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Impulse Paper for DG GROW of the European Commission

**Specific liability issues raised by the collaborative economy –
Professional services
Brussels – Barcelona – London**

Public version

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24 May 2016

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Executive Summary

The objective of this impulse paper is to provide a legal analysis of the liability issues, derived from the application of EU law,¹ faced by the collaborative economy actors (online platforms and providers) in the professional and non-professional services sector in Brussels, Barcelona and London. This impulse paper describes the national and local existing and draft rules, official guidelines and case-law related to the liability of online platforms as well as of the providers for the different business models. The paper also describes how the platforms apply those liability rules in practice, in particular in their terms of use.

(i) Liability regime for the collaborative economy platform

Given the wording, the context and the objective of the e-Commerce Directive as well as the broad interpretation of its scope adopted by the Court of Justice of the EU in the *Netlog* and *eBay* cases, we think that the collaborative economy platforms covered by this study are providers of information society services. Therefore, they are subject to the obligations of the e-Commerce Directive in particular with regard to the information they need to provide, the transparency on commercial communications and the contracts conclusion. The analysis of some cases studies shows that some of those obligations are not always met in practice.

The platforms enjoy the rights of the e-Commerce Directive. They benefit from the country-of-origin principle. Moreover, when they are merely a neutral, passive hosting platform, they benefit from the liability exemption with regard to the information stored and activities done by the users (service providers and recipients). The distinction between passive intermediaries enjoying the liability exemption and active intermediaries subject to standard liability rules has been clarified by the Court of Justice of the EU in the *eBay* case.² However, this subtle distinction is not easy to apply in the collaborative economy where the platforms are playing a role which may go beyond the roles of a traditional intermediary and have, alongside with the providers, an important role in building trust among the recipients of the services.

The terms of use we analyse specify that the platforms are merely and passively intermediating providers and recipients, thereby indicating that they would be only hosting platforms. However, it is not clear, and in some cases not convincing, that this is the case in reality. We have seen that some platforms in practice carry out tasks (i.e. selection of providers *ex ante* or *ex post*, active control and discretionary removal of content posted) that do not correspond to the passive role an intermediary normally plays. Obviously, a case-by-case assessment is needed but we consider that platforms may undertake a role that goes beyond of that of a hosting intermediary. To increase legal certainty as well as consistency of legal interpretations across the EU, thereby contributing to the success of the collaborative economy across the internal market, the Commission may need to clarify the application of Article 14 of the e-commerce to the collaborative economy platforms.

(ii) Liability regime for the provider of services

The offerer of a service on a collaborative economy platform may be subject to several layers of obligations aiming at protecting the recipient of the service.

¹ In particular, the Services Directive 2006/123, the Professional Qualifications Directive 2005/36, the e-Commerce Directive 2000/31 and the main horizontal EU consumer acquis rules comprising the Consumer Rights Directive 2011/83, the Unfair Commercial Practices Directive 2005/29, the Unfair Contracts Terms Directive 93/13.

² Case C-324/09, *L’Oreal et al. v. eBay*, ECLI:EU:C:2011:474.

First, *providers*, i.e. natural or legal persons providing services, should make some information available, for instance on their identities, their contractual conditions or their insurance schemes. However, the national laws analysed in this study do not always give the means to differentiate clearly and on a general basis cases where the offerer of a service is acting as a provider from those where he is acting as a mere consumer (i.e. a prosumer) and for whom the information obligations would be disproportionate.

Second, when the provider is a *trader* (i.e. acting for purposes relating to his trade, business, craft or profession) dealing with a consumer (i.e. acting for purposes that are wholly or mainly outside his trade, business, craft or profession), she is subject to the additional consumer protection obligations. The definition of trader has some flexibility and has been interpreted by national courts on the basis of a body of evidence. However, such flexibility may lead to legal uncertainty when a service provider does not know at which point she becomes a trader and is thus subject to consumer protection obligations. If that uncertainty becomes detrimental to the development of the collaborative economy, more precise interpretative criteria on the trader's legal qualification (for instance related the frequency or the amount of the services offered) may be needed, and given for instance by the Commission.

Third, when the provider is exercising a qualified profession, i.e. a profession which is specifically regulated in the Member States, she is subject to rules defined in the law and by professional bodies. It should be made clear that all providers offering services of a qualified profession on the collaborative economy platforms are subject to the rules of the profession regarding for instance insurance, diploma or registration to professional bodies.

(iii) The protection of the recipient of services

One of the key ingredients of success of the collaborative economy is the users' trust which is the shared responsibility of the platforms and the service providers. It requires correct information on the quality of the providers and on the extent of their obligations, which has several implications:

- First, the legal qualification of the provider (a professional trader subject to consumer protection obligations or a non-professional consumer not subject to those obligations) should be made clear to the recipients of the services who need to know the extent of their protection. Here again, EU consumer acquis may help as presenting oneself as consumer while being a trader has been condemned as a prohibited misleading practice. But given the sometimes uncertain application of the distinction between trader and consumer in the collaborative economy, legal guidance need to be provided by EU and national authorities. Moreover, the online platforms have a responsibility in informing the service recipients on the legal qualification of the services provider.
- Second, online reviews and endorsements, which are key in the choice of the consumers on the platforms, should be accurate and not biased. Current consumer protection rules, such as the prohibition of misleading commercial practices, may be instrumental in that regard and more legal guidance on the application of the Unfair Commercial Practices Directive may be needed.

In conclusion, the collaborative economy raises legal questions regarding services, e-commerce and consumer protection laws that need to be clarified at the EU level to increase, in an harmonised manner, legal certainty for all the actors (platforms, providers and recipients) and therefore help the development of such promising new way of commerce within the European Union.

Section 1: EU rules and the liability in the collaborative economy

1. Context and Objectives

The European Commission is developing a European agenda for the collaborative economy which includes guidance on the implementation of the existing EU rules to collaborative economy as well as a monitoring framework to track the developments in the collaborative economy.³ To grasp additional expertise on the concrete aspects of the collaborative economy, DG GROW has launched a series of impulse papers and this study is one of them.

The objective of this impulse paper is to provide a legal analysis of the liability issues derived from EU law faced by the collaborative economy actors, online platforms and providers, in the professional services sector (qualified and non-qualified professions) in Brussels, Barcelona and London.

This impulse paper describes the national and local existing and draft rules, official guidelines and case-law related to the liability of the online platforms as well as of the providers (professional and non-professional) for the different business models. The paper also describes how the platforms apply those liability rules in practice, in particular in their terms of use.

2. Main EU law provisions

The EU rules applicable to the provisions of services in general are:

- Directive 2006/123 on services in the internal market (Services Directive), which applies to the provision of most services in the EU;
- Directive 2005/36 on the recognition of professional qualifications (Professional Qualifications Directive), which applies to regulated professions.

The EU rules applicable on the provision of information society services are:

- Directive 2000/31 on electronic commerce (e-Commerce Directive) which applies to the provision of information society services;
- Directive 2015/1535 on the provision of information in the field of technical regulations and the rules on information society services.

The main horizontal EU consumer protection rules which apply to business-to-consumer (B2C) contracts are:

- Directive 2005/29 concerning unfair business-to-consumer commercial practices (Unfair Commercial Practices Directive);⁴
- Directive 93/13 on unfair terms in consumer contracts (Unfair Terms Directive);
- Directive 2011/83 on consumer rights (Consumer Rights Directive).⁵

This impulse paper analyses the application of those EU rules to the three main actors of the collaborative economy platforms offering professional services and to the three relationships between those actors.⁶

³ Communication from the Commission of 28 October 2015, Upgrading the Single Market: more opportunities for people and business, COM(2015) 550.

⁴ See also the Commission Staff Working Document of 3 December 2009 on Guidance on the implementation of the Directive 2005/29 on Unfair commercial practices, SEC(2009) 1666.

⁵ See also DG Justice Guidance document of June 2014 on the Consumer Rights Directive.

⁶ See also OCU (2015 :31-38).



The legal rules applicable to those relationships depend on the legal categorisation of the actors which in turn depends on their business models.

2.1. The intermediation platform

The application of the Services Directive and the e-Commerce Directive

In general, the collaborative economy platforms provide *services* normally provided for remuneration. Therefore, the Treaty rules on services apply⁷. The Services Directive also applies except when the platforms provide services which are excluded of its scope of application (e.g. transport).⁸

In this case, the providers of the services benefit from the rights of the Services directive, in particular regarding the freedom of establishment⁹ and the free movement of services¹⁰ as well as the administrative simplification.¹¹

They are also subject to the obligations regarding the information to provide, the professional liability insurances and guarantees, commercial communications for regulated professions, quality of services and settlement of disputes.¹²

The platform is also a provider of an *information society service* when it offers a service normally provided:

- for remuneration - as recognised by the Court of Justice of the EU, the remuneration may come from the recipient but also from income generated by advertisements posted on a website,¹³
- at a distance,
- by electronic means, and
- at the individual request of a recipient of services.¹⁴

⁷ Art. 56 et seq. Treaty on the Functioning of the European Union.

⁸ Art. 2 Services Directive.

⁹ Arts. 9-15 Services Directive.

¹⁰ Arts. 16-21 Services Directive.

¹¹ Arts. 5-8 Services Directive.

¹² Arts. 22-27 Services Directive.

¹³ Case 291/13, *Papasavas*. ECLI:EU:C:2014:2209, point 30. Recital 18 of the directive 2000/31 also provides that: “*information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data*”.

¹⁴ Art. 1(b) of Directive 2015/1535. Also Recital 18 of Directive 2000/31.

Given the fact that the aim of the e-Commerce Directive is to cover a wide range of activities to favour the development of the information society in the EU¹⁵ and that the directive should be interpreted according to its context and objectives,¹⁶ we consider that normally the collaborative economy platforms are providing information society services. In the *eBay* case, the Court of Justice of the EU already decided that an internet service consisting in facilitating relations between sellers and buyers of goods (in this case the eBay platform) is, in principle, an information society service.¹⁷

109. (...) an internet service consisting in facilitating relations between sellers and buyers of goods is, in principle, a service for the purposes of Directive 2000/31. That directive concerns, as its title suggests, 'information society services, in particular electronic commerce'. It is apparent from the definition of 'information society service' (...) that that concept encompasses services provided at a distance by means of electronic equipment for the processing and storage of data, at the individual request of a recipient of services and, normally, for remuneration. It is clear that the operation of an online marketplace can bring all those elements into play.

Furthermore, in the pending *Mc Fadden* case, Advocate General Szpunar considered that a provider of internet access via a Wi-Fi and free of charge falls under the scope of the 'information society provider' because "access to the internet may constitute a form of marketing designed to attract customers and gain their loyalty". He added that "in so far as it contributes to the carrying on of the principal activity, the fact that the service provider may not be directly remunerated by recipients of the service is not decisive".¹⁸

In the pending *Uber Spain* case, there is now a question before the Court of Justice of the EU to determine whether the activity consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources (in the words of Uber, intelligent telephone and technological platform interface and software application) which enable them to connect with one another must be considered as an information society service, a transport service, or a combination of both.¹⁹

When the platform is providing an information society service, the e-Commerce Directive applies with the following rights and obligations for the platform.

Regarding the rights, the platform benefits from the freedom of establishment and the freedom to provide services across-borders and cannot in principle be subject to prior authorisation or any other requirements having equivalent effect.²⁰

Moreover, when the platform is merely providing *hosting services*, it can benefit from a liability exemption.²¹ This requires that the platform only stores information provided by its users (services providers and seekers), does not have actual knowledge of possible illegal activities or information

¹⁵ See in particular recital 2 of directive 2000/31 noting the advantages of the development of ecommerce within the information society and recital 18 noting that information society services span a wide range of economic activities which takes place on-line.

¹⁶ In relation to the e-Commerce Directive, see Case C-324/09, *L'Oreal et al. v. eBay*, ECLI:EU:C:2011:474, point 111; Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ECLI:EU:C:2008:572, point 15.

¹⁷ Case C-324/09, *L'Oreal et al. v. eBay*, point 109. Also in the Case C-360/10 *Sabam v. Netlog*, ECLI:EU:C:2012:85, point 27, the Court considered that: "it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14 of Directive 2000/31".

¹⁸ Case C-484/14 *Mc Fadden*, pending.

¹⁹ Case C-434/15 *Asociación Profesional Elite Taxi/Uber Systems Spain*, pending.

²⁰ Arts. 3-4 of the e-Commerce Directive.

²¹ Art. 14 of the e-Commerce Directive.

and expeditiously remove or disable access to illegal information when knowing its illegality (notice and take down process). Thus, the activity of the platform should be of a mere technical, automatic and passive nature, i.e. the platform has neither knowledge nor control over the stored information.²² As clarified by the Court of Justice of the EU in the *eBay* case:²³

115. (...) the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 (...).

116. Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.

In *Papasavas*²⁴ the Court of Justice of the EU also stated that:

45. (...) since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an 'intermediary service provider' within the meaning of Articles 12 to 14 of Directive 2000/31, whether or not access to that website is free of charge.

Thus, the line between a passive, neutral platform benefiting from the hosting liability exemption referred in point 115 of the *eBay* case and the active, non-neutral platform subject to standard tort law referred in point 116 of the case is very thin and difficult to draw. This is especially the case for the collaborative economy platforms because they often exert some active control over the data posted by providers and the recipients of the underlying users, and optimise the information presented by the providers offering their services through them.

Also, the hosting platforms cannot have a general obligation to monitor the information that they store.²⁵ The Court of Justice of the EU stated that such prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights.²⁶

Regarding obligations, the platform should provide some information: its name, its address, its details - including the email - to be contacted rapidly and effectively. The price (of the platform service, often the commission taken on the transaction between the providers and the users) should also be indicated clearly and unambiguously. Moreover, if the platform is registered and/or has VAT number, this trade registration and/or VAT number should be indicated. When the platform

²² Recital 42 of the e-Commerce Directive.

²³ Case C-324/09, *L'Oreal et al. v. eBay*, points 115-116; Case 291/13, *Papasavas*, points 442-44. Also previously, Case C-236/08 à C-238/08 *Google France v. Vuitton*, ECLI:EU:C:2010:159, point 114.

²⁴ *Idem*.

²⁵ Art. 15 of the e-Commerce Directive .

²⁶ Case C-360/10 *Sabam v. Netlog*, point 34. Also previously, Case C-70/10 *Scarlet Extended v. Sabam*, ECLI:EU:C:2011:771.

exercises a regulated profession, the professional title, the applicable professional rules and the professional body should also be mentioned.²⁷

The platform should also be transparent on its commercial communications.²⁸ For contract conclusion, the platform should also provide information to ensure legal certainty and consumer trust and acknowledge the receipt of the order.²⁹

The application of the EU consumer acquis

The collaborative economy platform is a *trader* when it acts for purposes relating to its trade, business, craft or profession.³⁰ In this case, when the platform deals with consumers (being the providers of the services offered in the platform or the recipients of those services) in a B2C relationship, the EU consumer acquis applies with regard to the intermediation service offered by the platform (and not necessarily the services offered by the providers active on the platforms)

Consumer acquis give rights to consumers during the formation and the implementation of the contracts. During the formation and conclusion of the contract with the consumer, the platform cannot commit unfair commercial practices. This covers:

- Misleading practices, i.e. (i) containing false information, deceiving or likely to deceive the average consumer and (ii) causing or likely to cause the acceptance of the consumers;³¹
- Aggressive practices i.e. by harassment, coercion, including the use of physical force, or undue influence, significantly impairing or likely to significantly impair the average consumer's freedom of choice or conduct and thereby causing her or likely to cause her to take a transactional decision that she would not have taken otherwise.³²

Moreover, the consumer has the following rights:

- Information to be provided in case of distant contracts,³³
- Formal requirement for the conclusion of distant contracts,³⁴
- Right of withdrawal,³⁵
- Rules relating to use of means of payment as well as additional payment, passing of risks, communication by phone.³⁶

Finally, the platform cannot include in the concluded contract with its users (both the service providers and the recipients of those services) unfair terms, i.e. (i) clauses which are not individually negotiated and which cause significant imbalance to the detriment of the consumer or (ii) clauses which are black-listed by the directive.³⁷

2.2. The provider of the service

²⁷ Art. 5 of the directive 2000/31. See also Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, ECLI:EU:C:2008:572.

²⁸ Arts. 6-8 of the e-Commerce Directive.

²⁹ Arts 9-11 of the e-Commerce Directive.

³⁰ Art. 2(1) of the Consumer Rights Directive, see also art. 2(a) of the Unfair Commercial Practices Directive, art. 2(e) of the e-Commerce Directive.

³¹ Arts. 6-7 of the Unfair Commercial Practices Directive.

³² Arts. 8-9 of the Unfair Commercial Practices Directive.

³³ Art. 6 of the Consumer Rights Directive.

³⁴ Art. 8 of the Consumer Rights Directive.

³⁵ Arts. 9-16 of the Consumer Rights Directive.

³⁶ Arts. 19--22 of the Consumer Rights Directive.

³⁷ Unfair Commercial Terms Directive.

The application of the Services Directive, the e-Commerce Directive, the Professional Qualifications Directive

The provider of a professional service offered on a collaborative economy platform is a *provider* of a *service* in accordance with EU law when she provides a service normally provided for remuneration. If she offers a service which is not out of the scope of application of the Services Directive, she is subject to the different obligations set forth in the directive, including those concerning the provision of information, insurances and guarantees, commercial communications, quality of services and settlement of disputes.

