

THE SHARING ECONOMY: REGULATION AND THE EU COMPETITION LAW

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This article addresses a phenomenon of the sharing economy regulation and the European Union competition law concerns its business models encounter or are likely to face in the foreseeable future. The first part of the paper examines the importance and relevance of the sharing economy for the regulators, whilst the second part reviews potential systems of the regulation, that is, through the governmental and self-regulation mechanisms, with a highlight on the role of innovation and the consumers' perspective. The third part deals with the identified competition law concerns arising from both the dominant position and the possible mergers of the sharing economy undertakings within the EU. It is overall argued that the sharing economy changes the way of doing business for good, providing an alternative to the traditional markets and a better utilisation of unused assets, what calls for an effective and carefully tailored regulatory framework.

I. Introduction

The sharing economy¹ – a term often used interchangeably, although inaccurately², with expressions such as ‘collaborative consumption’,

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¹ “An economic system in which assets or services are shared between private individuals, either for free or for a fee, typically by means of the Internet.” See Oxford Dictionary, *Sharing economy*

<www.oxforddictionaries.com/definition/english/sharing-economy> accessed 12 July 2016.

² Each of these terms describes a similar, yet different, business model. Author opts for the term ‘sharing economy’ as the most commonly used expression in the academia. It is also worth mentioning that the European Commission uses the term ‘collaborative economy’, whilst the other EU institutions use the ‘sharing economy’. See more Rachel Botsman, *The Sharing Economy: Dictionary of commonly used terms*

‘collaborative economy’, ‘peer economy’, ‘on-demand economy’, ‘access economy’, ‘circular economy’ or ‘gig economy’ – is used in this paper as an umbrella term for any economic system³ in which businesses operate on online platforms which enable sharing of goods or services between private individuals whether for free or a fee.⁴ The whole idea behind the sharing economy is that it allows individuals to create monetary or non-monetary benefits from often underused assets or skills.⁵

In many aspects, the sharing economy appears to be not efficiently regulated, or it is captured only by the traditional regulatory frameworks.⁶ Within the discussions around the ongoing Digital Single Market Strategy⁷, the European Commission (‘Commission’) believes that tearing down Member States’ regulatory walls and moving to a single digital market could annually contribute €415 billion to the EU economy and create hundreds of thousands of new jobs⁸. In its communication, the Commission highlights that the sharing economy “*is small but growing rapidly, gaining important market shares in some sectors*”⁹. It estimates that the gross revenue sharing economy reached €28 billion in 2015, almost double than in the previous year and is set to expand robustly.¹⁰

Despite it being a phenomenon of the 21st century¹¹, case law related to the sharing economy in the European Union (‘EU’) is rather modest, with EU

<www.collaborativeconsumption.com/2015/11/12/the-sharing-economy-dictionary-of-commonly-used-terms/> accessed 4 July 2016.

³ See more about the different sharing economy business models in Damien Demailly and Anne-Sophie Novel, *The sharing economy: make it sustainable* (2014) Studies N°03/14, IDDRI, Paris, France, 13-18.

⁴ See more Alex Stephany, *The Business of Sharing: Making it in the New Sharing Economy* (Palgrave Macmillan 2015).

⁵ PwC Publication, *Consumer Intelligence Series - The Sharing Economy* (2015) <www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf> accessed 26 June 2016, 5.

⁶ See *infra* III. Regulating the Sharing Economy.

⁷ See more European Commission, *Digital Single Market* <http://ec.europa.eu/priorities/digital-single-market_en>; *Collaborative economy* <http://ec.europa.eu/growth/single-market/strategy/collaborative-economy/index_en.htm> accessed 30 June 2016.

⁸ See Commission Staff Working Document, ‘*A Digital Single Market Strategy for Europe – Analysis and Evidence*’, SWD(2015) 100, 06.05.2015.

⁹ Communication from the Commission, *A European agenda for the collaborative economy*, COM(2016) 356 final, 02.06.2016., 2.

¹⁰ *ibid.*

¹¹ Sharing economy started to appear in the literature in early 2000s. See more Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm* (2002) 112 *The Yale Law Journal* 369.

courts having not yet considered any competition law case involving the sharing economy business. To date, authorities and courts have dealt only with the limited scope of the legal issues occurring in the ride-sharing (e.g. Uber) and flat-sharing (e.g. Airbnb) sectors – arguably because these two sharing economy companies are most advanced, having become its poster children. Depending on the jurisdiction, they are facing diverse challenges – from a sector-specific regulation and various political initiatives coming from local authorities who are scrutinising the need for protection of ‘traditional competitors’ and consumers from the sharing economy’s alleged undesirable effects – to strong, sometimes even violent, reactions of the market incumbents.¹²

The question of how should the sharing economy be regulated, to a great extent, reflects the ‘unhappy marriage’¹³ between the innovation and competition law.¹⁴ Even though innovation in many ways promotes rivalry, as some point out – whilst the former may be seen to promote monopolies, the latter is designed to oppose them.¹⁵ Notwithstanding, there are at least two main avenues available to regulate the sharing economy. One is through governmental regulation and the other through self-regulation. Along with the consumer’s perspective, with an accent on the difficulty of establishing the liability for injuries or damages caused, these options are discussed below. It is generally argued that establishment of a modern and flexible framework for the sharing economy should be applauded since it would clarify much vagueness its innovative business models have brought to practice.

This paper further examines various sharing economy concerns in the context of the primary EU competition law rules, including articles 101 and 102 of the Treaty on the Functioning of the European Union¹⁶ (‘TFEU’) and the European Union Merger Regulation¹⁷ (‘EUMR’). Article 101(1) TFEU seeks to prohibit agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition, whilst article 102 TFEU is directed towards the unilateral conduct of dominant firms which act

¹² See *infra* – II.II. Why is the Sharing Economy important?

¹³ Lex Mundi Intellectual Property Practice Group, *Intellectual Property and Competition Law* (2012) p 1 <www.lexmundi.com/Document.asp?DocID=3911> accessed 13 July 2016.

¹⁴ See *more infra* III.I. The Role of Innovation.

¹⁵ *ibid.*

¹⁶ *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU), OJ C 326, 26.10.2012.

¹⁷ *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (the EC Merger Regulation), OJ L 24, 29.1.2004.

in an abusive manner.¹⁸ The EUMR was introduced due to concern that certain mergers could lead to less competitive markets and adverse effects for consumers post-merger.¹⁹

The majority of legal concerns around the sharing economy that arose among the commentators across the board were largely founded on the predictions and analysis of the ongoing development of the sharing economy business models. It seems that these concerns first and foremost may arise from a position of dominance, which falls under the scope of Article 102 TFEU, even though some of them, such as contractual obligations and pricing restrictions, may as well be scrutinised as agreements under Article 101(1) TFEU. The concerns identified in this paper are, namely, the ‘winner-takes-all’ effect, imposing barriers to ‘multi-homing’, asymmetries of bargaining power, contractual obligations such as referencing rivals, ‘most-favoured-nation’ and ‘meet-the-competition’ clauses, and imposing of price restrictions, for instance, a resale price maintenance and predatory pricing.²⁰ The concerns further stretch to the merger control,²¹ with issues such as escaping the scrutiny of competition authorities, vertical integration and leveraging and the use of big data.

As the sharing economy evolves rapidly – with its incumbents more and more likely to fall under some of these rules, this research should provide a useful overview of the credible EU competition law concerns. It is overall argued that even though competition law concerns are present, the existing tools of enforcement can be sufficient if the Commission appropriately approaches to the assessment of, in many ways specific, a phenomenon of the sharing economy.

¹⁸ Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015), 183.

¹⁹ *ibid.*

²⁰ *See infra* IV.I. Concerns arising from a dominant position.

²¹ *See infra* IV.II. Concerns under EU Merger Regulation.

II. The sharing economy

Due to its peer-to-peer nature²², the sharing economy operates on a two-sided market. Two-sided markets arise when two different types of users may benefit from interacting with each other through one or more platforms or mediators – and these are not a recent thing.

Two-sided markets have probably existed from at least medieval times²³, when franchises were granted by the crown or other authorities to entities such as towns or priories, etc., to run fairs and markets to generate commerce, bringing merchants to sell their goods to buyers who had likely originally come to worship on a Sunday or saint’s feast day.²⁴ More merchants attracted more buyers and vice-versa, a virtuous cycle that in today’s economic terms are called a ‘network effect’²⁵. Similar two-sided platforms can be found in newspapers, as an intermediary to link advertisers and readers, with greater value for advertisers the more readers a newspaper has. One of the most important innovations in financial services since World War II is the credit card, a platform linking consumers and merchants, again the greater numbers of each group creating more value for the other group in the network. More recently, computer operating systems connect computer users and application developers.²⁶

The sharing economy functions on these same principles. In this case, the online platform is acting as an intermediary. In order to operate, that platform must get both sellers and buyers on board – and only if a transaction between them takes place the market exists.²⁷ Thus, there are at least three categories of actors in the sharing economy. First are providers or suppliers of goods

²² See *infra* II.I. What is the Sharing Economy?

²³ Ray Fisman and Tim Sullivan, *The Inner Lives of Markets: How People Shape Them—And They Shape Us* (PublicAffairs 2016) 99-120.

²⁴ See Samantha Letters, *Online Gazetteer of Markets and Fairs in England and Wales to 1516* (Last updated 16 December 2013) <www.history.ac.uk/cmh/gaz/gazweb2.html> accessed 13 July 2016.

²⁵ See *more infra* IV.I.a. Winner-takes-all effect; See also David S. Evans and Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses* (2012) Coase-Sandor Institute for Law & Economics Working Paper No. 623; Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects* (1998) 86(3) *California Law Review*, art 7.

²⁶ See Thomas R. Eisenmann, Geoffrey G. Parker and Marshall W. Van Alstyne, *Strategies for Two-Sided Markets* (October 2006) *Harvard Business Review* 92.

²⁷ David S. Evans, *The Antitrust Economics of Two-Sided Markets* (September 2002) AEI-Brookings Joint Center for Regulatory Studies Related Publication 2, 2.

and services. They share their assets, time, resources and/or skills, and can be private or professional undertakings operating on a temporary or permanent basis. Second are the platform operators who through their platforms offer access to such goods or services and facilitate transactions and other intermediary services between the providers and users. Third are the users of these goods and services – the consumers.²⁸

Having these relationships in mind, the common features of business models employed in the sharing economy are discussed further in the below text as these are crucial to understanding what the sharing economy really is, why it is important and how it is relevant to the EU competition law.

1. What is the sharing economy?

As previously noted, ‘sharing economy’ is an umbrella term used to capture a wide range of similar business models that have emerged because of developments in information and communications technology, significantly lowering transactions costs.²⁹ The common features of these business models are considered below.

