



Exploratory study of consumer issues in online peer-to-peer platform markets

Task 5 Report - Legal Analysis Report



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Legal Analysis Report

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Abbreviations

ADRD	Alternative Dispute Resolution Directive
AGCM	Italian Antitrust Authority
B2B	Business-to-business
B2C	Business-to-consumer
CCP	Bulgarian Commission for Consumer Protection
C2C	Consumer-to-consumer
CJEU	Court of Justice of the European Union
CRD	Consumer Rights Directive
CSD	Certain Aspects of the Sale of Consumer Goods Directive
DECO	Portuguese Consumer's Defence Association
DPD	Data Protection Directive
ECD	Electronic Commerce Directive
EPD	e-Privacy Directive
GPSD	General Product Safety Directive
MCAD	Misleading and Comparative Advertising Directive
OCA	Bulgarian Obligations and Contracts Act
OECD	Organisation for Economic Cooperation and Development
P2P	Peer-to-peer
PID	Price Indication Directive
RODR	Regulation on Online Dispute Resolution
SD	Services Directive
SEUK	Sharing Economy UK
TFEU	Treaty on the Functioning of the European Union
TfL	Transport for London
UCPD	Unfair Commercial Practices Directive
UCTD	Unfair Contract Terms Directive
ÜTS	Estonian Public Transport Act
VAT	Value Added Tax

Executive summary

The sharing economy and online P2P markets are rapidly growing phenomena that could empower consumers by allowing peer suppliers/providers to monetise under-utilised resources, on the one hand, and by making goods and services more affordable for peer consumers, on the other hand. The emergence and development of these new markets, however, also raises consumer protection concerns due to regulatory uncertainty. Against this background, the 'Exploratory study of consumer issues in the sharing economy' (the Study), included in its objectives an analysis of the 28 EU Member States' legislation applicable to C2C transactions and to online platforms facilitating P2P transactions (Task 5 – Legal Analysis).

A focal point of this analysis is the identification of the key national-level indicators used to distinguish between individuals acting in a private capacity and individuals acting in a commercial/professional capacity; a distinction that has gained particular importance in the sharing economy context. Furthermore, the Legal Analysis investigates the extent to which the EU consumer *acquis* and other relevant EU legislation might apply to C2C transactions and online platforms facilitating these transactions. It also identifies the main enforcement issues of the applicable legal frameworks, the application problems experienced by national authorities, and relevant legal and policy initiatives adopted, or being discussed, by Member States or at EU level.

Objectives and methodology

The transactions falling within the scope of the Study, and therefore covered by the Legal Analysis, are those concluded by peers¹ and facilitated by online platforms that charge a certain type of fee (which might be, for example, the price paid by the user, or any other compensation to the platform for accessing and using it). Only platforms facilitating the (re)sale of goods, renting/sharing of goods, renting/sharing of accommodation, hiring/sharing of transport services and the hiring of non-professional services, are included in the scope of the Study.

The methodology for the Legal Analysis consisted of three main steps:

- **EU-level research:** desk research carried out by the Legal Analysis Team to identify relevant EU case-law and assess the extent to which relevant EU legislation can apply to C2C transactions and online platforms.
- **National-level research:** the completion of 28 Country Reports using a uniform template by national legal experts for each EU Member State. The Country Reports identify and analyse the national legislation applicable in the context of online P2P markets. They are based on desk research and supplemented by the consultation of selected national stakeholders.
- **Cross-analysis:** comparing the findings arising from the EU and national-level research and identifying the main consumer issues within online P2P markets, as well as relevant legal and policy initiatives.

Distinguishing B2C from C2C transactions

Distinguishing between B2C and C2C transactions is essential to determine whether consumer protection laws apply to a specific transaction. EU legislation does not clarify such distinction specifically within the sharing economy scenario and the **Member States' approach to the development of national level indicators that help distinguish traders from consumers is fragmented**: indicators vary from country to country and from sector to sector. Furthermore, while they are rarely defined in na-

¹ 'Peers' means both peer suppliers/providers and peer consumers. The term 'peers' generally covers individuals acting in a private capacity.

tional legal instruments, in most Member States, they are identified by national case-law, policy documents, legal doctrine, and/or the enforcement practice of the competent authorities. This fragmentation could arguably generate legal uncertainty and consequently hinder consumer protection.

A clearer distinction between B2C and C2C transactions has been identified as one of the core issues to be addressed in order to enhance the potential of the sharing economy and guarantee adequate consumer protection. The Legal Analysis, however, shows that there is no consensus amongst stakeholders on how to clarify the distinction between traders and consumers and reduce legal uncertainty generated by the fragmentation of national regulatory approaches.

Some stakeholders consider that the assessment of such an essential distinction on a case-by-case basis is not appropriate, and call for a uniform definition of 'trader' that makes it possible to establish a clear-cut line between B2C and C2C transactions.² The feasibility of this option is however debatable as the suitability of harmonised criteria remains highly dependent on the national context and varies across different sectors and areas of law. In line with this observation, the European Commission Communication of 2 June 2016,³ proposes to assess the nature of the transaction on a case-by-case basis, against three main elements (the frequency of the services; ii. the profit-seeking motive; and ii. the level of turnover). Furthermore, the Legal Analysis shows that, although national regulatory approaches are fragmented, in most Member States, the '**continuity**' and the '**professional nature**' of the activity carried out are the main elements on the basis of which, on a case-by-case basis, 'traders' are distinguished from 'consumers'. The 'continuity' is usually assessed against the number, amount and frequency of the transactions. The turnover generated by the activity or the profit-seeking motive are generally used as indicators of the 'professional nature' of the activity.

Additionally, some Member States developed **sector-specific thresholds** and/or **tax thresholds** that help distinguish between individuals acting in a private capacity and individuals acting in a commercial/professional capacity. These limits, however, clearly diverge from one Member State to another (as well as from sector to sector) and are not specifically set out to clarify the distinction between B2C and C2C transactions from a consumer protection perspective. Indeed, when sector-specific or tax thresholds are exceeded, the activity is presumed to be 'professional', or the individual is qualified as a 'business' for tax purposes. Consequently, the sector-specific legislation or the tax regulation, would apply. However, it might not be possible to categorically state that consumer law also becomes applicable. For example, in the accommodation sector, different local regulations set out **temporal thresholds**. They lay down the limits within which the renting activity is presumed to be 'non-professional' and is, therefore, neither subject to licensing or authorisation requirements, nor to other sector-specific requirements, such as compliance with fire safety regulations. In some Member States, tax thresholds are used to assess whether an individual is acting 'pro-

² Information collected through consultation with national stakeholders (e.g. Spanish Association of Digital Economy, 24 May 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of the Spanish Government, 13 June 2016; Catalan Government, General Directorate for Telecommunications and Information Society, 15 June 2016). See also: Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, online intermediaries, data, cloud computing and the sharing economy market (Positionspapier der Bundesrepublik Deutschland zum Regelungsumfeld für Plattformen, Online-Vermittler, Daten, Cloud Computing und die partizipative Wirtschaft) of 22 April 2016, available at https://www.bundesregierung.de/Content/DE/_Anlagen/BKM/2016/2016-04-22-positionspapier-plattformregulierung.pdf?__blob=publicationFile&v=2; HM Government Response to EU public consultation on Digital Platforms, BIS/16/74, p. 46, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491736/bis-16-74-digital-platforms-eu-consultation-response.pdf; The principles for legislators and policy makers developed by *Test-Achats/Test Ankoop* in the policy paper 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' are analysed under Section 6.2.1. of this Report.

³ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy', 2.6.2016, COM (2016) 356 final, available at <http://www.eesc.europa.eu/resources/docs/com2016-356-final.pdf>.

professionally'. For example, according to the Latvian Law on Personal Income Tax, the fact that an activity generates revenue exceeding approximately EUR 15,000 in a taxation year is an indicator of its professional or commercial nature. Similarly, in the United Kingdom, resident landlords⁴ who rent out their own furnished accommodation (rooms or entire floor) earning less than GBP 7,500 per year⁵ (approximately EUR 8,419) are qualified as 'private individuals' for tax purposes, and can accede to a tax exemption by opting into the 'Rent a Room Scheme' on their tax return.⁶ Furthermore, the introduction of sector-specific or tax thresholds to help distinguish traders from consumers has been generally criticised by some stakeholders as it could arguably generate more legal uncertainty.⁷ They consider that these limits would not adequately guarantee that above the threshold set out by law, individuals producing certain revenues are actually acting in a professional or commercial capacity (e.g. as professional drivers, in the transport sector). Indicators of what constitutes a trader should rather be flexible so as to allow assessing, on a case-by-case basis, the real income earned and consequently apply 'fair' taxes and licensing/authorisation requirements.⁸

Finally, the acknowledgement by national legislators of the existence of '**prosumers**' or '**micro-entrepreneurs**' as new types of economic operators has also been identified by some stakeholders as possibly helpful in clarifying the distinction between traders and consumers, and creating more legal certainty. The notion of prosumer is based on the necessity to adopt a flexible approach to the qualification of sharing economy operators. According to a policy paper recently released by a consortium of EU consumer associations from Belgium, Italy, Portugal and Spain, led in Belgium by the consumer protection organisation *Test Achats/Test Ankoop*, the prosumer is 'a private individual who provides, produces or trades goods or services not related to their habitual business, trade or profession'.⁹ In France, since 2016, the accessibility to the tax status of 'micro-entrepreneur' (which benefits from simplified tax and accounting rules), instead, has been tied to turnover thresholds depending on the type of business activity carried out. Against this background, it can be argued that the introduction of these new categories of economic operators would not necessarily guarantee more legal certainty as it would raise the questions of which legal regime would apply to them and what indicators should be used to distinguish 'prosumers' or 'micro-entrepreneurs' from 'traditional' businesses or consumers.

C2C legislation and related enforcement issues

The Legal Analysis identifies the national legislation applicable to: (i) the relationship between peers concluding contracts (through online platforms), and (ii) to the relationship between platforms facilitating P2P transactions and their users.

In most Member States, the **legislation applicable to C2C transactions** falling within the scope of this Study, consists of **civil code provisions** on contracts generally, obligations, contracts of sale, contracts of lease, letting of work and letting of things, as well as **specific laws applicable to the transport and accommodation services** (where relevant). Although this legal framework does not guarantee the same level of protection as afforded to consumers in B2C transactions, both general

⁴ Irrespective of whether the resident landlord owns the accommodation or not.

⁵ The tax threshold is GBP 7,500 from 6 April 2016. For the 2015 to 2016 tax year, the threshold was GBP 4,250.

⁶ 'Rent a room in your house', Gov.UK website available at <https://www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme>.

⁷ Conclusions of representatives of online platforms facilitating P2P transactions and of other stakeholders attending the Workshop in Brussels, as part of the Study, on 3 October 2016.

⁸ *Ibid.* See also OCU, *Altroconsumo*, *Deco Proteste*, *Test Achats/Test Ankoop*, *Cibersomosaguas*, *Ouishare*, 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU Ediciones, 65.

⁹ 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU, *supra*, p. 7.

civil code rules and sector-specific legislation assure a basic level of protection to parties to C2C contracts.

In some Member States, sector-specific laws apply to both B2C and C2C transactions and can include quality and/or safety rules that protect parties to C2C transactions. This is, for example, the case in Germany where, according to Section 2 of the Passenger Transportation Act¹⁰ every carrier offering transportation to a passenger requires a permit. Similarly, the Malta Travel and Tourism Services Act¹¹ prohibits any person from running or operating a tourist accommodation service activity without a licence. The Maltese Act does not distinguish between B2C and C2C transactions. Therefore, it can be assumed that the licensing requirement applies to both businesses and private touristic rentals.

With regards to the horizontal legislation applicable to C2C transactions, general civil law rules such as the good faith clause or general information requirements afford a basic level of protection to parties to C2C transactions. In theory, it could be argued that this level of protection is sufficient as in C2C transactions both parties are consumers and are thus on an equal footing. The national level analysis, however, shows that in practice, general civil provisions are **not usually tailored to C2C transactions concluded online**. According to case-law of the Court of Justice of the European Union (CJEU), when consumers are parties to a B2C contract and hold a weaker position than the business counterparty, they tend to agree to pre-determined terms without being able to influence their content.¹² These information asymmetries may also occur in C2C transactions concluded online where, in most cases, the parties or the goods are not physically present and the identity of the other peer is not clear. Therefore, although both parties to the C2C contract are consumers (i.e. peers - individuals acting in a private capacity), their relationship is not necessarily 'balanced'.

The main issue concerning the existing C2C legislation consists in its **scarce enforcement** in the sharing economy context. This is partially due to the fact that the competence of the national consumer protection authorities is generally limited to the B2C scenario. Furthermore, in order to enforce rules applicable to C2C transactions and guarantee access to redress by peers in case of disputes, the case must be brought before civil courts. The Legal Analysis shows that, however, **civil claims are very limited** for various reasons, most notably the high costs and length of civil proceedings compared to the average low value of C2C transactions concluded online, as well as the low confidence of the general public in traditional dispute resolution mechanisms and the scarce awareness of available remedies.

Additionally, the Legal Analysis shows that **the scarce enforcement of C2C legislation could be linked to the insufficient cooperation of platforms with competent authorities**. In the Netherlands, on the basis of the **Memorandum of Understanding signed by Airbnb with the city of Amsterdam in December 2014**,¹³ Airbnb directly collects tourist taxes on behalf of the hosts and transfers them to the City. It also provides information to its users on the private holiday rules that apply in Amsterdam. According to the temporal threshold set out by the Amsterdam rules on private holiday rentals,¹⁴ the renting activity of properties located in Amsterdam is presumed to be 'non-professional' when it is carried out for less than 60 days per year

¹⁰ German Passenger Transportation Act, 1990 (*Personenbeförderungsgesetz*), Federal Law Gazette I/2016, p. 203.

¹¹ Chapter 409 of the Laws of Malta, Act XII of 1999 as last amended by Act XXIII of 2009.

¹² C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579, para 29.

¹³ Website of the Municipality of Amsterdam (*Gemeente Amsterdam*), Agreement between Amsterdam and Airbnb (*Afspraken Amsterdam en Airbnb*), available at <https://www.amsterdam.nl/wonen-leefomgeving/wonen/bijzondere-situaties/vakantieverhuur/>.

¹⁴ 'May I let my home or home boat when I am on holidays?' (*Mag ik mijn woning of woonboot verhuren als ik op vakantie ben?*), website of the Municipality of Amsterdam available at <https://www.amsterdam.nl/veelgevraagd/?caseid=%7B9B2C2273-F797-460B-AD20-05DFB9F6F39F%7D>.

in total. Above this limit, the activity is qualified as a 'business' and a licence is necessary. According to the Memorandum of Understanding, Airbnb should therefore cooperate with the Municipality to prevent the breach of these rules (in particular that apartments located in Amsterdam are rented out through the platform for no longer than 60 days per year). The actual enforcement of this rule has been particularly difficult due to Airbnb's refusal (on privacy grounds) to disclose the identity of users who do not comply with the Municipality's rules.¹⁵ The independent website *Inside Airbnb* highlighted that around half of the Amsterdam flats are rented out through Airbnb exceeding the limit of 60 days per year.¹⁶ Although the City Council denied that the problem is as significant as described by *Inside Airbnb*,¹⁷ the case of Amsterdam could highlight the difficulty in using sector-specific thresholds to distinguish between professional and non-professional activities without the voluntary cooperation of online P2P platforms, or without rules specifically imposing **transparency requirements** on these platforms.

Transparency of online P2P platforms' rules and practices

Member States do not have specific legislation applicable to online platforms facilitating P2P transactions, apart from the provisions transposing relevant EU legislation (e.g. Articles 5, 6, 14 and 15 of the Electronic Commerce Directive – ECD)¹⁸ into national law. When the platform qualifies as a trader and engages in B2C commercial activities, national laws transposing relevant provisions of other EU Directives such as the Unfair Commercial Practices Directive (UCPD),¹⁹ the Consumer Rights Directive (CRD)²⁰ and the Unfair Contract Terms Directive (UCTD),²¹ would also apply.

It is noteworthy that Italy is currently discussing the adoption of a law specifically aimed at regulating digital sharing economy platforms (Legislative Proposal 3564/2016, the so called 'Sharing Economy Act').²² The Sharing Economy Act seeks to enhance online P2P platforms' transparency and accountability by instituting a national register of digital sharing economy platforms within the Italian Antitrust Authority – that would formally become the official Italian body in charge of monitoring and regulating online P2P platforms. In order to register, platforms should adopt a policy document (including all the conditions of the contract concluded between the platform and its users) that must be approved by the Antitrust Authority.

Furthermore, in France, a draft law for a Digital Republic is currently under discussion.²³ Although the draft law does not specifically seek to regulate the sharing economy, its Article 23 is of particular interest as it would impose certain new obligations

¹⁵ 'The 'Airbnb effect': is it real, and what is it doing to a city like Amsterdam?', The Guardian's website available at <https://www.theguardian.com/cities/2016/oct/06/the-airbnb-effect-amsterdam-fairbnb-property-prices-communities>.

¹⁶ Inside Airbnb website available at <http://insideairbnb.com/amsterdam/index.html?neighbourhood=&filterEntireHomes=false&filterHighlyAvailable=false&filterRecentReviews=false&filterMultiListings=false>.

¹⁷ 'The 'Airbnb effect': is it real, and what is it doing to a city like Amsterdam?', The Guardian, *supra*.

¹⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17 July 2000, pp. 1–16.

¹⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market OJ L 149, 11 June 2005, pp. 22–39.

²⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 165, 18 June 2013, pp. 63–79.

²¹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21 April 1993, pp. 29–34.

²² Legislative Proposal 3564/2016 'Discipline of digital platforms for sharing goods and services and provisions to boost the sharing economy' (*Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione*), 27 January 2016, available at http://www.makingspeechstalk.com/ch/comment_sea/?id_speech=45.

²³ Parliamentary proceedings of the Draft Law for a Digital Republic, available at <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000031589829&type=general&typeLoi=proj&legislature=14>.

and transparency requirements on operators of online platforms whose activity exceeds a certain number of connections defined by decree (Article 23(I)). In particular, Article 23 *quarter* A, c), II would impose on online platforms operating in the accommodation sector the obligation to check: i. whether the (furnished) apartment that the peer supplier wants to rent out through the platform complies with the registration requirements of the French Tourism Code; ii. that the apartment is not rented out for more than 120 days per year (where the property is the main residence of the lessor). It would therefore be up to the platform to check whether the temporal threshold distinguishing between touristic accommodation service activities carried out by businesses and those carried out by private individuals on an occasional basis is exceeded.

The French Draft Law is particularly relevant in the context of legislative and political initiatives aimed at improving consumer protection in P2P markets and maximising their potential by enhancing online platforms' transparency and accountability. One of the main issues concerning the relationship between platforms and their users relates to the lack of transparency in online P2P platforms' rules and practices. According to the national level analysis, most platforms qualifying as 'traders' and engaging in B2C commercial activities do not comply with some due pre-contractual information requirements arising from the professional diligence duty set out by Article 5(2) of the UCPD. The European Commission's Guidance on the Implementation/Application of the UCPD (UCPD Guidance),²⁴ clarifies that in order to comply with such duty, platforms qualifying as 'traders' in the meaning of Article 2(b) of the UCPD should adopt a series of appropriate measures aimed at **clarifying to their users with whom they are concluding contracts on the platform itself**. Consequently, where platforms do not enable their users to clearly indicate that they act in a professional/commercial capacity or do not clarify that consumer protection law exclusively applies when the transaction is concluded with a trader, this could represent a breach of a due pre-contractual information requirement. Furthermore, compliance with this information requirement is interlinked with the necessity to clarify the distinction between B2C and C2C transactions as platforms' users might not be aware of the criteria that help distinguish between traders and consumers.

The Country Reports show that most national online P2P platforms (with a few exceptions) do not specifically comply with this requirement. The Belgian consumer organisation *Test Achats/Test Ankoop* highlighted the need to explicitly require platforms to enable their users to know the nature of the transaction that they are concluding²⁵ and to clarify the platform's roles and responsibilities²⁶ in order to create reliable trust systems and adequately guarantee consumer protection. With regards to user reviews and user identification systems, on the basis of the professional diligence duty included in Article 5(2) of the UCPD and the **transparency requirements** set out by Articles 6(1)(b) and 7(4)(a) of the UCPD, **platforms' liability should also extend to adequately ensuring their users' identity**. According to the UCPD Guidance, platforms should adopt any necessary 'technical means to verify the reliability of the person posting a review, for instance by requesting him/her to register'.²⁷ However, most national online P2P platforms do not set out strict verification mechanisms of their users' identity. They usually exclusively require users' names and email addresses (and occasionally, phone numbers) in order to register, and set out basic verification systems that could either consist of sending verification emails or registering new us-

²⁴ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses', UCPD Guidance, 25.5.2016, COM (2016) 320, p. 123.

²⁵ 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU, *supra*, 7, p. 65.

²⁶ *Ibid.*, p. 66.

²⁷ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 137.

ers through social media or services offered by Google. Only a few platforms impose stricter identification requirements that peer suppliers (and, sometimes, also peer consumers) must meet in order to be able to use the platform. For example, the UK platforms Hassle²⁸ and Trusted House Sitters,²⁹ and the Dutch platforms Jobado and Helping interview peer suppliers³⁰ in order to verify their trustworthiness and reliability. Other platforms, enable users to acquire a 'verified user' that guarantee both users' identity and safer business (e.g. Bohla,³¹ Yoopies).³²

Liability of online P2P platforms

The Legal Analysis shows that transparency issues mainly concern the liability of the platforms. In most Member States, platforms' Terms and Conditions **exclude any liability of the platform in relation to the contracts concluded between the peers**, and explicitly state that the platform is not a party to such contracts. However, depending on the extent to which a platform 'intervenes' in the transactions concluded by its users, the latter may expect that the platform shares responsibility with the peers in case of non-performance or non-compliance of the performance. For example, where the platform actively manages P2P transactions (e.g. facilitating trust among peers by using or suggesting ID verification systems, managing user reviews, mediating disputes) or governs them (e.g. setting out pricing or user insurance as part of the transaction), it is more likely that its users have the impression that the platform will also share a certain degree of liability. However, in most Member States, the applicable legal framework does not set up such obligation and only general civil law rules on contractual and non-contractual liability can apply.

According to the CJEU, the applicability to online platforms of the liability exemption (set out by Article 14 of the ECD) for illegal information stored or transmitted at the request of third parties depends on the way the platform operates. The CJEU highlighted that in order to determine whether the platform should be deemed responsible or not, it is necessary to assess (on a case-by-case basis) whether the platform assumes an 'active' or 'passive' role.³³ Where the platform's role is '[...] neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores',³⁴ it could rely on the liability exemption set out by Article 14 of the ECD. Conversely, if the platform has 'active' control (and knowledge) over the information stored or transmitted, Article 14 cannot apply. In case C-324/09 *L'Oréal*, the CJEU clarified that the assistance provided by the plat-

²⁸ Hassle website available at <https://hassle.com/uk/apply> (non-professional services).

²⁹ Website available at <https://www.trustedhousesitters.com/gb/> (non-professional services).

³⁰ They are both platforms offering non-professional services. Jobado website, available at <https://www.jobado.nl/algemene-voorwaarden>; and Helping website, available at <https://www.helping.nl/algemenevoorwaarden>.

³¹ 'Terms & Conditions', Bohla website available at <http://www.bolha.com/koristno/pravila-in-pogoji-uporabe-bolhacom>.

³² 'General Use Conditions' Yoopies, available at <https://yoopies.fr/cgv/> (Article 2). The French site of Yoopies has been used as it is registered in Paris.

³³ Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, References for a preliminary ruling under Article 234 EC from the *Cour de cassation (France)*, made by decisions of 20 May 2008, received at the Court on 3 June 2008, in the proceedings *Google France SARL, Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA, Luteciel SARL* (C-237/08), and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), available at <http://curia.europa.eu/juris/document/document.jsf?docid=83961&doclang=en>; C-324/09, Reference for a preliminary ruling under Article 234 EC, from the High Court of Justice (England & Wales), Chancery Division, (United Kingdom), made by decision of 16 July 2009, received at the Court on 12 August 2009, in the proceedings *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, available at <http://curia.europa.eu/juris/document/document.jsf?docid=107261&doclang=en>.

³⁴ Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, *supra*.

form to its users, e.g. including the optimisation of published advertisements, may be an indicator of the 'active' role of the platform.³⁵

In this context, it is worth noting that according to the UCPD Guidance,³⁶ platforms cannot invoke the liability exemption set out by Article 14 of the ECD with regards to content that does not consist of illegal information stored at the request of third parties, or where the platform did not comply with the **professional diligence duty** set out by Article 5(2) of the UCPD.

Concluding note

Against this complex background, stakeholders' opinions on the way forward are not uniform.

The legal uncertainty generated by the difficulty in distinguishing between 'traders' and 'consumers' is perceived as one of the main legal issues affecting consumers operating in P2P markets. Possible solutions might be either defining, at EU level, a harmonised set of indicators of what constitutes a trader, or promoting legal initiatives at national and local level aimed at setting out sector-specific or tax thresholds. As highlighted above, the lack of consensus on the way forward leads to the conclusion that clarifying the distinction between B2C and C2C transactions requires deeper reflection and analysis at EU and national level. It would be beneficial to broaden the political debate on the point, as well as to monitor both relevant case-law and legal and policy initiatives adopted by the Member States, and assess their effective functioning.

With regards to the legal framework applicable to C2C transactions, the Legal Analysis concludes that, where both parties to the transaction are clearly consumers and their relationship is 'balanced', no extra regulation is required (i.e. applicable general civil provisions and sector-specific laws – where relevant, already guarantee a sufficient level of consumer protection). National legislators should instead evaluate the opportunity to review and update existing C2C rules (to reflect the challenges brought by the digital environment), if the content of the C2C contract (concluded online) has been pre-determined by one of the parties, or there are uncertainties relating to the actual identity of one of the parties.

In order to increase the enforcement of C2C legislation, the expansion of the remit of national consumer protection authorities to C2C transactions (including those concluded via platforms) could be considered. As highlighted above, the general public's mistrust of traditional dispute resolution systems, in case of low-value C2C contracts concluded online, might be mainly generated by the high costs and excessive length of national civil procedures. Promoting the use of the EU Small Claims Procedure for C2C disputes with a cross-border element and up to EUR 2,000 and amending, where necessary, national legislation regulating small claims procedures to ensure that their scope of application includes C2C disputes, therefore, could give peers additional mechanisms to enforce C2C legislation and obtain redress in case of disputes.

Platforms could further help enhance the enforcement of the legal framework applicable to C2C transactions by including in their Terms and Conditions information on applicable legislation and redress mechanisms, as well as by developing their own redress systems. Furthermore, enforcement could be also improved by promoting a stronger collaboration between online P2P platforms and competent authorities. As highlighted above, the enforcement of temporal thresholds that are sometimes set out at national or local level to help distinguish between professional and non-professional activities, would require a platform's proactive attitude in revealing the identity of the

³⁵ C-324/09 *L'Oreal*, *supra*.

³⁶ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, , p. 26.

users exceeding these thresholds to the competent authorities. Platforms' collaboration, however, is often limited by privacy rules³⁷ or by provisions that exclude the possibility to impose on platforms having their legal seat abroad the obligation to share data on their income or the income of their users with the competent taxation services.³⁸

Improving or clarifying the information that online P2P platforms provide to their users could address certain issues arising from the lack of transparency of platforms' rules and practices. On the one hand, platforms could make their Terms and Conditions more user-friendly, assuring that users are adequately informed about their rights and obligations, applicable legislation and available redress mechanisms. On the other hand, platforms could adopt the necessary technical tools to enable their users to indicate whether they are acting as traders and informing users that consumer protection laws will apply only when the contract concluded through the platform is a B2C transaction. Furthermore, in order to prevent users from creating fake profiles or providing false information, it would be beneficial if platforms were to adopt adequate trust tools to verify users' identity.

Platforms' roles and responsibilities could be either clarified by further interpreting already existing obligations arising from relevant EU legislation, or by taking legal initiatives at EU level. The majority of interested online P2P platforms claim that any new legal or policy initiative would represent an unnecessary regulatory obstacle to the development of new business models and should be justified by evidence of consumer detriment.³⁹ On the other hand, other stakeholders call for legal or policy initiatives (possibly at EU level) aimed at explicitly introducing transparency requirements for online P2P platforms,⁴⁰ including rules clarifying platforms' responsibilities, that should take into account their degree of intervention, management or government of the transactions concluded by their users.⁴¹ Some stakeholders consider that focusing on the actual enforcement of the already existing legislation and addressing possible loopholes through Codes of Conduct and measures adopted by individual platforms would be the preferred way forward⁴² The Legal Analysis, however, shows that the efforts made so far in some Member States to enhance the transparency of platforms' rules and practices by Codes of Conduct have been ineffective. The lack of platforms' collaboration could result in such initiatives being ignored: for example, the 'Manifesto for a sustainable sharing economy and respectful of consumer rights'⁴³ published in

³⁷ 'Amsterdam', Airbnb website available at <https://www.airbnb.nl/help/article/860/amsterdam>.

³⁸ Milikowski, F., 'The power of Airbnb. An air mattress with breakfast' (*De macht van Airbnb. Een luchtbedje met ontbijt*), *De Groene Amsterdammer* 14 April 2016, p. 32 et seq.

³⁹ Argument made by some stakeholders attending the European Consumer Summit of 17 October 2016 in Brussels.

⁴⁰ "Online Platforms and Digital Single Market", 10th Report of Session 2015-2016, HL Paper 129 <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/129/129.pdf>. Information collected through consultation with national stakeholders (the Latvian Ministry of Economics, 16 April 2016; Catalanian Competition Authority, 26 May 2016; *Ouishare*, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016). See also Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, 22 April 2016, *supra*. This argument was also supported by stakeholders attending the European Consumer Summit of 17 October 2016 in Brussels.

⁴¹ Information collected through consultation with national stakeholder (e.g. Association for the Defence of Consumers, 27 April 2016; Representative of the Spanish Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016). This argument reflects the position of the CJEU which gives a restrictive interpretation of Article 14 of the ECD, clarifying that platforms cannot invoke the liability exemption when assuming an 'active' role in relation to the transactions concluded by the peers.

⁴² Information collected through consultation with national stakeholders (Spain: Blog Ecolaborativa, 24 May 2016; Spanish Association of Digital Economy, 24 May 2016; National Commission on Markets and Competition, 26 May 2016; Consumers' and Users' Organisation, 2 June 2016; Ireland: Lecturer of Law at NUI Galway, 14 June 2016; Finland: Consumer Ombudsman, 20 May 2016, and the Consumer Union, 18 May 2016). This argument was also supported by stakeholders attending the European Consumer Summit of 17 October 2016 in Brussels.

⁴³ 'Manifesto per una sharing economy sostenibile e rispettosa dei diritti dei consumatori', *Altroconsumo* website available at <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2015/manifesto-per-una-sharing-economy-sostenibile-e-rispettosa-dei-diritti-dei-consumatori>.

July 2015 by the Italian consumer association *Altroconsumo* has not been signed up to by any platform. Other Codes (such as the Code of Conduct designed by Sharing Economy UK - SEUK),⁴⁴ although signed up to by several platforms and calling on its members to act 'honestly' and take 'steps to develop and sustain strong relationships of trust with customers, users and between their users',⁴⁵ do not specify which transparency requirements platforms should adopt or which responsibilities they should assume.

⁴⁴ 'Code of Conduct' Sharing Economy UK website available at <http://www.sharingeconomyuk.com/code-of-conduct>.

⁴⁵ Articles 2.1 and 2.2, 'Code of Conduct' Sharing Economy UK, *supra*.

1 Introductory note

This Section explains the scope and objectives of the Legal Analysis carried out as well as the methodology applied in order to achieve them.

1.1 Objectives and scope

This Report is the main output of Task 5 of the 'Exploratory study of consumer issues in the sharing economy' (the Study). The methodology for Task 5 is described in Section 1.2 below.

The aims of the Legal Analysis Report are:

- To analyse the extent to which relevant EU consumer law Directives are relevant to C2C transactions and online platforms facilitating P2P transactions.
- To analyse the key national-level indicators used in the Member States to distinguish between B2C and C2C transactions and related application problems experienced by national authorities.
- To map the national legislation of all EU Member States applicable to C2C transactions and analyse relevant rights and obligations of private individuals covered by this legislation compared to consumer rights guaranteed under the national legislation applicable to B2C transactions.
- To identify and analyse national rules applicable to online platforms facilitating P2P transactions concerning the role and responsibilities of platforms towards peers and related potential issues for peer consumers and suppliers.
- To identify any issue or problem that national authorities encounter in applying the relevant national rules and their application to cross-border transactions facilitated by platforms, as well as any relevant EU and national case-law (at least of the core EU Member States)⁴⁶ that may have caused adaptations or changes in the relevant national legal framework or that highlights how these rules are applied in practice.
- To give an overview of legal and policy initiatives being pursued at national, regional and local levels.

The overall objective of the Legal Analysis consists in assessing the relevance of the EU consumer *acquis* and the Member States' legislation in addressing gaps and problems in consumer protection as regards C2C transactions or online platforms facilitating P2P transactions, with particular attention to cross-border transactions.

The box below describes the scope of the Study.

Scope of the Study

Transactions covered

- This Study exclusively focuses on P2P transactions facilitated through online platforms that charge users a type of fee⁴⁷ and whose parties do not know each other personally.
- P2P transactions that occur through direct personal contact, sharing arrangements between closed groups of friends and family, or where the shar-

⁴⁶ It is noted that ten 'sharing economy core countries' have been selected for the purposes of this Study: Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Poland, Slovenia, Spain and the United Kingdom - as mentioned in the Tender Specifications. The sharing economy phenomenon is seen as already having gained considerable popularity and scale in these Member States.

⁴⁷ The Study covers all sharing platforms regardless of whether their users pay a price or a fee (for facilitation, insurance), or whether they are in any other way compensating the platform for accessing and using it. Not-for-profit platforms that charge fees and/or where payments occur are included in the scope.

Scope of the Study

ing offer is not addressed to the general public, are excluded from the scope.

Activities and services covered

Online platforms facilitating the following activities or services are included in the scope of this Study:

- The sharing/renting of goods and the (re)sale of new and used/second hand goods by persons in a private capacity.
- The sharing of private transport services.
- The sharing of private accommodation services.
- Non-professional services.

Platforms or websites facilitating the following transactions or activities are excluded from the scope of this Study:

- Transactions in goods wherein a third party assumes responsibility for the transaction as a commercial entity (B2C transactions);
- Transactions in customized or tailor-made goods;
- Transactions in cultural products (books, films, DVDs and CDs, theatre tickets);
- Food sharing activities and real estate transactions;
- Sharing of professional services such as legal advice, accounting and medical services between peers which raise specific qualifications and employment issues;
- Crowd funding/money lending which raise specific financial services issues;
- Regular B2C rental markets (car rental, bike rental) as well as commercial vehicle loan systems (e.g. zipcar).
- Platforms that offer predominantly commercial services to facilitate B2C transactions (such as booking.com, etc), communication platforms (Skype, Whatsapp), operating systems and app stores, audiovisual and music platforms (Youtube), and payment systems (Paypal).

Terminology

For the purpose of this Report,

- 'Online platform' means an information society service accessible through the Internet or by similar digital means which facilitates the conclusion of P2P contracts. Platforms excluded from the scope of this Study are listed above.
- 'Peer supplier/provider' means any natural or legal person acting in a private capacity who uses an online platform to sell, rent out or to share goods or services to other private individuals who are users of the same platform.
- 'Peer consumer' means any natural person acting in a private capacity who uses an online platform to buy, rent or share goods or services offered by other platform users.
- 'Peers' means both peer suppliers/providers and peers consumers. The term 'peers' generally covers all the users of an online platforms acting in a private capacity.
- 'Sharing economy' or 'online P2P' markets include online, for-profit facilitators of interactions between peers, acting in their personal capacity for a fee or other compensation, and who do not know each other personally.⁴⁸

Temporal scope

⁴⁸ This definition, is different from the European Commission's definition of the sharing economy (collaborative economy) as 'business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals' - European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy', 2.6.2016, COM (2016) 356 final. It is however appropriate for the Study's ultimate objective, which is to identify potential consumer issues and to develop operational policy options to address them.

Scope of the Study

The cut-off date for the Legal Analysis, in particular as regards information provided through the Country Reports, is 31 May 2016.⁴⁹

1.2 Methodological approach

The methodological approach adopted to achieve the set objectives consisted in three main methodological steps, the results of which are synthesised in this Report:

- **EU-level research** aimed at giving a brief overview of the relevant EU *acquis* that could apply to C2C transactions and to online platforms facilitating P2P transactions, as well as relevant EU case-law.
- **National-level research** across the 28 EU Member States aimed at identifying and analysing: i. national indicators distinguishing between B2C and C2C transactions; ii. the national legislation applicable to C2C transactions; iii. national rules applicable to online platforms facilitating P2P transactions; iv. any specific national, regional or local measures adopted by Member States in response to sharing economy activities; v. the relevant national case-law; vi. Terms and Conditions or any other non-legislative measure adopted by individual platforms falling within the scope of this Study; vii. the relevant institutional framework in each Member State; viii. application and enforcement issues encountered by national authorities in applying the relevant national legislation; ix. gaps and deficiencies in the national regulatory framework that result in problems with enforcing consumer protection rules and consumer rights in P2P business models, in particular as regards cross-border transactions that are not addressed or are insufficiently addressed by EU or national legislation.
- **Cross-analysis** of these findings aimed at identifying consumer issues in online P2P markets, especially those with a cross-border element.

The approach adopted for the completion of each of these steps is briefly described below.

Approach to the EU-level research

The EU-level desk research was conducted by the Legal Analysis Team, led by the Legal Analysis Expert.

In addition to reviewing relevant legislation, the main sources of information used included:

- EU policy documents, such as the European Commission Communication of 2 June 2016;⁵⁰
- Academic and legal literature;
- Other non-scientific sources, such as publications by EU consumer organisations;⁵¹

⁴⁹ The 28 Country Reports were completed and submitted to the European Commission in batches between March and July 2016 and revised by September 2016. It is noted that national experts may have therefore gone beyond the May 2016 cut-off date to include important developments that took place between June and September 2016.

⁵⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy', 2.6.2016, COM (2016) 356 final, available at <http://www.eesc.europa.eu/resources/docs/com2016-356-final.pdf>.

⁵¹ E.g. publications of the *Bureau Européen des Unions des Consommateurs* (BEUC); European Association for the Coordination of Consumer Representation in Standardisation (ANEC); *Confédération des Organisations familiales de la Communauté Européenne* (COFACE); Communauté Européenne des Coopératives (Euro Coop) - European Community of Consumer Cooperatives; European Consumer Centres (ECC).

- Relevant EU case-law.⁵²

Approach to the national-level research

In order to analyse the Member States' relevant legislation, **Country Reports** were completed for each of the EU-28 Member States on the basis of a standardised reporting template prepared by the Legal Analysis Team in consultation with the European Commission. The Country Reports are based on desk research and supplemented by the consultation of national stakeholders. Each Country Report provides:

- An analysis of the national legislation distinguishing between B2C and C2C transactions (including the identification of possible national-level indicators of what constitutes a trader under certain circumstances);
- The identification and analysis of the national/regional/local legislation applicable to C2C transactions and online platforms facilitating P2P transactions, as well as of related consumer rights issues and of specific issues in platform-peer transactions as identified in the national context;
- An overview of the main individual measures adopted by national, regional or local platforms, with a special focus on the liability of platforms and their user identity verification systems;
- An overview of the relevant national case-law resulting in changes or key interpretations to national/local rules relevant to P2P transactions or online platforms facilitating such transactions;
- An identification of the main issues and problems that national authorities encounter in applying the national rules relevant to the rights and obligations of parties to C2C transactions, and distinguishing between B2C and C2C transactions;
- An identification of the main issues or problems national authorities encounter in enforcing national rules applying to P2P cross-border transactions.

The Country Reports were piloted in two Member States (Germany and Malta) in order to test the template and provide the national experts with a concrete example to follow to efficiently structure their national research. In order to validate the findings of the national research and gather more practical data and information, each national expert interviewed three to four national stakeholders on average. National stakeholders were selected by each national expert, communicated to the Milieu Management Team and formally approved by the European Commission on the basis of the specific situation of the Member States and of questions unanswered through the desk research conducted.

Approach to the cross-analysis

As specified above, this Report is based on findings of the EU-level desk research conducted by the Legal Analysis Team and the EU-28 Country Reports completed by the national experts under the guidance of the Legal Analysis Team. The findings of these activities were analysed together and synthesised in this Report that provides:

- A summary of the key information collected through the EU-level research;
- A summary and comparative analysis of the main findings of the Country Reports;
- The identification of the main issues regarding consumer protection within online P2P markets (including P2P transactions with cross-border elements).

⁵² E.g. Joint Cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas Vs. OMAI Srl*.

2 Eu legal framework

This Section provides a brief overview of the EU legal instruments relevant in the context of this Report and analyses related EU case-law. The application of the EU consumer *acquis* when the platform qualifies as a trader and engages in commercial activities is also taken into account.

2.1 Overview of relevant EU legislation

As highlighted under Section 3.3 of this Report, a number of EU legal instruments could be relevant to the relationship between online platforms facilitating P2P transactions and their users, as well as, on occasion, to the relationship between the peer users themselves. The relevant EU consumer *acquis* includes:

- Directive 93/13/EEC on unfair terms in consumer contracts (UCTD);⁵³
- Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (PID);⁵⁴
- Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (CSD);⁵⁵
- Directive 2001/95/EC on general product safety (GPSD);⁵⁶
- Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (UCPD);⁵⁷
- Directive 2006/114/EC concerning misleading and comparative advertising (MCAD);⁵⁸
- Directive 2011/83/EU on consumer rights (CRD);⁵⁹
- Directive 2013/11/EU on alternative dispute resolution for consumer disputes (ADR);⁶⁰
- Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes (RODR).⁶¹

The applicability of most of these relevant EU legal instruments is typically limited to B2C transactions. However, where P2P transactions are facilitated by an online platform that qualifies as a 'trader' (in the meaning of the PID, UCPD, MCAD, CRD, ADR and the RODR), as a 'seller' (in the meaning of the UCTD and CSD) or as a 'supplier' (in the meaning of the UCTD), and the platform engages in B2C transactions towards

⁵³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *supra*.

⁵⁴ Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18 March 1998, pp. 27–31.

⁵⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees OJ L 171, 7 July 1999, pp. 12–16.

