

**DIRECTORATE FOR SCIENCE, TECHNOLOGY AND INNOVATION
COMMITTEE ON CONSUMER POLICY**

PROTECTING CONSUMERS IN THE PEER PLATFORM ECONOMY: EXPLORING THE ISSUES

Draft Background Paper for Panel 3.1 of the 2016 Ministerial on the Digital Economy

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This draft background paper has been prepared to support the preparation of panel 3.1 of the Ministerial on the digital economy in June 2016.

During its discussion at the CCP's 90th Session, delegates are invited to provide comments and suggestions on all aspects of the paper, which will need to be finalised by written process in early 2016 along with other supporting documentation for the Ministerial.

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NOTE BY THE SECRETARIAT

At its 89th session in April 2015, the Committee on Consumer Policy (CCP) discussed its possible contributions to the OECD's Ministerial meeting on the digital economy, to be held in June 2016. It agreed that a key sub-theme of panel 3.1 on consumer trust would be the consumer protection issues raised by the "sharing economy" and that a background paper should be prepared to support the discussion.

Following further discussion by the CCP Bureau and at the June 2015 meetings of the Committee on Digital Economy Policy, the scope of this paper has been refined to focus on peer-to-peer (P2P) transactions facilitated by Internet and mobile platforms. The scope includes many of the services currently considered to be part of the "sharing" economy but also includes P2P transactions involving the sale of goods. It does not cover "sharing" platforms that do not involve a commercial transaction.

The attached draft of the paper has been prepared by Dr. Natali Helberger, Professor at the University of Amsterdam, working as a consultant to the Secretariat. It has been prepared under tight deadlines and should be considered as work in progress.

It should also be noted that there is additional work being done on peer platforms elsewhere in the OECD. This includes CDEP work for the Ministerial, which is focused on the labour market issues, as well as work is underway in the Tourism Committee and the Competition Committee, which should be taken into account in future drafts.

At the CCP's 90th Session, delegates are invited to provide comments and suggestions on all aspects of the paper, which will need to be finalised by written process in early 2016 along with other supporting documentation for the Ministerial. Delegate attention is particularly welcomed regarding:

- The ***terminology*** used in the paper. It is hoped that part of the value of this paper would be to provide a common vocabulary to clarify policy discussion. In particular, the three key types of actors have been called "peer providers", "peer consumers", and "peer platforms", with the general subject matter referred to as the "peer platform economy". Are these terms useful?
- The ***section on consumer experiences***, which covers both benefits and detriments. To the degree delegates can inform the Secretariat about national studies, experiences and empirical data to help inform and enrich this section that would be very helpful.
- The ***concluding section***. This paper is intended as a discussion paper, to help raise and frame issues for continued work. Delegates are asked to consider whether the issues raised in the section are the most relevant ones and whether they have been framed appropriately. Should the paper conclude with a set of questions for further study?

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PROTECTING CONSUMERS IN THE PEER PLATFORM ECONOMY: EXPLORING THE ISSUES

1. Introduction

1. In peer platform economies, everybody can become a seller, a trader, a producer, a driver, a tasker or a host. Offering goods and services is no longer the privilege of professional actors. According to a recent study in the United States, 51 % of respondents indicated they could imagine providing services via peer platforms in the next two years, and 72% said they could see themselves becoming consumers of peer platforms in the next two years.¹ While relatively small, the market is expanding rapidly. House-sharing site Airbnb acquired more than one million listings in only seven years.² ShareYourMeals is expected to grow by 20,000 users per year.³ And 5 year-old ride-sharing service Uber has been valued in July 2016 at more than 50 billion, reaching the mark even faster than Facebook.⁴ Recent investments in BlaBlaCar have put in into the top five most valuable European start-ups.

2. Sharing, bartering, lending, exchanging and selling goods and services are traditional activities as old as civilisation, and deeply engrained in the human nature as a “cooperative species.”⁵ But the Internet and digital technologies have taken peer economies to a new level, expanding the scale and geographic reach of peer transactions spectacularly.⁶ Peers need no longer live in the same village, meet at the same market or even speak the same language. As the European Economic and Social Committee has framed it: “Collaborative or participatory consumption represents a third wave of the Internet, where people meet online to share offline.”⁷ Under-used assets get a second life; skills that would have gone unnoticed are put to work. Peer platforms offer new opportunities for consumer welfare, employment, sustainable development and community building.

3. But engaging with an Internet full of amateurs and semi-professionals, often strangers, also creates new challenges and risks for peers. In order to encourage and promote participation in peer platforms, there is also a need for measures to generate trust, and mechanisms to protect the interests of peers in case things go wrong. Even better are measures to avoid problems occurring in the first place.

4. Building trust through a policy framework that protects and empowers digital consumers is an important focal point in the work of the OECD. With its 1999 Guidelines on Consumer Protection in Electronic Commerce, the OECD established early on the core characteristics of effective consumer protection online. These Guidelines have influenced national regulations and other international instruments, and will continue to do so. The peer platform economy, however, also challenges existing principles and rules in consumer law. At which point do peers turn into “sellers”? Can we, and should we apply the same rules to professional and non-professional sellers. Can peers in peer-to-peer (P2P) transactions harbour same expectations regarding the level of protection, but also the level of safety, quality and fairness? And what is the role and legal responsibility of peer platforms?

1.1 Scope and terminology

5. The aim of this discussion paper is to explore some of the key issues that arise when applying existing consumer policy and law to peer platform economies. Peer platform economies are understood here as commercial transactions that involve the exchange of, or access to assets or skills between peers and that are mediated through Internet platforms (“peer platforms”). This understanding includes the more ‘traditional’ peer markets, such as selling items via eBay, as well as newer forms of P2P commerce that are often referred to as the “sharing” economy or “collaborative consumption”.

6. This paper will concentrate on the area of consumer protection in the peer platform economy. Issues related to competition may be addressed in a future draft. Other issues such as taxation, worker protections, and the application of specific regulation in areas like transportation, the financial sector, food safety, insurance and the environment fall outside the scope of this study. Points of reference will be existing OECD recommendations and policy guidance, with occasional references to national or regional legal frameworks. A comprehensive comparative legal analysis among the OECD countries goes beyond the scope of this study.

7. It is important to note that many of the peer platform developments discussed in this paper are both recent in origin and changing rapidly. At this stage it is difficult to predict the future dynamics and direction these markets will take. It also means that, on a more fundamental level, it may be premature to prescribe concrete policy measures for peer-to-peer markets. More generally, it is not the objective of this paper to make concrete recommendations regarding the future policy and legal framework, or to suggest clear solutions for the challenges ahead. What this paper does is to signal some of the main developments and possible implications for the regulatory frameworks. In so doing, it hopes to lay the basis for an informed in-depth policy discourse.

2. Trends in the emerging peer platform economy

2.1 From peer-to-peer sales to the "sharing" economy

8. The Internet, the proliferation of personal computers -- now available as mobile, location-enabled devices -- and the arrival of peer platforms such as eBay, Amazon, Craigslist, Etsy, and Autotrader have given a major impulse to the peer economy. Not only do these platforms increase the geographical reach and scope of potential peer markets, they also lower substantially the threshold for peers who wish to become more actively involved in market transactions. The changed technological environment has also encouraged a new sense of micro-entrepreneurship and pro-active mind set in users,⁸ which are parts of the explanation for the rapid take-up of P2P sales. At the heart of this development is the change from passive consumer to active trader, producer (prosumer) or peer (the notion that this discussion paper will use henceforth). Consumers have begun to seriously consider peer-to-peer sales as a viable alternative or complement to traditional and online business.

9. A more recent trend in P2P markets is the shift from owning and selling goods via peer platforms, to one involving the sharing of resources, and providing (time-limited) access to goods, skills and services. These emerging practices and markets are often referred to as the "sharing economy" or "collaborative consumption" – notions that are often used interchangeably. Others refer to "access-based" consumption, "the mesh" "collaborative consumption", "collaborative economy", "circular economy" or the "maker movement". For the time being, there are a variety of definitions of the sharing economy or collaborative consumption,⁹ each highlighting different facets of the phenomenon.

Box 1. Some definitions of the "sharing" economy

"Traditional sharing, bartering, lending, trading, renting, gifting, and swapping."

"People coordinating the acquisition and distribution of a resource for a fee or other compensation."

A "market or non-market system which, through sharing activities, empowers dense peer-to-peer user communities to access any kind of physical or intangible "assets for monetary or non-monetary outcomes".¹

10. While earlier forms of online sharing, such as the sharing of music and video (YouTube), knowledge (Wikipedia) or personal information (Facebook) were – at least from the perspective of peers – largely non-commercial or even altruistic activities, more recently, many forms of sharing have turned into a potentially profitable commercial endeavour. Thanks to the sharing economy, for example, some riders on Uber are able to make a living from offering their cars, time and skills; families enhance their monthly income through renting out their driveways through JustPark,¹⁰ and hosts renting out their homes via Airbnb use the returns to pay their bills, or go on vacation themselves.¹¹ In other words, sharing can be a new form of doing business: from B2C to peer-to-peer.