A primary underlying feature of sharing-economy businesses is that each is set up in the form of a multisided ‘peer-to-peer’ online platform that facilitates the exchange of goods or services. The business – a third-party platform operator – brings together providers of goods and services on one side, and users, who can access the platform over the internet, on the other. At the same time, the platform provider does not purchase or sell any goods or services itself.³⁰ The benefit of such business models is that being hosted through digital platforms enables “*a more precise, real-time measurement of spare capacity and the ability to dynamically connect that capacity with those who need it*”³¹.

A further sharing economy characteristic is the mutual trust between providers of goods and services and users, since “*a standard and more*

²⁸ Commission Staff Working Document, *European agenda for the collaborative economy - supporting analysis*, SWD(2016) 184 final, 02.06.2016, 5.

²⁹ Deloitte Access Economics, *The sharing economy and the Competition and Consumer Act – Australian Competition and Consumer Commission* (2015) <www.accc.gov.au/system/files/Sharing%20Economy%20-%20Deloitte%20Report%20-%202015.pdf> accessed 3 July 2016, 1.

³⁰ Stephen P. King, *Sharing Economy: What Challenges for Competition Law?* (2015) 6(10) *Journal of European Competition Law & Practice* 729, 729.

³¹ *PwC Publication* (n5), 15.

*intrusive regulation is often absent*³². That trust is created through ‘peer review’ system incorporated into the platform. It is used to rate goods and services provided, often aiming to ensure minimum standards and to overcome consumer protection concerns. That system “to some degree mimics the outcomes that more direct regulation would seek to achieve”.³³ Nevertheless, that trust is essential for individuals to connect and make a transaction³⁴, and consequently for the platform operators to make a profit out of it. A renowned sharing economy expert Rachel Botsman went even further, arguing that “trust is the currency of the new economy”.³⁵

Finally, for sharing economy platforms to be functional, ownership of an asset or skill is a prerequisite.³⁶ The ownership confers the right to use the asset or skill the way owner sees it fit, including allowing others to use or access it. Hence, literally anything underused or simply available to monetise – such as empty room, garage or office space, a spare work tool, bike or a space in a car – can create a new value for the owner. That facilitates mutually beneficial exchanges that might not otherwise have occurred.³⁷

These three characteristics lead to probably the biggest incentive to engage in sharing economy business – the possibility for small and micro entrepreneurs to offer services without employing a large amount of capital, while also being able to easily create new employment, flexible working arrangements and new sources of income. It enables them reaching a wider market and customer base, creating more competitive and efficient markets

³² João E. Gata, *The Sharing Economy, Competition and Regulation* (November 2016) Competition Policy International, 2 <www.competitionpolicyinternational.com/assets/Europe-Column-November-Full.pdf> accessed 30 June 2016.

³³ *Deloitte Access Economics* (n29) 3.

³⁴ “Economic agents perceive digital trust to be the key element of success in the digital economy: 83% of respondents to the Accenture Technology Vision 2016 Survey agreed that trust is the cornerstone of the digital economy. Given its important role the question arises how government policymaking can promote social trust in online platforms.” See Ignacio De Leon, *Competition Policies in the Internet-based industries: Do we need to reboot the debate?* (2016), 19 <www.academia.edu/24719038/Competition_Policies_in_the_Internet-based_industries_Do_we_need_to_reboot_the_debate> accessed 2 July 2016.

³⁵ See Rachel Botsman, *The currency of the new economy is trust*, TED Talks (June 2012) <www.ted.com/talks/rachel_botsman_the_currency_of_the_new_economy_is_trust> accessed 13 July 2016.

³⁶ *Deloitte Access Economics* (n29) 2.

³⁷ *ibid.*

by improving the matching between demand and supply³⁸ – and that seems to be the real essence of the sharing economy.

2. Why is the sharing economy important?

The sharing economy's significance is not only its rapid growth on a global scale but also its changes to the traditional ways of doing business. It is one of the key focus points of the EU Digital Single Market Strategy, being described as “*a new way to offer and use products and services through online platforms*”³⁹. The sharing economy covers the whole spectrum of different sectors and is much more widespread than one might be aware. According to ‘Mesh’⁴⁰, a website with the flattering subheading ‘the pulse of the sharing economy’, there are over 9.700 registered sharing economy companies across 133 countries. To illustrate, a few most well-known sharing economy companies are: *Airbnb*, *CouchSurfing* and *HomeAway* in a short-term rental sector; *Uber*, *Lyft* and *BlaBlaCar* in a transportation sector; *Taskrabbit*, *TaskAngel* and *Freelancer* in a personal services sector; *TransferWise*, *LendingClub* and *KickStarter* in a finance sector, and many, many more across the board.⁴¹ The constant development of sharing economy is recognised by the EU which points out that “*many imaginative people in Europe are developing new business models*” on a daily basis.⁴²

The British Government envisaged the potential in 2014, when Business Minister Matthew Hancock MP asked an independent researcher to write a report on the sharing economy and “*to make recommendations as to how the UK could become a global centre for this fast-growing sector*”⁴³. In one of its Reports from Sessions on ‘Online Platforms and the Digital Single Market’ House of Lords recommended careful balancing of the need to

³⁸ *European agenda for the collaborative economy - supporting analysis* (n28) 5.

³⁹ European Commission, *Factsheet on the collaborative economy* (2016) <<http://ec.europa.eu/DocsRoom/documents/16955/attachments/1/translations/en/renditions/native>> accessed 1 July 2016, 1.

⁴⁰ See ‘Mesh – the pulse of sharing economy’, <<http://meshing.it/>> accessed 12 July 2016.

⁴¹ See more Mesh, *Companies* <<http://meshing.it/companies>> accessed 12 July 2016.

⁴² *Factsheet on the collaborative economy* (n39) 1.

⁴³ Debbie Wosskow, *Unlocking the sharing economy - An independent review*, Report for the UK Minister of State for Business, Enterprise and Energy (2014) 8 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/378291/bis-14-1227-unlocking-the-sharing-economy-an-independent-review.pdf> accessed 5 July 2016.

protect competition and to promote innovation, which could “*facilitate increased investment in digital tech firms, and—most importantly of all—create a scale market of 500 million consumers*”.⁴⁴

According to the PwC research⁴⁵ from 2014, by 2025, only the five sharing economy sectors could generate over half of overall sales in all ten examined sectors (sharing economy sectors: *peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music and video streaming*, and traditional sectors: *equipment rental, B&B and hostels, car rental, book rental and DVD rental*). An estimated potential revenue is worth \$335 billion. PwC also estimates the UK’s share could be worth around \$15 billion by the same time.

Despite the key EU lawmakers’ awareness of the phenomenal growth of the sharing economy across many new sectors, dealing with it is yet not that easy task. Not only that the sharing economy influences our overall economy, but it has an impact on the society as a whole. Indeed, conflicting interests were noted among the stakeholders involved, having “*made the ‘sharing economy’ a domain of conflictual rhetoric and public controversies, legal disputes, and even violent protests*”⁴⁶. French Government responded to such protests⁴⁷ in Paris with the introduction of the so-called *Loi Thévenoud*, a piece of legislation seen as a ‘protectionist’ in respect of taxi market incumbents, without having genuine interests of consumers at heart.⁴⁸ Such impact to our

⁴⁴ House of Lords (UK), Select Committee on European Union, *Online Platforms and the Digital Single Market*, 10th Report of Session 2015–16, HL Paper 129, April 2016, 89.

⁴⁵ See more PwC Publication, *The sharing economy – sizing the revenue opportunity*, <www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-sizing-the-revenue-opportunity.html> accessed 8 July 2016.

⁴⁶ Christian Codagnone, Federico Biagi and Fabienne Abadie, *The Passions and the Interests: Unpacking the ‘Sharing Economy’*, JRC Science Policy Report, EUR 27914 EN, doi:10.2791/474555, 6.

⁴⁷ The rapid global expansion of Uber has sparked interventions from taxi drivers and authorities around the world. Among recorded incidents in Paris, London, Delhi, San Francisco, Hangzhou, Amsterdam, Madrid, Brussels, Montreal and Sidney, one of the most violent ones was in Paris – where over 3000 taxi drivers blocked main roads of Paris and burnt tires. See more Sean Farrell, *Uber expansion meets global revolt and crackdown*, The Guardian (26 June 2015) <www.theguardian.com/technology/2015/jun/26/uber-expansion-meets-global-revolt-and-crackdown> accessed 13 July 2016.

⁴⁸ Benjamin G. Edelman and Damien Geradin, *Efficiencies and regulatory shortcuts: How should we regulate companies like Airbnb and Uber?* (November 24, 2015 Forthcoming) Stanford Technology Law Review 239, 252.

everyday lives, combined with the astonishing growth projections, definitely puts the sharing economy to a spotlight of the public and of the regulators.

That being said, it seems reasonable, if not necessary, to thoroughly assess the sharing economy from all perspectives – economic, social and legal. Despite the need of a wide and in-depth analysis, such an overview is beyond the scope of this paper which aims to explore the possibilities of the sharing economy regulation and to analyse the concerns of the sharing economy within the EU competition law framework.

3. How is the sharing economy relevant for the regulators?

It can be argued that there is less *ex-ante* regulation of sharing economy businesses in comparison to that often applied to traditional commercial suppliers, which can pose a threat to traditional markets. The suppliers of products and services via sharing platforms often do not have to comply with many laws as their traditional competitors have to. For example, Uber drivers do not have to obtain licences as traditional taxi drivers (e.g. they do not need a ‘yellow medallion’⁴⁹ for taxicabs in New York City or a ‘taxi vehicle licence’⁵⁰ for black cabs in London; even though ‘for-hire’⁵¹ and ‘private hire’⁵² licences are required respectively) and Airbnb renters are not the subject to extensive health and safety regulations as hotels usually are.⁵³ That enables individual suppliers to avoid potentially significant costs for compliance and to offer their supplies at lower prices. While this might benefit those individuals, it does disrupt underlying supply markets⁵⁴, which are under scrutiny to comply with the regulations in place in order to get or not to lose a certain licence granted. This regulatory aspect, in contrast to the

⁴⁹ See New York City, Taxi and Limousine Commission, *Current Licences*, <www.nyc.gov/html/tlc/html/industry/current_licensees.shtml> accessed 12 July 2016.

⁵⁰ See Transport for London, *Apply for a taxi vehicle licence*, <<https://tfl.gov.uk/info-for/taxis-and-private-hire/licensing/apply-for-a-taxi-vehicle-licence>> accessed 12 July 2016.

⁵¹ See Uber NYC, *Get a TLC licence*, <<http://driveubernyc.com/tlc/>> accessed 12 July 2016.

⁵² See Uber London, *Licence requirements*, <www.driveuberuki.com/requirements/london/> accessed 12 July 2016.

⁵³ Guy Lougher and Sammy Kalmanowicz, *EU Competition Law in the Sharing Economy* (2015) *Journal of European Competition Law & Practice*, 15.