⁵⁶ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15 January 2002, pp. 4–17.

⁵⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, *supra*.

⁵⁸ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising OJ L 376, 27 December 2006, pp. 21–27.

⁵⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, *supra*.

⁶⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, OJ L 165, 18 June 2013, pp. 63–79.

⁶¹ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004, OJ L 165, 18 June 2013, pp. 1–12.

its users (who qualify as 'consumers'), such provisions would be relevant and the EU legal instruments listed above would also apply to the relationship between the platform and its users. For example, an online platform qualifying as a trader and engaging in B2C commercial practices in the meaning of Article 2(d) of the UCPD, should comply with the **transparency requirements** set out by Articles 6 and 7, as well as with the **'professional diligence' principle** set out by Article 2(h) of the UCPD. These requirements are further analysed in Section 3.3.2.

Cross-border transactions and online transactions are not always addressed separately by these EU Directives, presumably because they were drafted before the explosive growth of e-commerce business. Nevertheless, it is understood that:

- (i) They would also apply to cross-border transactions;
- (ii) They are technology neutral and would therefore also apply to online transactions.

The consumer rights set out in the above listed Directives are interlinked with broader legislation such as Directive 2006/123/EC on services in the internal market (SD)⁶² that applies to services generally and contains additional requirements that would be relevant in consumer contracts. The application of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (ECD)⁶³ is also complementary to the relevant EU consumer *aquis*.⁶⁴ It applies to information society services that could include those provided by online platforms.⁶⁵ The ECD provisions that are of most pertinent to the transactions falling within the scope of this Study are described in Section 3.3.2.

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (DPD)⁶⁶ and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (EPD) could also be relevant.⁶⁷ Indeed, while the DPD deals with the fair and lawful processing of personal data by the platform, Article 5(3) of the EPD, for example, requires the user's consent when the platform uses 'cookies'. Furthermore, the **European Commission's Guidance on the Implementation/Application of the UCPD (UCPD Guidance)**⁶⁸ highlights the interplay between these two Directives and the UCPD stating that, although data protection violations do not necessarily represent a breach of the UCPD, they must be taken into account when assessing the unfairness of a commercial practice (especially against Articles 6 and 7 of the UCPD).

⁶² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27 December 2006, pp. 36–68.

⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17 July 2000, pp. 1–16.

⁶⁴ Article 1(3) of the ECD states that the Directive '[...] complements Community law applicable to information society services'.

⁶⁵ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses', UCPD Guidance, 25.5.2016, COM (2016) 320, p. 22 and pp.120-121.

⁶⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Data Protection Directive, OJ L 281, 23 November 1995, pp. 0031 – 0050. It is noted that in 2018, Directive 95/46/EC will be replaced by the General Data Protection Regulation adopted in 2016.

⁶⁷ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, e-Privacy Directive, OJ L 201, 31 July 2002, pp. 37–47.

⁶⁸ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 26.

2.2 Overview of relevant EU case-law

The role of the CJEU in assuring that the relevant EU legislation is uniformly interpreted and applied in all EU Member States has clarified the applicability of the liability exemption set out by Article 14(1) of the ECD, as well as more specific issues related to the nature of the transaction. For example, *The Queen, on the application of the Eventech Ltd v The Parking Adjudicator*,⁶⁹ offers interesting elements related to determining the debated nature of transport services offered by online platforms such as Uber.

The rules set out by the London transport authority (Transport for London - TfL), distinguish between 'Hackney carriages' and 'private hire vehicle'. While a Hackney carriage equates to a **black cab taxi**, a private hire vehicle is a **minicab taxi**. The TfL allowed black cabs to use bus lanes and to drive along them in search of new customers, but prohibited licensed minicabs from using the same lanes as well as from picking up from those lanes a customer who had not made a prearranged booking with the firm. In relation to this case, the CJEU considered that both the **Uber-taxi, and the starting point and destination of the ride, must be pre-determined through the platform**. Similarly, minicab taxis need to be pre-booked. On the contrary, black cab journeys are rarely pre-booked.⁷⁰ The TfL's prohibition on minicab taxis to use the bus lanes or ply for trade, however, is counter-balanced by the black cab taxis' obligations to be recognisable, capable of carrying persons in wheelchairs, as well as to set the fares by meters and to have a thorough knowledge of the City of London. This rule clearly aims to protect the safety of passengers. In London, black cab taxis do not pay for their exclusive right, but incur costs to comply with the conditions in place to be classified as 'Hackney carriages'.

Another recent judgment of the CJEU that, although not directly related to the application of the EU legislation relevant to P2P online markets, is worth noting in this context is the *Wathelet* case (C-149/15).⁷¹ In fact, according to the CJEU's interpretation of Article 2(3)(c) of the Consumer Sales Directive,⁷² the notion of 'seller' in the meaning of the Directive could cover individuals who act as intermediaries (paragraph 43), but give consumers the false impression that they are professional sellers (paragraph 34). The CJEU's interpretation could arguably be extended to online P2P platforms that actively manage or govern the transactions concluded between peers, in order to determine the platform's degree of liability (see Sections 4.2.1 and 7.4).

Other relevant decisions of the CJEU concern the **interpretation of Article 14(1) of the ECD**. As specified under Section 4.2.1, according to the CJEU's case-law reported in Table 1 below, the **applicability to online platforms of the regime on exemptions from liability** for illegal information stored or transmitted at the request of third parties depends on the 'active' or 'passive' role of the online platform and needs to be assessed on a case-by-case basis.

Table 1. Selected EU case-law concerning the interpretation of Article 14(1) of the ECD

Case reference	Key facts	CJEU's decision	Relevance
Joined	This case concerned	The CJEU found that	According to the inter-

⁶⁹ C-518/13 Request for a preliminary ruling *The Queen, on the application of Eventech Ltd, V The Parking Adjudicator*, accessible at <http://curia.europa.eu/juris/document/document.jsf?docid=161376&doclang=EN>.

⁷⁰ According to a 2009 survey, while only 8 % of black cab journeys were pre-booked, 52 % of black cab journeys resulted from passengers hailing them from the street, and 34 % were picked up from cab ranks. See judgment of the High Court of Justice in *Eventech Ltd v the Parking Adjudicator*, EWHC [2012] 1903 (Admin), paragraphs 9 and 50(i).

⁷¹ CJEU, *Wathelet* case (C-149/15), available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-149/15>.

⁷² Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044>.

Table 1. Selected EU case-law concerning the interpretation of Article 14(1) of the ECD

Case reference	Key facts	CJEU's decision	Relevance
Cases C-236/08 to C-238/08, <i>Louis Vuitton</i> ⁷³	the sale by Google of keywords containing trademarks ('AdWords'). Advertisers pay Google for this service on the basis of the frequency with which users click on their advertisement. <i>Louis Vuitton</i> and other trade mark owners sued Google for trade mark infringement. One of the questions referred by the French Court of Cassation to the CJEU was if AdWords has to be considered either as an 'internet hosting service provider' or as an 'internet content provider'. In the first case, indeed, it would have access to the liability exemption set out by Article 14 of the ECD while, in the second case, it could be held liable for the information stored or transmitted.	AdWords is an information society service. However, Google could rely on the liability exemption set out by Article 14 of the ECD only where it proves that its role '[...] is neutral , in the sense that its conduct is merely technical, automatic and passive , pointing to a lack of knowledge or control of the data which it stores '.	pretation of the CJEU, the key element to determine the extent to which the exemption of liability ex Article 14 of the ECD applies to an online platform consists in the fact that the platform has ' active control (and knowledge) over the information stored or transmitted '.
C-324/09 <i>L'Oreal</i> ⁷⁴	<i>L'Oréal</i> sued <i>eBay</i> for being allegedly involved in trade mark infringements committed by users of its website. A number of questions were referred to the CJEU for a preliminary ruling, including the interpretation of Article 14 of	The CJEU clarified that Article 14(1) of the ECD '[...] must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored '.	The CJEU decided this case giving a restrictive interpretation of Article 14 of the ECD. Indeed, as in the joined cases described above, the CJEU clarified that the online platform (hosting service provider) plays an 'active' role which reveals its knowledge

⁷³ Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, References for a preliminary ruling under Article 234 EC from the *Cour de cassation (France)*, made by decisions of 20 May 2008, received at the Court on 3 June 2008, in the proceedings *Google France SARL, Google Inc. v Louis Vuitton Malletier SA (C-236/08)*, *Google France SARL v Viaticum SA, Luteciel SARL (C-237/08)*, and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08)*, available at <http://curia.europa.eu/juris/document/document.jsf?docid=83961&doclang=en>.

⁷⁴ C-324/09, Reference for a preliminary ruling under Article 234 EC, from the High Court of Justice (England & Wales), Chancery Division, (United Kingdom), made by decision of 16 July 2009, received at the Court on 12 August 2009, in the proceedings *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, available at <http://curia.europa.eu/juris/document/document.jsf?docid=107261&doclang=en>.

Table 1. Selected EU case-law concerning the interpretation of Article 14(1) of the ECD

Case reference	Key facts	CJEU's decision	Relevance
	the ECD.	According to the CJEU, the fact that the platform provides assistance to its users, for example optimising the advertisement of their offers, is an indicator of the 'active' role of the platform.	and/or control over the information stored or transmitted, it cannot rely on the liability exemption set out by Article 14.

Finally, additional relevant cases are: *Asociación Profesional Élite Taxi v Uber Systems Spain S.L.*⁷⁵ and *Uber Belgium BVBA v Taxi Radio Bruxellois NV.*⁷⁶ These cases are currently pending before the CJEU. These cases show how **determining the nature of parties to transactions** (i.e. traders or consumers) **is essential to identifying the applicable legislation** (for an in-depth analysis of the nature of transactions and related issues see Section 3.1).

Table 2. CJEU's pending cases on Uber

Case reference	Key facts	CJEU's decision	Relevance
C-434/15 <i>Asociación Profesional Élite Taxi v Uber Systems Spain S.L.</i>	In this case, the CJEU has been asked by the Commercial Court No 3 of Barcelona to preliminarily rule on the extent to which UberPop can operate in Spain without an authorisation from the competent Spanish authorities. The Commercial Court N. 3 of Barcelona asked the CJEU to clarify whether UberPop is a transport service provider (falling under Title VI TFEU) or an information society service within the meaning of the ECD.	The case is currently pending.	If UberPop is classified as an information society service, any licensing or authorisation requirements (set out at national level) that do not protect a public interest objective in a proportionate and non-discriminatory manner would be incompatible with EU law (see in Section 6.1 the assessment of market access requirements according to the European Commission's Communication of 2 June 2016). ⁷⁷
C-526/15	On 5 October 2015	The case is currently	As with C-434/15, this

⁷⁵ C-434/15 Request for a preliminary ruling from the Juzgado Mercantil No 3 de Barcelona (Spain) lodged on 7 August 2015, *Asociación Profesional Élite Taxi v Uber Systems Spain, S.L.*, OJ C 363, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CN0434>.

⁷⁶ C-526/15 Request for a preliminary ruling from the Rechtbank van Koophandel Brussel (Belgium) lodged on 5 October 2015 — *Uber Belgium BVBA v Taxi Radio Bruxellois NV*, Other parties: Uber NV and Others, OJ C 429/9, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CN0526&from=EN>.

⁷⁷ European Commission, Communication 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356final, *supra*.

Table 2. CJEU' s pending cases on Uber

Case reference	Key facts	CJEU's decision	Relevance
<i>Uber Belgium BVBA v Taxi Radio Bruxellois NV</i>	<p>the <i>Rechtbank van koophandel Brussel</i> (Belgium) asked the CJEU for a preliminary ruling on the compatibility of the Ordinance of the Brussels Capital Region of 27 April 1995 on taxi services and vehicle renting services with driver⁷⁸ with the rules of the internal market. The judgment of the first-instance Brussels Commercial Court found that Uber Belgium had committed an unfair commercial practice by transmitting requests for taxi rides to drivers who were not in possession of the licence referred to in Article 3 of the Ordinance. On the basis of this decision, on 14 October 2015, Uber suspended its UberPop service in Brussels. Uber currently only provides services through licensed drivers (i.e., the UberX service). The President of the Brussels Commercial Court asked the CJEU to clarify whether the notion of 'taxi services' set out by the Ordinance would also apply to occasional private drivers who are unpaid and engage in ride-sharing through</p>	pending.	judgment will have significant implications on the debated nature of the platform Uber and, consequently, on the way EU Member States regulate Uber services.

⁷⁸ *Ordonnantie van het Brussels Hoofdstedelijk Gewest van 27 april 1995 betreffende de taxidiensten en de diensten voor het verhuren van voertuigen met chauffeur/Ordonnance de la Région de Bruxelles-Capitale du 27 avril 1995 relative aux services de taxi et aux services de location de voiture avec chauffeur* – the Ordinance.

Table 2. CJEU' s pending cases on Uber			
Case reference	Key facts	CJEU's decision	Relevance
	a software application of Uber Netherlands, which is established in another EU Member State.		

3 National legal framework

This Section identifies and analyses the distinction between B2C and C2C transactions as well as the national legal frameworks applicable to C2C transactions and online platforms facilitating P2P transactions.

3.1 The nature of the transaction: B2C or C2C

Distinguishing between individuals acting in a commercial/professional capacity and individuals acting in a private capacity is an essential component in determining whether or not consumer law applies to a specific transaction. The classification of one of the parties to a transaction as a 'trader' or a 'consumer' determines the applicability of the consumer rights set forth in consumer protection legislation whose guarantees are specifically tailored to consumers who are presumed to be in a 'weaker' position than the business counterparty (see Section 3.2). In order to assess which consumer rights can apply to P2P transactions facilitated by online platforms and falling within the scope of this Study it must therefore be determined whether the goods or services are offered by professional providers or by private individuals.

The relevant EU consumer *acquis* defines the notion of **trader**. Taking the EU definitions into account, a 'trader' is any natural or legal person acting for purposes relating to his trade, business of profession, as illustrated in Table 3 below.

Table 3. Elements of the notion of 'trader'

EU Directive	'Trader' or similar terms	Natural person	Legal person	Acting for purposes related to:					Acting in the name or on behalf of trader	Publicly or privately owned
				Trade	Commercial or professional activity	Business	Craft	Profession		
UCTD	<i>Seller</i>	✓	✓	✓		✓		✓		✓
	<i>Supplier</i>	✓	✓	✓		✓		✓		✓
PID	<i>Trader</i>	✓	✓		✓			✓		
CSD	<i>Seller</i>	✓	✓	✓		✓		✓		
GPSD	<i>Distributor</i>							✓		
UCPD	<i>Trader</i>	✓	✓	✓		✓	✓	✓	✓	
MCAD	<i>Trader</i>	✓	✓	✓		✓	✓	✓	✓	
CRD	<i>Trader</i>	✓	✓	✓		✓	✓	✓	✓	✓

Although EU-level definitions of trader exhibit a common core, the Directives listed in Table 3 above use different terminology:⁷⁹ whereas the PID, the UCPD, the MCAD and the CRD refer to the term 'trader', the UCTD and the CSD use respectively the terms 'seller'/'supplier' and 'seller'. Finally, the GPSD uses the term 'distributor'. As Table 3 shows, only the PID mentions that the trader can act for purposes related to his 'commercial or professional activity'. Only the UCPD, MCAD and CRD include acting for purposes related to his 'craft' in the definition of 'trader'. These three Directives also specify that the person who acts in the name or on behalf of a trader is a trader too. It is also noted that all the Directives mentioned in Table 3, with the exception of the GPSD, expressly provide that traders can be both natural and legal persons.

The notion of **consumer**, as illustrated in Table 4 below, is almost invariably defined by relevant EU Directives in negative terms, departing from the definition of trader, namely as the natural person who acts for purposes outside his or her trade, business or profession.

⁷⁹ University of Bielefeld, 'EC Consumer Law Compendium, Comparative Analysis', 'The notion of business', Edited by Prof. Dr. Hans Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebersp, February 2008, p. 741.

Table 4. Elements of the notion of 'consumer'

EU Directive	Natural person	Acting for purposes which are outside their:				
		Trade	Commerce	Business	Craft	Profession
UCTD	✓	✓		✓		✓
PID	✓		✓			✓
CSD	✓	✓		✓		✓
UCPD	✓	✓*		✓	✓	✓
CRD	✓	✓		✓	✓	✓

*Including partially (see Article 18 of the UCPD).

In the EU Directives listed in Table 4 above only natural persons are regarded as consumers. According to the CJEU's interpretation of Article 2 of the UCTD, '[...] a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision'.⁸⁰

3.1.1 National definitions: individuals acting in a private capacity or in a professional/commercial capacity

As highlighted above, whether or not a party to a transaction is a trader or a consumer determines the applicable law.⁸¹ Member States provide statutory definitions of 'consumer' (or 'non-professional') and 'trader' (or 'professional', 'business', 'entrepreneur') in different areas of law. The definitions found in national consumer law reflect those provided by the EU consumer *acquis*. In addition, national Commercial Codes also typically set out the notions of 'trader' and 'acts of trade'. Although the terminology used by different national legal instruments is not always completely uniform, definitions of 'trader' and 'consumer' are substantively equivalent. In rare cases, differences in terminology could however affect legal certainty.⁸² This issue, for example, has been detected in Germany as explained in the box below.

Trader v entrepreneur in Germany

Sections 13 and 14 of the German Civil Code (BGB)⁸³ distinguish the 'consumer' from the 'entrepreneur' defining the latter as any person carrying out a 'planned activity on the market of a certain duration' (Section 14, BGB).

An 'entrepreneur' in the meaning of Section 14 of the BGB may also fall within the scope of the German Commercial Code (HGB) and be defined as a 'trader' where he/she has established a 'trading enterprise' pursuant to Section 1 I of the HGB.

The requirements set out by Section 14 of the BGB for the 'entrepreneur' are less strict than those used by Section 1 I of the HGB to define the 'trader'. Indeed, while the BGB merely requires an organisational minimum level (which may be also met by a part-time activity), according to the HGB a 'trader' needs both to act professionally and to set up a 'trading enterprise' (any professionally-run enterprise).⁸⁴ According to some literature, the use of the two different notions of 'trader' and 'entrepreneur' may lead to an unclear distinction between B2C and C2C transactions, as well as to difficulties in detecting situations (in online P2P markets) where

⁸⁰ ECJ, Joined Cases C-541/99 and C-542/99 - Idealservice2120.

⁸¹ It is noted that, however, sometimes Member States apply consumer protection rules outside B2C transactions as defined by the relevant EU legislation. E.g. in Denmark NGOs and churches are treated as consumers when dealing with professionals.

⁸² University of Bielefeld, 'EC Consumer Law Compendium, Comparative Analysis', 'The notion of business', *supra*, p. 736, 737, 740.

⁸³ German Civil Code, 2002 (*Bürgerliches Gesetzbuch*), Federal Law Gazette I/2016, p. 396.

⁸⁴ Bundesgerichtshof judgment VII ZR 44/73 (10 June 1973), BGHZ 63, [32 \(33\)](#) = NJW 1974, [1462](#); BGHZ 33, [324](#).

Trader v entrepreneur in Germany

peer suppliers who appear to be consumers acting in an individual capacity are actually traders.⁸⁵

Further uncertainty is generated by the terminology used: Section 2 II Nr. 6 of the German Unfair Competition Act (UWG)⁸⁶ uses the term 'entrepreneur' when transposing the notion of 'trader' set out by Article 2(b) of the UCPD. The terms 'entrepreneur' and 'trader', therefore, are hardly discernible in German law: German legal literature generally refers to the notion of 'entrepreneur' also where EU consumer law Directives use the term 'trader'.⁸⁷

3.1.2 Indicators of what constitutes a trader/seller and relevant circumstances

EU legal framework

EU legislation does not expressly clarify the distinction between B2C and C2C transactions within the sharing economy scenario.⁸⁸ According to Article 2(b) of the UCPD, 'trader' means 'any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name or on behalf of the trader'. Although there may be situations where individuals who appear to be consumers could in fact be traders ('**hidden trader**'), neither the UCPD nor other relevant EU Directives expressly set up the conditions that need to be met in order to qualify an individual as someone acting within or outside his/her trade, business, craft or profession. The **UCPD Guidance**,⁸⁹ however, addresses the issue of the 'hidden trader' by identifying some relevant criteria (reported in the box below) that help assess, on a case-by-case basis, whether an individual qualifies as a trader or a consumer.

Criteria for determining whether an individual qualifies as a trader - UCPD Guidance

- The profit-seeking motive (including the situation where the individual received a remuneration or other compensation to act on behalf of a given trader);
- The number, amount and frequency of transactions;
- The seller's sales turnover;
- The intention of the seller to purchase products in order to resell them.

According to the Organisation for Economic Cooperation and Development (OECD), additional factors that could be taken into account in order to distinguish between B2C and C2C transactions are:

- (i) The level of organisation and planning of the activity;
- (ii) The value of the transaction;
- (iii) The duration of the activity;
- (iv) The impression to the outside world.⁹⁰

⁸⁵ Meller-Hanich, *Zu einigen rechtlichen Aspekten der 'Share-Economy'* [2014, number 50] *Zeitschrift für Wirtschafts- und Bankrecht*, 2337-2345, 2342.

⁸⁶ German Unfair Competition Act, 2010 (*Gesetz gegen den unlauteren Wettbewerb*), Federal Law Gazette I/2016, p. 233.

⁸⁷ See e.g. Baumbach/Hopt-Hopt, *Commentary on Handelsgesetzbuch*, 36. ed. Munich 2014, on sec. 1, marg. Nr. 4.

⁸⁸ European Commission, *Communication 'A European agenda for the collaborative economy'*, 2.6.2016, COM (2016) 356 final, *supra*, p. 5.

⁸⁹ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, pp. 32-33 and 70-72.

⁹⁰ OECD 'Protecting consumers in peer platforms market: exploring the issue', Draft Background Paper for Panel 3.1 of the

Regarding the last criterion set out by the OECD, it is worth noting that the way the activity is perceived by consumers could indeed influence their behaviour. The possible vagueness of the distinction between individuals acting in a private capacity and individuals acting in a professional/commercial capacity could create legal uncertainty and mislead users of online platforms. For example, the peer consumer could be convinced that the counterparty to the transaction concluded through an online platform is actually a trader rather than a private individual and, consequently, expect that the guarantees granted by the consumer protection legislation would apply.⁹¹ The UCPD Guidance does in fact highlight that '[...] under the professional diligence and transparency requirements laid down by Articles 5(2), 2(h), 6 and 7 UCPD, any e-commerce platform, insofar as it can be considered a "trader", should take appropriate measures enabling, amongst others, its users to clearly understand who their contracting party is [...]' (see Section 3.3.2).⁹²

National approach

Regulatory approaches (in the field of consumer rights and other areas of law) relevant to distinguishing between B2C and C2C transactions vary from one Member State to another (as well as within the same Member State in case of local regulation), and from sector to sector (see Table 6 under Section 3.1.2.3). The analysis carried out at national level shows that although Member States' approaches are different and fragmented, the '**continuity**' and the '**professional nature**' of the activity carried out are the two main elements Member States use to qualify a person as a trader rather than a consumer, on a case-by-case basis. These two elements are assessed against indicators that most Member States identify through non-legislative instruments rather than by national legislation. The Country Reports also show that some Member States developed sector-specific thresholds and/or tax thresholds that help distinguish professional activities from non-professional activities, on the one hand, and businesses from private individuals for tax purposes, on the other hand. When these limits are exceeded, the sector-specific legislation or the relevant tax regulation, respectively, applies.

The elements set out by national law, and those identified through national case-law, policy documents, legal doctrine and the enforcement practice of competent authorities are further analysed under Sections 3.1.2.1 and 3.1.2.2, respectively. Tax thresholds and criteria developed on a sector-specific basis are described in Sections 3.1.2.1 and 3.1.2.3, respectively.

Table 5 below gives a general overview of the main indicators used by each Member State (at national and local levels) to assess the 'continuity' and 'professional nature' of the activity.

Table 5. National indicators of what constitutes a 'trader'

Member States	Continuity (regularity)		Professional capacity	
	Number, amount, frequency of transactions	Temporal thresholds	Profit-seeking motive	Turnover (or earning threshold)
AT	√			
BE	√		√	√ ⁹³

2016 Ministerial on the Digital Economy, 29 March 2016, DSTI/CP(2015)4/REV1, p. 18.

⁹¹ Information collected through consultation of the Finnish Consumer Union on 18 May 2016.

⁹² UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 124.

⁹³ Initiative in the pipeline. See in Section 6.2.2. earning and tax thresholds foreseen by the Belgian Draft Law-Programme aimed at regulating online platforms accredited by the government.

Table 5. National indicators of what constitutes a 'trader'

Member States	Continuity (regularity)		Professional capacity	
	Number, amount, frequency of transactions	Temporal thresholds	Profit-seeking motive	Turnover (or earning threshold)
BG	✓		✓	
CY	✓			
CZ	✓		✓	
DE	✓		✓	
DK	✓		✓	
EE	✓			
EL	✓			
ES		✓ ⁹⁴		
FI				✓ ⁹⁵
FR	✓		✓	✓ ⁹⁶
HR	✓			
HU	✓			
IE	✓			
IT	✓	✓ ⁹⁷	✓	✓ ⁹⁸
LT	✓		✓	
LU	✓			
LV	✓			✓
MT	✓			
NL	✓	✓ ⁹⁹		
PL	✓		✓	
PT	✓		✓	
RO	✓			
SE	✓		✓	
SI	✓		✓	
SK	✓		✓	
UK	✓	✓ ¹⁰⁰		

Table 5 shows that in almost all the Member States, the 'continuity' of the activity is assessed against the **number, amount and frequency of the transactions** carried out. Indeed, although not quantified, the continuity (or regularity) of the activity presumes a certain frequency and volume of transactions. Consequently, a one-off exercise of a commercial act would not render a person a trader.

The element of the 'professional capacity' is usually assessed against two possible indicators: the profit-seeking motive and the turnover. As showed by Table 5 above, the

⁹⁴ Temporal thresholds have been developed at local level by the Region of Catalonia and the City of Madrid in the accommodation sector.

⁹⁵ Initiative in the pipeline. See in Section 3.1.2.3 earning thresholds foreseen by the Draft Legislative Proposal of 19 April 2016 aimed at reforming the Finnish Transport Code.

⁹⁶ Earning threshold have been exclusively set out with regards to the notion of 'micro-entrepreneur', as reformed in 2016.

⁹⁷ In Italy, temporal thresholds are developed by some Regions in the accommodation sector.

⁹⁸ The Italian jurisprudence proposed to use the turnover as the main criterion to qualify drivers as 'professionals' (in the transport sector). However, no exact earning thresholds have been identified by Italian courts.

⁹⁹ In the Netherlands, temporal thresholds are developed by the Municipality of Amsterdam for the accommodation sector (see Amsterdam rules on private holiday rentals).

¹⁰⁰ Temporal thresholds have been developed at local level (in London) by the 2015 Deregulation Act for short term rentals.

first criterion is frequently used, with a few exceptions. In Finland, for example, the **profit-seeking motive** is not typically a relevant criterion: non-profit organisations carrying out gainful activity do not escape definition as businesses.¹⁰¹ Similarly, in Austria, while offering a commercial activity to a large circle of persons could be considered an act of trade, it is irrelevant, instead, whether a profit is actually made. If the income solely covers costs incurred, indeed, this intention cannot be assumed.¹⁰² In other Member States, the professional nature is assessed against the **turnover** generated by the activity carried out. For example, in France – since 2016, the status of ‘micro-entrepreneur’ can be granted to sole traders who do not exceed certain turnover thresholds (see Section 3.1.2.1). Furthermore, the Country Reports identified a number of (both general and sector-specific) policy and legal initiatives aimed at further clarifying the distinction between traders and consumers by introducing earning thresholds. These initiatives are described in Section 6.

Finally, another indicator taken into account by all Member States in order to assess whether the activity is carried out ‘by profession’ is the **economic purpose of the activity**. All Member States’ legislation transposing relevant EU consumer law Directives requires that, in order to classify an individual as a ‘trader’ the activity must be carried out for purposes relating to his trade, business, craft or profession.

3.1.2.1 Indicators of what constitutes a ‘trader’ set out by national legal instruments

As highlighted above, the analysis carried out at national level found that only a few Member States’ legislation includes provisions setting out indicators of what constitutes a trader under certain circumstances. For example, according to Section 420 of the Czech Civil Code, the following factors will be deemed key to distinguishing an individual acting in a private capacity (a consumer) from an entrepreneur:

- The **consistency** with which the supplier offers goods for sale or provides services;
- The **time period** over which the supplier offers goods for sale or provides services;
- The **organisation** (individually vs. in a group);
- The **profit-seeking motive**;
- The **liability of the supplier**;
- The **means of provision of the service** (occasionally online vs. physical store).¹⁰³

The information collected through the Country Reports showed that sometimes indicators set out by national legislation to distinguish between traders and consumers consist in **tax thresholds**. Above specific limits, an individual is presumed to act in a professional capacity and the relevant tax regime would apply. It has to be specified that, however, the distinction between businesses and private individuals on the basis of these thresholds, is exclusively carried out for tax purposes. Consequently, where the limit set out by law is exceeded, this does not necessarily make consumer protection laws applicable. Tax thresholds are, for example, set out by national legal instruments in Latvia, France, and, potentially, in Belgium. In the Netherlands and in Sweden, indicators to help distinguish between individuals acting in a private capacity and individuals acting in a commercial/professional capacity for tax purposes are set out by policy documents. Therefore, they are further analysed under Section 3.1.2.2 below.

¹⁰¹ See detailed Finnish tax advice to non-profit organizations, available at https://www.vero.fi/fi-FI/Syventavat_veroohjeet/Einkeinoverotus/Verotusohje_yleishyodyllisille_yhteisoil.

¹⁰² VwGH 15 September 1987, 86/04/0047.

¹⁰³ Lavický, P., *Občanský zákoník I* (1st edn, C. H. Beck, Prague, 2014) 1605-1610.

Exploratory study of consumer issues in online peer-to-peer platform markets

According to the Latvian Law on Personal Income Tax,¹⁰⁴ the fact that an activity generates revenue exceeding approximately EUR 14,229 in a taxation year, is an indicator of its professional or commercial nature. For the purpose of this assessment, Article 11 of the Latvian Law identifies additional relevant criteria: i. the aim of earning a proper remuneration; and ii. the regularity of the activity (which can be deduced from its economic nature and by the frequency of transactions - three or more transactions in a taxation period or five or more transactions in three taxation periods).¹⁰⁵

In this context, the **French regime applicable to micro-entrepreneurs** is also interesting.¹⁰⁶ Since 2016, the two business statutes of micro-enterprise and auto-entrepreneur have been merged, and they are now referred to as micro-entrepreneur. The notion of micro-entrepreneur is a specific tax status that benefits from simple tax and accounting rules rather than a legal business structure. A micro-entrepreneur is someone who: runs the business as a sole trader; pays social security based on sales (not on profit); accedes to simple accounting rules and does not exceed certain turnover thresholds. A business adopting the tax status of micro-entrepreneur can neither charge nor recover VAT. These thresholds depend on the type of business activity carried out which might be either a 'service based business'/'professional' activity or an activity mainly consisting of 'commercial sales'. While in a 'service based business' (or 'professional' activity), the turnover cannot exceed EUR 32,900 per year, where the activity carried out mainly consists of 'commercial sales', the turnover limit is EUR 82,200 per year.¹⁰⁷ In the first year of business the turnover thresholds are applied pro-rata to the period in which the business has been in operation.¹⁰⁸

While some Member States have already developed tax thresholds, other Member States are currently discussing the possibility of introducing them in national legislation. This is for example the case in Belgium where the Draft Law-Programme¹⁰⁹ currently under discussion aims at introducing new earning thresholds that, if exceeded, would bring about the application of the classic tax regime. According to the Draft Law, when an online platform facilitating P2P transactions and accredited by the government generates less than EUR 5,000 gross per year, a withholding tax of 20% on such income should apply. This initiative is described under Section 6.2.2.

3.1.2.2 Indicators of what constitutes a 'trader' set out by national case-law, policy documents, or in the enforcement practice of the competent authorities

In many Member States, the main indicators of what constitutes a 'trader' are interpreted by jurisprudence and legal doctrine (although, in most cases, such interpretation does not specifically refer to the sharing economy context). The latest developments of part of the Italian jurisprudence, for example, show that the aim of earning a proper remuneration could be used as a criterion to distinguish between professional and non-professional drivers. However, no exact earning thresholds have been identified by the Italian courts. The Tribunal of Milan (in first and second-instance decisions)¹¹⁰ argued that UberPop drivers should be classified as professional drivers because their services are provided against a proper remuneration, **while in P2P ser-**

¹⁰⁴ Law on Personal Income Tax (*Par iedzīvotāju ienākuma nodokli*), OP: "[LV](#)", 32, 01.06.1993.

¹⁰⁵ Article 11(3), Law on Personal Income Tax.

¹⁰⁶ 'Déclaration de micro-entrepreneur (auto-entrepreneur)' *Service-Public-Pro.fr*, Le site officiel de l'administration française website, available at <https://www.service-public.fr/professionnels-entreprises/vosdroits/F23264>.

¹⁰⁷ As per the former 'auto-entrepreneur' regime, micro-entrepreneurs have a slight leeway enabling them to stay within this new regime as long as they do not exceed the maximum turnover threshold (called '*plafonds majeurs*') of: EUR 34,900 for 'service based business' and EUR 90,300 for 'commercial sales'.

¹⁰⁸ 'Condition de chiffre d'affaires, Déclaration de micro-entrepreneur (auto-entrepreneur)' *Service-Public-Pro.fr*, Le site officiel de l'administration française website, available at <https://www.service-public.fr/professionnels-entreprises/vosdroits/F23264>.

¹⁰⁹ Draft Law-Programme of 2 June 2016, House of Representatives Doc 54-1875/001.

¹¹⁰ Tribunal of Milan, Section III, 25 May 2015 & Tribunal of Milan, Section III 9 July 2015.

vices peer suppliers are just compensated for the costs they incur. Other courts in Italy, however, have not used this criterion.¹¹¹ The box below briefly reports the indicators identified by the courts of another three selected Member States (Austria, Belgium and Germany).

Indicators of what constitutes a trader: selected case-law

Austria

The Austrian Consumer Code does not set out a minimum organisation, company size or capital in order to qualify an activity as a business. According to well-established case-law, a **permanent and methodical company organisation** is deemed necessary for this purpose.¹¹²

Belgium

The Belgian Cassation Court ruled that an individual must exercise his activity **for profit purposes, on a professional (i.e. not occasional) basis**, in order to be considered a trader.¹¹³

Germany

In order to identify a 'trading enterprise' in the meaning of Section 1 I of the German Commercial Code (*Handelsgesetzbuch, HGB*), according to German jurisprudence the activity needs to be: (1) **autonomous**, (2) **planned** and **intended to be undertaken for a certain period of time**, (3) **market-oriented**, (4) **profit-oriented** and (5) **not belonging to individuals carrying out 'independent professions'** which are marked by a special personal, creative or scientific commitment (e.g. lawyers, architects, doctors, etc.).¹¹⁴

In some Member States indicators of what constitutes a trader are set out by policy documents. For example, in 2015, the Swedish Tax Authority adopted an Opinion stating that the main indicators to be taken into account in order to qualify an activity as a business or as a private activity for tax purposes, are the continuity of the activity and the remuneration perceived.¹¹⁵ In the Netherlands, a policy rule from the State Secretary for Economic Affairs specifies that in the absence of a specific legal form (such as a public or a private limited company) the existence of an undertaking within the meaning of Article 2 of the Decision on the Commercial Register must be determined taking into account the **criteria used for the application of VAT**.¹¹⁶

In other Member States indicators of what constitutes a trader are set out by the enforcement practice of the competent authorities. This is, for example, the case in Bulgaria and Sweden as shown in the box below.

Indicators of what constitutes a trader: selected practice of competent authorities

Bulgaria

According to a 2015 Guidance of the Bulgarian National Revenue Agency, in order to

¹¹¹ The *Giudice di Pace* of Genoa, in its decision of 16 February 2015, argued that Uber Pop is not a taxi service; rather, it is a *chaffeur* rental service (Article 82 (5) of the Road Code). See IT Country Report.

¹¹² OGH 10 March 1992, 5 Ob 509/92; OGH 11 July 1990, 3 Ob 578/90; OGH 16 February 2012, 6 Ob 203/11p; OGH 21 October 1982, 7 Ob 515/82; OGH 22 June 2012, 6 Ob 93/12p; OGH 15 January 2013, 4 Ob 204/12x.

¹¹³ 7 April 1898, Cassation Court.

¹¹⁴ Oetker, *Handelsgesetzbuch* (4th edn, Beck, 2015), Paragraph 1 marginal N. 12; from case-law see e.g. Bayerisches Oberlandesgericht judgement 3 Z BR 57/02 (21 March 2002), NZG 2002, 718 (719) = NJW-RR 2002, 968 (969).

¹¹⁵ Skatteverket, 'Ställningstagande: Beskattningsbar person – gränsdragning mellan ekonomisk verksamhet och privat verksamhet'. An overview of applicable tax regulations is available on the website of the Swedish Tax Authority at <https://www4.skatteverket.se/rattsligvagledning/24.html>.

¹¹⁶ Decision on the Commercial Register (*Besluit van 18 juni 2008 houdende de vaststelling van een nieuw Handelsregisterbesluit 2008 (Handelsregisterbesluit 2008)*), Official Journal of the Kingdom of the Netherlands 240/2008.

Indicators of what constitutes a trader: selected practice of competent authorities

determine whether or not an activity is carried out **continuously** and by an individual acting in a **professional capacity** the following elements should be analysed in combination, in light of the specific circumstances of each case: i. the **number, amount and frequency of the transactions**; ii. the **profit-seeking motive**.¹¹⁷

In practice, the status of 'trader' is mainly assessed taking into account the number of transactions: if an individual lists on an online platform several items or announces several options, there would be suspicion that he is operating as a professional (seasoned) supplier. The Bulgarian Commission for Consumer Protection (CCP) will therefore request the platform operator to reveal data concerning the number and content of the offers published by the investigated user during a specific period. For investigation reasons, the CCP could also carry out a so-called 'mystery shopping', consisting in ordering several items to test the purpose of the user.¹¹⁸

Sweden

According to the Opinion adopted on 2 September 2015 by the Swedish Tax Authority, in order to distinguish between businesses and private activities for tax purposes, two main criteria should be taken into account: the **continuity** of the activity carried out and the **remuneration** perceived. If a natural person engages in renting activities of his private property on an occasional basis, that person will not be qualified as an individual acting in a professional/commercial capacity.¹¹⁹

It could also happen that the criteria to classify an individual as a trader are identified by a combination of regulatory legal instruments and the non-legislative instruments mentioned above. In the Netherlands, for example, where the criteria used for the application of VAT (see above) are not met, the **frequency of the activity** could be considered. If the activity is carried out for less than 15 hours per week, indicators of its professional nature could be: the occurrence of a certain input or investment; the intention to make profit; the fact that the individual acts under a certain name. The box below describes the 'objective approach' adopted by national courts where these criteria are not sufficient to determine if an individual is acting in a commercial capacity.

'Objective approach' of Dutch national courts

This approach consists of taking into account **thresholds related to the size** of the potential undertaking.

In the Netherlands, persons who benefit from a social security allowance need to notify any trading activity other than the occasional sale of private goods to the City Council and the mayor. Many cases of people selling goods on the platform Marktplaats¹²⁰ who have infringed this obligation have been identified.¹²¹

¹¹⁷ See Guidance no. 94-00-300 of 29 December 2015 of the National Revenue Agency ('if the activity is commercial in scope and nature lack of registration does not preclude application of the taxation rules applicable to traders'). Cf. decision of Administrative Court – Varna no. 612 of 11 March 2013 in case no. 4913/2012 – '...irrespective of the type of activity performed, a person who has created an undertaking, which by its subject-matter and volume requires to be managed in a commercial manner, shall be regarded as a trader...'.

¹¹⁸ Information collected through consultation of the CCP on 5 April 2016.

¹¹⁹ Impulse Paper prepared for the European Commission, DG GROW, 'Home-Sharing in the Digital Economy: The Cases of Brussels, Stockholm, and Budapest', p. 54.

¹²⁰ Marktplaats website, available at <http://www.marktplaats.nl/>.

¹²¹ E.g. *Centrale Raad van Beroep* (CRB) 17 November 2015, ECLI:NL:CRVB:2015:4062; CRN 15 May 2012, ECLI:NL:CRVB:2012:BW5987; CRB 10 June 2014, ECLI:NL:CRVB:2014:1968; CRB 29 May 2012, ECLI:NL:CRVB:2012:BW7738; CRB 9 August 2011, ECLI:NL:CRVB:2011:BR4924; CRB 31 March 2015, ECLI:NL:CRVB:2015:979; CRB 996, 25 February 2014, ECLI:NL:CRVB:2014:580. See also CRB 8 January 2013, ECLI:NL:CRVB:2013:BY8768.

'Objective approach' of Dutch national courts

In these cases, indicators which might lead to determining the existence of an undertaking within the meaning of Article 2 of the Decision on the Commercial Register¹²² are:

- the **number of transactions** concluded;
- their **value** (the higher the value, the fewer transactions are required to exceed the limits of incidental sale of private goods);
- the fact that **also goods belonging to other people are sold**;
- the **duration** of the activities.¹²³

These thresholds, however, are not precisely determined and need to be assessed on a case-by-case basis. The expected or realised revenue could be an indicator of the size of a potential undertaking, for example. However, while a yearly revenue of EUR 10.000 could be sufficient to classify a person selling self-produced goods as an individual acting in a commercial capacity, this threshold could be too low when second hand cars are sold.

3.1.2.3 Thresholds developed on a sector-specific basis

Some Member States distinguish between professional and non-professional activities on the basis of **thresholds developed on a sector-specific basis**. Table 6 below gives an overview of the thresholds developed by Member States in the transport and accommodation sectors to assess the nature of the activities that an individual is engaging in. It shows that, while in the **transport sector**, earning thresholds could be possibly set out in order to help distinguish between professional and non-professional drivers,¹²⁴ in the **accommodation sector** some Member States have already developed temporal thresholds (usually operating at local/regional level) aimed at distinguishing touristic accommodation service activities carried out by businesses from those conducted by private individuals on an occasional basis.

It is noted that Table 6 includes also thresholds that have not been adopted yet, but that were at some point foreseen or are currently being considered by initiatives in the pipeline.