Table 1. Examples of sharing economies

Accommodation & physical space	Airbnb (short term vacation stays), Couchsurfing, HomeAway, HomeStay, FlipKey, Wimdu, Villas.com, FlatClub, onefinestay, HouseTrip, Guesthop (support services for home sharers), DesksNearMe(workspace), Landshare (land, gardens)
Transportation & mobility	Uber, Hitch, Lyft, BlaBlaCar, Geraround, ParkingPanda (parking spots), Freecylce Network (bikes),
Food consumption	Feastly (connects diners with chefs), LeftoverSwap, EatWith (matches diners and hosts), MamaBake (homecooked cakes), EatWithMe (homecooked food)
Retail and consumer goods	Ziplok, Tradesy, Neighborgoods, SnalGoods, (eBay), Poshmark, Yerdle, Spinlister (sports equipment), Kidizen (kids clothing and toys); Rockbox (jewellery rental service),
Skills & services	TaskRabbit (all kinds of tasks),
Funding	Prosper, Kickstarter

11. When talking about the "sharing" economy, or more generally about the peer platform economy it is important to realise that there is no single marketplace, but rather thousands of different, decentralised economies/markets, with large variations and different dimensions. There are at least six such dimensions along which peer-to-peer markets can differ:

- The duration of access;
- The level of anonymity;
- The extent to which sharing and access are market-mediated and profit-driven;
- The degree to which consumers are actively involved and feel responsible towards others peers;
- The object being shared, and the type of accessed product; and
- The motivations for consumer to engage.¹²

12. These different dimensions influence the roles of peers and peer platforms, the relationship between peers, among peers, assets and services as well as the relationship between peers and peer platforms. In other words, peer platforms or networks are not easily captured under one common header, and probably even less so under one common policy approach.

2.2 The main actors in peer platform economies, and how they relate

Peers

13. Peers play a central role in the peer platform economy. They are the ones that trade, share goods, and provide services. But the role of peers goes beyond that of a trader or provider/consumer. Often, as members of a peer-to-peer community, peers have also an important role in shaping the norms and values that regulate the behaviour within a given community. The latter aspect is particularly relevant from the consumer policy point of view: through the development of social norms, through a feeling of shared responsibility and through active participation in the trust building schemes peers themselves can become part of the solution to some of the consumer protection issues that the peer platform economy raises.

14. For peers, the motives to engage in sharing can differ vastly, depending on the type of transaction and the community involved. For example, in a study of Norwegian users that engage in monetary marketplace exchanges, the researchers found that the prime motive for peers to engage in peer platforms is a financial one: to avoid costs and make money, closely followed by the convenience aspects of using peer platforms such as Airbnb, Uber and others.¹³ To the contrary, a study into the non-profit land sharing peer platform Landshare clearly identified societal and political motives as main driver for participation.¹⁴ One take-away from this is that the role and expectations of peers in a peer platform economy can differ greatly, and will very much depend on the type of P2P business and the communities involved.

Peer-to-peer relationships

15. Peers can be brought together in large peer-pools that have little in common except that they use the same peer platform to hail a ride or rent a vacation home. Peers can also form close-knit communities, with shared goals, values and (social rules) in which each peer feels strongly responsible and part of a bigger entity. There are even closer forms of organisation, e.g. in the form of co-ownership of land, animals or other resources. Peer-to-peer relationships can be largely social, with peers sharing or swapping items on a voluntary, not-for-profit basis; or they can be commercial with some peers (peer providers) selling (access to) goods or services to other peers (peer consumers). The latter, commercial exchanges between peers, will be the focus of this paper. Also, each peer is different: some peers use the sharing economy to conduct business on a larger scale, while others only occasionally rent out their apartment or sell items.

16. The way peers interact is governed by several layers of rules and norms. As mentioned already, in addition to legal rules, the relationship between peers is also governed by social rules and expectations, and it is important to realise that those can differ from those embedded in traditional consumer protection laws. What exactly these norms and expectations are can again differ between platforms. Finally, there are the peer platforms which in some cases can be the most important influencer of P2P interactions.

The role of peer platforms

17. The other central player in many if not most peer economies is the intermediary or peer platform. Peer platforms are an example of two-sided or even multi-sided markets that serve both, peer providers that offer skills or assets, and peer consumers that demand them (in addition, peer platforms can serve as advertisers, data analytics firms, insurance providers, etc.). The primary role of many peer platforms is to facilitate, organise and mediate the activities of peers. More concretely, important functions of peer platforms are to offer search facilities, match peers with peers, to set up reputation and other trust-enhancing mechanisms, and to exercise (differing degrees of) control over the organisation, sharing and P2P interaction (e.g. through the set-up of payment, mediation or messaging services).¹⁵

18. Among these peer platforms, a distinction can be made between ‘asset hubs’ that own physical assets such as cars or bikes and loan these to peers (e.g. ZipCar or BikeShare or the French Velib); and peer platforms that do not own assets themselves but establish a pool of peers that own particular assets or possess certain skills.¹⁶ The asset hubs resemble in many respects the traditional business model of car rental firms or hotel chains, with the difference of a higher degree of organisation of their customers, now peers, as well as a higher degree of disaggregation (instead of renting a car for an entire day, it is also possible to rent it for an hour, one way, together with others, etc.).¹⁷ They therefore fall outside the scope of this paper.

19. Some peer platforms are clearly profit-oriented, such as Uber or Airbnb, and some of them are very successful.¹⁸ Others are not or not primarily profit-oriented, such as Freecycle Network, Couchsurfing, LandShare, IfWeRanTheWorld or Craigslist.¹⁹ From the point of view of consumer protection, the for-profit platforms are likely to raise different concerns than those which are not-for-profit. This is not to say that there are no issues of consumer protection for not-for-profits (e.g. matters of data protection, communications security or fraud), but because their major focus is not on the selling products and services to consumers, many of the issues raised fall outside the remit of consumer policy, and therefore also outside the scope of this paper.

20. To the extent that peer platforms are operating for-profit, they experiment with various business models, including subscription or membership based modes (Sorted, HomeAway), the selling of insurances (Peerby?), fees, merchant commissions or surcharges (e.g. as a percentage of the price agreed upon by peers) (Sorted, ShareYourMeals, HomeAway), imposition of transaction or matchmaking fees (Fixura), guest booking fees (Airbnb).

Relationship between peers and platforms

21. An important aspect when talking about peer platforms and consumer protection is the way the relationship between peers and peer platforms is organised. Via their terms of use, community guidelines, privacy policies, etc., peer platforms play an important role in creating the conditions for safe, fair and trusted transactions among peers, and between peers and the platform. The way these platform policies interface with regulation (e.g. provisions about consumer protection, liability, data protection law, unfair commercial practice law, but also: labour law, housing regulations, food safety laws, etc.) can be an important source of legal controversy.

22. In addition to their terms of use and privacy policies, many peer platforms set the standards and rules of engagement for their peers. Examples are Airbnb hospitality-standard,²⁰ eBay’s rules for sellers and buyers,²¹ or Couchsurfing’s “Values”.²² The question to what extent peers internalise these community values and rules and actually comply, and to what extent they match with peers’ own personal or social communities rules is a question that deserves more research. It is a question that will be critical for the standards of quality and fairness that peer consumers and peer providers should expect. Moreover, policy makers may learn valuable lessons from the way peer platforms stimulate peers to actually follow their rules. This is because enforcement of norms, whether social or legal, will be a challenge in the strongly decentralised P2P environment. For example, some peer platforms use incentive-based forms of regulations, and nudges rather than sanctions. They identify, celebrate and reward members that commit to, and excel in the application of the values and rules of the peer platform. For instance, Couchsurfing has established an Ambassador program, in which it “celebrates a group of active members and their contributions to the community”.²³ And Airbnb defines so-called “super hosts”, and grants them several advantages, such as a ‘super host seal’, faster client service and travel vouchers.²⁴ Airbnb also encourages hosts to learn from each other²⁵ or to ask each other questions, as do other peer platforms, such as eBay.²⁶

23. The relationship between peer platforms and peers is not mediated by rules only. Algorithms, too, play an increasingly important role in shaping the relationship between peer platforms and peers, as well as between peers – through the profiling of peers, the automated sorting and matching, rating, but also the calculation of prices and other conditions.

24. Occasionally, there are instances in which peer platforms go beyond internal rulemaking, and also engage their users politically, as in the example of Uber in New York. Here, Uber mobilised peers to protest against new regulations that might affect the peer platforms' activities. Via email and in-app pop-ups, but also through the offering of free rides Uber sought to engage its peers in a political protest action.²⁷ This is an example of a peer platform using the collective energy and power of its peers as a way to exercise political pressure, and possibly altering the dynamics of the policy making process.

