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BRUSSELS ISSUES NEW GUIDELINES ON THE COLLABORATIVE ECONOMY

On 2 June 2016, the European Commission issues its European Agenda for the collaborative economy. This Communication is part of the Commission's Single Market Strategy announced last October and aimed at modernising the Single Market and creating more opportunities for businesses and citizens. It is also complementary to the recent Communication on online platforms.

The Communication provides legal guidance and orientations to public authorities, market operators and interested citizens on the applicable EU legislation to the collaborative economy and makes recommendations to Member States on how to assess the legal matters connected to such new business models, in the interest of a balanced and sustainable development of the collaborative economy. The Communication confirms the applicability of the E-Commerce and Services Directive to such business models.

The Commission considers that such guidance suffices, and there is no need for extra regulation at EU level for such type of innovative services.

editorial

Benoît Le Bret
Partner

THE COLLABORATIVE ECONOMY DEFINED

According to the Commission, the term "collaborative economy" refers to business models where activities are facilitated by online platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals.

The collaborative economy involves three categories of actors:

- Service providers who share assets, resources, time and skills;
- Users of such services;
- The intermediaries that connect, via an online platform, providers with users and facilitate transactions between them ("collaborative platforms").

AN ATTEMPT TO CLARIFY THE KEY LEGAL ISSUES PERTAINING TO THE DEVELOPMENT OF THE COLLABORATIVE ECONOMY

Market access requirements for service providers

The Commission stresses that, under the Services Directive, subjecting a service provider to market access requirements such as authorisation schemes and licensing requirements should be the exception rather than the rule. Additionally, when applied, such national requirements must satisfy the conditions of justification, necessity and proportionality. One of the objectives of the Commission is to prompt Member States to reassess the justification and proportionality of existing legislation applicable to the collaborative economy, in light of the specific features of such new business models.

Distinguishing between peer-to-peer and professional providers

For the purposes of regulating the activities in question, the Commission calls upon Member States to distinguish between peer providers acting in a private capacity and on an occasional basis and professional service providers, according to sector-specific thresholds. Peer-to-peer providers falling under the threshold should not be subject to regulation or at least should be subject to less restrictive requirements than professional service providers.

Market access requirements applicable to collaborative platforms

The Communication seems to differentiate between intermediation platforms and platforms which also provide other services on top of the intermediation - such as transport or short-term rental service - referred to as the “underlying service” by the Commission.

The Commission considers that the former come under the scope and protection of the E-Commerce Directive and on that basis cannot be subjected to prior authorisations or licensing requirements.

The latter could be subjected as regards the underlying service they provide alongside intermediation to the relevant national sector-specific regulation, including business authorisation and licensing requirements generally applied to service providers, provided they satisfy the conditions explained in the section on service providers.

**But how does one determine whether the collaborative platform provides the underlying service or not?
This will be no easy task.**

According to the Communication the “*level of control or influence that the online platform exerts over the provision of such services*” will be of particular importance.

Some of the key criteria put forward by the Commission include: the control the platform exerts over price setting (which is not the case with recommended prices that can be adjusted by users), the ownership of key assets needed to perform the underlying service, the influence of the platform on key contractual terms governing the relationship between the provider and the user etc.

Liability regimes

Collaborative platforms performing their intermediation activity without knowledge or control over the information they store are exempt from liability for the (illegal) content posted by providers of the underlying service. This is an extension of the benefit of the E-Commerce Directive.

Protection of users

Like any other controllers collecting and further processing personal data in the EU, collaborative platforms must comply with the applicable EU legal framework on the protection of personal data.

EU consumer and marketing legislation only applies to a collaborative platform or a provider of the underlying service who qualifies as a “trader” and engages in commercial practices vis-à-vis consumers. As regards peers providing the underlying service, the Commission proposes that the threshold to qualify as a trader depend on 3 criteria : the frequency of the service, the profit seeking motive and the level of turnover.

Self-employed and workers in the collaborative economy

In line with the new employment opportunities created by the collaborative economy, Member States are invited to assess the adequacy of their national employment rules considering the different needs of workers and the self-employed in the digital world.

The Communication gives some guidelines on how to conclude to the existence of an employment relationship between platform and service provider under EU law. Subject to case by case assessment, it considers that an employment relationship may be possible when the following three cumulative criteria are met:

- There is a subordination link;
- The activity is provided on a more than merely occasional basis, it must be regarded as more than purely marginal and accessory;
- The activity is remunerated.

Taxation

The Communication recommends that Member States should raise awareness on tax obligations related to the collaborative economy by notably issuing guidance or making tax administrators aware of collaborative business models. The Communication also refers to best practices in countries such as Estonia where the platform helps both the service provider and the tax authorities by registering the data needed for the tax declaration.

Follow up : Commission is likely to use the above mentioned principle as basis for enforcement and possible infringement against Member States restricting freedom to provide services and of establishment.

CONTACTS

BENOIT LE BRET
lebret@gide.com

DIANA CALCIU
diana.calciu@gide.com

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