When the service offered is part of a *regulated profession*, the provider is also subject to the Professional Qualifications Directive and therefore enjoys the freedom to provide services across borders and the freedom of establishment.

When the provider offers her service at a distance, with electronic means and at individual request (for instance, a lawyer giving her legal opinion online), she is also the provider of an *information society service*. In this case, the obligations contained in the e-Commerce Directive apply.

The application of the EU consumer acquis

The provider of professional services offered on a collaborative economy platform is a *trader* when she acts for purposes relating to her trade, business, craft or profession. In this case, in her relationship with the platform (which is normally a trader, hence a B2B relationship), the consumer acquis does not apply. In her relationship with the user of her services, who is often a consumer (a B2C relationship) the consumer acquis applies. In this case, the Consumer Rights Directive, the Unfair Commercial Practices Directive and the Unfair Commercial Terms Directive apply. In particular, presenting oneself as a consumer while being a trader is an unfair commercial misleading practice.

The provider of the service is a *consumer* when she acts for purposes which are outside her trade, business, craft or profession. In this case, in her relationship with the platform (which is normally a trader, hence this is a B2C relationship), the consumer acquis also applies. In her relationship with the user of the service, who is often a consumer (a C2C relationship), the consumer acquis does not apply.

Further, it is worth noting that the fact that the provider is not a trader does not mean that he is not a service provider in the sense of the Services Directive. As long as he provides a service (i.e. any self-employed economic activity which is normally provided for remuneration), he would be subject to the Services Directive.

2.3. The recipient of the service

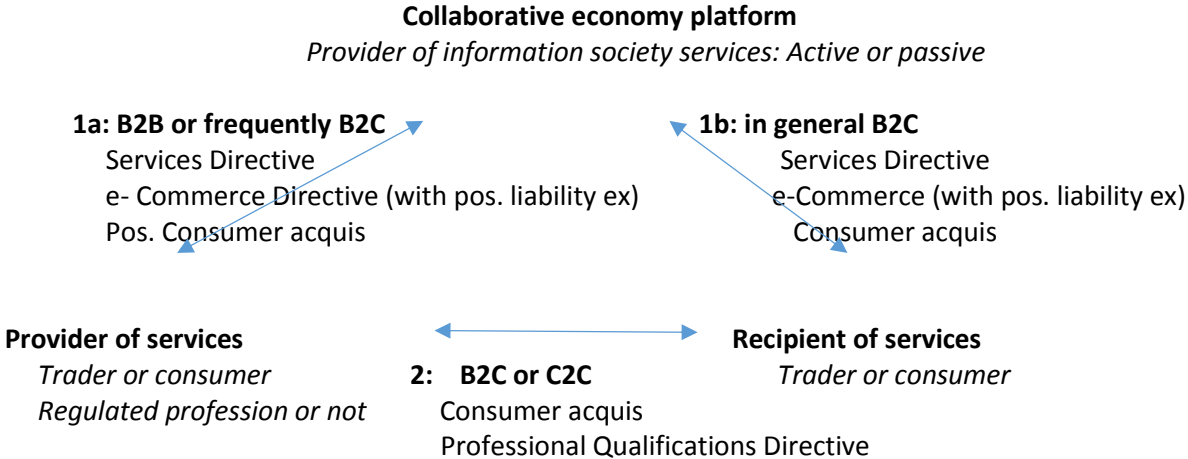
The application of the EU consumer acquis

The recipient of a professional service offered on a collaborative economy platform is often a consumer acting for purposes which are outside her trade, business, craft or profession. In this case, in her relationship with the intermediation platforms, which is a B2C relationship, consumer acquis applies. In her relationship with the service provider, consumer acquis applies when the provider is a trader and does not apply when the provider is a consumer.

2.4. A triangular relationship

The collaborative economy involves three main actors with three relationship (1a, 1b and 2 of the figure below) whose legal regime depends on the legal qualification of each actor.

- The collaborative economy platform is a provider of information society service whose role may be active or passive. When dealing with consumers, EU consumer acquis applies.
- The provider of the services may be a professional trader or, more frequently with the development of the collaborative economy, a non-professional consumer. More obligations apply to the trader than to the consumer.
- The recipient of the services may be a consumer or, more rarely, a professional trader. Consumers are better protected than professionals.



Section 2: Brussels

Currently, there are very few platforms for professional services active in Brussels, and nearly no platform dealing with qualified professions. There is also no specific case-law on collaborative economy platforms offering professional services. Therefore, the legal analysis is based on previous case-law concerning 2.0 Internet platforms such as eBay, the case-law regarding Uber as well as legal literature. At this stage, no soft law instruments (recommendations, guidance or opinion)³⁸ on collaborative economy platforms have been adopted.

1. Main legal provisions applicable

The main provisions applicable to collaborative economy are included in the Economic Law Code of 2013 which transposes the main EU directives mentioned in Section 1:

- Book III ELC transposes the Services Directive,
- Book XII ELC transposes the e-Commerce Directive,
- Book VI and XIV ELC transpose the consumer acquis.

1.1. Definitions

The main definitions applicable to the collaborative economy actors are included in Book I of the Economic Law Code. Most of them are copying the definitions of the EU directives mentioned in section 1.

Definitions related to persons

Undertaking (art. 1.1, 1° ELC)

Any natural person or any legal person, having an economic goal in a durable manner, including its association.

Provider (art. 1.2, 3° ELC)

Any natural person who is a national of a Member State, or any legal person as referred to in Article 54 TFUE and established in a Member State, who offers or provides a service.

Consumer (art. 1.1, 2° ELC)

Any natural person who is acting for purposes which are outside his trade, business, craft or profession.

Definitions related to activities

Services (art. 1.1, 5° ELC)

Every activity done by an undertaking in the context of its professional activities or in legal statutes.

Information society service (art. 1.18, 1° ELC)

Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

Regulated profession (art. 1.2, 8° ELC)

³⁸ The Consumer organisation Test Achats has only published a short guide on the collaborative economy which does not contain a legal analysis of the implementation of consumer protection rules: see Test Achats (2015).

A professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit.

1.2. Authorisation

Information Society Services

Article XII.2 ELC provides that the provision of information society services is not subject to a prior authorisation. Thus, providers of information society services established in an EEA country benefit from the freedom to provide services principle in Belgium, in accordance with the e-Commerce Directive.

Services

The provision of services benefit from the freedom of establishment and the freedom to provide cross-borders services as foreseen in the Services Directive (art. III.2 to III. 14 ELC).

1.3. General obligations

Obligation to inform

- Undertakings

All undertakings are subject to the information obligations contained in Book III ELC which transposes the Services Directive into the Belgian law. These information obligations are contained in Articles III.74-79 ELC, which apply without prejudice of the consumer law.

Article III.74-75 ELC³⁹ provides that undertakings have to make available to the service recipient, in an easily accessible manner and before the provision of the service, the following information:

- the name of the undertaking, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means,
- the trade registration number,
- if the provision of the service is subject to an authorisation scheme, the particulars of the public authority,
- for the qualified professions, the professional qualification and the member state in which it was delivered, as well as the trade association of the service provider,
- the general terms and conditions, including on the applicable law and on jurisdiction;
- the complete price of the service,
- the main characteristics of the service offered,
- the insurance or guarantees, and in particular the contact details of the insurer or guarantor and the territorial coverage.

In addition, Article III.76 ELC⁴⁰ provides that undertakings should, at the request of the client, provide the following additional information:

- when price is not fixed, the method to calculate prices;

³⁹ Transposing Art. 22(1) and (2) of the Services Directive.

⁴⁰ Transposing Art. 22(3) of the Services Directive.

- as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;
- information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest;
- any codes of conduct to which the undertaking is subject and the address at which these codes may be consulted by electronic means, specifying the language version available.

Mechanisms to make available the information obligations include an e-mail address provided by the undertaking.

- Providers of information society services

Article XII.6 ELC⁴¹ establishes that providers of information society services should render easily, directly and permanently accessible to the recipients of the service and competent authorities the following information:

- their name,
- the geographical address of the establishment,
- the contact details, including the e-mail address, which allow them to be contacted rapidly and in a direct and effective manner,
- if relevant, the trade registration number,
- when their activity is subject to an authorisation, the contact details of the relevant supervisory authority,
- for regulated profession, the profession association where the any professional body or similar institution with which the service provider is registered, the professional title and the Member State where it has been granted and a reference to the applicable professional rules in the Member State of establishment and the means to access them,
- their fiscal identification number,
- when they refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of taxes,
- the codes of conduct to which they have adhered.

If they exercise a regulated profession: the professional body or similar institution with which the service provider is registered, the professional title and the Member State where it has been granted, and a reference to the applicable professional rules in the Member State of establishment and the means to access them.

Prohibition of unfair commercial practices

Articles VI.104 to VI.109 ELC prohibit unfair market practices done by undertakings against persons other than consumers, thereby going further than the EU acquis on unfair commercial practices. In particular, Article VI.104 ELC is very broad and prohibits all practices contrary to fair market practices by which an undertaking damages or can damage the commercial interest of other undertakings.

1.4. Consumer protection rules

Consumer rules apply to contracts between undertakings and consumers. They are include in Book VI ELC when the undertaking is not exercising a liberal profession and Book XIV ELC when the undertaking is exercising a liberal profession. As the rules of Book XIV are very similar to those of Book VI, we deal only with the latter.

⁴¹ Transposing Art. 5 of the e-commerce Directive.

- Enhanced information obligation

Article VI.45 ELC provides that before the conclusion of a distant contract, the undertaking have to provide the following relevant information:

- the main characteristics of the goods or services;
- the identity of the trader;
- the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
- the total price of the goods or services inclusive of taxes;
- the costs of using the means of distance communication for the conclusion of the contract;
- the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;
- the language in which the contract will be concluded;
- the right of withdrawal;
- a reminder of the existence of a legal guarantee of conformity for goods;
- the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;
- the existence of codes of conduct;
- the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
- where applicable, the minimum duration of the consumer's obligations under the contract;
- where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- where applicable, the functionality, including applicable technical protection measures, of digital content;
- where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;
- where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

Art. VI.46 specifies that this information has to be provided in a format which is appropriate to the communication technique used and which can be kept by the consumer.

Unfair commercial practices against consumers

Articles VI.92 to VI.103 prohibit unfair commercial practices against consumers and incorporate the Unfair Commercial Practices Directive into the Belgian law. The unfair practice is defined according to EU law as (a) contrary to the requirements of professional diligence and (b) materially distorting or likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.⁴² As in EU law, prohibited unfair practices can be misleading or aggressive.

Regarding misleading commercial practices, the ELC does the same distinction between actions and

⁴² Art. VI.93 ELC transposing Art. 5 of the Unfair Commercial Practices Directive.

omissions. Misleading actions are defined as in EU law as false information on main contracts elements such as the products or services characteristics, the price or the nature and obligation of the undertaking.⁴³ Misleading omissions are omission of material information that the average consumer needs to take an informed transactional decision, hence causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.⁴⁴ The ELC also lists 23 black misleading commercial practices which are always prohibited.⁴⁵

Regarding aggressive commercial practices, ELC prohibits the use of harassment, coercion or undue influence which significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.⁴⁶ The ELC also lists 8 black aggressive practices which are always prohibited.⁴⁷

Unfair contract terms against consumers

Articles VI.82 to VI.87 ELC prohibit unfair terms in consumer contracts and transpose Directive 93/13 into Belgian law. Article VI.84 ELC makes void unfair terms, which are terms causing a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.⁴⁸ Article VI.83 ELC prohibits a list of 33 black unfair terms which are always prohibited.⁴⁹

1.5. Additional obligations for regulated professions (professional qualifications)

In Belgium, the provision of certain services is reserved to particular undertakings who hold a professional qualification. These providers are normally subject to additional obligations as compared with other undertakings, such as having and insurance or being member of a trade association.

If there is a general definition of the regulated profession in Article I.2.8 ELC, there is no general law on the issue. A specific law is regulating each profession. Most of those laws are federal, but part of the competence has been transferred to the Regions with the last Constitutional reform of 2014.

Some regulated profession are:⁵⁰ the accounting experts (law of 1999), the estate agents (law of 2013), the geometer expert (law of 2003), the architects (law of 1939), the psychologists (law of 1993), the car experts (law of 2007), the lawyers, the bailiffs, the doctors or the pharmacists.

Article III.13 ELC states that service providers established in EU member states can provide freely their services in Belgium. This article adds that such a provision of services cannot be prohibited or restricted by reasons related to a professional qualification, provided that the providers are established in an EU member state in order to exercise the profession in question.

⁴³ Art. VI.97-98 ELC transposing Art. 6 of the Unfair Commercial Practices Directive.

⁴⁴ Art. VI.99 ELC transposing Art. 7 of the Unfair Commercial Practices Directive.

⁴⁵ Art. VI.100 ELC transposing Annex I of the Unfair Commercial Practices Directive.

⁴⁶ Art. VI.101-102 ELC transposing Art. 8-9 of the Unfair Commercial Practices Directive.

⁴⁷ Art. VI.103 ELC transposing Annex I of the Unfair Commercial Practices Directive.

⁴⁸ Art. I.8.22° and Art. VI.82 ELC transposing Art. 3-4 of the Unfair Commercial Terms Directive.

⁴⁹ Art. VI.83 ELC transposing and extending Annex of the Unfair Commercial Terms Directive.

⁵⁰ See the site of the federal Ministry of Economics : http://economie.fgov.be/fr/entreprises/vie_entreprise/Creer/Conditions/Professions_liberales/#.Vxe8f_4w-pp as well as the site of the Brussels Region: <http://www.1819.be/fr/content/acc%C3%A8s-%C3%A0-la-profession-et-autres-habilitations>

1.6. Liability of intermediaries

Article XII.19 of the ELC⁵¹ foresees an liability exemption for the providers of intermediation services which consist of storing data provided by the recipient of the service will not be responsible for the information stored by the recipient, provided that they:

- do not have actual knowledge that the activity or the information stored is unlawful or that it harms the rights of a third party; or
- having actual knowledge of the service, do their best efforts to remove the data or disable access to them.

This liability exemption above does not apply in the event that the recipient of the service acts under the direction, authority or control of the provider, according to the law.

2. Rules on platforms

2.1. Legal qualification and applicable laws

To determine the rules applicable to collaborative economy platforms, three main issues should be addressed.

First, it should be determined whether the platform is an *undertaking*, i.e. have an economic goal in a durable manner. In practice, most of the platforms are for profit, hence are undertakings. In this case, the Economic Law Code applies.

Second, it should be determined what *type of contract* the platforms is offering. In particular it should be determined whether the platform provides an *information society service*, i.e. provided (1) normally against remuneration, (2) at distance, (3) by electronic means, (4) at the individual request of the recipient of the service. Thus, the collaborative economy platforms where the intermediation service is for profit (but not necessarily the intermediated services) are providers of information society services. This is the case of nearly all the platforms.⁵² In this case, Book XII ELC on digital economy applies.

It should also be determined, on the basis of their roles and the terms of use, whether the platforms are providing other services such as brokerage or mandate. In practice, many platforms limit their obligation to such an extent that they cannot be considered as offering additional regulated services.⁵³ In 2009, the Commercial Court of Brussels judged that eBay is just a hosting service and is not a broker subject to the obligations imposed on brokerage contracts.⁵⁴

Third, it should be determined what *type of contractors* are involved. In particular, it should be determined whether the platforms contracts with a *consumer*, a natural person acting outside his professional activity. In practice, most of the platforms deal with consumers, hence Book VI of the

⁵¹ Transposing Article 14 of the e-commerce directive.

⁵² See Montero (2011 :76), Hubin and Jacquemin (2016, n°10).

⁵³ In this sense Montero (2011 : 68-75).

⁵⁴ Comm. Bruxelles, 2 juin 2009, RG A/08/2054.

ELC on consumer protection applies, in particular the rules on distant contracts⁵⁵ with the right of withdrawal, the rules on unfair practices⁵⁶ and the rules on unfair terms.⁵⁷

2.2. Authorisation

As collaborative economy platforms are undertakings, they benefit from the general principle of free enterprise as well as the internal market freedoms provided by Books II and III ELC.

In addition, the platforms are providers of information society services, hence they also benefit from the freedoms of establishment and services provided in the e-Commerce Directive (articles XII.2-5 ELC).

2.3. Obligations

The obligations of the collaborative economy platforms depend on the legal qualification of the contracts they offer.

All platforms are subject to the general rules of the Civil Code applicable to all types of contracts.⁵⁸

As they are undertakings, platforms are also subject to the obligations of the Economic Law Code, in particular regarding the provision of information as well as the prohibition of unfair commercial practices.

In addition as they are information society services providers, platforms are also subject to the obligations of the e-Commerce Directive, in particular with regard to information,⁵⁹ commercial communications,⁶⁰ and conclusion of contracts.⁶¹

If, on the basis of their terms of use, they can be considered as offering a specific type of contract which is regulated (such as mandate, commercial agency, brokerage), platforms are also subject to the specific rules applicable to those contracts. However, this is rarely the case.

Finally, when platforms deals with consumers, which is often the case, they are also subject to the consumer protection rules of the Economic Law Code, in particular regarding provision of information as well as the prohibition of unfair commercial practices and unfair contract terms.

2.4. Liability regime

The liability regime applicable to collaborative economy platform depends on whether the liability exemption of hosting intermediaries (Art. XII.19 ELC) is applicable. In 2004, the Belgian Supreme Court, referring to recital 42 of the e-Commerce Directive, decided that the liability exemption is limited to the intermediaries whose activity is of a mere technical, automatic and passive nature, hence the provider has neither knowledge of nor control over the information which is transmitted

⁵⁵ art. VI.45-63 ELC.