⁵⁴ *ibid* p 15; See also Alexandre de Streel and Pierre Larouche, *Disruptive Innovation and Competition Policy Enforcement*, OECD, DAF/COMP/GF(2015) 7.

need to promote innovation, will be examined in the following part on regulating the sharing economy.

Furthermore, the sharing economy businesses may respond to market failures by offering creative market-based solutions to resolving these market failures, just as traditional firms and markets often did.⁵⁵ For instance, the previously noted ‘peer review’ feature of the sharing economy businesses provides a valuable answer to the present information asymmetry. On traditional markets, when a customer buys or borrows something from the provider, they are often deprived of other customers’ feedback about that good or service. By having that kind of information, it can be argued that the usual governmental intervention, which was necessary to ensure traditional businesses’ minimum quality and safety standards, is ceasing to be of that high importance since the sharing economy reduces the information asymmetry.⁵⁶

While such new solutions might be useful, they could also trigger some of the competition law concerns if companies’ market power becomes significant.⁵⁷ Strong market power combined with attributes of sharing economy such as network effects, as it is discussed further on, might enable sharing economy businesses to fight their rivals on the anticompetitive grounds, thus hindering the EU competition law.⁵⁸ That hypothesis, consequently, raises a first question – how should the Commission and national competition authorities (hereinafter: ‘NCA’) cope with such behaviour?

It may seem that the answer is rather simple – like with any other EU competition law concern. Through the tools of competition enforcement, competition authorities may seek to prevent certain risks, such as a risk of

⁵⁵ David Stallibrass and John Fingleton, *Why Peer-to-Peer Businesses Should Be Supported* (2016) *Journal of European Competition Law & Practice* (Advance Access published March 29, 2016), 5.

⁵⁶ Molly Cohen and Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy* (2015) 82 *The University of Chicago Law Review Dialogue* 116, p120-121, *See also* Adam Thierer, Christopher Koopman, Anne Hobson, and Chris Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the “Lemons Problem”* (2016) 70 *University of Miami Law Review* 830.

⁵⁷ *See infra* IV. EU Competition Law in the Sharing Economy

⁵⁸ *See* German Monopolies Commission, *Special Report 68: Competition Policy: The Challenge of digital markets* (2015) <<http://monopolkommission.de/index.php/en/reports/special-reports/284-special-report-68>> accessed 15 July 2016.

foreclosure and discrimination. For example, such risks could arise where a sharing platform is, or could through a horizontal merger become, “so significant to the matching of customers in an underlying supply market that access to it becomes indispensable in order to compete on the supply market”⁵⁹, *de facto* becoming an obligatory trading partner or an essential facility. Nevertheless, it might be insufficient to just wait for the sharing economy businesses to gain such significant market power, or even a dominant market position, to take action. Thus, a second question which calls for the answer prior to addressing the competition policy concerns is this – Is the EU competition law framework alone sufficient to answer to the new challenges the sharing economy brings? From that perspective, the answer seems a little bit more complex. Therefore, it is useful to examine the very purpose of the competition regulation, especially in innovative markets, and the grounds on which the sharing economy regulation should rest on.

III. Regulating the sharing economy

When looking into the ‘regulatory theory’⁶⁰, a vast majority of scholarship uses a ‘market failure’ framework as a normative. Duke University Professor Mathew D. Adler, summarises such concept, pointing out that “*regulation is justified only if certain failures of a free market occur, with externalities, public goods, monopolies, and imperfect information seen as the paradigmatic failures*”⁶¹. Not denying the central position of the market failure in the regulatory theory, it is argued that a purpose of regulation in practice often stretches far beyond the scope of a market failure. As noted above, when it comes to innovation, practices such as licensing⁶² clearly

⁵⁹ Lougher and Kalmanowicz (n53) 14.

⁶⁰ Also known as a ‘public interest theory’. See George J. Stigler, *The Theory of Economic Regulation* (1971) 2(1) *Bell Journal of Economics and Management Science* 3; Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (1971) 1 MIT Press; Richard A. Posner, *Theories Of Economic Regulation* (1974) 5(2) *Bell Journal of Economics and Management Science* 335.

⁶¹ Matthew D. Adler, *Regulatory Theory*, p 595 in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory*, ed. (Forthcoming University of Penn Law School, Public Law Research Paper No. 10-07, Cambridge University Press 2009).

⁶² Licencing can control market entry and can be used to shape market by limiting or not the number of players or the types of services that they are able to provide. See Ian Walden and John Angel, *Telecommunications Law and Regulation* (2nd edn, Oxford University Press 2005) 153.

move the centre of the gravity of regulation from promoting the competition to opposing it. Also, for example, the exercise of the regulatory power of the state (the police), is primarily founded in the public interest or general welfare, such as public health, morals, or safety.⁶³ Hence, the purposes behind diverse regulatory frameworks may significantly differ.

Accordingly, this paper further examines the role of innovation, alternatives to regulation and the consumers' perspective in regulating the sharing economy.

1. The Role of Innovation

The objective of the competition policy is to enhance economic welfare, and it posits that rivalry among competitors prompts them to 'reduce waste' and offer products tailored to consumers at the lowest price possible.⁶⁴ In highly innovative industries, not all components of economic performance match those in traditional markets, and that explains why the debate about the validity of competition law procedures in innovative industries is so controversial.⁶⁵

The sharing economy not only generates the innovation, but it also impacts traditional markets in a way that can be regarded as 'disruptive'. A Harvard Business School Professors Bower and Christensen distinguished two types of technological innovation – sustaining and disruptive innovation.⁶⁶ While a sustaining innovation "*takes place within the value network of the established firms and gives customers something more or better in the attributes they already value*"⁶⁷, disruptive innovation "*takes place outside the value network of the established firms and introduces a different package of attributes from the one mainstream customers historically value*"⁶⁸. First is

⁶³ *ibid* 159.

⁶⁴ David Encaoua and Abraham Hollander, *Competition Policy and Innovation* (2002) 18(1) Oxford Review of Economic Policy 63, 64.

⁶⁵ *ibid*.

⁶⁶ See Joseph L. Bower and Clayton M. Christensen, *Disruptive Technologies: Catching the Wave* (January–February 1995) 73(1) Harvard Business Review 43; Clayton M. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (1997) Harvard Business School Press.

⁶⁷ *De Streeel and Larouche* (n54) 2.

⁶⁸ *ibid*.

present on traditional markets, which tend to innovate in an evolutionary fashion, by enhancing their current technologies. That is – they introduce incremental improvements on their existing products. Conversely, new entrants such as the sharing economy players, are inclined to innovate more disruptively, as their incentive is purely to gain profit of creating a new market. They do not suffer from any loss of destroying old market as it would be the case if traditional market players would employ the same strategy.⁶⁹ As such, the sharing economy became “*a disruptive force that facilitates exchanges involving underutilized assets, from spaces to skills to things, for monetary gain on a scale that would not be achievable without modern technology*”⁷⁰.

Nowadays, certain popular press commentators⁷¹ summon the sharing economy as a ‘regulatory evasion’ instead of a ‘disruptive innovation’, claiming not all sharing economy businesses are truly innovative. Such characterisation, in author’s opinion, seems to be justifiable only in the case where sharing economy companies are avoiding any regulation, including taxation. When it comes to paying taxes, that assumption is often not the case, but that depends on the jurisdiction and the point of view.⁷² Some will argue that if we observe the well-known sharing economy firms, the taxes paid are significant.⁷³ Moreover, the UK Government introduced a £2,000 ‘tax break’ in early 2016 – to boost the sharing economy, which is a clear evidence that sharing economy revenues are, or at least can be, documented and taxed.⁷⁴

⁶⁹ Jonathan Chan and Herbert Fung, *Rebalancing Competition Policy to Stimulate Innovation and Sustain Growth* (2016) Asian Journal of Law and Economics doi:10.1515/ajle-2015-0029, 12.

⁷⁰ Abbey Stemler, *Betwixt and between: Regulating the shared economy* (2016) VIII Fordham Urban Law Journal, 4.

⁷¹ Izabella Kaminska, *No, regulatory evasion isn’t ‘disruptive innovation’*, Financial Times Alphaville (1 January 2014) <<http://ftalphaville.ft.com/2014/01/31/1759062/no-regulatory-evasion-isnt-disruptive-innovation/#respond>> accessed 16 July 2016.

⁷² Some argue that Uber is one of the examples of extensive tax avoidance. There are concerns that sharing economy businesses are actually slipping the tax net and eroding the market by encouraging race to the bottom. *See more* David Kocieniewski, *The Sharing Economy Doesn’t Share the Wealth*, Bloomberg (6 April 2016) <<http://www.bloomberg.com/news/articles/2016-04-06/the-sharing-economy-doesn-t-share-the-wealth>> accessed 20 July 2016.

⁷³ *See* Ryan Ellis, *Taxes And The Sharing Economy*, Forbes (5 July 2016) <<http://www.forbes.com/sites/ryanellis/2016/07/05/taxes-and-the-sharing-economy/>> accessed 17 July 2016.

⁷⁴ *See* Murad Ahmed, *‘Sharing economy’ boosted by tax break in Budget 2016*, Financial Times (16 March 2016) <<https://next.ft.com/content/b99dae3c-eb81-11e5-bb79-2303682345c8>> accessed 17 July 2016

To regulate how the sharing economy business models should operate is beyond what they can do themselves – it is on the society to regulate to do so. Imposing a governmental regulatory framework is one of the avenues to put an end to the undesirable connotations of regulatory evasion. However, a comprehensive regulation of the sharing economy so far appears to be extremely challenging.

The very relationship between the regulation and innovation has kept many people, and especially regulators and legislators, increasingly curious in recent years.⁷⁵ In dynamic and innovative markets, regulation often seems not to be able to keep up with the fast pace of innovation.⁷⁶ That occurs due to a fast development of new technologies whilst the regulatory frameworks are usually a way more static. To close that gap, on the line with author's reasoning, some commentators⁷⁷ suggest the introduction of a more 'innovation-friendly' regulatory frameworks which are subject to easier, yet responsible, amending and changing when new information or knowledge is available. Therefore, this paper further submits possible options on how to achieve that, since regulating the sharing economy so far proved to be remarkably resistant⁷⁸ to the orthodox regulation.

2. Systems of Regulation

In the available literature, there are two main groups of proposals on how to regulate the sharing economy. First is inviting for a comprehensive governmental regulation on a local, national or supranational level. The second one is proposing a path of self-regulation, calling for the introduction of some of the tried and workable self-regulation options. Both systems are succinctly laid out as follows.

⁷⁵ Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy* (2015) 16(1) *Minnesota Journal of Law, Science & Technology* 413, 440.

⁷⁶ Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation* (2015) 55 *Jurimetrics J.* 201, 202.

⁷⁷ *ibid*; See also Jennifer Kuzma, *Properly Paced? Examining the Past and Present Governance of GMOs in the United States* in Gary E. Marchant et al. eds, *Innovative governance models for emerging technologies* (176 2013).

