MS as long as they abide by the normal rules applicable to taxi services, including licencing, liability and fiscal rules (DE, FR, NL and Brussels).

In the accommodation sector, we find examples in Berlin and Catalonia. Registered rentals, which comply with the existing tourism legislation, can perfectly be advertised on Airbnb-like platforms. However, all unregistered short-term rentals are prohibited, and in the case of Catalonia, single rooms in private apartments cannot be rented out. Due to the strong social mobilisation against short term rental in different parts of Catalonia, there is a strong willingness to enforce the existing legislation very strictly: The Catalan Tourist Act was recently modified so as to oblige third parties to advertise the registration number of holiday rentals in any type of advertisement in which they appear\(^{90}\). This measure was approved in order to provide the administration with more efficient means to control illegal rentals.

In this respect, some public authorities have taken seriously the need to police not only users (in the sense of providers), but also platforms. The Catalan case is a good example. The Generalitat and Barcelona local authorities respectively fined Airbnb with 30,000 Euros in July 2014, and 60,000 Euros in December 2015. It is worth mentioning that the

\(^{89}\) A bill is being discussed to change the situation in Catalonia, but for now, the current tourism legislation forbids to rent out single rooms in private apartments.

\(^{90}\) Ley 2/2014, de 27 de enero, de medidas fiscales, administrativas, financieras y del sector público, DOGC n.6551, 30/01/2014.
fines were imposed because Airbnb allegedly advertises rentals that are not registered, and are therefore illegal.

Therefore, some aspects are legalized but there is an alignment of the legislation with the regime that applies to traditional actors. The underlying idea is that these new platforms only take advantage of technological advances to provide already existing services. The new actors are qualified as commercial actors that must comply with the same rules as those that apply to the traditional actors.

The effects of this approach by the authorities is starting to have results: In Amsterdam, Airbnb is up to fight illegal hotels promoted on its platform. The houses rental site removed in late December 2015 some 170 Amsterdam ads because the landlords would not abide by the rules.91

2.4.2 Imposing more rules

In many cases, the MS’ response has been to regulate the activity at stake, but with measures that impose more rules.

An example from the transport sector that arguably hinders the SE is the prohibition on electronic cruising approved in France. In the same way, even though they have not been adopted yet, the different measures that are being discussed in the UK are likely to have a negative impact on Uber-like platforms (e.g., a ban on showing cars for hire within a smartphone app, the ability to book rides up to seven days in advance, or the creation of controls on ridesharing in public vehicles).

In the accommodation sector, with the obligation to obtain a registration number for single rooms, Brussels’ response has been to impose more rules, obligations and controls on Airbnb’s users. The same holds true in Berlin where unregistered short-term rentals are expressly prohibited. In Barcelona, the new draft legislation is going to impose strict obligations on accommodation owners.

2.4.3 Simplifying

In the transportation sector, the tendency has not been to simplify the rules. However, one element is worth mentioning: the Loi Thévenoud expressly allows car sharing platforms that follow the model of Blablacar, i.e., where passengers share the costs of the ride with the driver, and where the trip is carried out by the driver for their own purposes.

Some authorities have revised the existing rules to make them more SE-friendly (Flanders, Hamburg, FR, NL, UK) in the accommodation sector even though they remain subject to a certain number of conditions.

In this regard, Flanders, FR, Hamburg, NL and Wallonia allow short-term rentals without licence or prior authorisation if the owner lives in the residence. The restrictions are therefore imposed on the secondary residence of the owner, which is subject to a licence or prior authorisation. Yet, in the French case, this obligation is automatic only in cities of more than 200,000 inhabitants.

In the field of tax collection, tools have been found in some cases to facilitate compliance with the law, through collaboration between the SE platform and the public authorities. The creation of a system of collection of the tourist tax directly on Airbnb is a good example (FR and NL). In the same way, France is currently discussing the possibility of creating an automatic system of tax return, in the form of a pre-filled tax return directly available on SE platforms\textsuperscript{92}. However, in order not to establish a too burdensome system for occasional users, it is also foreseen to grant a tax exemption for revenues amounting up to 5000 Euros; above that threshold, the common legal and fiscal provisions would apply. Another measure that is currently being discussed is the possibility to collect VAT directly at the source, at the moment of the transaction\textsuperscript{93}. This measure is not foreseen for SE platforms only, but for all eCommerce services. The idea is not to add a new tax, but to guarantee the effective recovery of this tax which is due, but not collected.

Therefore, the existing legal provisions in this domain are quite sparse; A common legal and tax framework covering the different activities falling under the SE is therefore needed. Nevertheless, the existence of scattered legislation also demonstrates that reaching an agreement at EU level might prove to be difficult.

2.4.4 Best practices


Some Member States have adopted measures that are interesting to foster the SE and which could be exported to other cities or MS. Table nº 4 briefly describes them.

**Table nº 4: Best practices**

<table>
<thead>
<tr>
<th>Area</th>
<th>Best practices</th>
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| Decision-making and procedures | The UK SE sector is engaging in associations for their sector in order to early engage with the regulators to design common constructive solutions for the P2P business.  

Brussels authorities are discussing a new legal framework for alternative taxi services in consultation with the taxi industry. This practice is especially relevant in this sector where taxis benefit from monopolies and are able to mobilize themselves in an important manner. |

| Concepts and definitions    | Providing a clear definition of the key concepts of the SE is crucial to ensure that citizens and businesses correctly apply the law. In this regard, the clarification on the concept of car sharing in France, based on Blablacar’s model, is welcomed.  

In addition, the Dutch and British authorities provide clear criteria to distinguish a commercial activity from occasional use, including time and space limits, safety requirements, and questions of ownership (residents can only rent the home they live in and they must own the space or have permission from their landlord to rent it). It therefore allows citizens and businesses to know very precisely if and how they can legally make use of Airbnb-like platforms, without room for doubt. |

| Cutting red tape            | Cutting red tape is extremely important for the success of the SE. The legislation in Flanders and in Wallonia is efficient in cutting red tape in the accommodation sector. In particular, the ease of becoming an official touristic accommodation operator in Flanders, by voluntarily requesting a recognition is especially worth noticing.  

Furthermore, one aspect of the legislation in Brussels is worth mentioning: while a normal procedure for getting a certificate of fire safety requires an inspection from the fire department, individuals will only need to present an inspection certificate of gas and electricity. |

| Tax compliance             | Cooperation with SE platforms to ensure compliance with the law is essential. In this regard, the system of collection of the tourist tax by |
Airbnb on behalf of public authorities (FR, NL) is extremely interesting and could be extended to other cities.

In the same way, the British authorities grant tax exemptions on revenue amounting up to £4,250 per year for letting out furnished accommodation in their home. In France, the authorities are discussing a similar system that would apply to SE platforms in general, and which would amount to up to 5000 Euros. That kind of arrangement is important to foster citizens’ use of SE platforms without fearing of infringing the law. It is also important to ensure that the benefits outweigh the costs of using SE platforms.

Even though these measures are under discussion before the French authorities, it is worth to mention:

- The proposal to create an automatic system of tax return, in the form of a pre-filled tax return directly available on SE platforms; and
- The proposal to collect VAT directly at the source, at the moment of the transaction. This measure is not limited to SE platforms only, but to all digital services in general.

**Enforcement**

Cooperation between the SE platforms and the public authorities is probably key to the enforcement of the legislation. In this respect, the system established between Amsterdam and Airbnb, according to which Airbnb will report information about infringement of the rules set by the City upon request, could serve as a model for other cities. Instead of adopting a punitive approach towards the platform for publishing illegal rentals, cooperation is foreseen to identify them.