⁵⁶ art. VI.92-103 ELC.

⁵⁷ art. VI.82-84 ELC.

⁵⁸ Arts. 1101-1314 Civil Code.

⁵⁹ Art. Art. XII.6-11 ELC transposing art. 5 Directive 2000/31.

⁶⁰ Art. XII.12-14 ELC transposing Art. 6-8 Directive 2000/31.

⁶¹ Art. XII.15-16 ELC transposing Art. 9-11 Directive 2000/31.

or stored.⁶² This approach was criticized by Montero (2009:29) as being too restrictive and applying recital 42 to Article 14 of the e-commerce while it should only be applied to Article 12 of the directive. Also Leonard (2012:815) is in favor of a less restrictive and more evolutive interpretation of the hosting intermediaries benefiting of the liability exemption. They should not be merely technical intermediaries but also, for instance, managers of blogs if they are not the authors of the posts.

Later in 2008, in a case concerning eBay,⁶³ the Commercial Court of Brussels decided to apply a hybrid system of liability:

- Regarding the offers posted by the sellers, the Court judged that eBay was a hosting intermediary and enjoyed the liability exemption;⁶⁴
- For the other services provided by eBay such as aid to drafting selling offers, advice to sellers and buyers, rating of the sellers, which are not hosting services, standard regime of contractual and non-contractual liability of the Civil Code applies without exemption.

In 2009, the Court of First Instance of Antwerp went even further and decided that the editor of a free blog was not covered by the rules transposing the e-Commerce Directive but, by analogy with those rules, enjoyed the liability exemption.⁶⁵ On the other hand, the Court of Appeal of Brussels decided that the manager of a student's association blog could not benefit from the liability exemption which is reserved to the IT firm technically hosting the data.⁶⁶ Such approach was criticised by Montero and Jacquemin (2012:24) as being too restrictive. In this case, the judge did not condemn the manager of the blog as he did not commit any fault because the content which was criticised should not have been removed from the blog.

Finally in 2015, the Commercial Court of Brussels condemned Uber in a cease and desist order for unfair commercial practice because it enabled drivers without licence to offer taxi services.⁶⁷ Thus platforms enabling the provision of activities which are not authorised will be condemned on the basis of Art. VI.104 ELC prohibiting unfair commercial practices in B2C but also B2B and C2C contracts.

3. Rules on providers

3.1. Legal qualification and applicable laws

To determine the rules applicable to collaborative economy providers, the type of providers should be determined.

The provider can be an *undertaking* who follows in a durable manner an economic goal.⁶⁸ The Courts assess this legal criteria on the basis of a body of evidences such as the frequency and the regularity of the activities, whether the provider earns important revenues from the activities or the intention of the provider.⁶⁹ In a tax case, the Court of First Instance of Mons decided that a student who sold, between 2005 and 2009, 21 scooters and 15 new car DVD players was exercising a professional

⁶² Cass. 3 février 2004, *R.V. v. Ministère Public*, Pas. 2004, p. 200.

⁶³ Comm. Bruxelles, 31 juillet 2008, *Lancome v. eBay, RDTI*, 2008, p. 521. Also Comm. Bruxelles, 2 juin 2009.

⁶⁴ Art. XII.19 ELC transposing Art. 14 Directive 2000/31.

⁶⁵ Civ. Anvers, 3 déc. 2009, *Auteurs & Média*, 2010, p. 560.

⁶⁶ Bruxelles, 25 nov. 2009, *RDTI*, 2010, p. 102.

⁶⁷ Comm Bruxelles (cess.), 23 sept. 2015, *Radio Taxi Bruxellois v. Uber*.

⁶⁸ See the definition of an undertaking in art. I.1.1 ELC.

⁶⁹ Montero (2011 :87).

activity.⁷⁰ When the provider is an undertaking, rules of the ELC apply. In addition, if the profession is regulated, the additional rules on the profession apply.

For the application of labour law, social security law and tax law, an additional distinction is made between permanent professional provider (*salarié* or *independent à titre principal*) and occasional professional providers (*indépendant à titre complémentaire*). However, such distinction is not directly relevant for the application of liability regime.

The provider can *exercise a liberal profession*. There is no closed list but only a general definition of a liberal profession which is an activity consisting mainly in providing intellectual services, has been authorised, follows lifelong learning and is regulated by a professional body established by law.⁷¹ In this case, the specific rules on liberal profession apply.

The provider can be a *consumer*, which means that she does not pursue in a durable manner an economic goal. In this case, only the Civil Code applies. Finally, the provider can be a *volunteer* who does an activity which is exercised without remuneration nor obligation.⁷² In this case, the liability exemption for volunteers applies.

3.2. Authorisation

When the profession is regulated, a general authorisation or an individual licence may be required. This is in particular the case for liberal professions such as architects, doctors, lawyers, notaries, bailiffs, accounting and tax experts, estate agents, psychologists, dental practitioners, veterinaries, pharmacists.

3.3. Obligations

The obligations for the collaborative economy providers depend on the type of providers and the contracts they offer.

All providers are subject to the general rules of the Civil Code applicable to all type of contracts. Those rules deal with the formation of the contract as well as the means of action in case of breach of contract.

Providers which exercise a regulated profession, including a liberal profession, are subject to the rules applicable to this profession. In case of liberal profession, they are also subject to the rules of their professional bodies.

Providers are also subject to the rules on the specific type of contracts they conclude with their customers. Some contracts are regulated by the Civil Code (such as sale contract, lease contract, service contract), other are regulated by the Economic Law Code (such as agency contract, dealership contract ...), and other are regulated by specific law (such as labour contract ...). In general, the providers are not providing information society services, hence are not subject to the e-Commerce Directive.⁷³

⁷⁰ Civ. Mons, 24 mars 2011, *Fisc.* 2011, 1249, p. 12.

⁷¹ Art. I.8.35 ELC.

⁷² Art. 3 Volunteering Act.

⁷³ Montero (2011:88-90).

Professional providers who conclude contract with consumers (B2C contracts) are also subject to consumer protection rules of the ELC. When a professional provider presents herself as a non-professional provider to escape the application of some rules, such behaviour will be condemned as an unfair misleading commercial practice.⁷⁴

3.4. Liability regime

The providers are subject to the standard contractual and non-contractual liability rules of the Civil Code. The volunteers enjoy an exemption of liability which is similar to the one applicable for contractual workers. As the provider cannot in principle be considered as an information society provider, she cannot benefit from the liability exemption provided by the ecommerce Directive.⁷⁵

4. Practice and terms of use

Currently, there are very few collaborative economy platforms offering professional services in Brussels and nearly none of them offer regulated profession services. The section below will analyse two examples of collaborative platforms.

4.1. Example 1

(a) The qualification of the contract between the platform, the providers and the users

This first example deals with a platform offering domestic services. In Article 4 of its terms of use, the platform commits to very few obligations and limits its role as a neutral hosting platform:

Les Services de (la plateforme) offerts sur le Site consistent à mettre à disposition une plateforme virtuelle d'échange, de permettre le placement d'Annonces et de faciliter les contacts entre les Demandeurs de Tâche et les Prestataires de Service de la plateforme.

En aucune manière, (la plateforme) n'intervient ou n'exerce de contrôle quant à la qualité des Annonces, quant à la qualité des Utilisateurs et/ou quant à l'exécution d'une Transaction. La plateforme ne peut donc pas être considéré comme partie à la Transaction conclue entre le Prestataire de Service et le Demandeur de Tâche, ni ne peut être lié dans quelque mesure que ce soit par les engagements souscrits dans le cadre de cette convention. La plateforme se contente d'héberger les Annonces.

La plateforme n'exerce aucun contrôle sur les éléments suivants (cette liste n'est pas exhaustive) : l'identité, la qualité, la compétence, la solvabilité, ou le statut juridique des Utilisateurs ; la nature et la légalité du travail effectué ; la fiabilité, la pertinence, les compétences intellectuelles, techniques ou pratiques des Utilisateurs ; la négociation, le contenu, la conclusion d'une Tâche et son exécution ; et l'exactitude, l'exhaustivité, la légalité des informations fournies par les Utilisateurs.

⁷⁴ Montero (2011 :87).

⁷⁵ Montero (2011 :88-90).

In particular with regard to the online reviews, the platform claims that it does not control them, although it keeps the right to refuse the publication of some:

Le Prestataire de Service accepte que le Demandeur de tâche dépose sur le Site des Evaluations quant à la qualité des travaux effectués par le Prestataire de Service. La plateforme n'exerce aucun contrôle sur les Evaluations et n'assume aucune responsabilité quant à ces Evaluations.

La plateforme se réserve toutefois le droit d'effectuer de tels contrôles à sa propre discrétion et se réserve le droit de refuser la publication d'Annonces et/ou d'Evaluations à sa propre discrétion sans que l'Utilisateur ne dispose d'un quelconque droit de recours quant à cette décision.

Moreover according to Article 3, the platform has the right to exclude a provider from the platform in case of breach of contract.

Sans exclure d'autres voies de recours, en cas de manquement, la plateforme se réserve le droit de limiter, suspendre ou mettre fin, provisoirement ou définitivement, totalement ou partiellement, aux Services et aux comptes d'Utilisateur; d'interdire l'accès au Site; de retarder la publication de contenu hébergé ou de le supprimer; et de prendre des mesures techniques et légales pour empêcher des Utilisateurs d'accéder au Site. La plateforme se réserve également le droit d'annuler les comptes non confirmés ou les comptes qui sont inactifs depuis longtemps.

Thus according to the terms of use, the platform wants to be considered as a mere passive hosting platform in order to benefit from the liability exemption. However, there is a tension between this claimed passive role and the control and selection of online reviews as well as providers' accounts.

(b) The liability of the platform vis-à-vis the providers and the users

In Article 13 of its terms of use, the platform limits strongly its liability with regard its own obligations, in particular on the functioning of the services or the quality of ads posted on the platforms.

A l'égard des Prestataires de Service, la plateforme n'assume que des obligations de moyens en sa qualité d'hébergeur.

La plateforme ne peut pas être tenu pour responsable ni du contenu ou des actions (ou absence d'action) d'autres Utilisateurs, ni des services qu'ils proposent. Le Prestataire de Services reconnaît que la plateforme n'est pas une société d'intérim ou un bureau de placement payant ou tout autre type de société particulière relative à l'emploi.

La plateforme déploie ses meilleurs efforts afin que le Site soit accessible tous les jours 24h/24 et dans les meilleures conditions de confort d'utilisation. La plateforme déploie ses meilleurs efforts afin d'assurer une qualité de services maximale. Compte tenu des risques inhérents à la technologie employée, La plateforme ne peut cependant encourir aucune responsabilité à leur égard en cas d'inexactitude ou d'omission dans les contenus diffusés, en cas de mauvais fonctionnement ou d'inaccessibilité totale ou partielle des services pour quelque raison que ce soit, et ce même en cas de faute lourde de sa part, sauf dans les hypothèses et conditions limitativement énumérées ci-après (...)

Pareillement, la plateforme n'exerce aucun contrôle sur le contenu des Annonces déposées sur le Site et n'assume donc aucune responsabilité à cet égard. La plateforme n'est pas

responsable si un Prestataire de Service adresse une réponse sur base d'une Annonce erronée et une telle situation n'ouvre aucun droit à un remboursement. Le Demandeur de Tâche concerné est seul responsable du contenu qu'il diffuse via le Site. Si les informations et/ou déclarations figurant dans une Annonce portaient atteinte aux droits d'un tiers (en ce compris un autre Demandeur de Tâche), celui-ci doit adresser toute réclamation directement au Demandeur de Tâche qui est l'auteur de cette demande. La plateforme ne peut cependant garantir la possibilité pratique d'identifier le Demandeur de Tâche qui aurait communiqué de fausses Données de Contact.

In the same Article 13, the platform also excludes any liability for the services of the providers.

La plateforme n'est pas responsable de la qualité, licéité et/ou de la ponctualité du travail fourni par les Prestataires de Service sélectionnés suite à une Annonce postée sur le Site. La plateforme ne peut garantir que le Demandeur de Tâche ou le Prestataire de Service exécutera la Transaction. Demandeur de Tâche et Prestataire de Service sont seuls responsables de la Transaction et la plateforme n'assume aucune responsabilité en ce qui concerne les Transactions.

Finally, the platform provides for a general limitation of liability at 150 EUR and excludes indirect damages.

En tout état de cause dans l'hypothèse où la responsabilité contractuelle de La plateforme pourrait malgré tout être engagée, l'indemnisation ne pourrait en aucun cas excéder un montant de 150 EUR et ne pourrait en aucun cas couvrir un préjudice indirect de quelque nature que ce soit (perte d'une chance d'obtenir une prime, etc.).

The limitation of liability in case of breach of the intermediation service could violate the consumer protection law if it amounts to unfair terms, either because they are black-listed⁷⁶ or because they cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.⁷⁷ With regard to providers of the service, who pay a commission when they provide a service thanks to the platform, the liability limitation may be abusive in some cases. With regard to customers who do not pay for the use of the platforms, the liability limitation is not abusive.

The contractual exclusion of liability in case of breach of the intermediated service is legal as the platform is not part of the contract between the providers and the customers. However, if the platform would knowingly help a provider to violate her obligation, she can be held liable under the non-contractual liability (art. 1382 of the civil code) for third complicity (*tierce complicité*).

(c) The qualification of the contract between the providers and the users

According to Article 6 of the terms of use, the platform is not part to the contract between the provider and the users and cannot be held liable for a breach of such contract. Therefore only the provider can be held liable in this case.

Les Prestataires de Services sont liés directement aux Demandeurs de Tâches par la relation exposée à l'Article 11 des présentes Conditions Générales. La plateforme ne prend en aucun cas part à la relation contractuelle qui naît entre les Utilisateurs suite à la conclusion de la Transaction établie selon des modalités convenues entre eux. La plateforme facilite uniquement la relation en fournissant un support pour la réalisation de la Transaction. Les

⁷⁶ By Art. VI.83 ELC, in particular points 13 and 17.

⁷⁷ Art. 1.8.24 ELC transposing Art. 3(1) of the Unfair Commercial Terms Directive.

Utilisateurs sont seuls responsables de l'exécution de leurs obligations respectives résultant de ou relatives à leur Transaction.

According to Article 11 of the terms of use, the contract between the provider and the user is a service contract and cannot be a labour contract. Therefore, labour law is not applicable.

Le Demandeur de Tâches et le Prestataire de Services exécutent leur collaboration sur une base indépendante.

Tout lien de subordination est par conséquent expressément exclu entre parties (...)

4.2. Example 2

This example deal with platforms offering small services regarding housing and gardening, pets, children, health and sport, leisure and travel, car, learning, administration and enterprise, tools, IT. The registration and the use of the platforms is free for providers although they can increase their visibility if they take a paid subscription as well as for the users. The terms of use are very similar to those of Example 1.

(a) The qualification of the contract between the platform, the providers and the users

In Article 2.1 of the terms of use, the platform limits her role as a hosting platform:

La Société fournit un service d'intermédiaire (le « Service ») pour la mise en relation de Demands de services et de Prestataires de services, sur le Site. Le Service comprend des outils de recherche et de communication permettant aux Demands de services de trouver et contacter des Prestataires de services (entre autre, un moteur de recherche avancé, une gestion des préférences, un module d'alertes), ainsi que des outils permettant aux Prestataires de services de proposer leurs services (entre autre, une gestion de profil, une gestion des compétences et d'expérience, une gestion des promotions et des évaluations).

This role is also mentioned by Article 5.1.

En tant qu'intermédiaire entre ceux qui proposent et ceux qui recherchent des services, la Société s'engage à offrir le Service, lequel consiste à mettre en relation des demandeurs de services et des prestataires offrant leurs services.

En tant que simple intermédiaire, et même si elle s'efforce de rendre le Service optimal, la Société n'a aucune obligation de résultat, en particulier pour ce qui concerne les éléments suivants :

- elle ne peut assurer au Demandeur de services la qualité des prestations du Prestataire avec lequel il a contracté, ni au Prestataire de services qu'il sera effectivement contacté par des Demands de services, ou que ceux-ci lui paieront la rémunération convenue. De même, les options payantes souscrites ne peuvent en aucun cas être une garantie de résultat.*
- elle ne peut garantir que les Prestataires de services disposent de toutes les qualifications, aptitudes, connaissances, compétences et autorisations nécessaires ou requises pour la bonne exécution de leurs prestations ;*
- elle ne peut garantir aucun résultat lié à l'utilisation du système d'évaluation des membres, de promotions, du moteur de recherche et du système de classement qu'elle offre.*

- elle met en œuvre tous les moyens raisonnables pour que le Service soit disponible en permanence mais ne saurait être tenue responsable pour des interruptions indépendantes de sa volonté, comme la nécessité de réaliser des opérations de maintenance, des pannes au niveau des serveurs, ou encore des problèmes liés au réseau internet même ;
- elle n'offre aucune garantie en cas de suppression ou de défaut de stockage de contenu diffusé ou transmis via le Site ;
- elle n'exerce aucun contrôle direct sur la qualité, la sûreté ou la licéité des services et sur la véracité ou l'exactitude des contenus publiés par les Utilisateurs. La Société offre sur le Site une fonctionnalité permettant aux Utilisateurs de lui signaler un contenu potentiellement abusif. C'est uniquement à la suite d'un tel signalement que la Société vérifiera le contenu publié par les Utilisateurs.

