

Client Alert

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Less Is More: European Commission Gives Boost to the Collaborative Economy

By Susan McLean

Sometimes, what's omitted is more important than what's included. And never more so than in relation to EU regulation and compliance. Providers of peer-to-peer platforms may have feared that a desire by the EU to "encourage" the development of European-based collaborative economy businesses would inevitably lead to more regulation. But a recent Communication by the European Commission seems intended not only to allay fears of sector-specific regulation but, even better, to encourage EU Member States to simplify and remove unnecessary regulatory burdens.

The sector has many names – the collaborative economy, the sharing economy, peer-to-peer, on-demand services, etc. Whichever name you prefer, platforms offering services that involve individuals sharing their resources are increasingly successful. Indeed, gross revenue from collaborative economy services reached €28 billion in Europe in 2015.

However, what's also been clear ever since collaborative economy operators first started to appear is that regulators and authorities aren't quite sure how to treat them. That's certainly been the experience in Europe, with Member States responding in different ways to providers of peer-to-peer or sharing economy platforms, leading to uncertainty and fragmentation across the EU. Resistance from regulators and authorities has generally focused on matters of public interest, whether that's concern in terms of consumer protection; safety; tax evasion; affordable housing; or ensuring a level playing field for traditional and new operators. There has also been significant pressure imposed on governments and local authorities from incumbent businesses and entrenched interests in reaction to the new competition.

GUIDANCE

In response to these concerns, on 2 June 2016 (nicely timed a few days before the start of Global Sharing Week 2016), the European Commission published a new Communication – "A European agenda for the collaborative economy". The guidance is complementary to the Commission's broader approach to [online platforms](#) that was presented on 25 May 2016 as part of the Digital Single Market initiative and is discussed in our [recent Alert](#).

The Communication invites Member States to review and, where appropriate, revise their existing legislation to help their citizens and businesses fully benefit from these new business models and promote the balanced development of the collaborative economy. Although the Communication doesn't introduce new EU law and isn't legally binding, it is a helpful intervention, clarifying the Commission's views on how Member States should approach the sector.

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KEY ISSUES

The key topics covered in the Communication are:

- **Market Access.** The Commission advises Member States to review, simplify and modernise market access requirements and relieve operators from unnecessary regulatory burden. Providers should be required to obtain licences or permits only where strictly necessary to meet relevant public interest objectives. In particular, platform providers should not be subject to authorisations or licenses where they only act as intermediaries between consumers and those offering the actual service. Member States should differentiate between individual citizens providing services on an occasional basis and providers acting in a professional capacity – for example, by establishing minimum thresholds of activity. Absolute bans should only be implemented as a measure of last resort.
- **Liability.** Platform providers should not be exempted from liability for any services that they themselves offer. However, where they are simply providing a platform for others to provide their services, they may be able to benefit from the “hosting” defence under the EU’s e-Commerce Directive. This exemption applies on the condition that the collaborative platform does not play an active role which would give it knowledge of, control over or awareness of any illegal information – and, where it nonetheless obtains such knowledge or awareness, acts expeditiously to remove it or to disable access. EU countries cannot oblige platforms to generally monitor or to actively seek out illegal activity. Voluntary checks, such as on the identity of providers or the quality of the services provided, can be carried out by collaborative platforms. They should not be seen automatically as an indication of an active role assumed by the collaborative platform. Ultimately, whether or not collaborative platforms can benefit from such liability exemption will need to be established on a case-by-case basis, depending on the level of knowledge and control of the online platform in respect of the information it hosts.
- **Consumer Protection.** The Commission expects Member States to protect consumers’ rights, while not applying disproportionate obligations on private individuals who only provide services occasionally. EU consumer and marketing legislation addresses transactions between a consumer and a trader, excluding consumer-to-consumer transactions. Clearly, the collaborative economy blurs these lines. It raises the

IMPACT OF BREXIT!

Any challenges which Brexit could create for the UK tech sector generally (e.g., in terms of making it harder to recruit overseas talent, reduced levels of investment due to uncertainty, potential loss of the single market, etc.) are likely to apply to UK sharing economy operators. However, despite such potential challenges, PwC has said that it doesn’t currently expect Brexit to alter the “*long-term trajectory for the sharing economy’s substantial growth*” in Europe.

It’s also unlikely that the UK’s approach to regulating the sector will change significantly as a result of Brexit. The UK government’s approach so far has been broadly consistent with the approach put forward by the European Commission in the Communication. The UK has emphasised that it is committed to ensuring that the UK is the best environment in the world for sharing economy businesses to flourish. Previous UK initiatives have included the lifting of legal and regulatory barriers and the introduction of tax breaks to boost the sector. In or out of the EU, the UK is likely to want to encourage an environment that helps the UK to continue to play a leading role in this sector.

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central question: Under which conditions in a peer-to-peer provision of services is the provider of the service a “trader”? Member States currently approach this issue in various ways. The Commission suggests that the following factors should be taken into account when trying to answer this question on a case-by-case basis: (i) how frequent are the services? (ii) is there a profit-seeking motive? and (iii) what is the level of turnover generated by the provider? The Commission also recommends that collaborative platforms enable underlying providers that qualify as traders to comply with EU consumer and marketing law, for example by designing their platforms to make it possible for “traders” to identify themselves as such. In addition, platforms should also clearly indicate to users that they will only benefit from protections under EU consumer and marketing laws where they transact with “traders”.

- **Employment.** The Commission acknowledges that the collaborative economy generates new employment opportunities and revenues and enables people to work more flexibly. At the same time, these arrangements may not be as stable as traditional employment, which can create uncertainty as to a worker’s rights. Accordingly, the Commission encourages Member States to assess whether their national employment rules are adequate for the needs of workers and self-employed people involved in the collaborative economy. Member States should also provide guidance on the employment rules that apply.
- **Tax.** Member States are encouraged to simplify and clarify the application of existing tax rules in order to create a level playing field for businesses providing comparable services. The Commission also expects platforms themselves to take a proactive stance in cooperating with national tax authorities to record economic activity and facilitate tax collection.

CONCLUSION

Collaborative economy providers will be reassured that the Commission has not suggested introducing specific regulations for the sector. Collaborative economy services include such a wide variety of business models, with different challenges and to which different existing laws apply, that a one-size-fits-all approach wouldn’t be workable. In any case, introducing new law would be inconsistent with the key aim of the Digital Single Market initiative, which is focused on reducing red tape and regulatory barriers in Europe. Accordingly, the Commission’s proposed approach for Member States to interpret existing laws in the context of collaborative economy services and make appropriate adjustments to enable growth in these services, while ensuring consumer protection, fair competition and other concerns are met, seems the right approach.

Only time will tell how Member States react to the guidance and whether it achieves its desired aim of driving more consistency of approach to the collaborative economy across Europe.

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