⁷⁸ Daniel E. Rauch and David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy* (2015) 76(4) *Ohio State Law Journal* 901, 904.

a. Governmental regulation

Different local authorities have chosen different ways of dealing with the sharing economy⁷⁹, but there is no evidence that any of them have captured the whole phenomenon in an efficient manner. Leaving the examination of the used regulatory frameworks for a further research, it seems useful to highlight the principles on how to regulate the sharing economy instead. Professor Stephen R. Miller, by using a short-term rental market (e.g. Airbnb) as an illustration, provided superb guidelines in 10 principles⁸⁰ on how regulation “*must be tailored to effectively respond to different aspects of the larger sharing economy*”⁸¹. The first principle essentially underlines the point made in the previous paragraph, stressing out the need for the understanding of the market segment being disrupted as well as the new markets being created by the sharing economy platform, in order to respond to the needs of all constituencies. It is emphasised that such regulation should be designed to address the new markets as a whole, and not only its dominant company (e.g. only Uber in a transportation sector).⁸²

Next two principles further accentuate the need of ‘daylighting’ the sharing economy and providing ‘the right information’ (e.g. about the users on the both sides of the platform) in order to understand and regulate a new market better.⁸³ Within the fourth principle, Miller underscores that the sharing economy is here to stay – and that it is a good thing. It appears that despite the efforts of some authorities to ban sharing economy activities (e.g. in the US city of Boise, where the local ban was overridden by a consequent state-level regulation), the sharing economy will somehow find a way to legally resist to such pressures.⁸⁴ Hence, a regulation seems to be a much better response to the sharing economy than a prohibition.⁸⁵ For example, Berlin’s

⁷⁹ For the EU, see European Parliament study no. PE558.777, Gracia Vara Arribas, Bettina Steible and Anthony De Bondt, *Cost of non-Europe in the sharing economy: legal aspects* (February 2016) <www.eipa.eu/files/FINAL%20REPORT%20for%20EIPA%20web.pdf>; Pierre Goudin, *The Cost of Non-Europe in the Sharing Economy: Economic, Social and Legal Challenges and Opportunities* (January 2016) <[www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU\(2016\)558777_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/558777/EPRS_STU(2016)558777_EN.pdf)> accessed 25 July 2016.

⁸⁰ Stephen R. Miller, *First principles for regulating the sharing economy* (2016) 53 Harvard Journal on Legislation 147.

⁸¹ *Ibid*, 150.

⁸² *Ibid*, 151-153.

⁸³ *Ibid*, 153-156.

⁸⁴ See also Rauch and Schleicher (n78) 904.

⁸⁵ R. Miller (n80) 156-160.

local authorities, after two years of the transition period, on May 1st 2016 passed a legislation prohibiting short-term rentals of whole flats or apartments without a city permit, allowing only room rentals for non-city residents.⁸⁶ The policy objective was to protect affordable housing, but it will be very exciting to observe how the short-term rental market will answer to such ban and whether it will lead to a grey economy instead of a regulated one. By simply browsing the 'entire home/flat' listings at the moment of writing this paper, it is worth noting that hundreds and hundreds of such listings are still offered to rent⁸⁷, despite the potential €100,000 fine for these renters.

The following proposed principle puts an emphasis on the aforementioned disruptive nature of the sharing economy – not only in respect of traditional markets but also in respect of other related markets. For instance, they disrupt the need for property managers and real estate bookers who were traditionally the only ones providing non-hotel tourist rentals.⁸⁸ Disrupting other markets also leads to an assumption that there must be 'a new market' the sharing economy creates, which is argued within the sixth principle. The scholar accurately observes that a turnaround revenue of Airbnb rentals by far surpasses any loss in market share seen by hotels, albeit they are affected.⁸⁹ And even more significantly, he points out that traditional markets want to enter these newly established markets.⁹⁰

⁸⁶ Matt Payton, *Berlin stops Airbnb renting apartments to tourists to protect affordable housing*, The Independent (1 May 2016) <www.independent.co.uk/news/world/europe/airbnb-rentals-berlin-germany-tourist-ban-fines-restricting-to-protect-affordable-housing-a7008891.html> accessed 18 July 2016.

⁸⁷ Browsing Berlin rentals at <www.airbnb.com>, with the 'entire home/flat' filter on, for the randomly selected one week periods during October and November 2016, the results show 300+ listings available to book, with the additional notification that 'only 19% of listings is available in the selected period'.

⁸⁸ R. Miller (n80) 160-163.

⁸⁹ The example of the State of Texas (US) short-term rental market shows that the impact of Airbnb on the hotel industry is negative and that Airbnb provides a viable alternative for certain traditional types of overnight accommodation. *See more* Georgios Zervas, Davide Proserpio and John W. Byers, *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, Boston University School of Management Research Paper No. 2013-16, <<http://ssrn.com/abstract=2366898>> accessed 18 July 2016; *See also* Iis P. Tussyadiah and Juho Pesonen, *Impacts of Peer-to-Peer Accommodation Use on Travel Patterns* (First published October 12 2015) *Journal of Travel Research* 0047287515608505.

⁹⁰ R. Miller (n80) 164-165.

The final four principles⁹¹ are focused on a unique nature of the sharing economy that requires a response beyond traditional regulation, often requiring changes in the long-established regulatory structures, the problem of determination of the harm caused, and the issue of necessity to address all of the parties involved.

These ten principles provide an excellent intersection of the most important features of the sharing economy any regulator should take into account when approaching to its regulation.

b. Self-regulation

The possible alternative way to regulate the sharing economy is a self-regulation. Self-regulation can be defined as “*groups of firms in a particular industry or entire industry sectors that agree to act in prescribed ways, according to a set of rules or principles. Participation by firms in the groups is often voluntary, but could also be legally required*”⁹². Many features of the sharing economy are prone to (e.g. a peer review system) and could be more successful if self-regulated.⁹³ Choen and Sundararajan argue and emphasise that a self-regulation does not have to mean deregulation or no regulation – but merely a reallocation of the regulatory responsibility to parties other than the government.⁹⁴ They claim that self-regulation often emerges as “*a natural byproduct of economic exchange and has a long history of success*”⁹⁵ and propose utilisation of digital platforms as partners in the regulation of exchange rather than as subjects requiring governmental regulation.

The summary of their proposals contends that for self-regulation organisations (‘SRO’) to succeed, there are four essential factors which need to be satisfied. These four factors are noticed and singled out based on the experience in a variety of modern industries. The first factor is an early

⁹¹ *ibid* 165-184.

⁹² *Arribas, et al.* (n79) 59.

⁹³ See Arun Sundararajan, *Trusting the ‘Sharing Economy’ to Regulate Itself*, *Economix* (3 March 2014) <<http://economix.blogs.nytimes.com/2014/03/03/trusting-the-sharing-economy-to-regulate-itself/>> accessed 18 July 2016; See also Christopher Koopman, Matthew Mitchell and Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* (2015) 8(2) *The Journal of Business, Entrepreneurship & the Law*, art 4, 542.

⁹⁴ *Cohen and Sundararajan* (n56) 116.

⁹⁵ *ibid* 132.

established credibility of the SRO through its performance. Second, a demonstration of strong enforcement capabilities. The third factor is a perception of SROs as a legitimate and independent body. And finally, it is pointed out that participants' reputational concerns and social capital must be taken into account and used as an advantage by the SROs.⁹⁶

To illustrate what an SRO is, an example in law is a bar association⁹⁷. Similar organisations exist in many sectors, such as the American Medical Organisation in medicine or the National Association of Realtors in real estate sectors.⁹⁸ It is argued that the sharing economy could be regulated on the same principles as these organisation, with a mere supervision by the state or local authority in contrast to an extensive regulation.

Both of the abovementioned concepts – either through governmental regulation or self-regulation – seem to be viable options for creating a workable legal framework for the sharing economy. To date, it is clear that regulators have struggled to adapt existing regulations to sharing platforms and that they face various challenges when it comes to the choice of the approach.⁹⁹ There is even an example of the *bona fide* initiative brought to the authorities by Airbnb, to regulate their business sector, which turned up against them – despite their “*heavy hand in passing the legislation in the first place*”¹⁰⁰.

Nonetheless, the sharing economy removes the need for regulation in many cases because of the expansion of the range of options and information available to consumers.¹⁰¹ Consumer's point of view is, therefore, important, and some argue that “*application of outmoded regulatory regimes may actually harm consumers*”¹⁰². In author's view, consumers in the sharing

⁹⁶ *ibid* 128-129.

⁹⁷ See more Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?* (2008) *Journal of The Professional Lawyer* 53.

⁹⁸ *Cohen and Sundararajan* (n56) 125.

⁹⁹ Vanessa Katz, *Regulating the Sharing Economy* (2015) 30(4) *Berkeley Technology Law Journal, Annual Review*, Article 18, 1067, p 1084; *Goudin* (n79) 1084ff.

¹⁰⁰ After self-initiated call for better regulation, the Airbnb's hometown legislator, San Francisco, imposed a complex registration procedure for hosts and \$1,000 fine a day for every unregistered listing. See Biz Carson, *Airbnb is a 'cautionary tale' on how not to work with governments, says Uber's political adviser*, *Business Insider UK* (30 June 2016) <<http://uk.businessinsider.com/bradley-tusk-startup-political-strategist-airbnb-created-unfixable-mess-2016-6??r=US&IR=T>> accessed 24 July 2016.

¹⁰¹ Koopman, et al., *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change* (n93) 532.

¹⁰² *ibid*.

economy are affected both directly – if their health, safety or consumer interests (arising from the contract law, i.e. contracts between consumers and providers concluded through online platforms) are jeopardised – and indirectly, as citizens, if the sharing economy is prone to tax evasion or it creates an unfair competition on the markets they are engaged with. Consequently, to better illustrate the desirable central purpose of regulating the sharing economy, the position of consumers is examined below.

3. Consumers' Perspective

Maybe the central reason why the sharing economy enjoys a lenient treatment in the public is the fact that it serves a positive role in society. It is more efficient than traditional businesses, it allows microbusinesses to profit from existing resources and it has the potential to bring unforeseen benefits.¹⁰³ On the other hand, the suppliers of goods and services via sharing economy platforms often do not have to comply with many laws regulating traditional commercial suppliers.¹⁰⁴ The fact that there is no level playing field can cause various troubles for the consumers.

As noticed by a group of prominent academics¹⁰⁵, “*the existing regulatory framework is primarily focused on ‘bipolar’ transactions between businesses and consumers*”¹⁰⁶. Such framework does not offer adequate solutions for the growing number of transactions between the platform, businesses (or individuals often not established as businesses) and consumers (i.e. a ‘triangular’ transaction) arising in the sharing economy.¹⁰⁷ It appears that a result of concluding contracts through online platforms is often a lack of effective consumer protection.