(b) The liability of the platform vis-à-vis the providers and the users

In Article 5.1 of the terms of use, the platform limits its liability with regard to the intermediation services.

Sauf en cas d'acte intentionnel ou de faute grave, la Société n'engage pas sa responsabilité en raison:

- de tout dommage subi en raison de difficultés techniques rencontrées sur le Site, en ce compris en raison de virus, d'interruptions du système, de sites web tiers vers lesquels il est renvoyé ou qui renvoient vers le Site;
- de tout dommage occasionné à votre système informatique et de toute perte d'informations résultant du téléchargement d'éléments se trouvant sur le Site ;
- de tout dommage résultant d'applications interactives;
- de tout dommage lié à l'utilisation du Site, dont la cause principale est un cas de force majeure, des actes ou des tiers qui ne sont pas sous contrôle de la Société;
- de tout dommage résultant, en ce qui concerne la partie information financière, d'erreurs matérielles dans les informations et données se trouvant sur le Site et, en ce qui concerne les autres parties, de toute erreur dans ces informations et données;
- de tout dommage résultant d'erreurs que vous commettriez lors de l'utilisation du Site;
- de tout dommage résultant de votre appréciation des données et informations se trouvant sur le Site.

In Article 2.2 of the terms of use, the platform excludes its liability in case of breach of service contract.

La relation entre le Demandeur de services et le Prestataire de service relève de la responsabilité de chacune de ces parties et la Société décline toute responsabilité en cas de dommage résultant de cette relation

As for in the previous case, such contractual exclusion is legal as the platform is not a part to the contract between the service providers and the customers.

5. Conclusion

Relationship between platforms and users (providers and users of services)

When intermediating for profit, a collaborative economy platform is an undertaking, hence she is subject to the rules of the ELC (in addition to the general rules of the Civil code). The platform is providing an information society service and, possibly, other additional services. Therefore, she is subject to the rules of book XII of the ELC which transposes the e-Commerce Directive, and possibly specific laws applicable to those additional services. As they often provide their services to consumers, they are also subject to the general consumer protection rules of the Book VI of the ELC.

Thus, the platforms must respect the information obligations of Books III and XII ELC and, when dealing with consumers, the information obligations of Book VI ELC. They cannot rely on general unfair commercial practices defined in Book III ELC. Thus, if the platform hosts providers not having a licence or an authorisation to exercise a qualified profession and does not remove such providers, she may be condemned to cease her practices.⁷⁸ Moreover, when dealing with consumers, platforms cannot use the more specific unfair commercial practices and contract terms prohibited by Book VI ELC.

With regard to liability, Belgian Courts apply a hybrid regime: for the hosting service, they apply the liability exemption of the e-Commerce Directive when the platforms remain passive and neutral while for the other services, they do not apply the exemption.⁷⁹ This approach is supported by the majority of the legal doctrine.

The terms of use of the collaborative economy platforms offering professional services that we analyse are very similar. In order to benefit of the liability exemption, they mention explicitly that platforms are merely hosting ads in a passive manner. They also limit their liability in case of breach of contract for the intermediation service. Such limitation may violate the consumer protection rules (rules on unfair commercial practices and unfair terms) but that requires a case-by-case analysis. Platforms also mention that they are not part of the service contract concluded between the providers and the users and exclude their liability in case of breach of this contract. This liability exclusion is valid except when the platforms contribute to the contract breach.

Relationship between providers and users of services

If, by being on the platform, the provider of professional service follows an economic goal in a durable manner, she is an undertaking and subject to the rules of the ELC, in particular the consumer protection rules (Book VI or XIV). Moreover, if the professional service is part of a regulated profession, the provider is also subject to the rules applicable to that profession.

If the provider is not following an economic goal in a durable manner, she is a consumer and subject only to the general rules of the Civil Code. In this case, the user of the service is less protected. This why it is important that customer knows when she deals with a professional provider or a non-professional provider and presenting oneself as a consumer while pursuing an economic goal in a durable manner is a prohibited misleading unfair commercial practice.

⁷⁸ Comm Bruxelles (cess.), 23 sept. 2015, *Radio Taxi Bruxellois v. Uber*.

⁷⁹ Montero (2011 : 92-93) citing Comm. Bruxelles, 31 juillet 2008, *Lancome v. eBay, RDTI*, 2008, p. 521 and Comm. Bruxelles, 2 juin 2009.

Section 3: Barcelona

1. Main applicable provisions

1.1 Definitions

Information society services

Law 34/2002⁸⁰, which implements the e-Commerce Directive in Spain, contains the legal obligations of providers of information society services, including those providers acting as intermediaries for the transmission of content.

The annex of Law 34/2002 provides that an information society is “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.*”

Law 34/2002 clarifies in a recital the type of services to which the law applies, which include those services of intermediation consisting of storing information, services or applications provided by others, as long as such services constitute an economic activity for the provider.

Service Providers

Article 3 Law 17/2009⁸¹, which transposes the Services Directive into the Spanish framework, defines service as any self-employed (“*por cuenta propia*”) economic activity, normally provided for remuneration. Provider means any natural or legal person who offers or provides a service.

Traders

It is worth noting that regarding consumer legislation, Catalan legislation primarily applies over national legislation. Article 111-2 Law 22/2010⁸² defines trader as “*any physical or legal person, public or private which, in carrying out business, a trade or a profession, markets goods or services, or in any other manner, acts within the framework of their business activity or profession.*”

Subsidiarily, the Spanish consumer legislation (e.g. Law 1/2007⁸³, which transposes the Consumer Rights Directive in Spain) applies. According to article 4 Law 1/2007, trader is, for the purposes of the law, any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession.

Consumers

Article 111-2 Law 22/2010 defines consumers and service users: “*the physical or legal persons acting within the framework of consumer relations that do not fall within the sphere of their commercial or professional activity. This also applies to members of cooperatives in consumer relations with the cooperative. Any reference made in the present law to consumer is understood to be made to the*

⁸⁰ Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico.

⁸¹ Ley 17/2009, de 23 de noviembre, sobre el libre acceso a las actividades de servicios y su ejercicio.

⁸² Ley 22/2010, de 20 de julio, del Código de consumo de Cataluña.

⁸³ Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias.

consumer or service user insofar as they enjoy goods and services that are the product of business activity in the market.”

Article 3 Law 1/2007 provides that consumers and users are those natural persons acting for a purpose which is outside their trade, business, craft or profession.

Service recipients

Article 3 Law 17/2009 defines service recipient as any natural or legal person that uses or wants to use a service.

1.2. Authorisation

Information Society Services

Article 6 Law 34/2002 provides that the provision of information society services is not subject to a prior authorisation. Thus, providers of information society services established in a EEA country benefit from the freedom to provide services principle in Spain, in accordance with the e-Commerce Directive.

Services

The provision of services is in principle not subject to a prior authorisation in Spain, in accordance with articles 5 (for establishment) and 12 (for cross-border provision of services in Spain) Law 17/2009. Prior authorisations can be imposed for both establishment or cross-border provisions of services, in accordance with the applicable sectoral legislation, provided that the conditions set, respectively, in articles 5 et seq. and 13 et seq., are met.

Article 12 Law 17/2009, provides, in particular, that providers established in EU countries other than Spain can freely provide their services, without being obliged to register in a professional association.

1.3. Consumer law

Information obligations

- Information society services

Article 10 Law 34/2002 establishes that providers of information society services should render easily, directly and permanently accessible to the recipients of the service and competent authorities the following information:

- their name and address, and the e-mail address or another data which allow them to be contacted rapidly and in a direct and effective manner;
- their trade register;
- when their activity is subject to an authorisation, the particulars of such an authorisation by the relevant supervisory authority;
- their fiscal identification number;
- when they refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of taxes;
- the codes of conduct to which they have adhered;

If they exercise a regulated profession: the professional body or similar institution with which the service provider is registered, the professional title and the Member State where it has been granted, and a reference to the applicable professional rules in the Member State of establishment and the means to access them.

- Traders

Regarding consumer legislation, Catalan legislation primarily applies over national legislation. More precisely, article 121-1 Law 22/2010 provides that consumer relations that take place within Catalonia are subject to this law.

Information obligations are contained in Law 22/2010. Article 123-3 provides, in relation to pre-contractual information, that consumers have the right to obtain a model contract, which outlines the general terms and conditions, and which is delivered to them in advance.

According to article 221-1 Law 22/2010, *“the trader must clearly and unambiguously display the following information”*:

- the identification details of the trader and the administrative authorisation, in the contractual offer and, if necessary, in any documentation presented to consumers.
- the telephone number, e-mail address and, in all cases, a physical address where consumers can present complaints and exercise their right of withdrawal.

Article 222-2 Law 22/2010 provides that distance contracting proposals must include clear and unambiguous information on:

- the identity of the trader;
- the identification of the contract proposal;
- the procedure to be followed and requirements necessary to execute the contract;
- the cost of using the distance communication technique where this is higher than basic service costs;
- information relating to the service on offer;
- the total price;
- the modality of performance of the service;
- the information concerning the right of withdrawal;
- the payment methods.

It is specified that this information has to be provided in a format which is appropriate to the communication technique used and which can be kept by the consumer.

Article 222-3 Law 22/2010 obliges the trader to deliver to the consumer all documentation relating to the contract and to the acknowledgement of payment.

Article 126-9 Law 22/2010 provides that consumers are entitled to have, on request, an official complaint form, which have to be available by electronic means. Further, traders must inform consumers about the dispute resolution procedures in the context of consumer relations.

For those information obligations which are not set in Catalan law, national law applies. In particular, additional obligations are contained in law 1/2007. These obligations in some cases overlap with those contained in the Catalan legislation.

Article 97 Law 1/2007 provides that previous to the conclusion of a distant contract, the trader will have to facilitate to the consumer the following relevant information:

- the main characteristics of the goods or services;
- the identity of the trader;
- the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting;
- the total price of the goods or services inclusive of taxes;
- the costs of using the means of distance communication for the conclusion of the contract;
- the arrangements for payment, delivery, performance, the time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy;
- the language in which the contract will be concluded;
- the right of withdrawal;
- a reminder of the existence of a legal guarantee of conformity for goods;
- the existence and the conditions of after sale customer assistance, after-sales services and commercial guarantees;
- the existence of codes of conduct;
- the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
- where applicable, the minimum duration of the consumer's obligations under the contract;
- where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- where applicable, the functionality, including applicable technical protection measures, of digital content;
- where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;
- where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

- Service providers

Service providers are subject to the information obligations contained in Law 17/2009, which transposes the Services Directive into the Spanish framework. These information obligations are contained in article 22 Law 17/2009, which applies without prejudice of the applicable consumer law.

Article 22 Law 17/2009 provides that service providers have to make available to the service recipient, in an easily accessible manner and before the provision of the service, the following information:

- the name of the provider, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
- the name of the trade register;
- if the provision of the service is subject to an authorisation scheme, the particulars of the public authority;
- for the qualified professions, the professional qualification and the member state in which it was delivered, as well as the trade association of the service provider;
- the general terms and conditions, including on the applicable law and on jurisdiction;
- the complete price of the service, including taxes;
- the main characteristics of the service offered;
- the insurance or guarantees, and in particular the contact details of the insurer or guarantor

- and the territorial coverage;
- where the provider exercises an activity which is subject to VAT, the fiscal identification number;
- the language of the contract; and
- the existence of the right of withdrawal.

Furthermore, service providers should, at the request of the service recipient, provide the following additional information:

- the duration and date of execution of the contract;
- as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;
- information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services;
- any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available;
- where a provider is subject to a code of conduct, or is member of a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement, information in this respect. The provider shall specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement.
- Information regarding alternative dispute resolution mechanisms.

Mechanisms to make available the information obligations in Law 17/2009 include an e-mail address provided by the service provider or its website

Unfair commercial practices

Unfair commercial practices are regulated in Law 3/1991⁸⁴, which incorporates the Unfair Commercial Practices Directive into the Spanish law.

The scope of application of this law is very broad, as it applies not only to entrepreneurs and professionals but also to any natural or legal person that participates in the market ("*participa en el mercado*").

The law establishes that it is unfair any behaviour contrary to the good faith. It is opposed to the good faith any conduct or act which is contrary to the professional diligence, which means that it materially distorts or is likely to materially distort the economic behaviour as regards the service of the average consumer whom it reaches or to whom it is addressed.

In particular, article 6 Law 3/1991 refers to misleading practices, which include any conduct that contains false or untruthful information or, in any way, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to some aspects, including the existence or nature of the product of service, its main characteristic, the extent of the traders' commitments, or the consumers' rights.

Article 7 Law 3/1991 refers to misleading omissions as those consisting of omitting information that the consumer needs in order to take a transactional decision. The provision of information which is

⁸⁴ Ley 3/1991, de 10 de enero, de Competencia Desleal.

unclear, unintelligible, ambiguous, or that it is provided in an untimely manner or fails to identify the commercial intent of the commercial practice, may constitute a misleading omission.

Unfair contract terms

Law 1/2007 transposes the Unfair Terms Directive into the Spanish framework. In particular, article 82 et seq. establishes the legal framework for unfair contract clauses. Article 83 provides that unfair contract terms are deemed void.

Article 85 refers to clauses which make the contract subject to the trader's will.

Article 86 contains those contract terms that limit the rights of the consumer.

Article 87 regulates contract terms that are unfair because they determine a lack of reciprocity in the parties' obligations.

Further, article 89 refers to unfair contract terms that concern the conclusion and execution of the contract.

1.4. Additional obligations (professional qualifications)

In Spain, the provision of certain services is reserved to particular providers who hold a professional qualification. This is the case of regulated professions such as lawyer, architect, or psychologist. These providers are normally subject to additional obligations as compared with other service providers, such as having and insurance or being member of a trade association.

The exercise of qualified professions is regulated in Catalonia by Law 7/2006⁸⁵. Its article 2 provides that qualified professions are those characterised by the application of knowledge and techniques whose exercise require a university degree.

Article 5 Law 7/2006 provides that in order to exercise a qualified profession it is necessary to hold the relevant academic degree and comply with other requirements legally established.

Furthermore, article 9 Law 7/2006 obliges qualified professionals in Catalonia to have an insurance or an equivalent guarantee covering the liability risks they could incur in the exercise of their profession.

According to article 3 Law 2/1974⁸⁶, membership to the relevant professional association may be required by law in order to exercise a qualified profession in Spain.

Profession	Additional obligations
Lawyers	Royal Decree 658/2001 ⁸⁷ approved the general statute of the Spanish legal profession. According to the royal decree, lawyers are those persons who, holding a law degree and being practising members of a Spanish bar, defend parties in legal proceedings, or provide legal advice (articles 6 and 9). Membership in a bar is

⁸⁵ Ley 7/2006, de 31 de mayo, del ejercicio de profesiones tituladas y de los colegios profesionales.

⁸⁶ Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales.

⁸⁷ Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española.

	mandatory and certain requirements must be complied with to be member. A Spanish lawyer also has to comply with the obligations foreseen in a code of ethics ⁸⁸ .
Architects	For architects, Royal Decree 327/2002 ⁸⁹ obliges them to become member of the professional association. A code of ethics also applies. Among other obligations, architects must submit to the professional association the documentation concerning professional works signed by them. The purpose is to check the identity of the responsible architect, as well as the relevant documentation (“visado”).
Psychologists	Royal Decree 481/1999 ⁹⁰ approves the general statutes of the official association of psychologists. The statutes oblige those who exercise the profession of psychologist to become member of the relevant professional association.

The conditions for the access and exercise of qualified professions by nationals of EU member states different from Spain are regulated in Royal Decree 1835/2009⁹¹, which implements the Professional Qualifications Directive in Spain.

For Catalonia, article 14 Law 7/2006 provides that professionals established in EU member states can provide freely their services in Catalonia. This article adds that such a provision of services cannot be prohibited or restricted by reasons related to a professional qualification, provided that the providers are registered (“colegiados”) or legally established in an EU member state in order to exercise the profession in question.

It is worth noting that the above additional obligations or requirements linked to the exercise of professional qualifications do not constitute a reserve of activity in the sense of article 15.2.d of the Services Directive. However, they are subject to Article 49 and 56 of the Treaty on the Functioning of the European Union.

1.5. Liability of intermediaries

According to article 16 Law 34/2002, providers of intermediation services which consist of storing data provided by the recipient of the service will not be responsible for the information stored by the recipient, provided that they:

- do not have actual knowledge that the activity or the information stored is unlawful or that it harms the rights of a third party; or
- having actual knowledge of the service, do their best efforts to remove the data or disable access to them.

Article 16 provides that it is understood that the service provider has actual knowledge when a competent body has declared the unlawfulness of the data, requested their removal, or that access to them is disable, or when the existence of a harm has been declared and the provider knew the relevant decision. This is without prejudice to the procedures of detection and removal of content

⁸⁸ Código deontológico adaptado al Estatuto General de la Abogacía Española, aprobado por Real Decreto 658/2001, de 22 de junio.

⁸⁹ Real Decreto 327/2002, de 5 de abril, por el que se aprueban los Estatutos Generales de los Colegios Oficiales de Arquitectos y su Consejo Superior.

⁹⁰ Real Decreto 481/1999, de 18 de marzo, por el que se aprueban los Estatutos Generales del Colegio Oficial de Psicólogos.

⁹¹ Real Decreto 1837/2008, de 8 de noviembre, por el que se incorporan al ordenamiento jurídico español la Directiva 2005/36/CE, del Parlamento Europeo y del Consejo, de 7 de septiembre de 2005, y la Directiva 2006/100/CE, del Consejo, de 20 de noviembre de 2006, relativas al reconocimiento de cualificaciones profesionales, así como a determinados aspectos del ejercicio de la profesión de abogado.

implemented by providers under voluntary agreements and other means of effective knowledge that may be established.