The software used in the City of Barcelona to detect illegal rentals is also worth mentioning as it probably is more efficient and less time consuming than the systems such as the one established in Berlin.
3 The EU regulatory framework

The SE is high on the EU agenda and its impact on the European single market is currently being scrutinized. In particular, the European Commission wishes to adopt EU legislation in this regard, in order to provide a unified response to the fragmented domestic legal frameworks. According to Commissioner Elżbieta Bieńkowska, the idea is “to present new rules this year to regulate and enable cross-border digital services such as Uber, Airbnb and other new online businesses to work more smoothly in the Member States”\textsuperscript{94}.

In this regard, the Commission has referred to the benefits of the SE in its \textit{Communication on a Digital Single Market Strategy for Europe (DSM) of 6 May 2015}\textsuperscript{95}, where it decided to assess “the role of platforms, including in the sharing economy, and of online intermediaries”. As part of this assessment, it has launched an online public consultation from 24 September till 30 December 2015\textsuperscript{96} monitored by DG for Communication networks, Content and Technology, and DG Internal Market, Industry Entrepreneurship and SMEs. In parallel, the Commission launched two studies, one by the Directorate-General for Mobility and Transport on "passenger transport by taxi, hire car and ridesharing in the EU" and another one by the Directorate-General for Justice and Consumers on "consumer issues in the sharing economy", both expected by the second quarter of 2016.

More recently, in the \textit{Communication on Upgrading the Single Market: more opportunities for people and business} of 28 October 2015\textsuperscript{97}, the Commission said that it would provide guidance on how EU law applies to collaborative economy business models, rather than strictly regulating the issue in 2016. In particular, it will draw upon national, European and international existing legislation to identify best practices, analyse how regulatory gaps need to be filled, and monitor its development. Thus, while the results of these initiatives are still to be expected, some elements can already be discussed.

But first of all, the question regarding whether the EU holds competence to act on this matter needs to be raised. The answer to this question can be answered positively: The Treaty on the Functioning of the European Union (TFEU) gives competence to the EU in “the establishing of the competition rules necessary for the functioning of the internal market” (article 3). As a consequence, if one considers the objectives which are pursued


\textsuperscript{97} COM(2015) 550 final.
by the Single Market regulatory framework, legal action at EU level seems necessary in the SE field, in particular with regard to the necessity to remove existing barriers to intra-EU trade and preventing the creation of new ones.

Furthermore, when considering the different types of SE platforms analysed in this report, there is already an important corpus of legislation that could serve as a basis for further action on this matter, albeit the EU action is unevenly important.

Transport is a shared competence between the EU and the Member States (TFEU, article 91); however it may apply to some SE platforms only, as it must involve a transnational aspect. Therefore, it seems that it would apply to Blablacar-like platforms rather than Uber-like platforms.

Moreover, the accommodation sector can be linked to tourism, where Union action must complement the action of the Member States but cannot lead to harmonization. Consequently, the degree of EU action will vary depending on the type of service provided.

Finally, many of the legal issues raised in Susan Mclean’s (2015) article are at least partly regulated at EU level. In this respect, there is a set of EU legislation that ensures consumer protection, data protection, protection from discrimination, and which deals with employment matters at EU primary and secondary levels.

The amount of European legislation affected directly or indirectly by the SE is therefore very vast. However, due to time and budget limitations, we will concentrate specifically on services, eCommerce, consumer protection and data protection in order to analyse to what extent are the current rules fit for purpose, and whether or not there is a need for the European Union to legislate and to what extent. Indeed, those areas are probably the most relevant ones at EU level in the SE field at this stage. The European Commission referred to them in the Communication on Upgrading the Single Market: more opportunities for people and business of 28 October 2015, said that they would be scrutinised and, if needed, modified.

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98 The objectives are the following: free movement of services; necessity to remove existing barriers to intra-EU trade and preventing the creation of new ones; and promoting a business and consumer-friendly environment based on transparent, simple, and consistent rules offering legal certainty and clarity. See: http://ec.europa.eu/growth/single-market/index_en.htm (last consulted on 01/11/2015).

99 TFEU, articles 6 and 149.


102 Charter of Fundamental Rights of the EU, article 8.

103 Charter of Fundamental Rights of the EU, article 21; TFEU, articles 10, 18, and 19.

104 TFEU, articles 2, 5, 9, 45-48.
Services Directive

Most of the services offered by the SE platforms probably meet the requirements of article 57 TFEU, which defines them as follows: “Services shall be considered to be "services" within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”.

Directive 2006/123/EC on services in the internal market (hereafter, the ‘Service Directive’) provides further guidance on its meaning. The Service Directive aims to guarantee the effective exercise of the freedom of establishment for providers and the freedom of provision of services between Member States as established by articles 49 and 56 TFEU. It covers most of regulated professions and tourism, with the exception of transport services. In particular, it applies when a) an undertaking wishes to establish itself permanently in its own country or in another Member State, and b) in case of cross-border service provision, in particular, when a consumer wishes to receive a service from another Member State, or when an undertaking established in a Member State wishes to provide services in another Member State without establishing itself permanently there. It is therefore critical to the good functioning of the single market, including with regard to the SE.

eCommerce Directive

Directive 2000/31/EC on electronic commerce (hereafter, the ‘eCommerce Directive’) establishes the legal framework for information society services (or online services) in the single market. Its objective is to remove “obstacles to cross-border online services in the European Union and provide legal certainty to business and citizens in cross-border online transactions”\(^\text{105}\).

According to the current legislation, information society services can be defined in the following terms: “undertaking operating in two (or multi)-sided markets, which use the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers”\(^\text{106}\).

While the eCommerce Directive establishes a general duty not to restrict the freedom to provide information society services from another Member State (article 3), it allows them to derogate from this duty where the derogation fulfils objectives of public policy,

\(^{105}\) \url{https://ec.europa.eu/digital-agenda/en/e-commerce-directive} (last consulted on 19/12/2015).

\(^{106}\) Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, available at: \url{file:///C:/Users/1236354/Downloads/pdfversionofthequestionnaire.pdf} (last consulted on 12/01/2015).
protection of public health, public security and the protection of consumers. In this sense, the bans that have been established in different Member States, especially regarding UberPOP probably fulfil one or several objectives. As a result, this Directive is critical to assess whether the EU regulatory framework is fit for purpose.

The eCommerce Directive offers some sort of liability protection for platforms, as it establishes a liability exemption affecting contractual liability, administrative liability, tortuous / extra-contractual liability, penal liability, civil liability or any other of liability for the conduct of their users, provided that they fulfil Section 4 requirements. This exemption includes conducts such as unfair commercial practices, unfair competition or publications of illegal content. Consequently, the Directive creates specific rules for information society services, thus establishing a difference of legal framework depending on whether the service is provided online or offline.

**Consumer legislation**

While a number of concerns related to the Sharing Economy are linked with taxation and unfair competition issues, others are more consumer-centric. Concretely, we have briefly touched upon concerns related to insurance, discrimination, safety and security, liability and more broadly, consumer protection. It is therefore important to look at steps taken at the EU level on the matters that can prove useful in the area of the Sharing Economy.

First and foremost, the **Directive on Consumer Rights** has to be noted. With this Directive, the EU aims at “at achieving a real business-to-consumer (B2C) internal market, striking the right balance between a high level of consumer protection and the competitiveness of enterprises.” Member States were to apply the national implementing laws as from June 13, 2014.