Table 6. National thresholds developed on a sector-specific basis

Member States	Transport sector	Accommodation sector
	Turnover (or earning threshold)	Temporal thresholds
ES		✓
FI	✓	
IT		✓
NL		✓
UK		✓

¹²² Decision on the Commercial Register (*Besluit van 18 juni 2008 houdende de vaststelling van een nieuw Handelsregisterbesluit 2008 (Handelsregisterbesluit 2008)*), Official Journal of the Kingdom of the Netherlands 240/2008 (frequently modified).

¹²³ *Ibid.*

¹²⁴ European Commission, Communication, 'A European agenda for the collaborative economy', 2.6.2016, COM (2016) 356 final, *supra*.

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The Legal Analysis shows that only Spain, Italy, the Netherlands and the United Kingdom have developed sector-specific thresholds so far (in the accommodation sector). These thresholds help to qualify an individual as a professional: i.e. above the limit set out by law, case-law or by government guidance documents, it is presumed that the individual is acting in a commercial/professional capacity rather than in a private capacity. When the thresholds are exceeded, the relevant sector-specific rules (e.g. licensing or authorisation requirements) apply. However, it might not be possible to categorically state that consumer law also becomes applicable.

With regards to the transport sector, the analysis carried out at national level found that as part of a proposal aimed at reforming the Transport Code, Finland has discussed the possibility of introducing, an earning threshold below which the income would be presumed to be generated by a 'non-professional' activity and exempted from the requirements to carry out the same activity professionally. The Draft Legislative Proposal (released on 19 April 2016) originally suggested to distinguish between P2P transport services and regulated transport services (e.g. taxi services) on the basis of an **earning threshold** of EUR 10,000.¹²⁵ The Draft Proposal required the facilitator of P2P services (i.e. the platform) to ensure that this threshold is not exceeded.¹²⁶ The introduction of this earning threshold has been dropped by the Finnish Parliament and is no longer included in the text of the Draft Proposal Furthermore, the Finnish tax treatment of P2P accommodation services has been subject to recent guidance developed by the Ministry of Employment and Economy in cooperation with other competent authorities.¹²⁷ According to this guidance document, the occasional provision of accommodation services is treated as ordinary rental income subject to capital gains tax up to a threshold of EUR 30,000. The 'occasional' character of the service provided, therefore, is the deciding factor distinguishing between P2P services and established businesses. Finally, a recent case decided at district court level considered that earnings of EUR 12,250 over approximately three and a half months would indicate the professional nature of the transport services activity carried out.¹²⁸

In the accommodation sector, possible sector-specific thresholds to help distinguish between professional and non-professional activities could concern the **regularity** with which the service is provided.¹²⁹ Where services are provided on an occasional basis (i.e. up to specific thresholds), the activity is intended to be carried out in a private capacity and is exempted from licensing requirements. For example, in the **United Kingdom**, Section 44 of the 2015 Deregulation Act¹³⁰ introduced a new temporal threshold of a maximum of 90 nights in a calendar year for short-term rentals in London, beyond that threshold the provision of accommodation will be considered as a professional activity. The Deregulation Act is further described under Section 6.2.1.

In some Member States the thresholds applied in the accommodation sector to distinguish between hotel and non-hotel tourist accommodation vary at local and regional level. As explained in Section 3.2.2, in the **Netherlands**, the Municipality of Amsterdam adopted specific municipal rules in the accommodation sector, including the **Amsterdam rules on private holiday rentals**.¹³¹ These rules exclude the necessity of

¹²⁵ See Government Proposal, available at: <http://www.lvm.fi/lvm-site62-mahti-portlet/download?did=200477>.

¹²⁶ *Ibid.* pp. 74-75.

¹²⁷ Guidance of the Ministry of Employment and Economy, available at: https://www.tem.fi/files/45129/3_2016_ohjeita_kotimajoitusta_tarjoavalle_25042016_WEB.pdf.

¹²⁸ Case 5500/R/0052018/15, Decision of the District Court of Helsinki in the case of *Yahyobek Adhamov*, Decision of 6 April 2016, appeal pending.

¹²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy', *supra*.

¹³⁰ Section 44 of the 2015 Deregulation Act, available at <http://www.legislation.gov.uk/ukpga/2015/20/section/44>.

¹³¹ 'May I let my home or home boat when I am on holidays?' (*Mag ik mijn woning of woonboot verhuren als ik op vakantie ben?*), website of the Municipality of Amsterdam, *supra*.

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any licence when a property located in Amsterdam is rented out for less than two months per year in total. Furthermore, on the assumption that a primary residence can only be rented out on an occasional basis, an individual renting out a property needs to be the main resident thereof and be registered as such in the Basic Register of Persons in order to avoid qualification as a professional B&B or hotel (see Section 6 of this Report).¹³²

In **Spain**, according to the **decrees adopted by the Region of Catalonia¹³³ and the City of Madrid¹³⁴** touristic accommodations are rented out 'habitually' when: the activity is carried out for a minimum period of three continuous months during one calendar year (Madrid); the renting occurs at least twice a year for a period of 31 days (Catalonia). The Catalan Decree on tourist accommodation and apartments for tourists' use and Madrid Decree on touristic apartments and the apartments for the use of tourists are described under Section 3.2.2 of this Report.

In **Italy** (see box below) Regions are empowered to legislate in the tourism sector by Article 117 of the Italian Constitution (setting out the so called 'residual' legislation).¹³⁵ Regional Regulation 8/2015 of Lazio,¹³⁶ Regional Law 27/2015 of Lombardia,¹³⁷ and Regional Law 42/2000 of Tuscany¹³⁸ are further described under Section 3.2.2 of this Report.

Accommodation services: Italian regional thresholds

In Italy, while some Regions refer to the notions of activity carried out 'occasionally' or 'continuously', other Regions have introduced specific temporal thresholds for each category of non-hotel accommodation.

This is for example the case of the new **Regional Regulation 8/2015 of Lazio** according to which renting out holiday homes is a non-professional activity where the period of 'inactivity' (i.e. when the apartment is not rented out) is equal or does exceed 100 days per year (Article 7(2)(a)). Furthermore, if more than three houses or apartments are rented out by the same person, the activity is presumed to be carried out in a professional capacity (Article 7(2)(b)).

Regional Law 27/2015 of Lombardia also allows private individuals to non-professionally rent out their houses and holiday apartments on the sole conditions

¹³² The cooperation between the city of Amsterdam and Airbnb guaranteed more legal certainty by clarifying the effective functioning of the platform in the city. However, the limit of 60 days set out by the Amsterdam rules on private holiday rentals has been object of criticism. Gert Jan Bakker of an Amsterdam organisation fighting undesirable renting behaviour (*Meldpunt Ongewenst Verhuurgedrag van het Wijksteunpunt Wonen*) in Milikowski, F., 'The power of Airbnb. An airmattress with breakfast' (*De macht van Airbnb. Een luchtbedje met ontbijt*), *De Groene Amsterdammer* 14 April 2016, p. 32 et seq.

¹³³ Decree 159/2012 of 20 November 2012 on tourist accommodation and apartments for tourists' use (*Decreto 159/2012, de 20 de noviembre, de establecimientos de alojamiento turístico y de viviendas de uso turístico*) DOGC number 6268, 5 December 2012.

¹³⁴ Decree 79/2010, of 10 July 2014 which regulated the touristic apartments and the apartments for touristic use of Madrid (*Decreto 79/2014, de 10 de julio que regula los apartamentos turísticos y las viviendas de uso turístico de la Comunidad de Madrid*) Boletín Oficial de la Comunidad de Madrid 31 July 2014.

¹³⁵ Constitution of the Republic of Italy 'Constitution of the Italian Republic as last amended by constitutional law 1/2012 introducing the principle of the balanced budget' (*Introduzione del principio del pareggio di bilancio nella Carta costituzionale*), Official journal number 95, 23 April 2012.

¹³⁶ Regional Regulation 8/2015 of Lazio 'New discipline on non-hotel accommodation facilities' (*Nuova disciplina delle strutture ricettive extra-alberghiere*), Regional Official Gazette number 73, 10 September 2015.

¹³⁷ Regional Law 27/2015 of Lombardy 'Regional policies on tourism and attractiveness of the Lombard region' (*Politiche regionali in materia di turismo e attrattività del territorio lombardo*), Regional Official Gazette, 16 September 2015.

¹³⁸ Regional Law 42/2000, Tuscany, 23 March 2000, 'Compendium of the regional laws in the touristic sector' (*Testo unico delle Leggi Regionali in materia di turismo*), Regional official gazette (*Bollettino ufficiale della Regione Toscana*), 03 April 2000, available at <http://raccoltanormativa.consiglio.regione.toscana.it/articolo?urndoc=urn:nir:regione.toscana:legge:2000-03-23:42>, as last amended by Regional law 25/2016, Tuscany, 18 March 2016, 'Reorganising provincial powers in the touristic sector' (*Riordino delle funzioni provinciali in materia di turismo in attuazione della l.r. 22/2015. Modifiche alla l.r. 42/2000 e alla l.r. 22/2015*), Regional official gazette (*Bollettino ufficiale della Regione Toscana*), 23 March 2016, available at http://www.toscanapromozione.it/magazine/wp-content/uploads/2016/04/legge_2016_25_v6.pdf.

Accommodation services: Italian regional thresholds

that the activity is carried out 'occasionally' and with regards to no more than three units (Article 26(2)(b)). Contrary to Regional Regulation 8/2015 of Lazio, this Regional Law does not set out any temporal threshold to classify the activity as 'occasional'.

Similarly, Article 61 of **Regional Law 42/2000 of Tuscany** generally states that individuals who rent out 'occasionally' the properties where they reside do not need to communicate to the Province the price of the renting and the description of the apartment as requested by Article 75 for individuals running guest houses in a professional capacity. The National Association of Bed & Breakfast, Guest Houses, private holiday rentals and touristic rentals (ANBBA) recently proposed to amend Regional Law 42/2000. In particular, according to the ANBBA, Article 61 should be replaced by a provision: i. highlighting the family-character of guest houses run by individuals acting in a private capacity; and ii. specifying that occasionally renting out a property - which is the main residence of the lessor and consists in not more than four rooms (with maximum twelve beds), should qualify as a non-professional activity. The renting activity should be considered as 'occasional' when carried out for less than 60 days in total per year.¹³⁹

3.2 Legislation applicable to C2C transactions

The EU consumer *acquis* applies exclusively to B2C transactions. Similarly, Member States do not set out any legislation specifically tailored to C2C transactions. In most Member States, the main provisions applicable to C2C transactions are **national Civil Code rules** and **sector-specific legislation applicable to transport and accommodation services** (where relevant). This Section does not provide an exhaustive overview of the legislation relevant to C2C transactions in each Member State. For example, sector-specific legislation is not mentioned where it is not applicable in a sharing economy context (i.e. where it does not provide specific requirements applicable to C2C transactions). Furthermore, the applicability of C2C legislation to cross-border transactions and online transactions is not addressed separately because these laws: i. are technology neutral; ii. would apply to cross-border transactions wherever the national law applies. Enforcement issues of C2C legislation are dealt with in Section 5.

3.2.1 Horizontal legislation

EU consumer law Directives and national consumer legislation do not apply to C2C transactions. They were originally designed to protect the 'weaker' party (i.e. the consumer) in B2C transactions. This assumption, however, does not apply to C2C transactions where, as both parties are consumers, their relationship is presumed to be already sufficiently balanced. Furthermore, in C2C transactions, the peer supplier lacks a sufficient professional organisation and diligence, as well as the necessary resources to comply with the same requirements imposed on traders in B2C transactions.¹⁴⁰

The **horizontal legislation** that applies to C2C transactions involving **sale and (re)sale activities, lease agreements and non-professional services** usually includes: general civil law provisions on contract formation, performance and remedies for breach, as well as specific provisions on the contracts of sale and lease, and on the

¹³⁹ 'Amendments of the non-professional renting activities regulated by Law 42/2000' (*Modifiche alle attività ricettive extra-alberghiere già definite dalla legge 42/2000 e sue modifiche e integrazioni*), HomeSharingItalia website available at <http://www.homesharingitalia.it/2016/03/15/anbba-e-la-proposta-di-modifica-alla-legge-regionale-toscana-sul-turismo/>.

¹⁴⁰ Organisation for Economic Cooperation and Development (OECD), 'Protecting consumers in peer platforms market: exploring the issue', Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy, 29 March 2016, DSTI/CP(2015)4/REV1.

letting of work and industry. Although these civil code rules do not guarantee the same level of protection as afforded to consumers in B2C transactions, they include general requirements that are relevant to C2C transactions and that could have a similar effect. For example, national laws normally do not explicitly protect parties to a C2C transaction from unfair commercial practices or unfair contract terms (as stipulated with respect to B2C transactions under the consumer law *acquis* and its transposing legislation). However, national Civil Codes typically state that contracts must be carried out in **good faith**.¹⁴¹ This is a general presumption that the parties to a contract will act honestly and will faithfully perform their obligations. Good faith assumes that there is no fraudulent intent from either of the parties.¹⁴² In Cyprus, although the national contract law does not include a general good faith clause, the use of undue influence as well as of duress/coercion make the contract voidable.¹⁴³ In effect, this makes the situation similar that that in the other Member States where this sort of conduct would in fact be a breach of good faith.

Interestingly, in France, a recent amendment of the French Civil Code by Ordinance No. 2016-131¹⁴⁴ extends some of the key rights protecting consumers in B2C transactions also to C2C transactions (see box below). In particular, the regulation of **unfair contract terms** (which was previously foreseen exclusively for B2C transactions in Article L. 212-1 of the Consumers Code) is also included in the new Article 1171 of the Civil Code applicable to both B2C and C2C transactions on the condition that the contract is an **'adhesion contract'**. According to the new Article 1110 of the French Civil Code, in order to qualify a contract as an adhesion contract it is sufficient that one party imposed its content on the other party. Although, as highlighted above, the level of protection afforded to consumers in C2C transactions can be arguably considered sufficient, as they do not need extra protection, this might not be the case when C2C transactions are concluded online. In these cases, often, the parties do not physically meet (or the goods are not physically present). Consequently, although both parties to the C2C transaction are consumers, their relationship might not necessarily be balanced, for example due to information asymmetries. Therefore, the new Article 1171 of the French Civil Code is particularly relevant in the context of **C2C contracts concluded online**, whose content is often pre-determined by one of the parties. A press release from the French Chancellery highlighted the utility of the new text by referring specifically to the collaborative economy phenomenon.¹⁴⁵

French Reform of Contract Law

According to new Article 1171, any unfair contract terms included in 'adhesion contracts' are void.

As a result of the recent Reform of Contract Law by Ordinance n° 2016-131 of 10 February 2016 (entered into force on 1 October 2016), other new useful tools applicable to C2C transactions (as well as to B2C transactions) have been introduced.

¹⁴¹ E.g. Article 1134 of the Belgian Civil Code, Articles 12 and 63 of the Bulgarian Obligations and Contracts Act; Section 242 of the German Civil Code, Section 6 of the Estonian Law of Obligations Act, Article 2888 of the Greek Civil Code, Article 1280 of the Spanish Civil Code, Section 33 of the Finnish Contract Act, Article 2274 of the French Civil Code, Article 4 of the Croatian Civil Obligations Act, Article 1:3 of the Hungarian Civil Code, Article 1175 of the Italian Civil Code, Article 6158 of the Lithuanian Civil Code, Article 1134 of the Luxembourgish Civil Code, Article 993 of the Maltese Civil Code, Article 6248 of the Dutch Civil Code, Article 227 of the Portuguese Civil Code, Article 14 of the Romanian Civil Code.

¹⁴² Cornell University Law School. 'good faith' available at https://www.law.cornell.edu/wex/good_faith.

¹⁴³ Articles 11 to 22 of the Cyprus Contract Law (Cap. 149) available at <http://cypruslaw.narod.ru/CAP149CY.htm>.

¹⁴⁴ Ordinance No. 2016-131 reforming contract law, the general provisions and the proof of obligations (Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations), available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032004939&categorieLien=id>.

¹⁴⁵ 'Let's make a concrete example: I rent a flat during my holidays on Airbnb, and the contract allows the owner to change the renting period at any moment, without my agreement and without any compensation. Thanks to the reform, I will be able to ask the judge to remove this clause'. Chancellery (Jean-Jacques Urvoas), press release, 11 February 2016: <http://www.presse.justice.gouv.fr/archives-communiques-10095/communiques-de-2016-12818/droit-des-contrats-28735.html>.

French Reform of Contract Law

The Reform, *inter alia*, codifies certain judicial practices such as:

- the **duty to inform** the counterparty (to all types of transactions) on the information essential to determine his consent (new Article 1112-1);
- the **invalidity of a clause in contradiction with the main obligation of a party** (new Article 1170);
- the **defence against non-performance of the contract** (new Article 1219).

The general national laws applicable to C2C transactions might also cover other consumer rights. For example, in relation to the **sale and (re)sale of goods** it may be argued that certain **information requirements** do exist within national civil law provisions. Sellers must provide buyers with a warranty of the quiet possession of the thing sold guaranteeing that the contract does not omit any burden that would deprive the buyer in whole or in part of the thing sold. Sellers must also warrant the thing sold against any latent (hidden) defects that would render it unfit for the intended use, or that would diminish its value to the extent that the buyer would not have bought it or would have paid less if he had been aware of them.¹⁴⁶

However, specific consumer rights for distance B2C contracts as set out in the CRD such as the detailed information requirements provided for by its Article 6 do not apply in C2C transactions. No specific national rules in relation to the **identity, geographical address or reliability of the peer supplier** in C2C transactions have been identified. However, the general duty for the parties to traditional transactions to make their identity clear has been in some cases extended also to 'less traditional' transactions such as the sale of second hand goods through online platforms. This was decided, for instance, by the Court of Zwolle Lelystad in the Netherlands on 3 May 2016 with regards to private sellers operating on the Dutch platform Marktplaats.nl.¹⁴⁷

The provisions of national Civil Codes are also relevant with respect to the buyer's **right to receive goods within a certain time frame or to be reimbursed in case of non-delivery**. National laws typically state that if the seller fails to deliver at the time agreed upon (and the delay was caused solely by the seller), the buyer may demand the dissolution of the contract or to be placed in possession of the thing sold.¹⁴⁸ Furthermore, the seller is liable for damages if the buyer sustained any loss from the non-delivery of the thing at the time agreed upon.

If **the thing sold is not of the quality promised**, the buyer may reject the thing and demand damages, or accept the thing with a diminution of the price.¹⁴⁹ It is worth noting here that this right is more limited than the right of withdrawal ('cooling off' period) granted to parties in B2C contracts under Article 9 of the CRD whereby consumers, 'have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14'. This right to cancel and return the object of the contract within 14 days, for any reason and with no justification applies only in the B2C context. The 14-day cooling off period does not apply with respect to goods

¹⁴⁶ E.g. Article 193, Sec. 2 and 3 of the Bulgarian Obligations and Contract Act, Section 2103 of the Czech Civil Code, Section 12 of the 1893 Irish Sales of Goods Act, Article 1626 of the Luxembourgish Civil Code, Article 1409 of the Maltese Civil Code, Article 1672 of the Romanian Civil Code and Article 1474 of the Spanish Civil Code.

¹⁴⁷ Court Zwolle-Lelystad 3 May 2016, ECLI:NL:RBZLY:2006:AW6288, Computerrecht 2006, 101, note J.P. van den Brink.

¹⁴⁸ E.g. Section 2002 of the Czech Civil Code, Articles 777(1) and 808 of the Portuguese Civil Code, Articles 455 and 491 of the Polish Civil Code, Articles 6:35 and 6:154 of the Hungarian Civil Code, Articles 1610-1624 of the Luxembourgish Civil Code, Articles 1385 and 1386 of the Maltese Civil Code, Article 6:38 of the Dutch Civil Code.

¹⁴⁹ E.g. Section 2107 of the Czech Civil Code, Article 69 of the Bulgarian Obligations and Contract Act, Section 437 of the German Civil Code, Article 560 of the Polish Civil Code.

bought from a private individual and - even in the B2C scenario - it does not apply to hotel bookings.

Another general guarantee applicable to C2C transactions is **non-contractual liability**, which could apply where parties act under the influence of **misleading and aggressive practices**. The general principle is that everyone is liable for damages that occur through their own fault (e.g. Article 1382 of the Luxembourgish Civil Code)¹⁵⁰ independently of any liability defined under a contract. These agreements may be also voidable on grounds of **mistake or deceit**. For example, the Bulgarian Obligations and Contracts Act (OCA)¹⁵¹ foresees that under certain circumstances a party may request the annulment of the contract – e.g. in cases of contracts executed due to error (Article 28), fraud (Article 29), duress (Article 30), lack of capacity (Article 31), or dire need (Article 33). In Latvia, the Civil Code establishes that deceptive practices and transactions are void and can be annulled (Articles 1.78-1.96).¹⁵² According to Articles 1111 and seq. and Article 1116 of the French Civil Code, where the consent is vitiated by violence or deceit the contract would be invalid.¹⁵³ Chapter 3 of the Finnish Contract Act¹⁵⁴ (regulating the invalidity of the contract) sets out that the binding nature of a transaction could be jeopardised by grave duress (Chapter 3, Section 28), coercion not constituting violence or a threat to health (Chapter 3, Section 29) and fraud (Chapter 3, Section 30). Furthermore, Section 31 provides that where a party takes unfair advantage of another's 'distress, lack of understanding, imprudence or position of dependence' to acquire a benefit that is disproportionate to the consideration they have offered, the transaction is not binding. According to Section 32, a party to a contract cannot benefit from a wrongful expression of will of the counterparty where he knew or should have known such error. Finally, Section 36 expressly states that unfair terms included in a contract may be adjusted or set aside. This applies also to the amount of consideration (Section 36.3). Furthermore, the national law recognises the possibility of dissolving contractual obligations for the non-performance of either of the parties. The party aggrieved by the non-performance can choose either to compel the other party to perform the obligation if this is possible, or demand the dissolution of the contract together with damages for non-performance.¹⁵⁵

Similar provisions exist in relation to contracts for the letting of things or works. These could be relevant in the context of the **renting of movable or immovable property or the provision of non-professional services**. The national Civil Codes regulating these contracts typically stipulate that the lessor is liable for defects or faults of the thing let and must warrant it against defects that prevent or diminish its use. Where the existence of such faults or defects is proved, the lessee can demand the dissolution of the contract or a reduction in the price of the lease. The lessor is also liable for any damage that the lessee might suffer as a consequence of latent defects of the thing where the lessor knew or had reasonable suspicion of them and did not inform the lessee of their existence or his suspicion of their existence. Such defects must ex-

¹⁵⁰ Civil Code of the Grand Duchy of Luxembourg (*Code Civil*) as last modified 1 June 2016, available at http://www.legilux.public.lu/leg/textescoordonnes/codes/code_civil/CodeCivil_PageAccueil.pdf. The same is provided in Belgium (Article 1382 of the Civil Code), Bulgaria (Article 45 of the Obligations and Contract Act), Finland (Chapter 2, Section 1.1 of the Tort Liability Act), France (Article 1382 of the Civil Code), Hungary (Article 6:519), Malta (Article 1031 of the Civil Code regulates non-contractual liability), Portugal (Article 483 of the Civil Code); Romania (Article 1349 of the Civil Code). Article 1902 of the Spanish Civil Code regulates tort liability and Article 1101 contractual liability.

¹⁵¹ Obligations and Contracts Act (*Закон за задълженията и договорите*), State Gazette 275/22 November 1950.

¹⁵² The Civil Law (*Civillikums*), OP: "*Valdības Vēstnesis*", 46, 26.02.1937. The Civil Law in Latvia is made up of four parts: Part I is dedicated to the Family Law, Part II covers the Inheritance Law, Part III contains the Property Law and Part IV is the Law of Obligations.

¹⁵³ Civil Code (*Code Civil*) last amended on 16 March 2016, available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>.

¹⁵⁴ Law 228/1929 'Contracts Act', as last amended.

¹⁵⁵ E.g. Articles 79-91 of the Bulgarian Obligations and Contracts Act, Section 437 of the German Civil Code, Articles 6.205-6.216 of the Lithuanian Civil Code, Articles 1741-1751 and 1794 of the Luxembourgish Civil Code, Articles 1570 and 1627 of the Maltese Civil Code.

ist at the time of the conclusion of the contract.¹⁵⁶ Conversely, the lessee is liable for any damages that might occur during the enjoyment of the thing let, unless he/she proves that they were not generated by his/her fault.¹⁵⁷

3.2.2 Sector-specific legislation

As highlighted above, sector-specific legislation also provides certain protective measures relevant in C2C transactions. Arguably, where licensing requirements for the provision of **transport and accommodation services** are in place, they provide a degree of protection as the licensee must fulfil certain conduct and competence conditions. Such conditions would apply also to many peer suppliers/providers of these services regardless of the scale of their activity. Although sector-specific licensing requirements would apply to peer suppliers operating through online platforms facilitating P2P transactions, some enforcement issues have been reported in practice. Section 5 of this Report examines these application and enforcement challenges.

As highlighted in Table 7 below, most of these specific laws regulating the transport and accommodation sectors either establish licensing requirements that indiscriminately apply to both B2C and C2C transactions, or help to distinguish between 'professional' and 'private' services (see also Section 3.1.2 of this Report). Table 7 also includes legislative initiatives in the pipeline. For example, in **Estonia** since February 2016, a new **draft bill**¹⁵⁸ **aimed at amending the Estonian Public Transport Act (ÜTS)**¹⁵⁹ has been under discussion. This draft bill aims at specifically regulating ride-sharing services (such as those offered by UberPop) by explicitly excluding them from the definition of 'public transport' set out by Section 2 I of the ÜTS. Ride-sharing services would be regulated by Sections 635 ff. of the Estonian Law of Obligations Act¹⁶⁰ (provisions on the letting of work). Consequently, where non-professional drivers carry out the transportation of persons the Community licence foreseen by the ÜTS would not be required. Local or regional sector-specific legislation is not included in Table 7, but it is separately analysed below.

Table 7. Overview of national legislation in the accommodation and transport sectors

Member States	Sector-specific legislation also applicable to C2C transactions		Sector-specific legislation helping to clarify the distinction between B2C and C2C transactions	
	Transport	Accommodation	Transport	Accommodation
AT		√		
CY	√	√		
CZ	√		√	
DE			√	
DK		√		
EE	√		√	
EL	√			√
ES		√		
FI		√		

¹⁵⁶ E.g. Article 6:332 of the Hungarian Civil Code, Article 1722 of the Luxembourgish Civil Code, Article 1546 of the Maltese Civil Code, Article 1559 of the Spanish Civil Code.

¹⁵⁷ E.g. Article 6:335 of the Hungarian Civil Code, Article 1732 of the Luxembourgish Civil Code, Article 1563 of the Spanish Civil Code.

¹⁵⁸ Draft bill No. 188 SE on amending the Public Transport Act, available at: <http://www.riigikogu.ee/tegevus/eelnoud/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/>.

¹⁵⁹ Public Transport Act (Ühistranspordiseadus), RT I, 23.03.2015, 2, available at <https://www.riigiteataja.ee/en/eli/529032016002/consolide>.

¹⁶⁰ Estonian Law of Obligations Act (Võlaõigusseadus), RT I 2001, 81, 487, available at <https://www.riigiteataja.ee/en/eli/528032016012/consolide>.

Table 7. Overview of national legislation in the accommodation and transport sectors

Member States	Sector-specific legislation also applicable to C2C transactions		Sector-specific legislation helping to clarify the distinction between B2C and C2C transactions	
	<i>Transport</i>	<i>Accommodation</i>	<i>Transport</i>	<i>Accommodation</i>
HR	√ ¹⁶¹			
HU	√	√		
IE	√	√ ¹⁶²		
IT		√	√	
LT		√		
LU	√			
LV		√		
MT	√	√		
NL			√	
PT		√		
RO		√		
SE		√		
SI		√		
SK		√		

Belgium, Bulgaria, France, Poland and the United Kingdom are not included in Table 7. In Belgium and in the United Kingdom the relevant sector-specific legislation is local or regional and, therefore, separately analysed below. Regarding Bulgaria, France and Poland, the national-level research carried out shows that the national rules for the transport or accommodation sectors do not apply to transactions concluded between peers, nor do they clarify the distinction between B2C and C2C transactions. For example, in France, a Decree of 26 March 2015 regulates both the characteristics of the cars used by chauffeurs¹⁶³ (length, number of seats, etc.) and the chauffeurs' requirements (e.g. age). However, it neither clarifies its scope of application nor does it set out criteria that help to qualify, for example, Uber drivers as individuals acting in a private capacity or individuals acting in a commercial/professional capacity. This is also the case in Bulgaria where the sector-specific laws that apply to the accommodation sector and the Road Transport Act¹⁶⁴ apply exclusively to hotel services provided by traders and to transportation activities performed by occupation, respectively and do not set out any indicator to distinguish between traders and consumers or professional and non-professional drivers. In Poland, the Tourism Services Act¹⁶⁵ regulates the provision of tourist services provided by entrepreneurs. Natural persons may provide accommodation services, but as an incidental activity (which is not defined in the Tourism Services Act).

Table 7 above shows that **in most Member States the specific legislation applicable to the accommodation sector also covers C2C transactions**. In few Mem-

¹⁶¹ The Ministry of Maritime Affairs, Transport and Infrastructure considers Uber to be an application and, therefore, provisions of the Croatian Road Transport Act (*Zakon o prijevozu u cestovnom prometu*, O.G.", No. 82/13) are not applicable to Uber. Information collected through consultation of the Croatian Ministry of Maritime Affairs, Transport and Infrastructure of the Republic of Croatia on 27 April 2016.

¹⁶² The Irish Tourist Traffic Act (Tourist Traffic Act 1939, as amended by S.I. 360/2013) applies to C2C transactions such as the ones facilitated by Airbnb as long as the lessor wishes to describe the premises as a hotel, guest house, holiday hostel, youth hostel or holiday camp.

¹⁶³ Decree of 26 of March 2015 about the characteristic features of the cars used by chauffeurs (*arrêté du 26 mars 2015 relatif aux caractéristiques des véhicules utilisés par les exploitants de voitures de transport avec chauffeur*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030429911>.

¹⁶⁴ Road Transportation Act (Закон за автомобилните превози), State Gazette 82/17 September 1999

¹⁶⁵ 'Tourism Services Act' (Ustawa z dnia 29 sierpnia 1997 r. o usługach turystycznych), consolidated text Journal of Law of 2016 item 187 as amended.

ber States (Austria, Spain, Finland, and Italy) such legislation does not apply to C2C (or B2C) transactions consisting in rentals for exclusively touristic purposes.¹⁶⁶ Table 7 also shows that while in different Member States the specific legislation applicable to the transport sector applies also to C2C transactions (e.g. Cyprus, Estonia, Luxembourg), **in a few Member States, although the specific legislation applicable to the transport sector does not cover C2C transactions, it helps in distinguishing between B2C and C2C transactions.** For example, in Germany, Section 1 para. 2 no. 1 of the Passenger Transportation Act¹⁶⁷ clarifies the distinction between professional and non-professional drivers stating that the Act exclusively applies to transportation services offered against remuneration. It could be argued therefore that when the ride is free of charge or the requested fee only covers the expenses of the ride, the driver is a non-professional and the Passenger Transportation Act does not apply. The Italian Road Code¹⁶⁸ is not directly applicable to C2C transactions. However, it is relevant in the context of the interpretation of Uber drivers as professional taxi drivers. Article 82(5) states that the transportation of third parties in the meaning of the Code could consist in carrying out different professional activities, notably: rental without chauffeur; chauffeur-rental service; and taxi service. According to Article 84, the rental without chauffeur service occurs when the lessor provides a vehicle to the lessee upon a certain payment. The profit-seeking motive, therefore, could be an indicator of the professional nature of the transport activity carried out. Article 2(5) of the Dutch Act on the transportation of persons 2000¹⁶⁹ sets out that the transportation of persons by car when the driver is paid no more than the costs of the ride and the transport activity is not carried out in the course of a profession or a business, is out of its scope. If the payment exceeds these costs, the activity constitutes 'taxi transportation' (in the meaning of Article 1 of the Act) and the relevant legal requirements would need to be fulfilled. The Czech Road Transport Act¹⁷⁰ applies to both C2C and B2C transactions. According to Section 2(10) the main difference between a 'taxi service' and 'occasional road transport' is whether the service is public or not: while taxi services are public services, occasional road transport services are not. Another example of transport-specific legislation relevant to clarifying the difference between traders and consumers is found in the Estonian draft bill described above.

It is finally noted that the national analysis carried out identified **two national sector-specific laws that clarify the distinction between businesses and consumers in the accommodation sector:**

¹⁶⁶ See: Austrian Tourism Tenancy Code (*Mietrechtsgesetz*, MRG, Government Gazette 520/1981); Spanish Act on Urban Leases (Act 29/1994 of 24 November 1994 of Urban Lease (*Ley 29/1994, de 24 de noviembre, de Arrendamientos Urbanos*) BOE 25 November 1994); Finnish Law on residential leases (Residential Leases Act (481/1995, *laki asuinhuoneiston vuokrauksesta*)); Italian Tourism Code (Legislative Decree 79/2011 'Code of national rules concerning the order and the tourism market, according to Article 14 of Law 246/2005, and transposition of directive 2008/122/EC on contracts of timeshare, contracts related to holiday products of long term, contract of (re)sale and exchange').

¹⁶⁷ German Passenger Transportation Act, 1990 (*Personenbeförderungsgesetz*), Federal Law Gazette I/2016, p. 203.

¹⁶⁸ Legislative Decree 285/1992 'New road code' (*Nuovo codice della strada*), Official journal number 114, 18 May 1992.

¹⁶⁹ Act on the transportation of persons' (*Wet van 6 juli 2000 houdende nieuwe regels omtrent het openbaar vervoer, besloten busvervoer en taxivervoer (Wet personenvervoer 2000)*), Official Journal of the Kingdom of the Netherlands 314/2000, (frequently modified).

¹⁷⁰ Law 111/1994 'Road Transport Act' (*Zákon o silniční dopravě*), Collection of Laws No. 37/1994. The Road Transport Act transposes, amongst others, the following EU legislation: Regulation (EC) No. 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonization of certain social legislation relating to road transport and amending Council Regulations (EEC) No. 3821/85 and (EC) No. 2135/98 and repealing Regulation (EEC) No. 3820/85; Regulation (EC) No. 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC; Regulation (EC) No. 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market; Regulation (EC) No. 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No. 561/2006; Regulation (EU) No. 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No. 2006/2004; Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organization of the working time of persons performing mobile road transport activities.

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- (i) The Greek Law no. 4276/2014 on tourism businesses and tourism infrastructure¹⁷¹ indirectly distinguishes between B2C or C2C transactions establishing that tourist accommodation services provided by private individuals to other consumers cannot exceed **30 days**,
- (ii) In the United Kingdom, the 2015 Deregulation Act introduces a new **temporal threshold of a maximum of 90 nights** per calendar year for short-term rentals in London. The Deregulation Act is further analysed under Section 6.2.1.

Transport sector

In some cases, the national transport-specific legislation does not distinguish between B2C and C2C transactions. For example, in Malta, anyone providing 'passenger transport services' must obtain a licence pursuant to Regulation 5(1) of the Passenger Transport Services Regulations.¹⁷² In principle, this requirement also applies to C2C transactions such as ride sharing or passenger transport activities where a fee is charged.¹⁷³ Similarly, the Czech Road Transport Act¹⁷⁴ applies to 'individuals carrying out road transport services for the benefit of others'. Although it distinguishes between 'taxi services' and 'occasional road transport', a licence is required for both. Consequently, even private individuals transporting people or goods on an occasional basis for a fee will need a licence.

In other Member States, specific transport laws are not applicable to C2C transactions¹⁷⁵ but could be relevant to classify individuals operating through online platforms (such as Uber) as professional or non-professional drivers. This is the case, for example, of the Danish Taxi Act¹⁷⁶ whose requirements – that exclusively apply to individuals acting in a commercial/professional capacity – have been recently interpreted by a decision of the Municipal Court of Copenhagen.¹⁷⁷ The Municipal Court of Copenhagen clarified that the authorisation requirements set out by the Taxi Act¹⁷⁸ for 'taxi services' are applicable to Uber because the transportation services offered through the platform cannot be classified as 'carpooling'. According to the Court, Uber drivers carry out a professional activity consisting in the transportation of passengers against a proper remuneration. Similarly, in Slovakia, Uber drivers are considered as professional drivers and thus, need to obtain the passengers transport licence and driving permit required by the Road Transport Act.¹⁷⁹ In Finland, the Finnish Taxi Act requires licences only for the provision of transportation services 'on a professional basis'. According to a recent case decided at district court level, earnings of EUR 12,250 over

¹⁷¹ Law no. 4276/2014, "Simplification procedures for operating tourism businesses and tourism infrastructure, special interest tourism and other provisions" (*Απλούστευση διαδικασιών λειτουργίας τουριστικών επιχειρήσεων και τουριστικών υποδομών, ειδικές μορφές τουρισμού και άλλες διατάξεις*), Government Gazette A' 155/30.07.2014.

¹⁷² Subsidiary Legislation 499.56, Passenger Transport Services Regulations, Legal Notice 149 of 2009 as last amended by Legal Notice 358 of 2015.

¹⁷³ According to Regulation 2 of the Passenger Transport Service Regulations, 'Passenger transport services' consist in the carriage of passengers using passenger transport vehicles for hire or reward (i.e. against payment or compensation by the person transported or by the transport organiser).

¹⁷⁴ Law 111/1994 'Road Transport Act' (*Zákon o silniční dopravě*), Collection of Laws No. 37/1994.

¹⁷⁵ E.g. the Italian Road Code sets out that only professional drivers - who exercise the transportation of persons in a professional/commercial capacity, need of a specific 'professional licence'. Legislative Decree 285/1992 'New road code' (*Nuovo codice della strada*), Official journal number 114, 18 May 1992.

¹⁷⁶ Restatement Act 107/2013 of 30 January 2013, Taxi Act (*Lovbekendtgørelse om taxikørsel*), Law Gazette A, 6 February 2014.

¹⁷⁷ Judgment Resume "Uber service is illegal taxi service" (*Uberkørsel var ulovlig taxikørsel*, 8th June 2016, available at <https://www.domstol.dk/KobenhavnsByret/nyheder/domsresumeer/Pages/Uberk%C3%B8rselvarulovligtaxik%C3%B8rsel.aspx>).

¹⁷⁸ Restatement Act 107/2013 of 30 January 2013, Taxi Act (*Lovbekendtgørelse om taxikørsel*), Law Gazette A, 6 February 2014.

¹⁷⁹ Lukáš Kosno, Živé.sk 'Uber reviewed also in Slovakia, The Slovak Trade Inspection did not get the list of drivers' (*Uber preverujú už aj na Slovensku, zoznam šoférov inšpekcia nezískala*) (2016) available at <http://www.zive.sk/clanok/113198/uber-preveruju-uz-aj-na-slovensku-zoznam-soferov-soi-neziskala>.

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approximately three and a half months may be considered as an indicator of the professional nature of the activity carried out (see Section 3.1.2 of this Report).¹⁸⁰

Accommodation sector

As in the transport sector, the Country Reports show that some Member States' sector-specific legislation on accommodation services does not distinguish between B2C and C2C transactions. Consequently, the requirements set out therein could apply to C2C contracts concluded through online platforms offering such services (such as Airbnb). This is the case, for instance, of the Cypriot Hotels and Tourist Lodgings Law.¹⁸¹ According to Articles 8 and 21, anyone providing tourism accommodation must obtain a licence issued by the Cyprus Tourism Organisation. The only exception to this requirement occurs when the accommodation is provided to relatives or friends against no payment. Another example is the Hungarian Tourism Accommodation Decree¹⁸² prescribing that any person running or operating a hotel, guesthouse, hostel, holiday premises or any other accommodation must officially register this activity with the notary of the local government (Article 6). However, the law does not require the operator to be a professional. Consequently, the obligation to register applies to all properties that are rented out for a fee, including C2C transactions such as those facilitated by Airbnb, even if the property is a private house.

In other Member States, accommodation regulations exclusively apply to B2C transactions. In Poland, the Polish Tourism Services Act¹⁸³ regulates the provision of tourist services by entrepreneurs. Therefore, accommodation services offered by natural persons would not be subject to the Tourism Services Act. The legislation applicable to such private activities would consist in general civil law provisions on the contract of lease or services contract.

Regional and local regulation

As described below, some EU cities, such as Amsterdam, Berlin¹⁸⁴ and Paris,¹⁸⁵ have adopted special regulations that would be applicable to C2C transactions facilitated by platforms such as Airbnb and Uber. Furthermore, some Member States developed local or regional regulations applicable to touristic accommodation and transport services that are relevant to C2C transactions.

- **Amsterdam: Amsterdam rules on private holiday rentals;¹⁸⁶ Amsterdam rules on B&Bs;¹⁸⁷ Amsterdam rules on short-stay.¹⁸⁸** As described in Table

¹⁸⁰ Case 5500/R/0052018/15, Decision of the District Court of Helsinki in the case of *Yahyobek Adhamov*, Decision of 6 April 2016, appeal pending.

¹⁸¹ Hotels and Tourist Lodgings Law 1969 (περί Ξενοδοχείων και Τουριστικών Καταλυμάτων Νόμος του 1969) (L. 40/1969), E.E., I, 731, 13/6/1969.

¹⁸² Governmental Decree no. 239/2009 on the conditions of operating tourism accommodations and the procedural rules of licensing such accommodations (*a szálláshely-szolgáltatási tevékenység folytatásának részletes feltételeiről és a szálláshely-üzemeltetési engedély kiadásának rendjéről*), Hungarian Official Gazette 148/2009.

¹⁸³ Tourism Services Act' (Ustawa z dnia 29 sierpnia 1997 r. o usługach turystycznych), consolidated text Journal of Law of 2016 item 187 as amended.

¹⁸⁴ Impulse Paper on the business authorisation/licensing requirements imposed both on peer-providers and platforms Barcelona, Berlin and Amsterdam, May 2016.

¹⁸⁵ Impulse Paper no.02 on the business authorisation/licensing requirements imposed on peer-providers and platforms in the accommodation/tourism sector in Paris, Rome, Milan and London, Guido Smorto Full Professor of Comparative Law Dept. Law - University of Palermo, March 2016.

¹⁸⁶ 'May I let my home or home boat when I am on holidays?' (Mag ik mijn woning of woonboot verhuren als ik op vakantie ben?), website of the municipality of Amsterdam, *supra*.