Article 16 adds that the liability exemption above will not apply in the event that the recipient of the service acts under the direction, authority or control of the provider, according to the law.

2. Rules on platforms

2.1 Legal qualification and applicable laws

For the purpose of this section, platforms are understood as those online platforms which advertise and intermediate between the provider offering his services and the user looking for services that require a professional qualification (e.g. legal advice) or that do not require a professional qualification (e.g. house cleaning).

As information society services, platforms providing their services in Spain are subject to Law 34/2002, which transposes the e-Commerce Directive in Spain.

A court of Barcelona sent in June 2015 a preliminary reference to the Court of Justice of the EU concerning Uber⁹². Although transport platforms are out of the scope of this study, some aspects of this preliminary reference⁹³, which is still pending, may be relevant for the purposes of the platforms covered by the study.

The court of Barcelona noted that:

- Uber facilitates a number of software tools (i.e. an interface) that allow car owners to connect with users in search of urban journeys;
- users access the service through an app managed by Uber;
- Uber provides the above services in exchange of a remuneration.

The main issue in this case is to determine whether Uber provides a transport service or not. In the affirmative, Uber would not be subject to the Services Directive, which leaves transport services out of its scope of application.

It is worth noting that the referring court does not put into question that Uber is an information society service. Furthermore, the referring court does not challenge that Uber is a service provider. What the referring court is asking is whether Uber can benefit from the provisions of the Services Directive or not.

Therefore, it is clear that the platforms covered by our study provide information society services, thereby being caught by the Spanish laws implementing the e-Commerce Directive and the Services Directive.

Also, the platforms covered by this study are traders in the sense of the applicable Catalan and national legislation, as they provide services of intermediation, understood as the provision of a software infrastructure helping qualified and non-qualified providers to connect with consumers.

⁹² Providencia dando traslado a las partes del planteamiento de una cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea, Juzgado Mercantil n. 3 Barcelona.

⁹³ Case C-434/15, *Asociación Profesional Elite Taxi*.

2.2 Authorisation

The platforms covered by this study are providers of information society services and hence are not subject to any prior authorisation regime in Spain. Even if the platforms provided themselves certain services (e.g. the website of a law firm), the platform would not be subject to an authorisation regime, but rather to the specific obligations linked to the exercise of a qualified profession (e.g. information obligations in article 10 Law 34/2002).

2.3 Obligations

As traders, platforms are subject to the Catalan and, subsidiarily, national consumer legislation. They will also have to comply with the laws on unfair commercial practices and unfair commercial terms.

2.4 Liability regime

We can distinguish the liability of the platform regarding:

- the content, data, opinions, information, advertisements stored on it by providers and users;
- the service of intermediation provided by the platform itself (i.e. the software application); and
- the underlying service provided through the platform.

The liability for the content stored in the platform is addressed in the legislation transposing the e-Commerce Directive. Although it is clear that the platforms covered by this study are information society services and intermediaries, whether they can benefit from the liability regime in article 13 et seq. Law 34/2002 depends on aspects that require a case-by-case analysis.

Thus, we cannot conclude *ex ante* that the liability regime in Law 34/2002 applies to all platforms covered by this study. A case-by-case analysis of liability is made in the examples of platforms provided below.

Although the e-Commerce Directive and hence Law 34/2002 address the responsibility of intermediaries in general, the majority of the cases that Spanish courts have dealt with concern the liability of intermediaries in the context of defamatory content and copyright infringements.

In Spain there have been no cases in which the liability of the type of platforms covered by this study has been assessed. However, some arguments developed by the Spanish courts in cases concerning other type of intermediaries may be relevant for the purposes of our study.

The Spanish Supreme Court stated that article 16 Law 34/2002 contains two requirements for the liability exemption, namely:

- the absence of links of subordination, dependency or control between the intermediary and the providers of content;
- the lack of actual knowledge (“conocimiento efectivo”) that the activity carried out or the information stored is illicit⁹⁴.

⁹⁴ Sentencia del Tribunal Supremo 7684/2009, de 9 de diciembre de 2009,

Further, a court of Madrid stated that article 16 Law 34/2002 has to be linked to article 10 of the same law, which obliges information society services to provide certain information⁹⁵.

The court assumed that if intermediaries provide their identity and localisation details, that would allow them to ensure compliance with the obligation to remove infringing content when required to do so.

Thus, according to the case-law, it is important that information society services provide by adequate electronic means the information set in article 10 in order to benefit from the liability exemption set forth in article 16.

A report⁹⁶ recently delivered by OCU, the Spanish consumer organisation, and other consumer organisations stated that in a P2P (C2C) relationship, *“platforms cannot be held responsible for content published by users”*, such as inaccurate service information, as long as they speedily remove or block the content. However, in our view, platforms may not only benefit from the liability exemption in the P2P context, but also in relation to B2C services.

As to the liability in which the platform could incur for the provision of the *“offline”* service, according to the report, the role that the intermediary platform plays in delivering the off-line service *“is key to determining what responsibilities the platform has for any off-line services; if the platform fixes the prices, the schedules, or intervenes in any way in the provision of the service, it would indicate that the platform is the provider (or partial provider) of the service and not just an intermediary.”*

Further, the report notes that *“indicators that a platform isn’t just an intermediary, and that it might have certain responsibility for the service it offers, include: involvement in setting prices, establishing the conditions of the exchange between two peers; and/or establishing the conditions of the cancellation policy.”*

3. Rules on providers

3.1 Legal qualification and applicable laws

Providers (B2C) – qualified and non-qualified

For the purpose of this section, provider means any natural or legal person, qualified or non-qualified, offering his services via a platform, in exchange of a remuneration.

Providers?

Even if their level of income is below the minimum required by the Spanish legislation to register as an independent professional (*“autónomo”*) (i.e. annual revenues amounting to €9034), it is clear that both qualified and non-qualified providers offer a service in exchange of a remuneration.

They are thus service providers in the sense of the legislation transposing the Services Directive into Spain.

Providers of information society services?

⁹⁵ Sentencia del Juzgado de Primera Instancia de Madrid número 44, de 13 de septiembre de 2007,

⁹⁶ Collaboration or business? Collaborative consumption: From value for users to a society with values, OCU and others, 2016, page 32 et seq.

The question here is whether, besides providing the underlying services (e.g. architecture design), qualified and non-qualified service providers can also be considered providers of information society services.

In this case, the response very much depends on the business model in question so it is not possible to provide a general response *ex ante*.

For instance, in the case of some of the analysed platforms, qualified and non-qualified professionals offer their services entirely online. This is the case of a lawyer who offers his legal advice through a video chat session. The software is provided by the platform.

In this case, it is undeniable that the lawyer is providing a service (i.e. legal advice) in exchange of a remuneration, at a distance, by electronic means (i.e. the platform software), and at the individual request of the recipient of the service.

Further, a recital in Law 34/2002⁹⁷ clarifies that information society services are provided by any individual who has an internet site whereby he carries out a number of activities, including “*the provision of information*” by electronic means, or any other service that it is provided at the individual request of the recipient, as long as it represents an economic activity for the provider.

Therefore, beside his service of legal advice, which is also a service in accordance with the Services Directive, the lawyer is providing an information society service.

However, in other cases, some elements contained in the definition of information society service are missing. For example, those providers that advertise and offer their services through a collaborative economy platform but that provide their services *in situ* (e.g. a cleaning lady, a furniture mover), do not provide an information society service.

In these cases, the information society services (e.g. conclusion of the contract by electronic means, payment system) linked to the provision of the underlying service are normally entirely provided by the platform itself.

The provider in question neither provides a service “*by electronic means*” nor “*at a distance*”. In this regard, the Court of Justice of the EU has stated that “*activities which, by their very nature, cannot be carried out at a distance or by electronic means, such as medical advice requiring the physical examination of a patient, are not information society services, and consequently, do not fall within the scope of*” the e-Commerce Directive.⁹⁸

We will analyse this issue further on a case-by-case basis, with the examples provided below.

Traders?

⁹⁷ A recital of Law 34/2002 provides that “*se acoge, en la Ley, un concepto amplio de “servicios de la sociedad de la información”, que engloba, además de la contratación de bienes y servicios por vía electrónica, el suministro de información por dicho medio (como el que efectúan los periódicos o revistas que pueden encontrarse en la red), las actividades de intermediación relativas a la provisión de acceso a la red, a la transmisión de datos por redes de telecomunicaciones, a la realización de copia temporal de las páginas de Internet solicitadas por los usuarios, al alojamiento en los propios servidores de información, servicios o aplicaciones facilitados por otros o a la provisión de instrumentos de búsqueda o de enlaces a otros sitios de Internet, así como cualquier otro servicio que se preste a petición individual de los usuarios (descarga de archivos de vídeo o audio...), siempre que represente una actividad económica para el prestador. Estos servicios son ofrecidos por los operadores de telecomunicaciones, los proveedores de acceso a Internet, los portales, los motores de búsqueda o cualquier otro sujeto que disponga de un sitio en Internet a través del que realice alguna de las actividades indicadas, incluido el comercio electrónico.*”

⁹⁸ Judgment of the Court of Justice of the EU of 2 December 2010 in Case C-108/09, *Ker-Optika*.

Also, both qualified and non-qualified providers are subject to the relevant Catalan and Spanish consumer laws, as they fit into the definition of trader in both laws 22/2010 and 1/2007.

Indeed, both qualified and non-qualified providers acting within the framework of their profession, business, trade or craft are subject to consumer legislation.

Non-professionals (C2C)

One of the most intricate aspects of the collaborative economy is to define the legal status of the prosumers, understood as those natural persons that out of the scope of their main business or professional activities, provide a service through a collaborative economy platform.

First of all, it is worth noting that the non-professional exercise of a qualified profession is not foreseen in the Spanish legislation. When offering their legal services, architectural or engineering services, qualified professionals are always subject to the obligations applicable to regulated professions (e.g. insurance obligations). Hence, the provision of C2C services could eventually only take place in the context of the provision of services for which a professional qualification is not required.

However, in our view, the Spanish law, given the broadness of some definitions, does not provide the means to differentiate C2C providers (prosumers) from B2C providers. For instance, the concept of service provider in the Spanish legislation implementing the Services Directive (i.e. any natural person who offers a service, which is a self-employed economic activity provided for remuneration) may well encompass both B2C and C2C providers.

Indeed, the fact that the individual offering a service (e.g. office secretary) is not registered as a professional or self-employed ("*autónomo*") because his income is below a given threshold does not change his qualification as a service provider.

Further, the concepts of service provider and trader in the applicable laws on services and consumer protection are not the same as the concept of trader in the Commercial Code⁹⁹, which is more restrictive as it covers traders that carry out commercial activities "*habitually*".

For instance, Law 3/1991, which transposes the Unfair Commercial Practices Directive into the Spanish legislation, applies to entrepreneurs and professionals but also to any natural or legal person that participates in the market ("*participa en el mercado.*")

Consequently, the Spanish legal framework does not provide the necessary means to distinguish C2C, also referred to as peer-to-peer or prosumers, from B2C providers.

This is not the stance taken in the report referred to above, which considers that C2C providers are only subject to Civil Law, without having to comply at all with the laws on services and on consumers¹⁰⁰.

3.2. Authorisations

⁹⁹ Real decreto de 22 de agosto de 1885 por el que se publica el Código de Comercio.

¹⁰⁰ Collaboration or business? Collaborative consumption: From value for users to a society with values, OCU and others, 2016, page 32 et seq.

As service providers located in Barcelona, providers, both qualified and non-qualified, who offer their services via a collaborative economy platform benefit from the national legislation implementing the Services Directive, namely Law 17/2009. Therefore, they are not subject to a prior authorisation. Also, if they provide an information society service, as explained, the providers in question are not required to obtain a prior authorisation, in accordance with Law 34/2002, which transposes the e-Commerce Directive into Spain.

However, those providers who exercise a profession subject to a professional qualification may be subject to other requirements which are different from an authorisation scheme, such as holding the relevant academic degree.

Additional obligations for qualified professionals

Article 9 Law 7/2006 obliges qualified professionals to have an insurance or an equivalent guarantee covering the liability risks they could incur in the exercise of their profession.

This obligation has to be linked with article 22 Law 17/2009, which obliges service providers to make available to the service recipients information concerning the insurance or guarantee subscribed, including the contact details of the insurer or guarantor and his territorial coverage.

According to article 3 Law 2/1974, membership to the relevant professional association may be required by law in order to exercise a qualified profession in Spain. This is the case of lawyers, psychologists and architects.

3.3 Obligations

Qualified and non-qualified providers offering their services via a platform are both service providers and traders and are consequently subject to the relevant consumer legislation.

This is not contested by the above report, which opines that *“in the case of a professional provider (sole trader, professional, company, etc.) consumer law applies.”*¹⁰¹

3.4 Liability regime

Providers are subject to the contractual and-non contractual liability linked to their services, in accordance with the applicable rules in the Civil Code.

4. Terms of Use and practice

4.1. Example 1

An online platform is operated by a company established in Barcelona and hence subject to Spanish legislation.

¹⁰¹ Idem.

According to its terms and conditions, the platform provides different types of services, including legal advice, teaching and psychology.

These services are provided through video chat sessions, by means of a software infrastructure provided by the platform.

The terms and conditions of the platform provide that:

- any user (providers) may offer his services to other users (buyers);
- all contacts between service providers and buyers must only be conducted through the platform;
- the platform will enable the buyers to communicate and negotiate with the service providers and to pay for their services;
- all interactions must be billed through the platform, even if the interaction is offline;
- the platform charges to consumers fees for the provision of their intermediation services (a flat fee for every period if video chat session);
- the platform does not control aspects such as the quality of the service provided by the professionals, their qualifications, skills, etc.;
- the platform can remove any information discretionally;
- the providers can be rated by the clients.

Authorisation

As an information society service, the platform is not subject to a prior authorisation in Spain.

Providers from EU member states who offer their services via the platform do not need a prior authorisation in Spain either.

However, qualified professionals such as lawyers and psychologists need to comply with the obligations linked to their professional qualifications, including having and insurance and being member of the relevant bar.

Assessment of liability of the platform

As an information society service we see that the platform does not fully comply with the information obligations set forth in article 10 Law 34/2002.

The platform informs that it is a company with offices in Canada and Spain. However, it does not provide any information as to its postal address. It is possible to contact the platform through its website but it does not provide an e-mail address. Further, the platform does not provide information on the trade register or fiscal identification number.

Prices of the service are not indicated clearly. They are accessible by clicking on a link placed on the terms and conditions' page.

It is worth noting that the omission of the information in article 10 Law 34/2002 can constitute an unfair commercial practice in accordance with Law 3/1991.

The platform is providing a service of intermediation and hence should also comply with Law 17/2009, which transposes the Services Directive in Spain. However, the platform does not comply with some of the obligations listed in article 22 Law 17/2009.

In particular, the platform does not provide the legislation it applies to its contracts with both providers and consumers. The platform does not make that information public by any means (e.g. website).

Also, the platform does not comply with article 23 Law 17/2009, as it does not supply a telephone number, a postal address, or an e-mail address where the recipients of its services can send a complaint or a request for information about the service provided.

According to Law 1/2007, pre-contractual information must always be provided, at least, in Spanish. This is not the case of the platform in question, which is established in Spain and clearly targets Spanish consumers, and which only provides its terms and conditions in English.

According to its terms and conditions, the platform does not guarantee aspects such as the accuracy, the quality, or the validity of the content provided by its users. Also, the platform does not control whether the service provider has the required qualifications to provide his services.

However, the fact that the platform does not intervene at all in relation to the content or the information posted on its website is not enough to conclude that the platform benefits from the liability regime in article 16 Law 34/2002.

Furthermore, the terms and conditions provide that the platform retains its capacity to remove the content discretionally. This seems to imply that the platform exerts some control over the content posted, which goes far beyond the passive role that an intermediary normally plays, in accordance with the e-Commerce Directive, as interpreted by the Court of Justice of the EU¹⁰².

In conclusion, the absence on its website of the information required by article 10 Law 34/2002 makes difficult that the platform is contacted in case that the information or content posted is illicit. Therefore, the platform should not benefit from the liability regime in Law 34/2002.

Assessment of liability of the providers

Qualified and non-qualified providers can offer their services via the platform. They are not only service providers, but also providers of information society services. This is because their services are entirely provided online.

Taking a Spanish lawyer as an example, we can see that the provider in question does not comply with the information obligations in the e-Commerce Directive, the Services Directive, and in the Consumer Rights Directive.

The only information provided by the lawyer in question is included in a description posted by him and that refers to his membership in the Bar of Barcelona.

For instance, the lawyer does not comply at all with article 22 Law 17/2009, as it does not have the means to make available to the service recipient, in an easily accessible manner and before the provision of the service the information listed in that article.

Further, the lawyer does not comply whatsoever with article 10 Law 34/2002, which establishes that providers of information society services should render easily, directly and permanently accessible to the recipients of the service and competent authorities information concerning aspects such as his fiscal identification number, his address and his trade register.

¹⁰² See, for instance, Judgment of the Court of Justice of the EU of 24 November 2011 in Case C-70/10, *SABAM*

Moreover, he does not provide recipients with the information about his professional qualification, namely:

- the professional title and the Member State where it has been granted, and
- a reference to the applicable professional rules in the Member State of establishment and the means to access them.