First of all, it lays down a number of information requirements. The ‘trader’ has to provide the main characteristics of the goods or services, reveal his identity, address and telephone number, present the total price, inclusive of taxes, as well as arrangements for payment and delivery. He also has to inform the consumer about his complaint handling

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108 Directive 2011/83/EU.


110 “‘trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive;” (Directive 2011/83/EU, art. 2 (2)).
policy as well as any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

Second, in article 20 the Directive clarifies who bears the risk at what moment when buying or service. It lays down that in contracts for the dispatching of goods form trader to consumer, the risk for loss or damage to the good passes to the consumer from the moment he (or a third party indicated by the consumer) has acquired the good in physical possession. However, if the consumer wants a carrier to transfer the good from the trader to the consumer and this option was not provided for by the trader, then the consumer bears the risk, without prejudice to the rights of the consumer against the carrier.

Finally, by article 22, it is prohibited for traders to use default options that the consumer needs to reject in order to avoid additional payments. Instead, the trader should seek the express consent of the consumer to any additional payment.

However, with regards to consumer protection in the Sharing Economy, it is unsure whether the directive would be applicable to all types of SE platforms. While the directive applies to both sales and service contracts\footnote{’service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof; (Directive 2011/83/EU, art. 2 (6)).}, some areas are out of scope. To be sure, passenger transport services are not included nor is the “supply of foodstuffs, beverages or other goods intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer’s home, residence or workplace”\footnote{Directive 2011/83/EU, art. 3 (3).}.

The \textbf{Directive on Consumer Sales and Guarantees}\footnote{Directive 1999/44/EC.} imposes rules on sellers of consumer goods with regard to the guarantee of conformity of the product with the contract. Since the entry into force consumers are guaranteed a period of two years after the delivery of the good. If, within this period, the good is not conform the sales contract, consumers have certain rights, for instance to see the good repaired or replaced. The final seller, on his part, can also hold the producer liable. This Directive only applies to the sales of consumer goods, understood as ‘any tangible movable item’.

Also worth noting in this regard is the \textbf{Directive on Unfair Contract Terms}\footnote{Directive 93/13/EEC.}. This directive aims to introduce a notion of ‘good faith’ so to prevent substantial imbalances between the rights and obligations of consumers on the one hand and sellers and suppliers on the other hand. Consumers can make use of the list of examples of terms that are considered unfair if they wish to do so, since if found unfair, terms are not binding for
consumers. It furthermore stipulates that contract terms have to be written in plain language and that ambiguities are interpreted in favour of consumers.

Equally relevant is the Directive on Unfair Commercial Practices\(^\text{115}\), adopted in 2005, that aims to install fair commercial practices, by prohibiting the use of aggressive marketing techniques or by providing untruthful information. It covers the activities related to the promotion, sale and supply of both goods and services to consumers. It is further complemented by the Directive on Misleading and Comparative Advertising\(^\text{116}\), which establishes the criteria by which comparative advertisement is allowed and by the Price Indication Directive\(^\text{117}\) that stipulates that price information must be unambiguous, clearly legible and easily identifiable.

Finally, two more EU legal documents are worth discussing. The Alternative Dispute Resolution Directive\(^\text{118}\) provides consumers with an alternative to bringing a case to court when they have a problem with a trader regarding a good or service they purchased. Such an alternative can come in many forms and names, e.g. arbitration, mediation, ombudsmen. The directive ensures access to Alternative Dispute Resolution (ADR) no matter what good or service has been bought, irrespective they are bought online or offline. In addition to this directive, and under the Online Dispute Resolution Regulation\(^\text{119}\), the European Commission is establishing a European Online Dispute Resolution platform (ODR platform). This web-based platform is intended to help consumers that have problems with online purchases of goods or services. Available in all EU official languages, it allows citizens to submit their dispute and have their claim transmitted to a national ADR body.

**Data protection legislation**

Data protection rules were recently modified. On 15 December 2015, the European Parliament and the Council reached an agreement on the Data Protection Reform. The relevant instrument regarding the SE is the ‘General Data Protection Regulation’ which aims to a) enable citizens to exercise effectively their right to personal data protection (TFEU, article 16.1), and b) modernise and unify rules so that business make the most of the Digital Single Market. While the Regulation seems to offer answers to some of the concerns raised by the SE, it is not yet available in its last version\(^\text{120}\). Consequently, the analysis in this regard can only be provisional.

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\(^{115}\) Directive 2005/29/EC.
\(^{116}\) Directive 2006/114/EC.
\(^{117}\) Directive 98/6/EC.
\(^{118}\) Directive 2013/11/EU.
\(^{119}\) Regulation 524/2013/EU.
Regarding fears relating to the processing of personal data of SE platforms’ users, it is worth noting that new rules will be implemented, including the so-called ‘right to be forgotten’, the right to data portability or the right to know when one’s data has been hacked\textsuperscript{121}. These guarantees should not be too burdensome on businesses, as they also benefit from new rules: a single law for data protection will be applicable across the EU territory, instead of the 28 domestic legal frameworks; in the same way, companies will deal with one single supervisory authority and the same rules will apply to all companies, even those based outside of Europe. These new elements are designed to create trust among users, and ultimately, to encourage innovation.

4 Remaining legal gaps and issues

4.1 Legal gaps

Even though the national authorities have tried to address the regulatory framework of the SE, many issues remain. First, the existing divergence at national level poses uncertainty for operators and leads to the fragmentation of the EU single market. Second, the existing EU legal framework does not provide a fully satisfactory answer and several elements would benefit from a reform.

4.1.1 About the definition of the sharing economy

There is no common definition on what the SE is at national level. The legal responses to the emergence of SE platforms appear to be quite disparate and to deal with different platforms – Uber, Airbnb, Blablacar just to name a few – without integrating them into a unified legal framework. As a result, it is difficult to understand what Member States understand as SE.

In the French case, some legal provisions shed some light on what is understood as SE. In particular, the definition of car sharing is significant as it distinguishes between the platforms that merely enable users to share costs (Blablacar) from than the ones that enable people to make profit out of these platforms (Uber). Pursuant to the French legislation, if the platform allows making commercial profits, then it should be regulated by the existing legislation.

\textsuperscript{121} \url{http://europa.eu/rapid/press-release_MEMO-15-6385_en.htm} (last consulted on 12/01/2015).
Furthermore, the legalisation of short-term rentals without prior registration or authorisation in several MS, provided that the rental is the principal residence of the owner and/or that the owner is present during the stay can also explain the meaning of the SE. It seems to involve a sharing element, which goes beyond simply handling out keys, and is quite limited both in terms of space and time. Therefore, it cannot generate large sums of money, but is rather conceived as a way to make extra-money.

It is also worth mentioning that there does not seem to be a consensus at EU level on the definition of the SE either. The European Commission does not use the expression ‘sharing economy’, but ‘collaborative economy’, which is defined as “a complex ecosystem of on-demand services and temporary use of assets based on exchanges via online platforms”\textsuperscript{122}. Nonetheless, the other EU institutions do use the expression ‘sharing economy’. The European Parliament refers to it in its resolutions of 9 September 2015\textsuperscript{123} and 29 October 2015\textsuperscript{124}, and defines it in the following terms: “a new socio-economic model that has taken off thanks to the technological revolution, with the internet connecting people through online platforms on which transactions involving goods and services can be conducted securely and transparently”. In these resolutions, the European Parliament emphasizes the need to adapt the regulatory framework to this phenomenon, by involving all actors at European, national, regional and local level. The European Economic and Social Committee also referred to the SE in its Opinion of 21 January 2014 on Collaborative or participatory consumption, a sustainability model for the 21st century (INT/686). Finally, the Committee of the Regions (CoR) has recently published the opinion ‘The local and regional dimension of the sharing economy’\textsuperscript{125}, where it gives its viewpoint on – among others - the legal implications: The CoR argues in favour of the need to distinguish between the different forms of SE, and calls for a coordinated approach between the European Commission and the MS in order to enable successful SE initiatives to spread easily across the borders.