¹⁸⁷ 'Starting or signing out a Bed and Breakfast (B&B)' (Bed and Breakfast (B&B) starten of afmelden), website of the Municipality of Amsterdam, available at <https://www.amsterdam.nl/veelgevraagd/?productid=%7bc8EA978C-5861-4C8D-906E-C805F4D80CD8%7d>.

¹⁸⁸ 'What is the difference between short-stay and holiday rentals', (*Wat is het verschil tussen shortstay en vakantieverhuur?*), website of the Municipality of Amsterdam, available at

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8 below, the city of Amsterdam has special rules on private holiday rentals, B&Bs and short stay accommodation.

Table 8. Amsterdam's special rules on private holiday rentals, B&Bs and short stay

<i>Amsterdam rules on private holiday rentals</i>	<i>Amsterdam rules on B&Bs</i>	<i>Amsterdam rules on short stay</i>
<ul style="list-style-type: none"> ▪ These rules only apply to C2C holiday rental contracts of properties located in Amsterdam, irrespective of whether or not the contract is concluded via an online platform. ▪ The person renting out a property needs to be its main resident and be registered as such in the Basic Register of Persons (<i>Basisregistratie Personen</i> - BRP). ▪ The home (or home boat) may only be rented out occasionally. When a property is rented out for more than two months per year in total, the City will investigate whether the renting activity is carried out professionally. ▪ Renting out part of a home (or a home boat) professionally is permitted under the rules applicable to B&Bs (see next column). ▪ 5% tourist taxes and income taxes are due. ▪ When the home is part of a larger complex, the Owners Associations (<i>Verenigingen van Eigenaren</i>) may have excluded private holiday rentals. Tenants need to consult their rental contract. ▪ The home or home boat must be fireproof and may not be leased to more than four 	<ul style="list-style-type: none"> ▪ These rules only apply when the host is the main resident of the premises (i.e. he lives there too). ▪ B&B activities must be notified to the competent authorities for the relevant city part. ▪ Maximum 40% of total floor area may be used for the B&B. ▪ The host needs to maintain a hotel register mentioning: i. name and address of the guest; ii. date of arrival and departure; iii. the type of ID presented by the guest. ▪ 5% tourist taxes on the room rate are due. ▪ Income taxes are due. 	<ul style="list-style-type: none"> ▪ Short stay requires a licence from the Municipality. ▪ The lessor does not stay in the residence himself. ▪ The residence may be rented out for subsequent periods of minimum seven nights up to maximum six months to several tourists or expats.

Table 8. Amsterdam's special rules on private holiday rentals, B&Bs and short stay

Amsterdam rules on private holiday rentals	Amsterdam rules on B&Bs	Amsterdam rules on short stay
<p>people at a time.</p> <ul style="list-style-type: none"> ▪ Guests must not cause nuisance to the neighbours. The main resident is responsible for the conduct of the guests. The neighbours must be informed in advance and the host needs to leave a phone number so that he can intervene or somebody else can intervene on his behalf where necessary. 		

- **France: Law 366/2014 on the access to housing and renovated urban planning¹⁸⁹**

- This law, also known as 'ALUR Law', formalises the existence of 'short rent' agreements, while imposing a legal framework to regulate them. Law 366/2014 is the result of a series of complaints made by residential communities against individuals renting out their properties for short-term rentals, in most cases through online platforms such as Airbnb and House Trip. ALUR Law provisions have been integrated into the Construction and Housing Code.¹⁹⁰ With regards to short rent agreements in Paris, it is noted that as of 1 October 2015 the City of Paris concluded a special agreement with Airbnb to simplify tourist tax payments. On the basis of the new collaboration between Airbnb and the French Government, Airbnb will directly collect and remit tourist taxes¹⁹¹ from guests on behalf of hosts in Paris (instead of requiring hosts to collect the tax from each guest individually and to remit it to the City Hall).
- Law 366/2014 targets furnished secondary residences rented out occasionally for holiday use (Article L. 631-7-1 A, Construction and Housing Code). People renting out or exchanging their main residence for short seasonal rental periods are excluded from its scope. The law requires the lessor who rents out his main residence to obtain two different types of permits: one from the City Hall to change the property's use from residential to commercial; the second one from the other owners of the apartment block or from the condominium. The penalty for not obtaining these permits is up to EUR 25,000 (Article L. 651-2 of the Construction and Housing Code). Alternatively, the City Hall may decide to grant a permit for a whole block of apartments, avoiding each individual owner having to request a separate permit.

¹⁸⁹ ALUR Law 2014-366 of 24 March 2014 on access to housing and renovated urban planning (*Loi n° 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové*) last amended 1 January 2016, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028772256&dateTexte=20160602>.

¹⁹⁰ Construction and Housing Code (*Code de la construction et de l'habitation*) available at <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074096&dateTexte=20160720>.

¹⁹¹ Such tourist tax amounts to EUR 0.83 per person per night and it is charged in Paris for accommodations included in the category 'meublés touristiques non classés'.

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- The law applies in large cities (more than 200,000 inhabitants) and in the suburbs of Île-de-France, as well as in 28 cities in 'tension zones' (i.e. continuous built-up areas with more than 50,000 people, characterised by a significant imbalance between the supply and the demand of housing - which provokes important difficulties in terms of access to housing in France).
- **Germany: Act for prohibition of misuse of living space¹⁹²**
 - Some States/cities in Germany (e.g. Berlin, Stuttgart, etc.) have passed acts concerning the misuse of living space. Misuse in the meaning of these regulations is using living space for purposes other than residing in them. One of such purposes might consist in regularly renting out the living space for short stays against remuneration. The Act of Berlin¹⁹³ defines 'regular' as the repeated lease of living space, determined in days or weeks.
 - Using living space for regular short-term renting against remuneration requires a permit.¹⁹⁴ Therefore, private individuals wishing to regularly rent out their living space through platforms such as Airbnb must apply for a permit. Obtaining the permit, however, usually entails certain costs. In Berlin, for example, a fee of EUR 225 applies to change the use of residential spaces.¹⁹⁵
- **Italy: Regional Regulation 8/2015 of Lazio;¹⁹⁶ Regional Law 27/2015 of Lombardia;¹⁹⁷ Regional Law 42/2000 of Tuscany¹⁹⁸**

According to Article 117 of the Italian Constitution,¹⁹⁹ the so called (regional) 'residual' legislation encompasses, *inter alia*, the 'enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities'. Regions, therefore, are empowered to legislate in this sector (tourism) with no need of national laws setting general principles (Article 117(4)). Furthermore, according to the principle of subsidiarity (Article 118(1)), administrative functions are also attributed to Municipalities that can adopt their own regulation to control tourist rentals (e.g. implementing tourist tax, or requiring lessors to register in special municipal registers for tourist locations). Some Italian Regions have adopted laws that regulate hotel and non-hotel tourist accommodation. For example, according to new **Regional Regulation 8/2015 of Lazio**,²⁰⁰ non-professional individuals can rent out to tourists, on an occasional basis, a maximum of two apartments. Article 26 of **Regional Law 27/2015 of Lombardia**²⁰¹ sets out that houses and holiday apartments can

¹⁹² German Act for prohibition of misuse of living space, 2013 (*Gesetz über das Verbot der Zweckentfremdung von Wohnraum*), Law and Ordinance Gazette Berlin p. 626, 2013.

¹⁹³ Section 2 para. 1 no. 1 of the Act for prohibition of misuse of living space of Berlin. Similar regulations from other German *Länder* are Section 3 para 1 no. 3 of the Statute on the Misuse of Living Space in the State capital Stuttgart (*Satzung über das Verbot der Zweckentfremdung von Wohnraum in der Landeshauptstadt Stuttgart*) and Section 9 para. 2 no. 2 of the Act on Protecting the Living Space in Hamburg (*Gesetz über den Schutz und die Erhaltung von Wohnraum*).

¹⁹⁴ German Act for prohibition of misuse of living space, 2013 (*Gesetz über das Verbot der Zweckentfremdung von Wohnraum*), Law and Ordinance Gazette Berlin p. 626, 2013.

¹⁹⁵ BerlinOnline Stadtportal GmbH & Co. KG, Change of use of the housing space – notice and permission (*Zweckentfremdung von Wohnraum – Anzeige und Genehmigung*) (2016) available at <https://service.berlin.de/dienstleistung/326217/>.

¹⁹⁶ Regional Regulation 8/2015 of Lazio 'New discipline on non-hotel accommodation facilities' (*Nuova disciplina delle strutture ricettive extra-alberghiere*), Regional Official Gazette number 73, 10 September 2015.

¹⁹⁷ Regional Law 27/2015 of Lombardy, 16 September 2015, *supra*.

¹⁹⁸ Regional Law 42/2000 of Tuscany, 23 March 2000, *supra*.

¹⁹⁹ Constitution of the Republic of Italy 'Constitution of the Italian Republic as last amended by constitutional law 1/2012 introducing the principle of the balanced budget' (*Introduzione del principio del pareggio di bilancio nella Carta costituzionale*), Official journal number 95, 23 April 2012.

²⁰⁰ Regional Regulation 8/2015 of Lazio, 10 September 2015, *supra*.

²⁰¹ Regional Law 27/2015 of Lombardy, 16 September 2015, *supra*.

be rented out both professionally and non-professionally. In the last case the activity must be carried out occasionally and no more than three units can be rented out (Article 26(2)(b)). Another requirement, which, according to Article 38(1) applies to both hotel accommodation facilities and non-hotel accommodation facilities is the communication of the activity carried out to the Municipality. Consequently, non-hotel accommodation facilities are also subject to a local tax for tourism (*tassa di soggiorno*) that is due where the rented apartment is in a city included in regional lists developed by Municipalities.²⁰² Regional Law 27/2015 has been celebrated as the first Regional Italian law regulating the phenomenon of 'home sharing'.²⁰³ As highlighted in Section 3.1.2.3, according to Article 61 of **Regional Law 42/2000 of Tuscany**,²⁰⁴ individuals who occasionally rent out the properties where they reside do not need to communicate to the Province the rental price and the description of the apartment. Regional thresholds distinguishing between individuals acting in a private capacity and individuals acting in a professional/commercial capacity are described in Section 3.1.2 of this Report.

- **Spain: Catalan Decree on tourist accommodation and apartments for tourists' use;**²⁰⁵ **Madrid Decree on touristic apartments and the apartments for the use of tourists.**²⁰⁶

As described in Table 9 below, certain autonomous Spanish communities have adopted Decrees on tourist accommodation (e.g. the Region of Catalonia and the City of Madrid). Although they do not directly distinguish between B2C and C2C, they establish thresholds concerning the **regularity** with which the service is provided (see Section 3.1.2 of this Report).

Table 9. Local Spanish Decrees on tourist accommodation	
<i>Catalan Decree on tourist accommodation and apartments for tourists' use</i>	<i>Madrid Decree on touristic apartments and the apartments for the use of tourists</i>
<p>According to the Catalan Decree on tourist accommodation and apartments for tourists' use, an apartment is rented out for tourists' use when the renting activity is carried out 'professionally' and 'habitually' and against the payment of a price.</p> <p>If these criteria are fulfilled the lessor must comply with the following obligations:</p>	<p>Articles 2 and 3 of the recent legislation on touristic apartments in Madrid provide definition of apartment rented out for tourists' use similar to the one existing in Catalonia: touristic apartments are those 'professionally' and 'habitually' rented out in exchange of a price. The main obligations set out by this Decree are the registration of the property as touristic apartment in the Register of Touristic Companies of the General Directorate of Tourism and that the apart-</p>

²⁰² Article 4, Decree 23/2011 of 14 March 2011, n. 23.

²⁰³ 'Lombardia, la prima regione con una legge sull'home sharing', linkiesta.it website available at <http://www.linkiesta.it/article/2015/09/22/lombardia-la-prima-regione-con-una-legge-sullhome-sharing/27498/>; 'Airbnb in Lombardia: la prima legge sull'home sharing', paneessharing.it webpage available at <http://www.paneessharing.it/viaggiare-a-costo-zero/airbnb-in-lombardia-la-prima-legge-sullhome-sharing/>.

²⁰⁴ Regional Law 42/2000, Tuscany, 23 March 2000, 'Compendium of the regional laws in the touristic sector' (*Testo unico delle Leggi Regionali in materia di turismo*), Regional official gazette (*Bollettino ufficiale della Regione Toscana*), 03 April 2000, available at <http://raccoltanormativa.consiglio.regione.toscana.it/articolo?urndoc=urn:nir:regione.toscana:legge:2000-03-23:42>, as last amended by Regional law 25/2016, Tuscany, 18 March 2016, 'Reorganising provincial powers in the touristic sector' (*Riordino delle funzioni provinciali in materia di turismo in attuazione della l.r. 22/2015. Modifiche alla l.r. 42/2000 e alla l.r. 22/2015*), Regional official gazette (*Bollettino ufficiale della Regione Toscana*), 23 March 2016, available at http://www.toscanapromozione.it/magazine/wp-content/uploads/2016/04/legge_2016_25_v6.pdf.

²⁰⁵ Decree 159/2012 of 20 November 2012 on tourist accommodation and apartments for tourists' use (*Decreto 159/2012, de 20 de noviembre, de establecimientos de alojamiento turístico y de viviendas de uso turístico*) DOGC number 6268, 5 December 2012.

²⁰⁶ Decree 79/2010, of 10 July 2014 which regulated the touristic apartments and the apartments for touristic use of Madrid (*Decreto 79/2014, de 10 de julio que regula los apartamentos turísticos y las viviendas de uso turístico de la Comunidad de Madrid*) Boletín Oficial de la Comunidad de Madrid 31 July 2014.

Table 9. Local Spanish Decrees on tourist accommodation

<i>Catalan Decree on tourist accommodation and apartments for tourists' use</i>	<i>Madrid Decree on touristic apartments and the apartments for the use of tourists</i>
<ul style="list-style-type: none"> • Obtaining a certificate of habitability; • Adequately furnishing the apartment; • Providing the users and neighbours with a telephone number to register and resolve any inquiry or incident; • Communicating to the competent authority the respective start of operation and registering the property in the Catalan Tourism Registry; • Providing official complaint forms to tenants. 	<p>ment must have a minimum amount of furniture.</p>

- **Belgium: Ordinance 8 May 2014²⁰⁷ and Government Decree of 24 March²⁰⁸ Decree of 18 December 2003;²⁰⁹ Decree of 27 January 2016²¹⁰**

Table 10 below shows that in Belgium the three regions of Brussels Capital, Wallonia and Flanders have different sector-specific regulations both in relation to touristic accommodation and transport services.

Table 10. Belgian regional regulations in the tourist accommodation and transport sectors

	Brussels Capital	Wallonia	Flanders
Tourist Accommodation	<p>Ordinance of 8 May 2014 and Government Decree of 24 March extend B2C regulation to private tourist accommodation, rented via platforms such as Airbnb and 9Flats.²¹¹ Article 3 of the Ordinance defines 'tourist accommo-</p>	<p>Decree of 18 December 2003 does not regulate the rental activity in itself except for the conditions on fire safety that apply to any tourism accommodation establishment regulated by the decree. It defines 'tourist</p>	<p>Decree of 27 January 2016 does not distinguish between B2C and C2C transactions. It has replaced the formality of prior authorisation required from tourist operators by a simple notification to the Flemish Government. According to Article 11 of the Decree, any in-</p>

²⁰⁷ Ordinance of 8 May 2014 'on tourism accommodation' (*Ordonnance relative à l'hébergement touristique*), Government Gazette 2014-05-08/50.

²⁰⁸ Decree of 24 March 2016 'implementing the Ordinance of 8 May 2014 on tourist accommodation' (*Arrêté du Gouvernement de la Région de Bruxelles-Capitale portant exécution de l'ordonnance du 8 mai 2014 relative à l'hébergement touristique*) Government Gazette 2016-03-24/16.

²⁰⁹ Decree 19909/32 of 18 December 2003 on 'tourism accommodation establishment' (*Décret relatif aux établissements d'hébergement touristique*), Government Gazette C-2004/200662.

²¹⁰ Decree 20160205/20 of 5 February 2016 on 'tourism accommodation' (*Decreet houdende het toeristische logies*), Government Gazette C – 2016/35230. This decree will enter in force in 2017.

²¹¹ 'Brussels Regulation on tourism accommodation' (*Réglementation bruxelloise des hébergements touristiques chez l'habitat*), Portail du droit en Belgique website, available at: http://www.droitbelge.be/news_detail.asp?id=839.

Table 10. Belgian regional regulations in the tourist accommodation and transport sectors

	Brussels Capital	Wallonia	Flanders
	<p>dation' as 'any accommodation offered for one or more nights, in return for payment, either regularly or occasionally, to tourists'. The Ordinance establishes seven categories of tourist accommodation for which specific rules apply: hotel, aparthotel, tourism residence, reception centre for social tourism, furnished dwelling, camping sites and homestay accommodation.</p> <p>Article 5 establishes that each category of tourist accommodation is subject to prior declaration and registration. Within 12 months from registration a public officer will carry out an inspection to verify that the accommodation complies with the requirements of health, safety and use.</p>	<p>accommodation establishment' as 'any facility providing housing or occupation of a touristic camping site to one or more tourists, even occasionally' (Article 2.3^o).</p> <p>The operator of a tourist accommodation must have a prior authorisation and hold a fire safety certificate (Articles 73-98).</p>	<p>termediary of touristic services²¹² has the duty to provide access to information about their users to the federal and local police and the competent authorities.²¹³</p>
Passenger Transport	<p>Ordinance of 27 April 1995 does not distinguish between B2C and C2C transactions. Therefore, it can apply to collaborative platforms offering passenger transport services where a fee is charged.</p>	<p>Decree of 18 October 2007 does not distinguish between B2C and C2C transactions and distinguishes between 'collective taxi services' and 'transport services with a public-service interest'. Both services require</p>	<p>Decree of 20 April 2001 does not distinguish between B2C and C2C transactions and distinguishes between four categories of services: car rental services with driver, transport for its own account, regular transport services and</p>

²¹² According to Article 2, 5^o, the intermediary is 'any natural or legal person who, against remuneration, intervenes to make a tourist accommodation available on the tourist market, to promote a tourist accommodation or to offer services enabling operators and tourists to contact each other directly.'

²¹³ Decree of 5 February 2016 on 'tourism accommodation', Article 11.

Table 10. Belgian regional regulations in the tourist accommodation and transport sectors

	Brussels Capital	Wallonia	Flanders
	Although it distinguishes between 'taxi services' and 'car rental services with driver', both services are subject to a prior authorisation from the government to operate on the territory of the Region of Brussels-Capital. ²¹⁴	a licence issued by the Municipal College. Services provided through online platforms would fall under the category of 'car rental services with driver'.	particular forms of regular transport services. ²¹⁵ All of these services are subject to authorisation of the Municipal College.

3.3 Legislation applicable to online platforms facilitating P2P transactions

Before the rise of the digital age, the traditional business model in the trading market was defined from a two-sided perspective: transactions took place between businesses and consumers.²¹⁶ In new sharing economy and online P2P markets, the model has transited from a bipolar to a tripartite one.²¹⁷ Three legal relationships compose the P2P transaction concluded via an online platform: the relationship between the peers (for applicable legislation see Section 3.2 of this Report); the relationship between the peer supplier and the platform; and, finally, the relationship between the peer consumer and the platform. This Section analyses the national rules relevant to the role and responsibilities of platforms towards peers and related potential issues for peer consumers and suppliers.

3.3.1 Overview of main national laws applicable to online platforms facilitating P2P transactions

Among the national rules applicable to online platforms facilitating P2P transactions there are the provisions transposing the **Electronic Commerce Directive (ECD)**²¹⁸ into national law. The ECD does not regulate platforms comprehensively, nevertheless, certain provisions are of particular relevance to this Study: Article 5 (general information requirements for service providers); Article 6 (information to be provided in commercial communications); and Articles 14 and 15 (laying down, respectively, the liability exemption described under Section 3.3.2 and the prohibition to impose on service providers monitoring obligations with regards to information stored or transmitted).

In most Member States the ECD has been transposed through an Electronic Commerce, E-Commerce or Information Society Services Act,²¹⁹ while, in some instances,

²¹⁴ Ordinance 'on Passenger Transport Service', Articles 3 and 16.

²¹⁵ Decree 'on Passenger Transport Service', Article 2.

²¹⁶ Goudin, P., 2016, 'The cost of non-Europe in the sharing economy', European Parliament Research Service, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU\(2016\)558777_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU(2016)558777_EN.pdf), p. 7; Busch, C., Schulte-Nölte, H., Wiewiórowska-Domagalska, a., and Zoll, F., 2016, 'The rise of the platform economy: a new challenge for EU consumer law?', Journal of European Consumer and Market Law, Issue 1/2016, p. 3.

²¹⁷ See for example, Todolí-Signes, A., 2016, 'The end of the subordinate worker: sharing economy, on-demand economy, crowdsourcing, Uber Economy and other ways of outsourcing', Universidad de Valencia; and Busch, C., Schulte-Nölte, H., Wiewiórowska-Domagalska, a., and Zoll, F., 2016, 'The rise of the platform economy: a new challenge for EU consumer law?', Journal of European Consumer and Market Law, Issue 1/2016, p. 4.

²¹⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

²¹⁹ E.g. Austria, Bulgaria, Croatia, Czech Republic, Denmark, Estonia (save for Articles 9-11 of the Directive), Finland, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain, United Kingdom.

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the Civil Code also includes provisions on distance contracts or contracts concluded through electronic means that would also apply to electronic transactions generally.²²⁰ It is also worth noting that in some Member States several instruments were used to transpose the ECD.²²¹

These national provisions apply to **cross-border transactions** and to **electronic transactions** generally (i.e. to the relationship between the peer user and the platform facilitating the transaction - although certain requirements may be also relevant to the relationship between the peer users). For example, in Greece, Presidential Decree (PD) 131/2003,²²² transposing the ECD into Greek law, applies to all information society services offered by an information service provider to any recipient of such service. 'Information society services' are defined in Article 1(a): they include any service normally provided for remuneration, by means of electronic equipment, at a distance, and at the individual request of a recipient of a service. Therefore, not only the relationship between the platform facilitating the transaction and the peer supplier or peer consumer, but also the relationship between the peer supplier and peer consumer (if the service is provided at a distance, by electronic means)²²³ constitutes such services.

In addition, the national provisions transposing the requirements of EU consumer law Directives such as the **UCPD**, the **UCTD**, and the **CRD** are also relevant wherever a platform qualifies as a 'trader' and engages in B2C commercial activities. A platform qualifying as a 'trader' must always comply with national rules transposing EU consumer and marketing law in so far as its own commercial practices are concerned. In such situations, under the UCPD, the platform is required to act with a degree of **professional diligence**, commensurate to its specific field of activity and not to mislead its users/consumers by either action or omission.²²⁴

The analysis carried out in the 28 Member States highlighted that, apart from the legislation transposing relevant EU Directives into national law, no Member State has specific legislation applicable to online platforms facilitating P2P transactions. France and Italy, however, could be considered as an exception. In France, on 19 January 2016, the **draft law for a Digital Republic** was presented in the French National Assembly.²²⁵ Although this draft law²²⁶ does not specifically seek to regulate the sharing economy, Article 23 is of particular interest as it imposes certain new obligations on the operators of online platforms whose activity exceeds a certain number of connections defined by decree (Article 23(I)). The most relevant points of the French draft law for the purposes of this Study are described in the box below.

²²⁰ E.g. Austria, Czech Republic, Germany, Hungary, Slovenia, Spain.

²²¹ E.g. Latvia uses five relevant legal instruments for this purpose: the Law on Information Society Services; the Law on the Prohibition of Unfair Commercial Practices; the Personal Data Protection Law; the Consumer Rights Protection Law; and the Law on Electronic Documents. In Sweden, the national legislation applicable to online platforms facilitating P2P transactions consists of: the Electronic Commerce Act, the Distance Contracts Act and the Electronic Communications Act. Likewise, Slovakia has two main instruments applicable to online platforms facilitating P2P transactions: the Electronic Commerce Act (ECA) and the Act on State Control of the Internal Market in the Consumer Protection Issues (Internal Market Control Act).

²²² Presidential Decree no., 131/2003, "Adjustment to Directive 2000/31 of the European Parliament and Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')" (*Προσαρμογή στην Οδηγία 2000/31 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου σχετικά με ορισμένες νομικές πτυχές των υπηρεσιών της κοινωνίας της πληροφορίας, ιδίως του ηλεκτρονικού εμπορίου, στην εσωτερική αγορά. (Οδηγία για το ηλεκτρονικό εμπόριο)*, Government Gazette A' 116/16.05.2003.

²²³ Otherwise the relationship between the peer consumer and the peer supplier is regulated by the articles and contracts of the Greek Civil Code (such as sale, lease of things, contract for work etc.).

²²⁴ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 123.

²²⁵ Parliamentary proceedings of the Draft Law for a Digital Republic, available at <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000031589829&type=general&typeLoi=proj&legislature=14>.

²²⁶ *Projet de loi pour une République numérique, texte élaboré par la Commission Mixte Paritaire*, available at <http://www.senat.fr/leg/pj15-744.pdf>.

French draft law for a Digital Republic (*Projet de loi pour une République numérique*)

- According to Article 23(I)(1), platforms should draft and disseminate codes of good practice to comply with their **obligations of clarity, transparency and loyalty**. For such purpose, they should define the indicators on the basis of which compliance with such obligations can be assessed (Article 23(I)(2)) and periodically release to the public the results of these assessments (Article 23(I)(3)). According to Article 23(II), the information referred to in Article 23(I)(1) and (I)(3) must be reported to the competent administrative authority which may: i. investigate it; ii. publish the list of platforms that do not comply with their obligations of clarity, transparency and loyalty; iii. collect from online platforms the data necessary to assess their compliance with the obligations set out by Article 23(I)(1) where the information published by the platform did not duly inform the consumers on such assessment.
- Article 23 *quater* of the draft law could also be particularly relevant for touristic accommodation service activities carried out by individuals acting in a private capacity through online platforms. Articles 23 *quater* A, c), II imposes on online platforms the obligation to check: i. whether the (furnished) apartment that the peer supplier wants to rent out through the platform complies with the registration requirements set out by the Tourism Code; ii. that the apartment is not rented out for more than 120 days per year (where the property is the main residence of the lessor).
- In addition, Article 23 *quater* b) allows large cities (of more than 200,000 inhabitants), as well as cities in 'tension zones' (i.e. continuous built-up areas with more than 50,000 people, characterised by a significant imbalance between the supply and the demand of housing - which provokes important difficulties in terms of access to housing in France) to impose the obligation to register furnished apartments rented out for short periods.

As regards Italy, on 27 January 2016 the Italian Innovation Technology Parliamentary Intergroup deposited in the Parliament a first draft of Legislative Proposal 3564/2016 (the so-called '**Sharing Economy Act**')²²⁷ aimed at regulating sharing economy digital platforms by guaranteeing the transparency of their activities, fair competition and consumer protection, as well as boosting fiscal equality, the sharing economy market and the use of innovation technologies.²²⁸ Should Legislative Proposal 3564/2016 become Law, a new legal instrument specifically targeting sharing economy digital platforms would exist in Italy. The Sharing Economy Act does not distinguish between B2C and C2C transactions; it would mainly focus on digital platforms facilitating C2C transactions.²²⁹ Furthermore, according to Article 2(1) of Legislative Proposal 3564/2016 the following platforms would be excluded from its scope: i. those acting as mere intermediaries between professional operators included in the businesses register (e.g. online platforms operating as intermediaries for freelance jobs); ii. those facilitating the exchange of goods which do not belong to the platform's users (e.g. in case of car sharing or bike sharing); iii. those whose users are employees of the platform itself. The main points of the Legislative Proposal are explained in the box below. The role of the Italian Antitrust Authority (AGCM) and related challenges, as well as other aspects

²²⁷ Legislative Proposal 3564/2016 'Discipline of digital platforms for sharing goods and services and provisions to boost the sharing economy' (*Disciplina delle piattaforme digitali per la condivisione di beni e servizi e disposizioni per la promozione dell'economia della condivisione*), 27 January 2016, available at http://www.makingspeechstalk.com/ch/comment_sea/?id_speech=45.

²²⁸ Article 1(2), Legislative Proposal 3564/2016.

²²⁹ 'The Legislative Proposal on sharing economy explained by who drafted it' (*La proposta di legge sulla sharing economy spiegata da chi l'ha scritta*), Econopoly website, available at M:\Projects\1816.15 Consumer issues in the sharing economy\Background docs\Italy\La proposta di legge sulla sharing economy spiegata da chi l'ha scritta - ilSole24ORE.mht.

of this legal initiative are further analysed in Sections 5 and 6 of this Report, respectively.

Italian Sharing Economy Act (Legislative Proposal 3564/2016)

- Article 2 of the Legislative Proposal defines the sharing economy as 'the economy generated by the optimised and shared allocation of goods and services as well as spatial and temporal resources through digital platforms'.²³⁰
- Article 3 identifies the AGCM²³¹ as the official body in charge of regulating and monitoring the activities of sharing economy platforms. It sets upon it the obligation to communicate on a yearly basis the results of its monitoring to Parliament and gives it authority to impose on the platform an obligation to offer an insurance or to ask its users to stipulate an insurance policy when concluding the contract.
- Under Article 3, the National Register of the sharing economy digital platforms (*Registro elettronico nazionale delle piattaforme digitali dell'economia della condivisione*) is created within the AGCM.
- Platforms must adopt a policy document in order to register. According to Article 4, the policy document should be communicated to and explicitly signed by the users of the platform. The policy document must include:
 - All the conditions established by the contract between the platform and its users and the conditions that the policy document cannot impose on the platform and its users.
 - The pecuniary transactions carried out by the users through the platform should be exclusively carried out by electronic payment systems.
 - The registration modalities suitable to avoid fake/misleading profiles. To do so, users are required to submit, in addition to personal data, their fiscal code/taxpayer number (*codice fiscale*)
- Article 5(1) establishes that income earned by users operating through digital platforms must be classified as 'income stemming from non-professional sharing economy activities' and separately indicated in the individual income tax return. Income produced by means of digital platforms and up to the threshold of EUR 10,000 must be levied at 10%. Income higher than EUR 10,000 will be cumulated with other income from employed or self-employed activities. According to Article 5(2), digital platform operators behave as withholding agents (*sostituto d'imposta*) for their own users. For this purpose, platform operators having their seat or residence abroad must equip themselves with a permanent organisation in Italy. Finally, Article 5(3) sets out that platform operators must communicate to the Revenue Agency data concerning the economic transactions concluded through the digital platforms even though the platform's users do not earn any income through activities on the platform.
- According to Article 7(3), digital platforms should guarantee to their users:
 - a) an online tool aimed at verifying, modifying, deleting and selecting data stored by the user on the platform;
 - b) the 'right to be forgotten', i.e. the possibility to permanently delete all data which the user allowed the platform to store.
- Article 10 sets out the sanctions that the AGCM can apply where the provisions of the Sharing Economy Act are not respected.

²³⁰ This limited definition of 'sharing economy' has been highly criticised and is currently subject to national and international debate. See for example: The Nation 'What the Sharing Economy Takes' available at <http://www.thenation.com/article/what-sharing-economy-takes/>.

²³¹ AGCM (*Autorità garante della concorrenza e del mercato*) website available at <http://www.agcm.it>.

3.3.2 Specific issues in platform-peer transactions as identified in the national context

The specific issues that have been identified in the national context with regards to the relationship between platforms and their users are reported below. They mainly concern information requirements, requirements relating to user reviews, the responsibility of the platform and its obligations towards the peers, and possible redress mechanisms.

Information requirements

According to the national rules transposing Articles 5 and 10 of the ECD, the information service provider (i.e. the platform) is required to render easily, directly and permanently accessible to the recipients of the service and competent authorities, the **general information** set out by Article 5 of the ECD (e.g. the name of the information service provider; the geographic address at which the service provider is established; the details of the information service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; etc.), as well as the **additional information obligations** on the process to reach and conclude an electronic agreement set out by Article 10. For example, under the Polish Provision of Services by Electronic Means Act²³² (which transposes the ECD into national law), the information service provider must ensure that the recipient of the service has access to current data regarding: 1) specific risks associated with the use of services provided by electronic means; 2) the function and purpose of the software or data, which is not part of the service content but is introduced to the communication system used by the recipient, by the information service provider. It is interesting to note that in Italy, according to Article 4(5) of Legislative Proposal 3564/2016 (described in Section 3.3.1 above), the policy document (which platforms must communicate to the AGCM for registration) must inform the platform's users of **possible obligatory insurances required to carry out certain activities** through the platform, as well as of insurances which have already been stipulated by the platform operator or which may be stipulated by the platform's users at a subsidised rate (on the basis of special agreements between the platform operator and the insurance company).

The provisions transposing Article 6 of the ECD into national law set out that **commercial communications**: (a) must be clearly identifiable as such; (b) the natural or legal person on whose behalf the commercial communication is made must be clearly identifiable; (c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the information service provider is established, must be clearly identifiable as such, and the conditions which are to be met to qualify for them must be easily accessible and be presented clearly and unambiguously; and (d) promotional competitions or games, where permitted in the Member State where the information service provider is established, must be clearly identifiable as such, and the conditions for participation must be easily accessible and be presented clearly and unambiguously.

As specified above under Sections 2 and 3.3.1, Article 2(h) of the UCPD describes the notion of 'professional diligence' as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers'.²³³ This notion is not new to Member States' legislation that already encompassed general principles (such the **good faith clause** usually provided by civil law rules²³⁴ - see Section 3.2.1) exist-

²³² Provision of Services by Electronic Means Act (*Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną*), consolidated text Journal of Law of 2013 item 1422 as amended.

²³³ Article 2(h) UCPD.

²³⁴ E.g. Article 1134 of the Belgian Civil Code, Articles 12 and 63 of the Bulgarian Obligations and Contracts Act; Section 242 of the German Civil Code, Section 6 of the Estonian Law of Obligations Act, Article 2888 of the Greek Civil Code, Article

ing before the adoption of the UCPD.²³⁵ Pursuant to Article 5(2) of the UCPD, online platforms qualifying as 'traders' in the meaning of Article 2(b) of the UCPD should comply with such **professional diligence duty** when engaging in commercial practices towards consumers. Such duty, however, does not entail a general monitoring obligation of the platforms towards their users (which would be contrary to Article 15 of the ECD - see below), but the adoption of a series of **appropriate measures aimed at clarifying to their users with whom they are concluding contracts on the platform itself**. According to the UCPD Guidance, such measures, for example could imply:²³⁶

- Enabling users who operate on the platform in a professional/commercial capacity to clearly indicate that they act as traders;
- Clarifying to all users that EU consumer protection and marketing law exclusively applies when they conclude contracts with traders;
- Enabling users acting as traders to present information in compliance with EU marketing and consumer law.

Consequently, indicating whether platforms' users are acting as traders or consumers should be a **pre-contractual information requirement** and, where online platforms do not comply with it, this would represent a breach of EU consumer law. However, on the basis of information collected through the Country Reports, it would seem that most platforms operating at national level do not specifically comply with this requirement. An exception was found with respect to the Finnish (sale and (re)sale) platforms Huuto.net and Myyjaosta.com that respectively require users publishing ads on the platform to clearly state whether or not they are acting in the course of a business,²³⁷ and to identify themselves as traders or private persons when registering with the platform.²³⁸ The Estonian (sale and (re)sale) platform Buduaar also asks its users to identify themselves either as peers selling their personal items on the site or as traders offering items professionally.²³⁹

Requirements relating to user reviews

In most Member States, the legislation applicable to online platforms facilitating P2P transactions does not impose express obligations for the platform to take action against fake or misleading user reviews and/or to not omit negative reviews.²⁴⁰ However, national rules transposing Article 14(1)(a) and (b) of the ECD would apply and, consequently, the information service provider will be held responsible if, knowing of the unlawfulness of the user review, did not take the necessary steps to delete or block access to this review.

Furthermore, if the online platform provides information society services to consumers, the relationship between the platform and its users will be generally qualified as B2C. Consequently, the national legislation transposing **Articles 5, 6 and 7 of the UCPD** will apply. On the basis of these provisions, the platform is required to provide **truthful information on the main characteristics of the good or service, as**

1280 of the Spanish Civil Code, Section 33 of the Finish Contract Act, Article 2274 of the French Civil Code, Article 4 of the Croatian Civil Obligations Act, Article 1 :3 of the Hungarian Civil Code, Article 1175 of the Italian Civil Code, Article 6158 of the Lithuanian Civil Code, Article 1134 of the Luxembourgish Civil Code, Article 993 of the Maltese Civil Code, Article 6248 of the Dutch Civil Code, Article 227 of the Portuguese Civil Code, Article 14 of the Romanian Civil Code.

²³⁵ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 54.

²³⁶ *Ibid.*, p. 123.

²³⁷ 'Terms and Conditions', Huuto.net website available at <https://www.huuto.net/rekisteroidy>.

²³⁸ 'Terms and conditions', MyyJaOsta.com website available at: <http://www.myyjaosta.com/main/user-agreement>.

²³⁹ The rules of B-Turg, p. 3.1. ff., available at: <http://buduaar.ee/turg/reegliid/>.

²⁴⁰ E.g. Belgium, Bulgaria, Cyprus, Germany, Greece, Italy, Lithuania, Luxembourg, Poland, Portugal, Sweden.

well as to not mislead its users as to the origin of the reviews or, in case of a sales contract, to the nature, attributes or rights of the entrepreneur/seller.

It is worth noting that in France other requirements relating to user reviews could result from the optional use of the standardisation model NF Z74-501²⁴¹ for the processing of online consumer reviews, as described in the box below.²⁴²

French standardisation model NF Z74-501

In 2013, the French Association for Standardisation (AFNOR) set out the optional standardisation model NF Z74-501 for the processing of online consumer reviews. The model NF Z74-501 is the first standard in the world that aims to treat consumers' opinions online. By implementing this standard, a company ensures the reliability and transparency of the collection, management and publication of online reviews, **avoiding the phenomenon of 'false reviews'**.

When a company adopts this standard it commits to comply with the following principles: i. the author of the review must be identifiable and contactable; ii. the non-purchasable character of the review; iii. the indication of the grounds for refusal of reviews in the general terms of use and conditions of the site; iv. the time-efficiency of the management of the reviews; v. the publication of the reviews in chronological order; vi. the publication of all the managed reviews.²⁴³

In addition, many platforms establish the requirements for user reviews and the conditions under which users might be banned. For example, certain Dutch platforms (such as the sharing of goods platform KrijgdeKleertjes and the platform KonnektID facilitating the exchange of personal services provided by non-professionals) explicitly prohibit posting false, misleading or incomplete information, as well as discriminatory or otherwise offending or illegal content. They also provide that any content (including reviews) infringing these rules may be removed.²⁴⁴ Similarly, the Maltese (sale and (re)sale) platform Second Hand can refuse or delete content that is inappropriate, illegal, fraudulent, false or in breach of the Terms and Conditions and can restrict a user's usage of the site temporarily or permanently.²⁴⁵ The Swedish (sale and (re)sale) platform Blocket goes beyond merely establishing requirements for user reviews or take-down mechanisms by revising all its users' advertisements before publishing them on the site and claiming the platform's right to refuse to publish those that are not in line with the platform's policies.²⁴⁶ The user review mechanism used by the Hungarian platform Vatera calls for trustworthy and truthful reviews and reserves to the platform itself the right to delete the profile of users who uploaded offending or false reviews. The platform moderates, modifies or removes reviews and comments containing personal data or that are aggressive, threatening, vulgar, or that advertise something. The platform also reserves the right to remove reviews and comments coming from consumers who did not actually enter into a transaction with the particular peer sup-

²⁴¹ French Norm (*Norme Française*) can be read on the website of the AFNOR.

²⁴² Website of AFNOR, Certificates, Certificate for user online reviews – Process to collect, manage and publish (*Avis en ligne – Processus de collecte, modération et restitution des avis*), available in French at <http://www.boutique-certification.afnor.org/certification/nf-service-avis-en-ligne> and <http://www.boutique.afnor.org/norme/nf-z74-501/avis-en-ligne-de-consommateurs-principes-et-exigences-portant-sur-les-processus-de-collecte-moderation-et-restitution-des-avi/article/808897/fa178349>.

²⁴³ 'Certificates, Certificate for user online reviews – Process to collect, manage and publish' (*Avis en ligne – Processus de collecte, modération et restitution des avis*), AFNOR website available in French at <http://www.boutique.afnor.org/norme/nf-z74-501/avis-en-ligne-de-consommateurs-principes-et-exigences-portant-sur-les-processus-de-collecte-moderation-et-restitution-des-avi/article/808897/fa178349>.

²⁴⁴ 'House rules', Krijgdekleertjes website available at <http://www.krijgdekleertjes.nl/huisregels>; 'User terms', Konnektid website available at <https://www.konnektid.com/terms>.

²⁴⁵ 'Terms and Conditions' Second Hand website available at <http://secondhand.com.mt/terms-and-conditions/>.

²⁴⁶ 'User agreements' Blocket website available at <https://blocket.zendesk.com/hc/sv/articles/209469918-Anv%C3%A4ndarvillkor>.

plier through the platform. Vatera, however, does not assume any responsibility for the unlawful nature of the comments and the damages caused as a consequence of such behaviour.²⁴⁷

Regarding platforms' liability for the possible unlawful nature of published user reviews, as explained below, in certain circumstances, platforms may be responsible for the information they store, including user reviews. In this case they have to remove or disable access to the concerned data and collaborate with the competent authorities to prevent or report the unlawfulness or unfairness of the review and eliminate its effects. Furthermore, as a consequence of the general **good faith** principle, platforms should refrain from publishing fake or misleading user reviews. Indeed, this clause may be interpreted as an obligation for platforms to take adequate measures to protect their users from any fake or misleading reviews posted on the platform, as long as the platform is aware of their existence.²⁴⁸

Shared responsibility for non-performance

In most Member States, the legislation applicable to online platforms facilitating P2P transactions does not set up a specific obligation for the platform to share responsibility with the user in case of non-performance or non-conformity of the performance. The applicable rules would be those of the **civil law on contract**, including the **provisions on non-contractual liability** (tort).²⁴⁹ For example, according to Article 193 of the Bulgarian OCA²⁵⁰ in contracts for the sale of goods, the seller is liable for defects and other non-conformities. Furthermore, in case of performance of work, the contractor is liable if it has deviated from the agreed upon specification or if the work is otherwise flawed (Article 265 OCA). National civil legislation also includes rules on **joint liability**, where the responsibility to fulfil the obligation lies with several obligors and, in case of non-performance, the remedies can be addressed against all of them, guaranteeing that the obligation or the damages for non-performance will be satisfied. For example, in Germany, general provisions on joint liability (Section 420 of the Civil Code)²⁵¹ would be applicable to all contracts with mutual obligors: in case of non-performance, remedies may be addressed to both debtors mutually. The Estonian Civil Code also has provisions on joint liability (Section 63 ff.)²⁵² that could apply.