Figure 1. Different layers of rule-making on peer platforms



3. Consumer experiences of the peer platform economy

25. Sound consumer policies and laws are informed by evidence of the actual detriments and benefits that consumers experience. Assessing the nature and magnitude of consumer detriment is therefore a critical step in the OECD's Consumer Policy Toolkit.²⁸ In the case of peer platform economies, doing so is rendered difficult by the current lack of access to data. Peer platforms are a rather recent phenomenon, and there is not yet much experience with these markets (with the qualification that some more evidence is available for P2P sales than for the "sharing" economy). Particularly with regards to the sharing economy, most existing studies tend to concentrate on the benefits of peer platforms rather than on possible instances of consumer detriment. Also, much of the available evidence is focused on experiences in the US. Based on the evidence available, the following section gives some preliminary indications of the benefits and detriments that consumers can experience in peer platform economies.

3.1 Consumer benefits

26. Valuable insights can be gained from the growing body of research into the reasons and motives of why people engage in sharing.²⁹ The perceived benefits of peer platform economies are reflected in the various reasons of peers to participate and engage. There are various reasons and motives why people engage and participate in P2P transactions, some of them personal, others societal or even political. A basic distinction can be made between financial, experiential and societal, ideological and political reasons and

benefits of engaging in P2P markets.³⁰ Examples of societal, ideological and political benefits are environmental and health benefits, the productive use of existing assets, creating value for underserved consumers, fostering local communities, social cohesion and innovation. Insofar, the sharing economy can also be a means to realise broader public policy objectives. To the contrary, benefits for individual consumers are either related to the financial aspect, or to the quality and experience of products and services.

Financial benefits

27. Financial benefits can be an important reason to engage in peer platforms. Peers engage in peer platforms in order to save money (by using often better priced or even free assets, as compared to goods and services that are offered via the more traditional B2C market places); or to earn money.

- **Making money and micro-entrepreneurship:** A study from Norway reports how peers in Norway use the financial returns from renting out their houses to cover their own running costs, or for extra spending money.³¹ For these users, participating in peer platforms is in the first place a matter of business and micro-entrepreneurship. Similarly, a study from the UK reports that in the UK, a typical Airbnb host would earn around GBP 3000 per year renting out her apartment for 33 nights a year.³² Another study estimates that in the US, users of TaskRabbit earn up to USD 10 000 per month.³³ Moreover, the UK study also showed that the peer platform economy creates opportunities for those who would normally find it difficult to work, including women with caring responsibilities. For them, according to the study, “the sharing economy can offer a lifeline back into work”.³⁴
- **Saving money.** Saving money has been reported as another benefit of engaging in peer platforms. Often, prices on peer platforms are below the commercial rates (or even for free). In addition, there are the cost savings that are associated with the (not any longer necessary) costs for maintenance, insurance, repair, etc. that typically accompany ownership over assets.

Benefits associated with the experience of a good or service

- **Accessibility and ease of use.** Aside from financial reasons, participating in the peer platform economy has also been linked to a better consumer experience. This can be because the service is easy and possibly even easier to use and more accessible than other commercial offers - an observation that also holds important implications for the competitiveness of commercial offers. With the peer platform economy, for example, accessibility of resources also outside one’s own hometown has been cited as an important motive for and benefit of engaging on peer platforms.³⁵
- **Better consumer experience.** Other benefits that are associated with the way how consumers experience the overall service is the different look-and-feel (living in a real home like a real local instead of staying at a hotel), the better service (e.g. if local hosts can give personal recommendations), the greater variety (instead of owning one type of car, peers have access to an entire car fleet), or the local proximity (fetching food from the neighbour instead of having to walk to a restaurant). Insofar, it is probably safe to say that consumers engaging in peer platforms have different expectations of the service and assets, their quality and the conditions under which these are delivered. This is another observation that matters for the application of traditional consumer laws (and e.g. the ‘reasonable expectations test’).
- **Choice and variety.** Closely related is the aspect of increased choice and variety. Sharing can enable access to resources that are normally not available (“being at a real home abroad”), or offered at higher prices (prices for rides on Uber tend to be may be significantly less than those of commercial taxi undertakings).³⁶ Another, not less important aspect is the sampling aspect,

namely that peer platforms allow users to test and experience goods or services that they are curious about but unfamiliar with, and/or would have normally not considered buying.³⁷

- **More social experience.** An important motive for some engaging in peer platforms is the social aspect of the experience, which may consist of both the social interaction as well as the feeling of belonging to a community. A related aspect is the fact that some users seem to have greater confidence in their peers, and to prefer doing business with them, rather than with commercial, often large corporations.³⁸ This aspect seems to reflect a growing dissatisfaction with the commercialisation of goods, services and resources,³⁹ broader societal concerns for e.g. the environment and against excessive consumption,⁴⁰ as well as a growing desire for more of what Benkler has coined so aptly as “nonreciprocal pro-social behaviour”.⁴¹ Again, this is an interesting aspect that may not only affect the design of consumer protection measures, but also the competitiveness of established commercial players, particularly where peer platforms succeed in conveying that feeling of trust and belong to a community, unlike their more established competitors.

3.2 Detriments

28. In considering possible detriments, a distinction can be made between broader societal and macro-economic detriments, and narrower instances of individual consumer detriment. Examples of the former are the concerns that because of the profitability of house sharing platforms, housing is not any longer available for long-term tenants, which can potentially create problems, especially in cities where the housing situation is difficult. Other possible instances of broader societal and economic detriment can be the impact on competition and innovation, but also on the efficacy of laws that are meant to protect public health and safety, such as food laws. Although these types of issues may concern policy makers in general, they exceed the scope of this paper, which focuses on the experience of the individual consumer.⁴²

29. While the available evidence is limited, a number of possible types of individual consumer detriment can be identified. Most are not unique to peer platform activities, but can be seen across business to consumer e-commerce in general. In some cases, however, there are characteristics of peer platforms that may give rise to special challenges in addressing the problem. Examples include: inaccurate or misleading information, faulty products or services, pricing issues, safety issues, allocation of responsibility, redress, privacy, and switching obstacles.

Misrepresentation and inaccurate information

30. Adequate information about the nature of the product or service and the conditions of delivery is critical for e-commerce. This is perhaps even more the case for peer platforms, where the personalised nature of services offered impedes standardisation (as a form of consumer information), and information about the service, assets and peers is a critical pre-condition for being able to trust. Concerns about misrepresentation, inaccurate or misleading information can arise in P2P relations as well as in the relationship between peers and platforms.

31. Like professionals, peer providers will typically have more information than the peer consumer considering whether transact. For example, a peer interested in hailing a ride via a peer platform may want information about the qualifications of the driver, her experience, the safety of the car, the price of the ride, etc. Similar, someone renting a home via a house sharing platform needs to know how big the home is, how many people it sleeps, whether it has a bathroom, electricity, etc. Of course it's not just having the key information elements available, but also having them being accurate. The interest in accuracy extends to information provided in rating and other forms of reputation systems.

32. In relation to the peer platform, both peer providers and peer consumers depend on information about the platform itself, the way it functions and the services and guarantees that it provides. As is commonplace in e-commerce in general such information is often not presented in an easily understandable manner for the reader.

Other issues

- **Faulty products and services.** A major potential source of consumer detriment in P2P sales is that goods either do not live up to their description or are otherwise defective.⁴³ To the contrary, in the sharing economy, a shift can be expected in the types of harm and detriment consumers experience. Because of the nature of the sharing economy (provision of access instead of ownership), the consumer issues in P2P transactions are likely to be different. Instead of problems involving the purchase of products that do not comply with consumers' reasonable expectations, in a sharing economy, problems are more likely to revolve around the accessibility of resources, the conditions of access and the quality of the products and services accessed, as well as the availability of mechanisms to solve conflicts should they occur.
- **Unfair pricing (surge pricing)** A pricing practice that has already caused controversy is surge pricing: driving prices up when the demand is high in order to balance offer and demand. For example, reportedly, during a snowstorm in New York, prices for Uber rides were 8.25 times higher.⁴⁴ Economic efficiency considerations aside, from the perspective of consumers such practices can create transparency problems if it is not clear to consumers that and why the price for the same service has suddenly gone up.
- **Safety issues.** Safety issues can arise from the assets shared (food, cars, etc.), as well as the lack of qualification and trustworthiness of the peers offering them. Again, evidence is anecdotal at most, and can include accidents through unqualified riders, theft and vandalism and other possibilities for abuse that may come with sharing one's own resources with relative strangers. Safety concerns may be rendered more problematic through uncertainty about to whom peers can turn in case accidents happen or safety issues arise: the peer provider, the platform, one's own insurance company? More generally, an important source of consumer detriment is the difficulty of peer consumers to obtain redress in case matters go wrong.
- **Data protection, privacy and security.** In a recent Eurobarometer study consumers mentioned the lack of trust in the safety of personal data as one of the obstacles to their participation in e-commerce,⁴⁵ and some advocacy groups have already signalled similar concerns on peer platforms. With the proliferation of peer platforms, more and more personal data will be collected by amateurs who, in many cases, have neither the background knowledge nor the facilities to guarantee the security and fair processing of this data.⁴⁶ Not only peers, but also peer platforms collect personal data, for a variety of reasons, including reasons that are not directly related to the actual purpose of the platform, but that span a broader range of privacy-sensitive activities, such as profiling and targeting media users, behavioural advertising and performing predictive analyses. At the same time, it will not always be clear to peer consumers what will happen to their data, what security measures are in place, or what steps they can take to protect their personal data vis-à-vis a) peer platforms, b) other peers, and c) third parties.
- **Switching between platforms** Peers may also experience different switching costs – an aspect that matters not only for individual consumers but also for functioning competition. Switching costs on peer platforms may have little to do with the infrastructure used, or the way services are bundled, as are many of the traditional switching costs that consumers incur. Rather, an important source of switching costs seems to be the social costs of switching between peer platforms, including the loss of social capital. Peer providers may invest considerable efforts in order to receive good ratings and build up a reputation. This is likewise the case for peer consumers, who

invest time and energy to become familiar with the peer platform, its trust mechanisms, write reviews and otherwise actively engage with the community.⁴⁷ If switching the platform means losing the positive reviews, social capital or the link with the community, this can be a serious disincentive to switch between platforms.