The main issue of the EU consumer protection and the sharing economy seems to be the absence of addressing the relationship between the two peers – individuals (i.e. the supplier who is *de lege* not a business and the consumer)

¹⁰³ Stemler (n70) p 35; See also Robert Cooter, et al., *The Importance of Law Promoting Innovation and Growth*, in *Rules for Growth: Promoting Innovation and Growth Through Legal Reform 1-2* (Ewing Marion Kauffman Foundation ed. 2011).

¹⁰⁴ Lougher and Kalmanowicz (n53) 15.

¹⁰⁵ Christoph Busch, Hans Schulte-Nölke, Aneta Wiewiórowska-Domagalska and Fryderyk Zoll, *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?* (2016) 5(1) *Journal of European Consumer and Market Law* 3.

¹⁰⁶ Busch, et al. (n105) 3.

¹⁰⁷ *ibid* 4.

in a two-sided market.¹⁰⁸ It is also unclear whether a relationship between the platform and the consumer (i.e. a contract to which the platform is usually not a party to) falls under the scope of the EU consumer law directives.¹⁰⁹ Finally, it is unclear whether the sharing economy suppliers of goods or services can be regarded as the employees of the platform operators.

a. Consumer-to-consumer transactions

As already noted, due to a two-sided market nature of the sharing economy platforms, it is very usual for the sharing economy to have individuals engaged on both sides of the market – either as suppliers/providers or as users of goods and services. Additionally, a research has shown that quite a few of them use the platform both as suppliers and consumers,¹¹⁰ whilst involvement in the sharing economy is not their only income, but just a supplement to their regular income streams.¹¹¹ As non-businesses, those individuals may hence lack the awareness that they have obligations under consumer laws, let alone awareness of what those obligations are.¹¹² The distinction between individual suppliers and businesses is important since “*users will not have the benefit of protection under EU consumer rules, as this legislation only applies to contracts between businesses and consumers*”¹¹³. That puts the consumers in a delicate position, often not knowing what should happen in case something goes wrong.¹¹⁴

In other words, within the EU, many contracts, “*although concluded in the highly professional environment of an online platform, totally escape the scope of application of existing consumer contract law*”.¹¹⁵ That issue¹¹⁶ was

¹⁰⁸ Cf. the critical remarks of the European Parliament resolution *Towards a Digital Single Market Act*, 19 January 2016, (2015/2147(INI)), paras 77-81.

¹⁰⁹ *Busch, et al.* (n105) 4.

¹¹⁰ Juliet Schor, *Debating the Sharing Economy* (October 2014) Great Transition Initiative, 4, <www.greattransition.org/publication/debating-the-sharing-economy> accessed 20 July 2016.

¹¹¹ *ibid* 3.

¹¹² *Deloitte Access Economics* (n29) 30.

¹¹³ *A Digital Single Market for Europe: Analysis and Evidence* (n8) 54.

¹¹⁴ *Woskko* (n43) 19.

¹¹⁵ *Busch, et al.* (n105) 4.

¹¹⁶ “Prior to the conclusion of the contract, the intermediary shall disclose to the consumer that he is acting in the name of or on behalf of another consumer, and that the contract concluded shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.”

raised along the lines of Article 7(1) of the Proposal for a Consumer Rights Directive but was dropped in the course of the legislative process.¹¹⁷ It seems indispensable, for the benefit of the consumers, that this issue gets properly addressed by the EU legislators. Alternatively, as others argue, pointing to the way some of the sharing economy business models themselves reimagine notions of consumer protection, there should be an option of self-regulation which would obviate the need for state intervention.¹¹⁸

That latter approach is more encouraged among the US scholars. In its comment before the US Federal Trade Commission, Koopman et al. argue that “*by trying to head off every hypothetical worst-case scenario, preemptive regulations actually discourage many best-case scenarios from ever coming about*”¹¹⁹. They conclude that ex-post remedies are often preferable to ex ante regulation since “*private insurance, contracts, torts and product liability law, antitrust enforcement, and other legal remedies can be utilized here when things go wrong, just as they are used in countless other segments of our economy*”¹²⁰. Even some European commentators warn of ‘the risk of acting prematurely’ when regulating the digital markets ex-ante.¹²¹ Instead, they propose clarifications of responsibilities around consumer protection, by creating such regulatory framework which would ensure that platforms provide clear information on their responsibility and how they operate, so consumers can make informed decisions.¹²²

As a possible solution to the issue of the liability of individual suppliers, the author suggests that a compliance with the local legal health, safety and other standards in general, along with the sound and prudent owner diligence,

See Article 7(1) of the Proposal for a Directive of the European Parliament and of the Council on consumer rights {SEC(2008) 2544} {SEC(2008) 2545} {SEC(2008) 2547}, COM/2008/0614 final - COD 2008/0196.

¹¹⁷ Busch, et al. (n105) 6.

¹¹⁸ Joel Vanoverschelde, Charles Delancray and Louisa Bartolo, *Collaboration, Innovation... Regulation? The disruptive shifts taking our economy by storm*, Deloitte Publications, 6, <www2.deloitte.com/content/dam/Deloitte/lu/Documents/technology/lu_en_collaboration-innovation-regulation_122015.pdf> accessed 25 July 2016.

¹¹⁹ Christopher Koopman, Matthew Mitchell, and Adam Thierer, *The Sharing Economy: Issues facing platforms, participants, and regulators* (2015) <<http://ssrn.com/abstract=2610875>> accessed 27 July 2016.

¹²⁰ *ibid.*

¹²¹ Alex Chisholm and Nelson Jung, *Platform regulation — ex -ante versus ex -post intervention: evolving our antitrust tools and practices to meet the challenges* (Spring/Autumn 2015) 11(1) Competition Policy International, 5.

¹²² *ibid.* 7.

should be the limit of their personal liability. Everything beyond that should be covered by the insurance schemes set up by the platform's operator, in which the suppliers can, perhaps when joining the platform, be prompted to. That might pose a barrier for new individuals to access the sharing economy platform, but it would shift a burden from both suppliers and platform's operator to the third party in insurance sector, and it would offer a clarity to the consumers.

Yet, it appears that many of the sharing economy businesses nowadays do provide, though very limited, a scope of protection to their platform users – evidently trying to restrict their liability to the very minimum, which is examined further.

b. Platform operator's role and liability

Between the two sides of the market, there is a platform operator – the intermediary in transactions between individuals. Or at least, exclusively 'the intermediary' is how the most of the online platforms tend to present themselves. That intention is usually stipulated in the platform operator's terms of service. Such statements are clearly present, for example, in the terms and conditions of TaskRabbit¹²³ and Uber¹²⁴. From consumers' perspective, such interpretation is not auspicious, and some argue it is doubtful whether such a declaration is sufficient to reduce platform's role to just an intermediary¹²⁵ – hence excluding their liability for any misconduct and damages caused by the suppliers using the platform.

However, even if platform operators successfully limit their role only to the intermediation (i.e. only facilitating the conclusion of a contract between a consumer and a third party who supplies goods or services), they may still

¹²³ "Clients and Taskers enter into a direct contract with each other in relation to the task to be performed. TaskRabbit and its affiliates are not a party to that contract so they are not responsible if Client or Tasker does not do what they have said they will do, or if a Tasker performs a task badly or incorrectly [...]". See TaskRabbit, Inc, *Terms of service* <www.taskrabbit.co.uk/terms> accessed 20 July 2016.

¹²⁴ "Uber UK does not itself provide transportation services, and is not a Transportation Provider. Uber UK acts as intermediary between you and the Transportation Provider.". See Uber UK, *Terms and Conditions* <www.uber.com/de/legal/gbr/terms> accessed 20 July 2016.

¹²⁵ Busch, *et al.* (n105) 5.

have various duties and obligations. Busch et al. distinguish at least four groups of such obligations – the pre-contractual information duties on goods and services offered, the attribution of communications made by the platform operator, the duties of the platform as a communication intermediary and certain duties of the platform provider towards suppliers.¹²⁶ Still, those obligations are not representing a ‘secondary liability’, what they suggest is one of the possible solutions to the liability issue.¹²⁷

Despite the fact that many sharing economy businesses have some form of insurance for their users in place, that insurance is often not equally directed to both ends of the platform. For example, Airbnb offers a ‘Host Guarantee’¹²⁸ to renters, protecting them with £600,000 for damages caused by the guests at no additional cost. The same protection is not offered to guests – the consumers – in case of whom Airbnb limits its liability only up to the amount paid by the consumer.¹²⁹ It seems that consumer’s damage claims should, therefore, be directed towards the hosts, which gets us back to the point of consumer’s vulnerability and it repeatedly calls for further consumer rights regulation within the sharing economy.

Behind the desire to restrict their liability and excluding themselves as parties to the contract, there is an understandable economic and business logic of the platform operators.¹³⁰ They seek to “*enter into a certain area of business activity and tap into a pool of revenue without being held responsible for the adequate performance of the contractual obligation rendered by a third party supplier.*”¹³¹ As platforms are not regulated by the EU legislation in that respect, there is in principle no objections against this business model from the legal point of view – as intermediaries are not liable for the performance of the obligation by the supplier.¹³²

¹²⁶ *ibid* 6-7.

¹²⁷ *ibid* 8.

¹²⁸ See Airbnb, *The £600,000 Host Guarantee*, <www.airbnb.co.uk/guarantee> accessed 20 July 2016.

¹²⁹ “26. [...] Except for our obligation to pay amounts to applicable hosts pursuant to these terms or an approved payment request under the Airbnb Host Guarantee, in no event will Airbnb’s aggregate liability [...], exceed the amounts you have paid or owe for bookings via the site [...]”. See Airbnb, *Terms of Service* (Last updated 29 March 2016) <<https://www.airbnb.co.uk/terms>> accessed 20 July 2016.

¹³⁰ Hein Kötz and Hans-Bernd Schäfer, *Judex oeconomicus*, Mohr Siebeck, 2003, 58-62.

¹³¹ Busch, *et al.* (n105) 7.

¹³² *ibid.*

c. Status of suppliers – independent contractors or employees?

In terms of liability, the situation would probably be ‘easier’ for both for the consumers and the regulators (not the platform operators!), had the sharing economy suppliers was regarded as the platform operator’s employees instead of the independent contractors. This question was raised in multiple lawsuits¹³³, out of which the one involving Uber hauled the most interest. Even though the US Labor Commission in California ruled that an Uber driver was an employee and not an independent contractor in 2015¹³⁴, it is yet to be seen how the ongoing appeal process will culminate. The confirmation of such a finding would have as an advantage a better security for Uber drivers, as they would enjoy worker benefits such as wage protection, unemployment and health benefits.¹³⁵ On the other hand, that could be detrimental for Uber’s concept of the sharing economy and it would put it outside of the definition of the sharing economy used in this paper.