4.1.2 About the notion of service

\textsuperscript{122} COM (2015) 550 final.
\textsuperscript{123} European Parliament resolution of 9 September 2015 on the implementation of the 2011 White Paper on Transport: taking stock and the way forward towards sustainable mobility (2015/2005(INI)).
\textsuperscript{124} European Parliament Resolution of 29 October 2015 on new challenges and concepts for the promotion of tourism in Europe (2014/2241(INI)).
The certainty of the applicable regulatory framework depends on the character of the service provided, but also on the degree of control exercised by the platform over each transaction.

First, the legislation that is applicable to the different SE platforms will differ depending on the character of the service provided: an information society service, or an industry-specific service (transport, accommodation, or professional services). This is why the outcome of the CJEU pending case is of utmost relevance, as it will allow determining whether SE platforms are subjected to the free movement of services. For example, if the Dutch position is followed, according to which Uber is a transport service (because of the degree of control exercised by the application), the EU’s action is limited as it shares the competence with the MS and can act on transportation involving a transnational aspect. The same holds true regarding the accommodation sector, where the EU action is limited insofar as it cannot lead to harmonization. However, if these platforms are recognized as information society services, then the EU has the competence to (not) regulate the matter.

If so, the restrictions applied in different EU Member States such as UberPOP ban might be considered as disproportionate and unjustified under both the Services Directive and the eCommerce Directive. They can also be considered as justified on public policy grounds, but the proportionality of some measures – complete banning on UberPOP, use of criminal sanctions – is debatable. In any case, the divergence of approaches at national level emphasized above arguably leads to the fragmentation of the EU single market, and could therefore be addressed by the EU for the SE to achieve its full potential.

Second, we should determine whether SE platforms are mere intermediaries in the provision of information between provider and consumer or are they themselves an industrial service. The category of information society services covers a wide range of activities, from online information services to online selling, to professional services. In this regard, the different SE platforms pursue different objectives and it might prove difficult to range them within a specific category. In particular, one claim that is sometimes put forward is the fact that SE platforms are only IP-enabled services connecting service providers with consumers, and should therefore be exempt from any type of liability in accordance with the special liability regime established by the eCommerce Directive. Some cases in the US go in that direction, e.g., dating services are not responsible for user-created fraudulent dating profiles126. However, it is questionable to consider some SE platforms as mere intermediaries, which proceed to a technical, automatic and passive process. Indeed, the degree of control exercised by the platform on its users is critical in order to determine

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the degree of liability of SE platforms\textsuperscript{127}. According to Katz (2015), some sharing platforms exercise control over transactions by directing the form and content of listings, issuing minimum quality standards for providers, providing an electronic payment system, and charging a transaction fee for each exchange. These platforms claim to have no employment relationship with providers, and no financial stake in any particular transaction. Sharing platforms generally seek to minimize their own liability by claiming that their services are close equivalents to message boards. However, can we say that they operate in practice like direct service providers?

The answer might be deduced from the analysis of the different business models of the platforms. We would need to create a clear system for platform classification as service provider or electronic intermediary (with clear set of rules for the different types of platforms).

According to S. P. Choudary (2015)\textsuperscript{128}, there are three patterns to classify the different types of platforms. For what concerns our study on the SE, two of them are of relevance:

a) Platforms that provide information and currency exchange through the platform, i.e. Airbnb, Taskrabbit;

b) Platforms that apart from information and currency exchange, also manage the transaction through the platform, i.e. Uber, Clarity\textsuperscript{129};

Indeed, in the case of Uber, the platform makes three transactions: 1/ Information for customers and drivers on the demand/offer situation; 2/ Uber is aware of the locations through which a ride moves, which in turn helps it bill of exact usage and determine the completion of the ride Although the transport itself is done outside the platform, the platform tracks and control the transfer; 3/ The currency exchange is done through the platform. (See image on the right)

The case of Airbnb is different. There are only two exchanges through the platform (information and currency exchange) since the transfer of goods and services is done outside the platform and without its control. (See image on the left)

\begin{footnotesize}
\textsuperscript{127} KATZ V. (2015), op. cit. p. 1071.
\textsuperscript{128} CHAUDARY, S.P. (2015), op. cit., p. 80.
\textsuperscript{129} \url{https://clarity.fm/}; the app provides contacts with consultancy experts, and the consumer will be charged per the duration of the telephone call with the expert.
\end{footnotesize}
This division could help the legislator to classify the platforms as a service provider or not, and as a consequence mark a certain divide for the application of different sets of legal requirements, including self-regulation aspects.

Furthermore, the divide between for profit and not-for profit service providers would add further elements into the classification. The example of Uber (for profit making) and BlaBlaCar (not-for profit) with the difference in treatment given by the authorities in France serves as an example.

4.1.3 About the obligations of the SE platforms

It is probably more difficult to regulate users than platforms. In this regard, it is worth asking whether SE platforms should not only inform users about all their legal and fiscal obligations, but also ensure that they comply with them. The creation of systems like automatic tax returns directly available on the SE platform as the one currently under discussion in France is worth considering.

In the same way, it is worth wondering whether SE platforms should ensure more transparency in relation to information required by consumer legislation, in particular by the Directive on Consumer Rights. Even if SE platforms are considered as information technology services, they slightly change their meaning as they probably cannot be considered as traditional information technology services either.

This question leads to another relating to labour conditions. In this regard, the requirements for the platform to be considered as an employer, and once considered as such, the mechanisms enforceable to protect workers are not clear. This is particularly relevant with
regard to professional services, especially where users consider themselves employees of the SE platform.

Furthermore, we should assess whether a duty of cooperation of the platforms with the authorities regarding the enforcement of the legislation should be established. In accordance with the eCommerce Directive, Member States cannot impose a general obligation to monitor the content they manage (article 15). Nonetheless, this general prohibition is arguably problematic when talking about SE platforms. In particular, one of the main criticisms made to Airbnb is that many users post ads illegally—because they sublet their apartment illegally, they do not declare their revenue to the national treasury, or they use the platform as a professional activity without declaring so. As a reaction to these critics, in December 2015 Airbnb has shown its willingness to cooperate with Dutch authorities: “the houses rental site removed in late December at least 170 Amsterdam ads because the landlords would not abide by the rules.”\textsuperscript{130}

In this regard, the recent modification to the Catalan tourist legislation according to which the registration number of the holiday rentals must appear on any type of advertisement where they appear seems to contradict the eCommerce Directive. This question is not trivial as Barcelona local authorities decided to strictly enforce the legislation and use a software to spot illegal apartments advertised on Airbnb and other similar platforms, thus resulting in fining Airbnb with 60000 Euros for posting illegal rentals. Besides, the efficiency of monitoring systems such as the one established in Berlin whereby compliance forces enter into the houses without warrant to ensure that the law is correctly applied is dubious; consequently, the question of monitoring the content managed by the information society services is certainly worth asking and probably needs to be reformed.

4.1.4 Regulatory framework applicable to users

One crucial question that seems to receive different responses at national level is the threshold between a professional activity exercised thanks to SE platforms and the occasional intervention of private individuals in this context. This distinction is particularly relevant at EU level because it determines whether users must comply with rules relating to consumer protection among others.