- **Trust.** Trust is a major issue in peer platforms. A recent study found that among US adults familiar with the sharing economy, almost 90% said that the sharing economy is based on trust between peers.⁴⁸ Peers can encounter issues of trust in many different contexts: trust into the reliability and qualifications of the peer offering a service; trust in the peer platform and the guarantees and procedural safeguards in place so that peers are protected or can exercise their rights, but also trust in the asset or service itself, for example that it is not dangerous (spoilt) food or unlawful. For many users, trust is a critical precondition for engaging in peer platform transactions. More generally, particularly in an environment where people no longer sell assets (with the result that it does not any longer matter to them whether the next owner thieves or destroys the good), but rather share them with strangers, the trustworthiness of these strangers matters even more. Accordingly, the importance of trust-enhancing measures and legal safeguards cannot be overestimated.

4. Consumer protection issues

33. In its 1999 E-Commerce Guidelines,⁴⁹ the OECD established some key principles for consumer protection in electronic commerce, including transparent and effective protection, fair business, marketing and advertising practices, clear information about an online business' identity, the goods or services at offer, and the terms and conditions of a transaction; a transparent confirmation process; secure payment, and fair, timely and affordable dispute resolution and redress, as well as privacy protection. The question of how to apply these principles to the peer platform economy cannot be easily be answered without greater experience and evidence. What evidence does exist (as discussed above) suggests that peer consumers can face many of the "traditional" e-commerce challenges that the 1999 E-commerce Guidelines were designed to address, as well as some that are particular to the peer platform economy.

34. The question as to what extent particular rules in consumer law should apply to the peer platform is one that goes beyond the scope of this study, as does the application of sector-specific rules. To give but one example: while consumer law will commonly provide for a lengthy list of information disclosures that a consumer should receive, consumers on some peer platforms seem to derive much more relevant information from pictures,⁵⁰ others from the description of the background and experience of peers.

35. Then there are issues that have not figured very prominently in the traditional consumer protection discourse, but that become more and more relevant with the new business models and peer platforms. The example of privacy and the protection of personal data has been already mentioned. The OECD has been a forerunner insofar as it has a long tradition of considering privacy as also an element of consumer protection. Consumer protection law, its provisions about transparency, the protection of reasonable expectations of consumers, the fairness of conditions and the protection from unfair commercial practices will gain increasing importance in helping consumers to safeguard their rights to privacy, also on peer platforms. The linkage has become more important as the commercial value of personal data has increased.

36. Other features of the sharing economy may require a more radical re-thinking of some of the basic tenets of consumer law and policy. One example is the role of algorithms in setting terms and conditions. With their prominent role in customising and personalising the service experience, algorithms raise new issues about transparency, which are not easily solved with the existing catalogue of information obligations. Then there are issues of discriminatory differentiation which may be unfair in certain contexts.⁵¹ Another example is the 'social' switching costs. Protecting the consumers' 'right to choice' is a

central objective of consumer law.⁵² An important function of consumer law is to create the market conditions that allow consumers to “vote with their purse”, by rectifying market failures, most notably information asymmetries. This is also why the removal of obstacles to the exercise of consumer choice, such as excessive switching costs, has traditionally held an important position in consumer law. This is also true also for sector-specific consumer laws, such as telecommunications law and, more recently, data protection law.⁵³

37. More generally, social capital is turning into an increasingly also valuable commercial asset. Already, social capital in the form of user reviews and friends-lists can influence the price that peers can ask for their services.⁵⁴ Social capital (in the form of reviews, followers, etc.) often constitutes part of, or the sole return that peers receive for their services, and it can also be part of the toolbox of remedies that consumers have (instead of asking for a return of their money, peers respond with negative reviews). Similarly, like in the case of data as a currency, consumer law and policy – with its traditional focus on remunerated services – is clearly being challenged by the arrival of these new, non-monetary currencies.

38. The reliability of trust and reputation systems is also an example of possible shifts in the tools and remedies that peers will depend on in peer platform economies. For example, in order to be able to make informed decisions peers rely on different kinds of information than consumers in a B2C setting. Instead of information about the address and website of a commercial business, for example, peers require information about the social profile, years of experience and ratings of individual peers. Insofar, trust and reputation systems play an important role in providing peers with information that traditional consumer law may not provide. Hence, possibly more important than the catalogues of prescribed information in current information law will be the availability and accuracy of rating systems, as well as the protection of peers from misleading or manipulated reviews.⁵⁵ For the question of how to ensure the accuracy and proper functioning of these systems, valuable lessons could also be learned from ongoing work in the reliability and transparency of digital comparison tools.⁵⁶

39. Similarly, because of the shift from sales – which transfer ownership – to agreements over (short-term) access and temporal use,⁵⁷ some areas of consumer protection law & policy may become relatively more relevant than others, e.g. contract law, as opposed to consumer sales law, or the provisions about rental and lending, as opposed to the rules about the right to withdrawal, rules about gift giving, bartering and loaning vs. the rules about distance selling.

40. On a far more fundamental level, however, some are raising questions as to what extent the existing consumer framework is applicable at all. This is a question that the following section will elaborate on in more depth, beginning with the question of whether there will be actually a need for applying consumer law, of whether peer platforms themselves already provide for a sufficiently high level of consumer protection.

4.1 Peer platform mechanisms for building customer trust

41. Peer platforms experiment with novel means and instruments to build customer trust, many of which may have the impact of protecting peer consumers. Many of these are not mandated by consumer law, but may well be better suited to address some of the peer platform-specific consumer concerns and instances of consumer detriment and could mitigate against the need to invoke conventional consumer law.

- **Review and reputation systems.** A central element in helping peer consumers to make informed choices are review and reputation systems. In addition to having a critical trust-building function, these systems can also be a factor in regulating behaviour through monitoring, feedback-systems and the exercise of peer-pressure.⁵⁸ The practical importance of trust and reputation systems is symptomatic for the change from a traditional B2C setting to more social forms of conducting

business. The effectiveness of these tools depends critically on the active involvement of both, peer platforms and peers. Trust and reputation systems, as well as peer-driven screening are clearly less effective without a critical mass of participating peers. Both, peers and peer platforms may have responsibilities in this regard.

- **Guarantees.** In response to negative experiences with accidents, but also theft and fraud, a number of peer platforms have introduced guarantees. Airbnb, for example, offers guarantees for both, guests and hosts to cover for both accidents but also instances of intentional theft and vandalism. Similarly, eBay and Uber offer guarantees, as do others, all with varying conditions however.
- **Verified identities.** One cause of consumer detriment can be the inability to contact peers in case of problems. As the OECD emphasised in earlier publications, identity management can be an important means to address risks that are associated with human interactions that help to build trust and lay a foundation for economic and social life.⁵⁹ The ability to verify and identify identities is possibly even more important in a P2P setting, in which dispute resolution begins with another peer. Accordingly, some peer platforms do take steps to verify the identity of peers.
- **Pre-screening** (by the peer platform or peers). Some peer platforms offer pre-screening, like in the case of Uber that performs criminal background checks and reviews of drivers' motor vehicle records throughout their time driving with Uber.⁶⁰
- **Secure payment systems.** Next to reputation systems and pre-screening, secure and trustworthy payment systems are considered another important enabler of trust and safety in peer transactions.⁶¹ Many peer platforms offer these, and in so doing cooperate with established/external payment systems.
- **Education, checklists and forms.** Many peer platforms invest in educating their users and providing them with the (legal) information that peers need to comply with their roles as traders, drivers, hosts, etc. Airbnb educates users e.g. about 'responsible hosting'.⁶² Kickstarter gives information on how peers can protect themselves from phishing.⁶³ eBay dedicates an entire section to legal questions. There, peers can find general information about the legal situation, recent changes in the law or case law, exemplary forms, etc.⁶⁴ How accurate and helpful that information is for peers is a different matter.⁶⁵
- **Social norms and community values.** An often overlooked fact is that the behaviour of users is governed not by laws alone (if at all). Social norms, too, play an important role for how we behave, deal with others or solve conflicts. Social norms have even proven to be effective alternatives to regulation in some areas.⁶⁶ And also on peer platforms, there is evidence that in smaller, community-oriented services, members can develop a collective sense of responsibility and social norms.⁶⁷ More generally, in a PriceWaterhouseCoopers study 64% of respondents said that in the sharing economy, peer regulation would be more important to them than government regulation.⁶⁸ It is not clear to what extent this perception is influenced by the fact that users either are not familiar with the relevant regulations or uncertain about their applicability in a sharing context. The fact remains that peer regulation and trust in the judgement of other peers are critical factors that influence behaviour in P2P markets.⁶⁹ It is important to realise, though, that these social norms and community values are typically community specific, with many variations between the different sharing economies.