In conclusion, on the basis of this and other examples analysed, both qualified and non-qualified providers that offer their services via this platform clearly fail to comply with the applicable legislation on services and consumer protection.

4.2. Example 2

A platform connects non-qualified providers (e.g. dressmakers, cooks, furniture movers, cleaning ladies) with consumers.

According to the information on the platform's website, the service provider has to pass a process of identification in-person or by telephone. His documentation is checked out by the company and, when necessary, the providers are tested.

The platform clarifies that the professionals do not form part of its staff but that they are identified as independent professionals. According to the platform's website, the large majority of professionals are independent professionals ("autónomos"). In any case, in order to offer services via the platform, it is required that they have the capacity to issue bills.

As to the payments, there are two bills:

- the platform issues a bill for its mediation services (18% for the intermediation); and
- the professional issue another bill directly to the client. Payments in cash are prohibited.

The providers are rated by the clients.

The platform has the trustmark "*confianza online*."¹⁰³ This trustmark requires compliance with a code of ethics¹⁰⁴. Companies with that trustmark are subject to a system for handling complaints which allows mediation and arbitration between the website and the client.

The trustmark also includes all the obligations contained in the applicable laws on information society services and on consumer protection.

The terms and conditions of the platform contain the following:

- the platform consists of a website whereby the service clients announce opportunities for the provision of services and look for service providers and, at the same time, the service providers publish their data in order to seek and evaluate opportunities;
- the platform is not involved in the payment, it is a mere intermediary for those payments;
- the platform is not responsible for the users' content;
- the platform will remove illicit content as soon as it becomes aware of it;
- in order to ask for a service, the payment method has to be introduced;
- the right of withdrawal is recognised, in accordance with the applicable laws;

¹⁰³ <https://www.confianzaonline.es/>

¹⁰⁴ <https://www.confianzaonline.es/wp-content/uploads/2015/02/Confianza-Online-Codigo-Etico-2015.pdf>

- service clients and providers are prevented from exchanging telephone numbers, e-mails or any other communication means;
- the platform will not be responsible for the lack of provision of the service by the provider, the loss of profit or damages;
- the platform is not responsible for the failures on its website;
- the platform can be used as an intermediary for the purposes of handling complaints, but without assuming any responsibility for it;
- the client will compensate the platform if he has agreements on the services offered by the providers through other means different from the website and will pay for damages.

Authorisation

The provision of the platform's services is not subject to a prior authorisation.

Providers that offer their services via the platform do not need an authorisation prior to the provision of their services either.

Assessment of liability of the platform

This platform is very compliant in terms of information obligations to consumers.

However, the fact that the platform prohibits that users and consumers exchange certain information (e.g. telephone numbers) may indicate that there is certain subordination, dependency or control between the intermediary and the providers. Thus, it could be questionable that the platform can benefit from the liability regime.

Further, in relation to the provision of intermediation services, the clause declaring that the platform is not responsible for the failures on its website could be considered abusive and thus void, in accordance with Law 1/2007.

Assessment of liability of the provider

The platform follows a particular business model whereby the consumer makes the order and establishes the price that she is willing to pay for the service.

Then, the interested providers offer their services and their budgets. The consumer takes the final decision.

Consumers can only access to the information concerning the providers once they have placed an order and registered through the platform.

When they respond to the offer, providers only inform about certain aspects such as the price of the service and their name.

4.3. Example 3

A platform offers services to find baby sitters, caregivers (assistants to the elderly), cleaning ladies and pets carers.

In order to offer their services through the platform, service providers have to register. Then, the staff of the platform will review the documentation and will validate the service providers. Then they can apply for the job offers posted by the clients. Clients will contact the candidate for a personal interview. The clients offer both permanent and part-time jobs.

According to the platform's terms and conditions:

- the user accepts that the use of content and services offered by the platform will be at its exclusive risk and responsibility;
- the platform will charge a fee for the publication of an advert by a potential client. The fee will depend on the extent, content and duration of the advert;
- the platform does not control the content posted through its website;
- the platform will not be responsible for the damages stemmed from user's contracts, content, and the services offered through the platform;
- the platform will not be responsible for the lack of performance of contracts, for unfair commercial practices, for the lack of adequacy of services and contracts, for the defects of the services and content contracted and provided, respectively, through the platform;
- the exemption of liability does not apply if the platform does not have actual knowledge ("*conocimiento efectivo*") that the activity or the information stored is illicit or harms the rights of a third party, or if having that knowledge, acts diligently to remove the data or content;
- the platform reserves the right to make changes unilaterally as regards both content and services, including modifying the advertisements;
- including additional information such as a personal website, e-mail address, social network profile, or deviating users to other websites, publishing spam, publishing pornographic or racist content, or information subject to copyright, can lead to the exclusion of the user.

The prices are not presented before registration with the platform.

Authorisation

The provision of the platform's services is not subject to a prior authorisation.

The provision of the underlying services offered through the platform in Barcelona is not subject to a prior authorisation.

Assessment of liability of the platform

In this case, the platform reproduces in its term and conditions the liability exemption in the e-commerce legislation. However, the platform grants to itself the right to modify, unilaterally, the content, including advertisements.

If this right implies an active monitoring of the content posted by the users and, consequently, some control over the providers of the underlying services, the platform should not benefit from the liability regime in Law 34/2002.

Assessment of liability of the provider

Regarding the providers who offer their services through the platform, the platform requires that the consumer registers before accessing the provider's information.

This prevents service providers to comply with the applicable pre-contractual information obligations.

5. Conclusions

The above platforms offering professional and non-professional services, as providers of information society services, are not subject to authorisation regimes in Barcelona. They are not offering additional guarantees and/or insurances but are not required to do so by the applicable laws. The platforms in question do not always comply with the information obligations set in the services and consumer acquis.

As to how platforms address their responsibility, their terms and conditions normally exempt them not only from any liability as regards the services provided through them and the content posted by users, but also concerning the functioning of the software intermediation service the platform is providing.

This clause could be regarded as abusive in the light of Law 1/2007, especially when the problem is attributable to the platform.

In relation to the content stored on their websites, in our view the platforms above would not benefit from the liability regime for intermediaries set in Law 34/2002, as they:

- do not adequately comply with the information obligation that would allow users to easily contact them, for example in the case that illegal content is posted; or
- do exert control over the content posted by users. This control is reflected in the most obvious cases, by granting to themselves the power to modify opinions and advertisements unilaterally, or to remove content discretionally.

Thus, we consider that the platforms above should not benefit from the liability regime in Law 34/2002, as interpreted by Spanish courts.

Regarding professional and non-professional providers, in all the cases above they do not comply with information obligations such as those contained in the Services Directive.

It is worth noting that according to the Spanish legislation, qualified professionals do always have an obligation to comply with the requirements linked to their professional qualification, regardless of the context where they provide their services.

Further, the Spanish legislation does not allow to distinguish prosumers from providers. The laws implementing the Services Directive and the consumer acquis contain different definitions of “*service provider*” and “*trader*” which are all broad and have not been restricted by the case-law for the purpose of the collaborative economy.

Section 4: London

1. Main legal provisions applicable

The main applicable rules to the collaborative economy are:

- The Provisions of Services Regulations (PSRs) 2009 which apply the Services Directive;
- The Electronic Commerce (EC Directive) Regulations (ECRs) 2002 which applies the e-Commerce Directive as well as the Guide of the Department of Trade and Industry of July 2002;
- The Consumer Protection from Unfair Trading Regulations (CPRs) 2008 which apply the Unfair Commercial Practice Directive, as well as the OFT Guidance of May 2008;
- The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (CCRs) 2013 which apply the Consumer Rights Directive, as well as the Implementing Guidance of the Department of Business, Innovation and Skills of December 2013;
- The Consumer Rights Act (CRA) 2015, which transposes the Unfair Commercial Terms Directive as well as the CMA Guidance of July 2015 on Unfair Contracts Terms.

1.1. Definitions

Definitions related to persons

Provider (Art. 4 Provision of Services Regulations 2009)

In relation to a service, means a person who provides, or offers to provide, the Service.

Trader (Art. 2.2 Consumer Rights Act 2015)

A person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

Consumer (Art. 2.3 Consumer Rights Act 2015)

An individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

Definitions related to activities

Information society services (Art. 2 Electronic Commerce Regulations 2002)

(which is summarised in recital 17 of the Directive as covering "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service") has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations(c), as amended by Directive 98/48/EC of 20 July 1998(d)).

Regulated profession (Art. 4 Provision of Services Regulations 2009)

A professional activity or group of activities—

(a) access to which, the pursuit of which or one of the modes of pursuit of which is subject (directly or indirectly) by virtue of legislative, regulatory or administrative provisions to the possession of specified qualifications, or

(b) the pursuit of which is by persons using a professional title which is limited by legislative, regulatory or administrative provisions to holders of a given professional qualification.

1.2. Authorisation

Information Society Services

Article 4 ECRs 2002 provides that the provision of information society services is not subject to a prior authorisation. Thus, providers of information society services established in an EEA country benefit from the freedom to provide services principle in the UK, in accordance with the e-Commerce Directive.

Services

The provision of services benefits from the freedom of establishment and the freedom to provide cross-border services as foreseen in the Services Directive (art. 24 PSRs 2009).

1.3. General obligations

Obligation to inform

- Service provider

Service providers are subject to the information obligations contained in PSRs 2009 which transposes the Services Directive into UK law. These information obligations are contained in Articles 7-11 PSRs 2009, which apply without prejudice of consumer law.

Articles 7-8 PSRs 2009 provide that undertakings have to make available to the service recipient, in an easily accessible manner and before the provision of the service, the following information:

- the name of the undertaking, his legal status and form, the geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
- the trade register number;
- if the provision of the service is subject to an authorisation scheme, the particulars of the public authority;
- for the qualified professions, the professional qualification and the member state in which it was delivered, as well as the trade association of the service provider;
- the general terms and conditions, including on the applicable law and on jurisdiction;
- the complete price of the service;
- the main characteristics of the service offered;
- the insurance or guarantees, and in particular the contact details of the insurer or guarantor and the territorial coverage.

In addition, Article 9 PSRs 2009¹⁰⁵ provides that undertakings should, at the request of the client, provide the following additional information:

- the price;
- as regards the regulated professions, a reference to the professional rules applicable in the Member State of establishment and how to access them;
- information on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest;

¹⁰⁵ Transposing Art. 22(3) of the Services Directive.

- any codes of conduct to which the undertaking is subject and the address at which these codes may be consulted by electronic means, specifying the language version available.

Mechanisms to make available the information obligations include an e-mail address provided by the undertaking.

- Providers of information society services

Article 6 ECRs 2002¹⁰⁶ establishes that providers of information society services should render easily, directly and permanently accessible to the recipients of the service and competent authorities the following information:

- their name,
- the geographical address of the establishment,
- the contact details, including the e-mail address, which allow them to be contacted rapidly and in a direct and effective manner,
- if relevant, the trade register,
- when their activity is subject to an authorisation, the contact details of the relevant supervisory authority,
- for regulated profession, the profession association,
- If they exercise a regulated profession: the professional body or similar institution with which the service provider is registered, the professional title and the Member State where it has been granted, and a reference to the applicable professional rules in the Member State of establishment and the means to access them.

1.4. Consumer protection rules

Consumer rules apply to contracts between traders and consumers.

Enhanced information obligation

Articles 13-14 CCRs 2013 list the information that should be provided before making a distance contract concluded by electronic means.

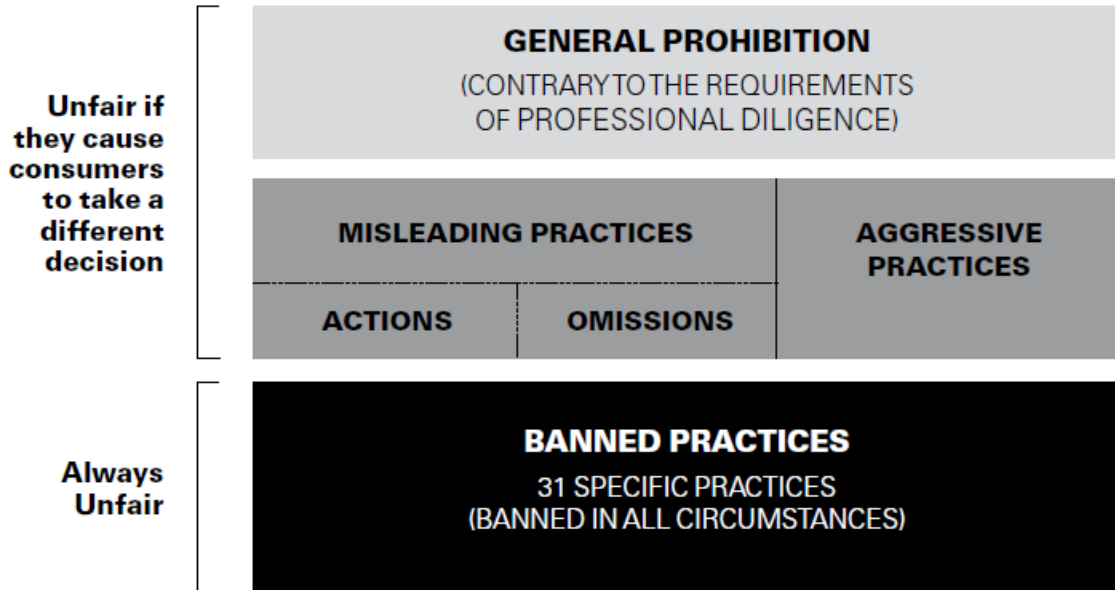
Unfair commercial practices against consumers

As explained in both Figures below, CPRs 2008 prohibits unfair commercial practices against consumers and incorporates the Unfair Commercial Practices Directive into UK law. An unfair practice is defined according to EU law as (a) contrary to the requirements of professional diligence and (b) materially distorting or likely to distort the economic behaviour of the average consumer with regard to the product.¹⁰⁷ As in EU law, prohibited unfair practices can be misleading (action or omission) or aggressive. Schedule 1 to the CPRs 2008 lists 31 practices which are prohibited in all circumstances.

¹⁰⁶ Transposing Art. 5 of the e-commerce Directive.

¹⁰⁷ Art. 3 CPRs 2008 transposing Art. 5 of the Unfair Commercial Practices Directive.

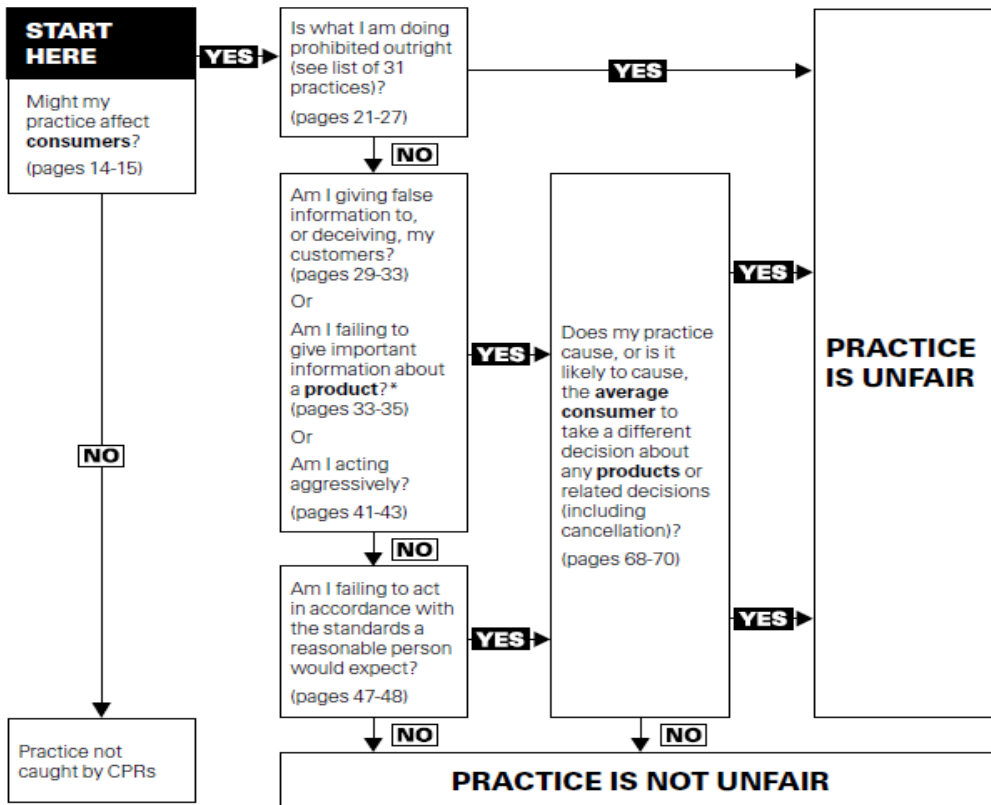
Figure: Prohibition of unfair commercial practices by CPRs 2008



Source: OFT Guidance of May 2008, p. 5

Figure: Assessment of the unfair practices

IS THE PRACTICE UNFAIR?