In France, **Article 15 of the Law on Confidence in the Digital Economy**,²⁵³ states that every natural or legal person providing a good or a service through electronic means must ensure to the consumer ('buyer' in the meaning of the Law) the fulfilment of the obligations agreed upon, including the execution of these obligations through a third party. As described in the box below, it could be argued that this obligation is also applicable to platforms facilitating P2P transactions.

French Law on Confidence in the Digital Economy, Article 15

The extension of Article 15 of the Law on Confidence in the Digital Economy to online platforms would impose on them the **obligation towards their users to**

²⁴⁷ 'General terms and conditions of use' Vatera website available at: <https://img-ssl.vatera.hu/license/main.html?1012>.

²⁴⁸ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 54.

²⁴⁹ The basic principle is that everyone is liable for any damage that occurs through their fault. E.g. Luxembourg (Article 1382 of the Civil Code); Belgium (Article 1382 of the Civil Code), Bulgaria (Article 45 of the Obligations and Contract Act), Finland (Chapter 2, Section 1.1 of the Tort Liability Act), France (Article 1382 of the Civil Code), Hungary (Article 6:519), Malta (Article 1031 of the Civil Code), Portugal (Article 483 of the Civil Code); Romania (Article 1349 of the Civil Code).

²⁵⁰ Obligations and Contracts Act (*Закон за задълженията и договорите*), State Gazette 275/22 November 1950.

²⁵¹ German Civil Code, 2002 (*Bürgerliches Gesetzbuch*), Federal Law Gazette I/2016, p. 396.

²⁵² Estonian Law of Obligations Act (*Võlaõiguseadus*), RT I 2001, 81, 487, available at <https://www.riigiteataja.ee/en/eli/528032016012/consolide>.

²⁵³ Law 2004 -575 of 21 June 2004 on the Confidence in the Digital Economy (*Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*) available in French at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164#LEGIARTI000006421558>.

French Law on Confidence in the Digital Economy, Article 15

provide the agreed upon service (access to and use of the platform). If the platform fails to provide this service, contractual liability could arise. The liability of the platform, however, would be limited to the relationship between the platform and its users and it is not intended to be extended to contracts concluded between the users.

This interpretation has been confirmed by a decision of the Tribunal of Rennes regarding online auction fraud carried out on eBay.²⁵⁴ The court condemned eBay to pay one-fifth of the damages for breaching its duty of information about fraud risk.²⁵⁵ On the contrary, the Tribunal of Instance of Grenoble,²⁵⁶ in a similar case, ruled that eBay could not be considered liable for the faulty peer seller's behaviour. Furthermore, the peer buyer (peer consumer) who was victim of the fraud actually contributed to it because he did not use the payment system Paypal put forward by eBay.

Finally, it has to be highlighted that the majority of platforms exclude any liability in relation to the transaction between the peers in their general Terms and Conditions. A detailed analysis of platforms' liability is provided in Section 4.2.1.

Obligation to remove suppliers who violate consumer rights

In most Member States, the legislation applicable to online platforms facilitating P2P transactions neither explicitly sets up an obligation for the platform to remove suppliers who violate consumer rights, nor to monitor their users. According to **Article 15 of the ECD**, online platforms are not obliged to monitor the information they store, transmit or make available when providing information society services, nor are they obliged to seek facts and circumstances indicating conduct of illegal activity. This rule limits substantially the scope of scenarios where a platform could be deemed to be aware of the apparent illegality of a specific activity.

The national legislation transposing **Article 14 of the ECD** may also be relevant as the platform would not be able to rely on the **liability exemption** if it has obtained knowledge or has been informed of the unlawful character of the information or has been informed by a competent state authority of the unlawful character of the activities of the recipient and did not undertake immediate actions to remove or to disable access to that information. Indeed, under this provision, the information society service provider is responsible for the contents of information saved following a request of the user only i. if the provider could have known from certain circumstances that the contents of the information saved or the dealings of the user are unlawful, or ii. if the provider learned about the unlawful nature of the saved information or about the unlawful behaviour of the user and if the provider at the same time failed to take steps that could have been necessary to delete or block the access to this information. Therefore, where the platform has been duly notified of the unlawful character of the information/activities of a user, it would be obliged to investigate the complaint and act by removing the fraudulent supplier. It is noted that, however, unless the notification of unlawful activity is submitted by a competent authority, the platform may refrain from immediate actions pending investigation. In this scenario it would be in-

²⁵⁴ Both decisions are available at <http://www.droit-technologie.org/actuality-1051/quelle-responsabilite-pour-ebay-a-la-suite-d-encheres-frauduleuses-d.html>

²⁵⁵ Tribunal de Grande Instance of Rennes of 26 March 2007.

²⁵⁶ Tribunal d'Instance of Grenoble, 1 February 2007.

cumbent upon the complaining party to provide sufficient evidence about the alleged illegal nature of the activities subject to the complaint.²⁵⁷

The **Dutch Supreme Court** held that the limitation of liability provided for by the ECD does not prevent national courts from taking measures which can reasonably be expected from the information society service provider in view of its obligations to seek and prevent illegal activities.²⁵⁸ Furthermore, according to the Dutch Supreme Court, the ECD does not imply that outside the cases referred to in Article 15(2) communication by a hosting provider of name and address of people using its facilities is prohibited. Articles 14(3) and 18(1) of the ECD and its general purpose rather point in the opposite direction.²⁵⁹

In Italy, Article 4(2)(d) of Legislative Proposal 3564/2016 states that the policy document (reporting the conditions established by the contract between the platform and its users) should not include any clause obliging the platform to remove users or to penalise the listing of a user's offers on the platform unless serious and objective motivations exist. It can be argued that, where such 'serious and objective motivations' are verified, the user could be removed from the platform or sanctioned in other ways. However, the Legislative Proposal neither sets up any obligation for the platform to take out users who, for example, violated consumer rights, nor specifies what these 'serious and objective motivations' should consist of.

Finally, it is worth noting that some platforms have introduced among their general Terms and Conditions their competence to ban or exclude users' profiles in the event, for example, of bad behaviour, non-fulfilment of their obligations, etc. For example, the Italian (re)sale of new and used/second hand goods platform Bakeca reports in its general Terms and Conditions that the platform's users are fully and entirely responsible for any violation of the Law, rules and of the platform's Terms and Conditions.²⁶⁰ However, no self-regulatory measure setting out the obligation for the platform to remove suppliers who violate consumer rights has been identified. On the contrary, in the same sector (sale/(re)sale) the Hungarian platform Vatera reserves the right to delete the profile of the user if the review contains bad or obscene language, is otherwise immoral, or commits slander. The platform moderates, modifies or removes aggressive, threatening, and vulgar reviews and comments, as well as those containing personal data or that advertise something. The platform also has the right to remove reviews and comments published by individuals who did not actually enter into a transaction with the peer supplier they are commenting on or reviewing. Vatera, however, does not take responsibility for the unlawful nature of the comments and the damages caused as a consequence of such behaviour.²⁶¹ Similarly, multi-country platforms such as Airbnb,²⁶² easyCar²⁶³ or eBay,²⁶⁴ also provide for their right to ban or

²⁵⁷ E.g. Bulgaria (Article 17 of the Electronic Commerce Act), Croatia (Articles 17, 18, 19, and 21 of the Electronic Commerce Act), Estonia (Section 11 of the Information Society Services Act), Hungary (Articles 8 to 11 of the Electronic Commerce Act), Italy (Article 17 of Legislative Decree 70/2003), Lithuania (Article 15 of the Law on Information Society Services), Malta (Article 22 of the Electronic Commerce Act), Poland (Article 15 of the Provision of Services by Electronic Means Act), Portugal (Articles 12 and 13 of the Electronic Commerce Act), Romania (Article 16 of the E-commerce Act), Spain (Article 11 of the Act on Information Society Services), Sweden (Paragraph 18 of the Electronic Commerce Act), UK (Article 15 of the E-commerce Regulations).

²⁵⁸ Supreme Court (*Hoge Raad*) 25 November 2005, ECLI:NL:HR:2005:AU4019, WBP 2009/34 note de Vries, H.H., NJ 2009, 550 note Hugenholtz, P.B, IER 2006/2 referring to similar the decision by the German Supreme Court dd 11 March 2004 re Rolex/Ricardo. See also Court (Rechtbank) Zwolle-Lelystad 3May 2016, ECLI:NL:RBZLY:2006:AW6288, Computerrecht 2006, 101, note van den Brink, J.P.

²⁵⁹ *Ibid.*

²⁶⁰ Bakeca specifies that the term Law refers to any legal provision which is currently in effect. 'Condizioni di utilizzo', Bakeca website available at <http://www.bakeca.it/info/termini/>.

²⁶¹ General terms and conditions of the use of Vatera, available at: <https://img-ssl.vatera.hu/license/main.html?1012>.

²⁶² General terms and conditions available at <https://www.airbnb.com/terms> (Section 14).

²⁶³ General terms and conditions available at <https://carclub.easycar.com/> (Section 14.3).

²⁶⁴ General terms and conditions available at <http://pages.ebay.com/help/policies/user-agreement.html> (Using eBay section).

exclude users' access to the platform when users violate the platform's general Terms and Conditions.

Redress mechanisms

The platform will be contractually liable towards the users according to the terms of the contract concluded between the platform itself and the peer supplier or peer consumer, as well as on the basis of the mandatory and default rules of contract law (including, for example, the obligation of the parties to act in good faith). Where the platform acts as a 'trader', the corresponding consumer protection legislation will also apply. For example, in Bulgaria, the Consumer Protection Act²⁶⁵ applies to the relationship between the platform and the peer supplier or the peer consumer. The redress mechanisms provided therein will be therefore available to all peers in case of disputes regarding, for example, defaults in the platform's services.

It can be concluded that, **in most Member States, the applicable legal remedies for dispute resolution are those provided in the rules of general civil law.**²⁶⁶ These include the liability for damages resulting from both contractual and extra-contractual claims (tort law). Thus, the disputes may be referred to the competent jurisdiction, normally civil courts. National courts and public authorities are eligible to issue injunctions, interim measures or judgments designed to terminate unlawful actions or remove illegal information as well as prohibit access to such information, on the basis of a respective request against an information society service provider.

In some Member States, the parties can bring the dispute to the competent authority for monitoring businesses and individuals that act as suppliers (trade authorities).²⁶⁷ For example, in the Czech Republic, if the information society service provider could have known from certain circumstances that the contents of the information saved on the request of the recipient is unlawful, and failed to take the necessary steps to delete or block access to this information, the peer consumer may file a motion²⁶⁸ with the Czech Trade Inspection Authority which may initiate proceedings in accordance with the Czech Consumer Protection Act.²⁶⁹ However, pursuant to the Czech Consumer Protection Act, this option exclusively applies to B2C transactions and to C2C transactions where the peer supplier is a natural person who sells to the consumer plant or animal products from their own small-scale production. In some instances, the competent trade authority, may also initiate proceedings and issue a decision on its own initiative (e.g. this is the case of the Czech Trade Inspection Authority). Other Member States where the competent authorities may initiate proceedings by referral or on their own initiative are Cyprus,²⁷⁰ Hungary²⁷¹ and Malta.²⁷²

²⁶⁵ Consumer Protection Act (*Закон за защита на потребителите*), State Gazette 99/9 December 2005.

²⁶⁶ E.g. Austria, Belgium, Denmark, Estonia, Germany, Greece, Poland, Slovakia, Spain.

²⁶⁷ E.g.: Cyprus Competition and Consumer Protection Service; Italian Anti-Trust authority; Hungarian National Media and Infocommunications Authority and the National Consumer Authority Maltese Communications Authority; Slovenian Market Inspectorate; Slovak Trade Inspection Authority.

²⁶⁸ The motion should contain, among others: the identity and contact details of the parties, a complete and clear statement of the facts; and an indication of what the consumer claims.

²⁶⁹ Law 634/1992 'Consumer Protection Act' (*Zákon o ochraně spotřebitele*), Collection of Laws No. 130/1992, available at <http://www.zakonyprolidi.cz/cs/1992-634>.

²⁷⁰ Under Article 16 of the Cypriot Unfair Commercial Practices Law, consumers have the right to address a complaint to the Cyprus Competition and Consumer Protection Service. The competent authority can also examine cases on its own initiative. The authority may request the courts to issue an injunction. It could also settle the case with the offending party.

²⁷¹ Under Article 6:82 of the Civil Code and Article 4 of the Electronic Commerce Act online platforms facilitating P2P transactions are subject to thorough investigations and inspections conducted with a certain frequency by both the Hungarian Authority for Consumer Protection and National Media and Info-communications Authority. These authorities systematically inspect whether the operation of the platform complies with the general information requirements and the specific information requirements established by law.

²⁷² Regulation 15(1) of the Electronic Commerce (General) Regulations states that where the Authority feels it is reasonably appropriate or necessary for the protection of consumers, it may on its own initiative issue a compliance order against an

Furthermore, information society providers and recipients may resort to **out-of-court dispute settlement mechanisms** under Article 17 ECD. In Romania, for example, the Law on E-commerce (transposing the ECD)²⁷³ regulates dispute resolution in its Chapter VI both within and out of a court of justice. According to paragraph 1 of Article 19, persons covered by paragraph 2²⁷⁴ may ask the court for an injunction, for the purposes of cease and desist, as well as for any potential damages that might have been incurred. Moreover, Article 20 mentions that disputes can also be solved out of court: information society service providers and recipients can submit their disputes to arbitration, as well as any other alternative dispute resolution means included in the Codes of Conduct referred to in Article 18.

In some cases, **platforms may also make dispute resolution services available to their users**. For example, eBay offers as a first stage an internal 'Resolution Centre'²⁷⁵ and the Dutch platforms Huizenruil²⁷⁶ and Krijgdekleertjes²⁷⁷ offer to mediate conflicts although they indicate that they are not obliged to do so. The Romanian (sale and (re)sale) platform Okazii.ro created a dispute resolution service (called 'Delivery Guarantee for any Method of Delivery') on the basis of which the platform intervenes in disputes between its users when the purchased product does not correspond to the description in the offer. Accepting Okazii.ro's general Terms and Conditions, users agree that the platform takes decisions on the basis of its own investigation, and that this decision cannot be appealed. In order to accede to this service, certain conditions need to be fulfilled: i. the buyer must contact the seller within three days from delivery; ii. the buyer must make a complaint through the Support Service of the platform within 30 days from delivery; iii. the product must be returned either to the seller or the platform.²⁷⁸ Since, as highlighted above, most platforms tend to categorically exclude their liability, normally they do not offer any conflict resolution mechanisms, but they provide information on the authority that their users can resort to in case of conflict. The Italian (sale and (re)sale) platforms Subito²⁷⁹ and Bakeka,²⁸⁰ for example, inform their users that disputes between them and the platform will be brought before the Tribunal of Milan. The competent courts for the Italian (sharing of goods and sharing of private accommodation) platforms Useit²⁸¹ and Homeaway²⁸² are the Tribunal of Terni and the Tribunal of Rome, respectively. The Hungarian platform Vatera²⁸³ refers directly to the European Commission's Online Resolution Centre which, however, does not deal with C2C transactions.²⁸⁴

information service provider or any other person for one or more of the purposes listed in Regulation 15. The Authority can also take any enforcement action that it considers appropriate to ensure compliance with the ECA and ECR and it may impose an administrative fine on anyone who fails to comply accordingly (Regulation 22).

²⁷³ Law 365/2002 on e-commerce (*privind comerțul electronic*), Official Gazette nr. 959 of 29 November 2006.

²⁷⁴ These are: a) natural and legal persons who are the right-holders of a subjective right mentioned by the law or of an interest that can only be realized by judicial means; b) associations and non-governmental organizations mentioned in Article 18(1) of the Law; c) the National Authority for Consumer Protection, county offices for consumer protection as well as the Bucharest office; d) consumer protection entities set up in Member States.

²⁷⁵ Website of eBay's Resolution Center available at <http://resolutioncenter.ebay.com/>.

²⁷⁶ 'Terms and Conditions of Use', Huizenruil website, available at <https://www.huizenruil.com/nl/terms-of-use/> (sharing of private accommodation).

²⁷⁷ 'House rules' (*Huisregels*), website Krijgdekleertjes, available at [http://www.krijgdekleertjes.nl/huisregels \(renting/sharing of goods\)](http://www.krijgdekleertjes.nl/huisregels (renting/sharing of goods)).

²⁷⁸ 'Terms and Conditions' Okazii.ro website available at <http://ajutor.okazii.ro/termeni-si-conditii>.

²⁷⁹ 'General conditions of the service' Subito website available at <http://www.subito.it/info/policies/condizioni-general.html>.

²⁸⁰ 'Conditions of use' Bakeka website available at <http://www.bakeca.it/info/termini/>.

²⁸¹ 'General conditions of use of the service' Useit website available at <https://www.useit.it/termini-condizioni>.

²⁸² 'Terms and conditions for travellers' HomeAway website available at <https://www.homeaway.it/info/chisiamo/legale/condizioni-general.html>.

²⁸³ 'General terms and conditions of use' Vatera website available at: <https://img-ssl.vatera.hu/license/main.html?1012>.

²⁸⁴ The European Commission's Online Dispute Resolution system is available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage>.

Exploratory study of consumer issues in online peer-to-peer platform markets

With regards to multi-country platforms, Airbnb and BlaBlaCar have set out online services to resolve disputes between their respective users. BlaBlaCar, however, specifies in its Terms and Conditions that this service is non-binding, is offered at BlaBlaCar's sole discretion and may be withdrawn at any time. Furthermore, if the dispute is not settled, BlaBlaCar reserves the right to retain any sums paid by the passenger until an amicable agreement has been reached between the passenger and the driver or a definitive judicial decision has been made.²⁸⁵ According to Airbnb's Terms and Conditions, users have 60 days after the reservation's checkout date to submit a Resolution Centre request. 72 hours after the request was opened, users can ask Airbnb to take a final decision on the case.²⁸⁶

The Country Reports highlight that one of the main issues concerning the enforcement of C2C legislation could be the fact that bringing the case to the civil courts is generally the only mechanism available to offer redress to peers in case of disputes. The limited availability of ADR and ODR systems, combined with the general low confidence of the general public in traditional dispute resolution systems and the high costs and length of civil proceedings compared to the average low value of online C2C transactions, might explain the lack of relevant civil cases at national level. Enforcement issues related to dispute resolution systems are further analysed in Section 5.1.

4 Non-legislative measures

This Section analyses Terms and Conditions adopted by national and international online platforms and focuses in particular on platforms' liability/exclusion of liability and user identification systems.

The **multi-country platforms** whose Terms and Conditions are taken into account in this Section are:

- Sharing of private accommodation: Airbnb and Wimdu;
- Sharing of private transport: BlaBlaCar, Uber and easyCar Club;
- Renting/sharing of goods: Peerby;
- (Re)sale of new and used/second hand goods: Wallapop and eBay;
- Non-professional services: Yoopies and Nimber.

The **national platforms** taken into account are the main platforms falling within the abovementioned categories identified by the national experts in the Country Reports.

4.1 Codes of conduct

In addition to non-legislative measures adopted by individual platforms, **Codes of Conduct** may apply to groups of platforms. In the United Kingdom, **Sharing Economy UK (SEUK)**, a trade body representing the country's most influential sharing economy businesses, designed a **Code of Conduct** that has been signed up to by all its members, and which aims to set out a framework of values and principles to enhance the trustworthiness of such sharing economy operators.²⁸⁷ Article 4.2 of the Code of Conduct specifies that although its provisions are not legally binding, they represent 'good practices' by SEUK's members and is promoted on that basis. If a

²⁸⁵ 'Terms and Conditions' BlaBlaCar website available at <https://www.blablacar.in/about-us/terms-and-conditions>.

²⁸⁶ 'What is the Resolution Centre?', Airbnb website available at <https://www.airbnb.com/help/article/767/what-is-the-resolution-center>.

²⁸⁷ 'Code of Conduct' Sharing Economy UK website available at <http://www.sharingeconomyuk.com/code-of-conduct>.

member fails to adhere to the terms of the Code, SEUK reserves the right in its absolute discretion to terminate its membership (Article 7.6). The values and principles set out by the Code of Conduct are quite general and they mainly refer to the relationship of 'honesty and trust' between the sharing economy operator and its users, as well as to 'safety and industry standards'. Indeed, according to Articles 2.1 and 2.2, SEUK's members 'shall act honestly in all dealings with consumers and users in the United Kingdom' and 'take steps to develop and sustain strong relationships of trust with customers, users and between their users'. Regarding safety and industry standards, Article 4.1 states that 'Members shall encourage their users to maintain a high level of safety for all products and services and will support the development of reasonable industry standards and safe practices'.

Other relevant initiatives have been identified in **Italy**, **Portugal** and **Spain**. In Italy, the national consumer association *Altroconsumo*, urged sharing economy operators such as Uber to develop **Self-regulatory Codes** through which they should make sure that security standards, as well as an efficient consumer protection, adequate to these new business models, are applied.²⁸⁸ Furthermore, on 1 July 2015 *Altroconsumo* published a '**Manifesto for a sustainable sharing economy and respectful of consumer rights**'.²⁸⁹ The Manifesto is articulated in nine points highlighting that the new sharing economy business models have the potential to create new job opportunities and make consumers able to monetise under-utilised resources. However, a sustainable growth of the sharing economy is hindered by regulatory uncertainty. According to the Manifesto, the use of new technologies requires and in depth revision of certain rules, so as to simplify access to the market of new sharing economy operators and, at the same time, guarantee adequate consumer protection. In particular, the Manifesto calls for: clearer rules on consumer rights - taking into account that a consumer operating through online P2P markets may either act as peer consumer or as peer provider/supplier - as well as on platforms' roles and responsibilities; an enhanced collaboration between platforms and consumers to eliminate possible unfair commercial practices and misleading clauses; an increased use of alternative dispute resolution mechanisms to offer redress to the peers in case of dispute. Furthermore, the Manifesto suggests that, in order to apply a fair tax regime, it is essential to clearly distinguish between individuals acting as businesses and individuals carrying out the same activity in a private capacity and on an occasional basis.²⁹⁰ So far, no sharing economy operators have signed up to the Manifesto of *Altroconsumo*.

The Consumer's Defence (DECO), the largest Portuguese consumer association, has recently made public²⁹¹ the **proposal for a Code of Conduct** for online platforms facilitating P2P transactions. The Code - to which no companies have yet subscribed, is briefly described in the box below.

Main elements of the Code of Conduct developed by the Portuguese consumer association DECO

The Code of Conduct exclusively covers the relationship between the platform and its users and it only applies to platforms that facilitate the exchange of under-utilised goods and/or services (through sharing, swapping, lending, renting and gifting), such as platforms facilitating the provision of accommodation, transport and non-professional services. For instance, it is not applicable to platforms facilitating the sale of goods. The Code of Conduct mainly focuses on the transparency of plat-

²⁸⁸ '*Altroconsumo a fianco di Uber in Tribunale. Si alla sharing economy e servizi innovativi*', *Altroconsumo* website available at <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2015/reclamo-uber-pop>.

²⁸⁹ '*Manifesto per una sharing economy sostenibile e rispettosa dei diritti dei consumatori*', *Altroconsumo* website available at <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2015/manifesto-per-una-sharing-economy-sostenibile-e-rispettosa-dei-diritti-dei-consumatori>.

²⁹⁰ *Ibid.*

²⁹¹ DECO website, available at <https://www.deco.proteste.pt/institucionalmedia/imprensa/comunicados/2016/consumo-colaborativo>.

forms and the information they provide to consumers. It lists forbidden terms and standardises the structure of the terms of use used by the platforms, clarifying the type of information that must always be given.²⁹²

According to Article 3 of the Code of Conduct, the platform should always inform its users, in a clear and adequate way, about the functioning of the platform, the services it offers, prices and payment methods, contractual conditions, and applicable data protection rules. Articles 8, 9 and 10 list, respectively: i. compulsory information to be provided in the contractual terms (between the platform and its users) - without prejudice to consumer protection rules, sector-specific legislation (where relevant), and the general contractual clauses regime; ii. compulsory information concerning data protection; iii. Information requirements to be provided by the platform's general Terms and Conditions. This aims to ensure that consumers can find the information they need more easily.²⁹³

Article 13 of the Code of Conduct sets out forbidden clauses and terms, including those indicating a maximum value up to which the platform may be asked to reimburse its users (e.g. in case of non-performance by the peer provider/supplier), or limiting the platform's liability for damages directly related to its operation. Platforms signing up to the Code of Conduct should abstain from behaviours that could distort competition or violate imperative tax rules (Article 13(3)).

In Spain, *Sharing España*, a collective of innovative companies within the Spanish Association of Digital Economy (*Asociación Española de la Economía Digital*) developed a '**Code on principles and good practices of sharing platforms**' that emphasises in particular the need to enhance consumer protection in online P2P markets.²⁹⁴ The Code is described in detail under Section 6.2.1 of this Report.

The **Netherlands** developed a **Notice-And-Take-Down Code of Conduct**²⁹⁵ setting out a procedure for hosting providers to remove or disable access to illegal information or content stored or published by users on the platform itself upon obtaining knowledge or awareness of such illegal content or information. The Code was presented to the Secretary of Economic Affairs and announced in a press release on 9 October 2008. It was adopted in the context of a project led by the National Infrastructure against Cybercrime in partnership with Dutch government authorities, law enforcement agencies and sharing economy operators such as eBay.²⁹⁶ The relevance of this Code for the adhering online platforms and their users consists in the accessibility to a **procedure for hosting providers that have been notified about online content that is punishable or unlawful**. According to the Code of Conduct, Notice-and-Take-Down procedures are set up by each hosting provider that must describe how the platform should proceed in these cases. The procedures must be made available to the public and must be consistent with the Code (Article 3, Code of Conduct). Users can report illegal content presenting a report to the platform. The platform could also be asked to treat the case with urgency where particular reasons occur (Article 4). The hosting provider evaluates the request on the basis of the information provided (Arti-

²⁹² It clarifies what information must be provided in each section of the terms of use, so that consumers can find the information more easily because they will know where to look.

²⁹³ DECO website, <https://www.deco.proteste.pt/institucionalemedia/imprensa/comunicados/2016/consumo-colaborativo>.

²⁹⁴ Website of Sharing España, available at <http://www.sharingespana.es/quienes-somos/>. Sharing España, 'Code on principles and good practices of sharing platforms' (*Código de principios y buenas practicas de plataformas colaborativas*), available at <http://www.sharingespana.es/media/codigo-principios-buenas-practicas-sharing-espana.pdf>.

²⁹⁵ 'Code of Conduct Notice and Take Down' (*Gedragscode Notice-and-Take-Down*), available at the Dutch Government website, <https://www.rijksoverheid.nl/documenten/rapporten/2008/10/09/gedragscode-notice-and-take-down>. An English translation is also available here: <https://ecp.nl/bijlagen/3721/ntd-gedragscode-engels.pdf> An English translation is also available at: <https://ecp.nl/bijlagen/3721/ntd-gedragscode-engels.pdf>.

²⁹⁶ An official list of participants and members does not exist.

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cle 5). Where the content or information is unequivocally unlawful, it must be removed immediately. Where its unlawfulness is unclear, the hosting provider contacts the content provider (i.e. the user who published or stored such content or information on the platform) either requesting its removal or to contact the user who claimed it in order to find a solution (Article 6).

In 2013, the e-commerce working group of IAB Polska (*Związek Pracodawców Branży Internetowej IAB Polska*), branch of IAB Europe, elaborated a document entitled 'Good practices in E-commerce', which may be perceived as the 'seed corn' of the Code of Good Practice. However, it applies solely to entrepreneurs and as such does not regulate C2C transactions.²⁹⁷ In Hungary, Article 15/A of the Electronic Commerce Act encourages the establishment of self-regulatory measures without prejudice to the autonomy of professional bodies and associations engaged in activities relating to the information society. This encompasses the drawing up of Codes of Conduct, the accessibility in Hungarian of these Codes of Conduct by way of electronic means and for recipients of the service and other interested parties established in any Member State of the European Economic Area in the official languages of such Member States, and the use of out-of-court schemes for dispute settlement by way of electronic means.²⁹⁸ It is noted, however, that no such Codes of Conduct exist so far.

²⁹⁷ 'Good practices in E-commerce' (*Dobre zasady e-commerce*), IAB Polska website, available at <http://iab.org.pl/wp-content/uploads/2014/01/dobre-zadady-ecommerce.pdf>

²⁹⁸ Act CVIII of 2001 on electronic commerce and on Information Society Services (*2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről*), Hungarian Official Gazette 153/2001.

4.2 Measures adopted by individual platforms

While individual platforms do not normally adhere to Codes of Conduct, they generally set out measures relating to, *inter alia*, requirements for users, user reviews and users' obligations, as well as information on tax (and other rules), insurance, access to mediation or other conflict resolution mechanisms, payment systems, deposits, privacy policy, liability of the platform and systems for verifying the identity of users. The Country Reports provide information on various measures that, whenever relevant, are included under different Sections of this Report. In particular, information on user reviews and users' obligations, as well as on access to conflict resolution mechanisms is provided in Section 3.3.2. As highlighted above, this Section exclusively focuses on platforms' Terms and Conditions regarding the platform's liability and user identification.

It is noted that, in addition to such measures, some multi-country platforms have also concluded **special agreements at national and local levels**. For example, in Estonia, a Draft Bill on ride-sharing services - such as those offered by UberPop, has been under consideration since February 2016 (see Section 6.2.2). In the Netherlands, Airbnb has agreements with the cities of Amsterdam and Paris to directly collect touristic accommodation taxes and remit them to the competent authorities.²⁹⁹ The box below describes the **Memorandum of Understanding signed by Airbnb with the city of Amsterdam in December 2014**.³⁰⁰

Memorandum of understanding between Airbnb and the City of Amsterdam

The agreement covers three main aspects:

- the efficient collection of tourist tax;
- the disclosure of information on the municipal policy on private holiday rentals;
- the cooperation of Airbnb with the city of Amsterdam's competent authorities to prevent the breach of municipal policies on private holiday rentals.

Airbnb promised to provide information on municipal rules by creating a special webpage that is prominently visible to anyone offering accommodation in Amsterdam.³⁰¹ The webpage provides a checkbox that hosts have to tick to declare that they understand and comply with such rules.

On the other hand, the Municipality may communicate the addresses of hosts violating municipal rules to Airbnb. Airbnb will consequently remove such hosts from the platform for a minimum period of two years. Under special circumstances this period may be shortened after consultation with the Municipality.

According to the Memorandum, Airbnb must update the Municipality, twice a year, on all rental activities taking place in Amsterdam through the platform. Airbnb also agreed to meet the Municipality every three months to discuss the progresses relating to the Memorandum of Understanding, to amend it where necessary and to prepare the possible implementation of binding agreements. Parties also reached an agreement on confidentiality matters.

²⁹⁹ Vincent, J., for 'The Verge', 'Airbnb starts collecting tourist tax in Paris, its most popular destination', 26 August 2015 available at <http://www.theverge.com/2015/8/26/9209603/airbnb-tourist-tax-paris>; Website of the City of Amsterdam, 'Amsterdam and Airbnb sign agreement on home sharing and tourist tax', 18 December 2014, available at <http://www.iamsterdam.com/en/media-centre/city-hall/press-releases/2014-press-room/amsterdam-airbnb-agreement>.

³⁰⁰ Website of the Municipality of Amsterdam (*Gemeente Amsterdam*), Agreement between Amsterdam and Airbnb (*Afspraken Amsterdam en Airbnb*), available at <https://www.amsterdam.nl/wonen-leefomgeving/wonen/bijzondere-situaties/vakantieverhuur/>.

³⁰¹ "Amsterdam" Airbnb website available at <https://www.airbnb.nl/help/article/860/amsterdam>.

Memorandum of understanding between Airbnb and the City of Amsterdam

The Municipality further expressed the intention to make aggregated data available after a similar agreement has been reached with other platforms.³⁰² This type of cooperation between local authorities and platforms could help increase the platforms' transparency and reliability.³⁰³

The actual enforcement of the Memorandum's provisions according to which Airbnb should cooperate with the Municipality of Amsterdam to prevent the breach of private holiday rentals rules, has been facing some practical difficulties due to Airbnb's refusal to disclose its users' identity.³⁰⁴ These enforcement issues are described in detail in Section 5.2.

4.2.1 Liability of the platform

As highlighted under Section 3.1.2 of this Report, the way consumers perceive an activity could indirectly influence their behaviour.³⁰⁵ For example, where Terms and Conditions do not explicitly state that the platform is not a party to the transactions concluded through it, users could be under the false impression that the platform is instead a party. In some cases, the platform is in practice the only direct interface for users. Similarly, even though users may be perfectly aware of the non-involvement of the platform in the transactions concluded through it, they could face difficulties in identifying who is responsible (e.g. in case of non-performance) and, consequently, in seeking redress. As specified under Section 3.3.2, according to the UCPD Guidance,³⁰⁶ the **professional diligence duty** set out by Article 5(2) of the UCPD means that online platforms qualifying as 'traders' should adopt appropriate measures aimed at clarifying to their users with whom they are concluding contracts on the platform. Such measures could include, for example, **enabling platforms' users to clearly state that they are acting in a professional/commercial capacity**. Furthermore, **the platform 'should inform consumers whether and if so what criteria it applies to select the suppliers operating through it and whether and if so what checks it performs in relation to their reliability'**.³⁰⁷ Section 3.3.2 shows that most platforms do not comply with this requirement. Examples of national platforms requiring their users to indicate whether they are acting as traders or consumers are reported in Section 3.3.2.

The liability of platforms could concern:

- The **conduct of the users** on the platform, including actions and omissions, as well as the use of the platform and its services;
- **Damages** that might arise from transactions concluded between users through the platform (whether direct, consequential or indirect), including the loss of profit and goodwill, bodily injury or emotional distress;

³⁰² 'Private holiday rentals' (Private vakantieverhuur), website of the municipality Amsterdam available at <https://www.amsterdam.nl/wonen-leefomgeving/wonen/bijzondere-situaties/vakantieverhuur/> (lastly consulted on 9 March 2016).

³⁰³ European Commission, Communication 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356final, 2 June 2016, available at <http://www.eesc.europa.eu/resources/docs/com2016-356-final.pdf>.

³⁰⁴ 'The 'Airbnb effect': is it real, and what is it doing to a city like Amsterdam?', The Guardian's website, *supra*.

³⁰⁵ Organisation for Economic Cooperation and Development (OECD), 'Protecting consumers in peer platforms market: exploring the issue', Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy, 29 March 2016, DSTI/CP(2015)4/REV1, p. 18.

³⁰⁶ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 123.

³⁰⁷ *Ibid.*, p. 129.

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- The **content** of the information published or stored by users on the platform, including the **information or content of third parties** to which the platform provides access;
- **Technical problems** such as service interruption or system failures and inability to use the site, including damages deriving from these (e.g. loss of data, computer damages, etc.).

The Country Reports highlighted a widespread use of clauses explicitly excluding the platform's liability in all of the areas mentioned above. In this context, it has to be noted that, as clarified by the UCPD Guidance, the liability exemption set out by Article 14 of the ECD relates only to illegal information stored at the request of third parties and cannot be invoked by online platforms where they fail to comply with the professional diligence duty set out by Article 5(2) of the UCPD.³⁰⁸ In other words, the clauses included in several platforms' Terms and Conditions that explicitly exclude the platform's liability represent a breach of EU consumer law where the platform (qualifying as a trader and engaging in B2C commercial practices directly connected with the promotion, sale or supply of products or services to consumers) excludes its responsibility with regards to its own activities or information which the platform exercises control over.³⁰⁹ The analysis carried out at national level shows that almost all national platforms expressly exclude any liability for direct, consequential or indirect damages and loss of data (e.g. Autobazar,³¹⁰ Bazar,³¹¹ Qoop,³¹² Oszkár Telekocsi³¹³). They also deny any liability arising from technical problems such as liability arising from the misuse of the login information by third parties (e.g. Sbazar.cz,³¹⁴ Vatera³¹⁵). Most online platforms also exclude any liability arising from information placed by the users on the platform (e.g. Autolevi,³¹⁶ Bébiszitter³¹⁷).

In some instances, instead, platforms limit their liability to certain circumstances. For example, the Terms and Conditions of the Hungarian platform Albérlet³¹⁸ establish that the platform's liability for any loss or damage cannot exceed the value of the transaction. The Italian platform, Useit³¹⁹ also limits its liability to cases of direct or indirect damages caused by serious negligence or by fraudulent activities carried out by the platform itself. In the Netherlands, the maximum amount for which some platforms accept responsibility is limited to the amount paid by the user in the 12 months pre-

³⁰⁸ *Ibid.*, p. 124.

³⁰⁹ *Ibid.*, p. 36.

³¹⁰ 'Terms and Conditions' Autobazar website available at www.autobazar.sk. Slovak platform facilitating the (re)sale of new and used/second hand goods.

³¹¹ 'Terms and Conditions' Bazar website available at <http://www.bazar.sk/>. Slovak platform facilitating the (re)sale of new and used/second hand goods.

³¹² 'Terms and Conditions' Qoop website available at <http://www.qoop.nl/text.php?file=voorwaarden.txt&text=Algemene+Voorwaarden&header=1>. Dutch platform facilitating (re)sale of new and used/second hand goods.

³¹³ 'General terms and conditions of use' Oszkár Telekocsi website available at <http://www.oszkar.com/login/hazirend.php#5>. Hungarian platform facilitating the sharing of private transport.

³¹⁴ 'Terms and Conditions' Sbazar.cz website available at https://napoveda.seznam.cz/soubory/Sbazar/Smluvni_podminky_Sbazar.cz.pdf. Czech platform facilitating the sale and (re)-sale of new and used/ second hand goods.

³¹⁵ 'General terms and conditions of use' Vatera website available at: <https://img-ssl.vatera.hu/license/main.html?1012>. Hungarian platform facilitating the sale or (re-)sale of new and used/second hand goods.

³¹⁶ 'Q&A section' Autolevi website available at <https://autolevi.lv/buj/>. Latvian platform facilitating the sharing of private transport.

³¹⁷ 'General terms and conditions of use' Bébiszitter website available at: <http://bebiszitter.info/aszf.php>. Hungarian platform facilitating the exchange of non-professional services.

³¹⁸ 'General terms and conditions of the use' Albérlet website, available at: <http://www.alberlet.hu/aszf> (sharing of private accommodation).

³¹⁹ 'General terms and conditions' Useit website, available at <https://www.useit.it/termini-condizioni> (renting/sharing of goods).

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ceding the event causing damage (e.g. Kamernet,³²⁰ KonnektID,³²¹ Tweedehands,³²² Jipio³²³) or to a nominal amount.

Table 11 below reports examples of liability rules found in the Terms and Conditions of selected national or local platforms operating in certain Member States.

Table 11. Self-regulatory measures on liability adopted by selected national platforms

BE	Most Belgian platforms exclude any liability arising from property damage or personal injury (2dehands, Homelink). ³²⁴ Sometimes platforms also disclaim any liability arising from non-payment to peer providers (MoiGITemps). ³²⁵ While some platforms also disclaim liability for the accuracy, content, or availability of information accessed or linked to through use of this service (HomeLink), ³²⁶ others deny any liability for the information posted by the users on the platform (2dehands). ³²⁷ Some platforms even deny responsibility as regards the use of their website, losses resulting from the platform being inaccessible and the issues of safety their users could encounter by using their websites (2dehands, HomeLink, Car Amigo). ³²⁸
CY	Platforms tend to exclude their liability in case of non-performance by the peer supplier. For example, the 'Limitation of Liability' clause in the general Terms and Conditions of MSD excludes the platform's liability for 'any incidental, special or consequential damage ' arising from the breach of contracts concluded through the platform or tortuous or negligent behaviour of the peer supplier. ³²⁹
CZ	Most online platforms exclude their liability for direct losses, consequential or indirect losses and loss of data . They also deny any liability arising out of technical problems (e.g. Sbazar.cz), ³³⁰ misuse of the login information by third parties (e.g. Mimibazar.cz) ³³¹ or any liability arising from information placed by the users on the platform (e.g. Bezrealitky.cz). ³³²

³²⁰ 'General Conditions', Kamernet website, available at https://resources.kamernet.nl/Content/pdf/KamernetAlgemeneVoorwaarden_en.pdf?_ga=1.217107222.1883130012.1460466510 (art. 12) (sharing of private accommodation).

³²¹ 'User terms' Konnektid website, available at <https://www.konnektid.com/terms> (art. 11.4) (non-professional services).

³²² 'User Conditions' Tweedehands website, available at <http://www.tweedehands.nl/doc/disc.html> ((re)sale of new and used/second hand goods).

³²³ 'Terms of use' Jipio website, available at <http://www.jipio.nl/tos> (renting/sharing of goods).

³²⁴ 'Homelink Terms, Conditions and Privacy Policy' Homelink website, available at: <http://homelink.org/en/terms-of-use> (platform for the sharing of private accommodation); 'General conditions of use' 2dehands website, available at: <http://www.2ememain.be/doc/conditions.html>. (Platform for the sale and (re)sale of new and used/ second hand goods.).

³²⁵ 'General conditions of use' GPALTEMPS website, available at: <https://www.gpaltemps.com/conditions-generales>.

³²⁶ 'Homelink Terms, Conditions and Privacy Policy' Homelink website, available at: <http://homelink.org/en/terms-of-use>.

³²⁷ 'General conditions of use' 2dehands website, available at: <http://www.2ememain.be/doc/conditions.html>.

³²⁸ 'Homelink Terms, Conditions and Privacy Policy' Homelink website, available at: <http://homelink.org/en/terms-of-use>; 'General conditions of use' CarAmigo website, available at: <https://www.caramigo.be/img/cgu/CGU-Caramigo-FR.pdf> (platform for the sharing of carpooling and ride sharing activities); 'Conditions générales d'utilisation' 2dehands website, available at: <http://www.2ememain.be/doc/conditions.html>.