In this regard, there are some criteria at national level that could be taken into account. For instance, France is discussing the possibility to grant tax exemption for benefits of up to 5000 euros in any activity relating to the SE. The same system already applies in the UK, setting up a threshold of £4,250 per year tax-free from letting out furnished accommodation

\textsuperscript{130} http://www.volkskrant.nl/economie/airbnb-schrapt-huizen-amsterdam-die-te-vaak-worden-verhuurd-a4223391/ (last consulted on 10/01/2016).
in their home. Another criterion that exists in different countries regarding accommodation is whether we are talking about the principal or secondary residence: the former does not need to be registered while the latter does. Finally, the Netherlands and Catalonia\textsuperscript{131} have also discussed time and space limits in order to determine whether the activity remains within the frame of the SE or falls under the common regulatory framework.

4.2 Obstacles and barriers preventing the Sharing Economy from reaching its full potential

The main obstacle so far has been to treat equally what is clearly different. Bans imposed on different SE practices have created a market segmentation and some regulatory measures have the effect of deterring new initiatives and protecting traditional sectors. While protection is justifiable and even necessary in some cases, in others it has been declared by the Court as illegal. The legal responses of the different legislators have been more or less conservative depending on policy choices, but there is not yet a clear line of action in the hands of policy makers.

Many and varied are the obstacles and barriers preventing the sharing economy. One of the objectives of this research paper is to provide a categorization of the detected legal obstacles. We propose to use the following categorization with respective indicators.

a) **HIGH** – Obstacles that absolutely prevent the existence of a SE practice, or make it equal to traditional services provision.

b) **MEDIUM** – Obstacles that deter marginal transactions, discourage consumers or overcharge providers. The activity is not prevented in itself but its attractiveness and added value is considerably diminished.

c) **LOW** – Obstacles that can be overcome. The activity itself is not prevented, but transnational movements are less likely because of the fragmentation of the law across the territory.

We can then attempt to label the found obstacles throughout the report, as presented in the table below.

| Table n° 5: Description of the obstacles and their corresponding indicators |
|---|---|
| **High** | • Bans imposed on SE platforms  
|  | • Financial penalties imposed on SE platforms for the conduct of their users |

\textsuperscript{131} Catalonia has not presented the bill yet, but this is one of the measures foreseen.
<table>
<thead>
<tr>
<th>Level</th>
<th>Regulations to equalize the SE platforms to the traditional provision of services without distinction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medium</td>
<td>Regulatory restrictions that deter marginal transactions</td>
</tr>
<tr>
<td></td>
<td>Insecurity and lack of clear legal framework regarding compliance and enforcement</td>
</tr>
<tr>
<td>Low</td>
<td>Laws are simplified, partnership with the platforms is implemented, but difficulties exist for transnational operations due to fragmentation of the law</td>
</tr>
</tbody>
</table>
### Table n° 6: Legal obstacles preventing the SE from reaching its full potential

<table>
<thead>
<tr>
<th>Country</th>
<th>Transportation</th>
<th>Accommodation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>BE</strong></td>
<td>High: Ban on UberPOP in Brussels + Existing legislation applies to the sector indistinctly. New legislation is under discussion in Brussels.</td>
<td>Medium-Low: Some regions simplify the rules, but Brussels imposed new rules. Risk of legal fragmentation which results in legal uncertainty for foreign users.</td>
</tr>
<tr>
<td><strong>DE</strong></td>
<td>High: Nationwide ban on UberPOP + Existing legislation applies to the sector indistinctly.</td>
<td>High: New rules are imposed in Berlin to expressly prohibit unregistered short-term rentals + aggressive enforcement</td>
</tr>
<tr>
<td><strong>FR</strong></td>
<td>Medium-High: Ban on UberPOP codified in the Law and considered constitutional by the Constitutional Court + Existing taxi legislation applies to Uber-like platforms indistinctly + prohibition on electronic cruising But: express legalization of car sharing platforms, understood as following Blablacar’s model.</td>
<td>Medium-Low: Licencing is simplified and the legal framework has been clarified. Some tools to facilitate fiscal law compliance are either implemented or under discussion. Threshold between commercial and occasional use of SE platform: Criteria to distinguish a commercial activity from occasional use of SE platforms are under discussion with the creation of tax exemptions are discussed. The prohibition on subletting is unchanged.</td>
</tr>
<tr>
<td><strong>NL</strong></td>
<td>Medium-high: Ban on UberPOP + Existing legislation applies to the sector indistinctly but willingness to adapt the taxi market to innovation.</td>
<td>Low: Rules are simplified, with some requirements to be fulfilled. Cooperation with the platform. Tools to facilitate fiscal law compliance are in place.</td>
</tr>
<tr>
<td><strong>ES</strong></td>
<td>High: Ban on Uber + Blablacar is challenged in court + Existing legislation applies to the sector indistinctly.</td>
<td>High: Existing legislation applies to the sector indistinctly and is modified not to simplify rules but to ensure it is effectively enforced + aggressive enforcement. New measures to regulate the activity are foreseen.</td>
</tr>
<tr>
<td><strong>UK</strong></td>
<td>Medium: Uber is legal in London, but some measures under discussion are potentially harmful to the SE.</td>
<td>Low: Rules are simplified, with some requirements to be fulfilled + tax exemptions apply until a certain threshold for occasional users.</td>
</tr>
</tbody>
</table>

Building on the case analysis it becomes possible to distribute the six MS according to the classification scheme. It is important to mention that classification of the legal obstacles in the sphere of professional services is not presented, as we did not find cases in the EU or Member State legislative responses in this area. Therefore, we are distributing the six MS
along only two axes, one for the field of accommodation and the other one for transportation.

**Chart: Member States’ legal obstacles in accommodation and transportation**

4.3 The potential of self-regulation in the SE

With the concerns the Sharing Economy brings to society, not only policy-makers but also academia are thinking and writing about the best ways to address those issues, more concretely, the best ways to regulate SE platforms. Many of them discourage the extension of old, existing rules to cover the new SE platforms. Instead, some utter the possibility to deregulate in order to level the playing field while others recommend the creation of self-regulatory schemes.

4.3.1 The concept of self-regulation

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135 This section focuses on the practical application of the theory. Readers that wish to have a more complete read about self-regulation, we refer to the annex.
Self-regulation can be defined as “groups of firms in a particular industry or entire industry sectors that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups is often voluntary, but could also be legally required” (OECD, 2015:11). From this definition follows that different types of self-regulation exist. In this regard, we could think of the level of co-operation between the industry and the authorities, the extent to which self-regulation is voluntarily initiated by the industry (as opposed to self-regulation mandated by the authorities).

4.3.2 Self-regulation in the Sharing Economy

Some argue that self-regulation or self-governing is one of the elements that makes the SE unique.136 In order to agree or disagree on this, we have to understand the options authorities have when dealing with the concerns related the SE. Basically, two types of approaches can be applied: (1) government control or top-down government regulation or (2) self-regulation or bottom-up regulation. Even though this division is too simplistic, it facilitates the understanding of possible approaches. In the first case, institutions provide assurance and alleviate transaction uncertainty. Doing so, the government addresses safety concerns. In the second case, SE platforms’ self-regulation through reputation (user ratings for instance) reduces uncertainty.

The general argument for government control is to maximize social welfare, to intervene where market deficiencies appear. However, it can be questioned to what extent this holds true.137 Furthermore, if some favour only a minimum of government regulation138 (which differs from self-regulation), this is inspired by the knowledge that the case for government intervention is weakened since most (consumer protection) regulation was needed because of the lack of information. Nowadays, “because the Internet and information technology alleviates the need for regulation in this fashion, […] consumer welfare may ultimately be better protected by loosening traditional regulations” (Koopman, Mitchell & Thierer (2015:17)). Since one of the key features of the SE is that it is driven by digital platforms, one could argue there is a valid claim for a self-regulatory approach when trying to address the concerns already mentioned.