The main argument why Uber drivers should not be regarded as employees is due to the platform’s limited intermediary role¹³⁶ and the fact that drivers are free to set their own working hours. Those opposing such argument claim that Uber sets “*most of the terms of employment, and is involved from vetting of drivers through to terminating them if they have low ratings*”¹³⁷, arguing that such a policy *de facto* contributes to the company’s status of an employer.¹³⁸ On the other hand, Professor Robert Sprague holds that “*the nature of work exemplified by the sharing economy requires a classification test that focuses not on the dependence of the workers on the employer, but the dependence of the employer on the workers.*”¹³⁹ Hence, the freedom that workers enjoy in providing individualised tasks and services can be seen as a form of an existential dependence of the platform operator to these workers,

¹³³ Katz (n99) 1091.

¹³⁴ See *Barbara Ann Berwick vs. Uber Technologies Inc*, Case no. 11-46739 EK, Labor Commission of the State of California, US, June 3, 2015, available at <<http://uberlawsuit.com/Decision.pdf>> accessed 23 July 2016

¹³⁵ For summary of the arguments and legal decisions in cases involving Uber in front of US authorities, including the ongoing class actions, see <<http://uberlawsuit.com/>> accessed 23 July 2016.

¹³⁶ Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System* (December 2015) 90(2) *Tulane Law Review* 241, 263.

¹³⁷ *Deloitte Access Economics* (n29) 15.

¹³⁸ Dyal-Chand (n136) 263.

¹³⁹ Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Trying to Fit Square Pegs in Round Holes* (2015) 31 *A.B.A. Journal of Labor & Employment Law* 53, 76.

and not the other way around. Ultimately, it is up to the courts to determine how far independent contracting can be strained, while the results might not be identical in every jurisdiction.

Even if Uber drivers were regarded as Uber's employees, the same finding could not be universally applied to other sharing economy businesses. It appears that Uber imposes restrictions to its drivers because that is inevitable to be able to comply with a heavily regulated traditional taxi markets regulations. However, if Uber would operate on the same way as traditional taxi operators do (with the only difference in having a modern online algorithm running the platform), it should be abiding by the same set of rules as the market incumbents – but it does not, for the reasons that follow.

In author's opinion, such finding would be farfetched, since Uber provides an alternative to traditional taxi services, connecting non-professional, part-time drivers with passengers. Therefore, it should be regulated as such, and not pushed under the 'taxicab' regulatory framework.¹⁴⁰ Not only that Uber created many new ridesharing markets across the world and lowered the costs of transportation, but it also influenced traditional taxi markets and decreased the level of the competition among them¹⁴¹, and for that – it should be applauded, and not punished. Maybe the solution lays in the compromise. Some sharing economy businesses in recent months started to offer their suppliers or providers some form of workers benefits.¹⁴² For example, TaskRabbit started offering access to discounted health insurance and accounting systems.¹⁴³ Instacart, a grocery delivery app, asked some of its workers to become part-time employees.¹⁴⁴ Such and similar steps prove that

¹⁴⁰ See more Damien Geradin. *Should Uber be allowed to Compete in Europe? And if so How?* (Forthcoming 2015) Competition Policy International <<http://ssrn.com/abstract=2615530>> accessed 20 July 2016.

¹⁴¹ Scott Wallsten, *The Competitive Effects of the Sharing Economy: How is Uber Changing Taxis?* (June 2015) Technology Policy Institute, 19 <www.ftc.gov/system/files/documents/public_comments/2015/06/01912-96334.pdf> accessed 25 July 2016.

¹⁴² See more Antonio Aloisi, *Commoditized workers: Case study research on labor law issues arising from a set of „on-demand/gig economy“ platforms* (2016) 37 Comparative Labor Law & Policy Journal 653.

¹⁴³ See more TaskRabbit Perks, <www.taskrabbit.com/perks> accessed 27 July 2016.

¹⁴⁴ See more Brad Stone, *Instacart Reclassifies Part of Its Workforce Amid Regulatory Pressure on Uber*, Bloomberg Technology (22 June 2015) <www.bloomberg.com/news/articles/2015-06-22/instacart-reclassifies-part-of-its-workforce-amid-regulatory-pressure-on-uber> accessed 27 July 2016.

a fair treatment of workers does not necessarily have to twist the sharing economy business model.¹⁴⁵

After addressing the identified key issues regulators should bear in mind when regulating the sharing economy, a further focus of this paper will be on the EU competition law perspective and its concerns with the sharing economy.

IV. EU Competition Law in the sharing economy

From a competition law perspective, there are some common characteristics of the sharing economy platforms that might cause harm and therefore should be regulated through common rules. The tools to tackle such harms are in the hands of the EU competition law enforcer – the Commission. Despite all the challenges in regulating the sharing economy, many experts agree that competition enforcers already got what it takes “*to adequately address potential abuses of dominance by online platforms*”¹⁴⁶, with the necessary adjustment on the enforcement level. The author breaks down all of the potential concerns identified in the available literature – although the list might not be exhaustive – with the main purpose to levy the discussion in attempt to raise the awareness of competition law threats posed by the sharing economy business models.

1. Concerns arising from a dominant position

The sharing economy businesses are developing at fast pace, using innovation as a disruptive force to enter or create different markets, reaching customers that market incumbents could not have reached before. As any other business, they have every incentive to expand and get their piece of a market pie, and there is nothing wrong in that. However, when they do it from a position of

¹⁴⁵ Aloisi (n142) 684.

¹⁴⁶ Olga Batura, Nicolai van Gorp and Pierre Larouche (e-Economics), *Online Platforms and the EU Digital Single Market*, Written evidence (OPL0066), <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/24920.html>> accessed 25 July 2016.

dominance – that might be detrimental for the competitors. Under article 102 TFEU and in the field of merger control, a firm is presumed to enjoy a dominant position¹⁴⁷ where its market share reaches or exceeds 50%.¹⁴⁸ It is established above how rapidly the sharing economy grows and it is no wonder that such a growth attracts high rates of investment.¹⁴⁹ With such a potential, it seems to be a matter of time when the legal thresholds¹⁵⁰ will be satisfied and companies' market shares will exceed that 50% presumption.

However, regardless of the fact that the following sharing economy concerns are discussed in the context of a potential abuse of a dominant position under article 102 TFEU, some of those concerns may meet the requirements under Article 101(1) and they should, therefore, be examined as such. In that event, the Commission has the power to apply both articles 101(1) and 102 TFEU to the same facts, whereas the facts that amounted to the breach of Article 101, cannot be merely 'recycled' to prove the infringement of the Article 102.¹⁵¹

a. Winner-takes-all effect

Having established that two-sided markets are characterised by a presence of 'network effects', it is useful to highlight that these network effects increase the likelihood of 'winner-takes-all' effect (also known as 'snowball effect'). But before moving on to how network effects lead to winner-take-all scenarios, the illustration of network effects is provided. For instance, if

¹⁴⁷ Dominance is a "position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers". See Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, para 65; Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, para 38.

¹⁴⁸ Case 62/86 *AKZO v Commission* [1991] ECR I-3359, para 60; See also *Horizontal Merger Guidelines* [2004] OJ C31/5, para 17.

¹⁴⁹ Investments in the sharing economy are at a record high – it is estimated that more than \$12 billion has been invested in sharing economy start-ups, more than twice as much than for social networking start-ups such as Twitter and Facebook. See more Deloitte Study, *The Sharing Economy: Share and make money – How does Switzerland compare?*, 3, <www2.deloitte.com/content/dam/Deloitte/ch/Documents/consumer-business/ch-cb-shared-economy-share-and-make-money.pdf> accessed 27 July 2016.

¹⁵⁰ See *infra* IV.II.a. Escaping scrutiny

¹⁵¹ That was established by a court practice. See Joined cases 6 and 7-73, *European Sugar Industry* [1974] ECR 00223; Joined Cases T-68, 77 & 78/89, *Flat Glass* [1992] ECR II-1043.

someone wants to send money abroad using the money exchange service TransferWise, the platform operator will, instead of making an international transfer, make two local transfers – each from its own account in a different currency – in order to avoid paying high international fees and exchange rates imposed by the banks.¹⁵² To be able to operate, the platform needs customers on both sides of the market to pay in the money in their own, different, currencies. Otherwise, there would not be enough resources for customers to retrieve their money in a designated currency and they would simply not be willing to use the platform anymore. The same is present if we observe Uber drivers’ need for enough of passengers, Airbnb hosts’ need for enough of guests and vice versa. Hence, the platform becomes more valuable as the number of user increases.¹⁵³ That is what is usually called a ‘network effect’.

Such network effects create a ‘tipping’ point – “*a virtuous circle of positive feedback ensures that a winner becomes even more a winner as it continues to attract more and more customers*”¹⁵⁴, leading to a strong market power immune to entry.¹⁵⁵ Chisholm and Jung argue that once a market has “tipped”, “*the platforms may have market power that could be used to discriminate against competitors or to the detriment of consumers and innovation*”¹⁵⁶. Furthermore, Kadar stresses out that some of these strong positions are likely to be maintained and become entrenched while disabling competitors with potentially even better products to challenge the market position of a market leader.¹⁵⁷ The case *Microsoft II*¹⁵⁸, where Microsoft tied the Internet Explorer browser with its Windows operating system, is a good example of the use of a dominant position created on the network effects.

Therefore, if there is a will to ensure that the competition among rivals places on the merits and that even if a strong or dominant market position is achieved, such position is not abused – it seems to be necessary to closely

¹⁵² See more TransferWise, *What is TransferWise?* <
<https://transferwise.com/help/article/1567514/good-to-know/what-is-transferwise>>
 accessed 25 July 2016.

¹⁵³ *Deloitte Access Economics* (n29) 21.

¹⁵⁴ Carl Shapiro and Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business School Press 1998) 174.

¹⁵⁵ *King* (n30) 731.

¹⁵⁶ *Chisholm and Jung* (n121) 4.

¹⁵⁷ Massimiliano Kadar, *European Union competition law in the digital era* (4/2015) *Zeitschrift für Wettbewerbsrecht* 342, 351.

¹⁵⁸ Case AT.39.530 – *Microsoft tying*.

monitor digital economy companies.¹⁵⁹ Notwithstanding, in regard to exclusionary conduct, some point out that it is relevant whether “*the firms make effort to run faster than rivals or whether their effort is directed at slowing rivals*”¹⁶⁰ when acquiring market shares.

Overall, it is argued that a winner-takes-all effect is likely to result in a creation of strong market positions in relevant industries.¹⁶¹

b. Barriers to multi-homing

In the two-sided sharing economy markets, participating users on one side of the market may choose whether to use only one platform or more alternative platforms simultaneously. If they choose to use only one platform, that is called single-homing (e.g. passengers may use only one ridesharing service whenever they need a ride). If they decide to use more alternative platforms, that is called multi-homing.¹⁶² For example, a person renting a room or flat may, at the same time, offer it on more than one platform, in order to maximise its profits and fill the room or flat with guests at all available time slots. The problem may occur when one side of the platform users (especially the supply side) are left with no choice but to use one platform, what may amount to exclusive dealing.¹⁶³

It seems that almost all of the concerns discussed above may give rise to barriers to switching between platforms or to ‘multi-homing’. As additional concerning factors, Chisholm and Jung underline not only the already mentioned contractual restrictions imposed by online platforms, but also the inability of customers to ‘transfer their reputation’¹⁶⁴ to a competing platform (thus making them ‘invested’ in their platform only) and ‘the use of

¹⁵⁹ Kadar (n157) *ibid.*

¹⁶⁰ Encaoua and Hollander (n64) 70.