³²⁹ 'Terms and Conditions' MSD.com.cy website available at: <http://www.msd.com.cy/manager/en/terms-conditions> (under 'F. Indemnity') (Platform providing non-professional services).

³³⁰ 'Terms and Conditions' Sbazar.cz website at https://napoveda.seznam.cz/soubory/Sbazar/Smluvni_podminky_Sbazar.cz.pdf. (Platform for the sale and (re)sale of new and used/ second hand goods).

³³¹ 'Terms and Conditions' Mimibazar.cz website at <http://www.mimibazar.cz/page.php?id=3>. (Platform for the sale and (re)sale of new and used/ second hand goods).

³³² 'Terms and Conditions' Bezrealitky.cz website at <https://www.bezrealitky.cz/informace/smluvni-podminky>. (Platform for the sharing of private accommodation).

Table 11. Self-regulatory measures on liability adopted by selected national platforms

FI	Most examined national platforms exclude their responsibility. For example, MyyJaOsta ³³³ disclaims any liability with regards to any damage caused by the service itself, including loss of income, interruption to business activities or loss of data or programs. The platform Huuto ³³⁴ refers to the users' exclusive responsibility for the use of the service and expenses associated with it.
FR	Most online platforms disclaim their liability in case of non-performance or for the lack of quality in the performance (leboncoin, ³³⁵ Ouistock, ³³⁶ zenpark, ³³⁷ karzoo, ³³⁸ Samboat, ³³⁹ allovoisins, ³⁴⁰ trampolinn). ³⁴¹ Allovoisins also excludes any liability as regards the identity and reliability of its users. ³⁴²
HU	Online platforms tend to limit their liability to the maximum possible extent permitted by law. Almost all platforms expressly exclude any liability for direct damages, consequential or indirect damages and loss of data (e.g. Oszkár Telekocsi, ³⁴³ Vatera ³⁴⁴). They also deny any liability arising from technical problems . Most online platforms exclude any liability arising from information placed by the users on the platform (e.g. Vatera, Bébiszitter ³⁴⁵). Some platforms state that should they be liable for any loss or damage, the amount of damages cannot exceed the value of the transaction (eg. Albérlet ³⁴⁶).
IT	Most online platforms limit their liability (Autostradecarpooling; ³⁴⁷ Subito; ³⁴⁸ Useit, ³⁴⁹ Bakeka; ³⁵⁰ HomeAway ³⁵¹). Autostradecarpooling excludes

³³³ 'User Agreement' MyyJaOsta website, available at <http://www.myyjaosta.com/main/user-agreement>. (Platform for the sale or (re)sale of new and used/second hand goods).

³³⁴ 'Terms of Service' Huuto website, available at <http://www.huuto.net/kayttoehdot>. (Platform for the sale or (re)sale of new and used/second hand goods).

³³⁵ 'General Conditions of Use' Leboncoin available at https://www2.leboncoin.fr/dc/cgu/0?ca=12_s. (Platform for the sale or (re)sale of new and used/second-hand goods).

³³⁶ 'General Conditions of Use' Ouistock available at <https://www.ouistock.fr/conditions-generales-utilisation-et-vente-ouistock> (renting/sharing of goods).

³³⁷ 'Terms and conditions' Zenpark website available at www.zenpark.com/conditions (renting or sharing of goods).

³³⁸ 'Terms and conditions' Karzoo website available at www.karzoo.fr/fr/mentions-legales (sharing of private transport).

³³⁹ 'Terms and conditions' Samboat website available at www.samboat.fr (sharing of private transport).

³⁴⁰ 'Terms and conditions' Allovoisins website available at allovoisins.com/page/conditions-generales-d-utilisation (non-professional services).

³⁴¹ 'General Conditions of Use' Trampolinn website, available at trampolinn.com/fr/pages/terms-conditions/ (sharing of private accommodation).

³⁴² 'Terms and conditions' allovoisins website, available at allovoisins.com/page/conditions-generales-d-utilisation.

³⁴³ 'General terms and conditions' Oszkár Telekocsi, available at <http://www.oszkar.com/login/hazirend.php#5> (sharing of private transport).

³⁴⁴ 'General terms and conditions' Vatera, available at: <https://img-ssl.vatera.hu/license/main.html?1012> (sale or (re)sale of new and used/second hand goods).

³⁴⁵ 'General terms and conditions of the use' Bébiszitter, available at: <http://bebiszitter.info/aszf.php> (non-professional services).

³⁴⁶ 'General terms and conditions of the use' Albérlet, available at: <http://www.alberlet.hu/aszf> (sharing of private accommodation).

³⁴⁷ 'Terms and conditions' Autostradecarpooling website, available at <http://www.autostradecarpooling.it/terms> (sharing of private transport).

³⁴⁸ 'General conditions of the Service' Subito website, available at <http://www.subito.it/info/policies/condizioni-general.html> ((re)sale of new and used/second-hand goods).

³⁴⁹ 'General terms and conditions' Useit website, available at <https://www.useit.it/termini-condizioni> (renting/sharing of goods).

³⁵⁰ 'General terms' Bakeca website, available at <http://www.bakeca.it/info/termini/> ((re)sale of new and used/second-hand goods).

³⁵¹ 'Terms and conditions Travellers', HomeAway website, available at <https://www.homeaway.it/info/chisiamo/legale/condizioni-general.html> (sharing of private accommodation).

Table 11. Self-regulatory measures on liability adopted by selected national platforms

	any responsibility in case its users carry out through the platform non-authorized or unlawful activities. The platform also excludes any monitoring obligation and liability as regards: 1. the identity and reliability of its users ; 2. the quality, security and legality of the contents published by its users on the platform; 3. the reliability, punctuality and competence of the peer suppliers. <u>Useit</u> also limits its liability for direct or indirect damages caused by serious negligence or by fraudulent activities carried out by the platform itself.
NL	Platforms tend to limit their liability to the maximum possible extent permitted by law. Almost all platforms expressly exclude any liability for direct damages, consequential or indirect damages; technical problems (e.g. <u>Qoop</u> ³⁵²); and for information placed by the users on the platform (e.g. <u>Markplaats</u> , ³⁵³ <u>Parkyourcar</u> ³⁵⁴). Several platforms warn that the exclusion of liability may not be valid in some jurisdictions and that those terms do not apply to the users in that case (e.g. <u>Jipio</u> , ³⁵⁵ <u>Jobado</u> ³⁵⁶). Some platforms expressly agree to be liable in certain circumstances . For example, <u>Goboony</u> ³⁵⁷ and <u>Kamernet</u> ³⁵⁸ accept liability for direct damages.
RO	All platforms dealing with sales transactions use an implicit acceptance clause according to which users may legally sell the products they are offering. This clause can be considered a disclaimer used by the platform to limit its liability in case products sold thereon have not been obtained legally. <u>Okazii.ro</u> ³⁵⁹ states that in the case of violation by users of the platform's General Terms and Conditions , users agree to exonerate the platform from any liability for judicial or extra-judicial actions and to pay any eventual litigation costs.

As regards the multi-country platforms (see list above) falling within the scope of this Study, all of them **explicitly declare that they are not part of the contractual relationships between the peers**. They rather operate as mere intermediaries facilitating transactions and, consequently, do not accept any liability for contracts concluded between their users through the platform itself.³⁶⁰ Furthermore, most multi-country platforms include an **'indemnity clause'** stating that by agreeing to the platform's Terms and Conditions, users also agree to indemnify the platform from any

³⁵² 'Terms and Conditions' Qoop website, available at <http://www.qoop.nl/text.php?file=voorwaarden.txt&text=Algemene+Voorwaarden&header=1> ((Re)sale of new and used/second hand goods).

³⁵³ 'General Conditions' Marktplaats website, available at <http://www.marktplaats.nl/i/help/over-marktplaats/voorwaarden-en-privacybeleid/algemene-gebruiksvoorwaarden.dot#gebruiksvoorwaarden> ((re)sale of new and used/second hand goods).

³⁵⁴ 'General Conditions', Parkyourcar website, available at <https://www.parkyourcar.com/nl/tekstpaginas/algemene-voorwaarden-2> (renting/sharing of goods).

³⁵⁵ 'Terms of use' Jipio website, available at <http://www.jipio.nl/tos> (renting/sharing of goods).

³⁵⁶ 'General Conditions' Jobado website, available at <https://www.jobado.nl/algemene-voorwaarden> (art. 8).

³⁵⁷ 'General Conditions' Goboony website, available <https://www.goboony.nl/> (sharing of private transport).

³⁵⁸ 'General Conditions' Kamernet website, available at https://resources.kamernet.nl/Content/pdf/KamernetAlgemeneVoorwaarden_en.pdf?_ga=1.217107222.1883130012.1460466510 (art. 12).

³⁵⁹ Terms and Conditions' Okazii.ro website available at <http://ajutor.okazii.ro/termeni-si-conditii> ((re)sale of new and used/second hand goods).

³⁶⁰ E.g. 'Terms of Service' Airbnb, available at <https://www.airbnb.com/terms> (Article 25), 'Terms and Conditions' Uber, available at <https://www.uber.com/legal/terms/nl/> (Article 5), 'User Agreement' eBay available at <http://pages.ebay.com/help/policies/user-agreement.html> (Parts 2 and 14), 'Terms and conditions' Wallapop available at <https://uk.wallapop.com/toc> (Article 2), 'Terms and Conditions' Wimdu, available at <http://www.wimdu.com/terms> (Articles 2 and 7).

liability, claim and expense, including reasonable attorneys' fees, relating not only to the Agreement and its breach, but also to 'any other policy' as well as to the 'use of or access to the platform'.³⁶¹ On the basis of information collected through the Country Reports it is also noted that these 'indemnity clauses' are sometimes used also by online platforms operating at national or local level. This is, for example, the case of the Cypriot platforms MSD³⁶² and Cyprus24.net.³⁶³ The Maltese platform Kiribiss contains a similar clause by which users' release the platform from all responsibility.³⁶⁴

4.2.2 User verification systems

As highlighted under Section 3.3.2, pursuant to Articles 6(1)(b) and 7(4)(a) of the UCPD, platforms should not mislead their users as to the origin of the reviews. Consequently, where the platform cannot adequately ensure its users' identity, it should avoid creating the impression that reviews posted through it originate from real users. According to the UCPD Guidance, **platforms should be equipped with the necessary 'technical means to verify the reliability of the person posting a review, for instance by requesting him/her to register'**.³⁶⁵ In general terms, platforms set out minimum identification requirements that users must meet in order to be able to use the platform. Generally, the user must release his name and email address and, on occasion, his phone number. In some instances, additional information is required, such as references from previous jobs, smoking habits or driving licence.³⁶⁶

The review of the Terms and Conditions of the national and multi-country platforms revealed that there are two main systems to verify the identity of users:

- Sending a verification email: emails are usually verified during the registration process: the platform sends an email to the email address provided by the user and asks him to confirm that he revealed his email address for the purpose of registration with the platform;³⁶⁷ and/or
- Registering with the platform through social media or services offered by Google, mainly Facebook or Google account: instead of filling in an online registration form, registration can be completed by linking the user's account to an existing social media profile. Consequently, the basic information available in the social media service, such as user's identity and personal contact information, is directly transferred to the platform.³⁶⁸

³⁶¹ E.g. 'Terms of Service' Airbnb, available at <https://www.airbnb.com/terms> (Articles 8. No Endorsement and 27. Indemnification), 'Terms and Conditions' Uber, available at <https://www.uber.com/legal/terms/nl/> (Article 5), 'Terms and Conditions' easyCarClub, available at <https://carclub.easycar.com/> (Article 15.6), 'User Agreement' eBay available at <http://pages.ebay.com/help/policies/user-agreement.html#14> (Part 14), 'Terms and conditions' Wallapop available at <https://uk.wallapop.com/toc> (Article 2), 'General Terms and Conditions' Nimber available at <https://www.nimber.com/terms> (Article 9).

³⁶² *Supra*, Terms and Conditions, MSD.

³⁶³ 'Terms of Use', Cyprus24.net website available at: <http://www.cyprus24.net/en/page/1>.

³⁶⁴ 'Terms and Conditions' Kiribiss website available at <http://kiribiss.com/terms-conditions.html> ([renting of goods and services](http://kiribiss.com/terms-conditions.html)).

³⁶⁵ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 137.

³⁶⁶ This is the case, for example, in the Hungarian Bebiszitter (<http://bebiszitter.info/aszf.php>) – a platform offering babysitting services, and in the Italian Autostradecarpooling (<http://www.autostradecarpooling.it/terms>) – a platform offering the sharing of private transport.

³⁶⁷ E.g. The Netherlands (Mobypark, Oppassen), Romania (Garajul cu vechituri, Okazii.ro). This has also been reported as a general trend for Bulgarian, Czech, German, Hungarian, Italian or Maltese platforms.

³⁶⁸ E.g. 'Terms and Conditions' Wimdu, available at www.wimdu.co.uk/terms, Bulgarian, Dutch, UK, German, Maltese reports, Belgium (2dehands; and ListMinut website, available at: https://listminut.be/users/sign_in?locale=fr (non-professional services)), Denmark (Den bBlå aAvis, By-del and GoMore), Hungary (Den bBlå aAvis, By-del and GoMore), Romania (e.g. 4inmasina, Fashion hunt), UK (Liftshare, Hiyacar, Spareroom, LocLoc). This has also been reported as a general trend for platforms in France, Bulgaria, Portugal and Germany.

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While some platforms announce that they have the right to carry out identity checks,³⁶⁹ others explicitly mention that they will not monitor their users' identity.³⁷⁰ The information collected through the Country Reports shows that most national platforms have no mechanisms to verify that the information provided by their users as well as their personal data are truthful and reliable. Multi-country platforms such as **Nimber** declare that although the platform does verify the accuracy and truthfulness of the information provided by users, verifying the identity of individuals operating on the Internet is quite difficult. Consequently, the platform cannot and does not confirm, and is not responsible for ensuring, the accuracy or truthfulness of its users' identity or the validity of the information that they post on the platform.³⁷¹

On **Airbnb**, user identification is required to access certain features and applications, as well as to book accommodation or create a listing. Airbnb informs its users (peers) about the **Verified ID process** which aims to connect a peer's Airbnb profile with other information, including: the peer's photo or an image of his ID card, as well as his driver's licence or passport; data stored on Facebook, Google, or LinkedIn accounts; the peer's phone number and email address.³⁷² Airbnb's users are asked to complete Verified ID when certain circumstances occur (e.g. to book accommodation of hosts requiring that guests' complete Verified ID). Airbnb informs its users that the information provided during this process is encrypted and governed by its Privacy Policy.³⁷³

Uber states in its Terms and Conditions that peer consumers' information is collected in order to let them accede to mobile applications, websites, and other online products and services. This information includes: **location information** (concerning the precise location data about the trip); **contact information** stored on the peer consumer's device (if the peer consumer allows the Uber app to access his address book); **transaction information** (i.e. transaction details related to the use of Uber, including the type of service requested, date and time the service was provided, amount charged, distance traveled, and other related transaction details); **usage and preference information** (e.g. through cookies and pixel tags); **call and SMS data** (including date and time of the call or SMS between the customer and the driver, the parties' phone numbers, and the content of the SMS); **log information** (e.g. IP address, access dates and times, app features or pages viewed, app crashes and other system activity, type of browser, etc.).³⁷⁴

Some platforms facilitating P2P transactions set out, instead, strict verification mechanisms for peer suppliers. For example, the Belgian platform CarAmigo³⁷⁵ requires its peer suppliers' **ID card** to verify their identity during the registration process. The Danish platform Guloggratis³⁷⁶ provides user verification through a **log-in system**, with optional user certification under the Danish digital ID system (*NemID*). The Swedish platform Tradera,³⁷⁷ optionally, offers the possibility to connect the peer's account

³⁶⁹ E.g. easyCar Club (Article 15.2); Belgium (HomeLink, MoiGITemps, Car Amigo), Ireland (Upwork, Currencyfair), the Netherlands (Jobado).

³⁷⁰ E.g. the Netherlands (Huizenruil), Ireland (Helpstay) and Finland (Torfi). In Austria, most examined platforms (namely, Willhaben.at, Gebrauchtwagen.at, shpock.com, waffengebraucht.at and car4you.at) do not verify the identity of users. For the use of flohmarkt.at, there is not even the need for registration.

³⁷¹ 'General Terms and Conditions' Nimber available at <https://www.nimber.com/terms>.

³⁷² 'What is Verified ID?' Airbnb website available at <https://www.airbnb.com/help/article/450/what-is-verified-id>.

³⁷³ *Ibid.*

³⁷⁴ 'User Privacy Statement' Uber website available at <https://www.uber.com/legal/privacy/users/en/>.

³⁷⁵ CarAmigo website, available at: <https://www.caramigo.be/img/cgu/CGU-Caramigo-FR.pdf>. Belgian platform for the sharing of carpooling and ride sharing activities.

³⁷⁶ 'Terms and conditions', Guloggratis website available at <http://www.guloggratis.dk/sider/brugerbetingselser>. Danish platform facilitating the (re)sale of new and used/second-hand goods.

³⁷⁷ Tradera homepage regarding liability available at <http://info.tradera.com/sakerhetscenter/anvandaravtal/>. Swedish

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to his Swedish **social security number**. Some platforms (e.g. the UK platform Hiyacar)³⁷⁸ – where certain payments are processed by the platform itself – also require **details of a bank account** or credit/debit card capable of being used electronically. The Estonian platform Osta³⁷⁹ requires its users (peers) to choose a certain authentication method (through **ID-Card** or through **e-Banking**) when they register with the platform. In Ireland, some platforms even ask for a **Police vetting** of the candidate service providers (e.g. Elderhomeshare).³⁸⁰

The main platform providers also apply ID verification of both peers.³⁸¹ BlaBlaCar establishes in its Terms and Conditions³⁸² that in order to increase trustworthiness, prevent typos and wrong numbers, as an option, users' identity can be **verified through their mobile numbers**. Users may provide BlaBlaCar with their mobile phone numbers. They will then receive an SMS with a 4-digit code that can be validated on BlaBlaCar's website. In Cyprus, the platform Bazaraki³⁸³ requires a phone number to complete the registration. GoMore³⁸⁴ in Sweden also uses its users' phone numbers to verify their identity.

In Slovenia, to overcome the problem of users' identity verification, some platforms enable users to acquire a **'verified user' status**. In this case, the user's account is signed by digital certificates (e.g. SIGEN-CA³⁸⁵) that guarantee both his identity and safer business (e.g. Bohla³⁸⁶). The multi-country platform Yoopies,³⁸⁷ providing babysitting services, uses a similar system. It grants the status of 'verified member' to those users whose profile has been certified. The user's identity is verified when the platform receives and has controlled the electronic copy of the user's ID-card (or passport or visa for third country nationals). Yoopies verifies that the name, surname and age indicated at the time of registration are in accordance with those of the corresponding identity document. Furthermore, when a professional certificate (e.g. certificate of babysitter) has been provided upon registration, the user must provide Yoopies with an electronic copy for verification. Members who wish to be certified have to pay EUR 4.

Some platforms, such as the Greek Chrysi Efkairea³⁸⁸ and E-market³⁸⁹ also require an **'entry fee'** to offer particular and specialised services to their users. Other platforms

[platform facilitating](#) the (re)sale of new and used/second hand goods).

³⁷⁸ 'Terms and conditions' Hiyacar website, <http://www.hiyacar.co.uk/terms-and-conditions>. It is a P2P car-sharing platform. English platform for the sharing of transport.

³⁷⁹ Terms and conditions Osta.ee, available at: <https://osta-ee.postimees.ee/index.php?fuseaction=support.page&id=1048>. Estonian platform for the sale or (re)sale of new and used/second hand goods).

³⁸⁰ 'Terms and conditions' Elderhomeshare website available at <http://www.elderhomeshare.ie/#!garda-vetting/c24ze>. Irish platform for sharing of private accommodation.

³⁸¹ Cohen, M., and Sundararajan, A., 2015, 'Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy', 82 *U Chi L Rev Dialogue* 116, available at: <https://lawreview.uchicago.edu/page/self-regulation-and-innovation-peer-peer-sharing-economy>.

³⁸² Terms and Conditions BlaBlaCar, available at <https://www.blablacar.fr/blog/conditions-generales> (Part III). NOTE: The French site of BlaBlaCar has been used since the company has its HQ in Paris.

³⁸³ 'Δημιουργία Αγγελίας' (Add creation), bazaraki.com website available at <http://www.bazaraki.com/newadd.php>?. A separate box pops up once an e-mail is given to enter an SMS that will be used for an one-time verification code. Platform for the (re)sale of new and used/second hand goods.

³⁸⁴ GoMore homepage regarding safety available at <https://gomore.se/rideshare/safety> (sharing of private transport).

³⁸⁵ Website of the Trust Service Authority of Slovenia (*Državni center za storitve zaupanja*) of the Ministry of Public Administration, available at <http://www.sigen-ca.si/eng/eng-index.php>.

³⁸⁶ 'Terms & Conditions', Bohla website available at <http://www.bolha.com/koristno/pravila-in-pogoji-uporabe-bolhacom>.

³⁸⁷ 'General Use Conditions' Yoopies, available at <https://yoopies.fr/cgv/> (Article 2). The French site of Yoopies has been used as it is registered in Paris.

³⁸⁸ Terms and conditions, *Chrysi Efkairea* website available at http://www.xe.gr/static_html/terms.html. It is a platform for the sale or (re)sale of new and used/second hand goods.

³⁸⁹ Terms and conditions, E-market website available at <http://www.emarket.gr/rules.php>. It is a platform for the sale or

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have additional requirements for registration. For example, the UK platform Hassle³⁹⁰ foresees **interviews and checks** of users providing non-professional services carried out by a qualified third party, while Trusted House Sitters³⁹¹ involves police checks in conjunction with reviews so as to assuage users that house sitters offering their services via their site are trustworthy and reliable. The Dutch platforms Jobado and Helping also interview peer suppliers.³⁹²

(re)sale of new and used/second hand goods.

³⁹⁰ Hassle website available at <https://hassle.com/uk/apply> (non-professional services).

³⁹¹ Website available at [https://www.trustedhousesitters.com/gb/\(non-professional services\)](https://www.trustedhousesitters.com/gb/(non-professional-services)).

³⁹² They are both platforms offering non-professional services. Jobado website, available at <https://www.jobado.nl/algemene-voorwaarden>; and Helping website, available at <https://www.helping.nl/algemenevoorwaarden>.

5 Application and enforcement of the current legal framework

This Section examines the application of the existing national legal frameworks relevant to C2C transactions and online platforms facilitating P2P transactions as well as related enforcement issues encountered by national authorities. As highlighted under Section 3.2 of this Report, the national legal frameworks currently relevant to P2P transactions falling within the scope of this Study (both via online platforms and not), normally include: horizontal legislation (relevant civil law rules on contracts in general, sale, lease, etc.) and sector-specific legislation (where relevant).

5.1 Challenges to enforcement of the national horizontal legislation applicable to C2C transactions

Lack of competence of consumer protection authorities

A number of Member States (Austria; Bulgaria; Greece; Latvia; Luxembourg; Malta; the Netherlands; Romania; Slovakia; Sweden) defined the limited competence of national consumer protection authorities to the enforcement of B2C legislation as problematic. The enforcement of most consumer protection rules falls within the competence of government bodies, i.e. a Ministry (or a specific department therein) and/or a Trade, Markets, Competition or Consumer Authority. However, as a general rule, public authorities cannot intervene in contractual relationships between individuals. Therefore, they usually have limited or no competence at all over C2C transactions. For example, in Bulgaria, in case of consumer complaints regarding transactions assisted via an online platform brought to the attention of the Bulgarian Commission for Consumer Protection (CCP), the authority can only inspect whether the relevant distance sale provisions of the Consumer Protection Act are complied with. However, where the goods are sold (or the service delivered) by a peer supplier, the CCP would not be further involved because this would be regarded as a purely civil dispute outside its competence.³⁹³

In Italy, the AGCM is the official body enforcing most of the EU consumer rights acquis. According to Article 3 of Legislative Proposal 3564/2016 (so-called 'Sharing Economy Act') that is currently under discussion in Italy (see Sections 3.3 and 6 of this Report), the AGCM would also be in charge of regulating and monitoring sharing economy digital platforms falling within the scope of the Sharing Economy Act. Apart from being responsible for the National Register where sharing economy digital platforms should register upon approval of their policy document by the AGCM, the AGCM would also have other specific tasks set out by Articles 3 and 4 of Legislative Proposal 3564/2016 (see Section 3.3.1). Because the activity of national consumer protection authorities operating in different Member States has been exclusively focused on the B2C scenario, no enforcement efforts concerning the legislation applicable to C2C transactions have been identified.

It is nevertheless noted that, sometimes, public authorities do assume an active approach towards P2P transactions even though their activity is normally limited to the B2C scenario. For example, in Hungary, online platforms facilitating P2P transactions are subject to thorough investigations and inspections conducted with a certain frequency by both the Hungarian Authority for Consumer Protection and the National Media and Info-communications Authority. These authorities systematically inspect whether the operation of the platform complies with the general information requirements and the specific information requirements established by law.³⁹⁴ The authorities

³⁹³ Information collected through consultation of the Bulgarian Commission for Consumer Protection on 5 April 2016.

³⁹⁴ Article 6:82 of the Civil Code, Article 4 of the Electronic Commerce Act.

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started a significant inspection campaign in the summer of 2015 in the tourism accommodation sector in order to find out how many service providers did not register the holiday premises with the notary of the local government.³⁹⁵ The campaign revealed that around 70-90% of the service providers did not comply with the registration duty, and most of them were offering their premises on Airbnb.³⁹⁶

Issues related to dispute resolution systems

In most cases, the typical available mechanism to enforce civil law provisions and offer redress to peer consumers or peer providers in case of dispute, consists in bringing the case before the civil courts.

The existing legislation applicable to C2C transactions does not provide the same degree of protection as afforded to consumers in B2C transactions. As highlighted in Section 3.2, this is not necessarily a deficiency in the legal framework: C2C transactions involve parties who are on an equal footing as opposed to B2C transactions where it is presumed that the trader has greater bargaining power than the consumer and that consequently the consumer needs enhanced protection at law.

However, it has to be noted that, traditionally, general civil law applicable to C2C relationships is based on the assumption that the transacting parties meet in person and/or the product or service is physically present. Indeed, in most cases, national civil provisions were drafted before the rise of the digital age. As in a C2C contract concluded online the parties do not physically meet, it might happen that, for example, (i) as regards disputes between the peers, one party does not have the same knowledge of the conditions set out in the contract as the counterparty (who might have drafted them) or (ii) as regards disputes between the platform and the peers, the peer user might not have sufficient understanding of the Terms and Conditions pre-determined and imposed by the platform.

When a contract's terms and conditions are pre-formulated by one of the parties (usually the business-party), the counterparty (usually the consumer) may be affected by legal and financial disparity.³⁹⁷ The Austrian Civil Code protects the 'weaker' party by limiting the validity of such clauses. For example, according to Article 879 paragraph 3, when a party introduces in the contract a clause which does not establish a main obligation and which is predominantly detrimental to one party, such clause is void.³⁹⁸ This is also the case of new Article 1171 of the French Civil Code introduced on 1 October 2016 by Ordinance No. 2016-131 (which applies to both B2C and C2C transactions – see Section 3.2.1 of this Report) setting out that any unfair contract term included in 'adhesion contracts' (i.e. contracts whose content is exclusively formulated by one of the parties to the transaction)³⁹⁹ is void.

On the basis of the Country Reports (e.g. Austria, Belgium, Bulgaria, Croatia, Czech Republic, France, Finland and Romania), it is possible to conclude that the lack of reported claims brought by parties to C2C/P2P transactions may be attributed to a low level of awareness of the general public about the available remedies. Although in recent years many public and private organizations have launched initiatives for consumer rights awareness, online C2C/P2P transactions were not the focus of their activities (see Section 6 of this Report).

³⁹⁵ In Hungary, the notary is a special figure of the local government with general and entry-level jurisdiction and enforcement power in many public administration matters. The notary oversees the operation of local businesses in multiple sectors (e.g. tourism, transportation, retail) and issues licences for the operation of such businesses.

³⁹⁶ Bence, S., for Index.hu, 'Airbnb turns everything upside down' (*Mindent felforgat az Airbnb*), 25 August 2015, available at: <http://index.hu/gazdasag/2015/08/25/airbnb/>.

³⁹⁷ Hinteregger, M., 'Contracts', in Grabenwarter, C./Schauer, M. (ed) *Introduction to the Law of Austria* (2015) 64.

³⁹⁸ Graf, F., 'Art 879 ABGB', in Kletečka, A./Schauer, M. (ed) *Kommentar ABGB-ON*^{1.02} (2015) ibid no. 276 et seq.

³⁹⁹ New Article 1110 of the French Civil Code, as amended by Ordinance No. 2016-131.

The costs and length of the proceedings could stop individuals from resorting to judicial action. This point was emphasized in the Latvian and Czech Republic Country Reports, amongst others. In the Czech Republic the limited number of alternative dispute resolution mechanisms in place has also been reported as an additional challenge to bringing complaints forward. Against this background, it is noted that, in case of cross-border C2C disputes of a value of up to EUR 2,000, the European Small Claims Procedure can be invoked. The procedure is available for both monetary and non-monetary claims and can be used for most types of civil (and commercial) claim. As the European Small Claims Procedure is, in principle, a written procedure, it is designed to be relatively speedy (for example, there is no obligation to instruct a lawyer) and less costly than other procedures (in most Member States it will be necessary to pay a fee to the court for lodging the application – additional costs may involve legal advice in case of optional instruction of a lawyer, experts' payments and translation costs).⁴⁰⁰ The availability of a specific small claims procedure for national level disputes, as well as the definition of its scope of application and possible thresholds depends on the Member State. For example, in Italy there is no specific procedure for small claims (which are instead heard by the *Giudice di Pace*).⁴⁰¹ In Ireland, claims concerning the sale or (re)sale of goods are covered by the national small claims procedure only where the transaction has been concluded between a trader and a consumer. Consequently, C2C claims are excluded. Claims concerning renting accommodation or landlord/tenant claims are covered by the Irish small claims procedure only when they arise from minor damage to properties or the non-return of a deposit for certain types of rented properties (e.g. the renting of a holiday flat, provided that the claim does not exceed EUR 2,000).⁴⁰²

The Country Reports also identified enforcement issues that relate specifically to cross-border transactions. For example, the Hungarian Association for Consumer Protection reported that few consumers turn to the authorities with problems resulting from a cross-border transaction, and consumer organisations also register an almost insignificant number of complaints against multi-country platforms. For example, in Slovenia only 17% of citizens buy online from other countries, while 30% buy online from their own country. This could also be due to the uncertainty regarding the effective enforcement of consumer rights when the transaction is concluded through an online platform.⁴⁰³ Furthermore, litigation costs, translation duties and communication problems in cross-border disputes make it almost impossible for consumers to get effective legal remedies against foreign service providers/sellers.⁴⁰⁴

A further challenge regarding cross-border transactions may be the differing contract law regimes existing in the different jurisdictions involved in these transactions. National contract law principles differ from State to State as might expectations as to self-regulatory standards. Perhaps in this sense some degree of harmonisation could be developed to ensure further protection of the parties in those areas where it is considered that either guidance or legislation is necessary.⁴⁰⁵

⁴⁰⁰ Small claims, European e-Justice Portal available at https://e-justice.europa.eu/content_small_claims-42-en.do.

⁴⁰¹ Small claims – Italy, European e-Justice Portal available at https://e-justice.europa.eu/content_small_claims-42-it-en.do?member=1.

⁴⁰² Small claims – Ireland, European e-Justice Portal available at https://e-justice.europa.eu/content_small_claims-42-ie-en.do?member=1.

⁴⁰³ European Commission, 'Digital Contracts for Europe, Slovenia Factsheet', December 2015, European Commission, available at: http://ec.europa.eu/justice/contract/files/digital_contracts/digital_contracts_factsheet-si_en.pdf, p. 1

⁴⁰⁴ Information collected through consultation with the Hungarian Association of Consumer Protectors on 14 April 2016.

⁴⁰⁵ E.g. Spain (information collected through consultation with national stakeholders: Catalanian Competition Authority, 26 May 2016; Ouishare, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

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Another factor which may prevent people from bringing disputes concerning C2C transactions concluded through online platforms to courts may be the difficulty to obtain the counterparty's personal data from the platform. This is mainly due to the fact that most platforms set privacy standards under their general Terms and Conditions or do not systematically verify users' identity (see Section 4.2.2).⁴⁰⁶ The box below reports a decision of the Dutch Supreme Court dealing with this issue.

The Netherlands: decision of the Supreme Court of 25 November 2005⁴⁰⁷

In this case, a person anonymously accused another person of fraud when selling stamps over the Internet through a website – Lycos (information service provider). The accused person requested from Lycos the name and address of the person making the accusation but Lycos refused this request. In first instance, the Court ordered the communication of the name and address of the accuser. The release of the personal information of the accuser by Lycos was contested before the Supreme Court.

The Supreme Court ruled that, under certain circumstances, a hosting provider may infringe the duty of diligence referred to in Article 6:162 of the Civil Code by not providing name and address of the person who published a post on a website hosted by the hosting provider to another person who claims to have suffered damage by such post.

A hosting provider infringes this duty when, although having knowledge of the contact details of the 'accuser', it refuses to communicate them to the accused person (who claims to have suffered damage as a result of the posting). Neither the E-commerce Directive nor Article 6:196c(4) of the Civil Code (or Article 8(f) of the Act on the Protection of Personal Data) prohibits this. It is true, however, that the right to free speech should be respected and that this may, under certain circumstances, include the right to express an opinion anonymously. Therefore, a diligent weighing of interests is required.

The order to communicate the name and address to the accused person constitutes an infringement of Articles 8 (Right to respect for private and family life) and 10 (Freedom of expression) of the European Convention on Human Rights. However, the infringement is justified by the interests referred to in the second paragraph of these provisions and does not go further than what is strictly necessary in a democratic society.

Finally, the generally **low confidence in the effectiveness of traditional dispute resolution tools** (i.e. various forms of civil litigation) seems to act as another deterrent for enforcement of rights derived from the general civil law.⁴⁰⁸ Within the national civil law systems there are however also **alternative dispute resolution mechanisms** such as mediation and arbitration that the peers may agree to have recourse

⁴⁰⁶ E.g. national platforms: UK (Storemates - <https://storemates.co.uk/terms-conditions>, Liftshare - <https://liftshare.com/uk/other/terms>, HiyaCar - <https://hiyacar.co.uk/terms-and-conditions>), the Netherlands (Jipio - <http://www.jipio.nl/tos>, ReWear - <https://www.rewear.co/terms-and-conditions>, Markplaats - <http://www.marktplaats.nl/i/help/over-marktplaats/voorwaarden-en-privacybeleid/algemene-gebruiksvoorwaarden.dot.html>), Malta (Second hand - <http://secondhand.com.mt/privacy-policy/>), Czech Republic (Aukro - http://aukro.cz/country_pages/56/0/user_agreement.php, Půjčovna.cz - <http://www.pujcovna.cz/obchodni-podminky>, Sbazar.cz - https://napoveda.seznam.cz/soubory/Sbazar/Smluvni_podminky_Sbazar.cz.pdf), Hungary (Vatera - <https://img-ssl.vatera.hu/license/main.html?1012>, Oszkár Telekocsi - <http://www.oszkar.com/login/hazirend.php>, Bébiszitter - <http://bebiszitter.info/aszf.php>); EU platforms (Airbnb - <https://www.airbnb.com/terms>, Wimdu - <http://www.wimdu.co.uk/terms>, BlaBlaCar - <https://www.blablacar.co.uk/terms-and-conditions>, Uber - <https://www.uber.com/legal/terms/us/>, Easycar - <https://carclub.easycar.com/>, Wallapop - <https://uk.wallapop.com/rules>, eBay - <http://pages.ebay.com/help/policies/user-agreement.html>, Peerby - <https://www.peerby.com/privacy>, Yoopies - <https://yoopies.fr/cgv/>, Nimber - <https://www.nimber.com/terms>).

⁴⁰⁷ ECLI:NL:HR:2005:AU4019, WBP 2009/34 note *de Vries*, H.H., NJ 2009, 550 note *Hugenholtz*, P.B., IER 2006/2. Confirmation of Court of Appeal (*Gerechtshof*) Amsterdam 24 June 2004, ECLI:NL:GHAMS:2004:AR2103, not published.

⁴⁰⁸ Conclusions provided by the Hungarian and Czech Country Reports. Bulgaria (information collected through consultation with the Commission on Consumer Protection on 5 April 2016); Finland (information collected through consultation with the Consumer Union on 18 May 2016).

to. As regards disputes between a peer consumer or supplier and a platform that qualifies as a trader and engages in B2C commercial activities, the ADRD and the RODR (that provide for alternative dispute resolution mechanisms for disputes between consumers and traders⁴⁰⁹ and an online dispute resolution system,⁴¹⁰ respectively) could apply (see Section 2.1). In addition, the Terms and Conditions of some platforms also provide for **online dispute resolution services** or **refer their users to the competent jurisdiction** as explained in Section 3.3.2.

5.2 Challenges to enforcement of the national sector-specific legislation applicable to C2C transactions

Regarding the sector-specific legislation applicable to C2C transactions, several Member States have reported **enforcement issues regarding the transportation and accommodation sectors**. These are described below.

Limited competence of national consumer protection authorities

The enforcement of sector-specific rules is beyond the remit of national consumer protection authorities. The Country Reports for Croatia, the Czech Republic, Cyprus, Germany, France, Ireland and Spain note that when national sector-specific legislation applies to C2C transactions (e.g. licensing requirements), these are not necessarily enforced with respect to private individuals providing transport or accommodation services on a non-professional basis by the sector-specific authorities.

Fragmentation of Member States' regulatory approach with regards to the distinction between B2C and C2C transactions

As highlighted under Section 3.1.2 above, indicators of what constitutes a trader vary from one Member State to another (as well as within the same Member State in case of local regulation), differ from sector to sector, and are set out by different legislative or non-legislative instruments. This fragmentation could generate legal uncertainty and consequently hinder the enforcement of the existing legislation, as well as consumer protection.

Difficulties relating to the lack of transparency of platforms' rules and practices

The scarce enforcement of the existing relevant legislation is **deeply interrelated with the lack of transparency of platforms' rules and practices**. For example, where platforms are not obliged to be equipped with the necessary technical tools to improve the information they provide to their users, the enforceability of any law aimed at clarifying the distinction between B2C and C2C transactions appears difficult. The independent website *Inside Airbnb*⁴¹¹ highlighted that around half of the Amsterdam flats are rented out through Airbnb exceeding the limit of 60 days per year set out by the Amsterdam rules on private holiday rentals.⁴¹² Furthermore, checking out

⁴⁰⁹ According to Article 2(1) ADRD, this Directive applies to 'procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution'.

⁴¹⁰ The ODR platform is a web-based platform developed by the European Commission, which aims to help consumers and traders solve their contractual disputes regarding online purchases of goods and services out-of-court. The ODR platform is available at <https://webgate.ec.europa.eu/odr/main/?event=main.home.show>.

⁴¹¹ Inside Airbnb website available at <http://insideairbnb.com/amsterdam/index.html?neighbourhood=&filterEntireHomes=false&filterHighlyAvailable=false&filterRecentReviews=false&filterMultiListings=false>.

⁴¹² 'May I let my home or home boat when I am on holidays?' (*Mag ik mijn woning of woonboot verhuren als ik op vakantie ben?*), website of the Municipality of Amsterdam, available at <https://www.amsterdam.nl/veelgevraagd/?caseid=%7B9B2C2273-F797-460B-AD20-05DFB9F6F39F%7D>.

the calendars set out by peer suppliers operating in Amsterdam for their listing, *Inside Airbnb* found that 51,6 % of entire homes and apartments rented out through the platform resulted highly available during the whole year, and 24,6 % of peer suppliers use multiple listings.⁴¹³ These data could arguably highlight that several individuals renting out their apartments through Airbnb do not actually reside there. They are more likely to be running a business and to exceed the temporal threshold of 60 days set out by short term rental laws. Although the City Council denied that the problem is as big as described by *Inside Airbnb*,⁴¹⁴ the case of Amsterdam could highlight the difficulty in using sector-specific thresholds to distinguish between professional and non-professional activities without the voluntary cooperation of online P2P platforms, or without rules specifically imposing transparency requirements on these platforms.

Enforcement issues might also arise from the fact that **most online P2P platforms do not specifically comply with the pre-contractual information requirement of enabling their users to clearly state whether they are acting as traders** (see Section 3.3.2).⁴¹⁵ The Country Reports also show that online platforms usually **do not set out strict verification systems of users' identity** (see Section 4.4.2). Consequently, enforcement issues could also arise from the way the platforms' users behave. According to some stakeholders, the 'impersonal nature' of the Internet allows for several violations of the law. In particular, it is not uncommon for businesses operating on online platforms to present themselves as consumers so as to conclude P2P contracts with other consumers and avoid the application of the B2C consumer protection legislation.⁴¹⁶ Some users might provide **false information** or **create fake accounts**, a practice that makes their detection by authorities extremely difficult. In fact, while platforms set out minimum identification requirements (e.g. name and email address) that users must provide in order to be able to use the platform (see Section 4 of this Report), this information is normally not sufficient to actually verify the identity of users. The Greek Consumer Ombudsman⁴¹⁷ emphasised that this creates great difficulties in the investigation, intersection, identification and banning of those users that violate the platform's general Terms and Conditions.

Risk of unfair competition

Furthermore, platforms tend to argue that they do not qualify under the definitions of national sector-specific provisions applying to the accommodation and transport sectors and, thus, do not need to fulfill the requirements set out therein, mostly regarding licensing and taxes.⁴¹⁸ Most of the legal cases have been brought before the courts by traditional businesses in the accommodation and transport sectors that perceive the new sharing economy actors as a threat. In fact, some national stakeholders have pointed out that, if sharing economy platforms do not have to comply with sector-specific legal requirements, this could constitute an **unfair competitive advantage of the platforms against traditional businesses**, which, instead, have no means to avoid these requirements. This could result in a case of unequal treatment and unfair competition (see Slovenian case in the box below).⁴¹⁹

⁴¹³ *Ibid.*

⁴¹⁴ 'The 'Airbnb effect': is it real, and what is it doing to a city like Amsterdam?', *The Guardian*, *supra*.

⁴¹⁵ This requirement would descend from the professional diligence duty set out by Article 5(2) of the UCPD and has been clarified by the UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 123.