42. There is yet a lack of evidence to assess the effectiveness of these measures, whether they are adequate and sufficient to address consumer detriment, or to what extent they maybe even alleviate the need for regulation. It should be noted, however, that these forms of consumer protection 'peer-style' may come with their own set of challenges, and ultimately need for regulatory oversight. The example of trust

and reputation system – often brought forward by proponents of the less or no regulation approach - may illustrate that point.

43. There are, for examples, doubts regarding the accuracy and objectivity of some reviews. Ratings can be false, biased or reflect socially desirable behaviour or strategic manipulation.⁷⁰ The difficulty to establish the accuracy of peer ratings is even more serious in a sharing economy, as peers will often not be able to fall back on established sources of information, such as the reputation of a brand, tests of consumer organisations, comparison sites, etc.

44. Trust and reputation systems can invite discrimination. For example, it has been shown that the posting of personal profiles and pictures facilitates discrimination based on the seller's gender, age, race, etc.⁷¹ The reliance on reputation systems and peer-ratings can also invite attempts to harm the reputation of others wilfully, instances of blackmailing and loss in social capital.⁷² Data protection issues are another pressing example: Uber and Lyft allow consumers to see the GPS path of their rides so that consumers can verify that drivers took the shortest route. This feature is only possible through the systematic collection of location data. More generally, reputation systems generate a lot of personal data, raising issues of compliance with privacy laws.

45. Similarly, there is evidence that pre-screening mechanisms in place may not always live up to the legal standards, and occasionally mislead consumers about the nature and quality of these screenings.⁷³ More generally, more data is necessary regarding the various consumers protection measures in place, their implementation in practice, their efficacy in preventing or addressing consumer detriment, peers' awareness of these schemes, as well as their effect on peers' choices and behaviour.

46. Common to many of these alternative means of consumer protection, including reputation systems, is that effectively they place burden of monitoring on the shoulders of consumers. This is more generally one of the drawbacks of the ongoing trend towards consumer empowerment: while potentially good and liberating for some consumers (particularly the well-educated and those with sufficient time at their hand to make use of all the new forms of empowerment), the trend towards more user empowerment can go at the costs of less empowered consumers, particularly if coupled with de-regulation measures.

4.2 The applicability of consumer law to peers

Do peer providers have to comply with consumer law?

47. Can and should consumer law apply to the relationship between peer providers and peer consumers? One of the main characteristics of peer platform economies is that the role of individual users is no longer confined to the role of consumer, as in traditional B2C market places. Instead, users step into the shoes of producers and sellers of goods and services. Does that also mean that peer providers and peer consumers fall under the rules that were originally designed to protect consumers in their relationship to businesses? Peers typically lack the scale, experience and resources to comply in the same way as businesses. How adequate and effective are the rules and remedies when applied in relation between amateur users? But also: can users, when engaging in commercial transactions with other users, expect the same level of professional diligence, care and quality? These are difficult issues that for the most part have not been confronted by policy makers. Addressing them becomes more pressing with the proliferation of peer platforms.⁷⁴

48. Consumer protection law commonly juxtaposes two actors: traders (or sellers) and consumers. It then defines responsibilities and obligations of the former, and rights of the latter. The qualification as trader or consumer is critical for the application of consumer law. For example, the EU Consumer Rights Directive (which has harmonised the rules about distance selling and consumer sales law in the EU)

applies “to any contract concluded between a trader and a consumer” [Art. 3 (1)]. In other words, it does not apply to contracts between two traders (B2B), two consumers (C2C) or peers (P2P). The same approach is reflected in the EU's directives on Unfair Commercial Practices and Unfair Terms in Consumer Contracts, as well as the OECD's E-commerce Guidelines.

49. The EU Consumer Rights Directive, defines a “consumer” as ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession’ (Art. 2 (1) Consumer Rights Directive).⁷⁵ By contrast, a trader is defined as ‘any natural person or any legal person, ..., 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’ (Art. 2 (2) Consumer Rights Directive). The key question is hence under which conditions does a peer who rents out his apartment or offers to cut hair or share a bike do so within or outside his trade, business, craft or profession. This is a question that is notoriously difficult to answer, and for which, so far, any comprehensive guidance is lacking.⁷⁶ Factors that can matter in this decision vary from country to country.⁷⁷ They can include indicators such as whether a transaction is planned or not, the way it is organised, the number of transactions, their value, the duration of the activity, the impression to the outside world, the way the activity is perceived by consumers, profit making intention, etc. It cannot be excluded that the activities of some “peers” may actually match the definition of professional trader, but the ultimate decision will be taken by judges on a case-by-case basis.

50. From the perspective of peers, this situation is particularly problematic, as peers, even more so than traders, will find it very hard to assess under which conditions they qualify as “trader” with the consequence that they also have to comply with the legal obligations that apply to traders. Perhaps even more challenging for peer consumers is to be able to recognise whether they are contracting with a professional “trader” or not. Both peer providers and peer consumers would benefit from some clear guidance on that issue.

51. Lessons could be learned from peer platforms, such as eBay, that distinguishes between ‘seller’ and ‘buyer’, or Airbnb, who is talking about ‘hosts’ and ‘sellers’. These peer platforms focus on the actual activity, rather than the link to any professional practice, trade or profession. Having said so, the functional approach at eBay, Airbnb and others may also confuse consumers as to the fact whether consumer protection rules do (or not) apply, precisely because of the difference in terminology. One possible outcome could be that even if a guest rents a holiday home via Airbnb from a host, she is not entitled to the protections under consumer law, because the host rents out her family apartment on a very occasional basis and thus does not fall within the definition of trader.

52. Inspiration for a workable solution to provide more guidance to consumers could also be drawn from other areas of law, e.g. data protection law (which limits the applicability of the law to the sphere outside the private household) or housing law. To give but one example: the municipality of Amsterdam has clarified that renting out a private house without a license is possible if peers do not rent it out for more than 60 days; beyond the 60 days peers will fall under the rules that apply to commercially operated B&B and hotels.⁷⁸ From the perspective of peers, these quantifiable, “hard” criteria are probably more significant than the far vaguer question of falling inside or outside one’s trade and profession.

Need to differentiate between peers and professional traders?

53. Even if a peer technically qualified as “trader” in the sense of consumer law, still the question remains to what extent it is adequate and desirable to apply the same rules to professional and non-professional actors (i.e. peer providers). In other words, does a peer selling items on eBay, renting her home or offering her services as a driver need to observe the same legal obligations as companies with a billion-dollar turnaround and an entire team of legal experts? Will peers have to observe consumer laws’

extensive information obligations, grant consumers a right to withdrawal, offer secure payment, transparent confirmation processes and adequate dispute resolution services? This question recalls earlier debates about the applicability of consumer law to SME's that also lack the resources to comply with the full regulatory regime. It is not only a matter of differences in expertise, experience and scale. It is ultimately also a question about feasibility, fairness and the reasonable expectations that peer consumers can harbour in relation to peer providers.

54. It may be obvious that peers, as non-professional amateurs, will often lack the technical, legal and organisational skills and resources that professional traders and businesses have. The legal knowledge aside, whereas a professional producer of cars or coffee machines can easily repair or replace a faulty product, this requirement from consumer sales law can very well pose a major problem for a peer who has sold his (only) car or coffee machine. Similarly, complying with the extensive catalogue of professional information obligations can be challenging for peers, who may not possess all the information required. In the worst case, ill-fitted legal requirements and legal risks could amount to a disincentive for peers (both, as suppliers and as consumers) to engage in peer platforms in the first place.

55. There may be situations in which peers are not able to comply with the legal requirements without cooperation from the peer platform. To the extent that contract law requires, for example, that prices and conditions are fair and meet reasonable consumer expectations, Uber drivers are not free to choose the price for their rides, as this is set by Uber. Similar, individual users will hardly be able to offer secure payment or mediation services without the cooperation from a (professional) peer platform. Another example is data protection law. While peers may very well be obliged to comply with the rules under data protection law when collecting and processing personal data from their guests,⁷⁹ in practice they may be limited in their ability to do so, e.g. because the peer platform collects the data, or reserves the right to share guest data with advertisers. More generally, in peer platforms the ultimate level of consumer protection will depend to a large extent on the just and effective cooperation between peers and the peer platform. This could be another reason to differentiate between the obligations for professional traders and the activities of peers.