Even though preliminary, we can already notice some examples of self-regulatory mechanisms that are put in place exactly to address concerns raised by many regarding the SE.

**Tax collection**

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137 According to the public choice school, private interest rather than public interest have often been served by top-down regulation (Allen & Berg, 2014).
If Airbnb has created a mechanism to collect tourist tax on behalf of the authorities (cf. France and the Netherlands), then this should be seen a first step of what we could call mandated co-operation. Indeed, the authorities pushed for such mechanisms but leave it up to the platform itself to design and operate it.

**Insurance**

Airbnb has decided to offer a ‘Host Guarantee’ that covers limited losses or damages to persons renting out a room. Even though it should not be compared to a traditional insurance, this guarantee was initiated by the platform itself, hence constituting another example of self-regulation in this field.

Uber offers a commercial insurance from the moment you enter a car until the actual drop-off. All rides ordered through the app are covered. For instance, before the service was taken down, all UberPOP rides in the Netherlands were backed with approximately €3.8 million per incident. This insurance complements the legally required insurance for motor vehicles and assures that passengers and third parties are protected during the ride. Uber offers this insurance through a partnership with an international insurer. Again, this serves as an example of how an SE platform reacts to public concerns.

**Safety**

Both Uber and Airbnb make use of cashless transactions (as opposed to Blablacar, to name one). Whenever a user orders a ride or books a room, the payment is made via credit card, hence neither the consumer nor the provider will have to carry around cash, which might cause feelings of insecurity.

Other elements adding to this are the use of anonymous feedback, or reputational rating mechanisms, the disclosure of information related to the driver such as the name, photo, licence plate number and star rating.

**Preventing the shadow economy**

The above-mentioned cashless transactions also serve other purposes. They provide platforms with income security (they retain a percentage of the transaction for their service) and prevent the shadow economy. Granting users the option of cash payments equals leaving the door open for the shadow economy. Those platforms make the clear choice for income security serving in parallel the aim of preventing the shadow economy. Authorities

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140 [https://newsroom.uber.com/amsterdam/nl/feiten-over-uberpop/](https://newsroom.uber.com/amsterdam/nl/feiten-over-uberpop/) (last consulted on 10/01/2016).
will be able to control the income of service providers through cooperation agreements with the platforms.

5 Conclusions and recommendations

The novelty of SE is posing governments with policy challenges. One could say governments need to undertake a balancing exercise between on the one hand, embracing SE because of the benefits it brings, and on the other hand, making sure SE platforms and their users (service providers and consumers) are subject to a clear, stable and equalitarian regulatory framework that guarantees a proper level of security (tax, social security, safety and consumer protection).

There are different elements to take into account to determine if and how the EU should act on this matter. Regarding if the EU action is necessary, the following aspects have been taken into account: Is the EU competent? Is there a clear European dimension? Is there EU legislation on the topic? Would EU action be too burdensome? In this respect, the possible routes for EU action make it clear that attention should most likely be focused on the platforms in order to categorise the different typologies and to place them – if need be - at the service of the authorities to control the compliance with the rules by both providers and consumers. Regarding how the EU should act, the recommendations below resort to regulation at EU level, but also to self-regulation. Furthermore, it should be noted that while the existence of divergences at national level on how to deal with the SE probably poses obstacles to the achievement of the single market, it also demonstrates that reaching an agreement at EU level might prove to be difficult.

The conclusions and recommendations for EU policy makers are divided into three main levels: the platform, the provider, and the consumer.

5.1.1 The platform level: towards a clear categorisation of platforms

Looking at the cases and responses from the authorities in the analysed MS, it becomes clear that there is still a challenge to define the SE as well as to label the different types of

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platforms that exist. The legal qualification of the services provided through a platform have proven to be a very complex task: Is Uber a taxi company or nothing more than an IP-enabled service? To what degree does it differ from Blablacar and what are the legal consequences of the differences? Do the rental services via Airbnb provide users with an income or is it just a little extra on top of a person’s regular salary? Questions like these have not yet been univocally answered. Yet, the policy responses should be different based on the answers.

Through case analysis, this report presents the dispersed legal landscape in Europe when it comes to sharing economy practices. We have seen that there are two economic sectors – transportation and accommodation – that have been subject to both important growth and strong legal challenges. A third sector – professional services – is also developing fast and subject to legal battles outside Europe. The analysis of the cases illustrates the differences among the different business models the SE platforms present and how these models impact differently traditional business sectors.

a) Some platforms facilitate simply the exchange of information, placing the accent on the sharing aspect (e.g. Peerby, CouchSurfing142) but without any economic exchange.

b) Others on top of that also facilitate the economic exchange between provider and consumer, without any further intervention (e.g. Airbnb, Blablacar).

c) On the other side of the typology we encounter those platforms that have been assimilated to the traditional business model where the platform facilitates three transactions, the provision of information between provider and consumer, the payment for the service through the platform, and the control of the service provider in its interaction with the consumers (e.g. Uber, some of the professional service platforms operating in the USA like for example Clarity).

According to this classification, the degree of control exercised by the platform on its users (providers and consumers) is crucial to determine the extent of its liability. However, the current legislation does not offer such nuances. In this regard, it is not surprising to see that it is in the third type of platforms where the most disrupting practices have been encountered and claims have been made to consider the platform-provider relationship as a labour relationship. Indeed, the platforms themselves have claimed to solely allow the exchange of information and to be mere intermediaries, in order to benefit from the liability exemption foreseen in the eCommerce Directive; however, it is quite difficult to go along with this claim as the case-law at national level demonstrates, especially in the case of

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142 A platform that allows people to offer a place to stay for free to other registered members. Members provide information about themselves on the platform and give feedback on others.
UberPOP. It is therefore also in this type of platforms where different cities and MS have imposed bans, and where the need for a harmonised approach comes at stake.

Against this background, EU regulatory action is desirable at the platform level. Current rules should be modernised in order to guarantee a truly functioning digital single market and a fortiori the EU single market, offering opportunities to the SE.

We therefore propose the following recommendations:

- **Provide a common definition to the SE at EU level.**
  It would provide greater legal certainty for all the parties involved, including national authorities, businesses and citizens. Having clear concepts in this growing sector of the economy is a condition sine qua non for the achievement of the EU single market.

- **Clarify the classification of SE services: information society service vs. industry specific business.**
  It is important to have clear criteria to know to which category SE platforms belong. The ruling of the CJEU in the case of Uber will shed light on the interpretation given regarding the legal qualification and the type of regulation applicable to these platforms. However it still is difficult to assess its scope. Indeed, it is not clear whether it will only affect car-sharing platforms, or if all the SE platforms will be referred to. For this reason, a clarification in the light of the SE with specific criteria to distinguish the platforms that should be considered as information society services, from the ones that have or may become industry specific business, is necessary.

- **Revise the existing categories of information society services and their corresponding legal regime so as to embrace the new reality created by the SE.**
  Even if we would take for granted that SE platforms are information society services, it appears that the current regulatory framework, in particular the eCommerce Directive, is not fit for purpose and needs to be modernized in order to embrace changes relating to the SE. The legislation was not created to frame activities such as Airbnb, which are in the grey area: they are online services, but it is difficult to argue that they merely are hosting providers in the sense of article 14 of the eCommerce Directive.