⁴¹⁶ Information collected through consultation of the Greek Consumer Ombudsman on 12 May 2016 and the Hellenic Telecommunications and Post Commission on 20 April 2016. Conclusions confirmed by stakeholders attending the Workshop carried out in Brussels, as part of the Study, on 3 October 2016.

⁴¹⁷ Information collected through consultation of the Greek Consumer Ombudsman on 12 May 2016.

⁴¹⁸ E.g.: multi-country platforms (Wimdu, Wallapop, Airbnb, Uber); national platforms: Denmark (GoMore), Estonia (Taxify), Italy (Homeaway), Malta (Second Hand), Portugal (Oxl), Spain (Socialcar).

⁴¹⁹ E.g. Spain (Information collected through consultation with national stakeholders: Catalan Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Representative of the Government, 13 June

Grounds on the basis of which the Slovenian Hotel 'Slon' accused Airbnb of unfair competition⁴²⁰

- *Taxes*: apartments rented through the platform neither pay tourist taxes, nor other taxes - The competent Financial Authority of the Republic of Slovenia (FURS)⁴²¹ established that taxes must be paid when renting property via Airbnb;
- *Insurance*: guests are not insured for any possible damage that they may cause during their stay;
- *Security*: rented apartments are sometimes not equipped with fire alarms and other security measures. According to Article 14 of the Hospitality Industry Act, natural persons who do not act in a professional/commercial capacity can rent out rooms only occasionally (not more than 5 months in a calendar year) if the apartment does not have more than 15 rooms and is registered in the Commercial Register of the Republic of Slovenia. In practice, such registration is very rare. The lack of registration is also common when apartments are rented in a traditional way (not via online platforms). Nevertheless, it seems that when it comes to Airbnb, registration is even less common.

Until now, it seems that it will depend on the discretion of the courts to determine whether online sharing economy platforms fall within the definitions set out by sector-specific legislation and, thus, should comply with their corresponding legal requirements.

Similar cases have been reported in the transportation sector regarding, overall, Uber Pop or Uber X. For instance, in Bulgaria, the Commission on Protection of Competition, in its decision of 30 June 2015, highlighted that UberX has all the features of a professional taxi-service activity. Nevertheless, the platform does not require UberX-drivers to comply with the requirements of Bulgarian law regarding licensing requirements for professional taxi drivers. Consequently, according to the Bulgarian Commission, UberX violates rules of fair competition and the good faith expected in business practices (by avoiding the licensing procedures, inspections and associated expenditures) for the purpose of gaining an unfair advantage and related economic benefits.⁴²²

2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁴²⁰ 'Booking in Airbnb se zajedata v prihodke hotelirjev', Gradbenistvo website, available at <http://gradbenistvo.finance.si/8838336>.

⁴²¹ According to the Personal Income Tax Act (*Zakon o dohodnini*), taxes apply to income received from renting out the apartment.

⁴²² CPC decision no. 540 of 30 June 2015. Similar cases have been reported for e.g. in Germany (case 3-08 O 136/14, 18 March 2015), France (UberPop France – 17 Mars 2016, Lilles' First instance Court) and the Netherlands (ECLI:NL:CBB:2014:250, Court (*Rechtbank*) Zwolle-Lelystad 14 March 2007, Rechtspraak.nl, NJF 2007, 297, IER 2007, 73, note Struik, H., WBP 2009/89).

6 Legal and policy initiatives

This Section provides an overview of relevant legal and policy initiatives being pursued at EU and national levels e.g. plans for the adoption of guidelines or legislative initiatives in the pipeline. Any stakeholder recommendations in this respect are also highlighted in Section 6.3 below.

6.1 EU initiatives

At EU level, the main and most recent policy document dealing with the issues raised by the sharing economy phenomenon with regard to the application of existing legal frameworks is the **European Commission's Communication 'A European agenda for the collaborative economy' of 2 June 2016**.⁴²³ The European Commission's Communication highlights that the blurred confines between individuals acting in a private capacity and individuals acting in a commercial/professional capacity combined with the fragmentation of the regulatory approaches adopted at national and local levels (see Sections 3.1, 3.2 and 3.3 of this Report), generates **uncertainty over the application of existing rules**. As described in Section 3.1.2, the vagueness of the distinction between traders and consumers could be particularly detrimental for **consumers who might not be aware of the nature of the transactions concluded through the platform, as well as of the applicable legislation**. Furthermore, in online C2C contracts, other possible consumer protection issues could arise from **information asymmetries** caused by the fact that the parties do not physically meet and do not have the same knowledge of the conditions set out in the contract as the counterparty. Such information asymmetries could also concern the relationship between the platform and the peers, as the peers might not have sufficient understanding of the platform's Terms and Conditions (see Section 5.1). The European Commission's Communication, therefore, provides **legal guidance and policy orientation** to consumers, businesses and public authorities when engaging in the sharing economy, by addressing concerns over their rights and obligations. In particular, the European Commission's Communication highlights that whenever an online platform qualifies as a trader and engages in commercial practices, the professional diligence duty set out by the UCPD would apply. Therefore, platforms should

'enable underlying service providers that qualify as traders to comply with EU consumer and marketing law, for example by designing their web structures to make it possible for third party traders to identify themselves as such to platform users. In addition, they could also clearly indicate to all users that they will only benefit from protection under EU consumer and marketing laws in their relation with traders'.⁴²⁴

As highlighted under Section 3 of this Report, national regulatory approaches to C2C transactions differ from one Member State to another. In a number of Member States sector-specific provisions applicable to the accommodation and transport sectors do set out either authorisation and licensing requirements that apply also to C2C transactions (concluded by peers through online platforms) or thresholds that help to distinguish between traders/professionals and consumers (see Section 3.1.2). The European Commission's Communication highlights that in order to assess whether a **market access requirement is non-discriminatory, justified** (i.e. necessary to attain 'an overriding reason relating to the public interest'),⁴²⁵ and **proportionate** (i.e. 'the ob-

⁴²³ European Commission, Communication 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356final, *supra*.

⁴²⁴ *Ibid.*, p. 10.

⁴²⁵ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on OJ L 376, 27 December 2006, pp. 36-68, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN>).

jective pursued cannot be attained by means of a less restrictive measure')⁴²⁶ in the meaning of Article 9 of the SD and of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU), it is necessary to distinguish between professional providers and private individuals operating on an occasional basis. Although EU legislation does not expressly clarify such distinction within the sharing economy scenario,⁴²⁷ the European Commission's Communication provides a number of indicators that could help in assessing, on a case-by-case basis whether a transaction is B2C or C2C. These elements are: i. the **frequency of the services**; ii. the **profit-seeking motive**; and iii. the level of **turnover**. They reflect the criteria set out by the **UCPD Guidance** to address the issue of whether someone qualifies as a 'trader' under the UCPD (see Section 3.1.2 of this Report). The analysis carried out at national level shows that issues relating to the distinction between traders and consumers are generally not adequately addressed at national level (see Section 3.1.2), generating legal uncertainty over the applicability of the existing legal frameworks to specific transactions.

With regards to the applicability of market access requirements to online platforms, the European Commission's Communication establishes **criteria to determine the level of control or influence of the platform over the transactions concluded by its users on the platform itself** and, hence, assists in assessing whether or not a platform should be considered as also providing the underlying service (e.g. transport or short-term rental service - in addition to an information society service). These criteria are: i. whether the platform sets the final price to be paid by the user, as the recipient of the underlying service; ii. whether the platform sets terms and conditions that determines the contractual relationship between the provider and the user; and iii. whether the platform owns the key assets used to provide the underlying service. Furthermore, the information collected through the Country Reports showed that in the relationship between the platform and its users, the platform's responsibility and its obligations towards the peers are not completely clear and have been subject of various interpretations (Section 3.3.2 of this Report). The European Commission's Communication clarifies that the applicability or not of the **liability exemption regime** set out by Article 14 of the ECD to online platforms depends on the activity carried out by the platform itself: the liability exemption is exclusively limited to the hosting services offered by the platform (in the meaning of Article 4 of the ECD) and only applies when the platform operates in a merely technical, passive and automatic way.⁴²⁸

Furthermore, the European Commission's Communication establishes that the Commission intends to set out a framework to **monitor the legal, economic and business developments** within the sharing economy scenario which will include four tools:

- Periodic surveys of consumers and businesses on the use of the collaborative economy.
- Ongoing mapping of regulatory developments in Member States.
- Stakeholder dialogue in the framework of the Single Market Forum, with twice yearly forums to assess sector development on the ground and to identify good practices.
- The results of the monitoring of the collaborative economy will be summarised in the Single Market Scoreboard.⁴²⁹

⁴²⁶ *Ibid.*

⁴²⁷ European Commission, Communication, 'A European agenda for the collaborative economy', 2.6.2016, COM (2016) 356 final, *supra*, p. 5.

⁴²⁸ *Ibid.*, p.9.

⁴²⁹ *Ibid.*, p. 15.

6.2 National initiatives

Table 12 below provides an overview of the types of legal and policy initiatives that have been already adopted by the Member States, as well as of any other national initiative in the pipeline. In Table 12, while hard law initiatives (i.e. initiatives involving the official and regular approval of legislation) are classified under 'Existing legal initiatives', soft law instruments, such as non-binding recommendations or guidelines, are included under 'Existing policy initiatives'. Whenever the initiative has not been adopted yet, it is classified under 'Initiatives in the pipeline'. The existing legal and policy initiatives have been sub-classified in two groups, distinguishing between those initiatives which contain measures addressing the sharing economy generally and those initiatives which are sector-specific. Initiatives with measures aiming at, for example, introducing general obligations for sharing economy platforms are found within the first group. Initiatives targeting, for example, licensing or tax requirements in a specific sector are included in the second group.

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Table 12. Legal and policy initiatives adopted or in the pipeline

MS	Existing legal initiatives			Existing policy initiatives			Initiatives in the pipeline
	General initiatives addressing the sharing economy	Sector-specific initiatives		General initiatives addressing the sharing economy	Sector-specific initiatives		
		Transport services	Accommodation services		Transport services	Accommodation services	
AT							
BE	√		√	√	√		
BG							
CY							
CZ							
DE				√			√
DK							
EE	√						
EL							
ES				√			√
FI	√			√			
FR	√						
HR							
HU		√					√
IE						√	
IT							√
LT							√
LU							√
LV					√		
MT							
NL		√	√	√			
PL					√		
PT				√		√	√
RO							
SE							
SI							
SK							
UK	√		√	√	√	√	√

6.2.1 Existing legal and policy initiatives

This Section gives an overview of the legal and policy initiatives already adopted at national, regional or local levels to tackle the sharing economy phenomenon. In most Member States that adopted such initiatives, their specific focus is not the sharing economy phenomenon as a whole, but rather specific issues (such as taxation – see under Section 3.1.2.1 tax thresholds introduced by national rules in some Member States) in those sectors where the sharing economy seems to be more active and the competition with ‘traditional’ businesses is particularly high (transport and accommodation). These initiatives often seek to extend the licensing and tax requirements set out by sector-specific legislation (see Section 3.2.2) to sharing economy actors. Some national and local initiatives in the transport and accommodation sectors are reported below (e.g. Hungary, Latvia and the United Kingdom). In Belgium, France, Italy and Spain, legal and policy initiatives that address the phenomenon of the sharing economy as a whole have been identified. The initiatives adopted in Belgium, Spain, Hungary, Latvia and the United Kingdom are briefly described below. The French Reform of Contract Law is described in Section 3.2.1 of this Report. Various aspects of the Italian ‘Sharing Economy Act’ are described under Sections 3.3.1, 5 and 6.2.2.

Belgium

A consortium of European consumer associations from Belgium, Italy, Portugal and Spain, led in Belgium by the consumers’ protection organisation *Test Achats/Test Ankoop*, and the network of sharing platforms *Netwerk Bewust Verbruiken*⁴³⁰ have recently released a policy paper outlining concrete recommendations for online platforms facilitating P2P transactions and policy makers aiming to promote the sharing economy.⁴³¹ The objective is twofold: i. to ensure that users are fully and adequately protected while engaging in C2C transactions concluded through online platforms; ii. to improve the quality of P2P relations and the quality of the services provided by platforms. The box below reflects the main recommendations found in this policy paper.

Selected recommendations developed by *Test-Achats/Test Ankoop* in the policy paper ‘Collaboration or Business? Collaborative consumption: From value for users to a society with values’, 2016

- Every platform should set out easily understandable interaction rules that are also clearly visible to users.
- Platforms should verify that providers have adequate insurance cover in place or provide adequate insurance policies where necessary. For instance, transportation platforms should make sure that drivers offering their services have adequate insurance, as standard car insurance might not cover such activities. Similarly, accommodation platforms should offer providers insurance cover for possible damages to properties.
- Platforms should inform all users about the applicable consumer legislation in their sector of operation and country, as well as about the platform itself, the activity they are involved in, and their rights (e.g. cancellation policies, privacy information). Such information should be clearly expressed and easily understood, and its compliance simplified as much as possible.
- As the legal nature of a transaction depends on the status of the provider (peer or professional), platforms should develop filters or appropriate tools, so that the consumer always knows the status of the party (peer or professional provider) they are dealing with.
- Platforms should create reliable trust systems, including control mechanisms such as cross peer review (e.g. a review is not published until the other party

⁴³⁰ *Netwerk Bewust Verbruikern*, available at: <http://www.bewustverbruiken.be/>.

⁴³¹ OCU, *Altroconsumo*, *Deco Proteste*, *Test Achats/Test Ankoop*, *Cibersomosaguas*, *Ouishare*, ‘Collaboration or Business? Collaborative consumption: From value for users to a society with values’ [2016] OCU Ediciones, 65.

Selected recommendations developed by *Test-Achats/Test Ankoop* in the policy paper 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', 2016

has also provided one) and user identity verification. Furthermore, users should be able to 'own' their own virtual reputation, so as to re-use it in other platforms to prove their reliability.

- Effective mechanisms for redress should be improved and/or developed. Such mechanisms should provide good tracking of conflict resolution and proper records of the solutions agreed between the parties. The introduction of alternative dispute resolution systems would also be a welcome development, as this tends not to be employed in P2P conflict resolution.

In addition, *Test-Achats/Test Ankoop* has also called for legislators and policy makers to develop a series of clear principles that are reported in the box below.

Selected principles for legislators and policy makers developed by *Test-Achats/Test Ankoop* in the policy paper 'Collaboration or Business? Collaborative consumption: From value for users to a society with values', 2016

- It is necessary to clarify platforms' roles and responsibilities.
- Legislators should define the parameters that distinguish a private activity from a professional activity. Ideally, such a consensus should work at European level.
- P2P collaborative consumption should not be over-regulated; P2P relationships would benefit from being deregulated and simplified. On the other hand, in B2C relationships, the existing consumer regulations should be reinforced at institutional level and be respected by professional collaborative consumption providers.
- Legislators should acknowledge 'the prosumer' as a new type of economic actor. They should define simple rules delimiting tax and administrative obligations for citizens that offer a non-professional service on an occasional basis.
- Governments should enforce compliance with the legal obligations that apply to all collaborative consumption participants.⁴³²

In addition, the network of consumer, environmental and development organisations *Netwerk Bewust Verbruiken* released a paper on '65 measures for the sharing economy in Flanders' hoping to 'inspire and encourage policy makers' and request them to take responsibility as 'facilitator[s], supporter[s] and regulator[s] of the sharing economy'.⁴³³ The paper, written by seven experts in the field, provides a multidisciplinary overview of the various challenges that sharing economy initiatives could encounter.⁴³⁴ The regulatory measures requested and proposed by the network include clear rules on the level of turnover. However, most of the proposed measures aim to regulate non-profit sharing economy initiatives.

⁴³² OCU, Altroconsumo, Deco Proteste, Test Achats/Test Ankoop, Cibersomosaguas, Ouishare, 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU Ediciones, 66.

⁹ 'Share the Future, 65 measures for the sharing economy in Flanders' (*Deel de toekomst, 65 maatregelen voor de deeleconomie in een veerkrachtig Vlaanderen*), Bewustverbruiken website, available at <http://www.bewustverbruiken.be/artikel/65-maatregelen-voor-devlaamse-deeleconomie>; Roeselaer, T., 'The sharing economy in Belgium: status and implications for entrepreneurs' [2014] University of Liverpool, 8-9.

⁴³⁴ Roeselaer, T., 'The sharing economy in Belgium: status and implications for entrepreneurs' [2014] University of Liverpool, 8-9.

Spain

Spain has adopted different legal and policy initiatives at national and regional levels. The Spanish Ministry of Industry, Energy and Tourism recently released a report stating that platforms such as Uber and Airbnb may be controlled and sanctioned by the Autonomous Communities.⁴³⁵ This argument is based on an interpretation of Article 16 of the Act on information society services and electronic commerce⁴³⁶ which regulates the responsibility of electronic platforms hosting or storing data. At **regional level**, the Catalan Government has recently approved the creation of a special commission in charge of regulating the sharing economy at regional level. The Catalan Government acknowledges the new figure of the '**prosumer**' and wants to further regulate online platforms' rights and obligations. This new figure refers to the 'professional consumer' whose role has been consolidated by the development of new technologies. Digital means, indeed, have empowered consumers, facilitating their access to parts of the market that were traditionally reserved to businesses and transforming them in the 'official' reviewers of the products and brands they acquire, influencing other consumers' choices and leading demand.⁴³⁷ The first task entrusted to this special commission is the elaboration of a report on the development of the sharing economy phenomenon and its impact on the market (overall regarding the accommodation sector) that will be presented before the Catalan Government.⁴³⁸ Spanish civil society is also very active in the sharing economy scenario. The initiatives of *Sharing España*, a collective of innovative companies within the Spanish Association of Digital Economy (*Asociación Española de la Economía Digital*) are described in the box below.

Selected principles for sharing economy online platforms developed by *Sharing España* in the 'Code on principles and good practices of sharing platforms'⁴³⁹

Sharing España aims to analyse and disclose the impact of sharing economy and P2P business models on the market from a socio-economic perspective, as well as in terms of sustainability and growth of the phenomenon. It developed a Code including inspiring principles based on good practices identified among sharing economy platforms. The Code is divided into five areas (promotion of the sharing economy; honesty, integrity and trust; effective safety and attention; cooperation with the public authorities; and fulfilment and outreach) and enshrines thirteen principles. These principles have a clear emphasis on the protection of users. For example, the Code urges platforms to develop efficient and trustworthy review systems (Principle 6). It also states that platforms should encourage their users to provide their goods and services with the highest possible levels of quality, safety and trust (Principle 9).

⁴³⁵ El Mundo, 'The Government enables the Communities to monitor and sanction platforms similar to Airbnb' (*El Gobierno faculta a las comunidades para que vigilen y multen a plataformas como Airbnb*) available at <http://www.elmundo.es/economia/2016/06/20/5766be36468aeb047a8b4664.html>.

⁴³⁶ Act 34/2002, of 11 July 2002 on information society services and electronic commerce (Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico) BOE, 12 July 2002.

⁴³⁷ Gunelius, S., for Forbes "The shift from CONsumers to PROsumers", available at <http://www.forbes.com/sites/work-in-progress/2010/07/03/the-shift-from-consumers-to-prosumers/#63950c59543f>.

⁴³⁸ An exact date for this presentation has not been set out yet. Government of Catalonia, 'Agreement GOV/44/2016, of 5 April, for the development of the sharing economy in Catalonia and the creation of an inter-departmental commission on sharing economy' (*ACORD GOV/44/2016, de 5 d'abril, per al desenvolupament de l'economia col·laborativa a Catalunya i de creació de la Comissió Interdepartamental de l'Economia Col·laborativa*) available at http://dogc.gencat.cat/ca/pdogc_canals_interns/pdogc_resultats_fitxa?action=fitxa&documentId=722189&language=ca_ES.

⁴³⁹ Website of Sharing España, available at <http://www.sharingespana.es/quienes-somos/>. Sharing España, 'Code on principles and good practices of sharing platforms' (*Código de principios y buenas practicas de plataformas colaborativas*), available at <http://www.sharingespana.es/media/codigo-principios-buenas-practicas-sharing-espana.pdf>.

Hungary

As a result of a number of protests from taxi companies against Uber,⁴⁴⁰ Hungary amended the Passenger Services Decree⁴⁴¹ to extend the application of the mandatory licensing requirements set out for taxi services to all individuals and business entities offering occasional passenger transportation services. The scope of the Decree was extended in order to cover the activities of Uber and its drivers.⁴⁴²

United Kingdom

In the United Kingdom, private cars used for hire are required to obtain a Private Hire Vehicle operator licence from the competent local authority or, if operating in London, from **Transport for London** (TfL) - in addition to a driving licence and a vehicle licence.⁴⁴³ Taking into account the increasing number of private-hire vehicles in London, and after several demonstrations from drivers of London's black cabs, TfL proposed new restrictions on the way private hire firms operate, as well as new measures to increase safety standards and customer service.⁴⁴⁴ The TfL's proposals include: i. increasing 'hire and reward' insurance requirements; ii. requiring drivers to be able to speak English; iii. guaranteeing that consumers are given both an estimate of the likely fare before the journey starts and the driver's identification requirements; iv. improving record keeping by private hire operators which should provide information about their drivers and vehicles to TfL to improve enforcement. In particular, as clarified by TfL, drivers of private hire vehicles should take either an English proficiency test or provide proof, such as a British school qualification, that they can meet the required level of English. This measure would guarantee that Uber-drivers are able to communicate with passengers to discuss a route, as well as to read and understand important regulatory, safety and travel information. Uber, arguing that the requirement to provide a certificate showing that Uber-drivers have an intermediate level of reading and writing is unnecessary and costly, won the right to take TfL to court over new rules.⁴⁴⁵

The initiatives adopted in the accommodation sector mainly aim at extending licensing and tax requirements to sharing economy platforms. However, in some instances, this extension has resulted in making rules more flexible for all the actors operating in the sector. For example, **Section 44 of the 2015 Deregulation Act** placed London homeowners on the same legal footing as other homeowners by repealing outdated sections of the Greater London Council (General Powers) Act 1973. The Greater London Council Act of 1973 stated that the use of residential premises for temporary sleeping accommodation up to 90 consecutive nights in London represented a change of use of the premises and that planning permission would be required in this case. Under the 2015 Deregulation Act, short term rentals (up to a maximum of 90 nights in a calendar year) are now allowed. However, properties benefiting from the new flexi-

⁴⁴⁰ What is the problem of cab drivers? (*Mi a bajuk a taxisoknak?*), available at: <http://index.hu/gazdasag/2016/01/18/taxi/>.

⁴⁴¹ Governmental Decree no. 176/2015 on the passenger transport services offered for a fee (176/2015. (VII. 7.) Korm. rendelet a személygépkocsival díj ellenében végzett közúti személyszállításról), Hungarian Official Gazette 99/2015.

⁴⁴² Governmental Decree 8/2016 on the amendments of certain governmental decrees related to transportation (*az egyes közlekedési tárgyú kormányrendeletek módosításáról*), Hungarian Official Gazette 15/2016.

⁴⁴³ These requirements emerge from the following pieces of legislation: London is covered by the Private Hire Vehicle (London) Act 1998; the rest of England and Wales by the Local Government (Miscellaneous Provisions) Act 1976; Scotland is regulated by the Civic Government (Scotland) Act 1982, as amended; and Northern Ireland by Road Traffic (Northern Ireland) Order 1981, the Public Service Vehicles Regulations (Northern Ireland) 1985 and the Public Service Vehicles (Conditions of Fitness, Equipment and Use) Regulations (Northern Ireland) 1995.

⁴⁴⁴ Available at: <https://tfl.gov.uk/info-for/media/press-releases/2016/january/tfl-sets-out-plans-to-modernise-and-enhance-london-s-private-hire-indust>.

⁴⁴⁵ 'Uber wins right to challenge driver English tests', BBC's website available at <http://www.bbc.com/news/uk-england-london-37247164>.

ble regime must pay council tax.⁴⁴⁶ Property and trading income will be included in the tax-free allowance for individuals from April 2017. Consequently, individuals with property or trading income will not need to declare or pay tax on the first GBP 1,000 they earn from each platform per year. If their income exceeds this, they will have to declare their earnings, but can benefit by deducting the allowance first.⁴⁴⁷ Furthermore, the so called 'Rent a Room Scheme' set out a tax threshold of GBP 7,500 per year (approximately EUR 8,419)⁴⁴⁸ below which resident landlords⁴⁴⁹ letting out their own furnished accommodation (rooms or entire floor) can accede to a tax exemption by opting into the scheme on their tax return.⁴⁵⁰

Latvia

In Latvia, a memorandum of understanding was signed between the Ministry of Economics and two major sharing economy platforms – Taxify and Uber – on 29 June 2016. This Memorandum will serve as 'a solid base for constructive discussion about the inclusion of ride sharing providers in Latvian transportation industry and their legal framework'.⁴⁵¹

Initiatives in the pipeline

This Section gives an overview of the legal and policy initiatives in the pipeline. Most of these initiatives focus on specific issues affecting the transport and accommodation sectors rather than tackling the sharing economy phenomenon as a whole. One notable exception to this trend is Italy's so-called 'Sharing Economy Act' (Legislative Proposal 3564/2016)⁴⁵² that aims to directly regulate sharing economy digital platforms. The main points of Legislative Proposal 3564/2016 and the role of the Italian Antitrust Authority (AGCM) are analysed in Sections 3.3.1 and 5 of this Report, respectively. The Sharing Economy Act would specifically target sharing economy platforms⁴⁵³ and related issues, boosting the national debate on sharing economy and probably contributing to EU future initiatives on the matter.⁴⁵⁴ However, Legislative Proposal 3564/2016 has been mainly criticised for: i. not providing any criteria to classify sharing economy online platforms as proper 'service providers' (traders) or as mere 'hosts' (intermediaries);⁴⁵⁵ ii. the fiscal regime set out by Article 5 that would introduce a tax threshold of EUR 10,000; iii. its 'limited' scope which: excludes the situation where the

⁴⁴⁶ "Promoting the sharing economy in London: Policy on short-terms use of residential property in London", February 2015, Department for Communities & Local Government, <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-02-09/HCWS267/>

⁴⁴⁷ http://www.theguardian.com/technology/2016/mar/16/landlords-and-traders-receive-2000-tax-allowance-to-boost-sharing-economy?CMP=tw_t_gu

⁴⁴⁸ The tax threshold is GBP 7,500 from 6 April 2016. For the 2015 to 2016 tax year, the threshold was GBP 4,250.

⁴⁴⁹ Independently from the fact that the resident landlord owns or does not own the accommodation.

⁴⁵⁰ 'Rent a room in your house', Gov.UK website available at <https://www.gov.uk/rent-room-in-your-home/the-rent-a-room-scheme>.

⁴⁵¹ Information available on the website of the Ministry of Economics: <https://em.gov.lv/en/news/10594-the-memorandum-of-understanding-between-the-ministry-of-economics-uber-and-taxify-have-been-signed>.

⁴⁵² 'leggeSharingEconomy, 2 marzo, ore 1430, Roma @Montecitorio' Innovation Technology Parliamentary Intergroup website, available at <http://www.parlamentari.org/blog/2-marzo-roma-pdl-leggesharingeconomy-929.html>

⁴⁵³ According to Article 2(1)(a) of the Sharing Economy Act, the sharing economy consists in 'the economy generated by the optimised and shared allocation of spatial and temporal resources, goods and services by digital platforms'.

⁴⁵⁴ Econopoly website, 'The Legislative Proposal on sharing economy explained by who drafted it' ('La proposta di legge sulla sharing economy spiegata da chi l'ha scritta'), available at <http://www.econopoly.ilsole24ore.com/2016/03/09/la-proposta-di-legge-sulla-sharing-economy-spiegata-da-chi-lha-scritta/>.

⁴⁵⁵ See: Collaboriamo, 'Five observations (and a proposal) on the Sharing Economy Act presented at the Parliament' ('Cinque osservazioni (e una proposta) sullo Sharing Economy Act presentato alla Camera'), (2016) available at <http://www.collaboriamo.org/cinque-osservazioni-e-una-proposta-sullo-sharing-economy-act-presentato-alla-camera/>; Altroconsumo, 'Il consumo? E' collaborativo', December 2015, p. 20.

platform is the employer of peer suppliers operating on the platform itself;⁴⁵⁶ confuses collaborative economy and rental economy.⁴⁵⁷

Selected sector-specific initiatives are described in the following paragraphs of this Section.

Belgium

On 2 June 2016 the Minister in charge of the Digital Agenda proposed a Draft Law-Programme under which the provision of services via online platforms accredited by the government will receive a specific treatment.⁴⁵⁸ The proposed Draft Law-Programme has two objectives: i. to reinforce legal certainty; and ii. to create an incentive for experimental entrepreneurship. Furthermore, the Draft Law introduces a new withholding tax of 20% on income below the threshold of EUR 5,000 gross per year generated by P2P services via platforms accredited by the government (after deduction of 50% of gross income for professional costs) where the following conditions are met:

- Services are exclusively provided to private individuals;
- The transactions between peers are concluded exclusively via an online platform accredited by the government;
- The payment is executed exclusively through the online platform;
- The activity carried out by the service provider on the platform is a secondary activity, i.e. it does not represent the provider's main source of income.⁴⁵⁹

According to the Draft Law, above this threshold, accredited platforms would fall under the scope of the classic fiscal regime.⁴⁶⁰ Furthermore, these new tax rules would **not apply** to income from renting out movable or immovable goods and passenger transport services. Peers using **platforms such as Airbnb, Cambio and Uber**, therefore, would be out of the scope of such rules. The relevance of this initiative, however, lies on the fact that the earning threshold of EUR 5,000 gross per year could potentially help clarify the distinction between individuals acting in a private capacity and individuals acting in a professional or commercial capacity (thresholds developed on a sector-specific basis by other Member States are analysed in Section 3.1.2.3 of this Report).⁴⁶¹

Another important legal initiative which might be realised at local level in Belgium in the **transport sector**, is the new **Taxi Plan** developed by the Minister for Mobility of

⁴⁵⁶ It could be argued that, for example, Uber-drivers should be classified as employees of the platform rather than freelance professionals. See: 'Sharing economy, all the gaps of the Italian Legislative Proposal' (*'Sharing economy, tutti i limiti della proposta di legge italiana'*) Agenda Digitale website, available at http://www.agendadigitale.eu/smart-cities-communities/sharing-economy-tutti-i-limiti-della-proposta-di-legge-italiana_2057.htm; Collaboriamo, 'Five observations (and a proposal) on the Sharing Economy Act presented at the Parliament', supra; Antonio Aloisi and Francesco Russo 'The Sharing Economy Act pretends to be Italian, but luckily (or unluckily) it is not', supra.

⁴⁵⁷ 'Sharing economy, all the gaps of the Italian Legislative Proposal', Agenda Digitale website, supra. See definition of 'sharing economy' pursuant to Article 2 of Legislative Proposal 3564/2016 under Section 1.1.2 of this Report.

⁴⁵⁸ Draft Law-Programme of 2 June 2016, House of Representatives Doc 54-1875/001.

⁴⁵⁹ Draft Law-Programme of 2 June 2016; 'Lower charges for those exercising a complementary activity in the collaborative economy' (*Baisse des charges pour les personnes qui exercent une activité complémentaire dans l'économie collaborative*), Minister for Digital Agenda website, available at: <http://www.decree.belgium.be/fr/baisse-des-charges-pour-les-personnes-qui-exercent-une-activite-complementaire-dans-l-economie-collaborative>; 'Providers of the collaborative economy pampered by the taxman?' (*Les prestataires de l'économie collaborative choyés par le fisc ?*), La Libre website, available at: <http://www.lalibre.be/economie/digital/les-prestataires-de-l-economie-collaborative-choyes-par-le-fisc-5734b01435702a22d74bf8f6>; 'Airbnb, BlaBlaCar Menu Next Door ... The government wants to tax the collaborative economy' (*Airbnb, BlaBlaCar, Menu Next Door... Le gouvernement veut taxer l'économie collaborative*), RTBF website, available at: https://www.rtb.be/info/economie/detail_airbnb-blablacar-menu-next-door-le-gouvernement-veut-taxer-l-economie-collaborative?id=9264980.

⁴⁶⁰ Draft Law-Programme of 2 June 2016.

⁴⁶¹ '#EcoCollab : Belgium, an inspiration for France ?', the Droit du Partage website.

the Brussels-Capital Region and its government in February 2015⁴⁶² that will be probably adopted in Autumn 2016.⁴⁶³ This Plan aims, *inter alia*, to set up a general regulatory framework applicable to the transport sector, including remunerated ridesharing services facilitated by smartphone applications such as UberX.⁴⁶⁴ The Minister has already announced that online platforms offering these new types of passenger transport services would have to fulfil similar conditions to those imposed on the taxi sector.⁴⁶⁵ The box below reports some of the announced measures for online platforms facilitating P2P transport services and non-professional drivers operating through such platforms.

Main points of the Belgian Taxi Plan for Brussels-Capital Region

- Only platform providers recognised by the Brussels-Capital Region will be authorised to provide such service. The **authorisation** will be delivered once the platform provider has fulfilled all legal requirements. These legal conditions have not been decided yet.
- The new services will not obtain 'the same privileges as the taxi sector' (no further details are specific in the plan).
- The platform provider is obliged to hold a **register** of every driver, car and journey carried out. The taxi, fiscal and social inspections have the right to consult the registers.
- Responsibility for the **implementation of the obligations** will be borne **by the platform** provider that in case of infringement of the law will be subject to heavy sanctions.
- The **drivers** must be **registered** by the platform, must be **aged 21 or older** and hold their **driving licence** for at least three years. In addition, the platform provider must annually monitor that drivers have a certificate of good conduct.
- Transport services can **never exercise this activity on a full-time basis**. Drivers can do so only as a 'complementary activity' to their main professional activity.
- The **driver** is **responsible** for their **client's insurance** and the security of the car.
- **Rates** can be set by the peer provider but must be clearly **communicated to the client**. Differences of more than 25 percent of the advertised rate must be justified.
- Customers must have the **possibility to share their journeys**.⁴⁶⁶

With regards to the **accommodation sector**, while some of the initiatives in the pipeline identified in some Member States aim at extending to individuals occasionally renting out their properties through online platforms such as Airbnb the licensing and

⁴⁶² The Minister for Mobility of the Brussels-Capital Region website, 'Le plan taxi mise sur un service convivial et fiable', available at: <http://fr.pascalsmet.be/articles/mobilite/le-plan-taxi>.

⁴⁶³ Information received from Cabinet of the Brussels Mobility Minister, 30 June 2016.

⁴⁶⁴ The Minister for Mobility of the Brussels-Capital Region website, 'Le plan taxi mise sur un service convivial et fiable', available at: <http://fr.pascalsmet.be/articles/mobilite/le-plan-taxi>.

⁴⁶⁵ The Minister for Mobility of the Brussels-Capital Region website, 'Le plan taxi mise sur un service convivial et fiable', available at: <http://fr.pascalsmet.be/articles/mobilite/le-plan-taxi>.

⁴⁶⁶ The Government of the Brussels-Capital Region, 'Note - Passenger transport services Plan 2015-2019' (*Note de Principe - Plan de transport rémunéré de personnes 2015-2019*) (2015) available at: http://fr.pascalsmet.be/media/attachments/15/03/Note-de-principe---Plan-de-transport-r_mun_r_-de-personnes-2015---2019.pdf.

tax requirements set out by the existing legislation applicable to professional touristic accommodation services (see, for example, Hungary below), other Member States aim to **make such legal requirements more flexible**. For instance, the Belgian Flemish Region recently adopted Decree of 27 January 2016 on tourist accommodation,⁴⁶⁷ scheduled to enter into force in 2017, to favour the reduction of the heavy-handed formalities applying to private individuals operating 'home-sharing'. The Decree will revoke the system of prior authorisation and replace it with a simple notification requirement to the competent authorities. As regards collaborative platforms, this future Decree goes one step further than the Brussels Ordinance on Touristic Accommodation⁴⁶⁸ as it also imposes obligations on intermediaries such as platforms and booking offices. For instance, authorities will require online platforms to provide them with personal data of their users to carry out specific controls. In other instances, initiatives aim at **clarifying the applicable requirements**. In Finland, for example, the Ministry of Employment and the Economy has attempted to clarify the rights and duties of P2P accommodation providers in a set of guidelines published in April 2016. This guidance document outlines the statutory duties of accommodation providers, some of which distinguish between professionally provided services and those that are only provided on an occasional basis: relevant statutory rules may include the idea of 'professionally' providing services.⁴⁶⁹

Estonia

In the **transport sector**, the Estonian Chamber of Commerce and Industry identified another positive development in the cooperation between ride-sharing platforms and the Tax Office. The Estonian Tax Office is currently trying to develop a way to transmit some information related to the transport services offered by these platforms (e.g. drivers' remuneration) to the tax office, so that it can be automatically entered into the online tax declaration.⁴⁷⁰ Another important legal initiative in the pipeline is the Draft Bill on ride-sharing services ('ride upon agreement') - such as those offered by UberPop, which has been under consideration in the Estonian Parliament since February 2016.⁴⁷¹ The box below summarises the main points of the expected reform.

Main points of the Estonian Draft Bill amending the Public Transport Act

- Section 5(1) of the Draft Bill defines the '**ride upon agreement**' as an agreement where one of the contracting parties binds itself to transport the other party from one place to another by car (which must not have more than nine seats). The transportation of persons carried out on the basis of a 'ride upon agreement' is neither an occasional service nor a professional taxi service. The transportation service is ordered through an electronic system which meets the requirements provided in Section 53² (7) (e.g. the agreement needs to include a car insurance).
- The Draft Bill should complement Section 1 para. 9 of the Public Transport Act⁴⁷² with a provision **excluding ride-sharing services from the scope of application of the Public Transport Act**. The Draft Bill would also mod-

⁴⁶⁷ 'The Flemish Housing Decree' (*Het Vlaamse logiesdecreet 2016*), the Lexalert website, available at: <http://www.lexalert.be/nl/article/het-vlaamse-logiesdecreet-2016>.

⁴⁶⁸ Ordinance of 8 May 2014 'on tourism accommodation' (*Ordonnance relative à l'hébergement touristique*), Government Gazette 2014-05-08/50.

⁴⁶⁹ Finish Ministry of Employment and the Economy, available at: https://www.tem.fi/files/45129/3_2016_ohjeita_kotimajoitusta_tarjoavalle_25042016_WEB.pdf.

⁴⁷⁰ Information collected through consultation with the Estonian Chamber of Commerce and Industry on 9 June 2016.

⁴⁷¹ Draft Bill No. 188 SE on amending the Public Transport Act, available at: <http://www.riigikogu.ee/tegevus/eelnou/eelnou/17074c56-bf09-477f-befb-a6e4ea86461f/%C3%9Chistranspordiseaduse%20muutmise%20seadus/>.

⁴⁷² Public Transport Act (*Ühistranspordiseadus*), RT I, 23.03.2015, 2, available at <https://www.riigiteataja.ee/en/eli/529032016002/consolide>.

Main points of the Estonian Draft Bill amending the Public Transport Act

ify Section 2 of the Public Transport Act so as to explicitly **exclude ride-sharing services from the definition of 'public transport'**. Ride-sharing services would be regulated by Sections 635 ff. of the Estonian Law of Obligations Act⁴⁷³ (**provisions on the letting of work**). Consequently, **no licence would be required**.

Hungary

The Hungarian Government is planning to establish a **registration duty** for all the owners of accommodation rented out through online P2P platforms facilitating the sharing or renting of accommodation, such as Airbnb. Service providers will only be able to create an account on Airbnb if they provide the registration number they obtained from the competent authority. A draft regulation is not available yet.⁴⁷⁴

Regarding tax obligations, the Hungarian Government plans to develop a **simplified way of taxation** to encourage private individuals who rent out their properties on online platforms such as Airbnb to register their property. The idea is to make them pay a lump sum once a year based on the floor area of the property (cc. EUR 5/m²). By enhancing the registration of more properties, the Government also seeks to ensure that these properties comply with the safety standards set out by the Tourism Accommodation Decree⁴⁷⁵ and to facilitate inspections. The new law is expected to be drafted and adopted by the end of 2016.⁴⁷⁶

6.3 Stakeholder recommendations

A stakeholder consultation was carried out in all Member States with relevant representatives including, for example, public consumer protection authorities; bodies responsible for the enforcement of specific Directives; national consumer organisations; data protection supervisors; consumer ombudsmen. The main stakeholder recommendations relevant to possible initiatives in relation to the sharing economy activities falling within the scope of this Study are reported below.

Some stakeholders consider it **unnecessary to legislate** as there is already legislation in place that would be applicable to both C2C transactions and online platforms facilitating P2P transactions (see Sections 3.2 and 3.3, respectively). Additionally, these existing regulatory frameworks are completed by the non-legislative measures adopted by individual platforms in their Terms and Conditions (see Section 4 of this Report).⁴⁷⁷ The Lithuanian Ministry of Justice, for example, noted that it is rather difficult to assess whether more detailed regulation of online platforms and P2P transactions facilitated by these platforms would bring any advantage to consumers. On the contrary, overregulation could have the undesired effect of hindering the development

⁴⁷³ Estonian Law of Obligations Act (*Võlaõiguseadus*), RT I 2001, 81, 487, available at <https://www.riigiteataja.ee/en/eli/528032016012/consolide>.

⁴⁷⁴ Information provided by the Hungarian Authority for Consumer Protection, 20 April 2016.

⁴⁷⁵ Governmental Decree no. 239/2009 on the conditions of operating tourism accommodations and the procedural rules of licensing such accommodations (*a szálláshely-szolgáltatási tevékenység folytatásának részletes feltételeiről és a szálláshely-üzemeltetési engedély kiadásának rendjéről*), Hungarian Official Gazette 148/2009.

⁴⁷⁶ It is expected to have an obligation to register Airbnb services (*Regisztrációhoz kötnék az Airbnb szolgáltatást*), available at: <http://magyaridok.hu/gazdasag/regisztraciohoz-kotnek-az-airbnb-szolgáltatást-525505/>.

⁴⁷⁷ Information collected through consultation with national stakeholders (Spain: Blog *Ecolaborativa*, 24 May 2016; Spanish Association of Digital Economy, 24 May 2016; Catalanian Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Consumers' and Users' Organisation, 2 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016; Ireland: Lecturer of Law at NUI Galway, 14 June 2016; Finland: Consumer Ombudsman, 20 May 2016, and the Consumer Union, 18 May 2016).

of the sharing economy.⁴⁷⁸ Some, e.g. the Latvian authorities consulted, noted that many of the potential issues raised by the sharing economy phenomenon (e.g. risks for consumers stemming from information asymmetries – see Section 3.3.2 of this Report) could be best addressed by self-regulatory measures.