56. Finally, the level of protection expected in peer platforms may also depend on the level of protection-worthiness or vulnerability of the peer consumers. Such consumers typically are aware that they are not contracting with professionals, but with peers like them. Their expectations may differ for such transactions, as well as their response to problems that may arise.⁸⁰ One study referred in this context to a "P2P" risk discount: "Less consistency of experience, some safety concerns, and other items cause what we call the "P2P Risk Discount"⁸¹ in order to explain why sharers would offer lower prices in comparison to commercial offerings, in order to compensate for the risks involved in P2P transactions. Following this line of thought one might argue that peers who engage in commercial transactions with other peers can themselves be expected to handle a heightened level of care and responsibility. Possible examples could be the obligation to mediate before suing, and being entitled to a lower standard of reasonable expectations.⁸²

57. In practice, judges will, and already do have an important role in striking a fair balance. For example, in Germany, courts do have some room to alleviate somewhat the level of care imposed on non-professional sellers. Other examples are Hungary, Norway and the Netherlands.⁸³ To the contrary, in other countries, such as Finland, Italy and Spain the possibility to differentiate seems to be explicitly excluded; once a party falls within a certain category, it has to abide by the applicable regulations.⁸⁴

58. Even if one decides to depart from consumer law's one-size-fits-all approach and apply some differentiation, participants in peer platforms would probably benefit from the definition of some minimum level of consumer protection that should be observed even between (non-professional) peers. What this level is will be ultimately also a political question, and may vary between sectors. Factors to take into account will be the goals and regulatory objectives for particular sectors, the level of detriment peers

experience and the availability and effectiveness of alternative, non-legal remedies. To give but some examples: While it can be considered just and feasible that peers provide information about themselves, contact details and the goods and services, they cannot be expected to make that information available in different languages, or take into account sector-specific information requirements in different nations. Peers cannot be expected to provide secure payment services themselves, but they could be expected to use those offered by others in order to increase the security of transactions. And while it is unreasonable to suggest that peers should offer dispute resolution, it can be fair to suggest that both peer providers and peer consumers have a duty to cooperate in settling disputes. Similarly, peers will only to a very limited extent be able to educate other peers, but it can be feasible to require that those engaging in P2P markets invest reasonable effort in getting acquainted with the basic rules and mechanisms in place (provided they are explained in a reasonably amateur-friendly way).

59. A related question is to what extent the same level of protection should apply, depending on whether a service has been rendered for money, or for in-kind services (e.g. as part of a community). Note that in some EU Member States, consumer law does not apply to non-remunerated services. In general, consumer law is not well-adapted to the fact that money has become only one out of many possible sources of commercially valuable return services. On the other hand, as long as an activity is not for profit and primarily motivated by societal, ideological etc. reasons it might not raise consumer protection issues in the first place.

4.3 Consumer law and peer platforms

Application of consumer law to peer platforms

60. Do consumer laws apply to P2P platforms? A commonly made argument of peer platforms against regulation is that they do not provide the services themselves, but merely connect the parties that do so.⁸⁵ The reality is more nuanced. It is probably true that often peer platforms do not offer the product or service themselves: if a peer contracts for a service via TaskRabbit, it is the Tasker, not TaskRabbit, who delivers the service. On the other hand, Uber also uses professional drivers and dictates many aspects of the service, e.g. the price, and the way drivers ride and behave. Notwithstanding the question of the legal status of these drivers, in this constellation the peer platform does offer (remunerated) services. The closer a peer platform comes to determining the terms and conditions of the service, the more plausible it is to apply consumer law.

61. Even if the peer platform itself is not providing the underlying good or service, in many cases a peer platform will still be deliver service to the consumer in their own right. This can include the use of the peer platform functions such as search, listings, reputation system, mediation and messaging systems, as well as value-added services such as insurance, guarantees, extra customer service, extra certification, etc. Where access to a peer platform is a service in itself, consumer law should apply as well. Contract law, for example, has an important function to ensure the fairness of the conditions between peer platforms and peers and should protect peer consumers from misleading advertising and the lack of critical information. Again, this will be particularly true for commercial peer platforms (with non-profit peer platforms it is already questionable whether they qualify as trader or business in the sense of consumer law). But even for non-commercial peer platforms it is worth considering whether a minimal level of consumer protection should apply, for example, informing peers about the peer platform, possible risks, and reputation mechanisms in place.

62. When applying existing rules to peer platforms it is important to keep in mind, however, that the rules were written for traditional B2C transactions, and may not fit new forms of peer commerce.⁸⁶ In the worst case, their application could put a break on innovation and activity that is beneficial to consumers.⁸⁷ Some question the need for the application of existing rules, arguing that through expanding the range of

options and information available to consumers, peer platforms are removing the need for regulation.⁸⁸ Market parties (including consumers) may find their own ways of ameliorating problems.⁸⁹ And finally, regulations can also invite regulatory capture and function as barriers to entry for new, innovative players.⁹⁰

63. Put differently, the question of what regulations to apply can also be a matter of industrial policy (what kind of competition to aim for?), broader policy objectives (stimulating peer platforms for reasons of environmental or social reasons) or considerations of fair competition and the creation of an equal playing field between peer platforms and established firms.⁹¹ A significant element in the ongoing legal controversies around services such as Uber or Airbnb, for example, is the resistance from established players who feel that they are disadvantaged vis-à-vis (commercially operating) P2P peer platforms if the latter serve the same markets and operate within the same industry but are not obliged to comply with the rules that apply to established industry players. This is a complicating, but not a novel factor. It touches more generally upon the difficult question of ‘innovation friendly regulation’, and the extent to which governments are willing or intent to lower the legal obligations for start-ups and new-comers in order to stimulate investment and innovation.

The role as intermediary

64. Apart from the questions about peer platform responsibilities for their own representations, activities and services, is a question about whether they should be accountable for the activities of the peer providers using their platforms. Aggrieved peer consumers might find it for various reasons unattractive or even impossible to seek redress from the peer providing the good or service. For example, they may not have the real names and contact details if the provider resides in another country or speaks another language, or is simply not able to cover the claims, e.g. because of lacking financial resources. In such situations, it can be attractive for peers to turn with their claims directly to the peer platform, for example on the basis of the rules about contributory liability, acting as a proxy or the violation of specific duties of care.⁹²

65. For peer platforms, the prospect of being held liable for the activities of their users holds considerable financial and legal risks, particularly in situations in which peer platforms exercise little control over the way peers interact, negotiate and execute tasks. There are some policies and regulations in place to address intermediary liability. An early example was the Communications Decency Act of 1996 in the United States, which provided immunity to ISPs for the content of their users. In Europe, and in accordance with the EU E-commerce Directive, Member States foresee liability exemptions for certain categories of intermediaries, including ISPs, caching and hosting services.⁹³

66. The purpose of the relevant provisions in the EU E-Commerce Directive is to define the conditions under which the three categories of intermediaries (for peer platforms the category of ‘hosting services’ is the most likely)⁹⁴ can be held liable for the activities of their users. In a nutshell, hosts cannot be held liable for the activities of their users as long as they have no actual knowledge of illegal activity, or, upon such knowledge act expeditiously to remove or disable access to the information. What is more, EU Member States are prohibited from imposing general, ex ante monitoring obligations on intermediaries. Comparable provisions exist e.g. in the US, although on a more fragmented, sectoral basis.⁹⁵

67. One structural problem with the liability exemptions for hosting providers is that it creates disincentives for peer platforms to engage in further-reaching, pro-active monitoring or quality and safety control measures.⁹⁶ Because “hosts” are only those who provide a merely technical, content-neutral service, and because of the knowledge requirement any pro-active involvement with the content or the way how peers interact on the peer platform risks disqualifying the peer platform from the application of the safe harbour provisions. This is for example the reason why many peer platforms that host user generated

content refrain from engaging in pre-editing, or make sure to place such content in a separate section of the website.⁹⁷ For some peer platforms the question is probably theoretical: to the extent that a peer platform has implemented a payment system, or identifies “super hosts”, sets the prices for services or defines the terms and conditions under which peers interact they are likely to fall outside the provisions of the hosting exemption.

68. The question of whether peer platforms that do fall outside the hosting exemption can be held liable for the actions of their users is a question that will need to be considered on a case-by-case basis and according to the relevant national laws. And while there are valid reasons to argue against holding peer platforms fully responsible for the activities of their peers, a more differentiated approach would subject platforms to specific duties of care in relation to their peers.