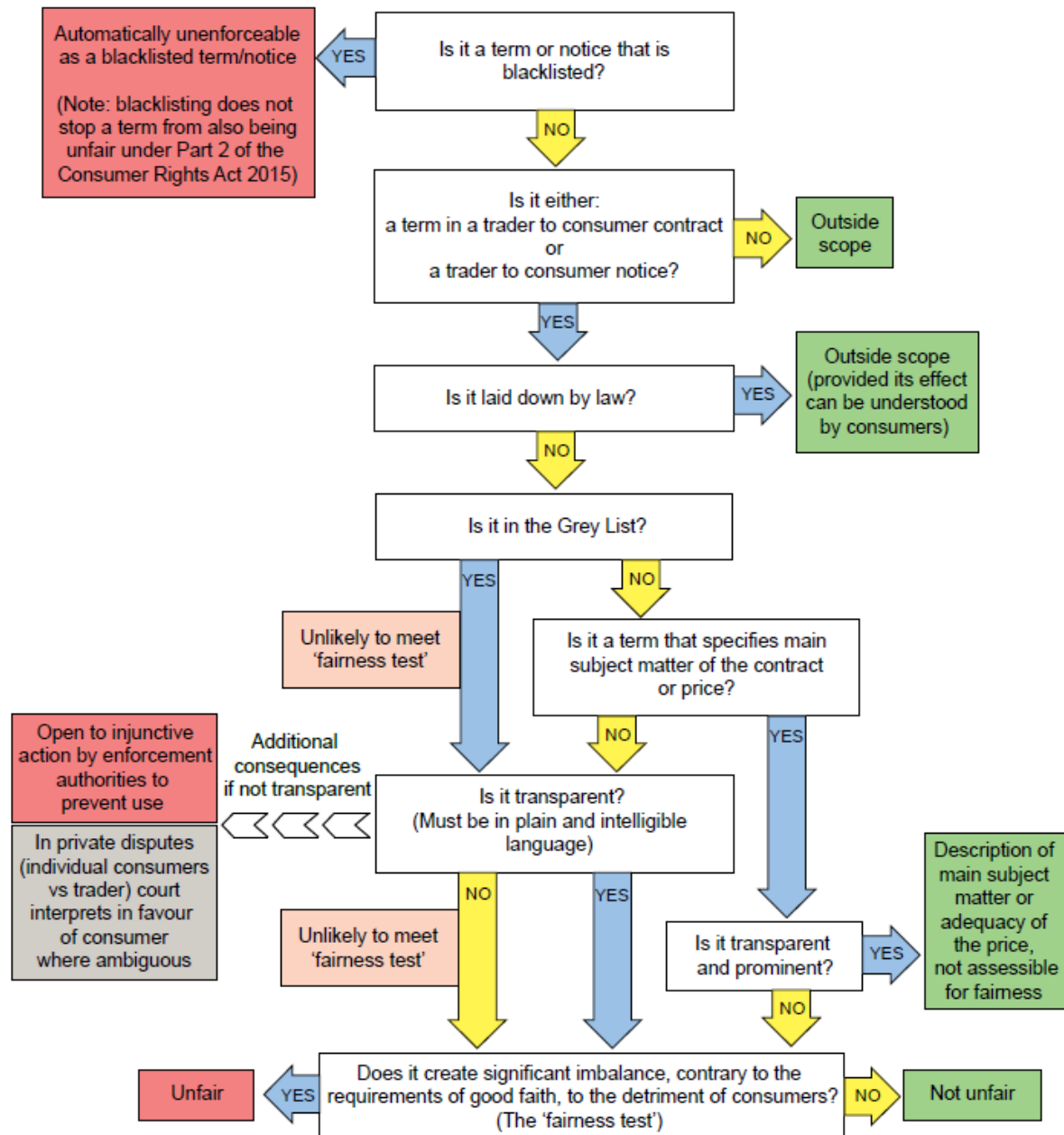


Source: OFT Guidance of May 2008, p. 12

Unfair contract terms against consumers

Articles 61-76 CRAs 2015 prohibit unfair terms in consumer contracts and transpose Unfair Commercial Terms Directive into UK law. A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.¹⁰⁸ Part 1 of Schedule 2 to the CRA 2015 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair.¹⁰⁹

Figure: Assessment of the unfair terms



Source: CMA Unfair contract terms Guidance of July 2015, p. 18

¹⁰⁸ Art. 62(4) CRA 2015 transposing Art. 3-4 of the Unfair Commercial Terms Directive.

¹⁰⁹ Transposing Annex of the Unfair Commercial Terms Directive.

1.5. Liability of intermediaries

As regards the liability regime of the platform as regards the content posted on it, Article 19 ECRs 2002 provides that “*where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—*

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.”

The DTI Guide clarifies that the onus will be on the party alleging that liability has arisen to demonstrate that a service provider had actual knowledge or awareness but did not act upon it appropriately.¹¹⁰

Article 22 ECRs 2002 adds that “*in determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to—*

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes—

(i) the full name and address of the sender of the notice;

(ii) details of the location of the information in question; and

(iii) details of the unlawful nature of the activity or information in question.”

2. Rules on platforms

2.1. Legal qualification and applicable laws

Collaborative economy platforms are providers of *information society services* as they provide a service (1) normally against remuneration, (2) at distance, (3) by electronic means, (4) at the individual request of the recipient of the service (art. 2 ECRs 2002).

In general, they are also *trader* as they are acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf (art. 2.2 CRA 2015). When they deal with a *consumer*, an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession (art. 2.3 CRA 2015), consumer protection rules apply.

¹¹⁰ DTI Guide for Business to the Electronic Commerce Regulation 2002, para 6.8.

2.2. Obligations

As they are information society services providers, platforms are subject to the obligations of the e-Commerce Directive, in particular with regard to information,¹¹¹ commercial communications,¹¹² and conclusion of contracts.¹¹³

As it is important the services recipients know their rights against the online platforms but also against the services providers, the Report of the House of Lords (2016: para 274) recommends that the platforms should clearly inform recipients that they are less protected when they deal with a provider who is a consumer than when they deal with a professional trader.

2.3. Liability regime

As in other countries, in the UK there is currently no case-law dealing specifically with the liability of collaborative economy platforms as regards the provisions of the national legislation implementing the e-Commerce Directive.

However, the liability of platforms in light of the e-commerce legislation has been tackled by UK courts, for instance as regards defamatory acts. A UK court stated that the role of platform providers such as Google in the case of its Blogger service, is *“a purely passive one.”*¹¹⁴

In a previous case, when assessing the liability of the intermediary with regard to defamatory publications, the same court noted that *“an ISP which performs no more than a passive role in facilitating postings on the internet cannot be deemed to be a publisher at common law.”*¹¹⁵

In the case where the court analysed the liability of Blogger, Google’s blog service, the court said that Google *“does not seek to exercise prior control over the content of blogs or comments posted on them, but it defines the limits of permitted content and it has the power and capability to remove or block access to offending material to which its attention is drawn.”*¹¹⁶

The court also stated that by the provision of the service Blogger, where the content posted is stored, *“Google Inc plainly facilitates publication of the blogs (including the comments posted on them). Its involvement is not such, however, as to make it a primary publisher of the blogs. It does not create the blogs or have any prior knowledge of, or effective control over, their content.”*

The court also stated that the intermediary *“is not in a position comparable to that of the author or editor of a defamatory article.”*

3. Rules on providers

3.1. Authorisation

¹¹¹ Art. 5 of the e-commerce Directive as transposed in UK law by art. Art. 6 ECRs 2002.

¹¹² Art. 6-8 of the e-commerce Directive as transposed in UK law by art. Art. 7-8 ECRs 2002.

¹¹³ Art. 9-11 of the e-commerce Directive as transposed in UK law by art. Art. 9-15 ECRs 2002.

¹¹⁴ *Tamiz v Google Inc* Queen's Bench Division, 2 March 2012

¹¹⁵ *Bunt vs Tilley* Queen's Bench Division, 3 March 2006

¹¹⁶ *Tamiz v Google Inc* Court of Appeal (Civil Division), 14 February 2013

Platforms, as providers of information society services, benefit from article 4 ECRs 2002 and are thus not subject to any prior authorisation in the UK.

Likewise qualified and non-qualified professional providing their services through collaborative economy platforms are not subject to a prior authorisation in the UK, in accordance with article 14 et seq. (for establishment) and article 24 et seq. (for cross-border provision of services) of PSRs 2009.

For the freedom to provide services, article 24 PSRs 2009 establishes that and obligation to obtain an authorisation from a competent body in the UK, *“including entry in a register or registration with a professional body or association”* in the UK is generally prohibited.

3.2. Obligations

Providers should provide the information imposed by Articles 7-11 PSRs 2009.

In addition, if they can be considered as traders contracting with consumers, they should comply with consumer protection rules, in particular on the provision of information of the CCRs 2013 as well as the prohibition of unfair practices of CPRs 2008 and unfair contract terms of CRA 2015.

However, as noted in the Report of the House of Lords (2016: para 261-274), the application of the concepts of trader and consumer is not always clear in the collaborative economy and leads to legal uncertainty with regard to the obligations of the services providers and the rights of the services recipients. Therefore the House of Lords recommends that:¹¹⁷

- *“the Commission and the (UK) Government review the use of these definitions within the consumer protection acquis in order to determine whether gaps in legislation exist and if legislative change is needed;*
- *the Commission publish guidance about the liability of online platforms on consumer protection issues in relation to their users, including their trading partners.”*

In June 2015, the CMA adopted a report on online reviews and endorsements with guidance on the application of consumer protection rules, in particular the CPRs 2008.¹¹⁸

According to the CMA, the businesses (and anyone acting on their behalf) which might have their products or services reviewed by consumers, or may wish to promote their items online should:

- not pretend to be a consumer and write fake reviews about their own or other businesses' goods and services; and
- ensure that advertising and paid promotions are clearly identifiable to readers/viewers as paid-for content (whether the payment is financial or otherwise).

Review sites should:

- be clear about how reviews are collected and checked;
- publish all reviews, even negative ones, provided they are genuine and lawful, and explain the circumstances in which reviews might not be published or might be edited (e.g. swearing, abusive language or defamatory remarks);
- make sure that there is not an unreasonable delay before reviews are published;
- disclose any commercial relationships with businesses that appear on their site, and explain how this might affect businesses' ratings and/or rankings;

¹¹⁷ UK House of Lords (2016 : para 273).

¹¹⁸ CMA (2015).

- clearly identify all advertising and paid promotions, including when reviews have been paid for; and
- have in place appropriate procedures to detect and remove fake reviews, and act promptly in response to reports of suspected fake reviews.

Bloggers and online publications should ensure that any content published on their sites, for which payment has been received (whether financial or otherwise), is clearly identifiable to readers/viewers as paid-for content.

On that basis, the CMA got in February 2016¹¹⁹ commitments of two websites for finding tradespeople (Checktrade and Trustatrader) and three care home review sites (Carehome.co.uk, Care Opinion and Most Recommended Care) to improve their practices by ensuring that all genuine, relevant and lawful reviews are published, that reviews received are checked properly as to whether they are genuine and that important information is brought to the attention of users. In March 2016,¹²⁰ the CMA forced Total SEO & Marketing Ltd a search engine optimisation and online marketing company to cease the practice of writing fake reviews for their clients and to remove the fake reviews already posted online.

The Report of the House of Lords (2016: paras 292-299) also analyses the online rating and reviews systems and call for more transparency. To achieve this objectives, the Report recommends that:¹²¹

- *“all online platforms should have publicly accessible policies for handling negative reviews, and clearly distinguish between user reviews and paid-for promotions;*
- *the Commission publish guidance clarifying how the Unfair Commercial Practices Directive applies to the rating and review systems used by online platforms.”*

3.3. Liability regime

Providers are subject to the contractual and-non contractual liability linked to their services, in accordance with the applicable rules in UK law.

4. Practice and terms of use

4.1. Example 1

(a) The qualification of the contract between the platforms, the providers and the users

In Article 2.1 of the Terms of Service, the platform limits its role as a venue, a neutral platform:

*The platform is a venue for informational and educational purposes to allow Customers to purchase vouchers enabling them to ask questions and Experts to answer them once the Customer redeems their vouchers. **Users of the Site, not the platform, provide the content in Posts (defined below).** The Experts determine which questions to answer. Experts are not employees or agents of the platform but are independent service providers using the Site to sell their knowledge to Customers and, as such, along with Customers, are simply users of the Site.*

¹¹⁹ <https://www.gov.uk/government/news/online-review-sites-commit-to-improve-practices>

¹²⁰ <https://www.gov.uk/government/news/cma-takes-enforcement-action-against-fake-online-reviews>

¹²¹ UK House of Lords (2016 para 299).

The platform is not involved in the conversations between Customers and Experts and does not refer Customers to, or endorse or recommend, particular Experts. You understand and acknowledge that the platform cannot and does not edit, modify, filter, screen, monitor, endorse or guarantee the content of Posts. The platform shall not be liable for any acts or omissions of Experts, content in Posts, the ability of Experts to answer questions or the ability of Customers to pay for answers. We cannot ensure that a Customer or Expert will complete a transaction. Notwithstanding the foregoing, the platform reserves the right, but is not obligated, to refuse to post or to remove any content and/or remove any user's access to the Site.

This is further clarified in Article 4.3.1 of the Terms of Service:

The platform may offer to its users products and services offered by non-platform entities. Placement of information, logos, links or names of such non-platform entities on the Site does not constitute an endorsement or warranty of these entities, their products or services. You take full responsibility for a decision to visit or use the services of any such entity and you agree that the platform is not responsible in any way for anything connected with those non-platform entities. You further acknowledge that no relationship (such as partnership, agent, joint venturer, or employee) is created between you and the platform by formation of this agreement or by your participation on the Site.

(b) The liability of the platforms vis-à-vis the providers and the users

In Article 4.1 of the Terms of Service, the platform limits its liability with regard its own obligations

4.1.2 To the extent permitted by law, we exclude all conditions, warranties, representations or other terms which may apply to the Site or any content on it, whether express or implied.

4.1.3 We will not be liable to you for any loss or damage, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, even if foreseeable, arising under or in connection with:

(a) use of, or inability to use, the Site; or

(b) use of or reliance on any content displayed on the Site; including any dispute with one or more users of the Site.

In Article 4.5 of the Terms of Service, the platform excludes its liability for the services of the providers.

4.5.1 TO THE EXTENT PERMITTED BY LAW, the platform SERVICES, SOFTWARES, AND RELATED DOCUMENTATION ARE PROVIDED "AS IS" AND WITHOUT ANY WARRANTY OF ANY KIND EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NO INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM US OR A USER THROUGH THIS SITE SHALL CREATE ANY WARRANTY, REPRESENTATION OR GUARANTEE NOT EXPRESSLY STATED IN THE TERMS. The platform DOES NOT REPRESENT OR WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED OR ERROR-FREE, THAT DEFECTS WILL BE CORRECTED, OR THAT THIS SITE OR THE SERVER THAT MAKES IT AVAILABLE, ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. The platform DOES NOT WARRANT OR REPRESENT THAT THE USE OR THE RESULTS OF THE USE OF THE MATERIALS AVAILABLE THROUGH THE SERVICE, FROM THIRD PARTIES OR A LINKED SITE WILL BE CORRECT, ACCURATE, TIMELY, RELIABLE OR OTHERWISE.

4.5.2 UNDER NO CIRCUMSTANCES WILL the platform BE LIABLE FOR ANY LOSS OR DAMAGE CAUSED BY YOUR RELIANCE ON INFORMATION OBTAINED THROUGH THE SITE, FROM THIRD PARTIES (SUCH AS EXPERTS OR OTHERS) OR A LINKED SITE, OR YOUR RELIANCE ON ANY PRODUCT OR SERVICE OBTAINED FROM A THIRD PARTY OR A LINKED SITE. TO THE MAXIMUM EXTENT PERMITTED BY LAW, YOUR USE OF THIS SITE IS AT YOUR SOLE RISK.

4.5.3 NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED BY YOU FROM the platform OR THROUGH OR FROM THE platform SERVICES SHALL CREATE ANY WARRANTY.

(c) The qualification of the contract between the providers and the users

According to Article 2.1 of the Terms of Service, the platform is not part to the contract between the expert and the customer and cannot be held liable for a breach of such contract. Therefore, only the expert can be held liable in this case.

2.1.3 When an Expert agrees to answer a question on the Site the Customer and Expert have entered into an agreement between themselves to which the platform is not a party. The platform takes no responsibility for any liabilities or obligations that any user takes on under such an agreement.

4.2. Example 2

(a) The qualification of the contract between the platforms, the providers and the users

According to its terms and conditions, the platform analysed is *“an online platform through which counseling, consulting, professional advice and any other information are provided.”*

The platform clarifies that the providers offering their services are neither its employees nor agents or representatives.

(b) The liability of the platforms vis-à-vis the providers and the users

In relation to the users, the terms and conditions of the platform set out that the platform assumes *“no responsibility for any act, omission or doing of any Counselor”* (provider).

Further, the platform makes:

- *“no representation or warranty whatsoever as to the willingness or ability of a Counselor to give advice”,*
- *“no representation or warranty whatsoever”* as to whether the user will find the services relevant, useful, correct, satisfactory or suitable to his needs.

The terms and conditions also provide that the platform does not control the quality of the service provider and does not determine whether the provider is qualified to provide any specific service, thereby acting as a mere provider of communications between professional provider and user. Interestingly, the platform acknowledges that *“while we may try to do so from time to time, in our sole discretion, you (the user) acknowledge that we do not represent to verify, and do not guarantee the verification of, the skills, degrees, qualifications, licensure, certification, credentials, competence or background of any Counselor.”*

However, the platform states on its website that *“Counselors in the platform are licensed, trained, experienced, and accredited psychologists (PhD / PsyD), marriage and family therapists (MFT), clinical*

social workers (LCSW), or licensed professional counselors". This clearly contradicts the terms of service and therefore the platform might be incurring in misleading advertising.