Other stakeholders argued that while there should be no new legislation, a **review of the existing legislation** would be welcome. In Spain, for example, stakeholders agreed that consumer protection and e-commerce legislation should be reviewed.⁴⁷⁹ Overall, the sector-specific legislation applicable to C2C transactions should be revised to remove obsolete requirements that are impeding the entry into the market of new business models.⁴⁸⁰ Some interviewees argued that if new regulation were to be adopted, first a **clear definition of what sharing economy is** needs to be established. Furthermore they argued that any new legislation applicable to online platforms facilitating P2P transactions should be tailored to the business model that the platform adopt and would depend on the extent to which the platform intervenes in the transactions concluded between its users.⁴⁸¹ This is also argued by the Portuguese Association for the Defence of Consumers according to which although the existing legal frameworks applicable to C2C transactions and online platforms facilitating P2P transaction are adequate, it would be important to clarify the liability of the platforms that determine the price of the transaction (or the criteria to set them out) or charge fees for the additional services they offer.⁴⁸²

The British House of Lords Select Committee on EU Internal Market recently issued the report 'Online Platforms and Digital Single Market'⁴⁸³ where it is recommended that: 'Consumer protection law should be updated to require online platforms to be more transparent about: i. Their obligations to consumers under consumer protection law; ii. How they rank and present search results and ratings and reviews; iii. When they undertake personalised pricing or price discrimination.'

It also warned that disruption of regulation by digital businesses will continue, requiring, possibly, 'an **independent expert panel**', that 'should be created to act as an outlet for public and political concerns, subject these to rigorous scrutiny, and make policy recommendations designed to accelerate the growth of the digital economy.' Regarding the possible extension of consumer law requirements to C2C transactions, the British Department for Business, Innovation and Skills is clear in stating that they 'do not currently have any plans to extend the application of horizontal consumer law to C2C transactions in general. The UK Competitions and Markets Authority are keeping the issue under review but have not currently identified any evidence of a need to intervene.'⁴⁸⁴

Other stakeholders interviewed consider that the regulation of the sharing economy should be limited to the need to **clarify the existing grey areas**. A December 2015

⁴⁷⁸ Information collected through consultation with the Ministry of Justice on 28 April 2016.

⁴⁷⁹ Information collected through consultation with Blog *Ecolaborativa* on 24 May 2016; the Spanish Association of Digital Economy on 24 May 2016; the Catalanian Competition Authority on 26 May 2016; the National Commission on Markets and Competition on 26 May 2016; the Consumers' and Users' Organisation on 2 June 2016; and the Catalanian Government, General Directorate for Telecommunications and Information Society on 15 June 2016.

⁴⁸⁰ Information collected through consultation with national stakeholders (Catalonian Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁴⁸¹ Information collected through consultation with national stakeholder (Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁴⁸² Information collected through consultation with the Association for the Defence of Consumers (*Associação Portuguesa para a Defesa do Consumidor*) on 27 April 2016.

⁴⁸³ "Online Platforms and Digital Single Market", 10th Report of Session 2015-2016, HL Paper 129 <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldecom/129/129.pdf>

⁴⁸⁴ HM Government Response to EU public consultation on Digital Platforms, BIS/16/74, p. 46, *supra*.

information letter to the Finnish Parliament⁴⁸⁵ linked to the Commission Communication COM(2015) 550,⁴⁸⁶ observes that new legislation should not be considered without significant evidence that demonstrates it is necessary.⁴⁸⁷ The parliamentary committee on the economy in turn observed that⁴⁸⁸ in relation to the emerging sharing economy, even if no new legislation is required, potential lacunae in consumer protection and safety, as well as insurance aspects should be identified and explored.

Some stakeholders held that any new legal initiative should come from the EU. For example, the German Federal Ministry of Justice and Consumer Protection published a position paper on the regulatory framework for sharing economy where it argues that the sharing economy should be regulated at EU level.⁴⁸⁹ In particular, the Ministry is already examining the question of the extent to which peer suppliers on platforms may be classified as merely private or as 'commercial' parties (and therefore entrepreneurs). Other focus points are: the transparency of the platform (information obligations); the opportunity to introduce further legislation applicable to C2C transactions (including eventual applicable minimum standards) and online platforms facilitating P2P transactions.⁴⁹⁰ Latvian authorities would also support EU level action to avoid fragmentation of the EU Digital Single Market where necessary.⁴⁹¹ Spanish stakeholders welcomed the European Commission's Communication on 'A European Agenda for the collaborative economy',⁴⁹² agreeing that the initiative of setting basic common principles should be the competence of the EU.⁴⁹³ Most of them pointed out that this process should be accompanied by national, regional or even local legislation were needed to adapt it to the specific territorial needs and respecting the competences of each authority and by self-regulation⁴⁹⁴ from the platforms.⁴⁹⁵ Nonetheless, some stakeholders highlighted that self-regulation by the platforms should never replace regulation by the public authorities.⁴⁹⁶ Legislative authorities should understand that instead of regulating specific, sector-based platforms, targeting a very isolated problem; they should be regulating horizontally.

⁴⁸⁵ Government report E 78/2015 vp 'Valtioneuvoston selvitys: Komission tiedonanto: Sisämarkkinoiden päivitys: enemmän mahdollisuuksia kansalaisille ja yrityksille', 4 December 2015 (hereinafter E 78/2015).

⁴⁸⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Upgrading the Single Market: More opportunities for people and business, Brussels, 28 October 2015, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF>.

⁴⁸⁷ E 78/2015, p. 3.

⁴⁸⁸ *ibid.*

⁴⁸⁹ Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, online intermediaries, data, cloud computing and the sharing economy market, 22 April 2016, *supra*.

⁴⁹⁰ VZVB, consulted on 31 March 2016, within its *Diskussionspapier Teilen, Haben, Teilhaben – Verbraucher in der Sharing Economy*, p. 39-42.

⁴⁹¹ Information collected through consultation with the Latvian Ministry of Economics on 16 April 2016.

⁴⁹² European Commission, Communication 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 3556 final, *supra*.

⁴⁹³ Information collected through consultation with national stakeholders (Catalonian Competition Authority, 26 May 2016; Ouishare, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of the Government, 13 June 2016; Catalonian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁴⁹⁴ It is noted that, according to the 2003 [Interinstitutional Agreement on Better Law-making](#), self-regulation is 'the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)'. Interinstitutional agreement on better law-making, OJ C 321, 31/12/2003 P. 0001 – 0005, (2003/C 321/01), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003Q1231\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003Q1231(01)&from=EN).

⁴⁹⁵ Information collected through consultation with national stakeholders (Interview with the Blog *Ecolaborativa*, 24 May 2016; Spanish Association of Digital Economy, 24 May 2016; Catalonian Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Ouishare platform, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of Government, 13 June 2016; Catalonian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁴⁹⁶ Information collected through consultation with national stakeholder (Interview with Commission on Markets and Competition, 26 May 2016, Representative of the Government, 13 June 2016; Catalonian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

Most stakeholders agree on the need to establish a determining definition of 'trader' in order to establish a clear-cut distinction between B2C and C2C transactions and, consequently, apply the corresponding legislation. The box below reflects some of the main positions across Member States:

Selected stakeholder reflections on the notion of 'trader' and the distinction between B2C and C2C transactions

Germany

The Federation of German Consumer Organisations⁴⁹⁷ published a Discussion Paper on consumers in the sharing economy⁴⁹⁸ where it argues that the legal status of the peer supplier should be clearly disclosed on the platform and that the platform should be permanently responsible for verifying the legal status of its users.

The Federal Ministry of Justice and Consumer Protection also specified in a position paper on the regulatory framework of the sharing economy⁴⁹⁹ that it would be essential to set out EU and national-level indicators to clearly distinguish between private individuals occasionally operating on sharing economy platforms and individuals acting in a commercial/professional capacity.

Spain

In Spain, most of the stakeholders interviewed agreed with the fact that the key issue is to distinguish between situations where users act as private consumers and where they act as professionals.⁵⁰⁰ Some of the stakeholders stated that clarifying the distinction between B2C and C2C transactions should be the starting point of any legislative initiative.⁵⁰¹

UK

The UK has noted that 'the distinction between an individual selling as a consumer and an individual selling as a trader is becoming increasingly blurred. The UK Government therefore clarified in the Consumer Rights Act (2015) that a trader means 'a person acting for purposes relating to that person's trade, business, craft or profession...' and a consumer means 'an individual acting for purposes that are wholly or mainly outside of that individual's trade, business craft or profession', so if the seller in a C2C transaction was in fact a trader whose main income was their activity on the C2C platform, the B2C rules would apply. If the seller was simply an individual selling something or offering a service as a side line, the consumer law would not apply.'⁵⁰²

⁴⁹⁷ Verbraucherzentrale Bundesverband e. V., To Share, to have, to participate – Consumers in the Sharing Economy, (*Teilen, Haben, Teilhaben: Verbraucher in der Sharing Economy*) (2015) available at <http://www.vzbv.de/sites/default/files/downloads/dvt15-positionen-vzbv-2015-06-29.pdf>.

⁴⁹⁸ Verbraucherzentrale Bundesverband e. V., To Share, to have, to participate – Consumers in the Sharing Economy, (*Teilen, Haben, Teilhaben: Verbraucher in der Sharing Economy*) (2015) available at <http://www.vzbv.de/sites/default/files/downloads/dvt15-positionen-vzbv-2015-06-29.pdf>.

⁴⁹⁹ Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, online intermediaries, data, cloud computing and the sharing economy market, 22 April 2016, *supra*.

⁵⁰⁰ Information collected through consultation with national stakeholders (Spanish Association of Digital Economy, 24 May 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁵⁰¹ Information collected through consultation with national stakeholders (Spanish Association of Digital Economy, 24 May 2016; Catalanian Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Ouishare platform, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁵⁰² HM Government Response to EU public consultation on Digital Platforms, BIS/16/74, p. 46, *supra*.

7 Concluding remarks

The emergence and development of the sharing economy could have both positive and negative effects on consumers. On the one hand, the use of new technologies by sharing economy online platforms has the potential to enable efficient matching (e.g. reducing costs and making private individuals able to monetise their under-utilised resources), reduce information asymmetries and provide opportunities for new employment.⁵⁰³ On the other hand, the sharing economy could blur the line between 'traders' and 'consumers', generating legal uncertainty over both the respective rights and obligations of parties to C2C transactions concluded through online platforms and the liability of such platforms.⁵⁰⁴ This legal uncertainty could eventually hinder consumer protection, hamper 'the development of the collaborative economy in Europe' and prevent 'its benefits to materialise fully'.⁵⁰⁵

The Legal Analysis shows a lack of consensus as regards the way forward: while some stakeholders (including, in particular, representatives of online P2P platforms) claim that any new legal or policy initiative would represent an unnecessary regulatory obstacle to the development of online P2P markets, a variety of stakeholders call for EU or national level initiatives aimed at allowing the sharing economy to fully reveal its potential benefits for consumers (see Section 6.3). These initiatives could encompass: clarifying the distinction between B2C and C2C transactions in order to enhance legal certainty; 'modernising' the existing C2C legislation and effectively guaranteeing its enforcement; introducing transparency requirements for online P2P platforms, including rules clarifying the platforms' responsibilities; filling possible gaps in the existing relevant legislation through Codes of Conduct and measures adopted by individual platforms.

The following subsections summarise the main issues identified and describe possible solutions. As a general finding, the Legal Analysis shows that stakeholders tend to favour waiting for relevant developments and initiatives at EU level in relation to the sharing economy before intervening at national or local level in order to avoid a fragmented approach (see Section 6.3).⁵⁰⁶ When considering the possibility of adopting new legislation, it would be appropriate to investigate how existing rules apply to specific platforms and adopt a **risk/harm-approach**: only when there is a high risk of a high impact damage, should *ex ante* regulation be adopted. In other cases, *ex post* intervention is preferable in order not to hinder the development of new innovation technologies or the entry of new economic operators on online P2P markets.⁵⁰⁷

⁵⁰³ Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European agenda for the collaborative economy', supporting analysis, 2.6.2016, SWD (2016) 184 final, p. 6.

⁵⁰⁴ European Commission, Communication 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356final, *supra*, p.2.

⁵⁰⁵ OCU, Altroconsumo, Deco Proteste, Test Achats/Test Ankoop, Cibersomosaguas, Ouishare, 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU Ediciones, p.2.

⁵⁰⁶ Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, online intermediaries, data, cloud computing and the sharing economy market, 22 April 2016, *supra*. Information collected through consultation with the Latvian Ministry of Economics on 16 April 2016. Opinion shared by: the Latvian Ministry of Economics consulted on 16 April 2016; the Catalanian Competition Authority, consulted on 26 May 2016; Ouishare, consulted on 2 June 2016; the Spanish Consumers' and Users' Organisation, consulted on 2 June 2016; a representative of the Spanish Government, consulted on 13 June 2016; the Catalanian Government, General Directorate for Telecommunications and Information Society, consulted on 15 June 2016.

⁵⁰⁷ 'Digital Platforms: an analytical framework for identifying and evaluating policy options' (Digitale Platforms: een analytisch kader voor het identificeren en evalueren van beleidsopties), website of the Second Chamber of the Dutch Parliament, available at <https://www.tweedekamer.nl/kamerstukken/detail?id=2015D50811>. This argument was also made by some of the stakeholders attending the European Consumer Summit of 17 October 2016 in Brussels.

7.1 Nature of the transaction

The **legal uncertainty** generated by the difficulty in distinguishing between 'traders' and 'consumers' could arguably hinder consumer protection and is perceived as one of the main legal issues affecting consumers operating in P2P markets. In online P2P markets, private individuals might operate both as peer suppliers and as peer consumers on the same online platform. Furthermore, businesses operating on online platforms might qualify themselves as consumers to avoid the application of consumer protection laws or stricter tax regulations. As highlighted in Section 3.1.2, indicators of what constitutes a trader vary at national and local level, differ from sector to sector, and are set out by several different means (e.g. national law, national case-law, legal doctrine, policy documents, enforcement practice of competent authorities). Some Member States have also developed national or local **sector-specific thresholds** that help distinguish between professional and non-professional activities (see Section 3.1.2.3). In the transport sector, for example, the fact that the activity generates a level of income lower than a certain threshold, could determine its qualification as a non-professional activity and, consequently, exclude the application of the specific legislation covering professional transport services. In the accommodation sector, the 'regularity' of the activity is generally considered as an indicator of its professional nature, and temporal thresholds are set out in some Member States (at national or local level). Furthermore, in some Member States, **tax thresholds** are used to assess whether an individual is acting 'professionally' (see Section 3.1.2.1). For example, in France, since 2016, the tax status of 'micro-entrepreneur' can be granted to sole traders who pay social security based on sales and do not exceed certain turnover thresholds (see below and Section 3.1.2.1). When sector-specific or tax limits are exceeded, the activity is presumed to be 'professional' or the individual is qualified as a 'business' for tax purposes and, consequently, sector-specific rules or the relevant tax regime would apply.

The national level analysis shows that there is **no consensus amongst stakeholders** on how to reduce legal uncertainty generated by the fragmentation of Member States' regulatory approaches to the development of national level indicators that help distinguish traders from consumers.

- A first option could consist of **defining, at EU level, a harmonised set of indicators that help distinguish traders from consumers**. As highlighted in Section 6.1, EU legislation does not expressly clarify the distinction between B2C and C2C transactions within the sharing economy scenario.⁵⁰⁸ However, the European Commission's Communication of 2 June 2016 identifies in the frequency of the services, the profit-seeking motive, and the level of turnover, the elements on the basis of which to assess, on a case-by-case basis, whether an individual is acting in a professional/commercial capacity or in a private capacity.⁵⁰⁹ These indicators reflect those listed by the UCPD Guidance,⁵¹⁰ which confirms that the qualification of an individual as a trader or a consumer must proceed on a case-by-case basis. In most Member States the 'continuity' and 'professional nature' of the activity carried out constitute the two main elements against which it is assessed whether an individual is acting in a private or professional capacity (see Section 3.1.2). The assessment of these two elements is normally conducted on a **case-by-case basis** by using indicators that, while in a few Member States are set out by national legislation (see Section 3.1.2.1), in most Member States are determined by national case-law, policy documents, legal doctrine and the enforcement practice of the competent

⁵⁰⁸ European Commission, Communication, 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356 final, *supra*, p. 5.

⁵⁰⁹ *Ibid.*, p. 9.

⁵¹⁰ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, pp. 32-33 and 70-72.

authorities, as well as by a combination of these instruments (see Section 3.1.2.2). According to some stakeholders, distinguishing between B2C and C2C transactions by setting out a uniform definition of ‘trader’ would be more appropriate than conducting this assessment on a case-by-case basis (see Section 6.3).⁵¹¹ These stakeholders highlight that the lack of legal certainty could increase the risk that ‘regulatory grey zones are exploited to circumvent rules designed to preserve the public interest’.⁵¹² The feasibility of establishing uniform indicators is however debatable as the suitability of these criteria remains highly dependent on the national context, sector in question and area of law.

- An alternative option could consist in **promoting legal initiatives at national and local level aimed at setting out sector-specific or tax thresholds**. As highlighted above and in Sections 3.1.2.1 and 3.1.2.3, some Member States have already developed sector-specific thresholds and/or tax thresholds that help distinguish professional activities from non-professional activities, or businesses from private individuals for tax purposes. Furthermore, different initiatives already adopted by Member States in the transport and accommodation sectors seek to extend licensing and tax requirements to peer suppliers operating on sharing economy platforms. For example, the Hungarian Passenger Services Decree⁵¹³ was amended in 2015 to extend its licensing requirements to individuals offering transport services on an occasional basis and, in the United Kingdom, according to Section 44 of the 2015 Deregulation Act, for short term rentals (up to a maximum of 90 nights in a calendar year) no permit is required and council tax must be paid⁵¹⁴ (see Section 6.2.1). In other instances, initiatives aiming to make such legal requirements more flexible or to clarify the requirements applicable to peer suppliers operating on online platforms, have been adopted. For example, the Decree of 27 January 2016 on tourist accommodation,⁵¹⁵ scheduled to enter into force in the Belgian Flemish Region in 2017, aims to replace the system of prior authorisation with a simple notification requirement to the competent authorities for private individuals operating ‘home-sharing’ (see Section 6.2.2). Sector-specific or tax thresholds, however, clearly diverge from one Member State to another (as well as from sector to sector) and are not specifically set out to clarify the distinction between B2C and C2C transactions from a consumer protection perspective. For example, when a temporal threshold (applying in the accommodation sector) is exceeded, the activity is presumed to be ‘professional’ and the licensing or authorisation requirements set out by the relevant sector-specific legislation would apply. However, it might not be possible to categorically state that consumer law also becomes applicable. Furthermore, setting out sector-specific or tax thresholds could arguably generate more legal uncertainty. For example, some stakeholders oppose the introduction of earning thresholds (e.g. in the transport sector)⁵¹⁶ arguing that they would not adequately guarantee that individuals producing revenues exceeding the limit set out by law are actually acting in a

⁵¹¹ Information collected through consultation with national stakeholders (Spanish Association of Digital Economy, 24 May 2016; Consumers’ and Users’ Organisation, 2 June 2016; Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016). See also: Position paper of the Federal Republic of Germany on the regulatory framework for sharing economy platforms, online intermediaries, data, cloud computing and the sharing economy market, 22 April 2016, *supra.*; HM Government Response to EU public consultation on Digital Platforms, BIS/16/74, *supra.*, p. 46; The principles for legislators and policy makers developed by *Test-Achats/Test Ankoop* in the policy paper ‘Collaboration or Business? Collaborative consumption: From value for users to a society with values’ are analysed under Section 6.2.1. of the Task 5 Report.

⁵¹² ‘Collaboration or Business? Collaborative consumption: From value for users to a society with values’ [2016] OCU, *supra.*, p.2.

⁵¹³ Governmental Decree no. 176/2015 on the passenger transport services offered for a fee, *supra.*

⁵¹⁴ ‘Promoting the sharing economy in London: Policy on short-terms use of residential property in London’, *supra.*, February 2015.

⁵¹⁵ ‘The Flemish Housing Decree’, *supra.*, available at: <http://www.lexalert.be/nl/article/het-vlaamse-logiesdecreet-2016>.

⁵¹⁶ Conclusions of representatives of online platforms facilitating P2P transactions and of other stakeholders attending the Workshop that took place in Brussels, as part of the Study, on 3 October 2016.

professional or commercial capacity (e.g. as professional drivers). Indicators of what constitutes a trader should rather be flexible so as to allow assessing, on a case-by-case basis, the real income earned and consequently apply 'fair' taxes and licensing/authorisation requirements.⁵¹⁷

- Another option could be for **national legislators to acknowledge 'micro-entrepreneurs' or 'prosumers' as new types of economic operators.**⁵¹⁸ A definition of 'prosumer' as 'a private individual who provides, produces or trades goods or services not related to their habitual business, trade or profession'⁵¹⁹ has been developed by a consortium of EU consumer associations from Belgium, Italy, Portugal and Spain, led in Belgium by the consumer protection organisation *Test Achats/Test Ankoop* (see Section 6.2.1). Recognition of the prosumer might address the need for a flexible approach to the qualification of new sharing economy operators, taking into account that in online P2P markets the role of the consumer is much more 'fluid' than in traditional markets. Against this context, an interesting initiative was adopted in 2016 in France where the two business statutes of micro-enterprise and auto-entrepreneur were merged, and are now referred to as micro-entrepreneur⁵²⁰ (see Section 3.1.2.1). The introduction of these new categories of economic operators, however, would raise the question of which legal regime would apply and what indicators should be used to distinguish a 'prosumer' from a 'traditional' business or consumer. The OECD observed that even where an individual operating through P2P platforms technically qualifies as a 'trader', whether it is desirable or not to apply the same rules designed for traditional businesses remains an open question. Such individual (or micro-business) could lack the technical, legal and organisational skills and resources necessary to comply with the extensive requirements set out by consumer laws.⁵²¹ On the other hand, in France, the turnover threshold varies depending on the type of business activity carried out (which might be either a 'service based business'/'professional' activity or an activity mainly consisting of 'commercial sales' - see Section 3.1.2.1).⁵²² For these reasons, before taking any legal initiative, it would be important to further investigate which potential benefits and risks in terms of consumer protection and legal certainty could arise from the introduction of another category of supplier or provider.

7.2 Issues related to existing c2c legislation

As highlighted in Section 3.2, general civil rules (such as the requirement for the parties to act in good faith) and sector-specific legislation (where licensing or authorisation requirements apply to both B2C and C2C activities) may arguably ensure a basic consumer protection in C2C transactions. Consequently, the fact that parties to C2C contracts do not enjoy the same guarantees afforded to parties to B2C transactions does not necessarily represent a deficiency in the legal framework. The legal rationale

⁵¹⁷ *Ibid.* See also OCU, *Altroconsumo, Deco Proteste, Test Achats/Test Ankoop, Cibersomosaguas, Ouishare*, 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU Ediciones, 65.

⁵¹⁸ See the initiatives of the Catalan Government described in Section 6.2.1. See also 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU, *supra*, p. 7.

⁵¹⁹ 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU, *supra*, p. 7.

⁵²⁰ 'Déclaration de micro-entrepreneur (auto-entrepreneur)' Service-Public-Pro.fr, *Le site officiel de l'administration française* website, available at <https://www.service-public.fr/professionnels-entreprises/vosdroits/F23264>.

⁵²¹ OECD, Digital Economy Paper No. 253, 'Protecting consumers in peer platform markets. Exploring the issue', 2016 Ministerial Meeting on the Digital Economy, Background Report, pp. 20-21.

⁵²² As per the former 'auto-entrepreneur' regime, micro-entrepreneurs have a slight leeway enabling them to stay within this new regime as long as they do not exceed the maximum turnover threshold (called '*plafonds majeurs*') of: EUR 34,900 for 'service based business' and EUR 90,300 for 'commercial sales'.

for consumer protection is linked to the diminished bargaining power of consumers who typically depend on what professionals or businesses have to offer.⁵²³ Consumer protection laws were thus originally designed to protect the consumer who, in B2C transactions, is presumed to be in a weaker position 'as regards both his bargaining power and his level of knowledge'.⁵²⁴

The national level analysis shows that the main issues concerning the existing C2C legislation relate to its scarce enforcement, as well as the fact that, in most Member States, it is **not tailored to C2C contracts concluded online**.

The general civil provisions applicable to C2C contracts were drafted before the rise of the digital age and presume that the transacting parties meet in person and/or the goods are physically present. Since in C2C transactions concluded online the parties do not physically meet, the assumption that, as both parties are consumers, their relationship is sufficiently balanced, might be not valid. According to the CJEU case *Asturcom*, the weaker position held by the consumer in B2C contracts leads him to agree 'to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms'.⁵²⁵ Although the CJEU's decision specifically refers to B2C transactions, this could also happen in C2C transactions concluded online, for example where the contract's terms and conditions have been pre-formulated by one of the parties or by the platform.

- Against this background, it can be concluded that **C2C transactions do not necessarily require extra regulation if the identity of both parties as consumers is clear and they have the same bargaining power**. On the other hand, in case of C2C contracts concluded online, it would be beneficial to **make the existing C2C legislation fit for digital purposes**. For example, in response to this concern, a recent amendment to the French Civil Code introduced a new provision⁵²⁶ setting out that unfair contract terms in 'adhesion contracts' (i.e. contracts whose content has been pre-formulated by one of the parties)⁵²⁷ are void. This civil provision applies to both B2C and C2C transactions and it is particularly relevant for C2C contracts concluded online whose terms and conditions, in many cases, are pre-formulated by one of the parties (see Section 3.2.1).

Regarding the enforcement of the existing legal framework applicable to C2C transactions, the Country Reports highlighted that, **C2C transactions generally fall outside the competence of national consumer protection authorities**. Moreover, in a number of Member States, when national sector-specific rules apply to C2C transactions (e.g. licensing requirements), these are not necessarily enforced by the sector-specific authorities with respect to private individuals providing transport or accommodation services on a non-professional basis.

- **Expanding the competence of national consumer protection authorities to C2C transactions** could improve poor enforcement and enhance consumer protection.⁵²⁸

⁵²³ University of Ghent, Mikael Aroutiounian, 'The paradigm of the weaker party in EU consumer law: just a myth?', 2011-2012, pp. 12, 13.

⁵²⁴ C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579. The CJEU explained the rationale which is supposed to have influenced the European legislator when elaborating consumer protection law in para 29 of this case.

⁵²⁵ *Ibid.*, para 29.

⁵²⁶ New Article 1171 of the French Civil Code, as amended by Ordinance No. 2016-131.

⁵²⁷ New Article 1110 of the French Civil Code, as amended by Ordinance No. 2016-131.

⁵²⁸ Conclusions of stakeholders attending the Workshop carried out in Brussels, as part of the Study, on 3 October 2016.

The lack of enforcement is also due to **issues related to dispute resolution**, such as the high cost and excessive length of civil proceedings compared to the average low value of C2C contracts concluded online, combined with the general public's low confidence in, and limited awareness of, traditional dispute resolution mechanisms and the available remedies (see Section 5.1). In other cases, the lack of enforcement practice is simply due to the fact that the sharing economy phenomenon is not particularly relevant at national level. With regards to transport services, for example, this is the case in Malta and Luxembourg, where Uber or similar platforms do not operate and ride sharing platforms are limited to transactions where passengers share the costs of the ride rather than pay a fee.⁵²⁹

- Enforcement of C2C legislation might be improved by **promoting the use of faster and less costly resolution mechanisms than civil proceedings**. In case of cross-border C2C disputes up to EUR 2,000, in addition to national civil procedures, the **European Small Claims Procedure** can be invoked (see Section 5.1). At national level, the availability of small claims procedures for C2C national-level disputes, as well as the definition of their scope of application and possible thresholds, depends on the Member State. The effective use of the European Small Claims Procedure to solve C2C disputes with a cross-border element, as well as the availability and functioning of national small claims courts, and their applicability to C2C disputes that do not have a cross-border element, however, should be further researched.

Online P2P platforms could also have a significant role in enhancing the enforcement of existing legislation. The national level analysis shows that only a few online P2P platforms (e.g. eBay, the Dutch platforms Huizenruil and Krijgdekleertjes, and the Romanian platform Okazii.ro) make dispute resolution services available to their users or explicitly indicate in the general Terms and Conditions which mechanisms are available at national and EU level to enforce C2C legislation (see Section 3.3.2). Furthermore, the Legal Analysis shows that the **platforms' lack of collaboration with competent authorities might also hinder the actual enforcement of existing C2C legislation**. For example, Section 5.2 highlights that Airbnb refuses on privacy grounds to disclose the identity of users who do not comply with the Amsterdam rules on private holiday rentals (in particular with regards to the temporal threshold of 60 days – exceeding which the renting activity is presumed to be 'professional' and requires a licence). Consequently, the application of the Memorandum of Understanding concluded between the Municipality of Amsterdam and Airbnb results ineffective from this point of view. The weak cooperation between the platform and the competent authorities led to a scarce enforcement of the relevant municipal rules.

- Against this background, it can be concluded that the enforcement of existing C2C legislation could be improved by: i. Requiring platforms to include information on applicable legislation and redress mechanisms in their Terms and Conditions; ii. Encouraging platforms to develop their own redress systems; iii. Promoting stronger collaboration between online P2P platforms and competent authorities to facilitate peer compliance with relevant tax regulations and to counteract unfair competition.

7.3 Lack of transparency in online P2P platforms' rules and practices

Regarding the relationship between the platform and the peers, apart from Italy and France, which are discussing the possibility of new legislation to regulate sharing economy digital platforms or, to at least impose certain new obligations and transpar-

⁵²⁹ See, for example, the declarations of the Luxembourgish Minister of Transport in: 'Uber in Luxembourg, an unlikely establishment' (*Uber au Luxembourg, une implantation improbable*), 5' Minute.lu website available at <http://5minutes.rtl.lu/grande-region/laune/645627.html>.

ency requirements on them (see Section 3.3.1), the other Member States do not currently have specific legislation on online platforms facilitating P2P transactions. As highlighted in Section 3.3.1, among the national rules applicable to online platforms facilitating P2P transactions are the provisions transposing the relevant EU consumer *acquis* into national law. Articles 5, 6, 14 and 15 of the ECD are particularly relevant and apply to cross-border transactions and to electronic transactions generally. Furthermore, when the online platform qualifies as a 'trader' and engages in B2C commercial activities, other EU Directives such as the UCPD and the CRD are also relevant.

Some of the main concerns regarding the relationship between platforms and their users relate to the lack of transparency in online P2P platforms' rules and practices. Certain initiatives identified at national level highlight the necessity to enhance the transparency of platforms and the information they provide to consumers.⁵³⁰ For example, according to the recommendations included in a policy paper released in 2016 by the consortium of European consumer associations led by the Belgian *Test Achats/Test Ankoop*, platforms should both create reliable trust systems, including control mechanisms such as cross peer review and user identity verification, and develop filters or appropriate tools, to always enable their consumers to know the nature of the transaction that they are concluding (i.e. if the counterparty is a peer or professional provider).⁵³¹ In addition, *Test-Achats/Test Ankoop* called on legislators and policy makers to clarify platforms' roles and responsibilities.⁵³² According to the European Commission's Communication of 2 June 2016 increasing transparency through online information could be also a tool 'for unlocking the potential of the collaborative economy'.⁵³³

As highlighted in Sections 3.3.2 and 4.2.1, in order to comply with the professional diligence duty set out by Article 5(2) of the UCPD, platforms qualifying as 'traders' in the meaning of Article 2(b) of the UCPD should **enable their users to clearly state whether they are acting as traders** or as consumers and should inform them that consumer protection legislation applies exclusively where the contract is concluded with an individual acting in a commercial/professional capacity.⁵³⁴ The national level analysis, however, shows that most platforms do not comply with this requirement (see Section 3.3.2). As highlighted under Section 3.2.1, this could affect consumers operating through online P2P platforms who might not be sufficiently aware of the fact that certain important consumer rights such as the right of withdrawal without giving any reason (Article 9 of the CRD) do not apply. The ability of parties to C2C transactions to withdraw from a contract is more limited than in B2C transactions and would need to be justified under the general civil law provisions for example, the good purchased is defective.

Apart from **lacking transparency in providing information on the status of their users, platforms usually do not adopt adequate trust tools to verify users' identity** (see Section 4.2.2). On the basis of the professional diligence duty and the transparency requirements set out by Articles 5(2), 6(1)(b) and 7(4)(a) of the UCPD, platforms' liability should also extend to adequately ensuring their users' identity so as to not mislead them as to the origin of the reviews (e.g. creating the impression that

⁵³⁰ See, for example: the proposal for a Code of Conduct of the Portuguese consumer association DECO under Section 4.1; the Italian 'Sharing Economy Act' and the French draft law for a Digital Republic described in Section 3.3.1; the policy paper released by the consumers' protection organisation *Test Achats/Test Ankoop* analysed in Section 6.2.1.

⁵³¹ OCU, *Altroconsumo*, *Deco Proteste*, *Test Achats/Test Ankoop*, *Cibersomosaguas*, *Ouishare*, 'Collaboration or Business? Collaborative consumption: From value for users to a society with values' [2016] OCU Ediciones, p. 65.

⁵³² *Ibid.*, p. 66.

⁵³³ European Commission, Communication, 'A European agenda for the collaborative economy', 2.6.2016, COM(2016) 356 final, *supra*, p. 13.

⁵³⁴ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 123.

reviews posted on the platform by fake profiles originate from real users).⁵³⁵ The Legal Analysis shows that most platforms only set out minimum identification requirements (e.g. name and email address) that users must provide in order to use the platform. This information, however, is normally not sufficient to actually verify the identity of users. As a consequence of the lack of strict verification systems of users' identity, some users might provide false information or create fake accounts, a practice that makes their detection by authorities extremely difficult (see Section 4.2.2).

Additionally, some stakeholders consider that as online P2P platforms' users are often unaware of the actual content of their Terms and Conditions due to their excessive length and lack of clarity, platforms should make them more user-friendly. Initiatives to this effect would be welcome to ensure that transacting parties are aware of the terms they are signing up to.⁵³⁶

- It can be concluded that in order to ensure legal certainty and adequate consumer protection, it would be important for platforms to improve or clarify the information they provide to their users by: i. Enabling their users to clearly indicate whether they are acting as traders or as consumers; ii. Clarifying that consumer protection laws only apply when the transaction is concluded with a trader (i.e. B2C transaction); iii. Adopting trust tools that help to adequately ensure users' identity and setting out stricter identification requirements at the time of registration; iv. Informing their users about their rights and obligations, in particular whether there is a right to withdrawal or to otherwise obtain a refund v. Making their Terms and Conditions more user-friendly.
- It is worth noting that according to some stakeholders, identifying a uniform set of rules applicable to all online P2P platforms would not be realistic. They consider that any regulatory process should be accompanied by **self-regulation** from the platforms.⁵³⁷ The Legal Analysis, however, shows that the attempt to improve platforms' transparency by adopting Codes of Conduct has not yet received sufficient support by platforms. While in some cases online platforms have not signed up to these voluntary codes (this is, for example, the case of the 'Manifesto'⁵³⁸ developed by the Italian consumer association *Altroconsumo* in 2015), in other cases, Codes of Conduct, although signed up to by several platforms, do not specifically set out the transparency requirements that platforms should adopt or the responsibilities they should assume (see Section 4.1).

7.4 Issues concerning the liability of online P2P platforms

Most platforms exclude any liability in relation to the transaction between the peers in their general Terms and Conditions and explicitly state that they are not a party to such transactions (see Section 4.2.1). However, depending on the extent to which the platform actively manages the contracts concluded by its users, the peers may expect the platform to share responsibility with the user (e.g. in case of non-performance or non-compliance of the performance, damages that might arise from

⁵³⁵ *Ibid.*, p. 137.

⁵³⁶ Conclusions of stakeholders attending the Workshop carried out in Brussels, as part of the Study, on 3 October 2016. Stakeholders [attending the European Consumer Summit of 17 October 2016 in Brussels also emphasised this point.](#)

⁵³⁷ Information collected through consultation with national stakeholders (Blog *Ecolaborativa*, 24 May 2016; Spanish Association of Digital Economy, 24 May 2016; Catalanian Competition Authority, 26 May 2016; National Commission on Markets and Competition, 26 May 2016; Ouishare platform, 2 June 2016; Consumers' and Users' Organisation, 2 June 2016; Representative of Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁵³⁸ 'Manifesto per una sharing economy sostenibile e rispettosa dei diritti dei consumatori', Altroconsumo website available at <https://www.altroconsumo.it/organizzazione/media-e-press/comunicati/2015/manifesto-per-una-sharing-economy-sostenibile-e-rispettosa-dei-diritti-dei-consumatori>.

the transaction, the information published or stored by users on the platform, or technical problems). An OECD Paper of March 2016, highlights that the way consumers perceive an activity could indirectly influence their behaviour.⁵³⁹ Such 'impression to the outside world' could also concern the liability of the platform and its role with regards to the contracts concluded by its users. Where the platform actively manages these transactions (e.g. facilitating trust among peers by using or suggesting ID verification systems, managing user reviews, mediating disputes) or governs them (e.g. setting out contractual terms of the P2P transaction – including pricing or user insurance as part of the transaction), it is more likely that its users have the impression that the platform will also share a certain degree of liability. However, in most Member States, the applicable legal framework does not set up such obligation and only general civil law rules on contractual and non-contractual liability can apply.

- Against this background, a possible intervention could consist of **further clarifying at EU level the interpretation of the liability exemption** and, in general, of already existing obligations arising from EU legislation (e.g. from the professional diligence duty set out by Article 5(2) of the UCPD). It is noted that some CJEU decisions⁵⁴⁰ already give a restrictive interpretation of the liability exemption set out by Article 14(1) of the ECD (see Section 2.2). According to the CJEU's case-law, the applicability of Article 14(1) depends on the 'active' or 'passive' role of the platform with regards to the transactions concluded between its users, and needs to be assessed on a case-by-case basis.⁵⁴¹ The platform should not be deemed responsible where its role is 'merely technical, automatic and passive'.⁵⁴² However, where its conduct is 'active' and entails a certain control (and knowledge) over the information stored or transmitted, the platform cannot invoke the liability exemption set out by Article 14(1) of the ECD. Furthermore, the UCPD Guidance further clarifies the applicability to online platforms of the regime on exemptions from liability stating that platforms cannot invoke the liability exemption with regards to contents that do not consist of illegal information stored at the request of third parties or where the platform has not complied with the professional diligence duty set out by Article 5(2) of the UCPD.⁵⁴³
- Online P2P platforms' responsibilities could also be clarified by **taking legal initiatives at EU level**. Depending on the services offered (as well as on the platform's evolution), an online P2P platform could, at the same time, operate both as a mere virtual space where peers meet to conclude contracts, and as an information provider actively managing or even governing such P2P transactions. Therefore, some stakeholders argue that any regulatory initiative should primarily clarify the responsibility of the platform in relation to the transactions concluded between the peers and **tailor it to its degree of intervention, management or government of the transactions concluded by its us-**

⁵³⁹ Organisation for Economic Cooperation and Development (OECD), 'Protecting consumers in peer platforms market: exploring the issue', 29 March 2016, DSTI/CP(2015)4/REV1, *supra*, p. 18.

⁵⁴⁰ Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, *supra*; C-324/09 *L'Oréal*, *supra*.

⁵⁴¹ Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, References for a preliminary ruling under Article 234 EC from the *Cour de cassation (France)*, made by decisions of 20 May 2008, received at the Court on 3 June 2008, in the proceedings *Google France SARL, Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA, Luteciel SARL* (C-237/08), and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), available at <http://curia.europa.eu/juris/document/document.jsf?docid=83961&doclang=en>; C-324/09, Reference for a preliminary ruling under Article 234 EC, from the High Court of Justice (England & Wales), Chancery Division, (United Kingdom), made by decision of 16 July 2009, received at the Court on 12 August 2009, in the proceedings *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, available at <http://curia.europa.eu/juris/document/document.jsf?docid=107261&doclang=en>.

⁵⁴² Joined Cases C-236/08 to C-238/08, *Louis Vuitton*, *supra*.

⁵⁴³ UCPD Guidance, 25.5.2016, COM (2016) 320, *supra*, p. 124.

ers.⁵⁴⁴ In other words, platforms whose activity is limited to passively hosting P2P transactions should not have the same liabilities as platforms that actively manage those transactions or govern them. For instance, the liability exemption set out by Article 14 of the ECD could apply to platforms providing hosting services for their peers, but it should not apply to platforms governing the contract between the peers. These legal initiatives could also take inspiration from the revised Package Travel Directive⁵⁴⁵ which foresees a liability regime linked to the degree of involvement of traders in the transaction. The Directive's definition of 'trader' includes '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, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider' (Article 3(7)). The new Package Travel Directive facilitates the identification of the liable party: the organiser of the package must deal with the problem if something goes wrong (additionally, Member States may decide that also the retailer is fully liable); traders are explicitly liable for booking errors in relation to packages and linked travel arrangements. The CJEU judgment in the *Wathelet* case (C-149/15)⁵⁴⁶ could also be particularly relevant in this context (see also Section 2.2). In its decision, the CJEU highlighted that although the notion of the seller for the purposes of the Consumer Sales Directive⁵⁴⁷ does not cover intermediaries (paragraph 33), it could include traders who act as intermediaries (regardless of whether they are remunerated for their services - paragraph 43) but present themselves as professional sellers to consumers, giving consumers the false impression that they are concluding a B2C contract (paragraph 34). According to paragraph 44, '[...] The degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer and the latter's behaviour may, in particular, be relevant in that regard in order to determine whether the consumer could have understood that the intermediary was acting on behalf of a private individual'.⁵⁴⁸

⁵⁴⁴ Information collected through consultation with national stakeholder (Association for the Defence of Consumers, 27 April 2016. Representative of the Government, 13 June 2016; Catalanian Government, General Directorate for Telecommunications and Information Society, 15 June 2016).

⁵⁴⁵ Revision of the Package Travel Directive (2015/2302/EU), Official Journal of the European Union, Volume 58, 11 December 2015, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2015:326:FULL&from=EN>.

⁵⁴⁶ CJEU, *Wathelet* case (C-149/15), available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-149/15>.

⁵⁴⁷ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0044>.

on certain aspects of the sale of consumer goods and associated guarantees

⁵⁴⁸ CJEU, *Wathelet* case (C-149/15), *supra*, para. 44.

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