¹⁶¹ Kadar (n157) *ibid.*

¹⁶² King (n30) 732.

¹⁶³ Deloitte *Access Economics* (n29) p 23.

¹⁶⁴ See more Andreas Diekmann, Ben Jann, Wojtek Przepiorka and Stefan Wehrli, *Reputation Formation and the Evolution of Cooperation in Anonymous Online Markets* (2014) 79(1) *American Sociological Review* 65.

proprietary data'¹⁶⁵ a dominant platform may have access to (what could in principle create an unmatched advantage over competitors).¹⁶⁶

King argues that “*the ability of one or other set of participants to a peer-to-peer platform to multi-home can significantly alter the competitive dynamic*”¹⁶⁷. He also points out that once a participant has chosen a particular platform, and platforms will compete vigorously to sign them up to single-home (i.e. exclusivity agreement), the platform becomes a ‘gatekeeper’ for the parties on the other side who wants to interact with those single-homing participants – making them more vulnerable to the exploitation of market power.

c. Asymmetries of bargaining power

A further concern expressed¹⁶⁸ in regard online platforms in general, but which is easily applicable to the sharing economy business models, is the one of discrepancy of bargaining power between platforms and users of platforms.

The example of the OTAs discussed above¹⁶⁹ can be used again to illustrate this concern. The OTAs such as Booking.com, acquired by Priceline in 2005¹⁷⁰, now represents over a half of the market in the respective industry, while Expedia has “*a considerable share of the remaining half of the sector*”¹⁷¹. On the other hand, over 86 percent of the hotel industry are small and medium-sized operators, and that makes negotiations of hotels with OTAs “*extremely difficult*”¹⁷².

Another example can be found in online creative industries sector. YouTube allegedly threatened to remove content and block access to its services to the Independent Music Companies Association (IMPALA), thus creating

¹⁶⁵ See more *infra* IV.II.c. Use of data

¹⁶⁶ Chisholm and Jung (n121) 4.

¹⁶⁷ King (n30) 732.

¹⁶⁸ *Online Platforms and the Digital Single Market* (n44) 37.

¹⁶⁹ See *infra* VI.I.d.i. Most-favoured-nation clauses

¹⁷⁰ See more Priceline Group, <www.pricelinegroup.com/about/history/> accessed 30 July 2016.

¹⁷¹ *Online Platforms and the Digital Single Market* (n44) 37.

¹⁷² *ibid.*

artificial barriers to accessing the digital market.¹⁷³ IMPALA claimed that YouTube forced them to accept ‘*non-negotiable licensing conditions*’ as well as that they tried to impose a ‘*least-favoured nation*’ clause. Such clauses were supposed to ensure that the royalty rate of all independents is aligned with the lowest rate agreed with any label worldwide.¹⁷⁴

It overall seems that the fast-growing sharing economy champions may likely come in a position to impose similar requirements on its individual users, hence exploiting their position of a dominant market player.

d. Contracts that reference rivals

CRRs contracts are type of exclusivity arrangements which can be used by a platform operator to limit how participants will interact with other platforms.¹⁷⁵ King argues¹⁷⁶ they can be a particular concern in the sharing economy for two reasons. First, due to their anticompetitive nature in peer-to-peer networks when combined with the issue of ‘tipping’. In that setting, they may create significant barriers to entry, as they deter participants on one side of the market from ‘multi-homing’. Second, challenged by the new sharing economy business models, incumbent suppliers might want to seek to enter the sharing economy in order to compete and underpin their expansion. Such a behaviour may enhance competition, but not if the incumbent market players use CRRs. If they do, the use of CRRs might lead to leveraging of their traditional market position into a significant or dominant position in the sharing economy.

An example of the use of CRRs as a part of uncompetitive collusive agreement between a new platform and incumbent publishers is a recent *Apple e-books* case¹⁷⁷. Their clause required that publishers offer the lowest e-book retail price on their iBookstore, compared to any other price of the same e-book on competitors’ platforms, including Amazon. “*The effect of this*

¹⁷³ See more IMPALA, *IMPALA invites the European Commission to red card YouTube* (27 June 2014) <www.impalamusic.org/content/dispute-between-youtube-and-independent-music-companies-%E2%80%93-formal-process-starts-brussels> accessed 30 July 2016.

¹⁷⁴ *Online Platforms and the Digital Single Market* (n44) 39.

¹⁷⁵ King (n30) 732.

¹⁷⁶ *ibid* 733.

¹⁷⁷ See *United States of America v Apple Inc., et al.*, US District Court (Southern District of New York) 12 Civ. 2826 (DLC) (filed 7 October 2013); *United States of America v Apple Inc.*, US Court of Appeals for the Second Circuit, 13–3741-cv 30 June 2015.

*clause was to force publishers to re-negotiate their supply arrangements with Amazon and to increase retail prices for e-books.”*¹⁷⁸

It is overall argued that even if CRRs may be common and can be benign, in some settings they may be a key element of anticompetitive behaviour. Two types of clauses facilitate reaching CRRs – MFN and MTC clauses.

i. Most-favoured-nation clauses

MFN clauses, also known as most-favoured-customer clauses, have been one of the key concerns of the competition authorities around the world in recent years.¹⁷⁹ They require the seller to always sets the price to a particular customer at the lowest price that it sells to any other customer, therefore “*preventing price discrimination in case the contracted firm would offer a lower price to another customer*”¹⁸⁰. Such a policy is a guarantee to a particular customer that becomes effective only if the firm offers lower price in a specified future period.¹⁸¹ That “*mutes the incentives of the seller to selectively price discount as this leads to rebates or equivalent discounts to other customers*”¹⁸². In the sharing economy, such clauses seem likely to occur, since platforms are employing various disruptive strategies, creating and entering new markets, and it sounds reasonable that some of them might try to attract new customers by offering them contracts on MFN terms. That restriction also represents a barrier to switching to the competitor’s platform.¹⁸³

An example of the anticompetitive use of CRRs involving MFN clauses in a traditional online market was addressed in 2014 by the UK Office of Fair

¹⁷⁸ King (n30) 733.

¹⁷⁹ Pinar Akman, *A Competition Law Assessment of Platform Most-Favoured-Customer Clauses*, University of Leeds, CCP Working Paper 15-12, 1 <<http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-12/c6a8d985-0ad4-4f7b-bcc4-8dc8fcfdbb62>> accessed 26 July 2016.

¹⁸⁰ Claude d’Aspremont and Rodolphe Dos Santos Ferreira, *Meet-or-Release and Most-Favored-Customer Clauses with Price-Quantity Competition Yield Cournot Outcomes* (2015/2) 17 *Économie publique/Public economics* [En ligne] 225, <<http://economiepublique.revues.org/3040>> accessed 28 July 2016.

¹⁸¹ Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion* (Autumn 1986) 17(3) *Rand Journal of Economics* 377, 377-378.

¹⁸² King (n30) 733.

¹⁸³ Chisholm and Jung (n121) 4.

Trading decision.¹⁸⁴ OFT accepted the commitments to remove certain discounting restrictions for online travel agents such as Booking.com and Expedia. In OFT's "*attempt to balance the pro- and anticompetitive effects*"¹⁸⁵, accepted commitments allowed hotels to discount only the particular repeat customers. It was undermining for the *Online Travel Agents* (hereinafter: 'OTA') business model if the customers could find best deals via OTAs, and then get offered the same or even better deals directly from the relevant hotels online.¹⁸⁶

Akman points out that at least fourteen NCAs in Europe alone currently investigate or have recently investigated competition issues raised by MFN clauses.¹⁸⁷ On top of that, the Commission recently launched its own investigation into Amazon's practices, including MFN clauses. The Commission holds that clauses granting "*the right to be informed of more favourable or alternative terms offered to its competitors*" and/or "*the right to terms and conditions at least as good as those offered to its competitors*", "*seem to shield*" Amazon from competition from other e-book distributors.¹⁸⁸

It is overall argued that such clauses may represent a competition law concern because they can facilitate a reduced intensity of competition, and potentially, higher prices for consumers.¹⁸⁹

ii. Meet-the-competition clauses

MTC clauses, also known as meet-or-release clauses, state that if a customer receives a better price from an alternative seller, then the current seller will match that price.¹⁹⁰ That clause guarantees the customer a lower price or

¹⁸⁴ Office of Fair Trading, *Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents* (31 January 2014) OFT1514dec.

¹⁸⁵ *King* (n30) 734.

¹⁸⁶ *See more Online Platforms and the Digital Single Market* (n44) 34-37.

¹⁸⁷ Akman (n179) 2.

¹⁸⁸ *See* European Commission, Press Release, *Antitrust: Commission opens formal investigation into Amazon's ebook distribution arrangements*, Brussels, 11 June 2015 (IP/15/5166).

¹⁸⁹ *King* (n30) 733.

¹⁹⁰ *ibid.*

releases the customer from the contract after he informs the current seller about the competitor's lower price offered.¹⁹¹

King highlights that such clauses may lead to collusive behaviour because “[i]f one participant to the collusion ‘cheats’ and lowers its prices, then the buyers inform its competitive rivals about the lower price”¹⁹², which makes ‘stealing’ customers from competitors even harder. The sharing economy may easily get tempted to introduce such clauses since the core of many business models seems to be competing on lowest prices. Not only that such a clause can help stabilise a collusive arrangement, but also, as Motta argues, MTC clauses have so strong pro-collusive impact, they should probably be put under a *per se* prohibition rule.¹⁹³

e. Price restrictions

Besides the above discussed anticompetitive concerns raised by the use of MFN clauses (i.e. the OTAs example) which may also be regarded as price restrictions, in its study for the Australian NCA, Deloitte addressed issues of resale price maintenance (hereinafter: ‘RPM’) and predatory pricing as further potential sharing economy concerns competition authorities should take under scrutiny.

RPM may pose a concern depending on “*whether the platforms actually engage in price setting, or whether they are merely ‘information providers’ that re-publish suppliers’ prices*”¹⁹⁴. Former scenario seems to be a feasible concern since platform operators in the sharing economy usually generate their profit by receiving a percentage of the price transacted, therefore having an incentive to maintain a certain price level. For example, Uber pricing algorithm may pose a challenge to competition law, especially its ‘prices surges’ feature. That algorithm’s feature enables the increase of fare rates when the demand is higher than the supply (i.e. the lower number of drivers around the passenger), usually at peak times.¹⁹⁵ Gata highlights that if Uber

¹⁹¹ Aspremont and Santos Ferreira (n180) 225.