Regarding third party content, the terms and conditions provide that *"the Platform may contain other content, products or services which are offered or provided by third parties ("Third Party Content"), links to Third Party Content (including but not limited to links to other websites) or advertisements which are related to Third Party Content. You confirm and acknowledge that we have no responsibility over any such Third Party Content, including (but not limited to) any related products, practices, terms or policies, and that we will not be liable for any damage or loss caused by any Third Party Content."*

In this case, the platform does not seem to exert any control over the content posted on it and hence can in our view benefit from the liability provisions in UK legislation,

(c) The qualification of the contract between the providers and the users

According to the terms and conditions, the user's *"relationship relating to the Counselor Services is strictly with the Counselor"*. *"We are not involved in any way with the actual substance of that relationship or any part of the Counselor Service (whether provided through the Platform or not), and we do not validate or involved in any of the Counselor Services"*, the platform adds.

Section 5: Conclusions

The rise of the collaborative economy carries substantial economic potential for the European economy¹²² but raises important challenges to the EU and national laws, in particular to those related to services, e-commerce and consumer protection because of two main trends:

- First, the move from a bipartite relationship between an Internet seller and a consumer buying goods or services directly from the seller (Internet 1.0) to a tripartite relationship where an Internet platform intermediates between a third-party seller and a buyer (Internet 2.0). The e-Commerce Directive, adopted in 2000, was based on Internet 1.0 commerce.
- Second, the move from a vast majority B2C transactions that were also the basis of Internet 1.0 commerce to a massive increase of C2C transactions made possible by collaborative economy platforms and the reduction of transactions costs and increase of trust they allow. Here again, the consumer acquis was built at times when most of the transactions were B2C.

Those two trends, which are related, require clarifications of the EU and national interpretations of current laws. To deal with those, we review the obligations and the liability of each of the three main actors of the collaborative economy platforms offering professional services by distinguishing between the intermediation service (the role and the added-value of the platform) and the intermediated services (the professional service exchanged on the platform).

(i) Liability regime for the collaborative economy platform

Given the wording, the context and the objective of the e-Commerce Directive as well as the broad interpretation of its scope adopted by the Court of Justice of the EU in the *Netlog* and *eBay* cases, we think that the collaborative economy platforms covered by this study are providers of information society services. We do not think that this position will be overturned in the currently pending *Uber Spain* referral, where what seems to be at stake is the role of the platform in relation to the underlying service.

Therefore, we think that collaborative economy platforms are subject to the obligations of the e-Commerce Directive, which applies in B2C as well as in B2B relations, in particular with regard to the information they need to provide, the transparency on commercial communications and the contracts conclusion. The analysis of some cases studies shows us that some of those obligations are not always met in practice.

The platforms also enjoy the rights of the e-Commerce Directive. They benefit from the country-of-origin principle. Moreover, when they are merely a neutral, passive hosting platform, they benefit from the liability exemption with regard to the information stored and the activities done by the users (professional and non-professional services' providers and services' recipients).

The distinction between passive intermediaries enjoying the liability exemption and active intermediaries subject to standard liability rules has been clarified by the Court of Justice of the EU in the *eBay* case.¹²³ However, this subtle distinction was easier to apply in the Internet 1.0 commerce with a separation between the Internet sellers and the technical intermediaries than in the Internet 2.0 commerce where the seller is not anymore the Internet actor and the platforms are playing a role which may go beyond the roles of a traditional intermediary.

¹²² See European Parliamentary Research Service (2016).

¹²³ Case C-324/09, *L'Oreal et al. v. eBay*, points 115-116.

Indeed, the collaborative economy platforms play, alongside with the providers, an important role in building trust among the recipients of the professional and non-professional services. The question then is whether such role leads to the removal of the liability exemption. The terms of use we analyse specify that the platforms are merely and passively intermediating providers and recipients, thereby indicating that they would be only hosting platforms.

However, it is not clear to us, and in some cases not convincing, that this is the case in reality. We have seen that some platforms in practice carry out tasks (i.e. selection of providers *ex ante* or *ex post*, active control and discretionary removal of content posted) that do not correspond to the passive role an intermediary normally plays. Obviously, a case-by-case assessment is needed but we consider that platforms may undertake a role that goes beyond of that of a hosting intermediaries. In this case, they cannot benefit from the liability exemption in both EU and national e-Commerce laws.¹²⁴

To increase legal certainty as well as consistency of legal interpretations across the EU, thereby contributing to the success of the collaborative economy across the internal market, the Commission may need to clarify the application of Article 14 of the e-commerce, as interpreted by the Court particularly in the *eBay* case, to the collaborative economy platforms. For instance, the Commission may list the relevant criteria developed by the Court of Justice of the EU to determine whether a platform may benefit from the liability exemption or not.

Finally, it is important to underline that when a platform does not enjoy the liability exemption, the normal tort law applies and the platform is only liable in case of breach of *its* obligations. Except when there is a labour contract between the platforms and the providers, which is normally not the case, the platform is not liable for breach of the obligations of the providers offering their services via the platforms.

(ii) Liability regime for the provider of services

The provider of a service on a collaborative economy platforms is subject to several layers of obligations aiming at protecting the recipient of the service, whose application depend on the legal qualification of the provider.

- All providers, i.e. natural or legal person offering or providing services, should make some information available, for instance on their identities, its contractual conditions or their insurance schemes.
- When the provider is a trader (i.e. acting for purposes relating to his trade, business, craft or profession) dealing with a consumer (i.e. acting for purposes that are wholly or mainly outside his trade, business, craft or profession), she is subject to the additional consumer protection obligations. Those obligations are reinforced when the contract is concluded at distance, which is the case of the collaborative economy.
- When the trader is exercising a qualified profession, i.e. a profession which is specifically regulated in the Member States, she is subject to a third layer of rules defined in the law and by professional bodies. These rules often include obligations to hold a university degree, to register in the relevant professional body, and to have an insurance.

¹²⁴ Montero (2011:102) argues on the contrary that liability exemption should be applied extensively to ensure the development of Internet 2.0 commerce.

Those legal distinctions were relatively easy to apply in the Internet 1.0. commerce and the obligations they imply were justified by the roles they played. In the Internet 2.0 commerce where non-professional trader have an easy access to an important market demand hence can easily offer services, the distinctions are more difficult to apply and their obligations may be more difficult to justify.

Given the broad definition of provider in EU and national laws, individuals offering their services through the platforms may be considered service providers. However, the national legislations analysed in this study do not give the means to differentiate clearly and on a general basis cases where the offerer of a service is acting as a provider from those where he is acting as a consumer (i.e. a prosumer). When providers, they should provide the information foreseen in the Services Directive and the national implementing laws. This obligation would be disproportionate for some very small and occasional actors of the collaborative economy.

Furthermore, the consideration of a qualified professional as a prosumer becomes even more difficult, taking into account the legislation in the member states covered make them always subject to the requirements attached to their qualified profession.

The Commission may consider the removal of the information obligations in the Services Directive, as they somehow duplicate the information obligations in the consumer acquis.

The definition of trader has some flexibility and has been interpreted by national courts on the basis of a body of evidence. However, such flexibility may lead to legal uncertainty which can be high in the collaborative economy when a service provider does not know at which point she becomes a trader and is thus subject to consumer protection obligations.¹²⁵ If that uncertainty becomes detrimental to the development of the collaborative economy, more precise interpretative criteria on the trader's legal qualification (for instance related the frequency or the amount of the services offered) may be needed.

Finally, in case of qualified professionals, it should be made clear to all providers offering services on the collaborative economy platforms that they are subject to the rules of the profession regarding for instance insurance, diploma or registration to professional bodies.

(iii) The protection of the recipient of services

One of the key ingredients of success of the collaborative economy is the users' trust.¹²⁶ This trust is the shared responsibility of the platforms and the service providers. It requires correct information on the quality of the providers and on the extent of their obligations. This has several implications.

First, the legal qualification of the provider (a professional trader subject to consumer protection obligations or a non-professional consumer not subject to those obligations) should be made clear to the recipients of the services who need to know the extent of their protection. Here again, EU consumer acquis may help as presenting oneself as consumer while being a trader has been condemned as a prohibited misleading practice. But given the sometimes uncertain application of the distinction between trader and consumer in the collaborative economy, legal guidance need to

¹²⁵ UK House of Lords (2016: para 272-273) also points to this legal uncertainty and calls for Guidance of the Commission on the liability of online platforms on consumer protection issues.

¹²⁶ Botsman and Rogers (2010).

be provided by EU and national authorities. Moreover, the online platforms have a responsibility in informing the service recipients on the legal qualification of the services providers.¹²⁷

Second, online reviews and endorsements, which are key in the choice of the consumers on the platforms, should be accurate and not biased. The platforms have an incentive to guarantee the accuracy of the online reviews when inaccuracy can be detected and negatively impact the use of the platforms. Otherwise, consumer regulation should protect consumer against false or biased reviews and endorsements. Current consumer protection rules, such as the prohibition of misleading commercial practices, may be instrumental in that regard. Therefore the link between the prohibition of misleading practices and online reviews should be clarified.¹²⁸

In conclusion, the collaborative economy raises legal questions regarding services, e-commerce and consumer protection laws that need to be clarified at the EU level to increase, in an harmonised manner, legal certainty for all the actors (platforms, providers and recipients) and therefore help the development of such promising new way of commerce within the European Union.

¹²⁷ Also in this sense, UK House of Lords (2016: para 274).

¹²⁸ UK House of Lords (2016: para 299) also calls for more transparency on rating and review systems and calls for Guidance of the Commission on how the Unfair Commercial Practices Directive applies to the rating and review systems used by online platforms.

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EU law

Definitions related to persons

Provider (art. 4(2) Dir. 2006/123)

Any natural person who is a national of a Member State, or any legal person as referred to in Article (54 TFEU) and established in a Member State, who offers or provides a service.

Trader (art. 2(2) Dir. 2011/83, also art. 2(b) Dir. 2005/29)

Any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.

Recipient of the (information society) service (art. 2(d) Dir. 2000/31)

Any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible.

Consumer (art. 2(1) Dir. 2011/83, see also art. 2(a) Dir. 2005/29, art. 2(e) Dir. 2000/31)

Any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

Definitions related to activities

Services (art. 57 TFEU)

Are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions.

Information society service (art. 1(b) Dir. 2015/1535)

Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:

- 'at a distance' means that the service is provided without the parties being simultaneously present;
- 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

Regulated profession (art. 3(1a) Dir. 2005/36, see also art. 2(l) Dir. 2005/29, art. 2(g) Dir. 2000/31)

A professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit.

Service contract (art. 2(6) Dir. 2011/83)

Any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.

Brussels

Definitions related to persons

Prestataire (art. 1.2, 3° CDE)

Toute personne physique ressortissante d'un Etat membre ou personne morale visée à l'article 54 du TFUE et établie dans un Etat membre qui offre ou fournit un service.

Entreprise (art. 1.1, 1° CDE)

Toute personne physique ou personne morale poursuivant de manière durable un but économique, y compris ses associations.

Client (art. 1.2, 3° CDE)

Toute personne physique ressortissante d'un Etat membre ou qui bénéficie de droits qui lui sont conférés par des actes communautaires ou personne morale visée à l'article 54 du TFUE établie dans un Etat membre qui, à des fins professionnelles ou non, utilise ou souhaite utiliser un service.

Consommateur (art. 1.1, 2° CDE)

Toute personne physique qui agit à des fins qui n'entrent pas dans le cadre de son activité commerciale, industrielle, artisanale ou libérale.

Definitions related to activities

Service (art. 1.1, 5° CDE)

Toute prestation effectuée par une entreprise dans le cadre de son activité professionnelle ou en exécution de son objet statutaire

Service de la société de l'information (art. 1.18, 1° CDE)

Tout service presté normalement contre rémunération, à distance, par voie électronique et à la demande individuelle d'un destinataire du service.

Profession réglementée (art. 1.2, 8° CDE)

Une activité ou un ensemble d'activités professionnelles dont l'accès, l'exercice ou une des modalités d'exercice est subordonné directement ou indirectement, en vertu de dispositions législatives, réglementaires ou administratives, à la possession de qualifications professionnelles déterminées; l'utilisation d'un titre professionnel limitée par des dispositions législatives, réglementaires ou administratives aux détenteurs d'une qualification professionnelle donnée constitue une modalité d'exercice.

Personne exerçant une profession libérale (art. 1.8 35° CDE)

Toute personne physique ou morale qui, de manière intellectuellement indépendante et sous sa propre responsabilité, exerce une activité professionnelle consistant principalement en des prestations intellectuelles, a suivi auparavant la formation exigée, est tenue de suivre une formation continue, est soumise à un organe disciplinaire créé par ou en vertu de la loi et n'est pas un commerçant au sens de l'article 1er du Code de commerce.

Volontariat (art. 3, 1° loi 2005)

Toute activité : a) qui est exercée sans rétribution ni obligation; b) qui est exercée au profit d'une ou de plusieurs personnes autres que celle qui exerce l'activité, d'un groupe ou d'une organisation ou encore de la collectivité dans son ensemble; c) qui est organisée par une organisation autre que le cadre familial ou privé de celui qui exerce l'activité; d) et qui n'est pas exercée par la même personne

et pour la même organisation dans le cadre d'un contrat de travail, d'un contrat de services ou d'une désignation statutaire.

Barcelona

Definitions related to persons

Service Provider (article 3 Law 17/2009)

“Cualquier persona física con la nacionalidad de cualquier Estado miembro, o residente legal en España, o cualquier persona jurídica o entidad constituida de conformidad con la legislación de un Estado miembro, cuya sede social o centro de actividad principal se encuentre dentro de la Unión Europea, que ofrezca o preste un servicio.”

(Servicio: cualquier actividad económica por cuenta propia, prestada normalmente a cambio de una remuneración, contemplada en el artículo 50 del Tratado de la Comunidad Europea.)

Trader (article 111-2 Law 22/2010)

“Cualquier persona física o jurídica, pública o privada, que, en la realización de un negocio, un oficio o una profesión, comercializa bienes o servicios o, de cualquier otra forma, actúa en el marco de su actividad empresarial o profesional.”

Article 4 Law 1/2007: “a efectos de lo dispuesto en esta norma, se considera empresario a toda persona física o jurídica, ya sea privada o pública, que actúe directamente o a través de otra persona en su nombre o siguiendo sus instrucciones, con un propósito relacionado con su actividad comercial, empresarial, oficio o profesión.”

Article 1 Commercial Code: “son comerciantes para los efectos de este Código:

- 1.º Los que, teniendo capacidad legal para ejercer el comercio, se dedican a él habitualmente.*
- 2.º Las compañías mercantiles o industriales que se constituyeren con arreglo a este Código.”*

Professional (article 2.2 Law 7/1998)

“A los efectos de esta Ley se entiende por profesional a toda persona física o jurídica que actúe dentro del marco de su actividad profesional o empresarial, ya sea pública o privada.”

Consumer (article 111-2 Law 22/2010)

“Las personas físicas o jurídicas que actúan en el marco de las relaciones de consumo en un ámbito ajeno a una actividad empresarial o profesional. Tienen también esta consideración los socios cooperativistas en las relaciones de consumo con la cooperativa. Cualquier referencia que se haga en la presente ley al concepto de persona consumidora se entiende hecha a la persona consumidora o usuaria en la medida que goza de bienes y servicios fruto de la actividad empresarial en el mercado.”

Article 3 Law 1/2007: “son consumidores o usuarios las personas físicas que actúen con un propósito ajeno a su actividad comercial, empresarial, oficio o profesión.

Son también consumidores a efectos de esta norma las personas jurídicas y las entidades sin personalidad jurídica que actúen sin ánimo de lucro en un ámbito ajeno a una actividad comercial o empresarial.”

Service recipient (article 3 Law 17/2009)

“Cualquier persona física o jurídica, que utilice o desee utilizar un servicio.”

Definitions related to activities

Information society service (annex Law 34/2002)

“Todo servicio prestado normalmente a título oneroso, a distancia, por vía electrónica y a petición individual del destinatario.

El concepto de servicio de la sociedad de la información comprende también los servicios no remunerados por sus destinatarios, en la medida en que constituyan una actividad económica para el prestador de servicios.”

Qualified profession (article 2 Law 7/2006)

“A los efectos de la presente ley son profesiones tituladas las que se caracterizan por la aplicación de conocimientos y técnicas para cuyo ejercicio es preciso estar en posesión de un título académico universitario, acreditativo de la completa superación de un plan de estudios, que habilite para el ejercicio profesional de acuerdo con la normativa vigente y, si procede, para cumplir las demás condiciones establecidas por ley.”

London

Definitions related to persons

Provider (Art. 4 Provision of Services Regulations 2009)

In relation to a service, means a person who provides, or offers to provide, the Service

Trader (Art. 2.2 Consumer Rights Act 2015)

A person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

Consumer (Art. 2.3 Consumer Rights Act 2015)

An individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

Definitions related to activities

Information society services (Art. 2 Electronic Commerce Regulations 2002)

(which is summarised in recital 17 of the Directive as covering "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service") has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations(c), as amended by Directive 98/48/EC of 20 July 1998(d))

Regulated profession (Art. 4 Provision of Services Regulations 2009)

A professional activity or group of activities—

(a) access to which, the pursuit of which or one of the modes of pursuit of which is subject (directly or indirectly) by virtue of legislative, regulatory or administrative provisions to the possession of specified qualifications, or

(b) the pursuit of which is by persons using a professional title which is limited by legislative, regulatory or administrative provisions to holders of a given professional qualification;