Specific duties of care

69. In response to the development of ever-more active peer platforms that enable and encourage peers to share music, videos, all kinds of contents and services, there has been increasing pressure to impose further-reaching obligations on intermediary peer platforms, including obligations to pro-actively monitor and apply ex ante measures to prevent infringements.⁹⁸ Especially with regard to commercial peer platforms it may not be unreasonable to demand the investment of greater efforts in ensuring the lawfulness of the peer-driven operations on their platform. Additional arguments are reasons of efficiency and societal responsibility of these peer platforms.⁹⁹

70. For example, the European Economic and Social Committee suggested that “it is impossible to eliminate all risks, but platforms facilitating exchanges must ensure that their members are aware of these risks and have sufficient information to manage them effectively.”¹⁰⁰ In other words, the Committee proposes a differentiated approach. It acknowledges that Internet platforms cannot be held fully responsible for the activities of users, because of the lack of control, the number of peers involved, etc. Even so, it is reasonable to expect that peer platforms do invest some efforts in making user peers (peer providers and peer consumers) understand the risks and have the means to deal with them.

71. It was mentioned earlier that peer platforms have various mechanisms in place to protect peers, and also to regulate the behaviour of peers. It was also shown that in order to be able to behave responsibly and comply with legal requirements, peers may depend on the cooperation from peer platforms, and the necessary (technical and legal) infrastructure and arrangements offered there. Finally, making sure peer platforms are safe to use also aligns with the incentives of peer platforms and the expectations of peers. These are all arguments that would support the establishment of a responsibility on the part of the platforms to provide peers with the knowledge and means to behave in a way that complies with essential consumer protection principles. Possible elements of such an approach could be the obligation to provide effective reputation, monitoring and feedback mechanisms, educating and informing peers, to make sure peers properly inform other peers, establish secure ways of communication and mediation, and make sure peers can be identified in case matters go wrong.

72. This would suggest that the burden of offering a reasonable level of consumer protection is a shared one.¹⁰¹ Peer and peer platforms would be responsible – together - for providing an adequate level of consumer protection. Consumer protection in peer platform must follow a model of co-operative responsibility, which would need to be reflected in the terms of use, values, behaviour and organisational measures in place. Many peer platforms have already made a head start in that direction.

5. Conclusions

73. Digital technology and the arrival of specialised peer platforms allow users to engage in peer transactions, and to do so on a growing scale. In so doing, peer platforms challenge a legal order that has been modelled upon the more traditional B2C model. In peer platform economies, consumers have a far more active role not only as consumers, but also as rule maker, monitoring authority, mediator or producer. The beginnings of a new mind set among consumers may be up us.¹⁰² The reasons why peers engage in peer platforms often go beyond the common expectations of consumers of comparable products or services in B2C markets.¹⁰³ Different expectations and attitudes can also affect the way users behave and solve conflicts (e.g. relying more strongly on social ways of solving conflicts, e.g. through a direct conversation, sharing experiences, writing a review). What is more, in a radically decentralised and disaggregated environment, not only the applicability of existing rules and values is at stake. Also the monitoring and enforcement of those rules may raise new challenges.

74. Technology plays a prominent role in making peer platforms work. This can raise consumer issues on its own, e.g. about the safety of transactions, the opacity and fairness of algorithms but also broader social welfare aspects, such as digital exclusion and the importance of media literacy. And there is an even more prominent role for new types of intermediaries that see their main task (and business model) in matching peers and facilitating transactions, rather than in providing the services themselves. Some are profit-oriented and highly organised, others are non-profit and peer-driven.

75. Peer platforms can bring consumers significant benefits. By unleashing the power, skills and underutilised resources of peers, peer platforms can generate financial benefits, increase choice and the consumer experience and contribute to the realisation of a host of broader public policy objectives, such as making products and services more affordable for disadvantaged groups in society, contributing to the more sustainable use of resources, stimulating travel and cultural exchange, fostering (disruptive) innovation, competition and social cohesion. As such, peer platforms can be a means to advance traditional consumer protection and public policy goals, such as choice, affordable services, etc.¹⁰⁴ But as in all markets, consumers can also experience detriment. Some types of consumer detriment resemble the challenges that consumers in more traditional markets experience, such as information asymmetries, misrepresentation, products and services that do not live up to users' expectations, and practical difficulties in obtaining redress. Other issues are new, though not necessarily peer platform-specific, such as concerns about privacy, data protection, the protection of reputation and social switching costs.

76. Many of the traditional values and principles of consumer protection will be relevant also for and on peer platforms: the availability of the information needed to make informed choices, fairness of transactions, the importance of the availability of safe payment options, effective remedies and dispute resolution. This observation is not self-evident: at present, there is also a lot of resistance against applying rules that were devised for more established markets to the new economy: because the rules are ill-fitted, innovation-hostile or prone to regulatory capture. Having said so, it is important to distinguish between the principles and values that motivate certain rules, and the tools that have been developed to realise those goals. The traditional values behind consumer protection are valid also in peer platform economies, even though there will be a task for policy makers to adjust these principles to the faculties and intrinsic motivations of peers. To the contrary, the tools that traditional consumer law provides do not always fit the situation of peer platforms: because of ill-fit definitions and remedies, because of a shift in consumer issues, and because there is a massive enforcement problem. In this context it is important to realise that there is no such thing as "the peer platform". Peer platforms come in all forms and constellations. In some situation, the underlying business model is better suited for application of consumer law than in others.

77. Peer providers would benefit from guidance on the exact criteria of when a peer falls under the ambit of consumer law, as well as the rules and standards they are expected to comply with. In many

instances consumer law will not apply to the relationship between peers, because the activities of ‘peers’ do not amount to those of “traders”. In these situations, peer providers and peer consumers will operate in a legal grey area, which is regulated in the first place by social norms, the values, terms and mechanisms that the peer platform offers. More research is needed to assess whether these informal types of regulation are adequate and sufficient to guarantee an adequate level of consumer protection. But even where peers do technically comply with the legal definition of “trader” (with the consequence that consumer law is applicable), many of the tools and instruments that consumer law provides do not fit the situation of individual amateur peer providers. There may be a need for more guidance and nuance to approach these issues.

78. Regarding the applicability of consumer law to peer platforms, where peer platforms offer (remunerated) services in their own right to peers (matching, screening, search functions, pricing, etc.) consumer law applies, including the rules about unfair commercial practices and prohibitions on deception. More research, data and information on the exact types of peer detriment is needed to assess the adequacy of these rules or whether there is a need for updated and additional norms. The other, maybe even more pressing and complicated question is to what extent peer platforms can be held accountable for the behaviour of peers and be required to ensure that peers comply with acknowledged principles of consumer protection. Again, it is important to keep in mind the great variety of peer platforms, as well as the fluidity and nascent nature of this sector. Commercially operating peer platforms should in any event offer the means and technical and organisational measures that are needed to uphold an overall level of consumer protection across peer platforms, also in the relationship between peers. It was demonstrated that in many instances peers will depend on such measures (e.g. education, clear information on how peer platforms operates, reputation systems, secure payment, secure communication and data protection) and cooperation from the peer platform to protect themselves and the peers they are dealing with. Many peer platforms and peers are already experimenting with such means. More research is needed on the extent to which they are adequate and effective in realising an acceptable standard of consumer protection.

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NOTES

- 1 PriceWaterhouseCoopers, 2015, p. 17
- 2 PiperJaffray, 2015, p. 20
- 3 Business Innovation Observatory, 2013
- 4 MacMilan & Demos, 2016
- 5 (Pagel, 2012). Whether it is the division of labour (hunters and gatherers), the shared supervision of offspring, the exchange of furs for food, collaborative use of land and tools, or the selling of vegetables at the door, peer-to-peer exchange of products and services always has, and will continue to hold an important place in the economy.
- 6 PiperJaffray, 2015, p. 12
- 7 European Parliament, 2014, p. para 3.2
- 8 See e.g. (Benkler, The Wealth of Networks. How Social Production Transforms Markets and Freedom, 2006, p. 76), referring to the example of Wikipedia.
- 9 Botsman, The sharing economy lacks a shared definition. Giving meaning to the terms, 2013
- 10 A report estimates that in the UK, 20.000 property owners renting out their driveways make an average of 465 Pounds a year), (Woskow, 2014, p. 13)
- 11 (Belk & Llamas, The nature and effects of sharing in consumer behavior, 2012) (PiperJaffray, 2015, p. 8)
- 12 (Bardhi & Eckhardt, 2012)
- 13 (Stene & Holte, 2014, pp. 25-26) Similarly, Bardhi & Eckhardt 2012, have also found that people are primarily motivated by utilitarian, self-centred reasons, (Bardhi & Eckhardt, 2012, p. 891)
- 14 (McArthur, 2014, p. 245 subsq.); (Albinsson & Perera, 2012)
- 15 (Smolka & Hienerth, 28.-30 July 2014, p. 11) (Gansky, 2012)
- 16 (Rauch & Schleicher, 2015, p. 12 subsq.) make this useful distinction.
- 17 (Rauch & Schleicher, 2015, p. 13)
- 18 PriceWaterhouseCoopers, for example, estimate that Airbnb is valued at 13 billion USD, more than traditional players such as Hyatt or Wyndham Worldwide, p. 23; and Uber operates in more than 250 cities

worldwide and was valued in February 2015 at 41.2 billion US dollar. PWC further suggests that the five key sharing sectors – travel, car sharing, finance, staffing, and music and video streaming – have the potential to increase global revenues from 15 billion today to approximately 335 billion USD by 2025.