  The creation of hybrid categories of information society services is therefore worth discussing, with a more balanced legal regime than the current one. This modernization is also important because the difference in the applicable legislation for offline and online
services is becoming detrimental, as it is perceived to encourage unfair competition, with companies simply resorting to an online platform to avoid their obligations.

Furthermore, we could establish a subdivision in the third category above mentioned between employer-like platforms and mere intermediaries without employer obligations. The dividing line would be given by the type of control the platform exercises over the service providers: the more instructions/control as to how to perform a task a platform gives to a provider, the more one might believe providers act as employees of a third party rather than independent contractors self-employed. According to Europe Economics (page 25), “To the extent that peer-to-peer transactions are displaced by business-to-consumer transactions over time, reflecting a division of labour and a reduced incentive to own assets that can more easily be rented, that is then equally likely to result in some reversion to the typical employment practices in the existing industries”. It would therefore be useful to have clear criteria and thresholds available in order to classify the platforms.

This revision should entail modifications to the special liability regime established by the eCommerce Directive. The hybrid categories of information society services should also contain nuances regarding liability. Online services can benefit from a liability shield, while offline services cannot. This clear-cut division should probably be revised in order to introduce some elements of liability depending on the degree of control exercised by the SE platform.

The application of the Directive on Consumer Rights to SE platforms should also be discussed, in particular with regard to the third category of platforms above mentioned. In the event that employer-like platforms are created, their legal regime should probably see important changes. In this regard, it is worth discussing whether the concept of ‘trader’ in the sense of article 2 of the Directive could apply to these platforms, with the resulting obligations.

- **Create a legal framework for the way reputational rating systems work**

These systems are crucial to the way users (both providers and consumers) decide to engage with each other. A harmonization (including rules on transparency) could boost the trust people have in SE platforms and their users.

5.1.2 Action at the service provider level: ensuring compliance

The Commission has announced that it will provide guidance on how existing EU law applies to the SE platforms and its users, rather than strictly regulating it. The EU is competent to establish the necessary competition rules for the functioning of the single
market according with the TFEU. There is already an important corpus of legislation to rule the actions of service providers be it through IP enabled services or not. But the EU needs to tackle the insecurity related to compliance and enforcement of legal obligations for service providers when acting through a platform.

We therefore propose the following recommendations:

- **Clarify the distinction between professional and occasional use of a SE platform.**
  The EU should provide guidelines on the threshold between what constitutes a professional activity exercised in the SE platform and what does not. Looking at the best practices/examples that we have analysed in different European cities, we see elements that could help the legislator to set the common level playing field. These include time and space limits, as well as income thresholds. In any case, although indications would be welcomed at EU level in order to have a unified framework, these should be limited to guidelines at least regarding income thresholds, as the standards of living are not the same across the EU.

- **Revise the absence of obligation to monitor illegal content is desirable.**
  A duty of cooperation of platforms with the authorities is worth considering. The recent modification to the Catalan legislation demonstrates that public authorities expect SE platforms to cooperate in the fight against illegal content. Since policing providers might prove to be practically difficult and costly for public authorities, some of the burden might need to fall on platforms.

- **Use self-regulation to ensure compliance with the legal and fiscal legislation**
  While the modification of the eCommerce Directive would ease the process of enforcement of the legislation, it is also worth considering the role self-regulation has to play into this. Take the example of the agreement between the city of Amsterdam and Airbnb where the platform collects the taxes on behalf of the accommodation providers. We can also think of certain types of illegal activities that could be detected and prevented by encouraging the platform to self-regulate. As highlighted by Europe Economics (2015: 57), the solution might lay in the outsourcing of certain legislative and control functions to the platforms. They are best placed to ensure compliance with the rules by their users while this is exactly one of the struggles for public authorities. Indeed, the platform is ideally positioned to ensure enforcement of service providers’ legal obligations since all the information is already centralized on the platform. An example is the recent removal by Airbnb of some
The guiding principle should therefore be: make reasonable regulatory requirements when needed and adapt the existing legislation when possible. Thereafter, it should be controlled by the platforms through partnership agreements with the authorities, in order to ensure that its users (both providers and consumers) meet the requirements. How this could be achieved might vary depending on the type of platform:

1.- For type b) platforms (those facilitate the economic exchange between provider and consumer, without any further intervention (e.g. Airbnb, Blablacar).
   a) the establishment of (minimum) standards (per sector) to allow the expansion of sharing economy practices while still ensuring a level playing field, and promote voluntary codes of conduct (recital 49 of the eCommerce Directive).
   b) the EU could develop a certification programme for SE initiatives and practices, with a multilevel collaborative approach, and being inspired by the interesting initiatives launched in different European cities. Certifications could be given to those providers complying with the set of standards established by sectors, after a holistic analysis made by all the EU institutions in a coordinated manner.
   c) Encourage and support compliance and enforcement of the rules at the platform level.
   d) Set the principles under which reputational working systems operate.

2.- For type c) platforms (those platforms that have been assimilated to the traditional business model) the licencing approach could be considered. Of course using certifications is more competition-friendly than working with licences. Occupational licensing could be a way for traditional companies to prevent market entry for newcomers. The EU should at all times be very aware of such a risk and take this into consideration when taking steps.

- **Foster the exchange of best practices**

   Best practices have been identified at national level, and the EU could organize workshops and platforms to promote their circulation across the EU territory.

5.1.3 Action at the consumer level: creating trust

As long as citizens do not have complete faith in the operations of SE platforms, these will not live up to their potential. To many, the SE platforms are entirely new in the way they
operate, not only because they are driven by digital platforms, but also because the providers seem not to comply with the laws that would apply to an employee of a ‘traditional’ company. Therefore, it is important to tackle this lack of trust.

While the following recommendations are already stated before, here they serve another purpose: create trust among SE consumers.

- **Clarify the legal landscape in order to ensure compliance with the rules**

  Providing a stable and clear regulatory framework is likely to increase confidence among consumers, as they will have no fear of doing something illegal while using SE platforms.

- **Create a system of certificates**

  Providers that fulfil certain criteria could then be given a certificate (cf. Flanders’ approach regarding tourist accommodations) that indicates they comply with EU standards, something that could convince doubting citizens to participate in the SE as consumers.
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Annex I

The concept of self-regulation

In this paper, self-regulation is considered as a policy instrument.¹⁴³ It is most often talked about in the sphere of industries. Therefore, in the literature, one will often come by Industry Self-Regulation (ISR) in this regard. According to the OECD (2015: 11), this concerns “groups of firms in a particular industry or entire industry sectors that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups is often voluntary, but could also be legally required”.

According to Bartle & Vass (2005), self-regulation is but one of the various ways by which an industry can be regulated. This variation can be presented on a spectrum ranging from no regulation over self-regulation, co-regulation, to statutory regulation.

<table>
<thead>
<tr>
<th>No regulation</th>
<th>Self-regulation</th>
<th>Co-regulation</th>
<th>Statutory regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>No explicit controls on an organisation</td>
<td>Regulations are specified, administered and enforced by the regulated organisation(s)</td>
<td>Regulations are specified, administered and enforced by a combination of the state and the regulated organisation(s)</td>
<td>Regulations are specified, administered and enforced by the state</td>
</tr>
</tbody>
</table>

This conceptualisation makes it clear that self-regulation is different from giving industrial players a blank cheque. According to Cohen & Sundararajan (2015: 116), it should be distinguished from deregulation or no regulation at all, “[r]ather, it is the reallocation of regulatory responsibility to parties other than the government.”