¹⁹² King (n30) 733.

¹⁹³ Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), 158

¹⁹⁴ Deloitte Access Economics (n29) 23.

¹⁹⁵ See more Uber Surge Pricing, <<http://uberestimator.com/uber-surge-pricing>> accessed 29 July 2016.

drivers are treated as independent contractors and their prices are not determined independently, but by the pricing algorithm, then price fixing may be occurring.¹⁹⁶

Predatory pricing represents a misuse of market power and it occurs when a company with “*substantial market power or share of a market sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market*”¹⁹⁷. Deloitte emphasises two ways¹⁹⁸ the sharing economy platforms could likely engage in predatory pricing. First, by offering ‘so low’ listing fees to the users of the platform so they do not list with the competitors, and once the competitors are forced out of market – they raise their listing fees for platform users. Second, by reducing the commission it charges to platform users for each transaction, allowing them to achieve higher margins in comparison to the margin they can get on the competing platform, and once the competitors are forced out of market – they raise their commission.

The competition authorities, as well as the sharing economy companies, should be aware of these concerns in order to avoid anticompetitive effects on the relevant markets. These concerns seem to pose a credible threat and they should be thoroughly examined when dealing with a potentially problematic sharing economy business models.

2. Concerns under EU Merger Regulation

It appears that many of the previously discussed concerns may overlap, and the impact of these individual anticompetitive practices may enhance the effects of others. Therefore, some may also be relevant when assessing mergers. Some argue that winner-takes-all effect, for example, is “*the reason why competition authorities should be mindful not to allow the creation or strengthening of market power through anticompetitive mergers in the first place.*”¹⁹⁹ Furthermore, e-Conomics pointed to a list of, currently, 195

¹⁹⁶ Gata (n32) 4.

¹⁹⁷ Australian Competition & Consumer Commission, *Predatory Pricing*, <www.accc.gov.au/business/anti-competitive-behaviour/predatory-pricing> accessed 29 July 2016; See also Case C-209/10 *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-0000; Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

¹⁹⁸ *Deloitte Access Economics* (n29) 25.

¹⁹⁹ *Kadar* (n157) 351.

Google acquisitions²⁰⁰, noting that some of those acquisitions may be interpreted as the elimination of competition, consequently foreclosing future markets and throttling innovation.²⁰¹ For instance, a leading ad-serving technologies provider *DoubleClick* was bought by Google, and even one of the US Federal Trade Commissioners in its dissenting statement²⁰² opposed that acquisition. Despite her concern that the merger might lessen the competition on the ad-serving market, the acquisition was eventually cleared.²⁰³

Because of such phenomenon, when assessing the mergers in the digital economy, hence in the sharing economy, the concerns of escaping scrutiny, vertical integration and leveraging and the use of big data, seem to be the three most challenging issues and are therefore discussed under this caption.

a. Escaping scrutiny

It seems reasonable to assume that a vast majority of the sharing economy firms are still not reaching the existing turnover thresholds required under Article 1 EUMR, which are used to establish the Commission's jurisdiction over mergers. To be scrutinised by the Commission, merging parties' aggregate turnover needs to exceed at least €5000 million worldwide, and €250 million within the EU for at least two merging parties, out of which more than two-thirds have to be generated in more than one Member State.

Kadar argues that these thresholds should be complemented by additional notification requirements based on the transaction value.²⁰⁴ His proposal is similar to the German Monopoly Commission's opinion²⁰⁵, which called for such an amendment to close a legal gap. The Monopoly Commission holds

²⁰⁰ *e-Economics* (n146) fn 21.

²⁰¹ *ibid* 56.

²⁰² Federal Trade Commission (US), *Dissenting Statement of Commissioner Harbour In the Matter of Google/DoubleClick* (20 December 2007) <www.ftc.gov/public-statements/2007/12/dissenting-statement-commissioner-harbour-matter-googledoubleclick> accessed 26 July 2016.

²⁰³ Federal Trade Commission (US), *Statement of the Federal Trade Commission Concerning Google/DoubleClick* (20 December 2007) <www.ftc.gov/public-statements/2007/12/statement-federal-trade-commission-concerning-googledoubleclick> accessed 29 July 2016.

²⁰⁴ Kadar (n157) 356-357.

²⁰⁵ See more Daniel Zimmer (Monopolkommission), *Digital Markets: New Rules for Competition Law* (8 July 2015) *Journal of European Competition Law & Practice*.

that this issue is particularly important in the digital economy, as acquisitions of companies which did not achieve a high turnover in the past may give rise to competition policy concerns, arguing that the purchase price often better reflects the economic potential of an acquisition target than the turnover.²⁰⁶

It overall seems that the existing EUMR turnover thresholds test alone might not be sufficient to efficiently capture all competition policy concerns in the sharing economy.

b. Vertical integration and leveraging

The concern of vertical integration and leveraging was expressed within the Commission's analysis²⁰⁷ of the Digital Single Market Strategy. The Commission stated that some platforms act as a marketplace and a retailer at the same time, what enables them to use the data obtained from the business users of marketplace to enhance their own retail arm.

An example of that concern is expressed in the Commission's' Statement of Objections in the *Google Search* case²⁰⁸. The Commission considered that Google abused its dominant position by systematically favouring its own comparison shopping product in its general search results pages. It pointed out that users do not necessarily see the most relevant results in response to their queries, what amounts to discrimination in listing between platforms' own services and third party services. That is considered to be detrimental to consumers and rival comparison shopping services, as well as stifling innovation, and is in breach of the EU competition law.

Albeit this issue was scrutinised as an abuse of dominance, this kind of competitive behaviour seems to be a potentially relevant factor in assessing mergers of companies with the similar online structure.

²⁰⁶ *Kadar* (n157) 357.

²⁰⁷ *A Digital Single Market for Europe: Analysis and Evidence* (n8) 55.

²⁰⁸ See more European Commission - Fact Sheet, *Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*, MEMO/15/4781, 15.04.2015.

c. Use of big data

The sharing economy businesses collect users' data, and that use of data and data analytics are an integral element of any online platform.²⁰⁹ The obtained data gives the platform operator a significant competitive advantage²¹⁰ over its rivals.

According to an estimate in OECD study, it appears that the number of big-data-related mergers more than doubled between 2008 and 2013 – from 55 to 134, which points to the increased interest in acquiring a “data advantage” over rivals.²¹¹ Competition authorities already pursued evaluation of the concern of data utilisation for commercial purposes. For example, the European Commission recently examined potential data concentration, even though, “*only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof*” in the case of *Facebook/WhatsApp*²¹².

French Competition Authority, in its opinion on the cross-usage of customer datasets²¹³, sets three criteria which can be used to determine whether the use of such datasets could result in a restriction of competition.²¹⁴ Moreover, German Monopolies Commission highlights that in data-related markets, a merger between market incumbent and innovative newcomer, could result in “*differentiated data access and increase the concentration of data related to this market if the newcomer has access to a large database (gained on another market for instance)*”, despite having a low impact on the market structure in many other markets.²¹⁵ Nevertheless, Lougher and Kalmanowicz points out the fact that ‘network effects’ and economies of scale and scope

²⁰⁹ *Online Platforms and the Digital Single Market* (n44) 47.

²¹⁰ As highlighted in the contributions by the UK CMA and Ezrachi and Stucke in *Online Platforms and the Digital Single Market* (n44) fns 243, 244.

²¹¹ Ariel Ezrachi and Maurice Stucke, *Online Platforms and the EU Digital Single Market*, Written evidence (OPL0043), para 2.7 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23223.html>> accessed 30 July 2016.

²¹² European Commission, *Facebook/WhatsApp*, Decision of 3 October 2014, M.7217, para 164.

²¹³ French Competition Authority, Opinion n°10-A-13 of 1406.2010 (14 June 2010) <www.autoritedelaconurrence.fr/pdf/avis/10a13.pdf> accessed 30 July 2016.

²¹⁴ See more French Competition Authority, *Competition Law and Data* (10 May 2016) <www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> accessed 30 July 2016.

²¹⁵ *Competition policy: The challenge of digital markets* (n58) 16.

were frequently featured the Commissions' merger control decisions, whilst the possession or use of data has been less often considered as an important factor in such proceedings.²¹⁶

Overall, the use of big data in the sharing economy appears to indeed be a sound concern, and it seems to be crucial to address this issue with the special attention in the future assessments of mergers and acquisitions of sharing economy business models under the EU competition law.

V. Conclusions

It appears that the sharing economy changes the way how many businesses are getting done – for good. It boosts the global economy and it provides an alternative to traditional markets. Most importantly, it employs individuals who would otherwise be unlikely involved in or profit from such exchange of goods or services. The utilisation of underused assets and skills should be praised, and it, therefore, deserves a carefully tailored, efficient regulation – the opposite of bans and unreasonably extensive restrictions.

The existing regulatory frameworks are giving the impression of being outdated – unable to effectively cope with the digital (r)evolution the sharing economy is part of. A possible answer to how to regulate the sharing economy is through governmental or self-regulation bodies. In doing so, it is essential to recognise and respect all the unique characteristics the sharing economy brings and promote the best of them. Despite its disruptive nature, there is a growing body of evidence that such impact on traditional markets improved their own efficiency. The author argues that in a pursuit to find the best way to regulate the sharing economy, consumer's interests should be held in the heart of all considerations. Consumers are and should be the ones benefiting the most – making sure they are protected from existing uncertainties such as a problem of liability in the event of injuries or damages, and of which rights they are entitled to as suppliers which use the online platforms.

When it comes to the EU competition law concerns, it is important to highlight that the vast majority of them arise from the potential abuse of a dominant position. The huge impact of network effects present on the two-

²¹⁶ *Lougher and Kalmanowicz* (n53) 13.

sided markets may easily lead any sharing economy business model to a ‘tipping’ point, towards a strong market power. That produces outcomes such as winner-takes-all effects and asymmetries in bargaining power. In order to maintain their market strength, it is likely that many businesses will impose various barriers to multi-home to their users, especially on the supply side of the market. Furthermore, the sharing economy incumbents may engage in introduction of contracts that reference rivals, including MFN and MTC clauses, and enforce some of the price restrictions, such as RPM and predatory pricing. These latter concerns can be assessed not only under Article 102 TFEU but also as agreements under Article 101 TFEU.

Finally, many of the identified concerns are not scrutinised at all when it comes to merger control, as the undertakings merged often do not meet the thresholds criteria set in EUMR. When it comes to mergers of digital economy companies, it is argued that existing criteria should be complemented with the value of the transaction criteria. Regulators should also pay attention to concerns of anticompetitive vertical integration and leveraging as well as the use of big data.

Author’s reasoning is clear – the identified concerns and unique features of the sharing economy deserve a greater attention from the regulatory and competition authorities. Effective regulatory framework for the sharing economy can only strengthen the innovative solutions 21st century has to offer.