For the different business models: (Bardhi & Eckhardt, 2012)

<https://www.airbnb.de/hospitality>

<http://pages.ebay.co.uk/help/policies/everyone-ov.html>

<http://www.couchsurfing.com/about/values/>

<http://www.couchsurfing.com/about/ambassadors/>

Super hosts are hosts that have minimally 10 bookings per year, and excellent response rates and user reviews, see: <https://www.airbnb.de/superhost>

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E.g. eBay’s “Ask questions to other eBay members” <http://community.ebay.co.uk/t5/Answer-Centre/ct-p/11900000007>

(Pasick, 2015) (Scheiber, 2014)

(OECD, 2014)

See e.g. (Business Innovation Observatory, 2013) (Botsman & Rogers, What's Mine is Yours: The Rise of Collaborative Consumption, 2010) (Smolka & Hienerth, 28.-30 July 2014) (Gansky, 2012) (Nelson, Rademacher, & Paek, 2007) (Sundarajan, 2013)

The distinction is an adaptation of a distinction developed by (Stene & Holte, 2014).

(Stene & Holte, 2014, p. 25)

(Woskow, 2014, p. 14)

(Business Innovation Observatory, 2013, p. 8)

(Woskow, 2014, p. 14)

(Stene & Holte, 2014, p. 25) (Owyang, 2014)

(PiperJaffray, 2015, p. 6)

(Huygen, Helberger, Poort, Rutte, & Van Eijk, 2009) (Stene & Holte, 2014, pp. 30-31)

(Stene & Holte, 2014, pp. 33-34)

(McArthur, 2014, p. 240)

(Belk, Sharing, 2010) (Stene & Holte, 2014) (McArthur, 2014)

(Benkler, Sharing nicely: on sharebale goods and the emergence of sharing as a modality of economic production, 2004)

For a discussion and overview of some of the current regulatory responses see (Miller, 2015)

(Peters & Bodkin, 2007, p. 24)

(Lowry, 2014)

(Eurobarometer, 2011)

See (Helberger & Van Hoboken, Little brother is tagging you - legal and policy implications of amateur data controllers, 2010)

(Stene & Holte, 2014, pp. 28-29)

(PriceWaterhouseCoopers, 2015, p. 9)

(OECD, 1999)

(Ert, Fleischer, & Magen, 2015)

(Calo, 2014)

(Barents, 1990) (European Commission, 2005)

One point of discussion in the ongoing process of drafting a Data Protection Regulation is the ability of consumers to transfer data from one peer platform to the other.

See the example of Airbnb: the so called “super hosts” are often able to ask higher prices and are more likely to attract clients, among others on the basis of their user reviews, their level of engagement and participation in the network.

(OECD, 2009, p. 26)

(ECME Consortium, 2013), also pointing to the important role of the Unfair Commercial Practice Directive, but also to a lack of guidance on its applicability to comparison tools.

(Smolka & Hiennerth, 28.-30 July 2014, p. 2; Belk, Possessions and the Extended Self, 1988)

(Strahlevits, 2006)

(OECD, 2011, p. 9)

<https://www.uber.com/safety>

<https://piper2.bluematrix.com/docs/pdf/b73e4dc7-0fe5-447a-a7f0-f0dd1f941abb.pdf>, p. 8.

62 <https://www.airbnb.co.uk/help/responsible-hosting>

63 <https://www.kickstarter.com/trust?ref=footer>

64 See e.g. <http://pages.ebay.de/rechtsportal/index.html> (German version) and <http://pages.ebay.com/sellerinformation/index.html> (US/international version, interestingly, the .com version focus much more on issuing general information (how to sell, how to take good photos, etc.) than on legal education.

65 Taking the example of eBay again, on its German site eBay does inform about a relevant German judgement about the responsibility of traders on eBay. EBay, however, neither clarifies when peers actually do fall under that definition of trader, nor does it provide users with a layman discussion of the judgement. Instead, it refers to the original version of the judgement, which will be incomprehensible for most users. <http://pages.ebay.de/rechtsportal/index.html> (German version visited on 6 September 2015).

66 (Fauchart & Van Hippel, 2006) (Balázs, 2013)

67 (Stene & Holte, 2014, p. 33), quoting one interviewee who participates in the Norwegian sharing peer platform Bilkollektivet: “The community orientation is important. You want to treat a car nice, as you expect the other users to do the same. It requires a joint effort to make the system work.”

68 (PriceWaterhouseCoopers, 2015, p. 16)

69 (Nielsen, 2013): 84% of consumers in 58 different countries indicated to trust word-of mouth and social recommendations more than other forms of advertising.

70 (Zervas, Prosperio, & Byers, 2015) (Hu, Pavlou, & Zhang, 2009) (Bolton, Greiner, & Ockenfels, 2013)

71 (Edelman & Luca, 2014)

72 (Solove, 2007)

73 (Hui, 2014)

74 It may be noted that the application of market regulation to amateurs is not unheard of, and early instances of regulating forms of ‘informal economies’ have been reported already from the 15th century (Casson & Lee, 2011, p. 31)

75 A more or less identical definition can be found in the Unfair Commercial Practice Directive.

76 (Helberger, Guibault, Loos, Mak, Pessers, & Van der Sloot, 2013, p. 51) (Swire, 2008)

77 (Helberger, Guibault, Loos, Mak, Pessers, & Van der Sloot, 2013, p. 42)

78 (Municipality of Amsterdam)

79 (Helberger & Van Hoboken, Little brother is tagging you - legal and policy implications of amateur data controllers, 2010)

A study reported for example that in case things do not work out, peers can have a tendency to blame themselves and feel personal accountable, rather than seeking redress, as they would do with a professional actor (Janssen, 2015, pp. 82, 85)

(PiperJaffray, 2015, p. 6)

For example, when buying a used product peers cannot expect the quality and durability of new products.

(CSECL-IViR, 2012, pp. 212, 257, 212)

(CSECL-IViR, 2012, pp. 8, 165, 319)

(Rauch & Schleicher, 2015, p. 24)

(Business Innovation Observatory, 2013, p. 14), with examples.

The example of Uber is a good example of the struggle around this question. When Uber proliferated and became a serious actor in the transportation market, it also entered the radar screen of competitors as well as regulators. Effectively competing with established taxi undertakings and offering its services to a rapidly growing number of customers, the call for legal scrutiny and compliance with the national/local rules on transportation, labour law, insurance, taxation and consumer protection became louder. The failure to comply with local rules resulted in some countries, like Germany, France and the Netherlands, even in a (partial) ban of Uber or Uber riders.

(Koopman, Mitchell, & Thierer, 2014, p. 5)

(Steckbeck & Boettke, 2003, p. 222)

(Koopman, Mitchell, & Thierer, 2014, p. 10 subseq.)

(Rauch & Schleicher, 2015)

(Angelopoulos, 2013) (Helberger, Guibault, Janssen, Van Eijk, Angelopoulos, & Van Hoboken, 2009, p. 39)

(European Commission, 2003, pp. 12-13)

According to Art. 14 of the E-Commerce Directive, hosting services are services whose activities are ‘of a merely technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(Hoboken, 2012)

(Helberger, Guibault, Janssen, Van Eijk, Angelopoulos, & Van Hoboken, 2009, p. 50)

(Esmeijer, et al., 2012)

An observation that has also been made during the OECD workshop “The role of internet intermediaries in advancing public policy objectives” held on 16 June 2010 in Paris, France, <http://www.oecd.org/internet/ieconomy/45997042.pdf>.

- ⁹⁹ Others distinguish between professional and amateur peer platforms, arguing in favour of a need to differentiate between amateurs and professionals, see e.g. Regional Appeal Court Düsseldorf, 7 June 2006, No. I-15 U 21/06; District Court Frankfurt, 16 July 2008, No. 31 C 257/07-17 (for the case of a blog, arguing that too far reaching monitoring duties would risk the existence of the blog and pointing to eventual conflicts between prior-publication duties and freedom of expression.
- ¹⁰⁰ (European Parliament, 2014, p. para. 1.1)
- ¹⁰¹ In this sense and more elaborate also (Helberger & Van Hoboken, Little brother is tagging you - legal and policy implications of amateur data controllers, 2010, p. 105 subseq.) (Miller, 2015, p. 22)
- ¹⁰² (El Observatorio Cetelem 2013, 2013)
- ¹⁰³ For example, while people might value in a hotel room location, cleanness and a good price-service balance, when booking accommodations via Airbnb also other aspects come to the fore, such as the fact that they can experience a new city 'like a local', the social profile and reputation of a peer, customised experiences, etc.
- ¹⁰⁴ Rauch and Schleicher, for example, predict that local governments will increasingly seek to integrate sharing economies into their policies as a means of realising important public policy goals, (Rauch & Schleicher, 2015, p. 5 subseq)