Authors have tried to categorize different types of self-regulation. According to Bartl & Vass (2005), five categories can be distinguished:

- Co-operative: occasions where there is co-operation between the regulating State and the one being regulated on the operation of statutory regulation;
- Delegated: occasions where the implementation of statutory duties is delegated by a public authority to self-regulatory bodies;
- Devolved: when statutory powers are devolved to self-regulatory bodies.
- Facilitated: the State explicitly supports self-regulation yet the self-regulatory scheme itself is not laid down in a legal document;

¹⁴³ Self-regulation also exists as a concept in psychology.
• Tacit: this almost boils down to pure self-regulation. There is little explicit State support, nevertheless, the State’s implicit role can be rather influential.

According to others, like Julia Black (2001), self-regulation covers four categories (or layers as she calls them):
  • Voluntary self-regulation, where there is no governmental involvement;
  • Coerced self-regulation, where an industry organisation self-regulates to avoid being subject to government rules;
  • Sanctioned self-regulation, where the government has to approve the industry proposed rules;
  • Mandated self-regulation, where the industry is ordered to create and establish a framework.

Summarizing, we can say self-regulation is but one option to regulate the industry and even within that option, various forms exist.

1.3.1 Advantages of self-regulation

For governments:
- a way to exert influence when, because of legal constraints, it is limited in its ability to address an issue;
- cost–effective policy-making;
- flexibility;
- maximize social welfare

For businesses:
- flexibility;
- lower regulatory burden;
- more commitment, pride and loyalty within a profession or industry;
- enjoy a better reputation;
- avoid stringent and costly statutory regulation;
- avoid discouragement of innovative solutions due to barriers to enter the market

Consumers:
- a better functioning market (market failures are overcome);
- it can address issues such as corporate social responsibility.

1.3.2 Concerns

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144 Bartl & Vass (2005); OECD (2015)
A number of respondents of Bartle & Vass (2005) study argued that some caution should be in place when one considers self-regulation. There is, for one, the question of public interest versus private interest. How can it be guaranteed that self-regulation is in the best interest of all and not just the industry that wants to protect itself? Furthermore, how can self-regulation be compatible with effective systems and process of transparency and public accountability? Finally, measuring the effectiveness of self-regulatory is not an easy task.
First question

Inasmuch as Article 2(2)(d) of Directive 2006/123/EC (1) of the European Parliament and of the Council of 12 December 2006 on services in the internal market excludes transport activities from the scope of that directive, must the activity carried out for profit by the defendant, consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of the defendant, ‘intelligent telephone and technological platform’ interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of Directive 98/34/EC (2) of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services?

DIRECTIVE 98/34 EC “A procedure for the provision of information in the field of technical standards and regulations & rules on Information Society services”

1. With what is the Directive concerned? 1a. Underlying philosophy The basic principles of the EU include the freedom to provide services and prohibiting quantitative restrictions on the movement of goods and measures which have an equivalent effect. This Directive aims to support these principles, and the smooth functioning of the internal market, by delivering transparency in respect of national initiatives for the establishment of technical standards or regulations, thus avoiding the creation of new barriers to trade within the EU.

2. What does the Directive do? This Directive imposes an obligation upon each Member State to inform the Commission, and every other Member State, of technical regulations and technical standards in draft, before they are adopted in national law. In general, once notified, the measure enters a 3 month standstill period, during which the measure cannot be laid, enabling other Member States and the Commission to raise concerns whether the proposed measure is a potential barrier to trade. The procedure laid down by the Directive is consultative: information is disseminated on the proposed new measure to advise and stimulate
dialogue, thus enabling Member States and the Commission to identify and prevent barriers to trade.

3. What is the scope of the Directive? The Directive applies to: θ ‘information society services’ (i.e. services supplied at a distance by electronic means and at the individual request of a recipient of services); and to all θ industrially manufactured products and agricultural products. The scope of this Directive is very broad. It can include: Page 4 of 33 Directive 98/34/EC Procedure Guidance for Officials θ laws, regulations or administrative provisions; θ primary legislation (Government Bills, Private Bills, Private Members’ Bills and Private Legislation Procedure (Scotland) Act 1936 measures) and any form of secondary legislation; θ measures such as administrative circulars, departmental guidelines, advice notes, codes of practice, voluntary agreements etc; and θ technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with technical specifications. If such documents recommend the use of given specifications or standards and the consequences (not necessarily legal consequences) of following or not following the specifications or standards are such that they have de facto obligatory effect, they are notifiable.

Second question

Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in the Community legislation — Article 56 TFEU and Directives 2006/123/EC and … 2000/31/EC (3)?

DIRECTIVE 2000/31 E COMMERCE

The Electronic Commerce Directive, adopted in 2000, sets up an Internal Market framework for electronic commerce, which provides legal certainty for business and consumers alike. It establishes harmonised rules on issues such as the transparency and information requirements for online service providers, commercial communications, electronic contracts and limitations of liability of intermediary service providers.

The proper functioning of the Internal Market in electronic commerce is ensured by the Internal Market clause, which means that information society services are, in principle, subject to the law of the Member State in which the service provider is established. In turn, the Member State in which the information society service is received cannot restrict incoming services.

In addition, the Directive enhances administrative cooperation between the Member States and the role of self-regulation.
Examples of services covered by the Directive include online information services (such as online newspapers), online selling of products and services (books, financial services and travel services), online advertising, professional services (lawyers, doctors, estate agents), entertainment services and basic intermediary services (access to the Internet and transmission and hosting of information). These services include also services provided free of charge to the recipient and funded, for example, by advertising or sponsorship.

DIRECTIVE 2006/123 SERVICES DIRECTIVE

Article 9 on freedom of establishment

Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
   (a) the authorisation scheme does not discriminate against the provider in question;
   (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;
   c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

2. In the report referred to in Article 39(1), Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1 of this Article.

3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly by other Community instruments.

Article 56 TFEU Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

POLAND CONSIDERATIONS

145 Interview with Dorota Lutostańska, held in Barcelona in November 2015, Counsellor to the Minister Department of European Union Law, Ministry of Foreign Affairs
Poland considered that the factual information provided by the referring court is insufficient to analyse the case properly. We based our position on data provided by Uber on www.uber.com website.

In our opinion this data suggests that there are 2 separate services – an information society service provided by Uber and a transport service provided by the drivers.

As Uber Spain is established in Spain, article 56 TFEU and article 3 para 2 of directive 2000/31 do not apply. Article 49 TFEU should be applied.

*Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.*

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capita

It is possible to oblige Uber Spain to obtain a licence in Spain, as long as requirements specified in article 4 paragraph 2 of directive 2000/31 are fulfilled.

**PARR 1.** Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other Requirement having equivalent effect.

**PARR 2.** Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(1).


**Third Question**

If the service provided by UBER SYSTEMS SPAIN, S.L. were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, the question arising is whether Article 15 of the Law on Unfair competition — concerning the infringement of rules governing competitive activity — is
contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment.

Fourth Question

If it is confirmed that Directive 2000/31/EC is applicable to the service provided by UBER SYSTEMS SPAIN, S.L., the question arising is whether restrictions in one Member State [regarding] the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, are valid measures that constitute derogations from paragraph 2 in accordance with Article 3(4) of Directive 2000/31/EC.

Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: (a) the measures shall be necessary for one of the following reasons: — public policy, in particular the prevention, investigation, detection and prosecution of criminal which the service provider has to comply in respect of: offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

— the protection of public health,

— public security, including the safeguarding of

— the protection of consumers, including investors;

(ii) taken against a given information society service which general authorisations and individual licences in the field of prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

proportionate to those objectives;